

**LAWS GOVERNING CIVIL SOCIETY ORGANISATIONS AND THEIR  
IMPACTS ON THE DEMOCRATIZATION OF A COUNTRY:  
ETHIOPIA IN CASE**

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## ABSTRACT

Democratization involves many important actors and institutions including vibrant civil society organisations ('CSOs'), a free press, well organized and competitive political parties and an independent judiciary. Civil Society sector is one pillar that has contributed to the development and the democratization process of scores of countries by delegitimizing authoritarian regimes, generating social capital, empowering communities, building capacity of democratic institutions, and holding government to account.

However at present, there is an on-going backlash against CSOs across the globe. The threats noticeably change from obvious direct repressions of CSOs and activists, to more elusive legal or quasi-legal obstacles that restrict the space in which CSOs operate.<sup>1</sup> The legal barriers include barriers to entry to discourage or prevent the formation of CSOs; barriers to operation to restrict or ban advocacy and lobbying activities; and barriers to resources to restrict CSOs' ability to secure fund required to pursue their purposes of formation.<sup>2</sup> The thesis examines such legal impediments that restrict CSOs space of operation and their possible impact in the democratization process of a nation.

It argues that any committed effort towards democratization demands an enabling legal framework that ensures freedom of association; facilitates CSOs formation and sustained existence; allows CSOs engagement in wider lawful purposes including the promotion of human rights and democracy; broadens CSOs access to resources; and regulates CSOs accountability. This thesis provides the first comprehensive assessment of the Ethiopian legal framework against such ideally enabling legal conditions. It does so in order to appraise the potential impacts of the legal framework on the democratic functions of CSOs operating in Ethiopia, and to suggest reforms so that those functions be better carried out to the advancement of the democratization process of the country.

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<sup>1</sup> ICNL and World Movement for Democracy, 'Defending Civil Society: A Report of the World Movement for Democracy; (2008) 3.

<sup>2</sup> Ibid.

## **ACKNOWLEDGMENT**

With sincere thanks to my advisors Professor Debra Morris and Jonathan Garton; and the University of Liverpool that has sponsored my study.

This thesis is dedicated to my wife, Tirsit Zewge.

## ACRONYMS

AAPO	All Amhara People's Party
ACHPR	African Charter on Humans and Peoples' Rights
AIDWO	African Initiative for Democratic World Order
APAP	Action Professional Association for People
CAPDE	Council of Alternative Forces for Peace and Democracy in Ethiopia
CBOs	Community Based Organisations
CCRDA	Consortium of Christian Relief and Development Association
CETU	Confederation of the Ethiopian Trade Union
CRDA	Christian Relief and Development Association
CSO	Civil Society Organisations
CSP	Charities and Societies Proclamation
CUD	Coalition of Unity and Democracy
EBA	Ethiopian Bar Association
ECHR	European Convention on Human Rights
EDP	Ethiopian Democratic Party
EECMY	Ethiopian Evangelical Mekane Yesus Church
EHRC	Ethiopian Human Rights Council
EHRCO	Ethiopian Human Rights Council Organisation
EMDA	Ethiopian Muslim Development Association
EOC/DICAC	Ethiopian Orthodox Church Development and Inter Church Aid Commission
EPRDF	Ethiopian People Revolutionary Democratic Front
EU	European Union
EWLA	Ethiopian Women Lawyers Association
FDRE	Federal Democratic Republic of Ethiopia
FFSC	Forum for Street Children
HOF	House of Federation
IAG	Inter-Africa Group

ICCPR	International Convention for Civil and Political Rights
ICNL	International Center for not-for-profit Law
IFLO	Islamic Front for Liberation of Oromia
MDF	Management Development Forum
NATO	North Atlantic Treaty Organisations
NEWA	Network of Ethiopian Women Association
NGOs	Non-Governmental Organisations
OLF	Oromo Liberation Front
ONC	Oromo National Congress
OSJE	Organisation for Social Justice in Ethiopia
PANE	Poverty Action Network of Ethiopia
SAP	Structural Adjustment Programme
TGE	Transitional Government of Ethiopia
UDHR	Universal Declaration of Human Rights
UEDF	United Ethiopian Democratic Front
UEWCA	Union of Ethiopian Women Charitable Association
UN	United Nations
UPR	Universal Periodic Review
US	United States
VAT	Value Added Tax

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## CHAPTER 1

### INTRODUCTION

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Civil Society Organisations (CSOs) which are the associations of people lawfully organized, as independent, voluntary and non-profit distribution entities are often formed to pursue various legitimate socio economic and political purposes.<sup>1</sup> One such legitimate purpose of CSOs is the promotion of democracy. While the system of democracy allows the growth of Civil Society Organisations, on the other hand civil societies also promote the democratization of a nation from an authoritarian political system to semi-democracy or from semi-democracy to a full-fledged democracy.

CSOs have an important role in the democratization of a country through the de-legitimization of an authoritarian government; education and empowerment of the citizenry; interest representation and articulation; watchdog services such as human rights monitoring, corruption control, and budget auditing; conflict mitigation, resolution and management; and poverty reduction programs etc. However, CSOs can play these roles only when there is an enabling environment. An Enabling environment could be social, economic, political and/or legal in its nature. Although this thesis acknowledges the importance of all these factors, it nonetheless focuses on the enabling legal environment for CSOs role in democratization. It thus argues that the legal framework in which CSOs operate plays an important role in the functions of CSOs including the promotion of democracy.

Such enabling legal conditions that promote CSOs contribution to democratization include the recognition and the enforcement of CSOs right to exist; to solicit funds from various sources; and to engage in any kind of lawful activities that aim at pursuing a legitimate purpose including the promotion of democracy. Enabling legal environment also entails CSOs accountability that balances the need to regulate them without unwarranted infringement on their autonomous existence and engagement. In turn, these factors critically determine the basic attributes of CSOs such as plurality,

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<sup>1</sup>Lester Salamon and Helmut Anheier, 'Measuring the non-profit sector Cross-nationally: a comparative method' (1994) *Voluntas* 4(4) 538.



activism, autonomy, resourcefulness, legality and civility that are essential conditions to play an effective role in the democratization process.

The democratization role of CSOs was particularly evident during the third wave of democratization that took place in the 70s. Recently also, there has been an associational revolution where CSOs have played an important role in the removal of the authoritarian governments and the promotion of democracy. Following the vibrant role of CSOs in democratization however, a number of countries have enacted very restrictive laws that would cripple CSOs formation and sustainable existence, free engagement and resource mobilization capability. They also stipulate unwarranted severe penalties that threaten the organisations and individuals involved in the sector. What is peculiar about such restrictive laws is that they particularly target advocacy organisations engaged in the promotion of democracy and human rights. Governments often justify the enactment of such stultifying regulations on such grounds as the need to protect the country from foreign intervention; to prevent terrorism financing; to ensure CSOs accountability; to coordinate CSOs engagements with government policies etc. However, a careful analysis of these accounts may demonstrate that such illiberal democratic governments largely use the law to control CSOs, the media, the political parties and the people in general with intent to dominate power, leaving no or little room for any form of accountability and opposition from such groups.

Such global trend has provoked the writer of this thesis to answer how the law is being used as an instrument to curtail the democratization process of a nation. Hence, the main research question that this thesis aims to answer is whether or not the legal framework of a nation could possibly have an impact on the democratic functions of CSOs. In order to answer this general question, it will also be necessary to answer the following supplementary question.

1. What constitutes the civil society sector?
2. What is democracy and democratization?
3. What is the relation between civil society organizations and democracy? What roles, if any, do CSOs have for the promotion of democracy?
4. What factors affect CSOs contribution to democratization?

5. Among other factors, the thesis will also specifically aims to answer how the law can affect the interplay between CSOs and democracy. Such interplay is explained using the four pillars that the law regulates:
  - a. The legal existence of CSOs
  - b. The purposes of CSOs
  - c. The resource mobilization of CSOs
  - d. The accountability of CSOs

Ethiopia is chosen as a case study in explaining these four pillars as it is one of those countries which recently enacted a very stringent law that regulates the civil society sector following the restrictive global trend. The fact that the writer worked in the Ethiopian Civil Society Sector is also one of the reasons to choose the Ethiopian legal framework as a case study.

This thesis therefore tries to answer the question, ‘What is the role of the law in assisting CSOs in democratisation’ by taking a thorough legal analysis of the newly enacted Ethiopian Charities and Societies Proclamation as a case study. It sees to jurisprudential analysis and best practices of other countries in order to determine how enabling or disabling the existing legal framework of Ethiopia is for CSOs and how it would potentially affect the democratization functions of CSOs. The thesis is thus structured in the following way.

Chapter two answers the first supplementary research question by laying the conceptual framework. It thus defines the key terms of the research: Civil Society, Democracy and Democratization. It does so in order to clarify such notions and put them in context for the purpose of this research. It thus offers workable definitions of the terms for this particular thesis. It also briefly introduces the reader to the basic idea of the Ethiopian Civil society and the Ethiopian democratization process.

Chapter three answers what roles, if any, CSOs have for the promotion of democracy. After discussing how civil society organisations could potentially contribute to the democratization process of a nation, it briefly reviews the role of Ethiopian civil societies in the democratization of the country.

Chapter four by way of introduction answers the question ‘what factors affect CSOs’ contribution to democratization?’ Although it briefly discusses all potential factors that affect the interplay between CSOs and democratization it in particular focuses on the enabling legal conditions for the democratic functions of CSOs. It thus introduces the four pillars by which the law can create enabling legal conditions (i) facilitating and ensuring the legal existence of CSOs; (ii) allowing the free engagement of CSOs in any lawful purpose (iii) permitting the resource mobilization of CSOs; and (iv) ensuring the accountability of CSOs.

The subsequent chapters (Chapter five up to chapter eight) discuss each of these four pillars of an enabling legal framework in detail by taking the Ethiopian legal framework as a case study in order to answer the main research question how the law governing CSOs assist in democratization?

Chapter five thus discusses how the rules that govern the ‘*legal existence of CSOs*’ could affect CSOs democratic functions. It argues that a legal framework that facilitates undemanding requirements for the formation and acquisition of legal personality, and that protects them from an unwarranted dissolution help CSOs to boost in volume. The growth of the sector in turn assists the democratization process through the formation of social capital and the representation of diverse interests. The Ethiopian Charities and Societies Proclamation that governs the formation, registration and dissolution of Ethiopian CSOs is assessed against such enabling legal conditions.

Chapter six examines how the law that allows the ‘*free engagement of CSOs in lawful purposes*’ facilitate the democratic functions of CSOs. It asserts that CSOs need to be given the right to freely choose and to freely engage in any lawful purpose including the promotion of democratization. It therefore entails the rights of CSOs to choose any lawful strategies and activities. Such freedom for CSOs enhances their activism, autonomous engagement and coordination with all the relevant actors and institutions that promote the democratization of a nation. The Ethiopian legal framework which prohibits the engagement of CSOs that raise more than 10% of their annual income from foreign sources, in the promotion of human rights and democracy, equality,

justice and peace will be particularly examined in detail against the criteria of enabling legal conditions discussed in the chapter.

Chapter seven explores how the legal rules that regulate the '*resource mobilization and utilization of CSOs*' could impact on CSOs' democratic function. It argues that a legal framework that allows CSOs to solicit fund from diverse lawful sources ensure their financial sustainability and thus their efficiency to undertake any of their purposes including democratization. Moreover resource mobilization from diverse sources enables them to remain autonomous and to resist any unwarranted influence which is necessary in their democratic functions. This chapter also assesses the Ethiopian legal framework that governs the resource mobilization and utilization of resources to analyse the extent to which the law is enabling to enhance the resource capability of CSOs.

Chapter eight discusses the '*accountability of CSOs*' as an enabling legal condition to ensure CSOs transparency and accountability. It asserts that impartial and reasonable accountability measures, in addition to protecting stakeholders and the public at large, will also help to ensure the trustworthiness of CSOs and to screen out corrupt and 'uncivil' societies such as terrorist groups which could threaten the democratic functions of the sector. The chapter also make the assessment of the Ethiopian legal framework to analyse to what extent it strikes the balance between CSOs accountability and/or transparency and that of their autonomy.

Based on the analysis made in the foregoing chapters, the last Chapter concludes by summarizing how the Ethiopian legal framework that governs CSOs could potentially affect the contribution of the sector for the development of the democratization process in the country. Finally, the concluding chapter proposes reforms to the Ethiopian legal framework, based on the findings of the research.

## CHAPTER 2

### CONCEPTUAL FRAMEWORK: CIVIL SOCIETIES, DEMOCRACY, AND DEMOCRATISATION

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Key words that merit definition for better understanding and laying the conceptual framework of this research are civil society, democracy and democratization.

#### 2.1 Civil Society

Civil Society is most commonly defined as an arena outside of the family, the state, and the market where people associate to advance common interests.<sup>1</sup> Such broad conceptualization encompasses scores of institutions existing as a distinct social space in between the family and the state, or between the market and the state. If such broad conceptualization is accepted with no qualification, then the following and many more may be grouped together as constituting the sector: Academia, activist groups, advocacy organisations, charities, citizens' militias, civic groups, clubs of different sorts, community foundations, community organisations, fanatic terrorist groups organisations, cooperatives, churches, cultural groups, environmental groups, foundations, fundamentalist groups, labour unions, lobbyists groups, mafia groups, media, men's groups, non-governmental organisations, non-profit organisations, policy institutions, political parties, private voluntary organisations, professional associations, rebels, religious organisations, social enterprises, support groups, think-tanks, trade unions, voluntary associations, women's groups etc.<sup>2</sup> Precisely defining Civil Society is therefore difficult owing to the diversity of the units that are said to constitute the sector.

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<sup>1</sup> Micheal Bratton, 'Civil Society and Political Consolidation in Africa' (1994) *IDR Reports* 11 (6) 4-5 in John Keane (edn) *Civil Society and the State: New European Perspectives* (Verso 1988); Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press 1994); Ernest Gellner, *Conditions of Liberty: Civil Society and its Rivals* (Allen Lane 1994); James Schmidt, 'Civility, enlightenment, and society: conceptual confusions and kantian remedies' (1998) *American Political Science Review* 92 (2) 423; Helmut Anheier, *Civil Society: Measurement, Evaluation, Policy* (Earthscan 2004) 22.

<sup>2</sup> See generally, Gordon White, 'Civil Societies, democratization and development (I): Clearing the analytical ground' (1994) *Democratization* 1 (2) 375-390; Larry Diamond, 'Towards Democratic consolidation' (1994) *Journal of Democracy* 5(3); Udaya Wagle, 'The Civil Society Sector in the developing world, Public Administration and Management' (1999) *An Interactive Journal* 4 (4) 529; Commission of European Communities (2001) *European Governance: White paper, COM, 428*.

In order to meet this definitional challenge, the ‘structural-operational definition’ which is coined by Salmon and Anheier, has presented four fundamental characteristics which CSOs should reasonably exhibit. These are: *Organisation, Independence, Non -profit distribution, and Voluntary*.<sup>3</sup>

*Organisation:* CSOs may be constituted either formally or informally. Thus an institution is deemed to be a civil society organisation if it is either officially registered or exercise a certain degree of institutionalization in terms of its organisational form and permanence or systems of operation.<sup>4</sup> Thus CSOs are distinct from those activities of the informal sector, such as mutual support by family members, which is a similar activity to that performed by CSOs, but executed on an ‘ad hoc’ or temporary basis.<sup>5</sup> The structural-operational definition, by giving due recognition to those entities that fulfill a minimum characterization of ‘organisation’ devoid of a formal registration process as part of the civil society sector, renders the definition more comprehensive and workable across jurisdictions.<sup>6</sup>

*Private/Independent:* civil society organisations should also remain fundamentally private in basic structures<sup>7</sup> and exercise a certain degree of autonomy from the state apparatus and the private sector<sup>8</sup> irrespective of funding or other relationship with those entities.<sup>9</sup>

*Non-Profit distribution:* Civil society organisations should neither distribute dividends or profits among their managers, members, or founders but rather plough back the profit into funding their activities.<sup>10</sup>

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<sup>3</sup>Lester Salamon and Helmut Anheier, ‘Measuring the non-profit sector Cross-nationally: a comparative method’ (1994) *Voluntas* 4(4) 538.

<sup>4</sup> Ibid, 537.

<sup>5</sup> Lester Salamon, and Helmut Anheier, ‘In Search of the non-profit sector: the question of definition’ (1992) *Voluntas* 3 (2) 125-135.

<sup>6</sup> Lester Salamon, Helmut Anheier, *Defining the Non-profit Sector: A cross-national Analysis*, (Manchester University Press 1997) 48.

<sup>7</sup>Ibid, 33.

<sup>8</sup> Frederick Powell, *The politics of Civil Society: Neoliberalism or Social Left?* (The Policy Press 2007) 14; Jonathan Garton, *The Regulation of organized Civil Society* (Hart Publishing 2009) 36.

<sup>9</sup> In the united kingdom alone, in the year 2006/07 charities had received more than one third of their annual income equivalent to 11.5 billion £ from the state. The UK Civil Society Almanac 2009: Executive Summary, accessed on 29 May 2015 <[http://www.ncvo-vol.org.UK/uploadedFiles/NCVO/What\\_we\\_do/Research/Almanac/NCVOCivilSocietyAlmanac2009Summary.pdf](http://www.ncvo-vol.org.UK/uploadedFiles/NCVO/What_we_do/Research/Almanac/NCVOCivilSocietyAlmanac2009Summary.pdf)> accessed on 20 May 2015.

<sup>10</sup> Lester Salamon and Helmut Anheier, above n 6 at 34.

*Voluntary*: civil society organisations should also demonstrate some level of voluntary participation, either in the actual implementation of the activities of organisations, or as members of the board of directors governing or managing the body of the organisation,<sup>11</sup> notwithstanding the fact that the organisation has hired staff or income aside from voluntary contributions.<sup>12</sup>

Thus as per the structural-operational definition, to be considered as part of the civil society sector, an organisation ‘must make a reasonable showing on all four of the above criteria’.<sup>13</sup> This research in conceptualizing Civil Society however makes two further qualifications to the abovementioned standards.

Firstly, the structural- operational definition excludes a significant proportion of ‘non-statutory’ and ‘non-profit’ community-based development organisations and cooperatives which distribute dividends to their members, because they fail the non-profit distribution test. Nonetheless, the primary objectives of these organisations are not to make profits but to improve the livelihood of the general community.<sup>14</sup> Hence we may qualify the non-profit distribution criteria to Not-for-profit. By not-for-profit, we refer to those organisations whose main objectives of formation are not to make profit but to bring socio-economic development of their members, but may distribute dividends to members or other beneficiaries as part of their basic purpose of formation. The Not-for profit standard has a quality of being broad enough to encompass the great variety of community organisations and cooperatives commonly considered to be part of civil society organisations, and concurrently being sharp enough to distinguish these entities from the private sector which has profit making as its primary goal.

Secondly, the yardsticks of the structural operational definition fail to take account of the ‘legality’ of either the institutions or their purpose. To use the language of Anheier the tests employed to assess what constitute the sector are ‘*morally blind*’.<sup>15</sup> Hence, some uncivil entities such as the mafia and fundamentalist groups may be considered

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<sup>11</sup> Ibid.

<sup>12</sup> Lester Salamon, above n 5 at 126.

<sup>13</sup> Lester Salamon and Helmut Anheier, above n 6 at 34.

<sup>14</sup> Ibid, at 33.

<sup>15</sup> Helmut Anheier, *Civil Society: Measurement, Evaluation, Policy* (Earthscan 2004) 22.

as civil societies. Nonetheless there still is much debate concerning civil society's normative content<sup>16</sup> as scholars assert that in order to belong to civil society, actors must be democratic,<sup>17</sup> oriented towards the public good<sup>18</sup> or at least adhere to basic civil manners.<sup>19</sup> Moreover, as the test of 'public benefit', 'legality' and 'civility' could be of a paramount significance in any effort to gauge the sector's contribution to the democratization process of a country, this research would add this standard to those provided by the operational-structural definition and exclude uncivil and illegal organisations from the realm of the civil society sector.<sup>20</sup>

Thus, for the purpose of this research *civil society* could be defined as 'lawfully constituted, independent, voluntary and not-for-profit organisations which are formed outside of the family, the state and the market.'

#### *Ethiopian Civil Society Organisations*

As an associational life of any society, the Ethiopian CSOs are heterogeneous in all aspects and can be mainly classified as (1) *NGOs (National and international)*-most of these organisations are primarily engaged in the promotion and implementation of projects and programmes focusing on the provision of social welfare, health, clean water, education, relief, urban/rural development; (2) *Advocacy organisations* – Rights based institutions which are engaged in Human rights education, civic education, policy advocacy, women's empowerment, voter education, election monitoring; (3) *Community Based Organisations (CBO)*– informally constituted traditional membership based self-help groups and neighbourhood associations; and (4) *Membership based Interest groups such as Employers' Association, Trade unions, Professional Associations, Women's Association, Youth Associations, Co-operatives*

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<sup>16</sup>Heinrich Volkhart and Mahi Khallaf, 'Assessing Civil Society In Cyprus And Across The World' (2011) The Civic Civil Society Index, *CIVICUS*, 2. <[http://www.civicus.org/view/media/AssessingCivilSocietyinCyprus\\_AcrossTheWorld.pdf](http://www.civicus.org/view/media/AssessingCivilSocietyinCyprus_AcrossTheWorld.pdf)> accessed on 30 April 2015.

<sup>17</sup>Larry Diamond, 'Towards Democratic consolidation' (1994) *Journal of Democracy* 5 (3) 4-7.

<sup>18</sup> Barry Knight and Caroline Hartnell, 'Civil Society - Is it Anything More Than a Metaphor for Hope for a Better World?' (2001) *Alliance* 6 (4).

<sup>19</sup> Edward Shils, 'The Virtue of Civil Society' *Government and Opposition* (1991) 26 (1) 3-20.

<sup>20</sup> Larry Diamond, 'Rethinking Civil Society - Towards Democratic Consolidation' (1994) *Journal of Democracy* 5 (7); Brett Bowden, 'Civil Society, the State and Global Civil Society: Global Civil Society' (2006) *Journal of Interdisciplinary International Relations* 163-165.



*and the likes* which are primarily engaged in promoting and protecting their members rights and interests. <sup>21</sup>

This thesis will deal with all these types of CSOs but will focus on those civil society organisations that remain largely in the public sphere or have specific democratization functions as pressure or advocacy groups.

## **2.2 Democracy**

An analysis of the role of civil societies for the initiation and consolidation of democracy requires some definition of democracy at the outset. However defining democracy in a precise manner would be a vain exercise. This section therefore has a sole purpose of elucidating its main features.

The term democracy, originating from two Greek words Demos ('the people') and kratien ('to rule') indicates a form of political system or government where the supreme power to rule is vested in the people. Reflecting such basic facet where the ultimate power has resided in the people, '*democracy*' is also designated as: the 'rule of the people', 'rule of the people's representatives', 'rule of the people's party', 'majority rule' etc. Thus it alludes to the structure of government in which the ultimate power resides in and exercised by the people either directly by vote of the electorate, which is known as 'direct democracy'; or indirectly through their representatives freely and periodically elected and referred to as 'indirect democracy' or 'representative democracy'. The latter however is the most common form of democracy in a contemporary polity. Yet, direct democracy is still exercised in some local institutions or associations having not many populaces.

In spite of such generalized comprehension however, the term democracy is defined in various ways at different times, based on distinct socio political beliefs and affiliations, historical accounts and other reasons. Discrepancies and discords in definitions also allude to the fact that attempts are made to define the term on the basis of either the

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<sup>21</sup> Desalegne Rahmato, 'Civil Society Organisations in Ethiopia', in the Bahru Zewde and Siegfried Pausewanf (Eds) *The challenge of Democracy from Below* (Nordiska Africainstitute and Forum for Social Studies 2002) 105; Jeffrey Clark, *Civil Society, NGOs and Development in Ethiopia: A snap shot view* (2000) The World Bank, 4-7.

basic principles, values and attitudes attached to it; or process and procedures that validate it; or substances contained in it; or practices that substantiate or otherwise refute it; or results it bears out; or even institutions it encompasses etc. Generalizing this fact Tilly wrote, attempts to define ‘democracy’ take either the ‘constitutional’, ‘substantive’, ‘procedural’ or ‘process-oriented’ approach each signifying the different facet of democracy.<sup>22</sup>

According to *Constitutional approach* the political system or the regime is said to be democratic provided the legal instruments of that country guarantee political rights to its citizens. Conversely *Substantive approach* focuses on the substantial attitude of the state towards human rights, human welfare, security, equity, social equality, the conflict resolution methods, etc. notwithstanding the legal framework. The hub of *Procedural approach* on the other hand lies on genuine, participatory and periodical elections but often fails to assay state of affairs in between elections contrasting the *Process-oriented approach* which identifies some minimum set of processes that must be continuously in motion for a state and the government to qualify as democratic.<sup>23</sup>

The different approaches in defining democracy thus give prominence to either one or another aspect of democracy and prompt lack of universally accepted definition. Nevertheless, several attributes which must exist in order to have a democratic government can be deduced.

### ***Basic Attributes of Democracy***

#### ***Equality and Liberty***

Amongst the many facets, *equality* and *liberty* are often singled out as the two most important democratic archetypes on which the remainder features of democracy are based upon. They are the epitome and pillars of polity that ensures both democratic processes and democratic outcomes. Many scholars have provided that political governance should endorse freedom and equality to be deemed as democratic and their supremacy thereof must be guaranteed by constitutionalism.<sup>24</sup> Thus at a minimum, the

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<sup>22</sup> Charles Tilly, *Democracy* (Cambridge University Press 2007) 7.

<sup>23</sup> Ibid.

<sup>24</sup> Aristotle, *Politics* (Oxford University Press 1995); Roland Pennock, *Democratic Political Theory* (Princeton University Press 1979); Evelyne Huber and others, ‘The Paradoxes of Contemporary Democracy: Formal, Participatory and Social Democracy’ (1997) *Comparative Politics* 29 (3) 323-42.

supreme law of the land needs to avail due recognition and protection for liberty and equality. Many of the principles derived from freedom and equality are thus already recognized by the constitutions of many countries and the regional and international instruments such as the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the African Charter on Human and People's Rights (ACHR).

Equality at minimum implies equality before the law, or equal protection of the law. In spite of socio economic inequalities, therefore, the state should be required to treat everyone equally and evenly. This signifies that in a democratic state, it is fundamental that all individuals are valued equally, have equal opportunities, and may not be discriminated against because of their race, ethnicity, gender, sexual orientation, etc. A democratic state guaranteeing equality therefore facilitates the flourishing of democratic society by inspiring and advancing pluralism and tolerance as individuals and groups still enjoy their right to have different personalities, cultures, languages and beliefs.

Equality before the law also safeguards two fundamental principles necessary for a democracy to exist, namely the rule of law and due process of the law. Thus democracy entails that everyone must comply with the law and be held equally accountable when the law is violated and that the law be equally, fairly and consistently enforced. Thus in most democratic societies equality before the law and non- discrimination are emphasised. Few other democratic societies also take equality further beyond equal opportunities to also mean equal outcomes and a guarantee to equitable socio economic benefits of citizens. The latter which is referred as 'social democracy'<sup>25</sup> over and above formal democracy ensure high levels of participation without systematic differences across social categories and increase equality in social and economic outcomes.

Freedom or liberty is another fundamental facet of democratic society. In a democracy, the constitutionality of the bills of rights maximizes the protection of people against despotism and abuse of power by setting limits on regime power. It also allows the

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<sup>25</sup> Evelyne Huber and others, 'The Paradoxes of Contemporary Democracy: Formal, Participatory and Social Democracy' (1997) *Comparative Politics* 29 (3) 323-42.

enforcement of those guaranteed rights and freedoms in the court of law which must entertain judicial independence.

Such fundamental bills of rights include civil, socioeconomic and political rights. Civil rights comprises the right to life, liberty and security, freedom of religion, freedom of thought and expression, freedom of assembly and association, freedom of movement and residence, etc. The bills of rights also include socio economic rights such as the right to development and physical wellbeing, the right to housing, the right to environmental protection etc. The political right on the other hand involves the right to take part in government and includes among others the right to vote and to compete as a candidate to run for public office. Thus a political system is said to be democratic when it constitutionally guarantees, enforces and protects such fundamental human rights as liberty and equality. The enforcement and protection of such fundamental rights in particular require the accountability of the government as a procedural mechanism to ensure the system of democracy.

#### *Accountability*

The accountability of elected officials is an important mechanism to sustain a democratic polity that safeguards such fundamental rights. The accountability of elected officials can be sanctioned primarily, through a constitutional mandate. Constitutions establish the authority of elected officials that assume public authority and set forth the government's basic operating procedures. Thus constitutionalism sanctions accountability by providing clearly defined limits on the power of government.

Yet to ensure democratic polity, there must also be procedural safeguards that the government does not surpass and abuse its constitutional mandate. This demands a vertical and horizontal accountability of officials. Vertical accountability of officials to the electorate is ensured through *periodical election* and *active participation* of citizens. Horizontal accountability on the other hand is maintained through the system of *trias politica* that involves the legislature, executive and judiciary and a *check and balance system*.

*i. Election*

Most narrow definitions of democracy primarily focus on one of the political rights namely, the right to take part in government comprising among others the right to vote and the right to run for public office in periodical elections. While some pseudo-democratic governments run periodic elections merely to legitimize their power as a form of procedural minimum, a genuine electoral democracy however entails such qualities as competitive, free, fair, participatory, informed and peaceful periodical elections.

For a democracy to be sustainable, election should be inclusive, thus allowing all adult citizens to have the right to participate in periodical elections either as a candidate to run for office, or to cast their vote based on informed choice from alternative sources, and free of any form of coercion. A genuine election thus signifies the existence of competitive multipartite political system or competing leaders, presenting alternatives of public policies; and the institutionalization of the periodical, peaceful competition amongst them to win the ballot from all adult citizens having the right to vote and to assume public power.<sup>26</sup> Hence, for a democracy to exist, more than one political party must participate in elections providing voters with a choice of candidates and policies to vote for. Political parties must also exist beyond the election period as opposition to the winning party.

Electoral democracy also ensures free and fair election that entails uncertainty as to who will win. Przeworski argues democracy should be ‘a form of institutionalization of continual electoral competition ... and of uncertainty of subjecting all interests to uncertainty.’<sup>27</sup>

What’s more, the election and post-election period needs to be peaceful. Thus in a democratic system, once the process of election is proven to be fair and vindicated, the losing party and its followers must agree with the outcome of the election and work in

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<sup>26</sup>Raymond Aron, *Democracy and Totalitarianism* (Praeger 1969); Powell Bingham, *Contemporary Democracies* (Harvard University Press 1982); Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press 1991); Robert Dahl, *On Democracy* (Yale University Press 1998).

<sup>27</sup> Adam Przeworski, ‘Some Problems in the Study of the Transition to Democracy’ in Guillermo O’Donnell and others (eds) *Transitions from Authoritarian Rule: Prospects for Democracy*, Part III (Johns Hopkins University Press 1986) 58.

cooperation with the winning party while they maintain their legal opposition to the decisions and ideologies of the latter. This would facilitate non-violence and substantiate the system of democracy since popularly elected governments must be able to exercise their powers without obstruction or control by unelected officials, for example the military.<sup>28</sup>

Thus a genuine electoral system having those qualities sustains democracy serving as a procedural means to guarantee the rule of the majority; and to ensure that the elected officials remain accountable to their electorate.

ii. *Participation*

Apart from periodical election, citizens' participation and active engagement in the public sphere sanctions the accountability of elected officials. Active participation of citizens during and in between elections, in civil society organisations or in community or civic meetings, or in any other public arena is an imperative right as well as duty of democratic citizenry that facilitates accountability. Such, vertical accountability is a crucial facet of contemporary representative democracy as it is the means to enforce the 'rule of the people.' Morino<sup>29</sup> writes,

*'...in moderating the difficulties that objectively exist when there is a shift from direct to representative democracy, accountability becomes a truly central dimension in so much as it grants citizens and civil society in general an effective means of control over political institution.'*

Ensuring an active participation and engagement of the electorate in the public sphere and the accountability of elected officials, requires the guaranteeing and enforcement of freedom of information, expression, and association. Robert Dahl<sup>30</sup> argued in the same line asserting that in addition to inclusive suffrage; free and fair elections; and elected officials that must be met as procedural minimum conditions, the exercise of

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<sup>28</sup> Philip Schmitter and Karl Terry, *'What Democracy is ...and is not'* (The John Hopkins University Press 2009) 9.

<sup>29</sup> Leonardo Morlino, 'What is a "Good" Democracy? Theory and Empirical Analysis' (2002) University of Florence < [http://ies.berkeley.edu/research/files/CP02/CP02-What\\_is\\_Good\\_Democracy.pdf](http://ies.berkeley.edu/research/files/CP02/CP02-What_is_Good_Democracy.pdf)> accessed on 10 March 2015

<sup>30</sup> Robert Dahl, *On Democracy* (Yale University Press 1998)

such freedom are necessary requisites for democracy or as he puts it, “*Polyarchy*.”<sup>31</sup> Certainly the right to information, expression and association are features of a democratic polity that can facilitate electoral democracy. Further such rights serve as means to ensure the participation of citizens and the accountability of the government in between elections.

Freedom of information, for instance facilitates informed participation of citizens and transparency of the regime. Freedom of information avails alternative channels of information and communication to citizens. Moreover freedom of information obliges elected officials to open up themselves to the media and the public; and to aware their electorate what decisions have been made and why. This ensures that citizens make informed public decisions and informed elections. Thus freedom of information ensures that institutional power holders elected by the people remain responsible to the people and held accountable for their actions in the public realm by citizens.

Freedom of association also facilitates competitive elections by enabling the creation of competitive political parties and interest groups. It also enables the formation of civil society organisations that contribute to the democratization process from below through educating and empowering citizens; and from above through monitoring and controlling authorities. Freedom of expression also ensures the accountability of authorities as citizens express themselves, and criticize officials, their decisions or ideology without the risk of coercion.

Thus a polity that protects and enforces freedom of information, expression and association thus ensures ‘vertical accountability’ of rulers to the ruled which can be secured through the facilitation of regular free and fair elections, as well as continued participation of citizens in the public governance.<sup>32</sup> The accountability and responsiveness of elected officials in turn consolidate democracy.

### *iii. Horizontal Accountability*

Accountability of elected officials is also maintained through the check and balance role of the different state machineries namely the executive, the legislative and an

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<sup>31</sup> Ibid ; Robert Dahl, *Polyarchy, ‘Participation and Opposition’* (Yale University Press 1972)

<sup>32</sup> Larry Diamond, ‘Is the Third Wave Over?’ (1996) *Journal of Democracy* 3 (3) 23-24

independent judiciary. The existence of independent organs such as the ombudsman and human rights commissions, anti- corruption commissions and similar institutions also ensure the transparency and accountability of the government. Such institutions must be mandated to take action against any illegal deeds by an elected officials or government public servants. They also need to have the necessary mandate and technical capacity to pressurize government for improved administration, recognition and protection of the rights and privileges of citizenry. Such horizontal accountability of office holders to one another will result in the protection of constitutionalism and the rule of law.<sup>33</sup>

In sum, democracy is a system of governance which principally upholds constitutionally guaranteed liberty and equality of the governed; and the power limits of the government. It also encloses such basic attributes as multiparty system; regular, free fair and competitive elections; accountability and transparency of the government, citizens' participation in the public sphere; independent and free media; check and balance of state apparatus, independent judiciary etc. Thus, if the regime and citizens are exhibiting those attributes of democracy by and large, the country is said to be 'democratic', whereas if a government and its citizens do not parade such characteristics it is said to be 'undemocratic.' While these are the two extremes for any particular country, the back and forth steps towards such characteristics are referred as the de-democratization and democratization process, respectively. The following section further elucidates on the process of democratization.

### **2.3 Democratization**

Democratization is a political transition to a more democratic political regime. It could be a transition from an authoritarian political system to semi-democracy or from semi-democracy to a full democracy or a stretched stride from an authoritarian political system to a full-fledged democracy. In reverse, the relation between states and citizens may shift rearward to a direction of autocracy. This is referred to as de-democratization.

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<sup>33</sup> Larry Diamond, 'Is the Third Wave Over?' (1996) *Journal of Democracy* 3 (3) 23-24.



According to Huntington, the world has experienced three waves of democratization with a wave being defined as a significant number of forward transitions from non-democratic to democratic political system or governance; but also followed by reverse waves where some countries undergo de-democratization leaving fewer cases of consolidated democracies behind.<sup>34</sup> The first 'long' wave that marked the emergence of the first democratic regimes runs uninterruptedly from 1826 to 1926. This democratization wave was attributed to a number of factors such as industrialization, modernization, the socio economic environment of the British Settler countries, the victory of the western allies in the World War I, and the resulting break up of continental empires. In this a century long wave of democratization that have rooted in the American and French revolution, the US and more than 30 countries in Latin America and Europe such as France, Great Britain and Switzerland have made transition to democracy.<sup>35</sup>

This was followed by a reverse wave where some countries lapsed to autocracy until the Second World War provided the fertile soil for the second wave of democratization that lasted until early 1960s. During this wave a number of Latin American countries and others defeated by in the Second World War such as Germany and Japan have made a transition to democracy as a result of an imposition of democracy by victorious allied powers. Numerous other nations decolonized following the end of the war also transited to the democratization move. Afterwards, an extensive global sway to de-democratization occurred for about a decade.

The decade long de-democratization was then succeeded by a third wave of democratization, marked by the end of the Portuguese dictatorship in 1974 and runs until recently. This wave is characterized by a significant increase in the number of countries taking the democratization strand, making the total number of countries transited to democracy 117 by 1996, from meagre 40 in 1974. Even though not all of these countries' democratization is necessarily consolidated as Huntington has applied the minimalist measure to make such analysis, the argument in favour of more democratization still holds true as democratization signifies any movement forward.

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<sup>34</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 15.

<sup>35</sup> *Ibid*, 16.

Huntington further perceived by the early 90s, the possible signs of the beginnings of de-democratization wave, as Haiti, Sudan and Surinam from the third wave of democratization had swiftly reverted to authoritarian regimes.<sup>36</sup> Although the shift from full-fledged democracy backward is rather atypical, nonetheless back and forth shift from semi democracy to autocracy or dictatorship has become a common phenomenon globally, particularly in the past few years. The 2011 Freedom House Report verifies that while nearly 80 countries improved in the aggregate scores towards more democratic system from 2002-2005 progressively, nevertheless the years 2006-2010 successively showed regression and decline of nearly 60 countries.<sup>37</sup> In 2010 alone, the same report<sup>38</sup> provides while five countries including Ethiopia has regressed to the de-democratization path, only two have taken the trend of democratization as authoritarian regimes give way to civilian rule based on competitive elections.

Such course of a democratization process that is mainly characterized by change of a dictatorial regime is commonly referred as ‘a transition to democracy.’ Yet beyond transition, a shift towards a full-fledged democratization demands the ‘consolidation’ of democracy whereby all political actors accept democratic norms (‘rules of the game’) with no venture to revert to a dictatorship and further entrenchment of democratic institutions, practices and values.<sup>39</sup> Hence, despite the fact that 194 countries in the world today have adopted some democratic form of government, only 87 of them have established a consolidated and sustainable democracy of a varying degree.<sup>40</sup>

The consolidation of democracy roughly speaking is similar in nature and gradual in momentum even in countries with different socioeconomic and political settings. However, transitions from authoritarian to a democratic government are distinct in nature, affected by factors which are specific to a particular country and are either gradual or swift in speed. Analysing such distinctiveness in nature and velocity, Share

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<sup>36</sup> Ibid, 25-26.

<sup>37</sup> Freedom house 2011 report, <<http://freedomhouse.org/template.cfm?page=363andyear=2011>> accessed on 11 April 2015.

<sup>38</sup> Ibid.

<sup>39</sup> Howard Handelman, *The Challenge of Third World Development* (5<sup>th</sup> ed, Pearson Education 2006)

<sup>40</sup> Freedom house, above n 37.

classifies transition to democratization into four namely 'incremental', 'protracted revolutionary struggle', 'transaction' and 'rupture' (revolution, coup, collapse and extrication).<sup>41</sup> According to this model, the first two represent slow process of democratization, whereas transaction and rapture democratization are considerably swift.<sup>42</sup>

Whereas incremental and transaction democratization which are top- down in character might have better chance to sustain as they are predictably better tolerated by regime leaders, transitions through revolutionary struggles, may not consolidate and sustain as it is highly likely to meet resistance and cause political instability.<sup>43</sup> Scholars further argue for the significance of top-down democratization process and the imperative of elites' involvement for the initiation and consolidation of democratic procedures and institutions as well as norms of accommodation and cooperation.<sup>44</sup> However, empirical evidence also alternatively demonstrate that top-down democratization is neither entirely free of risk of instability as government elites are less likely to give up their previous authority right off. Historical accounts such as the American Revolution and the French Revolution also make it evident that an incremental process is not one-off approach to consolidated and sustained democracy.

Differences in historical and empirical evidence apparently signify that there is no conclusive solo condition necessary or sufficient for democratization. This is because the democratization process and particularly its consolidation thereof are significantly affected by various factors, apart from the role played by elites and revolutionaries. The variations in the democratization of nations in degree and moment in time also signify that democratization is a process that is fluid and impermanent. Two nations with similar socio political culture, economic and human development and even comparable constitutional framework may exhibit considerable differences in their level of democratization. Therefore any analytical studies and inferences of the

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<sup>41</sup> Donald Share, 'Transitions to Democracy and Transition through Transaction' (1987) *Comparative Political Studies* 19 (4) 530.

<sup>42</sup> *Ibid*, 530.

<sup>43</sup> *Ibid* at 525-48; R.J. Rummel, 'Democratization' In William Voegelé and Roger Powers (edn) *Protest, Power, and Change: An Encyclopedia of Nonviolence Action From Act-up to Women's Suffrag* (Garland Publishing 1996) 21 <<http://www.hawaii.edu/powerkills/DEMOC.HTM>> accessed on 02 April 2015.

<sup>44</sup> Hingley John and others, 'The Persistence of Post-communist Elites' (1996) *Journal of Democracy* 7 (2) 145.

factors, institutions, systems or laws impacting the democratization process of a country will certainly be complicated to say the least. While giving due consideration for this fact, some patterns of economic, social and cultural conditions more favourable to the initiation and consolidation of democracy can however be deduced. Without claiming conclusiveness, only few of the favourable conditions for democratization on which CSOs may possibly have some bearing on, will be discussed below to lay the background facts for the next chapter that in detail discusses the functions of CSOs on democratization.

### ***Capable State***

One of the major elements of democratization is the existence of a capable state.<sup>45</sup> Predominantly, the state is the responsible organ for the protection and the enforcement of citizens' fundamental rights. Thus devoid of state's substantial capacity to back them, every fundamental right constitutionally granted would be meaningless. CSOs may enhance state capability through capacity building programmes such as technical support and professional training for parliamentarians, law enforcing officers, the judiciary and public servants. Some specialized CSOs such as think-tanks, policy advocacy and lobbying CSOs may also build state capacity in policy formulation and implementation through applied research and policy analysis. CSOs also help strengthen state capability through legitimizing the government.

### ***Culture***

Aside from the role of the state, the cultural and the moral fibre of citizens are also said to play major role in the democratisation process. Political and civic cultures play either a destabilising or consolidating role in the democratization process. Although a view that one culture or religion is better than the other for democratization may be criticized as ethnocentric, in general however many agree that political and civic cultures, that permit willingness to negotiate, to compromise, to accommodate, and to lose are favourable soils for fostering democracy.<sup>46</sup> This however does not outright exclude that nations which do not cultivate such civic cultures cannot have democracy

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<sup>45</sup> Charles Tilly, above n 22 at 15.

<sup>46</sup>R.J Rummel, 'Democratization,' In William Voegelé and Roger Powers (edn) *Protest, Power, and Change: An Encyclopedia of Nonviolence Action From Act-up to Women's Suffrag* (Garland Publishing 1996) 21 <<http://www.hawaii.edu/powerkills/DEMOC.HTM>> accessed on 02 April 2015.

whatsoever. Pre -democratic civic cultures of Japan, France, Germany, or India for instance were favourable for autocracy than democracy. However with the emergence of political democracy through revolution and foreign imposition, autocratic civic cultures give way to democratic civic cultures.

