

Freedom of Association and NGO Law: The Constitutionality of the 2009 Zambian NGO Law

Muna Ndulo
Cornell Law School, mbn5@cornell.edu

Follow this and additional works at: <https://scholarship.law.cornell.edu/sajpd>

 Part of the [African Studies Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Ndulo, Muna (2015) "Freedom of Association and NGO Law: The Constitutionality of the 2009 Zambian NGO Law," *Southern African Journal of Policy and Development*: Vol. 1 : No. 2 , Article 5.
Available at: <https://scholarship.law.cornell.edu/sajpd/vol1/iss2/5>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Southern African Journal of Policy and Development by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Freedom of Association and NGO Law: The Constitutionality of the 2009 Zambian NGO Law

Muna Ndulo

(Cornell University)

Freedom of Association is entrenched in the Zambian Constitution and in several International Law instruments to which Zambia is a party. By hindering the independent and effective operations of NGOs, the Non-Governmental Organizations (NGO) Act of 2009 unjustifiably curtails this freedom. This paper examines the NGO Act and documents the various instances in which it imposes an unconstitutional, unjustifiable and disproportionate hindrance on the ability of NGOs to operate effectively. It argues that the Act threatens to roll back the enormous gains that NGOs have made and continue to make in fermenting accountable, democratic and effective governance in Zambia.

1. Introduction

In 2009 The Zambian Government enacted the Non-Governmental Organizations Act (NGO) No. 16 of 2009.⁷ The Act created the NGO Board whose function is to consider and approve applications for registration from NGOs. The Act requires all NGOs formed after the passing of the Act to register with the said Board, and those in existence prior to the enactment of the Act to apply for a certificate of registration. The Act gives broad discretion to the Government to deny registration to NGOs, powers to dictate NGOs' thematic and geographical areas of work and imposes mandatory re-registration every five years in contravention of international human rights treaties, best practices and standards. In this article, we argue that the NGO Act of 2009 is unconstitutional and violates both the 1996 Zambian constitution and numerous provisions pertaining to freedom of association of international treaties and conventions, to which Zambia is a party and is therefore obligated to abide by. It is also in breach of well-established international best practices. The Act is clearly intended to curtail the freedom of NGOs in Zambia to operate independently and effectively. If implemented, it will without doubt hobble their operations.

NGOs, both domestic and international, are an indispensable component in the functioning of a democratic state and in the effective promotion of human rights, the rule of law and good governance. Their contributions are important in relation to fact finding, reporting, standard setting and the overall promotion, implementation, and enforcement of human rights and citizens' participation in governance. NGOs operate on the basis of

⁷ Non-Governmental Organizations Act, No. 16 of 2009.

differing mandates, each responding to its own individual priorities and methods of action, bringing a range of viewpoints to issues that arise in governance. In addition, they promote accountability in governance. From the earliest times, they have played a key role in protecting human rights, human dignity, and human progress. One of the oldest and most well-known NGOs is the Anti-Slavery Society, founded in 1823. It is well-known for its campaign to rid the world of the slave trade (Davies, 1966). Another well-known example is the International Campaign to Ban Landmines. Established initially by six NGOs, the campaign was awarded with the Nobel Peace Prize in 1997 for its contribution to the adoption of the 1997 Mine Ban Treaty. Further, NGOs' significant role in the establishment of the International Criminal Court is well recognized (see Glasius, 2006). Yet another example is the Kimberly Certification Scheme. This is an international diamond certification system established in 2003 that focuses on stopping the trade in conflict diamonds.⁸

Whatever the shortcomings, it is inconceivable that the progress made thus far in establishing democracy and accountability for governance throughout the world and in Zambia could have been achieved without the work of NGOs. An important condition for the existence of a democratic society is the respect for fundamental rights and freedoms enshrined in a national constitution. Freedom of association is a cornerstone for a functioning democracy. The right to form groups, to organize and to assemble together with the aim of addressing issues of common concern is a human right. The ability to organize is an important means by which citizens can influence their governments and leaders. The right of association not only applies to individuals who wish to form associations but also guarantees associations so formed the right to operate freely and without interference. It is important that government creates an environment that allows associations to flourish, rather than enacting draconian laws that claw back and impose unnecessary restrictions on the enjoyment of the freedom of association.

