

I. Bench marks for Progressive CSO Legislation

The following are internationally accepted standards against which the assessment of the draft law is made.

1. Protecting fundamental freedoms

- The CSO law should protect fundamental freedoms of expression, association and information to CSOs

a. Formation of CSOs

- Registration of CSOs should be administered by law enacted by the parliament; leaving little room for administrative rules
- Registration process should be relatively quick, easy, and inexpensive
- Mandate of registration better be given to an independent organ; court, chamber of commerce
- Decisions of authorities not to register CSOs should be appealable to an independent court
- There should be a single, national registry of all CSOs that is accessible to the public

b. Operation of CSOs (permitted activities)

- Be permitted to engage in legal activities for the benefit of their members and in public benefit
- Provide clear guarantee for advocacy CSOs that they have the right to speak freely about all matters of public significance, including debate about and criticism of existing or proposed state policies and actions

c. Ensure entitlement for public benefit; tax exemption

d. Ensure access to the media

2. Ensuring integrity and Good Governance of CSOs

- a. The law should require governing structure and mandate depending on the type of the CSO; membership and non-membership
 - b. The law should give an CSO (through its highest governing body) broad discretion to set and change the governance structure
 - c. Internal Reporting and Supervision: Duties and liabilities of governing bodies and their Members
 - d. Prohibition on Conflicts of Interest
 - e. Prohibition on the distribution of profits and other private benefits
 - f. CSOs should be permitted and encouraged to set higher standards of conduct and performance through self-regulation and codes of ethics
 - g. the laws should permit and the society should encourage the formation of umbrella organizations to adopt and enforce principles of voluntary self-regulation
3. Financial sustainability
- a. CSOs should be permitted to engage in all legally acceptable and culturally appropriate fundraising activities
 - b. CSOs should be permitted to engage in lawful economic, business, or commercial activities, provided that no profits or earnings are distributed as such to founders, members, officers, board members, or employees
 - c. CSOs should be exempt from income taxation on moneys or other items of value received from donors or governmental organs (by grant or contract) and regular membership dues, if any
 - d. donations of individuals and business entities to public benefit CSOs should be entitled to reasonably generous income tax benefits (deduction)
 - e. Any net profit earned by an CSO from the active conduct of a trade or business could be --

- i. (a) exempted from income taxation,
 - ii. (b) exempted from income taxation,
- f. CSOs and their activities should be given preferential treatment under a value added tax (VAT), other taxes (e.g., property taxes), and customs duties

4. Accountability and transparency

a. Reporting;

- i. All reports required of CSOs should be as simple to complete and as uniform among state organs as is possible
- ii. All reporting requirements should contain appropriate provisions to protect the legitimate privacy interests of donors and recipients of benefits as well as the protection of confidential or proprietary information
- iii. CSOs be required to publish or make available to the public a report of its general finances and operations

b. Auditing

- i. Provide safeguard that audit power should not be used to harass organizations or individuals connected with them.

5. Sanctions

- a. The law shall provide verity of sanctions for different types of violations
- b. Acts entailing penalty should be stated clearly in the law with their type of penalty
- c. Administrative sanctions shall be subject to judicial review
- d. Sanctions may include oral warning, written warning, suspension, and involuntary termination for serious violation

II. The Draft Charities and Societies Proclamation

Vis a Vis the Benchmarks

This draft law is divided into twelve sections which have a total of 125 provisions. The law is designed to be applicable for charities and societies that operate in more than one regional state, to foreign charities or societies or to charities or societies operating in the City Administration of Addis Ababa or Dire Dawa. (Art. 3) For the implementation of the law the following supervisory organs have been established; Minister of Ministry of Justice Charities and Societies Agency, Charity and Society Council and Sector Administrators. The agency has its own legal personality and be made accountable to the Ministry of Justice whereas the Council consisting of sector administrators and such other government organs as the Minister may appoint.

