

CURRENT CHALLENGES FACING THE CIVIL SOCIETY IN KENYA

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On Saturday 27 June 1981 in the Kenyan capital city, Nairobi, during the eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (replaced by the African Union in 2002), the African Charter on Human and People's Rights (hereinafter referred to as the Charter) was adopted. The Charter in its Article 2 says that «Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status» The fact that the Charter was adopted in Kenya, it gave more strengths to Kenyan human rights activists of that time to start demanding from the Government of Kenya the realisation, in Kenyans' lives, of the different rights and freedoms that are enshrined in that Charter.

Sadly on 1 August 1982, slightly more than a year after the adoption of the Charter, a failed military coup d'état ushered in a dark decade where there were massive violations of human and people's rights in Kenya. Nonetheless, human rights activists continued their struggles, which led to the introduction of multipartism in the early 1990s. The arrival of multipartism in the Kenyan political scene opened other doors including very long, painful and difficult negotiations that led to the promulgation of a new Constitution of Kenya on 27 August 2010. The current Constitution (2010) of Kenya is very progressive in the sense that it devotes a whole chapter (Chapter Four: The Bill of Rights) to social, economic and political rights of individuals and that chapter is what keeps strong the civil society and the media in Kenya.

This short paper attempts to give a historical background to the birth of the current strong civil society in Kenya and briefly discusses the current threats and opportunities for the Kenyan civil society. It ends with an analysis that believes that the Kenyan civil society will continue being a strong player in the Kenyan society for a number of years to come.

CURRENT SITUATION OF THE CIVIL SOCIETY IN KENYA

Professor Jan Aart Scholte, director of the Centre for the Study of Globalisation and Regionalisation defines civil society as a political space where voluntary associations deliberately seek to shape the rules that govern aspects of social life. The civil society thus encompasses many sorts of actors and it is much wider than the formal world of non-governmental organisations. In Kenya, there are thousands of groups of the civil society that work in the not-for-profit sector. They are in different forms including non-governmental organisations (national, regional and international), community-based organisations, faith-based organisations, clubs, associations, trusts, foundations, charitable companies, forums, research institutions, think tanks, universities, the media, coalitions and networks among many others. All those entities have one common objective—at least on paper—of improving the social, economic and political lives of Kenyan people. In other words, the realisation of Chapter Four: The Bill of Rights of the Constitution (2010) of Kenya.

Organisations and groups that work in the not-for-profit sector use different strategies to achieve their objectives. Some build schools, clinics, install water pipes in communities, deliver food and medicine, support small farmers and small business people and run training centres among other things. On the other hand, other organisations implement their work through dialogue with policy makers so that the policies that are taken and implemented respond to the needs of ordinary citizens. This second group of organisations that are in the «policy and advocacy» category is what many governments including the Government of Kenya do not like because they see them as threats to their leadership. On the contrary, policy and advocacy organisations such as Fahamu exist mainly to educate citizens so that they are aware of their rights and re-

sponsibilities so that they can be full participants in the affairs of their countries. Policy and advocacy organisations also do facilitate dialogues between citizens and policy makers so that decisions that are taken at all levels reflect the will and interests of the citizens.

The ability of citizens and groups of citizens (the civil society) to express their views and participate in the affairs of their country is guaranteed under the current Constitution (2010) of Kenya. Unfortunately, there are negative forces within the ruling class in Kenya that want to take the country back to the days before the adoption of the African Charter on Human and People's Rights and the promulgation of the current constitution. The following section shows attempts by some forces within the Kenyan Government to introduce legislations that dilute the provisions of Chapter Four: The Bill of Rights of the Constitution (2010) of Kenya and different actions taken by the civil society to fight against those unconstructive laws.

THE CURRENT LEGAL STATUS OF THE PROPOSED PUBLIC BENEFIT ORGANISATION ACT (2013)

A bill that seeks to revise the Public Benefit Organisations (PBO) Act 2013, amongst other laws, was published on 30 May 2014. It is called The Statutes Law Miscellaneous Amendments Bill 2014 and contains proposals to amend the PBO Act 2013. The proposals are largely similar to those included in the Miscellaneous Amendments Bill of 2013, which was rejected by Parliament in December 2013. Noticeably missing, however, are the contentious proposals that sought to restrict foreign funding that PBOs would be able to access. The Kenyan civil society has expressed that it is pleased with several proposed amendments, but that it is concerned about other amendments that do not promote an enabling environment for the civil society sector. Furthermore, in October 2014, fresh amendments to the PBO Act 2013 sponsored by the Gatundu South Member of Parliament Moses Kuria were reportedly under consideration. The amendments, if adopted, would limit foreign funding of non-governmental organisations to 15 percent.

