COMMENTARIES AND RECOMMENDATIONS ON THE LATEST DRAFT CHARITIES AND SOCIETIES PROCLAMATION

ETHIOPIAN CIVIL SOCIETY ORGANIZATIONS
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I – Introduction

Though Ethiopian has a long history of associational life, the right to the freedom of association cannot be exercised to the fullest extent possible for various reasons. As a result of this, except for traditional associations such as, Idirs and Iquibs and quite a few professional associations, other forms of associations could not emerge and occupy any prominent space. Notwithstanding this, some non-governmental organizations – mostly foreign ones – have managed to engage in mostly relief activities. From 1991 onwards, however, different civil society organizations with various objectives which include human rights advocacy, have mushroomed and occupied a prominent space in the social life of the country, as a result of which the country now boasts to have over three thousand registered civil society organizations.

Against the above background, the laws that govern associations were enacted in the early and mid fifties, where there were no any prominent associations that can claim to advance the right to association. These laws are chiefly characterized by their silence as a result of which, the supervisory organs – formerly the Ministry of Interior and currently the Ministry of Justice – have filled the gap by issuing directives that mostly infringe the constitutionally guaranteed rights. Cognizant of the inadequacies of these laws, the Ethiopian government had prepared a draft law in consultation with representatives of Ethiopian CSOs and this cooperative enterprise was highly appreciated by the latter group. Despite such an unprecedented mutual concern and endeavor to create a conducive legal environment through the enactment of a modern law that caters for the needs of the newly formed CSOs, the draft was shelved for more than five years for unknown reasons. This draft law, which was prepared in 2003,

though it did not garner the full blessing of Ethiopian CSOs, was no doubt a better law compared to the currently operating laws and practices.

The Ethiopian government has now come up with a new draft charities and societies' law and invited Ethiopian CSOs to comment on it.[1] Moreover, representatives of Ethiopian CSOs were given audience, once in the presence of the Minister of Justice and in the presence of the Prime Minister at another time. Seizing this opportunity, the CSOs have established a task force which is mandated with the task of collecting views from every stakeholder and preparing an alternative view on the draft. The task force had accomplished its task by submitting general and specific comments on the draft which was later submitted to the Ministry of Justice. It appears that some, if not all, of the recommendations are taken into account while preparing the second and third draft legislations[2]. The official release of the second and third drafts have called for another round of consultation between the government and CSOs as well as among the CSOs themselves. The task force has again gone into the drafts and found out that they again fall short of the minimum guarantees that a modern and democratic CSO legislation requires.

As noted above, representatives of Ethiopian civil society organizations were given the opportunity to attend meetings organized for the sole purpose of discussing the draft legislation with the Prime Minister. In this occasion, the PM had invited Ethiopian CSOs to submit their views before the formal enactment of the law by the legislature. This work is thus prepared as a response to this invitation.

While preparing their responses, Ethiopian CSOs have held series of meetings to deliberate on the draft law and gathered opinions from a large segment of their

[1] It should be noted here that the new draft is completely different from the former that was by all standards generous.
[2] As shown below in detail, these drafts have not brought about significant changes on the contentious issues that have pitted the CSOs against the government.

members. This work is, therefore, the result of such an endeavor. The methodology employed is testing the provisions of the draft law against the Ethiopian constitution, international human rights instruments ratified by Ethiopia, and international best practices, more particularly the practices of countries that are deemed to have similar economic development with Ethiopia.

IV. Major Findings

1. The draft contains self contradictory provisions.
2. Contrary to the constitutional guarantee that allows the freedom of association for every lawful purpose, to anyone, irrespective of one's nationality and source of income,

   2.1- The draft confers this right to Ethiopians only;

   2.2- Nationality is conferred based on one's ability to collect 90% of its income from local sources. Put differently, an Ethiopian CSO cannot raise more than 10% of its income from foreign sources. By putting many limitations on the right to engage in income generating activities and a close to none tax privileges, the draft has failed to create a suitable environment for Ethiopian CSOs to generate income from local sources.

   2.3- Foreign charities cannot engage in fields that pertain to human rights advocacy.
3. With regard to CSOs that have a federal or national nomenclature, the draft demands representation in at least five regional states.
4. Contrary to the constitutional guarantee that allows the right to access to justice in an unconditional manner, the draft limits this right to appeal to a court of law on questions of law only. Moreover, the right is accorded to Ethiopian CSOs only, and the power to hear appeals is given to an administrative organ.
5. By conferring special privileges on mass based organizations to engage in the processes of democratic elections, the draft has marginalized other CSOs.

6. Given the fact that many Ethiopian CSOs will reorganize themselves as charitable societies as a result of the many limitations imposed by the new law, the draft has failed to provide sufficient provisions for their administration unlike the case of other charities and societies. Moreover, their status has become uncertain because of the draft's position that they will be considered as charities as well as societies.
7. The different powers conferred on the supervisory organ invite intrusion in internal affairs.
8. The grounds of refusal of registration and dissolution are by and large unjustified.
9. Though the severity of punishment is lessened in the latest draft, the remaining punishments provided for different offences are still severe.
10. The one year period of transition is too short for both the Agency as well as the many CSOs that are required to reregister within this period to wind up their past affairs and start anew.

All the above issues indicate that the draft law violates those basic rights guaranteed under the Ethiopian constitution as well as those international human rights instruments ratified by the country. Specific areas of conflict between the provisions of the draft law and these legal instruments are presented below.

II - <u>The bases of a standard democratic CSO's law</u>

CSO's laws are all about the exercise of the right to the freedom of association. It is thus, through such laws that the constitutionally guaranteed right of association can be implemented. In line with this, the constitution and other equivalent laws have to enshrine this basic right, whose details are left to subsidiary legislation. It should also be noted that the legal regime that governs CSOs' conducts cannot be complete without the recognition of the rights to the freedom of assembly and expression.

In light of the above premises, the Constitution of the FDRE recognizes all the three basic rights, albeit with some limitations. Moreover, Ethiopian has ratified the International Convention for Civil and Political Rights as well as many other similar conventions[3]. The relevant provisions of the Ethiopian constitution and the international convention are more or less similar and this can be taken as a commendable point. In addition to this, the limitations are also found in both instruments as a result of which, the constitution is consistent with international instruments. These limitations are self explanatory and need no further explanation. It should, however, be noted that the phrase "in violation of appropriate laws" seems to be general and amenable to subjectivity. This fear is ameliorated by the command of Art. 13/2 of the constitution which provides that "the fundamental rights and freedoms specified in [the constitution] shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, international conventions on human rights and international instruments adopted by Ethiopia ." The UDHR provides in this regard that "rights can be limited to further a legitimate government interest necessary in a democratic society", - *Art. 29,* which is understood to mean serious and flagrant violations only demand such interference.

Based on the above discussions, it can be safely concluded that the three basic constitutional rights can be limited for the purposes of preventing serious and flagrant violations, and criminalize associations formed to subvert the constitutional order or promote the same[4]. Thus, any other limitation cannot be imposed by subsidiary laws on the exercise of the right. If such an instance takes

[3] See Arts. 29 -31. The constitutional limitations are: On the right to freedom association – formation in violation of appropriate laws, formation to illegally subvert the constitutional order and to promote such activities – Art. 31 and on the rights to the freedom of expression and assembly – to protect the wellbeing of the youth, the honor and reputation of individuals, acts of propaganda for war and those that are intended to injure human dignity – Arts. 29 & 30.

[4] The rights to the freedom of assembly and expression are rights that are shared by CSOs and others. Since these rights are governed by their own laws, this commentary will not deal with them.

place, the limitation is subject to judicial interpretation which may make it null and void.

In addition to the above basis for the measurement of a democratic CSOs' law, it helps to note that there is no binding international instrument that governs the area[5]. Despite the absence of such an instrument, there are plenty of none binding but persuasive standards issued by different bodies that have the right of association as their primary objective. Given its comprehensiveness, the Check List of CSOs' laws prepared by the International Center for Non Profit Law (2006) stand first among the rest[6]. Given these realities, it appears that no wrong will be committed if a given CSOs' law is to be measured against these standards and the same is done here.

III – Methodology and Scope

It is mentioned above that Ethiopian CSOs have submitted their comments on an earlier draft law. The document is divided into two main parts, i.e. general and special comments followed by suggestions. Given the similarities between the two drafts, it is opted to follow the same structure and repeat the same comments whenever found necessary.

The draft aims at governing two forms of associations, namely charities and societies. Though the two are governed by different sets of rules, their formation, supervision, dissolution, etc. are governed by same rules that apply to both. Moreover, the law is to be enacted as federal law but not regional. Accordingly, it will have effect in the two federal cities, namely Addis Ababa and Dire Dawa only.

