



**THE NGO BILL 2015 AND ITS PRACTICAL AND HUMAN RIGHTS IMPLICATIONS  
ON ORGANISATIONS WORKING ON THE RIGHTS OF MARGINALISED PERSONS**

**15<sup>th</sup> May 2015**

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## **1. Introduction**

The Non Government Organisations Bill 2015 (NGO Bill) is a draft bill being proposed by the Government of Uganda that was published in the Uganda Gazette on 10<sup>th</sup> April 2015. It is ready for tabling before the Uganda parliament. It seeks to replace the current Non Governmental Organisations Registration Act Cap 113 as amended. According to its Memorandum, the Bill seeks to: replace the existing Act; provide a conducive environment for Non Governmental Organisations (NGOs) to operate; strengthen and promote the capacity of NGOs; provide for corporate status of the National Board of Non Governmental Organisations (NGO Board) and strengthen its capacity to register, regulate and monitor NGOs; to establish regional officers of the NGO Board, and Non Governmental Organisations Monitoring Committee at District and sub county levels; establish a fund for NGOs; and provide for special obligations of NGOs. It contains 51 different provisions divided into 11 parts. The memorandum further shows that the need for the Bill is due to gaps in the existing law. That there is rapid growth of NGOs, which has led to subversive methods of work and activities, which in turn undermine accountability and transparency in the sector. The bill therefore seeks to streamline NGOs and their activities to ensure that they work within the precincts of the law. While the Bill has noble intentions as mentioned above, it also has some very controversial provisions that if passed into law, will violate the rights to freedom of conscience, expression, movement, assembly and association for both organisations and individuals. Despite this however, these provisions will not affect all civil society organisations in the same way. Organisations working on socially blacklisted issues concerning marginalised groups will be among those that will be most affected by the bill if it becomes law. These organisations include those working on: Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) rights and issues; sex worker rights and issues; access to safe abortion issues; drug users' issues; those protecting religious minorities; and those working with persons charged with terrorism and other serious crimes. The following analysis shows the disproportionate effect that the Bill will have on these organisations and subsequently on marginalised persons themselves:

## **2. The practical implications of the different provisions on groups working on the rights of marginalised persons**

There are a number of provisions in the bill that are aimed at increasing government control on civil society and increasing the powers and discretion of government agencies in controlling the operations of NGOs. These especially affect organisations working on socially blacklisted issues in Uganda like Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) rights and issues; sex worker rights and issues; drug users' issues; access to safe abortion issues; drug users issues; those protecting religious minorities; and those working with persons charged with terrorism and other serious crimes. Working on such issues has always raised a lot of disapproval within government and within the general public. However, these groups are in fact the ones mostly in need of protection due to their

vulnerability. However, the NGO Bill does exactly the opposite. The most worrying provisions for such organisations are as analysed below:

### **2.1 Mandatory registration**

Clause 31(1) provides that no organisation shall operate in Uganda without being registered with the Board. Clause 3 defines an ‘organisation’ as ‘a legally constituted non governmental organisation under this Act...’ This implies that only registered organisations can legally exist for the purposes of this Act. Under international human rights law, an organisation does not have to be registered in order to operate. However, registration is important for legitimacy and for monitoring purposes and may thus be covered under the limitation clauses in case only some but not all activities are restricted to only registered groups. Blanket mandatory registration may not pass the test. For groups working on the rights of marginalised groups, some of whose actions may even be criminalised, it may not be easy for them to legally register under the Act, and thus they cannot be regarded as existing, and it would be criminal for them to carry out their services as organisations.