2. Freedom of Association: Basis and Scope

In this section we will analyze the international instruments that entrench freedom of association and the court jurisprudence interpreting these instruments by both domestic and international tribunals. Zambia, like all state parties to these instruments, has the prime responsibility to promote, protect and implement human rights and fundamental freedoms articulated by the conventions Zambia is party to. The freedom of association is guaranteed by a number of international, regional and national constitutions.⁹ The Universal Declaration of Human Rights 1948 provides per Article 20(1) that 'Everyone has the right to freedom of peaceful assembly and association.' It provides further that 'No one

⁸ <http://www.globalwitness.org/campaigns/conflict/conflict-diamond> (accessed 21 November 2013).

⁹ The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (ICCPR), The Convention on the Elimination of Racial Discrimination, The International Covenant on Economic, Social and Cultural Rights are examples of international conventions that guarantee the freedom of association in democratic societies. The European Convention on Human Rights, The American Convention on Human Rights and the African Charter on Human and Peoples Rights are examples of regional arrangements that guarantee the freedom of association.

may be compelled to belong to an association.' The International Covenant on Civil and Political Rights provides per Article 22(1) that: 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.' Whilst guaranteeing the freedom of association, international conventions recognize that the freedom is not absolute and may be interfered with or derogated from under limited circumstances. The circumstances under which freedom may be interfered with are carefully and strictly circumscribed by law and once the requirements are not met, the continued interference becomes an impermissible violation of freedom, actionable before the courts.

International human rights treaties are replete with provisions that guarantee the freedom of association. Article 11(1) of the European Convention on Human Rights provides that: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.' Article 11(2) provides that:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Article 11(2) of the European Convention sets out the conditions under which the freedom may be limited under the European Convention. In *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (2009)¹⁰ (hereinafter referred to as TMC case), The European Human Rights Court held that '... an interference will constitute a breach of Article 11 unless it was 'prescribed by law', pursued one or more legitimate aims under paragraph 2 and was 'necessary in a democratic society' for the achievement of those aims.' All three conditions must be fulfilled cumulatively or the implied restriction will be considered in violation of the Convention (Guluzade et al., 2010). Thus though the freedom of association is not absolute, the law set a very high standard allowing a limited scope of permissible intrusion.

The expressions "prescribed by law" require that there must be a domestic law that is precise and accessible to everyone in the country.¹¹ The expression also refers to the quality of the law in question.¹² Thus in the *TMC case* the court held that:

The expressions 'prescribed by law' and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among many

¹⁰ (Application no. 37083/03)

¹¹ *Tebieti Mühafize Cemiyeti and Israfilov V. Azerbaijan* (Application no. 37083/03) p. 14.

¹² *Ibidem*.

other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004- I).

Domestic legislation aimed at limiting the freedom must also provide a level of protection against arbitrary interference by government officials, since it would be contrary to the rule of law to grant an unfettered discretion to the executive.¹³ The law must therefore spell out the scope of any discretion and how it is to be exercised by the executive.¹⁴ The expression 'necessary in a democratic society' is to be construed strictly and interference under it is permissible only where the interference corresponds to a pressing social need, but not construed broadly to encompass a regulation that is merely useful or desirable.¹⁵ The African Charter of Human and People Rights provides in Article 10(1) that: 'every individual shall have the right to free association provided that he abides by the law.' Article 10(2) provides that: 'Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.' In *Lawyers for Human Rights v Swaziland*, citing *Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR 2000)*, the African Commission, quoting its Resolution on the Right to Freedom of Association, held that:

the regulation of the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter and in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom and that the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards.

Flowing from this decision, state parties are obliged to regulate freedom of association in a manner that is consistent with the charter and not to limit the right, to regulate the freedom in a manner not to override constitutional guarantees and international treaties. Generally, international and regional bodies guard jealously the freedom of association as a fundamental right allowing official interference only under limited and prescribed circumstances.

