



WORLD MOVEMENT *for* DEMOCRACY

Confronting the Challenges to Democracy in the 21st Century

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AFRICA REGIONAL WORKSHOP ON *DEFENDING CIVIL SOCIETY*

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SUMMARY

On June 25-26, the World Movement Secretariat co-organized with the International Center for Not-for-Profit Law (ICNL) the Africa Regional Discussion to analyze challenges and opportunities for reforming restrictive legal measures on civil society, and to develop practical reform strategies. This meeting brought together authors of country reports on Ethiopia and Liberia, which the World Movement Secretariat commissioned with support from Canada Department of Foreign Affairs and International Trade, and authors of reports on Kenya, South Africa, Uganda, and Zimbabwe, which ICNL commissioned with support from Pact, Inc. and the U.S. Agency for International Development. Unfortunately, due to scheduling conflicts, the authors from Ghana, Rwanda and Sierra Leone were unable to attend the discussion.

Based on the draft reports' findings, each participant highlighted challenges specific to his/her respective country, potential opportunities to improve the legal environments, and exchanged ideas for reform strategies and lessons learned. Because all the draft reports were shared among the participants prior to the meeting, the participants were prepared to engage in discussions of challenges, opportunities, and strategies of each country in detail:

Ethiopia: As discussed widely by many international organizations today, Ethiopia's new NGO law presents enormous challenges, including limited areas of activities (i.e. restriction on areas in which civil society organizations can and cannot operate), restrictions on access to foreign funding (i.e. a 10% limit on foreign funding for "Ethiopian" organizations), limited access to justice (i.e. international NGOs are not permitted to challenge a court's decision.), and the government's direct interference in NGO operations (i.e. the newly established government agency responsible for NGO regulations can remove NGO officials directly). Since this legislation was only enacted in February, with implementation beginning only in June, it is premature to assess its real impact on civil society.

The report author shared experiences in organizing a meeting with the Prime Minister to discuss the then-draft law, facilitated by embassies of the U.S. and European countries. While very limited opportunities exist, the author highlighted the use of the Constitutional Court and the African Court of Human and People's Rights to challenge the constitutionality of the law. Another window of opportunity is a possible working relationship with technical officials who draft legislation. Those who are actually involved in drafting the text of legislation are much more sympathetic to civil society's concerns, while the political departments of the government continue pushing the restrictive characteristics of legislation. The report author also proposed long-term strategies to change the perception of civil society organizations, such as organizing ad-hoc meetings and fora in which civil society can engage in dialogue with the government. While seeking to improve the legal environment in the country is a priority, it was urgently cautioned that civil society groups need to build survival skills for their daily operations.

The Ethiopian participant also underlined the importance of monitoring the development of legislation. Since the 2005 elections, when domestic NGOs were banned from monitoring activity by the Electoral Board, a series of legislation and policies, such as the electoral and media laws, have clearly indicated the potential introduction of more restrictive control over NGO sectors. Most recently, the government recently introduced an anti-terrorism law, which could potentially affect the broader civil society community.

Kenya: The Kenya report author characterized Kenya's legal framework as fragmented and uncoordinated. There are many legal acts, some of which are duplicative and some of which conflict with each other. For example, both the NGO Coordination Act and the Society Act regulate the registration of civil society organizations, but they do not reference each other. In addition to a lack of harmonization among different legal measures, she pointed out that civil society has increasingly lost credibility because of its inability to self-regulate. She reported that today civil society groups increasingly discuss how to balance the State's regulations with civil society organizations' self-regulation. Civil society groups also lack knowledge of the acts and regulations. For example, with efforts by the East African Association of Grant-Makers, donors to civil society groups in Kenya are entitled to receive a 100% tax deduction. However, due to insufficient education and awareness, numerous groups are simply not aware of this benefit.

There is currently an opportunity to ensure an enabling environment in Kenya. The government is currently considering revisions of the NGO Coordination Act of 1990. The government, through the Ministry of National Heritage, has initiated a series of consultations with NGOs to draft a policy paper for revising the Act. While NGOs provide their input into the process of drafting the policy paper and the revisions, they are not usually actively lobbying the government or the Parliament. Participants critically pointed out that, in its consultative efforts, the government selects only those who are favorable to the current "inclusive" government arrangements and that NGOs sometimes compromise their independent positions. To address this challenge, it was suggested that the government and civil society groups develop "principles" and specific plans regarding their engagement in the consultation processes.

