Another One Party State Effort: Zimbabwe's Anticipated NGO legislation

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Introduction

"Some NGOs and churches are causing too much confusion in the country because they are converting their humanitarian programmes into politics" , Paul Mangwana, the Minister of Public Service, Labour and Social Welfare.

Several issues have dominated the Zimbabwean political conversation over the last two decades. These range from the state ideology and one-party state debates of the 1980s; the justifications of neo-liberalism in the late 1980s; the constitutional debates of the 1990s to the land and democracy debates of the last decade. Many of the debates and issues have centred on the person and office of the presidency and recently the MDC. Zimbabwean political conversation has placed an enormous premium on politics. Tragically our national politics has largely enacted in moral or ethical vacuum. State politics has rampantly replicated itself in the non-state sector as evidenced by instances of misgovernance recorded in several CSOs.

Clearly, to begin with, political domination has to be secured as a political victory. A political victory initially has to be secured with public relations. A public relations victory cannot be secured until it has been secured in and with a sense of justice and justification. One does not need to agree with the Government of Zimbabwe's (Goz) arguments for the control of civic space and actors. The argument for increased supervision and surveillance has great appeal to those within the establishment and simplistic minds who presume good faith on the part of government. Notably the arguments that are likely to be forwarded for this intrusion on democracy are not rooted in power, guns or pity, but some logic that has a pseudo-moral base.

Throughout Zimbabwe's history dictatorships have committed unrivalled evil in conjunction with a sense of moral right. Authoritarianism often gains support for its actions by justifying a supposedly moral position to the mass of the people often at the expense of truth and integrity.

The land issue, food insecurity, human rights violations and political violence have dominated national conversation for the last decade. These issues have collectively defined both domestic and international perspectives on the Zimbabwean question. Resultantly the Zimbabwean question is perhaps the most verbalized and yet misunderstood African political subject. It is not the intention of this paper to unravel this complex question but rather to critically analyse one core component of the Zimbabwean crisis, namely state-civil society relations. This paper suggests that state-civil society relations are a microcosm of a broader political crisis. In part, the analysis proffered herein might also apply with equal force to civic-military relations for instance.

Available data suggests that between three to four million Zimbabweans will need food aid this year . At least one-in-four Zimbabweans are HIV positive and the prevalence rate seems constant if not on the increase. The country churns in excess of 350 000 high school leavers each year and these join the reserve army of the unemployed. Current figures suggest that 75% of our nation is unemployed in an economy that is likely to continue experiencing shrinkage.

The Reserve Bank's new monetary policy is unlikely - in the absence of other measures - to address the broader structural crisis in Zimbabwe. There is urgent need to rationalize fiscal and monetary policies. Many homesteads are unable to afford basic foodstuffs such as bread, cooking oil, sugar, salt and maize meal. Their menial wages are unable to keep pace with inflation and the skyrocketing cost of living.

The enormity of the above challenges has obscured crucial components of national conversation regarding the specific role of civil society. In the fluid political situation prevailing

in Zimbabwe CSOs are expected to act as both a watchdog over the political protagonists and as a safety net for the millions of Zimbabweans living below the poverty datum line (PDL).

This discussion paper specifically focuses on the pending NGO legislation and the opportunities and dangers it poses. The writer trusts that this is a subject of equal interest to development, governance, local, regional and international CSO leaders. Indeed, as it should be to leaders of various social movements and common law universitas.

State-Civil Society Relations: A Historical Perspective
State-civil society relations in Zimbabwe have always been contentious. Examples abound of serious curtailment of civic formations during the Rhodesian era. This was often done under the guise of defending national sovereignty or fighting the so-called 'terrorists' (in reality 'black freedom fighters'). Advocating for democratic governance was seen as terrorism by the minority racist regime of Ian Douglas Smith. Thus the contours of an authoritarian state were fashioned under the seemingly benign guise of defending state security and national sovereignty. Rhodesian authoritarianism was rooted not only in racism but also in its denial of equal citizenship and rights to those citizens who dared question the government of the day. It made human rights an entitlement dispensed at the discretion of state elites. Violence and political xenophobia were justified as patriotism. Supervision and surveillance were entrenched as a culture of containing discontent. Laws were enacted not to serve the interests of the citizenry, but rather to limit their rights to question repressive state practices. The Rhodesian state sought to avert the questioning of its legitimacy by criminalizing dissent.