The Statutes Law (Miscellaneous Amendments) Bill 2013 posed serious threats to the respect and protection of the right to freedom of association in Kenya. The Bill was seriously undermining the spirit and letter of the Public Benefit Organisation (PBO) Act 2013 and was likely to put at risk the ability of civil society organisations and other actors of the not-for-profit sector to carry out their activities effectively, independently and free from governmental interference.

The Statutes Law Miscellaneous Amendments Bill 2014 had many proposed changes to various existing laws including on anti-corruption, public benefit organisations, internal displaced persons and other areas of the devolved government. The President of Kenya, Uhuru Kenyatta signed those changes that were passed by the National Parliament, but rejected amendments on the Anti-Corruption and Economic Act, 2003, saying that «The proposed changes promote discrimination against public officers with executive powers». That part of the bill has been returned to the National Parliament. The amendments to the Public Benefit Act, 2013 were rejected at the level of National Parliament. Contentious changes were mainly two: limitation of foreign funding to 15% and a requirement to all not-for-profit organisations to register afresh with the government, which raised fears that some organisations could have been deliberately left out. Currently, the Government of Kenya is in consultations with different stakeholders regarding the status of the Public Benefit Act, 2013. The PBO Act 2013 is an act to provide for the formations, operations and growth of PBOs; to establish a regulatory and institutional framework within which PBOs can conduct their affairs and for such other connected purposes.

THE CURRENT STATUS OF THE NEW SECURITY LAWS

On 2 January 2015, the High Court of Kenya ruled in favour of a petition tabled by the Coalition for Reforms and Democracy, the main coalition of political parties in the opposition in Kenya and the Kenya Human Rights Commission questioning the legality of the process by which The Security Laws (Amendment) Act, 2014 was arrived at and the constitutionality of some of its clauses. They sought orders to have these sections suspended pending determination of a full hearing.

Judge George Odunga of the High Court declared that the issues raised by the petitioners were important constitutional issues, which required to be investigated by the High Court. He added that issues raised substantial questions of law and also affected fundamental freedoms enshrined in The Bill of Rights of the

Constitution (2010) of Kenya, which could be infringed by the implementation of certain sections. Consequently, he stated, «what is at stake is the balancing of the need to secure the country on one hand and the protection of the Bill of Rights on the other both of which the State is enjoined to attain»

The High Court decided to suspend only those provisions, which disclose a danger to life and limb or imminent danger to Chapter Four: The Bill of Rights at that very moment by way of conservatory orders. However, this does not amount to a determination that those provisions are unconstitutional. Clauses in The Security Laws (Amendment) Act, No 19 of 2014 that were suspended pending the hearing and determination of these petitions were:

- (1) Clause 12 of the Act that introduces a clause, which limits the freedom of expression and freedom of the media and imposes a hefty fine of KES 5,000,000 (€ 50,000) for the offenders or three years in prison or both.
- (2) Clause 16 that has the effect of denying the accused person evidence sought to be presented against him/her until just before the hearing. It would render the process unfair.
- (3) Clause 26 of the Act that introduced an admission of statement by consent in criminal trials. This amendment is objected as contravening Article 50(2) (l) with respect to self-incriminating evidence.
- (4) Clause 29, which seems to introduce summary procedure to criminal proceedings by introducing proof by way of notice though it is called agreement.
- (5) Clause 48 that inserted section 16A to The Refugees Act.
- (6) Clause 56 that introduced new Part V dealing with «special operations» which are operations meant to «neutralise» threats against national security. The provisions, which would then proceed to dealing with what are called «covert operations».
- (7) Clause 58 that seeks to replace «Parliament» with «National Assembly» effectively removing the Senate from playing oversight role on the National Intelligence Service. This provision was objected because it has been inserted without recourse to the Senate.
- (8) Clause 64 introduced an offence of publication of offending material which is defined as publication or statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism.

[The full Security Laws \(Amendment\) Act, 2014 can be accessed here.](#)

Even though Clause 12 above was suspended, the Government of Kenya is currently involved in a legal dispute between its Communication Authority and four main private television channels (Citizen TV, NTV, KTN and QTV) that account for more than 90% of the viewership in Kenya. The Government of Kenya wants to those four television channels to acquire necessary equipment to switch from analogue to digital signals, the four channels say that they need more time to get those equipments. Some members of the civil society and the Kenyan opposition believe that the Government has used the deadline of the move from analogue to digital signals to frustrate the free media in the country. Those four TV channels are now using the Internet to broadcast as the Kenya Communication Authority has switched off their analogue signals on 15 February 2015.