The United Nations Declaration on Human Rights Defenders adopted on 9 December 1998 declared: 'Everyone has the right to promote and strive for the protection and realization of human rights and fundamental freedoms.' The declaration states that this right may be enjoyed 'individually and in association with others'. The Declaration emphasizes the fact that human rights defenders are entitled to their rights both as individuals and as members of any group, association, or non-governmental organization. The Human Rights Committee in General Comment No.25 observed that the freedom of association includes the right to form and join organizations and associations concerned with political and public affairs.

Under the United Nations Charter, member states are obligated to promote universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race, sex, language, or religion. A state that is party to human rights

¹³ *Ibidem*.

¹⁴ *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000- XI).

¹⁵ *Tebieti Mühafize Cemiyeti and Israfilov V. Azerbaijan* (Application no. 37083/03) p. 16.

treaties is furthermore under a legal obligation to ensure the rights articulated in the treaties to all individuals under its jurisdiction, and to provide for an effective remedy in case of a violation. In *Velasquez Rodriguez v. Honduras* (Inter-Am. Ct (ser.c) No.4) the Inter-American Court of Human Rights held that when states join treaties they undertake to respect the rights and freedoms recognized in the treaties. States assume the following obligations: (a) to respect the rights and freedoms recognized in the treaties; (b) to ensure free and full exercise of the rights recognized by the treaties to every person subject to their jurisdiction. This obligation implies the duty of states to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights and (c) states must prevent, investigate and punish any violation of the rights recognized by the treaties.

2.1 Freedom of Association in the Zambian Constitution

The Zambian Constitution as Amended by Act No. 18 of 1996 echoes the determination of the people to establish a sovereign democratic state and promises the freedom of association to all citizens. Article 21(1) of the Zambian Constitution as Amended by Act No. 18 of 1996 provides that:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests.

The constitution guarantees every citizen the freedom to associate with any person with the view to protecting and promoting their interest. Flowing from this provision, the freedom is only to be curtailed with the consent of the individual.

Article 21(2) of the constitution further provides that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision: (a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; (c) that imposes restrictions upon public officers; or (d) for the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

Article 21(2) introduces a limitation to the absolute enjoyment of the freedom. Thus without the consent of the individual the state may enact laws that seek to do a list of things aimed at interfering with the absolute enjoyment of the freedom. However, these laws must conform to a standard set by the constitution itself. The standard as interpreted by the courts being that the law must be reasonably justifiable in a democratic society and fall under the permitted exceptions under the constitution. This standard is akin to the standard espoused in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* and *Lawyers for Human Rights v Swaziland* (ACHPR 2000).

3. The NGO Act of 2009: A closer look

The Non-Governmental Organizations' Act, No. 16 of 2009 of Zambia, according to its preamble, provides for the co-ordination and registration of non-governmental organizations; the establishment of the Non-Governmental Organization's Board and the Zambia Congress of Non-Governmental Organizations; the constitution of the Council of Non-Governmental Organizations; and the provision for matters connected with or incidental to the foregoing. The implementation of this law has a significant impact on the enjoyment of the freedom of association by individuals who seek to establish non-governmental organizations for the promotion and protection of their interest in the country. Thus the provisions of the law must be carefully matched against the enjoyment of the freedom to ascertain whether it unjustifiably interferes with same.

3.1 Self-Regulation of Non-Governmental Organizations

Part V of the NGOs Act deals with self-regulation of NGOs registered under the Act. The Act establishes a Zambia Congress of Non-Governmental Organizations which shall be a collective forum of all organizations registered under the Act.¹⁶ The Congress adopts its own structures, rules and procedures for its administration.¹⁷ In addition to this, the Congress elects a twelve member Council which shall be responsible for the management of the affairs of the Congress.¹⁸ The Council is mandated to develop, adopt and administer a code of conduct for NGOs, facilitate and coordinate the work of NGOs operating in the country and perform other functions assigned by the Congress.¹⁹ The law provides further that for the purposes of developing a code of conduct for the operation of NGOs, the first twelve NGOs to be registered under the law shall comprise an interim council competent to develop the Code of Conduct for NGOs in the country.²⁰

Flowing from the provisions of the Act, after going through all the mandatory registration requirements under the law, an NGO is compelled to join the collective forum called the Congress. It is not clear who will finance the activities of the Congress created

¹⁶ Section 29(1) of Non-Governmental Organizations Act, 2009.

