

## COMMENTS

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# On the Non-Governmental Organizations (Amendment) Bill, 2018

## Introduction

ICNL is pleased to submit these comments on Malawi's Non-Governmental Organizations Bill, 2018 (the Amendment Bill).

Non-governmental organizations (NGOs) in Malawi are regulated by the Non-Governmental Organizations Act ("the NGO Act").<sup>1</sup> The Attorney General, through the Clerk of Parliament, published the Amendment Bill on November 9, 2018. ICNL received a copy, along with a request for an analysis, on November 15, 2018. According to local NGOs in Malawi, they were not formally told in advance about the amendments, nor given an opportunity to review or consult on their formulation.

The Amendment Bill has some positive aspects, including a formal commitment in the *Objects and Reasons* section, to promote freedom of association, as enshrined in section 32 of the Constitution of Malawi. It would also, for instance, eliminate mandatory membership in the Council of NGOs of Malawi (CONGOMA) which is currently required for NGOs to register. This would remove a burdensome requirement that also violates the right to freedom of

The International Center for Not-for-Profit Law (ICNL) is an international organization that provides technical assistance, research, and education to support the development of appropriate laws and regulatory systems for civil society organizations in countries around the world. ICNL has had the opportunity to provide assistance to civil society law reform projects in over 100 countries, including, in Africa, Ethiopia, Kenya, Tanzania, Rwanda, Uganda, Nigeria, and South Africa. ICNL has worked closely with the US Department of State and Agency for International Development; the United Nations, European Union, World Bank, and other international institutions; private foundations; and scores of in-country colleagues

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<sup>1</sup> Act No.3 of 2001, at [http://www.congoma.mw/download/downloads/NGO-ACT2000\\_2.pdf](http://www.congoma.mw/download/downloads/NGO-ACT2000_2.pdf) (last accessed on November 17, 2018).

association, which includes the right not to associate. The Amendment Bill would also ensure that members of the NGO Regulatory Authority (the Authority) have experience and expertise in a field relevant to the authority’s mandate, provide that half of the appointees are women, and take into account the provisions of the Disability Act. It would require that members of the Authority operate independent of the undue influence or interference of any public office, any organ of state, any political party, or any other quarter.

At the same time, the Amendment Bill contains problematic provisions that could pose challenges for NGOs’ ability to operate, including provisions that introduce ambiguity as to the application of the law and reduce the role of civil society in the sector’s governance. ICNL’s comments focus on these and other problematic aspects. We have also identified several issues below where the Amendment Bill could go further to remedy certain provisions under the current NGO Act that do not comply with international standards and good practices. One such example is the retention of mandatory registration for all organizations to which the law applies. ICNL remains ready to provide additional, more detailed analysis and other technical assistance upon request.

## International Law

Article 22 of the International Covenant on Civil and Political Rights (ICCPR), guarantees the right to freedom of association.<sup>2</sup> Restrictions on this right must be (1) prescribed by law; (2) necessary in a democratic society; and (3) in furtherance of one of four clearly-defined interests: national security or public safety; public order; the protection of public health or morals; or the protection of the rights and freedoms of others. These limited circumstances must be “construed strictly; only convincing and compelling reasons justify restrictions on...freedom of association.”<sup>3</sup>

To meet the ICCPR’s requirement that a restriction be “prescribed by law,” the restriction must be sufficiently precise to enable an individual or NGO to assess whether their intended conduct would be in breach of the law, and to foresee the likely consequences of any such breach.<sup>4</sup> Similarly, with reference to Section 10 of the African Charter on Human and Peoples’ Rights (ACHPR)<sup>5</sup> protecting the right to associate, the African Commission on Human and Peoples’ Rights has clarified that restrictions on the right to association must meet the same conditions prescribed

<sup>2</sup> Malawi ratified the ICCPR on December 22, 1993.

