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# NGOs' Position on the NGO Amendment Bill, 2022

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## (1) Introduction

On Tuesday, March 22nd, 2022, the Malawi Parliament passed the NGO Act Amendment Bill No. 10 of 2022. The Bill now awaits the President's assent before it bears the force of the law. However, the Bill in its current form has the potential to erode freedom of association as well as undermine the gains we have made as a country since the dawn of multi-party democracy. It is in this context that the Civil Society in Malawi makes a special appeal to the President to reject assenting to the Bill and instead, refer the Bill back to Parliament for further scrutiny.

## (2) Major Highlights and Recommendations

While we note the disturbing grey areas in the Bill, we wish to acknowledge some positive elements as follows: First, the Bill 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. Secondly, the Bill also provides clarity and broadens the bodies that may nominate members to the Non-Governmental Organizations Authority (the Authority), enabling a more diverse composition for this important oversight body. Further, the Bill fosters transparency and accountability by aligning the operations of NGOs with the fundamental principles of the Constitution of the Republic of Malawi to ensure they benefit of the people of Malawi.

The above notwithstanding, the Bill contains problematic provisions that could limit NGOs' ability to operate and fully exercise their fundamental freedoms. Our key concerns with the Amendment Bill are as follows:

### 2.1 Vague and open-ended monitoring powers

Section 20(b) of the Amendment Bill provides the Authority with the power to "monitor compliance by NGOs with the provisions of the NGO Act or any other written law." This provision grants the Authority broad powers to monitor NGOs without stating which actions it may undertake to fulfil this function, which raises the risk of intrusive government monitoring.

Under international and regional standards, freedom of association includes the right to be free from undue state interference. The African Commission on Human and Peoples' Rights notes that "the oversight powers of the authorities shall be carefully delimited, so as not to infringe on the right to freedom of association."

**OUR RECOMMENDATION:** We call for the revision of the relevant clause in Section 20(b) to clearly state which actions the Authority is authorized to take in monitoring NGOs. The revised clause should provide procedural safeguards related to monitoring, including requirements that the government:

- Clearly define the documents that may be requested as part of the monitoring process and when document requests are appropriate.
- Ensure adequate due process protections are in place, including providing notice and sufficient time for NGOs to comply with monitoring requests; and
- Establish a mechanism for NGOs to obtain a remedy for excessive or intrusive monitoring activities.

## **2.2 Declaration of non -partisan politics, including electioneering and politicking for NGOs and staff**

Section 23 (v) of the Amendment Bill introduces a requirement that NGOs should make a declaration that management and staff of the NGO "shall not engage in partisan politics, including electioneering and politicking. The Bill has not defined what the terms "electioneering" and "politicking" mean, which raises the risk that the provisions could be abused to deal with dissent among the NGO community. These provisions could also stifle meaningful engagement and advocacy on political issues.

**OUR RECOMMENDATION:** We call for the complete removal of the declaration requirement. Since the NGO Regulatory Authority only deals with an already existing legal entity, such a requirement would be arbitrary. If anything, the requirement should be in the Principal acts that create these entities.

## **2.3 Disproportionate sanctions and imputed liability**

Section 36 of the Amendment Bill seeks to increase the minimum fines for contravention of the Act from K50,000 to K5 million and impose a two-year prison sentence on individuals for violations of the Act. Section 37 increases the fines introduced through ministerial regulations from the current K25,000 to K1 million. We feel these penalties are excessive compared to other laws. For example, Section 54 (4) of the Corrupt Practices Act (Cap 7:04 of the Laws of Malawi) imposes a fine of MK50, 000 for contravening regulations under this Act. Under the Gender Equality Act (No. 3 of 2013), section 4 (2) imposes a fine of one million Kwacha (K1, 000,000) and a term of imprisonment of five (5) years for sex discrimination. Under the Education Act, 2013, penalties range from K100,000 to K1, 000, 000 plus five years' imprisonment (see sections 47, 48, 69, 71, 109).

We also feel these penalties are not in line with international standards and best practice. As stated by the African Commission on Human and Peoples' Rights, "States shall not impose criminal sanctions in the context of laws governing not-for-profit associations." All criminal sanctions should be specified in the penal code and not elsewhere. This helps to

ensure that governments do not introduce specialized penalties for NGOs aimed at restricting civil society.

In addition, Section 36 of the Bill would impose a two-year prison sentence for offenses under the NGO Act, which is highly disproportionate to the types of violations at issue. For instance, it appears that an individual could receive this harsh prison sentence for failing to properly submit documentation or annual reports required by the NGO Act. This provision could also enable the authorities to disproportionately apply criminal sanctions to disfavoured NGOs and individuals.

