

Observations on the Draft CSO Law

Kumlachew Dagne

The new draft Charities and Societies Act has become the most topical issue among the Ethiopian civil society, member and non-members of CRDA alike. This comes as no surprise, taking into account the fact that the draft law shows, both in the drafting process and in substance, a radical departure from previous attempts on the part of the Ministry of Justice to come up with a law for the regulation of CSOs/NGOs in Ethiopia.

The current drafting process showed a major deviation from the tradition of continued dialog and consultation between MoJ and CSOs during the preparation of draft CSO laws in the past. Unlike previous processes, CSOs were given a very short time to submit their comments in writing, making a wider consultation of CSOs and legal professionals difficult if not impossible. The Ethiopian Civil Society is still hopeful that the MoJ will, with give an adequate opportunity for continued dialog and constructive engagement on the drafting process.

In terms of substance, the most important change introduced by the draft is regarding the nationality of CSOs. According to Article 2(3) of the draft, a charity/society is deemed Ethiopian if three conditions are fulfilled: it should be formed and controlled by Ethiopians; it must get at least 90% of its assets from Ethiopians and it must be formed in accordance with Ethiopian Law. In other words, any local NGO/CSO will be deemed to be a foreign charity or society if it gets more than 10% of its income from external sources. This has become a major area of concern for Ethiopian CSOs as it drastically changes the status of more than 90 of local NGOs to foreign charities by the mere fact that they are funded by international donors and foreign governments. The effect would be that most local CSOs/NGOS will be prohibited from engaging in development advocacy, human rights, democratic governance and conflict resolution (Article 16(6)). This, as we all know, will cause retrogression in the development of civil society in Ethiopia, which grew from relief and rehabilitation to service delivery and later to development advocacy using the rights based approach. If the draft is passed into a law, most Ethiopian CSOs will be forced to confine themselves to relief and service delivery services, while advocacy CSOs will face a total shut down. The problem becomes worse for societies/associations, as they would have to register abroad should they plan to get more than 10% of their funds from non-Ethiopian/external sources (Article 74(1)(e)). In a country that is in dire need of civic education and empowerment of the poor to achieve sustainable development and democracy, the exclusion of local CSOs from advocacy would only hamper the support for democratic process and undermine partnership between government and civil society in promoting development and good governance.

Another major concern of the NGO/CSO community is that the draft law seems to be skewed towards control and sanctions rather than creating an enabling legal environment for Ethiopian CSOs. This is manifested in the third preambular paragraph which defines the central objective of the draft law as “the prevention of the illegal acts that are perpetrated in the name of serving the society”. It could also be easily discerned from the broad, intrusive and sweeping powers the draft gives the Charities and Societies Agency, as well as the astounding number of punitive provisions (26 of the draft's provisions are dedicated to sanctions). The draft empowers the agency to

suspend, remove or appoint officers and employees of charities and societies (Article 103-104), institute a scheme for the administration of CSOs, or give the charity or society to a caretaker. The agency is also allowed to refuse registration or cancel a charity or society on vague and dubious grounds like “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. By giving vague and broad powers that are prone to abuse, the draft law seems to jeopardize the institutional and operational autonomy of CSOs. While many would agree with the writer there is a visible need to ensure accountability and transparency in the activity of CSOs, it is also clear this should be undertaken without jeopardizing the operational and institutional autonomy of CSOs. International and comparative benchmarks on CSO regulation make it clear that a law drafted to regulate the formation and operation of CSOs should always maintain the delicate balance between independence and accountability. By tilting towards control and sanctions at the expense of the autonomy of CSOs, the draft law seems to have lost the balance between accountability and independence. A better approach to ensuring accountability would have been encouraging and institutionalizing self-regulation in the CSOs themselves by empowering their internal control mechanisms (the general assembly, the board, etc) and by setting procedures and standards of financial and property administration in CSOs which have to be included in their constituting documents.

Likewise, the sanctions for violation of most provisions of the draft seem to be indiscriminate and excessive. 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 vague. Furthermore, the draft empowers the Agency to impose sanctions not only on the institutions but also on the individual members and officers, effectively making the Agency to be investigator, prosecutor, judge and executioner, all in one. To make matters worse, even the standard guarantees of fair hearing and due process have not been put in place, thereby denying accused CSOs and their officers the means to defend themselves in the investigation process. It is submitted that 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 would have been enough to make cross references to the relevant provisions of the Penal code rather than prescribing double penalty for one offence. Harsh penalties going beyond fines should also be handled by the courts only.

The draft also assimilates religious institutions with societies, making them subject to the sweeping and intrusive powers of the agency. This doesn't seem to be consistent with the principle of secularism enshrined under Article 11 of the FDRE Constitution as it allows government interference in the internal management of religious institutions. A better approach would be enacting a different law on the regulation and operation of religious institutions, taking into account the unique and delicate nature of religious institutions which make them different from other CSOs.

Another shortcoming of the draft is that it fails to provide for an effective judicial review of the administrative actions of the agency. Only Ethiopian CSOs are allowed to appeal to court from the decisions of the agency (reviewed by the Minister of Justice), which means all foreign CSOs are not entitled to have the decisions of the agency reviewed by

court. Moreover, appeal to courts is only limited to issues of law, which will only be raised rarely as the majority of complaints on the agency's decisions are bound to focus on issues of fact/findings by the agency than issues of erroneous interpretation of the law.

However, all this does not mean that the draft doesn't have brighter sides. The fact that the Ministry has taken an initiative to draft a new law to regulate the CSOS is by itself a major step forward. Likewise, the Ministry's decision to consult CSOs on the draft needs to be highly appreciated though there is still a need for continued and broadbased dialog on the law. The recognition by the draft of the right of CSOs to engage in income-generating activities and the tax exemption it provides for charities are measures which will, if applied to both societies and charities, greatly help CSOs to sustain themselves financially.

In conclusion, it seems logical to state that the major problem of the draft is more of approach rather than intent. Responsible and vibrant CSOs can only evolve through time with the support and encouragement of the government. The approach should therefore focus on encouraging self regulation and internal capacity building of CSOs rather than trying to 'discipline' CSOs through excessive external control and sanctions. Government cannot legislate a 'responsible' civil society into existence. It can only help it grow.