

Democracy & Society

A PUBLICATION of the CENTER FOR DEMOCRACY and CIVIL SOCIETY

Volume 7, Issue 2

Democrats, Dictators, and Demonstrators Conference Issue

Backlash Against Democracy: The Regulation of Civil Society in Africa

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¹This paper builds on TrustAfrica funded research regarding the legislative environment for non-governmental organizations in Africa. TrustAfrica is an African foundation, based in Dakar, Senegal, which promotes equitable development and democratic governance by funding civil society organizations across the continent. For more information visit www.trustafrica.org.

Among the many forces² which contributed to the political liberalization of African nations, civil society formations played a pivotal role in dismantling authoritarian one-party rule and opening public space for wider political participation.³ However, democratic gains achieved during the 1990s have slowly begun to erode as conflict has resurfaced across the continent and many hybrid⁴ democratic regimes have adopted repressive tactics to maintain political power. The increasing regulation of the civil society sector indicates a return to autocratic practices and a backlash against democratization. Yet, despite this trend several countries have also adopted enabling frameworks for civil society, recognizing the contribution of this sector to national development. The existence of these simultaneous trends invites a re-examination of the current state of African civil society and its relationship to democratic consolidation.

The first section of this paper provides a brief overview of the recent history of state-civil society relations in Africa. The second section examines the current trend in repressive NGO legislation in Zambia, Ethiopia, and Zimbabwe, which include: (1) barriers to entry; (2) barriers to operational activity and free speech; and (3) barriers to resources.⁵ The third and final section frames this trend within the history of democratization in Africa and identifies new directions for research and analysis.⁶

The 1990s ushered in an era of hope and optimism in Africa, as previously autocratic regimes took salutary steps towards accommodating political participation, establishing democratic institutions, and relinquishing absolute power over state apparatus. The failure of state-socialism and the victory of liberal democracy created new incentive structures for developing nations to adopt political and economic reforms to ensure favorable aid flows. African civil society played a pivotal role in this transition as well, convening sovereign national conferences and constituent assemblies which laid the foundations for multi-party democracy and political transition.

² Other forces include the collapse of the Cold War bipolar system, international pressures for democratization, the contagion effect of popular democratic movements in Eastern Europe and various forms of aid conditionality.

³ Gyimah-Boadi, E. "Civil Society in Africa." *Journal of Democracy* 7.2 (1996): 118-32.

⁴ Hybrid regimes refer to the 'incomplete' or 'stalled' transitions to multi-party democracy which emerged as a result of political liberalization in the early 1990s.

⁵ This analysis adopts the framework established in the World Movement for Democracy's February 2008 report, "Defending Civil Society." www.wmd.org

⁶ It should be noted that the countries covered by this paper represent examples of repressive regimes. There are also examples of African states which have created enabling environments for civil society such as Ghana, Senegal, and Tanzania, to name a few. A comparative study of the legislative and political environment for civil society in a mix of repressive and open regimes will be the subject my dissertation research.

This third wave of democratization resulted from a combination of internal and external pressures to open up closed political spaces and create the conditions for democratic governance and popular participation. The question of why nations transition from autocratic to democratic systems is posed by Robert Dahl in terms of the “the costs of suppression” versus the “costs of toleration.”⁷ When the former outweigh the latter, even dictatorial regimes will cede to nominal levels of political inclusion and compromise to maintain access to political power. During the third wave of democratization, the costs of suppression greatly increased. Post Cold War, international allies withdrew their support from autocratic leaders who had previously enjoyed unlimited amnesties and financial backing from opposing sides in the East-West divide.

The victory of economic and political liberalism gave rise to a global consensus regarding the virtues of democracy. Democratic government promised to advance economic development, human rights, and peace. The practical implications of this new consensus were manifest in the proliferation of democracy-assistance programs funded by governments, multilateral bodies, international financial institutions, and independent foundations.⁸ The end of the Cold War and the failure of state-centered development strategies led international donors to seek new avenues to influence political and economic development, namely civil society and non-governmental organizations. Civil society’s role thus expanded from the sphere of political and civil liberties to play an integral role in development strategies, poverty reduction, humanitarian aid, and basic services provision.

Incomplete democratic transitions have created a new kind of authoritarianism in which outright repression and violence are no longer tolerable given the increased effectiveness of civil society from within the state and the international climate for human rights and donor conditionality based on good governance and the rule of law. In these cases, autocrats have either appointed and quickly replaced reformists after brief intervals of unsuccessful democratization, or have held on to power while touting superficial liberalization and a moderately more open political space for democratic opposition. The underlying political realities remain unchanged: manipulated elections, weak government institutions, excessively powerful executives, state-censored media, rampant corruption, and the lack of an independent

⁷ Dahl, Robert Alan. *Polyarchy :Participation and Opposition*. New Haven: Yale University Press, 1971. As quoted by Linda Kirschke (2000).

