UGANDA'S NGO REGULATION REGIME:

IMPLICATIONS FOR ORGANISATIONS WORKING ON MARGINALISED PEOPLES' RIGHTS

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1. INTRODUCTION AND OVERVIEW

1.1 Introduction

On 14th March 2016, the Non-Governmental Organisations Act, 2016 (The NGO Act) came into force. The Act replaced the Non-Governmental Organisations (Registration) Act Cap 113 (NGO Registration Act). The Bill for the NGO Act was introduced before Parliament in April 2015. Due to successful lobbying on the part of civil society, many of the provisions in the Bill that were viewed as draconian did not make their way into the Act that was passed in November 2015. However, there remains a number of worrying provisions which affect the ability and capacity of organisations to meaningfully operate. HRAPF is particularly concerned with organisations working with marginalised and criminalised populations, particularly LGBTI persons, sex workers and drug users, which will be especially affected. It was hoped that the Regulations that were to be made by the Minister under section 55 to operationalise and give effect to various sections of the Act would address the challenges in the Act, particularly to define vague concepts. In exercise of this mandate, on 24th March 2017, the Minister, Major General Jeje Odongo issued two sets of regulations: the Non Governmental Organisations Regulations 2017 (NGO Regulations)[1] and the Non Governmental Organisations (Fees) Regulations (Fees Regulations 2017).[2] The Regulations, which were published in the Gazette on 5th May 2017[3] revoked and replaced the NGO Regulations of 2009.

The Regulations provide a framework for the implementation of the mandate conferred by the Act on the Minister of Internal Affairs, the National NGO Bureau (Bureau), the District NGO Monitoring Committees (DNMC) and Local Governments among other authorities. They also prescribe forms and procedures. The Regulations, far from explaining the vague concepts, merely regurgitate them, and entrench the restrictive regime of regulation introduced by the Act. HRAPF has before issued analyses of the then NGO Bill, then the NGO Act, and also drafted Proposed Regulations to address some of the deficiencies. Now that, the Regulations have also been completed, this is a comprehensive analysis of the full NGO regime as it currently stands.

1.2 Overview of the Act and the Regulations

The Act is divided into 12 parts. Part I has the preliminary provisions; Part II establishes the National Bureau for Non-Governmental Organisations, its functions and powers; Part III provides for the Board of Directors of the Bureau including its membership and functions; Part IV provides for committees and sub-committees

1 Statutory Instrument No. 22 of 2017.

2 Statutory Instrument No. 21 of 2017.

3 Statutory Instruments Supplement to The Uganda Gazette No. 25, Volume CX, 5 May 2017.

of the Board of Directors; Part V provides for management and staff of the Bureau; Part VI establishes regional offices of the Bureau and District NGO Committees; Part VII contains financial provisions; Part VIII provides for the registration and incorporation of NGOs including the requirements for registration, granting of operating permits among others; Part IX provides for establishment of a self-regulatory body, and administrative and reporting obligations; Part X creates offences and penalties under the Act; Part XI contains miscellaneous provisions dealing with the inspection of NGOs, special obligations, dissolution of NGOs and the establishment of an adjudication committee; and Part XII contains transitional provisions including a provision on the continuation of operation of organisations.

The NGO Regulations are divided into 7 parts. Part I provides for the title and interpretation; Part II provides for the procedure and requirements for registration of NGOs including foreign NGOs; Part III provides for the creation of a register of NGOs and the contents of such a register; Part IV provides for the establishment and operation of a NGO self-regulatory body; Part V provides for the filing of annual returns and the furnishing of information by NGOs; Part VI provides for the procedure of inspecting NGOs and the procedure for lodging complaints; and Part VII contains miscellaneous provisions including the revocation of the NGO Regulations 2009 and a requirement for organisations to conclude Memoranda of Understanding with Local Government authorities in the areas where they work. The Regulations have various forms as annexures. The Fees Regulations on the other hand the different fees payable under the Act listed in the Schedule.