<sup>3</sup> *Sidirouopoulos v. Greece*, 4 Eur. Ct. H.R. 500 (1998); *United Communist Party v. Turkey*, 4 Eur. Ct. H.R. 1 (1998); *Socialist Party and Others v. Turkey*, Application No. 21237/93 (1998), para. 50. See also *Freedom and Democracy Party v. Turkey*, Application No. 23885/94 (1999); *Refah Partisi (The Welfare Party), Erbakan, Kazan, and Tekdal v. Turkey*, Application Nos. 41340/98, 41342/98, 41343/98, and 41344/98 (2001).

<sup>4</sup> See United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, U.N. Doc. A/HRC/20/27 (2012), para. 16.

<sup>5</sup> Malawi ratified the ACHPR on November 17, 1989.

under the ICCPR.<sup>6</sup> To meet the requirement that a restriction be “necessary in a democratic society,” the restriction must be proportionate to one of the legitimate aims enumerated above. A restriction is proportionate where it is the least restrictive means required to achieve the purported aim.<sup>7</sup>

## Analysis

### AMBIGUITY AROUND THE DEFINITION OF NGO AND APPLICATION OF THE AMENDMENT BILL

**ISSUE:** The Amendment Bill creates confusion as to which organizations would be subject to the provisions of the NGO Act.

**DISCUSSION:** Under Section 4 of the NGO Act, the law applies to “an NGO within Malawi” that fulfills a number of criteria including, *inter alia*, that it applies all of its funds and resources “for public benefit purpose only.” The Amendment Bill proposes to expand this definition to include “a Non-Governmental Organization, *a Community Based Organization or a Faith Based Organization* constituted for the purpose of a public benefit to which the provisions of this Act are applicable under section 4.”<sup>8</sup> Neither the Amendment Bill nor the NGO Act define the terms “Community Based Organization” or “Faith Based Organization.” The NGO Act defines “public benefit purposes” as:

“organisational purposes involving developmental and charitable purposes including but not limited to, educational, health, welfare, advocacy, cultural, civic, social, recreational, scientific, environmental, or other similar objects for the benefit of the general public, a section thereof or members of the organisation but excluding involving the activities of a church or religion, trade union, employers organisation or political party.”

It appears that Government is seeking to ensure that community-based organizations (CBOs) and faith-based organizations (FBOs) are incorporated into the same legal regime as NGOs. While there may be advantages to having a single regulator for various types of NGOs, it may also present complications. CBOs are often constituted informally, and do not have written constitutions or legal status. Under the current NGO Act, such an organization would appear to be exempt from the Act’s provisions and not required to register.<sup>9</sup> The Bill, however, requires that all NGOs, including CBOs, “constituted for the purpose of a public benefit” register under the Act and

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<sup>6</sup> See African Commission on Human and People’s Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para. 24.

<sup>7</sup> *Report of the Special Rapporteur, A/HRC/20/27*, supra note 3, at para. 17.

<sup>8</sup> Section 2 of the Amendment Bill. New (additional) terms proposed by the Bill appear in italics.

<sup>9</sup> Section 5 - “Exempt Organisations: Subject to the provisions of section 20(2), this Act shall not apply to an organisation which is a) informal, and does not have a written constitution.”

comply with its terms unless they meet a list of narrow exemptions. Because the Bill does not define a CBO, it is not clear whether there remains a class of informal organizations that need not register and otherwise comply with the Act.<sup>10</sup> It is therefore difficult for organizations to know whether they are subject to the law and how to conform their conduct.

In order for the Act to be consistent with the right to freedom of association under international law, its provisions must be “sufficiently precise for an individual or NGO to assess whether or not their intended conduct would constitute a breach and what consequences this conduct may entail.”<sup>11</sup> The African Commission’s Study Group on Freedom of Association and Assembly in Africa has clarified that this means the law “must be accessible, and formulated in clear language of sufficient precision to enable persons to regulate their conduct accordingly.”<sup>12</sup> By failing to clearly define the organizations subject to its provisions, the Bill fails to meet this strict standard. Ambiguity as to the definition also provides state officials with unacceptably broad discretion to decide whether an organization meets the definition and has complied with the Act, creating uncertainty and the potential for abuse.

