ANALYSIS OF THE NEW NON-GOVERNMENTAL ORGANIZATIONS ACT (AMENDMENT) REGULATIONS BY MEMBERS OF THE TANZANIA HUMAN RIGHTS DEFENDERS COALITION

ANALYSTS

Dr. Rugemeleza Nshala
Adv. John Seka
Adv. Jeremiah Mtobesya
Onesmo Olengurumwa
Adv. Jones Sendodo and
Adv. Fulgence Massawe

DECEMBER 2018

1.0 Introduction

On 12th day of October, 2018, Hon. Ummy Mwalimu, MP, Minister for Minster for Health, Community Development, Gender, Elderly and Children in exercising her powers under Section 38 of the NGOs Act signed the Non-Governmental Organizations (Amendments) Regulations, 2018 which were later published in the Government Gazette of the United Republic of Tanzania on 19.10.2018] as GN 609 of 2018.

This GN was made to be read as one with the Non-Governmental Organizations Regulations 2004 [GN. No. 152/2004]. The newly introduced law essentially introduced a new part (Section) to the 2004 Regulation now to be known as Part IV with the Title of FINANCIAL TRANSPARENCY AND ACCOUNTABILITY. The members of the Tanzania Human Rights Defenders Coalition support the move by the Ministry for they seek to ensure transparency and accountability for the NGOs in Tanzania. THRDC has even been and continues to organize members and stakeholders meeting for the purposes of raising awareness to them on the content of the Regulations. We have also prepared Compendium of domestic laws and policies governing NGOs in Tanzania as part of ensuring NGOs/THRDC members complies with them. However, the Coalition is concerned with several issues which we would like to bring to the attention of the Ministry for consideration. Our concerns are all based on having good Regulations for the interests of all stakeholders and development of NGOs sector.

1.1 Stakeholder's Involvement

The wider civil society sector and NGOs play an important role in stimulating social, economic and cultural development in our society. Their active participation at local, national trans-boundary and regional level in all aspects of development, awareness raising, policy formulation, planning, management, implementation, monitoring and evaluation of different projects makes their involvement in any decision that affects their interests even more crucial.

In order to ensure a meaningful, coordinated and effective participation of civil society in the above mentioned phases, there is a need to actively involve them in decision making processes.

In 2001, the Tanzania Government passed the National Policy on Non-Governmental Organizations (NGOs). The Policy sought to "enhance self-regulation, transparency and accountability of NGOs and the modalities for interaction between NGOs and the state and between NGOs and other stakeholders."

The promulgation of the new NGOs Regulations did not follow the procedure, as the law requires consultations of the Board. This is based on the facts that there is no Non- Governmental Organization Coordination Board which has not been formed since the expiration. Section 25(1) of the NGO Act establishes the National Council for Non-Governmental Organizations

(NACONGO) as a collective forum for purposes of coordinating and networking NGOs in the country. Therefore, failure to consult key stakeholders such as NACONGO and NGOs Board in the making of these Regulations makes them loose their legitimacy. We therefore propose that the Regulations should cease to be used until all key stakeholders are involved in the process of making them.

1.2 Procedural Propriety

Section 38(1) and (2) of the NGO Act empowers the Minister upon consulting the Non-Governmental Organizations Coordination Board to make regulations. Regulations can be made dealing with:

(a) various forms to be used in this Act;
(b) fees payable under this Act;
(c)the format of the reports of activities to be submitted by the Non-Governmental Organization; and
(d) any matter which needs to be prescribed under this Act.

Section 38(3) requires that the Regulations made by the Minister to be published in the Government Gazette. It is important to note that whenever a law requires that a subsidiary legislation, including regulations must be published in the Government Gazette, then the said regulations must be published in the Government Gazette and can only come into effect upon being so published and not otherwise[1] The Non-Governmental Organizations (Amendments) Regulations, 2018 seems to be in compliance with this requirement as they have been published on 19th of October 2018 as GN No. 609 of 2018.

1.3 Validity of the Regulations

It is elementary to note that an Act of parliament is operationalized by a subsidiary legislation. This means therefore that guidelines as to how particular sections of an Act are to be implemented can to be found in a particular piece of subsidiary legislation promulgated for that purpose. It is in that premise that courts have always been strict to limit the scope of the subsidiary legislation to the confines of a particular section in the parent Act from which the legislation is drawn. Where it appears that the subsidiary legislation has gone beyond what was envisaged in the parent Act, courts have not hesitated to declare such excesses illegal and un-procedural.

