

TRAINING MANUAL

NORMATIVE STANDARDS AND BEST PRACTICES FOR NGO REGULATION IN MALAWI

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AND REHABILITATION (CHRR)**

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"The Noble Cause is Evident in the People Themselves"

PROTECT

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LIST OF ACRONYMS

ACHPR	African Commission on Human and People Rights
AUC	African Union Commission
AI	Artificial Intelligence
ATI	Access to Information
CBO	Community Based Organization
CEDEP	Centre for the Development of People
CHRR	Centre for Human Rights and Rehabilitation
CONGOMA	Council for Nongovernmental Organizations in Malawi
CSO	Civil Society Organizations
FBO	Faith Based Organizations
EITI	Extractive Industries Transparency Initiative
FATF	Financial Action Task Force
	FCDO – UK Foreign, Commonwealth and Development Office
FIU	Financial Intelligence Unit
HRD	Human Rights Defender
HRDC	Human Rights Defenders Coalition
ICCPR	International Covenant on Civil and Political Rights
ICNL	International Center for Not-For-Profit Law
MLS	Malawi Law Society
NGO	Non-governmental Organization
OPC	Office of the President and Cabinet
OGP	Open Government Partnership
PROTECT	Protecting Rights, Openness and Transparency - Enhancing Civic Transformation
SADC	Southern Africa Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations

CHAPTER 1

Introduction

This manual has been developed by the Centre for Human Rights and Rehabilitation (CHRR) with technical and financial support from the International Center for Not-for-Profit Law (ICNL) under a collaborative project titled PROTECT (Protecting Rights, Openness and Transparency - Enhancing Civic Transformation) being implemented in partnership with Article 19, Hivos, and Internews. PROTECT is a UK Foreign, Commonwealth and Development Office (FCDO)-funded consortium partnership for knowledge and learning in Malawi, Kenya and Myanmar aimed at countering shrinking civic space, easing pressure on free media and infomediaries, and enhancing transparency through better civil society access to data and information. Specific interventions under PROTECT in Malawi are geared towards empowering civil society organizations (CSOs), human rights defenders and infomediaries to hold the government accountable with the aim of expanding and protecting the civic space.

CSOs in Malawi are facing considerable risks and restrictions. Some of these threats are emanating from the NGO legal framework. Others are based on political narratives and practices against the role of civic actors in the governance and development process¹. This is a particularly concerning trend considering that a strong and vibrant civil society is widely recognized as a key component of sustainable and legitimate development and democracy. A dynamic, diverse, and independent civil society, able to operate freely, knowledgeable and skilled with regard to human rights, is a key element in securing sustainable human rights protection in all regions of the world².

This manual has been developed in order to equip key state and CSO actors with knowledge on applicable norms and good practices for NGO regulation in order to push for improved operating environment for CSOs in Malawi. The manual is intended for use by the NGO Board, its staff and other State regulatory bodies as well as other relevant independent bodies/actors, such as the Council for Nongovernmental Organisations in Malawi (CONGOMA) and the Malawi Human Rights Commission.

The manual recounts the history of the NGO sector and regulatory regime in Malawi and outlines international law and standards governing regulation of the NGO sector. The manual also sets out the current legal framework regulating NGOs in Malawi and highlights gaps between existing Malawi law and international standards and best practices. Finally, the manual highlights an upcoming opportunity for reform.

¹ Chingaipe, Henry (2020). Regulatory Threats to the Civic Space in Malawi and their Impact on the Functioning of CSOs/NGOs. MEJN & IM Swedish, Lilongwe

² <https://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx>

CHAPTER 2

Definitions, Activities, and Typology of NGOs

NGO stands for non-governmental organization. While there is no universally agreed-upon definition of an NGO, typically it is a voluntary not-for-profit group or institution with a social mission, which operates independently from government.

The **Malawi NGO Policy** defines an NGO as:

“A legally constituted, not for profit making, autonomous and non-partisan entity whose primary activities include service provision, development initiatives, humanitarian response, awareness raising and advocacy, provided under framework of human development and good democratic governance.”

“NGO” is sometimes used interchangeably with “CSO,” however NGOs should be properly understood as a subset of Civil Society Organisation (CSOs) – a term that covers a broad range of organizations, including NGOs. In Malawi, Civil Society Organizations encompass non-governmental organizations (NGOs), faith-based organizations, trade unions and associations. Constituency-based organizations, such as trade unions or professional associations, for example, often do not self-identify as NGOs, but rather as CSOs.

CHAPTER 3

History and Growth of NGOs in Malawi

The history of NGOs in Malawi can be traced back to colonial days, prior to independence. During that period, the NGOs generally existed as native, welfare and religious associations aimed at promoting the socio, economic, cultural, political, and religious wellbeing of Malawians against the exploitative nature of colonialism.

Malawi became independent in 1964 with a colonial-era democratic constitution, which provided for the Bill of Rights and a democratic mode of governance. This changed following the 1964 Cabinet Crisis which erupted barely six weeks after independence, culminating in the adoption of the Republican Constitution in 1966.

The 1966 Republic Constitution abrogated the Bill of Rights on the basis that Malawi was already a signatory to the 1948 Universal Declaration of Human Rights (UDHR). The scrapping of the Bill of Rights was followed by the introduction of an array of repressive laws such as the Censorship and Entertainment Act, which compromised the right of free access to information and the Preservation of Public Security Act, which compromised freedoms of association, movement, and assembly. Strikes and demonstrations or any kind of open protests were banned. Any organisation considered as a threat to the government was banned outright. For instance, in 1967, the religious denomination, Jehovah's Witnesses, was declared an "unlawful society"³. The main reason was the refusal of its members to buy party cards and owe allegiance to the ruling party.

NGOs were allowed to operate but under very stringent conditions. Only NGOs engaged in social welfare or service delivery were allowed to operate. Any NGO that attempted or was suspected to be involved in policy and advocacy was banned outright. A case in point is the Christian Service Committee (CSC). In 1976, the CSC was closed down by the government for reasons that they were doing a rights-based approach to community development, which was prohibited then. Discussions ensued between CSC and Government, which led to the introduction of working party agreements, a kind of Memorandum of Understanding. Since then, all NGOs in Malawi had to sign these working party agreements. This working party arrangement transformed into the Council for Social Welfare Services in Malawi (CSWSM) in 1985 through which government continued to maintain control of NGOs. The Council for NGOs in Malawi (CONGOMA) took over from CSWSM after CSWSM changed name to CONGOMA in

³ Heiko Meinhardt and Nandini Patel (2003). Malawi's process of democratic transition: An analysis of political developments between 1990 and 2003. Konrad Adenauer Foundation, Malawi. Retrieved from <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.498.1503&rep=rep1&type=pdf>

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1992⁴. Since then, local and international NGOs working in Malawi have to be members of CONGOMA.

Following a referendum that was held in June 1993, Malawi became a democratic state. A new Constitution, incorporating a Bill of Rights and abolishing the one-party state, was adopted on 18th May 1994, and entered into force on 18th May 1995. The Constitution upholds freedom of association ⁵, which includes the right to form associations.

The adoption of the new Constitution in Malawi was accompanied by various institutional reforms, which were inevitable as so many political institutions had to change to conform to the new system of governance. The political reforms that were instituted were basically aimed at reorganizing the distribution and exercise of power. A key reform in this respect was the decentralization of government, which effectively meant that power and resources devolved from central to local government areas. Consequently, the Decentralization Policy ⁶ was adopted by Cabinet in 1996 and approved by government in 1998 together with an enabling legislation, the Local Government Act enacted in 1998.