Two forms of associations have been recognized; Charities and societies. Charity has the meaning of an institution established for charitable purposes which are listed under Art. 16(3) whereas society is defined as “any non-profit making civic, religious, mass organization, chamber of commerce, and sectorial associations or any association of 10 or more persons, organized for lawful purpose”. (Art. 60) Section five of the draft Proclamation deals with formation, licensing and registration of charities and societies while section seven (section six is missing) addresses issues of accounts and reports. The remaining sections deal with supervision of charities and societies, administration of finance and property, fund raising, entitlement for income tax exemption and involvement in income generating activities

Major Issues of Concern;

1. Barriers to Entry (Formation)

Art. 2(3) which defines Ethiopian Charities and Societies excludes those Ethiopian organizations that receives money from foreign source greater than 10% of their total asset. This appears to be unrealistic in a country where most of the CSO are highly dependent on foreign aid, and the level of domestic financial support is almost zero. The implication of this classification between Ethiopian and international charities/ societies should be understood in line with article 16/6/ of the draft which excludes non Ethiopian charities from mandates of:

- advancing citizenship or community development, 16/3/f/
- the advancement of human and democratic rights, conflict resolution or reconciliation or the promotion of harmony or equality and diversity amongst nations, nationalities and peoples or different religious groups,16/3/j/
- the promotion of the sustainable development of the nations, nationalities and peoples of Ethiopia, 16/3/l/
- the promotion of the efficiency of the justice and law enforcement services; 16/3/m/

According to the wording of the draft and the explanation given at the consultation organized by the Ministry of Justice almost all the current local non government actors fall under the category of charitable societies and hence are subjected the above restrictions. Exclusion of local non governmental actors who have and can contribute significantly for the over all development of the country from engaging in the above activities on the very ground that they secure more than 10% of their income from foreign sources would have a significant bearing in the democratization process. Especially at a time when even the traditional concept of ‘aid’ and ‘charity’ is being challenged and is being replaced by the right based approach, the introduction of such a legislation would have a negative impact in the effort towards sustainable development.

The right of individuals to form an association with a membership of less than 10 is curtailed by Art. 60. Only when the “public interest” so demands that the Agency allow the registration of an association whose founding members are five and above. Raising the number of minimum number of membership extraneously has its own negative consequence on the work of CSOs and freedom of association. It will undermine the right of individuals who are not well-connected to provide the required number of members.

The rights of individuals to organize themselves informally without requesting for registration is prohibited and considered as a punishable criminal act. (Arts. 82 - 85) This is against the principle of freedom of association as guaranteed by international

human rights instruments ratified by Ethiopia such as ICCPR, UNDHR, ACHPR. The protection afforded by freedom of association has nothing to do with legal personality of association. The freedom of association does not entitle an association to be recognized by law as a body corporate, and the freedom is not violated when such recognition is withdrawn.

Arts 73 and 74 provide the requirements for registration as well as denial of registration by the Agency. However, these provisions are marred with broad and vague terminologies which leave wider space for subjectivity and unwarranted discretion to the Agency. Freedom of association can only be limited by grounds which are acceptable in an open and democratic society, for the benefit of the public and stated clearly by a law duly enacted. In the Proclamation, the following have been identified as areas left for the discretionary decision of the Agency in relation to registration and denial of registration

Additional documents.... as the Agency may require. Art. 73 (2)(f)

The proposed organization fails to provide for proper management and control. Art. 74(1)(a)

The proposed organization is likely to be used of unlawful purposes prejudicial to public peace, welfare and good order. Art. 74(1)(b)

Consanguinity or affinity in the opinion of the Agency cause the use of the proposed organization for personal gain. Art. 74(3)(c)

It appears to it that the name under which the proposed organization to be registered is in the opinion of the Agency undesirable, immoral or illegal Art. 74(3)(d)

Please note that none of the terms underlined are defined in any way, and hence they are subject to the personal interpretation of the agency and susceptible to inconsistency.

