

**THE ROLE OF CIVIL SOCIETY ORGANISATIONS IN THE REALISATION OF HUMAN RIGHTS IN
AFRICA AND THE EFFECT OF REGULATORY MECHANISMS ON THEIR FUNCTIONS: ETHIOPIA
AND GHANA IN PERSPECTIVE**

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DECLARATION

I, DESSET ABEBE TEFERI, do hereby declare that this research is my original work and that, to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:.....

Date:.....

This dissertation has been submitted for examination with my approval as University Supervisor

Signed.....

This work is dedicated to

...the women who means a world to me, my perfect fan and best part of my life...

Elizabeth Abebe (mom)

and

To Solomon Tesfaye, for all the love and support

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Above all, I am great full to God almighty and his holy mother (Eme brehan), for everything that is and that has been, for each and every single day that passes by with his endless mercy and blessing.

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List of acronyms

AA	Action Aid
ACHPR	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AGR	African Governance Report
APAP	Action Professionals' Association for the People
APPF	African Child Policy Forum
APRM	African Peer Review Mechanism
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Convention on the Elimination of all forms Racial Discrimination
CLPC	Children's Legal Protection Center
CRC	Convention on the Right of Child
CRDA	Christian Relief Development Association
CSOS	Civil Society Organizations
CSP	Charities and Societies Proclamation
DVB	Domestic Violence Bill
ECA	Economic Commission for Africa
EHRCO	Ethiopian Human Right Council
EWLA	Ethiopian Women Lawyers Association

FDRE	Federal Democratic Republic of Ethiopia
GA	General Assembly
HPR	House of Peoples' Representative
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICNL	International Center for Not-for-Profit-Law
NGOs	Non Governmental Organisations
NHRIs	National Human Rights Institutions
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	United Nations Charter
UNCHR	United Nations Commission on Human Rights
UNCT	United Nations Country Team
UNDP	United Nations Development Programme
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review

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Chapter one: Introduction

1.1 Background

It is generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good governance¹

Good governance and human rights are mutually reinforcing.² In turn, 'good governance and good public administration are essential aspects of democracy and for achieving democracy a freely functioning, well organised, vibrant and responsible civil society is indispensable.'³ Democracy presupposes free elections, functioning political parties, independent media and active civil society organisations (CSOs) that can operate freely.⁴ Human rights are better promoted and protected in a democratic system.⁵ Accordingly it is submitted that a measure taken by a government which undermines key elements and role players of such a system tends to undermine the protection and promotion of human rights.

CSOs⁶ play a significant role in keeping democratic processes alive and reinforce good governance especially by their involvement in issues such as human rights advocacy, electoral accountability and transparency of governance.⁷ Across Africa, vibrant CSOs have continued to emerge, a signal that a wind of change is blowing from state-centric big government to people-centered governance.⁸ Different African countries have reacted with different strategies to the growing number

¹ The New Partnership for Africa's Development (NEPAD) Declaration (2001).

² United Nations 'Good governance practices for the protection of human rights' (2007) 1. www.ohchr.org/Documents/Publications/GoodGovernance.pdf (accessed on 26 March 2010).

³ 'Guidance Note of the Secretary General on Democracy, UN Democracy Assistance Areas of UN Focus and Comparative advantage', issued by UN Secretary-General Ban Ki-moon on 11 September 2009. www.un.org/democracyfund/.../UNSG%20Guidance%20Note%20on%20Democracy.pdf (accessed on 20 March 2010).

⁴ Government Offices of Sweden <http://www.regeringen.se/sb/d/573> (accessed on 26 March 2010).

⁵ C Gershman & M Allen 'New threat to freedom: The assault on democracy assistance' (2006) 17:2 *Journal of Democracy* 36.

⁶ In this study the terms Civil Society Organisations (CSOs) and Non Governmental Organisations (NGOs) will be used interchangeably.

⁷ Economic Commission for Africa (ECA) *African Governance Report II* (2009) 132. The African Governance report has been acclaimed as the most comprehensive report on governance in Africa and it focuses on political and economic governance, human rights and the rule of law among other things <https://unp.un.org/Details.aspx?pid=19191> (accessed on 23 August 2010).

⁸ As above.

of non governmental organisations (NGOs).⁹ Some have acknowledged their roles and granted them a wide autonomy to pursue their objectives within the confines of national laws while others adopted stringent laws aimed at impeding their functions.¹⁰

1.2 Problem statement

Just a year before the national election, in February 2009, the Ethiopian House of Peoples' Representative (EHPR) adopted a Proclamation¹¹ which provides for the registration and regulation of charities and societies, the 'Ethiopian Charities and Societies Proclamation No 621/2009' (CSP). The CSP is Ethiopia's first comprehensive law regulating the activities of CSOs.¹² The CSP, contrary to its professed objectives in the Preamble of 'aiding' and 'facilitating', contains direct and indirect restrictions on the work of CSOs,¹³ especially on working on the advancement of human rights and good governance.

On the basis of the amount of funding they receive from foreign sources and the nationality of their members, the Proclamation classifies CSOs into three groups: Ethiopian charities and societies, Ethiopian resident charities and societies and foreign charities and societies.¹⁴ While CSOs obtaining more than ninety percent (90%) of their funding from local sources are classified as 'Ethiopian charities and societies', those getting more than ten percent (10%) of their funding from foreign sources are classified as 'Ethiopian resident charities and societies'. Ethiopian resident charities and societies and foreign charities¹⁵ cannot engage in activities related to advancement of human rights and governance issues.¹⁶ Given the poverty of the nation and the undeveloped culture of philanthropy by local

⁹ As above. Benin is a good example for an African country who actually established a separate institute to promote NGOs and enhance policy dialogue. The institute is named Centre for the Promotion of Associations and NGOs (CPA-ONG). See further in GC Lillehammer *State-NGO relationships in transitional democracies: The case of CPA-ONG-a government centre for the advancement of NGOs in Benin* (2003) 6.

¹⁰ As above.

¹¹ It is referred to as 'Ethiopian Charities and Societies Proclamation No 621/2009.' A legislation passed by the Ethiopian Parliament is known as 'Proclamation' whereas in other countries it might be referred to as 'Act' or 'Bill'.

¹² See Chapter 4, section 4.2.2 of this study.

¹³ Preamble of the CSP.

¹⁴ Art 2(2) (3) (4) of the CSP.

¹⁵ See Chapter 4. Section 4.2.3 of this study.

¹⁶ Art 14(2) of the CSP.

businesses, Ethiopian CSOs are fully dependent on foreign funding.¹⁷ Accordingly the CSP was able to effectively exclude many CSOs working on the area of human rights and governance from operating in the country. For obvious reasons many NGOs in Africa are donor dependent.¹⁸ This has triggered the suspicion of governments towards the function of NGOs as channel for the implementation of donor-driven agendas¹⁹ and in some instances supporters of opposition political parties. This can be inferred from statements made by public officials in Ethiopia before and after the adoption of the CSP.²⁰

Ghana is one of the African countries, in addition to Botswana, Cape Verde, Malawi and Benin, which is commended for providing a considerable degree of operational independence for CSOs according to the 2009 African Governance Report II (AGR), a study covering 35 African counties.²¹ In Ghana the constitutional rule in 1992 opened a larger political space for CSOs and the number of civic associations and NGOs increased considerably.²² Many CSOs are devoted to the protection of human rights and the promotion of democratic governance and played a significant role in the undertaking of periodic elections and other areas related to governance.²³

¹⁷ D Hailegebriel 'Restrictions on foreign funding of civil society: Ethiopia' (2010) 12:3 *International Journal of Not-for-Profit Law* 21.

¹⁸ ECA (n 7 above) 132-133.

¹⁹ This concern seems to be shared by prominent scholars like Shivji who ruthlessly criticises NGOs in Africa for being Trojan horses of neo colonialism. See IG Shivji *Silences in NGO discourse: The role and future of NGOs in Africa* (2007).

²⁰ Center for International Human Rights, Northwestern University School of Law 'Sounding the horn: Ethiopia's civil society law threatens human rights defenders' (2009) 5. www.law.northwestern.edu/humanrights/.../EthiopiaCSOPaper-Nov2009.pdf (accessed on 20 April 2010). This

²¹ ECA (n 7 above) 133.

²² J Ayee 'Assessing the progress of democracy and good governance in Africa: The Ghanaian case' (1998) 12-16. www.my-world-guide.com/.../ghana/Assessing%20the%20Progress%20of%20Democracy%20and%20Good%20 (accessed on 20 April 2010).

²³ As above.

1.3 Research questions

- A) Have civil society organisations played any role in the promotion and protection of human rights in Africa? What is the place of CSOs in the reinforcement of good governance and democratic rule, which are recognised as prerequisites for the protection of human rights?
- B) What are the international rules and principles that should guide regulatory mechanisms adopted by states to regulate CSOs? What role should these mechanisms play?
- C) Do the regulatory mechanisms in Ethiopia and Ghana provide for adequate functional autonomy to enable CSOs play a role in the protection of human rights? Are these regulatory mechanisms in line with principles and guidelines providing for an enabling legal environment for CSOs?

1.4 The place of civil society organisations in ‘civil society’

Despite the fact that the idea of ‘civil society’ has been in existence for the past hundred years,²⁴ with a long history dating back to Hobbes and Hegel,²⁵ assigning a specific definition to the term has proved to be difficult until now. Most writers would agree with Blair that ‘civil society’ inhabits the area between individuals (or families) and the state.²⁶ However in an attempt to find a narrower and workable approach to the term he pointed that the definition of the term should primarily embrace NGOs, which emphasise public rather than private goals or voluntary groups concerned *inter alia* with influencing state policy.²⁷

Ottaway underlines the contribution of multilateral international aid organisations to define the boundaries of civil society and the governments of countries that are recipients of democracy assistance. The former puts it as a requirement that organisations should focus on ‘civic education’ or

²⁴ PI Hajnal *Civils society in the information Age* (2002) 1.

²⁵ H Blair ‘Donors democratisation and civil society’ in D Hulme & M Edwards (eds) *NGOs, states and donors: too close for comfort?* (1997) 24.

²⁶ As above.

²⁷ Blair (n 25 above) 25.

‘advocacy for democratic reform’ so as to fall under ‘civil society’.²⁸ They further add the requirement of some form of formal organisation and registration. On the other hand, governments follow this trend and shape the definition by imposing registration requirements²⁹ and regulating the sector. Ottaway calls these formally organised, professionalized NGOs ‘modern civil society’ as opposed to ‘traditional civil society’ which is composed of an informally organised and loosely structured part of the society.³⁰ It is impossible to deny or overlook the contribution of the actors encompassed in the sphere of ‘traditional civil society’ in deepening democracy and governance in Africa as Orji³¹ argues in his work. However for the purposes of this study, focus will be on those CSOs as portrayed in the definition of ‘modern civil society’. Those CSOs formally regulated by the government.

1.5 Literature review

Blair³² deals with the relationship between donors, democratisation and civil societies. He discussed the role of CSOs in influencing public policy and strengthening democracy and the strategies pursued by donors in supporting the same. However he does not explore the regulatory role of the state. Clark³³ discussed the emergence of NGOs as a critical ingredient of civil society and how they moved from being mere ‘suppliers’ to helping communities in ‘articulating their preferences and concerns so as to become active participants in the development process’ of their respective countries. He goes further and explores state-NGO relationship and various state instruments that could influence the functions of NGOs for better or for worse. According to his view a state stance towards NGOs could be non interventionist, active encouragement, partnership, and co-option or control. Viljoen³⁴ explored the contribution of CSOs to the African regional human rights system. However, he did not discuss in-depth

²⁸ M Ottaway ‘Civil Society’ in P Burnell & V Randall (eds) *Politics in the developing world* (2005) 124.

²⁹ As above.

³⁰ Ottaway (n 28 above) 125-26.

³¹ K Orji ‘Civil society, democracy and good governance in Africa’ 4:1 *Central European University Political Science Journal* 76.

³² Blair (n 25 above) 23-42.

³³ J Clark ‘The state, popular participation and the voluntary sector’ in D Hulme & M Edwards (eds) *NGOs, states and donors: too close for comfort?* (1997) 43-57.

³⁴ F Viljoen *International human rights law in Africa* (2007).

the effect of regulatory mechanisms employed by African states in their role. Steiner and Alston³⁵ devoted a portion to discuss civil society; specifically human rights NGOs and other groups. They discussed their contribution and different factors affecting their work in length and underlined their indispensability in the human rights movement.