The Decentralization Policy has five purposes, four of which have to do with the devolution of functions and resources from central to local government areas. The fifth purpose is aimed at promoting popular participation in the governance and development processes of the local government areas. This entails the involvement of the ordinary citizen in the identification, planning and execution of development policies and interventions. Not only would this institutional reform promote accountability and good governance, but it would also empower citizens to contribute to efforts towards poverty reduction and spur economic growth. This would result in the mushrooming of CSOs, including community-based organisations, promoting accountability and good governance at various levels in the decentralisation set up.

⁴ <https://www.congoma.mw/about-us/>

⁵ Section 32 of the Republican Constitution of Malawi

⁶ <https://localgovt.gov.mw/publications/other-documents/12-malawi-decentralisation-policy>

CHAPTER 4

The Emergence of Regulatory Regimes Governing NGOs in Malawi.

The sudden increase in the number of NGOs and the need to provide a comprehensive regulatory framework for NGOs led to the development of the NGO Act in 2001⁷, with an eye to enhancing NGOs' contribution to national development and regulating their operations. This Act⁸ constituted the NGO Board of Malawi. Its mandate is to register and regulate the operations of all NGOs in Malawi⁹. As a government agency, the NGO Board is under the Ministry of Gender, Community Development and Social Welfare¹⁰. Its specific functions include to:

- Establish and maintain the Register of NGOs, consider, and adjudicate upon applications for registry by NGOs and ensure due compliance by NGOs.
- Withhold, or suspend or cancel registration of NGOs in the event of failure or refusal to comply.
- Determine from time-to-time incentives applicable to NGOs and provide free access to the NGO Register.
- Commission Surveys, Enquires and Research to any matter affecting NGOs.

Further, the NGO Act granted the Council for Non-Governmental Organizations in Malawi (CONGOMA), which was established in 1985 as an NGO Coordinating body. Section 24(1) of the NGO Act, 2001, provides that:

“The general Assembly shall designate the Council for Non-Governmental Organisations in Malawi (in this Act otherwise referred to as "CONGOMA") as the designated NGO co-ordinating body for the purposes of this Act”.

As the designated NGO coordinating body, CONGOMA is mandated to “represent and promote the collective interest and concerns of NGOs in Malawi”. Its specific functions include:

- a) To enhance and improve operational environment within which NGOs function.

⁷ Act No. 3 of 2001

⁸ Section 6 of the Non-Governmental Organizations Act (Cap 5:05 Laws of Malawi)

⁹ Section 18 (1) Act

¹⁰ <http://ngoboard.mw/who-we-are#duties-and-functions>

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- b) To promote and facilitate coordination, collaboration and cooperation between the NGO community, the Government, the Donor Community, and the commercial sector in Malawi.
- c) To further the standing of NGOs as competent, professional, and suitable agents of development.
- d) To support NGOs to become institutionally strong; and
- e) To assist NGOs to carry out their functions under the Act.

Apart from the NGO Act, Malawi has an NGO Policy, which was launched in May 2019. The Policy provides an overall framework and direction under which the government engages with NGOs as partners in the development process.

“The aim of the National NGO Policy is to set out a framework that strengthens the relationship between the NGO Sector and Government...”¹¹

The NGO Act was expected to be revised once the Policy is in place. In Chapter 10 of this manual, focused on the amendments contained in the proposed NGO Act Amendment Bill of 2020 and the challenges they present to the operation of NGOs.

¹¹ <http://ngoboard.mw/wp-content/uploads/2021/03/NGO-POLICY-Printed-on-2nd-May-2019.pdf>

Chapter 5

International and Regional Legal Standards on Freedom of Association

International Law on Freedom of Association

International law supports the free establishment and independent operation of CSOs. One key principle is the right to freedom of association, which is enshrined in the Universal Declaration of Human Rights (UDHR) of 1948. Article 20 of the UDHR states:

- (1) Everyone has the right to freedom of peaceful assembly and association.*
- (2) No one may be compelled to belong to an association¹².*

The UDHR was adopted by the General Assembly of the United Nations (UN) on 10 December 1948 and sets forth the foundational guiding human rights principles binding all member states of the United Nations (UN).

Along with 172 other countries, Malawi is a party to the International Covenant on Civil and Political Rights (ICCPR)¹³, a binding human rights treaty that also guarantees the right to freedom of association in Article 22¹⁴:

- (1) 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.*
- (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law, and which are necessary in a democratic society in the interests of national security or public safety, public order (or republic), the protection of public health or morals or the protection of the rights and freedoms of others.*

The right to freedom of association is likewise enshrined in other UN treaties and instruments under the following articles:

- Article 15 of the International Convention on the Rights of the Child.
- Article 7(c) of the Convention on the Elimination of All Forms of Discrimination Against Women.
- Article 26 and 40 of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families.

¹² <https://www.un.org/sites/un2.un.org/files/udhr.pdf>

¹³ Malawi ratified the ICCPR on December 22, 1993.

¹⁴ <https://www.ohchr.org/documents/professionalinterest/ccpr.pdf>

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- Article 15 of the 1951 Convention Relating to the Status of Refugees.
- Article 24(7) of the International Convention for the Protection of All Persons from Enforced Disappearance.
- Article 29 of the Convention on the Rights of Persons with Disabilities; and
- UN Declaration on Human Rights Defenders.

The right to freedom of association, as guaranteed under the international law instruments set forth above, is a broad concept that expansively protects the establishment and operations of NGOs. As confirmed in his first thematic report to the Human Rights Council, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association (the UN Special Rapporteur) confirmed that an “*association*’ refers to any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interest.”¹⁵ This wide coverage includes NGOs formed for a variety of purposes, including political advocacy.

Regional Law on Freedom of Association

At regional level, the right to freedom of association is enshrined in the African Charter on Human and People’s Rights (ACHPR), to which Malawi is party¹⁶. The ACHPR (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. The ACHPR has been accredited with helping “to steer Africa from the age of human wrongs into a new age of human rights”¹⁷. Since its adoption 40 years ago, the ACHPR has formed the basis for individuals to claim rights in a regional African forum.

The right to freedom of association is one of the rights entrenched in the ACHPR. Article 10 of the ACHPR states:

1. *Every individual shall have the right to free association provided that he abides by the law.*
2. *Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.*

The right to freedom of association is also guaranteed under Article 8 of the African Charter on the Rights and Welfare of the Child, and Articles 12(3), 27(2) and 28 of the African Charter on Democracy, Elections and Governance.

¹⁵ UN Doc. A/HRC/20/27, 21 May 2021, para. 51.