CSOs which are democratic in structure and nature may contribute to the democratization process by influencing the cultural and social values of communities. They do so by educating their members, important civic virtues and civic skills such as participation, tolerance, and compromise which, when applied in the public sphere, could promote the democratization process. CSOs may also influence the civic culture through community empowerment programmes. Educated and empowered citizens who are able and keen to participate in public life and debate on policies and legislation play crucial roles in cultural exchange that promote pluralism and tolerance thus sustaining democratization endeavours.

Such political and civic cultures that promote pluralism and tolerance are particularly indispensable in multicultural societies for democratization to thrive as they promote the prevention, management, resolution and transformation of ethnic or religious conflicts which otherwise would hold back and sabotage democratization. Jean Grugel underscored:

*Violent ethnic conflict violates the basic principles of democracy. Civil war also implies complete state breakdown, as force become the prerogative of particular social group. And finally, its lasting impact can be the embedding of ascriptive identities for generations and the triumph of uncivil nationalisms which conflict with the democratic ethos.*<sup>47</sup>

Without such civic culture and pluralism, democratization would be disrupted in a country with heterogeneity and deep segmentation whether by tribe, ethnicity, religion or language as different groups would be more interested in advancing their own position than in sharing power with each other. In addition preventing potential conflicts by inculcating civic cultures, CSOs may also play a role in conflict management and transformation.

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<sup>47</sup> Jean Grugel, *Democratization: A Critical Introduction* (Palgrave Publishers 2002) 79.

### ***Modernization***

Another factor that potentially plays a positive role in the democratization of a nation is modernization and industrialization. Ronald Inglehart and Christian Welzel<sup>48</sup> argue that although modernization does not necessarily result in democracy, it would facilitate and accelerate democratization by bringing socio economic changes such as a rising in specialization, urbanization, education, life expectancy, and rapid economic growth which would in turn eventually encourage the establishment of democratic political institutions and mass participation in politics. Inglehart and Welzel specifically assert

*‘..... privatization and industrialization can cultivate the educated middle-class, which is one of the biggest impetuses for developing liberal democracy; a high level of economic development gives people more economic security, which leads to more tolerance and trust of different groups and political opinions; with improved living standards, people need channels to express their opinions and participate in the government decision-making process.’<sup>49</sup>*

Many others including Lipset and Adam Przeworski also through statistical analysis highlight that affluence, economic development and liberalization are indispensable for the democratization process as democracy cannot take root and outlive in a country where income is low and unequally distributed.<sup>50</sup> Proponents of this view contend that it is necessary to facilitate the consolidation of democracy by exerting a stabilizing influence between the upper classes that hanker after authority to preserve their position and the lower classes that ache for political power to lift themselves up.<sup>51</sup>

Such statistical or otherwise evidence that demonstrate the requisite of modernization for democratization and the entrenchments of democracy in more affluent nations are not however absolutely accurate as evidenced by the rating of nations according to

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<sup>48</sup> Ronald Inglehart and Christian Welzel. ‘How Development Leads to Democracy? What We Know About Modernization’ (2009) *Foreign Affairs* 88 (2) 34-37.

<sup>49</sup> *Ibid*, 37.

<sup>50</sup> Adam Przeworski, and others, *Democracy and Development: Political Institutions and Well Being in the World, 1950–1990* (Cambridge University Press 2000) 92–103; Lipset Martin ‘Some Social Requisites of Democracy: Economic Development and Political Legitimacy’ (1959) *American Political Science Review* 53, 69-105.

<sup>51</sup> Robinson James, *Economic Origins of Dictatorship and Democracy* (Cambridge University Press 2006).

their economic and democratic performances.. Amartya Sen thus strongly challenges extreme positions that assert affluence is a necessary prerequisite to democracy, he contends that ‘democracy is not a luxury that can await the arrival of general prosperity.’<sup>52</sup>

Notwithstanding such contentious positions regarding the importance of affluence for democratization, CSOs may nonetheless play a role in modernizing a nation through the implementation of poverty alleviation and sustainable development programmes. Such programmes help to enhance the human and the economic development of a country. They may also address issues of income inequality by advocating for the socioeconomic rights of the poor and advising on policy formulations that can ensure equitable wealth distribution.

### ***Vibrant Civil Society Organisations***

Another major factor that impacts the democratization process is the existence of vibrant civil society organisations.<sup>53</sup> In addition to the indirect impact CSOs may have in the democratization process by influencing the capacity of the state, the socio cultural values of the community, and the modernization of the nation, CSOs may have numerous other democratic functions. For instance, CSOs contribute to the democratization process by offering citizenry common purposes and thus inculcating unity. They also serve as social channels through which it would be feasible to challenge the decisions of elected officials and the power of the state hierarchy. Citizens’ engagements in CSOs also prepare and empower them to participate in the public sphere and the political regime. Civil societies also facilitate the growth of social capital and build trust, thereby offering the mainstay of functioning democratic institutions.

Although few, there were instances of CSOs engagement during the first and second wave of democratization such as the involvement of civic associations in the U.S.

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<sup>52</sup> Amartya Sen, ‘Democracy as a Universal Value’ in Larry Diamond and Marc Plattner ( eds) *Democracy Global Divergence of Democracies* (Johns Hopkins University Press 2009) 308-309.

<sup>53</sup> Gordon White, ‘Civil Societies, democratization and development (I): Clearing the analytical ground’ (1994) *Democratization* 1 (2) 375-390; Larry Diamond, ‘Towards Democratic consolidation’ (1994) *Journal of Democracy* 5 (3); Udaya Wagle, ‘The Civil Society Sector in the developing world, Public Administration and Management’ (1999) *An Interactive Journal* 4 (4) 529.

notably, the African American civil rights movement that re-established the U.S. democracy after the civil war. However, the democratization function of CSOs has been particularly evident during the third wave of democratization. A study by Freedom House has concluded that, democratic civil society organisations has contributed for over 70 percent of transitions from autocracy that occurred during the third wave of democratization,<sup>54</sup> even in nations where other preconditions of democracy were mostly lacking.

### ***Foreign pressure***

Apart from those internal dynamics, foreign intervention or external pressure is another factor that plays a major role for democratization of many nations all over the globe since the age of colonization until today. Such foreign interventions or external pressures that reflect either ‘leverage’ or ‘linkage’ assume different forms such as diffusion, diplomatic or military pressure, multilateral political conditionality, democracy assistance programmes, and the activities of trans-national human rights and democracy networks.<sup>55</sup>

For instance, democracies of Canada, New Zealand and Australia that become fully-fledged and sustained were initiated during the British colonization. With the military occupation of Japan and Germany following the end of Second World War, initiation of democratic system fell under the supervision of the allied power namely the United States, Great Britain and France.<sup>56</sup> Of late, the democratization processes of many countries post the Cold War were also overwhelmingly influenced by western governments, multilateral institutions and regional or international organisations such as NATO and the European Union. The latter in particular has played the most important role in promoting democracy in Europe mainly by imposing conditionality of political reform for potential membership in the organisation and/ or trade and financial benefits.<sup>57</sup>

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<sup>54</sup> Freedom House ‘Study: Non-violent Civic Resistance Key Factor in Building Durable Democracy’, May 24, 2005, <http://www.freedomhouse.org/template.cfm?page=70&release=275> accessed on 18 June 2014; Adrian Karatnycky and Peter Ackerman, ‘How Freedom is Won: From Civic Resistance to Durable Democracy’ Freedom House. [http://www.freedomhouse.org/uploads/special\\_report/29.pdf](http://www.freedomhouse.org/uploads/special_report/29.pdf) accessed on 18 June 2011.

<sup>55</sup> Steven Levitsky and Lucan Way, ‘International Linkage and Democratization’ (2005) *Journal of Democracy* 16 (3) 21.

<sup>56</sup> *Ibid.*

<sup>57</sup> Frank Schimmelfennig and Scholtz Hanno, ‘EU Democracy Promotion in the European



The debate over whether democracy is a direct consequence of any or all of these factors, namely wealth, civic culture, homogeneity, non-violence, robust civil society organisations, foreign assistance, is far from conclusion. In spite of some historical and statistical evidence which prove casual relations, it is worth to underscoring that the correlation between these conditions and the democratization process is neither unequivocal nor linear. While the fulfilment of the preconditions will not necessarily warrant democratization, at times democracy can also surface despite lack of most of the favourable socio economic and structural conditions.

It is not, however, the objective of this research to prove whether or not all of such conditions contribute to democratization or which conditions better facilitate democratization. Simply out of interest and without claiming that it is a better precondition for facilitating democratization, this research will examine the functions of civil society organisations in the democratization process in chapter 3. However, as will be discussed in chapter 4, the democratization functions of CSOs require an enabling environment that offers a broader space of operation.

## **2.4 Democratization in Ethiopia**

Democracy is a new phenomenon in the Ethiopian political history. Before 1991, the country had witnessed two violent transfers of power in its modern history. The first one took place in 1974 where the Derg<sup>58</sup> (A Marxist military junta) overthrew the government of Emperor Haile Selassie I (an absolute monarch who ruled Ethiopia for 40 years). The second happened in 1991 where the Ethiopian People's Revolutionary Democratic Front (EPRDF) removed the Derg regime.

After the overthrow of the Dergue regime, Ethiopia adopted a liberal constitution that enshrines the fundamental civil, political and socio-economic rights. It also experienced a paradigm of constitutionalism, multiparty system, decentralization, and

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Neighborhood: Political Conditionality, Economic Development and Transnational Exchange' (2008) European Union Politics 9 (2) 187.

<sup>58</sup> 'Derg' is the Amharic for committee.

a liberalized economy.<sup>59</sup> It also conducted 4 general elections (1995, 2000, 2005, and 2010) and conducted the fifth one on May 2015.

### *Ethiopian Transition to electoral democracy*

After the overthrow of the Derg regime, EPRDF called a national conference in 1991 and invited different political parties which had far longer existence in the country and others that are established after the fall of the Derg regime. A Transitional government of Ethiopia (TGE) was established that would oversee the transfer of Ethiopia into a smooth democratic transition. The conference also adopted a Charter which stipulates the TGE's commitment to respect the Universal Declaration of Human Rights (UDHR) particularly the freedom of association, expression and assembly and people's right to engage in any kind of lawful political activity including the formation of political parties.<sup>60</sup>

### *The 1992 local election*

After the Establishment of the TGE, the first multi-party local and regional election was launched in 1992. Unfortunately, the election which was expected to herald the new paradigm to plural politics in Ethiopia failed the standard of competitiveness. The major political parties like the Oromo Liberation Front (OLF) which was the second largest party in the Transition Government, withdrew from the Transitional Government and the election protesting against what it called increasing EPRDF domination and non-conducive political space.<sup>61</sup> Subsequently, other political parties such as the Islamic Front for the Liberation of Oromia (IFLO) and the All-Amhara Peoples' Organisation (AAPPO) also boycotted the election.

Following the withdrawal of the OLF from the TGE, there was an armed conflict between the EPRDF forces and the forces of OLF where the latter was crushed and the EPRDF consolidated its power throughout the country. In the post-election period,

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<sup>59</sup> Jon Abbink, 'Breaking and making the state: the dynamics of ethnic democracy in Ethiopia' (1995) *Journal of Contemporary African Studies* 13 (2) 149–63; Paul Henze, 'A political success story' (1998) *Journal of Democracy* 9 (4) 40–54; Kjetil Tronvoll, 'Ethiopia: a new start?' (Minority Rights Group International 2000); Sarah Vaughan, 'The Addis Ababa Transitional Conference of July 1991: its origins, history and significance' (1994) Centre of African Studies, Edinburgh University.

<sup>60</sup> The Transition Charter of the Government of Ethiopia (1991).

<sup>61</sup> Sandra Joireman, 'Opposition politics and ethnicity in Ethiopia: we will all go down together' (1997) *Journal of Modern African Studies* 35 (3) 387–407.

several other parties also left the TGE thereby giving the EPRDF an opportunity to further consolidate its power in the country without any form of peaceful opposition.

The 1991 local and regional election was therefore conducted in an atmosphere of armed conflict in the country and was marred by irregularities, according to the international observer's mission report.<sup>62</sup> As some observers suggested, the election was conducted when the country was not ready both politically and in infrastructure to conduct free and fair elections,<sup>63</sup> thus had little or no contribution to the development of democracy in the country.<sup>64</sup>

### *The 1995 General Election*

Ethiopia conducted the first general election in 1995 which is considered by some as 'democratic in formal structure as well as in spirit and practice.'<sup>65</sup> Yet others commented that it did not fulfill any democratic standards.<sup>66</sup> The election was conducted in an environment where there was a lack of genuine choice of candidate for the electorate<sup>67</sup> to choose from as many of the prominent political parties boycotted the election.<sup>68</sup> Neither was there a proper debate even amongst the few candidates that remained in the process.<sup>69</sup> EPRDF was declared winner with a 90% share of the vote. Thus, this election like that of the 1991 local election made little contribution to the democratic development of the country, since democracy without any genuine democratic public debate and unpredictable competition is a futile exercise.

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<sup>62</sup> National Democratic Institute for International Affairs/African–American Institute (NDI/AAI), *An evaluation of the June 21, 1992 Elections in Ethiopia* (NDI/AAI1992); Norwegian Institute of Human Rights (NIHR) *Local and regional elections in Ethiopia 21 June 1992: report of the Norwegian Observer Group* (NIHR1992).

<sup>63</sup> Sandra Joireman, above n 61 61, 399.

<sup>64</sup> National Democratic Institute/African American Institute, *An Evaluation of the June 21, 1992 Elections in Ethiopia* (NDI and AAI 1992) 7.

<sup>65</sup> Paul Henze, 'A political success story' (1998) *Journal of Democracy* 9 (4) 40–54.

<sup>66</sup> Richard Joseph, 'Oldspeak vs. newspeak' *Journal of Democracy* 9 (4) 55–61; John Harbeson, 'A bureaucratic authoritarian regime' (1998) *Journal of Democracy* 9 (4) 62–9.

<sup>67</sup> Department of Political Science and International Relations (DPSIR), *The May 1995 Elections in Ethiopia: The Quest for Democratic Governance in a Multi-ethnic Society* (1997) Unpublished report, Addis Ababa university.

<sup>68</sup> Terrence Lyons, 'Closing the transition: the May 1995 elections in Ethiopia' (1996) *Journal of Modern African Studies* 34 (1) 121–42.

<sup>69</sup> Marina Ottaway, 'The Ethiopian Transition: Democratization or New Authoritarianism?' 'An Analysis of the New Constitution of Ethiopia and the Process of its Adoption' (1996) *Northeast African Studies* 3, 2138.

### *The 2000 General Election*

In the 2000 general and regional election, opposition parties abandoned their boycotting strategies and several political parties including the All Amhara People's Organisation (AAPO), the Ethiopian Democratic Party (EDP), the Oromo National Congress (ONC) and the Council of Alternative Forces for Peace and Democracy in Ethiopia (CAPDE) participated in the regional and national election. This was mainly due to a better political space in the country where opposition parties were allowed to conduct political rallies and given media outlet to reach their constituencies, although in a limited manner. Thus for the first time in the country voters were given alternative parties to choose from. Despite the improvement, the 2000 election cannot be said to have the qualities of a genuine electorate democracy owing to limited public participation and competition. EPRDF and its affiliate parties again won the election by a 90% share of the vote. The opposition parties on the other hand won 13 seats out of the 547 Federal parliament seats which were shared by AAPO, EDP, ONC, and CAPDE. Rather, the 2000 election and the previous two elections failing the standards of inclusiveness, competitiveness, and fairness in having access to the public media, are said to have helped for the creation of electoral authoritarianism on the part of the EPRDF.

### *The 2005 general election*

The 2005 general and regional election is considered by many the most competitive election in the history of Ethiopia. This was mainly due to the unparalleled political space opened by the EPRDF for the first time. In unprecedented manner, the opposition political parties were allowed to conduct political rallies and were given air space in the public media to communicate their political opinion to the electorate. A television debate between the ruling party and the opposition parties on national issues provided voters with alternative policies on key national issues. For the first time in the history of the country, the incumbent political party was genuinely challenged peacefully through election.

The local civil society organisations were engaged in voter education and were able to train several thousands of election monitors to observe the election. The two main opposition coalitions of parties: The Coalition of Unity and Democracy (CUD) and the

United Ethiopian Democratic Front (UEDF) were also able to field candidates in most of the constituencies in the country and were posed as an alternative to the EPRDF.

The election processes were relatively open, peaceful and democratic until the Election Day. After the closing of poll however, a semi- emergency was declared in the capital Addis Ababa and the government imposed a ban on freedom of association. The Election Board of Ethiopia, declared the EPRDF as a winner of the 2005 election. However, the two main political parties, i.e., CUD and UEDF won 109 and 52 seats respectively signaling the new parliamentary paradigm in Ethiopia.

Nonetheless, despite an increase in the number of seats from 13 to 161 (a third of the parliamentary seats), the opposition parties claimed massive irregularities in the election process and refused to accept the result. The European Union (EU) observer mission also supported the opposition's claim and unanimously stated that there had been major irregularities at the counting spots and that the election fell short of international standards. The population reacted to the result and went out to the street opposing the result and more than 200 people were killed by the government forces. The leaders of CUD including the mayor-elect of Addis Ababa were arrested and charged for attempting to change the government unconstitutionally. Several thousands of supporters of CUD and representatives of CSOs were also detained.<sup>70</sup>

Unfortunately, the election that allowed the Ethiopian opposition parties to win one third of the available parliamentary seats and that which made a great number of Ethiopians believe in the transition of government power through ballot boxes has become a turning point in the democratization process of the country for the worse. This is reflected in the 2010 election where the EPRDF won all but two of the 547 parliamentary seat.

### *The 2010 General Election*

After the most competitive election held in 2005, the government of Ethiopia enacted series of laws that constricted the political space for opposition parties, the media and civil society organisations. These laws include the Amended Electoral law

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<sup>70</sup> Jon Abbink, 'Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath' (2006) *African Affairs* 105 (419) 173–99.

Proclamation (2007), the Political Parties Registration Proclamation (2008), the Freedom of the Mass Media and Access to Information Proclamation (2008), the Anti-Terrorism Law (2009), the Registration and Regulation of Charities and Societies Proclamation (2009), the Electoral Code of Conduct for Political Parties (date?). Each of these laws has provisions that narrow the space for political parties, civil society organisations and the media. They also contain severe sanctions that many international human right organisations including Amnesty international and Human Rights Watch criticized as highly restrictive and stultifying.<sup>71</sup>

The 2010 election was thus conducted in the atmosphere where several prominent civil society organisations and media outlets were closed, and the CUD, which was the main contender to the EPRDF, was fragmented due to the imprisonment of its members. In this condition, the EPRDF and its affiliates were declared as the winner of the 2010 election with 99.6% share of the vote with only two seats (of the 547 parliamentary seats) shared by an opposition party and an independent individual candidate. The election was condemned by the European Union observation mission for failing to secure a fully democratic electoral process and which declared the election short of international standards especially on the transparency of the process of election and the lack of a level playing field for all the contesting parties.<sup>72</sup>

#### The 2015 General Election

In the 2015 general election, EPRDF and its coalition won all the 547 parliamentary seat (100% of seats in the parliament)<sup>73</sup>. This is a blow to the multi-party system that was introduced in 1991 after the overthrow of the Derge regime. This kind of result cannot be seen as the approval of the good work done by the incumbent party. Rather, taking the results of the 2010 election where the EPRDF won all but one parliamentary seat, the fact that the party won all the parliamentary seats in 2015 could be taken as a sign that the government is going towards a totalitarianism rather than a democratic transition. In a country of 96 million people that has more than 84 ethnic groups and

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<sup>71</sup> Amnesty International ‘*Stifling Human Rights Work, the Impact of Civil Society Legislation in Ethiopia*’ (Amnesty International 2012).

<sup>72</sup> European Union, ‘Election Observation Mission (EU-EOM): Ethiopia Final Report House of People’s Representatives and Council of Elections May 2010’ (2010) EU-EOM.

<sup>73</sup> National Electoral Board of Ethiopia, ‘The 2015 Ethiopian House of Representative Final election result’(2015)

that follows ethnic federalism<sup>74</sup> it is very difficult to assume that a single party will be able to represent 100 percent of the people. Rather, it can be argued that the result is the “the inevitable outcome of a political system in which opposition parties face extraordinary challenges and nearly all avenues for citizens to engage in political debates are closed.”<sup>75</sup>

Since the 2005 general election in which the opposition parties gained a significant number of parliamentary seats, the EPRDF government has introduced restrictive laws that has crippled democratic institutions such as the political parties, civil society organizations and the media. The independent media has been annihilated; the handful of civil society groups that decided to work on democracy and good governance issues has been virtually reduced to nothing; and peaceful public demonstration has not been allowed to political parties and civil societies or quelled with force.

It has been reported that the in the lead up to the election, the government has cracked down on opposition parties and their supporters putting leading members of the opposition and media personnel on trial for terrorism charges.<sup>76</sup> Political parties also reported difficulties in registering candidates and organizing rallies. A few days before election several opposition members and candidates were killed in suspicious circumstances.<sup>77</sup> In its January 2015 report, Human Rights Watch said that ‘the Ethiopian government’s systematic repression of independent media has created a bleak landscape for free expression ahead of the May 2015 general election.’ The report further states that ‘at least 60 journalists have fled their country since 2010, while at least another 19 languish in prison’. International elections observers such as the European Union election observation missions were absent choosing not to monitor the election that has little or no independence<sup>78</sup>. The African Union election observer peaceful, and credible<sup>79</sup> but failed short of saying the election as being free and fair.

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<sup>74</sup> FDRE Constitution, Article 46(2)

<sup>75</sup> Human Rights Watch, ‘Dispatches: Alarm Bells for Ethiopia’s 100% Election victory’ (2015)

<sup>76</sup> Amnesty International, ‘Ethiopia: Onslaught on Human Rights ahead of election’(2015) [www.amnesty.org/en/latest/news/2015/05/ethiopia-onslaught-on-human-rights-ahead-of-election](http://www.amnesty.org/en/latest/news/2015/05/ethiopia-onslaught-on-human-rights-ahead-of-election) accessed on 24 October 2015

<sup>77</sup> Amnesty International, ‘Amnesty International Asks Ethiopia to Investigate Suspicious Murders and Human Rights Violations’, June 23, 2015.

<sup>78</sup> Voice of America, (Amharic Service)-“The European Union said it would sit out on the May 24 polls because Ethiopia had ignored the mission’s recommendation following the last round of election” (5 January 2015)

<sup>79</sup> Aaron Masho, ‘African Observers say Ethiopia poll Credible, opposition cries four’, Reuters,[www.reuters.com/article/1015/05/26/us-ethiopia-election](http://www.reuters.com/article/1015/05/26/us-ethiopia-election) accessed on 24 October 2015.;

In one of five polling stations visited, AU observers noted campaigning inside polling station, and election officials failed to ensure that ballot boxes are empty before voting began.

Although 58 political parties contested in the election, most of them were weak, fragmented or affiliated with the ruling party. According to the national election board, More than 38.8 million voters have registered for the election which is a 26 percent increase compared to 2010 and the turnout exceeded 90 percent.

As mentioned above, the enactment of laws that stultify the active participation of other democratic actors such as CSOs, the media and political parties from the public arena significantly compromised the legitimacy of the democratization movement in the country. Thus, despite the high turnout that could demonstrate high participation by citizens the fact there is no strong political party, strong and independent civil society organization and an independent media has helped EPRDF to win the 2010 General election with 99.6 percent and again the 2015 election with a 100 percent control of the Ethiopian the parliament.

In conclusion, although the electoral democracy of Ethiopia signifies the initiation of the democratization process, it fails to consolidate owing to lack of participation, competitiveness and legitimacy. Firstly, in terms of *Political participation*, the overall participation of Ethiopians measured through voter turn-out has been notably high in all the four elections conducted since 1991, particularly in the 2005 election. Yet, although the official data shows a massive turnout (more than 90% for the 1995 and 2000 election) the opposition and other political observers question the figure considering the fact that all the major opposition political parties boycotted these two elections. The Electoral board explained the high turnout on the voter education that informed the public about the importance of participating in the election. Several qualitative research conducted on the 1995 and 2000 election however question the Electoral board's assumption<sup>80</sup> and provides reasons such as coercion by the

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African Union, 'African union election observation mission to the 24 May 2015 parliamentary elections in the Federal Democratic Republic of Ethiopia: Preliminary result' 2015.

<sup>80</sup>Herald Aspen, 'The 1995 national and regional elections in Ethiopia: local perspectives' (1995) Working Papers on Ethiopian Development, Trondheim: Centre for Environment and Development, University of Trondheim; Eva Poluha, 'The 1995 Ethiopian elections viewed from the grassroots' (SIDA 1995); Kjetil Tronvoll and Aadland ØAadland, *The Process of Democratisation in Ethiopia: an expression of popular participation or political resistance?* (1995) Norwegian Institute of Human Rights).



government. More than 85% of the population of Ethiopia are living on agriculture. However as the land ownership vests in the state,<sup>81</sup> it gives tremendous power to the government over the peasants whose lives and survival depend on the land. Thus, some argued that the high turnout is rather due to the government's threat against the peasants who are forced to come out and vote for fear of eviction from their land.<sup>82</sup>

Secondly, in terms of *political competition* the country has made progress to a multiparty system as there has been a significant increase in the number of parties and candidates participating in the elections. Nonetheless the increase in the number of political parties and candidates didn't bring a true multiparty competitive system for two reasons. Firstly, although the number of parties participating in the election increased every election, a close look on the political parties indicates that many of the political parties are either created by the ruling party (EPRDF) or are affiliates to it<sup>83</sup> depriving the electorate genuine alternatives to vote for. Secondly, the fact that there was no open and leveled space for competition which impelled some major opposition parties to boycott in the 1995 and 2000 elections undermined the quality of competitiveness in the electoral process. Uncompetitive electoral system thus led EPRDF to hold a monopoly of parliamentary seats in these two elections. The 2010 election also failed the principle of genuine competition and can only be considered to have partial participation owing to the restriction of space available for all and the weakening of political parties due to the imprisonment of members and leaders of the parties.

Thirdly, the democratization process also failed to grow and take a strong hold for lack of legitimacy. The opposition parties have challenged the legitimacy of the elections for instance through boycotting the election in 1995; and also refusing to take up the seats that CUD won in the parliament in the 2005 election. The lack of acceptance of the election result by certain political parties certainly weakened the legitimacy of the

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<sup>81</sup> FDRE constitution, Article 40(3).

<sup>82</sup> Kjetil Tronvoll, and Oyvind ØAadland, *The Process of Democratisation in Ethiopia : an expression of popular participation or political resistance?* (Norwegian Institute of Human Rights 1995); Herald Aspen, 'The 1995 national and regional elections in Ethiopia: local perspectives' (1995) Working Papers on Ethiopian Development, Trondheim: Centre for Environment and Development, University of Trondheim.

<sup>83</sup> Sarah Vaughan and Knejit Tronvoll, *The Culture of Power in Contemporary Ethiopian Political Life* (Sida studies 2003).

election process. The legitimacy of the democratization process was also questioned by the public at large mainly during the 2005 election which led to an electoral violence that took the life of 200 civilians.

Beyond the flaws of election, Ethiopia stands fourth in the world in the number of imprisoned journalists.<sup>84</sup> It also stands amongst the leading countries in the number of political prisoners<sup>85</sup>. Freedom of expression is also crippled by the most stringent media law, and the monopoly of TV by the government.<sup>86</sup> Ethiopia being the lowest in access to the internet in Africa and due to the trend of imprisoning social media bloggers, the social media also fails to fill the gap created by the state monopolized mass media. Freedom of association and participation of CSOs in the democratization process is also seriously curtailed by the law governing the sector. All these factors indicate the democratization process and phase of the country.

In sum, while the four regional and national elections conducted since 1991, and the existence of a multiparty election is a good beginning in the democratisation of the country, there is little progress in the development of genuine democratic substance. The little progress reflected in the 2005 election was also backtracked by new laws enacted subsequent to the aftermath of the election, and which stifled the newly emerging democratic institutions such as the media, political parties and the civil society organisations. What has materialized after the four consecutive general elections is thus a ‘new electoral authoritarianism’ where the ruling party grips a complete power through election. Election has thus become a means of legitimizing the ruling party rather than serving as a means of democratic expression of the people.

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<sup>84</sup> According to the Committee to Protect Journalists (CPJ), Ethiopia is number four on CPJ’ most censored country and ‘Top worst jailors of journalists worldwide. See CPJ, ‘10 most censored countries’, < <https://cpj.org/2015/04/10-most-censored-countries.php> > accessed on 25 May 2015.

<sup>85</sup> See generally Human Rights watch reports of 2012, and 2013 at [www.hrw.org/world-report-2012/ethiopia](http://www.hrw.org/world-report-2012/ethiopia) and <[www.hrw.org/world-report-2013/countries-chapter](http://www.hrw.org/world-report-2013/countries-chapter) >

<sup>86</sup> In Ethiopia, there is only one TV station which is owned by the government.

## CHAPTER 3

### THE ROLE OF CIVIL SOCIETY ORGANISATIONS IN DEMOCRATIZATION

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#### 3.1. Civil Societies and Democratization

Historically civil society organisations carry out a host of social, political, economic and cultural functions that the state and the market fail to provide. In recent times however, CSOs increasingly perform those functions that were conventionally deemed the prime affairs of the other two sectors.<sup>1</sup> Thus, the belief that civil societies are gap fillers has given way in the 21<sup>st</sup> century. This chapter however focuses on those functions of civil societies that either directly or indirectly play a role for democratization.

The contribution of democracy to the proliferation and effectiveness of civil society organisation through recognition of freedom of association has been categorically established. Nonetheless, the reverse relation in terms of the contribution of CSOs to the democratization of a nation has been debatable. Indeed the viewpoint goes from one extremity that argues the negative role of civil societies for initiation and consolidation of democracy, to another edge that upholds ‘no civil society - no democracy.’<sup>2</sup> Hence, the exact relationship between civil societies and democratization remains unclear.

The view points on the contribution of civil societies for the democratization process can be summarized as (i) ‘categorically positive’ (civil society organisations inherently engender democratization); (ii) ‘discrete’ (having no causal relation), (iii) ‘negative’ (civil society organisations serve as a negative force and rather cause de-democratization); (iv) ‘conditional affirmative.’ (civil society organisations could play a positive role for democratization provided they realize some preconditions or possess some mannerism). These four line of argument will be discussed below with special focus on the conditional affirmative view point which the approach

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<sup>1</sup>Jonathan Garton, ‘*The Regulation of organized Civil Society*’ (Hart Publishing 2009) 44.

<sup>2</sup> Ernest Gellner, *Conditions of liberty: Civil Society and its rivals* (Hamish Hamilton 1994).

The first viewpoint upholds that CSOs are inherently good for the democratization of a nation as they contribute to pluralizing the public sphere. Literatures in the field alluding to historical facts, theoretical justifications and empirical based research tests, reiterate the positive role of civic associationalism portrayed by Alexis de Tocqueville, and validate that a strong civil society is a defining characteristics of consolidated democracies.

However the second view contends that there is no causal relationship between CSOs and democracy. Fisher for example, argues that ‘the majority of the literatures on the role of civil societies sated with hasty generalizations are based more on faith of their potentials that remain speculative and rhetoric than their factual input to political change and democratization or to political continuity.’<sup>3</sup> Jonathan Fox,<sup>4</sup> Bermeo and Nord<sup>5</sup> also assert that there are no causal mechanisms that determine the patterns of civil society organisations’ influence on horizontal accountability and longevity of democracy. Sydney Tarrow<sup>6</sup> having the same position specifically pointed out that while democracy could advance civil society, however reversely, civil societies do not necessarily promote democratization. Nonetheless many who assert both the positive and the negative role of CSOs for democracy challenge the discrete view. Gill for instance strongly argues that civil society organisations and democratic institutional performance are mutually reinforcing.<sup>7</sup>

At the other end, the third view strongly maintains that civil society organisations wield a negative force on the democratization process. Those who argue the negative effects of civil society assert that CSOs that are unrepresentative, biased or presenting their own agenda are particularly threatening to the democratization process. Joerg Forbig in summarizing the possible negative effects of CSOs points out that firstly, Civil

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<sup>3</sup> William Fisher, ‘DOING GOOD?: The Politics and Anti-Politics of NGO Practices’(1997) Annual. Review. Anthropol 439-464, 441.

<sup>4</sup> Jonathan Fox, ‘Civil Society and Political Accountability: Propositions for Discussion’ (2000) Working Paper presented at ‘Institutions, Accountability and Democratic Governance in Latin America,’ Helen Kellogg Institute for International Studies, University of Notre Dame.

<sup>5</sup> Nancy Bermeo and others, *Civil Society before Democracy* (Rowman and Littlefield publishers 2000).

<sup>6</sup> Sydney Tarrow, ‘Making Social Science Work Across Space and Time: A Critical Reflection on Robert Putnam’s Making Democracy Work’ (1996) American Political Science Review 90, 389–97.

<sup>7</sup> Graeme Gill, *The Dynamics of Democratization: Elites, Civil Society and the Transition Process* (St Martin’s Press 2000).

society might become rent-seekers and face political co-optation either with the incumbent government or opposition parties and turn into societal instruments for specific political purpose rather than serving the general public.<sup>8</sup> Secondly, although civil society is by definition a realm of interest articulation and representation of groups in the public sphere, uncompromising CSOs that push for specific interests make negotiations of different interests and political decision making process lengthy, obscure and complex.<sup>9</sup> The third and probably unintended negative effects of CSOs is societal segregation. Although some civil societies may work for the promotion of the equality of some disadvantaged groups and the unity of the nation, nonetheless as it's likely that individuals associate with their own socially and economically defined groups, they develop their segregated organizational milieus and perpetuate traditional socio economic stratification and fortify ethnical and religious segregation.<sup>10</sup>

Diamond also points out that a hyperactive, confrontational and relentlessly rent-seeking civil society can overwhelm a weak, penetrated state with the diversity and magnitude of its demands, leaving little in the way of a truly 'public' sector concerned within the overall welfare or society.<sup>11</sup> This is a particularly pressing dilemma for new democracies lacking sufficient autonomy, legitimacy, capacity and support to mediate among the various interest groups and balance different interests in the face of stiff opposition from CSOs.<sup>12</sup>

Moreover CSOs cause regime instability, exerting too much influence in policy making and usurping the state's moral imperative to govern in times of crisis thus causing inefficient governance.<sup>13</sup> In support of this view, some scholars present historical accounts of the negative political activism of CSOs in some new democracies of the third wave mainly from the Latin American region. They argue that the mobilization of populist societal groups that put forth an undue pressure caused

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<sup>8</sup> Joerg Forbrig, 'The Nexus Between Civil Society and Democracy: Suggesting a critical approach' in Reichel, Walter (edn.) *Political Priorities between East and West. Europe's rediscovered wealth – What the accession-candidates in Eastern and Central Europe have to offer* (2002) 2, 4

<sup>9</sup> Ibid

<sup>10</sup> Ibid, 5

<sup>11</sup> Larry Diamond, 'Towards Democratic Consolidation' *Journal of Democracy*, 5(3), 4-17,4

<sup>12</sup> Ibid

<sup>13</sup> Linz Juan, *The breakdown of democratic regimes: Crisis, Breakdown, and Re-equilibration* (John Hopkins University Press 1978).

interrupted leadership and facilitated the rise of military juntas and oppressive dictatorships in Venezuela and Ecuador; and pulled back to authoritarian leaders in Guatemala and Bolivia.<sup>14</sup> Civil society organisations thus caused the disruption of the democratization process threatening its consolidation and sustainability.

While recognizing such latent de-democratization potential of civil society organisations, the relation between civil society organisations and democratization should not however be depicted as completely negative for two key reasons. Firstly, the argument that asserts CSOs are only negative forces for democratization based on experiences from some of the failed democracies in the Latin American countries can be refuted by citing other historical accounts which prove otherwise. Cases from other regions evoke remarkable contributions of civil societies to a political change. For example, a series of studies focusing on Thailand, Chile and the Philippines establish the greatest contribution of the civil society sector for the ‘restoration of electoral democracy’, ‘consolidation of political democracy’ and ‘economic development’.<sup>15</sup>

Secondly, as even admitted by those who argue against the democratic functions of CSOs, there are many factors that could affect the interplay between CSOs and democracy. In fact many scholars and activists agree that CSOs can have both a positive and a negative role as it is conditional on the environment wherein they operate, and their own governance and mission. The political and institutional arena, for instance, may cause CSOs to play either positive or negative functions. The negative impact of civil societies that has typically played out in the South American region could thus be attributed to its shaky and ineffective institutions that are the typical marks of new democracies. As elucidated by Rose and Shin<sup>16</sup> whilst first wave and second wave democracies had longer experience with democracy and have better state institutional performance, third wave states have inherent institutional deficits

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<sup>14</sup> Arturo Valenzuela, ‘Latin American Presidencies Interrupted’ (2004) *Journal of Democracy* 15 (4) 5–19; Alison Brysk, ‘Democratizing Civil Society in Latin America’ (2000) *Journal of Democracy* 11 (3) 151–65; Guillermo O’Donnell, *Modernization and Bureaucratic Authoritarianism* (University of California Institute of International Studies 1979).

<sup>15</sup> E.W. Gohlert, ‘Thai Democracy and the May 1992 Crisis: The Role of Private Non-Profit Organisations’ (1992) paper presented to the Western Conference of the Association for Asian Studies, Tucson, University of Arizona, 23 (24) 2.

<sup>16</sup> Richard Rose and Doh Shin, ‘Democratization Backwards: The Problem of Third-Wave Democracies’ (2001) *British Journal of Political Science* 31 (2) 331–75.

because they underwent electoral democracy prior to the establishment of the rule of law.

Such argument in effect implies that civil society organisations do not contribute to the democratization process at least in countries where efficient institutions are lacking. The view is supported by others such as Sheri Berman who, citing the rise of the Nazi party from strong civic nationalism in Weimar Germany, emphasized that, devoid of strong state apparatus, vigorous civil societies facilitate societal discord prompting cleavage structures and organisations that are subversive, radical, seditious, insurgent and revolutionary.<sup>17</sup> Diamond adds, a strong civil society in itself is no substitute for solid political and legal institutions, which are a sine qua non for a democratic system, however, once they are in place, civil society can and indeed must establish a more deeply rooted, legitimate and effective democracy.<sup>18</sup> While the importance of other democratic institutions is unquestionable for democratization, nonetheless their lack thereof would not necessarily and totally impair the contribution of CSOs. NGOs in India and the Philippines for instance are considered to have emerged to fill the institutional vacuum caused by the weakness of political parties and trade unions.<sup>19</sup> Similarly, Thailand having had vibrant NGOs and fragile party political system during the 1980s, key role of organizing the opposition movement was taken over by the former.<sup>20</sup> The Indonesian regime change and fight for democratization in the late 90s could also be equally attributed to the leading Indonesian NGOs as the opposition party.<sup>21</sup>

Thus an important matter to examine is why are some civil society organisations able to bring meaningful and positive results in their democratic functions than others? What factors impede or promote the interplay between civil societies and their democratic functions?

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<sup>17</sup> Sheri Berman, 'Civil Society and Political Institutionalization' (1997) *American Behavioral Scientist* 40 (5) 562–74; Sheri Berman, 'Civil Society and the Collapse of the Weimar Republic' (1997) *World Politics* 49 (3) 51–66.

<sup>18</sup> Larry Diamond, 'Rethinking civil society: Toward democratic consolidation' in Larry Diamond and Marc Plattner (Eds.) *The global resurgence of democracy consolidation* (Johns Hopkins University Press 1996) 227–240.

<sup>19</sup> Gerard Clarke, below n 39.

<sup>20</sup> Gerard Clarke, below n 39 at 36–52.

<sup>21</sup> Gerard Clarke, below n 39 at 36–52.

### ***Factors affecting the democratic functions of CSOs***

As seen above different scholars and activists portray the contribution of CSOs for democracy as positive; negative; or no contribution at all. However many others describe the contribution of CSOs for democracy as ‘*conditional affirmative*’.<sup>22</sup> Thus rejecting the inherent worth of CSOs, they assert in order to be able to play a significant role at any of the stages in the democratization process, civil societies must exhibit certain characteristics that facilitate democracy and deters autocracy.

Those characteristics of civil society organisations that assist the facilitation of democracy are generally related to their internal governance (organisational characteristic) and external relations (relationship characteristic) with other actors notably the state. Diamond for instance stresses that, ‘for civil societies to contribute to democratic change and endure, (internally) they must be pluralistic, institutionalized, and democratic.’<sup>23</sup> He further noted that externally CSOs need to balance their relation with the state e.g., between autonomy and cooperation, vigilance and loyalty, scepticism and trust, assertiveness and civility.<sup>24</sup> Fowler<sup>25</sup> and Mercer<sup>26</sup> further added that civil societies should be representative, strong, well developed, non-fragmented and uncompetitive. Thus CSOs that are lacking such characteristics might impede the democratization efforts causing protract the status quo or exerting an unfavourable bearing on democratic consolidation.

### ***Institutionalisation***

A certain degree of institutionalization in terms of the organizational form or system of operation is not only one basic feature for an entity to be considered as a civil society organization as discussed above,<sup>27</sup> but it is also an important feature for the

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<sup>22</sup> Larry Diamond, ‘Rethinking Civil Society: Toward Democratic Consolidation’ (1994) *Journal of Democracy* 5 (3) 4-17; Alex Hadenius and Fredrik Uggla, ‘Making Civil Society Work, Promoting Democratic Development: What Can States and Donors Do?’ (1996) *World Development* 24 (10) 1622-1628; Yael Yishai, ‘Civil Society and Democracy: The Israeli Experience’ (2002) *International Journal of Voluntary and Nonprofit Organisations* 13 (3) 218-221.

<sup>23</sup> Larry Diamond, ‘Rethinking Civil Society: Toward Democratic Consolidation’ (1994) *Journal of Democracy* 5 (3) 4-17. These basic features necessary for CSOs contribution to democracy as pluralistic, institutionalized and democratic are further discussed below.

<sup>24</sup> *Ibid.*

<sup>25</sup> Alan Fowler, ‘Non-Governmental Organisations and the Promotion of Democracy in Kenya’ Ph.D. thesis (University of Sussex 1993).

<sup>26</sup> Claire Mercer, ‘NGOs, civil society and democratization: a critical review of the literature’ Department of Geography’ (2002) University of Leicester, 7-8.

<sup>27</sup> Larry Diamond, ‘Rethinking Civil Society: Toward Democratic Consolidation’ (1994) *Journal of Democracy* 5 (3) 4-17, 10-13



contribution of CSOs to democratization. Diamond argues when CSOs are institutionalized (i) they manage to organize interests of those they represent in a structured and stable manner that allows bargaining and the growth of cooperative networks (ii) reduce the cost of setting up new structures of social forces and (iii) their leaders will be more accountable and responsive to push for the interests and policy goals of their constituency rather than seeking to maximize short-term benefits in an uncompromising manner.<sup>28</sup>

### ***Autonomy***

One of the democratic functions of CSOs is ensuring the accountability of authorities and those in positions of power. Civil societies which are autonomous from the state in their recruitment, decision making and financial resources are thus able to challenge decisions of authorities, and put a check on the power of government invoking legal and bureaucratic means available for accountability. Fiscal dependence or political allegiance of CSOs to the government or other political parties on the other hand would limit their inclination to face the authorities and curtail their role as adversaries to the state.<sup>29</sup>

Further the autonomy of civil societies from a government avail free space for citizens as they would be encouraged to be members of institutions that are free from state pressure. Hence, they serve as forums where citizens are able to articulate their interest, develop it through dialogue and deliberations, and effectively voice it out. Thus autonomous CSOs contribute to the democratization process through ensuring accountability of governments; and availing space for the aggregation and the representation of interests.

### ***Representation, Inclusion and Integration:***

The notion of representation, inclusion and integration specifically refers to having a larger and diverse constituency and networking. Representation often refers to the size of membership or constituency. Inclusion on the other hand connotes more of the level of heterogeneity of the members or the heterogeneity of the ideas the organization

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<sup>28</sup> Ibid, 12.

<sup>29</sup> Yael Yishai, above n 22 at 219.

represents within. On the other hand integration refers to the external relation a CSO has with other individuals and organizations and how cooperative and accommodative it is to others.

Generally speaking CSOs that have large membership and represent the interest and ideas of a larger group of society gain greater legitimacy and louder voice. Thus would have a better chance to force their agenda in the public sphere as they can easily mobilize their larger constituency to influence policies and government decisions.