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[5] The UN Convention of 1948 on the Right of Association has in view, the rights of workers and has no relevance with the subject at hand.

[6] The Check list is prepared by taking note of the best laws and practices of over 150 countries. See, www.icnl.org.

Preamble

It is well known that the legislature states/ puts the political, economic and social conditions that necessitated the enactment of legislation at the beginning of the law. It also states the source of superior constitutional or other laws that mandates it to enact the law. The Draft law, has accordingly, listed some grounds that have served as bases for the enactment of the law. These are:

1. Ensuring the realization of citizens' right to association enshrined in the Constitution of the Federal Democratic Republic of Ethiopia; and
2. Aid and facilitate the role of charities and societies in the overall development of Ethiopian peoples.

Ensuring the constitutionally guaranteed right to the freedom of association is put as the primary objective of the law. It is thus, imperative/important to assess this objective in light of Art. 31. Art. 31 of the Constitution reads as follows: Every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited. It can clearly be observed from the Constitution that freedom of association is guaranteed to everyone. This right is not, however, guaranteed to nationals only as it is observed from the Draft law. The Constitution has clearly identified those rights that belong to nationals and every person. Accordingly, the following rights belong to everyone:

1. Right of thought, opinion and expression – Art. 29;
2. The right of assembly, demonstration and petition, Art. 30;
3. Freedom of association, Art. 31;
4. Marital, personal and family rights, Art. 34;
5. Rights of women, Art. 35;
6. Rights of children, Art. 36; and
7. Right of access to justice, Art. 37.

In contrast to the above, those rights that are identified as belonging to Ethiopians or nationals are the following:

1. Freedom of movement, Art. 32;
2. Rights of nationality, Art. 33;
3. The right to vote and be elected, Art. 38;
4. Rights of nations, nationalities, and peoples, Art. 39;
5. The right to property, Art. 40;
6. Economic, social and cultural rights, Art. 41; and
7. The right to development, Art. 43.

It can clearly be observed/ understood from the above that freedom of association and the right of access to justice are guaranteed to all, but not to Ethiopians alone. This position of the constitution is very consistent with those international human rights instruments ratified by Ethiopia. Contrary to this position, the Draft law provides that this right is guaranteed to nationals only. This position runs contrary to the Constitution and those international instruments ratified by Ethiopian and needs to be reconsidered seriously.

Recommendations

The following should be added to the preamble

"Whereas, it is found necessary to enact a law in order to ensure the right to the freedom of association enshrined in the Constitution of the Federal Democratic Republic of Ethiopia".

Ethiopian charities or societies, Ethiopian residents' charities or societies, and foreign charities, Art.2/2, 3,and 4.

It can be observed from the above provisions that the Draft law recognizes three different types of charities and societies and these are: Ethiopian, Ethiopian residents and foreign. It can also be observed that the bases for classification are: the places of registration, nationality of members, sources of income and residences of members.

It is common in every legal system to classify juridical persons into domestic and foreign and the bases for such classification depend on the legal system of each country. Accordingly, classifications are made based on: the country/ place where they are registered and acquired legal personality, the place where the head office and/ or the primary working place is situated and the nationality of owners. Such classification is commonly applied on business organizations. It is, however, uncommon to classify and determine the nationality of an organization based on the sources of its income as a result of which it is very hard to come across a legal system with such a practice and this is not common to the Ethiopian legal system.

There are ample reasons that suggest close scrutiny and revision of those provisions that define these organizations. The first among these is the requirement that the nationality of an organization should be determined based on the place where it is registered and has its primary working place but not on the source of its income. Accordingly, since the right to the freedom of association is guaranteed under the Constitution to all whether he/she is an Ethiopian or a foreigner, and the source of income is local or otherwise, source of income should not serve as a basis to determine nationality. Furthermore, creating a distinction based on this criterion tantamount to discrimination and violation of the Constitution.

It is indicated in the Preamble that that one of the reasons that has necessitated the enactment of the law is, to aid and facilitate the role of charities and societies in the overall development of Ethiopian peoples. It is understood that the law by stating this as one of its purposes, has in mind the elevation of these organizations from their current positions but not to force them regress. Accordingly, the enactment of an act that requires Ethiopian charities and societies limit the percentage of their foreign income to 10%. Such a limitation, however, primarily and necessarily requires ensuring that these organizations

have local sources of income or a conducive environment that enables them to do so and continue to progress well.

Given the realities that exist in the country where the economic development is minimal, and the culture of donation to charitable purposes is non existent, the position of the law that requires charities and societies to run their businesses through local donations/sources needs to be reconsidered. The other point that needs to be inquired is whether the law has created a suitable atmosphere that enables Ethiopian charities and societies collect and solicit money from local sources. As shown below in detail, it is difficult to conclude that the law has created such a conducive atmosphere. Unlike the practice in some countries such as Ghana, the Draft law does not provide for public benefit status from public funds (governmental budgetary subsidy), tax discounts, exemption or relief. What is allowed in this regard is the right to engage in income generating activities albeit, that it is subject to several prerequisites. Accordingly, limiting the percentage of foreign incomes of Ethiopian charities and societies to 10% only against the background that there exists no such reality on the ground and the absence of a suitable legal atmosphere, contradicts the purpose of the law shown at the preamble. This monetary limitation cannot in any way enable aid and facilitate the roe of Ethiopian charities and societies in the overall development of Ethiopian peoples.

The other issue that needs attention is the definition given to mass based societies, under Art. 2/5. It is known from the customary process of legal drafting that concepts are defined only when they are mentioned repetitively in the body of the law and they are the major component of the law. Mass based societies are, however, mentioned only once and they do not have distinctive features that make them different from other societies.

The definition given to administrative costs, under Art. 2/14 is circular as a result of which it is difficult to conceive what is provided therein. The fact that administrative costs are defined as costs required for administrative purposes,

makes it circular. It would have been preferable had the law provided for administrative works that do not correlate with the major purposes of the organization and then provide that costs incurred for such purposes are not administrative costs.

Recommendations –

Art. 2/2 should be amended as follows:

Alternative 1

Ethiopian charities or Ethiopian societies shall mean those charities or societies that are formed under the laws of Ethiopia, operate in Ethiopia and wholly controlled by Ethiopians.

Alternative 2

Ethiopian charities or Ethiopian societies shall mean those charities or societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. They may, none the less be considered as Ethiopian charities or societies if they can decrease the percentage of their foreign income by 10% annually and then ultimately raise all their income from local sources.

Alternative 3

Ethiopian charities or Ethiopian societies shall mean those charities or societies that are formed under the laws of Ethiopia, operate only in Ethiopia, wholly controlled by Ethiopians and get more than 50% of their income from foreign sources based on trilateral agreements. A trilateral agreement shall mean an agreement entered into between the donee charity or society, government and the donor for the purpose of determining the manner in which the donee will make use of the donation.

Alternative 4

Ethiopian charities or Ethiopian societies shall mean those charities or societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians,

generate income from Ethiopia and wholly controlled by Ethiopians. Notwithstanding these, they may be considered as Ethiopian charities or societies, if the annual income that they get from foreign sources is less than 5,000.000 (five million Ethiopian Birr). In the case of those charities or societies that are established to work in association with others either as a coalition partner or member of a union, this sum should apply to each charity or society. If a charity or society gets more than 5,000,000 (five million Ethiopian Birr) from foreign sources, it should enter into a tripartite agreement with the government so as to be considered as an Ethiopian charity or society.

Board - Arts. 7 -10

One of the bodies that are given administrative powers under the Draft law is the Board. It is provided under Art.7 that, this organ is one of the bodies that established the Agency. The Board shall have seven members to be nominated by the government, two of which shall be nominated from the charities and societies. Powers and functions of the Board as well as its meetings are provided under Arts.9 and 10, respectively.

One of the issues that is raised with regard to the Board is its accountability. There is no provision in the Draft law that indicates the accountability of the Board. If the Board is taken as one of the organs that has established the Agency, as provided under Art. 7, it then appears that it is accountable to the Director of the Agency who is the supreme officer of the Agency. A look at the powers conferred on the Board, however, evinces that it has the power to hear appeals from the decisions of the Agency. Accordingly, the Board, being a part of the Agency as well as accountable to the Director, it will be difficult to conclude that it will hear appeals from the decisions of the Agency.