Section 36 of the Bill also introduces a new provision into the NGO Act (NGO Act, Section 34(2)) under which every trustee, chief executive officer, or manager of an NGO shall be liable for the same fine as the NGO or two years in prison for any offense committed by the NGO under the Act. It is inappropriate to impute criminal and financial liability of an NGO to the NGO's trustees, managers, and chief executive officer. Under international standards, offenses committed by an association, for instance, through the decisions of its officers, should not be imputed to members of the association who did not take part in the offenses in question. The new provision in the NGO Act would potentially apply severe criminal and financial penalties to every manager, trustee, and chief executive of an NGO for offenses committed by the NGO. Even if the authorities do not actively enforce these provisions in this way, the existence of these sanctions will have a chilling effect on the freedom of association as individuals will fear that serving as an NGO's trustee, manager, or director would expose them to serious criminal liability.

Furthermore, while this provision provides certain defenses to imputed liability, these do not fully address the risks posed. For instance, an individual manager or trustee may escape liability by proving to the court that the offense was committed without the individual's "knowledge or consent." This rule unfairly places the burden of proof on the accused individual to prove they did not have knowledge of and did not consent to the commission of an offense. It may be difficult for individual managers and trustees to produce evidence to prove this. If they are unable to do so, the default rule under the Amendment Bill would be for them to be held criminally and financially liable for any violation committed by the NGO.

**OUR RECOMMENDATIONS:** We call for the revision of the relevant clauses in Sections 36 and 37 to:

- Remove any criminal penalties for offenses under the NGO Act.
- Remove the imputation of criminal and civil liability for offenses committed by an NGO to the NGO's managers, trustees, and chief executive.
- Remove the provision of fines for offenses under the NGO Act. A better practice for failure to comply with provisions of the NGO Act or ministerial regulations on NGOs is to require compliance. If this revision is not forthcoming, the government

should add an opportunity to remedy an alleged breach of the NGO Act or ministerial regulations before imposition of a civil penalty and revise the level of fines to reflect the severity of the alleged breach.

## **2.4 Broad powers to verify NGO documents**

Section 25(c) of the Amendment Bill grants the Authority the power to verify information submitted annually by NGOs, including audited financial statements, activity reports, details of persons affiliated with the NGO, and the NGO's sources of funding. The Authority may impose "any penalty prescribed by regulations made by the Minister under this Act" where the Authority is satisfied that an NGO has failed to comply with this section. These powers are overly broad, discretionary, and open to abuse.

The UN Special Rapporteur on the rights to freedom of peaceful assembly and association notes that while independent bodies may examine an organization's records to ensure transparency and accountability, "such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk." Similarly, the African Commission Guidelines provide that "associations shall not be required to transmit detailed information such as the minutes of their meetings, lists of their members, or personal information of their members to the authorities."

**OUR RECOMMENDATION:** We call for the revision of Section 25(c) to clearly define the scope of information and documentation that the Authority may request for verification. The revised provision should include procedural safeguards to prevent arbitrary enforcement, such as specifying redress for violations committed during the verification process, right to counsel, and right to object and appeal to an independent body or court of law in line with African Commission standards. Any penalties should be proportionate so as not to violate the right to freedom of association for NGOs.

## **2.5 Investigative and dispute resolution powers**

The Bill grants the Authority new powers to "receive, investigate, and determine" complaints against NGOs and to act as a dispute resolution forum without safeguards or rules of procedure, raising the risk of due process violations. These provisions are concerning because they grant the Authority broad powers to investigate NGOs and to resolve disputes involving NGOs without providing rules of procedure or safeguards to ensure an impartial process.

Section 20(b) authorizes the Authority to "receive, investigate, and determine" complaints against NGOs but does not describe how the Authority will conduct these functions. It is thus left to officials to determine the procedures they will use to investigate and "determine" complaints. Our concern is that this could result in a complaint procedure

that is arbitrary and open to abuse. Complaint procedures should provide adequate notice, a hearing before an impartial body, and the right to appeal. Similarly, Section 20(b) states that the Authority will resolve "through mediation or conciliation" disputes involving NGOs but does not describe the mediation and conciliation procedures that will be used.

**OUR RECOMMENDATION:** Ensure that the complaint and dispute resolution functions under Section 20 (b) provides for due process protections, including notice, impartial review, and the right to appeal. To accomplish this, we urge the government to issue clear rules of procedure related to these functions. An alternative would be to establish a specialized mechanism to conduct these functions. The government may wish to consider creating a specialized independent body with rules of procedure to adjudicate complaints related to NGOs and to serve as a dispute resolution mechanism. This body should also be authorized to receive and resolve complaints involving the Authority to ensure effective oversight.