The inclusiveness of an organization is also important feature that determines its contribution to the democratization process. Firstly, inclusiveness allows CSOs to exercise democracy within and to promote tolerance among members. Although freedom of association includes the right of individuals to choose with whom they want to associate i.e. the right to dissociate, a limiting principle that balances the freedom to dissociate with protection against unjustifiable exclusiveness can be stated. “Freedom of association must be limited to secure a regime in which freedom of association can flourish.”<sup>30</sup> Hence the right to exclude that ensues from associational freedom must be limited if it unduly curtails others’ freedom or jeopardize their equal voice in democratic decisions. Such a balance is particularly necessary to protect individuals and minorities in CSOs who otherwise may be threatened to be banned merely for having a dissenting voice.

Secondly, inclusiveness of an organization may also promote a pluralistic society that value tolerance. Indeed, closed membership in an organization would facilitate homogeneity in the articulation and aggregation of interests and would increase the bargaining power of the organization. However, the degree of pluralism is also another major factor that determines CSOs level of contribution to democracy. If the organizational structures of civil society largely follow deep-seated cleavages, it creates the segregation and the fragmentation of the social and political community and such segregated CSOs, or more precisely several distinct civil societies stand in clearly disadvantageous relation to democracy as they cause the fragmentation and

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<sup>30</sup> Alexander Larry, ‘What is Freedom of Association and What Is Its Denial’ (2008) *Social Philosophy and Policy* 25, 16

potential disintegration of the overall society and polity.<sup>31</sup> This is particularly challenging for nations having diverse ethnic and religious groups like Ethiopia. Hyden also argues that the test of open recruitment is particularly relevant for the integration of multi ethnic or religious society.<sup>32</sup>

CSOs that promote integration of their members with others and are themselves willing to cooperate and network with other organizations on the other hand better help the democratization process. Those civil society organisations that open up their membership to as many individuals and groups, and do not restrict members' connection to other associations or to the wider society encourage the flourishing of pluralistic societies and facilitate trust and compromise amongst different individuals and groups both within and outside a certain associational life. Moreover their integration with diverse body of CSOs and the formation of coalition or networks helps them to have a louder voice that can influence decisions, policies and the whole governance system.

CSOs with closed membership and organizational structure that do not promote inclusiveness and integration on the other hand might encourage polarization<sup>33</sup>. Such types of CSOs would particularly threaten the democratization process if they have anti-democratic missions since the polarization could instigate conflict. Along this line, Warren also argues, although civic associationalism is a pillar for good governance, CSOs might as well play an off-putting impact in championing antidemocratic sentiments – eliciting factional splits and promoting societal cleavages.<sup>34</sup>

### ***Democratic structure and mission:***

For civil society organisations to have a positive impact in the democratization process, it is also imperative that they have democratic missions and exercise democracy within. The chances to develop stable democracy improve significantly if civil society does not contain maximalist, uncompromising interest groups or groups with

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<sup>31</sup>Joerg Forbrig, 'The Nexus Between Civil Society and Democracy: Suggesting a critical approach' in Reichel Walter (edn.) *Political Priorities between East and West. Europe's rediscovered wealth – What the accession-candidates in Eastern and Central Europe have to offer* (2002) 2, 79-103,86

<sup>32</sup> Goran Hyden, 'Building Civil Society at the Turn of the Millennium' in John Burbidge (ed.) *Beyond Prince and Merchant: Citizen Participation and the Rise of Civil Society* (Pact Publication 1997).

<sup>33</sup> Martin Lipset, *Political Man: The Social Bases of Politics* (Doubleday 1960); Francis Fukuyama, 'Social Capital, civil society and development' (2001) *Third world Quarterly* 22, 38-52.

<sup>34</sup> Mark Warren, *Democracy and Association* (Princeton University Press 2001).

antidemocratic goals and methods.<sup>35</sup> Thus both their objectives of formation and the course of action they take towards attaining their objectives need to be democratic. Having a democratic structure that allows periodical election of the board, greater participation of stakeholders and accountability to their own constituencies help CSOs to have a pro-democratic impact.<sup>36</sup> CSOs that exercise democracy coach their members important democratic values that they may employ in the public sphere. On the other hand, CSOs that do not parade democracy within, would neither enhance members' capacity for democratic participation nor influence them positively to internalize democratic values.<sup>37</sup>

Though far-fetched to possess all such characteristics to the ideal degree, civil societies exhibiting such characteristics to a greater degree are said to have positive roles in initiating and consolidating democratization. The following section briefly summarizes the functions of CSOs for the initiation and consolidation of democracy.

#### *i. Initiating Democracy*

CSOs can play a role in initiating democracy by criticizing and delegitimizing authoritarian regime during pre-transition period, and through lobbying for the reform of electoral laws, voter education and election monitoring immediately after transition. History proves the role of organized social groups such as students, women's groups, farmers' organisations, Nongovernmental organisations, trade unions, religious groups, professional organisations, the media, think tanks and human rights organisations in mobilizing pressure for political change or democratic transitions.<sup>38</sup> In the context of Southeast Asia for instance, notably in Cambodia, Indonesia, the Philippines and Thailand, NGOs have contributed to the fight for and transition to democracy, and have remained a significant political force since.<sup>39</sup>

#### *ii. Consolidation of Democracy*

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<sup>35</sup> Larry Diamond, 'Toward Democratic Consolidation' (1994) *Journal of Democracy* 5 (3)11.

<sup>36</sup> Goran Hyden, above n 32 at 31-32.

<sup>37</sup> Goran Hyden, above n 32 at 31-2.

<sup>38</sup> Larry Diamond, 'Toward Democratic Consolidation' (1994) *Journal of Democracy* 5 (3) 10; Larry Diamond Rethinking civil society: toward democratic consolidation (1994) *Journal of Democracy*, 5 (3) 5

<sup>39</sup> Clarke Gerard, *The politics of NGOs in South East Asia: participation and protest in the Philippines* (2001) *Crossroad: An Interdisciplinary Journal of Southeast Asian Studies* 15 (1) 139-141.

The democratic functions of autonomous CSOs also sustain the post transition period and may generally be classified as the (i) pluralist function and (ii) educational function. The most direct function of civil societies in pluralizing the political sphere is crucial in ensuring government's accountability and articulating and defending interests. The educational aspect also indirectly and consequentially facilitates democratization by empowering citizens to internalize and exercise democracy.

***a. The Pluralist Function***

One major function of civil societies that greatly contribute to the consolidation of democracy is pluralizing the political sphere. Civil societies by virtue of their existence as autonomous actors, are said to pluralize (and therefore to strengthen) the institutional arena, and bring more democratic actors into the political sphere who would share power in society and in political life.<sup>40</sup> Strong and dense civil society organisations form a bulwark against despotic tendencies in political life (ensuring accountability), and serve as a defence against oppressions and discrimination in the intercourse of social groups (ensuring interest articulation and representation).<sup>41</sup>

*Advisory functions*

Contemporary scholars underscore that the growth of civil society in its modern form plays a decisive political role not solely by challenging authoritarian governments and instigating democratic polity but also by enhancing the quality of governance within that polity.<sup>42</sup> Thus, beyond initiating and facilitating electoral democracy, civil societies play a considerable role in building the capacity of democratic institutions such as the police, public prosecutors, parliament and courts through technical and material provisions. CSOs also train 'local and state elected officials and candidates emphasizing not only technical and administrative skills but normative standards of public accountability and transparency.'<sup>43</sup> Civil societies thus contribute to sustaining democracy through capacity building of the government.

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<sup>40</sup> Claire Mercer, above n 26 at 8-10; Alex Hadenius and Fredrik Ugglå, above n 22 at 1622-1628.

<sup>41</sup> William Kornhauser, 'The politics of Mass Society' (Routledge and Kegan 1960).

<sup>42</sup> Larry Diamond 'Toward Democratic Consolidation' (1994) *Journal of Democracy* 5 (3) 9.

<sup>43</sup> *Ibid.*

Many writers based on compelling research in Eastern Europe, signify the roles vibrant and dense civil societies played through provision of technical advice to state elites in promotion of regulatory quality and the efficacy of state-bureaucratic management.<sup>44</sup> Furthermore, organisationally, a strong civil society supports the state machinery by providing an unswerving and constant flow of information on the demands of the public and how best the state can execute in greater accord, permitting the state to draw up actionable and manageable plans of action for better performance.<sup>45</sup>

### *Regulatory functions*

Civil societies reinforce accountability through setting a limit to state authority and challenging the state at both national and local levels; enhancing regulatory quality; and promoting transparency and efficiency. As the most effective means of exercising control, they resort to democratic political institutions and public scrutiny, pressing for change and developing an alternative set of perspectives and policies.<sup>46</sup>

If citizens have to participate and make an informed decision in the policy making decision of their countries in a meaningful manner, it is important that they obtain all the relevant prima-facie information. By establishing a constant flow of information to the masses about government policies, legislations, budget, human right records of the government as well as information that can expose governmental mismanagement and inefficiency civil society organisations enable the citizenry to make a more informed decision and defend their interests and values.<sup>47</sup> This way also, civil societies would have indirect effects on state apparatus, by checking human rights records, tracking budget and challenging the state and ensuring transparency and accountability. In so doing, a vibrant civil society can alter the balance of power away from the hegemonic state by impelling state officials to use their power more responsibly and contributing

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<sup>44</sup> Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (The MIT Press 1992); Keane John, *Civil Society: Old Images, New Visions* (Stanford University Press 1998); Mark Warren, *Democracy and Association* (Princeton University Press 2001).

<sup>45</sup> Phillip Schmitter, and Karl T, 'What Democracy is ...and is not' in the Diamond, Larry and Plattner, Mark (edn) *Electoral Systems and Democracy* (The John Hopkins University Press 2009).

<sup>46</sup> Samuel Huntington, 'Will more countries become democratic?' (1984) *Political science quarterly* 99 (2) 204; Larry Diamond (1994) 'Toward Democratic Consolidation' *Journal of Democracy* 5 (3) 7.

<sup>47</sup> Andreas Schedler, 'Restraining the State: Conflicts and Agents of Accountability' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner 1999).

to the kind of ‘balanced opposition’ that is held to be characteristic of established democratic regimes.<sup>48</sup>

#### *Monitoring and Disciplinary functions*

Strong and independent civil society organisations also serve as watchdogs against violations of the law, potential abuse of political power and corruption. They can pressurize the government to act in pursuance of the demands of the public. They can also act as an institutional alternative that can scrutinize the transparency and efficacy of legislation and can expose to the public the intensity or forms of client-patron relations, prebendalism, cronyism, and nepotism in governance at the local or national levels.<sup>49</sup> Thus, they also challenge the abuses of executive or legislative authority, and minimize arbitrary policies imposed by the state and compel properly authorized state authorities to prosecute, penalize, sanction, or punish errant public officials.<sup>50</sup> Hence civil societies also play a disciplinary role by exposing government’s failure of standards of public morality and performance.<sup>51</sup>

#### *Representation function*

In addition to ensuring accountability, the pluralistic aspect of civil societies is crucial even in the highly consolidated, non-corrupted, and competent democracy, as the state which intrinsically is politically motivated would be inclined to pull off the interests of the majority leaving out minorities. Civil societies render political leverage by providing the latter with protection mechanisms against potentially alarming decisions, policies and legislation affecting their interests as they provide a forum for the articulation, aggregation and representation of the interests and grievances of the minorities thereby building a solid constituency.<sup>52</sup> Civil societies also contribute to more effective and equitable economic and political reforms feeding legislators with a

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<sup>48</sup> Kassis Mudar, ‘Civil Society Organisations and Transition to Democracy in Palestine’ (2001) *International Journal of Voluntary and Nonprofit Organisation* 12 (1) 36.

<sup>49</sup> Stephan Ndegwa, ‘Civil Society and Political Change in Africa: The Case of Non-Governmental Organisations in Kenya’ (1994) *International Journal of Comparative Sociology* 35, 19-36.

<sup>50</sup> Phillip Schmitter, and Karl T, ‘What Democracy is ...and is not’ in the Diamond, Larry and Plattner, Mark (edn) *Electoral Systems and Democracy* (The John Hopkins University Press 2009).

<sup>51</sup> Kassis Mudar, above n 48 at 36.

<sup>52</sup> Larry Diamond, ‘Rethinking Civil Society: Toward Democratic Consolidation’ (1994) *Journal of Democracy* 5 (3) 4-17; Larry Diamond, *Developing Democracy Toward Consolidation* (Johns Hopkins University Press 1999).

greater breadth of information and experience pressure policy formulations in favour of the communities that they represent.<sup>53</sup>

Thus, a rich associational life supplements the role of political parties in stimulating political participation and increasing the political efficacy and skill of democratic citizenship. Strong, multiple, self-sufficient, self-governing and impartial civil society organisations which pluralize the political sphere therefore do certainly contribute to the consolidation of democracy through representation of interests and inspection of accountability.

### **b. *Educational Function***

Beyond the notion of pluralism, most literatures that examine the relationship between civil societies and democratization, base themselves on the extensive consequential impacts or instrumental role of civic associationalism echoing the point of Alexis de Tocqueville that American civic associationalism promoted a strong sense of democratic citizenship.<sup>54</sup> It is argued, ‘democracy cannot do without democrats- thus- no democratic order can be sustained, if not the prime practitioners of this form of government, namely the people, is prepared to stand up firmly for the principal rules of the game.’<sup>55</sup> Greatly emphasizing this function of civil society organisations in educating the prime practitioners of democracy, Robert Putnam and other social capitalists assert that civil society organisations which are ‘schools of democracy’ positively impact democratization through the formation of ‘social capital’ that has an effect on individuals, communities and the entire nation. Social capital is understood as an instantiated informal norm that promotes cooperation in groups and therefore are related to traditional virtues such as honesty, keeping commitments, reliable performance of duties, reciprocity and the like.<sup>56</sup> Thus, while civil society and networks may arise as a result of social capital, the formation of civil society organizations that practice democracy within may in turn advance the strengthening of social capital by inculcating such values as trust, reciprocity, solidarity and tolerance.

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<sup>53</sup> Marc Howard, ‘Civil Society and Democracy’, *International Encyclopedia of Civil Society* (Springer 2010) 186-192.

<sup>54</sup> Alexis de Tocqueville, *Democracy in America* (Achor Books 1969).

<sup>55</sup> Alex Hadenius and Fredrik Ugglå, above n 22 at 1622-1628.

<sup>56</sup> Francis Fukuyama, ‘Social Capital, Civil Society and Development’ (2001) 22(1)7-20,8



The very heart of the 'educational function' lies on the presupposition that the existence of multiple autonomous organisations that bring diversity into a smaller communal sphere instils integration of the diverse which in turn promotes tolerance of the diverse, negotiating and compromising with the diverse and trusting the diverse societal groups which altogether promote democracy within the smaller organisational sphere and outside to the higher, wider public political sphere.

Civil society organisation provides space for ordinary citizens to interact with one another outside of their closed networks of the family unit. Therefore as is explained by Varshney and confirmed by an empirical study made by Tusalem states such as India with strong and dense civil societies profit from higher levels of social tolerance and political stability, since such interethnic and interfaith networks of civic engagement facilitate coexistence, bridge the differences, promote tolerance and defuse factional rivalries through intra-group nationalism, and an increased level of interethnic contact and develop higher levels of trust despite pronounced cleavages.<sup>57</sup>

Greater trust, tolerance, and bargaining skills, undoubtedly are important facets of democracy. Through such democratic practices, not only citizens would learn to live to a reasonable extent with prevailing frictions and controversies; but convergence of opinions and integration into a common system of norms would also be more feasible.<sup>58</sup> The world bank for instance contends that an active civil society aid decentralization particularly in countries with 'marked ethnic divisions and deeply rooted local identities' through greater participation across all sectors of society and bring consensual policies that address 'social dislocations.'<sup>59</sup>

Further to promoting pluralism, integration, tolerance and trust, strong civil society organisations which themselves are democratic, augment an associational culture which can facilitate a network and web of social connectedness that enhances ever deeper levels of social capital which in turn promotes a strengthened sense of

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<sup>57</sup> Ashutosh Varshney, 'Ethnic Conflict and Civic Civil Society: India and Beyond' (2001) *World Politics* 53, 362-98; Rollin Tusalem, 'A Boon or a Bane? The Role of Civil Society in Third- and Fourth-Wave Democracies' (2007) *International Political Science Review* 28 (3) 380.

<sup>58</sup> Alex Hadenius and Fredrik Ugglå, above n 22 at 1623.

<sup>59</sup> World Bank, 'Anticorruption in Transition: A contribution to the policy debate' (2000) World Bank.

democratic citizenship and a democratic political culture.<sup>60</sup> Central to the process of democratization is the promotion of ‘civil culture; the consolidation of a set of values that promote civility, deepen the feeling of citizenship, promote egalitarian values and a sense of responsibility that stimulates participation.’<sup>61</sup> Putnam’s long-term research project in Italy also indicates that a vibrant network of community-based voluntary organisations builds the ‘social capital-civic virtues, skills, and knowledge-needed for the consolidation of democracy.’<sup>62</sup> The experience of individuals as members of democratic civil society organisations such as professional associations, alumni, interest groups, bowling leagues, and other organized groups could potentially build a strong sense of civic-mindedness. By coming together in civil associations that practise democratic norms weak individuals became strong; and the associations they formed could either participate directly in political life as interest group or could serve as ‘school of citizenship’ where individuals learned the habits of co-operation that would eventually carry over into public life.<sup>63</sup>

Active participation in civic association thus allows individuals to gain capacities and interests and enhance the social capital. This creates a more proficient and engaged citizenry to engage in a participatory democratic system. The more people participate in CSOs that are democratic in nature and structure, the more they internalize the norms and behaviour of a participatory democratic citizenry, which can only strengthen the institutions and performance of a country’s democratic government. In support of this argument, Hadenius and Ugglä write:

*‘... the spiritual support for democracy’s fundamental principles can be created, essentially, in just one way: through the experience gained from a long standing participation in democratic structures. It is a matter of socialization into democratic norms, through a process of learning by doing....and organisations of civil society often provide the best soil for this educational process.’<sup>64</sup>*

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<sup>60</sup> Rollin Tusalem, above n 57 at 365-66.

<sup>61</sup> Kassis Mudar. Above n 48 at 36.

<sup>62</sup> Robert Putnam, ‘Bowling alone: America’s Declining Social Capital’ (1995) *Journal of democracy*, 6 (1) 65-78.

<sup>63</sup> Francis Fukuyama, ‘Social Capital, Civil Society and Development’(2001) 22(1)7-20,11

<sup>64</sup> Alex Hadenius and Fredrik Ugglä, above n 22 at 1622-23.

Apart from such educational function that any democratic civil organisations can impart for their members, Right-based groups, Human Rights Defenders, Advocacy Organisations and Lobbying Groups may further contribute to the democratization process providing formal and informal education particularly of human rights and civic education empower citizenry and enhance democratic citizenship.

In sum, in an effort of initiating and consolidating democracy through interventions of assorted nature CSOs play a crucial role as an intermediary political communication or transmission-belt between state and society thereby enhancing the performance of democratic polity and serving as an alternative principle of representation complementary to periodic elections. They also serve as an additional mechanism for strengthening democratic accountability. Fisher eloquently expressed this correlation stating ‘successful bottom-up democracy’ in many instances, eventually leads to ‘top-down political change.’<sup>65</sup>

### **3.2. Civil Society Organisations and Democratization in Ethiopia**

As in many other parts of the world, the end of the cold war proclaimed the breeding ground for a large number of civil societies in Ethiopia. With the fall of the socialist regime in 1991 a significant number of local NGOs interest groups and professional associations mushroomed.<sup>66</sup> The number increased from meagre 24 in 1994 to 246 in 2000.<sup>67</sup> The new aid regime, which channels bilateral aid and social services through civil societies, has also rendered the latter as key agents both in the development and in the political discourse.<sup>68</sup> The approach changed due to the awareness that in wide contrast to the state apparatus which is burdened with red tape and infested with corrupt officials, civil society organisations are more accountable and more transparent as conduits of development assistance. As the former UN Secretary General, Kofi Annan remarked:

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<sup>65</sup> Julie Fisher, *Non governments: NGOs and the political development of the Third World*. (Kumarian Press 1998) 126.

<sup>66</sup> Kassahun Birahun, , ‘The Role of NGOs in Promoting Democratic Values’ in Bahru Z and Siegfried P (Eds) *The Challenge of Democracy from Below* (Nordiska Africa institute and Forum for Social Studies 2002); Ibid, 5-7.

<sup>67</sup> Desalegne Rahmato, above n 21 at 107.

<sup>68</sup> Paulos Mikias, ‘The role of Civil Society in Promoting Democracy and Human Rights in Ethiopia’ (2006) a paper presented at the Ethiopian American Council Conference. <<http://www.shebacss.com/docs/socsesr009-09.pdf>> accessed on 03 April 2015.

*‘The United Nations once dealt only with governments. By now we know that peace and prosperity cannot be achieved without partnerships involving Governments, international organisations, the business community and civil society. In today’s world, we depend on each other.’<sup>69</sup>*

Thus both regime change internally and Aid policy externally caused the burgeoning of Trade unions, peasant cooperatives, youth and student organisations, professional associations, non-governmental organisations and advocacy groups in Ethiopia.<sup>70</sup>

Despite the proliferation of scores of civil societies, however only very few played a direct role in the democratization process of the country.<sup>71</sup> Many remained focused on welfare and service delivery functions. A survey conducted in 1994 proves while 72% of all NGOs engaged in relief work in Ethiopia deal strictly with subsidies and service delivery activities, 22% concentrate on the capacity building and the improvement of the quality of life of its rural clientele.<sup>72</sup> In 1995 only 10 out of 350 NGOs operating in Ethiopia played a role in the democratization process through human rights promotion, advocacy, and democratic awareness etc.,<sup>73</sup> and this ratio has never improved up until 2009 where only 3% of Ethiopian CSOs were engaged in democratic related activities. This is attributed to the fact that the space available for CSOs was limited as they ‘were alarmed and suspicious of government that constantly keeps them under guard.’<sup>74</sup>

Yet, even the contributions of those few organisations whose purpose of formation is democratic promotion were limited. This is because of both internal and external factors. Internally, many of them were small in size, lacked experience, were concentrated in the cities and align mostly with elite groups.<sup>75</sup> The external factors, as some writers argue is attributed to resource deficiency and foreign aid dependency;

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<sup>69</sup> Kofi Annan, former Secretary General of the United Nations, [www.unvienna.org/unov/en/ngo\\_liason\\_service.html](http://www.unvienna.org/unov/en/ngo_liason_service.html) accessed on 24 October 2015.

<sup>70</sup> Paulos Mikias, above n 68 at 3-4.

<sup>71</sup> Dessalegn Rahmato, and others, *CSOs-NGOs in Ethiopia: Partners in Development* (Taskforce on Enabling Environment for CSOs in Ethiopia 2010).

<sup>72</sup> kassahun Birhanu, ‘The Role of NGOs in Promoting Democratic Values’ in Bahru Z and Siegfried P (Eds) *The Challenge of Democracy from Below* (Nordiska Africa institute and Forum for Social Studies 2002) 125.

<sup>73</sup> Ibid; See also, Christian Relief and Development Association, *Directory of Members* (CCRDA 1995).

<sup>74</sup> Ibid.

<sup>75</sup> Desalegne Rahmato, above n 21 at 116-118; Paulos Mikias, above n 68.

intricate bureaucracy and prescribed permitted activities both by the government and donors; government distrust of their allegiance to political opposition parties.<sup>76</sup> Such factors cause the fragmentation of CSOs in Ethiopia and limited their contribution to the democratization process at national level.

In spite of such internal and external challenges however, as we shall see below, those very few civil society organisations in Ethiopia have played indispensable roles in the democratization process of the country for nearly two decades in promoting accountability and efficiency of the state machinery and empowering the citizenry.<sup>77</sup>

*i. Empowering the citizenry*

One of the ways in which the Ethiopian CSOs contribute to the democratization process is through awareness raising programmes and the advancement of civic education. Nearly all of the advocacy organisations sensitized and created community awareness through civic education, human rights education, promotion of the principles and values of democracy etc. employing different means such as organizing public platforms, through mass and mini Medias, dissemination of information ...and communication (IEC) materials etc. Those awareness raising projects informed the public of their rights and duties thereby enabling them to actively participate in the democratic and development agendas of the country that affects their life and enabled them to make an informed decision and to demand their rights.

Some advocacy civil society organisations beyond awareness creation facilitate access to justice particularly for the poor and other marginalized and vulnerable sections of the society through pro-bono legal aid services. Such free legal aid service offered by Ethiopian Women Lawyer's Association (EWLA), Action Professional Association for People (APAP), Ethiopian Human Rights Council (EHRCO), and others helped to protect the rights of citizens who would otherwise had been denied justice for lack of financial means and knowledge.<sup>78</sup> It also empowers the community to claim their political, social and economic rights in the court of law.

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<sup>76</sup> Desalegne Rahmato, above n 21 at 116-118; Paulos Mikias, above n 68.

<sup>77</sup> Dessalegn Rahmato and others, above n 74 at 82-97.

<sup>78</sup> Ibid, 84; Norwegian Church Aid –Ethiopia Annual Report (2010).

*ii. Promoting Accountability and Efficiency of the State*

Recognizing the need to build the capacity of the state apparatus to enforce the constitutional rights of its citizens, in a new democracy and decentralized system, several Ethiopian advocacy organisations have been engaged in building the capacity of the democratic institutions of the government including the parliament, the judiciary, the police and different executive branches particularly in the regions<sup>79</sup>. APAP, EWLA, OSJE and Forum for street children (FSCE), African Initiative for a Democratic World Order (AIDWO) can be cited as very prominent examples.<sup>80</sup>

Although the primary responsibility of legislation and ratification of international laws and treaties lies with the government, the Ethiopian civil societies notably the Ethiopian Women Lawyers Association (EWLA), Action Professionals Association for People (APAP), Ethiopian Human Rights Council Organisation (EHRCO), Organisation for Social Justice in Ethiopia (OSJE), Confederation of the Ethiopian Trade Union (CETU), have also played a role in identifying the loopholes or predicaments of the laws in addressing the socio economic challenges of the society and lobbying for the enactment and amendment of some laws. This has result in the amendment of the Ethiopian Family Law, the Penal Code of Ethiopia and the Labour law.<sup>81</sup>

Also conceding the indispensability of peace and amicable ways of resolving conflicts, for any viable democracy some civil societies and most remarkably the faith based organisations have worked for the advancement of conflict resolution and peace building activities. Faith based organisations such as the Ethiopian Orthodox Church-Development Interchange Church Commission (EOC-DICAC), Ethiopian Evangelical Church Mekane Eyesus (EECMY-DASC and EMDA( (EMDA) have managed to prevent, resolve, manage and transform a number of inter-ethnic, inter religious, resource based as well as intra conflicts<sup>82</sup> which otherwise could escalate and affect the democratisation process.

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<sup>79</sup> Dessalegn Rahmato and others, above n 74 at 82-97; Jeffrey Clark, *Civil Society, NGOs and Development in Ethiopia: A snap shot view* (2000) The World Bank, 4-7.

<sup>80</sup> Dessalegn Rahmato and others, above 74 at 82-97; Norwegian Church Aid, above n 78; Desalegne Rahmato, n 21 at 116-118.

<sup>81</sup> Desalegne Rahmato, above n 21 at 106-116.

<sup>82</sup> Norwegian Church Aid, above n 78.

In addition to building state capacity and playing a complementary role, civil societies occasionally challenge the state in its decisions and policies although in general, they have not reached the point of critically challenging government's policies and plans or acts of violations.<sup>83</sup> The Confederations of Ethiopian Trade Unions (CETU's) opposition to the Ethiopian government's economic reform known as Structural Adjustment Programme (SAP) in 1995<sup>84</sup>; and APAP's challenge to the city administration decision of eviction of hundreds of households devoid of fair compensation in pursuance of international standards<sup>85</sup>; and the challenge by coalition of Ethiopian civil societies represented by OSJE, in the court of law against the decision of the government forbidding civil societies to monitor the 2005 election and the subsequent verdict in favour may be cited as an illustration.

The Ethiopian Human Right Council (EHRCO) has also been very active in its watchdog role and stands as the only human right organisation that regularly monitors and reports on human right violations of government, political parties or any other organ. EHRCO monitors and reports on human rights violations such as extra-judicial killings, arbitrary detentions, torture, forced disappearances, unlawful and arbitrary confiscation of property, violation of privacy, unlawful dismissal of employees, denial of the freedom of conscience, religion, expression and association calling for immediate action by concerned organ<sup>86</sup>.

Further to election monitoring, some advocacy organisations such as OSJE, APAP, EHRCO, Inter Africa group (IAG), chamber of Commerce have worked to advance free and fair elections through voters' education and the promotion of human and democratic values and culture among the community through trainings and information dissemination. In the 2005 national election in particular, a coalition of thirty five civil societies were highly engaged in voter education and election observation activities mobilizing and training more than 3000 election observers.

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<sup>83</sup> Sisay Gebre-Egziabher, *The Role of Civil Society Organisation in Democratization Process in Ethiopia* (2002) Paper presented at the fifth International Conference of the International Society for the Third-, July 7-10, University of Cape Town, South Africa.

<sup>84</sup> *Ibid*, 11.

<sup>85</sup> Dessalegn Rahmato and others, above n 74 at 85.

<sup>86</sup> Desalegne Rahmato, above n 21 at 110-111; Sisay Gebre-Egziabher, n 83 at 11.

Indeed many people in the CSO sector believe that the most restraining Ethiopian Charities and Societies Proclamation is the result of the civil society engagement in election related activities in the controversial 2005 national election where the ruling party lost a significant number of parliamentary seats.<sup>87</sup> Whatever the motivation behind the legislation may be, however, it marked out another epoch in terms of the roles the Ethiopian civil societies could play in the democratization process in particular and in the development of the country in general. With the advent of the new charity law, the greater majority of CSOs have given up their advocacy work .Few others such as EWLA, EHRCO, and EBA determined to pursue their advocacy work have however downsized their operations in the regions and cutting their human resource owing to the financial challenges caused by a restriction imposed on them to raise funds from foreign source. Thus, in general, the contribution of CSOs to the nascent democracy that Ethiopia experienced since 1991 was interrupted after the enactment of the CSP.

As discussed above, civil society organisations have a great role to play in the democratization of Ethiopia and elsewhere. Nevertheless, the ability of the civil society organisations to carry out their democratic role or any other activities highly depends upon the environment in which they operate<sup>88</sup> . Factors which determine this environment among others include, the legal environment in which the CSOs operate; the ‘socio-cultural characteristics of the society; the political systems of the country; economic structures and wealth distribution, institutional division of labour, beliefs and values, and historically embedded conventions and norms’,<sup>89</sup> the ‘material base and resources they generate, access and control’,<sup>90</sup> the political will of the government; etc. All these factors influence the necessary ‘enabling elements’ that are essential to the effectiveness of civil societies. The next chapter discusses such condition necessary to create an enabling environment for CSOs.

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<sup>87</sup> Kassahun, Birhanu , ‘The Role of NGOs in Promoting Democratic Values’ in Bahru Z and Siegfried P (Eds) *The Challenge of Democracy from Below* (Nordiska Africa institute and Forum for Social Studies 2002).

<sup>88</sup> Alan Fowler, ‘An enabling environment for civil societies. What does it mean and how does law fit in? (2003) Centre for Civil Society’ Research Report, 3.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid, 6



## CHAPTER 4

### ENABLING LEGAL ENVIRONMENT FOR CSOs' ROLE IN DEMOCRATISATION

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#### 4.1. Introduction

The aim of this chapter is to lay the groundwork for the forthcoming chapters that assess the Ethiopian law against the standards of an enabling legal framework for CSOs. The chapter is organized as follows. First, it briefly discusses the notion of an 'enabling environment.' Secondly, it gives a general background on the interplay between the legal and non-legal factors affecting an enabling environment for CSOs. It also explores what constitutes an enabling legal framework for CSOs i.e. what it entails and how the law can create enabling conditions for the democratic functions of CSOs. It thus introduces the four pillars by which the law can create the enabling legal conditions for CSOs which will be discussed in the subsequent chapters.

#### 4.2. The Notion of an Enabling Environment for CSOs

In order to understand the forthcoming discussions on the enabling environment for the role of CSOs in democratization, it is necessary to briefly consider 'what is an enabling environment' or 'what is to be enabled.' This may require us to quickly examine the direct and indirect roles that CSOs can play in the democratization process. As concluded from the previous chapter, CSOs indirectly influence the democratization process by serving as a school of democracy and training members with civic virtues such as pluralism, public trust, tolerance and; civic skills such as participation, and collective and autonomous decision making.<sup>1</sup> If such educative role of CSOs that Warren has referred as the 'developmental effects on individuals'<sup>2</sup> has to be achieved, then, what is to be enabled is simply the flourishing of diverse types of CSOs which are internally democratic. As CSOs grow in number and diversity, individuals' affiliation in such organisations may increase as they will have better chance to find institutions that represent and defend their interests. Such affiliation may in turn increase the capacity enhancement of individuals in internalizing

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<sup>1</sup> For detail discussion on the direct role of CSOs on democratisation, see Chapter 3 above.

<sup>2</sup> Mark Warren, *Democracy and Association* (Princeton University Press 2001)97

democratic virtues and exercising democratic skills, provided the organisations are democratic in nature. As this individual capacity enhancement reaches the public sphere, it fosters the democratization process. In short therefore, what is to be enabled is the existence of diverse (in size, purpose, forms of incorporation) types of CSOs which are democratic in nature and structure.

CSOs also directly contribute to the democratization process of a nation through the promotion of the rule of law and the accountability of the government; interest representation and articulation of diverse groups; deliberations on public matters; and lobbying or advocacy for the enactment or the enforcement of specific policies and legislation.<sup>3</sup> Such direct contribution of CSOs for democratization, that Uhlin referred as the ‘institutional level’<sup>4</sup> engagements of CSOs, perhaps require activism and autonomy of CSOs. Such civic advocacy organisations must have autonomy in order to negotiate with other actors in the public sphere and to ensure the accountability of the government. They must also exhibit activism in order to be a voice to the groups that they represent, to lobby, and to advocate. Such ‘institutional level’ democratic functions of civic advocacy organisations, in contrast to the individual capacity enhancement function of CSOs, require more space for engagement in the public sphere. Thus, for the institutional level democratization functions of CSOs, what is to be enabled is CSO’s free engagement in the public sphere. In short, what is to be enabled is the right of CSOs to freely choose any lawful purpose that promotes democracy as their legitimate purpose of formation and their autonomous engagement in the democratization process.

Additionally, the contribution of CSOs to democratization whether indirectly through individual capacity enhancement or directly through institutional level engagement, requires both human and financial resources. The type and the amount of resources each and every organisation requires in order to accomplish its purposes may vary, depending on the size of the organisation and the nature of its engagement. However, in general the resource capability of CSOs is one factor that determines their ability to

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<sup>3</sup> For detail discussion on the direct role of CSOs on democratisation, See Chapter 3 above.

<sup>4</sup> Anders Uhlin, ‘Which Characteristics of Civil Society Organisations Support What Aspects of Democracy? Evidence from Post-communist Latvia’ *International Political Science Review* (2009) 30 (3) 271–295,275

contribute to the democratization process. Thus another factor that has to be enabled is CSOs resource mobilization and effective utilization.

Hence, what ‘an enabling environment for the CSOs role in democratization’ entails is *CSOs existence; CSOs resource mobilization; CSOs autonomy and activism in public engagement*. Indeed, these enabling conditions are not peculiar for CSOs that promote democratization as their primary purpose and influence it is the institutional level. The facilitation of the enabling conditions i.e. the existence, the resources and the engagement of CSOs is essentially the same for all types of CSOs whether engaged in the democracy promotion or otherwise. In this sense, the qualification of an enabling environment for CSOs role in ‘*democratization*’ seems redundant.

In terms of the enabling conditions, perhaps, the difference between the democratic oriented civic advocacy CSOs that primarily focuses on the promotion of institutional level democratization and the other types of CSOs (such as developmental and recreational ones) is only a matter of the degree or the depth of autonomy, activism and accessibility to the public sphere required to efficiently and directly promote democracy. While all CSOs need to balance autonomy with cooperation with other actors, CSOs that aims at controlling state power needs to be more autonomous from the government and other political parties as otherwise political co-optation would threaten their potential to democratic function. For Developmental CSOs on the other hand more of cooperation than autonomy may be required as those organizations are essentially providing public and quasi-private goods and services that the government is normally providing the public. Taking this into consideration, although the discussion on the enabling law for CSOs role in democratization will highlight the enabling conditions necessary for democratic oriented CSOs as deemed relevant, nonetheless a general approach is employed. Thus while the discussion raises all enabling conditions for CSOs in general, it focuses on those important attributes of CSOs necessary for their democratic function. Indeed the general approach is justified because an enabling environment for all kinds of CSOs irrespective of their primary purpose would help to boost the sector as a whole and thereby indirectly contribute to the democratization process through individual capacity enhancement that can have a positive spill over effect on the public sphere.

### 4.3. Legal and Non- Legal Factors Affecting the Enabling Environment for CSOs

#### *Non- Legal Factors*

The premise of this chapter is that the democratic functions of CSOs can be influenced by the legal regime governing the sector. However, it is important to clarify that law is but one factor that shapes the enabling environment for CSOs' contribution to democratization. Although the focus of the thesis is on the legal conditions, nonetheless the democratization functions of CSOs is often the result of the interplay between different factors such as legal, sociocultural, socioeconomic, political governance factors, institutional etc.<sup>5</sup>

#### *Sociocultural factors*

Mercer for instance highlighting the impact of culture argues that traditional norms, rituals and patterns of authority are part of the reasons why a strong and viable civil society is absent in many third world countries.<sup>6</sup> Others also emphasize the impact of socio-cultural factors, particularly in countries where tradition, culture and religion have a dominant place in the social fabric. Kamrava also, in reasoning out why CSOs in third world countries fail to have a political dialogue with the government or to influence the political decisions of the government, asserts that the third world political orientations are seldom expressed openly and often find expression through religion and various cultural forms.<sup>7</sup>

#### *Socioeconomic factors*

The socioeconomic conditions also have an impact on the democratization role of CSOs. Poverty may cause disinterest amongst the marginalized and the vulnerable groups within society from participating in public matters. This is evidenced by the World Bank research that demonstrates the negative correlation between income

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<sup>5</sup>Lester Salmon and Stefan Toepler, 'The Influence of the Legal Environment on the Development of the Not profit Sector' (2000) Center for Civil Society Studies, Working Paper Series 17 (2).

<sup>6</sup> Claire Mercer, 'NGOs, Civil Society and Democratization: a Critical Review of the Literature' (2002) Progress in Development Studies 2 (5).

<sup>7</sup> Mehran Kamarava, *Politics and Society in the Developing World* (2<sup>nd</sup> edn, Routledge 2000) 134.

inequality and measures of ‘voice and accountability.’<sup>8</sup> Indeed part of the democratization role of CSOs is articulating, aggregating and advocating for the interests of such groups affected by economic, gender or political inequality. However, the participation of poor people even in CSOs that advocates for their rights and equality is limited not only because of disempowerment but also the opportunity costs it entails, as active participation in CSOs might force them to trade off the time they spend to earn an income.

On the flip side, the negative correlation between income and measures of voice is not always true. Poverty and inequality might also prompt people to invest their labour and meager resources to fight against a particular governance system or to overthrow a tyrant government. Particularly, if poverty and inequality have an ethnic dimension, it carries heavy implications on the democratization role of CSOs as such groups that represent the disfavoured group might exhibit undemocratic values such as resentment, faction and intolerance. Nonetheless exhibiting such seemingly undemocratic values may not be necessarily damaging for democratization. Some scholars argue that shared grievances of deprivations and generalized beliefs (loose ideologies) about the causes and possible means of reducing these grievances are important preconditions for the emergence of social movements in a collectivity.<sup>9</sup> Thus, even CSOs that exhibit intolerance and resentment might contribute to the democratization process by overthrowing a tyrant government that failed to address structural inequalities. Thus in general, the socio-economic conditions of a nation affect how CSOs would influence the democratization process in an intricate manner.

#### *Political governance factors*

The political context, which includes the governance system, the relation between state and CSOs, formal and informal rules that govern the relations among the different actors in the public sphere, also affect the democratization role of CSOs. In a democracy where the freedom of association is recognized and well respected the number of CSOs tends to increase thereby enhancing the civic engagement of citizens.

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<sup>8</sup> Stefano Migliorisi and Clay Wescott, *A review of the World Bank Support for Accountability* IEG Working Paper (2011) 11 (5)

<sup>9</sup> Ted Gurr, *Why Men Rebel* (Princeton University Press 1970); Neil Smelser, *Theory of Collective Behavior* (Free press 1963); Ralph Turner and Lewis Killian, *Collective Behavior* (2<sup>nd</sup> edn, Prentice-Hall 1957).

Also where the state- society relation is commanded by a genuine vote cast, CSOs will also have better and wider space to cooperate and to challenge the government. Thus, in a healthy democratic system, CSOs can influence the formation and implementation of policies and legislations by delivering ideas, information and evidence to policy makers and legislators through established channels. Whereas in an authoritarian regime that has less or no tolerance for autonomous CSOs the operating space would be narrowed by formal and informal rules.

Indeed, in an authoritarian regime where there is one party or one person dominance in all aspects of political life, the law itself may be used as a legitimizing force to limit or to halt the democratization role of CSOs. The recent global trend also shows that authoritarian and pseudo democracies are using the law as a tool to narrow the space for the existence and the engagement of CSOs.<sup>10</sup> The political context and the political will of the government are thus particularly powerful in constraining the actual and potential role of the law.

Depending on the state-CSOs relation and the political will of the legislators, the law may be either enabling or disabling for CSOs. A general presumption is that political will yields an enabling law for CSOs and in turn an enabling law brings forth democratization. Conversely, lack of a political will causes the enactment of disabling laws that can serve as tools to narrow the space for CSOs and stultify their functions. Such correlation between the lack of political will of the government and a disabling law is particularly feasible in non-democratic regimes having what some scholars called ‘puppet legislatures.’<sup>11</sup> Desposato for instance, asserts that many authoritarian executives have sought to maintain a façade of democracy by creating ‘puppet’ legislatures who support the regime since they would otherwise risk career-ending punishments.<sup>12</sup> Hence, in such authoritarian regimes where the trias politica principle is only symbolic, the law is just nothing but a tool of expression of the will of the regime. Thus the governance system also affects the operational environment for the democratization functions of CSOs.

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<sup>10</sup> International Center for Not-for-Profit Law (ICNL) and World Movement for Democracy, *Defending Civil Society: Report* (2<sup>nd</sup> edn, ICNL 2012).

<sup>11</sup> Scott Desposato, ‘Legislative Politics in Authoritarian Brazil’ (2001) *Legislative Studies Quarterly* 16 (2) 287-317, 287.

<sup>12</sup> *Ibid.*

### *Institutional and structural factors*

The presumption which asserts ‘no political will- no enabling law for the CSOs role in democratization’ however, considerably reduces the significances of the law and puts it altogether at the mercy of the political context. Nevertheless, law is also bound to be more than a dependent variable. In spite of the major place that the political will of the government has in shaping the law either as enabling or disabling, the relation between the political context, the law and CSOs is nonetheless not always straightforward.

The relation between the law, CSOs and collective actions for democratization is a more complex institutional field that constitutes interactions among different actors, including CSOs, individual activists, politicians, donors who seek to change the socio-political dynamics and the public at large. Although the state demands compliance with the law, individuals and their associations do not always unreservedly accept all laws, particularly disabling ones. Hence, CSOs may disregard, or resist disabling laws. CSOs, particularly those that advocate and lobby for a change of law, may exert influence to pressurize the government to amend or repeal a disabling law.

Indeed, beyond influencing the content of a specific law, the potential of CSOs might even extend to causing a regime change that brings transformation of the governance system as a whole that prompts a change of scores of laws including the constitution. The role of CSOs in South Africa against apartheid can be cited as a good example of the potential of CSOs in changing the governance systems and regimes.<sup>13</sup> The strategies or tactics CSOs employ in order to demand the amendment of the law or to influence the democratization process however can be reformed either as instantaneous revolution or lengthy negotiated process depending on the political contexts wherein CSOs operate.

On the other hand, the existence of a political will and an enabling legislation for CSOs does not necessarily warrant a democratic contribution of CSOs. The law can shape institutional behaviours only to the degree that there is compliance. The compliance culture of organisations is again highly dependent on the content of the law, CSOs

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<sup>13</sup>Lester Kurtz, *The Anti-Apartheid Struggle in South Africa (1912–1992): Summary of Events Related to the Use or Impact of Civil Resistance* (International Center on Nonviolent Conflict 2010).

relation to the state, the capacity of law enforcing institutions and the severity of penalties imposed for non-compliance.