### **2.2 Reservation of name**

Clause 31(2) requires organisations to reserve names with the NGO Board, and Clause 31(4) gives the Board powers to refuse to register a name on grounds that include the following: ‘where the objectives of the organisation as specified in its constitution are in contravention of the law’;<sup>1</sup> ‘where it is in the public interest to refuse to register the organisation’;<sup>2</sup> and ‘for any other reason that the Board may deem relevant.’<sup>3</sup> It is indeed normal to give the registering authority powers to refuse to reserve a name. For example under Section 32(2) of the Companies Act No. 1 of 2012, the Registrar is given powers to reject a name, which he/she deems to be ‘undesirable’. All the three grounds above would render organisations working on marginalised persons’ issues unregistrable especially those working on issues that are regarded as criminal, for example LGBTI rights and sex worker rights. The first ground on ‘contravention of the law’ implies that if an organisation’s name shows that it will be working on the rights of persons whose actions are criminalised it will not be registered. Same sex sexual acts are criminalised under section 145 of the Penal Code Act while sex work is criminalised under section 139 of the Penal Code Act. Although these sections do not necessarily criminalise the work engaged in by NGOs, different authorities have interpreted these sections to include the work NGOs do. In the case of *Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema, and Geoffrey Ogwaro v. The Attorney General and Hon. Rev. Fr Simon Lokodo*,<sup>4</sup> the High Court held that organising a skills training workshop by organisations working on LGBTI rights was illegal since it would amount to aiding a criminal act since section 145 of the Penal Code Act criminalises ‘carnal knowledge against the order of nature’. Recently, the Uganda Registration Bureau also rejected the reservation of the name ‘Sexual Minorities Uganda’ citing section 145 of the Penal Code Act.

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<sup>1</sup> Non Governmental Organisations Bill, Clause 34(1)a.

<sup>2</sup> Above, clause 31(4)(d).

<sup>3</sup> Above, clause 31(4)(e).

<sup>4</sup> *Jacqueline Kasha Nabagesera, Frank Mugisha, Julian Pepe Onziema, and Geoffrey Ogwaro v. The Attorney General and Hon. Rev. Fr Simon Lokodo* High Court Miscellaneous Cause No. 33 of 2012.

The argument was that since the organisation was being formed to protect the rights of LGBTI persons, its activities were criminal. Having a provision in the NGO Bill that says that an organisation cannot be registered if its objectives are in contravention with the law is very prone to abuse considering the above mentioned precedents. This is a provision that will most likely be used to frustrate the registration of organisations with legitimate activities, as the NGO Board will claim that the activities are criminal, merely because the law criminalises actions that may be done by the individuals whose rights the organisation may be protecting.

On the issue of public interest, this is not defined in the bill but it usually means something that affects all persons generally. Issues concerning LGBTI persons, sex workers, abortion, protection of religious minorities and persons charged with terrorism and other serious offences are very controversial issues that are widely frowned upon by Ugandan society. The public feels that sympathisers of homosexuals and sex workers are responsible for many vices including child sexual exploitation, eroding of African cultures and morals, contradicting religion, spread of diseases like HIV/AIDS among other things. There is therefore no approval from the general public as far as sexual minorities issues are concerned. So are issues concerning abortion, drug use, religious minorities and persons charged with serious crimes. Some of the existing organisations have been able to operate because the concerned laws give them enough space to do so. Having a law that expressly says that an organisation can only be registered with the approval of the public is denying these organisations existence implicitly. Marginalised persons need to be protected from the harm occasioned on them by the majority population that subjects them to marginalisation. The Bill puts the interests of this same majority as paramount when registering these organisations. This explains why in the *Kasha Jacqueline* case above, the High Court found that the Minister acted in public interest to stop a skills training workshop on the basis that it was aiding a criminal act. Therefore a real danger exists that this provision will also affect the registration of organisations working on the rights of marginalised groups.

The last problematic ground is the one on any reason as the board deems fit. This clause is to the effect that the NGO Board can refuse registration of an organisation for any reason that they can think of. Some of the reasons expressly provided for in the Bill are problematic and yet this provision gives space for more reasons that the members of the Board can come up with.

The reasons for refusal of reservation of name are very wide sweeping and greatly affect the ability of organisations working on marginalised peoples' rights from registering.

### **2.3 Registration and incorporation of organisations**

The requirement for registration for purposes of monitoring the operations of NGOs is not necessarily unlawful. However, where the registration and incorporation is made in such a way that it would be almost impossible for organisations working on legitimate but unpopular issues to register, the process becomes problematic. Clause 31 deals with the registration and incorporation of organisations with the Board generally. Sub-clause (4) thereunder provides for instances where an organisation cannot be registered. These are: where the objectives of the organisation as specified in its constitution are in contravention

of the law;<sup>5</sup> where it is in the public interest to refuse to register the organisation;<sup>6</sup> for any other reason that the board may find relevant.<sup>7</sup> These are in pari materia with the provisions on refusal of reservation of name and so the same reasoning as provided for refusal of reservation of name apply.

#### **2.4 Broad and undefined offences**

Clause 31(10)(a) creates an offence, which would have disproportionate effect on organisations working on LGBTI and sex worker issues than others. It provides that an organisation which contravenes any provision of the bill commits an offence and is liable, on conviction, to a fine not exceeding two hundred currency points.