**RECOMMENDATION:** Consider deleting Section 2(c) of the Amendment Bill to reduce uncertainty around the definition of NGOs.

#### **ELIMINATION OF CIVIL SOCIETY ROLE IN FORMING THE NGO REGULATORY ENTITY AND REMOVING ITS MEMBERS**

**ISSUE:** The Amendment Bill would change the composition and method of appointment of the Authority by eliminating the consultative role of the Council of NGOs of Malawi (CONGOMA) in determining the Authority’s composition.

**DISCUSSION:** According to the NGO Act, the NGO regulatory entity comprises ten members, seven of whom are appointed by the Minister “in consultation with CONGOMA.” Section 5 of the Amendment Bill eliminates this consultative element, however, providing for an NGO Authority of eleven members staffed entirely by a chairperson appointed by the Minister (rather than the Authority, as currently prescribed), five members appointed by the Minister “*in consultation with relevant professional and other bodies*” (without making clear which bodies these are), and the Solicitor General and four other Government secretaries acting *ex officio*. Section 6 likewise amends the provisions on removal and substitution of members of the NGO Authority: Under the NGO Act, such substitution or removal occurs only by a decision

<sup>10</sup> NGO Act, Section 20.

<sup>11</sup> ICNL and World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (2008), p. 31.

<sup>12</sup> African Commission on Human and Peoples’ Rights, *Report of the Study Group on Freedom of Association and Assembly in Africa*, (2014), p.23.

of the Minister “in consultation with CONGOMA.” The Amendment Bill would once again eliminate CONGOMA’s consultative role. Accordingly, if the Amendment Bill were adopted, civil society would have no formal, guaranteed role in selecting, substituting, or removing members of the NGO Authority. The Government would have complete control over the Authority’s composition. Whilst the Amendment Bill does provide for consultation with “professional and other bodies,” as stated above, it is not clear which bodies these are, and so it is not guaranteed that civil society will have a voice in the selection.

It is unclear, given the Authority’s mandate to protect and promote civil society, why civil society should no longer have a formal role in shaping the Authority’s composition and substituting or removing its members. Representatives of civil society organizations are best placed to provide information about the needs and interests of the sector; they are also well-suited to inform policies to regulate the sector efficiently and effectively and to assess the suitability of the Authority’s representatives. Other countries have given civil society a formal role in the sector’s regulatory entity. In Uganda, for instance, the seven-member governing body of the NGO Bureau, which regulates the civil society sector, includes two representatives from the NGO sector. This is enshrined in Uganda’s NGO Act of 2016.

Additionally, the procedure for substitution or removal of members is not stated in the Amendment Bill. As such, the amendment fails the test that any restriction be “prescribed by law,” and that the restriction must be sufficiently precise to enable an individual or NGO to assess whether their intended conduct would be in breach of the law, and to foresee the likely consequences of any such breach.

**RECOMMENDATION:** Reinstate a statutory role for civil society in determining the composition and tenure of the NGO Authority’s members, as well as in processes for the substitution or removal of its members. If the requirement to consult “professional and other bodies” is to be maintained, state clearly which bodies there are.

#### **ELIMINATION OF THE STATUTORY BASIS FOR CONGOMA**

**ISSUE:** The Amendment Bill would remove provisions establishing the NGO Coordinating Body, the Council for Non-Governmental Organisations in Malawi (CONGOMA). At the same time, the Amendment Bill gives the NGO Authority a newly expanded mandate to act in the interests of civil society, which was previously CONGOMA’s remit.

**DISCUSSION:** The Amendment Bill not only seeks to remove CONGOMA’s consultative role in shaping the regulatory authority, but goes further to eliminate Section VII and Section VIII of the NGO Act, which provide statutory basis for

CONGOMA's role as the designated NGO coordinating body and for CONGOMA's general assembly, respectively.

