Opinion: Private Voluntary Organisations Act
Pearson Nherere, Advocates' Chambers
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This opinion was commissioned by the National Association of Non-Governmental Organisations (NANGO)

A few days ago, the ministry of the Public Service, Labour and Social Welfare published in the Herald newspaper a Notice calling upon all voluntary organisations whose activities come within the ambit of section 2 of the Private Voluntary Organisations Act. (Cap. 17:05), who are not registered with that Ministry urgently to stop their operations until they have regularized their registration in terms of Section 9 of the Act. The exhortation "urgently to stop their operations" is accompanied by the dire warning that "Failure to adhere to the law will result in arrests being made." Counsel's opinion is sought on the legality/constitutionality of this notice.

Counsel is of the view that focus is being wrongly placed on the Notice. The Notice does not change the law. The notice simply purports to interpret the law as laid down in the Private Voluntary Organisations Act ("The Act"). Assuming for a moment, the legality/constitutionality of all the provisions of the Act (save for Section 21 struck down in *Holland & Ors v Minister of The Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S).

It is Counsel's view that any organisation that was obliged to register three months ago is obliged so to do not by virtue of the Notice, but by virtue of the Act. Similarly any person who is liable to prosecution under the Act is so liable today not because of the Notice but the Act. Consequently. such person was liable to prosecution even before the publication of the Notice and would have been so liable to prosecution even had the Notice not been published at all. There is nothing illegal or unconstitutional in the Notice itself. What the Notice really is is gratuitous legal advice by the Ministry.

If it is proposed to challenge the legality of anything then it should be the law itself i.e. the Private Voluntary Organisations Act that requires registration and imposes criminal sanctions for commencing or continuing activities without registering. If that law, the Private Voluntary Organisations Act is constitutional, then, the Notice is good advice as one would have been liable to prosecution anyway.

Section 6 of the Act provides:
"

(1) No private voluntary organisation shall;
  (a) commence or continue to carry on its activities: or
  (b) seek financial assistance from any source:
  unless it has been registered in respect of the particular object or objects in furtherance of which it is being conducted.

(2) No person shall collect contributions from the public except in terms of this Act.

(3) Any person who in any manner takes part in the management or control of a private voluntary organisation, knowing that such organisation is contravening subsection (1), shall be guilty of an offence.

(4) No unregistered private voluntary organisation shall be entitled to receive a grant from the State."

The term "private voluntary organisation" is defined in Section (2) of the Act. Private Voluntary Organisation means any body or association of persons, corporate or unincorporate, or any institution, the objects of which include or are one or more of the following-

(a) the provision of all or any of the material, mental, physical or social needs of persons or families:

(b) the rendering of charity to persons or families in distress:

(c) the prevention of social distress or destitution of persons or families:

(d) the provision of assistance in, or promotion of, activities aimed at uplifting the standard of living of persons or families:

(e) the provision of funds for legal aid:

(f) the prevention of cruelty to, or the promotion of the welfare of, animals:

(g) such other objects as may be prescribed:

(h) the collection of contributions for any of the foregoing: but does not include -

(i) any institution or service maintained and controlled by the State or a local authority: or

(ii) any religious body in respect of activities confined to religious work: or

(iii) any trust established directly by any enactment or registered with the High Court: or

(iv) any educational trust approved by the Minister: or

(v) any body or association of persons, corporate or unincorporate, the benefits from which are exclusively for its own members: or

(vi) any health institution registered under the Health Professions Act [Chapter 27:19], in respect of activities for which it is required to be registered under that Act: or…"

From the definition of "Private Voluntary Organisation" in section (2) of the Act, it necessarily follows that where the activities carried on by a given organisation do not fall within the ambit of section 2, then, such organisation is not required to register in terms of section 6. Should it come to prosecution or having work interrupted by the police, the answer would simply be that one is not required to register in terms of the Act. If an organisation that takes the view that its activities do not come within the ambit of section (2) has its work interrupted and/or its assets seized, the remedy would be to seek an urgent interdict restraining the police from interfering with its work and/or ordering the police to return the seized assets.