¹⁶ Malawi ratified the ACHPR on November 17, 1989. See, <https://www.achpr.org/legalinstruments/detail?id=49>

¹⁷ <https://www.achpr.org/legalinstruments/detail?id=49>

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The ACHPR Guidelines on Freedom of Association and Assembly in Africa (ACHPR Guidelines) elaborates on the standards for free association within the African context.¹⁸ Among other standards, the ACHPR Guidelines provide that:

ACQUISITION OF LEGAL PERSONALITY

- The establishment of NGOs should follow a simple, clear, and quick procedure.¹⁹
- No insuperable administrative burdens should be imposed on individuals wishing to form an NGO.²⁰
- The right to establish NGOs should also not be limited through the imposition of high fees but should rather be free of charge.²¹
- The number of founding members should be small, preferably no more than two individuals.²²
- Registration should be governed by a “notification” procedure, whereby the founding members merely inform the competent authority of their will to establish an organization, instead of an “authorization” procedure which would require prior approval of the administration.²³
- Agencies in charge of administering NGOs should decide on applications in a timely and non-discriminatory manner. Where a notification procedure is in place, the failure of the agency to respond to an application within a given, short timeframe should result in the automatic legal establishment of the NGO.²⁴

“The Special Rapporteur is of the opinion that a “notification procedure”, rather than a “prior authorization procedure” that requests the approval of the authorities to establish an association as a legal entity, complies better with international human rights law and should be implemented by States.”

United Nations General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, May 21, 2012 (A/HRC/20/27) at 58

¹⁸ https://www.achpr.org/public/Document/file/English/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf

¹⁹ Article 13 of the African Commission on Human and Peoples' Rights Guidelines on Freedom of Association and Assembly in Africa (2017) (ACHPR Guidelines)

²⁰ Article 14, ACHPR Guidelines, *ibid.*

²¹ Article 18, ACHPR Guidelines, *ibid.*

²² Article 10, ACHPR Guidelines, *ibid.*

²³ Article 13, ACHPR Guidelines, *ibid.*

²⁴ Article 16, ACHPR Guidelines, *ibid.*

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- The authority's powers to reject the application must be based on clear legal and limited grounds.²⁵ Procedurally, the authority should give detailed reasons for its decision in writing to the affected NGO. The NGO should have the opportunity to appeal this decision and re-apply after addressing the reasons that led to the rejection.
- The documents to be submitted should be limited in number and scope. NGOs should not be required to send any more information than necessary for the administration to decide upon the application. Only basic information should be required, for example the name of the NGO and its founding members, physical address (if any), contact information, and planned aims and activities of the association.²⁶

NGO PURPOSES AND PERMISSIBLE ACTIVITIES

- NGOs should be able to determine their purposes and activities freely.²⁷ Among others, NGOs should be able to engage in the political, social, and cultural life of their societies and be involved in all matters pertaining to public policy and public affairs.²⁸
- *Fundraising activities:* NGOs should have the right to seek, receive and use funds freely in compliance with not-for-profit aims.

Summary of principles of the right to establish an NGO:

- Small number of founding members for NGOs.
- Minimal or no registration fees.
- Registration should follow a notification procedure not authorization.
- Clear, simple, and less bureaucratic of registration process.
- No requirement of unnecessary and excessive documents.
- Timely response with detailed reasoning for application rejections.
- Possibility of appeal against decisions by the authority.
- No compulsory/mandatory registration of NGOs, including no criminal penalties for unregistered, informal organizations.
- Suspension or dissolution should be a last resort based on a court order.
- No criminal sanctions under NGO regulatory laws.

²⁵ Article 13, ACHPR Guidelines, *ibid.*

²⁶ Article 14, ACHPR Guidelines, *ibid.*

²⁷ Article 23, ACHPR Guidelines, *ibid.*

²⁸ Article 25, ACHPR Guidelines, *ibid.*

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OVERSIGHT ON NGOS

- State oversight bodies should only have oversight in relation to essential, minimum internal governance structures and standards.²⁹

REPORTING OBLIGATIONS ON NGOS

- Reporting requirements should be simple and non-burdensome.³⁰

PENALTIES AND SANCTIONS

- States should not impose criminal sanctions in the context of laws governing not-for-profit associations, as criminal sanctions are better specified in the penal code.³¹
- Suspension or dissolution of an NGO should only occur where there has been a serious violation of national law and as a matter of last resort following a court order or exhaustion of all available appeal mechanisms.³²

²⁹ Article 31, ACHPR Guidelines, *Ibid.*

³⁰ Article 48, ACHPR Guidelines, *Ibid.*

³¹ Article 55, ACHPR Guidelines, *Ibid.*

³² Article 58, ACHPR Guidelines, *Ibid.*

CHAPTER 6

International Principles Protecting the establishment and operation of NGOs.

Duty of the State to Protect NGOs

In accordance with the right to free association guaranteed by international law (as set forth in Chapter 6), governments should encourage the operation of NGOs and their active participation in the life of society. Several international legal instruments demand that states not only refrain from unduly interfering with the rights of NGOs, but also actively protect and support civil society.³³ This positive obligation means that states should take measures to ensure that those wishing to come together to form associations are facilitated in doing so by an enabling social, legal and political framework. As set forth in paragraph 7 of the ACHPR Guidelines:

“National legislation on freedom of association, where necessary, shall be drafted with the aim of facilitating and encouraging the establishment of associations and promoting their ability to pursue their objectives. Such legislation shall be drafted and amended on the basis of broad and inclusive processes including dialogue and meaningful consultation with civil society.”

Prohibition of undue interference

One aspect of an enabling framework is the assurance that NGOs are not subjected to undue interference with their establishment, internal affairs, activities, fund-raising, privacy rights, expression, or other operations from the government or third parties. State interference is only permissible where in accordance with the “limitations clause” of Article 22(2) of the ICCPR.

This limitations clause sets forth only four grounds (protection of national security or public safety, public order, public health or morals, or the rights and freedoms of others) under which the authorities can interfere with freedom of association, i.e., limit the rights of NGOs. These grounds must be “prescribed by law” and “necessary in a democratic society” to protect at least one of the four enumerated grounds.

The UDHR has a similar limitations clause that applies to all the rights and freedoms in Article 29 (2): *“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due*

³³ See e.g., UN Doc. A/HRC/20/27, 21 May 2012, at para. 63.

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recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

In effect, these limitations clauses prohibit government interference with NGOs except where necessary to protect these narrowly prescribed interests. Thus, the default for any NGO law or related government regulation must be to facilitate, rather than restrict, NGO establishment and operation.

Voluntary Registration

It is well established in international law that the right to freedom of association applies both to registered and non-registered associations; thus, registration of an NGO as a legal person should not be required by law for the NGO to exist and operate. Registration may be necessary for the NGO to be afforded legal personality, which status may confer certain benefits or be required to fulfill certain functions. However, informal, or unregistered organizations are still legitimate associations, and their existence and operation should be protected by the law. Any registration regime must be strictly voluntary, and failure to register must not carry criminal or administrative penalties.

It should also be pointed out that association rights apply to all people, not just citizens. The Human Rights Committee, in its general comment No. 15 (1986) on the position of aliens (or foreigners) under the Covenant, explicitly confirmed that the rights set forth in the International Covenant on Civil and Political Rights (ICCPR) apply to everyone, irrespective of reciprocity, and irrespective of each individual's nationality or statelessness (para. 1). Aliens receive the benefit of the right of peaceful assembly and of freedom of association (para. 8).” Therefore, under the Covenant, restrictions to form associations for non-citizens are a violation of the right to freedom of association³⁴.
Legal Personality

Summary of grounds for Limiting the Activities of NGOs in accordance with Article 22 (2) ICCPR:

1. Must be prescribed by law; AND
2. Must be necessary in a democratic society in the interests of
 - a) national security or public safety,
 - b) public order,
 - c) protection of public health or morals, or protection of the rights and freedoms of others

³⁴ For some information on this point, check out the recent UNSR on Migrant report on this issue: <https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CallFreedomAssociationMigrations.aspx>

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Because legal personality may be important for associations to access public benefits, solicit resources or employ staff, any organization that wishes to obtain legal personality should be able to apply for it. The NGO legal framework should facilitate the process through clear and precise regulations that do not pose significant obstacles on the NGO, such as high fees, burdensome documentation, or lengthy procedures.