In this regard the Smith regime enacted many repressive laws such as the Law and Order Maintenance Act (LOMA) , which empowered the police to detain and restrict citizens without trial. These laws were aimed at stemming the growing tide of urban-organised African nationalism. They sought to root out and forestall the growth of a social movement opposed to colonial rule. Zimbabwe's pre-independence history demonstrates a trend whereby civic formations transformed themselves into political entities that later waged war against colonial rule and also contested for state power . There is also a trend where the state's predictable response has been either banning or introducing stringent licensing requirements against civic formations.

The Rhodesian regime's response to African calls for democratisation can be framed into three broad approaches, namely:

1. Criminalisation: This had dual application in that the state criminalized all forms of democratic protest and discourse and the citizenry saw the state and its agencies as criminal elements viz the exercise of their rights. This severe limitation of democratic space and voice led to the armed struggle. Deviance or extra-legal activity became part of the inevitable strategy of self-liberation from colonial rule. Arguably criminal laws passed by a criminal settler regime could only be responded to through acts of defiance. The settler's notions of criminality thus became the black majority's notions of justice and redemption. Mr Mugabe eloquently argued that:
"Only a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law…"

2. Coercion (Force): Coercion naturally followed from criminalisation. It gave the arms of state such as the intelligence unit, army and police force the power to maim and kill on the most nebulous suspicion of commission of a prohibited political act. This power became a hanging sword over the heads of those citizens who dared to defy the colonial state and its multi-layers of illegitimacy. Notably, repressive laws gave rise and justification for the pervasive problem of police brutality. Brutal treatment of the state's perceived political opponents became an acceptable institutional practice amongst the disciplined forces (army; police and intelligence services). It is arguable that the administrative arms of government had equal disdain for oppositional voices under colonial rule.

3. Co-optation/Fraud: Media, state security and public order laws contained various inducements that sought to entice citizens to spy on each other. Consequently, several citizens became willing spies for the colonial state. These laws also attempted to create false

distinctions of so-called “good” and “bad” citizens. Perhaps one can call this a state determined civic morality. There were consequences (good and bad) for associating with either group of citizens.

Given this reality the success of colonial civil society and related social justice movements was in their capacity and willingness to creatively defy unjust laws. The growth of authoritarian state politics expressed through crude force and fraud, supervision and surveillance is directly related to the growth of civil society formations advocating for the democratization of social power

- Zimbabwe’s colonial rule teaches us that authoritarian state politics require certain pre-conditions for its survival, namely:

- Efficient, loyal and ruthless coercive arms of state.

- Complicit civic authorities and institutions such as courts and the civil service;

- Weakened civic, economic and political spaces. This enables patronage and repression due to the fact that outside of the state there exists no other organized conduit of expression or action;

- Organized (mis) information through tightly controlled public media that serves as a mouthpiece for political elites. Through its monopoly over the public (print and electronic) media the political elites define for the country what is to be ‘true’, what has to be true, those entitled to know such truth and the form in which such ‘truth’ should be told . The net result is that the ruling elite assumes a monopoly over all legitimate conduits of expression and information. The ultimate hope is that they become the only source of knowledge within a given society.

- Tight controls over the operation of all social movements, NGOs and civil society. This is often achieved through a complex system of licensing, supervision and surveillance. The state seeks to control the funding and leadership of these groups through a bogus system of supervision.

  The rationale for repressive legislation in Rhodesia went beyond the limited intention to silence dissent and criticism .The real objective was to create a compliant citizenry . The futuristic critique of proposed NGO legislation below seeks to demonstrate how political and legal systems generally have the capacity –if not resisted – to drastically impinge upon our ‘citizenship’. It is hoped that the reader will be able to – using the above framework - draw parallels between Rhodesia and independent Zimbabwe where these are applicable.

It is also hoped that this historical context will assist those that are interested in engaging the state and/or resisting the erosion of democratic space.

NGO Operating Environment

Our recent history demonstrates that the Goz is using a political script similar to that of its Rhodesian predecessors. For example we have seen the specification of journalists working for independent radio stations ; the bombing of independent media institutions ; arrest and harassment of human rights defenders and the closure of the Daily News .