Where an organisation's activities fall within section (2) of the Act, then, that organisation has the choice of either applying for registration so as to be on the safe side, or, alternatively, challenging the constitutionality of Section (6) of the Act.

The most obvious provision of the Declaration of Rights under which Section (6) of the Act may be challenged is section 21 of The Constitution. The section provides:
"

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

(2) ---

(3) Nothing contained in or done under the authority of any laws shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision-

(a) in the interests of defence, public safety, public order, public morality

or public health:

(b) for the purpose of protecting the rights or freedom of other persons:

(c) for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations: or

(d) that imposes restrictions upon public officers:

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

In view of the wide definition of "private voluntary organisation" in section (2) of the Act, the requirement in section (6) that a private voluntary organisation may "commence" or "continue" its activities only if it is registered constitutes an interference with the right to freedom of association as contemplated in section 21 (1) of the Constitution. Subsection (1) of s.21 must, however, be read in the light of subsection (3). According to s.21 (3) [C], the mere fact that a law makes provision for the registration of companies, partnerships, *societies or other associations of persons,* other than political parties, trade unions or employers' organisations does not render that law invalid on the grounds of inconsistency with subsection (1) of section 21. Further, in terms of S.21 (3) (B), it is permissible to pass a law which restricts the freedom of association of some persons if that law is for the purpose of protecting the rights of freedom of other persons. The State, therefore, has a very good case for arguing that section (6) of The Act (as read with sections (2) and (9) thereof) is perfectly constitutional as it is the type of law contemplated under s.21 (3) [C], or, alternatively, s.21 (3) (B). To counter this argument, one would have to go a step further and show that Section (6) of the Act is not reasonably justifiable in a democratic society.

In *Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and Others* 1995 (1) SA 703 (ZS) (1995 (1) BCLR 56) the Supreme Court emphasised that an abridgement of a guaranteed right should not be arbitrary or excessive.

In *Nyambirai v National Social Security Authority and Another* 1996 (1) SA 636 (ZS), at 647, the Supreme Court held that:

In effect the Court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right:

(ii) the measures designed to meet the legislative objective are rationally connected to it: and

(iii) the means used impair the right or freedom no more than is necessary to accomplish the objective.

Also see *R v Oakes* (1986) 26 DLR (4^{th}) 200 (SCC) at 227 ((1986) 19 CRR 308 at 336-7) (a decision of the Supreme Court of Canada). In *South African National Defence Union v Minister of Defence And Another* 1999 (4) SA 469 (CC) (at p481, the South African Constitutional Court took a similar approach. It observed:

> "At the second stage of the constitutional enquiry, the relevant questions are: what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well tailored to that purpose?"

It is counsel's view that a challenge of section (6) based on section 21 of the Constitution has to be very narrowly confined indeed. Paragraph (A) of subsection (1) of section (6) is, it is

submitted, not reasonably justifiable in a democratic society. It is arguable that Paragraph (B) is also not reasonably justifiable in a democratic society. However, the case for impugning Para.(B) is not as strong as that for Para.(A). Per contra, if one looks at S.6 (4), it is perfectly reasonable for the State to say that it shall not give any State grants to organisations that are not registered. To put it differently, it is understandable and rational that the State would give State funding only to those organisations that are registered and are subject to the monitoring and scrutiny contemplated under Part IV of the Act. The same reasoning applies to subsection (2). There is some rationale in saying that any organisation that seeks to collect contributions from members of the public should be registered with Government and be subject to some scrutiny.

The rationale for Section 6 (1) (A) is rather difficult to fathom. The effect of the paragraph is to require registration for any organisation whose activities fall within the definition of "private voluntary organisation" in section 2 of the Act. This is regardless of whether or not such organisation actually does or proposes to raise funds from members of the public or from the State. The usual justification for this type of regulation is protecting unsuspecting members of the public from harm. That justification is not present here – unless the persons who are being protected from harm are the would-be beneficiaries. This would not make sense in view of the breadth of the definition of "private voluntary organisation". In fact, Section 6 (1) (A) is absurd. If an individual, using her own monies carries on charitable activities, she may do so without having to register because she is not an association. If that same individual, using her own monies, creates a trust to continue her activities after her death, such trust should register.