Generally speaking, not all contraventions of law result into criminal offences. Such a blanket provision creates undefined offences, and one cannot have enough knowledge of what may constitute the specific criminal act and thus contravening the right to a fair trial.

The broad sweeping nature of the provision could prove to be problematic. It should be noted that the Bill has very many vague and ambiguous provisions like requiring organisations not to engage in work that is prejudicial to the dignity of Ugandans. Any work can be interpreted to be prejudicial to the dignity of Ugandans. When such a provision is interpreted against organisations that work on issues of sexual minorities for example, there is a very slim chance of them operating and not being held criminally liable for violating the provisions of the Act. This broad provision will open floodgates for the closure of different organisations as it greatly narrows down the space of operation for them. The Bill proves to be very vague and it becomes difficult for one to understand which kind of work would be considered a violation of its provisions. The provision is too broad and if left to the interpretation of a body that implicitly seeks to reduce civic space, it will be hard for organisations working on issues of sexual minorities to operate freely or at all.

#### **2.5 Dual liability of the organisation and its directors**

Clause 31(11) imposes dual liability for a criminal offence on both the organisation and its directors when the organisation commits an offence. The clause provides that this will happen if it is shown that the acts or omission of any director or officer gave rise to the commission of the offence by the organisation. This provision goes against the established company law concept of incorporation, which leads to limited liability of directors and shareholders of a corporation. Officers and directors of a body corporate are exempted from liability of actions by the entity they oversee. Organisations act through their directors and officers and so these should not be punished with the organisation unless the exception falls under the rarely applied principle of 'lifting the corporate veil' of incorporation which usually focus on a company being set up for fraudulent purposes but not simply on any action of the organisation. That means that if an organisation is working on the protection of the rights of LGBTI persons or those of sex workers whose actions are deemed to be illegal, it can easily be found to be liable for contravening the law and it and its directors would be liable. This provision is prone to abuse as it will justify witch-hunts and biased prosecution

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<sup>5</sup> n1 above, Clause 31(4)(a).

<sup>6</sup> Above, Clause 31(4)(d).

<sup>7</sup> Above, Clause 31(4)(e).

of directors and officers of organisations whose activities are deemed unwanted. Very many activists working on issues of marginalisation are not popular with the state and having such a provision would provide opportunities to slap criminal offences and sanctions on them just because they are part of an organisation that protects the rights of groups whose actions are regarded as criminal.

## **2.6 Revocation of an organisation's operating permit**

Clause 33 provides for grounds for revocation of an organisation's operating permit. Those most crucial to organisations working with sexual minorities are: where the organisation contravenes the provisions of the Act<sup>8</sup> and where in the opinion of the board, it is in the public interest to do so.<sup>9</sup>

On the first ground, as already discussed above, contravention of the provisions of the Act is vague and broad, and so one cannot be sure of what exactly is criminalised. The Bill has many vague provisions whose interpretation could be prejudicial to some organisations for example those working on the rights of marginalised groups. This provision gives the NGO Board broad powers to revoke organisations' permits as and when they wish. From the provisions of the Bill, it is not easy to tell what could amount to a violation of the Bill's provisions. Very many organisations are likely to be caught off guard and have their permits revoked.

On the second ground, as discussed earlier, the term public interest is not defined in the draft bill and its interpretation is therefore subjective. As already mentioned, the general public in Uganda is deeply opposed to issues concerning sexual minorities, access to abortion services, and protection of certain religious minorities as well as work on the rights of persons charged with terrorism and other serious offences or their sympathisers. For sexual minorities, they are regarded as offensive to Ugandan morals, cultural and religious values, and a form of western imperialism. With all sincerity therefore, it would seem to be in the public interest to revoke the operating permits of organisations working on issues of sexual minorities. This would however go against all tenets of accepted human rights and democratic principles that advocate for the protection of the socially marginalised from the views and wrath of the majority.

It should be the object of the law to create safeguards within which minorities and their views can be protected as the law is the only protection they can get. Having provisions that elevate public interest above the human rights of minorities, amounts to stripping marginalised groups of the only protection they can get. This violates Uganda's constitutional principles, human rights guarantees and international human rights obligations.

## **2.7 General powers of the NGO Board to inspect organisation premises**

Clause 37 provides that an officer authorised by the Board can inspect organisation premises at any time he/she deems reasonable and can investigate any matter. This gives the Board very wide discretion to meddle into the affairs of organisations. The clause does not provide for prior notice to organisations before such inspection. The officer is authorised to ask for

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<sup>8</sup> Above, clause 33(1)(c).