The inference to be made here is, thus the relation between the State, the law and CSOs should be conceptualized as overlapping institutional arenas that help to constitute and shape one another within a multi-institutional environment. Although the enactment of an enabling legal framework is one of the most important inputs governments can make to the development and the active engagement of CSOs, nonetheless the enactment of an enabling law does not entirely depend on the political will of the government. The vibrancy of CSOs themselves and the public support they can secure also influences state action. The empirical test of Pamela Paxton for the ‘reciprocal effect’ of democracy upon association also suggests that ‘although more associations would be expected to exist when governments allow them to exist as is predicted by many political theorists, the effect is nevertheless only modest.’<sup>14</sup> This justifies the merit of studying how the legal environment could influence the democratization role of CSOs notwithstanding the sociopolitical context.

In general, the legal, political, social, cultural and economic contexts and their complex interrelation shape CSOs’ operational environment that defines their positions and influence in the public sphere and the space available to pursue democratization. While recognizing the importance of these variables and their complex interdependence in shaping the enabling environment for CSOs role in democratization, the focus of this thesis is nonetheless on the legal conditions that are necessary to create an enabling environment for CSOs contribution to democratization. The way to do it will thus be by proposing some general principles that enabling legal conditions should entail in order to facilitate the development of CSOs and their role for democratization. Hence for the purpose of this chapter, ‘enabling legal conditions for the democratization role of CSOs’ are framed based on what an ideal law should be like.

In addition to stipulating enabling primary rules, an enabling legal framework requires an independent, accessible and efficient law enforcing institutions such as a registering

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<sup>14</sup>Pamela Paxton, ‘Social Capital and Democracy: An Interdependent Relationship’ (2002) *American Sociological Review* 67, 254–277, 259.



and regulating Agency.<sup>15</sup> In assessing the impact of the law on the democratization role of CSOs, therefore the thesis recognizes the importance of both what H.L.A. Hart called the ‘primary rules’ i.e. those rules governing CSOs behaviour; and the ‘secondary rules’ which indicate how, when, and by whom the primary rules are to be recognized, construed, and enforced. However the focus of this thesis is on the ‘primary rules.’ The contents of the ideally enabling legal framework proposed in the subsequent chapters are thus made based on an assumption that there are suitable legal and institutional infrastructures including efficient law-enforcing institutions to implement the enabling conditions and independent courts to interpret laws and review the actions and the decisions of the executive organs.

### ***Legal Factors***

The legal regime affects the role CSOs can play in democratization by enacting both substantive and procedural legal guarantees. Laws can influence CSOs’ existence and operation by regulating the transaction costs involved in establishing and sustaining CSOs.<sup>16</sup> The influence of law on CSOs can be explained by the ‘transaction cost analytical framework’ derived from a set of ideas embodied in what is known as the ‘New Institutionalism.’<sup>17</sup> The central argument of new institutionalism is that institutions are necessary because they reduce the transaction cost (the cost of negotiation, execution, and enforcement) by creating permanent structures through which interactions can take place.<sup>18</sup> When it is costly to transact individually, then institutions matter.<sup>19</sup> It follows that institutions can only arise and persist when they confer benefits greater than the transaction cost that is incurred in creating and sustaining them.<sup>20</sup>

By the same token, CSOs can be established and sustained only when the transaction cost of forming and sustaining them is minimal. A law may thus affect CSOs either positively or negatively by regulating the transaction cost. An enabling law is thus one

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<sup>15</sup> Leon Irish and others, *Guidelines for Laws affecting Civic Organisations* (2<sup>nd</sup>eds, Open Society Institute 2004) 32.

<sup>16</sup> Lester Salmon and Stefan Toepler above n 5 at 4.

<sup>17</sup> Ibid.

<sup>18</sup> Douglas North, ‘Economic Performance through Time’ in Mary Brinton and Victor Nee (eds.) *The New institutionalism in Sociology* (Russell Sage Foundation 1998) 248.

<sup>19</sup> Ibid.

<sup>20</sup> Paul DiMaggio and Walter Powell, ‘Introduction’ in Paul DiMaggio, and Walter Powell (eds) *The New Institutionalism in Organisational Analysis* (Chicago University Press 1991) 1-38, 3-4.

characterized by and able to reduce the transaction cost to form and to sustain CSOs. Lester M. Salmon and Stefan Toepler classified the transaction cost of the law into the supply side and the demand side.<sup>21</sup>

From the supply side the law is enabling for CSOs by reducing the transaction cost which the founders and members may incur in the process of formation and operation of CSOs. Where the cost of forming CSOs is easier and cheaper or where working without them is costlier, people would be encouraged to establish CSOs. The law plays a significant role in this regard by stipulating constitutional or legal guarantees that reduces the transaction cost for the formation of CSOs and for the operation of CSOs. The constitutional or legal guarantees include the freedom to associate without undue interference; the right to form and to attain legal personality status without difficulty; the right to freely choose and to pursue the purposes for which CSOs are established for; and the right to access diverse financial resources. Such legal guarantees would significantly minimize the transaction cost for the founders and the members of CSOs. Conversely, where CSO's right to associate are not guaranteed by the law and where it is demanding to gain legal personality, to mobilize resource and to engage autonomously in pursuing purposes of formation; or where the accountability mechanisms are demanding and too intrusive, people would be discouraged to establish CSOs as the cost of forming and sustaining it would be higher.<sup>22</sup> Thus, the law could create either an enabling or disabling environment for CSOs by determining the transaction cost for the formation and operation of CSOs.

From the demand side, the law can reduce the transaction cost which the beneficiaries, donors and other stakeholders may incur in the process of assessing and regulating CSOs. The law can do this by requiring CSOs transparency and democratic governance, and prohibiting profit distribution, private inurement and self-dealing. For example, a law that puts the non-profit distribution constraint<sup>23</sup> on CSOs has the potential to maintain consumer's trust on CSOs thereby maintaining or increasing the demand for civil society organisation. Additionally, a legal framework that puts a

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<sup>21</sup> Lester Salmon and Stefan Toepler, above n 5 at 7.

<sup>22</sup> Ibid, 7

<sup>23</sup> Non-profit distribution is one of the essential elements of an organized civil society. For further discussion on the essential elements of a civil society, see Chapter 2 above.

requirement for internal democratic governance structure of CSOs; and that prohibits private inurement and self-dealing also has the potential to build trust on CSOs that would have impact on the CSOs demand thus increasing the number of people to join and to support CSOs. For example, donors want to know that their contributions are being used properly and only for the intended purpose. The legal provision that regulates CSOs fundraising activity and sanctions financial transparency could increase donors' confidence in the organisation and the sector in general.

The degree that a legal framework is enabling thus depends on the degree that it reduces both the demand side and supply-side transaction costs with a necessary balance. On the other hand, the legal frameworks that increase the demand and supply side transaction costs will negatively affect or will have a disabling factor. Hence an enabling legal framework for the regulation of CSOs should consider the 'transaction cost' which is associated with the cost of the interaction necessary for the formation, operation, resource mobilization and accountability of CSOs.

The purpose of this thesis is to examine the Ethiopian laws governing CSOs against these sets of enabling legal conditions. The degree to which a law is enabling thus depends on whether or not it guarantees freedom of association; facilitates the formation and acquisition of legal personality; allows resource mobilization from diverse sources; and ensures accountability of CSOs. The premises of enabling legal conditions for CSOs role in democratization thus builds upon the argument that constitutional guarantee to the freedom of association and compliance to such constitutional right that allows CSOs formation and autonomous engagement in any lawful purpose relevant for a democratic society including advocacy, will stimulate community empowerment and activism of their associations, which in turn promotes the democratization process.

Against these sets of conditions that serve as a parameter of enabling law, the forthcoming chapters will assess the Ethiopian legal framework. The primary focus of this thesis is thus to make a legal analysis to determine how enabling or disabling the existing legal framework of Ethiopia is and how it would potentially affect the role of CSOs in democratization. The Charities and Societies Proclamation that governs the sector will be the main focus of the assessment. The Constitution and other laws

governing aspects of enabling legal conditions for CSOs will also be discussed as found relevant. Notwithstanding the source of the law, the legal assessment focuses on the areas of legislation which have specific implications for CSOs engagement in the democratization process.

The forthcoming four chapters of the thesis will thus discuss the aspects of CSOs that are mainly influenced by the law under the ‘four pillars.’ The first pillar ‘*the legal existence of CSOs*’ is discussed in chapter five. It argues that in order to enable CSOs existence, the law must provide undemanding requirements for the formation, the acquisition of legal personality and the registration of CSOs. A law that protects CSOs from unwarranted decisions of dissolution also ensures their existence for perpetuity or until they fully attain the objectives they are established for. Such legal conditions will help CSOs boost in volume. The increase in number of CSOs means the growth of civic associationalism that assists the democratization process through representation of diverse interests and capacity enhancement of the community in public engagement and decisions making.

The second pillar ‘*The Purposes of CSOs*’ is discussed at length in Chapter six. It argues that in order to enable CSOs engagement, the law must permit the rights of CSOs to freely choose their areas of engagement (recreational, developmental, political or otherwise); and to pursue the same free of any undue interference or pressure. From the perspectives of democracy promotion of an enabling law must therefore ensure CSOs, the right to promote human rights and democracy and facilitate adequate and equitable access, participation and influence of CSOs in the public sphere.’<sup>24</sup>

Chapter seven deals with the third pillar ‘*The Resource mobilization of CSOs*’. Its main focus of argument is, in order to enable CSOs financial sustainability the law must allow resource mobilization from diverse legal local and foreign sources. Thus, what is to be enabled by the law is, in Fowler’s language, the expression of CSOs<sup>25</sup>. By expression he meant the resources that enable CSOs to express and engage themselves.

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<sup>24</sup> Alan Fowler, ‘An Enabling Environment for Civil Society: What Does it Mean and How Does Law Fit In?’ (2003) Center for Civil Society Research Report 7 (7).

<sup>25</sup> Ibid

Since establishing CSOs without the necessary financial means to pursue their purpose would be in vain, an enabling law must recognize CSOs right to mobilize resource and allow them to solicit, to receive and to utilize fund from diverse sources. The law must therefore allow CSOs to solicit fund from diverse lawful sources to boost their human resources and programme implementation capability. This is expected to increase their efficiency in gathering and disseminating information, mobilizing the community, lobbying advocacy as well as implementing different other projects that contribute to the democratization process.

The fourth pillar *'the Accountability of CSOs'* is discussed in chapter eight. This chapter argues that an enabling law also needs to balance the rights of CSOs with their transparency and accountability. It asserts that, a legal and regulatory framework that ensures the legality, accountability and plurality of CSOs will enhance the democratization role of CSOs by screening corrupt CSOs that serve individual interest; or 'uncivil' societies that serve as a de-democratization force. On the other hand, an enabling law also needs to ensure that the accountability measures will not be unwarrantedly demanding to the level of threatening CSOs existence and autonomy. It further argues that legal conditions must ensure that sanctions for non-compliance are impartial, proportional and justifiable.

The autonomy of CSOs which is specifically crucial for those CSOs engaged in the democratization process will also be discussed as a crosscutting issue. Although the rights of CSOs existence, expression and engagement embrace CSOs autonomy, it is nonetheless important to highlight that an enabling law must also ensure the financial and operational autonomy of CSOs, if they have to play a meaningful role in the democratization process. Once formed, the autonomy of CSOs is the utmost important attribute of CSOs in their role for democratization as it will enable them to hold the government accountable; and to pressurize both the ruling and opposition parties to act according to the explicit canons of the constitution and thereby ensure respect of the rule of the game in a democracy. An enabling law that ensures the autonomy of CSOs by prohibiting an undue state interference that threatens CSOs existence and operation will empower CSOs and facilitate their role in democratization. Enabling law must therefore ensure that the power of the regulating Agency should be limited to non-intrusive, transparent and legitimate mandate.

Each chapter begins with a discussion of enabling legal conditions necessary for the democratization role of CSOs based on jurisprudential and constitutional justifications, international good practices and related case laws<sup>26</sup> for the relevant topic or pillar under discussion. The enabling legal conditions stated will be followed by an overview of the Ethiopian legislation addressing that specific pillar. Hence, it identifies the enabling conditions as well as the shortcomings, loopholes, ambiguities and inconsistencies of the existing legal framework governing CSOs in Ethiopia which may increase the transaction cost of forming and sustaining CSOs and which may undermine the democratization role of CSOs.

However as mentioned above the proposed enabling legal conditions demand the existence of efficient and independent courts to interpret laws, to enforce the enabling conditions, and review the actions and the decisions of the executive organs. Although the recommendations are framed in a general manner taking a simple assumption that such efficient and independent courts and law enforcing institutions will be in place, it may be worth to briefly mention some of the legal and practical challenges of the Ethiopian judiciary system in its current state.

The first legal condition that challenges the efficiency of the courts is their lack of mandate to interpret the supreme law of the country, the constitution. Although the 1995 FDRE constitution provides broad human rights protection in consistent with international human rights laws and principles and entrusted the courts with the mandate to enforce such fundamental rights, its application is limited as the constitutional interpretation is entrusted to the House of Federation (HOF)<sup>27</sup> at the exclusion of the judiciary. The House of Federation is an organ of parliament that is composed of each ethnic group represented by one member, with an additional representative per one million of its population.<sup>28</sup>

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<sup>26</sup> Although Ethiopia does not have a case law system, relevant decisions of the European Court of Human Rights made in relation to the freedom of Association will be discussed as Article 11 of the European Convention on Human Rights is in effect similar to Article 22 of the ICCPR which Ethiopia has ratified and given an equivalent hierarchical status as the supreme law of the country, the Federal Democratic Republic of Ethiopia Constitution.

<sup>27</sup> FDRE Constitution, Article 62(1)

<sup>28</sup> FDRE Constitution, Article 61(1)(2)

Because the courts are constitutionally independent, the judiciary could have been the best option for the interpretation of the constitution. However, the House of Federation that is given a constitutional mandate to interpret the constitution failed to interpret and to clarify many of the constitutional principles and failed to develop a coherent body of precedents on constitutional interpretation.<sup>29</sup> As the mandate to interpret the constitution is given to the HOF, an institution that is political in nature and inefficient in practice, it has limited the application of constitutional law and has affected the protection and the enforceability of the fundamental constitutional rights.<sup>30</sup> It has also weakened the judiciary denying it the power to review the constitutionality of legislations, administrative decisions and actions.

The second practical challenge is related to the reluctance of the courts in applying ratified international treaties that are constitutionally recognized.<sup>31</sup> Although the constitution provides the incorporation and the applicability of ratified international treaties into the domestic law of the country, however, in practice, uncertainty of the courts as to their jurisdiction in applying those treaties, unfamiliarity with the provisions, and difficulty in accessing the ratified treaties have also made the constitutional recognition for such treaties inapplicable. Even though the court of cassation in its breakthrough precedent-setting decision recently invoked the Child Rights Convention, yet lower courts are still reluctant to apply international human rights instruments in their decisions.

The lack of independence and efficiency of the judiciary is also another practical challenge.<sup>32</sup> The FDRE constitution recognizes and protects the separation of powers, and the independence of the judiciary<sup>33</sup>. In practice however the understanding of and respect for judicial independence is lacking. The judicial system is also weakened due to noncompliance to the constitutional provision that guarantees the judicial tenure, as well as poor compensation and working conditions that do not attract qualified and

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<sup>29</sup> Chi Mgbako and others, 'Silencing the Ethiopian Courts: Non Judicial Constitutional Review And Its Impact on Human Rights'(2008)Fordham International Law Journal 32(1) 259-297

<sup>30</sup> Ibid, at 273

<sup>31</sup> Canadian International Development Agency(CIDA), 'Independence, Transparency and accountability in the Judiciary of Ethiopia'(2008)179-194

<sup>32</sup> Ibid, 174-176

<sup>33</sup> FDRE Constitution, Article 78 and 79

experienced judges. The poor public perception of the courts in terms of their independence, impartiality and accountability has also weakened the judiciary system.

Such challenges certainly call for basic judicial and legal reforms in order to give the judiciary a power to interpret the constitution, to exercise judicial review, to enjoy independence and to undergo organizational and structural adjustment for efficiency and accountability. Nonetheless, the enabling legal conditions that will be proposed under the following chapters take the presumption that the courts are or will become independent; efficient; and able to interpret laws, to enforce such enabling legal conditions and to review legislations and the actions and decision of the executive.



## CHAPTER 5

### THE LEGAL EXISTENCE OF CSOs

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#### 5.1. Introduction

The first pillar of enabling legal conditions for CSOs that we are going to discuss under this chapter is related to CSOs legal existence. The coming into existence of CSOs is *prima facie* for CSOs contributions for democratization or otherwise. Notwithstanding the type or the purpose of CSOs, their formation is therefore the very first condition that needs to be facilitated by the law. Once formed, their perpetual existence also needs to be guaranteed in order to protect them from an involuntary and unwarranted dissolution. Although other sociocultural factors may affect the existence of CSOs, the law may also either positively or negatively influence the legal existence of CSOs by stipulating conditions for their formation, acquisition of legal personality and dissolution. The discussion on the legal existence of CSOs will therefore focus on these three important points. This chapter examines the features of an enabling law that recognizes, ensures and protects the legal existence of CSOs. Thus it discusses ideally enabling legal conditions necessary for the formation of CSOs; the acquisition of legal personality; registration; and protection from unwarranted dissolution. It also assesses the prevailing rules and procedures governing the legal existence of CSOs in Ethiopia in light of the ideal enabling conditions, and their possible impact on CSOs role to democracy promotion.

#### 5.2. The Rationale for an Enabling Law for the Legal Existence of CSOs

A number of rationales can be mentioned why the law should create an enabling condition for CSOs formation and sustainability. Firstly, owing to their non-profit orientation and efficiency, CSOs can best provide public goods and quasi-private goods.<sup>1</sup> Public goods by their very nature are ‘non-rivalous’<sup>2</sup> and ‘non-excludable.’<sup>3</sup>

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<sup>1</sup>Henry Hansman, ‘The Role of Non Profit Enterprise’ (1980)Yale Law Journal 89,835-901, 863-866; Lester Salmon, ‘Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government- Nonprofit Relations in the Modern Welfare State’(1987) Nonprofit and Voluntary Sector Quarterly16(20)39-41; For a general discussion on CSOs provision of public goods and quasi private goods, See Jonathan Garton, *The Regulation of organized Civil Society* (Hart Publishing 2009)

<sup>2</sup> Non-rivalous goods and services are those the consumption of which by one individual does not reduce availability to others and have linear cost of production irrespective of quantity

<sup>3</sup> Non-excludable goods and services are those, once availed that no one can be effectively excluded from using them. For further detail on the explanation of public goods, See Henry Hansman, above n1

Due to these features of public goods individual consumers tend to ‘free ride’, taking benefits without bearing cost, which makes public goods unprofitable thus uninviting to the market which is profit driven.<sup>4</sup> Nor is the state more efficient in delivery of such public goods, notwithstanding its authority to control free riders through taxation system, as it is politically driven.<sup>5</sup> Even in an established democracy, a state will only produce those public goods or services that can command the majority support leaving minority groups unsatisfied and urging the latter to turn to CSOs that are insulated from political motivations.<sup>6</sup>

Furthermore CSOs can provide public goods more efficiently, economically and sustainably because of their proximity to the community, voluntarism character and smaller size.<sup>7</sup> The proximity of CSOs to the community conferring them an awareness of the actual needs to take informed actions, render them more efficient than government, which is often distant. The size of CSOs also offer them an advantage over government in specializing on provision of specific public goods and services with better quality;<sup>8</sup> breaking off lengthy bureaucratic process and transaction costs.<sup>9</sup> Government on the other hand has to seek endorsement of the electorate for its plan, notify officeholders of the decisions, enact a law, and go through other lengthy and pricey bureaucratic procedures. Volunteerism and competition among CSOs also play a role in the efficiency and economy of provision of public goods. The provision of public goods by CSOs is also more sustainable as they would be able to plan long term projects not affected by the national or regional elections.<sup>10</sup>

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<sup>4</sup> Burton Weisbrod, ‘Toward a Theory of the Voluntary Sector in a Three-Sector Economy’ (1986) in S Rose-Ackerman (ed), *The Economics of Nonprofit Institutions: studies in Structure and Policy* ( Oxford University Press 1986)26; for detail explanation on the four theories of Market failure, contract failure, government failure and voluntary failure, See Jonathan Garton, *The Regulation of organized Civil Society* (Hart Publishing 2009) 49-68.

<sup>5</sup> Lester Salmon, ‘Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government- Nonprofit Relations in the Modern Welfare State’(1987)*Nonprofit and Voluntary Sector Quarterly*16(20)49

<sup>6</sup>*Ibid*, 39

<sup>7</sup>*Ibid*, 39-41; see also Jonathan Garton, *The Regulation of organized Civil Society* (Hart Publishing 2009) 49

<sup>8</sup>Jonathan Garton, ‘The future of Civil Society organizations: towards a theory of regulation for organized civil society’ in Myles McGregor-Lowndes and Kerry O’Halloran (edn) *Modernizing Charity Law* 212-14

<sup>9</sup> Jonathan Garton, above n7 at 57

<sup>10</sup> Lester Salmon, above n 5 at 39-41; see also Jonathan Garton, above n 8 at 213

Moreover the state and the market simply cannot and do not anticipate and provide all of the public goods and services that are desired by the citizenry. The extreme heterogeneity of citizens' interests and desires in sport, music, art, politics etc. simply render the government incapable to recognize them all and to satisfy those needs in a responsive, adequate, and evenhanded manner. Those interests may not be satisfied at all if there are no economic incentives that attract the market. Enabling legal environment for CSOs can thus be justified as CSOs are best placed in delivery of public goods<sup>11</sup> and the development of the sector is beneficial to the public at large.

Moreover, the law also needs to create an enabling condition for CSOs owing to their contribution to the democratization of a nation. By recognizing, enforcing and protecting CSOs existence, the law may possibly bring a direct or an indirect bearing in the democratization role of CSOs mainly for the following reasons. Firstly, enabling legal conditions for the formation of CSOs could encourage the formation of associations and thus boost the number of CSOs that in turn build builds the social capital. The growth of the social capital in turn assists the democratization process through community capacity enhancement in public engagement and decisions making process. Secondly, with the flourishing of diverse (in size, membership, purpose, forms of incorporation) types of CSOs, the articulation and the representation of different interests increases thus contributing to the democratization process by rectifying the at drawbacks of democracy through the principle of majority rule, minority protection. Thirdly, an enabling law that protects CSOs from unwarranted involuntary dissolution and ensures their sustainability helps CSOs to grow strong, autonomous and vibrant, which are essential attributes for their contribution in the democratization process through advocacy, lobbying, and watchdog.

Thus if CSOs should contribute to the democratization process, the law should first, recognize the right to form various types of CSOs pursuing a lawful purpose, (advocacy, developmental, recreational etc.) It would be trite to add that if CSOs should contribute to the democratization process, the law needs to ensure that the process of formation and registration as well as the protection against dissolution should not discriminate against human rights and advocacy CSOs whose main

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<sup>11</sup>Henry Hansman, above n 1 at 848; Jonathan Garton, above n 7; Lester Salmon, above n 5

objective of formation is pursuing democracy promotion. Yet it is still important to underscore the non-discrimination rule against advocacy CSOs since as it is noted by the ICNL that ‘particular legal and non-legal barriers against the formation and the sustainability of advocacy CSOs has come to be the trend in a number of countries in Africa and elsewhere.’<sup>12</sup>

Second, the law should also enforce the right to form various types of CSOs by laying down clear, uncomplicated and undemanding process for their formation and acquisition of legal personality. The law also needs to grant CSOs the freedom to be incorporated either informally or formally. Where registration at the relevant government office is required for the attainment of legal personality, as in the case of Ethiopia, it is important that the registration process is easy, uncomplicated and not at the discretion of the government. Thirdly, the law should also protect the perpetual existence of formed CSOs from unwarranted involuntary dissolution by providing specific legal grounds for dissolution that are only necessary for a better cause. Fourthly, it also ought to provide them with the right to judicial appeal in the event of administrative grievance on any matter that can affect their existence. The following sections of the chapter will provide a closer look at such enabling legal conditions for CSOs formation, acquisition of legal personality and sustainable existence.

### **5.3. Enabling Legal Conditions for the Formation of CSOs**

Some of the enabling legal conditions for the formation of CSOs are thus the constitutional guarantee for freedom of association; the right to choose the form of incorporation including informal existence; undemanding, clear and non – discriminatory requirements of formation of CSOs and their coalition.

#### *Constitutional Guarantee for the freedom of association*

The first basic issue relating to the legal treatment of civil society organisations in the country involves not the specific laws governing CSOs but the broader legal context

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<sup>12</sup>International Center for Non-Profit-Law (ICNL) and World Movement for Democracy, *Defending Civil Society* (ICNL 2008); for detail discussion on the global trend of governments limiting CSOs formation, operational activity and financial resource, See generally the ‘The Legal and Regulatory Framework for Civil Society: Global trend in 2012-13’ Global Trend in NGO Law, ICNL < <http://www.icnl.org/research/trends/Global%20Trends%20in%20NGO%20Law%20Final%20October%202016.pdf> > accessed 10 February 2015.

within which the legal treatment of CSOs is rooted. The law may put the underlying enabling condition for CSOs by providing a constitutional guarantee to the freedom of association. With the constitutional guarantee for the freedom of association, due process of the law requires that any other subordinate laws, policies or government decisions will necessarily comply with the freedom to associate.

Freedom of association in principle is the right to form new association and/or to join existing associations with the purpose of pursuing a particular rights and interests.<sup>13</sup> Such freedom to associate ensures individuals to interact and organize among themselves; and to collectively express, promote, pursue and defend common interests. The essence of freedom of association indeed lies in the fact of accession which characteristically enable the association achieve goals which an individual would not be able to attain single-handedly, or at least not effectively; as associations offer solidarity, safety and identity. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.<sup>14</sup> This is particularly true for CSOs that promote democracy because at least in pluralist model of democracy interest groups play an essential role by filling gaps left by political parties and thus availing adequate representation for the full range of diverse interests that influence the public governance.<sup>15</sup>

Freedom of association guarantees ‘everyone’ (natural or legal) to form and join association.<sup>16</sup> Underscoring the universality of the freedom of association, the international and regional treaties including the ICCPR, and International Convention on the Elimination of All Forms of Racial Discrimination specifically stipulate provisos that ensure freedom of association to everyone without distinction of any kind as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status.<sup>17</sup> Such safeguards oblige governments to

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<sup>13</sup> ICCPR, Article 22; ECHR, Article 11

<sup>14</sup> Thomas Emerson, “Freedom of Association and Freedom of Expression” (1964) Faculty Scholarship Series. Paper 2797, 1 <[http://digitalcommons.law.yale.edu/fss\\_papers/2797](http://digitalcommons.law.yale.edu/fss_papers/2797). Accessed 14 April 2015

<sup>15</sup> Manfred Nowak, , ‘U.N. Covenant on Civil and Political Rights: ICCPR Commentary’(2005) Engle, 385

<sup>16</sup> ICCPR, Article 22(1); ECHR, Article 11.

<sup>17</sup> The right to freedom of association is a fundamental human right guaranteed by many of the major international and regional legal instruments without any discrimination. See, The Convention on the

recognize and to take all appropriate measures as to enable ‘everyone’ to enjoy their freedom of association. Thus, firstly, an enabling law as a matter of principle should guarantee the enjoyment of freedom of association to all individuals without distinction of any kind.<sup>18</sup>

Where the rights of individuals to form and to join associations are explicitly guaranteed in the supreme law of a nation, it obliges governments to recognize and to take all the appropriate measures as to enable the formation of CSOs. Such measure will reduce the ‘transaction cost’<sup>19</sup> of incorporating CSOs as it offers organisations and their members a constitutional shield against any form of interference except on certain compelling legally prescribed grounds, necessary in a democratic society to protect the rights and safety of the state and the public.

Thus, where the freedom of association for a lawful purpose is constitutionally guaranteed and enforced, it likely prompts persons who are interested to promote a particular private or public purpose, including the promotion of human rights and democracy, to come forward and form CSOs. Thus the legal recognition and protection for the freedom to associate could allow a much broader range of associations to flourish. On the other hand, where individuals’ right to form associations are not guaranteed or are highly restricted, it is highly likely that people will be discouraged to form CSOs. The central issue at the heart of an enabling law is therefore the constitutional recognition of the freedom of association, not as a privilege that the government can give or take away at it pleases, but as a fundamental right.

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Elimination of All forms of Discrimination against Women (1989), Article 7; Convention on the Rights of the Child (1990), Article 15; UN Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declarations on Human Rights Defenders), (1998) Article 5; The International Covenant on Economic, Social and Cultural Rights (UN, 1966), Article 15; ICCPR, Article 22(1); ECHR, Article 11  
<sup>18</sup> The major international legal instruments protects guarantees freedom of associations to different sections of the society. See, The Indigenous and Tribal Peoples Convention (ILO Convention No. 169) (1989), Article 6; The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN, 1990), Articles 26, 36 and 40; The Framework Convention for the Protection of National Minorities (UN, 1995), - Articles 3, 7, 8, 15, 17 and 18; The Convention on the Participation of Foreigners in Public Life at Local Level (CoE, 1992), Articles 3 and 4; The Convention on the Rights of Persons with Disabilities (UN, 2006), Article 29; The Convention relating to the Status of Refugees (UN, 1950), Article 15; The Convention relating to the Status of Stateless Persons (UN, 1960), Article 15

<sup>19</sup> For a detail discussion on the transaction cost, see Chapter 4 above.

### *The right to choose the form of incorporation*

The most important aspect of the right to freedom of association is the ability to create a legal entity in order to act collectively in a field of mutual interest, since ‘without the right to form, the freedom of association would have no practical meaning.’<sup>20</sup> Thus, at the most basic level a law must allow the formation and incorporation of diverse types of CSOs. Generally, the public benefit CSOs that are outward looking, and membership CSOs that are more representative could have a greater potential to influence the democratization process. Yet the flourishing of different types of CSOs irrespective of their membership size or benefit orientation could help for the democratization process by representing different interests and enhancing civic virtues and civic skills.

An enabling law therefore allows CSOs to be incorporated either as formal or informal; membership or non-membership; public benefit or private benefit organisation; network organisation etc. Depending on their purposes of formation and resource capability, they can also be constituted either at the grassroots, district, local, national, regional or international level.

### *Formation of CSO coalitions*

Besides the rights of individuals to form and to join CSOs, an enabling law also permits and facilitates the formation of a coalition or network of CSOs who wish to join hands to pursue or defend common objectives. The formation of coalitions or networks will help CSOs to share resources and experiences and join more hands for the accomplishment of a common goal. In addition to the collaboration and horizontal learning among themselves, the formation of coalitions of CSOs is also particularly important for the democratization process since the joining of hands of different organisations can help them to become stronger, gain more voice and create a strong pressure group. Thus the law can create enabling legal conditions for the formation of CSOs by allowing diverse forms of incorporation including the formation of coalition or network of CSOs.

### *Undemanding, Clear and Non –discriminatory formation requirements*

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<sup>20</sup> *Sidiropoulos and Others V. Greece 10 July 1998, para 40.*

In addition to allowing different forms of incorporation, the law may also facilitate the formation of CSOs by putting undemanding and non-discriminatory minimum requirements. The legal prerequisites for establishing a CSO should be limited to minimum conditions that are necessary for the legitimate exercising of the fundamental freedom of association. Thus for instance the law should not be onerous on the number of persons required to form CSOs as it would discourage the formation of CSOs. From the perspective of individuals' rights to form associations, it can be argued that at least theoretically the minimum number of persons to form associations is two. Neither should it be cumbersome on the value of material resources required to establish endowments and trusts as it would otherwise deter the formation of CSOs. Furthermore, an enabling law demands that states must refrain from restricting formation of association (freedoms of association) through vague, imprecise and overly broad regulatory language.<sup>21</sup>

An enabling law does not either discriminate on who can form CSOs and on the conditions of formation. The freedom of association entails that all persons should be entitled to form and to join CSOs without any discrimination whatsoever as to sex, political or other opinion, ethnic or social origin, language, religion etc.<sup>22</sup> However, a case that is often in contest is that of foreigners, particularly in pursuing purposes such as democratization. Although the engagement of foreigners in democratization can be seen as interventionist in terms of the elements of internal sovereignty, nonetheless coalitions formed among foreign and domestic CSOs could be particularly relevant for democratization for two reasons. First, in terms of funding advocacy groups within countries where local funding is deficient, foreign CSOs might strengthen the local

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<sup>21</sup> The International Centre for Not-for-Profit Law and World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (World Movement for Democracy and ICNL 2008) 4.

<sup>22</sup> International standards also indicate that the freedom of association is given for 'every person' notwithstanding any discrimination whatsoever. Underscoring the universality of the freedom of association, the international and regional treaties including the ICCPR and International Convention on the Elimination of All Forms of Racial Discrimination specifically stipulate provisos that ensure freedom of association to everyone without distinction of any kind as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status. See also, The Convention on the Elimination of All forms of Discrimination against Women (1989), Article 7; Convention on the Rights of the Child (1990), Article 15; UN Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declarations on Human Rights Defenders), (1998) Article 5; The International Covenant on Economic, Social and Cultural Rights (UN, 1966), Article 15; ICCPR, Article 22 (1); ECHR, Article 11.



resource pool. Secondly, because internal advocates of democratization are so vulnerable, mutually beneficial networks of local and foreign CSOs would allow actors and institutions across borders to cooperate directly and work collaboratively.<sup>23</sup> Moreover the rights of individuals to form associations with a person of their own choice should be extended to include foreigners as long as the purpose their association is lawful and remain within the legal bounds.

#### **5.4. Formation of CSOs under the Ethiopian Legal System**

Under the Ethiopian legal system, the major laws governing the formation of CSOs are found in the Federal Democratic Republic of Ethiopia (FDRE) Constitution and the Charities and Societies Proclamation (the CSP) that specifically governs charities and societies. Article 31 of the FDRE constitution provides the legal recognition for the freedom of association. The constitutional guarantee for the freedom of association primarily provides an enabling legal condition for the formation of CSOs. However, as we shall see below, highly demanding requirements of formation of CSOs at national level, and the limitations imposed on forming coalitions of CSOs stipulated under the CSP, however, makes the formation of CSOs and their coalition rather challenging.

##### *Constitutional Guarantee for freedom of association*

The Ethiopian legal framework has taken the fundamental step towards an enabling environment that creates a legal space for the existence of CSOs by providing a constitutional guarantee for the freedom of association that upholds the right to form and to join CSO for any lawful purpose.

Article 31 of the Federal Democratic Republic of Ethiopia (FDRE) Constitution reads:

*‘Every person has the right to freedom of association for any cause or purpose. Organisations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited’*

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<sup>23</sup> Timothy Sisk, ‘Global Networks for Democracy Promotion’ *UN Vision Project on Global Public Policy Networks* <[http://www.gppi.net/fileadmin/gppi/Sisk\\_Local\\_Governance.pdf](http://www.gppi.net/fileadmin/gppi/Sisk_Local_Governance.pdf)> accessed 12 April 2015.

The constitution provides enabling legal conditions for the formation and the flourishing of CSOs by (i) recognizing the universality of the freedom to associate allowing the formation of diverse types of CSOs pursuing any lawful purpose and (ii) barring uncivil and illegal organisations that could discredit the sector from the public sphere.

Firstly, by recognizing the ‘universality’ of the freedom to associate, the constitution guarantees the right to form and to join CSOs for every person. One may plausibly argue that the term ‘every person’<sup>24</sup> signifies that the FDRE constitution guarantees freedom of association without distinction of any kind as to sex, language, religion, ethnicity, nationality, property or other status. One may also argue that the term ‘person’ implies that both natural and juridical persons are envisaged as having the right to associate and thereby to form CSOs and networks or coalitions of CSOs. The constitution also lays the general enabling legal basis for CSOs by guaranteeing the freedom to associate for *any lawful cause or purpose*.<sup>25</sup> This ensures the rights of persons to form CSOs as long as their cause or purpose is within the legal bounds of the country. Such universal recognition of freedom of association for any cause is not only in parallel with the principle of democracy that enshrines individuals’ freedom, but also promotes the democratization process as it also boosts the formation of CSOs promoting different interests that enriches social and political capital.

Secondly, the constitution creates an enabling condition by reducing the demand side transaction cost by putting a ban against the operation of CSOs formed in violation of ‘appropriate laws’. Illegal CSO may wreck the perception and relation of CSOs with the community and the government. Moreover CSOs with such traits are unfit for democratization as they produce ‘negative social capital’ and have a tendency of destabilizing the democratization effort.<sup>26</sup> Thus, by ruling out ‘illegal’ or ‘uncivil’ CSOs formed for illegal purposes that have the potential of discrediting the sector as a whole, the constitution helps to reduce the demand side transaction cost which the beneficiaries, donors and other stakeholders would have otherwise incurred in the

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<sup>24</sup> Federal Democratic Republic of Ethiopia (FDRE) Constitution, Article 31.

<sup>25</sup> Ibid.

<sup>26</sup> Monga Célestin, ‘Uncivil Societies: A Theory of Socio-political Change’ (2009) Policy Research Working Paper 4942 2, The World Bank, Development Economics Policy Review Unit.

process of assessing and regulating CSOs. It thus helps the public to count on CSOs' trustworthiness which is the key facet for their functions. This in turn enhances an enabling space for the operation of CSOs, and builds their relationship with other actors in the public sphere.

Although the constitution is said to be enabling for guaranteeing the freedom to associate, it nonetheless lacks clarity on its limitation clause. As the freedom of association is not an absolute right, the constitution provides two grounds for limitation of the freedom. Thus the violations of '*appropriate laws*' or '*subversion of the constitutional order*' can be grounds to justifiably restrict the formation of CSOs or to dissolve existing ones.

However the first constitutional limitation on the freedom of association is not very clear as the wording 'appropriate law' is not markedly defined. Neither has the Council of the Constitutional Inquiry, which is mandated to interpret the constitution interpreted the provision under consideration, to date.<sup>27</sup> Issues such as what are the facets of the laws that gives it a characteristic of 'appropriateness' to justify restriction on the freedom to associate or under what grounds the 'appropriate' law can limit the right to form or to join CSOs are far from clear from a mere reading of Article 31 of the constitution.

Although this provision in general signifies that the state may interfere in the legal existence of CSOs, the term –'appropriate law'- is open to subjective interpretation. As the constitution does not provide the grounds and factors that the law maker shall consider in the enactment of the respective 'appropriate law', it could give a loophole for legislative manipulation leaving the limitations on the freedom of association at the mercy of the legislator and/or even the executive.<sup>28</sup>

Nonetheless it can be argued that the concept of 'appropriate law' can be clarified through interpretations that are in line with international human rights instruments that

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<sup>27</sup> FDRE Constitution, Article 83 and 84 (The mandate of the Council is limited to giving recommendations to the House of Federation, the upper house of the bicameral Federal Parliamentary Assembly, which has the ultimate power to determine the case).

<sup>28</sup> Because appropriate law is not clearly defined, it may refer to a proclamation promulgated by the parliament or a regulation and directive enacted by the executive branches of the government.

Ethiopia has ratified such as the ICCPR.<sup>29</sup> According to Article 9 and Article 13 of the FDRE Constitution, international human rights instruments ratified by Ethiopia form an integral part of the law of the land; and the fundamental rights and freedoms specified in the constitution, including freedom of association shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR), International Covenants on Civil and Political Rights (ICCPR) and other international instruments adopted by Ethiopia.<sup>30</sup> Therefore, these instruments may serve to indicate the qualifying factors that ‘an appropriate law’ should consider in imposing limitations on the freedom of association

Therefore, it can be implied that a law can be considered as an appropriate law when it sets a limitation on the formation and operation of CSOs only when doing so is necessary for the protection of the public safety and security as necessary in a democratic society.<sup>31</sup> This interpretation is also in line with the spirit of the constitution that establishes a Democratic State.<sup>32</sup> Hence ‘an appropriate law’ that limits the constitutionally guaranteed freedom of association should be applicable only to the extent that it is necessary to promote democratic practices and culture and to enable the well-functioning of democratic institutions.

The second limitation clause provided by the FDRE Constitution on freedom of association provides that organisations formed to defend ‘*illegal subversion of the constitutional order*’ or those found engaged in such activities are denied the freedom to associate. This limitation clause is quite similar to the limitation provided under the UDHR, ICCPR and other International human rights frameworks ‘to protect the national security, public safety public order and the protection of rights of others.’<sup>33</sup> This is also in line with the traditional function of state. A State has an ultimate power to deal with the problems of survival and security and defend the constitutional order in order to maintain the established constitutional order from any sort of subversive act which threatens or endangers it.

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<sup>29</sup> Ethiopia ratified the International Covenant for Civil and Political Rights (ICCPR) in 1993 and is also a party to the African Charter of Human and People’s Right (ACHPR) signed in 1981.

<sup>30</sup> FDRE Constitution, Article 9 (4) and 13 (2).

<sup>31</sup> ICCPR, Article 22 (2)

<sup>32</sup> FDRE Constitution, Article 1.

<sup>33</sup> ICCPR, Article 22(2); ECHR, Article 11(2)

State of emergency is also a conventional standard in limitation of rights. Thus the fundamental rights of CSOs may also be suspended in case of a state of emergency.<sup>34</sup> Furthermore, Article 9 (2) of the constitution states the supremacy of the constitution as the prevailing law of the land, and specifies that political or any other association and their officials have the duty to ensure observance of the Constitution and to obey. Hence when CSOs are formed in contravention of the constitutional order, for instance to engage in a terrorist act, the state may rightfully restrain or dissolve CSOs.

However, an enabling legal environment demands that exceptions to the fundamental freedoms should be construed narrowly and judiciously not to infringe upon the fundamental rights of individuals to form CSOs and to express themselves. Thus while an intent or attempt to subvert the constitutional order will justify the state to curtail freedom of association, for a greater good of protecting the public, the enforcement of this exceptional proviso will however be justified only when there is a legitimate showing of an imminent and serious threat that warrants the need to protect constitutional order.

In sum, the FDRE constitution has laid the general enabling legal framework for the formation of CSOs by recognizing the freedom of association, although in a qualified manner. However since the country endorses international human rights treaties such as the ICCPR as constituting part of the law of the country and as a guiding principle to interpret the fundamental rights, if the qualifying conditions that could possibly serve as grounds to limit the freedom of association are applied consistently with such principles the right to form and to join CSOs would be facilitated. Thus along the lines of the protections that the ICCPR offers for the freedom of association, restriction against the formation of CSOs will be justified only when it is necessary to protect the constitutional order as is justifiable in a democratic society.

While the Ethiopian legal framework provides a constitutional guarantee to form and to join CSOs, below we shall examine how the Charities and Societies Proclamation

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<sup>34</sup> FDRE Constitution, Article 93.

(CSP) translates the right to form and to join CSOs in light of the constitutional right of freedom of association and the enabling legal framework criteria discussed above.

#### *Formation and Forms of Incorporation*

The CSP envisages the incorporation of CSOs either as charity, society or charitable society. Apart from religious organisations, traditional grassroots self-help organisations such as *Edirs*; Credit association such as *Ekub*; and societies such as trade unions, which are governed by distinct laws, all CSOs that are governed by the CSP shall be constituted either as charity or society.<sup>35</sup> Those that are inward looking i.e. benefiting only members are established as Societies and those that are outward looking i.e. benefiting the public at large are established as Charities. Thus all forms of CSOs such as NGOs, professional associations, research institutions, think-tanks, social (non-diaconal) wings of religious institutions, alumni, clubs and leagues of different interests etc., should be formed either in the form of charities or societies.

According to the CSP, a Charity is an institution, which is established exclusively for charitable purposes and gives benefit to the public.<sup>36</sup> Article 14(2) of the CSP lists out charitable purposes and include: (i) the prevention or alleviation or relief of poverty or disaster; (ii) the advancement of the economy an social development and environmental protection or improvement;(iii) The advancement of animal welfare;(iv)The advancement of education;(v) the advancement of health or the saving of lives;(vi) the advancement of amateur sport and the welfare of the youth;(vii) the relief of those in need by reason of age, disability, financial hardship or other disadvantages; (viii) the advancement of capacity building on the basis of the country's long term development directions; (ix) the advancement of human and democratic rights; (x) the promotion of equality of nations, nationalities and peoples and that of gender and religion; (xi) the promotion of the rights of the disabled and children's right; (xii) the promotion of conflict resolution or reconciliation; (xiii) the promotion of the efficiency of the justice and law enforcement services, and (xiv) any other purposes as may be prescribed by the directives of the Agency.