2. ANALYSIS OF THE ACT AND REGULATIONS

The following provisions are problematic for NGOs working on marginalized peoples' issues:

2.1 Provisions on Registration of organisations: Section 29 of the Act; Regulations 3 & 4 of the NGO Regulations

The following provisions concerning registration of organisations under section 29 of the Act and Regulations 3&4 of the NGO regulations are problematic. They are:

a) Mandatory registration: Section 29(1) requires any person or group of persons incorporated as an organisation to register with the Bureau. This is reiterated in Regulation 3. An organisation is defined in section 3 to mean 'a legally constituted non-governmental organisation under th[e] Act, which may be a private voluntary grouping of individuals or associations established to provide voluntary services to the community or any part, but not for profit or commercial purposes.' This implies that any form of private grouping of individuals or associations not established for commercial purposes is regarded as an NGO and therefore has an obligation to register. This is mandatory registration under one registration regime for all organisations. Hitherto, organisations had the option to get incorporated as an NGO, as companies limited by guarantee, as private trusts or remain unregistered, and each of these choices had its advantages. This is no longer possible, as every organisation is required to register after getting incorporated. For organisations working on marginalised people's rights, the option to register under any of other ways and enjoy the protections and benefits that accrue under the selected option, or not to register at all, is very important as they are usually small and the obligations under different options may be too heavy upon them. Also they face legal, social and cultural resistance and so it may not be possible for them to register. Mandatory registration is contrary to international standards on freedom of association.[4] This position is far from the reality in Uganda and the Constitutional Court has held that NGOs should be registered as part of their regulation by government to ensure they carry out their work within the bounds of the law.[5]

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4 See International Centre for Not for Profit Law (ICNL)'s discussion of the international standards on mandatory registration in International Centre for Not for Profit Law (ICNL) 'Comments on Uganda's Non-Governmental Organizations Act, Regulations, and Fees, 2017' September 18 2017.

5 In *HURINET & Ors v Attorney General* Constitutional Petition No. 5 of 2009 the High Court held that '[t]he necessity of registration is to enable Government to assess the objectives of the NGOs and to ascertain whether the activities that are intended to be carried out are lawful. It is also important to monitor and ensure that NGOs do what they set out to do in the geographical areas of their registration. In short, the regulation is merely to operationalize, monitor and ensure that

b) Onerous requirements for registration: The NGO regime imposes onerous requirements for registration. These are:

i) Need to first get incorporated under another regulatory regime: For an organization to be registered, it has to first get incorporated under the Companies Act or the Trustees Incorporation Act. These laws also impose their own processes and reporting requirements. This implies that an organization has to first fulfill the requirements for incorporation, and then apply to be registered as an organization under the Act. Indeed, for organisations working on marginalized peoples' rights, the process of reserving a name which is a requirement under section 36 of the Companies Act has been difficult, as the Uganda Registration Services Bureau (URSB) usually rejects names that have connotations of serving these groups. This situation led to one of the organisations denied reservation of name, Sexual Minorities Uganda to challenge this refusal in the High Court.[6] The case is still pending.

ii) Prohibitively too many documents required for registration: After that huddle, which would be very difficult for any organization to go over with its name and objectives clearly showing that they work on LGBTI, sex work or drug use issues, there comes the lengthy list of requirements for registration with the Bureau. The first set is in the Act, in Section 29(2) These are: the registration application form provided under the Regulations (Form A); evidence of statements made in the application as the Minister may prescribe by regulations; a certified copy of the certificate of incorporation; a copy of the organisation's constitution or governing documents; and proof of payment of the prescribed fee. As if these are not enough Regulation 4(1) of the NGO Regulations adds more, perhaps as the 'evidence of statements made in the application as the Minister may prescribe by regulations.' These are: chart showing the governance structure of the organization; source of funding of the activities of the organization; copies of valid identifying documents for at least two founder members; minutes and resolutions of the members authorising the organisation to register with the Bureau; a statement complying with Section 45 of the Act on staffing; recommendations from the District NGO Monitoring Committee where the headquarters are located and the responsible Ministry/Ministries/government department or agency. These requirements make the registration process of organisations tedious, and prohibitive,

For a local NGO to commence operations, the process involves no less than eight documents to be applied for from other entities. These are: Incorporation under the Companies Act or the Trustees Incorporation Act; application for registration with the NGO Bureau; application for a permit at the NGO Bureau; seeking for a recommendation of the District Non-Governmental Organizations Monitoring Committee (DNMC); seeking for recommendations from line ministries and government departments; seeking approval from the DNMC under section 44(a) of the Act and Regulation 41; seeking approval from the relevant Local Government

the objectives of Civil Society organisations are not contrary to the Constitution and to protect the NGOs in their lawful activities.'