NGOs should also be allowed to regulate their internal affairs freely. This includes the right of an NGO to enact its bylaws and decide on its hierarchical and management structure, decision-making process, membership requirements, frequency of meetings, fundraising activities, etc.

Right to Privacy

NGOs enjoy the right to privacy as stipulated under Article 17 of the ICCPR: *“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”*

The UN Human Rights Committee in its General Comment No. 31³⁵ confirmed that the right to privacy applies not only to individuals but also to organizations.³⁶ Freedom from “arbitrary or unlawful interference” under this right means that authorities cannot access the records, grounds, or property of an NGO without due process. NGOs have the right to keep their activities private.

Right to Freedom of Expression

NGOs have the right to freedom of opinion and expression as guaranteed by Article 19 of the ICCPR and Article 19 of the UDHR. This right includes freedom to hold opinions

The Special Rapporteur underlines that the right to freedom of association equally protects associations that are not registered... Individuals involved in unregistered associations should indeed be free to carry out any activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions... This is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views or beliefs.

Nations General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, May 21, 2012 (A/HRC/20/27) at 56

³⁵ UN Doc. CCPR/C/21/Rev.1/Add. 1326 May 2004 (para 9) available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsiYoiCfMKoIRv2FV aVzRkMjTnjRO%2Bfud3cPvrcM9YR0iW6Txaxgp3f9kUFpWoc%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuu JQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvmQGVHA%3D%3D>

³⁶ Although... the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant... may be enjoyed in community with others

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without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. (Article 19 of the UDHR)

Many NGOs serve the important function of actively informing public opinion and speaking out on issues of public interest. Particularly, this role may include providing and disseminating information on political and human rights issues. The UN Human Rights Defenders Declaration clarifies this function in Article 16: *“Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training, and research...”*. Thus, governments should not limit NGOs’ ability to provide information to the public and conduct advocacy but rather support them in their efforts to create a more just and pluralistic society. NGOs’ activities should not be restricted for political reasons.

Much like the limitation clause under Article 22 of the ICCPR that prevents governments from unduly interfering with freedom of association, governments are likewise prevented from interfering with a group’s freedom of expression, except where prescribed by law and in the narrowly tailored interest of protecting the rights or reputations of others; national security or public order; or public health or morals.

PROHIBITION OF CRIMINAL PENALTIES

Because the purpose of any regime regulating NGOs is to facilitate the exercise of freedom of association, States should ensure that people can participate in NGOs without fear of being arrested, detained, or otherwise severely sanctioned.

Thus, States should not impose criminal sanctions in NGO laws that solely apply to not-for-profit associations. Generally, because criminal laws already apply to all those in a particular territory, criminal penalties that appear only in an NGO law are likely to either be redundant, improper, or unfair. It is inappropriate to govern civil society by provisions of criminal law different from those in the generally applicable provisions of the penal law. This is particularly the case where such penalties might be used to sanction unregistered organizations as stated by the UN Special Rapporteur:

“Individuals involved in unregistered associations should indeed be free to carry out any activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions This is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views or beliefs.”

CHAPTER 7

Current Legal and Policy Framework for NGOs in Malawi

This Chapter focuses on laws regulating NGOs in Malawi and analyzes how existing regulatory frameworks adhere to applicable to international and regional human rights norms and standards referenced above.

(A) Legal Framework governing NGOs in Malawi

I. CONSTITUTION OF THE REPUBLIC OF MALAWI (1994)

Section 32 (1) of the Constitution of Malawi upholds freedom of association, which includes freedom to form Associations. It also provides that no entity shall be compelled to join an Association.

Section 12(d) of the constitution provides that:

The inherent dignity and worth of each human being require that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups, and minorities whether or not they are entitled to vote.

Section 15(2) supports the right of groups to ensure the promotion, protection, and enforcement of human rights. The section stipulates that:

Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection, and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission, and other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.

Other constitutional provisions include freedom of conscience (Section 33); freedom of opinion (Section 34); freedom of expression (Section 35), freedom of the press (Section 36); access to information (Section 37); and freedom of assembly (Section 38). Section 40(1)(c) provides that “every person shall have the right to participate in peaceful political activity intended to influence the composition and policies of the government.”

II. NGO ACT (2001)

The NGO Act provides the regulatory framework for NGO operations in Malawi. Specifically, the Act addresses issues relating to registration and other legal

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requirements for the NGOs to operate in Malawi. The Act³⁷ applies to institutions or organisations constituted for public benefit purposes and this expressly excludes churches, religious organisations, political parties, trade unions or social clubs.

Below are some of the key provisions governing NGO registration and operations in Malawi:

A. MANDATORY REGISTRATION

The NGO Act requires all NGOs to be registered with the NGO Board of Malawi. In registering with the NGO Board, the following documents, as per Section 20(3)(a) of the NGO Act, should be filed:

- A completed application in the prescribed form (available on request).
- A constitution of the NGO.
- Payment of registration fees (as prescribed by the NGO Board).
- A plan of activities planned or intended to be carried out by the NGO.
- Memorandum of Understanding (MOU) or any other agreement with the Ministry or Ministries responsible for the activities to be undertaken by the NGO concerned.
- Proof that the NGO is a member of CONGOMA.
- A statement that the NGO will not engage in partisan politics.
- A statement on the sources of funding of the NGO.

In addition, Section 20(3)(b) of the NGO Act stipulates that the application form shall contain the following particulars of the NGO concerned:

1. (i) Name of the NGO; (ii) physical and postal address; (iii) telephone, facsimile, and telex numbers where applicable; (iv) the full names, addresses, occupations and nationalities of all Trustees, Directors and other executive Board members.
2. The name and address of the NGO's auditors, who are acceptable to the Board.
3. The latest available audited annual financial statements and annual report, in respect of existing NGOs.

Regardless of whether an NGO is registered under the Trustees Incorporation Act or the Companies Act, all NGOs must also register under the NGO Act.

B. REGISTRATION WITH CONGOMA

All NGOs are required to apply to CONGOMA for Registration under the NGO Act. CONGOMA is a designated NGO coordinating body in Malawi. It functions to

³⁷ <http://ngoboard.mw/download/ngo-act-2001/>

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collectively represent the interests of NGOs, strengthen their capacity, advocate for a conducive environment, coordinate NGO work and assist NGOs to operate within the NGO Act.

To register with CONGOMA, an organisation is required to submit the following³⁸:

- Form (available on request).
- A copy of the NGO Constitution.
- A copy of minutes of the first meeting of the Trustees at which it was agreed to form/ register the NGO.
- A brief Concept Paper outlining the activities that the NGO intends to undertake in Malawi.
- Sworn in Affidavits/ particulars of Trustees and/or Directors, giving their names, citizenship, occupation, and address. This is one of the legal documents of the NGO and as such the swearing and signing of this document must be conducted by a Commissioner for Oath/public Notary and certified by his/her official staff and signature. Preparation of the affidavits should be done by a legal person and may be at a fee or not.
- A copy of the Trustees Declaration certified (signed and stamped) by a Commissioner for Oath.
- A copy of Certificate of Registration with the Registrar General.
- Payment of a non-refundable Processing Fee of MK 3500.00 for Malawian NGO and MK5250 for International NGOs. (This fee is subject to review at any time).