1.6 Significance of the study

As a result of the Ethiopian CSO law many CSOs were compelled, either to shut down altogether or revise their missions and objectives. By underlining the role played by CSOs and taking the Ghanaian regulatory framework as an example, this study aims to show the impact of a restrictive legislative and regulative framework. Moreover through consulting international human rights instruments and guidelines developed by different stakeholders, the study will try to show a direction towards enabling legislations regulating CSOs. Since the CSP was introduced only recently a comprehensive literature dealing with its implication on the role played by CSOs in the protection of human rights is scanty. Therefore, this study intends to contribute to filling in this gap with a comprehensive research on the nature and effect of regulatory mechanisms regulating CSOs in other African countries specifically Ghana.

1.7 Methodology

The study seeks to examine the role of CSOs in the protection of human rights and the effect of regulatory mechanisms on their work. In order to achieve these objectives the research will base itself on both primary and secondary sources. Primary sources include international and regional human rights instruments and legislation regulating CSOs in Ethiopia, Ghana and other African countries as required. Secondary sources include books, journals articles, internet sources and other relevant materials.

³⁵ HJ Steiner & P Alston *International human rights in context: law politics morals* (2000).

1.8 Limitation of the study

Given the fact that the CSP was only adopted in January 2009, this study only focuses on events following the adoption of the legislation. The limited amount of time, literature resources written on the subject and maximum word count requirement are factors that limited the scope of the study.

1.9 Overview of chapters

The research will basically have five chapters. This introductory part will form the first chapter. The aim of the second chapter is to discuss the role of CSOs in reinforcing good governance and the protection of human rights. The third chapter will deal with regulatory mechanisms regulating CSOs and the nature and scope of international standards guiding the regulation of the sector. The fourth chapter will attempt to discuss regulatory mechanisms in Ethiopia and Ghana to regulate CSOs. Assessment will be made as to the level of functional independence and the provision of enabling environment for CSOs to achieve their objective in a responsible manner. The fifth chapter contains conclusion and recommendations based on the analysis undertaken in the previous chapters.

Chapter two: The role of civil society organisations in the promotion and protection of human rights

2.1 Introduction

NGOs are a vital part of the overall human rights regime. They contribute significantly to standard setting as well as to the promotion, implementation and enforcement of human right norms.³⁶ They alert duty bearers to live up to agreed standards and empower right holders to demand the same. NGOs all over the world have achieved a lot in their endeavor to promote and protect human right norms and values. In this chapter, an attempt will be made to make a case for the indispensability of NGOs in furthering human right values at every level of society and in particular, at the national level. Moreover, given the fact that human rights are well protected in a democratic system where the principles of good governance are upheld, the role of CSOs in reinforcing these elements will also be discussed.

2.2 Human rights NGOs

Working at the international and national level NGOs function as unofficial ombudsmen safeguarding human rights against governmental infringements...³⁷

According to Wiseberg human rights NGOs are 'those private associations which devote significant resources to the promotion and protection of human rights, which is independent of both government and political groups that seek direct political power...'³⁸ It is also possible to use the term 'human right defenders' interchangeably for such type of NGOs.³⁹

³⁶ Steiner & Alston (n 35 above) 939.

³⁷ DW Broadt & J McCarthy 'Fact finding by international non-governmental human rights organisations' (1981) 22 *Virginia Journal of International Law* 1-2.

³⁸ L Wiseberg 'Protecting human rights activists and NGO's' (1991) 13 *Human Rights Quarterly* 529.

³⁹ 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' General Assembly Resolution 53/144 of 9 December 1998. . The Declaration contains a broad category of actors that could be considered as human right defenders including any person or group of persons working to promote human rights.

Hegarty describes the unprecedented growth in number of NGOs, their number of activities and their influence with governments and international bodies as 'the most striking feature of the human rights field in the latter half of the 20th century.'⁴⁰ Among the different factors which brought about this change were the increased world focus on human right issues and the number of international human rights instruments adopted after the Second World War. The plethora of monitoring mechanisms instituted under the different human right treaties and the space created for the involvement of NGOs explains the prominent feature they have managed to attain in the international human rights arena. The role played by NGOs in the promotion and protection of human rights at different levels of the human rights regime now falls to be discussed.

2.3 Human rights regimes⁴¹

2.3.1 At the international level

The horrors of the Second World War, though not the only factor,⁴² were the most important factor in bringing about the concerted effort in creating a mechanism providing for the protection and promotion of human rights at the international level. Classic international law⁴³ was conceived as those legal norms which regulate relations between states exclusively.⁴⁴ Only states were subjects of international law whereas the relationship between states and their citizens fell exclusively under the domain of the internal jurisdiction of the concerned state. This trend changed with the coming of the United Nations (UN) in to the picture in 1945.

The United Nations Charter (UNC) is significant in the history of international human rights regime. It signified that the rights of human beings were a matter of international concern and no longer

⁴⁰ A Hegarty 'Non-governmental organisations: the key to change' in A Hegarty & S Leonard (eds) *Human rights: An agenda for the 21st century* (1999) 267.

⁴¹ According to Freeman, 'a regime is a set of rules and practices that regulate the conduct of actors in a specified field'. See M Freeman 'Human rights' in Burnell & Randall (eds) (n 28 above) 241.

⁴² As above.

⁴³ Refers to International Law prior to 1945 and the establishment of the UN.

⁴⁴ FG Isa 'International protection of human rights' in FG Isa & KD Feyter (eds) *International protection of human rights: achievements and challenges* (2006) 20.

a matter falling within the exclusive jurisdiction of a state.⁴⁵ It further made the 'respect of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' one of the main purposes of the UN alongside the maintenance of peace and international security.⁴⁶ Based on the UNC the UN and its subsidiary institutions were legally mandated to embark upon a codification of human rights.⁴⁷ Under the UN, the Commission on Human Rights (UNCHR)⁴⁸ was entrusted with the task of developing a document including the most fundamental human rights, along with appropriate mechanisms for their protection⁴⁹ which eventually led to the drafting of the 'Bill of rights' comprised of Universal Declaration of Human Rights (UDHR) first and consequently the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

After UDHR a number of human rights instruments concerning the right of specific groups or specific rights were adopted under the UN human rights system.⁵⁰ The numerous human rights conventions under the framework of the UN led to the creation of a wide range of mechanisms for monitoring compliance with the standards agreed upon. Wiseberg as quoted by Hegarty has described how far NGOs have gone in making themselves indispensable for the human rights mechanisms constituted under the auspicious of UN in the paragraph cited below:

In the human right field, there is widespread acknowledgement that NGOs all but drive the United Nations human rights bodies. Without NGO information... the United Nations special mechanisms and treaty- monitoring bodies, would all but grind to a halt.⁵¹

⁴⁵ P Cumper 'Human rights: history, development and classification' in Hegarty & Leonard (eds) (n 40 above) 4.

⁴⁶ Art 1 of the United Nations Charter (UNC).

⁴⁷ Cumper (n 45 above) 5.

⁴⁸ Currently replaced by UN Human Rights Council through the adoption of a General Assembly resolution (A/RES/60/251) on 15 March 2006.

⁴⁹ FG Isa 'International protection of human rights' in Isa & Feyter (eds) (n 44 above) 32.

⁵⁰ eg Human right instruments concerning the rights of specific groups and specific rights respectively - e.g. Convention on the Rights of the Child, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵¹ A Hegarty 'Non-Governmental Organisations: The key to change' in Hegarty & Leonard (eds) (n 40 above) 276.

Under the international regime there exist two distinctive types of supervisory mechanisms.⁵² The first mechanism is the treaty based mechanism, a supervisory mechanism instituted under legally binding human rights instruments or conventions. These bodies are commonly known as ‘treaty bodies’. The second supervisory mechanism is the non treaty based mechanism which is not based on human rights treaties.⁵³

The supervisory procedures established under the various human rights treaties can be divided into four main groups: reporting procedures, inter-state complaint procedure, individual complaint procedure and inquiries and other procedures.⁵⁴ Among these procedures the two main procedures where NGOs support is indispensable will be discussed below.⁵⁵

A) NGOs and State reporting

Most human rights treaties provide for a system of periodic reporting by which state parties are expected to report periodically to a supervisory body on the implementation, at the domestic level, of the treaty in question.⁵⁶ At the UN level, each treaty body has formulated general guidelines regarding the form and contents of the reports to be submitted by state parties.⁵⁷ States are expected to prepare a report according to the guidelines and submit it to the General Secretary who in turn makes the

⁵² M Sepulveda & T Banning et al *Human rights reference hand book* (2004) 53.

⁵³ This supervisory mechanism is generally based on the Constitution or Charter of an intergovernmental human rights forum, or on decisions taken by the assembly or a representative body of the forum and is mostly known as ‘charter based’ mechanism. See further in Sepulveda & Banning et al (n 52 above).

⁵⁴ As above.

⁵⁵ In the individual complaint procedure the role of NGO is limited since most of the current procedures do not allow NGOs to lodge complaints unless they themselves are victims of violation or they are authorized representative of the victim. See R Brett ‘Role of NGOs-An overview’ in G Alfredsson (eds) *International human rights monitoring mechanisms: essays in honour of Jakob Th. Mölle* (2001) 851.

⁵⁶ For instance Art 40 of the ICCPR, states parties shall ‘submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights’. (All the core UN human rights conventions contain a reporting procedure, including: Art 16 ICESCR, Art 40 ICCPR, Art 9 CERD, Art 19 CAT, Art 44 CRC, Art 18 CEDAW).

⁵⁷ UN Doc HRI/GEN/2/Rev.2.

reports available to the relevant treaty body.⁵⁸ The report is analysed by the relevant supervisory body, which comments on the report and may request the state concerned to furnish more information.

According to Quashigah 'state reporting is a means of ensuring the observance of human rights at the international level as well as, ensuring a government's accountability to its own people and the international community.'⁵⁹ Similarly Lekie quoted by Cofie asserted that 'the analysis of state reports remains the most important means of monitoring compliance with international human rights instruments at the national level.'⁶⁰

For many reasons the quality of reports submitted by states is very diverse. Some states, either for lack of financial capacity or political will submit reports that do not comply with the treaty reporting guidelines or that hardly reflects the domestic human rights situation.⁶¹ Other states follow the guidelines and try to give a full picture of the situation on the ground and justify the gaps created in the protection of rights. Accordingly the authenticity of reports submitted by states is highly dependent on the seriousness of the state in complying with its treaty reporting obligation and its understanding of the benefit of the treaty reporting system.

The treaty reporting process, for legitimate reasons, is not owned only by states and treaty bodies receive additional information from other sources including NGOs, intergovernmental organisations, academic institutions and UN agencies.⁶² The final outcome and the quality of Concluding Recommendations made by treaty bodies depends heavily on this additional information gathered from other sources.⁶³ These reports have the objective of counter balancing the information submitted by states to treaty bodies.

⁵⁸ K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 269.

⁵⁹ Quashigah (n 58 above) 261.

⁶⁰ Quashigah (n 58 above) 266.

⁶¹ Brett (n 55 above) 849.

⁶² FD Gaer 'Reality check: Human rights NGOs confront Governments at the UN' in TG Weiss & L Gordenker (eds) *NGOs, the UN, and global governance* (1996) 56.

⁶³ This additional information provided by NGOs is known as 'parallel' or 'shadow' report.

B) UN Special mechanisms and NGOs

Established by the UN Human Rights Council (UNHRC) for human rights monitoring,⁶⁴ the UN special mechanisms are divided into two broad categories that is to say 'country specific' and 'thematic rapporteurs'.⁶⁵ Through these mechanisms concerns of specific issues or areas are focused on.⁶⁶ Though the mandate of special procedures mechanisms may vary it is usually organised around activities such as 'sending communications on alleged violations of human rights, submission of thematic report to the UNHRC and undertaking of country visits.'⁶⁷ NGOs play a crucial role in this mechanism both by triggering the attention of the special rapportures towards a violation of some kind as an early warning system or by provision of facts.

The role played by NGOs under the treaty based monitoring mechanism is different from the one they play under the special monitoring mechanisms. Under the treaty based mechanism NGOs take part on an informal basis and the information they provide do not have formal status.⁶⁸ However under the UN special mechanisms they are included in the processes in that they are authorised by the resolutions establishing the mechanisms⁶⁹ as a source of information.