Section 6 (1) (B) prohibits an unregistered organisation from seeking financial assistance from "any source". One understands the rationale for protecting the would-be contributors from fraud or having their monies used for purposes other then those they truly intended to fund. This justification is compelling if the sources of the funds are members of the public. The justification loses force if the "source" is a private one or, a foreign donor agency which is in a position to put in place its own control mechanisms as to how its funds are used. Thus, it is arguable that Section 6 (1) (B) also goes beyond what is reasonably justifiable in a democratic society.

In light of the foregoing, it is Counsel's view that Section 6 (1) (a) and (b) can be successfully challenged as being unconstitutional.

Counsel's instructing practitioners also raise the issues of "the right to livelihood" of the employees of NGO's and. the "right to life" of the beneficiaries of NGO services. There are some difficulties with asserting these rights. In the first place, when one is challenging the provision of a law as being unconstitutional, one must be able to point to a specific section of the Constitution and be able to say "This provision contravenes section – of the Constitution". One must find a particular peg on which, as it were, to hang one's hat. Our Constitution does not, anywhere, recognize the right to a "livelihood". As far as the right to life is concerned, section 12 of The Constitution reads:

"

(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case–
    (a) for the defence of any person from violence or for the defence of property:
    (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained: …"

The activities of NGO's are pretty varied. Without further evidence, it is impossible to say that banning the activities of a particular organisation would lead to deaths. In any event, it should be noted that the law does not, as such, ban any organisation. The law simply requires that any organisation whose activities are covered by Section 2 should register. If an application to

register is turned down or, the activities of an organisation are actually interrupted, then, it could, possibly, be argued that such interruption or denial of registration leads to deaths. Even that would be stretching the argument.

As far as the United Nations Covenant on Economic Social and Cultural Rights is concerned, one cannot enforce that in the law courts of Zimbabwe. The covenant has not been incorporated into our law by an act of Parliament as is required by Section 111 (B) of The Constitution. That provision states:

"111B Effect of international conventions. etc.

(1) Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organisations–

(a) shall be subject to approval by Parliament: and
(b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament."

So one cannot successfully rely on the covenant in the Zimbabwean Courts.

(Compare: *R v Secretary of State for the Home Department. Ex parte Brinal and Others* [1991] 1 AC 696 (HL) ([1991] 1 AII ER 720): *Azanian Peoples Organisation (AZAPO) And Others v President of The Republic of South Africa And Others* 1996 (4) SA 671 (CC), at 688.)

I would therefore advise that paragraphs (A) and (B) of subsection (1) of Section (6) of the Private Voluntary Organisations Act are unconstitutional as they are inconsistent with section 21 (1) of The Constitution and can be shown not to be reasonably justifiable in a democratic society.

With regard to strategies, an NGO whose activities fall within the ambit of section 2 has two alternatives. Either it files an application with the Supreme Court in terms of Section 24 (1) of the Constitution challenging the unconstitutionality of the sections of the Act. Alternativley, it can wait until there has been a prosecution and then insist that the trial court refers the matter to the Supreme Court in terms of Section 24 (2) of The Constitution. I would recommend a pre-emptive section 24 (1) application.

Should the section 24 (1) route be preferred, careful attention should be paid to the question of *locus standi.* The Supreme Court could avoid a decision by simply holding that the Application before it lacks *locus standi.* To address this possibility, I would suggest that the application be filed by an organisation, and a member thereof so that both the Applicant organisation and the individual member assert their rights in terms of Section 21. The organisation concerned would have to aver that its activities come within the ambit of section 2 and, therefore, it is required to register. While this is a necessary averment, it also means that should the Supreme Court application fail, that organisation would have to apply for registration as it would have sworn that it comes within the purview of the Act. Also, the Applicant/s must be chosen with great care. It must be an Applicant who does not raise funds from the public and, does not seek State grants. Further, it is Counsel's view that the Applicant/s must be as politically neutral as possible

I advise accordingly.

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