¹⁷ Section 29(2) of Non-Governmental Organizations Act, 2009.

¹⁸ Section 30(1)(2) of Non-Governmental Organizations Act, 2009.

¹⁹ Section 31(a)(b) and (c) of Non-Governmental Organizations Act, 2009.

²⁰ Section 34 of Non-Governmental Organizations Act, 2009.

under the law and the subsequent Council the Congress is tasked to elect.²¹ The provisions of Part V must be subject to scrutiny because they compel all registered NGOs to form an association called the Congress. The law does not offer a choice whether to join or not. The freedom to associate has been held to mean the freedom to dissociate.²² As it is indicated above, Article 20 of the Universal Declaration on Human Rights mandates that no one can be compelled to join an association. According to Article 10(2) of the African Charter no one may be compelled to join an association. Moreover, it is a well-established principle of the European Court of Human Rights that the freedom not to associate is part and parcel of the freedom of association. In a case that is now regarded a leading authority of the European human rights law, *Young, James and Webster v. The UK*, the European Court on Human Rights discussed whether article 11 of the European Convention included a “negative right” not to be compelled to join an association. The Court held that the dismissals of the applicants as a result of their refusal to join a trade union represented a form of compulsion incompatible with the freedom of association guaranteed by the European Human Rights Convention.²³ To be able to compel NGOs to enter into a forum without giving them the option of leaving, the government must provide reasonable justification to satisfy the constitutional test since it is an interference going against the individual consent requirement under the constitution.

Compelling people or a group of people to join an association is frowned upon even if the initiative was at the instant of those compelled. In *New Patriotic Party V. Attorney-General*,²⁴ the plaintiff brought an action before the Ghanaian Supreme Court for a declaration that: (1) the Council of Indigenous Business Associations Law, 1993 (PNDCL 312)(CIBA) was inconsistent with and a contravention of articles 21(1)(e), 35(1) and 37(2)(a) and (3) of the Constitution, 1992 and consequently void.²⁵ The Attorney-General contended, inter alia, on the merits that since PNDCL 312 had been enacted upon, the petition of the associations specified in the schedule to the Law to enable them to freely operate under the umbrella of a council similar to the Trades Union Congress, it was not in breach of their right to form or join any association of their choice under articles 21(e) and 37(2) (a) of the Constitution. The Supreme Court held that:

²¹ It may be that the fees and remuneration of the members of the Council or the interim council under the law will invariably be borne by the NGOs and not the government.

²² *New Patriotic Front v Attorney General* [1997-98] 1 GLR 378 – 461 at 382.

²³ *Young, James and Webster v. the United Kingdom*, App. No. 7601/77, 13 August, 1981, para.55.

²⁴ [1997-98] 1 GLR 378 – 461.

²⁵ Article 21 provides 21. (1) All persons shall have the right to- ...

(e) freedom of association. which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest ...

Article 37 (2) provides: The State shall enact appropriate laws to assure-

(a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes. rights of access to agencies and officials of the State necessary in order to realize effective participation in development processes; free-dome to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities.

...in testing the constitutionality of any law, the court should not concern itself with the propriety or expediency of the impugned law, but with what the law itself provided. Accordingly, the fact that the organizations in section 4 of the Schedule to PNDCL 312 themselves had requested the enactment of that Law would not obviate the necessity for the requirement that the Law should pass the constitutional test.