C. FEE PAYMENT REQUIREMENTS

After registration with CONGOMA, the NGO also pays an annual membership subscription determined by the CONGOMA Annual General Assembly from time to time³⁹.

In addition to paying fees to CONGOMA, an NGO is also required to pay a registration fee to be registered with the NGO Board and once registered, it is required to pay annual fees to the Board.

The amount of the fees is not prescribed by law; instead, the law requires the NGO Board to set fees as may be deemed appropriate, subject to review from time to time.

D. SUBMISSION OF REPORTS

³⁸ <https://www.congoma.mw/membership/#1548861960013-58595fd8-43d2>

³⁹ <https://www.congoma.mw/membership/#1548861960013-58595fd8-43d2>

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In accordance with Section 22(1) of the NGO Act, NGOs are required to submit annual audited accounts to the NGO Board regardless of whether they have received funding from donors or implemented a project. In full, NGOs are required to annually submit:

1. *“Its audited annual financial statements.*
 2. *its annual report outlining the activities undertaken by the NGO in the year and such other information as may be prescribed.*
 3. *an annual return reflecting details of its trustees, directors, office bearers, auditors and such other information as may be prescribed; and*
 4. *its source of funding*
- (b) in the event of any amendment to its constitution or government instrument, a certified copy of such amendment, within sixty days of such amendment being adopted, and*
- (c) any such further documentation or information regarding the officers and activities of a registered NGO which the Board may require.”*

E. AGREEMENT WITH RESPONSIBLE MINISTRY

Section 20(3)(a)(iv) of the NGO Act requires NGOs to submit for registration a memorandum of understanding (MoU) or other agreement between the NGO and the Ministry responsible for the NGO's sphere of activities. This necessitates that an NGO's activities be pre-approved by a government authority prior to establishment.

F. SANCTIONS FOR NON-COMPLIANCE

Under the Section 34 of NGO Act, sanctions apply for any non-compliance with the NGO Law, including with the registration provisions. Because the NGO Act prohibits the formation and operation of “unregistered groups”, this leaves informal associations at risk of sanction. Potential sanctions include fines, subject to court determination.

Section 23(1) of the NGO Act provides that “*the Board may order the Registrar to cancel or suspend the registration of an NGO if it is satisfied that the NGO –*

- (a) has ceased to exist or function for the purposes for which it was constituted.*
- (b) has failed or refused to comply with the provisions of the Act, or*
- (c) has been engaged in partisan politics.”*

Section 23(2) of the NGO Act provides that the NGO coordinating body—in this case CONGOMA—may, “where it has good and valid reasons”, also make recommendations to the Board for cancellation or suspension of an NGO's registration. What constitute “good and valid reasons” are not further specified in the NGO Act.

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Section 23(3) of the NGO Act gives the Board the powers to order the cancellation or suspension of an NGO's registration. However, Section 23(4) gives any aggrieved NGO the ability to challenge the decision of the Board by applying to the High Court for judicial review.

G. FOREIGN NGOS

The NGO Act does not contain special rules or restrictions applicable to the registration or incorporation of foreign NGOs, except that all NGOs registered under the Board must have at least two Malawian trustees or directors. Section 20 (2) of the Act states as follows:

No NGO should be registered under this Act unless a minimum of two of its directors or trustees, as the case may be, are citizens of Malawi⁴⁰.

However, this provision may be problematic as the right to free association applies to all people, not just citizens. Thus, the provision requiring Malawi citizenship for certain roles in an NGO seems to violate the right to association for any foreigner attempting to organize under Malawi law. Specifically, provisions like these disproportionately affect migrants or other foreign residents.

III. THE LEGAL FRAMEWORK FOR CBOS

Under the current NGO Act, Community Based Organisations (CBOs) are not required to register under the Act. Instead, they are registered with and can be de-registered by the Ministry of Gender, Women and Child Development through the Social Welfare Department. Once registered, CBOs can open a bank account. CBOs can be either religion-based or independent of any religion.

IV. TRUSTEES INCORPORATION ACT OF 1962

The Trustees Incorporation Act of 1962 is the law that regulates trusts in Malawi. A distinction is made between public trusts and private trusts. The Malawi Supreme Court of Appeal (MSCA) has adopted the definition of this distinction as set out in Snell's Principles of Equity, according to which:

"a trust is private if it is for the benefit of an individual or class irrespective of any benefit which may be conferred thereby on the public at large; it is public or charitable if the object thereof is to promote the public welfare, even if incidentally it confers a benefit on an individual or class."⁴¹

The Trustees Incorporation Act deals only with the incorporation of public trusts or charities. Section 3 of the Act provides that trustees of "*any charity for religious, educational, literary, artistic, scientific or public charitable purposes may apply for*

⁴⁰ <http://ngoboard.mw/download/ngo-act-2001/>

⁴¹ The Attorney General v. Malawi Congress Party et al [1997] 2 MLR 181 at 202.

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*incorporation to the Minister responsible.*⁴² The Minister may also receive applications from trustees of any charity which or part of which, in his or her opinion, is for the benefit or welfare of the people of Malawi. The application must include the following details:

- The will or deed, or the instrument creating the trust, and a proposed seal.⁴³
- The application must be accompanied too by the minutes of the meeting at which the decision to form a trust was made, and the names of the people who were present.
- Furthermore, the trustees must provide their personal particulars, which means their full names, address, and occupation.

V. THE COMPANIES ACT⁴⁴

CSOs in Malawi can also be registered under the Companies Act of 2000. Basically, the Companies Act regulates companies that focus on profit-making; it requires the company to declare profit returns as an accountability mechanism. Although NGOs are not-for-profit organizations, NGOs are free to register either under the Companies Act or Trustees Incorporation Act, provided that they operate within the confines of the law.

Registration with the Registrar General requires the payment of certain fees. The current fee structure (as May 2020) is as follows:

Registration	MK50,000
Change of Trustees/registration of new address	MK10,000
Change of Name or Constitution	MK30,000
Inspection of registered documents	MK5,000

VI. ACCESS TO INFORMATION ACT (2017)

The Access to Information Act (2017) promote transparency and accountability of public authorities as well as private bodies. The Act is in line with the NGO Act and this policy as both promote transparency and accountability.

⁴² See Chapter 1 pages 7 – 8 of the Trustees Incorporation Act.

⁴³ Rule 2 Trustees Incorporation Act Rules.

⁴⁴https://malawilii.org/mw/consolidated_legislation/4603

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NGOs are required to submit annual reports as a way of promoting transparency and accountability while the Board as a public authority is required to provide any public information to the public upon request as stipulated in by the Section 5 of the Act.

VII. LOCAL GOVERNMENT ACT

The Act stipulates that any assistance to the Assembly (Local Council) from NGO shall be approved by the Minister responsible for Local Government in consultation with the Assembly.