### **2.6 Lack of recourse for registration rejection**

We note that the Amendment Bill fails to address the absence of recourse for organizations whose registration applications have been rejected by the NGO Regulatory Authority under Section 20 (b) of the Bill. That provision simply requires the Authority to provide reasons for rejecting an application but does not specify what remedies are available to affected organizations. According to the UN Special Rapporteur on the rights to freedom of assembly and association, "Associations whose submissions or applications have been rejected should have the opportunity to challenge the decision before an independent and impartial court."

**OUR RECOMMENDATION:** We call for the amendment of Section 20(b) of the Bill to specify that organizations whose registration applications are rejected have the right to appeal the decision before an independent and impartial court.

### **2.7 Power to suspend or cancel NGO registration**

Section 20 of the Amendment Bill retains the authority for the NGO Regulatory Authority to "*withhold, suspend, or cancel the registration of an NGO in the event of failure or refusal to comply with the provisions of [the NGO Act].*" This provision is inconsistent with the international standard, which states that suspension and involuntary dissolution of an NGO should only be applied when there has been a serious violation of national law and as a matter of last resort. The grounds included in Section 20 for suspension or cancellation of NGO registration do not meet this strict test since it is likely that even minor infractions could count as failure or refusal to comply with the provisions of the NGO Act. Moreover, Section 20 fails to include procedural safeguards recommended under international law, namely suspension only after court order and dissolution after full judicial procedure and exhaustion of appeal mechanisms.

**OUR RECOMMENDATION:** We call for the revision of Section 20 of the Bill to explicitly state that suspension and cancellation of registration can only be applied where there are serious violations of national law, and only by a court order (suspension) or a full judicial hearing (for cancellation).

### **2.8 Composition of the NGO Regulatory Authority**

Section 7 (1) of the Amendment Bill states that the NGO Regulatory Authority shall consist of eleven members who shall be citizens of Malawi and appointed by the Minister. Out of the eleven, only two will be from CONGOMA yet at the Salima Consensus Meeting, it was agreed that CONGOMA would have three representatives. In addition, the Bill does not make provision for a 60-40 gender quota as provided for under Section 11 of the Gender Equality Act. Section 7 of the Amendment Bill states that the Minister shall "take into account the provisions of the Disability Act and the Gender Equality Act" in making appointments to the Authority. However, it is not clear how the Minister will "take into account" the Disability Act and the Gender Equality Act.

**OUR RECOMMENDATIONS:** Section 7 should be revised to explicitly state the specific actions that the Minister would take to ensure the inclusion of people with disabilities and women. The Principal Act states clearly that "**The Board shall consist of ten members... appointed as follows: (a) seven members, at least three of whom shall be women...**" The Amendment Bill should also be clear in terms of how many of the members would be females. There is also a need to consider the representation of the Malawi Human Rights Commission as ex-officio based on its responsibility under the Access to Information Act and the Gender Equality Act.

### **2.9 NGO Regulatory Authority qualifications and appointment process**

The Bill institutes education and work qualifications that may unduly exclude individuals from serving on the Authority. In addition, the Bill contains vague provisions on the appointment process. According to Section 7 of the Bill, a member of the Authority must possess (1) a bachelor's degree or higher educational attainment and (2) at least five years of post-qualification work experience. While ensuring competence and qualifications is a worthy goal, it is possible that Section 7's strict education and work experience requirements will cause the undue exclusion of individuals from serving on the Authority. A nominating body, for instance, may wish to nominate an NGO leader who has expert knowledge of the workings of civil society but is ineligible due to a lack of sufficient post-qualification work experience. These prescriptive qualifications could thus impede the ability of the Authority to recruit members with valuable input and exclude competent individuals. The nominating bodies are better equipped to select qualified individuals as they are professional bodies with expertise in their sectors.

**OUR RECOMMENDATION:** We call for the removal of the requirement for Authority members to possess a bachelor's degree and five years of post-qualification work

experience. The standard qualification to serve on the Authority should be experience with and knowledge of civil society.

### **2.10 Mandatory registration**

Section 23 of the Bill requires NGOs to register in order to operate legally, which contravenes international standards on the right to freedom of association. Article 22 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to freedom of association, has been consistently interpreted to prohibit mandatory registration of NGOs (refer to declaration by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association). The African Commission Guidelines clearly provide that associations should not be compelled to register in order to exist and operate freely. The mandatory registration requirement also contravenes section 32 of the Constitution of Malawi, which states that "*Every person shall have the right to freedom of association, which shall include the freedom to form associations.*" The above provision is deeply concerning because, under the Amendment Bill, severe criminal and civil penalties may be imposed for violations of the NGO Act, including operating an unregistered NGO.

**OUR RECOMMENDATION:** We call for the removal of Section 23 of the Bill that requires mandatory registration of an NGO.