Liberia: Liberian NGOs have actively engaged with the government to develop legislation to secure civic space, according to the country report author. For example, as discussed in the West Africa sub-regional workshop, a coalition of major NGOs worked with the government to draft the current NGO Policies and Guidelines. Therefore, NGOs operate in a relatively enabling environment. However, there are still remaining challenges. Many community-based organizations are not aware of the NGO Policies and Guidelines, from which they might benefit by registering as NGOs. Trade unions are currently registered with the Ministry of Labor, although they can be registered as NGOs and benefit from the NGO Policies and Regulations. The author acknowledged the high level of NGO participation in current legislative reforms, but pointed out that large NGOs tend to dominate dialogue with the government. He warned that to enhance civil society space generally, it is important to ensure that smaller NGOs and CBOs are brought into the dialogue. At the same time, he pointed out that there is a promising opportunity for civil society groups to strengthen their participation in policy reform initiatives because the President explicitly encourages all ministries to engage with civil society.

South Africa: While acknowledging the progressiveness of his country's legal framework for civil society, the author or the South African report highlighted some challenges. First, although registration under the Non-Profit Organization (NPO) Act is voluntary, State funds are not available for groups without NPO registration. An organization also cannot open a bank account without NPO registration. Therefore, in reality, registration under the NPO Act is mandatory for groups wishing to operate effectively. The second challenge is the delay in implementation caused by lack of resources. As reported at the

Southern Africa sub-regional workshop, the registration process takes longer than is required by law. The delay might affect the operation of a number of organizations. Finally, as the government seeks to impose more restrictions on terrorist organizations and money laundering, the concept of “voluntary” registration may be questioned as an inappropriate loophole, thereby affecting a number of voluntary organizations. In addition to the progressiveness of the South African legal framework and the Constitutional Court, the author argued that with a global economic recession, the NPO-registered organizations should argue for an increase in tax benefits.

Uganda: The Uganda report author argued that the issue of legal regimes is an issue of governance. The restrictions that the government imposes are not only for NGOs, but also other actors, such as political parties and trade unions. Therefore, it is important to review the legal framework in a broader context. Challenges he identified specific to the current NGO Registration Act of 2006 include: lack of NGO representation on the NGO Board, which oversees the implementation of the Act; a ban on sexual minority groups from registering under the Act; and required approval of foreign organizations by Ugandan embassies in the country of origin. To address issues related to restrictive legal measures, he suggested several mechanisms. First, he pointed out the importance of a strong coalition of civil society groups, taking advantage of different kinds of status and structures. Because different groups have different kinds of registration status, a coalition can overcome various restrictions that different legal measures impose on certain members of the coalition. Second, peer learning is an important tool for strengthening the capacity of civil society strategies. For example, many laws in Uganda are similar to those in Kenya. Exchanging ideas and comparing notes between Uganda and Kenya is extremely useful. Third, he suggested that the UN Human Rights Council’s Universal Review Mechanism and African Union NEPAD Peer Review Mechanism could be used more effectively to monitor the development and implementation of legal measures and report any violation of international principles and standards.

He also provided valuable insight into how to use domestic mechanisms effectively. Working with the Parliament to reform legislation could be effective especially if the Parliament is relatively progressive like the one in Uganda. The constitutional framework can be used effectively to challenge certain legislation. For example, human right groups brought a case challenging prison conditions in the country to the Constitutional Court, citing Article 15 of the Constitution, which says anyone who argues that there is a violation of human rights can bring a case to court. Based on this and other similar experiences, the Ugandan participant urged other participants to consider using the domestic court mechanisms, where the Constitution includes provisions supporting their cases. Also, he emphasized that a constitutional petition requires thorough research on evidence and that the petition is a time consuming process. For the case of the prison conditions, it took three law firms to complete the petition. The petitioners also need to be aware of costs involved in the process. Unfortunately, a Constitutional Court’s ruling in one’s favor does not translate into immediate changes. The ruling needs to be followed by administrative policies, which enforces the ruling. Therefore, civil society groups need to monitor closely the follow-up after the court ruling. When asked how the NGO Registration Act of 2006 could be challenged, the Ugandan author believes that it is difficult to challenge the constitutionality of the Act because it has not been fully implemented. While the Act has been signed, and policies based on the Act have been signed, the proposed regulations are not yet approved by the government. Therefore, civil society groups still operate under the previous law of 1989. Finally, the idea was explored of using a “Private Members” bill, through which a small group of MPs can introduce and sponsor certain legislation.

The Ugandan author shared the successful experience of winning a case against the Ugandan government to demonstrate how the East African Community (EAC) Court of Justice is another available mechanism for supporting democracy and human rights organizations in East Africa. However, like other regional mechanisms, the EAC Court lacks authority to enforce its rulings.

