

Comments of Ethiopian Civil Society Organisations on the Charities and Societies Draft Proclamation presented by the FDRE Ministry of Justice

(13th May 2008)

A. Introduction

Following the legislation of the Civil Code of 1960 and the Associations Registration Regulation of 1966, no other law has been enacted for quite a long time in Ethiopia that takes into account the development of non-governmental and civil society organisations, their interests and activities, and the level of growth of the sector in general. As the laws issued earlier were outdated and do not reflect the level of development of civil society's institutions, several problems have been encountered in the registration, control and administration of CSOs/NGOs.

Cognisant of this, the Ministry of Justice prepared various drafts of a new legislation concerning the registration and regulation of CSOs/NGOs and presented them for discussion at different times, for example in 2002, 2003, and 2004.

Continuing with this positive tradition, the Ministry launched a forum on 6th May 2008 and invited CSOs/NGOs to its auditorium to discuss the recently issued draft Charities and Societies Proclamation. The aim of this writing is to convey to the government the views of Ethiopian CSOs/NGOs regarding the draft proclamation as well as the concerns raised by government representatives during this discussion.

B. Assumptions and policy rationales of the draft proclamation

His Excellency Ato Assefa Kesito, Minister of Justice, and Ato Abadir Mohamed, one of the drafters, provided an extensive explanation of the aims, policy rationales and underlying assumptions of the draft proclamation. Some of the main policy objectives and rationales of the draft proclamation were:

1. the fact that the current law is outdated and does not correspond to the level of development, characteristics, and activities of civil society in Ethiopia;
2. the regulations currently in force are too cumbersome and unsuitable for registering the organisations, regulating their operations and ensuring their accountability;
3. the need to facilitate for civil society organisations to become development partners of the government;
4. the need to create a conducive environment to enable citizens to exercise their constitutionally guaranteed right to associate;
5. the need to legislate a law that enables to identify illegal activities within the civil society organisations and to penalise the offenders.

Ethiopian non-governmental and civil society organisations believe that the above-mentioned rationales and policy objectives are valid, and for the same reasons, the existing old legislations need to be changed. The organisations also appreciate the

government's initiative and effort in this regard. It is therefore the firm belief of the civil society community that the new legislation should create an enabling environment for citizens to exercise their right to organise, engender the prevalence of accountability and transparency, enable the civil society community to become government partners in enhancing development and democratization processes.

In this regard, it would be more important if the primary objective of the legislation becomes the creation of an enabling environment for CSOs/NGOs, while with respect to ensuring accountability; the priority should be on putting in place a system of self-regulation whereby the institutions themselves will be responsible for controlling and making themselves accountable. In parallel with this, the government's role should be to encourage and build the capacity of the civil society organisations, monitor and provide them support, while in the event of illegal acts committed by any of them, it should take appropriate legal measures in a manner that ensures due process and their institutional autonomy. In other words, the legislation has to maintain a balance between institutional autonomy and accountability. This is a precondition that the legislation must fulfil in accordance with the FDRE constitution and the international instruments ratified by Ethiopia.

We have found that, in its present form, the draft proclamation does not enable the realisation of the above-mentioned objectives and maintain a balance between accountability and autonomy for the following reasons:

1. As can be noted from the best practices of other countries, before issuing a legislation on civil society, it is necessary to formulate a civil society policy that is conducive for the institutional autonomy and operation of civil society, that clearly defines the responsibilities of government organs and civil society, and that puts forward the principles and policy directions which a new legislation needs to follow. Such a policy document will also clearly delineate the benchmarks that the legislation should meet. Civil society laws legislated within this framework should uphold standards set by the constitution and international instruments and best assure the partnership that ought to exist between civil society and government. Therefore, prior to the promulgation of the draft legislation, we strongly request that such a policy be formulated. It is also our firm belief that the policy formulation process should be one that allows the active participation of the civil society community and other stakeholders.
2. Instituting accountability in the institutions of civil society can best be realised primarily not through government control, but through the CSOs/NGOs' internal systems of control and accountability. Accordingly, this can be achieved by vesting in their institutional structures, such as the general assembly, the board and other organs, controlling power, ensuring that their statutes and other bye laws lay down minimum standards that uphold accountability and transparency, monitoring the fulfilment of these yardsticks, and taking commensurate and legal action when these are violated. However, the draft proclamation has tried to ensure accountability by vesting in the Agency considerable control and punitive power which enables it to encroach on the operational independence of the institutions and which entails risks of abuse.
3. In the first place, the primary cause of the problems encountered in the existing regulatory practices is not one of law, but one of implementation and institutional