[1] See section 37(1)(a)-(b) of the Interpretation of Laws Act Cap 1 R.E 2002.

The newly enacted Regulations are intended to operationalize Section 32 of the NGOs Act which provides to the effect that, “Non-governmental Organizations registered under this Act shall be entitled to engage in legally accepted fund raising activities.”

From the foregoing provision, and from the foundation we laid in the foregoing paragraph, it was expected that the provisions of GN No. 609 of 2018 would be confined to providing guidelines as to what comprises ‘legally accepted fundraising activities’ and the procedure on how to engage in said activities. To the contrary, the provisions of Regulations 12 and 13 of GN No. 609 of 2018 have gone beyond what was expected; they provide for matters that are beyond fundraising activities. This provisions are ultra vires the parent Act and as such illegal and therefore are supposed to be struck out of GN No. 609 of 2018.

1.4 The Constitutionality of the Regulations

Regulations 12 and 13 seek to force non-governmental organizations (NGOs) to do disclosure which we submit that interferes with NGOs’ right to privacy as provided for under Article 16 of the URT Constitution of 1977 as amended. For instance, Regulation 12 requires NGOs, inter alia, to disclose to the public sources of fund or resources obtained, expenditure of the funds or resources obtained, the purpose of the funds or resources obtained, activities to be carried from the funds or resources obtained, whereas Regulation 13 requires NGOs to publish bi-annually funds received and its expenditure in wide circulated newspapers and other media channels which are easily accessible by the targeted beneficiaries, cause the contracts or agreements entered with donors or person who granted the funds to be submitted to the treasury and the Registrar not later than ten days from the date of entering the said contract or agreement for approval, declare to the Registrar of NGOs any other resource received either in cash or in kind before its expenditure.

First of all, the disclosure of information to the public sought under Regulation 12 and disclosure by publication sought in Regulation 13 are unnecessary and uncalled for. Complying with Regulation 12 is hard because all information are supposed to be published within 14 days contrary to financial principles which requires publication of only audited financial information which principally indicates sources, purpose and expenditure of the grant.

1.5 Offences Imposed under the New Regulations and their Implications

This part shall generally look at the regulation that introduced the offences and its linkage with the offences in the NGOs Act, provide a brief synopsis of the introduced offences and at the end make suggestions and recommendations of what should be left as offences and what should be removed in a set of offences.

Offences under the Non-Governmental Organizations (Amendments) Regulations, 2018

Regulation 15(2) of GN 306/2018 creates offence(s) which can be collectively be described as Non Compliance by the NGO with Provisions of Part IV of the NGO Regulations of 2004. The introduced section terms the offence as an NGO which contravenes the provision of this Part commits an offence.

A serious reading of this section would imply that anything not done or omitted to be done by NGOs amongst those items listed in Part IV of the Regulation may constitute an offence and hence attract penal sanctions .

List of Likely Offences that can be committed by NGOs under Part IV

The following are lists of key offences that can be committed by NGOs under Part IV of the GN 306/2018:-

a. Offences under regulation 12 relating to non-compliance with requirements of disclosure within a specified time frame of 14 days of completion fund raising activities and includes offences such as failure to disclose:-

i. Sources of funds obtained,

ii. Expenditure of funds or resources obtained;

iii. Purpose of funds or resources obtained and

iv. Activities to be carried from of funds or resources obtained.

b. Offences under regulation 13(a) relating to failure to publish to NGO beneficiaries by means of wide read medium of communication details of funding obtained that are in excess of TZS 20 million;

c. Offences under regulation 13(b) relating to failure to seek within 10 days approval of contracts in excess of TZS 20 million from the Treasury and the Registrar

d. Offences under regulation 13(c) relating to failure to declare to the Registrar before expenditure all other resources in excess of TZS 20 million whether in cash or in kind;

e. Offences relating to lack of financial transparency and accountability under Regulation 14 including but not limited to failure to open bank accounts, being transparent, not being audited, not having financial regulations etc;

f. Offences relating to failure to be accountable to the people being served by NGOs through existing local government structures under regulations 15(1)(a);

g. Offences relating to undermining the sovereignty of the state and rights of the people under regulation 15(1)(b) and,

h. Offences relating to non-observance of national laws under regulations contained under regulations 15(1) (c).