### **2.11 Elimination of civil society oversight of the Authority**

Section 29 of the Bill repeals Part VIII of the NGO Act, which creates the General Assembly of NGOs. The General Assembly currently provides a strategic platform for NGOs to ensure accountability of the Authority and to engage in a cross-sectoral dialogue that is critical for an enabling operating environment for the NGO sector. The General Assembly has significant value in offering NGOs the opportunity to participate in oversight of the government's regulation of the NGO sector. Through the General Assembly, NGOs receive a report concerning the Authority's activities and engage in an annual forum to provide suggestions and concerns. The Amendment Bill eliminates "oversight by the CONGOMA General Assembly in order to promote independence and professionalism of the Authority." While maintaining the Authority's independence is a worthy goal, as a matter of good practice, the Government should consider alternative ways to ensure adequate civil society input into the Authority's work. In comparable jurisdiction, the Kenyan NGO law provides for the NGO Policy Forum (composed of NGOs with its own leadership) as a platform for dialogue and accountability of the NGO Coordinating Board.

**OUR RECOMMENDATION:** We call on the government to consult widely with civil society to explore viable alternatives to ensure that the Authority is accountable and transparent.

## 2.12 Clarity on Operations of International NGOs

The Principle Act is amended in Section 35 to provide the Minister with powers to make regulations for the operations of international NGOs in Malawi. However, the provision is vague and only singles out INGOs.

**OUR RECOMMENDATION:** We call for clarification of provision 35 (a)(ii) and ensure that the Regulations cover all NGOs. We further urge that NGOs be genuinely consulted in the drafting of the Regulations and ensure that it passes the test of the Constitution and international human rights standards.

## 2.13 The Amendment Bill tabled and passed against Court Order

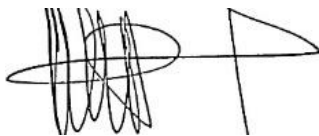
We note with concern that despite a clear 2019 court order restraining parliament from tabling or debating the NGO Bill, the Executive and Parliament proceeded to table and pass the Bill. This matter is still pending before the Supreme Court and the order of stay has not been vacated or varied. This is blatant violation of the rule of law, a dangerous precedent and path to impunity. The Tonse Alliance administration should be the last to disobey court decisions, as it is a beneficiary of the respect of the rule of law. We therefore urge the President to uphold the spirit and foundation of the constitution in particular the rule of law by not assenting to the Bill

### **(3) Conclusion**

We, members of the Civil Society in Malawi, have raised the above issues in anticipation that the President will find a proper basis for referring the Bill back to Parliament for further scrutiny in the areas as identified. In our pursuit of participatory democracy and good governance, we believe that laws must not be cast in stone. They must be purposive to deepen our democracy and only seek to remedy the defects in the law. Therefore, we trust that the President and the government at large will find our recommendations plausible.

Signed today, Friday, 22 April 2022

**Signed on behalf of NGOs:**



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**Endorsed by the following NGOs, Networks and advocates:**

- 1) Public Affairs Committee (PAC)
- 2) Youth and Society (YAS)
- 3) Centre for Human Rights and Rehabilitation (CHRR)
- 4) National Advocacy Platform (NAP)
- 5) Human Rights Defenders Coalition (HRDC)
- 6) TROCARE
- 7) Catholic Commission for Justice and Peace (CCJP)
- 8) Save the Children
- 9) Church and Society – Livingstonia Synod
- 10) Section 12
- 11) Human Rights Consultative Committee (HRCC)
- 12) Natural Resource Justice Network
- 13) Rumphu CSO Network
- 14) Blantyre Urban CSO Network
- 15) Balaka CSO Network
- 16) Dedza CSO Network
- 17) Centre for Human Rights Education, Advice & Assistance (CHREAA)
- 18) Good Health Organisation
- 19) BASEDA
- 20) Centre for Social Accountability and Transparency (CSAT)
- 21) Kusamala Institute of Agriculture and Ecology
- 22) Nsanje CSO Network
- 23) Youth-Decide Campaign
- 24) Matchona Phiri – Human Rights Advocate
- 25) Wesley Mwafurirwa – Human Rights Lawyer
- 26) Development Communications Trust (DCT)
- 27) Dowa CSO Network
- 28) Chikwawa CSO Network

- 29) TROCARE
- 30) Malawi Economic Justice Network (MEJN)
- 31) Catholic Development Commission (CADECOM)
- 32) Society for Women and Aids in Malawi (SWAM)
- 33) World Renew
- 34) One Acre Fund
- 35) Civil Society Network on Climate Change
- 36) Circle for Integrated Community Development (CICOD)
- 37) Area 55
- 38) Gender and Justice Unit
- 39) COWLHA
- 40) Malawi Relief Fund UK
- 41) Christian Aid
- 42) MARVE Project