



**POSITION PAPER ON THE NON-GOVERNMENTAL ORGANISATIONS ACT,
2016**

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Contents

1. Introduction and overview	2
2. Background.....	2
3. What is wrong with Section 44(d) and (f), and section 30(1)(a)?	3
4. Other concerns: The continued validity of the NGO Regulations 2009	5
5. The above provisions and freedom of association.....	5
6. Recommendations	6
7. Conclusion	6

1. Introduction and overview

On 14th March 2016, the Non Governmental Organisations Act, 2016 (The NGO Act) came into force. The Act replaces the Non Governmental Organisations (Registration) Act Cap 113 (NGO Registration Act). The Bill that has now become the Act was introduced before Parliament in April 2015. Civil society organisations lobbied to have the most problematic provisions of the bill dropped. Indeed, the final Act passed in November 2015 does not include most of the draconian provisions. However, there are still some worrying provisions in the NGO Act upon which civil society needs to decide the next steps. These provisions are section 44(d) and (f) which imposes special obligations on organisations not to engage in activities that are prejudicial to the ‘security and laws of Uganda’, and to the ‘interests of Uganda and to dignity of Ugandans’ and section 30(1)(a) which allows the NGO Bureau to refuse to register an organisation whose objectives are regarded as being in contravention of the laws of Uganda. HRAPF is of the position that section 44(d) and (f) would have a very negative impact on all organisations as their vagueness can easily be used to clamp down on organisations doing legitimate work. Section 30 would give legal backing to the emerging unlawful practice of denying registration to organisations working on protection of the rights of criminalised minorities. HRAPF formally consulted with LGBTI and sex worker organisations and it was agreed that there was need to bring these concerns to the other civil society organisations and seek their support in opposing these provisions. It was agreed that unilateral action should not be taken that would curtail the other gains that civil society has made, except if mainstream organisations do not take the requisite action. This position paper gives a detailed analysis of the above provisions in light of their practical implications for all organisations, and for those working on LGBTI, sex work and other criminalised minorities.

2. Background

The coming into force of the NGO Act, 2016 is the culmination of a long campaign to more closely regulate and monitor the work of Non Governmental Organisations in Uganda, and an equally long campaign by civil society organisations to oppose such unconstitutional restrictions. The first substantial changes to the legal regime governing NGOs were first made in 2006 with the passing of the NGO Registration

(Amendment) Act, 2006. The Act gave powers to the NGO Board to incorporate NGOs, made it illegal for NGOs that were not registered to operate and also gave the NGO Board wide powers to register and deregister NGOs. The Act was followed by the Non-Governmental Organisations Registration Regulations, 2009 (NGO Regulations, 2009) which had many restrictive provisions that were not even envisaged by the parent Act. These included special obligations on NGOs and the powers of officials of the NGO Board to inspect organisations without notice. Civil society challenged the NGO (Amendment) Act 2006 and the NGO Regulations 2009 in the Constitutional Court, but this petition has been pending since 2009. The NGO Act 2016 was thus introduced to circumvent the petition in court and give the NGO Regulations 2009 the force of law. Indeed most of the Regulations were reproduced in the Bill, and it was only the relentless lobbying of CSOs that ensured that most of them did not make it to the Act. Nevertheless, two provisions remain worrying to all civil society organisations and to organisations working on the rights of criminalised minorities specifically. These are analysed as below:

3. What is wrong with Section 44(d) and (f), and section 30(1)(a)?

Section 44(d) and (f) and section 30(1)(a) have the potential to overturn the gains that civil society made when most of the draconian provisions were not include in the Act. This is for the following reasons:

Section 44 (d) and (f)

Section 44(d)

An organisation shall-

...

(d) not engage in any act which is prejudicial to the security and laws of Uganda;

(f) not engage in any act, which is prejudicial to the interests of Uganda and the dignity of the people of Uganda.

This provision impacts on all organisations regardless of the work that they are engaged in. This is because the words used are broad and undefined, and can therefore be used to wantonly limit the enjoyment of the right to freedom of association. 'Security reasons' have on many occasions been given as a justification to clamp down on freedom of expression and association, and so 'security' can easily be used to further clamp down on the work of organisations. 'Laws of Uganda' on the other hand are many and varied and it must be clear which laws are being prejudiced by an organisation's acts. Indeed, to avoid this vagueness is the very reason why laws including the NGO Act, 2016 itself, have provisions that create offences for violating provisions of that specific law. The term prejudicial contributes to the vagueness more, for it is not clear whether it must be proved that the action actually led to the insecurity or violated any laws. Prejudicial does not necessarily amount to violation and thus speculation is allowed to prevail which for a penal provision is unacceptable. Any acts can be said to be prejudicial to the security of Uganda or the laws of Uganda depending on who chooses to label them so. For

example an organisation can easily be said to be doing something prejudicial to security and to traffic laws when planning to hold a peaceful demonstration, or the government can easily shut down social media on the pretext that they think some organisations may create insecurity just as it was during the elections, or an organisation providing legal services to an LGBTI person or a sex worker may be deemed to be doing something prejudicial to the laws of Uganda, which criminalise same sex relations and sex work.