C) NGOs and Universal Periodic Review

The Universal Periodic Review (UPR) is a mechanism established under the General Assembly Resolution 60/251 of 15 March 2006.⁷⁰ Under the UPR process a state is assessed on the basis of the UN Charter, the UDHR, and human rights instrument ratified by the state (for example ICCPR, ICESCR), applicable

⁶⁴ N Rodley 'United Nations human rights treaty bodies and special procedures of the Commission on Human Rights: complementarity or competition?' (2003) 25 *Human Rights Quarterly* 882.

⁶⁵ Viljoen (n 34 above) 66.

⁶⁶ The main focus of the thematic special procedures is the provision of UN members, information as to problem areas in the protection of human rights as well as guidance on how to solve these problems.

⁶⁷ Rodley (n 64 above) 883.

⁶⁸ Rodley (n 64 above) 890.

⁶⁹ Rodley (n 64 above) 892. See eg summary of arbitrary executions, E.S.C. Res. 1982/34, U.N. ESCOR, 64th plenary meeting, U.N. Doc. E/RES/1982/34 (1982), which, on the recommendation of the UNCHR, established the mandate of the special Rapporteur to seek and receive information from governments and international governmental and NGOs.

⁷⁰ UPR is a unique and innovative system which was set up with the objective of reviewing all 192 members of the UN with regard to the implementation of their human rights obligations and commitments.

international humanitarian law and other commitments and voluntary pledges made by the state.⁷¹ This system is unique in that 47 member states of the UNHRC will undertake the review and all member states of the UN will go through the process making the UPR truly universal.⁷²

The UNHRC considers written submissions from 3 different sources; the state under review, the UN human rights system compiled by Office of the High Commissioner for Human Rights (OHCHR) from treaty bodies and special procedures and OHCHR compilation from other stakeholders like NGOs, other civil societies and National Human Rights Institutions (NHRIs).⁷³ Accordingly, NGOs play a role similar to that which they play in the treaty reporting process by preparing written submissions on points that are contemporary human rights concerns and make recommendations as to the necessary steps to be taken by the government in order to address these issues. Though NGOs have a limited role during the review and the deliberative discussions (since the right to speak is limited to states and Special Observers), their presence is significant in keeping a 'watch' on the government under review.⁷⁴

2.3.2 At the Regional level

...recognizing the contribution made by African non-governmental organisations (NGOs) to the promotion and protection of human rights in Africa...⁷⁵

At the regional level the most relevant human rights regime for the purpose of this study would be the African regional human rights system. The African regional human rights system was developed under the auspices of the Organisation of African Unity (OAU).⁷⁶ The central document of the African regional human rights system is the African Charter on Human and Peoples' Rights (ACHPR) which also constitutes its sole supervisory body the African Commission on Human and Peoples' Rights (the

⁷¹ Resolution 60/251 of 15 March 2006.

⁷² 'A Guide to the Universal Periodic Review Process for NGOs and NHRIs' www.iwraw-ap.org/aboutus/documents/factsheetupr.pdf (accessed on 13 September 2010).

⁷³ 'The Universal Periodic Review Handbook' (2009) 2. www.fidh.org/IMG/pdf/UPR_HANDBOOK.pdf-United States (accessed on 13 September 2010).

⁷⁴ As above.

⁷⁵ Grand Bay (Mauritius) Declaration and Plan of Action, the first OAU Ministerial Conference on Human Rights. (April 1999).

⁷⁶ Now transformed into African Union (AU) in 2001. C Heyns & M Killander 'The African regional human rights system' in Isa & Feyter (eds) (n 44 above) 509.

Commission).⁷⁷ NGOs have proved to be a significant role player in the African regional human rights system starting from the drafting of the ACHPR to consolidating its supervisory body.⁷⁸

The mandate of the Commission as stated out under Article 30 of the ACHPR is promoting human and peoples' rights and ensuring their protection in Africa.⁷⁹ The state reporting mechanism set out under Article 62 of ACHPR is one of the most important monitoring mechanisms to enable the Commission to carry out its mandate.⁸⁰

CSOs play a significant role in the state reporting process. Since most states lack honest self-reflection or introspection⁸¹ CSOs are indispensable as a source of supplementary information about the status of human rights in the state under review. The role of NGOs is not only limited to the submission of parallel reports or participation in the preparation of state reports. NGOs are also instrumental in following up on whether the government is taking measures to implement the recommendations given by the Commission. Taking into account the fact that the Commission is logistically limited to monitor compliance by states of its recommendations, this role of NGOs remains indispensable if the monitoring mechanism is to work meaningfully.⁸²

Though not provided under the ACHPR the Commission has been innovative in establishing new monitoring mechanisms such as the appointment of special rapporteurs under the thematic areas of focus or specific regions, and setting up a working group.⁸³ NGOs contribute significantly to the set up and proper functioning of these mechanisms.⁸⁴

⁷⁷ Art 30 of the African Charter on Human and Peoples' Rights (ACHPR) (1981/1986).

⁷⁸ Viljoen (n 34 above) 407.

⁷⁹ As above.

⁸⁰ Viljoen emphasized the examination of reports by the state as 'the core of the commission's promotional mandate' see in Viljoen (n 34 above) 368.

⁸¹ Viljoen (n 34 above) 381.

⁸² Quashigah (n 58 above) 641.

⁸³ Heyns & Killander (n 76 above) 529.

⁸⁴ R Murray 'The African Charter on Human and Peoples' Rights 1987-2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 5. eg It was the result of NGOs lobbying that prompted the Commission to appoint Special

NGOs are entitled to apply for an observer status⁸⁵ before the Commission and those NGOs who get the status make statements during its sessions.⁸⁶ NGOs use several ways to lobby for the protection of human rights in Africa in general and in their countries during their presence in the sessions of the Commission. Especially NGOs with observer status at the Commission can inform the Commissioners of the human rights situation in a country through an oral statement at a public session. NGOs make a statement that gives an overview of human rights violations, related to the item under discussion and make recommendations to the States concerned and the Commission. NGOs also collaborate with the Commission in developing normative resolutions and new protocols to the ACHPR⁸⁷ and other human rights instruments.⁸⁸

A) NGOs and African Peer Review Mechanism

The African Peer Review Mechanism (APRM) is the result of New Partnership for Africa's Development (NEPAD) effort to improve governance in Africa.⁸⁹ It is a voluntary self-monitoring mechanism by which AU member state avail themselves for review. The overall purpose is to improve the governance of African states which includes as well improvements of their commitment to human rights. The country under review first assesses itself by means of standard questionnaires.⁹⁰

The APRM is aimed to be a multidimensional process involving several actors within the country under review including organisations and individuals. The process has been termed as an extraordinary panel for it provides an opportunity for CSOs and businesses to contribute to policy making.⁹¹ Turianskyi asserts that for the APRM process to be fair, impartial and as a result credible, the involvement of CSOs

Rapporteurs on Prisons and other Conditions of Detention, on Summary, Arbitrary and Extrajudicial Executions and on the rights of Women.

⁸⁵ For more information on observer status refer Viljoen (n 34 above) 408-11.

⁸⁶ Murray (n 84 above) 5.

⁸⁷ Heyns & Killander (n 76 above) 530.

⁸⁸ NGOs played a significant role in the adoption of the declaration of the Pretoria seminar on social, economic and cultural rights in Africa. See Viljoen (n 36 above) 417.

⁸⁹ R Herbert & S Gruzd *The African peer review mechanism: lessons from the pioneers* (2008) 5.

⁹⁰ Herbert & Gruzd (n 89 above) 5.

⁹¹ Herbert & Gruzd (n 89 above) 6.

is vital.⁹² According to Turianskyi only if the story from both sides, government and civil society, is presented and reviewed by the team conducting the review, is the real situation in the country can be discovered and the final report will show the real quality of governance in the country.

2.3.3 At the national level

It is domestic NGOs that often call governments ‘to account and compel reconsideration of policies and programmes that have been designed in disregard or violation of human right norms.’⁹³ They serve as a voice for the voiceless, for the marginalised and disempowered. They take collective action on their behalf and fight for their rights.⁹⁴ CSOs undertake the task of ensuring that the government delivers the pledge contained in the Bill of rights section of the national Constitution or in other subsidiary legislation.

In order to attain this objective they use different mechanism ranging from litigation before the national courts through the scheme of public interest litigation to a pure promotional work through human rights education. Under the following section discussion will be made on selected areas of contribution made by CSOs at the national level.

⁹² Y Turianskyi ‘A critical analysis of the African Peer Review Mechanism as a standard for ‘good governance’’ unpublished Degree of Magister Atrium (political science) University of Pretoria 2008, 21.

⁹³ Steiner & Alston (n 35 above) 941.

⁹⁴ H Zafarullah & MH Rahman ‘Human rights, civil society and nongovernmental organisations: the nexus in Bangladesh’ (2002) 24:3 *Human Rights Quarterly* 1012.

A) Human rights education

The World Conference on Human Rights recognizes the important role of non-governmental organisations in the promotion of all human rights...at national, regional and international levels...appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training and research in this field, and to the promotion and protection of all human rights and fundamental freedoms.⁹⁵

The phrase 'human rights education' is more often used to refer to the content of education to develop a substantive knowledge and understanding of human rights.⁹⁶ At the start of the UN Decade for Human Rights Education,⁹⁷ the General Assembly (GA) defined 'human rights education' as⁹⁸

a comprehensive, life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies.

Member states of the UN have long committed themselves 'to promote and achieve universal respect for, and observance of human rights and fundamental freedoms' through the UNC. The UDHR elaborates on this commitment and vested the duty on 'every individual and organ of the society to... strive by teaching and education to promote the rights and freedom' enshrined therein.⁹⁹ Most international human rights instruments include sections on the obligation of states to educate their citizens on human rights principles.¹⁰⁰ This is because knowledge of rights is the gate to their protection. It is only when a person knows his/her rights that he/she demands for their respect and seek for a remedy upon violation.

⁹⁵ Vienna Declaration and Plan of Action from the 1993 World Conference on Human Rights, General Assembly Resolution 49/30 (December 1994) para 38.

⁹⁶ N Horn 'Human rights education in Africa' (2010) 54.

www.kas.de/upload/.../namibia/Human_Rights_in_Africa/3_Horn.pdf (accessed on 13 September 2010).

⁹⁷ From 1995-2004, a UN initiative to the promotion of human rights education at the universal level. For more information See www2.ohchr.org/english/issues/education/.../decade.htm -(accessed on 13 September 2010).

⁹⁸ F Tibbitts & IA Rehaman 'The Role of Human Rights Education in the Process of Global Social Change' (2003) 1. www.equitas.org/english/programs/downloads/ihrtp.../Ippoliti-1-Ang.pdf (accessed on September 13 2003).

⁹⁹ Preamble, Universal Declaration on Human Rights.

¹⁰⁰ Moreover, Vienna Declaration and Program of Action reiterated the important role played by education on human rights and the dissemination of proper information in the protection of human rights. See Vienna declaration and programme of action (n 95 above) para 33.

States bear the principal responsibility both in the provision of human rights education to their people and facilitate the provision of the same by other actors. An oppressive state has an interest in sabotaging human rights education since empowering citizens brings a backlash effect and places the government under scrutiny. Rather than lack of capacity or difficulty in other technical matters, lack of political will presents itself as a great obstacle for the low attention given to human right education in Africa.¹⁰¹ NGOs proved to be very instrumental in filling this gap to the extent that some scholars described the contribution of NGOs as ‘the only possible way of overcoming government apathy and lack of commitment’ towards the advancement of human rights education.¹⁰² According to Horn, NGOs are in the forefront of human rights education and in fact did better in covering issues which were not addressed by African governments.¹⁰³

B) Human rights advocacy

Over the years NGOs have changed their strategy from a pure service provision to advocacy.¹⁰⁴ This came about as a result of the realisation that mere service delivery does not bring a significant change in the lives of the underprivileged people they aim to support. Through advocacy the poor and the disadvantaged groups are given the ‘tools to influence public policies and implementation practices, to challenge the status quo by addressing social injustice issues and structural causes of inequality.’¹⁰⁵

NGOs undertake research on problem areas and identify gaps in laws and policies of states. Based on the outcome of the research they make recommendations on measures that should be adopted. These recommendations might take the form of lobbying the government to adopt policy measures to alleviate the problem or to enact legislation to address a specific issue. CSOs operate on the

¹⁰¹ The effort of some African governments to stifle the role of CSOs in the advancement of human rights supports this assertion.