The current threats to civil society have assumed even more guises than the Rhodesian regime could afford. Firstly, the Goz has enacted legislation that circumscribes and criminalizes the activities of key sections of civil society such as the media and NGOs. Secondly, there have been incidents of indirect threats and state sponsored attacks on individuals and organised elements of civil society. Several government ministers have issued NGOs with threats of de-registration for non-compliant behaviour .

Inevitably NGOs working in this environment cannot avoid issues of fundamental human and constitutional rights and responsibilities among all sectors of the population. Increased levels

of political violence and polarisation combine with the socio-economic conditions alluded to above to cause rapid changes in the needs of communities that NGOs serve. This requires consistent reorientation of programmes in order to make them more responsive and relevant to the needs of their target groups. In essence, the prevailing environment precludes the implementation of project activities within parameters of their original mandates. More significantly both aid agencies and their partners have been forced to shift their activities to more discreet arrangements. There is broad consensus amongst NGOs that the operating environment described above is far from ideal.

Several donor countries and aid agencies have had to decide whether or not to stay on in Zimbabwe. These aid agencies have found themselves in a quandary of whether to engage or disengage as well as reconciling the tension between seeking to strengthen Zimbabwean civil society, whilst at the same time signalling disapproval for the prevailing politics of chaos. The remaining donor/aid agencies are faced with a government that intends to exercise greater control and supervision of their activities, especially that of their local partners.

Why a discussion of pending NGO legislation is important?

Most NGOs and CSOs are working to create an enabling environment conducive to the enjoyment of human rights, the promotion of economic growth and sustainable development. The key question is what legislative, strategic and resource interventions are required to achieve such an environment? What should NGOs define as their primary objective in this process? How can NGO operations be made more sustainable in the prevailing environment? How can NGOs be made more transparent and accountable to their constituents and funders and each other? How can NGOs be secured as a non-partisan arena free from foreign control and political-party interests? Should these be made into legislative objectives at all?

Zimbabwean CSOs need to engage with these issues and formulate comprehensive advocacy and lobbying strategies to safeguard their interests. This is particularly important if CSOs are to significantly influence the legislative and policy processes regarding their existence and operation environment. CSOs are already severely constrained in their operations by draconian laws such as POSA and AIPPA. The prospect of further legislation therefore raises questions about processes or mechanisms to strengthen, rationalize or redeem the relationship between government and CSOs. This paper attempts a futuristic discussion of the contentious question of anticipated NGO legislation , what it might contain and why?

The Problem/Challenges with current NGO Legislation

Under the current NGO legislation (namely the PVO Act) there are several vacuums that would justify the need for new legislation. These include – but are not limited to - the following:

· An incoherent framework of registration for various types of civic formations. International aid agencies either register with particular ministries depending on their area of operation or with the ministry of foreign affairs either as departments of their embassies or under some government-to-government co-operation agreement. Local NGOs can register with local authorities within their areas of operation. Alternatively they can register as private voluntary organisations in terms of the Private Voluntary Organisations (PVO) Act. In practice the majority of groups that constitute Zimbabwean civil society are registered as trusts under either the Deeds Registries Act or the High Court Act. Yet others operate without any form of registration at all. These are what are termed common law ‘universitas’. The bulk of this latter group is organisations engaged in governance and democracy advocacy work.

- The capacity of the state to supervise and retain surveillance over the work of these entities is near impossible under the current legal regime .It may be easy for those groups that are registered as PVOs and those functioning under bi-lateral agreements. However, the other civil society groups are left with greater leeway in the nature of work and activities they can engage in outside the scrutiny of the state. For instance, Trusts are under no obligation to submit annual reports and financial statements to any governmental department or authority. This presents a political dilemma for the government due to the fact that most trusts work in the sensitive

areas of democracy, governance and development and are therefore very influential in communities.

- Following from the above, the government views almost all socio-economic, civic and political activities outside its control as oppositional. In the result, stamping out oppositional voices might entail either severely controlling, shutting down or simply undermining the viability, cohesion and security of such entities. Hence the argument herein that the government might think of a unitary system of registration and stringent licensing arrangements for specific types of groups. This may be married with curtailments of such groups' entitlement to foreign funding.