capacity. Consequently, the first step should have been to identify the operational deficiencies that hamper the CSOs Registration Office from effectively dispensing with its regulatory and monitoring responsibilities in accordance with the existing law, to identify the solutions to address these deficiencies, and to build its institutional capacity accordingly. Once this is accomplished, the gaps in the existing law should have been identified and legal reforms instituted in a manner that does not compromise institutional autonomy and the right to organise. Since this has not been made and as the attempt made was to address implementation problems through legislation, the draft proclamation has accorded to the Agency enormous power that enables it to intrude at will into the internal affairs of the organisations thus putting at risk the organisational independence and the very survival of the institutions.

4. Civil society related legislations are expected to be consistent with the FDRE Constitution, international instruments and agreements ratified by Ethiopia, and development and democracy policies and strategies adopted by the Government. Thus in accordance with the international human rights instruments, the Cotonou Agreement, the African Union Charter, NEPAD and APRM documents, PASDEP and the HIV/AIDS policy, the draft proclamation should be revised to create an enabling environment and enhance the role of civil society organisations in the poverty reduction and development as well as democratisation processes.

In view of the significant contributions made to date by non-governmental and civil society organisations as government partners in the development, poverty reduction, democratisation processes, we expect to see the issuance of a legislation that encourages and enables them towards greater partnership in enhancing development and building good governance. We therefore believe that the draft proclamation needs to be revised to strengthen its positive aspects while removing those provisions that arrest the growth of civil society and undermine their contributions to development and good governance.

C. General comments on the draft proclamation

1. Concerning the dialogue forum

The MoJ-organised discussion on the draft proclamation was conducted three days after the document reached the invited CSOs/NGOs. Consequently, due to the complexity and wide scope of the draft law and the new departures it contains, we were unable to examine the provisions in detail; nor were we able to consult experts in the field within the short time available. While we are grateful to the MoJ for being allowed to present our comments in writing, we would like to express our deep concern at being unable to hold thorough discussions with the wider civil society community within the short time we were given, and that we are hence unable to accommodate their views adequately. Therefore,

- From the point of view being democratic and participatory, and cognisant of the need to involve the wider civil society community in thorough discussions of the draft proclamation;
- Recalling the series of discussions held among the civil society community and between civil society and the government concerning the draft legislations

prepared by the FDRE's Ministry of Justice (2002-2004), and noting that this good practice should be sustained;

- Recognising that the opportunity accorded to the media community for a series of thorough discussions among themselves as well as with government representatives and other stakeholders over the recent draft press and freedom of information law should also be given to the civil society community;
- Recalling that countries such as South Africa that served as models have laws requiring that not only similar draft legislations, but even amendments should be thoroughly discussed by stakeholders before being promulgated, and since this is a good practice we, too, should adopt;

We earnestly request that, before the draft proclamation is referred to the Council of Ministers, we be given sufficient time to launch a series of discussions among the civil society community, and that, as in past precedents, a suitable platform for holding a series of discussions between the drafters and civil society representatives over the specific provisions of the draft legislation be arranged for us.