<sup>9</sup> Above, clause 33(1)(d).

any information they deem relevant from the organisation. This is a very problematic provision to organisations working on issues on the rights of marginalised groups since their work is already considered suspicious. There is a general belief that these organisations engage in the recruitment of young people into homosexuality, sex work, abortion, or terrorism and that they are hubs for sexual exploitation. The provision gives the Board unabated powers to satisfy such baseless curiosity by carrying out un-announced inspections of organisation premises.

The clause also gives officers authorised by the Board the powers to initiate criminal proceedings against organisations if from the inspection, the organisation is found to be engaging in activities contrary to the Act. As already discussed, most of the activities engaged in by organisations working on issues of marginalised groups are regarded as criminal. Giving powers to the board and its officers to carry out un-announced inspections for any reason they deem fit, and asking for the production of any information they want without justification leaves these organisations prone to criminal prosecutions. Having such a law would make it almost impossible for such organisations to operate as most of their activities could easily be interpreted as contravening the Act.

## **2.8 Special obligations of organisations**

Clause 40 provides for special obligations of the NGOs. All the obligations are vaguely worded and ambiguous but those that would majorly affect organisations working on rights of marginalised groups are; organisations shall not engage in any act which is prejudicial to the security and laws of Uganda;<sup>10</sup> and organisations should not engage in any act, which is prejudicial to the interests of Uganda and the dignity of the people of Uganda.<sup>11</sup>

As already mentioned, the laws of Uganda do not criminalise the work of organisations protecting human rights including the human rights of marginalised persons. However from trends, the relevant laws could easily be read to include work done by these organisations. The term 'security' is also not defined and following recent trends, working on sexual minorities issues or the rights of terrorism suspects can easily be regarded as affecting the security of Uganda due to propaganda that such NGOs are foreign agents. Therefore organisations working on sexual minorities issues face particular challenges with such a provision in place.

The 'interests and dignity of people of Uganda' is not also defined in the Act. Many Ugandans still feel that issues of sexual minorities are an imposition of Western values on Ugandans and that they are part of an agenda or conspiracy to strip Uganda and Ugandans of any semblance of identity regarding religion, culture and morals and its sovereignty. Members of parliament and individuals in the government have repeatedly said this. Therefore it is quite foreseeable that reference to the interests and dignity of Ugandans will be easily used to gag and stop the work of organisations working on sexual minorities' issues. Having a provision like this on the law books is tantamount to asking organisations to refrain from engaging in issues of sexual minorities.

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<sup>10</sup> Above, clause 40(d).

<sup>11</sup> Above, clause 40(f).

## **2.9 Dissolution**

Dissolution of organisations is usually voluntary or by order of court. Under Clause 44 however, dissolution is either voluntary or by order of the NGO Board. The court is expressly excluded. The Board is given powers to dissolve an organisation for among other reasons 'for any other reason the board considers it necessary, in the public interest'.<sup>12</sup> What such a provision means for organisations working on the rights of marginalised groups has already been discussed above. If they are allowed to be registered in the first place, they will always be liable to dissolution by the Board at any time it wants in 'public interest'.

### **2.10 Appeals to be made to the Minister and the powers of the Minister**

Under Clause 45, organisations aggrieved by any decision of the NGO Board can appeal to the minister within three months. The minister referred to is the Minister responsible for Internal Affairs.<sup>13</sup> The same minister is vested with the authority to appoint the Board and has the authority to remove people from the board. It is also the general role of the Minister to oversee the activities of the board and even issue guidelines on how the board should operate which are binding.<sup>14</sup> This goes to show that the Minister in fact controls the Board. It is highly probable and likely that the decisions made by the Board will be influenced by the Minister. Providing this same Minister as the only avenue for appeal defeats all tenets of justice. It should be noted that the Board has corporate liability and can therefore sue and be sued in its own name. It can therefore be argued that if an organisation is aggrieved by the decision, the Board can be taken to court to address the issue. However the failure for the Bill to expressly provide for that and leave the minister as the only avenue for appeal shows the intention of the drafters. This violates the right to a fair hearing guaranteed under the Constitution. Organisations working on the rights of marginalised persons would most probably be dissolved or not registered on the orders of the minister and so it would make little or no sense to appeal to the same person.