⁸ Gershman, Carl and Allen, Michael. "New Threats to Freedom: The Assault on Democracy Assistance." *Journal of Democracy* 17.2 (2006): p. 36.

judiciary.⁹

Since democratic movements have the potential to topple weak states in favor of democracy and away from the control of ruling elites, civil society represents a viable threat to the stability of these repressive regimes.¹⁰ Such politically insecure governments have adopted subtle strategies for quelling dissent, including: barriers to entry, legal restrictions on NGO activities, and barriers to resources.

1. Barriers to Entry (Registration Limitations)

In most cases, the right to association is guaranteed by national constitutions. In Ethiopia, the right to free association is enshrined in Article 31 of the Constitution stating that ‘Everyone shall have the right to form associations for whatever purpose.’ The Zambian constitution safeguards fundamental rights and freedoms including the right to freedom of association under Article 11 (b). The same is true for Zimbabwe. However, these rights are obstructed by prohibitions against unregistered groups, complex registration procedures, vague grounds for denial, re-registration requirements, and barriers for international organizations. For example, the 2008 Ethiopian Proclamation on Societies and Charities imposes severe penalties on individuals managing unregistered groups including a fine of 10,000 Birr (approximately \$800 US) which can be combined with a prison sentence of up to 5 years.¹¹ Such penalties undermine the civil society sector by criminalizing unregistered groups and creating a climate of fear and insecurity for groups which have not yet received legal status.

To ensure the independence and freedom of civil society organizations, registration procedures should be voluntary, efficient, time-bound, and include well defined grounds for refusal of registration.¹² Contrary to these international best practices, repressive legislations create mandatory and burdensome registration requirements which are purposefully vague. The 2009 Zambian NGO Bill mandates compulsory registration for all NGOs, a requirement that can be debilitating for community based organizations, which may or may not be able to produce official documents such as annual reports and audited accounts. Although the bill allows for organizations to begin activities once a registration application has been

⁹ Gershman (2006: 36).

¹⁰ Gershman, Carl and Allen, Michael. "New Threats to Freedom: The Assault on Democracy Assistance." *Journal of Democracy* 17.2 (2006): 38.

¹¹ Bhekinikosi Moyo, *Regulating Civil Society in Africa*, Unpublished article, p. 11.

¹² Mandeep S. Tiwana, "Analysis of the Zambia NGO Bill 2009," *Civil Society Watch Program*, CIVICUS.

entered, it does not prescribe time limits on application processing. This uncertainty effectively prevents organizations from making intermediate and long term plans since future registration status remains in doubt.¹³ Similarly, in Ethiopia, Uganda, and Zimbabwe, regulations governing the registration process are vague and leave considerable discretion to the registration officials. As a result, NGOs have trouble registering, bear long delays, recurring requests for information, and in some cases denial.

In all four countries, the grounds for refusing registration are poorly defined thereby creating the conditions for prejudicial decisions against which civil society organizations have no legal recourse. Registration can be denied for a number of reasons, all of which repose on the discretionary power of political authorities. In Zambia, an application for registration can be rejected on the basis of failing to contribute to “public interest,” which is not defined in the text of the bill, or upon recommendation of the NGO Council, a body created under the auspices of the bill to oversee registration processes.¹⁴ The absence of clearly defined rules and regulations regarding the registration procedures exacerbates the climate of insecurity for NGOs whose registration status remains at the discretion of political authorities. Additionally, the Zambian NGO Bill requires registration applicants to specify the administrative districts, divisions, and location where NGOs plan to carryout proposed activities as well as indicate proposed sources of funding. These stipulations represent self-imposed constraints which could seriously hamper the future expansion and effectiveness of civil society organizations.

2. Barriers to Operational Activity (Legal Restrictions on NGO Activities)

Once organizations have successfully negotiated complex and burdensome registration requirements, legal constraints can restrict the types of activities they participate in. These barriers to operational activity include direct prohibition of certain spheres of activity, intrusive government oversight, criminal sanctions against individuals, and the threat of termination or dissolution. Recent legislation in all three countries includes provisions which correspond to one or more of these barriers to operational activity.

Both the 2004 Zimbabwean NGO Bill and the 2008 Ethiopian Proclamation on Societies and Charities impose restrictive definitions of foreign versus national NGOs, which are subsequently used to prohibit certain spheres of activity. In Zimbabwe, the 2004 bill defined local NGOs as those organizations that are

¹³Tiwana, Ibid, p. 3.