The court held further that provisions contained in sections, 3(b) and 4 of PNDCL 312 were unconstitutional and would be struck down as null and void because:

...the organizations listed under section 4 of the Schedule were composed of individual persons with rights of freedom of association. Freedom of association meant freedom of people to voluntarily join together to form an association for the protection of their interests free from state interference. However, that freedom was effectively taken away, in the instant case, by the compulsion of the stated organizations to join CIBA under section 4 of PNDCL 312 which was not a regulatory law permitted under the Constitution, 1992. Since coercion implied some negation of choice and voluntariness, section 4 offended against article 21(e) and 37(2) (a) of the Constitution, 1992. Furthermore, since the freedom to associate implied the right to dissociate, the failure to provide the manner of leaving CIBA by the registered associations, took away the freedom of the concerned members to freely associate with others in violation of article 21 (e) of the Constitution, 1992.

What matters is that the law which follows as a result of a request or petition must satisfy constitutional standards. Therefore if government has sufficient reasons to interfere in the enjoyment of the freedom it must do so without contravening the Zambian constitution, the African Charter and other treaties it has joined. Article 21(2) of the 1996 Zambian Constitution provides that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision: ... (d) for the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

The exception applies to political parties and trade unions. Section 2 of the NGOs Act provides that the law does not apply to political parties and trade unions. Therefore the Article 21(2) (d) exception does not apply to NGOs. Assuming it did, the requirement for limiting the freedom will still not be met since the exception pertains to setting

preconditions for registration of an association, but not necessarily post-registration restrictions as seen under the NGOs Act, since being a member of the Congress is not a precondition for registration by the Board.

Compelling NGOs to form the Congress has not been shown to be reasonably required in the interests of defense, public safety, public order, public morality or public health, or for the purpose of protecting the rights or freedoms of other persons. It has not been shown that democracy in Zambia will be in danger for which reason government must interfere and compel NGOs to join a Congress after their registration with the Board. The constitutional requirement that an exception to the rule must fall under one of the stated exceptions under the constitution has not been met. Barring all these, it has to be determined whether compelling NGOs to constitute a forum under the law is reasonably necessary in a democratic society. In the *TMC case* the court reiterated that:

...the exceptions to freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a 'pressing social need'; thus, the notion 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'. Thus to be called a necessary restriction on the freedom of association in a democratic society the limitation must address a pressing social need and must not merely be useful or desirable.

The Congress is constituted for the purposes of adopting a code of conduct.²⁶ The code of conduct, the final product of Congress for which reason NGOs are compelled to form Congress, is subject to approval by the registration Board.²⁷ Although establishing codes to govern the conduct of NGOs is a good and progressive thing to do, it is however not necessary to burden the freedom of association under the constitution with such requirements. This is because when an application for registration is filed with the Board, the applicant is required to file a constitution and is required to enumerate its objects and purposes.²⁸ This serves as a good guide for the conduct of the activities of the NGO. The NGO is also bound by the general laws of the land, breach of which is saddled with dire consequences. A code of conduct may be useful and desirable but it is not necessary to burden the freedom to associate with such a requirement, especially when the end product is subject to the approval of the Board. The Board by itself can develop a model code of conduct to guide the affairs of NGOs in consonance with its responsibility to develop policy guidelines for harmonizing activities of NGOs in Zambia.²⁹ It has authority to constitute a committee of experts to produce a document like a model code of conduct. A very good best practice in the field of regulating NGOs is the Non-Profit Organization Act 1997 of South Africa, a piece of legislation that shuns the compulsion of registered association to develop a code of conduct but rather empowers the Directorate to produce a model constitution for

²⁶ Section 32(2) of Non-Governmental Organization Act 2009.

²⁷ Section 32(3) of Non-Governmental Organization Act 2009.

²⁸ Section 10(5) of Non-Governmental Organization Act 2009.

²⁹ Section 7(i) of Non-Governmental Organization Act 2009.