1.6 General Conclusions

The Regulations generally have introduced burdensome financial disclosure and reporting requirements, which can undermine NGOs' independence, ability to fundraise for their activities. The Regulations also provide a wider room for excessive state interference into organizations' internal operations and hence interferes with NGOs' right to freely operate. Violation of organizational privacy rights, vague obligations for financial transparency, which grant the Government broad discretion to find that an NGO has violated the Regulations, is yet other restrictions under the new Regulations. Tanzania Human Rights Defenders Coalition organized its more than 150 members and endorsed this analysis and recommendations which we would wish the Minister to consider. Meanwhile, we propose that the implementation of the Regulations to be stayed pending consultation with key stakeholders in order to come up with progressive Regulations that have less implications on NGOs.

ANNEXURE 1

Stakeholder's Recommendations for Improvement of the Regulations

S/N	Provision	Challenges	Proposed Amendments
1.	Regulation 12 Subject to section 32 of the NGOs Act, the Non-Governmental Organizations shall be obliged to disclose to the Public, Registrar, the Council, the Board and stakeholders within fourteen days from the date of the completion of the fundraising activities: (a) Sources of fund or resources obtained; (b) Expenditure of the fund or resources obtained; (c) Purpose of fund or resources obtained; (d) Activities to be carried from fund or resources	• The requirements under Regulation 12 are not "necessary in a democratic society" to further a legitimate aim. Although financial transparency and accountability are worthy goals, disclosure of new resources within a short time period of fourteen days to multiple stakeholders (i.e. the public, Council, Board, Registrar, and other stakeholders) is not the least restrictive means to achieve those aims • The Minister acted in excess of her powers under section 32. She ought to have detailed what are the legal and acceptable means one can use to fundraise rather than detailing the consequences of fundraising. • Article 17 of the ICCPR protects the right to privacy. The ICCPR Human Rights Committee has recognized that certain rights "may be enjoyed in	• Regulation 12 should be amended to require only submission of the (1) total amount of funding received and (2) activities carried out from the funding on an annual basis if the same report satisfies the principal legislation's requirements under Section 29. All these information are obtained in the audited report which according to the law are public documents and are annually submitted to the Registrar.

		community with others" and privacy is one such right. No such justification has been offered in the regulations, and there is a danger that authorities could abuse their discretion to obtain, for example, organizational strategies, personal information, details of organizational bank accounts and transactions, etc. in the absence of such a law and proper justification.	
	Regulation 13 Notwithstanding regulation 12, non-governmental organizations that obtained fund exceeding twenty million shillings shall; (a) Be obliged to publish bi-annually the fund received and the expenditure in wide circulated newspapers and other media channels which are easily accessible by the target beneficiaries.	• The Minister had no mandate to act as such. It is therefore unconstitutional. • It is also not clear which Registrar is referred under Regulation hence making it difficult to comply. • Authorization of contracts is likely to impose an overwhelming administrative burden on the treasury and the Registrar. If every	• Because the annual reporting requirement under Section 29 of the principal legislation already requires submission of comparable information to that required under Regulation 13, then Regulation 13 is rendered nugatory. It is therefore proposed that all information should be sent to

	(b) Cause the contract or agreements entered with donor or person who grant the said fund to be submitted to the treasury and the Registrar not later than ten days from the date of entering the said contract or agreement for approval and; (c) Declare to the Registrar of the Non-Governmental Organizations any other resources received either in cash or in kind before its expenditure.	contract over $8,700 conceivably needs authorization, these institutions will need to review a considerable number. In practice, this will create a significant impediment to programming through arbitrary delays to an organization's ability to use the funds. It defies logic to submit contracts which have already been signed to the Registrar for approval. • It also erodes the financial independence of NGOs because once an NGOs is legally registered it acquires full autonomy including independence to fundraise without state's interference.	the Registrar of NGOs and then he/she can decide to share to other government organs as he/she deems fit. • It is also difficult for NGOs to publish two reports annually before they are audited. We propose that one report is issued per Calendar year after being audited. • There is no need to publish the information to the public unless there is an order of the court to so do. However this information should remain readily available for inspection. • It is further proposed that contracts should be submitted to the Registrar of NGOs only for their information and not for approval. We are totally opposing