6 *Frank Mugisha and Others v Uganda Registration Services Bureau and Another* Miscellaneous Cause No. 95 of 2016.

authority under section 44(a) of the Act and Regulation 41; and seeking for Memoranda of Understanding with the relevant local governments. In addition to the foregoing, foreign organisations have the added responsibility of obtaining approvals and recommendations from their home governments or diplomatic missions in Uganda and the Ugandan Ministry of Foreign Affairs.[7] Organisations working on cross-cutting issues country-wide are required to present approvals from multiple ministries and enter into Memorandums of Understanding with over 112 district local governments across the country. These requirements are burdensome for a framework that should be merely regulatory. They are tedious and costly up to the point of being prohibitive and this discourages the development of a robust and meaningful civil society sector. The processes also create many avenues for refusal and sabotage of organisations by those who are supposed to recommend them, as it would be quite difficult to get all the required approvals, unless the NGO has not done any work that the authorities think is not in their interests, or unless an organisation bribes its way to get all the required approvals and recommendations. For organisations that work on issues of sexual minorities, this is a threat as their work is considered criminalised and faces many prejudices. These processes will subject the existence and operation of such organisations to the prejudicial minds and discretion of authorities.

c) Collection of invasive private information: Some of the requirements are invasive as their collect private information. These include: collection of information for sources of funding for the organisation and the organisation's bankers' information is not only invasive, but also unrealistic at the stage of an application for registration. Sections 29 and 31 of the Act, read together with Regulations 3 and 7 are to the effect that an organisation shall not operate without proper registration and acquisition of a permit from the NGO Bureau. It is therefore hard to imagine how an unregistered and illegal entity can be able to have sources of funding and even have operational bank accounts, as all these are requirements when requesting funds and opening up bank accounts. These provisions are therefore contradictory and create room for abuse. This requirement can also be used by enforcers to target organisations engaging in work that is considered prejudicial to the country's interests as provided in Section 44 of the Act. For issues like homosexuality, the prevailing opinion is that working on rights of LGBTI issues is supported by a 'western agenda' that seeks to erode the country's cultural and social beliefs and promote neo-colonialism. Such a provision would prompt enforcers to pry into the sources of funding of organisations, which information could be used to re-enforce the western agenda theory and invade the organisation's privacy. The second invasive detail is the requirement for certain details regarding the officers of the organisations, namely their names, positions, occupations and addresses. This is in addition to the information of members provided when applying for a certificate of incorporation from the Uganda Registration Services Bureau and the NGO Bureau. Excessive and unnecessary information is requested by the State, which violates the privacy of individuals. According to the African Commission on Human and Peoples' Rights (ACHPR), 'authorities must not be given excessive powers of oversight relative to associations - for example, associations should not be required to provide

7 Section 34 of the Act and Regulation 17.

excessive personal information as to their members or officers.'[8] In addition, as is the case with funding, it is unlikely that an organisation that has not commenced operations will have officers working for it. The form also requires the organisation to declare any properties it may have, which is information that is not necessary for the state to be able to regulate the work of civil society organisations. Having such personal information of persons working with organisations could cause witch-hunts, especially in the case of persons working on unpopular issues like LGBTI rights. There have been incidents in the past where LGBTI activists have been summoned by ministers and where LGBTI community members and activists have been targeted and attacked.[9] The potential for such incidents occurring needs to be reduced by limiting the amount of individual information in state control.