NGOs, a code of conduct and other documents that may be necessary to guide the affairs of NGOs.³⁰

The Congress elects a Council which is charged with the duty of facilitating and coordinating the work of non-governmental organizations operating in Zambia.³¹ The Congress also has authority to prescribe responsibilities for NGOs operating in Zambia.³² The list of responsibilities prescribed by the Congress is subject to the approval of the Board.³³ It is however, clear that the Board is also entrusted with the duty to advise on strategies for efficient planning and co-ordination of the activities of NGOs in Zambia.³⁴ It is therefore unnecessary to coerce NGOs into a single forum for the purpose of doing the same thing.³⁵ Furthermore, Part IV of the NGOs Act provides in an extensive way the duties of a registered organization under the law.³⁶ It serves no legitimate purpose to form an NGO Council to compile a list of responsibilities subject to the approval of the Board when the subject is tackled in a whole part of the law. No legitimate purpose is served by duplicating duties, a recipe for creating tension between the NGOs Council and the NGO registration Board. Compelling NGOs to belong to a forum fails the validity test and is contrary to law. It fails the test because it offers no option for NGOs to leave the forum, undermining the freedom to dissociate. It serves no legitimate purpose and is unreasonable in a democratic society.

3.2 Powers of the Minister Under the Act

The Minister who has the cabinet responsibility for the administration of the Act, may on recommendation of the Board responsible for registering NGOs make regulations for the terms and procedure of the Council of NGOs elected by the NGO Congress.³⁷ It is also provided under Part V that the members of the Council shall be elected at an annual general meeting of the Congress and shall hold office for such period and such terms and conditions as the Congress may determine.³⁸ Flowing from these two provisions it is clear that the Minister has power to regulate the terms and procedure of the council, while the same power to regulate is another breathe given to the NGOs Congress. This presents a critical legal problem to be resolved. Perhaps if a conflict arises and the matter is brought

³⁰ NPO Act 1997; s 6 (1) The Directorate must—

(a) prepare and issue model documents, including—

(i) model constitutions for nonprofit organizations; and

(ii) a model of the narrative report to be submitted by registered nonprofit organizations to the Directorate; 45

(b) prepare and issue codes of good practice for—(i) nonprofit organizations; and

(ii) those persons, bodies and organizations making donations or grants to nonprofit organizations.

³¹ Section 30(3), 31(2) of Non-Governmental Organization Act 2009.

³² Section 32(4) of Non-Governmental Organization Act 2009.

³³ Section 32(4) of Non-Governmental Organization Act 2009.

³⁴ Section 7(j) of Non-Governmental Organization Act 2009.

³⁵ Section 7 of Non-Governmental Organization Act 2009.

³⁶ Section 25-28 of Non-Governmental Organization Act 2009.

³⁷ Section 37 of Non-Governmental Organization Act 2009.

³⁸ Section 30(3) of Non-Governmental Organization Act 2009.

before court then the court will put to rest the tension created by the law. As it stands and in light of the purposes of the law it must be scrutinized to ascertain whether it can withstand the constitutional validity test. If the minister's power is maintained as it is currently stipulated in the Act, the minister has authority to appoint members of the NGO Board and unfettered discretion to approve or reject nominations from other agencies to the Board. The minister has power to set term limits for the NGO council, an elected body of the NGO congress. The code of conduct and list of responsibilities must all be approved by the Board appointed by the Minister. The minister also has power on the recommendation of the Board to make a statutory instrument for the better carrying out of the law. It goes without saying that the Minister wields absolute power and extensive influence on the Board and has unfettered discretion to interfere in the work of the NGO Council, and consequently Congress.

The Board is subject to control by the Minister in all its dealings. Thus even though the minister is not a member of the Council or Congress, he has authority to set the term limit and procedure of the Council and through the Board appointed by him approve their code of conduct and any other significant things done by the NGOs. Article 6 (3) provides that the Board shall comprise: two members appointed by the Minister, one person each from the Ministries of Health, Home Affairs, Economic Planning, Community Development, Local Government, Attorney's General's office, and seven members elected by the Congress. Apart from the fact that the majority of the members of the Board are Government officials, nothing is left to chance to ensure that the Government majority is not threatened and consequently article 6 (3) provides that the Minister shall, on receiving the names of the proposed representatives, consider the nominations and may reject any nomination. Never mind that the organization is allowed to make another nomination, that too can be rejected by the Minister presumably until the organization comes up with a name to the liking of the Minister. Institutional effectiveness and accountability are central to good governance and the rule of law. They require independent, functional and credible institutions to be meaningful checks on governance. A Board appointed by the Minister is a travesty and a shameful attempt to institute and legitimize a Board without the slightest integrity. Under the Act the Minister and the Government are the de facto board.