DEREGISTRATION OF 540 NGOS

The Kenyan Government's Non-governmental Organisation (NGO) Coordination Board in December 2014 de-registered 540 organisations for «non-compliance with the law» accusing some of them of «using their charitable status as a front for raising funds for terrorism». Fifteen out of those 540 NGOs were accused of links with terrorism. The NGO Co-ordination Board Executive Director Fazul Mahamed Yusuf said, «It would compromise investigations still under way» and added that «investigations by local and international intelligence agencies have linked the 15 NGOs to criminal activities including terrorism». A separate list of 12 organisations including Médecins Sans Frontières, Concern Worldwide, Adventist Development, Relief Agency International and Centre for Health Solutions Kenya among others were asked to provide their audited accounts or risk being deregistered.

According to the NGO Coordination Board, most of those NGOs that were deregistered were accused on not complying with NGOs regulations including filing their audited accounts. Others were accused of having links with terrorists groups who have attacked Kenya at different times. Even though there could be some entities and groups using the cover of the not-for-profit status for other purposes, the mass deregistration of more than 500 NGOs portrayed a strong message to civil society actors that the Government of Kenya was after their sector. There is thus need for concerted efforts from all actors of the civil society in Kenya to work towards the protection of Chapter Four of the Constitution (2010) of Kenya because the Government can use a small excuse to silence all actors of the civil society including the media. Another way that actors of the civil society can use to counter accusations from the Government is to comply with existing laws (both internal procedures and Government laws) in order to avoid any rooms for accusations.

THE FUTURE OF THE CIVIL SOCIETY IN KENYA

The civil society sector is and will continue being an important player in Kenya for many years to come. For instance, in 2013, figures from the NGO Coordination Bureau showed that there were 8,260 registered NGOs that contributed a total of KES 80 billion in 2012 (USD 1 billion at that time) to the national economy. The NGO sector alone employed over 200,000 in 2012 of which most are primarily Kenyan. The sector grows by 500 organisations each year with a 12.2% increase in their overall funding. As explained above, civil society actors are present in many and important sectors of the society such as education, health, conservation of environment, nutrition and agriculture just to name a few. The Government of Kenya knows very well the vital role that the civil society plays in Kenya and it is hard to imagine how the Government of Kenya can replace the work done by those actors were it to continue pressing for limitations of their foreign funding.

In addition, it can be argued that the civil society in Kenya is strong and vibrant and will not easily let the government violates the rights and freedoms of Constitution of Kenya that many of its (civil society) hardly fought for. At least for the foreseeable future, The Constitution (2010) of Kenya and the judicial system that is going through reforms will continue protecting and strengthening the civil society in Kenya. This was evidenced in December 2013 when the National Parliament rejected the proposed changes to the Public Benefit Organisations Act, 2013. Some of the Members of Parliament mentioned the fact that they had benefited from the support and existence of the civil society in Kenya and they were not going to restrict the work of that important sector. Other Members of Parliament considered the economic importance of the civil society sector in Kenya. The Government of Kenya would have serious problems to find alternative employment to thousands of Kenyans that are employed by the civil society sector let alone finding solutions to economic challenges that would come with limiting NGO foreign funding to 15%.

CONCLUSION

Kenya has had a long history of fighting for equality and dignity of individuals and that struggle was given impetus after the adoption of the African Charter of Human and People's Rights in 1981 in Kenya. Additional efforts followed the introduction of multipartism in the country, which also opened doors to negotiations that led to the adoption of the current constitution of Kenya. Nevertheless, there are political players who do not want to see progressive laws govern Kenya and do their best to push for laws that, if implemented, would limit the rights and freedoms that are enshrined in Chapter Four of the Constitution (2010) of Kenya. Chapter Four of the Kenyan constitution is what gives strengths and power to the civil society in Kenya and with a reformed judiciary, the civil society will continue being a strong player in the Kenyan society. This statement is further supported by three main reasons. The first one is that the Kenyan judiciary is going through considerable reforms and can be a relying partner to protect Chapter Four of the Constitution (2010) of Kenya that guarantees the existence of the civil society. Secondly, Kenya is keen to keep foreign investment coming from Western countries and institutions for various infrastructural projects of its Vision 2030. Some of that foreign investment may stop coming were the country to violate its constitution by restricting the work of part of its civil society. Finally, the economic value of the work of the civil society (including those working on policy and advocacy issues) is very high to Kenya to the point that it would require well thought-out plans including alternative sources of funding to offset the losses caused by limiting NGO foreign funding to 15% of total budgets.

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