Non-Governmental Organisations Bill, 2004
Legal Resources Foundation
July 27, 2004

Preliminary

The NGO world is a big industry and the possibilities for frauds, scams and incompetence are enormous. It would be reasonable to ensure that donors' money ends up where it is intended; that bodies representing themselves as set up for charitable purposes actually attempt to carry out those purposes; that money is not wasted on administration, unnecessary and frivolous travel, and so on.

All this can be achieved without interfering with two important constitutional rights: the right to freedom of expression and the right to freedom of association. The relevant sections of the Constitution read as follows (matter unnecessary to what follows is omitted):

> "**20 Protection of freedom of expression**
>
> (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –
> (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;
> (b) ….
> or
> (c) … ;
> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
>
> (3) – (6) [not relevant]
>
> **21 Protection of freedom of assembly and association**
>
> (1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.
>
> (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.
>
> (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision—
> (a) in the interests of defence, public safety, public order, public morality or public health;
> (b) for the purpose of protecting the rights or freedom of other persons;
> (c) <u>for the registration of companies, partnerships, societies or other associations of persons</u>, other than political parties, trade unions or employers' organisations; or
> (d) that imposes restrictions upon public officers;
> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
> (4) …"

It is thus constitutional to provide that NGOs be registered; and it would follow that it would be constitutional to provide for some mechanism for registration and a person or board to

supervise the process. However, there is no restriction in the Constitution on the purposes for which an association may be formed. The only restrictions that may be imposed under any law are those "in the interests of defence, public safety, public order, public morality or public health". These are similar to the permissible restrictions on freedom of expression.

Comparison between Bill and the existing Private Voluntary Organisations Act [*Chapter 17:05*]

Before comparing the two, it should be pointed out that the Private Voluntary Organisations Act (which will be referred to, for convenience, as the PVO Act) is not necessarily entirely constitutional. However, no person or organisation has seen fit to challenge the constitutionality of any aspect of the Act, so it must, to some extent, be assumed that existing NGOs have found they can live with the PVO Act, as it stands.

The NGO Bill is very similar in many respects to the PVO Act. There are changes to the designation of some of the posts. For example, the Bill refers to the "director" of an NGO; the Act refers to the "secretary" of such an organisation. The Bill creates an NGO Council in place of the PVO Board. Many of the other provisions are identical or similar in substance. The Bill refers to NGOs instead of PVOs, though the definitions are, for the most part, identical.

There are, however, some important changes, such as:

(1) The distinction between foreign and local NGOs
(2) The inclusion of "issues of governance", human rights, environmental rights and interests and other matters in the objects of NGOs
(3) The requirement to disclose, among other things, the NGO's sources of funding (in particular, foreign donations) and a three-year plan of activity
(4) The composition of the council
(5) The introduction of a code of conduct
(6) The council's and the Minister's powers generally, particularly over the executive committees of NGOs
(7) The omission of any equivalent to ss 7 and 8 of the PVO Act (these provide for partial exemption for a limited period from the requirements of the Act, and also allow for temporary authority to be granted to make collections where registration would take too long)
(8) The introduction of fees for registration.
(9) The power of Ministerial trustees (appointed where the Minister has suspended the executive of an NGO) to dispose of an NGO's property (clause 24(6))

I will deal with the more important of these, and related matters, in more detail and consider whether they can be justified in terms of the Constitution. What follows is not exhaustive. There are many other items which could be dealt with, but the following are the most important ones.

(1) *Distinguishing between foreign and local NGOs*

The reason for distinguishing between the two is that, although both have to be registered, a foreign NGO may not be registered "if its sole or principal objects involve or include issues of governance" (clause 9(4)). This provision is a clear infringement of the right of freedom of expression and of the right of freedom of association. To prohibit the advocacy by anyone, foreign or not, of good governance or the promotion of human rights cannot possibly be justified on the grounds of defence, public safety, public order, public morality or public health – certainly not in a democratic society. Indeed, one would imagine that any attempt to control the advocacy of human rights is the very antithesis of what is expected of a

democratic society. While there is room for disagreement on the scope of human rights, a democratic society should be open to debate on the matter.

(2) *Inclusion of "issues of governance", human rights etc in objects of NGOs*

"Issues of governance" is a very vague term. It is defined as "including" (which implies that it can mean other things) "the promotion and protection of human rights and political governance issues". "Human rights" is a very broad term, as anyone knows. It includes such matters as constitutional issues, gender issues, children's rights, minority rights, and so on. A local NGO can include these matters among its objects, but if it does so, it is precluded from receiving any foreign funding. The only reason for this provision can be to attempt to prevent local NGOs from carrying out these objects, as it is well known that local funding of any kind is very limited anyway, but particularly for such supposedly sensitive matters. There is again no possible justification on the permissible grounds of defence, public safety or public order for preventing local NGOs from receiving foreign funding for these purposes (public morality and public health clearly are irrelevant to this subject).