Article 3 and 62(6) read in tandem give the impression that associations cannot be established at federal (national) level if they cannot have branch offices in at least five regional states and members drawn from these regions. This approach definitely affects organizations which are established to advocate on national policy issues

without being confined to specific region, research organization, etc. In terms of cost particularly for an establishing organization is very costly to open five branch offices at a time and during initial period.

Although the above mentioned provisions require mandatorily for the establishment of branch offices for an organization to be treated as federal organization, according to Article 77 of the same law establishment of branch office is possible only with prior approval of the Agency. In deed establishment of branch offices should be the internal affair of the organization and hence notification to the Agency should have been sufficed.

2. Barriers to Operational Activities

Article 16(3) provides for lists of activities which can be considered as charitable. This provision also provides for charitable activities which are not allowed to foreign organizations; the advancement of citizenship or community development, the advancement of human and democratic rights, conflict resolution or reconciliation, the promotion of harmony of equality and diversity among nations, nationalities, and people or different religious groups, the promotion of sustainable development of the nations, nationalities and people of Ethiopia, the promotion of the efficiency of the justice and law enforcement services. It is not clear why these restrictions are made and the legitimate interest to be protected by doing so. This provision has a damaging effect for several international organizations currently working in the areas mentioned.

The law recognize the right of mass based organizations to participate in the democratization process particularly in voter education and observing electoral process but remains silent for other forms of organizations recognized by the same law. It is not clear why the law singled out only these groups and kept quiet for the rest. Does that mean the remaining groups of organizations are not allowed to take in the such type of democratic process? Not clear. (Art. 62/7)

Independence of the association to the administration of its internal affair is one of the areas protected by freedom of association. The freedom of CSOs would be undermined if the state engages itself in determining the content of article of

association, goals and objectives of the CSOs, deciding on the type and nature of membership, determining the minimum number of founders, deciding on the structure of the association, etc. Articles 78 to 80 undermine such fundamental guarantees by allowing state interference in the administration of changing organization's name, place and memorandum of association. Simple notification of such changes to the Agency should have been enough and there is no need to wait for the approval of the Agency. After the notification, the agency can raise any reasonable questions on the changes made. In addition, the stated provisions provide for unwarranted power to the Agency to decide on such changes as stated under Article 79(2) and (5). Terms like "In the opinion of the Agency", "likely to mislead the public", "contrary to national interests, prejudicial to the public peace, welfare or good order of Ethiopia" need to be defined objectively to avoid administrative discretion and potential of arbitrary abuse.

Article 86 provides for renewal of license to be made on annual basis. This is a retrogressive measure against the current practice which is three years. This requirement is extremely cumbersome both for the organizations and the Agency itself. The application for renewal has to be submitted every ten months, which means before the end of the budget year and getting audit and activity report. Better maintain the current practice.

Articles 96 and 97 oblige organizations to inform the conduct of their general assembly meeting, and entitled the agency or sector administrator or a police officer ordered by either of them to enter at any reasonable time to the place where the organization carries out meetings or normal business. These provisions are both unnecessary and dangerous undermining freedom of association and the right to privacy which are all guaranteed by the FDRE Constitution and international human rights instruments ratified by Ethiopia. Article 26 of the FDRE Constitution provides;

1. Everyone has the right to privacy. This right shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under /his personal possession.
2. Everyone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices.

3. Public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.

Article 68 is also another area where the Government is attempting to invade the privacy of members of the organization by requesting submission of information about members. This information, in fact, should be limited to the founders and there is no legitimate reason for the Agency to know who members of the organization are. By other provisions of the law, the Agency already has full information about the founders and leaders who might be held accountable. The provision undermines the rights of privacy of members and freedom of association by putting members under government scrutiny.