## **3. The constitutionality of such provisions**

Apart from the above provisions having very negative implications on the work of organisations working on marginalised persons' rights, they are also unconstitutional. This is because they violate the right to freedom of association, fair trial and privacy.

### **3.1 The right to freedom of association**

All the cited provisions have the effect of eroding the right to freedom of association. The right to freedom of association is protected under Article 29(1)(e) of the Constitution of the Republic of Uganda. In terms of normative content, the right to freedom of association concerns the formation and joining of groups for any purposes- ideological, religious,

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<sup>12</sup> Above, clause 44(3).

<sup>13</sup> Above, clause 3.

<sup>14</sup> Above, clause 46.



political, economic, social, cultural, sports or other purposes. In this regard, even organisations whose views may be contrary to the views of the majority are protected.

Uganda heralds itself as a democracy and its democratic values are espoused in its Constitution. As such, the country is supposed to be governed basing on internationally accepted principles of democracy. It is widely accepted that in democratic societies, civil society manifests the interests and will of the citizens. These opinions are normally criticisms of the ruling governments. Governments are therefore always tempted to try and frustrate the work of civil society by exerting unnecessary control on their operations and narrowing their space. This is however in contravention of internationally accepted human rights standards. People's freedom of association should be protected in democracies where political pluralism is practiced. Divergent opinions are often offensive to ruling governments but the essence of political pluralism is to create space for the public to be able to criticise the government as this acts as a check and implores government accountability. Unreasonably restricting these freedoms is therefore going against all tenets of democracy and internationally accepted human rights standards.

The right to freedom of association is not an absolute right. It is subject to the general limitation in Article 43 of the Constitution. The limitation states that '*In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*' Clause 2 expounds on the issue of Public interest and states that it shall not permit '*a) Political persecution; b) Detention without trial; and c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*'

In interpreting the extent of the limitation clause, Mulenga JSC in the case of *Charles Onyango Obbo and Anor v Attorney General*,<sup>15</sup> confirmed that: *The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society... Limiting their [rights] enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. ... "There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight."*<sup>16</sup>

Therefore, freedom of association of individuals protecting the rights of marginalised persons cannot be limited by considerations other than those legally accepted under the Constitution and international law, and the considerations shown above do not satisfy the test because they completely erode the right.

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<sup>15</sup> *Charles Onyango Obbo and Anor v Attorney General*, Constitutional Petition No. 2 of 2002, SC.

<sup>16</sup> Above.

## **2.2 The right to a fair trial**

Article 28(1) of the Constitution provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. The NGO Board acts as the prosecutor, and the judge in cases of revoking permits, and dissolution of NGOs. This runs contrary to Article 28(1).

Clause 31(10)(a) has the effect of violating Article 28(12) of the Constitution, which provides that *'Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.'* This is because it creates a vague and wide sweeping offence that leaves one uncertain as to what is being criminalised.

The Bill also implicitly violates the right to a fair trial in administrative decisions guaranteed under Article 42 of the constitution. The Article provides that *"Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her"*. By taking away the powers of appeal to the court, the Bill will violate this right. Considering the environment within which NGOs in Uganda operate, their only recourse to dealing with the violations they are likely to face would be courts of law. Having a law that intends to deny them the right to a fair hearing is denying them all tenets of justice in a free and democratic society and leaves them defenseless.

The right to a fair hearing is not subject to the limitation clause under the provisions of Article 44 of the Constitution.

## **4. Conclusion**

There is no doubt that a law is needed to streamline the work of civil society to avoid civic space being used for purposes that threaten the country and the well-being of its citizens. Care however must be taken when drafting and passing such a law as the question of civil society in democracies is very sensitive. Governments are very eager to narrow the space within which civil society organisations operate and this always causes the risk of passing unconstitutional laws or laws that violate international human rights obligations. In a country like Uganda, there is a particular crop of NGOs that faces an even greater risk of being crippled by such a law. These are NGOs that work on the rights of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) rights and issues; sex worker rights and issues; drug users issues; access to safe abortion issues; those protecting religious minorities; and those working with persons charged with terrorism and other serious crimes. While having bad provisions in a law poses threats to civil society as a whole, NGOs working with marginalised groups, face an even bigger threat. If this bill is passed in its current form, it will be close to impossible for organisations working on these issues to operate at all. Some of the provisions as identified would be unconstitutional for violating the right to freedom of association and the right to a fair trial.

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