(B) Policy Framework governing NGOs in Malawi

NGO POLICY

In May 2019, the government of Malawi through the Ministry of Gender, Children, Disability and Social Welfare, launched the new NGO Policy in order to guide the operations of NGOs. In the foreword to the Policy, the government confirmed that it had *“identified a number of gaps which include limited oversight capacity of NGO operations, weak legal framework, unavailability of a policy and inadequate transparency and accountability within the NGO Sector.”*

The Policy, therefore, was created with the goal of *“fortifying the relationship between the NGO Sector and Government and enhancing capacities and effectiveness in the areas of regulation, coordination, service delivery, advocacy and community empowerment.”*

The Policy sets forth guiding principles, which include respect for fundamental human rights, freedom of association, gender equity and inclusion within the NGO sector, the right of NGOs to autonomy and self-governance, dignity, and transparency, informed public participation and sustainability (Section 2.4).

The Policy focuses on five priority areas within the NGO sector:

- i. *Regulation of NGOs.* The Policy aims to ensure effective regulation of NGOs and enhanced enforcement of law within the NGO sector through reviewing the NGO Act; developing regulations for NGO operation; facilitating enforcement of the NGO Act and regulations; and enhancing the NGO Regulatory Body’s regulatory capacity.
- ii. *Coordination, Networking and Partnerships.* The Policy aims to ensure strong coordination among NGOs and harmonized strategies for implementation and resourcing programmes at the community level. The strategies for accomplishing such better coordination include: strengthening partnerships between local and international NGOs, civil society networks on all levels, and local councils and NGOs; developing, implementing and enforcing measures that ensure and show the equitable spatial distribution of NGOs throughout the

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country; better ensuring that NGOs confine themselves to the goals set out in their constitutions; and developing guidelines to harmonize with other development initiatives.

- iii. *Accountability and Transparency*; The Policy aims to ensure that NGOs are transparent and accountable in their operations through: amending the NGO Act to transform the NGO Board into the NGO Regulatory Authority; raising awareness on transparency and accountability in the NGO sector; strengthening mechanisms for reporting progress and finances; enhancing mandate of NGO Regulatory Body to prosecute cases involving non-compliant NGOs; promote citizen participation to help beneficiaries hold NGOs accountable; and enhancing collaboration among institutions to check fraud in NGO sector.
- iv. *Governance, Ownership and Capacity in NGOs*. The Policy aims to strengthen NGOs' governance structures by developing and implementing standards for NGO governance structures; sensitizing NGOs on the importance of recruiting qualified personnel for key positions; promoting adherence to the Gender Equality Act in hiring and promotion and providing security to NGO employees.
- v. *Sustainability and responsiveness of NGO Programmes*. The Policy aims to develop and implement mechanisms that promote the sustainability of NGO programmes by: increasing community participation; building capacity of local councils to manage NGOs, developing and implementing guidelines on proper handover of NGO programmes and assets; developing a framework for agreements between local councils and NGOs vis-à-vis grassroots work; and promoting the sharing of information and funding opportunities in the NGO Sector.

MALAWI GROWTH AND DEVELOPMENT STRATEGY (MGDS III)⁴⁵

The third Malawi Growth and Development Strategy III (2017 –2022), the overarching development strategy of the country, aims at reducing poverty through efforts from various stakeholders including Government, NGOs, Development Partners, and the citizenry. Under section 7.3, the Strategy has strengthening legal and policy frameworks for effective regulation of NGOs as a key intervention that will spur development in the country through the NGOs.

THE NATIONAL DECENTRALISATION POLICY

The National Decentralization Policy recognizes the key role that NGOs play at grassroots. This is manifested in the establishment of Civil Society Network whose

⁴⁵ [https://www.undp.org/content/dam/malawi/docs/UNDP_Malawi_MGDS\)%20III.pdf](https://www.undp.org/content/dam/malawi/docs/UNDP_Malawi_MGDS)%20III.pdf)

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members are represented at District Sector Working Groups. The policy also provides some guidelines to be followed when introducing any new projects at district level.

The Policy has five purposes, four of which have to do with the devolution of functions and resources from central to local government areas. The fifth purpose is aimed at promoting popular participation in the governance and development processes of the local government areas. This entails the involvement of the ordinary citizen in the identification, planning and execution of development policies and interventions. Not only would this institutional reform promote accountability and good governance, but it would also empower citizens to contribute to efforts towards poverty reduction and spur economic growth.

SOCIAL WELFARE POLICY

The Social Welfare Policy identified partnerships among churches, NGOs, and local structures as a key component to enhancing social protection for vulnerable groups. The policy recognizes that the provision of social welfare services in Malawi owes its foundation to working with Non-Governmental Organisations (NGOs) and other civil society groups. The policy therefore promotes partnerships with Civil Society Organisations such as Faith and Community-Based Organisations that are implementing programmes for the vulnerable children, families, and communities.

COMMUNITY DEVELOPMENT POLICY

The Community Development Policy offers State and Non-State actors the opportunity to engage with communities in a more coordinated way to meet local needs, address intractable problems, build capacity, and support local development efforts. The Policy therefore aims at contributing towards effective and sustainable socio-economic development through a clearly defined, consistent and collaborative people-centered approach.

CHAPTER 8

Adherence of the current Malawi Legal Regime on Association with International Standards

This Chapter analyzes current gaps in the legal framework, implementation challenges and emerging issues.

NGO Establishment

The following are the concerns around Malawi legal requirements for NGO establishment:

- *Mandatory registration:* the NGO Act makes registration mandatory for all NGOs. This is a violation of Article 22 of the ICCPR, which has been consistently interpreted to prohibit mandatory registration of NGOs. It is also a violation of the ACHPR guidelines on freedom of association and freedom of assembly in Africa.

Requiring an organization to register prior to operating violates core principles of international law, which forbid the freedom of association from being contingent on registration or legal entity status. The African Commission's Study Group on Freedom of Association and Assembly in Africa agrees, stating, "*States should not require associations to register in order to exist and operate freely.*" Even more problematically, as Article 34 of the NGO Act sets forth sanctions for non-compliance with the Act, any such non-registration can lead to conviction or a fine.

- *Double registration and compulsion to join CONGOMA:* The NGO Act requires an NGO intending to register with the NGO Board to show proof that the NGO is a member of CONGOMA. This means an NGO must register with CONGOMA before it registers with the NGO Board. The double registration requirement is inconsistent with section 32(2) of the Constitution, which states that no person may be compelled to belong to an association. It also contravenes Article 17(2) of the UDHR and Article 10(2) of the ACHPR, which state that "*Subject to the obligation of solidarity, provided for in Article 29, no one may be compelled to join an association.*"
- *Burdensome or unpredictable fees.* This two-tiered registration imposes a burden on newly formed NGOs to raise money to register with both the NGO Board and CONGOMA as required by the law. This is particularly problematic as Article 35(1) of NGO Act gives the Minister broad discretion to set the schedule of fees.

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- *Restrictions on non-citizens freedom of association.* Section 20 (2) of the NGO Act requires that all NGOs registered under the Board must have at least two Malawian trustees or directors. This provision is problematic as the right to free association applies to all people, not just citizens. Specifically, such a provision disproportionately affects migrants or other foreign residents.
- *Broad bureaucratic discretion to deny registration.* Laws that confer the broad discretion to reject registration on the Registrar General or Minister, such as the Trustees Incorporation Act and the Companies Act, could be abused to disfavour CSOs that are not consistent with such authority's personal beliefs or preferences (as case of ASH and the case of NRA below illustrate). This broad discretion granted could also be abused to target CSOs that are critical of government.
 - **The case of ASH**

In 2013, the former Minister of Justice, Hon. Henry Phoya, refused to register the Association for Secular Humanism (ASH) because the views of the Association conflicted with the Minister's religious beliefs. The Association was later registered after a new Minister was appointed.
 - **Case of Nyasa Rainbow Alliance**

In July 2016, the Nyasa Rainbow Alliance, an organization based in Blantyre that works on LGBT rights, filed an application for registration as a non-governmental organization with the Registrar General's Department. In a May 18, 2017 letter, the Registrar and the Ministry of Justice, which certifies registration of NGOs, informed the organization's Board of Trustees that the organization cannot be registered under Malawi laws "on the ground that the 'membership practices' are recognized as an offence under the Laws of Malawi."
- *Restriction on CSO freedom of expression.* The NGO Act requires that NGOs file a statement that they will not engage in partisan politics (and permits for cancellation or suspension of the NGO if it does engage in partisan politics). It is unclear what engagement in "partisan politics" is deemed to cover. If this language would restrict NGOs from political advocacy, it unduly limits NGOs' freedom of expression.