Freedom of association means freedom without interference by the state. It is not likely non-interference can be achieved given the powers of the minister under the law and no legitimate reason is provided for allowing a non-member of the NGO council to have authority to dictate the term limit and the procedure of the council. In *New Patriotic Party V. Attorney-General* supra, the Ghanaian Supreme Court held in relation to governmental interference as follows:

Since under sections 6 of PNDCL 312 it was the minister who appoints, inter alia, the executive secretary who was responsible for the day to day administration of the business of the council; and under section 13 it was the minister who by legislative instrument would make regulations for the effective implementation of the Law, the minister had in effect almost absolute control of the council. Thus the function of the council under section 3(b) of PNDCL 312 to monitor the operations of the registered associations would necessarily involve and result in interfering in its affairs by the

minister who was not a member of any of the registered associations but was in control of the CIBA council through his representatives and appointees. That was violative of articles 21 (e) and 37(2) (a) of the Constitution, 1992 regarding the right of freedom of association free from interference.

There is nothing democratic about being forced to join an association and elect your governing body and then await a non-member to determine their term limits and procedure for conducting their affairs. This interference is obscene and totally unjustifiable in a democratic state.

3.3 Refusal of Registration

Under the Act, the Board has authority to reject an application for registration, citing a variety of broad reasons for its action. The Board may reject an application if the proposed activity or the procedures of the organization are not in the public interest. One would wish that for the purposes of the Act, public interest would have been defined since the Act was made to enhance transparency, accountability and performance of NGOs. Public interest is not defined and it is too nebulous a term that can encompass a myriad of reasons to refuse registration. It is a term that has proved to be a darling of authoritarian regimes worldwide. Even more absurd is that under the act the Board can refuse registration of a NGO if its internal procedures are according to the Board not in the public interest. Matters of internal procedure should not be a reason for denying individuals the freedom of association. It is rather too harsh and undesirable in a democracy. Registration should be a simple and routine matter not subject to approval by a government official. That is the only way to remove the risk that a government official might abuse his or her power in determining which organizations should be allowed to exist or not. In the *TMC case*, the government of Azerbaijan had dissolved an NGO because, among other reasons cited, it did not comply with its internal procedures for holding a meeting of the organization. The European Court of Human Rights held that:

It is clear that, for example, when an association misses its deadline for conducting a members' meeting, it does not create a danger to a democratic society, and therefore, there is no necessity to restrict the activities of the association in order to preserve the democracy. Such a violation of internal governance rules may not be used as the basis for involuntary dissolution of an association, such an action is an impermissible restriction of the right to freedom of association.

Matters of internal procedures therefore should not of themselves be the basis for refusing the registration of an organization. This coupled with the fact that the public interest has not been defined, the danger that it may be used to limit the enjoyment of the freedom is glaring.

The Board has authority to refuse registration when it is satisfied on the recommendation of the Council of NGOs that an application should not be approved. This means that other NGOs have power to oppose the registration of another association and

may do this by a recommendation to the Board. This is deeply worrying. If an NGO sees a new entrant to the market as a threat to its operations, or for some other reason, it may convince the Council to make a recommendation to the Board to refuse registration. This undoubtedly is a violation of the NGOs freedom of association. The state is constitutionally bound to ensure that individuals under its jurisdiction enjoy the rights articulated in the constitution. Its failure to do so is a violation of the NGOs' rights. The quality of law requirement is not met under these circumstances because the law does not provide sufficient safeguards against abuse and arbitrariness by the NGO Council and the Board. The Law must spell out the scope of the discretion and how it is to be exercised and must give sufficient indication of what practices or conduct will trigger the NGO council recommendation to the Board.³⁹ In the absence of this safeguard government officials will interfere in the enjoyment of the freedom with their unfettered discretion by arbitrarily refusing registration. Further, the Board may refuse the registration of an association if it feels that the name of the association is repugnant or otherwise undesirable. No benchmarks are provided for exercising this power. It gives a wide discretion to the Board and can be used to frustrate the freedom of association.