The powers conferred on the Board under Art. 9 may give the appearance that it is the supreme organ of the Agency. It is, however, provided under Art.11 that the Director of the Agency is accountable to the Minister of Justice. It is also

indicated under the same article that the Director shall direct and administer the activities of the Agency according to the general directions given to him by the Minister. The Board is given under Art.9, the powers to deliberate on and make recommendations to the Minister on policy matters concerning the implementation of the Proclamation; give solutions to problems that arise in connection with the administration of charities and societies; hear appeals from decisions of he Director General; approve directives to be issued by the Agency; and decide on other matters concerning charities and societies submitted to it by the Director General. This situation has made ambiguous the accountability of, not only the Board but also the Director of the Agency. Art. 105/2 seems to evince that the Board has a status that is different from the Agency. It states that "[anyone], who is aggrieved by the decision of the Agency, may appeal to the Board…." If it can be concluded that the Board and the Agency have no separate status, matters concerning the administration of charities and societies provided in the Draft law should have been decided by the Director, but not the Agency. If this is taken as the position of the law, it will be simple to understand that there is division of labour between the Board and the Director.

The other issue is the appointment of Board members by the government, provided under Art. 9. The law does not provide as to which state organ has the power to do so. It is not known whether the appointing organ is the House of Peoples' Representatives, Council of Ministers, the Prime Minister or the Ministry of Justice. The other relevant issue is whether the appointee Board members are accountable to the organ/s that appointed them or not. If this is so, it will be inconsistent with the provisions of Art. 7, which has assimilated the Board with the Agency by making it part of the latter.

There is yet another issue that can be raised Vis a Vis the Board, and this is, the small number of representatives of charities and societies. In order to ensure the interest and demands as well as accountability and independence/ autonomy of charities and societies, the number of representatives should be raised. It would

have been preferable had the law provided the criterion for appointment as well as the procedure for it or that a directive will be issued to this effect. Moreover, the works of the Board would have been more productive, had the Board been composed of other stakeholders in particular beneficiaries.

Art. 14; Charity and Charitable activities

This article has provided for the definition of a charity, its objectives as well as the fields in which it may engage. It has also provided the situations wherein a public benefit is deemed to exist. The other component of the article is the areas of engagement which are allotted to Ethiopian charities only.

The provision that appears to attract one's attention is Sub Article 5 of the article which has allotted specific fields of engagement to Ethiopian charities alone. Out of the fifteen fields of engagement listed under Sub Article 2 of the article, except for Ethiopian charities, Ethiopian residents and foreign charities cannot engage in the following fields:

- the advancement of human and democratic rights;
- the promotion of equality of nations, nationalities and peoples and that of gender and religion;
- the promotion of the rights of the disabled and children's rights;
- the promotion of conflict resolution or reconciliation; and
- the promotion of the efficiency of the justice and law enforcement services.

One of the principal rights of charities and societies guaranteed by the Constitution is the right to the freedom of association which also encompasses the right to engage in any lawful activity of their choice. Art. 31 of the Constitution has clearly provided that everyone (irrespective of one's nationality or residence) has the right to freedom of association. Accordingly, Art.14 of the Draft law should be seen in light of constitutional guarantee. The Draft law as it appears now has made a distinction between Ethiopian nationals and non

Ethiopians. This distinction/ discrimination, however, runs contrary to Art.31 of the Constitution as well as the international instruments ratified by Ethiopia.

The limitations that can be placed on the right to the freedom of association are provided under Art.31 of the Constitution as well as Art.22 of the International Covenant on Civil and Political Rights that is ratified by Ethiopia. The limitation should be clear and aim at achieving a legal end that facilitates the creation of a democratic society. It is hard to imagine the harm that may follow in the country's effort of the creation of a democratic society, if Ethiopian residents and foreign charities engage in those fields listed above.

Moreover, except for benefits that may promote the building of the democratic process, there will not be any problem if those who need special attention, such as victims of natural and man made disasters, those who cannot afford to protect their rights by their own money or those who cannot in any way protect their rights, such as women, children and the disabled secure foreign donations to protect their rights. The fact that charities and societies have contributed to the advancement of good governance and capacity building of the justice sector is an undeniable reality that can be seen from their hitherto practices. They have thus, contributed towards the government's effort in the creation of a transparent and democratic society. All these are achieved through foreign donations.

Recommendation

The limitations under Art.14/5 should be deleted.

Art. 47 – Charitable societies and charity committees.

Per Sub Art (1) of this article, a charitable society is a society formed for charitable purposes. It is also provided under Art. 48 that appropriate provisions concerning charities shall apply to charitable societies[7].

Given the current reality regarding the organization of civil society organizations, many indigenous organizations will change to charitable societies. Thus, they need adequate provisions that govern their conducts.

Recommendation

Given their importance, charitable societies should be governed by detailed and separate rules and their status should be made clear, for the application of all provisions concerning charities as well as societies on them creates more confusion than solving any real or imaginary difficulties that may face them.

Arts.49 – 55 – Charitable Committee.

Per Art.53 3), persons who have donated money or property to a charity committee may not claim it back when the money or property collected is insufficient to attain the object. It is not, however, clear why donors are stripped of their right to reclaim their donations where a charitable committee fails to achieve its original purposes due to insufficiency of fund.

Recommendation

From a donor's point of view, a donated property should be utilized for the same intended purpose for which a donation is given. If this cannot be achieved then it is up to the donor either to claim back the property or give it to another charity. Thus, the sub article should be amended so that donors should be given the right of claim back their properties.

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[7] The third draft provides that the structure and working process of charitable societies shall be governed by the relevant provisions of societies – Art. 48/1. This cannot solve the problem mentioned above.

Arts. 56 – 64 - Societies

Definition -Per Art. 56, a society is any non profit making organization organized for lawful purposes. The definition is broad enough to encompass all varieties of associations and this is a positive contribution on the part of the drafters of the law. Moreover, the restriction imposed in the former draft, i.e., a minimum of ten/ five members, is now removed and this is another positive contribution. Thus, the article as it stands at present is not subject to any criticism.

The second leg of the article provides that societies can form a consortium society to coordinate their activities and the details will be determined by directives. The right to form consortia is not expressly forbidden under the existing laws. Despite this, the express recognition of this right is a positive move. However, it appears that the purpose behind forming consortia is limited to coordination of activities but nothing else. It should have, therefore, been provided that consortia that have their own legal personality can be established to promote and defend common interests too.

Recommendation

The limited purpose of consortia is unnecessary and this has to be removed. It will be preferable to provide the right without any qualification. Moreover, it should be clearly provided that the consortia shall have their own legal personality.

Rights and obligations of members -Article 58

The article provides for the rights and obligations of members, representation in regions, and the right of mass based organizations to participate in the process of strengthening democratization and election. The contents of some of the provisions have been criticized in the past but, the recommendations are not taken into account while preparing the second draft. Accordingly, the former comments still stand valid and need to be reconsidered.

Admission of new members – it is provided that a society shall be open to a new member that fulfills the requirements of the society and that no society may admit or dismiss members except as provided by its rules – Sub Arts.1 and 4. The two sub articles appear to be contradictory, for it is not clear which one will prevail in case of conflict. This is to say that a society can determine the qualifications as well as the size of its members in its rules. Accordingly, if the society does not have space to admit new members, a new member cannot be admitted even if he/she meets the requirements. If this is the intention behind the law, the two sub articles will be consistent and create no confusion. But, if the interpretation is that a society has a duty to admit everyone who meets the requirements under the rule irrespective of the limit of members therein, then this will create an unnecessary burden on societies and this should be avoided. Moreover, it appears that the law has membership based societies in mind but not board led societies that do not need many members. Thus, the requirement is a one size fits all standard that needs to be amended.

Societies that have a federal character and nomenclature – the draft requires that societies that have federal character and nomenclature need to have representation in at least five regional states. This requirement was criticized for being unduly restrictive, but this is left untouched in the second draft. The rationale behind such qualification is not clear and does not fall under anyone of the constitutional limitations. Thus, the geographical scope of operation need not be the concern of the law and this should be left to the decision of societies. Moreover, the composition of members should be decided in the rules as provided under Sub Art. (4).