The Legislative Prescription

As intimated above the current NGO legal and policy framework is incoherent if not chaotic. In fact, there is no consensually agreed national NGO policy. When debate concerning NGO legislation review started in the late 1990s the following justifications were offered:

- The need to harmonise both the process and criteria for NGO registration and operation. The understanding was that they would be pre and post-incorporation requirements. This – it was argued – would link strict legal status questions to operational ethics issues.

- There was need for increased governmental oversight over activities of NGOs and foreign aid agencies;

- External funding of local NGOs needed to be proscribed in the interests of national security and sovereignty;

- The nature, scope and focus of voluntary organisations needed to be statutorily prescribed

There are several factors that might motivate government to fast-track NGO Legislation through parliament such as:

- The perception that there is deviance amongst and by NGOs and that NGOs need to be subjected to supervision vis-à-vis their objectives and operations.

- Many queries have been raised regarding Trusts that do not confine themselves to their trust objectives;

- The perception that these bodies must be controlled and that current control mechanisms are slack

- The impression that organizations operating in an environment as fluid as Zimbabwe should remain parochially focused on their narrow terms of reference;

- The impression that all NGOs should be registered and that voluntary non-registration is an act of defiance;

- The notion that Trusts registered with the High Court and other Acts of parliament should compulsorily register as PVOs;

- The argument that the current PVO Act is obsolete, since it permitted for some non-state actors to operate with licensing under the law. The target groups for this query are the democracy and governance groups and those dealing with environmental and other socio-economic rights issues.

The following might be government's likely prescription for dealing with CSOs:

1. Streamline legislation dealing with PVOs by creating a harmonized law;

2. Increase government's regulatory, surveillance and supervisory responsibilities regarding the operation of CSOs. The harmonized law might be renamed in order to cover Trusts, international NGOs, social movements and DG advocacy groups;

3. Broaden the objectives that might oblige an organization to be registered to include advocacy, human rights, environment, special interests, etc. The definition of registrable groups might include everything doable by the non-state sector;

4. Exclusion of common law universitas and Trusts from exemption from registration

5. Mandatory disclosure of foreign funding within a specified period

6. Mandatory auditing requirements and possible annual or biannual certification. This might be related to a registration fee;

7. Mandatory certification might be accompanied with mandatory specifications regarding CSO board composition. There are indications that government might wish to limit the presence of foreigners and employees of foreign missions on CSO boards-even if such individuals are Zimbabwean citizens;

8. Given the parlous state of the economy, it would not be startling for government to include provisions that gives it claim to property and resources upon dissolution or winding up of an organization. This form of forfeiture to the state of financial resources and property seems to be the real motivation behind proposed stringent licensing requirements;

9. Concessions may be made enabling the formation of national representative NGO bodies, primarily because Zanu PF would want to set up rival bodies as happened within the trade union and student union sectors. This is a double-edged sword because it is likely to relate to the composition of the proposed NGO council. More specifically the minister can pick and choose from which organizations to seek nominations to the new council. This raises the spectre of voluntarism enacted from above and in the interest of the state.

10. There is a likelihood that government will want to control issues relating to remuneration and contracts within the non-state sector as well as the administration of funds.

11. Given the last Supreme court judgment in the Sekai Holland et al, case government might have no choice but to provide for some modicum of fair administrative action (especially the application of the rules of natural justice) in the determination of applications for registration by various groups.

12. The new NGO council might be trimmed to a number less that 15 but certainly more than 10 members. The practice is to have an odd number with government having one representative more than the CSOs. It is not clear – given the inclination towards a unitary registration - why government would still require that between 6 to 8 ministries be represented on the council. There may be a case for a council chaired by a retired judge and with three representatives from government and civil society respectively.

13. Because the primary motivation behind the proposed NGO legislation is supervision and surveillance, the new Council is likely to have expanded powers that include the following: disciplinary and investigatory power over CSO operations and drafting a code of ethics for CSOs.