d) Redundancy: Lastly, some of the information required is redundant and makes the process of registration unnecessarily tedious. For example, the requirement of minutes and resolutions by members authorising the organisation to register with the Bureau is unnecessary as registration is a mandatory requirement of the law. The decision does not lie with the members of the organisation, and thus the registration process is not done as a result of such a decision. This makes the resolutions and minutes redundant. Registration of an organisation with the Bureau is not a company decision, but rather a matter of course. The minutes and resolutions by NGO members to have the organisation registered cannot serve any identifiable purpose in the process of registering an NGO. The Regulations require approvals, which seem to be close to duplicates of one another at the different steps toward the operation of an organisation. An organisation requires both a registration certificate and an operating permit from the NGO Bureau;[10] both a recommendation and an approval from the District Monitoring Committee[11] and both an approval from Local Government as well as a Memorandum of Understanding.[12] The registration certificate and the operating permit are issued by the same entity to signify their approval for an organisation to operate. These can be issued as one and the same document just as the Uganda Registration Services Bureau merely issues a certificate of incorporation. If that cannot be done, they can be issued pursuant to the same process: when an organisation applies for registration and qualifies to get a certificate, they should also be issued with an operating permit. Creating two separate processes for obtaining a registration certificate and an operating permit is prohibitive and the right to freedom of association. The various approvals required from Local Government and District NGO Monitoring Committees respectively also seem redundant considering that the District NGO Monitoring Committees will most likely work under the Local Government of a particular area. It is therefore unnecessary to seek approvals

8 African Commission on Human and Peoples' Rights *Report of the Study Group on Freedom of Association and Assembly in Africa* (2014) 72.

9 Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation *Uganda Report of Violations based on Sex Determination and Gender Identity 2016* (2016) 33, 35 & 43.

10 Regulation 5 & 7.

11 Regulation 4 & 41.

12 Regulation 41 & 42.

from both these entities, separately. A Memorandum of Understanding with the Local Government should be sufficient evidence of approval from the Local Government and would, at the same time, nullify the need for a recommendation and approval from the District NGO Monitoring Committee. There would also be no need for a recommendation from a line ministry or government department or agency in terms of Regulation 3(1) if the Memorandum of Understanding is approved. As already discussed, such requirements increase the possibility of bias and prejudice and presents various opportunities for organisations to be refused to exist and operate.

The multi-layered registration processes of NGOs also make starting an organisation a very costly endeavor. The current NGO registration regime is so expensive that it stifles the growth of civil society in the country. Although the fees provided for under the Regulations appear modest,[13] the costs involved in the preparation of the required documentation, getting incorporated as a company first, seeking of approvals and recommendations, and undergoing three different application processes so as to fulfill the requirements under the NGO Act and Regulations are high. Needless to add, the process could easily reach a dead-end at the various stages of approval in the absence of informal and unregulated payments. This implies that only financially well-off individuals or organisations will be able to successfully undertake the registration and approval processes. A reform of the processes will reduce the financial burden.

2.2 Grounds for Refusal to register organisations: Section 30; Regulation 6

Section 30 provides for the grounds upon which an application to register an organization may be refused. One of these is if the objectives of the organisation contravene 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 used to provide legal backing to the currently unlawful actions of refusing to register NGOs working on sexual minorities' 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 one occasion refused to register an organisation 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.[14] The Bureau has also on three occasions refused to reserve organisation names that had reference to sexual minorities.[15] The reasons that have been advanced for these actions are that registering such organisations would be akin to promoting illegalities.

13 According to the Non-governmnetal Organizations (Fees) Regulations, 2017, is payable for an application to register an indigenous organization or a self-regulating body; to review the conditions of a permit , for the certification of documents; and as an inspection fee.

14 This matter is the subject of *Frank Mugisha and Others v Uganda Registration Services Bureau and Another* Miscellaneous Cause No. 95 of 2016.

15 See Violation Report 2016 (n 9 above) 42 for details about the URSB's refusal to register SMUG as well as two other organisations in 2015.

With the provision in Section 30 in place, organisations working on LGBTI issues, sex worker issues, drug use issues and those advocating for the legalisation of abortion would all be likely to be denied registration under this provision, as these issues are considered criminalised.