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<sup>35</sup> Charities and Societies Proclamation (CSP) Ethiopia, Article 3 (2) (a).

<sup>36</sup> CSP, Article 14 (2).

A charity may thus be incorporated in different forms as charitable endowment, charitable trust, charitable institution or charitable society to be engaged in any one of the abovementioned charitable purposes.<sup>37</sup> The CSP recognizes that charities can be constituted either as *universitas personarum*, as membership organisations or association of persons; or as *universitas rerum* by which a specific property will be donated and administered by trustees or boards to promote a specific charitable purpose. Charities can be formed by virtue of which specific property is constituted solely for a charitable purpose by donation, or will or other instrument constituting the charitable property either perpetually and irrevocably as forming Charitable Endowment or only for a specific period forming a Charitable Trust.<sup>38</sup>

Society, on the other hand, is defined as association of persons organized on non-profit making and voluntary basis for the promotion of the rights and interests of its members and other similar lawful purposes.<sup>39</sup> Structurally the CSP envisages societies to be membership organisations mandatorily constituting the General Assembly, officers and an auditor.<sup>40</sup> As these are membership organisations promoting the legally prescribed charitable purposes and any other similar lawful purposes, the law focuses on the internal structure and the management of such types of CSOs in order to ensure the legality and transparency of such organisations.

However CSOs may also be formed having a structure of a society but also having an outward looking charitable purpose of serving the public at large. Such types of CSOs are referred to as charitable societies.<sup>41</sup> This form of incorporation allows the formation of closed membership based organisations but having an outward looking objective of benefiting the public at large. Although there are no specific provisions in the law that governs charitable societies, Article 47 (1) and (2) state that all appropriate provisions of the CSP concerning the structure and working of societies as well as those applicable to charities shall apply to charitable societies.

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<sup>37</sup> CSP, Article 15 (1).

<sup>38</sup> CSP, Article 16 and 30.

<sup>39</sup> CSP, Article 55 (1).

<sup>40</sup> CSP, Article 58.

<sup>41</sup> CSP, Article 46 (1).

Thus in general the CSP recognizes the rights of persons to form or to join CSOs incorporated as charity, society or charitable society. While the incorporation of CSOs can assume these three different forms, the CSP further divides Charities and Societies on the basis of their source of income, as “Ethiopian Charities or Societies”, “Ethiopian Resident Charities or Societies” and “Foreign Charities.” According to Article 2 of the CSP

*“Ethiopian Charities” or “Ethiopian Societies” shall mean those Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they use not more than ten percent of their funds which is received from foreign sources.”*<sup>42</sup>

*“Ethiopian Residents Charities” or “Ethiopian Residents Societies” shall mean those Charities or Societies that are formed under the laws of Ethiopia and which consist of members who reside in Ethiopia and who receive more than 10% of their funds from foreign sources”*<sup>43</sup>

*“Foreign Charities” shall mean those 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”*<sup>44</sup>.

While the recognition of the different ways of incorporation is appreciable, the major flow of the CSP is the unprecedented classification of the Ethiopian Charities and Societies on the ground of their source of income. This classification has two major implications.<sup>45</sup> First, whereas the legislation allows Ethiopian Charities or Societies to engage in any of the charitable purposes enumerated above, it nonetheless bans Ethiopian Resident Charities and Societies as well as Foreign Charities from undertaking the following charitable purposes: the advancement of human and

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<sup>42</sup> CSP, Article 2(2)

<sup>43</sup> CSP, 2(3)

<sup>44</sup> CSP, Article 2(4)

<sup>45</sup> For further discussion on the implications see chapter 6 below



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 right; the promotion of conflict resolution or reconciliation and the promotion of the efficiency of the justice and law enforcement services.<sup>46</sup>

Secondly, the CSP recognizes the right to judicial appeal only for the Ethiopian Charities and Societies.<sup>47</sup> Accordingly, 'Ethiopian Charities and societies' which are not satisfied with the decision of the Agency may lodge an administrative appeal to the Director General of the Charities and Societies Agency, and a judicial appeal to the Federal high court.<sup>48</sup> Whereas Ethiopian Resident Charities and Societies and Foreign Charities, can only appeal to the Board of Charities and Societies, whose decision is final.<sup>49</sup>

#### *Coalition of CSOs*

Despite individuals' experience of working collectively that can be evidenced from traditional institutions such as Edir and Ekub, networking of organisations is a recently new phenomenon in Ethiopia. The inexperience and also lack of legal regime governing networks affected its development. The CSP, by expressly permitting the formation of networks or consortium of two or more charities and societies, addresses the long-time uncertainty of the legal status of networks.<sup>50</sup> The Charities and Societies Consortium Directive that regulates the registration and operation of networks also provides that consortia can be established to support members to attain common objectives, facilitate exchange of information, ideas and experience among members and build their capacity as well as enhance the integrity and professional competence of members.<sup>51</sup> Hence it facilitates the conditions for charities and societies to advance through information exchange, experience sharing and cooperated and coordinated engagement in addition to their individual efforts.

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<sup>46</sup> CSP, Article 14(5)

<sup>47</sup> CSP, Article 39

<sup>48</sup> CSP, Article 104(3)

<sup>49</sup> CSP, Article 104(2).

<sup>50</sup> CSP, Article 15 (3).

<sup>51</sup> Charities and Societies Consortium Directive, Article 5 (1) and (2).

Nevertheless the legislation has put a number of restrictions on the formation of consortiums. First, charities cannot form consortiums with societies; and secondly ‘Ethiopian charities and societies’ who are not allowed to receive more than 10% of their annual income from foreign sources cannot form a consortium with an ‘Ethiopian resident charities and societies’ who are allowed to receive foreign funds and/or foreign charities.<sup>52</sup> The government did not provide any official reason for the restriction, however a closer analysis of the CSP and the purpose for which the law was enacted provide us a plausible explanation of the restriction. The CSP classified Ethiopian CSOs as ‘Ethiopian charities and societies’, ‘Resident charities and societies’ and foreign charities on the basis of their source of income and the purpose for which they are formed. So, the only plausible justification inferred from the purpose of the law is that the restriction on the formation of coalition between and among these groups of charities and societies is that Ethiopian charities and societies that are allowed to engage in advocacy should not join and make a coalition with Resident charities and societies and Foreign Charities who are prohibited from engaging in advocacy works in the country. The justification against this restriction on coalition is therefore based on the government’s argument that the promotion of human rights and democracy and other similar activities that the government deems ‘political’ in nature should be done exclusively by Ethiopian CSOs and the creation of coalition between different groups of CSOs will defeat the very basis for which they are classified as such. There seems to be no convincing justification for such restriction that threatens inter-organisational collaboration among the different types of CSOs. Such restriction would therefore seriously curtail the advocacy roles of charities and societies as such fragmentation would render them unable to share information and experience, to advocate in a coordinated manner and to serve as a pressure group by joining hands.

As Hansensfeld and Gidron noted, the greater the connectedness of advocacy CSOs to other organisations that control important resources (e.g., members, funds, legitimacy, and technical expertise) the greater their chances for survival.<sup>53</sup> Yet in contrast to this, the restriction imposed on consortiums has affected advocacy CSOs significantly.

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<sup>52</sup> Charities and Societies Consortium Directive, Article 9 (1) (2) and (3).

<sup>53</sup> Yeheskel Hasensfeld and Benjamin Gidron, ‘Understanding Multi-purpose Hybrid Voluntary Organisations: The Contributions of Theories on Civil Society, Social Movements and Non-profit Organisations’ (2005) *Journal of Civil Society* 1 (2) 97–112, 106.

Following the enactment of CSP a number of networks which had all sorts of member organisations had to make a hard choice of determining their status and did so mainly according to the size of their membership.<sup>54</sup> Hence, since many charities and societies decide to be re-registered as Ethiopian residents, those few advocacy CSOs had no choice but to withdraw membership from the consortium. In another single instance however the Network of Ethiopian Women Association (NEWA) a network that was working on women rights and economic development decided to remain an Ethiopian society despite loss of more than 75% of its member organisations due to the fact that they are either charities or Ethiopian resident societies.<sup>55</sup> Yet, the remaining 26 members re-registered as Ethiopian resident established another network, Union of Ethiopian Women Charitable Associations (UEWCA). Other small size networks and coalitions of advocacy CSOs, such as Networks of Legal Aid providers and Coalition of human right organisation for the parallel UN Universal Periodic Review report writing, however ceased to be functional when some of their members became Ethiopian resident changing their original objective.

Another restriction provided by the CSP is that consortiums are allowed only to coordinate the activities of their members but not allowed to implement projects by themselves. This, first of all is a violation of the rights of a legally established body to choose its own objectives; and secondly it will prevent CSOs from being organized for the purpose of pushing their objectives as a powerful force. Such restrictions on consortium membership and project implementation could therefore drastically affect those advocacy CSOs for which networking would have had a paramount importance conferring them with collective civic assertiveness to become as Fowler said ‘agents of change and the foundation, guardians and instruments of accountable governance.’<sup>56</sup> The absence of effective networks of advocacy CSOs which coordinate their engagements, speak for members and represent their interests would also render it

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<sup>54</sup> 334 out of 348 member organisations of the largest consortium in Ethiopia, Consortium of Christian Relief and Development Association (CCRDA) are re-registered as Ethiopian resident thus few withdrew membership from the network (Annual reports of the CCRDA, 2010). Similarly, other consortiums such as Poverty Action Network Ethiopia (PANE), Basic Education Network (BEN) etc. became consortium of Ethiopian Resident charities and societies (Charities and Societies Agency’s report, 2010).

<sup>55</sup> Kumelachew Dagne and Debebe Hailegebriel, *Assessment of the Impact of the Charities and Societies Regulatory Framework on Civil Society Organisation in Ethiopia* (Task Force on Enabling Environment for civil societies in Ethiopia 2012) 28.

<sup>56</sup> Alan Fowler, ‘An enabling environment for civil societies: What does it mean and how does law fit in?’ (2003) Centre for Civil Society, Research Report 7, 1.

difficult to make collective demands and to establish coherent voice at national level thereby significantly weakening their contribution to democratization.

### *Requirements of Formation*

Although the requirements of formation set by the CSP are generally on a par with the enabling conditions that we saw earlier, requirement on membership for CSOs working at national level are cumbersome.

### *Cumbersome Membership requirement*

There are two membership requirements that are particularly challenging for the formation of CSOs. One of the conditions of formation that is particularly cumbersome is the formation of National CSOs that work in more than one regional state. Ethiopia is a federal state, where the regulation of CSOs is within the jurisdiction of the regional states. Charities and Societies may thus be established having a federal status for the two cities administered by the federal government, namely Addis Ababa and Dire Dawa. Charities or Societies that operate in more than one regional state or Societies whose members are from more than one regional state are also deemed as having a federal status.<sup>57</sup> CSOs having Regional status can be formed and be operational in any of the Regional States. However, the formation of CSOs working at the federal or national level is demanding as it requires either the representation of members from at least five regional states or operational branch offices in five of the nine regional states and two federal cities<sup>58</sup> covering almost 50 percent of the country.

The representation requirement is quite demanding as it increases the transaction cost of establishing a CSO that works at national level. Firstly, it violates the rights of individuals to associate with people of their own choice with whom they want to promote a lawful purpose. Secondly, it makes formation cumbersome since it is difficult to organize individuals from five regions. Third even if formed, efficient promotion of purposes will be difficult as it will be challenging to have regular meetings and decision makings, where technology is not advanced; and increases the operational cost of the organisation.

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<sup>57</sup> CSP, Article 3.

<sup>58</sup> CSP, Article 57 (6) and 69 (5).

Such requirement implies that citizens cannot work on issues where they are not permanently physically present. Nonetheless, there is no persuasive reason to oblige physical presence of CSOs. For instance the advocacy work of a CSO that aims at researching and influencing the changes of federal laws and policies but has its office only in the capital might still be successful given that it offers opportunities for the participation of beneficiaries and other key stakeholders from the regions in the development of its advocacy work. As a matter of fact, the federal law makers that such CSO desire to make frequent contact with and to lobby could have their principal working place in the Capital and there may be no good reason for it to permanently establish five branch offices that certainly would escalate its administration and operational costs. There is also no good reason to demand membership representation from five regions or the opening of branches in five regions, when for instance a charity wishes to serve only in three of the less served regions of the country.

It is worth noting that Ethiopia is constituted based on ethnic federalism. Thus the demanding rule of members' representation will also have ethnic dimension thus denying a group of people in Region 1 regardless of their number to support and advocate for the rights of people in Region 2 and vice versa. It is not also clear whether residence or place of birth is required to prove representative membership. For instance if place of birth is required to show representation then a CSOs formed by a group of people who are originally from five different regions but currently living in the Capital is said to fulfill the legal criteria. If however, current place of residence is required as a proof of representation, then it would mean that only people that reside in five different Regional States can form and operate at federal level. This would make the formation and operation of CSOs very demanding and costly. The opening of operation offices in five regions is particularly demanding having regard to the legal maximum ceiling of 30% administration cost imposed by the CSP.<sup>59</sup>

The mandatory requirement of opening five branch offices, while it is possible for CSOs to have an office in one region and coordinate their lobbying and advocacy activities in different regions, is demanding and even unwarranted. Thus in effect the

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<sup>59</sup> CSP, Article 88. For further discussion on Administration Cost see Chapter 7.

CSP limits CSOs right to independently determine their place of formation and operation.

### **5.5. Enabling Conditions for the acquisition of Legal Personality of CSOs**

A law also plays a role in either enabling or hindering the existence of CSOs by governing the acquisition of legal personality of CSOs. Legal personality refers to the legal capability of having rights and obligations. It may be very useful for individuals to know that once they organize themselves and draw specific internal rules, they may qualify as CSOs in the eyes of the law, with all the legal consequences it entails. The rights and obligations that legal personality confers to CSOs may vary in different legal systems. In general however, obtaining juridical personality offers CSOs the ability to enter into a legally binding transactions or contracts. It thus gives them the capability to open bank accounts, to hire staff, to own property, and to mobilize resource. The acquisition of legal personality therefore facilitates the smooth operation of CSOs as it offers them the capability to undertake legal transactions necessary in pursuing their objectives. It also enables them to interact and to network with other organisations. The denial of legal personality could thus in essence amount to a violation of CSOs existence and operations.<sup>60</sup>

With rights, certainly come corresponding obligations. Thus, legal personality also enforces the corresponding obligations of CSOs that ensure their legitimacy, transparency and accountability.<sup>61</sup> The transactions of CSOs should not detrimentally affect the rights and interests of third parties and their own members. The law therefore may impose specific obligations on CSOs for the protection of third parties with whom CSOs interact such as the beneficiaries, the donors and other creditors of CSOs. Without legal personality that protects third parties, private and public organisations may be reluctant to work with CSOs for lack of clear lines of accountability. Lack of legal personality may thus possibly have a negative impact on the resource

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<sup>60</sup> The idea that the denial of legal personality could amount to a violation of freedom of association has also been recognized by the European Court of Human Rights (ECtHR) in *Sidiropoulos and Others V. Greece* where the refusal to register which results the denial of legal personality was held as an interference with freedom of association. See *Sidiropoulos*, above n 20 at 31.

<sup>61</sup> Richard Fries, 'The legal Environment of Civil Societies' in Helmut Anheier and others (eds) *Global Civil Society* 2003 (LSE 2003) 224.

mobilization, constituency building and networking of CSOs. Therefore, it is necessary that the law guarantees CSOs the right to attain legal or juridical personality.

In general, the legal obligations of CSOs offer protection for third parties by making CSOs and their founders or managers legally liable for the debts or wrongdoings of the organisation. The liabilities however vary in different legal systems. In some instances, even though legal personality is bestowed to CSOs in order to enable them undertake legal transactions, the founders or persons designated to manage will assume joint and several liability for the obligations and debts arising out of the activities of the organisation. In other jurisdictions, legal personality further offers CSOs with what is commonly referred as a separate legal personality that confers juridical personality to the organisation distinct from the founders. In such jurisdictions where CSOs have distinct legal personality from the founders, the legal personality of the organisation offers a corporeal veil to the founders and members and limits their liabilities for the debts and obligations of the organisation.

The distinct legal personality of CSOs that offers limited liability for the founders may encourage individuals to form and to join CSOs, thereby helping the growth of the sector. However, it is important that the law also ensures that the distinct entity principle is not abused by founders, members or officers of CSOs and flagrantly opposes justice or the rights, interests and securities of third parties (individuals or the public at large). The law therefore needs to ensure that the distinct personality of CSOs be regulated in a stricter manner. It is thus reasonable that CSOs that seek distinct legal personality be registered with authorities assigned for this purpose and the registry is made accessible to the public. While access to the public registry of such CSOs would enable third parties to make an informed decision, it also helps authorities to ensure that the purpose of the organisation is lawful. Hence, although registration should not be considered as a precondition for the legal existence of CSOs, the enjoyment of distinct legal personality that limits the liability of founders may serve as a motivation for CSOs to be formally incorporated.

Another common motivation for CSOs to seek distinct legal personality and to incorporate formally is to become eligible for tax concessions. Since tax benefits should be systematically regulated, if given for CSOs, organisations seeking tax

concessions need to be formally registered. Nonetheless tax concession varies depending on tax and welfare policies as well as the financial capability of States. Thus the choices needs to be given to individual CSOs to thoroughly examine the distinct advantages and disadvantages of being formally incorporated and to make the decision of either being registered or remaining informal and minimize the transaction cost of formation.

On the other hand however, the mandatory requirement of registration would increase the transaction cost of forming associations and dissuade many from forming and participating in CSOs, particularly if registration requirements are cumbersome and open to wide discretion of the government. Where registration requirement is not clearly set out and authorities have absolute power with no room for further judicial challenge, CSOs existence will be put at the mercy of the discretion of the government. This in turn would negatively affect the growth of the social capital and CSOs activism which is essential for democratization. This will also compromise the potential of CSOs to play their role of regulation and watchdog.

Moreover the freedom of association being one of the fundamental rights that can be limited only for compelling reasons that amount to threats to public safety and democratic society, CSOs informality alone cannot satisfy such prerequisites for the denial of such fundamental freedom. Hence CSOs which are civil in character and legal in action should be given the freedom to associate informally. The freedom to informal association does not, however, preclude the possibility that certain institutional forms may be required if particular benefits such as tax concessions are to be enjoyed. On the other hand, should the association wish to incorporate formally and possibly get distinct benefits from its registration, it has to fulfil certain legally prescribed rules and procedures of registration and incorporated with a body assigned for such purpose.

A law is thus enabling when it allows individuals to make a choice of forming either informal CSOs, i.e. without a formal filing with any government agency for official registration, or formal CSOs established through formal incorporation. For instance some small organisations with few properties and transactions might prefer to stay informal for fear of burdensome reporting or other requirements which are associated



with the registration process. Reasonably, registration may be sought by CSOs only when it brings specific advantages to them. Nonetheless, the law should not impose the registration process on CSOs as a necessary precondition to exercise the freedom of association.

Thus, a law is enabling for the existence of CSOs when it provides the freedom of CSOs to exist as an informal legal entity. Mere ‘notification for authorities’ or ‘declaration of the formation of a distinct legal entity in the statutes of the organisation’ is thus the simplest options that a law may offer for the acquisition of legal personality.<sup>62</sup> Hence if the association wishes to incorporate informally, its mere formation after the fulfilment of the minimum requirements of formation should suffice for the acquisition of a legal personality to enter into legally binding transactions. Some legal systems such as Switzerland for instance have adopted the use of a mere private action or ‘declaration’ of status as CSOs in the statutes of the organisation or ‘notification’ of formation for concerned authorities.<sup>63</sup>

## **5.6. Legal Personality of CSOs under the Ethiopian Legal System**

### *Compulsory registration*

After fulfilling the minimum requirements set forth in the law for their formation,<sup>64</sup> charities and societies are deemed to be formed. However, Article 65 (1) of the CSP states that merely formed charities and societies shall not have legal personality.<sup>65</sup> Charities and societies that are deemed to be formed fulfilling the minimum legal requirements may undertake only limited legally enforceable transactions such as raising fund and owning property the value of which may not exceed 50,000 Ethiopian Birr. The legal recognition is given for formed CSOs for a maximum period of 3

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<sup>62</sup>Leon Irish and others, *Guidelines for Laws affecting Civic Organisations* (2<sup>nd</sup>eds, Open Society Institute 2004) 27.

<sup>63</sup>The Swiss Civil Code, Article 60. The article runs as ‘Associations which have a political, religious, scientific, artistic, charitable, social or any other than an industrial object, acquire the status of a person as soon as they show by their constitution their intention to have a corporate existence’.

<sup>64</sup> The minimum requirements include among others preparation of bylaws or rules of the organisation when applicable; the selection of the board of management, auditor, trustee or any other departments that form the structure of charities and societies as required by the law; the act of constituting of a charitable trust or charitable endowment and determination of beneficiaries for the formation of charitable endowment or charitable trust etc.

<sup>65</sup> It is important to note that some traditional cultural or religious associations such as ‘Edir’ and ‘Ekub’ which are not within the legal scope of the CSP as per Article 3 (2) (c) may exist informally as long as they remain as self-help organisation. However even Edirs are expected to be registered if they are involved in other socio economic and development activities.

months.<sup>66</sup> During this initial period, the founders of charities and societies assume an individual legal liability for the organisation.<sup>67</sup>

Despite existing international enabling practices that the decision to get registered should be the prerogative of an individual organisation, the CSP nonetheless obliges all charities and societies to subject themselves to compulsory registration within 90 days of their formation. Once formed, all charities and societies are required to be registered within three months from formation time, with the Charities and Societies Agency established for the registration and regulation of Charities and Societies, under a sanction of cessation of the formed organisation.<sup>68</sup> While it is essential that the law should provide the means to get registered for CSOs that so desire, it should, however, never condition the exercise of the right to freedom of association on the registration or acquisition of formal status whatsoever. However, the CSP denies Charities and Societies the right to be constituted and to remain an informal organisation.

The registration process, although mandatory, confers upon the charities and societies a distinct legal personality. Upon registering and thus acquiring legal personality, the rights and duties of the Charity or Society formed shall accrue to the registered Charity or Society.<sup>69</sup> The only exception to this general rule of distinct legal personality of the charity is applicable on Charity Committees,<sup>70</sup> perhaps owing to their temporary nature. Unlike charities and societies the rights and duties of the charity committee are not transferred to the registered Charity committee despite being registered by the agency. Rather, According to Article 51 of the CSP, the members or officers of a Charity Committee shall be jointly and severally liable for obligations and debts arising out of its activities.<sup>71</sup>

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<sup>66</sup> CSP, Article 65 (3).

<sup>67</sup> CSP, Article 65 (1) and (2).

<sup>68</sup> CSP, Article 64 (2) and Article 65 (4).

<sup>69</sup> CSP, Article 65 (2).

<sup>70</sup>Charitable Committees are defined as a collection of five or more natural persons who have come together with the intent of soliciting money or other property from the public for purposes that are charitable but transient in nature, although they may be converted to a lasting charitable endowments where the money collected is significantly larger than the attainment of the proposed specific purpose, See CSP, Article 46 (2) and Article 54

<sup>71</sup> CSP, Article 51 (2), the article provides that any donor, member, beneficiary, the Agency, or the Sector Administrator can have a legal standing against Charity Committees.

While conferring a distinct legal personality for many of the charities could be an advantage, nonetheless the hitch of the CSP is that it has made registration compulsory for the very legal existence of all charities and societies. The mandatory registration requisite however indicates that registration can be used as a process to check and control CSOs instead of offering them a benefit of attaining legal personality. This can also be drawn from the draft versions of the CSP that suggested harsh penalties for informal existence of Charities and Societies beyond the permitted period of 3 months. The draft versions of the CSP outlawing informal existence of Charities and societies stipulated a penalty that reached up to 15 years of imprisonment for ‘participating in the management of or disseminating information in the interest of an unregistered charities and societies’ or ‘allowing a meeting of unregistered CSOs on one’s property.’<sup>72</sup> Although such harsh penalty was omitted in the final law, yet the CSP replaced it with a single broad provision stating that ‘any person who violates the provisions of this proclamation shall be punishable in accordance with the provisions of the criminal code’.<sup>73</sup> The problem with this provision is not only penalizing failure to register but its lack of clarity on the demarcation between informally organized CSOs and other types of informal associations such as Edirs which are not within the scope of the CSP. This is particularly challenging in recent time since Edirs that were traditionally engaged as burial and other self-focused services have widened their scope to engage in other charitable purposes.

However a charity or society may be relieved of the penalty of cessation of the formed organisation and still apply for registration notwithstanding that the time limit has passed if it proves to the Agency the existence of good cause for failing to meet the deadline.<sup>74</sup> Yet another drawback is that there is no interpretative guidance or case law on good cause in Ethiopia due to Ethiopia’s civil law system and the law fails to enumerate or even indicate circumstances that can possibly be deemed as good cause, thus leaving a wide open discretion for the Agency which could be manipulated and used discriminately.

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<sup>72</sup> The first draft of the CSP circulated by the Ministry of Justice, Article 14.

<sup>73</sup> CSP, Article 102.

<sup>74</sup> CSP, Article 64 (3).

## 5.7. Enabling Legal Conditions for the Registration of CSOs

Enabling legal conditions related to the registration of CSOs are related to the right to seek legal personality and to register; clear, undemanding and non-discriminatory requirements of registration with the right of appeal; speedy process of registration and independent registering authority with limited discretion to decide on the right to register.

### *The Right to get registered*

Where registration is a process whereby CSOs attain their legal existence<sup>75</sup> or other benefits such as tax concession, the law needs to ensure that the rules governing registration facilitate the process of registration. Freedom of association dictates the right to form CSOs and the right to seek and to obtain legal personality. Thus once the conditions of registration are fulfilled registration should be automatic since the process of registration should serve as a process to facilitate but not impede the freedom of association. Hence the denial of registration, delay in registration or cumbersome procedures for registration is deemed as violation of the freedom.<sup>76</sup>

The right to be formed and to have legal personality entails the protection from unwarranted discretion of authorities to determine the formation and acquisition of personality. Thus for example the required documents for registration should be clearly defined and be limited to the principal governing documents such as the constitution or statute, bylaws or articles of association. These documents in addition to providing relevant information for third parties<sup>77</sup> also avails the opportunity for authorities to check the legality of the intended purposes of the organisation. Any other additional requirements for registration if at all necessary should also be based on ‘*clear and objective*’ criteria so that discretionary measures will not affect the existence and the independence of CSOs.<sup>78</sup>

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<sup>75</sup> This refers to the case where mandatory registration is required for CSOs existence as in the case of Ethiopia (Charities and Societies Proclamation No 621/2009, Article 64 (2) and 65 (4) ), Zimbabwe (Zimbabwean Private Voluntary Organisations Act, Article 6 (1) (a) and (b) ), Uganda (Republic of Uganda Non-Governmental Organisations Registration Act (Amended 2006), Article 2 (5) and (6) ), Kuwait (State of Kuwait, Law 24 of 1962, Article 2. For a comparison, see Paragraph 28 of the Council of Europe’s Recommendation CM/Rec (2007) 14 on the legal status of NGOs in Europe.

<sup>76</sup> See *Sidiropoulos* above n 20.

<sup>77</sup> Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association*, source book 89 <<http://pilnet.org/public-interest-law-resources/30-enabling-civil-society-practical-aspects-of-freedom-of.html>> accessed 14 April 2015.

<sup>78</sup> *Ibid*, 90.

Once CSOs are registered enabling legal conditions demand that its existence is protected for perpetuity. The registration process should thus be limited only as a process to facilitate the rights of individuals to form CSOs as a means of exercising their freedom to associate. Thus there should not be any process of repeated re-registration unless the organisation has made major amendments in its bylaws for instance regarding its purposes or structure; or the laws governing CSOs are changed and conditions demand the same.

*Clear, undemanding and non-discriminatory registration requirements*

A law will be enabling if it ordains that the registration process is undemanding and impartial. It therefore should be un-bureaucratic with no or limited discretion of authorities, expeditious and inexpensive to the extent that is possible and practical.<sup>79</sup> The law itself that governs the registration process should also be well-defined with the utmost level of precision that avoids vagueness and ambiguity not to leave unwarranted discretion for decisions by authorities. Furthermore, the law must give CSOs an opportunity of a day in court to challenge the decisions of the registering authorities.

*Expeditious registration process*

As legal personality is the most important expression of freedom of association that enables individuals to jointly pursue a common interest, the facilitation and promptness of the process is just as important as the acquisition. An enabling law thus needs to ensure that the process of registration is not lengthy.<sup>80</sup> It needs to provide the maximum time that the registration decision should take as it would otherwise expose CSOs to the exercise of the discretion of authorities and compromises their independence. Thus, there needs to be a prescribed *time limit* within which the responsible state agency should decide the application for registration. A law will be more enabling if it clearly provides that failure to decide within such prescribed period should be treated as a grant of legal personality with no additional requirements.<sup>81</sup> This

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<sup>79</sup> Council of Europe's Recommendation on the legal status of NGOs in Europe CM/Rec (2007) 14, s IV 28-29; See also, Leon Irish above n 62 at 26.

<sup>80</sup> Richard Fries, 'The legal Environment of Civil Societies' in Helmut Anheier and others (eds), *Global Civil Society* 2003 (LSE 2003) 221.

<sup>81</sup> See Public Interest Law Initiative, above n 77 at 90; See also Leon Irish, above n 62 at 27.

is an important procedural guarantee for the exercise of the freedom of association since otherwise if CSOs registration would depend on the discretion of authorities, the existence and the autonomy of CSOs would be compromised. The right of an automatic presumption of registration is nonetheless not practical, if the purpose of registration is not to attain legal personality but to be qualified for some benefits as tax concessions.

#### *Inexpensive Registration Fee*

Registration fee should not pose a serious obstacle for the registration of CSOs. An enabling law must therefore ensure that the registration process should not demand unreasonable application processing fee. This is particularly important in jurisdictions where registration is mandatory, since the unaffordability of registration should not deny one to exercise one's freedom of association. Unaffordability will also contradict the 'universality' of the freedom of association. Although the freedom to associate is a right that must be guaranteed to 'everybody' irrespective of the economic status or otherwise, the imposition of an unreasonable registration fee would systematically deny the rights of those people who are economically disadvantaged. Yet perhaps, the formation of CSOs is particularly relevant for those groups, from the democratization perspective, as the right to associate would offer them the chance to join hands and pool their limited resources to set the imbalance in interest representation influenced by money politics. Expensive registration fee will also generally deter the formation and the flourishing of CSOs. Moreover, in order to avoid subjectivity and partiality, the amount also needs to be predetermined and made known to the public to enable individuals make an informed decision before they start out the formation of CSOs.

#### *Independent and Accountable Registering Authority*

One of the enabling conditions for the registration of CSOs and their autonomous operation is the existence of a registering authority, which is transparent, efficient and independent of the government. The independence of the authority from the executives will enable CSOs engage autonomously. The most enabling legal approach is the establishment of a single specialised regulatory agency whose staff develop appropriate expertise and whose sole task is regulating CSOs. Such a specialised agency eliminates all too frequent inter-ministerial conflict and inconsistency. In addition, by developing a centralized expertise it helps 'improve the understanding of the law affecting CSOs and enhances the professionalism of civic organisations by

offering courses and training sessions.<sup>82</sup> This model is adopted in England and Wales where an independent specialized agency- The Charity Commission regulates the activities of Charities. Establishment of a specialised independent agency that may be constituted of representatives from government, CSOs and the public at large also ensure the continuity of policy despite changes of party.<sup>83</sup>

Thus, although it is not necessarily the only way, the registration and regulation of CSOs by specialized regulatory agency is deemed as a sound model. It is also important that its decisions should be subject to judicial appeal.<sup>84</sup> Regulation by a specialised agency under a court review system facilitates the coordination and continuity of policies made by the executive while ensuring political insulation and unwarranted intrusion of its decisions on the rights of CSOs existence and engagements. Thus, an enabling legal environment for the registration of CSOs requires the establishment of a specialized registration body and a well-functioning independent court that could entertain appeals from the decision of the registering authority.

All these enabling conditions for registration are crucial since the process of registration that is unwarrantedly demanding and subjective affects the potential role that CSOs can play in democratization. Firstly, the demanding registration procedure discourages the formation of Charities and Societies and thus limits the growth of the social and political capital that could help the process of democratization through diverse interest representation and the nurturing of civic and democratic values. Secondly, the more vague and subjective the registration process is with unrestrained discretion of authorities, the more it risks the inherent autonomous quality of the sector that is indispensable for the democratization process. When the registration process highly impinges on the autonomy of CSOs, their capacity and role in holding the state apparatus accountable becomes doubtful. Moreover, if the right to form and the right to attain legal personality are left to the discretion of authorities, the registration process could be used as a screening mechanism for the state to filter out CSOs with a potential of influencing or challenging state action from entering the public sphere.

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<sup>82</sup> Leon Irish above n 62 at 33.

<sup>83</sup> Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice*, (Oxford University Press 1999) 7.

<sup>84</sup> Leon Irish above n 62 at 33.

### **5.8. Registration of CSOs under the Ethiopian Legal System**

As explained above, the registration of Charities and Societies in Ethiopia is a mandatory precondition to attain legal existence and legal personality.<sup>85</sup> Since legal existence is not an automatic consequence of the formation of charities and societies, it is thus crucial that the rules governing the registration process should meet the aforesaid enabling criteria since otherwise it would be tantamount to the denial of their very existence and the violation of the freedom of association. Nonetheless, as we shall see below, the particular challenges related to the process of registration under the CSP are vague with open ended rules that give unfettered power for the registering and regulating Agency in registering and demanding requirements of registration that suggest a move towards a narrowing of the space for CSOs existence. The CSP is premised on an officious intent by the state in the regulation of the existence and the operation of CSOs and provides for overstated and unchecked administrative discretion to the registering authorities.

#### *Registering and regulating authority*

The Charities and Societies Agency (hereinafter the Agency) represented by its officers and the Director General, the Board of the Charities and Societies Agency (hereinafter the Board) and the Sector Administrators are assigned with the responsibility of registering and regulating charities and societies in Ethiopia. Their structure that does not maintain their independence and wide discretionary mandate unchecked by the court however fails to fully comply with the standards of enabling legal conditions explained above.

#### *The Charities and Societies Agency*

The CSP establishes a specialized registering and regulating Agency, the Charities and Societies Agency.<sup>86</sup> Among others, the Agency has the power and functions to license, register, and supervise; to publish and distribute information about the registration of Charities and Societies in the Gazette; to take decisions, in cooperation with the concerned Sector Administrator, on the application of Charities and Societies for registration and license; to collect fees for the services it renders; and to ensure that

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<sup>85</sup> CSP, Article 64 (2); Article 65 (1) and (2).

<sup>86</sup> CSP, Article 4 (1).



Charities and Societies operate legally.<sup>87</sup> The Agency is organized having a Charities and Societies Board hereinafter referred to as the ‘Board’; a Director General to be appointed by the Government; and other staff.<sup>88</sup>

#### *The Board of Charities and Societies*

The Board constitutes seven members, including its Chairperson to be nominated by the government; and two persons nominated from the Charities and Societies representing the sector.<sup>89</sup> Some of the powers and functions of the Board include making policy recommendations to the Minister on policy matters; and hear appeals from the decisions of the Director General including decisions on the registration of charities and societies.<sup>90</sup> Neither does the law say anything as to how the CSOs are selected. Yet even if nomination is made in a proper manner, the representation of the sector would only be nominal in a majority decision.

#### *Sector Administrators*

In addition to the Agency, the CSP also gives for Sector Administrators the powers of making decisions on the registration and regulation of Charities and Societies.<sup>91</sup> Sector Administrators are relevant Federal Executive Offices designated by the Justice Minister to provide the necessary support to the Agency in the process of registration and regulation of Charities and Societies.<sup>92</sup> For those CSOs whose activity did not fall within any of the government ministries (sector administrator) and for whose activity falls within two or more ministries, the Agency will serve as Sector Administrator.<sup>93</sup>

The sector administrators are given a wide mandate in the registration and supervision of charities and societies as they are given the mandate to evaluate and recommend on the Charities’ and Societies’ programmes and projects; to supervise and control operational activities of Charities and Societies and take necessary measures; to develop criteria that have to be followed by the Agency which shall assure the maximum benefits of the public from the activities of Charities and Societies; and

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<sup>87</sup> CSP, Article 6.

<sup>88</sup> CSP, Article 7.

<sup>89</sup> CSP, Article 8.

<sup>90</sup> CSP, Article 9.

<sup>91</sup> CSP, Article 66.

<sup>92</sup> CSP, Article 66 and Article 67.

<sup>93</sup> CSP, Article 66 (2).

make arrangements with Charities for coordinated efforts towards the achievement of the common goals of the Charities and the said Sector Administrator.

Sector Administrators, having specialization in different sectors, evaluate and give specific recommendations on the programmes and projects of Charities and Societies before and during their registration and supervise and control operational activities of charities and societies. What this means in practice is that individuals who wanted to establish a charity or society working on Education should get their proposals and planned activities approved by the Ministry of Education (as a relevant sector administrator) before they get registered by the charities and societies agency. They are also expected to get approval from the Ministry of any new programs and project activities before they start implementing the programs and project activities. This gives a tremendous power to the Ministry of Education on the formation and regulation of CSOs working on Education to the level that it may prevent the formation of CSOs advocating for the change of the educational policy of the incumbent government. This could amount to the violation of citizens' right to form CSOs to promote their interest.

In general, although the establishment of a specialized Charities and Societies Agency, whose sole task is registering and regulating Charities and Societies, is a positive aspect to facilitate the registration process to develop the expertise and master the implementation of the law, the fact that it is answerable to the executive however puts its independence in question. Similarly, the Sector Administrators that assist the Agency in the registration and regulation process could enhance the specialization and the expertise of the Agency. Nonetheless, as will be discussed below the wide power of the Sector Administrators and the Agency that allows them to encroach into the detail programmes and activities of Charities and Societies is threatening to the autonomy and even to the very existence of CSOs.

### **Barriers to Registration**

#### *Excessive Scrutiny*

The requirements of registration as laid down under the CSP include, but are not limited to, particulars concerning the organisation's goals, objectives and activities outlined as per the guideline prepared for the same purpose; a copy of its rules or bylaws; document showing the act of constituting of a charitable trust or endowment

etc.<sup>94</sup> In addition to these documents foreign charities are also required to present a certificate of registration and recommendation letter from the Embassy of its country of origin or other competent government organ; letter of recommendation and proof of ability to operate in Ethiopia from the Ministry of Foreign Affairs of the FDRE as well as the power of attorney of the country representative.<sup>95</sup>

The requirement of these principal governing documents is pertinent in order to enable the Agency to check the legality of the intended purposes of the organisations and also to provide relevant information for third parties. This helps the public to know about the organisation and to make informed decisions in its dealings with the organisation for example to volunteer or to fund; and to have trust in the organisation. However, the law further stipulates that the Agency may require all charities and societies to provide ‘similar documents and duly completed forms’ in addition to those principal governing documents.<sup>96</sup> Such required documents for registration are not however clearly and objectively defined by the law thus leaving the registration and thus the acquisition of legal personality of organisations at the mercy of the Agency’s discretionary measures. Such wider discretion that could compromise the registration of CSOs might increase the transaction cost of establishing charities and societies, and threaten their autonomy hence their efficiency to play a role in democratization.

One of the documents that the regulating Agency requires formed organisations to submit, apart from the bylaws, is a project proposal demonstrating detailed activities and budget plan with a maximum of 30% administration cost.<sup>97</sup> This requirement, added to the fact that associating informally is not encouraged, demands even very small charities to necessarily have a qualified personnel to write a project proposal. The proposal will be submitted to and evaluated by either the Sector administrator or the regulating Agency. This causes censorship of CSOs activities right from the very beginning even before they assume a legal status. If the ministry or the Agency does

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<sup>94</sup> CSP, Article 68 (3).

<sup>95</sup> CSP, Article 68 (4).

<sup>96</sup> CSP, Article 68 (3) (b).

<sup>97</sup>In addition to the by rules and the application form required by the CSP, the Agency lists the following as requirements for an application for registration: project proposal of the charity revealing its intended activity, the list of founders, their Identification card, photograph, logo of the charity if any with its size, content and objective of the logo and details of the cost of registration. < <http://www.chsa.gov.et/web/guest/local-charity>> accessed on 12 May 2015> accessed on 25 May 2015.

not approve the project, the CSO will not be permitted the license, notwithstanding the lawfulness of the activities.

Thus, in effect the CSP has given the sector administrators and the Agency immense power that would determine the very existence of an organisation. Such censorship is particularly burdensome for advocacy CSOs as it could be likely that a sector administrator will not approve a project proposal that would challenge the policy that the government has enacted and is enforcing. For example, a charity that works on the promotion of quality education needs to get the approval of the sector administrator, in this case the Ministry of Education. Thus if that charity plans to advocate for the change of the existing education policy, it could be highly unlikely that the Ministry of Education will approve of the plan of the charity that challenges its own policies. This might result in the formation/ registration of only those CSOs that work in line with the government policies without any substantial challenge whatsoever. The CSP did not provide a specific ground on which the Sector administrators approve or disapprove a program or project activity. They are also not bound by the law either to give a written explanation of the ground on which they approve or disapprove a program or project activity. As a result, it is difficult to get information on the number of programs or project activities that are approved or disapproved by the ministries. Practically however, CSOs submit their programs and/or project activities for approval and where the ministry did not approve their programs, they will amend their programs and/or projects until they satisfy the recommendations of the ministry and will get the ministry's approval.

Once the necessary documents are presented or requirements are fulfilled, an enabling legal environment requires that registration should simply be a procedural matter instead of authorities' discretion.<sup>98</sup> The role of authorities should thus be limited only to verifying the fulfillment of basic legal conditions. Hence rules governing registration should be precisely defined to avoid discretionary power of authorities whose bureaucracy could suppress the fundamental freedom of formation and function of CSOs. Thus, while it could be appropriate that the registering authority checks the objectives of the formed charities and societies are lawful, it is nonetheless very

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<sup>98</sup> See Leon Irish above n 62 at 27.

intrusive to require charities to submit the details of their activities and put their actions and registration at the mercy of authorities' discretionary decision. However the registration requirement added by the prerogative of the Agency to require the submission of the project proposal and to oversee and direct the activities of the charities and societies is a serious threat to the operational autonomy of the sector.

### *Discretion of the Agency*

The approval of the registration application and the issuance of the certificate endorse the acquisition of legal personality and thus the rights and duties of the charity or society formed shall accrue to the registered organisation.<sup>99</sup> This will enable the founders and officers to undertake transactions such as entering into binding contracts, purchasing assets, opening bank accounts etc. in the name of the organisation. Obtaining legal personality also helps the organisations to attract funding from the public and private companies and to procure tax benefits. It also ensures the continuing identity of the organisation distinct from the founders.

On the other hand, the Agency may either require making the necessary amendments or refuse to register the charity or society. Article 69 exhaustively listed the grounds on which registration may be denied. The Agency thus may deny registration where the rules/bylaws of the organisation, or its nomenclature, or its application do not comply with the necessary legal conditions.<sup>100</sup> It may also deny registration where 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.<sup>101</sup>

The exhaustive listing of the grounds for denial of registration is good as it limits an unwarranted discretionary power of the Agency. Yet the discretion of the Agency is not entirely ruled out owing to the vagueness of the conditions for the denial of registration such as 'purposes prejudicial to public peace, welfare or good order.' The vagueness could still leave room for subjective interpretation of the Agency whose bureaucracy could stifle the acquisition of legal personality. As Ethiopia follows a civil law legal system, there is no precedent recorded for judges to follow as to what it means

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<sup>99</sup> CSP, Article 65 (2) and Article 68 (1).

<sup>100</sup> CSP, Article 69 (1) (3) (4) (5).

<sup>101</sup> CSP, Article 69 (2).

by ‘purposes prejudicial to public peace, welfare or good order’ However, the interpretation of the Agency should be guided by the constitution and international human right instruments ratified by Ethiopia as laws higher in the hierarchy of the country’s legal system. If the Agency guided by these documents still found that the proposed organisation does not meet the legal prescriptions and the standards necessary for a democratic society, it should prohibit registration in order to protect the public and salvage the sector from those that discredit it and communicate its decision within 30 days.