¹⁰² N Rosemann ‘Human rights education towards the end of the UN decade’ (2003) 4 *Nordic Journal of Human rights* 6.

¹⁰³ Horn (n 96 above) 69.

¹⁰⁴ Commonly the term advocacy is defined as a process where individuals and organisations try to influence public policies – and their practices – through the strategic use of information to democratize unequal power relations.

¹⁰⁵ MI Camerer ‘Civil society, state and democracy’ unpublished M.Phil thesis, University of Stellenbosch, 1994 36.

basis of different mandates, each responding to its own priorities and methods of action.¹⁰⁶ CSOs initiated and promoted policy dialogues in various areas and succeeded in making the rights of women, children, pastoralists, people with disabilities and other vulnerable groups', policy issues at the national level.¹⁰⁷

An increasing number of CSOs take part in provision of free legal aid service which is crucial to access to justice. In most African countries the government has both capacity and efficiency limitations to provide for legal aid for those who are in need of it. Accordingly most NGOs work to alleviate this problem by engaging in projects specifically aimed at the provision of free legal aid to vulnerable groups, counseling and representation before courts.

2.4 The nexus between human rights and democracy

Before embarking upon showing the relation between democratic governance and the protection of human rights, conceptualizing the notion of democracy or democratic governance is only appropriate. Albeit the different meaning and definition given to the term at different times of history and in different societies, all forms of democracy is based to some extent on the original Greek notion of *demokratia*, that is, 'government by the people' from the words *demos* (people) and *kratos* 'rule or power'.¹⁰⁸ The definition adopted by Vienna Declaration represents the modern conception of the term that reflects the original Greek notion of democracy.

...democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.¹⁰⁹

¹⁰⁶ Steiner & Alston (n 35 above) 938.

¹⁰⁷ D Rahmato & A Bantirgu et al 'CSOs/NGOs in Ethiopia partners in development and good governance' (2008) 88. www.pane.org.et/.../Report%20on%20CSOs-NGO%20Ethiopia%20Partners%20Development.pdf (accessed on September 13, 2010).

¹⁰⁸ JA Scholte 'Civil society and democracy in global governance' (2002) 8 *Global Governance* 645.

¹⁰⁹ Vienna Declaration and Plan of Action (n 95 above).

Despite the different form it might take, a common trend runs in any democracy. Democratic governance is participatory, consultative, transparent, and publicly accountable. By one mechanism or another, democratic governance rests on the consent of the governed.’¹¹⁰

It is submitted that the recognition and exercise by people of their right to take part in the governance of the country is premised on ‘the central principle of equality of all human beings.’ The exercise of this right requires the guarantee of all the fundamental rights and freedoms such as freedom of expression, association, the right to seek and receive information. In turn the aim of democracy, like all of human rights, is ‘to uphold the dignity of every individual and to ensure that the voices of the weakest are also heard.’¹¹¹

2.4.1 The role of CSOs in promoting democratic governance

It is impossible to think about democracy without elections.¹¹² According to Henwood, election is not only important as a means to elect those who govern but also it confers legitimacy, that is, ‘the legal right to govern and the political right to take decisions that can be enforced’ before the electorate.¹¹³

In a democracy, the elected government must accurately reflect the popular will to enjoy any legitimacy. This means that the election must be free and fair.¹¹⁴ In addition to being free and fair, elections have to be done periodically. CSOs contribute significantly to this vital element of democracy. They usually undertake the task of voters’ education to sensitize and mobilize the public to participate in elections. They organise fora for debate among contending parties to ensure access to information to the public on the programmes.

¹¹⁰ Scholte (n 108 above) 645.

¹¹¹ ‘UNIT 2: The importance of human rights to democracy, governance and development’. www.parliamentarystrengthening.org/humanrightsmodule/.../humanrightunit2.pdf - (accessed on 22 September 2010).

¹¹² WB Teshome ‘Electoral violence in Africa: experience from Ethiopia’ (2009) 3 *International Journal of Humanities and Social Sciences* 176.

¹¹³ R Henwood ‘Democracy and elections in Africa: A critical perspective’ (2010) 3. Department of Political Sciences, University of Pretoria.

¹¹⁴ M Steytler & R De Vos *Free and Fair Elections* (1994) xxi.

CSOs play a significant role in promoting and consolidating democracy by educating and socializing citizens in a democratic system and by being a 'critical vigilant resistance to the state' and make sure that it remains accountable to its citizens.¹¹⁵ CSOs together with other stakeholders act as 'watchdog' over a state and the possible abuse of power and limitation of state power.¹¹⁶ They support the process of democratisation by organising and empowering the marginalised section of the community and prompt them to engage in the process of government as citizens.¹¹⁷ After their contribution in elections which is indispensable to establish democracy, CSOs continue to engage in an element which is essential in consolidating democratic system, good governance.

2.5 The role of NGOs in promoting good governance

Transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a *sine qua non* for the promotion of human rights.¹¹⁸

The above statement which underlines the nexus between human rights and good governance was stated in the April 2000 resolution passed by the UNCHR.¹¹⁹ Good governance promotes human rights in a number of ways. It encourages public participation in government, inclusion in law-making and policymaking, and accountability of elected and appointed officials. It enables civil society to become actively involved in policymaking and leads to the wide representation of societal interests in decision-making. In this manner, disadvantaged groups, including women and minorities, are empowered to defend their rights. The result may be laws and policies that better respect cultural diversity, contribute to the resolution of social conflicts and tensions, and address the challenges of inequality and

¹¹⁵ Camerer (n 105 above) 58.

¹¹⁶ Report on Wilton Park Conference S06/10 'Strengthening democratic governance: The role of civil society' (14 June 2006) 5 www.innovations.harvard.edu/download- doc.html?id=15417 (accessed on 13 September 2010).

¹¹⁷ P Kilby 'Non governmental organizations and accountability in an era of global anxiety' (2004) 5 *Seton Hall Journal of Diplomacy and International Relations* 68.

¹¹⁸ 'The role of good governance in the promotion of human rights', U.N.C.H.R. Res 2000/64, UN Doc. E/CN.4/RES/2000/64 (2000).

¹¹⁹ LC Reif *The ombudsman, good governance, and the international human rights system* (2004) 70.

poverty.¹²⁰ According to Pasha, civil society, and CSOs as the most influential and organised part of civil society, can further good governance through several mechanisms including policy analysis and advocacy and regulation and monitoring of state performance and the action and behavior of public officials.¹²¹

2.6 Conclusion

To conclude, CSOs are indispensable in the protection and promotion of human rights, both at the national and international level. Not only do they play a vital role in the direct protection and promotion of human rights, they also take part in facilitating conducive environment for the protection of human rights by taking part in democratisation and governance issues of their country. However their contribution can highly be affected by the environment they engage in. The next chapter will explore the nature of regulatory mechanisms states employ and its effect on the existence and the effectiveness of CSOs.

¹²⁰ OHCHR 'Good governance practices for the protection of human rights' (2007) 9
www.ohchr.org/Documents/Publications/GoodGovernance.pdf (accessed on 13 September 2010).

¹²¹ A Ghaus-Pasha 'Role Of Civil Society Organizations In Governance' 6th Global Forum on Reinventing Government' (2005) 5.
unpan1.un.org/intradoc/groups/public/.../un/unpan026997.pdf – (accessed on 13 September 2010).

Chapter three: Regulatory mechanisms and their effect on the work of CSOs: To foster or to tamper?

3.1 Introduction

In chapter two, an attempt was made to show the significant roles played by CSOs. Both the effectiveness and the scope of this role can highly be affected by the nature of the regulatory environment with in which they operate. In other words, the regulatory approach followed by a state could either foster or tamper with the work of CSOs. The obligation of states to provide for an enabling environment stems from their pledge made under international and regional human right instruments and their respective national constitutions. Accordingly, it is submitted that any regulatory measure undertaken by a state should be juxtaposed to and scrutinised against these obligations.

In this chapter attempt will be made to outline the scope of obligations of states in providing enabling environment for the function of CSOs. Moreover given the fact that a growing number of states are adopting regulatory mechanisms (through legislation or policy measures) that purport to stifle CSOs an attempt will be made to give a picture of what a 'good law' should provide by focusing on the most frequently used barriers that the majority of states employ.¹²²

¹²² This will be undertaken by importing guiding principles from the following guidelines and principles on laws pertaining NGOs developed by different stakeholders including international NGOs, UN agencies and intergovernmental organisations. These guidelines were developed based on best practices all over the world pertaining NGO laws.

- a. D Moore & D Rutzen 'The role of legal reform in supporting civil society: An introductory primer' developed in cooperation between International Center for Not-for-Profit Law (ICNL) and United Nations Development Programme (UNDP) (2009). www.icnl.org/knowledge/pubs/UNDP%20ICNL%20Primer.pdf (accessed on 27 October 2010).
- b. Principles developed in collaboration with ICNL & World Movement for Democracy in 'Defending civil society: a report of the world movement for democracy' www.wmd.org/.../Defending%20Civil%20Society%20-%20English.pdf (accessed on 18 October 2010).
- c. As above (similar source in a journal form) ICNL & World Movement for Democracy 'Defending Civil Society' (2008)10:2 *International Journal of Not-for-Profit* 30.
- d. Note Outlining Key Guiding Principles of Freedom of Association With An Emphasis on Non-Governmental Organizations :- principles developed by Organization for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR)

<http://www.legislationline.org/upload/lawreviews/46/a8/24ea8fac61f2ba6514e5d38af6b2.pdf> (accessed on 18 October 2010).

Though formally organised CSOs are the focus of this study, it should be noted that the right to freedom of association is also enjoyed by informally associated groups who do not possess legal personality.¹²³ Accordingly, the right is not dependent on registration or legal personality of the group or entity. It is always implicated when a gathering has been formed with the object of pursuing certain aims and has a degree of formal structure.¹²⁴

3.2 The duty to protect

Though there are many factors that might influence the health, vibrancy and sustainability of CSOs, the direct impact of the legal framework under which they operate is indisputable.¹²⁵ The primary aim of legislation to provide for the regulation of CSOs should be to ensure and protect rights and fundamental freedoms enshrined in the different international and regional human rights treaties and individual constitutions.¹²⁶

CSOs are founded on the principle that citizens have the right to associate freely.¹²⁷ Accordingly the most relevant right and fundamental freedom for the purpose of establishing a CSO is the right to freedom of association. Other rights such as the right to freedom of expression and assembly are indispensable in guaranteeing a healthy working environment for CSOs. However in the course of this study, the discussion is focused on the right to freedom of association and the other two rights will be referred to in passing and only as a matter of necessity.

3.2.1 State responsibilities at the international level

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- e. LE Irish & R Kushen et al *Guidelines for laws affecting civic organisations* (2004.) (referred as 'guidelines' in the text of the study).

¹²³ In most countries CBOs function on behalf of their members without the need to register.

¹²⁴ ICNL & World Movement for Democracy (n 122 (c) above) 57.

¹²⁵ Moore & Rutzen (n 122 above) 23.

¹²⁶ 'The Non-Governmental Organizations Registration (Amendment) Bill 2001: A Challenge to Constitutional Guarantees and the Democratization process in Uganda, A response by the coalition on the NGO Bill (CONOB) to the draft report of the committee on defense and internal affairs (2005) 3 *International journal of civil society law* 2.8

¹²⁷ M Wyatt *The central and eastern European working group on non profit governance: - A handbook of NGO governance* (2004) 1.

The right to freedom of association is guaranteed under core UN human rights treaties. Article 20 of the UDHR¹²⁸ guarantees not only the positive right to form and join associations, but also the right to exercise one's choice in a negative manner i.e. non-belonging to an association.¹²⁹

Drawing from the UDHR, the ICCPR guarantees the right of everyone to freedom of association under Article 22 with permissible limitations under paragraph 2.¹³⁰ The obligation of states towards the rights guaranteed under ICCPR is not confined to respect (not violate) only; it further extends to taking positive steps to ensure the enjoyment of these rights.¹³¹ Accordingly states are required to take specific measures to meet their obligation. One of these measures is adoption of laws elaborating on specific rights.¹³² It must be underlined that ICCPR does not make any distinction between nationals and foreigners in the enjoyment of the right to freedom of association.¹³³ In fact it has been explicitly noted that 'aliens receive the benefit of the right of peaceful assembly and of freedom of association' under General Comment No 15.¹³⁴

State parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) have an obligation to guarantee the right to freedom of association without distinction on several grounds including race, colour, or national or ethnic origin.¹³⁵ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) specifically stipulates that the

¹²⁸ Though not a binding instrument the UDHR is the most influential human rights document.