While the above provision is not reiterated in the Regulations, Regulation 6 provides for the period within which a decision of refusal of registration should be communicated to the organisation, and the form in which the notification of refusal is made (Form C). The Regulation however does not provide for the procedure of appeal in case a person is dissatisfied with the Bureau's decision. This procedure is also not provided for under the Act, as Section 53 thereof merely provides that there will be an adjudication committee to hear appeals from decisions of the Bureau and provides for the committee's constitution. There is need to provide for the period within which to appeal and the form of such an appeal. The Regulations also fail to provide for an appeal procedure where decisions made by the District NGO Monitoring Committees are appealed to the NGO Bureau, and decisions of the Sub-County NGO Monitoring Committees are appealed to the District NGO Monitoring Committees.

2.3 Application and issue of permit: Section 31 and Regulation 7

The two provisions are to the effect that no organisation can operate without a valid permit. They provide the requirements and the process of application for a permit. As already noted, creation of another process for application of a permit is tedious and unnecessary and merely increases opportunities for organisations working on unpopular issues to be prevented from operating. Even though the Act requires an application process for an organisation to obtain an operating permit, this process does not necessarily have to be separate from the process of applying for registration with the Bureau. Additional requirements for an application for an operating permit could be added to the process of applying for registration, which would enable a single application process. The Bureau could issue organisations with both a registration certificate and a permit after a single successful application in the same way that Community Based Organisations can obtain both registration and an operating permit upon a single application to the District NGO Monitoring Committee in terms of Regulation 15.

2.4 Grounds for revocation of a permit and conditions for a permit: Section 33; Regulation 8

Section 33 provides for grounds upon which a permit can be revoked, which are if the organisation does not operate in accordance with its Constitution and where the organisation contravenes any of the conditions or directions in the permit. Regulation 8 provides what are called 'conditions for a permit', which include not using the permit for a purpose or objective other than the one for which it was issued or engaging in work that does not relate to the sector approved in the

permit; not transferring the permit to another organisation. The provisions of the Regulation are redundant as the conditions for revocation specified in the Act provide adequate guidance on how permits should be used by an organisation. It is also presumed that the permit itself will have conditions, which should be able to specify how it will operate. Issues of changing particulars in the permit are adequately dealt with in Regulation 9. This Regulation is therefore not of substantive value.

In addition, Regulation 8 creates conditions that are vague and potentially problematic. As an example, it prohibits organisations from engaging in activities that are outside the 'sector' approved in the permit. What is meant by sector is not defined and the word is too broad and vague. The danger with this is that organisations are likely to suffer consequences for engaging in legitimate work, under the pretext that the activities are not part of the sector of work approved for them. This would mostly be for work that is unpopular like work on issues of sexual minorities. For example, an organisation approved to work on access to HIV might not be allowed to work on improving the respect of the rights of sexual minorities, as an enforcer can claim that rights of sexual minorities are outside the sector of access to HIV.

2.5 Renewal of permit: Section 32; Regulation 12

Section 32 provides for the process of renewal of a permit including when an application for renewal should be made. Regulation 12 provides for requirements when an organisation seeks to have its permit renewed. These are: a copy of audited accounts; a copy of the annual report; minutes of the annual general assembly or the governing body; work plan and budget or strategic plan for the organisation; and evidence of payment of prescribed fees. The provision does not specify the years for which these requirements are needed. Section 31(7) of the Act is to the effect that an operating permit can be valid for up to 5 years. It is therefore not clear whether the annual report and copy of the audited accounts are for the years for which the permit was valid, or the year immediately preceding the application for renewal. It is also not clear what kind of minutes would be required under the Regulation. It does not say whether they are minutes for Annual General Meetings during the time the permit was valid, minutes for an Annual General Meeting held in the year preceding the renewal application, minutes authorising the renewal application or general minutes about anything and everything. In addition, if organisations are required to submit annual reports, strategic plans and audited accounts, there is no justification for also requiring the submission of minutes. This would be an invasion of the privacy of the organisation, as internal organisation business should not be interfered with unless it violates permit conditions. Such vague provisions are fodder for abuse and the discretion they give to enforcers is likely to be used against organisations working on unpopular issues or with unpopular populations like sexual minorities.