#### *Unlimited registration period*

According to the CSP, once the charity or society successfully applied for registration, the Agency is required to register the applicants as a charity or a society and issue a certificate of legal personality within 30 days from the date of application.<sup>102</sup> Once the governing documents are presented or conditions are fulfilled, the process of registration should simply be a technical routine or a procedural issue instead of authorities’ discretion. The Agency should thus be limited merely to checking the satisfaction of those prescribed prerequisites. Therefore, once the Agency verifies the fulfillment of the conditions prescribed by law or the conditions that it deems necessary and also confirms the lawfulness of the objectives of the association it needs to register and issue a certificate, within 30 days.<sup>103</sup> Although longer than what it takes to register profit making entities, this still compares acceptably to the 22 days that take to register a business in Ethiopia.<sup>104</sup> Yet, the fact that a specific time limit is prescribed for the decision of the Agency is commendable on its own.

The failure of the Agency to decide within such period cannot however be deemed as the granting of legal personality. Thus, where the Agency does not issue a certificate of legal personality or does not make known that it will not do the same; the applicant may apply to the Board within 15 days from the end of the 30th day limit prescribed for the decision making of the Agency. However the law is silent on the conditions whereby the Board may review the decisions of the Agency and it is not clear whether

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<sup>102</sup> CSP, Article 68 (1).

<sup>103</sup> Ibid.

<sup>104</sup> Ameha Bekele and Zemedeneh Negatu, *Company Registration in Ethiopia*, (The Addis Ababa Chamber of Commerce and the Swedish Agency for International Development Cooperation (SIDA) Research Team, 2005) 19.

or not the appellant would have the right to be heard before the board or represented by a lawyer as it would in the court of law.<sup>105</sup>

One challenge related to the appeal process is related to evidence. As the law does not require the Agency and the Board to provide the fact of denial of the registration application and the reason for denial in writing, the denied applicant could face evidentiary challenge to lodge an appeal to the Board or to the court of law as the case may be. A written and clear communication of denial in addition to giving an opportunity for the proposed organisation to amend the oversight would have made the Agency answerable in case of misuse of power. Moreover, the law does not require the Agency and the Board to record and make their decision available to the public. As a result, it is difficult to know how many applications has been denied and the grounds of the denial.

In addition, specific timeframe is lacking for the decision of the Board on the appeal made against the decision of the Director General of the Agency. The fact that the board can keep the application of the CSO for unlimited period of time would impede CSOs existence, especially for Ethiopian Resident and foreign Charities that are not allowed to go to a court to challenge the board's indecisiveness. Even the Ethiopian charities and societies that have the right to appeal may be in a difficult position to go to court without having a written decision of the Board thus leaving the appellant to wait for undefined time period before it makes a further appeal to the court. This might also cause the relinquishment of a formed organisation and the funds it solicited before registration as a formed organisation must be registered within three months period. In practice there were instances during the re-registration period where the Board took more than six months to decide on the appeal of four local and international organisations.<sup>106</sup> As registration is mandatory under the Ethiopian law, delay in registration is an unjustifiable denial of the right to exercise one's freedom of association.

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<sup>105</sup> The mandate of the Board may be compared to that of the Council in Malawi as section 18 of the Malawi's Non-Governmental Organisation Act of 2001 provides a more enabling legal environment. The Council which has comparable mandate as the Ethiopian charities and societies Board represents seven out of ten members and its decisions are subject to review by a court of law.

<sup>106</sup> Kumelachew Dagne and Debebe Hailegebriel above n 55 at 12.

### *Unreasonable Registration Fee*

Article 58(6) of the CSP provides that the necessary registration fee shall be paid where an application for registration is made. Directives issued based on this provision require local charities to pay an approximate equivalent of 30-50 US dollars for registration and licensing excluding the publication cost that will depend on the market value.<sup>107</sup> This is however not favourably compared to the registration fee of business companies as it costs three to five times double for charities.<sup>108</sup> This increases the transaction cost of forming CSOs and might discourage their formation.

### *Requirement for Re-registration*

Even after an organisation is registered, the Agency has the authority to interfere in its legal existence since the law requires CSOs to re-register disregarding the principle of perpetual succession for legal entities. Aside from the registration process, the CSP requires charities and societies to renew their licenses every three years not later than two months after the expiry date.<sup>109</sup> Thus, in addition to the process of acquisition of legal personality that undermines the existence of CSOs and subjects them to arbitrary procedures; their sustainable existence is also continuously challenged by the unwarranted process of renewal of license.

The preconditions for renewal as provided on the CSP are payment of renewal fee; complete and accurate performance and audit reports; and non-violation of the provisions of the CSP or regulations and directives issued thereunder.<sup>110</sup> Charities and Societies are not required to resubmit their current or future programs and activities as they are expected to get approval of their projects from the agency or relevant sector administrator every time they have a new program or project activity. The renewal requirement serves no purpose since the Agency can dissolve any charity or society at any time if any reason that warrants their dissolution occurs. The sense of uncertainty about their existence continues even after registration, since their license can be

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<sup>107</sup> The Agency website in addition to the by rules and the application form required by the CSP lists out the following as requirements for an application for registration: project proposal of the charity revealing its intended activity, the list of founders, their Identification card, photograph, logo of the charity if any with its size, content and objective of the logo and details of the cost of registration. The information is available on the official website of the Charities and Societies Agency at <<http://www.chsa.gov.et/web/guest/local-charity>> accessed on 10 April 2015.

<sup>108</sup> Amha Bekele and Zemedeneh Negatu, above n 104 at 19.

<sup>109</sup> CSP, Article 76 (1) and (2).

<sup>110</sup> CSP, Article 76 (3).



suspended or even cancelled even for a minor infringement of the provisions of the CSP, with no distinction made between first-time and repeat offenders. Yet the requirement that all charities and societies should undergo renewal is however an unnecessary measure to scrutinize their existence again and again and adds needless transaction cost.

The registration of CSOs is thus at best a temporary license to operate for a fixed period rather than a process that facilitates individual's freedom of association. It therefore compromises CSOs autonomy and activism for democratic promotion in their role as monitoring, disciplinary and pressure group as it allows repeated bureaucratic hurdles and an opening for the Agency to harass organisations that are critical of official policies.

In sum, although the registration process is mandatory for charities and societies, the process is nonetheless bounded with a number of disabling legal conditions that allows the registering authority to exercise unfettered discretion before and after the registration process thereby putting CSOs' legal existence at its mercy.

### **5.9. Enabling legal conditions governing the dissolution of CSOs**

The legal existences of CSOs come to an end through dissolution. CSOs could be dissolved voluntarily by the decision of CSOs governing body; and involuntarily by the decision of the CSOs regulating Agency or court order. The founders of charities should be allowed to voluntarily dissolve the organisation on the basis of their bylaws. On the other hand, the protection for the legal existence and autonomy of CSOs entails their protection not to be unwarrantedly dissolved without due process, since otherwise the right to exist would be a hollow right. The European Court of Human Rights underscores this when it decides that if the right to form did not include the right not to be dissolved, then freedom of association would be in vain.<sup>111</sup>

Hence the dissolution of CSOs or their restriction in any form can be justified when the following three grounds are fulfilled simultaneously: (i) when the restriction is prescribed by law; (ii) in the interest of national security, public safety, public order,

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<sup>111</sup> *Sidiropoulos and Others V. Greece* 10 July 1998, para 40.

public health, morals or the protection of the rights and freedoms of others and (iii) necessary in a democratic society.<sup>112</sup>

Thus, to begin with, any legitimate restriction on CSOs should have a legal basis and accountability measures should be in conformity with a law duly promulgated in advance. The law should also have specific substantive and procedural qualities. From the statutory law perspective, the law that restricts the freedom of CSOs should pass the test that by limiting CSOs autonomy it will attain a greater good of protecting the safety and security of the public and/ or the nation. The test validates the setting of the necessary equilibrium between CSOs autonomy and their accountability.

Also from the legal drafting perspective, the law that puts the restriction measures should have a quality of *sufficient precision* in order to enable CSOs and their members assess whether or not their intended action could amount to a breach of the law and thereby ensure them with *certainty* and *foreseeability*.<sup>113</sup> The certainty and foreseeability of the law will likely reduce the transaction cost for the formation and operation of CSOs. It thus encourages the formation of CSOs as their incorporation would not be placed at the mercy of authorities as long as they fulfil the minimum legal requirements. It also gives CSOs confidence that they will be free from undue and arbitrary intrusion in their governance and operation; and free from unwarranted dissolution on the grounds that have not been specifically prescribed by law. On the other hand, laws that are precisely defined will give the government a valid authority to check on the accountability of CSOs.

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<sup>112</sup> ICCPR, Article 22; ECHR, Article 11.

<sup>113</sup> Organisation for Security and Cooperation in Europe/Office for democratic Institutions and Human Rights Office (OSCE/ODIHR), 'Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organisations'<sup>4</sup> <<http://www.un.org.kg/en/publications/document-database/article/Document%20Database/UN%20System%20in%20Kyrgyzstan/Human%20Rights%20and%20Human%20Rights%20Based%20Approach/115-Governance/2129-osce-odihr-note-outlining-key-guiding-principles-of-freedom-of-association-with-an-emphasis-on-non-governmental-organisationorganisations-eng>> accessed on 11 March.2013; *N.F. v. Italy*, App no37119/97(ECHR 2August2001).In this case, a judge against whom disciplinary measure was taken for being a member of an association, 'Freemason lodge' based on two laws which read: 'any judge who fails to fulfil his duties or behaves, in or outside the office, in a manner unworthy of a trust and consideration which he must enjoy will incur a disciplinary sanction' AND 'judges' membership of associations imposing a particularly strong hierarchical and mutual bond through the establishment, by solemn oath, of bonds such as those required by Masonic lodges, *raises delicate problems* as regards observance of the values enshrined in the Italian Constitution.' The ECHR highlighting the vagueness of the term 'raises delicate problem' to indicate prohibition of membership in such association and the fact that it is not adequately foreseeable to enable the applicant to adjust his conduct ruled that the applicant's right to freedom of association had been violated.

Secondly, the enforcement of laws that restrict the freedom of CSOs is justified only when there is a legitimate showing<sup>114</sup> of an imminent and serious threat that warrants the need to protect the rights of individuals, the safety of the public and the security of the nation.<sup>115</sup> Certainly, the government as one of its oldest and notable mandate should protect the public from any perils. The actions of CSOs should not be an exception to this rule. Thus the government may take any legal action including dissolution in response to illegitimate actions of CSOs that jeopardizes the rights and securities of individuals, the public or the nation.

However, government should not abuse such mandate to arbitrarily control CSOs or to silence those that challenge the government under the pretext of protecting the public. Hence the freedom of association sanctions that the state action against the autonomous operation of CSOs will be justified only when the threat posed by CSOs against the public is '*serious and imminent.*' It therefore is necessary that the government will not restrict the freedom of association for a merely 'local or relatively isolated threat of law and order.'<sup>116</sup> Unsystematic and incidental threats posed by CSOs should thus not cause a limitation on the freedom of CSOs.

The third criterion that must be present, in concert with the foregoing ones, is the absolute necessity of the restriction for a democratic society. This implies that any measure that limits freedom of CSOs should be not only proportionate to the legitimate purpose of protecting the public but also necessary for a democratic society. For example, a group of individuals who want to form a charity or society that promotes the change of government from secular to a religion state led by a religious leader may not pass the test of 'necessity for a democratic society' as democracy requires plurality

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<sup>114</sup> *Izmir Savas Karsitlari Dernegi and Others v Turkey*, App no.46257/99 (ECtHR, 02 March 2006)

<sup>115</sup> ICCPR, Article 22 (2); ECHR, Article 11 (2)

<sup>116</sup> The 'Siracusa Principles' [United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985) <<http://www1.umn.edu/humanrts/instate/siracusaprinciples.html>> accessed 20 April 2015. This principle was adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, and the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human rights, and the International Institute of Higher Studies in Criminal Sciences. Though not legally binding, these principles provide an authoritative source of interpretation of the ICCPR with regard to limitations clauses and issues of derogation in a public emergency.

of ideas and interests, the tolerance and acceptance of others and their ideas and for this reason, a country like Ethiopia whose constitution clearly provide to follow a democratic form of government may refuse to register such kind of CSOs. The restriction of the autonomy of CSOs should thus pass the strict test of both legality and necessity.

The imposition of strict requirements against the infringement of the freedom is necessary as ‘freedom of association would be largely theoretical and illusory if it were limited to the establishment of CSOs’, but if state authorities could unwarrantedly dissolve CSOs without having to comply with the guarantees CSOs and their member are entitled to.<sup>117</sup> Such guarantees help CSOs to maintain their autonomy – an essential ingredient for their role in democratization.

#### **5.10. Dissolution of CSOs under the Ethiopian legal system**

The CSP provides both voluntary and involuntary dissolution. Charities and Societies may thus be voluntarily dissolved by the decision of the appropriate organ (such as the Boards or trustees or the General Assembly) in accordance with its rules. Freedom of association entails not only the right to associate but also the negative right of the freedom not to associate. Hence, when the members of the association decide to dissolve their association they can appoint a liquidator on whom the property of the organisation vests for the purpose of winding up the dissolution without affecting the rights of third parties.<sup>118</sup> CSOs may also be dissolved for a reason of insolvency.<sup>119</sup>

CSOs may also be involuntarily dissolved by the decision of the Charities and Societies Agency or a court order. According to the constitution the freedom of association may be limited only when CSOs disrupt the constitutional order or an appropriate law. Also as per Article 9 and 13 of the FDRE constitution that qualifies the ICCPR as forming part of the law of the land, the grounds of involuntary dissolution of any charity or society should be guided by three set of principles outlined above. Hence it must be

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<sup>117</sup> *United Communist Party of Turkey and others v Turkey* ECHR 1998-I, 33. In this case, ECHR provides that ‘the protection afforded by Article 11 [freedom of association] lasts for an association’s entire life and that dissolution of an association by a country’s authorities must accordingly satisfy the requirement of paragraph 2 of that provision’.

<sup>118</sup> CSP, Article 94 (1).

<sup>119</sup> CSP, Article 93 (1) (c).

legally prescribed; be limited only to protecting the safety and security of the public and the nation; and be relevant in a democratic society.

In line with the first condition, the CSP prescribes potential grounds for dissolution of charities and societies providing predictability. A charity or society may be dissolved by the Agency where it has become insolvent or where the appropriate organ of the Charity or Society decides to dissolve it in accordance with its bylaws.<sup>120</sup> A charity or society may also be dissolved where the Agency cancels its license for a reason of violating the CSP or the penal law; registering fraudulently, failing to renew license; failing to rectify the causes for suspension within the time limit set by the Agency; and for having purposes which are unlawful, and prejudicial to public peace, welfare or security.<sup>121</sup>

However, beyond the legal prescription, when the grounds of dissolution are assessed against the abovementioned standards of an enabling law that should be fulfilled in concert, not all may be considered justifiable. For instance, fraudulent acts, criminality or the violation of the penal law, and an imminent threat to public peace, security and welfare could be considered reasonable grounds for dissolution, assuming the content of the law is justified as reasonable enough to be relevant in a democratic society. On the other hand dissolution for other non-flagrant grounds such as failure to renew license within two months period or using more than 30% of the income for administrative cost etc. even without taking the degree of deviation into consideration and without a notice that offers a chance to rectify errors is out of all proportion and amenable to abuse. This is particularly true for instance for an organisation that fully complies with all the requirements of the CSP but failed to renew its license within the prescribed time which could be easily rectified as renewal does not serve any significant purpose in the first place. Same holds true for an organisation which uses for instance only 31% of its income for an administrative cost, given the ambiguity of what constitutes administrative cost and the fact that the deviation from the rules of 30% is so minimal, particularly for those having insubstantial amount of annual income.

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<sup>120</sup> CSP, Article 92 and 93 (1).

<sup>121</sup> CSP, Article 93 (1) (b).

In general, given the contribution of charities and societies for public good, the grounds for dissolution should be strictly in compliance to the requirements of legality, and necessity for a democratic society. Each individual case should be carefully examined to verify the absolute necessity of the dissolution for a democratic society, without however opening loophole for arbitrariness and discrimination.

In sum, an enabling law first of all should facilitate the formation and the attainment of legal personality. Among others an enabling environment requires the right to associate informally; the right to seek and obtain legal personality; the right to have uncomplicated, impartial, inexpensive and speedy registration process before a specialized registering agency; and the right of judicial appeal for any administrative grievance. The more enabling these conditions, the lesser the transaction cost and the greater chances that people would be motivated to form associations which can thicken the social fabric or the social capital. This in turn facilitates the democratization process as CSOs fill that space between the state and citizens and serve as channels or as transmitters of citizens' interest.

In conclusion, the registration requirements provided under the CSP do not adequately pass the test of enabling legal condition as the process entails cumbersome procedures beyond the constitutional restrictions and thereby increasing the transaction cost of CSOs legal existence. As can be presumed from such taxing procedure that is amenable for the Agency's discretion, it is reported that organisations and mainly advocacy CSOs were challenged during the registration process due to the subjectivity, unpredictability, rigidity of the application of the law and even imposition of requirements beyond the requirement of the law, by the Agency.<sup>122</sup>

Hence in general the registration and dissolution process brimmed with numerous vague and subjective requirements that are subject to the application of wider discretionary power of the registering authority with limited control from an

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<sup>122</sup> Kumelachew Dagne and Debebe Hailegebriel, above n 55 at 7 and 29. In this report that took sample from the different types of CSOs 93% of advocacy CSOs and 47% of development CSOs (among the sample organisations) responded that compliance with the re-registration process were challenging because the officers 'were not well versed with the law and did not share a uniform understanding' of the law; 'were not willing to have constructive dialogue and to explain unclear matters pertaining to re-registration'; 'were not adequately trained in appraising projects presented as part of the re-registration requirement'.

independent judiciary, infringes on the ideal notion of CSOs autonomy. Such threatened autonomy added to the already prevailing state of fear caused by continuous intimidation makes advocacy CSOs role in democratization rather unpromising.

The process also tends to increase the transaction cost and undermine the growth of the sector. The cumbersome procedures of existence and the narrowing of the legal space for operation perhaps partly contributed to a significant decrease of the number of CSOs from 3822 just before the year the CSP was enacted to 1655 in 2010.<sup>123</sup> Although the exact reasoning for the extinction of each of these organisations is not precisely known nonetheless there are some evident cases whereby CSOs such as Heinrich Böll Foundation, a foreign charity involved in promoting human rights and democracy pulled out of the country owing to limited space of operation.<sup>124</sup> Hence, the CSP fails to adequately satisfy the standards of an enabling legal framework for CSOs role in democratization, that we discussed at the beginning of the chapter, as it largely compromises the existence, growth and autonomy of CSOs and thereby deter citizens' engagement and activism in the democratization process.

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<sup>123</sup> The Charities and Societies Agency of Ethiopia, 9 months report presented to the FDRE House of Representatives available at <<http://www.chsa.gov.et/web/guest/?jsessionid=E34D984DC7C307B36EC7D97B36E6EA44>> accessed 19 April 2015.

<sup>124</sup> Heinrich Böll Foundation, 'Closure of the Heinrich Böll Foundation office in Ethiopia' Press Release, November 29, 2012 <<http://www.boell.org/web/145-Closure-of-HBF-Ethiopia-Office.html>> accessed on 12 February 2015.

## **Chapter 6**

### **Engagement of CSOs in Lawful Purposes**

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#### **6.1 Introduction**

The previous chapter discussed what an enabling law should be in terms of protecting the rights of CSOs for formation and acquisition of legal personality. The mere protection of the bare right to form and to acquire legal existence however has more of a symbolic than a practical relevance. The existence of CSOs is given legal protection mainly because CSOs are formed in order to pursue a particular legitimate purpose that benefits either their own members or the public at large. Thus a legal regime governing the purposes of CSOs is most important as it can significantly influence the sector and the role it can play in society.

The thesis also gives special focus for this chapter and discuss it in length as it is an important pillar of the Ethiopian experience that affects the democratization element of CSOs functions in the country. It also needs comparison to other legal systems, as the Ethiopian government seeks to legitimize the legal approach it has taken in governing the matter by taking the approach from other legal systems and notably the United Kingdom.

Generally speaking, a law is said to be enabling when it recognizes that CSOs can be formed to serve a myriad of purposes. In general, the less legal limitation on the types of purposes the better for the sector. This also has a particular relevance for the democratization of the nation as the permission to pursue diverse purposes would pluralize the public sphere and enhance better representation of ideas and interests of societies. Yet, it would be too simplistic to claim that CSOs can pursue any objective of their own choice as one cannot assume that all CSOs are inherently good and that their purposes are intrinsically good. Thus it is necessary for a law to have clear standards or principles to determine permissible purposes which CSOs can be engaged in. By way of introduction, it may be relevant to point out that this chapter suggests two different sets of tests that can be applied in determining the permissibility of purposes of CSOs: a general test and a supplementary test. The first general test refers to the very minimum condition that must be fulfilled in order for a purpose to be qualified as permissible. This refers to the ‘lawfulness’ of the purpose which the CSO



aimed at pursuing. All CSOs irrespective of their nature should pass the general test of ‘lawfulness’ of purposes. What constitutes a lawful purpose will be discussed hereunder in section 5.2.

While the rule is that CSOs must be allowed to engage in any ‘lawful’ purpose, nonetheless some specific exceptions can be made to some CSOs by virtue of their unique organisational characteristics or social functions. The supplementary test refers to such additional conditions that must be met to qualify the purpose as permissible. The supplementary condition that is applicable in a number of legal systems is non-partisanship. Charities and Public Benefit Organisations that are deemed to benefit the public at large need to pass the supplementary test and thus are required to prove that their purposes are not only lawful but also nonpartisan. CSOs need to meet this qualifying condition to attain a distinct status that brings with it a social prestige and/or other pecuniary benefits for instance in the form of grants and tax concessions. What constitutes a nonpartisan purpose will be discussed below by way of comparison of the Ethiopian law which is the main focus of this study with other countries.

## **6.2 Engagement of CSOs in Lawful Purposes**

*What does lawful purpose mean?*

One of the guiding principles that need to be taken into consideration in determining the permitted purposes of CSOs is the individual rights of the founders or the members of CSOs. A law would be enabling when it permits CSOs to choose and to pursue any purpose that their members or founders can pursue in their individual capacity. Thomas Emerson argues:

*‘The one general principle of association which can be expressed in terms of constitutional doctrine is that an association or its members acting in concert are entitled to do what an individual can do to the extent the associational conduct is merely an extension of individual liberty, and the government can compel through the medium of compulsory association only what it can compel directly.’<sup>1</sup>*

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<sup>1</sup> Thomas Emerson, ‘Freedom of association and freedom of expression’ (1964) *The Yale Law Journal* 74 (1).

This assertion entails that what an individual can do in his individual capacity he must be able to do it with his associates, to the extent practicality of the application of rights permits. This also signifies that the purposes of CSOs are not limitless as neither are the rights of individuals. The limits on the rights of the founders and their organisations can be made based on a very pervasive conception that rights can only be limited in order to secure the rights and freedoms of others.<sup>2</sup> Similar to what some authors prefer to refer as the Newtonian law of inertia: a right will continue to be in force as long as it does not collide with another right which conflicts with it.<sup>3</sup> Thus CSOs right to choose and to pursue a purpose will be limited only to the extent that it affects the rights or interests of other individuals or organisations. Terrorist groups, Mafia triads and gangs may thus be disqualified as they threaten the rights, the security and the peace of others. This principle can also be validly extended to non-membership CSOs such as foundations since, as mentioned above, the right recourse theory validates that the exercise of a right will be limited if it collides with another right which conflicts with it.<sup>4</sup>

A similar limitation that takes the health, safety and security of the public is also provided as a limitation on the freedom of association under international laws.<sup>5</sup> The freedom of association entails that CSOs can be engaged in any purpose except in those that by the standards of a democratic society, would threaten the safety and security of the public and the state. The standard of a democratic society among others include the respect for human rights, equality before the law, justice, state accountability, citizens' participation, tolerance, accommodation, pluralism, diversity and peace.<sup>6</sup> Then it follows from the above principles that an enabling law ought to allow CSOs to pursue any purpose as long as such purposes promote such democratic values as rights, equality, justice, peace and pluralism as such values would rather promote the safety and security of the people. Thus the permissibility of the promotion of democratization by CSOs would only be self-evident. For the purpose of simplicity, when this chapter

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<sup>2</sup> Andrei Marmor, 'On the Limits of Rights' (1997) *Law and Philosophy* 16 (1) 1-18, 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> International Convention for Civil and Political Rights (ICCPR), Article 22; European Convention on Human Rights (ECHR) Article 11.

<sup>6</sup> For detail discussion on the substantive contents of democracy, see Chapter 2 above.

refers to such permitted purposes of CSOs that is not in conflict with the rights and freedoms of other people, it will use the term ‘lawful purposes’ of CSOs.

*What does lawful purpose signify?*

Once such general principle on the lawful purposes of CSOs that pertains to the morality or political issue is established, it is conventional in the rights discourse to ask the analytical question of what it means to have such rights. This is also relevant from a practical point of view since legislation that concede with the rights of CSOs in promoting any lawful purpose may not otherwise be translated in practice to actually enable CSOs exercise the right of pursuing such purposes. In addressing the analytical question of what it means to have the right to pursue any lawful purpose the following fundamental propositions that merit focus can be made.

Firstly, at the most basic level the right to pursue any lawful purpose shall signify the autonomous freedom of CSOs to choose and pick their own purposes of formation as long as such purposes are lawful. An enabling law that allows CSOs to choose and to pursue any lawful purpose thus has got a relevance of guaranteeing CSOs the freedom to promote democratization as a fundamental right rather than a privilege that a government can permit or restrict as it wishes.

The freedom to pursue any lawful purpose also pertains to the autonomy of CSOs to pursue their lawful purposes without undue interference from state apparatus, political parties, the business or any other institution. Autonomy is a very important feature of CSOs particularly for those engaged in the democratization process, as without it CSOs may not be able to hold governments into account. Joerg Gorbig argues along these lines asserting

*‘If CSOs are to function as an efficient control mechanism over the exercise of state and political power, their crucial organisational property is autonomy from both the state apparatus and political society more broadly. This autonomy extends beyond mere technical independence, that is the existence of separate organisational structures and the availability of resources required for the pursuit of an organisation’s specific interest. More broadly, it can be described as a relationship of*

*mutual acceptance and respectful cooperation without any claims for superiority on either side.*<sup>7</sup>

Thus, imposition or restriction of purpose (s) or unwarranted interference in their engagements would not only threaten their inherent quality of autonomy, but also compromise CSOs efficiency and the balance of power.

Secondly, the right to pursue any lawful purpose signifies the right to seek, to receive and to utilize the necessary resource that enable CSOs pursue such purpose. The right to pursue any lawful purpose would only be hollow, if the resource to achieve such purpose cannot be attained. Thus, an enabling law would not only grant the right of CSOs to promote any lawful purpose but also to mobilize resources that allows them pursue such purpose. This topic will be discussed in length in the forthcoming chapter.

Thirdly, the freedom to pursue any lawful purpose also signifies the right of CSOs to choose their own approaches, strategies or activities that can help them attain the best possible result in accomplishing their purposes of formation. CSOs freedom to pursue any lawful purpose thus focuses not only on the content or the substantive right but also signifies the rights of CSOs to choose the modus operandi or the approach that they can take. It therefore encompass the right to possess the capability to undertake any lawful strategy and activity as having the right would otherwise be meaningless without the necessary tools that can translate the right into a reality. In short, what an enabling law entails is not only to recognize CSOs freedom to pursue democratization as their purpose of formation, but further to guarantee the means to exercise such right in an effective manner.

From the perspective of democratic promotion for instance, CSOs might employ different strategies such as the promotion of government accountability; the empowerment of citizenry; the representation of the rights and interests of vulnerable groups; the capacity building of democratic institutions; the promotion of reforms of

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<sup>7</sup> Joerg Forbrig, 'The Nexus Between Civil Society and Democracy: Suggesting a critical approach' in Reichel, Walter (edn.) *Political Priorities between East and West. Europe's rediscovered wealth – What the accession-candidates in Eastern and Central Europe have to offer* (2002) 2, 79-103.

systems, laws, policies, and actions or decisions of actors in the public sphere; etc.<sup>8</sup> In order to implement such strategies that enable them to attain their purpose of promoting democratization, CSOs could carry out different activities. For example, in order to promote government accountability, CSOs might carry out election monitoring, budget tracking, human rights monitoring, and corruption control. The citizenry empowerment programme might also involve activities such as community mobilization, civic and human rights education, voters' education, etc. In order to articulate and represent the interests of their clients CSOs may offer them pro bono legal aid services or be involved in public interest litigation. They may also employ lobbying, advocacy, peaceful demonstration in order to defend the rights of groups they represent. The capacity building of the democratic institutions might also involve human rights and other technical trainings or material provisions for the democratic institutions such as the police, the public prosecutor office, the judiciary and the parliament. On the other hand, the promotion of reforms may also involve the undertaking of research that provides alternative policies and legislation and deliberations, lobbying, advocacy, demonstrations etc.

Yet it is only logical to expect that not only CSOs purposes of formation, but also their strategies and activities should be lawful. Thus, consistent with the line of argument made above in defining lawful purpose, any activity that does not come in conflict with the rights and interests of other individuals, groups or institutions in a democratic context shall be deemed as a lawful activity for CSOs. As the purposes of CSOs can be legitimately limited by the protection of the rights and security of other people as is necessary in a democratic society, the permissibility of the activities of CSOs should also pass a similar test to ensure that it does not collide with any other rights and freedoms as recognized in a democracy.

Thus, what it means to have the right to pursue any lawful purpose is having the right to employ any lawful strategies or the right to carry out any lawful activities that will facilitate the attainment of such purpose. Emphasising the importance of ensuring not only the purpose but also the strategies and activities of CSOs, Diamond writes 'CSOs chances to consolidate democracy improves significantly if CSOs do not contain

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<sup>8</sup> For detail discussion on the role of CSOs on democratisation, See Chapter 3 above

illegal or antidemocratic *goals and methods*.<sup>9</sup> In sum, an enabling legal framework therefore entails not only the recognition of CSOs' right to pursue any lawful purpose in its crudest form, but its construal that recognizes the capability of CSOs to employ such different strategies or activities as long as they do not employ a violent or an illegal means that could threaten the rights, interests, safety and security of others.

Lastly, the freedom to pursue any lawful purpose may also entail the need to equip CSOs with the necessary legal backing that allows better implementation of their programmes to attain their purposes. From the point of view of promoting democratization for instance, a law may be enabling if it recognizes and enforces such rights as the freedom of expression, the freedom of assembly, the freedom of information and communication and networking etc. Such rights will reinforce CSOs activism and enable them to carry out democratic functions. Although it is not meant to claim that these are the only legal guarantees that facilitate CSOs promotion of democratization, they nonetheless deserve brief explanation owing to the degree of importance they have particularly for CSOs promoting democratization.

#### *Freedom of Expression and Assembly*

The recognition and the enforcement of the freedom of expression is an important condition for the democratization role of CSOs as it allows them to successfully undertake a number of democratic functions. Firstly, it enables them to be vocal in their advocacy activities to continuously push for a more inclusive public sphere; to criticize government actions and policies; and to lobby for better policy alternatives and legislation. Secondly, freedom of expression empowers citizens and their associations. Freedom of expression includes communication of ideas of all kinds without '*frontiers*'<sup>10</sup> and includes not only ideas regarded as inoffensive or a matter of indifference but also those that 'offend, shock or disturb' since pluralism is essential for democratic society.<sup>11</sup> The enforcement of freedom of expression is thus a very important vehicle for CSOs in their role of resistance and control of the state apparatus without fear of prosecution.

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<sup>9</sup> Larry Diamond, '*Toward Democratic Consolidation*' (1994) *Journal of Democracy* 5 (3)11.

<sup>10</sup> ICCPR, Article 19; ECHR, Article 10.

<sup>11</sup> *Socialist party and others v. Turkey* ECGR 1998-III 41.

Thirdly, freedom of expression is also crucial for CSOs role of deliberation and representation. It permits CSOs to contribute to a genuine democracy that relies on the exchange of different ideas by guaranteeing their right to freely express their views in important public decision-making. Freedom of expression also enables CSOs to play a role of representation as it guarantees their freedom to speak on behalf of the rights and interests of the less served minority groups.

The freedom of assembly on the other hand facilitates CSOs role in mobilizing communities and giving them avenues to voice issues to the public. It allows individuals and CSOs to come together, to consolidate their opinions through discussions and debates and to lobby and assert their agendas for discussions or actions. The freedom to express and assemble are also significantly related to the very purpose of forming or joining CSOs since their existence would be inconsequential without the freedom of individuals and their organisations to assemble and to express themselves. Indeed the exercise of the freedom of association, expression and assembly are ‘more than linked’ and so ‘inextricably bound up’ that the infringement of one of them is an infringement of the other.<sup>12</sup> An enabling legal framework for CSOs should therefore essentially uphold the freedom of expression and assembly in an unequivocal manner.

#### *Freedom of Information, Communication and Cooperation*

The freedom of information is also an important right that an enabling law should recognize and enforce because to begin with, it facilitates the right to join CSOs. Information offers individuals and groups with greater prospect to identify and communicate with those having similar interests and outlooks to be organised for a shared aim. Moreover the freedom of information and communication would allow CSOs to seek, to obtain and to receive, public information; as well as to disseminate information. Thus the right to communication serves as important instruments for the democratic functions CSOs could play at the grassroots level w by inspiring civic engagements through awareness raising, educating, empowering and participating communities in public agendas.<sup>13</sup>

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<sup>12</sup>*Ezelin v. France* (1991) Series A, no. 202.

<sup>13</sup> The right to information and communication has been recognized as one of the fundamental rights by several international and regional human right instruments. See for example, ICCPR, Article 19 (2); The

Moreover, access to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizens' participation. The freedom of information and communication thus serves CSOs in getting access to government policies and decisions on which they can make informed deliberations. Ensuring the accountability of government also requires having reasonable access to governmental decision making processes, human rights information and other public data and reports. The right to access information thus facilitates CSOs' role of monitoring human rights violations and corruption. Hence, an enabling law which allows access to broader and more diverse sources and channels of information and permits dissemination of information would enhance CSOs contribution to democratization.

The freedom of information is also important for CSOs to enable them hold the Charities and Societies Agency and other regulating authorities accountable for their decisions that affect the existence and operation of CSOs. As the Charities and Societies Proclamation has left a number of loopholes that leaves the regulating Agencies with wider discretion with no legislative obligation to explain the reasons for its decisions, the freedom of information that is enshrined in the constitution will be a very important guarantee for CSOs in being able to know the reasons for decision making. The publication of the decisions of the quasi-judicial and judicial authorities is very important not only from the perspective of the freedom of information of a particular CSO but also for the purpose of building up bodies of case laws that could potentially help to attain consistency and non-discrimination in decision making process.

An enabling law should also allow CSOs to form and to participate in networks and coalitions in order to pursue their legitimate purposes and to impart information and ideas of all kinds through their networks and coalitions. Networks and coalitions are crucial mediums for exchange of information, experience sharing and awareness raising particularly for CSOs engaged in advocacy works. Indeed the power of CSOs to negotiate with the government and the private sector and in bringing changes mainly

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American Convention on Human Rights, Article 13 (1) and The Declaration on Human Rights Defenders, Articles 5-9.



lies in their collective civic assertiveness through strengthened networking and co-operation. As Fowler argues, ‘civic assertiveness wired on networking of different actors connected from local to global levels enable stimulation of the rights, roles, responsibilities and capabilities of citizens to become agents of change and to become the foundation, guardians and instruments of accountable governance and corporate responsibility’<sup>14</sup>

CSOs should also have access to a negotiation platform to enable them to articulate the interest of groups that are left out by party politics. Their aptitude to communicate, cooperate with, negotiate and influence state and non-state actors including individuals, CSOs, business community, international organisations both within and outside of their home countries determines the place they have in the democratization process. Therefore, CSOs need to have a reasonable access to public information, policy process and negotiation forums with public authorities, inter-governmental organisations and private corporations.

#### *Freedom to access justice*

While recognizing all the fundamental freedoms discussed above is the first important step for the active engagement of CSOs, their enforcement is indispensable as all those freedoms on paper would remain theoretical and illusory. The interpretations and applications of such fundamental freedoms among others require the right of CSOs to access an independent judiciary. Thus the right of access to justice should also be guaranteed by the law in order to enable CSOs assert their freedoms and contribute to the democratization process.

The courts should also be accessible to CSOs not only to defend their own institutional rights but also the rights and privileges of the community they represent. An enabling law should therefore permit CSOs to have a legal standing to appear in court to undertake public interest litigation. Public interest litigation is just one, but very important, process whereby CSOs represent the interests of communities challenge authorities in the court of law. Thus an enabling law should uphold the right of CSOs

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<sup>14</sup> Alan Fowler, ‘An enabling environment for civil societies: What does it mean and how does law fit in?’ (2003) Centre for Civil Society, Research Report 7, 1.

to access the court in order to allow them defend their own rights and the rights of the community they represent in a court of law.

By way of conclusion, it may be relevant to underscore that the freedom to form CSO would be totally meaningless without CSOs freedom to choose and to pursue a specific purpose. The purposes they choose however must pass the general test of ‘lawfulness’ and thus not undermine the rights and interests of other individuals and groups. As is expected in a democratic society, an enabling law must therefore recognize the rights of CSOs to freely choose and to autonomously pursue any lawful purpose, including the promotion of human rights and democratization. This entails CSOs freedom to be protected from any unwarranted government restrictions or intrusions; and the freedom to solicit funds that enable them to implement their programmes that aim at contributing to democratization. The genuine recognition of CSOs right to choose and to pursue any lawful purpose also demands the enforcement of the freedom of expression, assembly, information and communication, since without such freedoms CSOs would be lack the necessary conduits for democratic activism.

### **6.3 Lawful Purposes of CSOs under the Ethiopian Legal system**

#### **6.3.1 The Federal Democratic Republic of Ethiopia Constitution**

Article 31 of the FDRE constitution provides the general framework for the engagement of CSOs in ‘any lawful purpose’ as long as it does not violate any appropriate laws or disrupt the constitutional order. Hence only two constitutional limitations are imposed on CSOs freedom to choose and to pursue any purpose: *Non violation of an appropriate law and non-disruption of the constitutional order.*

The first constitutional limitation is similar to the general test of ‘lawfulness’ that we discussed above as the legality of CSOs’ purpose of formation is required as the bare minimum. Hence any purpose that is in violation of ‘any appropriate law’ can be legitimately restricted. The constitutional qualification ‘*appropriateness* of the law’ is far from clear from the mere reading of the provision. However it seems to suggest that not all laws are adequate enough to suspend the freedom of association. Thus, an

appropriate law may be understood to be any regulation that has a merit of suspending the fundamental right of freedom of association.<sup>15</sup>

The qualification of *an appropriate law* may be clarified through the interpretation of the provision in line with the international human rights treaties ratified by Ethiopia, since Article 13 of the constitution permits the interpretation of the fundamental rights in line with such treaties. For instance, if we take the ICCPR, one of the international treaties ratified by the country, any limitation on the freedom of association to pursue a self-chosen purpose always needs to pass the validity test of ‘necessity in a democratic society to protect the rights of others or the safety and security of the state.’<sup>16</sup> Thus interference in CSOs engagement due to nonconformity to the law can be justified only to the extent that the contents and the applications of such law are valid in a democratic society.

The second ground for the limitation of CSOs engagement is related to the disruption of a *constitutional order*. Although a very broad concept, a constitutional order may be understood as a set of institutions through which the nation’s fundamental decisions are made, and the fundamental principles that guide those decisions.<sup>17</sup> Thus in line with the ICCPR, CSOs engagement may be deemed to have disrupted the constitutional order only when it threatens democratic institutions, that makes democratic decisions, necessary in a democratic society. This may be an important qualification for the limitation provided by the constitution since otherwise CSOs will not be able to play their role of monitoring and challenging the actions, decisions and policies of the government, if any opposition would be deemed as a disruption of a constitutional order.

Thus the reading of the constitutional provision that guarantees the freedom of association in concert with the ICCPR that forms the integral part of the law of the land provide that CSOs have the right to engage in any lawful purpose that is in line with the constitutional order as is relevant in a democratic society. The FDRE Constitution

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<sup>15</sup> Mark Tushnets, ‘The New Constitutional Order’ (Princeton University Press 2003) 1.

<sup>16</sup> ICCPR, Article 22 (2); for further detail discussion on the limitation of freedom of association, See chapter 3 and 4 above.

<sup>17</sup> Mark Tushnets, above n 15 at 1.

is therefore substantially in harmony with the enabling legal framework that we discussed above, and signifies the right of Ethiopian CSOs to be engaged in the promotion of democratization as a lawful purpose as long as they employ lawful strategies and activities.

The FDRE constitution also facilitates CSOs activism for democratization as it recognizes the freedom of information and expression<sup>18</sup> as well the freedom of assembly and demonstration.<sup>19</sup> The issue of whether these freedoms are given only for individuals or can also be invoked by CSOs can be a point of a legal argument. However as has been stressed earlier, an association or its members acting in concert need to be entitled to do what an individual can do to the extent the associational conduct is merely an extension of individual liberty.<sup>20</sup> Thus it will also be reasonable to argue that if CSOs are entitled to do what their individual members are entitled to do then they must also possess the same rights and capabilities that their members are entitled to have to the extent practicality of the application of such right permits. If we follow this line of reasoning, it may be argued that the freedom of expression, assembly, information and communication can also be invoked by CSOs.

Article 29 of the constitution guarantees every individual the right to freedom of expression including the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice without any interference. It also facilitates their role in agitation and mobilization of community to get public support towards a specific reform. CSOs freedom of expression also facilitates their role in policy deliberations and dialogue. The recognition of the freedom of expression enables CSOs to play a role in interest representation through lobbying, advocacy, public interest litigation. The Constitution also allows the public interest litigation role of CSOs as it allows any association representing the collective or individual interest of its members or the groups it represents 'to bring a justiciable matter to and to obtain a decision or judgment by a court of law or any other competent body with juridical power.'<sup>21</sup>

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<sup>18</sup> Ethiopian Charities and Societies Proclamation (CSP), Article 29.

<sup>19</sup> CSP, Article 31.

<sup>20</sup> Thomas Emerson, above n 1.

<sup>21</sup> Federal Democratic Republic of Ethiopia (FDRE) constitution, Article 37.

The FDRE constitution also provides the right to petition, to peaceful assembly and demonstration having regard to the rules that stipulate the requirements for the protection of democratic rights, public morality and peace during such a meeting or demonstration.<sup>22</sup> The right to peaceful assembly enables CSOs to mobilize community either for education and awareness raising purposes or to voice demands to the government or any other institution. Peaceful assembly and demonstrations might help CSOs to be vocal and to get public attention and public support which can help them to achieve a desired policy outcome.

Thus in general, the Constitution upholds fundamental freedoms that enable CSOs to pursue democratization. The integration of international human right treaties such as the UDHR and the ICCPR as constituting part of the law of the country and the acceptance of a liberal interpretation of the constitution in line with such treaties ensure the setting of an enabling constitutional framework for CSOs formation and engagement in democratization and any other lawful purposes. Nonetheless, as we shall see below such liberal and enabling constitutional guarantee is not wholly translated in the Charities and Societies Proclamation (CSP) that was issued to specifically govern the civil society sector.

### **6.3.2 The Charities and Societies Proclamation**

The CSP classifies CSOs as societies that pursue legitimate private interests of its members and as charities constituted to promote public purpose i.e. charitable purposes having public benefit. Similar to the general standard of permissibility of purposes, the CSP requires that all charities and societies are lawful. Charities can pursue any one of the thirteen different charitable purposes designated by Article 14 (2) of the proclamation: (a) the prevention or alleviation or relief of poverty or disaster; b) the advancement of the economy and social development and environmental protection or improvement; c) the advancement of animal welfare; d) the advancement of education; e) the advancement of health or the saving of lives; f) the advancement of the arts, culture, heritage or science; g) the advancement of amateur sport and the welfare of the youth; h) the relief of those in need by reason of age, disability, financial hardship

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<sup>22</sup> FDRE Constitution, Article 30.

or other disadvantage; i) the advancement of capacity building on the basis of the country's long term development directions; j) the advancement of human and democratic rights;

k) the promotion of equality of nations, nationalities and peoples and that of gender and religion;

l) the promotion of the rights of the disabled and children's rights; m) the promotion of conflict resolution or reconciliation; n) the promotion of the efficiency of the justice and law enforcement services; and o) any other purposes as may be prescribed by directives of the Agency.