The section on interest and dignity of Ugandans is equally problematic because it does not define what the 'interests of Uganda' are and neither does it define what the 'dignity of Ugandans' means. Therefore any work may be interpreted to be prejudicial to the interests of Uganda and to the dignity of Ugandans. It is a statement of ideals, yet, as reflected in Section 40 (1) (d), it has the force of penal law as it falls under the category of doing anything that contravenes the Act. It is thus punishable by fines and imprisonment of up to three years. Therefore many NGO leaders risk jail or fines based on vague provisions.

Vagueness in criminal provisions is unconstitutional. Article 28(12) of the Constitution provides that an offence must be clearly defined. HRAPF notes with concern that these penal provisions on 'security,' 'laws of Uganda,' 'interests of Uganda' and 'dignity of Ugandans' are vague and undefined and are therefore unconstitutional. They are also likely to be abused to clamp down on any organisations which the powers that be decide to be doing work that they do not like.

Section 30. Refusal to register section

Section 30 (1) *An organisation shall not be registered under this Act-*

- (a) where the objectives of the organisation as specified in its constitution are in contravention of the laws of Uganda;*

While it sounds legitimate that an NGO must have objectives that comply with the law, the events of the recent past show that this provision is going to be used to provide legal backing to the currently unlawful actions of refusing to register NGOs working on LGBTI issues in particular. The Uganda Registration Services Bureau (URSB) which is the entity that will be incorporating NGOs under the NGO Act 2016 has on two occasions in the past two years refused to register organisations seeking to provide health and other services to LGBTI persons on the basis that their objectives are in contravention of section 145 of the Penal Code which criminalises same sex conduct. This has been done with no legal backing whatsoever because otherwise organisations working on criminal defence would all be rendered illegal because they defend persons engaging in acts that are criminal acts. With such a provision in place, organisations working on LGBTI issues, sex worker issues, drug use issues and those advocating for legalisation of abortion would all be likely to be denied registration under this provision.

4. Other concerns: The continued validity of the NGO Regulations 2009

Section 56(2) of the Act saves all regulations that were made under the NGO Registration Act and these certainly include the NGO Regulations, 2009. Though the section requires that for the Regulations to be valid, they should be in line with the NGO Act, 2016, they nevertheless still have the force of law until court pronounces on them or they are revoked. The NGO Regulations, 2009 contain most of the provisions that were left out of the NGO Act, 2016. They therefore do not fulfill the requirements of Section 56(2) and the Minister should immediately revoke them.

5. The above provisions and freedom of association

Apart from the above provisions having very negative implications on the work of civil society organisations, they are also unconstitutional. This is because they violate 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, 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* [Constitutional Petition No. 2 of 2002] 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.'*

Therefore, freedom of association 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.

6. Recommendations

From the above analysis, HRAPF recommends the following:

- i) The Minister of Internal Affairs should as soon as possible come up with Regulations that clearly define the vague terms used in the Act in line with the powers given to her under Section 55(1) of the Act.
- ii) The Minister of Internal Affairs should immediately pass a statutory instrument revoking the NGO Regulations, 2009 which are still in force by virtue of Section 56(2) of the NGO Act, 2016 and yet most of their provisions are inconsistent with the NGO Act, 2016.
- iii) Civil Society Organisations should come up with a joint position paper highlighting these problematic provisions and use it to engage the Minister of Internal Affairs on the need for Regulations that are clearer and that do not disproportionately affect certain sections of civil society.
- iv) If the Regulations that the Minister comes up with do not resolve the vagueness, then Civil Society Organisations should challenge the identified provisions in the Constitutional Court seeking interpretation.
- v) Development partners should engage the government on the need for Regulations that clearly define the meaning of the vague terms in the Act and for the repeal of the NGO Regulations, 2009.

7. Conclusion

While we applaud the legislature and the executive for passing an NGO Act that is progressive and for actively consulting with NGOs, sections 44(d) and (f) and section 30(1)(a) of the Act remain points of concern. These provisions are not only vague and subject to being misused to clamp down on NGOs doing legitimate work, but they

are also unconstitutional. They also shall have a disproportionate effect on organisations working on organisations working on issues that are unpopular in the country such as LGBTI issues, sex worker issues, and issues of abortion. They therefore need to be defined in a way that protects organisations doing legitimate work.