Ethiopian mass based organizations –it is indicated under Sub Art.(5) that "Ethiopian mass based organizations may actively participate in the process of strengthening democratization and election, particularly in the process of conducting educational seminars on current affairs, understanding the platforms of candidates, observing the electoral process and cooperating with the electoral

organs". Per Art. 2/5, mass based societies include professional associations, women's associations, youth associations and other similar Ethiopian societies. The manner of drafting leaves the door open for different interpretations. First, the listing of mass based organizations is not exhaustive, meaning it may include other unlisted associations. Second, participation in the enumerated fields is not a mandatory obligation. Third, it is not expressly provided that other non mass based societies/ charities cannot participate in these fields. Fourth, in the revised proclamation that determined the powers of the Election Board that was enacted in 2007, it is provided that determining which type of societies can participate in elections and civic education is within the mandate of the Board. Thus, the two provisions contradict each other. Given all these, it is not clear why the sub article has provided these rights to mass based organizations only. Thus, since charities and societies can engage in any lawful field that fall under their respective mandates the conditions are unnecessary and need to be deleted. If the understanding is, however, that other charities or societies cannot engage in these fields, then this will be unconstitutional for the constitution does not provide for any such limitation.

Recommendations

- The confusion to be created in the admission of new members should be cleared by leaving the prerogative to societies and expressly mentioning that the limitation applies to those societies that have many members only.
- Representation in five regional states serves no legitimate purpose and affects the rights of persons to associate with other persons of their choice. It should, therefore, be deleted.
- Participation in the processes of democratic elections that is conferred on mass based organizations creates more confusions than solving any real or imaginary problems. Moreover, this can trigger constitutional disputes. Thus, the sub article should be deleted in toto.

Structure of societies –Art. 59

The draft provides that though the organizational structure of societies has to be determined by their rules, they have to have general assemblies, executive organs and auditors. This lacks clarity, for at least two reasons. First, the draft does not define what an executive organ is. Second, it is not clear whether having general assemblies applies to membership based societies as well as board led societies. Third, though it is provided that the organization of a society includes the executive organ, the powers and duties of this organ is not provided neither in the following provisions nor elsewhere. Fourth, the similarity and differences between the executive organ and the officer are not clearly known.

Recommendations

The phrase "executive organ" should be given a clear definition that includes that its powers and responsibilities shall be determined in the rules for this may enable societies to structure their organizations in any manner that fits them. But, the mandatory requirement of having general assemblies should be made clear by amending the requirement that this applies to membership led societies and that as regards board led societies, general assembly shall mean an assembly of founders or similar stakeholders.

Dissents from the resolutions of the general assembly – Art.61

The article provides that any member who has a dissenting opinion may record his opinion separately in the minutes and petition the Agency when he believes that the decision of the GA has contravened the law or the rules of the society. Though it may be valid to provide for the record of dissenting opinions separately in the minutes, providing for the right to petition the Agency when one believes that the decision of the GA has contravened the law or the rules, creates contradictions among members and work load on the Agency rather than giving any tangible benefit. If there is disagreement among members and the law or the rules are violated, there is nothing that prevents a member from petitioning, even

in the absence of such a provision. Moreover, the Agency can easily ascertain the legality of decisions from copies of the minutes sent to it without any other help.

Recommendation

The provision that provides for the right to petition in case when one believes that the decision rendered by the GA contravenes the law or the rules should be deleted.

Meetings of the general assembly-Art.62

The article provides among others that: where the chairperson fails to convene the regular meeting within thirty days as per the rules of the society, the Agency will convene the same through the chairperson or by its own, upon the request of one or more members or officers; nominate a chairperson where appropriate; that quorum shall in principle be decided by the rules of a society which cannot, however provide that the quorum can be constituted by less than fifty percent of the members; in case the quorum cannot be fulfilled for two consecutive meetings the third meeting can be held lawfully with less than fifty percent of the members present , but with the decision of the Agency.

These provisions invite intrusion. A GA may not be called within 30 days for exceptional reasons. Accordingly, calling a meeting just because the 30 days have elapsed and a member has requested so, without verifying the reason for such failure, as well as the power given to the Agency to appoint a chairperson undoubtedly invite intrusion.

Calling GAs is normally governed by the rules of societies or business organizations. Moreover state interference will be proper only when failure to do so will seriously hurt the interest of members but not in all cases. In view of these, the law should leave such matters to the rules of societies and interference should be allowed in serious cases only, such as upon petition by a large percentage of members.

Recommendations

Sub Articles 2 and the following should be amended as follows:

- Where the chairperson of the Assembly fails and is unwilling to convene the meeting of the General Assembly within 30 days in accordance with Sub Article (1) of this article, the Agency may upon the request of not less than 1/3 rd of the regular members, require the chairperson to call the meeting or explain the reasons for such a failure.
- If the Agency upon examination finds that the reasons offered for not calling the meeting are unfounded, it may order the chairperson to call a meeting within 30 days.
- If the chairperson fails to call the meeting in accordance with the order, the General Assembly can be called through the Agency.
- If the General Assembly is called per Sub Article (4) of this article, the Agency shall require members to elect a chairperson to chair the meeting.
- The chairperson of the General Assembly shall give an accessible notice for the purpose of calling the meeting.
- The quorum of the society which includes the system of participation through representation shall be as provided in its rules. Failing such provision, a simple majority of the Assembly shall constitute a quorum. The rules may not, however, provide that the quorum can be constituted by less than 50 percent of the members. Where the quorum is not fulfilled for two consecutive meetings, the quorum shall be deemed to have been fulfilled on the third, such meeting despite there not being a 50% presence.

Powers and duties of the Auditor – Art.63

It is indicated in the Draft that the Auditor is an administrative organ of a society. It is indicated under Art.63 that the Auditor shall monitor the financial and monetary administration of the society and prepare the internal audit of the society and submit the same to the GA. The article had been criticized for confusing internal and external auditors and it had been suggested that it should

be redrafted in such a way as to show that it applies to external auditors but not internal auditors. As usual, the suggestions were not heeded. When the Auditor's duties are seen in light of preparing internal audits, it appears that the provision talks about an internal auditor. When this is seen in light of the fact that the Auditor is employed by the General Assembly, but not the executive (Board or officer), it appears that the provision talks about an external auditor.

An internal auditor is an individual professional who monitors the daily financial transactions of an organization, while an external auditor may be an organization. Employing an individual professional through the decisions of the General Assembly is difficult to implement and makes the task of ensuring his skill and controlling his accountability very difficult again. The General Assembly is required to call meetings and employ auditors each time an auditor terminates his contract. In addition to this, it is not clear why the General Assembly, which is not given the power to elect the officer, is here given the mandate to appoint an auditor.

Recommendations

Article 63 should be amended as follows:

The Auditor shall have the following powers and functions:

1. Monitor the financial and proprietary administration of the society.
2. Prepare the internal audit report of the society in accordance with standards acceptable in Ethiopia and submit to the General Assembly.
3. Notwithstanding the provisions of this proclamation regarding external audits the society may at any time use an external auditor.

Information about members – Art.64

The articles requires among others that: the officers of societies shall record and keep the particulars of their members and furnish the same to the Agency upon request and the Agency shall determine the particular information required by directives A point of concern that may be raised in relation with the article is, the

right to privacy that is guaranteed under the Constitution. The duty under the article may jeopardize the right to privacy unless handled with care. Accordingly, the details about members should not go any further than general information that indicates identity but nothing else. Moreover, the details should be determined in the proclamation than in rules.

The postponement of the particulars had been criticized in the past and it has been suggested that these particulars should be provided in the law and they should not be so personal so as to scare away members. The second draft has deleted three sub articles which were made redundant as a result of revision. The nature of the particulars is not, however, changed. Thus, the former comments as well as suggestions stand valid.

Recommendations

It will be preferable to list the particulars in the law than in future directives upon which CSOs may not have any control. Furthermore, the particulars should be as general as possible but not so detailed that demand unnecessary information about personal affairs. It is believed that such general information will enhance membership.

The article shall be amended as follows:

1. The officers of the society shall record and keep the identity and address of its members and furnish the same to the Agency upon request.
2. Should be deleted.

Formation, licensing and registration of charities and societies Arts. 69 - 77

Formation; Art 65 and 66

Art.65 requires among others, that charities or societies shall apply for registration within three months their formation; this time limit may be extended for three months[8] by the decision of the Agency, where good cause is shown.

Art. 66 provides among others that, merely formed charities and societies shall have no legal personality; they may not solicit money and property exceeding fifty thousand Birr before registration[9] , and failure to register within the prescribed period shall be a ground for cessation of a formed charity or society.

International practice, more particularly the practice of democratic nations evinces that societies should not be required to have legal personality or be registered in order to carryout their activities. It should be noted here that legal personality is a right that needs to be demanded by CSOs for their own advantage but not a duty to be imposed upon them. The position of the draft law is, however, the opposite of this well known premise. The freedom of association should not, therefore, be determined on registration. Accordingly, societies should be allowed to request for legal personality at any time of their choice and engage in their fields of activities without registration.