It is unclear what the legal status and future role of CONGOMA will be if the Amendment Bill is implemented, more so as the Amendment Bill would transfer some of its functions to the Authority.

Without a statutory basis, it is not certain whether CONGOMA would continue to serve as a leading entity to coordinate the sector's efforts and advocate for its interests. It is also difficult to reconcile the Authority as both a regulator whose function is to oversee the NGO sector and hold it accountable, yet at the same time seek to represent its interests with other stakeholders.

At a minimum, a legal change of this magnitude affecting the largest civil society coalition in Malawi and all NGOs in the country should only be effected with substantial civil society feedback. NGOs and CONGOMA itself should have ample opportunity to discuss the possible implications of abolishing CONGOMA in the NGO Act and eliminating its official roles in regulating the sector.

**RECOMMENDATION:** Refrain from eliminating the legal basis for CONGOMA. Provide for extensive, multisector dialogue with meaningful civil society participation around the role of CONGOMA and the implications of enshrining its establishment and functions in the NGO Act.

#### **NEW, OVERLY BROAD DUTIES, FUNCTIONS AND POWERS OF THE REGULATORY AUTHORITY**

**ISSUE:** Section 7 of the Amendment Bill would expand section 18 of the Act to introduce additional duties, functions and powers for the Authority, many of which are broad, vague and potentially subject to abuse by the Authority

**DISCUSSION:** The Amendment Bill intends to provide the Authority new powers and functions to:

- promote transparency and accountability of NGOs to the beneficiaries and Authority [section 18(d)];
- inspect NGOs for compliance with the Act and any other written laws [section 18(e)];
- issue and revoke certificates of registration [section 18(f)];
- represent and promote the collective interests and concerns of NGOs in Malawi [section 18(g)];
- enhance and improve the operational environment within which NGOs function [section 18(h)];

- promote and facilitate coordination, collaboration, and cooperate between the NGO community, Government, donors and the private sector in Malawi, including but not limited to geographical distribution of NGOs and the need for NGOs to promote national development policies, strategies and plans [section 18(i)]; and
- strengthen the institutional growth of NGOs in Malawi [section 18(j)].

Many of these functions (previously the remit of CONGOMA) are overly broad and the extent of the powers are not clearly defined. For example, how does the Authority intend to “promote NGO transparency and accountability to beneficiaries” or “enhance or improve” their operating environment? The wide power to inspect NGOs for compliance without providing clear grounds on which these powers can be exercised provides for too much discretion and can lead to unfair targeting of NGOs by the Authority. At the sole discretion of the Authority, officials may initiate inquiries, demand documents, and enter onto the property of any NGO. There are no procedural protections such requiring a warrant, prior notice, an opportunity to object, the right to counsel, or the right to a hearing to contest the grounds for the inspection request. Most of these new powers and functions thus fail to pass the test of permissible restrictions, since they are not clearly prescribed by law, and those subject to the Act will not know how to moderate their conduct in order not to fall afoul of the law.

**RECOMMENDATION:** Consider removing these provisions, as the objectives can be better attained through a Code of Conduct or self-regulation by civil society, through CONGOMA or other representative civil society body.

#### **IMPOSITION OF CRIMINAL SANCTIONS**

**ISSUE:** The Amendment Bill would increase minimum fines provided for in section 34 of the Act and introduce criminal liability and imprisonment for trustees and directors. The Amendment Bill would also amend section 35 to increase the fines introduced through ministerial regulations.