Zimbabwe: The Zimbabwean author discussed the issues of implementation, application, and interpretation of the Private Volunteer Organization (PVO) Act, which is responsible for overall NGO registration. In addition to the PVO Act (an Act of the Parliament), the government also limits civil society space through its policy directives. Many provisions in a previously introduced NGO law that was not passed are in fact now implemented as policy directives. He also added that the current proposed amendment to the PVO Act would force all the trusts to register under the PVO Act. Currently, many civil society groups, including his own organization, Zimbabwe Lawyers for Human Rights, are registered as “trusts” because the process is easier than registration under the PVO Act. He pointed out that more than 100 groups have submitted their registration applications under the PVO Act, and none have received an approval or response from the government, while registering through the High Court as a trust can take only two weeks.

The author argued that the current Constitutional reform process is an important opportunity. It is critical to ensure that provisions are included in the new Constitution to safeguard civil society space. Also, some civil society groups are considering challenging the constitutionality of the PVO Act. In discussing the importance of the Constitution, the author encouraged civil society to hold the government accountable by citing that the Constitution requires public hearings, which allow citizens to monitor the government and the Parliament. Also, it was suggested that civil society continue to work with friendly Members of Parliament and government officials to encourage reform initiatives.

International mechanisms, laws and standards could be used more widely and effectively in Zimbabwe. The Zimbabwean author described how a judge made reference to the international law on freedom of religion in a trial case, but never expanded on the interpretation of the law. Zimbabwe’s law on labor includes a reference to the ILO’s standards. This might be used as a tool for bringing cases of human rights violations in the country to the courts. He also shared his experiences in dealing with the African Commission on Human and Peoples’ Rights. He and his colleagues at the Zimbabwean Lawyers for Human Rights have submitted 15 cases to the Commission, and received favorable decisions on three. A major challenge he identified is the long process of reviewing and decision making. Those three cases were submitted in 2003, and some decisions were made only in early 2009. Other cases are still under the Commission’s review. As others pointed out, another challenge is that many of the Commission’s decisions are simply guidance, and not legally binding. There are three different categories of the Commission’s decision: Recommendations, Resolution, and Directive. Recommendations and resolutions are merely guidance, and the Commission lacks a monitoring mechanism to oversee how those recommendations and resolutions have been followed by the governments. However, the Commission’s directives are legally binding. The mechanism of the UN Special Rapporteurs was also identified as a potential opportunity. However, Zimbabwean experiences demonstrate that the Special Rapporteurs’ communication tends to be highly secretive, and that it is difficult for civil society groups to explore more meaningful ways to engage with Special Rapporteurs. Other participants pointed out that the information about the UN Special Rapporteur mechanism has not been widely disseminated and understood by civil society groups, and that civil society groups should deepen their knowledge of the mechanism for effective engagement.

Through the discussion, the participants identified common challenges:

- The gap between law and its implementation,
- Weak internal governance of civil society groups,
- The appropriate balance between State regulation and self-regulation,
- Limited access to justice, or ways to challenge law,
- Multiple, overlapping legal measures to govern civil society groups,

- The perception, often negative, of civil society, and lack of awareness of the role and contribution of civil society,
- Limited civil society representation in government mechanisms and regulatory institutions, and
- Lack of legal awareness among civil society actors.

Some strategies that emerged from sharing experiences are:

- Developing alternative laws,
- Building coalitions of civil society groups, and working with a wider community, including faith-based groups, churches and mosques, media, Diaspora community, and trade unions,
- Monitoring legislative trends,
- Understanding power dynamics in decision-making mechanisms, such as the executive branch, the legislative body, the government political party, opposition parties, technical bureaucrats, and civil servants,
- Engaging with relevant government agencies, parliamentary committees, and stakeholders at an early stage of legislative reform initiatives,
- Speaking to government's interests,
- Taking advantage of other reform initiatives, such as electoral reforms and constitutional reforms, to ensure freedom of association, assembly and expression, and
- Building the capacity of civil society groups to deal with immediate threats.

While many efforts can be made to widen and enhance civil society's participation and consultation in the process of developing or reforming legislation, participants agreed that what matters most is political will and that it is critical to deal with broader governance issues.

To conclude, the discussion participants provided a short list of recommendations to the World Movement's Defending Civil Society project:

- Encouraging the UN to accept the Defending Civil Society report and its principles as a UN document. If the report becomes a UN document, any government or others can cite the report in their official reports and documents.
- Conducting periodic reviews of legislative developments in the region. Participants pointed out that it is important to review not only the legislation itself, but also the practical implementation of the legislation.
- Organizing fact-finding missions to assess and review the legislation and its impact.
- Publishing a newsletter devoted to the Defending Civil Society project. This newsletter could include updates on the development of various pieces of legislation related to civil society space, and highlights of World Movement participants' activities to challenge such legislation.