2. Concerning the positive aspects of the draft proclamation

In spite of the concerns of the NGOs/CSOs over a number of the provisions, they also note that the draft proclamation has several encouraging features, for which they appreciate the MoJ's efforts. These positive features include the following:

- a) *the drafting of a separate legislation focusing on NGOs/CSOs:* as indicated earlier, despite general provisions for charities and associations, the existing legislation does not create an enabling environment for their operations because it was not formulated in such a way as to accommodate the diversity of civil society institutions, their operations, and unique characteristics. The government's initiative to address these gaps was both timely and eagerly anticipated. Another positive feature is the establishment of an Agency to undertake the registration and supervision of civil society organisations and a council to handle issues related to charities and societies. In this context, we would like to underscore the need for the proclamation to recognise charities and societies as key stakeholders. This means making provisions for their representation on the council in sufficient numbers and with a voting power, and putting in place a procedure for the council to supervise the activities of the Agency and address the grievances of the charities and societies.
- b) *The incorporation of specific provisions for different types of NGOs/CSOs:* We appreciate that there are specific provisions about charities and societies. While most indigenous organisations are likely to fall under the category of 'charities' according to the draft proclamation, however, there is only one article (Art. 50) about 'charitable societies'. Further, given that sub-Article 50(2) says that all appropriate provisions of the proclamation concerning charities and societies also apply to the charitable societies, it is not clear which provision will apply to charitable societies when there are different provisions for charities and societies over the same issue (for example, exemption from income tax). On the other hand, the proclamation has several provisions for charitable endowments and trusts which are quite few in number in Ethiopia. Therefore, it would be better if

the section dealing with charities primarily focuses on charities and contains more detailed provisions.

Still, we feel that the charitable purposes enumerated under sub-Article 16(3) fairly reflect the current status of the organisations and cover to a large extent the spheres of engagement of the NGOs and CSOs in Ethiopia. If the field of intervention of NGOs to improve the livelihood of pastoralists is also accommodated in this provision, it would enhance the range of charitable purposes.

Finally, as was done for local charities and societies, it would give the proclamation greater clarity and make its application easier if all the provisions concerning the registration and licensing of charities and societies established abroad are brought together under the same section.

- c) *Making provision for the establishment of consortium of charities or societies:* One of the difficulties encountered under the existing legislation is the lack of a provision for the legal status of CSO/NGO consortia. In this regard, the draft legislation's provision in sub-Article 6(1) for the establishment of such a consortium is one of its main strengths. However, in order to make this provision more comprehensive, the law needs to recognise the right of charities and societies to create consortia not only for coordinating their activities but also for any legal purpose (for instance, for protecting their common interest or promoting a common goal).
- d) *Allowing charities and societies to engage in income generating activities:* We strongly support this measure because it helps charities and societies to strengthen their internal capacity and ensure the sustainability of their activities.
- e) *Exemption from income tax for charities:* this is a positive step that is in line with the service they provide to the public and which enhances their financial capacity. To complete this measure, it is also necessary to provide such an exemption to societies, too, as they also engage in similar operations. Likewise, if charities and societies are also exempted from VAT and customs duty for their imports, the outcome of the support would be even more fruitful.

3. Concerning the provisions of the draft proclamation that need to be amended

3.1 Concerning the Preamble of the draft proclamation

The Preamble needs to be revised in such a manner as to underscore the partnership between civil society and government and recognise their past constructive contributions to the development and democratisation processes. We also believe that creating an enabling legal framework for the operations of civil society organisations should be clearly stated as the main aim of the proclamation. In particular, it is inappropriate that Paragraph 3 of the Preamble negatively portrays the civil society community; it also seems to suggest that the main aim of the draft proclamation is to impose control and penalties. Therefore this Paragraph should be replaced by another one which indicates that the main aim of the proclamation is to put in place a system for the self-regulation, transparency and self-control of civil society.