¹²⁹ Art 20(1) (2) of the UDHR.

¹³⁰ Art 22 of the ICCPR. The scope of limitation and derogation clauses incorporated under different provisions of ICCPR for the purpose of limiting or derogating from the enjoyment of rights enshrined under the Convention are elaborated under United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) these principles will be referred under Chapter 3 of this study while discussing permitted limitations on the right to freedom of association. www1.umn.edu/humanrts/.../siracusaprinciples.html – (accessed on 13 October 2010).

¹³¹ Human Rights Committee, General Comment No 3:- Article 2 Implementation at the national level (1981).

¹³² This obligation stems from Art 2 of ICCPR which requires state parties to undertake the necessary steps and adopt laws or other measures necessary to give effect to the right recognized in the covenant.

¹³³ Art 2(1) of ICCPR reads 'state party to the covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized....without distinction of any kind, such as national or social origin....'.

¹³⁴ ICCPR General Comment No 15:- The position of aliens under the Covenant, para 7.

¹³⁵ Art 5 of the ICERD. This guarantee is very necessary since most states purports to limit the enjoyment of the right by non nationals.

right of women equally with men, to participate in NGOs and associations concerned with the public and political life of a state is guaranteed.¹³⁶ The right of children to freedom of association and to peaceful assembly is guaranteed under Article 15 of the CRC.¹³⁷

Another non binding document but yet very important human rights instrument under the UN which has a direct bearing on the establishment and function of CSOs is the UN General Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders).¹³⁸ The UN Declaration on Human Rights Defenders articulated the right of every one, individually and in association with others both at the national and international level, to form, join and participate in NGOs, associations or groups for the purpose of promoting and protecting human rights and fundamental freedoms.¹³⁹

3.2.2 State responsibilities at the regional level

To promote and protect human rights: We have agreed to facilitate... the development of vibrant civil society organisations ...¹⁴⁰

All human rights regimes at the regional level guarantee the right to freedom of association under their main human rights instruments.¹⁴¹ For the purpose of this study the African regional human rights system will be the focal point of discussion. Under the African regional human rights system the right to freedom of association is guaranteed under Article 10 of the ACHPR. It provides that 'every individual shall have the right to free association provided that he abides by the law.'¹⁴² This right formed a subject

¹³⁶ Art 7(3) of the CEDAW.

¹³⁷ Art 15 of the CRC.

¹³⁸ See further ICNL & World Movement for Democracy (n 122 (c) above) 57.

¹³⁹ Art 5 of the UN Declaration on Human Rights Defenders (1999).

¹⁴⁰ Heads of State and Government of the member states of the African Union (AU) 'Declaration on democracy, political economic and corporate governance (2002)' para 15.

¹⁴¹ American Convention on Human Rights (Article 16), European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11).

¹⁴² Art 10 of the ACHPR.

of litigation in the case of *Jawara v The Gambia*¹⁴³ where the Commission asserted that any law a state purports to adopt must be consistent with its obligation under the ACHPR.

Apart from the ACHPR several instruments adopted by the AU explicitly deal with the right of freedom of association and the role of CSOs. One of the instruments that directly deals with the right to freedom of association is the Resolution on the Right of Freedom of Association adopted by the Commission.¹⁴⁴ The Resolution highlighted the fact that, 'the regulation of the exercise of the right to freedom of association should be consistent with the States' obligations under the African Charter on Human and Peoples' Rights.'¹⁴⁵ The Commission appointed a Special Rapporteur on Human Rights Defenders in Africa, with the aim of furthering the causes of the UN Declaration on human rights defenders.¹⁴⁶ As recent as year 2009 the Commission adopted another resolution basing its mandate under Article 45 (a) of the ACHPR.¹⁴⁷ The Commission expressed its belief that 'violations of the freedom of association of human rights defenders put democratic values at risk in... African societies, in particular, the guarantee of the respect for the promotion and protection of human rights and fundamental freedoms in Africa...'¹⁴⁸ Accordingly, the Commission has taken up the task of initiating a study on laws governing freedom of association in African countries.

The African Charter on Democracy, Elections and Governance is the other instrument which highlighted the obligation of African states to 'create conducive conditions for civil society organisations to exist and operate within the law', with the aim of promoting democratic principles and consolidate the culture of democracy.¹⁴⁹

¹⁴³ *Jawara v The Gambia* (2000) AHLRLR 107 (ACHPR 2000) para 68.

¹⁴⁴ Resolution on the Right to Freedom of Association ACHPR /Res.5(XI)92.

¹⁴⁵ As above

¹⁴⁶ Resolution on Special Rapporteur on Human Rights Defenders in Africa , adopted at the 34 the Ordinary Session held from 21 May to 4 June 2004 in Banjul, The Gambia.

¹⁴⁷ Under Art 45(a) of ACHPR the Commission is given the mandate ' to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights' in furthering the promotion of human rights in Africa.

¹⁴⁸ ACHPR/Res151(XLVI)09: Resolution on the Need for the Conduct of a Study on the Freedom of Association in Africa (2009).

¹⁴⁹ Art 12 of African Charter on Democracy, Elections and Governance (2007).

3.2.3 Limitations on the right to freedom of association

The right to freedom of association is not an absolute right. It can be restricted under specific circumstances. The Human Rights Committee (HRC)¹⁵⁰ has stated that ‘where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.’¹⁵¹ Article 22 (2) of the ICCPR prescribes the conditions under which the restriction of the enjoyment of the right to freedom of association would be legitimate. Accordingly, limitation of the right must fulfill the following conditions:

- it must be prescribed by law;¹⁵²
- it must be in the interests of one of the following legitimate state interests, namely:-
 - National security or public safety;
 - Public order;
 - The protection of public health or morals;
 - The protection of the rights and freedoms of others; and
- Necessary in a democratic society.

Most limitation clauses under other human right instruments are worded in a similar manner except for the ACHPR which puts the requirement of prescription by the law as an adequate reason to limit the

¹⁵⁰ Human Rights Committee (HRC) is the supervisory body instituted under the ICCPR.

¹⁵¹ Human Rights Committee General Comment No 31:- Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para 6.

¹⁵² Johannesburg Principles assert that ‘the law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful’ 11. The Johannesburg Principles were developed by a meeting of international experts at a consultation in South Africa in October 1995 and they deal with the limitation of the right to freedom of expression guaranteed under Art 19 of ICCPR. www.Article19.org (accessed on 18 October 2010).

right without elaborating further as to what it meant by 'law'.¹⁵³ The conditions prescribed for the basis of permitting limitation are worded in vague terms and are capable of being widely interpreted and there by susceptible for abuse by states. Following attempt will be made to define the scope of permitted limitations on the right.

A) Prescribed by law¹⁵⁴

This is a crucial aspect of the regulation of the right to freedom of association. It is aimed to ensure compliance with the principle of legal certainty and foreseeability.¹⁵⁵ This requirement is to the effect that any restriction or limitation on the right must have a formal basis in law and be sufficiently precise enough to make it predictable as to what constitutes a breach, and what does not, and the consequences thereof.¹⁵⁶ As per what the Johannesburg Principles set out 'the law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.'¹⁵⁷

B) Legitimate government interest

Apart from being prescribed by law, limitation on the right to freedom of association must come under at least one of the four listed legitimate government purposes. The exhaustive nature of the list connotes that any other 'condition' submitted by states for limiting the right would automatically infringe the right. Though the wordings of the listed conditions are susceptible to a wider interpretation, in order to avoid misuse or abuse, the European Court of Human Rights (ECHR) asserted

¹⁵³ It is important to note that the ACHPR has no derogation clause. The only legitimate reasons for limitations to the rights on freedoms of the charter are found under Art 27 (2), that is individual rights guaranteed under the Charter should be exercised subjected to 'collective security, morality and common interest'. The Commission reasoned in *Media Rights Agenda and Others v Nigeria* (2000) case that reasons warranting limitations must be founded in a legitimate state interest and 'the evils of limitations of rights 'must be 'strictly proportionate' with and 'absolutely necessary 'for the advantages which are to be obtained. See *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 66.

¹⁵⁴ See Siracusa Principles B (i) (n 130 above) for further elaboration on the scope of this element of limitation.

¹⁵⁵ OSCE/ODIHR 'Guiding Principles (n 122 above) 4.

¹⁵⁶ ICNL & World Movement for Democracy (n 122 (c) above) 52.

¹⁵⁷ The Johannesburg Principles (n 152 above) Principle 1.1(a).

that the terms should be ‘interpreted narrowly’ and ‘the content of those terms should not be broadened beyond their usual meaning.’¹⁵⁸

The justifications submitted by governments for adopting restrictive regulatory mechanisms are as many as the restrictions themselves. The promotion of NGO accountability, the protection of state sovereignty or preservation of national security are the most typical justifications relied on by states. However lack of precise definition of these terms makes them prone to abuse and misuse. This concern was reflected in UN human rights fact sheet no 29 where it was noted that under the pretext of security reasons human right defenders (which includes human rights NGOs) were banned or requested to abort all their human rights activities.¹⁵⁹

C) Necessary in a democratic society

It is not enough for a justification to be ‘prescribed by law’ and to be in pursuance of ‘legitimate governmental concern’. It should pass the third test of the ‘concern’ being ‘necessary’ in a ‘democratic society’. The test of ‘necessity’ and what constitutes a ‘democratic society’ is crucial in this case. The ‘necessity’ test implies that any measures must be proportionate to the legitimate aim pursued.¹⁶⁰ In the determination of whether the measure taken by the state is proportionate, the availability of a less intrusive means to achieve the same objective must be determined.¹⁶¹ Accordingly a disproportionate measure by the state against CSOs would amount to unjustified interference. The notion of necessity must further be understood in the context of a democratic society as ‘one which cherishes pluralism, tolerance, open-mindedness, equality and freedom, as well as encouraging self-determination.’¹⁶²

¹⁵⁸ Z Mataga (Legal Adviser at the European Court of Human Rights) ‘The Right to Freedom of Association under the European Convention on the Protection of Human Rights And Fundamental Freedoms’ (2006) 17 www.icnl.org/.../freedom_association_sourcebook_2006_eng.pdf - (accessed on 18 October 2010).

¹⁵⁹ Fact Sheet No 29:- Human Rights Defenders: Protecting the Right to Defend Human Rights, para 12.

¹⁶⁰ ICNL & World Movement for Democracy (n 122 (c) above) 53.

¹⁶¹ As above.

¹⁶² Mataga (n 158 above) 16.

3.3 At the national level

CSOs operate within the framework created by national law and regulation in their respective countries.¹⁶³ In most countries, the national Constitution is the overarching legal framework followed by specific legislations, regulations or executive directives elaborating on one or more issues.¹⁶⁴ Though the wording might be different from constitution to constitution all national Constitutions in the world enshrine the fundamental human right to freedom of association. Since constitutional provisions are broad and do not deal with specific matters, states most of the time adopt specific legislations to regulate the implementation of the right on the ground.

Unfortunately, in recent times rather than using regulatory mechanisms to protect constitutional rights, states are increasingly using the law as a handy tool to cripple the development of civil society and the existence of CSOs. Only in the past few years, more than forty countries have introduced or enacted legislation constricting civil society.¹⁶⁵ The end result being the reduced ability of CSOs to participate meaningfully in the public and political life of the country, states employ different forms of regulatory barriers.¹⁶⁶ In response to this trend, different stakeholders including local CSOs, international NGOs and intergovernmental organisations have been making an effort to come up with general guidelines including minimum principles that must be followed while drafting laws affecting the work of CSOs.¹⁶⁷

¹⁶³ Moore & Rutzen (n 122 above) 23.

¹⁶⁴ Moore & Rutzen (n 122 above) 15.

¹⁶⁵ The NGO Legal Enabling Environment Program (LEEP) Quarterly Programmatic Report July – September 2009 pdf.usaid.gov/pdf_docs/PDACP042.pdf (accessed on 18 October 2010).

¹⁶⁶ As above.

¹⁶⁷ ICNL & World Movement for Democracy (n 122 (c) above) 33.