The law should not have set any limit on the amount of money or property to be solicited before registration. In addition to the difficulty in quantifying the value of properties, the importance of such a provision is very questionable. This limitation compels societies to engage in solicitation than commencement of their works soon after registration.

[8] Note – the third draft has left out the three months extension and the period of extension is now indefinite.

[9] The Amharic and English versions of the third draft appear to be contradictory, for the Amharic version provides for the sum to be collected and the English sum to be solicited.

The consequences of cessation of a society are not provided under the Draft. It is, therefore, recommended that the law should provide for the consequences of those contracts entered into by founders and the destination of monies collected for the purposes of the society.

Recommendations

Article 65; Formation

1. Charities and societies shall be deemed to be formed when they fulfill the requirements set forth in this proclamation.
2. Any charity or society shall apply for registration seeking legal personality and license.

Article 66; Effects of formation

Sub Articles (3) and (4) should be amended as follows:

3. If the money or property solicited by charities and societies before their registration is in excess of Birr 100,000, the founders shall have the duty to notify the Agency, the amount solicited as well as expenses incurred. The Agency may compel such charities and societies to register.
4. If the formation of a charity or society has ceased due to failure to register as provided above, the Agency may seek a court order to destine money collected other than membership fees, to charities with similar purposes.

Sector Administrators (SAs); **Arts. 67 and 68**

These provisions provide, among others that relevant federal executive organs can be assigned as sector administrators and will have the powers to support the Agency, supervise and control operational activities of charities and societies and take necessary measures according to laws that established them. The articles, by giving unchecked powers to SAs are skewed more towards control than cooperation, and created a situation of double/multiple accountability. The power to take “necessary measures” as provided under Art.67 (3) gives to the SAs unnecessarily broad and open ended power that are amenable to different

interpretations. Moreover, no system of appeals from such decisions is provided under the law.

Recommendations

Since these articles provide for the powers, responsibilities and roles of Sector Administrators in the process of formation and other aspects of charities and societies, it will be preferable to shift the articles to the first part of the proclamation. Moreover, rather than giving SAs the power to take measures by themselves, it will be preferable to limit their powers to an advisory one only, in which they will report technical and operational error/s to the Agency that will take the ultimate measures. In addition to these, since SAs are governed by their own laws that provide for their respective powers and duties it will be unnecessary to provide for their additional powers in this law.

Registration and refusal of applications for registration – Arts.69 & 70

Art. 69 provides among others that the Agency shall register an applicant after ensuring that the legal requirements are met; the requisite documents that need to be submitted are the rules of the charity or society and such similar documents and duly completed forms as the Agency may require; and extra documents for foreign charities.

Art. 70 also provides among others, that the following grounds can bring about refusal of registration and theses are:

- where the rules do not comply with the necessary conditions set by the law;
- where the proposed charity or society is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Ethiopia;
- when the application does not comply with the provisions of the law or any regulation;

- when the name under which the charity or society to be registered resembles the name of another charity or society or any other institution or is contrary to public morality or is illegal; and
- where the nomenclature of the charity is country wide and the composition of its members or its work place do not show the representation of at least five regional states.

International practices evince that the process of registration should be relatively quick, easy and inexpensive and the decision not to register should be appealable to a court of law. In light of these and the constitutional limitations mentioned above, the many restrictions imposed upon charities and societies seeking registration are too cumbersome and devoid of any rationale. Accordingly, while the draft has listed the documents needed for registration, it is not clear why it gave the Agency to demand unspecified additional documents. This leaves the door open for abuse and serves no legitimate purpose.

Some of the grounds for refusal of registration are vague and general. Purposes prejudicial to public peace, welfare, good order of the country, and contrary to public morality are cases in point. These preconditions are undoubtedly susceptible to abuse. Moreover conditions such as failure to comply with the provisions of the law or regulations are general as a result of which minor or major failures can lead to refusal and this is unjustified. International best practices show that grounds that lead to refusal of registration should be clear so as to preempt any interpretation by administrative organs. Thus, these grounds should be clearly provided under the law as is required by the International Convention for Civil and Political Rights.

Though similarity of names appears to be a legitimate ground, it is not clear why the name of a charity or society should not be similar to other institutions. Since the requirement is provided to avoid confusion, no harm will be done if institutions engaged in dissimilar fields have identical names.

Regarding representation in at least five regions, the limitation has no legal basis and contravenes the freedom of association that is guaranteed under the Constitution. Everyone has the right to form associations with those like minded persons and organize for lawful purposes. Just because individuals cannot find others who share their views and work with them in other regions, this should not be a ground to deny them of their right to association.

Since one of the objectives of the Agency is to enable and encourage charities and societies to develop and achieve their purposes in accordance with the law, it has to advice them to rectify errors before it refuses registration which should be decided only when the charity or society fails to heed the advice.

Recommendations

- General and vague conditions should be made clear so as not to leave any room for interpretation and subjectivity.
- The Agency's power to demand additional unspecified documents for registration should be deleted.
- Only serious cases of failure to meet the requirements of the law or regulations should lead to refusal of registration.
- Grounds that can bring about refusal of registration should be listed exhaustively under the law but should not be left to administrative discretions.
- Similarity of names should be limited to names of other charities or societies only.
- More importantly, the Agency should be bound to advise an applicant whose petition has failed to meet the requirements before it passes a binding decision.

Branch of a charity or society – Art.74

The article provides among others that branches can be established based on the rules of charities or societies by giving prior notice to the Agency, the powers of the branch should not make it an independent institution or not adequately under the control of the charity or society, and failure to notify the Agency will bring about criminal liability.

One of the basic rights of civil society organizations is the right to choose their working places. Though the requirement that charities and societies have to notify the Agency when they intend to open branches appears to pose no threat, this, however, raises an issue of necessity. If a charity or society has indicated in its rules that it will have branches, then imposing a duty of notification as well as criminal liability for the same works, will be unjustified. Moreover, the element of the article that shows that this omission will bring about criminal liability and its cross reference to Art. 104 - that talks about income generating activities - suffers from irrelevance and drafting error.

Recommendations

- Opening a branch without notification should lead to administrative sanctions which cannot, however, impose anything except warning.
- The cross reference made under Art. 73 (3) to Art. 104 should read as Art. 103.

Renewal of licenses - Art.77

This article provides that licenses have to be renewed every three years. Moreover, other controversial provisions of the former draft are deleted. This is a very commendable move that needs to be appreciated. It is known that the Agency has the mandate to receive all types of periodic reports and check whether a given charity or society is functioning according to the law. Thus, if it finds out that there is a grave error that demands the cancellation of the license,

the Agency can take appropriate sanctions even without waiting for the time of renewal of license. Accordingly, requiring the renewal of licenses is unnecessary.

Recommendation

Periodic renewal of licenses is an unnecessary burden that serves no legitimate purpose. It should, therefore, be deleted.

Art. 78 – Duty to keep accounting records

One of the duties usually imposed on civil society organizations is the duty to keep accounting records that show their financial transactions. This duty is also found in the laws of other countries. Though the presence of such duties is not per se problematic, it should be noted that there are basic principles that govern this duty. Accordingly, similar duties imposed on other organizations to keep accounting records and the privileges therein should be taken into account. Hence, laws that are enacted with a view to guarantee the right to privacy and constitutional guarantees should equally apply to civil society organizations.

Art. 78 of the Draft law provides for the duty to keep accounting records. Sub Art. 3 of the article provides that "charities and societies may not receive anonymous donations and shall at all times keep records that clearly indicate the identity of donors." Art. 103 on the other hand provides that a charity or society which violates Art. 78 shall be punishable with a fine not less than Birr 10,000 and not exceeding Birr 20,000 and officers and workers who have participated in this act are punishable with a fine not less than Birr 5,000 and not exceeding Birr 10,000 or with simple imprisonment not exceeding five years or both.

It is well known that charitable activities are based on voluntarism and mainly depend on donations procured from individuals and organizations that are willing to help others. Such donors may not be interested in the disclosure of their identities for different reasons and this is normally seen in practice. The Draft law has provided that anonymous donations are not allowed without providing

the reason/s for such limitation. The legality of the works of an organization should be measured from its activities but not its source of income and control should focus on the management and use of money. Forcing charities and societies to disclose the identity of donors will violate the right to privacy of donors and harm their economic interests.

Recommendations

1. The article has to be deleted or alternatively, the sub art. should be amended as follows:
2. Charities and societies shall keep records that clearly show the identity of the donor.
3. If a charity or society receives donations from an anonymous donor, it can make use of the donation by notifying the Agency.