The CSP also permits the engagement of societies in any one of the charitable purposes listed above and also 'in any other similar lawful purposes.'<sup>23</sup> Nevertheless charities and societies can pursue any/or all of the above listed charitable purposes provided they earn not more than 10% of their annual income from a foreign source. Income from a foreign source is defined in Article 2(5) of the CSP as 'a donation or delivery or transfer of any article, currency or security from the government agency or company of any foreign country; international agency or any person in a foreign country.' The charitable purposes are thus further classified into two. From among the enumerated 13 charitable purposes Ethiopian resident charities, Ethiopian Resident societies and foreign charities are excluded<sup>24</sup> from being engaged in the following five set of charitable purposes: (a) the advancement of human and democratic rights; (b) the promotion of equality of nations, nationalities and peoples and that of gender and religion (c) the promotion of the rights of the disabled and children's right (d) the promotion of conflict resolution or reconciliation (e) the promotion of the efficiency of the justice and law enforcement services.

These set of charitable purposes are reserved only for 'Ethiopian charities and societies' that receive not more than 10% of their total annual income from foreign source.<sup>25</sup> The application of this provision precludes nearly 79%<sup>26</sup> of Ethiopian CSOs

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<sup>23</sup> CSP, Article 55 (1) and Article 14 (5).

<sup>24</sup> CSP, Article 14 (2).

<sup>25</sup> CSP, Article 14 (5).

<sup>26</sup> The Charities and Societies Agency, 'Nine months report of the Charities and Societies Agency presented to the law and administrative standing committee of the FDRE House of representative'. The full report is available on the official website of the Ethiopian Charities and Society Agency at <[www.Chsa.gov.et](http://www.Chsa.gov.et)> accessed on 13 February 2015.

who are currently receiving more than 10% of their annual income from foreign sources and registered as Ethiopian Resident charities and/or societies from engaging in the promotion of human rights and democracy, equality of gender, ethnicity and religion; peace building and efficiency of the democratic institutions. Looking at the nature of those charitable purposes that are proscribed for Ethiopian resident charities, such as the promotion of rights, equality, justice and peace, it can be asserted that the majority of charities are systematically excluded from exerting direct and immediate impact on the democratization process in practice. This is to say that although any organisation has an opportunity to engage in any of the charitable purposes provided it does not take more than 10% of its budget from foreign funds and so not totally excluded from democratic promotion, the reality however was that all those that were re-registered as Ethiopian resident might not exist otherwise if they were not foreign funded.

This is not however to imply that the other charitable purposes listed under Article 14 (2) (a-i) do not contribute to democratization. Any form of independent civic association may contribute to democratization by pluralizing and strengthening the institutional arena and ‘thickening the social capital.’<sup>27</sup> Furthermore ‘education, healthy society and economic might having the benefit of laying a fertile ground for democratization’,<sup>28</sup> the contribution of charities and societies engaged in any of the charitable purposes enumerated above, should not be underestimated. However, the CSP by outlawing the promotion of rights, equality, justice and peace by Ethiopian resident CSOs and foreign charities that receive more than 10% of their income from foreign sources, significantly stultifies the pluralistic contribution of CSOs for democratization through interest representation and rights promotion of vulnerable groups such as children, women and ethnic minorities; the promotion of government accountability and the capacity building of democratic institutions.

*Government’s Justification:*

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<sup>27</sup>Jonathan Fox, ‘How Does Civil Society Thicken? The Political Construction of Social Capital in Rural Mexico’ (1996) *World Development* 24 (6) 1089-1103.

<sup>28</sup>Adam Przeworki and others, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* (Cambridge University Press 2000).

One of the justifications made by the government is that the right to freedom of association is not a human right but a democratic/political privilege that is reserved for citizens alone<sup>29</sup>. The logical result of this position is that since freedom of association is merely a privilege that a government can bestow, limit or deny for foreigners, it has validly done so by limiting the areas of engagement of foreign CSOs and those which are assimilated as foreign by the reason of substantial funding from foreign sources.

Secondly, the CSP also seems to imply that not all Ethiopian charities and societies have equal rights to engage in the democratization process when it singles out only mass based organisations to have the legitimacy to monitor elections. The government also argues that in order for CSOs to have the legitimacy to work on democratization and more notably on electoral democracy, they should necessarily have a larger constituency.

Third, the Ethiopian government also justifies the outlawing of the listed charitable purposes for foreign and Ethiopian resident CSOs as it deems such purposes are ‘political’ in nature.<sup>30</sup> It argues that the engagement of foreign charities in such ‘political purposes’<sup>31</sup> might cause a threat to the sovereignty of the nation as it gives leeway for foreigners to meddle in the internal affairs of the country.<sup>32</sup> Likewise, Ethiopian resident charities and societies that receive a substantial amount of their income from foreign source are prohibited since their engagement in such charitable purposes that are deemed to have a ‘political’ feature might still open an opportunity for an illicit foreign intervention.<sup>33</sup> The overall tone of such politicized argument is that CSOs involved in the areas that are deemed as ‘political’ must truly represent national interests and are not vulnerable to direct or indirect manipulation by

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<sup>29</sup> Ethiopian Ministry of Justice, *Mabrarya (Explanatory note) on the draft CSP* (2009) 16 (Amharic version) Ethiopian Ministry of Foreign Affairs, ‘The Charities and Societies Proclamation and national and international Non-Governmental Organisations in Ethiopia’ <<http://www.mfa.gov.et/internationalMore.php?pg=59>> accessed 10 March 2015.

<sup>30</sup> Ibid.

<sup>31</sup> As per Article 14(2) of the CSP, Purposes that are deemed ‘political’ include ‘(a) the advancement of human and democratic rights; (b) the promotion of equality of nations, nationalities and peoples and that of gender and religion (c) the promotion of the rights of the disabled and children’s right (d) the promotion of conflict resolution or reconciliation (e) the promotion of the efficiency of the justice and law enforcement services’.

<sup>32</sup> Ethiopian Ministry of Justice, above n 29 at 16.

<sup>33</sup> Amnesty International, *Stifling Human Rights Work, the Impact of Civil Society Legislation in Ethiopia* (Amnesty International 2012) 27.



foreigners. This was clearly spelt out in the ruling party policy document issued immediately after the most contested national election held in 2005. The document provides:

*‘NGOs are not organisations established by citizens to protect their rights. These organisations are rather established by individuals mainly for personal benefit, accountable to, and advancing the interests of foreign agencies. Their leaders are not accountable to the staff of the organisations and the beneficiaries. As a result, they cannot have a democratic nature and role... Therefore, the government has to confront the ‘rent seeking’ nature of NGOs, for example, by considering those organisations receiving 15% of their income from foreign sources as foreign organisations and denying them recognition as a means of expression of freedom of association as well as democratic forums.’<sup>34</sup>*

Here, it is good to note that the Ethiopian ruling party (EPRDF) has been in power since 1991 with a firm grip of power to the point that in the last two elections (2010 and 2015) it won 99.6 % and 100% of the federal parliamentary seats respectively. Where the ruling party controls 100% of the legislative mandate, any ideas and doctrines reflected in the party document will be enacted as a law without any challenge. In such a condition, where there is very little difference between the party documents and the government documents, the rationale behind the CSP can be inferred from The EPRDF’s party document issued prior to the passing of the CSP.

Fourthly, in addition to such justifications provided by the Ministry of Justice in the Explanatory notes of the CSP, it is also asserted that the underlying motivation behind the prohibition of such charitable purposes is the perceived-necessity to control the partisan role of CSOs. For instance, Hailegebriel writes:

*‘The Government accuses some of the human rights CSOs and their leaders of abandoning their impartiality and aligning themselves with the Opposition. Consequently the Government resorts to vindictive measures toward the CSO leaders, whom it has labeled as ‘angry elites’ in league with Opposition*

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<sup>34</sup>Ethiopian People Revolutionary Democratic Front (EPRDF), ‘Revolutionary Democracy and Struggle for the Development of Democratic Rule’ (EPRDF 2006).

*leaders. The restrictive legislation also seems to be a manifestation of these vindictive measures.*<sup>35</sup>

As these four points constitute the main justifications provided (both officially and unofficially) for the effective exclusion of nearly 80% of charities and societies from the role of democratization, it is important to evaluate them in terms of the enabling legal framework standards that we set above and the possible impacts of such restriction in the democratization process of the nation. Thus it is relevant to assess whether or not these arguments are sound enough to outlaw the contribution of CSOs in terms of enabling legal conditions that facilitate the democratization role of CSOs. The assessment will therefore raise the following three questions. *Firstly*, is it constitutional to argue that foreigners do not have the right to freedom of association but only a privilege that the government can restrict as it deems necessary? *Secondly*, should CSOs necessarily have larger constituency in order to be engaged in the democratization process? *Thirdly*, even if averting foreign influence can be warranted in order not to disrupt internal politics, can one still plausibly argue that the advancement of human and democratic rights, the advancement of equality, the promotion of conflict resolution and the development of efficiency of the justice sector are ‘political’? Thus the underlying issue to answer in relation to the third point will be what is political purpose? *Fourthly*, how does this across-the-board prohibition on charities and societies receiving more than 10% of their fund compare with the non-partisan requirement that could be imposed on charities owing to their distinct organisational feature?

#### *Freedom of Association: A Human or a Democratic Right?*

As stated above one of the justifications for the exclusion of the Ethiopian resident charities and societies and foreign charities results from the narrow conceptualization of the freedom of association as a democratic right than a human right.<sup>36</sup> The fact that the right to freedom of association is found in the section of the Ethiopian Constitution dealing with democratic rights is also raised to support such justification.

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<sup>35</sup> Debebe HaileGebriel, ‘Restrictions on foreign funding of civil societies’ (2010) *The International Journal of Not-for-Profit-law* 12 (3).

<sup>36</sup> Ethiopian Ministry of Justice, above n 29.

Despite the constitution that guarantees freedom of association for ‘*everyone*’<sup>37</sup> the Ethiopian government maintained that constitutionally guaranteed democratic rights including the freedom of association, unlike human rights, are citizens’ privileges that foreigners cannot invoke outright. The preamble of the CSP also reflects the same outlook when it provides that the purpose of the proclamation is to facilitate the freedom of association of ‘*citizens*.’<sup>38</sup> This is further construed to entail that the government can impose any kind of restriction on foreign charities or local charities as they do not have constitutionally guaranteed freedom to associate. Consequently the CSP prohibited foreign charities engagement in democratization- oriented purposes.

However, the argument that the freedom of association is a political right that only ‘citizens’ are entitled to, does not seem to be a compelling justification. Article 31 of the FDRE Constitution provides that ‘everyone’ has the right to freedom of association. Although the FDRE constitution puts freedom of association under a title of ‘Democratic Rights’, it is nonetheless difficult to argue that all rights stipulated thereunder are systematically organized to be restricted to citizens alone. This can be evidently beheld from the reading of other provisions such as the right to movement and the right to marital, personal and family rights which are also mentioned under democratic rights but also referring to foreigners. Moreover, the inclusion of such fundamental rights as child rights and women’s rights under the same section will also justify that the fact the freedom of association is provided under a specific section of the constitution cannot by itself deprive its status as a human right.

In fact the constitution specifically uses the terminology ‘Every Ethiopian citizen’<sup>39</sup> in provisions that are conventionally the rights of citizens such as the right to own immovable property, the right to vote and to be elected. Whereas it uses general terms as ‘every person’<sup>40</sup> while referring to such rights as freedom of association, freedom of thoughts etc. which are also enshrined as universal rights under international treaties such as the ICCPR. This shows that the stipulation of freedom of association under the

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<sup>37</sup> FDRE Constitution, Article 31.

<sup>38</sup> CSP, Paragraph 1 of the preamble.

<sup>39</sup> FDRE Constitution, Article 38 and 40.

<sup>40</sup> FDRE Constitution, Article 31.

title of ‘Democratic Rights’ does not necessarily imply that freedom of association is a right given only for citizens’ rights.

Furthermore, Article 13 of the constitution also provides that the fundamental human and democratic rights enshrined in the constitution should be interpreted in agreement with the international human right instruments ratified by Ethiopia such as the ICCPR and the UDHR. Hence, also in line with the interpretation of such treaties, it can be concluded that freedom of association is a basic right granted to ‘everyone’ notwithstanding nationality. Thus the legal argument invoked by the government to restrict the engagement of Ethiopian resident organisations and foreign charities based on the narrow abstraction of freedom of association is not plausible. Thus the existence and operation of foreign charities and Ethiopian resident charities receiving foreign fund should not be threatened on the ground that the government can impose ‘any kind of restriction whatsoever’ on foreign charities as they do not have constitutionally guaranteed freedom.

The practical contribution of local and foreign charities and foreign funding for the development and the democratization of the country cannot be questioned.<sup>41</sup> A study shows that just before the enactment of the CSP the civil society sector was mobilizing much more resource from foreign funding than the export of coffee, the country’s major export item.<sup>42</sup> Thus it is evident that the prohibition of foreign funding for the democratic promotion; and the exclusion of Ethiopian resident and foreign charities that constitute 79% of the total of registered CSOs from pursuing democratization-oriented purposes, would stultify the democratization process that was lately initiated.

#### *State Sovereignty*

The limitation on the democratic-oriented purposes of CSOs is also justified by the government as constituting political purposes that threaten state sovereignty. Indeed this argument is not new to Ethiopia, as there is an ‘inevitable contradiction’ between a core promise of a traditional sovereign that excessively guards the sovereign

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<sup>41</sup> For detail discussion on the role of CSO’s on democratization of Ethiopia, see Chapter 3 above.

<sup>42</sup> Dessalegn Rahmato, and others, *CSOs/NGOs in Ethiopia- Partners in Development and Good Governance* (Ethiopian CSO/NGO Task Force 2008).

prerogative and international activities to protect human rights.<sup>43</sup> However, as the concept of the state is evolving, so must the notion of sovereignty that defines the nature and the scope of state authority. Kathryn Sikkink writes:

*'If sovereignty is a shared set of understandings and expectations on the authority of the state and is reinforced by practices, then a change in sovereignty will come about by transforming understandings and practices. In this sense, the expansion of human rights law and policy in the postwar period represented a conscious, collective attempt to modify this set of shared understandings and practices.'*<sup>44</sup>

The democratization process that was initiated in Ethiopia and the quest of CSOs for more operational space is also part of the process of redefining the new contour of state sovereignty, similar to the global trend that recognizes global governance and human rights. However, in this era where governance and human rights have a wider global implication, the introduction of the CSP to exclude international organisations and to limit local CSOs from the realms of governance and human rights serves no purpose other than reinforcing human rights violation and uncontrolled state action which would result in the de-democratization of the nation.

The CSP, which is enacted to jealously guard the state sovereignty, has thus come at the cost of democratization and the protection of the rights of vulnerable groups such as children, women, ethnic and religious minority groups, the poor unable to afford defending their rights and victims of conflicts. The CSP that is so penetrated by state-centric rationality also contradicts the constitutional principle of 'people's sovereignty' as it limits the participation of local CSOs in the democratization process.

This is also part of the global trend practiced by pseudo democracies, which only gives lip service to the protection of human rights and democratic principles. As evidenced by the FDRE constitution the Ethiopian government accepted the legitimacy of international human rights practices and recognizes that the ICCPR, UDHR and other

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<sup>43</sup>Kathryn Sikkink, 'Human Rights, Principled Issue-Networks, and Sovereignty in Latin America' (1993) *International Organisation* 47 (3) 411-441 <<http://www.jstor.org/stable/2706982>> Accessed on 01 May 2015.

<sup>44</sup> *Ibid.*

international treaties ratified by Ethiopia form the integral part of laws of the country. However, the human rights violation and lack of enabling environment for the operation of CSOs makes the ratification of the human rights treaties more of a lip service than a genuine recognition to the international human rights practice. However with the introduction of the CSP, the government even took a backward step in the continuum of the human rights realm by denying the legitimacy of international organizations and local CSOs that raise more than 10% of their income from foreign sources. While the CSP could legitimately exclude foreigners and foreign funding from purely partisan purposes for the purpose of safeguarding sovereignty from foreign intervention, the general prohibition of cooperation with international organizations for the promotion of human rights and democracy is nonetheless unwarranted.

This is not, however, to simplify the argument that the promotion of democratization and the involvement of CSOs in the process will be justified at the cost of state sovereignty. The concept of sovereignty evolves but will never disappear. So the important thing that an enabling legal framework for CSOs must take into account is finding the right balance between state sovereignty and the rights of CSOs to engage in the public domain. The international human right treaties such as the UDHR and the ICCPR shall still serve as a guiding principle setting the balance. Hence in line with the FDRE constitution that permits the interpretation of the fundamental rights as per the UDHR and the ICCPR the freedom of association may be regulated and restricted under the following circumstances. First, foreign charities may be subjected to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public health and safety, and for the protection of the reputation or rights of others.<sup>45</sup>

Secondly, the freedom of foreigners to associate may also be subjected to further restriction in time of emergency as is required by the exigency of the situation.<sup>46</sup> Article 93 of the FDRE constitution provides that state of emergency could be declared where the council of ministers believe that there is an external invasion, a breakdown of law and order which endanger the constitutional order and which could not be controlled by the regular law enforcement agencies and personnel, a natural disaster,

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<sup>45</sup> The FDRE Constitution, Article 9 (4) Article 13 and Article 31; ICCPR Article 22, ECHR, Article 11

<sup>46</sup> The FDRE Constitution, Article 93

or an epidemic occurs.’ The constitution further gives power to the council of ministers under Article 93(4) (b) to suspend political and democratic rights contained in the constitutions. Thus, a threat to state sovereignty in the context of these two conditions shall still serve as a ground to limit CSOs engagement.

### *Mass Based Organisations*

The law also seems to suggest that participation in the democratization process requires CSOs to have a large constituency. In spite of the general unwelcoming approach to CSOs engagement in democratization, it is however interesting to note that the CSP specifically favours and encourages the Ethiopian Mass Based Organisations to be engaged in electoral democracy and the strengthening of democratization process of the country. Article 57 (7) encourages the Ethiopian Mass Based Organisations ‘to actively participate in the process of strengthening democratization and election, particularly in the process of conducting educational seminars on current affairs, understanding the platforms of candidates, observing the electoral process and cooperating with electoral organs’.<sup>47</sup> This provision brings forward a number of issues worth discussing. Firstly, what are mass based organisations? Second why are they singled out for such purpose and how does this provision fit in with Article 14 which allows all Ethiopian charities and societies to be engaged in the promotion of human and democratic rights? Thirdly, do they possess the necessary structure, capacity and even motivation to pursue democratization purposes?

What are mass based organisations is far from clear. Article 2(5) of the CSP defines only what constitutes Mass Based Societies. It defines mass based societies illustratively as to include ‘professional associations, women’s associations, youth associations and other similar Ethiopian societies. The definition does not clearly provide which organisations are considered mass based societies thus leaving the discretion for authorities to decide on the status of an organisation. The proclamation however does not define mass based charities, if any exist. Thus, although Article 57(7) of the CSP uses a more general term ‘mass based organisations’ rather than mass based societies, it is not clear whether Ethiopian charities can invoke this particular provision to support their engagement in election related activities.

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<sup>47</sup> CSP, Article 57 (7)

Related to this, it is relevant to ask if there are any organisations that can be considered as ‘mass based charities? Or is it intentional that the CSP does not define mass based charities and limited itself to mass based societies assuming that there exists no mass based charity? If one answers the latter question to the positive it might imply that the basic feature of mass based organisation is mainly related to ‘representation of membership’ since ‘societies’ are by definition interest groups or membership organisations promoting the interest of their members. Thus it follows that mass based societies are deemed to have the legitimacy to have active participation in the democratization process because they represent their members’ interests.

Nevertheless, Article 57(7) of the CSP uses a more general term ‘mass based organisations’ rather than mass based societies. If this would more straightforwardly refer to, any ‘organisation having mass membership’ it can also be invoked in favour of Ethiopian charities to allow their engagement in the democratization process including voters’ education and election monitoring, notwithstanding lack of definition for ‘mass based charities.’ According to this line of reasoning, CSOs legitimacy for active participation in the democratization process tends to relate to having a larger constituency or membership regardless of whose interest they are pursuing. In either case what constitutes a mass is not clear. So the practical question of what is the minimum number of membership to be considered as a mass based organisation and to have a greater space to be engaged in democratization remains murky. The inclusion of professional associations in the definition adds to the ambiguity as there are many professional associations which have only few memberships and do not meet the requirement of a mass.

Notwithstanding the imprecision of what constitutes mass based organisations there is no doubt that larger constituency and representation enhances the role of advocacy CSOs in democratization having a great outreach. Many of the Ethiopian mass based organisation also have such structure that outreaches from the regional administrations down to the village and group level. Such outreach has a potential in stirring democratization from below and stimulating activism through their representatives in the local governance structures.



While not doubting the greater contribution CSOs can tap from having wider constituency and representation, yet the purpose of Article 57 (7) in singling out mass based organisations is not clear. Although no definition is provided by the law and or explanation is given by the regulating Agency as to what constitute ‘the promotion of democratic rights’ Article 14 allows the engagement of all Ethiopian charities and societies to pursue such charitable purpose. The promotion of democratic rights among others include activities listed under Article 57 (7) such as ‘active participation in the process of strengthening democratization and election, particularly in the process of conducting educational seminars on current affairs, understanding the platforms of candidates, observing the electoral process and cooperating with electoral organs.’ Thus this would raise a question why does Article 57 (7) specifically provide mass based organisations with such right? Is the clause redundant since all Ethiopian charities and societies receiving less than 10% of their fund can engage in those activities and many more that promote democratic rights?

Nevertheless there is no sound justification for the discriminatory selection and privileging of mass-based organisations to engage in such activities. Firstly from a constitutional law perspective it is the right of citizens to be engaged in any lawful purpose including taking active part in the public affairs. Secondly, constituency is just one characteristic that can stimulate the democratization role of advocacy CSOs. Other traits such as autonomy and resourcefulness of CSOs are also at play for the contribution of the sector in the democratization process. However, many of the mass based organisations currently operating in the country lack the autonomous structure, the human and material resource and also the experience to play an active role in the democratization process.

Notwithstanding, their well-entrenched organisational structure many of these organisations with the exception of few operating in the capital city and the Tigray region have very limited capacity in collecting membership fee, fundraising, proposal writing and project implementation.<sup>48</sup> Those organisations also have no or very limited

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<sup>48</sup> The TECS team, ‘Tracking Trends in Ethiopia’s Civil Society (TECS): Mass Based Societies in Ethiopia: Prospects and Challenges’ 2 < [http://www.dagethiopia.org/index.php?option=com\\_docman&task=doc\\_download&gid=293&Itemid=120](http://www.dagethiopia.org/index.php?option=com_docman&task=doc_download&gid=293&Itemid=120)> accessed on 21 May 2015.

experience in such activities as voters' education and election monitoring and democratization and their engagements in such areas are, 'to date no different than was the case prior to the proclamation.'<sup>49</sup> Even the very few organisations with a relatively developed organisational capacity are however registered as Ethiopian resident societies in order to access foreign fund for their development engagements.<sup>50</sup> Thus the contribution of mass based organisations for democratization (at least in the current state) is trifling, if any. Indeed, many of the mass-based organisations being affiliated with the government lack autonomy, an important trait of advocacy CSOs. Indeed in the language of some critics mass based organisations 'being essentially run by the ruling party may rather serve as 'impostors of democracy'.<sup>51</sup> Thus, beside the ambiguity of what constitutes mass based organisations that the government desires to empower and engage in the democratization process, their contribution to democracy is however minimal due to their capacity and lack of autonomy.

On the other hand however, the most active advocacy CSOs in Ethiopia do not have mass constituency, thus being excluded from the realm of this provision. In fact the government often raises small membership base of elite driven approach as the reason for their lack of legitimacy to be engaged in the democratization process. It is true that part of the aspects that seem to have the relevance to explain the role of CSOs in democratization in Ethiopia is the 'elite agency approach' and the 'donor-driven' approach.<sup>52</sup> This is not however peculiar to advocacy organisations. Most CSOs, development and advocacy alike, that are often referred to as NGOs are founded by local elite groups in bringing about change in the development and democratization of the country. While the necessity of participation of grassroots organisations for the consolidation of the democratization process cannot be overstated, the contribution of professional oriented organisations or elite formed advocacy CSOs that can push for specific political or legal reforms or decisions and actions of the government should

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<sup>49</sup> Ibid.

<sup>50</sup> For example, the Addis Ababa youth Association and Addis Ababa Women Association which have a large number of members and have been in operation for several years are both registered as 'Ethiopian Resident Societies'.

<sup>51</sup> Mark Tran, *Ethiopia Curb on Charities Alarms Human Rights Activities*, The Guardian, Jan. 26, 2009 < <http://www.guardian.co.uk/world/2009/jan/26/ethiopia-charities-human-rights>>; see also Carl Gershman and Michael Allen, 'New Threats to Freedom: The Assault on Democracy Assistance' (2006) 7 (2) Journal of Democracy 36-51, 44.

<sup>52</sup> John Higley and others, 'The Persistence of Post-communist Elites' Journal of Interdisciplinary studies (1996) 18 (2) 133-147.

also be recognized. Firstly, such activist groups being in a good position to access information and to understand the impacts of policies and legislations may forward alternative ideas for deliberations by all stakeholders and the government. Such deliberations which engage stakeholders are also indispensable to nurturing democratic culture. Moreover the elites who themselves have a right to form associations and pursue any lawful objective should not however be curtailed to exercise their constitutionally guaranteed freedom even if their contribution to democratization would be minimal, if at all.

Additionally it is also necessary to pay heed to the particular difficulty of advocacy organisations to get a mass support owing to the sometimes intangible nature of their objectives. As R. Allen Hays explains succinctly, the goals of such advocacy organisations contribute to the ‘free rider’ problem- that is, an individual can benefit from the efforts of advocacy groups’ without however being a member or at least without being heavily involved.<sup>53</sup> Moreover, with the declared intention of the government against advocacy organisations, people would be deterred to become members of active advocacy organisations, to fund them or to be associated with them. This therefore stifles the contribution of active advocacy organisations in the democratization process by restricting their role in the promotion of rights of the vulnerable groups, equality of the marginalized society, resolution of conflicts and strengthening the justice sector.

#### **6.4 Political Purposes of CSOs**

The justification for the prohibition of some of the charitable purposes such as the promotion of rights, equality, justice and peace on the ground that they are political also need further examination on what are political purposes? So the focus of the discussion in the forthcoming sections of this chapter are what constitutes political purposes? And why are CSOs prohibited to promote political purposes? The main objective is however to find out how an enabling legal framework should govern the matter. For such purpose, this chapter takes on the experiences of England and Wales

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<sup>53</sup> Allen Hayes, ‘The Role of Interest groups’  
<<http://www.ait.org.tw/infousa/zhtw/docs/demopaper/dmpaper9.html>> accessed 11 March 2015.

as one of the jurisdictions from which, the government claims,<sup>54</sup> that the CSP has drawn its basic canons. It will show how the restriction of the advancement of political purposes by charities in England and Wales is distinct from the CSP and discuss points that can, perhaps, be taken as good practices from this legal system. It also refers to the laws of other countries notably the USA and Australia deemed to have an enabling environment to clarify the notion of ‘political purposes’ and to take good practices that can form an enabling legal environment for CSOs engagement in democratization.

What constitutes political purposes has been subject to a range of interpretations in different jurisdictions. Despite the lack of a precise definition, political purpose has been broadly defined by many jurisdictions to include ‘supporting or opposing candidates for public office, supporting particular political parties, lobbying for or against specific laws, engaging in public advocacy, pursuing interest-oriented litigation, or engaging in policy debates on virtually any issue.’<sup>55</sup> Many countries including old democracies such as UK, USA, Australia, and France govern such ‘political’ purposes of CSOs distinctly from other purposes. In these countries the notion of ‘public benefit’ is an important litmus in determining the engagement of CSOs in political purposes. In such legal systems, while pursuing political purpose is in general lawful, nonetheless, as we shall see below, charities or public benefit organisations that benefit from tax concessions or public grant are restricted from engaging in partisan political purposes.<sup>56</sup>

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<sup>54</sup> Ethiopian Ministry of Justice, *Mabrarya (Explanatory note) on the draft CSP* (2009). In this document, the Ethiopian Ministry of Justice gives an explanation and claimed that the CSP has drawn the practice from other common law countries notably England, Canada, Singapore and Uganda. See the CSA online newsletter on the agency’s official website < [www.chsa.gov.et](http://www.chsa.gov.et) > accessed on 1 May 2013.

<sup>55</sup> International Centre for Non-for-profit law, ‘Political Activities of NGOs: International Law and Best Practices’ (2009) *Internal Journal of Not-for-Profit Law* 12 (1) 8.

<sup>56</sup> In the US, political activity is defined as ‘participate[ing] in, or intervene[ing] in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.’ (IRC 501(c) (3)); in England and Wales, the term political activity were defined by Slade J in *Mc Govern v Attorney-General* as (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy of or particular decision of government authorities in a foreign country’: *McGovern v Attorney-General*, [1982] Ch 321 at 340. See also Charity Commission, *Speaking out Guidance on Campaigning and political activities by Charities (CC9)* (Charity Commission 2008) <<http://www.charity-commission.gov.UK/Publications/cc9.aspx>> accessed 10 April 2015.

### *England and Wales*

In England and Wales, political purposes is understood as constituting (i) furthering the interests of a particular political party; or (ii) procuring changes in the domestic or foreign laws or (iii) procuring a reversal of domestic or foreign governments policies or decisions.<sup>57</sup>

Although everyone's liberty to advocate or promote a change in law by any lawful means is recognized, the pursuit of political purposes by charities is however restricted by a body of case law in England and Wales for three reasons. (i) The incapacity of the judiciary to determine public benefit- it was asserted that the court has no means of 'judging whether a proposed change in the law will or will not be for the public benefit.'<sup>58</sup> (ii) The separation of power argument –builds on the judicial incapacity argument and holds that the restriction on political purposes of CSOs (specifically an advocacy for a change of law) is justified because the power of determining reform of laws should solely lie with the legislator. Thus 'even if the evidence suffices to enable the court to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislators'.<sup>59</sup> (iii) The stultification of the law argument- 'the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed'.<sup>60</sup>

The definition of what constitutes political purpose as provided under the laws of England and Wales is by far liberal compared to Ethiopia. Moreover, it should be underscored that the charity laws of England allow the engagement of non-charitable CSOs to be engaged in any lawful purposes including political purposes. The prohibition of political purposes thus lies only against charities which are provided with special tax privileges owing to the public benefit they offer. Yet, the cogency of

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<sup>57</sup> Historically the restriction on political purposes, particularly the limitation of charities in lobbying for the change of laws came from decisions of the English court in the early part of the twentieth century passed by Lord Paker in *Bowman v Secular Society Ltd* [1917] AC 406 [442]. Later, decisions made by *Slade J in McGovern v Attorney-General*, holding that Amnesty International was not charitable, further expounded the restrictions on political purposes of charities by extending what constitutes political activities in *McGovern v Attorney-General* [1982] Ch 321 [340].

<sup>58</sup> *Bowman v Secular Society Ltd* [1917] AC 406 [442]; *McGovern v Attorney-General* [1982] Ch 321 [340].

<sup>59</sup> *McGovern v Attorney-General* [1982] Ch 321 [506].

<sup>60</sup> *Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 [50] (Lord Wright) and [62] (Lord Simonds).

the argument which has been advanced for the restriction on political purposes of charities in the English legal system is still highly questionable.

Firstly, the rationale that courts lack the capacity to determine whether or not political purposes are of public benefit is unsound because, as Leslie Sheridan noted, ‘there are few people better qualified than judges to assess whether a change in the law would be for the public benefit.’<sup>61</sup> It is what they are established for and in fact, there are many examples of the court judging whether or not a proposed change in the law will be for the public benefit.<sup>62</sup> Sheridan further argues:

*‘Judges must decide cases on the basis of the law as it stands, it does not have to approve the eternal correctness of all our laws...Nothing could be more stultifying of the legal system than the judges always sticking to precedent, never breaking new ground, taking no notice of changing social conditions.’*<sup>63</sup>

The second ground for the restriction on political purposes of CSOs for a reason that the power of determining reform of laws should solely lie with the legislator not to impinge upon the mandates of the legislature is also a superfluous concern. The proposal of a reform in law or policies by CSOs would simply call the attention of the legislature or policy makers and provide them with alternatives. And a mere determination of public benefit in attempts of the law reform does not necessarily imply giving effect to that reform, as the persuasiveness and subsequent legislative actions are not influenced by the court.<sup>64</sup>

Additionally, the court at minimum could recognize that the initiation of public discussions and debates in public discourses are to the public benefit without deciding on the merit of the substance as to whether a particular law or policy reform being sought is for the public benefit or not.<sup>65</sup> As it cannot be determined in advance which opinion will make the most important contribution to the debate, all ideas should be

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<sup>61</sup> LA Sheridan, ‘Charity versus Politics’ (1973) 2 Anglo-American Law Review 47, 58.

<sup>62</sup>The commissioner’s factual findings in the Anti-vivisection case are a good example. See, *Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 [50] (Lord Wright) and [62] (Lord Simonds).

<sup>63</sup> LA Sheridan, above n 61 at 47, 57.

<sup>64</sup>Adam Parachin, ‘Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purpose’ (2008) 45 (4) Alberta Law Review 871, 884.

<sup>65</sup> Charles Rickett, ‘Charity and Politics’ (1982) New Zealand University Law Review 10, 169,171.

assumed to have equivalent importance and to compete in free and transparent public discourse to find the truth.<sup>66</sup>

The third judicial justification for the prohibition of political purposes of charities on the ground that the ‘law could not stultify itself’<sup>67</sup> is not plausible either, because law is not static in nature and its amendment is always anticipated. Indeed dissenting judgments, law reform commissions and rules of statutory interpretations are designed or permitted by law itself recognizing the imperfection of laws.

Thus the rationale for the prohibition of political purposes particularly the restriction of charities advocacy for a change of law or policy even under the English legal system is not justifiable. However, the distinction made between ‘political purposes’ and ‘political activities’ in the laws of England and Wales can be taken as a good practise in determining the rights of CSOs in political engagements. Recent developments of the charity law jurisprudence from a mixture of cases, Charity Commission guidelines and good practices in England endorse that the prohibition on political purposes of charities does not necessarily mean an absolute ban on their political activities. Meaning, even though charities cannot pursue ‘political purposes’ directed at furthering the interest of any political party; or securing, or opposing, any change in the law or in the policy or decisions of authorities, they can however be legally engaged in ‘political activities’.<sup>68</sup>

Thus, as long as political activities are not the continuing and sole purpose of a charity in England and Wales, it can undertake a range of political activities or campaigning<sup>69</sup> for either a change in the law or implementation of existing laws necessary to further or support its charitable purpose.<sup>70</sup> Thus campaigning by charities, ‘calling on a government to observe certain fundamental human rights and for the practice of torture to be abolished; or calling on authorities to ensure that all children with special

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<sup>66</sup> Christopher McCrudden, ‘The Impact of Freedom of Speech’ in Basil Markesinis (eds), *The impact of the Human Rights Bill on English Law* (Oxford University Press 1998) 85,105.

<sup>67</sup> *Anti-vivisection Society v Inland Revenue Commissioners* [1948] AC 31(HL) 62.

<sup>68</sup> *McGovern v Attorney-General* [1982] Ch 321 [340]; see also Charity Commission, CC9, C5.

<sup>69</sup> Campaigning is referred to as ‘awareness-raising, educating or involving the public by mobilizing their support to address a particular issue or to influence or change public attitudes.’ Campaigning also refers to activities which aims to ensure that existing laws are observed (Charity Commission, CC9 C4) ; See also *Re Koeppler's Will Trusts* [1986] Ch 423.

<sup>70</sup> Charity Commission, CC9 D1.

educational needs receive the support they are legally entitled to; are lawful charitable activities.<sup>71</sup> Charities can also support or oppose a bill introduced by the parliament if linked to their charitable purpose; provide alternative bills or publish comments on proposed bills or proposed changes in the law or government policy; provide members of parliament or party representatives regarding the implication of proposed laws or government policies which can be an instrument for a debate on particular political issues or promote a change in the legislation or public policies both in the country and abroad.

Thus, charities may carry out political activities related to change of the law or policy and devote their resources thereto provided it is not the charity's *sole* purpose and it is made to support and further its primary charitable purpose. Indeed a charity can lawfully invest *most* or even *all* of its resources on political activities in furtherance of its charitable purpose, for a particular period of time if it believes that its charitable purpose can be most effectively pursued in that manner.<sup>72</sup> The test is that political activity is not and does not become the only reason for the charity's existence. Thus, if the trustees believe that the purpose of the charity will be best served or succeed with the change in the law or policy of the government, they can involve themselves in campaigning or public awareness activities investing all or most of their resources on political activities.<sup>73</sup>

Nevertheless, when it comes to a more 'partisan' facet of political activities of CSOs that is related to directly or indirectly supporting political parties, the law is less compromising. Charities cannot directly support any particular political party or candidate; provide financial or in kind support; or organise a campaign against or in support of any candidate to a public office or a political party before an election.<sup>74</sup> However, it does not mean that they are not allowed to engage with political parties at all. A charity can support a particular policy advocated by a political party or candidate as long as the policy is in support of its charitable purposes.<sup>75</sup> Charities therefore can

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<sup>71</sup> Charity Commission, CC9 C4.

<sup>72</sup> Charity Commission, CC9 D8.

<sup>73</sup> Charity Commission, CC9 D8.

<sup>74</sup> *Bonar Law Memorial Trust V IRC* (1933) 49 TLR 220 (Conservative Party); *Re Hopkinson* [1949] 1 ALL ER. 346 (Labour Party); *Webb v O'Doherty* (1991) (1991) 3 Admin LR 731.

<sup>75</sup> Charity Commission, CC9 E2.



invite political parties or individual candidates to speak at public meetings on public issues the charities are campaigning for; invite party representatives or candidates to debate on issues which the charities are pushing for; invite party representatives to speak at their conference organised in support of their purposes; publish the views of politicians and of government ministers and election candidates where these views relate to and support the charity's purposes in some way<sup>76</sup> or make their facilities available for political parties or candidates to hold public meetings charging them a reasonable amount of money.<sup>77</sup> Hence in general charities can engage in any activity that promotes their purposes other than those activities which are categorically partisan.

In supporting a policy advocated by a government or opposition parties however, charities should always maintain their neutrality not to lose their reputation as independent organisations. In dealing with the political parties, the only thing a charity should do is to ensure that they are not encouraging or supporting any particular political party or candidate as that would amount to engaging in a 'partisan' political activity which is prohibited for charities.<sup>78</sup> The principle is therefore that 'charities can try to influence the policies of political parties to the advantage of their constituencies or beneficiaries but they must not assist any political parties or candidates to be elected.'<sup>79</sup>

### *United States*

In the United States, the restrictions on political purposes of charities are rather statutory and are essentially related to the U.S tax system. The U.S legal system defines political purposes to constitute political campaign on behalf of (or in opposition to) any candidate for elective public office; and lobbying for a change of law.<sup>80</sup> Thus,

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<sup>76</sup> Charity Commission, CC9 E3.

<sup>77</sup> Charity Commission, CC9 G5.

<sup>78</sup> Charity Commission, CC9 E1.

<sup>79</sup> Charity Commission, CC9 E2.

<sup>80</sup> The absolute statutory prohibition on political campaign has been stressed on several occasions by the court: See for example, *The Ass'n of the Bar of the City of N.Y. v. Comm'r*, 858 F. 2d876, 881 (2d Cir, 1988) *cert denied*, 490 U.S. 1030 (1989); *United states v Dykema*, 666 F.2d1096, 1101 (7<sup>th</sup> Cir 1981) *cert denied*, 456 U.S.983 (1982); the IRS (See, e.g., I.R.S. Tech. Adv. Mem.99-07-021 (May 20,1998) ('The prohibition against participation or intervention in a political campaign is absolute') and the Congress: See, e.g., H.R. REP. No. 13270 (1969) reprinted in 1969-3 C.B. 200, 221; S. REP. No. 91-552, at 47 (1969) reprinted in 1969-3 C.B. 423, 454 (stating that 'no degree of support for an individual's candidacy for public office is permitted').

contributions to political campaign funds; or public statements of position (verbal or written) made on behalf of the organisation in favour of or in opposition to any candidate for public office; engagement of the charitable organisation agent in political activities at its official functions or through official publications clearly violate the prohibition against political campaign activity and may result in denial or revocation of fiscal privileges<sup>81</sup> and imposition of tax on the 'political expenditures' i.e. expenses incurred in the engagement of prohibited political activities.<sup>82</sup> The tax is imposed not only on the charitable organisation but also on its managers.<sup>83</sup>

Although sharply restrictive on political campaigning public charities are nevertheless permitted to be engaged in activities such as 'voter education, presenting public forums for candidates, publishing voter education guides, voter registration and get-out-the-vote drives, distributing information about candidates, recording votes' if conducted in a nonpartisan manner.<sup>84</sup>

Furthermore, public charities can also be engaged in lobbying activities as long as they devote merely an '*insubstantial*' part of their activities to attempt to influence the legislation.<sup>85</sup> By 'insubstantial' it is meant up to 20% of the overall purpose related expenditures for small organisations; and a slightly more than 5% but at any case not more than one million dollars for large organisations.<sup>86</sup> However 'insubstantial' activities may also be defined case- by- case by the concerned authorities (Internal Revenue Service) for all other charitable organisations that didn't opt for the specific expenditure test.<sup>87</sup> Appeals to the public to contact their legislator (known as grass-

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<sup>81</sup> Treasury Regu, s 1.501 (C) (3)-(iii) (2006); See also, IRS. Tech. Adv. Mem. 91-17-001.

<sup>82</sup> IRC, s 4955 (d) (1) (2006) defines Political expenditure as '...any amount paid or incurred by a s501(c) (3) Organisation in any participation in, or intervention in (including the publication nor distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office'.

<sup>83</sup> Sec IRC, s 4955 (a) (1) (2006).

<sup>84</sup> IRS, 'The restriction of Political Campaign Intervention by Section 501 (C) (3) Tax exempt organisations' < [http://www.irs.gov/Charities-and-Non-Profits/Charitable-Organisations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501\(c\)\(3\)-Tax-Exempt-Organisations](http://www.irs.gov/Charities-and-Non-Profits/Charitable-Organisations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501(c)(3)-Tax-Exempt-Organisations)> accessed 08 March 2015.

<sup>85</sup> IRC, 'Lobbying' <<http://www.irs.gov/Charities-and-Non-Profits/Lobbying>> accessed 06 March 2015.

<sup>86</sup> Internal Revenue Service (IRS), 'Publication 557, Tax Exempt Status for your Organisation' (2011) 49 <http://www.irs.gov/pub/irs-pdf/p557.pdf>> accessed 13 May 2015.

<sup>87</sup> IRC, s 501(h) (2000).

roots lobbying) are subject to a separate cap one-fourth the size of the restriction on direct lobbying.<sup>88</sup>

Unlike charitable organisations, social welfare organisations can be engaged in lobbying activities or activities designed to influence legislation<sup>89</sup> in furtherance of their public policy purposes with no restriction.<sup>90</sup> Social welfare organisations can also engage in election campaigning although it should not be their primary purpose.<sup>91</sup> However social welfare organisations can be fully engaged in political campaigning at a cost of losing the tax deduction offered to their donors.

In general, the subsidy rationale underpins the legal system of the U.S.A on matters of political engagement of public benefit organisations. The subsidy rationale asserts that public benefit organisations receive tax benefits as an effective way of indirectly subsidizing public benefit purposes.<sup>92</sup> One of the major arguments against CSOs political engagements therefore rests on the basis that states must not subsidise political activities.<sup>93</sup> This rationale known as the ‘non-subvention principle’ was first set out by Justice Learned Hand in *Slee v Commissioner of Internal Revenue*: ‘Political agitation... must be conducted without public subvention; the Treasury stands aside.’<sup>94</sup> According to the ‘subsidy argument’, charities should not be involved in political activities as there is no way of knowing whether the tax payer who indirectly subsidized their activity by contributing to the public fund supports or oppose their political activities.<sup>95</sup>

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<sup>88</sup>See the IRC official website at <<http://www.irs.gov/charities/article/0,,id=163392,00.html>> accessed 06 March 2015.

<sup>89</sup>Legislation in this case among others include actions by Congress, any state legislation, any local council, or similar governing body, with respects to acts, bills, resolutions, or similar items but does not include actions by executive, judicial, or administrative bodies: IRS, ‘Lobbying <<http://www.irs.gov/Charities-and-Non-Profits/Lobbying>> accessed on 2 April 2015.