3.3.1 Forms of barriers

The report co-authored by the International Centre for Not-for-profit Law (ICNL) and the World Movement for Democracy identified the following commonly used legal constraints used to undermine civil society.¹⁶⁸

A) Barriers to entry

States use the law in different ways to discourage, burden, or prevent the formation of organisations.¹⁶⁹ In doing so states might not provide for the right to association both formally or informally. Apart from not providing for the right the law might provide for punishment or prohibition of unregistered groups.¹⁷⁰ This situation is aggravated where the state makes it nearly impossible for associations to register and obtain legal personality by providing for a burdensome registration or incorporation procedure.¹⁷¹ Lack of clarity regarding the registration procedure or vague regulations; complex documentation requirements and excessive delay in the registration procedure are only a few of the hurdles of registration.¹⁷²

The use of overbroad and vague grounds for denying registration application has been indicated as being a common legal tool for barring the registration of associations.¹⁷³ This situation is worsened where the law does not provide for an appeal procedure against the decision of public officials. The other disturbing requirement states placed by stifling laws is the requirement of re-registration every other year or after few years which makes CSOs unstable and give the government a wide discretion in refusing the continued operation of a CSO who happened to be perceived as strong opponent.¹⁷⁴

¹⁶⁸ ICNL & World Movement for Democracy (n 122 (c) above) 36.

¹⁶⁹ ICNL & World Movement for Democracy (n 122 (c) above) 40.

¹⁷⁰ Gershman & Allen (n 5 above) 40.

¹⁷¹ Onerous registration procedures for NGOs was raised as a concern by HRC in its concluding recommendation to the state of Belarus. Concluding recommendation on Belarus (1997) UN doc. CCPR/C/79/Add.86, para. 19.

¹⁷² ICNL & World Movement for Democracy (n 122 (c) above) 40.

¹⁷³ Gershman & Allen (n 5 above) 40.

¹⁷⁴ Gershman & Allen (n 5 above) 41.

B) Barriers to operational activity

After surviving the hurdle of registration CSOs are faced with the situation where the law makes it nearly impossible for them to undertake their legitimate activities. The law might in some cases provide a direct prohibition against certain type of activities i.e. working on governance and human rights issues or it might stipulate vague and general prohibitions which make CSOs vulnerable to arbitrary administrative action refrain e.g. laws may prohibit engagement in terrorist acts without listing what those acts actually are.¹⁷⁵ The other means by which the activities of CSOs may be stalled include the use of legislation which permits unlimited administrative interference by public officials in their work.¹⁷⁶

C) Barriers to speech and advocacy

Especially for human rights NGOs whose work requires the full benefit of freedom of speech and advocacy, laws that place requirements such as prior censorship, broadly worded defamation laws and general restrictions on advocacy works have proved to be a problem.¹⁷⁷

D) Barriers to Contact and Communication

It is submitted that collaboration and coordination between CSOs working towards one or more common objective results in a better outcome in their impact. States adopt laws which go against this practice either by forcing network of CSOs to join one organ set up by government or a right out prohibition against the formation of network associations, federations or coalitions.¹⁷⁸

E) Barriers to resources

The target being on foreign funds, limiting access of funds that are crucial to their operations is becoming a very typical method of stifling CSOs.¹⁷⁹ Under the pretexts of 'ensuring security, political

¹⁷⁵ ICNL & World Movement for Democracy (n 122 (c) above) 41.

¹⁷⁶ As above.

¹⁷⁷ ICNL & World Movement for Democracy (n 122 (c) above) 44.

¹⁷⁸ ICNL & World Movement for Democracy (n 122 (c) above) 46.

¹⁷⁹ J Elone 'Backlash against democracy: The regulation of civil society in Africa' (2010) 7:2 *Journal of Democracy* 41.

stability, and non-interference in the country's internal affairs' ¹⁸⁰ governments are taking steps that drains the ability of CSOs to undertake their activities.

Article 13 of the UN Declaration on Human Rights Defenders guarantees the right of every one, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.¹⁸¹ It is to be noted that the Declaration does not make any distinction between the source of funding, domestic or foreign, and provides for a general guarantee.¹⁸²

The UN explicitly identified the banning or hindering 'the receipt of foreign funds for human rights activities as one of the violations and obstacles faced by human right defenders in the course of their work.¹⁸³ Hina Jilani, the Special Representative of the Secretary General on Human Rights Defenders underlined the serious effect of restriction on funding on the ability of human right defenders in carrying out their activities.¹⁸⁴ Based on this observation the Special Representative made the following recommendation

Governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments. The only legitimate requirements of such NGOs should be those in the interest of transparency.¹⁸⁵

¹⁸⁰ ICNL & World Movement for Democracy (n 122 (b) above) 7.

¹⁸¹ Art 13 of the UN Declaration on Human Rights Defenders.

¹⁸² Most repressive laws place limitation on funding from foreign sources by accusing NGOs of holding hidden agenda.

¹⁸³ Fact Sheet No 29 (n 159 above).

¹⁸⁴ Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly Resolution 58/178, page 20.

¹⁸⁵ As above, page 22.

3.3.2 An enabling legal framework

The legal framework for civil society is a primary manifestation of a country's governance theory and plays a key role in the ability of nations to advance human development.¹⁸⁶

A state can create a legal space which is 'open, broadly accessible, supportive and enabling' or which is 'closed, difficult to access, constraining, and inhibitive.'¹⁸⁷ Whereas the former represents an 'enabling legal environment' the latter represents a 'restrictive' one. While a democratic state strives to create an enabling environment, a less democratic or oppressive one performs otherwise.

An enabling legal framework consists most importantly of a 'good law' that regulates CSOs in a manner which acknowledges the fundamental freedoms recognised under the several international and regional human rights treaties and the respective Constitution of the relevant country. In the next section attempt is made to depict what a 'good law' should provide for by using international guidelines developed by stakeholders, such as local NGOs, international NGOs, intergovernmental bodies and legal experts working in the area.¹⁸⁸

A) Licensing and registration

An NGO might want to acquire legal personality so as to be able to act in its own name e.g. open bank account, rent office space or hire employees.¹⁸⁹ Most of the time access to donor, government and even community resources is limited to registered NGOs.¹⁹⁰ By the same token most private donors prefer to grant donations to and support for NGOs which are formally organised and have legal personality.¹⁹¹ In

¹⁸⁶ Moore & Rutzen (n 122 above) 4.

¹⁸⁷ ICNL & World Movement for Democracy (n 122 (c) above) 40.

¹⁸⁸ Most of the legal standards in this part are taken from Irish & Kushen et al (n 122 above) see page 9-11 of the guidelines.

¹⁸⁹ YM Grandvaux & M Welmond *Evolving partnerships: The role of NGOs in basic education in Africa* (2002) 7.

¹⁹⁰ As above.

¹⁹¹ Donors cannot provide support for an organization that is not registered in some way, that does not have a name and address, or that cannot be audited. See Ottaway (n 28 above) 124.

addition to direct fundraising, acquiring legal personality, in most cases is necessary for NGOs in order to become eligible for tax or other state benefits.¹⁹²

Beside the above mentioned benefits, CSOs in some instances might find it difficult to pursue their objective without a formal legal basis. The difficulty of acquiring observer status before the Commission is one restriction among many that may be faced by CSOs which are not licensed or registered. Apart from the requirement that an NGO must work in the 'field of human rights'¹⁹³ and with objectives that must be in consonance with those of the AU Constitutive Act and ACHPR, NGOs are required to submit a certificate of registration to show proof of their 'legal existence' in the particular country within which they operate, in order to acquire an observatory status before the Commission.¹⁹⁴

Procedural formalities for recognition of associations must not be onerous¹⁹⁵ and should not leave too much room for arbitrary discretion. Consideration for decision-making procedures towards permitting an association to acquire legal personality must be circumscribed to meeting legal requirements.¹⁹⁶ Decisions must be rendered within a stipulated fixed period of time and unfavourable decisions must be capable of being appealed against to a higher body.¹⁹⁷ The government body which is vested with the power to decide on the fate of applications should accompany its refusal to accept application for registration with a document showing its reason for the same.¹⁹⁸ The Guideline recommends that 'rules for legal establishment should set short time limits within which the responsible

¹⁹² Irish and Kushen et al (n 122 above) end note 1.

¹⁹³ Criteria for the Granting of and for Maintaining Observer Status with the African Commission on Human and Peoples' Rights (1999) Chapter 1.2.

¹⁹⁴ Despite this requirement the Commission usually adopted a flexible approach to admission towards NGOs denied domestic registration eg in its 40th session the Commission granted an observatory status to Lawyers for Human Rights Swaziland (LHR-Swaziland) Viljoen (n 34 above) 408.

¹⁹⁵ S Joseph & J Schultz et al *The International Covenant on Civil and Political Rights: cases, materials and commentary* (2000) 433.

¹⁹⁶ Irish & Kushen et al (n 122 above) 27.

¹⁹⁷ As above.

¹⁹⁸ As above.

state agency must act (e.g. a maximum of 60 days) and should provide that failure to act on complete applications within the required time results in presumptive approval.¹⁹⁹

B) Scope of activities

As indicated above limiting the area of activities in which a CSO can engage is one form of legal barrier employed by states. Most importantly it should be noted that limitation on the right of freedom of association must satisfy the permitted grounds under international human rights law standards.²⁰⁰ Anything outside this scope amounts to violation. Accordingly the law must permit the undertaking of any legal activities by CSOs which are legal if undertaken by individuals.²⁰¹

NGOs must be free to pursue their objectives, 'provided that both the objectives and the means employed are lawful.'²⁰² A 'good law' should permit a broad range of permissible purposes that could be pursued by NGOs. 'Permissible purposes generally embrace all 'legal' or 'lawful' purposes and specifically includes the promotion and protection of human rights and fundamental freedoms.'²⁰³ The UN Declaration on Human Rights Defenders explicitly guarantees the right of every one, 'individually or in association with others to promote and to strive for the realisation of human and fundamental freedoms at the national and international level.'²⁰⁴ Accordingly any enabling legal environment should encourage the work of CSOs as long as it is legal and specifically related to the promotion and protection of human rights.

¹⁹⁹ As above.

²⁰⁰ See Chapter 3, section 3.2.3 of this study.

²⁰¹ Principle 10, of the guiding Principles (n 122 above) 9.

²⁰² As above.

²⁰³ ICNL & World Movement for Democracy (n 122 (c) above) 31.

²⁰⁴ Art 1 of the UN Declaration on Human Rights Defenders (1999).

C) Fundraising

After being formally established raising fund so as to cover costs to accomplish their mission is another crucial issue for CSOs. Unlike most charitable organisations in industrialized societies, African NGOs do not typically attract funds locally.²⁰⁵ The culture of philanthropy by individuals and local businesses is not sufficiently developed. Accordingly, the bulk of funding to undertake their activities comes from international donors and NGOs.²⁰⁶ The law should recognise the right of NGOs 'to seek and secure funding from legal sources including individuals and businesses, other civil society actors and international organisations, inter-governmental organisations, as well as local, national, and foreign governments.'²⁰⁷

3.4 Conclusion

To conclude whatever regulatory mechanisms a state choose to follow in order to regulate CSOs it should primarily recognise fundamental human rights and freedoms. Moreover any type of limitation or restriction the law purports to place should be checked against the permissible limitation grounds of the above mentioned rights. Ideally states and CSOs are better off working together towards one mission, serving the people. However, short of collaboration the government should accept the right of CSOs to exist and to work autonomously.

²⁰⁵ MK Gugerty 'Patterns and structures of NGO self-regulation in Africa' (2009) 7:1 *International Journal of Civil Society Law* 1.

²⁰⁶ As above.

²⁰⁷ Principle 5, ICNL & World Movement for Democracy (n 122 (b) above) 5.

Chapter Four: - Regulatory mechanisms in Ghana and Ethiopia

4.1 Introduction

Flowing from the general discussion on role of CSOs and the effect of regulatory mechanisms on their functions, this chapter will narrow down its focus to two African countries, Ethiopia and Ghana. Attempt is made to give a brief background of CSOs in both countries and to outline the separate the legal frameworks under which they operate currently. Assess the availability of enabling legal environment for CSOs in these two counties is the objective of this chapter. For this purpose, guidelines and principles incorporated under chapter three will be used as a main reference.