2.6 Registration of Community Based Organisations: Regulation 15

The Act does not provide for registration of Community Based Organisations. Regulation 15 provides for the requirements of the registration of Community Based Organisations. Their requirements are not as many as those provided for NGOs and they only go through one process of application for both a registration certificate and a permit. However, the application form (Form K) requires divulging invasive information, as is the case with the form for NGOs. Such information includes names, occupations and addresses of officers of the organisation, sources of funding, details of the bankers of the organisation, and information on organisational property. For the same reasons discussed above, these provisions should be removed.

2.7 Refusal to register a Community Based Organisations: Regulation 16

Regulation 16 makes provision for the District NGO Monitoring Committee to refuse to register a CBO on the grounds that, among others, its objectives are in contravention of the laws of Uganda and that its name is undesirable. This is not provided for under the Act itself. One of the grounds in the provision is similar to Section 36(2) of the Companies Act 2012, which provides that 'no name shall be reserved and no company shall be registered by a name, which in the opinion of the registrar is undesirable' and has been used to deny the incorporation of organisations working with sexual minorities. It is currently the subject of litigation in the High Court between Sexual Minorities Uganda (SMUG) and the Uganda Registration Services Bureau.[16] The danger with this provision is that it remains undefined and gives the enforcers a lot of power and discretion to decide what is undesirable and what is not. As has already been experienced, this discretion affects organisations that work on unpopular issues or with unpopular populations.

The Regulation also provides, as one of the grounds for refusal, if the objectives of the organisation contravene the laws of Uganda. Considering that sexual minorities in Uganda are criminalised, there is a potential for abusing this ground since any work in support of these populations, however legitimate, can be construed as contravening the laws of Uganda. This was one of the reasons given their objectives indicated that they would be working with LGBTI persons, who are criminalised under section 145 of the Penal Code Act. The Regulation should be amended to include a safeguard against abuse of the grounds.

2.8 Refusal to register a self-regulatory body: Regulation 25

The Regulation provides for grounds upon which registration of a self-regulatory

16 n 14 above.

body can be refused. This is not provided for in the Act. They are similar to those discussed above in Regulation 16 on refusal to register a Community Base Organisation and suffer the same shortcomings.

2.9 Furnishing of information: Section 39; Regulation 31

Section 39 of the Act requires an organisation to submit to the Bureau information on its accounting policies, annual returns, audit accounts, areas of operation, estimates of its income and expenditure, budget, work plan, funds received, sources of funds or any other information that may be required. Regulation 31 requires organisations to furnish different forms of information to different authorities. Sub-regulation 1 provides that at least once every twelve months, every organisation should submit its sources of funding, funds received and estimates of income and expenditure to the NGO Bureau. Sub-regulation 2 requires an organisation working in a district to declare and submit its annual work plans and budgets to the District Technical Planning Committee at least once in every calendar year. Finally, Sub-regulation 3 requires an organisation to declare and submit its source of funds, funds received and estimates of income and expenditure to the District NGO Monitoring Committee. The Regulation does not specify the timeframe for this submission.

Expansive information is required from the organisations and yet there are no safeguards as to what it is to be used for, how it would be handled and by whom. Organisations are legal persons whose privacy has to be respected. For organisations that work with unpopular populations like sexual minorities, this might create self-censorship as mishandling of their organisational information could pose a threat to the organisations and the persons they work with. While it is true that the rights to freedom of assembly and citizen participation in civic governance are not absolute and can be limited, the limitation has to conform to the parameters set by Article 43 of the Ugandan Constitution: the limitation should be to protect the rights of others or the public interest. There is no justification for the requirement of divulging this information by NGOs, especially where the information is declared and submitted to many institutions. This re-enforces the notion that the idea is to control instead of regulate the civil society sector. This undermines the integrity, capacity and legitimacy of the sector and hampers the ability of organisations to perform their functions. Additionally, this information is already required under other Regulations and creates duplicity in processes.