**DISCUSSION:** The Amendment Bill seeks to increase minimum fines for contravention of the Act from K50,000 to K15 million. Trustees and directors would now be subject to seven years’ imprisonment, unless they can prove they were not aware of the commission of the offence. The Bill goes further to empower the Minister to introduce fines of up to K10 million, up from the current K25,000. Because criminal penalties attach to violations of any provision of the Act, even minor deviations from basic, administrative provisions contained within the law can potentially lead to lengthy prison sentences or hefty fines. The Amendment Bill lacks substantive and procedural



safeguards guaranteed to criminal suspects under international law.<sup>13</sup> The Bill does not mention a right to appeal, nor does it include any specific rights or protections granted to organizations or individuals accused of criminal wrongdoing. The absence of a cross-reference or even a mention of such safeguards present in Malawi’s criminal code is concerning and will likely have a deterrent effect on associational activity. Without such protections, the Amendment Bill violates Article 14 of the ICCPR, which requires all criminal cases to be decided by a “competent, independent and impartial tribunal established by law,” appealable to a “higher tribunal,” and accompanied by a variety of substantive and procedural rights.

The attachment of personal liability, particularly for minor or insignificant administrative violations is inconsistent with mainstream international practices and potentially in violation of international law. One of the primary purposes of formally registering an organization with the state, whether non-governmental, not-for-profit or otherwise, is to shift the risk of financial and contractual liability from the individuals comprising an association to the association itself. The idea behind this common legal principle is to incentivize associational activity, which is essential to any nation’s development and growth. In most instances, individuals cannot be held liable for the financial and contractual obligations incurred by the organizations they are associated with; the organization itself is alone liable for such obligations. On the other hand, individuals can be held liable for criminal wrongdoing committed on behalf of an organization. In such cases, the responsible individuals are not protected by the general rule that individuals are legally immune from the liabilities of their organizations. The law should make this important distinction clear, highlighting the standard required for personal criminal liability to attach, which typically includes intentional wrongdoing.

**RECOMMENDATION:** Remove the imposition of criminal and personal liability. Revise the level of minimum fines payable, add an opportunity to rectify the breach prior to imposing a civil sanction, and add specific language on what precisely constitutes a violation, and the level of fines to be imposed depending on the severity of the alleged breach. Specify a procedure allowing organizations to appeal any judgment against them before an independent tribunal.

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<sup>13</sup> ICCPR, Art. 14 (see below); Universal Declaration of Human Rights, Art. 10 (stating that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”), Art. 10 (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”).



**ADDITIONAL ISSUES:**

- **Objects of the Act**

The Amendment Bill seeks to introduce a new provision as section 3(1) to the effect that the authority to operate an NGO derives from the people of Malawi for whose benefit and on behalf of whom all NGOs operate and to whom the NGOs are accountable. This is a vague provision, which seems to be better included in a policy document, rather than the law.

- **Additional reporting requirements for NGOs**

The Amendment Bill seeks to impose additional reporting requirements on NGOs under section 22 of the current Act. In addition to submitting annual reports, activity plans and audits, NGOs will now have to comply with the Financial Crimes Act<sup>14</sup> in reporting its sources of funding. The Amendment Bill also introduce a new sub-section (2) to section 22, which states that, “*The Authority shall have power to verify information submitted in accordance with subsection (1) and impose any measures it deems fit where the Authority is of the view that an NGO fails or refuses to comply with this section*” [our emphasis]. These requirements are overly broad, discretionary, and do not allow NGOs to know exactly what information is required. The provisions are therefore subject to abuse and should be removed or clear information added about exactly what information is required.

- **Removal of civil society oversight and public accountability by the Authority on its financial and programmatic issues**

Not only would the Amendment Bill remove the authority, functions and powers of CONGOMA, but it would also do away with the General Assembly, which is an annual convening of civil society organizations to ensure accountability of the Authority to those it purports to regulate. Currently, the Act obliges the regulatory authority to provide its annual reports and audited accounts to the General Assembly, obtain its approval for loans, and offers a forum through which to gather suggestions and concerns from NGOs. The proposed removal of the General Assembly and these accountability and oversight provisions allow the Authority to escape scrutiny, whilst at the same time the Bill is adding a number of similar obligations on NGOs. If such provisions were retained, this would show a sincerity on the part of government in requiring mutual transparency and accountability by both the Authority and NGOs. The oversight provisions requiring the Authority to present activity reports and