3.2 Concerning the nationality of NGO/CSO institutions (Art. 2(3))

Sub-Article 2(3) of the draft proclamation provides that charities and societies established by Ethiopians under Ethiopian law are deemed to be foreign institutions solely for receiving more than 10% of their income from external sources. This provision:

- Denies Ethiopian nationality to most indigenous CSOs/NGOs that have been making significant contributions to the development and democratisation processes in the country by utilising funds mostly secured from external sources, and violates their constitutional right to organise;
- Doesn't recognise that the source of income of the institutions has no intrinsic link with citizens' constitutional right to organise;
- When read in conjunction with sub-Article 16(6), it forces most indigenous organisations to abandon their important role in development policy advocacy, promotion of human rights, the democratisation process, conflict resolution, citizenship and social development, in short advocacy of policy and good governance, and since this is harmful to the democratisation and development processes and contrary to the interest of beneficiaries;
- Reverses the direction of development of civil society in Ethiopia (from relief to social service, and from rights-based development to advocacy), and has the negative impact of restricting them to aid and service delivery;
- When read in conjunction with sub-Article 74(1)(e), denies registration and legal personality to most indigenous organisations in Ethiopia that receive over 10% of their income from external sources;
- Denies these local organisations, in accordance with sub-Article 118(3), the right of appeal to court;

We request that this Article be removed and replaced by another article which affirms that any charity or society that is formed in Ethiopia under Ethiopian law shall have an Ethiopian nationality.

3.3 Concerning the sweeping power vested in the Agency which opens way for interference

Since the power assigned to the Agency in the draft proclamation is too wide and allows it to interfere in the operations of civil society institutions, it violates their institutional autonomy and endangers their existence. In view of the broad scope of the Agency's power, one wonders whether the Agency will have the capacity to exercise it. In particular, in view of the fact that the power assigned to the Agency in regard to registration, supervision, and cancellation of licenses is blanket and open to interpretation, it is not amenable to control and could lead to abuse. For example, the grounds that lead to denial of registration and cancellation of licenses in Articles 74 and 105, and the fact that terms such as "in the opinion/belief of the Agency", the society is used "for purposes prejudicial to public peace, welfare or security", contrary to "public or national interest", the name is "undesirable", founders' relations may "in the opinion of the Agency" cause use of fund for personal gain, lack clarity and could lead to

inappropriate actions. These terms need to be clearly defined, in a manner that doesn't restrict rights and that facilitates consistent action.

Since the cancellation/involuntary dissolution of associations is intrinsically linked to the right to organise, this power should be given, not to the Agency, but to the court.

The broad powers assigned to the Agency in Articles 103 and 104 to suspend, remove or appoint officers and employees of charities and societies, on the assumption that there has been mismanagement, create room for the restriction of the right to organise, unwarranted interference in the internal affairs of civil society institutions, and abuse of power by Agency officials. Since the unrestricted power given to the Agency makes it too difficult for its control, it will make the Agency unaccountable. When these provisions are applied to religious institutions, the implication is that the Agency can remove, suspend, or replace the leaders of these institutions, and interfere in the conduct of their affairs. This in turn will be contrary to the constitutional principle that the government shall not interfere in religious affairs.

The extensive investigative power assigned to the Agency to, without a court warrant and valid ground, search the business premises of charities and societies, take away original documents, investigate employees, allow an investigator/police officer to enter the premises and "participate" in meetings, violates the right to privacy of the institutions and their members. Furthermore, the fact that the investigation process is not made subject to fair hearing and due process of the law violates the constitution.

In general, the powers vested in the Agency need to be reduced. The proclamation has to be revised in such a way that the task of ensuring control and accountability shall be primarily accomplished through the internal structures and operational systems of the institutions themselves, and in a manner that facilitates oversight by the Agency. The Agency's investigations have to take into account the autonomy of the institutions under investigation, and their right to privacy, fair hearing and due process. The power to investigate has to focus on matters beyond the capacity of the investigated organisation's executive organs and be confined to examining the reports, launching inquiries in the event of discovery of irregularities, and conducting proper monitoring. It is essential for the proclamation to start from the premise that the institutions will conduct their affairs legally, and that investigative measures as well as sanctions shall be exceptions rather than the norms.