When filing annual returns, organisations are required to attach a copy of their audited accounts and their annual reports, which provide all of the information requested under Regulation 31. This is done annually. It becomes unnecessary therefore, for the organisations to be requested to furnish the same information to the same entity a second time. Also, there is no justification why information submitted to the Bureau cannot be used by the District NGO Monitoring Committee or the Technical Planning Committee. Duplicate requirements are prohibitive and a threat to the thriving of civil society organisations especially without adequate

safeguards. As noted earlier, where the State possesses intricate information concerning an organisation's work, funding and personnel this poses a threat to the organisation and persons working on unpopular issues and with unpopular populations. The Regulation should be removed as furnishing of this information is adequately addressed in other provisions and in the Act.

2.10 Powers of Inspectors: Section 41; Regulation 34

Regulation 34 seeks to operationalise Section 41 of the Act, which provides for the Bureau's inspection of organisations. Inspectors are given powers to access an organisation's premises, confiscate documents and materials, interview and record statements, recommend the temporary closure of an organisation's offices and issue compliance notices. An inspector also makes a report to the Executive Director of the Bureau concerning affairs of an NGO. Powers of inspectors present an affront to the independence of organisations. Organisations working lawfully in accordance with the Constitution of Uganda 1995 but whose activities could be interpreted as unlawful under out of date legislation, such as Section 145 of the Penal Code, could have their activities severely affected. Both Section 41 and Regulation 34 should be amended in order to curb the powers of the investigating officer. A search of an organisation's premises ought to not be allowed under the law in the absence of a court order to that effect.

2.11 Operation of an organisation in a district: Section 44(a); Regulations 41 and 42

These provisions require an organisation intending to operate in a district toseek the approval of the District NGO Monitoring Committee and the Local Government of the area. Regulation 42 is to the effect that when such approval is secured, a Memorandum of Understanding should be signed between the organisation and the Local Government on how the organisation would carry out its activities. As discussed earlier, these are some of the processes that are viewed as onerous and unnecessary steps toward the operation of organisations. The District NGO Monitoring Committees will be operating as part of the Local Government structure and therefore there is no justification to separate the two. Concluding a Memorandum of Understanding is sufficient approval, and there is no need for a second process of seeking approval. Also, as already discussed, these multi-layered approvals create many avenues for unpopular work with minorities like sexual minorities to be hampered.

3. OTHER PERTINENT ISSUES NOT COVERED BY THE REGULATIONS

There are other issues of concern to organisations working with marginalized communities that are not covered by the Regulations and yet the Act is vague about them. These are:

3.1 The Regulations do not provide clarity on the vague special obligations

Section 44(d) and (f) of the Act provide that:

> *An organization 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.*

These provisions 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 should not be 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 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. 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 interests 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 also likely to be used to clamp down on any organisations, which the powers that be decide to be doing work that they do not like.

3.2 Failure to clearly define the decision making powers and functions of the Bureau, DNMCs and SNMCs

The Act gives the Bureau, DNMCs and SNMCs powers to make various decisions that affect the operations of organizations. There are however no properly established ambits within which these powers should be exercised. There is need to ensure that they are not abused.

3.3 No timelines provided for registration

Section 29(3) of the Act provides that 'upon compliance with the requirements of sub section 2(2), the Bureau shall register the organisation'. The Act however does not specify the exact time period within which the organisation shall be registered. This gap could be exploited by the Bureau to deny registration to certain organizations that it may choose not to register.

3.4 There is no clarity on where appeals from decisions of the Bureau go

Section 52 of the Act gives the right to appeal against decisions of the SNMCs to DNMCs and from DNMCs to the Bureau. However, it is not indicated to where the decisions of the Bureau are appealed. This may create the impression that decisions of the Bureau are final. Although section 53(4) gives guidance to the Adjudication Committee on how to deal with decisions of the Bureau, it is not clear whether this is with respect to decisions on appeals from the DNMCs. In addition, the Act does not provide timelines within which the appeals should be handled.