NGO Operations

- *State interference in the operation of NGOs.* The current legal framework enables state interference in the work of CSOs/NGOs.

State interference is enabled through a variety of tactics, including requiring that NGO activities be aligned with government developmental priorities; imposing onerous obligations to periodically

provide information such as financial reports; and permitting cancellation of suspension of NGOs for reasons that are not clearly specified in law.

The NGO Policy, while admirably aims to enhance good governance in the sector, also outlines a number of strategies for achieving accountability and transparency that would enable undue government interference, such as ensuring the NGOs confine themselves to the goals set out in their constitutions, strengthening measures to report progress and activities, or enhancing the mandate of the NGO Regulatory Body to prosecute non-compliant NGOs.

- *Burdensome requirements* to file their activity plans and sign MOUs or other agreement with the Ministry responsible for the NGOs during registration under the NGO Act, suggests that NGOs must receive advance approval from the government in order to exist and carry out their activities. In addition to giving the government an impermissible amount of control over NGO operation, this requirement also presents a logistical challenge when the activities are impromptu. For example, an advocacy campaign for academic freedom in the university may not have been planned in advance but may have been necessitated by events such as a students' demonstration. Such unforeseen activities cannot, therefore, be expected to be part of the agreement or MoU as part of the registration process.
- *Disclosure of sources of funding* – Requiring NGOs to disclose their funding sources could allow the government to use this information to stifle funding. Some donors want to remain anonymous. The NGO Board has previously appealed to donors to support only NGOs that are registered with the NGO Board.

Threats of Closure

Although the NGO Board has not, to date, de-registered any NGO, it has threatened to do so from time to time. The Board threatened to close NGOs that did not register with the NGO Board by June 30, 2013 by invoking Section 18 and subsequent sections. Although the Board did not follow through on this threat, in 2014 it again threatened to close all NGOs that were not registered.”

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- *Burdensome and vague reporting obligations* – such as the requirement for organizations to submit to the registrar a wide range of reports including “an annual return reflecting details of its trustees, directors, office bearers, auditors and such other information as may be prescribed constitute an impermissible restriction that threatens to violate the privacy rights of organizations.

CHAPTER 9

Upcoming Legislation and Opportunities for Reform

NGO AMENDMENT BILL, 2020

In January 2021, the Minister of Gender, Children Disability and Social Welfare publicized the NGO Amendment Bill, 2020 to kick-start consultations with the Sector and other interested stakeholders.

The Amendment Bill has some positive aspects; for instance, it eliminates mandatory membership in the Council of NGOs of Malawi (CONGOMA), which is currently required for NGOs to register. This would remove a burdensome requirement that also violates the right to freedom of association, which includes the right not to participate in an association. It is also commendable that the Bill provides for a diverse composition of the Authority, including state actors and civil society, to oversee NGOs in Malawi as this will facilitate civil society representatives to inform regulatory policies that are favorable to the sector.

At the same time, the Amendment Bill also contains problematic provisions that could pose challenges for NGOs' ability to operate and fully exercise their fundamental freedoms. Key concerns in the Bill are as follows:

- The definition of "NGO" is ambiguous, leaving uncertainty over which organizations are subject to the law.
- The provisions for nominating civil society representatives to the Board do not define which "certain bodies" are permitted to nominate candidates or establish the procedure to be followed during the nomination process.
- The Authority has excessive discretion to suspend, cancel, and revoke NGO registration, and other broad powers, which could be used to shut down organizations for criticizing government or for implementing activities viewed to be politically sensitive.
- Eliminating the General Assembly, a mechanism through which NGOs currently monitor the work of the NGO Board, would remove a critical avenue for accountability and transparency of the Authority. The General Assembly has been a good practice that local CSOs consider to be vital to a conducive working relationship with the NGO Board. CSOs and other key stakeholders should all be consulted to determine a viable alternative and consideration of other good practices in this regard.

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- The Authority has broad discretionary powers to access and verify NGO internal records and to “impose any measures it deems fit” when an NGO fails to comply with the Act.
- NGOs would be subject to excessive and disproportionate penalties of up to K10,000,000 (\$12,000) for contravening the Act; this is not the least restrictive means to ensure that NGOs comply with the law as required by international law.

In addition, the Amendment Bill could go further to revise provisions from the current NGO Act that do not comply with international standards and good practices, as set forth in Chapter 9 above. As an example, the Amendment Bill retains a requirement that all organizations must register, regardless of how small or informal they are.

CHAPTER 10

Key Recommendations

A diverse, strong, and independent NGO sector is essential for the long-term, sustainable, and just reduction of poverty. The need to preserve freedoms of association and assembly, and with them democratic space for NGOs, must lie at the core of the measures adopted by NGO regulatory authorities and champions of democratic governance. Therefore, this manual concludes with key recommendations for NGOs, governments, and the international donor community.

For Civil Society

1. CSOs should explore opportunities to have legal provisions that improperly curtail NGO activity revised by legislatures or invalidated by appropriate judicial organs. In particular, litigation focused on the freedoms of association and assembly offers a potent tool not only to reverse legal provisions that improperly curtail NGO activity, but also to publicly dramatize the NGO cause and to delegitimize government actions.
2. To counter some of the pernicious accusations made against NGOs, particularly that they are self-serving, “foreign agents,” or otherwise lacking in transparency, the groups should work to build legitimacy through their rootedness in communities and commitment to service and good governance, while ensuring that they are free of corruption (including by adopting internal anticorruption policies).
3. Solidarity within civil society is key to effective pushback against anti-NGO measures. NGOs from all fields of activity should seek to build collaborative platforms and coalitions and pursue joint advocacy at all times, even if there is no current threat of repressive legislation. In some contexts, more developed national NGOs should organize awareness-raising sessions for other NGOs concerning compliance with government policy.

For the Government

1. Government should uphold its international and regional human rights commitments regarding freedoms of association, assembly, and expression. Mandatory registration procedures that are susceptible to abuse of discretion and that interfere in the normal operations of NGOs, or their external sources of funding are not in keeping with these commitments. Governments are entitled to pursue legitimate interests, such as suppression of criminal activity and protection of national security, by closing off avenues for terrorist financing and money laundering. They also have an interest in ensuring accountability in the nonprofit

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sector. But these objectives can be aligned with a commitment to freedoms of association and assembly and made to nurture rather than harm an open and democratic society.