(3) *The requirement to disclose the NGO's sources of funding (in particular, foreign donations)*

It is difficult to see how this requirement can be justified under any of the enumerated grounds. If freedom of association exists, and the objects of the association are lawful, it is of no concern to anyone who is funding the association. There is nothing sinister or subversive in the promotion of human rights or good governance.

(4) *The composition of the council*

There is an important difference in the composition of the NGO Council as compared to the PVO Board. The current Board consists of 5 PVO representatives, plus one PVO representative per province. There are representatives of 6 Ministries, plus the Registrar, who is the current Director of Social Welfare. Consequently, PVO members outnumber Government employees. The proposed NGO Council would have only 5 NGO representatives (who, as at present, would not be elected by NGOs), but there would be nine high-ranking Government employees, from nine different Ministries or departments, plus the Registrar. Apart from the question of why certain Ministries are involved at all (for example, why should the administration of NGOs be any concern of local government, or of information, or of the Office of the President?), it is quite clear that effective control of the Council would be placed in the hands of Government employees, who would unquestionably be instructed by their political masters what line to take. When one looks at the powers of the Council, it is again impossible to justify the control given to the Government over NGOs.

(5) *The introduction of a code of conduct*

The Council is given the function, among other things, of formulating a code of conduct for NGOs. As the Council would effectively be controlled by the Government, it is obvious that such a code would be entirely in accordance with the Government's wishes and policies, irrespective of what NGOs want.

(6) *The Council's and the Minister's powers over NGOs*

The Council has the power to investigate an NGO for, among other things, "maladministration". This term is defined in clause 23(1). Apart from having its normal meaning, it also means –

- any "improper" (which is not defined) conduct which would justify the cancellation of the NGO's certificate of registration in terms of clause 11; and

- any contravention of the code of conduct.

As previously mentioned, the NGOs would have little or no say in the drawing up of the code of conduct. An NGO that is found guilty of "maladministration" can have its registration cancelled by the Council.

The process of investigation of "maladministration" is a clear contravention of the "due process" provisions of s 18 of the Constitution, the relevant portions of which read as follows:

> "(1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law.
> ….
>
> (10) Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

By no stretch of the imagination could the process of investigation and adjudication be considered impartial. The Registrar, a public servant, initiates the investigation; an investigator, if appointed, would be a public servant; the Council is effectively controlled by the State through its public servants; and the initial appeal is to the Minister, who is clearly an interested party. The only recourse to an impartial adjudicating authority is an appeal from the Minister's decision to the Administrative Court. That would not constitute a "fair hearing" as envisaged by s 18(10). As the outcome of an investigation could be the cancellation of an NGO's registration, what is being determined is the existence of the NGO's civil rights.

(7) *The omission of any equivalent to ss 7 and 8 of the PVO Act*

It cannot be said that this omission is unconstitutional, although why these matters are omitted is hard to say, other than as evidence of a determination to control NGOs and their activities, however objectively harmless.

(8) *Charging of fees*

It is arguable that charging fees for registration is another method of controlling the right of association, but provided the fees are reasonable it might equally be argued that if the Constitution allows for registration, it would also, as a logical extension, allow for any reasonable administrative charges associated with registration.

(9) *The power of Ministerial trustees (appointed where the Minister has suspended the executive of an NGO) to dispose of an NGO's property*

Under the PVO Act, it is clear that a trustee is appointed for a limited period and has no power to dispose of an NGO's property (s 23). The Bill makes it clear that the intention is that trustees can exercise any of the powers of the executive an NGO, including, by implication, the disposal of the NGO's property (clause 24(6)).

The system whereby the Minister can suspend the executive of an NGO is arguably a contravention of s 21 of the Constitution. It should be possible to provide for the protection of the public against fraudulent or incompetent NGOs without resorting to Ministerial interference.

A final word

The first sentence of the explanatory memorandum accompanying the Bill states that the Bill will "provide for an enabling [*sic*] environment for the operations, monitoring and regulation of all non-governmental organisations". When one considers the degree of control that the Bill seeks to give to the State over NGOs and the restrictions on NGOs' freedom of operation, the use of the word "enabling" is reminiscent of "Newspeak" in George Orwell's *1984*, where words are used in precisely the opposite sense to their real meaning.