Art. 78/5

This sub article provides that charities and societies have the duty to preserve accounting records for at least five years from the end of the financial year. The same duty is imposed on the last officer of a charity or society that has ceased to exist. This duty is common to laws of different countries as well as the customary practice of certain donor organizations. Thus, it may be said that this legal duty is legally valid.

The provision, however, seems to ignore two basic principles. The duty to preserve records imposed on officers of an organization that have ceased to exist should be seen in light of the individual's right and the expense to be incurred in discharging this obligation. Imposing such a duty on an individual who happens to be an officer of an organization that has ceased to exist violates the human right of the individual.

Recommendation

Sub Article 5 should be amended as follows:

Unless the Agency consents in writing to the records being destroyed or otherwise disposed of, where a charity or society ceases to exist within the period of five years mentioned in Sub article 4 as it applies to any accounting records, the officers shall hand over the records to the Agency.

Annual examination of accounts – Art. 80

Art. 80 of the Draft law provides for the annual examination of accounts. According to this article, accounts have to be examined annually by a certified auditor, or internal auditor an auditor designated by the Agency. It, therefore, appears that the law has three types of auditors and auditing methods in mind. Accordingly, it provides that where the annual gross income of a charity or society preceding the specified budget year is less than Birr 100, 000 the organization shall be audited by an internal auditor. But, if its income is above Birr 100,000 it has to be audited by an external auditor. The third type of audit can be accomplished in either of two ways. One of these is sudden audit to be conducted at any time according to the directives to be issued by the Minister. The second one refers to the situation whereby a charity or society is not audited within the past five months from the end of that year or to be audited by an external auditor the Agency may appoint an auditor. The expenses of any audit carried by an auditor appointed by the Agency shall be paid by the charity or society concerned, or where at fault, by their officers.

It is unquestionable that control over the financial transactions of an organization as well as requiring them to submit audit reports are important prerequisites that ensure accountability. Moreover, the indication of the law that supervisory organs can conduct sudden and mandatory audits is also valid.

The law has, however, ignored certain conditions that should have been taken into account while imposing such a duty. The law should have provided

guarantees against unnecessary intrusions on the liberty of the organizations, when supervisory organs conduct sudden and involuntary audits. Moreover, the conditions that necessitate sudden audits should have been provided in a clear manner and organizations should have been given prior notice within a reasonable period.

The condition mentioned under Sub Art. 4 i.e. “where it appears to the Agency that it is preferable to conduct audit by an external auditor” is subject to interpretation and challenges the liberty of the organizations. Since the law has provided under Sub Art. 3 that the Agency has the power to conduct sudden audits, the requirement provided under Sub Art. 4 that demand sudden audit at the expense of the organization appears to be unnecessary.

Recommendations

- Art. 80/3 should read as follows:

  Notwithstanding Sub article 2 of this article, examination of accounts may be conducted by an external auditor or an auditor designated by the Agency any time and by giving prior notice within a reasonable time according to the directives issued by the Minister, when the Agency had sufficient evidences proving that the charity or society is not conducting its financial affairs according to established rules.

  Art. 80/4 should be amended as follows:

- Where the accounts of a charity or society are not audited within five months from the end of the fiscal year and the officers cannot produce sufficient reasons for this, the Agency may conduct the audit by a designated auditor.

  Art. 80/5 should be amended as follows:

- In accordance with Sub article 4 of this article, the expenses of any audit carried out by an auditor appointed by the Agency shall be paid by the

charity or society concerned. Where the charity or society, however, believes that the officers are at fault for such an omission it may proceed against them in accordance with the civil code.

Power to cause the production of documents and search records -Art. 86

Recommendation

The contents of this article are similar to those of Art. 85. Accordingly, shifting Sub Art.2 to Art. 85 and make it Sub Art. 4 of the latter, can help avoid repetition.

Notification of meetings – Art.87

The article requires that societies shall notify in writing of the time and place of any meeting of the General Assembly of the society not later than seven working days prior to such meeting. This condition is unknown either to any law of any country or international standards issued to this effect. Once individuals have been organized for lawful purposes, they should not be required to notify their meetings. The rights to the freedom of expression, assembly and demonstration that are guaranteed under the Constitution are not subject to prior approval. Since societies are formed for the interest of their members they may call their meetings for several times. They may also be forced to call such meetings within less than seven days. The provision, however, prohibits these and the reason behind such limitation is not clear.

Recommendations

1. The article should be deleted in toto. Or,
2. it should be amended as follows:

Any society shall send to the Agency, copies of the minutes of the meetings of the General Assembly pertaining to administrative matters within ten days.

Disclosure of information – Art.89

This article provides for the disclosure of information which is already covered under Arts.85 and 86. Since Art.85 has already provided for information, the presence of this article seems to be unnecessary.

Recommendations

1. For the sake of avoiding repetition, the article should be deleted as a whole. Or,
2. It should be made Sub article 2 of Art. 85.

Administrative and operational costs – Art.90

This article provides for the percentage of expenses charities and societies shall allocate for administrative purposes. Accordingly, it provides that charities and societies shall allocate 70 percent of the expenses in the budget year for the implementation of their purposes and an amount not exceeding 30 percent for their administrative activities. It is further provided that the government may confer various incentives to a charity or society that allocate more than 80 percent of its total income for its operational purposes. A violation of this also results in criminal liability which is made punishable by fine or imprisonment, per Art. 103.

Though the practice shows that there are many problems of implementation, such controls are also found in the laws of certain countries. The main problem that is faced while implementing such a limitation is failure to take account of the changing nature of organizations. It may appear that allocating 30 percent of one's income to administrative purposes is too much for such organizations that have many branches in addition to their head offices. In contrast to these, those organizations that are engaged in research, those which conduct their operations manly from head offices and those that are newly established will naturally have greater administrative expenses.

In addition to these, it appears that the article is to be applied on those organizations that conduct their businesses with membership contributions only. Certain societies may be established for the sole purpose of protecting the rights of their members conduct their businesses with membership contributions or secure the major part of their income from such sources. Accordingly, an attempt to apply the provisions on such organizations will violate the rights of individuals to dispose of their properties as they see fit. This provision should, therefore, take into account donations secured from individuals, organizations or the government as a result of public solicitations, but not membership contributions.

The definition provided for administrative expenses is circular as a result of which it is difficult to understand the concept. Though, the law has attempted to provide a definition for the phrase “administrative costs” under Art. 2/14, it has not defined what an administrative work is as a result of which it is difficult to understand the article. Since comments are provided on this issue at the beginning of this paper no further comments will be provided here.

Recommendations

The scope of the article should be limited to charities only. Alternatively, if the intention is to extend the application of the article to societies, there should be a distinction between those societies that are established for the benefit of their members and for third parties’ interests and those that get their income from membership contributions and those that get their income from donor organizations, individuals, or government. Accordingly, the article should be amended as follows:

1. Subject to the agreements that it has entered into with its donor organizations or individuals, any charity shall allocate not less than 70% of the donation for the implementation of its purposes and an amount not exceeding 30% of the donation for its administrative activities. Administrative works shall mean those works that have no relevance with

the purpose for which the charity has secured the donation and expended to carry out its daily activities that are required to run its normal operations.

2. Notwithstanding the provisions of Sub Article (1), if a charity is forced to expend more than 30% of its income for administrative activities, it may raise the percentage to 40% after notifying the fact to the Agency and upon the latter's permission.
3. Expending donations given for the purposes of capacity building shall not be considered as an administrative cost.

Protection of property – Art.92

This article pertains to the protection of properties of charities and societies. The measures that the Agency may take when it believes that the properties of a charity or society are not well protected are indicated in the article.

The power given to the Agency to control the properties of charities is a common provision found in the laws of many jurisdictions. Similar powers are exhibited in the international practice. There are, however, two issues that are raised in relation with such power. One of these issues is the duty imposed on the supervisory authority to notify the situation to the trustee???/ governing organ of the organization or society before it takes the measures indicated at Sub Art. 1. Moreover, the Agency should exercise the power only after the officers of the organization have failed to carry out the orders given to them.

The second issue pertains to the measures provided under Sub Art. 2. It is provided therein that the Agency may prevent a charity or society from entering into certain obligations or making certain types of payments or order any person who holds any property on behalf of the charity or society or any debtor not to part with the property or not to pay h is / her debt without the approval of the Agency. This power has the potential to place the very existence of an organization or society under threat, and over extends the Agency's powers so as

to make it a plaintiff as well as a judge in a case. Ordering the non payment of debts, not parting with a given p property and not entering into a contractual relationship is no less than ordering the dissolution of an organization.