4.2 CSOs in Ethiopia

4.2.1 Background on CSOs in Ethiopia

It was after the downfall of the Derg regime²⁰⁸ in 1991 that the number of CSOs substantially increased.²⁰⁹ According to the Christian Relief Development Association (CRDA) the development of CSOs in Ethiopia exhibits three phases first, their full engagement in relief and humanitarian work second, in the de-linking of relief and humanitarian work and focusing on basic services provision and thirdly, in their engagement in governance, advocacy and human rights in addition to their service delivery.²¹⁰ By the year 2009 there were more than 3500 registered CSOs in the country.²¹¹

According to Teshome, almost 72% of NGOs operating in Ethiopia undertook activities on and around welfare programs.²¹² Teshome further noted that, up until the 2005 historical election, where CSOs contributed significantly, they were usually criticized for their heavy emphasis on relief work. Due

²⁰⁸ The Derg military regime sustained from 1974 - 1991.

²⁰⁹ WB Teshome 'Civil society and democratization in Africa: the role of the civil society in the 2005 election in Ethiopia' 4:2 (2009) *International Journal of Social Sciences* 80.

²¹⁰ Teshome (n 209 above).

²¹¹ Note must be taken that this number takes into account Community Based Organisations (CBOs) CRDA 'Assessment of the operating environment for CSO/NGOs in Ethiopia.' (2006) 6.

www.crdaethiopia.org/Documnets/Assesment%20of%20NGOs%20 (accessed on 14 October 2010).

²¹² Teshome (n 209 above).

to this inclination, apart from few prominent CSOs who followed a progressive approach in their work, the contribution of the general CSO community could be said not to have contributed to the emergence and consolidation of democratic values.²¹³

Other commentators also noted that the lack of adequate awareness about human rights, a limited democratic culture and the limited participation of citizens in governance of the country proved to be significant challenges in realising human rights and consolidating democracy.²¹⁴ CSOs in Ethiopia used different approaches within their limited capacity, both in terms of manpower and finance, to address these root causes. Covering a wide area in the country the Ethiopian Women Lawyers Association (EWLA) was one of the human rights NGOs that has been providing legal advice, counseling and supporting the representation of women victims of gender based violence. In addition to EWLA, African Child Policy Forum (ACPF) provided similar services to children through its Children's Legal Protection Center (CLPC). Action Professionals Association for the People (APAP) is one of the human rights NGOs engaged in the provision of free legal service and awareness promotion.²¹⁵

4.2.2 Legal framework

The 1995 Federal Democratic Republic of Ethiopia Constitution (FDRE Constitution) is the overarching legislation that governs the legal framework under which NGOs in Ethiopia operate. Article 31 of the said Constitution guarantees the right of 'everyone' to form associations for 'whatever purpose' they see fit.²¹⁶ However the right is not absolute. Associations formed in violation of the appropriate laws or those associations formed with the objective of overthrowing the constitutional order as well as those associations carrying out these activities are prohibited. Before the adoption of the CSP, apart from the FDRE Constitution the legal framework governing CSOs was consisted in the 1960 Civil Code of Ethiopia,

²¹³ As above. The small number of NGOs involved in promoting good governance, democracy, human rights and peace building (120- at federal level and 37- at regional level by the year 2008) supports this conclusion. See further in Rahmato & Bantirgu et al (n 107 above).

²¹⁴ Rahmato & Bantirgu et al (n 107 above) 79 .

²¹⁵ Rahmato & Bantirgu et al (n 107 above) 84 .

²¹⁶ Art 31 of the FDRE Constitution.

the 1966 Association Registration Regulation and other subsidiary legislation.²¹⁷ Ethiopia's Ministry of Justice handled the registration process and further administrative works related to CSOs operating in the country.²¹⁸

As the number of CSOs and their area of engagement grew the need to readjust the legal environment to make it responsive to the current realities of the sector became obvious.²¹⁹ The CSP was introduced in this environment to address this need. In addition to catering for the contemporary need of CSOs, the rationale behind adopting the CSP was to 'ensure the realisation of citizens' rights to association enshrined' in the Constitution as per the preamble.²²⁰ Further the CSP has the objective of aiding and facilitating 'the role of Charities and Societies in the overall development of Ethiopian people.'²²¹

Unfortunately, the CSP was one of the areas indicated as a 'source of concern' in the submission made by the UN Country Team to the UNHRC during the UPR.²²² The CSP was a point of great concern to UN bodies and other organisations. Indeed, the ICNL described the law as 'one of the most controversial NGO laws in the world.'²²³ While these two sources were cited as an instance, stakeholders all over the world including main donors of the Ethiopian government also voiced their protests.²²⁴ The legislation has been criticized for narrowing down the space within which CSOs in the country function and for violating international human rights standards with regard to fundamental rights and freedoms such as the rights to freedom of association, expression and assembly.

²¹⁷ Rahmato & Bantirgu et al (n 107 above) 84.

²¹⁸ Rahmato & Bantirgu et al (n 107 above) 94.

²¹⁹ As above.

²²⁰ It should be noted that the constitutional provision guaranteeing the right to association do not qualify the enjoyment of the rights only to citizens unlike what the Proclamation states.

²²¹ Preamble CSP.

²²² Joint submission by the UN Country Team (UNCT) in Ethiopia for the UN Compilation report: UNCT report for the Universal Periodic Review of Ethiopia – Sixth Session of the UPR Working Group (30 November-11 December 2009) 5 lib.ohchr.org/HRBodies/UPR/.../ET/UNCT_ETH_UPR_S06_2009_E. (accessed on 15 October 2010).

²²³ 'NGO law monitor Ethiopia' www.icnl.org (accessed on 21 October 2010).

²²⁴ Human Rights Watch 'One hundred ways of putting pressure: violations of freedom of expression and association in Ethiopia' (2010) 44. <http://www.hrw.org> (accessed on 11 October 2010).

4.2.3 The Charities and Societies Proclamation (2009)

In general, the CSP provides for two types of organisations that is, Charities and Societies. Charities are institutions established exclusively for charitable purposes and to provide public benefit.²²⁵ On the other hand Societies are associations or persons organised on non profit making and voluntary basis for the promotion of the rights and interests of their members and to undertake other similar lawful purposes as well as to coordinate with institutions with similar objectives.²²⁶ The CSP regulates all areas related to formation, operation and dissolution of CSOs. In addition to setting rules under which CSOs are going to be administered it also establishes a regulatory body, the Ethiopian Charities and Societies Agency (the Agency) containing the Charities and Society's Board (the Board) and an appointed Director General.²²⁷

The controversial nature of the CSP starts from the definition clause. It classifies CSOs into the following three categories based on their place of incorporation and source of funding²²⁸:-

1. 'Ethiopian Charities' or 'Ethiopian Societies':- These Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and are wholly controlled by Ethiopians.
2. 'Ethiopian Residents Charities' or 'Ethiopian Residents Societies' :- These groups are exactly the same as the above one except that they *receive more than 10% of their funds from foreign sources*;²²⁹ and
3. 'Foreign Charities':- These Charities that are formed under the laws of foreign countries or which consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources.

²²⁵ Art 46 of the CSP. Four types of organisations are recognized under Ethiopian law these are: - a Charitable Endowment, Charitable Institution, Charitable Trust and Charitable Society.

²²⁶ Art 55 of the CSP.

²²⁷ Art 4 of the CSP.

²²⁸ Art 2 of the CSP, (my own emphasis added).

²²⁹ 'Income from Foreign source' means —a donation or delivery or transfer made from foreign source of any Article, currency or security. Foreign sources include the government agency or company of any foreign country; international agency or any person in a foreign country. See further Art 2 (15) of the CSP.

A) Licensing and registration

While registration should be on a voluntary basis, the CSP makes it mandatory for all types of associations to register within three months of formation.²³⁰ Further, Article 65 of the CSP explicitly states that a CSO which does not register within the prescribed time limit shall cease to exist.²³¹ This negates the right to freedom of association, the exercise of which should not be subjected to formal incorporation.²³² In addition to the mandatory nature of registration, the Agency is given a nearly unlimited power to deny registration. Article 69 of the CSP states that the Agency should deny registration if:-

- 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 or
- the name of the charity or society is in the opinion of the Agency contrary to public morality or illegal.

The provision gives the Agency a broad discretionary power to 'predict' the likelihood of the CSO engaging in acts which are unlawful, prejudicial to public peace or welfare, or good order in the country. This poses a grave danger especially for NGOs with the objective of engaging in the monitoring of human rights violations or challenging the government by demanding transparency and accountability.

Though the law provides for a maximum of 30 days within which the Agency should render its decision whether it accepts to register the CSO or not, there is no duty placed on the Agency to provide reasons for refusal.²³³ Rather the applicant is required to appeal before the Board and the law is silent on the duration of time within which the Board is supposed to render a decision.²³⁴ Ideally a

²³⁰ Art 64 of the CSP. Elone expressed fear that the stipulation of mandatory regulation and the attached penalty for non compliance will create a climate of fear and insecurity for groups which have not yet received legal status. See Elone (n 179 above).

²³¹ Art 65 of the CSP.

²³² See Chapter three, section 3.1 of this study.

²³³ Art 68 (1) of the CSP.

²³⁴ Art 68 (2) of the CSP.

presumption of registration should have been made and the CSO was supposed to be considered legal where the registering body fails to render a decision within a limited time, which is not the case in the CSP.²³⁵ The ramifications are worse for non-Ethiopian CSOs *per se* (foreign NGOs and Ethiopian resident NGOs) since they do not have access to courts. According to Article 104 of the CSP only Ethiopian CSOs can appeal from the decision of the Board to judicial bodies of the country.²³⁶ Denial of the chance to appeal to a court of law from an administrative decision has many implications and exposes CSOs to the arbitrary denial of registration. Generally, the Agency virtually possesses unlimited discretionary power over the licensing and registration process.

²³⁵ See Chapter three section 3.3.2 (B) of this study.

²³⁶ Art 104 of the CSP.

B) Scope of activities

A law which aims to promote an enabling legal environment should permit the undertaking of any activity which is legal both in terms of the end and the means employed to achieve it. Article 14 of the CSP lists the type of activities which can legitimately be engaged in by CSOs. The list is not exhaustive and the Agency may adopt a directive to add other activities to the list.²³⁷ Among this list of activities the following are exclusively limited to be legally undertaken by Ethiopian CSOs:²³⁸

- 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;
- the promotion of the efficiency of the justice and law enforcement services

Except for those foreign NGOs operating in the country by virtue of an agreement with the Government and as a result is not covered by the CSP, all the other foreign NGOs can not engage in these activities. Moreover, in spite of the fact that all their members are Ethiopian and their organisation is incorporated in Ethiopia, Ethiopian resident CSOs can not undertake these activities just because they earn more than 10% of their income from foreign sources. Human Rights Watch, an international human rights NGO, raised this as a concern stating that any attempt it makes to undertake a research on the human rights

²³⁷ Art 14 (4) of the CSP.

²³⁸ Combined reading of Art 14 (2) & Art 14 (5) of the CSP. It stands as a great concern that the law purports to limit the operation of non Ethiopian CSOs to developmental and service provision only. This goes against the growingly accepted notion of 'rights based approach to development' where any developmental work should be undertaken in the view of advancement of human rights values.

situation of the country would automatically become illegal.²³⁹ This barrier to scope of activities especially in the advancement of human rights is a real concern and makes the whole right to associate nugatory.

C) Fundraising

As has been discussed above, source of funding has been the underpinning criterion for the categorisation of CSOs. According to the observations of Hailegebriel the Proclamation made source of funding a significant determinant factor for corporate citizenship of CSOs without regard to the law of the place of incorporation or the nationality of the members.²⁴⁰ It must be noted that the (FDRE Constitution) guarantees the right to freedom of association to every one without making any distinction between citizens and non citizens.

This particular barrier on funding has significant ramifications for the work of advocacy and human rights NGOs. This is as a result of the fact that Ethiopia is a poor country where there is no substantial local funding that can compensate for the loss of resource from foreign donations.²⁴¹ The law had an almost immediate impact and many CSOs took steps to make changes to their original mandates, closed branch offices and reduced staff due to the financial crises they were exposed to.²⁴² Ethiopian Human Rights Council (EHRCO), EWLA, Action Aid (AA) and CRDA are among the many organisations that were compelled to close branch offices and lay off staff.²⁴³ EHRCO which is the only NGO engaged in the monitoring of human rights protection in the country and the reporting of violations, closed nine out of 12 branch offices and confined its activities to its head office and three branches only.²⁴⁴

²³⁹ 'Human Rights Watch draft NGO law analysis' (13 October 2008) 4. This concern is shared by all the other international human right NGOs such as Amnesty International. www.hrw.org/pub/2008/africa/HRW.NGO.Law.Analysis.pdf (accessed on 10 October 2010).