Why the legal prescription is dangerous

The private policy justifications given by government to justify the proposed reform conceals the following reality:

- That any new law that has retrospective application will result in de-registration of many CSOs. Some of these CSOs have operated as Trusts or common law universitas for a significant period of time .The premise of the de-registration might be failure to comply with new requirements. The most appropriate remedy would be to deem all existing Trusts and common law universitas duly registered for a given grace period in order to facilitate full compliance with new legislative requirements;

- That some CSOs may be criminalized by virtue of falling outside the newly defined legal regime;

- That some CSOs will be refused registration for political reasons and their recourse under Zimbabwean law is unclear given the Daily News experience;

- That integrating ethics into law severely constrains the scope of internal governance and organisational culture development by virtue of bureaucratisation;

- That increased levels of state intrusion into the civic sector will result in the total control of both civic and public space. This has the effect of closing political and democratic spaces available to citizens outside the scrutiny and control of the state. To this end the agenda of the new legislation is to recreate the one-party state framework and effectively kill off multiplicity of views. The net result of this will be the weakening of democracy and government accountability. We have already seen the insatiable appetite for power in government through the Harare City Council saga. The real dangers of unfettered ministerial discretion are abuse of authority and unaccountable behaviour.

- That the real intention is to induce dis-investment by multi and bi-lateral aid agencies in democracy, governance and human rights work. There is a sense in which the government wishes to continue to the benefit from the activities of aid agencies and CSOs without bearing the cost of transformation and democratisation of social power.

- That any restraint – other than limitations based on previous criminal convictions - of participation by citizens on CSO boards is patently undemocratic. CSOs should be able to determine conflict of interest issues as part and parcel of their internal governance mechanisms. Regulation is not the same as control. The purpose of regulation is to facilitate the orderly functioning of a sector of society within the framework for equitable, air and predictable rules.

- That prior disclosure of foreign funding is not related at all to regulation except if it can show that such funding has resulted in anti-state and unconstitutional activities. A mere requirement for a proper audit should reveal sources of funding for each group without invading its privacy. If the government is concerned about the extent of foreign funding for local groups it can put a cap on acceptable funding levels and indicate that anything in excess thereof should be justified to the council. However even this course is undesirable. The new council is likely to have the liberty where it suspects an infraction of the law to initiate – of its own accord - an investigation into the operation of a given organization.

Possible Responses by NGOs

The target for the proposed new legislation are those groups that are involved in development work; governance and democracy advocacy as well as ‘unfriendly’ international aid agencies. The devices referred to above indicate that the government intends to use a reward and sanctions system in dealing with NGOs. Responses to the government’s proposals must appreciate these and other considerations. There are several possibilities that NGOs can consider, namely:

- The legal route. This space can only be effectively utilised once the new legislation has come into existence. The reality though is that once government puts pressure on local and international NGOs, many will either pull out or close down. History has

taught us of the numerous dangers of attempting to participate in limited negotiations on the content of legislation.

- Re-organisation of funding arrangements. This is a prerogative of the multi and bi-lateral aid agencies;

- Non-cooperation. This must be followed by an intense lobbying and advocacy strategy that clarifies what NGOs are opposed to in terms of content, process and principles. Otherwise, the real danger is that we will end up with another draconian piece of legislation.

Conclusion

The intentions of government can be discerned from a notice issued by the Legal Advisor to the Ministry of Public Service, Labour and Social Welfare and published in the Herald Newspaper of 13th September 2002 .The notice stated as follows:

> "Any body or Association of persons, corporate or un-incorporate or any institution whose objects include one or more of those stipulated in section 2 of the Private Voluntary Organisations Act [Chapter 17:05], excluding those excepted under the same section, is a Private Voluntary Organisation and should be registered in terms of section of the Private Voluntary Organisations Act, aforesaid.
>
> Section 6 of the PVO Act, prohibits such a body, institution or association to operate without being registered. And section 25 of the same Act, makes it a criminal offence to operate without being so registered.
>
> May all such bodies as are not registered urgently stop their operations until they have regularised their registration in terms of section 9.Failure to adhere to the Law will result in arrests being made."

The Meaning of the Notice

The Notice was a re-assertion of the provisions of the PVO Act regarding registration of PVOs and in particular section 2(2) from which the spirit of the notice has been extracted .It does not seek to create any new category of PVOs nor does it expand the existing one .The Notice also does not alter the range of exceptions set-out in the Act in section 2. The Notice constituted the first attempt to enforce the PVO Act after the contra judgment against the Ministry in the AAWC case.