			the requirement of submitting the contracts for approval. This is because after NGOs have been registered they are free and autonomous bodies capable of entering into contract without any interference. • Registrar should have one electronic platform to enable NGOS to upload all required information.
	Regulation 14 Each NGO shall be obliged to; (a) Develop and adhere to clear, well defined and written financial regulations that are consistent with sound financial management principles and practice. (b) Seek to limit resources used	• Regulation 14's provisions are concerning because they are so vague that it is difficult for NGOs to understand how to comply with them, thus failing the "prescribed by law" test. For example, the regulation does not define "sustainability," "prudence," "organizational	• We fully support the introduction of these provisions of the law. However; • We propose an addition of the requirement of international organizations to be willing to help local NGOs

	towards fundraising and running costs to a reasonable level or standards. (c) Develop programs that take into account institutional strengthening and sustainability. (d) For purposes of sustainability, undertake financial resources sustainability activities. (e) Manage resources in a manner that is prudent and provides value for money, including employing or involving competent personnel (f) Ensure all financial transactions are transparently and fully documented and that these documents are preserved for a defined number of years; (g) Ensure all substantive expenditures are authorized in a process that involves scrutiny by more	priorities," or a "reasonable" level of overhead costs, thus leaving the government authority broad discretion to decide if an NGO is violating Regulation 14. This vagueness is particularly concerning because Section 35 of the principal Act provides for a range of punishment for violations of regulations attached to the Act, including a fine or imprisonment, disqualification from holding office in an NGO for up to five years, and subjection to punishments under the Penal Code.20 Without further definition of the goals outlined under Regulation 14, the government authority has broad discretion to subject NGO's to such punishments. Because of the vagueness of the requirements under Regulation 14 and the punishments	through different partnerships. • The Regulation should state categorically what amounts "sustainability," "prudence," "organizational priorities," or a "reasonable" level Overhead costs to avoid vagueness. • Auditing should take into consideration small organizations that have not received any funding but doing their activities on voluntary basis.

	than one officer, and where the Chief Executive officer does not have unlimited authority. (h) Ensure procurement is undertaken in a manner that provides quality at least cost, avoids favoritism and corruption is transparent, documented and otherwise conforms to sound procurement principles. (i) Maintain a regularly updated account register in accordance with sound accounting practice; (j) Maintain and manage bank account (k) Develop and adhere to clear policies regarding payments to staff, volunteers, to avoid conflicts of interests and incentives to distort organizational priorities (l) Prepare comprehensive and	flowing from a violation of the regulation, these provisions are an impermissible restriction on the freedom of association. Additionally, Regulation 14 is redundant, as its provisions are the same (verbatim) as Part 7 of the Code of Conduct on Financial Transparency and Accountability. Since violations of both regulations and the Code of Conduct are held to the same punishment under Section 35(e) of the principal Act, it does not make sense to revisit these provisions in a regulation. • The government should distinguish between small and medium-sized organizations and large organizations when imposing auditing requirements, because small and medium organizations not be able to afford audits. Moreover,	

	accurate financial statements in accordance with sound accounting practice; (m) Ensure that its financial statements are independently audited by registered and competent auditors; and (n) Exercise zero tolerance on corruption, money laundering and other form of substantive misuse of funds and take effective actions to hold persons or institutions responsible accountable.	requiring all organizations to procure audits will be burdensome to both NGOs and auditing firms given the disproportionate number of NGOs to licensed auditing firms	
	Regulation 15 (1) Each NGO shall; (a) Be answerable, responsive and accountable to the people it serves through existing local government structures (b) Not enter into contracts which undermines sovereignty of the state and rights of the people; and;	• To promote an open democratic environment, organizations must be free to determine their purposes and activities. Prohibiting contracts that "undermine sovereignty of the state" is subject to the three-part test under international law. Regulation 15(1)(b) fails the "prescribed by law"	• NGOs should be answerable, responsive and accountable to people it serves and shall establish working r/ship with local government depending on the nature of activities.

	(c) Work in accordance with national laws (2) Any NGO which contravenes the provisions of this part commits an offence.	test because the concept of "sovereignty" is so vague that an NGO cannot predict what types of activities would "undermine sovereignty of the state." Additionally, the U.N. Special Rapporteur on the freedom of association and peaceful assembly has stated that the protection of sovereignty "cannot reasonably be included under 'the interests of national security or public safety' or even 'public order	
			The regulations are ambiguous on what constitutes underestimation of the state Sovereignty. Mentioning some of these in the Regulations would make sense;