In addition to the above, the provision should have made a distinction between charities and organizations that are established for the benefits of their members and depend on their contributions. Accordingly, the provision should be applicable on those charities that are established for the benefit of the public or third parties and collect donations from the public, organizations or government but not on societies that are established for the benefit of their members and depend on membership contributions. Government should not attempt to administer a property that is not donated by it or secured in the name of its citizens.

Recommendations

1. The article should not be applicable on societies. In addition to this, Sub (b) should read as (a).
2. [The Agency] shall notify the appropriate organ so as to take appropriate measures on the officer who failed to readjust the working procedures.
3. If the organ fails to take the measure, the Agency shall petition the Board requesting the suspension of the officers. The Board shall give appropriate decisions after examining the Agency's petition as well as the response of the concerned organization.

Removal and replacement of officers – Art.93

This article provides for the removal of officers that have fallen short of any of the requirements of set forth under Art. 71. The grounds of disqualification to act as an officer are:

1. Conviction of a crime that involves fraud or other crimes that involve dishonest acts;

2. conviction of any crime as a result of which one has been deprived of his/ her civil rights and the rights have not been restored;
3. inability to act by reason of incapacity within the meaning of the law;
4. interdiction by a court; and
5. absence from Ethiopia and when such absence impedes the proper administration of the charity or society.

Setting the standards that enable to screen the skills and loyalty of officers is a valid requirement and Arts. 71 and 93 should be seen in such manner. Special attention should, however, be given to the powers of the Agency on such matters. Accordingly, the Agency's powers should be limited to general supervisions and investigation but not to decide on such matters. The power should also be given to the Director but not to the Agency. If the Director proves that individuals that fall under Art.71 are holding posts of officers it should have the power to order the appropriate organ of the society to rectify the error and in case of failure petition the Board to pass a decision on the issue.

Recommendations

1. [The Agency] shall petition the Board for the removal and replacement of an officer who has failed to meet any one of the requirements of Art. 71.
2. The Director of the Agency may order the suspension of the officer mentioned under Sub Art. 1, till his replacement by another or the Board's ultimate decision.
3. The organization, the society or the officers may lodge their appeals from the decision of the Board, to the Federal High Court.

Suspension and cancellation of license – Art.94

This article provides for the grounds under which the licenses of charities and societies can be suspended or cancelled. Suspension and cancellation of licenses is very vital for the existence of organizations. Accordingly, such major decisions should be left to courts. The practice in many jurisdictions evinces that in such

cases an aggrieved party has the right to appeal to a court of law within a reasonable time. Moreover, the grounds that lead to suspension and cancellation have to be serious and which cannot be rectified. The South African practice in this regard shows that in such cases of differences between societies and administrative organs the dispute is settled through conciliation.

Recommendations

1. The power to decide the suspension or cancellation should be given to the court or the Board.
2. The power to decide on the existence of the situations listed under Sub Art. 2 should be given to the Board, but not the Agency.
3. The organization or the society that is aggrieved by the decision of the Board shall lodge its appeal to the Federal High Court within a month.

Small charities and societies – Art. 98

This article provides for small charities and societies as well as the grounds that can make them small organizations. Accordingly, a charity may be considered as a small charity if its income in its last financial year does not exceed Birr 50,000 and it does not own any immovable property. In light of this, the competent organs of the charity may decide that: all the property of the charity should be transferred or divided to such other charities; the rules of the charity should be modified by replacing all or any of the purposes of the charity with such other purposes, being in law as charitable; amend the rules of the charity regarding procedures that have to be followed by officers to administer the charity; and that any action taken must be passed by two thirds of its trustees or board members.

This provision contains several issues that need attention. First, there is disparity between the title and the body. Though societies are mentioned at the heading, they are not made elements of the article. The body mentions charities only. Second, the fact that trustees or the board is mentioned as the organ to pass decisions evokes an issue of whether the article applies on two types of

organizations only. This is so because, under the law the charities that have such types of bodies of management are, charitable trusts and charitable endowments only. Moreover, the fact that it is provided under Sub.1 that "the competent organs of the charity may decide" and that actions taken must be passed by two thirds of the "trustees" or "board" only, makes the article self contradictory . [*The term <u>only</u> does not appear in the English version*]. In those organizations that have general assemblies, the highest organ is the Assembly but not the Board. The law, however, mentions nothing about those charities or societies that are administered by the General Assembly as their supreme organ.

The third and major issue is the fact that an organization is considered as small depending on its income. Although the annual income of an organization may be less than fifty thousand Birr, its expenses may be in millions. Moreover, an organization though it has no income in a given year it may, however, subsist with the income generated three or four years ago. Thus, the fact that it has failed to generate an income that is less than fifty thousand Birr, should not be taken as a ground to consider it as a small organization.

The other issue that needs to be mentioned in this regard is the small amount of the money indicated therein. Given the economic achievements of the country, the amount should be raised to another minimum.

Recommendations

1. Where the gross income of a charity in its last financial year does not exceed Birr 100,000 and it does not own any immovable property, the competent organs of the charity may decide that:
    a. All the property of the charity should be transferred or divided to such other charities;
    b. The rules of the charity should be modified by replacing all or any of the purposes of the charity with such other purposes, being in law charitable;

c. The rules of the charity regarding the procedures that has to be followed by officers to administer the charity shall be amended.

2. Any action taken under Sub Art. (1) of this article must be passed by two thirds of members of the supreme organs of the organization or the society.
3. The provisions of this article shall apply only upon the prior approval of the Agency.
4. Notwithstanding Sub Article 1 of the article, the Agency may determine that the provisions of Sub Article 1 (a) – (c) be employed.

Penalty – Art.103

This article contains crimes and penalties that are made punishable under the Criminal Code as well as the Draft law. Like other laws, it is provided under Sub Article 1 that violation of the proclamation is punishable. It is, however, provided under Sub Article 2 that violation of the provisions of Arts. 78, 79, 84 and 90 by an organization or society is punishable with a fine of not less than Birr 10,000 or not exceeding Birr 20,000 and repetition can result in dissolution. If the culprit is an officer or a worker, the penalty will be a fine of not less than Birr 5,000 or not exceeding Birr 10,000 or imprisonment for not less than three years and not exceeding five years or both.

The duties mentioned under Arts. 78, 79, 84 and 90 are, the duty to: keep accounting records, submission of annual statements of accounts; notification of bank accounts; and expending more than 30% of one's income for administrative activities, respectively. Failure to observe these duties results in criminal liability of organizations or societies and their officers.

Imposing penalties listed under Art. 103 (1) on charities or societies is not different from that of similar liabilities imposed on any person as a result of which its validity is unquestionable. However, all necessary cares should be

taken so that the organizations or societies should not be exposed to situations that will compel them to repeat the crimes. As indicated under Arts. 78 and 79, the consequence of failure to submit statements of account is provided under Art. 80. It is also indicated under Art. 80 that if a charity or society fails to submit the report in due time, the Agency has the power to audit the account by appointing auditors and that the expenses shall be borne by the organization or its officers. Accordingly, the fact that the charity or society is to be punished under Art. 103(2) for the same act should be seen in light of the seriousness of the punishment.

It is clearly indicated under Art. 94 that failure to comply with the Agency's orders, contravention of the proclamation or regulations or directives issued there under, failure to submit reports in due time shall result in suspension and cancellation of licenses. Thus, the additional punishment provided under Art. 103(3) imposed on the charity or society makes the punishment concurrent and disproportionate.

Recommendation

Art. 103 (2) and (3) should be deleted.

Income generating activities – Art.104

This article provides for prerequisites that need to be met in order to engage in income generating activities. The preconditions and limitations are:

- Securing written approval of the Agency.
- The proceeds shall not be distributed among members or beneficiaries.
- Proceeds shall be used to further the purposes for which the charity or society is established.
- The work has to be incidental to the achievements of the purposes of a given charity or society.
- The charity or society has a duty to keep separate books of account.

- The requirements and procedures laid down in other laws concerning the registration and licensing requirements for activities related to trade, investment or any profit making activities are applicable to charities or societies that engage in income generating activities.

One of the reasons for the enactment of a civil societies' law is to guarantee their rights of engaging in income generating activities. Accordingly, the fact that the Draft law allows charities and societies to engage in income generating activities is commendable. It is highly important for the sustainability and autonomy of such organizations that they should engage in income generating activities and set themselves free from donations dependency and be independent. More importantly, to a law that aims at the total elimination of dependency on foreign donation, it is imperative that it should extend the means of securing income from local sources and encourage charities and societies to engage in such fields.