3.4 Concerning the numerous and harsh sanctions

Among the grounds that give the impression that the proclamation gravitates towards control and punitive measures is that it contains too many sanctions (some 26 of them). Although most of the sanctions are administrative, the lack of definition and the fact that the type and level of gravity of these sanctions are not specified, have made the proclamation scary and denied it clarity. Since administrative sanctions are imposed in addition to penalties provided for in the Penal Code, we find that the proclamation violates the legal principle that a person shall not be penalised twice for the same offence. Furthermore, the draft proclamation's provisions that empower the Agency to impose sanctions not only on the institutions but also on the individual members and officers effectively make the Agency to be investigator, prosecutor, judge and executioner, all in one. This practice will not only erode the powers vested in the courts

by the constitution and the criminal procedures, but is contrary to basic principles of constitutional law.

Therefore, the proclamation should provide clear distinctions between light and serious offences, while the sanctions imposed should be proportional to the degree of gravity of the offence and specified clearly. In addition, since several of the offences in the proclamation are provided for in the Penal Code, it is adequate for the proclamation to make references to these provisions. Harsh penalties going beyond fines should also be handled by the courts only.

3.5 the need for issuing other laws for religious institutions and societies with unique characteristics

The treatment of religious institutions under the same provisions as societies, especially the application of the provisions concerning license renewal, control, sanctions equally on these institutions, does not seem to appreciate the unique character of religious institutions as well as the constitutional principle that government shall not interfere in religious affairs. It would therefore be better if a separate law is legislated for the registration and regulation of religious institutions and activities. It is also necessary for this law to take into account the specific nature of the aims, formation, and internal operation of these institutions.

Likewise, it would be difficult to assume that community-based organisations such as *iddirs*, given their structure, capacity, and level of development, would fulfil the modern organisational and operational requirements provided for in the draft proclamation. Therefore, it would be better if a different law that corresponds to their nature and organisational status is legislated.

3.6 Concerning the right to an independent judicial review

Since the decisions that are made by the Agency over matters of registration, control, and cancellation can violate the fundamental right to organise which is recognised in the constitution and international human rights instruments, the proclamation is expected to provide for a fair mechanism of appeal to the court by the institutions and individuals affected by the decision. However, what is provided for in Article 118 is quite different. In the first place, as provided for in sub-Article 118(1), it is only Ethiopian charities and societies that have the right of appeal. When taken in conjunction with sub-Article 2(3), which deems most of the indigenous institutions as “foreign”, it denies them the right to appeal. This in turn curtails the exercise of the right to access to justice guaranteed in Article 37 of the FDRE constitution, including the denial of adequate guarantee to the right to associate which is also recognised in international instruments. It is necessary to note that according to the International Convention on Civil and Political Rights (ICCPR), the right to associate is a fundamental human right and its exercise shall not be subject to discrimination based on nationality.

Secondly, even the right to judicial review accorded to Ethiopian organisations is limited to questions of law. In view of the broad and sweeping powers assigned to the Agency, most of the complaints and issues that may arise will be over questions of facts, rather than errors in law. Therefore, the denial of the right to appeal over issues of facts will nullify the right of appeal provided for in the proclamation. Consequently, the

proclamation should clearly recognise any charity's or society's right to appeal to the Agency and Sector Administrator, the Minister and then to the court.

3.7 Concerning tax exemptions and income generating activities

We believe that recognising the legality of income generating activities and exempting charities from income tax will enable the organisations to build their capacity; these are hence very useful measures. However, while charities are exempted from income tax, it is unjust that societies, which also make no less contributions to democratisation and development, are compelled to pay income tax except on membership contributions. Therefore, this disparity has to be rectified and societies should be equally exempted from paying income tax.

Furthermore, charities and societies should be exempted from VAT and customs duty for imports of goods and equipment necessary for their operations.

While the views presented above are our general comments, our detailed comments on the specific provisions of the draft proclamation are presented as follows.