3.4 Suspension and Cancellation of Certificate

The Board has authority to suspend or cancel the certificate of an organization if the NGO Council recommends the suspension or cancellation of the certificate (17 (1) (f). The section in in 17 (3) attempts to give the NGO whose certificate is to be cancelled an opportunity to submit reasons why the NGO should not be suspended or have its certificate suspended. This procedural requirement is worthless as there are no strict and clear guidelines as to the grounds upon which the NGO Council may exercise this power in a clear, predictable and objective manner. Thus the NGO Council has wide discretion to do whatever it wants when it comes to who gets suspended or whose license gets cancelled. This is a threat to any meaningful enjoyment of the freedom of association. It is surprising that this provision is included in the Act especially when the Board has unquestionable broad powers over the life and death of registered NGOs. It vets their constitutions, vets their reports, checks who is managing and mismanaging funds, and approves the codes of conduct of associations. Giving this power to the Council is oppressive since the Council is not a regulatory body properly so called, but rather a body elected by the associations themselves. This gives power to a body the qualifications of whose members are not specified anywhere in the Act and are not subject to the requirements for appointment as is the case with the Board, yet they wield authority to recommend suspension of NGOs to the Board. It appears that the Board will have no discretion to refuse to follow the recommendations of the Council since none is provided for under the law.

The Board may also suspend or cancel the certificate of an association if the organization alters its objects or pursues other objects than its declared objects. Thus if an association is established for the promotion of human rights and it conducts charity or development operations the association has breached a cardinal rule and its certificate could conceivably be suspended or cancelled. This does not sit well with good reason,

³⁹ Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 84, ECHR 2000- XI).

especially when NGOs have no shareholders. So long as the activities undertaken by association are not illegal, contrary to the laws of Zambia and not inimical to the national security, no legitimate aims are achieved by shutting it down. There should be no need to cancel the certification of organizations on such broad terms. Besides, involuntary termination or dissolution of NGOs must meet the applicable standards and the relevant government official exercising such power must be guided by objective standards and restricted from arbitrary decision-making.

4. Conclusion

In our view the NGO Act is unconstitutional under the 1996 Zambian constitution. It also violated international human rights norms relating to the freedom of expression. It without doubt belongs to the pre-democratization era and completely fails to see NGOs as partners in the good governance project. The attempt by the Act in its introduction to justify and legitimize the obstacles it is placing for NGO operations, as necessary to enhance accountability and transparency of NGOs, to harmonize or coordinate the NGOs' activities and to meet national interest are mere rationalizations for repression and are violations of international laws and conventions to which Zambia is a signatory. Government must strive to promote freedom of association and a robust civil society, independent of state control or government involvement, since it is a necessary and important ingredient in a functioning democracy. It must give NGOs an enabling environment for them to operate effectively. Where it is necessary to restrict the rights of citizens, the interference must be made in accordance with the constitution, must pursue a legitimate aim necessary in a democratic society and the measures taken must be proportional to the legitimate aims sought to be achieved. While the NGO Act of 2009 is not a model in clarity of drafting, it is clearly riddled with provisions that are designed to facilitate interference with the enjoyment of the freedom of association. In its current form it has no place in a democratic society. The Government should immediately repeal the law due to its lack of compliance with the Zambian constitution, international human rights treaties and best practices.

References

Davies, D.B. (1966). *The Problem of Slavery in Western Culture*. Oxford: Oxford University Press.

Glasius, M. (2006). *The International Criminal Court: A Global Civil Society Achievement*. Oxford: Routledge.

Guluzade, M & N.C. Bourjaily. (2010). "The NGO Law: Azerbaijan Loses Another Case in the European Court", *The International Journal of Not for Profit Law*, 12(3). Retrieved from http://www.icnl.org/research/journal/vol12iss3/art_2.htm