3. Ensuring good governance; Independence with accountability

CSO laws may provide for provisions guaranteeing good governance to ensure the effectiveness of the organizations and protect the rights of the public and other stakeholders. However, equally important is the independence of the organization; to be protected from undue interference by the government in their internal affairs. Section eight of the draft bill is dealing with supervision of charities and societies. A close look at this section, however, reveals that the Agency is accorded with excessive power to interfere with the independent operations of organizations. The power of the Agency to carry out "inquiry" imposes exceedingly great administrative burdens on the staffs of the organization, open room for interference with the daily operation of the organization, insertion of government personnel in governance and operational meetings of the organization with attendant intimidation, and ultimately dissolution of organization. In all these processes what is worse is the absence of judicial interference to counter balance such excessive power given to the Agency and the Sector Administrators. Seizure of property, conducting a search, removing staffs and attending operational meetings through police force without court order is really against the FDRE Constitution and international human rights instruments ratified by the country.

Once established, CSOs shall enjoy fundamental rights which are indispensable to carry out their activities. These rights may include; freedom of assembly, freedom of expression, freedom of speech, right to privacy (protecting the organization from arbitrary interference by public authorities), right to use and dispose property as well as the right to establish association of associations. They should be considered and treated as legal entities established for public good and have sense of accountability.

Article 103 provides that where the “Agency..... is satisfied” that it has uncovered “misconduct or mismanagement” in the administration of the organization, it may take a range of actions including removing or suspending officers or agents of the organization, establish a scheme (plan) for the administration of the organization, restrict the transaction of the organization, appoint new officers as it wishes for the administration of the organization, etc. This provision is dangerous as it affects not only the independence of the organization but it also has the effect of taking the organization and its property, operations and management by the Agency with no findings by any court. The room for courts’ interference for such type of acts has been closed by Article 118 of the bill; appeal to the court is possible only when there is error of law and not facts, and it is allowed only for national organizations.

Article 104 provides for removal and replacement of officer by the Agency. Some of the grounds for the removal and replacement may appear to be acceptable. Nevertheless, the grounds which are particularly indicted under (b), (d) and (e) should be left to the choice of the organization as they are more of internal matters. This power should be given to the Board or the General Assembly of the organization than to the Agency. Same comment applies to sub Articles 2 and 3 of Art. 104

4. Barriers to Resource

There are provisions which are highly affecting access to resources and undermine the existence and sustainability of CSOs. Article 2(3) has the effect of prohibiting access to foreign aid for domestic organizations. According to this provision, for a charity or society to be considered as an Ethiopia organization, at least 90% of its income has to be drawn from Ethiopian sources which is unrealistic.

Article 87(3) prohibits the receipt of anonymous donation which is against the principle of the right to privacy. The agency should control and has to focus on the legality of the activities of the organization than the sources of the fund. The fund can come from anywhere but what is most important is the activities carried out by such fund (is it against the national interest, peace, security etc. of the country?)

Article 93 provides for notification of bank account to the agency “periodically”. But the law is not clear how frequently and when this report has to be made.

It is only charities which are entitled to exemption from income tax, and societies are exempted from income tax to the extent of their members’ contribution. Both charities and societies can engage in income generating activities that are incidental to the achievements of their purposes. Nevertheless, the law fails to provide other means which are considered to be essential for the financial sustainability of CSOs such as tax deduction for (domestic) donors, exemption from fees and taxes on immovable property, exemption from import duties, exemption from VAT, etc.

4. Sanctions

The draft consists several types of sanctions to be taken against organizations or their leaders as well as members. The sanctions range from criminal to administrative but in most cases criminal sanctions. The following 25 areas have been identified as areas of entailing sanctions of either administrative or penal.