²⁴⁰ Hailegebriel (n 17 above) 19.

²⁴¹ Hailegebriel (n 17 above) 21.

²⁴² Human Rights Watch (n 17 above) 45.

²⁴³ Hailegebriel (n 17 above) 21.

²⁴⁴ Human Rights Watch (n 224 above) 46.

4.3 CSOs in Ghana

4.3.1 Background on CSOs in Ghana

After the 1992 Constitutional rule created a large political space, both the number of CSOs²⁴⁵ and the scope of issues they deal with, recorded a significant increase.²⁴⁶ In their endeavour to consolidate the democratic dispensation that existed after 12 years of military rule, CSOs strived to consolidate the new democratic dispensation.²⁴⁷ To achieve this goal they shifted their interest from pure self-help livelihood projects, to campaigning and advocacy towards better governance and the protection of human rights.²⁴⁸ The country benefited from their ability to mobilize citizens and engage them in policy dialogue.²⁴⁹

The role played by CSOs in the 1996 elections marks a great achievement in the history of the CSO movement in Ghana. Prominent CSOs came together in an effort to provide voters' education,²⁵⁰ deploy election monitors and establish local election-watching bodies. In addition to the 1996 election the success of CSOs in preparing a draft Domestic Violence Bill (DVB) and initiate the adoption of the Disability Act (2006) is an example of their active involvement in the promotion and protection of human rights and democracy consolidation.²⁵¹

Ghana has been mentioned throughout the AGR²⁵² as an example of a state, together with African countries such as South Africa and Botswana, where both legal constraints (through restrictive legislative measures) and factual constraints (harassment by government officials) are almost non

²⁴⁵ Ayee (n 22 above) 14.

²⁴⁶ RA Atuguba 'Legal Analysis of the Draft Trust Bill 2006 and the Draft NGO Policy Guidelines' Paper Prepared for the Parliamentary Advocacy Project of the Legal Resources Centre (LRC)-Ghana (2007) 3.

²⁴⁷ During these years CSOs with other civic groups played a role in opposing the military regime in 1978-1979 and again in 1986-1992. See further in E McCandless et al 'Anglophone Civil Society Organization Assessment: Ghana and Nigeria Synthesis Report 16.' (2001) pdf.usaid.gov/pdf_docs/PNACP552 (accessed on 21 October 2010).

²⁴⁸ Atuguba (n 246 above) 3.

²⁴⁹ 'Ghana, democracy and political participation' A review by AfriMAP and Open Society Initiative for West Africa (2007) 53.

²⁵⁰ Prominent CSOs such as Christian Council, the Conference of Catholic Bishops, the Ghana Legal Literacy and Resource Foundation played a significant role in this process.

²⁵¹ n 249 above.

²⁵² Economic Commission for Africa (n 7 above).

existent. CSOs in Ghana enjoy wide latitude of freedom to operate.²⁵³ Accordingly, they are involved in governance issues and in the protection and promotion of human rights without fear of reprisal from the government.

As has been discussed under chapter three an enabling legal environment is one of the significant factors that enhances the effectiveness of CSOs. Accordingly the next section will discuss the legal framework under which CSOs operate in Ghana.

4.3.2 Legal framework

At the national level the overarching legislation providing the basis for the operational autonomy of CSOs is the 1992 Constitution of the Republic of Ghana (the Ghanaian Constitution).²⁵⁴ The rights of 'all persons' to freedom of association which includes the freedom to form associations, be it national or international 'for the protection of their interest' is guaranteed under the constitutional Article 21 which is in Chapter 5 thereof.²⁵⁵

Moreover under Chapter 6 Article 37, the Constitution imposes an obligation on the state to take legislative measures aimed at ensuring the right of the people to effective participation in development. In order to exercise this right effectively, the Constitution underlines that the state must recognise the rights of people to form their own associations and be free from state interference. Moreover, the law should recognise the right of the people to use these associations to promote and protect their interests and have the freedom to raise funds so as to support their activities.²⁵⁶ This section impressively guarantees the following important elements of an enabling legal environment: - the freedom to form associations; freedom to undertake activities without state interference and to raise funds to cover the cost of activities.²⁵⁷ Given the fact that these elements are now constitutionally entrenched all legislation regulating the sector can not introduce any principle negating this elements.

²⁵³ Economic Commission for Africa (n 7 above) 133 .

²⁵⁴ Constitution of the fourth republic of Ghana (1992) (Ghanaian constitution).

²⁵⁵ Art 5 (21) (1) (e) the Ghanaian constitution.

²⁵⁶ Chapter 6 (37) (2) (a) the Ghanaian Constitution.

²⁵⁷ Chapter 6 (37) (2) the Ghanaian Constitution.

The Constitution further stipulates that the state should be guided by international human rights instruments which recognise and apply particular categories of human rights.²⁵⁸

As it stands now the Companies Act 179 (1963) (the Companies Act)²⁵⁹ is the legislation that defines the legal and institutional framework within which CSOs operate in Ghana. The Code deals both with for-profit (business company) and not-for-profit company.²⁶⁰ Under two broad categories the Code regulates six kinds of companies. While the public/private category is one feature of categorising whether a company is limited and if so how it is limited forms the base of categorisation. The following are the Six types of corporations that can be formed under the Companies Act²⁶¹:-

- Private company Limited by Shares;
- Private company Limited by Guarantee;
- Unlimited private company ;
- Public company limited by shares;
- Public company limited by guarantee ,and
- Unlimited public company

A company limited by guarantee, whether it is private or public, is neither permitted to engage in trading or profit making activities nor to pay dividends or distribute/return any asset to its members.²⁶² Most CSOs in Ghana are incorporated as companies limited by guarantee.²⁶³ The Act

²⁵⁸ Chapter 6 (37) (3) the Ghanaian Constitution.

²⁵⁹ The Code covers issues on how companies are formed and dissolved; requirements that must be met before a business starts functioning; the right, duties, powers and liabilities of members officers and auditors of the company; the raising, disbursing, accounting and auditing of funds and capital of the company and the supervision of corporate

²⁶⁰ PE Bondzi-Simpson *Company law in Ghana* (1998) 1. This has been indicated as one gap existing in the current regulatory mechanism of CSOs since the code seems to emphasis more on for-profit companies and not-for-profit companies like CSOs are given inadequate attention. See further in Atuguba (n 246 above).

²⁶¹ Bondzi-Simpson (n 260 above) 20.

²⁶² See Art 10 of the Companies Act for further characteristics of a company limited by guarantee.

prescribes the minimal requirements for registration and defines the rules and regulations for conducting business under the terms of the Code. The Registrar General's Department is the institution entrusted with the task of granting certificates of incorporation as a proof of registration to CSOs.²⁶⁴ After a certificate of incorporation, the Department of Social Welfare issues a certificate of Recognition upon an application made by a specific CSO.²⁶⁵ Though there are no laws as such restricting the establishment and operation of CSOs in Ghana, the process of registration might prove to be slow.²⁶⁶

4.4 Conclusion

It is impossible to have a democratic country with a silenced civil society. A state with the objective of building democracy must provide an open space for participation. If Ethiopia is to achieve the 'Democratic Republic' prefix in its nomenclature, the CSP must lift up its barriers and be trimmed by human rights principles. Space must be created for participation and history has shown that CSOs provide one good way of achieving it. Ghana is a good example for this. After a protracted military regime Constitutional rule started in both countries almost at same time: since 1991 in Ethiopia and 1992 in Ghana. Looking at where they are now in the continuum of democratic governance, taking a lesson from Ghana looks like most profitable, and the current CSP is not going to get Ethiopia there.

²⁶³ RA Atuguba & C Dowuona – Hammond 'Corporate Social Responsibility in Ghana' (2006) 21-2. www.revitalization.org/csrm/.../CSR%20FINAL%20REPORT-3-8-06.doc (accessed on 28 October 2010).

²⁶⁴ 'Registering a non-profit organisation in Ghana'. makolalaw.blogspot.com/.../registering-non-profit-organisation.html – (accessed on 22 October 2010).

²⁶⁵ As above.

²⁶⁶ However, with all the successes achieved in the provision of enabling environment (at least by not adopting restrictive mechanisms) for CSOs, the currently proposed Draft Trust Bill (2007) appears to be a threat to the sector. According to Atuguba, among other things the fact that the bill lumped NGOs with Trustees and other issues such as the incorporation of a clause to the effect that a statutory council would be instituted to fill vacancies in NGOs; the requirement of ministerial approval before the commencement of projects and other issues are a concern to the NGO sector. The Bill has been a point of controversy between the government and CSOs lately. If passed without the incorporation of the necessary amendments the legislation is going to undermine the role played by CSOs so far and put their further endeavor in danger. See further in RA Atuguba 'Killing the NGO industry in Ghana' (2008) 2:7 *Ghana society for development dialogue* 12. www.egnghana.org/.../2%20No.7legon%20observer%20.pdf – (accessed on 21 October 2010).

Chapter five: - Conclusions and Recommendations

5.1 Conclusions

Promotion and protection of human rights is not a task left for the government alone. Neither is it a mission to be accomplished overnight. It is a multi-faceted process that demands the collaborative effort of governmental and non-governmental actors alike. Even though states possess the primary obligation to 'respect, protect, and fulfill human rights', history has shown that for several reasons, notable of which is the lack of political will, some governments have not lived up to expectation. It is such reluctance, to say the least, on the part of states that has necessitated the rise of CSOs to the rescue.

The paper has tried to highlight the roles of CSOs in enhancing good governance and democracy. It has also showed that CSOs are at the heart of the human rights regimes, from the international to the regional and national levels. CSOs have contributed to the development of human rights standards and enhancing their implementation through active participation in monitoring and empowering right holders. CSOs voluntarily take the initiative of backing the blind side of the state. Chapter two discussed at length this contribution of CSOs at every level, from the international to the national.

In chapter three, discussions have been made of the regulatory factor that significantly determines the level of effectiveness in the work of CSOs. AS the study has shown, the regulatory mechanism adopted by a state could either foster or impair the roles of CSOs. Principally, it is up to the state to decide. The state might consider operations of CSOs intrusive and wish to limit their function. Some of such restrictive measures could be barriers to entry, advocacy, and resources. The state might also still choose to recognize the invaluable contribution of CSOs and provide an environment in which CSOs function autonomously. This latter choice obviously sits comfortably with human rights standards, with all its support coming from national constitutions and international human rights standards. This chapter attempts to explain these competing theories in order to identify the regulatory mechanism which is compatible with human rights standards and at the same time conducive to the effectiveness of CSOs.

It is upon this foundation that chapter four tries to put the regulatory framework of two African countries in perspective. Ghana is a state commended for its enabling environment for the function of

CSOs. On the other hand Ethiopia has been criticised for adopting one of the most restrictive CSOs laws in Africa. The analysis of the Ethiopian legislative framework in light of the guidelines and principles developed in chapter three indicated that the Charities and Societies Proclamation unfairly hampers the function of CSOs and highly limits their contributions towards the advancement of human rights in Ethiopia. In the case of Ghana, the legislative framework allows CSOs to work autonomously and effectively, contributing to the commendable human rights and governance record of the country.

5.2 Recommendations

The problem underpinning this whole study is the stifling of the role of CSOs by states. Accordingly, the study recommends that states must refrain from interfering and stifling CSO operations through the promulgation of restrictive legislations. By way of general recommendations the following two points must be taken into consideration while adopting any kind of regulatory mechanism (whether it is a policy document or legislation):-

- a. Any regulatory mechanism has to recognize the positive role of CSOs in good governance and democratization and aim at furtherance of these ideals of governance.
- b. Guaranteeing freedom of association, a fundamental and constitutional right, should be the main rationale guiding legislations on CSOs. Accordingly any rule on the exercise of this right having restrictive effect on the function of CSOs should be sensitive to human rights standards and limitations have to be to protect 'legitimate interest' and 'necessary in a democratic society'.

An enabling environment for the function of CSOs is an obligation and not a choice left to states to grant or withhold at will. Therefore that the Ethiopian government should amend CSP and bring it in line with international human rights standards, practices and norms for the establishment of a conducive environment and the legitimate operation of CSOs.

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