Section 2 of the PVO Act defines a PVO as an association of persons, corporate or unincorporated, or any institution with any one or more of the following objects:

- The provision of all or any of the material, mental, physical or social needs of persons or families;

- Rendering of charity to persons or families in distress;

- The prevention of social distress or destitution of persons or families;

- The provision of assistance in, or promotion of, activities aimed at uplifting the standard of living of persons or families;

- The provision of funds for legal aid;

- The collection of contributions for any of the fore-going

This definition excludes the following entities:

- The Zimbabwe Red Cross Society

- Any political organisation in respect of work to political activities

- Registered hospitals and nursing homes and work done for their benefit
- Registered health institutions under the Medical, Dental and Allied Professions Act [Chapter 27:08];
- Any entity whose activities are for the sole benefits of its members
- Any Trust established directly by any enactment or registered with the High Court ;or
- Any educational trust approved by the Minister
- Any institution or service maintained and controlled by the State or a local authority; and
- Any religious body in respect of activities confined to religious work

The sting in this notice, therefore, is really in the requirement that all bodies and association of persons (corporate or otherwise) any whose objects fall within the Act should cease operations forthwith or risk prosecution.

This prohibition covers many common law associations founded only in terms of their constitutions as well as temporary networks (political or otherwise) currently set-up to respond to the food crisis and those Trusts registered with the Registrar of Deeds and not the High Court. In other words, the notice covers attempts by political parties and several trusts to assist displaced farm workers and other disadvantaged communities. The exact ramifications of this Notice for organisations dealing with Aids orphans and widows, street children and the unemployed should be fully investigated. The requirement that temporary entities set-up to respond to the prevailing national crisis should be registered under the PVO Act defies logic .It is tantamount to saying that –faced with the incapacity of the State and registered PVOs to respond to the current food crisis due to its magnitude – all other bona fide attempts to assist are criminal.

The process of registration set-out in section 9 of the Act is too cumbersome and experience suggests that it may –at times – take several months if not years .In the result, the requirement that those already operating as un-incorporated entities or who for any other reason fail to comply with the Act should cease operations forthwith, is grossly unreasonable. Particularly because it is perfectly legal in our law to register and operate a trust without having to register with the High Court. This should also be understood in the context of section 11 of the PVO Act which prohibits registered PVOs from carrying on their activities, seeking financial assistance from any source or collecting contributions from the public ‘under a name other than the name under which it is registered’. Section 23 of the Act makes it a criminal offence to collect or even attempt to collect contributions on behalf of an un-registered PVO.

The Constitutionality Test

- As intimated above, the Notice is not contrary to the PVO Act and is therefore, at law, intra-vires the Act. Aggrieved parties must, therefore, look elsewhere for relief .It is possible that the Notice is, in its effect, unconstitutional for the following reasons:
- Prior to requiring affected parties to cease operations, they should have been afforded an opportunity to be heard in terms of section 18(9) of the Constitution of Zimbabwe. Primarily because the effect of the Notice goes to the root of their existence as associations under the law. The constitution requires that they be granted a fair and impartial hearing in the determination of their rights and privileges. In the result groups adversely affected by this notice are at liberty to seek redress through a High Court review ;or
- If it is deemed that they were operating illegally anyway, they still should have been given adequate notice to cease operations or regularise their status within the law.

This is particularly because their activities affect their employees and beneficiaries in very significant ways and it could not be the intention of government to penalise these groups unnecessarily. It is in any respect a requirement of our administrative justice system;

- The provisions of the Act relating to the criminalisation of un-registered associations violate the freedom of association enshrined in the constitution of Zimbabwe. There seems to be no real public interest basis for criminalising entities that do not collect contributions from the public for their operations. Nor is there any constitutional basis for criminalizing trusts or common law associations founded in terms of their own constitutions. The restrictions in the PVO Act go beyond the interests sought to be protected and therefore may be said to be unreasonable in a democratic society.

On the whole, one notices a frightening trend whereby law is being used as a political weapon to deal with perceived opponents as opposed to facilitating freedom. Discussions of NGO policy, operating environment and legislative reform must deliberately address these issues. In particular, no negotiation should be embarked on before the government's assault on NGOs is halted. The process of legislative reform should be broad, inclusive and consultative.