A look at Art.104, however, evinces that there are several issues that need to be addressed. First, the article, apart from allowing them to engage in income generating activities, does not provide for any special guarantee extended to charities and societies. It is rather focused on control and narrows the possibility of charities and societies to engage in income generating activities. The practice in other jurisdictions shows that the provisions that allow engagement in income generating activities also provide for special guarantees. If the law does not provide for special guarantees, its usefulness is questionable. If charities and societies are registered and have their legal personality, then they have a constitutional right to acquire properties and engage in income generating activities. Accordingly, the Draft law, in addition to reflecting this right has to provide for a special guarantee under which these rights should be exercised.

One of the set preconditions to engage in income generating activities is securing prior approval of the Agency. The necessity of this precondition is very questionable. What is the reason behind securing the prior approval of the

Agency? As far as charities and societies have legal personality and are established to engage in lawful activities, why should they be required to have the prior approval of the Agency in order to engage in any field of their choice that can enable them generate income? Moreover, given the fact that the law provides that charities and societies that intend to engage in income generating activities are to be considered as any other business organization and need to be licensed, it is not clear why they should also have the prior approval of the Agency for the same purpose. This power rather opens the door for the Agency to violate the rights of the organizations to engage in lawful activities of their choice. Furthermore, this exposes the organizations to multiple bureaucratic hurdles. Accordingly, nothing can be gained in securing the prior approval of the Agency without having a special legal benefit and security.

The primary duty of the Agency should have been to control the expenditure of those properties and monies that charities and societies get from income generating activities for the purposes for which they are established. As they are required to notify the Agency, the donations that they have secured from donors and have a prior approval, they should not have been required to have the prior approval of the Agency to engage in income generating activities.

The security given to prohibit the distribution of income of the charity or society among members is valid for this is one of the features that distinguish them from business organizations. Accordingly, prohibiting the distribution of incomes among members is common in the laws of other jurisdictions and therefore valid. The other issue that needs to be considered along with this is the non - transferability of profit among beneficiaries, that is mentioned in the draft. A charity or society may be established with the intention to build the economic capacity of third parties or different sectors of the society. No legal problem will ensue if such an organization engages in an income generating activity with the view to realize this objective and distributes the income derived there from to the beneficiaries. The problem arises if the organization distributes the income

among its members or expends it on other unrelated purposes. Moreover, it is hard to find a country that prohibits the distribution of income among beneficiaries.

The third standard is the one that requires that the proceeds shall be used to further the purposes for which the charity or society is established. It is not clear why the limitation is made part of the law. As far as charities and societies are engaged in lawful activities and not guaranteed any special privilege, they should have been allowed to engage in any beneficial field of their choice. The issue that needs to be taken into account again is that the limitations imposed on the right to engage in income generating activities should focus on the control over the oversight that the charity or society has in fact expended the profit for the purposes for which it is established but not on the types or features of the work. Moreover, the fact that a law that has imposed heavy restrictions on the right of securing foreign donations has again imposed severe prerequisites on the right to secure income from local sources tantamount to restricting charities and societies from any possibility of growth and development.

The other issue relevant to the right to engage in income generating activities is the special legal guarantee/ *security??*? indicated above. It is clearly indicated under Sub Article 4 that there will be a possibility of providing for a special legal guarantee. The practice of many countries, however, shows that charities and societies engaged in income generating activities are exempted from income or profit taxes or both. Thus, providing for limitations that demand the prior approval of the Agency and that the income should be used to further the purposes for which the charity or society is established, without, however, providing for any support in this regard and efforts in registration and securing license, will be unjustifiable.

Recommendations

Art. 104 should be amended as follows:

1. A charity or society may engage in income generating activities the proceeds of which shall not be distributed among the members and that are used to further the purposes for which it is established.
2. A charity or society that undertakes income generating activities shall keep separate books of account with respect to such activities.
3. Where a charity or society is found to have distributed its profits or should it fail to keep separate books of account, the Agency shall take appropriate measures in accordance with Article 94 of this Proclamation.
4. The Council of Ministers shall issue regulations regarding the exemption of income and profit taxes on income generating activities conducted by charities and societies.

Claims and appeals – Art.105

This article provides for: the duty of the Agency to decide on claims within 15 days; an aggrieved party has the right to lodge an appeal to the Board; and that an Ethiopian charity or society, or an Ethiopian with a vested interest has the right to lodge an appeal from the decision of the Board to the Federal High Court within 15 days.

Setting the time limit within which the Agency should decide on claims made to it and establishing a system of administrative and judicial appeals are beneficial. It is known that the law has conferred on the Agency with several powers that includes the power to decide on the very existence of an organization. Accordingly, the right given to lodge an appeal from the decision of the Agency is valid. This article, however, contains within itself, issues that need to be taken into account.

The first and major issue is the discriminatory nature of the article. The article allows the right of appeal to an Ethiopian person, charity or society only. It is

known that Art. 31 of the FDRE Constitution has guaranteed the right to association to everyone without making any distinction between nationals and aliens. Furthermore, the International Covenant on Civil and Political Rights that is ratified by Ethiopia and made part of the law of the land as well as other international human rights instruments ratified by the country prohibit such discriminations. Accordingly, Art.105 (3) of the Draft that has conferred the right to appeal to Ethiopians only should be amended in light of the international human rights conventions ratified by Ethiopia.

The Constitution, while providing for the right to access justice under Art.37, has not made a distinction between nationals and aliens. The fact that the right to access justice is conferred on everyone is a reality that is clearly provided in the Constitution. Accordingly, the prohibition imposed on those organizations that have registered their organizations as foreign organizations for the purpose of getting foreign donations, not to lodge appeals from the decisions of the Agency and the Board to courts or other bodies that are given such powers is unconstitutional.

The fact that appeal is allowed on questions of laws only, is the second issue of concern. Given the fact that the many conditions set in the law and issues that demand judicial decisions are mainly questions of law rather than fact, the restriction placed on the right of appeal to pertain to questions of law only, limits the right to access to justice. The practice of lodging appeals to courts on questions of law only, actually exists in the Ethiopian legal system. Tax and labour issues are cases in point. These bodies that have first instance jurisdiction are, however, quasi judicial organs whose procedures are very similar to that of the formal courts. The Agency and the Board that are given similar powers under the Draft have administrative but not judicial powers.

The third issue that needs to be raised here pertains to the time limits provided to lodge an appeal. The 15 days limit provided to lodge appeals either to the Board

or the court is too short. Given the fact that the time limit in similar civil cases entertained by courts is 60 days, it is not clear why the time under the Draft is shortened. As witnessed in international practices, charities and societies should be given sufficient time to lodge appeals from decisions which they are aggrieved about.

Recommendations

Art.105 should be amended as follows:

1. The Agency (Director) shall decide over the claims made to it in relation to its activities within 15 days.
2. Anyone aggrieved by the decision of the Agency (Director) may appeal to the Board within a month from the date of decision. The Board shall decide on the appeal within 15 days. The decision of the Board shall be a final administrative decision.
3. Anyone who is aggrieved by the decision of the Board may appeal to the Federal High Court within a month from the date of decision.
4. Any charity or society in the process of appeal, where it is in relation to registration or cancellation shall be deemed not registered or cancelled until final decision is rendered by the concerned authority.

Transitional provisions – Art.101

This article provides for the continuation of rights and duties arising under any provision of the repealed laws and the duty of charities and societies that were previously registered to reregister within one year from the coming into effect of the proclamation.

An issue of concern that may be raised in relation to the article is, the one year limit provided under Sub Article 2. Though the sub article provides that those charities and societies that were registered previously should be reregistered within one year, it is silent on whether or not they should complete those works that they begun under the repealed laws. The Prime Minister during the first

consultative meeting has explained that such works can continue for another year, though not under the new law. The provision under the Draft, however, does not contain such an element.

An organization established under the repealed law needs sufficient time to change and reorganize itself. It is also required under the contract that it has entered into, to complete and handover the projects that it has begun, to the government and beneficiaries. Since the previous programs were designed under the legal framework of the repealed laws, it is known that the project may take from three to five years for completion. Accordingly, forcing charities and societies to reregister within one year under the new law, by discontinuing the works that they have begun will hurt not only the charities and societies but also the government, beneficiaries and donors.

The other cause for concern is the capacity of the Agency and sector administrations that will organize themselves after the enactment of the proclamation. Whether they can register and administer the multitudes of current charities and societies within the requirements of the law is questionable. Taking the current practice, the time that it takes to approve a project submitted by a society is not that short.

Recommendations

1. Any right or duty arising under any provision of the repealed laws shall continue unless it contravenes this Proclamation.
2. All charities and societies previously registered shall reregister within three years of the coming into effect of this Proclamation.