3.5 Absence of Regulations on Winding up, self-regulating bodies and tax exemption

Among the numerous issues for which the Minister of Internal Affairs is mandated to make Regulations under section 55 of the Act are; winding up of an organization upon cessation of operations, self-regulating bodies and acquiring of tax exemption, among others.

Self-regulating organizations are a new concept in Uganda and the need for a clear and comprehensive legal framework cannot be over-emphasized. On the other hand, tax exemptions have the potential to be applied incoherently and as tools for political control and influence. Similarly, the process of winding up organizations, which no longer operate, should be comprehensive and clear to avoid the same being used to crack down on organizations. The current Regulations do not provide for these critical aspects and it is hoped that subsequent Regulations will address this omission.

3.6 Want of procedures and remedies

Instead of prescribing complete procedures for applications and other regulatory and administrative processes required to be undertaken under the Act, the Regulations devoted a lot of pages to re-stating what is already stated in the Act while the actual procedures themselves are wanting in a number of respects some of which are highlighted below:

- There is no laid down procedure and time frame for appealing the decisions of the Bureau to the Adjudication Committee and from the Adjudication Committee to the High Court as required by section 53 of the Act.

- While decisions of the Bureau in respect of NGOs are appealable to the Adjudication Committee and subsequently to the High Court, the Regulations are silent on appeals from decisions of District NGO Monitoring Committees in respect of applications by Community Based Organisations.

- Regulation 41 requires an organisation to obtain the approval of the District NGO Monitoring Committee and the Local Government before operating in an area but where the approval is denied, all the District NGO Monitoring Committee and Local Government have to do is to put the decision in writing. Under the Regulations, their decision is final and may not be challenged.

- There is no recourse provided for an organization or a Community Based Organisation in the event that any of the offices from whom a recommendation is required unreasonably withholds the recommendation without any sufficient cause.

4.THE NGO REGULATORY REGIME AND THE CONSTITUTION

Apart from the negative implications which the provisions discussed above have 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 purpose: ideological, religious, political, economic, social, cultural, sports or others. 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 on the basis of internationally accepted principles. 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 government. 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. As discussed above, the provisions under consideration do not pass the test.

5. CONCLUSION

In 2010, the Government adopted the National NGO Policy, which recognised the important role NGOs play in accelerating development and re-iterated its commitment to ensuring that NGOs have the necessary political and legal space within which to undertake legitimate activities that advance the process and impact of national development.[17] However, the cumbersome procedures and requirements introduced by the NGO Act and subsequently entrenched by the Regulations not only betray the government's policy declarations but also negate the rights and freedoms guaranteed under articles 29 and 38 of the Constitution. The processes are cumbersome and subject to government control and interference. They are an infringement on the right to freely associate and and the right of every Ugandan to engage in peaceful civic activities to influence government policies.

Even before the new Act and the Regulations were adopted, organizations working on issues of sexual minorities were finding it difficult to register, let alone be permitted to freely operate in Uganda.[18] Instead, tactics of arrest, intimidation, detention, and forceful dispersion of meetings were employed to stifle the voices of organisations focused on sexual minorities. Thus the registration and operation of sexual minority-led and focused organisations under the new regime face even more hurdles.

The shrinking civil society space in Uganda featured prominently at the 34th Session of the United Nations Human Rights Council where Uganda rejected all recommendations calling for revision of restrictive legislation.[19] With a regime like this, it is highly probable that civic space will be stifled and that organisations working with sexual minorities will lose the capacity to do their work. Consequently, an already marginalised population will be pushed further underground. This situation greatly undermines the role the civil society sector plays in development, as envisaged by the NGO Policy of 2010.

17 Ministry of Internal Affairs *The National NGO Policy* (2010) available at http://www.icnl.org/research/library/files/files/Uganda/policy.pdf (Accessed 30 October 2017).

18 Human Rights Watch: World Report 2013, Events of 2012, pages 156-158 available as a read only copy at https://books.google.co.uk/books?id=1z

19 See Civil Freedom Monitor: Uganda available at http://www.icnl.org/research/monitor/uganda.html

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