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<sup>14</sup> We have not had the opportunity to review the Financial Crimes Act, but there is a growing trend of governments using laws relating to anti-money laundering and countering the financing of terrorism to clamp down on civic space. For this reason, it is important to know exactly which provisions would apply to NGOs and ensure they cannot potentially be used to restrict freedoms of association, amongst other fundamental rights.

audited accounts to the General Assembly should not be removed from the current Act, and the General Assembly should be retained.

**ADDITIONAL ISSUES RETAINED IN THE ACT:**

The Amendment Bill also does not take the opportunity to remedy certain aspects of the NGO Act that contravene Malawi’s obligations under international law. By not addressing these issues, the Amendment Bill misses an opportunity to align Malawi’s NGO Act with international law and provide a legal framework that will enable and support a vibrant, independent civil society.

- **Mandatory registration for all NGOs**

The NGO Act makes registration mandatory for all NGOs.<sup>15</sup> The Amendment Bill does not specifically repeal the provisions related to mandatory registration and preserves the role of the NGO Authority to register all NGOs. This is a violation of Article 22 of the ICCPR, which has been consistently interpreted to prohibit mandatory registration of NGOs.<sup>16</sup> Requiring an organization to register prior to operating violates core principles of international law, which forbid the freedom of association from being contingent on registration or legal entity status. The African Commission’s Study Group on Freedom of Association and Assembly in Africa agrees, stating, “States should not require associations to register in order to exist and operate freely.”<sup>17</sup> We recommend that the Amendment Bill explicitly remove the current requirement for mandatory registration under the Act.

- **Limitation on permissible purposes**

As noted above, the Act defines “NGO” as an organization that is “constituted for public benefit purposes.”<sup>18</sup> The Amendment Bill does not alter this limitation, and in fact extends it to specifically include CBOs and FBOs that serve public benefit purposes. While the Act’s definition of “public benefit purposes” is fairly broad, it is still a limitation on an NGO’s permissible purposes. International law recognizes the right of individuals, through NGOs, to pursue an extensive range of objectives. Individuals should be free to form legal entities that permit them to associate to pursue any legal or lawful interests – whether these interests are aligned to national development priorities, social care, development, language, culture, religion, awareness-raising or environmental concerns, human rights or private interests of,

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<sup>15</sup> NGO Act, Section 20.

<sup>16</sup> Maina Kiai, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, A/HRC/26/29, (April 2014), [http://freemassembly.net/wp-content/uploads/2014/05/A-HRC-26-29\\_en1.pdf](http://freemassembly.net/wp-content/uploads/2014/05/A-HRC-26-29_en1.pdf).

<sup>17</sup> The African Commission on Human and Peoples’ Rights (2014) *Report of the Study Group on Freedom of Association & Assembly in Africa*, available at <http://www.achpr.org/files/special-mechanisms/human-rights->.

<sup>18</sup> NGO Act, Section 2.

e.g., clubs and membership associations. Even the pursuit of ideas “that offend, shock or disturb” are permissible associational aims.<sup>19</sup> Allowing NGOs the freedom to pursue any legitimate and lawful aim shows that a government is tolerant, values diversity and encourages pluralism, peace, stability and respect for the rule of law. Denial contravenes Article 22 of the ICCPR and Article 10 of the ACHPR and falls short of the permissible restrictions under these instruments. We recommend eliminating the requirement that NGOs serve “public benefit purposes,” and provide instead that they may serve any legitimate and lawful aim.

## Conclusion

ICNL appreciates the opportunity to comment on the Amendment Bill and stands ready to discuss these issues further as necessary.

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<sup>19</sup> Case of United Communist Party of Turkey and Others v. Turkey, 4 Eur. Ct. H.R. 1 (1998), paragraph 43.