¹⁴ Mandeep S. Tiwana, “Analysis of the Zambia NGO Bill 2009,” *Civil Society Watch Program*, CIVICUS, p. 4.

founded, managed, and staffed by Zimbabwean nationals residing in the country. Foreign NGOs whose primary purpose involves governance issues would be denied registration, and local NGOs participating in governance activities would be prohibited from receiving foreign funding. Similarly, charities and societies established by Ethiopians under Ethiopian law would be deemed foreign institutions if they received more than 10% of their funding from foreign sources. Foreign NGOs are prohibited from participating in activities that advance citizenship, community development, human and democratic rights, conflict resolution, equality, diversity, and the efficiency of the justice and law enforcement system. These laws effectively relegate civil society organizations to service delivery and preclude their engagement with substantive issues such as human rights and governance.

The establishment of government oversight agencies to regulate the NGO sector creates intrusive supervisory mechanisms which are in many cases beyond judicial review. Invasive oversight measures may take the form of burdensome reporting requirements, interference in internal management, and mandatory coordination with government policy. Much like the Zambian bill, the Ethiopian proclamation establishes a regulatory agency with virtually limitless powers including the authority to revoke registration status and dissolve organizations which it suspects of “misconduct or mismanagement” or participating in “unlawful purposes” which are “contrary to national or public interest.” In addition, the Ethiopian agency can appoint, remove, or suspend staff of civil society offices, freeze assets, perform intrusive audits, intervene in internal decision making processes, scrutinize operations, and force testimonial disclosure with respect to any matter related to the organizations operations. Membership lists and donor records are also required in order to provide government access to information regarding all individuals potentially associated with an organization.¹⁵ Under these circumstances, participating in local civil society organizations entails serious personal risk since NGO members can be fined and imprisoned as a result of their connection to any “unlawful” organization.¹⁶

3. Barriers to Resources

NGO legislation can be used to constrain the ability of NGOs to secure the funding necessary to carry out their activities. Increasingly, barriers to funding have become common place and target foreign funding in

¹⁵ Alemayehu G. Mariam, “No Good Deed will go Unpunished,” February 25, 2008. EthioPolitics.com (http://ethiopolitics.com/news_1/20080225280.html)

¹⁶ Ethiopian Charities and Societies Proclamation, No. 621/2009, Article 10.103 (February 2009).

particular. Zimbabwe was the first African country to institute legislation restricting foreign funding to local organizations and proscribing the types of work local organizations could participate in once they had received foreign backing. Similarly, the 2009 Ethiopian law restricts NGOs receiving more than 10% of their financing from foreign sources to engage in activities related to “the advancement of human and democratic rights.”¹⁷ This severely limits the productivity of these organizations because it is virtually impossible for these groups to raise sufficient funds from local sources. Such provisions silence civil society by starving NGOs of resources, essentially extinguishing their right to expression.¹⁸

Implications for Democratic Consolidation in Africa

Although the progress of democracy in Africa since the 1990s is undeniable, many of Africa’s democratic transitions remain incomplete and pluralistic policies exist alongside persistent authoritarian practices. In this regard, Larry Diamond distinguishes between electoral democracy and liberal democracy.¹⁹ Electoral democracy refers to a minimalist conception of democratic practice based on electoral competition and participation, while liberal democracy refers to the qualitative elements of political freedom necessary to render electoral participation meaningful. These political freedoms, which include the right to free speech, the right to media independence, and the right to free association, are currently being undermined by the drafting, restrictive NGO legislation across the continent. Until these fundamental rights have been operationalized, African democracies will remain hostage to political elites in control of state apparatus.

Democratic consolidation in Africa thus requires a vibrant and free civil society which can contribute to the transformation of electoral democracies into liberal democracies through the expansion political freedoms and mobilization of popular participation in economic and political development. The state remains an essential player in this important work, thus the two sectors must develop effective rules of engagement so that they can work as allies rather than as adversaries. The repressive legislations discussed in this paper fail to provide a positive regulatory framework which could advance local civil society’s capacity to contribute to economic and political development by providing predictable and reliable systems of corporate governance, oversight, and management. Instead, these legislations represent an underhanded attempt by the state to re-conquer the political arena and criminalize dissent. These authoritarian efforts are

¹⁷ Ethiopian Charities and Societies Proclamation, No. 621/2009, Article 14 (2) (j-n) (February 2009).

¹⁸ “Barred from the Debate: Restrictions on NGO Public Policy Activities”, *Global Trends in NGO Law*, Volume 1, Issue 3, p. 6. Source: <http://www.icnl.org/knowledge/globaltrends/GloTrends1-3.htm>

¹⁹ Larry Diamond, “Is the Third Wave Over?” *Journal of Democracy* 7.3 (1996): 21.

in contrast to the enabling environments nurtured by several African governments, which recognize civil society and the NGO sector as partners in economic and political development. In these cases, the regulation of civil society becomes a welcome sign of state strength and contributes to advance political legitimacy and popular support for good governance.

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