- Soliciting funds from the public without prior approval of the Charity Committee; Art. 53(4); Criminal liability
- Failure to provide information about members Art. 68(5); Both criminal and administrative penalties
- Soliciting money and property exceeding 50,000 Birr before registration; Art. 70(4); both criminal and administrative penalties.
- Working as an officer (LEADER?) of an organization in violation of Article 75 (1)(a – c); Criminal liability

- Change of name, place of business, memorandum of association without prior approval of the Agency; Administrative penalty, Art. 78(2)
- Failure to observe the order of the Agency to change names and memorandum of association of the organization; Both criminal and administrative penalties; Art.79(6)
- Use of symbols without prior approval of the Agency; Both criminal and administrative penalties; Art. 80(3)
- Failure to display certificate of registration, name and symbols of the organization as well as administrative decision of the Agency; Administrative penalty; Art. 81(3)
- Participation in the management of an organization considered to be unlawful; Criminal liability; Art. 82(2)
- Participation in a form of membership in an organization considered to be unlawful; Criminal liability; Art. 82(3)
- Donation to an organization considered to be unlawful; Criminal liability; Art. 82(4)
- Allowing a meeting to be conducted in ones premise for an organization considered to be unlawful; Criminal liability Art. 83
- Procuring subscription or aid for an organization considered to be unlawful; Criminal liability; Art. 84
- Disseminating information about an organization considered to be unlawful; Criminal liability; Art. 85
- Failure to submit annual report and “relevant” information about the organization to the Agency; Administrative penalty; Art. 90(4)
- Failure to notify the Agency of Bank Accounts; Administrative penalty to be determined by Council of Ministers; Art. 93 (2)

- Failure to cooperate the agency in conducting investigation (inquiry) against a given organization; Administrative penalty; Art.94(4)
- Altering, suppressing, concealing or destroying any documents which s/he requires to produce; both criminal and administrative penalty; Art. 94(5)
- Failure to notify meetings of the organization; administrative penalty; Art. 96(2)
- Supply of false or misleading information or concealing or destroying documents to be given to the Agency or Sector Administrator; Criminal liability; Art. 98
- Failure or refusal to comply with the recommendation of the Agency on employment of officers and utilization of fund (admin. cost not to be more than 30%); Both criminal and administrative penalty; Art. 101(3)
- Employment of expatriate in violation of Art. 102 (1); Criminal liability
- Contravening orders of the Agency in relation to the protection of property of the organization; criminal liability ; Art. 103(3)
- Conducting public collection without prior approval of the Agency; Criminal liability and confiscation of the money collected; 110(3) and 113(2)
- Distributing of profits of the organization drawn from income generating activities to members; criminal liability an administrative sanction; Art. 115(3)(b)

The types of administrative sanctions are not provided in the Proclamation and hence they are expected to be determined by Regulation which will be enacted by the Council of Ministers.

5. Cancellation (Termination and Dissolution)

Article 105 provides the grounds for termination. These grounds lack specificity and hence open room for improper discretionary power to the Agency. Grounds like

“used for unlawful purposes or purposes prejudicial to the public peace, welfare or security”(sub b), “contrary to the public or national interest”(sub d), and “failure to comply with Agency’s instruction to change rules”(sub e) are all based on the discretion of the Agency and no room for judicial review. (A CAPITL PUNISHMENT BY THE EXECUTIVE WITHOUT APPEAL TO COURT)

6. Appeal procedures and judicial review

The Agency is given the power to take all of the abovementioned administrative sanctions which is appearing to be making it a court of law than an administrative organ.

Appeal against any of the administrative decision of the Agency can be made to the Minister of Justice within 15 days. But two major problem arises when it comes to judicial review of the decision of the Agency and the Minister.

- a) International organizations do not have the right to judicial appeal against the decision of the Agency and the Minister.
- b) Local organizations are entitled to appeal but only on error of laws and not facts. This is against Article 37 of the FDRE Constitution which guarantees the Right to Access to Justice.

7. Recommendations

Compared with previous draft CSO laws, this law is entirely different, consists new concepts which need further clarification and serious discussion. We need to learn from Malawi, Mozambique, **South Africa** (one of the benchmark countries) and Tanzania that have enacted their respective laws after engaging in serious consultations with civil society. The discussion process can take lesson from the current draft legislation on Mass Media and Freedom of Information Law.