For the International Community of Donors

1. The donor community should raise concerns about anti-NGO measures. In public statements and private engagements, diplomats and members of legislative bodies should emphasize that anti-NGO legislation is considered a high priority, will be regularly monitored, and will remain tied to diplomatic engagement.
2. Foreign governments should encourage African governments to repeal or amend anti-NGO legislation through the use of both penalties (sanctions and other tools) and incentives (including foreign and military assistance and trade legislation and delegations).

ANNEX A

International Best Practices on NGO Regulation

Based on international experience of laws and regulations affecting CSOs, a number of good practices have been identified that enable CSOs to be effective in fulfilling their roles as development actors.⁴⁶ These practices include the following elements:

- a) Acquisition of legal status as voluntary, based on objective criteria, and not a prerequisite for the exercise of rights to expression, peaceful assembly, and association.
- b) Civic organization laws written, clearly defined, and administered so that it is quick, easy, and inexpensive to establish and maintain a civil organization as a legal entity in perpetuity, with a defined and reasonable time limit for decisions and written justification for denial of status, subject to appeal.
- c) All acts and decisions affecting formal civil organizations as subject to appropriate and fair administrative and independent judicial review.
- d) Laws and regulations as excluding or simplifying reporting procedures for small, provincial, community-based organizations and alliances.
- e) Laws and regulations as sustaining effective processes and instruments that ensure social participation in public policy development, implementation, and evaluation.
- f) Laws and regulations as providing guarantees for civil organizations with the right to speak freely on all matters of public significance, including existing or proposed legislation, state actions and policies, and the right to non-partisan criticism of state officials and candidates for public office.
- g) Civic organizations as facilitated to carry out public policy activities such as education, research, advocacy, and the publication of position papers.
- h) Laws, regulations, and policies as providing for mechanisms and processes that allow for less bureaucratized, consistent, transparent, and more efficient access to public funds, with accountability on the part of both government and CSOs.
- i) Laws, regulations, and policies as facilitating civic organizations to engage in any legitimate fundraising activity, with voluntary self-regulatory

⁴⁶ See, Open Society Institute: Guidelines for Laws Affecting Civic Organizations', 2004; The Organization for Security and Co-operation in Europe (OSCE): "Guidelines on Freedom of Association", 2015

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mechanisms for accountability, but public disclosure of the ways in which funds are raised and used, including fundraising expenses.

- j) Laws, regulations, and policies as creating an enabling tax regime that stimulates civic participation through tax incentives for donations from individuals and the private sector.
- k) A formal civic organization that is properly established in one country should generally be allowed to receive cash or in-kind donations, transfers, or loans from outside the country so long as all generally applicable foreign exchange and customs laws are satisfied. Such laws should not impose confiscatory taxes or unfair rates of exchange.
- l) CSO laws and regulations as administered by an independent multi-stakeholder body. A government agency mandated to determine whether an organization qualifies for 'public benefit' or 'charitable' status, and to administer laws and regulations governing CSOs, might function as an independent commission with mixed stakeholder governance. It is appropriate for the regulatory burdens on civic organizations to be commensurate with the benefits they obtain from the State.

ANNEX B

Best Practices on NGO Regulation – Country Frameworks

The following are examples taken from NGO laws from all over the world that can be considered best practices in supporting the rights of NGOs and allowing their full participation in society.

NO REGISTRATION REQUIREMENT FOR NGOS

Kosovo, Law No.03/L-134, On Freedom of Association in Non-Governmental Organizations, 2010

Article 9 Registration

1. Every person, notwithstanding the race, nationality, religion, gender etc. shall be eligible to register NGO under the terms and conditions of this Law. No person needs to register the NGO to exercise the right on freedom of association.

RIGHT OF FOREIGNERS TO ESTABLISH AN NGO

Macedonia, Law on Associations and Foundations, 2010

Foreign Person and Foreign Organizations - Article 37

1. Foreign persons may also be founders and members of an organization, in accordance with this Law.
2. The persons from paragraph (1) of this Article shall have the same rights and responsibilities as the domestic persons, unless otherwise stipulated by Law.

PROVISION OF RESOURCES AND SUPPORT FOR NGOS

Croatia, Act on the National Foundation for Civil Society Development, 2003

ARTICLE 3

1. The Foundation shall be established with the basic purpose of promoting and developing the civil society in the Republic of Croatia.
2. In order to fulfil its basic purpose, the Foundation shall provide support for programmes fostering the sustainability of the not-for-profit sector, inter-sector co-operation, civil initiatives, philanthropy, and volunteerism, those improving the democratic institutions of the society, as well as other programmes fulfilling the basic purpose of the Foundation.

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Rwanda, Law No.04/2012 of 17/02/2012 Governing the Organisation and the Functioning of National Non-Governmental Organisations, 2012

ARTICLE 12: FINANCIAL SUPPORT FROM THE GOVERNMENT

The Government shall include in its national budget funds meant for supporting national non-governmental organisations.

An Order of the Minister in charge of national non-governmental organisations shall specify modalities for granting such support.

BENEFITS FOR NGOS

Belize, Non-Governmental Organisations Act, Chapter 315, Revised Edition 2000

13. FINANCIAL PROVISIONS

1. Every Non-Governmental Organisation registered under this Act shall be exempt from the payment of income tax, but subject to the provisions of regulations made under subsection (3) below, may apply to the Minister of Finance to be exempted from the payment of business tax or any other tax, duty or impost levied by the Government from time to time.
2. Subject to sections 17 and 109 (1) of the Income and Business Tax Act, every person in Belize who makes a donation to a Non-Governmental Organisation registered under this Act shall be eligible, in the financial year when the donation is made, to have such donation treated as tax-deductible for income tax and business tax purposes.
3. The Minister of Finance may, after consultation with the Minister, make Regulations to give effect to the provisions of this section.

Montenegro, The Law on Non-Governmental Organizations, 1999

TAX AND OTHER EXEMPTIONS AND PRIVILEGES - ARTICLE 27

The Government shall provide tax and other exemptions and privileges for nongovernmental organizations.

CODIFICATION OF THE RIGHTS AND FUNCTIONS OF NGOS

Rwanda, Law No.04/2012 of 17/02/2012 Governing the Organisation and the Functioning of National Non-Governmental Organisations, 2012

ARTICLE 28: RIGHTS OF A NATIONAL NON-GOVERNMENTAL ORGANISATION

National non-governmental organisation shall have the following rights:

1. to put forward views in designing national policies and legislation in relation with the functioning of national non-governmental organizations.

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2. to advocate, protect and promote human rights and other national values.
3. to express opinions and views on national policies and legislation.
4. to enter into agreements with other organisations and entities.
5. to enjoy tax exemption in accordance with relevant laws.
6. to enjoy the literary and artistic property right and property of all its operations related to its mission.

PARTICIPATION OF NGOS IN BUILDING PUBLIC OPINION

Macedonia, Law on Associations and Foundations, 2010

INITIATIVES IN PUBLIC LIFE - ARTICLE 14

Organizations may freely express and promote their positions and opinions regarding the issues of their interest, raise initiatives and participate in building the public opinion and policy making.

THE ROLE OF NGOS IN MONITORING THE GOVERNMENT

Tunisia, Decree Number 88 for the Year 2011, Published on 24 September 2011
Pertaining to Regulation of Associations

ARTICLE (5):

An association has the right to:

1. Access information.
2. Evaluate the role of the State institutions and submit proposals to improve their performance.
3. Organize meetings, demonstrations, conferences, workshops, and all types of civil activities.
4. Publish reports and information, print leaflets, and conduct opinion polls.