<sup>90</sup> Rev Rul 68-656 1968-2 CB 216- (i) contacting, or urging the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or (ii) advocating for the adoption or rejection of legislation’.

<sup>91</sup> Rev Rul 69-385, 1969-2 CB 123; See also Rev 81-95, 1981-1 C.B.332.

<sup>92</sup>Laura Chisolm, ‘Politics and Charity: A proposal for Peaceful Coexistence’ (1990) 58 George Washington Law Review 308,320.

<sup>93</sup>Ibid, 338-41.

<sup>94</sup>*Slee v Commissioner of Internal Revenue* 42 F 2d 184 (2<sup>nd</sup> Cir 1930) at 185.

<sup>95</sup> Perri 6, *Restricting the Freedom of Speech of Charities: Do the Rationales Stand Up?* (Demos 1994).

Even this argument is not without criticism. Firstly, the non-subvention principle seems unrealistic as it is not practical to say that a subsidy should be given only to causes that all tax payers approve of.<sup>96</sup> Though mandated through elections, governments also spend tax payers' money on programmes which many voters including their own constituency may not agree or approve but the subsidy argument fails to recognise this. Secondly, charities are not the only institutions which receive subsidies from government in the form of tax cuts or other privileges. Individuals and commercial enterprises also receive subsidies from government but the latter are not restricted from engaging in political activities whether the tax payer supports or opposes the view expressed by them.<sup>97</sup> Thus the law by restricting only charities from political engagements should not unwarrantedly apply double standards as there should be equality between organisations and fiscal policies should address equality.

Hence, the limitation on the political purposes expenditure particularly on advocacy or lobbying activities is unwarranted since the private benefit rationale is not utterly compelling. Nonetheless, as best practice the Ethiopian legal system can take the example of differentiating between what constitutes partisan and non-partisan political purposes; and the 'insubstantial engagement' rule only for CSOs that receive financial concessions from the public fund, if at all.

### *Australia*

A more enabling practice in governing the political purposes of CSOs can be taken from Australia. Influenced by the English law, charities in Australia were not allowed to have a political purpose without sacrificing their charitable status.<sup>98</sup> However, the High court in its landmark decision in *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*') held that an organisation was not necessarily excluded from charitable status because it had a main or a dominant political purpose.<sup>99</sup>

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<sup>96</sup> Elias Clark, 'The Limitation on Political Activities: A Discordant Note in the Law of Charities' (1960) 46 Virginia Law Review 439, 462-463.

<sup>97</sup> Ibid.

<sup>98</sup> *Royal North Shore Hospital of Sydney v Attorney General* [1938] 60 CLR396.

<sup>99</sup> *Aid/Watch Incorporated v. Commissioner of Taxation* [2010] HCA 42. The case was instituted by Aid/Watch an incorporated association that research, monitors, reports and campaigns on the effectiveness of Australian Government's and multilateral overseas aid programmes when denied charitable status by the Australian Taxation office for its 'political activities'.

The High court in this case has decided two things with certainty. First, the rule that political purposes may not be charitable was repealed. Secondly, the court held that ‘the generation by lawful means of public debate...concerning the efficiency of foreign aid directed to the relief of poverty’ is a charitable purpose<sup>100</sup> within the fourth head of the *Pemsel* charitable purposes, as it contributes to purposes beneficial to the community.

However, the court has refrained from going further to discuss on the generation of debates about the activities of government falling outside the four *Pemsel* charitable heads. One may therefore argue that it is still debatable whether the generation of public debate about matters not falling within the four chartable heads could be considered as charitable purpose.

Secondly, the court’s decision did not go further and decide that generating public debate about any or every government activity or policy on a particular subject matter, would fall within the fourth *Pemsel*/head. As a result, it is difficult to know whether the generation of public debate about a particular government activity or policy that is beyond existing heads of charity can be a charitable purpose.

Nonetheless, what needs to be underscored and what is remarkable of this case that it qualifies as a good state practice is the fact that the High Court refers to the constitutional provision in deciding the case. The court in a majority vote determined that the purpose for which the charity was established although political is within the constitutional realm of Australia and advances a ‘public benefit’ to the community.

Explaining the need of public debate between the government and electorate in a constitutional democracy, the court held that even if Aid/Watch employed political tactics in its operations as a charity, it benefited the public by contributing to public welfare. The court in particular determined that activities and purposes of Aid/Watch are charitable because the generation of public debate on aid efficiency was beneficial

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<sup>100</sup> *AID/WATCH* [2010] HCA 42, [47].

to the community<sup>101</sup> and ‘do not contradict any established system of government and the general public welfare.’<sup>102</sup>

Thus the Australian high court decision fundamentally challenged the underpinning and long-established rationale behind the notion of disqualification of charities from political purpose’ that assert ‘the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. It did so, by establishing in this particular case, the existence of the public benefit of the political purposes of Aid/Watch and deciding that the purposes and activities of Aid/Watch should not fall within the ambit of an exclusion of ‘political objects.’

Apart from undermining the rationale behind the rule against political purpose, the court has taken an advanced position that underlies the supremacy of the constitution. It relied on the importance of communication on matters of government and politics, enshrined in the Australian Constitution and held that in Australia, political purposes of charities are permitted because there is no general constitutional doctrine which excludes ‘political objects’ from charitable purposes.<sup>103</sup> The court was of the view that the origin of the apparent disqualification of ‘charities’ from pursuing political purposes was decided in a context which did not take the Australian Constitution into account, including the inherent rights of constituents for agitation and communication about matters affecting government, politics and policies. The court noted that the constitution was based on representative and responsive government, including a universal adult franchise, and provided for constitutional change through popular referenda, and thus assumed as an ‘indispensable incident’ communication between the executive, legislature and electors on matters of government and politics.<sup>104</sup> The system itself therefore requires ‘agitation’ for legislative and political change, and assumed that this would contribute to public welfare.<sup>105</sup> Thus, the long-established rationale that asserts ‘allowing agitation by charities for a change of laws would ‘stultify’ laws’ has been well challenged by the decision of the court based on constitutional arguments.

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<sup>101</sup> *AID/Watch* (2010) 241 CLR 557 [47].

<sup>102</sup> *AID/Watch* (2010) 241 CLR 557 [46].

<sup>103</sup> *AID/Watch* (2010) 241 CLR 557 [47]-[49].

<sup>104</sup> *AID/Watch* (2010) 241 CLR 539 556 [44].

<sup>105</sup> *AID/Watch* (2010) 241 CLR 556 [45].

The court also stressed that the pursuit by charities for the enactment, amendment or nullification of laws rather than ‘stultifying’, would allow dynamism of the law as it fits the society. It noted that the law of charities has evolved to accommodate new social needs in addition to providing services such as food for the poor, and shelter for the homeless. In the modern political world charities also monitor and comment on government policies regularly and are consulted by governments ‘to take a view’ on policy initiatives and make submissions.

The High Court judgment confirms that it is sensible that a charity assisting the homeless could provide an important contribution to public policy in relation to public housing. As such the distinction between politics and charity is not clear; and it is no longer possible to imagine a charity that would abstain from policy debates and the pursuit of charitable purposes has become inseparable from policy advocacy. Even though charities in England can pursue the same ‘charitable activity’ the Australian court decision has taken an advanced step towards the increased capacity of charities in campaigning and advocacy activities by allowing them to have an advocacy role as their sole purpose.

Hence it empowers charities to have an increased ability to carry out campaigning and advocacy activities, rather than just participating in government-led reforms or providing educational information on relevant issues. Such activities include advocacy for improvement in the effectiveness of government policies relating to relief of poverty, advancement of education, advancement of religion or other purposes recognised as beneficial to the community. These activities must however be directed towards public benefit purposes since ‘disqualification of charitable purpose may still occur where a purpose does not contribute to public welfare, probably by reason of the particular ends and means involved’ as noted by the court.<sup>106</sup>

It has been a long requirement of the common law that activities and purposes of charities that offend public policy principles are not charitable.<sup>107</sup> An entity’s purpose

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<sup>106</sup> *AID/Watch* (2010) 241 CLR 557 [49].

<sup>107</sup> Gino Dal Pont, *Law of Charity* (Lexisnexis 2010) 72-75.

is not beneficial if it is contrary to public policy,<sup>108</sup> is unlawful or is carried out by unlawful means.<sup>109</sup> Thus, objects which threaten national security such as terrorist activity, religious purposes that place its adherents at risk or which are illegal in some way, education for illegal or harmful purposes or to encourage illegal activities and discrimination against particular classes of people which goes beyond what is allowed by law<sup>110</sup> are all deemed not to have public benefit, thus prohibited to be carried out by charities.

In general, the High court decision of Australia adds a practical significance to the sector as it allows formation of advocacy charities whose sole purpose is advocating for changes in the law, government policies or any other political objectives and their open and active engagement without fear of the loss of their charitable status. The decision also broadens up the scope an organisation can advocate on behalf of members' interests.

Moreover, from a point of view of development in jurisprudence, it clearly spotlighted that the supremacy of constitutional and democratic principles is indispensable in determining whether charities should or should not have political purposes. The constitutional supremacy can be taken as a best practise in Ethiopia, in the implementation of the CSP in line with the FDRE constitution. Hence any subordinate laws of Ethiopia should be framed within a context that CSOs should be permitted to advance any lawful purpose that 'does not subvert the constitutional order' or that threatens the public safety and security.

Hence in general the following can be selectively taken as a best practice from the above- discussed legal systems. Firstly and most importantly, CSOs should be allowed to be engaged in any lawful purposes; and any restriction on the engagement of CSOs should be made only in accordance with the constitution of the country. To this one may also add the international human right treaties such as the ICCPR which as a

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<sup>108</sup> *Perpetual Trustee Co (Ltd) v Rovins* (1967) 85 WN (Pt. 1) (NSW) 403, 411. See also *Thrupp v. Collett* (No 1) (1858) 53 ER 844.

<sup>109</sup> *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1997] 1 NZLR 382,395.

<sup>110</sup> Gino Dal Pont above n 107.



matter of principle upholds that CSOs should be allowed to pursue any lawful purpose that does not ‘threat public safety or disrupt the values of democratic society.’<sup>111</sup>

Hence in Ethiopia, similar to Australia political purposes of charities should be allowed because there is no general doctrine in the FDRE constitution which excludes ‘political objects’ from charitable purposes.<sup>112</sup> To the contrary, all those charitable purposes proscribed for Ethiopian resident charities such as the promotion of rights, equality, justice and peace are within the realm of the FDRE constitution and advance a ‘public benefit’ to the community.

Nonetheless reasonable legal exceptions could be made to this general principle. Although such constitutional guarantees exist for all sorts of associations including political parties, its application for autonomous CSOs should be practically limited. The notion of CSO as we have conceptualized it under the second chapter refers to those that do not compete for political power and do refrain from any partisan politics. The rules and regulations that govern autonomous CSOs should thus be distinct from the laws that regulate political parties for a number of reasons including the financial concessions to which independent CSOs are often entitled to. This is also reflected in the statutory laws or precedents governing political purposes of CSOs we have seen above.

Thus, the second point that we can draw from the abovementioned practices is that charities or public benefit organisations benefiting from tax concessions or public grant may be restricted from pursuing only partisan political purposes. Restricted political purposes should therefore be narrowly defined to include only partisan purposes such as supporting or opposing candidates for public office and supporting particular political parties. The restriction or exclusion of charities should thus be limited only against such narrowly construed partisan purposes. However charities should still be allowed to have constructive engagement with political parties or individual candidates or organize a debating sessions for them to debate on matters that the charities are campaigning for while keeping their neutrality.

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<sup>111</sup> ICCPR, Article 22 (2).

<sup>112</sup> *AID/Watch* (2010) 241 CLR 557 [47]-[49].

They should also be permitted to engage in public advocacy or lobbying for or against specific laws, pursuing interest-oriented litigation, or engaging in policy debates should not be restricted even for charities or public benefit organisations receiving benefit from the public purse. This is because as the Australian court argues, the purpose of such CSOs as communication channel between the electorate and the legislators or the executive is indispensable for the democratization process. Thus, allowing any non-partisan activity is relevant to give a wider space of operation for charities in the public affairs and democratization process of the country without however undermining their independence by indulging in party politics which is conventionally the realm of political parties.

The allegation of the Ethiopian government that CSOs cannot resist the neoliberal ideology of their foreign donors is not substantiated by any evidence. Yet, even if this assertion is assumed to be true, it would only be constitutional to bring all different sorts of economic and socio-political ideologies including neoliberalism to a public debate as the public should be the final decision maker in choosing not only policies and legislations but also the system of governance. Indeed, this feature of constitutional democracy that engages the public on matters of government, politics and policies is what the FDRE constitution upholds as the rights of citizens. The mere reasoning that charities and societies would bring neoliberal ideology shall not therefore fall within the ambit of an exclusion of ‘political objects.’ Thus CSOs should be allowed to openly advocate for changes in the law, government ideologies and policies. Hence, it is constitutional for any charity or society not only to implement service-delivery projects in accordance to the development policies of the government but also to challenge such policies

## **6.5 Political Purposes of CSOs under the Ethiopian Legal System**

As mentioned above the CSP outlaws the engagement of Ethiopian resident charities and societies and foreign charities from pursuing democratization-oriented charitable purposes on the ground that they are ‘political purposes’. The construal of political purposes and the rationale for the restriction is nonetheless different from what we have seen above in other legal systems because among other reasons, even the very definition of charities in the Ethiopian context does not imply an organisation receiving any financial concession from the public purse. Any civil society organisation

exclusively established for charitable purpose and gives benefit to the public is considered as a charity under the CSP.<sup>113</sup> However these organisations cannot be compared with charities in England and Australia or public charities of the USA as they do not receive any particular tax concessions or other benefits. This is also true for societies. Indeed there is no systematic tax concession or public grant benefit for the sector as a whole.

Thus there is no legal ground that justifies a precise parallel argument that the Ethiopian resident charities and societies should be restricted from pursuing political purposes owing to the benefits they receive from the public purse. Yet, a comparable analogy can be made between public fund and tax concession granted to the public benefit organisations in other countries with that of foreign funding in Ethiopia. Thus, it may be argued that foreign fund solicited and received in the name of the Ethiopian public at large through international cooperation agreements can be treated as a public fund. Hence with the same reasoning as above, it can be asserted that foreign fund should not be expended to promote 'partisan' political purpose, notwithstanding the legality of such purpose. If the public fund of the state should not promote partisan objects, so should be foreign fund perhaps for a stronger reason of state security. Even with such an extended analogy drawn between foreign funding for Ethiopian CSOs with that of the financial concession granted to charities and public benefit organisations elsewhere, the prohibition of foreign fund will be justified only for partisan political purposes.

Nonetheless the main problem with the CSP lies in the definition of what constitutes political purpose. Certainly the promotion of rights, equality, justice and peace as we have seen above do not constitute political purposes, and cannot be considered as partisan. Indeed it can be argued that there is no other notion as rights, equality, justice and peace that have universal value to the level that they constitute the cornerstone of the universal declaration of human rights. Hence such concepts being conventionally representative they are by definition non-partisan. Therefore, even if the argument that prohibition of foreign aid for the promotion of partisan political purpose can be justified, receiving aid for the promotion of such charitable purposes as rights, equality,

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<sup>113</sup> CSP, Article 14 (1).

justice and peace should not be restricted. Although the advancement of such purposes by their nature engages the public it is nonetheless non-partisan public engagement.

Moreover, the restriction on the advancement of such charitable purposes cannot pass the test that needs to categorically ensue in order to justify the constitutional restriction imposed on freedom of association; i.e. legal prescription, threat to public safety or security and necessary in a democratic society. Generally speaking, the advancement of such charitable purposes cannot be a threat to public safety and security. To the contrary, it can be assumed that they have public benefit. This can be challenged since the CSP itself stipulates such acts as charitable purposes presumed to have public benefit as long as such purpose can generate an identifiable benefit to the public without exclusion of those in need.<sup>114</sup> Indeed charitable purposes such as the promotion of rights, equality, justice and peace by their very intangible nature benefit the public at large without necessarily excluding any person or group who is in need of it even if they are not actively involved or specifically targeted by the activities of a particular charity pursuing such purpose. Therefore, any advocacy work for the promotion of human rights and equality, peace and justice having a public benefit as per the CSP, cannot be considered as having public security threat.

Furthermore, the promotion of rights, equality, justice, as well as conflict resolution and reconciliation being the underpinning of democratic principles and democratic culture the restriction of CSOs engagement in such purposes cannot be justified as a ‘necessity for a democratic society’.<sup>115</sup> Hence the restriction of such purposes cannot be considered as justified as political to deny the right of people to associate for such purpose.

On the other hand it is worth noting that as the CSP does not specifically rule out partisan politics such as support to a particular candidate or party, it rather opens a leeway for at least the Ethiopian societies that constitute 12% of the Ethiopian CSOs to engage in partisan purposes so long as they do not receive foreign fund. This implies for example, that an Ethiopian society raising not more than 10% of its fund from foreign source for the promotion of women’s rights, may support a political party that

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<sup>114</sup> CSP, Article 14 (3).

<sup>115</sup> ICCPR, Article 22 (2).

pledges better policy for women and lobby for its election. Hence, the CSP fails to effectively limit the engagement of Ethiopian societies from pursuing partisan politics that could compromise the political insulation of societies that raises funds locally. On the other hand, however it unwarrantedly restricts nearly 80% of other CSOs from what was supposed to be non-partisan charitable purposes<sup>116</sup>.

With the wider interpretation of what constitutes political purposes and the exclusion of the majority of CSOs from engaging in such purposes, in no doubt would stultify the contribution of CSOs to the democratization process. It is the aim of the following section to merely illustrate in brief, the possible implication of the CSP on democratization because of the restrictions imposed on CSOs engagement on the (i) promotion of human and democratic rights and the rights of vulnerable groups; (ii) conflict resolution and reconciliation; equality of gender, (iii) the promotion of gender, religious, and ethnic equality; and the promotion of the justice and law enforcement services.

#### *Promotion of human and democratic rights*

The CSP affects the democratization process as it prohibits many of the CSOs from being engaged in the promotion of human and democratic rights, and the rights of children and the disabled.<sup>117</sup> The importance of recognition, protection and enforcement of human rights cannot be overstated as a prerequisite for enhancing the democratization process. Indeed the respect of civil and political rights and fair and free election are the preliminary requisites for a democratization process of a nation. In this regard the contribution of many of the advocacy CSOs is substantial. Just to mention an example of their contribution it would suffice to state that the Ethiopian Women Lawyers Association, Action Professional Associations for People (APAP) and Ethiopian Human Rights Council reached 22, 189 most vulnerable segments of society who otherwise would have suffered serious human rights violation, through the provision of pro bono legal aid services, only in just a year before the enactment of the

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<sup>116</sup> The Charities and Societies Agency report, <[http://www.chsa.gov.et/c/document\\_library/get\\_file?uuid=92111137-7114-4fce-92d3-53b9cd550242andgroupId=10136](http://www.chsa.gov.et/c/document_library/get_file?uuid=92111137-7114-4fce-92d3-53b9cd550242andgroupId=10136)> accessed June 2013> accessed on 15 May 25, 2015

<sup>117</sup> CSP, Article 14 (2) (J) (I).

CSP.<sup>118</sup> However a year after the coming into force of the CSP, APAP was forced to completely forgo its legal aid programme and the whole of its human rights promotion objective and the remaining two organisations were affected from the considerable reduction of their financial and human resource. Thus the promotion and respect of rights of citizens will be seriously curtailed. Also with the closing down of many of the regional branch offices of the Human Rights Council (the former EHRC), the only charity that investigates, monitors and reports on human rights violations in the country, and the human rights violations that are rampant in the regions might continue unabated and hence threaten the democratization process of the country.

### *Conflict Resolution and Reconciliation*

The CSP also affects the democratization process as it restricts major actors in the peace process from engaging in conflict resolution activities. Ethiopia is a country that experienced active conflict in each of the ten years between 2002 and 2011 and is still classified as one of the fragile states until 2012.<sup>119</sup> Thus the contribution of any actor including CSOs in conflict resolution and reconciliation is enormous. Although there does not seem to be a universal consensus on the contribution of CSOs for the democratization process, most agree that they have the potential to serve as a space where values such as trust, tolerance and cooperation can be cultivated. Such values are particularly pertinent for multi-ethnic, multi-religious country like Ethiopia where reconciling differences is indispensable.<sup>120</sup> Reconciliation process and peace would in turn help to advance the democratization process through the development of pluralism and tolerance.

The contribution of the development wings of the major religious institutions in Ethiopia such as the Ethiopian Orthodox Church Development and Inter Church Aid Commission (EOC/DICAC), the Ethiopian Evangelical Mekane Yesus Church (EECMY) Peace Office and the Ethiopian Muslim Development Association (EMDA) having both the largest constituency as part of the religious institution and having the

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<sup>118</sup> Summarized from the 2009 Annual Reports of the three Organisations <[http://www.kirkensnodhjelp.no/PageFiles/787/%C3%85rsrapport\\_Etiopia\\_2009.pdf](http://www.kirkensnodhjelp.no/PageFiles/787/%C3%85rsrapport_Etiopia_2009.pdf)> accessed on 11 May 2015.

<sup>119</sup> Global Humanitarian assistance, <<http://www.globalhumanitarianassistance.org/countryprofile/Ethiopia/>> accessed 12 April 2015.

<sup>120</sup> Ethiopia's population is highly diverse, containing over 80 different ethnic groups. It also represents a number of faiths including Orthodox Christian, Protestant, Islam, traditional beliefs and others.

technical expertise as a charity had a great role to play in the conflict resolution and peace building process. In individual and concerted effort they addressed a number of inter-state ethnic and religious conflicts, and mediated in intra-state conflicts with neighbouring nation.

However, the CSP seriously curtails the conflict management and peace building activities of these organisations owing to the treatment of the development wings of these religious institutions as distinct entities from the diaconal part and the consequent application of the 90/10 local fundraising requirement. Owing to the fact that these organisations relied on foreign aid for their development and peace projects, similar to other charities, the peace projects are seriously compromised owing to the financial constraints.<sup>121</sup> As Jean Grugel puts it, ‘violent ethnic conflict violates the basic principle of democracy as it results in the embedment of ascriptive identities and triumph of uncivil nationalism which conflict with the democratic ethos.’<sup>122</sup> Hence with the effective exclusion of such important actors, who have both the moral influence and the technical expertise, of the peace building process, the democratization of the country could be decelerated as violent conflicts threaten the essence of democratic culture and principles.

#### *The promotion of gender religious and ethnic equality*

The restriction of promoting religious, ethnic and gender equality for the majority of CSOs in Ethiopia is also another factor that affects the democratization process. The strengthening of democracy demands that the rights of minority groups within the country are constitutionally guaranteed; and that diverse ethnic groups coexist peacefully. Indeed, CSOs are particularly suitable for the representation and interest articulation of the minority groups whose interest could often be marginalized by the state that is influenced by the majority vote. Ethiopia, in particular hosting more than eighty ethnic groups; and a population with Christianity, Islam and traditional beliefs CSOs could have economized the transaction cost of democratization by identifying,

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<sup>121</sup> Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the Annex to Human Rights Council Resolution 5/1 – Ethiopia, Section 5, Parg 43 < <http://www.refworld.org/topic,50ffbce51b1,50ffbce5208,4acc63fc0,0,,ETH.html> > accessed on May 01, 2015.

<sup>122</sup> Jean Grugel, ‘*Democratization: A Critical Introduction*’ (Palgrave 2002) 79.

articulating and communicating the socio-economic and political demands which otherwise might remain dormant or be expressed in ineffective or non-peaceful ways.

The diversity of the nation also particularly demands the promotion of equality of the different groups for their peaceful coexistence. The harmony and solidarity of such diverse group is quite indispensable since internal stability is an essential prerequisite to strengthen democratization. It is argued that conflict can pose serious dilemmas for any county trying to democratize, and impedes further consolidation.<sup>123</sup> Hence, the restriction of CSOs who have the great potential of promoting equality and pluralistic society through representation and promotion of interests and rights of religious or ethnic minority groups would seriously affect the democratization process of the country.<sup>124</sup>

*The promotion of Efficiency of the Justice and Law Enforcement Services*

Another role of CSOs in the democratization process of the country is involved in making the decentralization system work. The importance of decentralization that involves and empowers local government is indispensable for the democratization of the country. CSOs greatly contributed to facilitate the decentralization system by building the capacity of local law enforcement organs of the governments which were seriously lacking technical expertise. The contribution of local CSOs such as Management Development Forum (MDF), APAP and foreign charities such as Action Aid-Ethiopia and Save the Children in training the local government officials and offering technical expertise was significant.

Corruption jeopardizes the democratization of any nation but could be worse in countries such as Ethiopia which are already challenged by the many facets of poverty. Ensuring the accountability of public officials and sanctioning corrupt practices is therefore essential. The role of CSOs advocating for transparent and accountable governance system and the monitoring of corrupt practices will therefore minimize the risk of undermining the democratization process. In this regard, the contribution that

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<sup>123</sup>Tina Mavrikos-Adamou, 'Challenges to democracy building and the role of civil society' (2010) *Democratization*, 17 (3) 514-533, 524.

<sup>124</sup> This however takes the premises that our definition of CSOs has ruled out 'uncivil' entities like ethnic or religious fundamental organisations.



was made by Transparency Ethiopia and Human Rights Council (formerly Ethiopian Human Rights Council) in sensitizing the public and monitoring corrupt practices was enormous. However the CSP inroads the contribution of these and similar other charities as many face financial challenges after getting re-registered as an Ethiopian charity. The role of other organisations such as APAP which contributed to the fight against corruption through their government accountability programmes have also been discontinued with their new Ethiopian resident status.

#### *Community Sensitization and Empowerment*

The CSP also has an implication on the democratization process by affecting the role of CSOs in community empowerment. One of the most important roles of CSOs is to purposefully create and cultivate a sense that citizens have a role to influence the development and the political agenda of the nation and to make a difference in the public arena as is envisaged in the constitution. The role of network organisations such as Christian Relief and Development Association (CRDA), Poverty Action Network Ethiopia (PANE) and Network of Ethiopian Women Association (NEWA) was notable in the participation of local community in the initial stages of the national development strategies of the country. The initiation of Action Professionals Association for People (APAP), Organisation for Social Justice in Ethiopia (OSJE) and other advocacy and developmental CSOs to work with and build the capacity of grassroots CSOs such as Edirs was also a very good initiation to create a home-grown version of democracy and to entrench and sustain democratization from below. However with the restrictions imposed by the CSP, the role of CSOs in cultivating the demand side of democratization through community empowerment is also seriously curtailed.

These illustrations merely represent just some of the significant work that some of the advocacy organisations were undertaking and contributing for the democratization process but stifled due to the disabling features of the CSP. It is nonetheless beyond the scope of this paper to make an impact assessment of the law on each of these organisations. However, these few illustrations can demonstrate how the democratization process is strategically stifled by restricting the space for the engagement of active advocacy organisations.

In sum, it can therefore be concluded that although a law may justifiably prohibit the engagement of CSOs from partisan politics and the involvement of foreigners in the internal political affairs of the country, the measure taken by the CSP is nonetheless unwarranted and ineffective for such purposes; but instead becomes a tool for suppressing the democratization role of CSOs. It is also unconstitutional in many regards.

Firstly, the CSP in effect debases the promotion of rights, equality, justice and peace as ‘unlawful charitable purpose’ for Ethiopian resident charities and societies and for foreign charities that constitute nearly 80% of the sector. Such restriction on the operational freedom is in contradiction of Article 31 of the Constitution that guarantees the freedom ‘of everyone’ to associate for ‘any cause or purpose.’<sup>125</sup> Thus although CSP was meant to give effect to constitutional guaranteed freedom of association, it however fails to be in conformity with the letter and the spirit of the constitution. It therefore rendered the freedom of association meaningless denying individuals their liberty to choose the objectives that they want to pursue.

Secondly, the CSP also fails to meet the ‘non-discriminatory standards’ of an enabling legal framework by allowing foreign funding for all charitable purposes, but for democracy promotion. This in effect discriminates between the rights of individuals who choose to promote democratization and their fellows who choose to defend other interests.

Thirdly, the CSP can also be said to be unconstitutional as it contravenes the sovereignty of citizens. According to the FDRE constitution, the sovereignty of the Nations, Nationalities and Peoples of Ethiopia, shall be expressed through their direct democratic participation.<sup>126</sup> International human rights instruments to which Ethiopia is a party also provide the right of everyone to engage in the public affairs of their country.<sup>127</sup> However the CSP contravenes these principles as it limits the right of citizens to participate in the democratization process of the nation for the reason that

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<sup>125</sup> ICCPR, Article 22.

<sup>126</sup>FDRE Constitution, Article 8.

<sup>127</sup>ICCPR, Article 25; See also Article 8 of the International Convention on the Elimination of Discrimination Against Women, which provides the right of women ‘to participate in nongovernmental organisations and associations concerned with the public and political life of the country’.

their associations is accessing foreign fund including fund from their countrymen residing abroad.

Fourth, by restricting the freedom of association and the democratization roles of charities and societies, the CSP has also significantly impinged on other constitutionally guaranteed rights such as freedom of expression as those two rights are inextricably related. For instance, by restricting the promotion of human and democratic rights the CSP in effect limits the rights of citizens to ‘seek, receive and impart human rights information and democratization ideas’ in violation of the freedom of expression enshrined in the FDRE constitution and other international human rights instruments.<sup>128</sup>

Lastly, the legislative impediments on the promotion of rights in general contradicts the international commitments Ethiopia has ratified as binding, as member countries to those treaties are obliged to promote the rights enshrined therein.<sup>129</sup> The restriction on the promotion of rights also infringes other non-binding commitments of the country such as the UN Declaration on Human Rights Defenders which asserts the right of everyone to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international level either *individually or in association.*<sup>130</sup> Nevertheless, the reluctance of the government to comply with its international commitments has also sustained even after a number of the UN Committees,<sup>131</sup> which oversee the implementation of international human rights law at country level, have formally called for the amendment of the CSP to safeguard freedom of association to the fullest and to ensure that any limitations on the right to freedom of association strictly adhere to the international human rights

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<sup>128</sup> FDRE Constitution, Article 29; ICCPR, Article 19 (2).

<sup>129</sup> ICCPR, Article 2.

<sup>130</sup> ‘Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’, Resolution 53/144 adopted by the UN General Assembly, 1999, <<http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>> accessed on 18 February 2015. Even if the Declaration is not legally binding, its unanimous adoption by the General Assembly signifies a very strong state commitment towards implementation.

<sup>131</sup> The committees include the UN Committee on Human Rights, the Committee on the Elimination of Discrimination against Women, the Committee Against Torture and, the Committee on the Elimination of Racial Discrimination.

instruments ratified by the country.<sup>132</sup> Neither do the recommendations to amend or to repeal the CSP made by countries such as Canada, Ireland, Netherlands, Norway, Switzerland, UK and USA based on the Universal Periodic Review (UPR) process which involves a review of the human rights situations of all UN Member States, receive any consideration from the government of Ethiopia.<sup>133</sup> Emphasizing on the issue, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr. Maina Kiai, has also commented that ‘the enforcement of these provisions has a devastating impact on individuals’ ability to form and operate associations effectively, and has been the subject of serious alarm expressed by several United Nations treaty bodies.’ He further went on to recommend that ‘the Government revise the 2009 CSO law due to its lack of compliance with international norms and standards related to freedom of association, notably with respect to access to funding.’

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<sup>132</sup> See Concluding Observations of the Human Rights Committee: Ethiopia, 25 July 2011, <<http://daccessods.un.org/TMP/4400946.7959404.html>> accessed 12 April 2015; See also, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Ethiopia, July 2011, <<http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-ETH-CO-7.pdf>> accessed on 10 May 2015; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ethiopia, Sept 2009 <<http://daccess-ddsny.un.org/doc/UNDOC/GEN/G09/448/34/PDF/G0944834.pdf>> accessed on 10 May 2015. Open Element; Concluding Observations of the Committee Against Torture: Ethiopia, Jan 2011, <<http://www2.ohchr.org/english/bodies/cat/cats45.htm>> access on 10 May 2015. Report of the Working Group on the Universal Periodic Review: Ethiopia, Jan 2010, <<http://daccess-ods.un.org/TMP/9098610.28194427.html>> accessed on 10 May 2015.

<sup>133</sup> Report of the Working Group on the Universal Periodic Review: Ethiopia, Jan 2010, <<http://daccess-ods.un.org/TMP/9098610.28194427.html>> accessed on 10 May 2015.

<sup>134</sup> UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, April 24 <<http://freeassembly.net/rapporteurreports/funding-report/>> accessed on 12 May 2015.

## CHAPTER 7

### RESOURCE MOBILIZATION

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#### 7.1 Introduction

Resource mobilization of CSOs is the third pillar that can be influenced by the legal regime. As in any other organisational setting both the effective delivery of CSOs mission and the growth and vibrancy of the sector heavily relies on their ability to mobilize and access sufficient human, material and financial resources. Particularly, influencing the democratization process, which is one of the key expected roles of CSOs, demands deploying huge financial and human resources for initiatives related to mobilizing supporters for a social cause, use of mass media for advocacy, organizing policy initiation and deliberation forums, gathering and synthesising information for interest representation, monitoring of corruption and human rights violation. To meet these demands and attain their mission as not- for profit institutions CSOs need to mobilize and solicit various tangible and intangible resources through a process of resource mobilization from various sources.

The types and nature of resources that CSOs can mobilize and utilize may range from tangible to intangible resources. By tangible resources we mean resources such as financial, material and human resources. The possible sources and forms of tangible resources that CSOs can mobilize ranges from membership contribution to soliciting direct financial support through public collection; commercial income generating activities; tax concessions; funding agencies and public grants. Intangible resources on the other hand refers to the ‘moral and cultural resources.’ Moral resources include such intangible notions as ‘legitimacy, integrity, solidarity support, sympathetic support and celebrity.’<sup>1</sup> Cultural resources also include tacit civic knowledge and skills such as ‘enacting a protest event, holding a news conference, running a meeting, forming an organisation, initiating a festival, or utilizing new social media required to either mobilize, produce events, or access additional resources.’<sup>2</sup>

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<sup>1</sup> Bob Edwards and McCarthy John, ‘Resources and social movement mobilization’ (2004) in Snow David and others (eds) *The Black-well Companion to Social Movements* (Blackwell Publishing 2007) 116–152

<sup>2</sup> Ibid.128

Two critical factors influence CSO's ability to mobilize resources: a) their internal capacity including the nature of their mission, leadership capacity and legitimacy; and b) the regulatory environment. This chapter focuses on the second factor, i.e. the legal regime governing CSOs resource mobilization and utilization. Thus the chapter discusses the basic legal conditions or features of an enabling law that could potentially enhance CSOs resource mobilization capability to ensure their sustainability and the growth of the sector at large. In light of such enabling legal conditions, it examines the extent to which the prevailing legal environment in Ethiopia, particularly the Charities and Societies Proclamation (CSP) enables resource mobilization by CSOs.

## **7.2 The rationale for an enabling law for resource mobilization**

A number of rationales can be mentioned why the law should create an enabling condition for CSOs resource mobilization. Primarily, the underlying justification for the rights of CSOs to mobilize resources ensues from their non-profit orientation.<sup>3</sup> No institution can be sustained without resources. Governments earn revenue from taxes or non-taxable sources such as government owned corporations, and capital receipts in the form of external loans. Businesses are sustained from the profit they earn. Whereas CSOs lack the mandate of collecting revenue from tax; and are not essentially profit making entities although some can be engaged in income generating activities. Thus, they should rely on distinct resource mobilization strategies that heavily depend on provisions from individuals, the business sector and the government. The ability to mobilize resources is therefore a necessary condition for the continued survival, effective operation and the development of CSOs. Achieving this requires an enabling regulatory legal environment which allows CSOs to mobilize access and utilize resources from various sources.

The rationale for CSOs resource mobilization particularly those that attempt to influence the democratization process can best be explained by the resource mobilization theory of social movements. The capacity of social movements to engage in collective action is influenced greatly by the type, amount and distribution of

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<sup>3</sup>For a detailed discussion on the non-profit distribution constraint of CSOs, see chapter 3 of this paper ;See also Jonathan Garton, *The Regulation of organized Civil Society* (Hart Publishing 2009) 38.

resources within the movement.<sup>4</sup> Thus, the success of CSOs in influencing the democratization process through collective action depends on the amount and types of resources that they are able to mobilize. Thus, an enabling law that allows CSOs engagement for the democratization process must recognize the right of CSOs to mobilize resources.

Secondly, the rationale for providing an enabling legal environment for resource mobilization goes even beyond the idea of enabling the sustainability of CSOs and the development of the sector and its contribution to democratization. In a sense CSOs ability to mobilize resources has a far reaching power balancing effect in society as it aids to maintain the inherent worth of democracy through counter balancing the possible adverse effects of money-politics on the financially disadvantaged majority.

Thirdly, as the freedom of mobilizing resources is pivotal to CSOs engagements, continued existence and independence of all types of CSOs, it is a necessary precondition to exercising the fundamental freedom to associate. Without the required means to pursue a legitimate objective forming an association becomes of a diminished or no value.<sup>5</sup> When a legal environment sets a condition that denies or sets restriction on their ability to mobilize resources it could amount to a violation of their right for freedom of association as it would nullify their mission or at the least affect the growth of the sector in general by way of discouraging their formation or forcing their dissolution. It follows therefore that a limitation on resource mobilization could be justified only when there is a 'legitimate state concern necessary in a democratic society.'<sup>6</sup> Thus the true exercise of freedom of association entails the freedom to mobilize resources from any legal source either within or outside the country.

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<sup>4</sup> Bob Edwards and Patrick Gillham, *Resource mobilization theory* (The Wiley-Blackwell Encyclopedia of Social and Political Movements 2013).

<sup>5</sup> Several international and regional legal instruments have recognized the importance and relationship between freedom of association and the right to access to funding. See International Service for Human Rights (ISHR) 'Right to Access Funding, Human Rights Defenders Briefing Papers Series' (2009) 3 < [www.ishr.ch/.../346-hrd](http://www.ishr.ch/.../346-hrd)> accessed 23 April 2012; See also, The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Article 6; The UN Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declarations on Human Rights Defenders), Article 13.

<sup>6</sup> ICCPR, Article 22 (2); for a detailed discussion on the limitations of freedom of association, see chapter 3

In sum, an enabling legal environment that allows CSOs to mobilize, access and utilize resources from various sources is not only congruent with the intent of the law that in the first place established them but also will demonstrate respect for their rights of association and their valuable contribution to the overall democratization process.

The law may create an enabling condition for CSO's resource mobilization mainly under the following three conditions. First, the law needs to recognize and facilitate CSOs right to solicit funds as a right that is consequential to exercising the fundamental freedom to associate. Thus the right to mobilize financial resource must be generally recognized and any limitation to such right needs to be made in parallel to the necessary conditions made to exercise the freedom of association. Thus, an enabling legal environment should operate under the premise that any source of funding should be considered lawful unless it is legally proscribed and it should not be limited unless the limitation is a necessity in a democratic society for the protection of the public good or the national security.

Second, in order to create enabling conditions for resource mobilization, the law needs to broaden up CSOs potential sources of funds. It should therefore allow resource mobilization by CSOs from diverse local and foreign sources including individuals, the private sector and public funds. The law thus needs to allow them to receive donations and to conduct public collections; to offer them various forms of tax concessions; to enable them access public grants and contracts; and to permit them to self-generate income through commercial engagements.

Thirdly, the law also needs to balance CSOs right to solicit funds with the necessary conditions that ensure their financial transparency. The legal framework is thus considered enabling when it recognizes the fundamental right of CSOs to solicit funds from any 'lawful source', and does not impose cumbersome procedures in resource mobilization and utilization, and when it is well-defined, undemanding, and not dependent on the discretion of authorities.

The following sections of this chapter will provide a closer look at enabling legal conditions for CSOs ability to mobilize and access the different possible forms and sources of resources.



### 7.3 Human Resources

The law may take across-the board measures such as creating an enabling legal environment for CSOs to enhance the quantity and the quality of human resources in the sector. Enabling legal environment for CSOs may possibly encourage people to volunteer and/or to be employed in the sector. The growth of volunteerism and attraction of highly qualified professionals to the sector in turn increases the human resource capability of CSOs and enables CSOs to accomplish their purposes efficiently. On the other hand disabling conditions such as harsh penalties for even minor faults, or a general bad outlook of the government against the sector would discourage people to volunteer, to get employed, or to associate themselves with the sector in any other manner.

With enabling environment for CSOs, the sector is one of the most appropriate arenas in which massive volunteerism can be developed and effectively managed.<sup>7</sup> While culture has a predominant role, the law may also contribute to the development of volunteerism by encouraging the mobilization of volunteers.<sup>8</sup> The law can boost volunteerism and encourage their participation in CSOs by creating incentives to volunteers and making the operational space of CSOs conducive.<sup>9</sup> The law may for instance take some specific legal measures such as allowing volunteers tax privileges on the amounts they may receive as subsistence support.

Moreover, the growth of participation of volunteers and the association of many with the sector also boosts the constituency of CSOs and their legitimacy, which is particularly advantageous for the democratization role of CSOs. Social movements mobilize bystanders into adherents and subsequently adherents into constituents and ultimately mobilize constituents to active participation.<sup>10</sup> By the same token, as the law protects volunteerism, it encourages the level of participation of individuals in CSOs turning them from ‘bystanders’ who watch from the sidelines to ‘adherents’ who

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<sup>7</sup> UN Volunteers and others, ‘Voluntarism and Legislation: A Guidance Note’(2004) <[http://www.ipu.org/PDF/publications/volunteer\\_en.pdf](http://www.ipu.org/PDF/publications/volunteer_en.pdf)> accessed 20 August 2013.

<sup>8</sup> Ibid.

<sup>9</sup> UN Volunteers, ‘Drafting and Implementing Volunteerism Laws and Policies A Guidance Note’ (2003).

<sup>10</sup> Bob Edwards and Patrick Gillham, above n 4 at 1.

share the values of democratization; and from ‘adherents’ to ‘constituents’ who contribute their time and finances to help the movement of democratization; and ultimately from ‘constituents’ to ‘active participants’ and activists of the democratization process.

### **7.3.1 Human Resources under the Ethiopian Legal System**

Neither the CSP nor any other legal framework specifically governs volunteerism. The lack of a legal framework may discourage the participation of volunteers and causes the treatment of volunteers as any other officer employed in the sector. Despite the absence of a legal framework for volunteers, Article 70 of the CSP that governs the human resources of CSOs provides that any capable person can be engaged as an officer in charities and societies except those persons who have been convicted of a crime that involves fraud or dishonesty or have been convicted of any crime which causes the deprivation of his/her civil rights. Such requisites could possibly enhance the trustworthiness of the sector which is a necessary attribute for their function in democratization and the provision of public and quasi private goods.

## **7.4 Financial Resources**

Finance is one of the most tangible and widely used form of resources that CSOs access and use for the achievement of their objectives. CSOs use different processes and methods to mobilize financial resources such as membership contributions, public collections, commercial activities, and public funds in the form of grants or contracts, and foreign funding sources.

### **7.4.1 Membership Contribution**

CSOs may or may not rely on only their own members’ contribution depending on their purposes, size and the financial ability of their membership. Membership dues cannot however be the only source of funding for CSOs because to begin with not all CSOs are membership based, which suggests that, other forms of resource mobilization would still remain necessary for non-membership based CSOs. Moreover even membership based CSOs may have broader goals that cannot be fully sustained by members’ contributions. What’s more, a total reliance on members’ contributions may effectively contradict the ‘universal’ nature of the freedom of association as uneven wealth distribution in society would deny the economically

disadvantageous groups of the society not to pursue their objective for lack of sufficient resource. This therefore warrants that CSOs need to mobilize resources from diverse sources other than membership fees. An enabling law must thus recognize this need and cater for possibilities for CSOs to use other forms of fund raising or resource mobilization from funding agencies and the public at large.

#### **7.4.2 Membership Contribution under the Ethiopian Legal System**

Members' contribution is one source of funding for CSOs but an area on which the stretch of the law is limited. Thus understandably the CSP does not govern membership contribution as a source of funding for charities and societies. However, as long as the purposes of CSOs are lawful, it would only be reasonable that members who joined the organisation to pursue such purpose would be allowed to invest their own material and human resource onto the accomplishment of such purpose.

#### **7.4.3 Public Collection**

While it might be possible for small informal associations to largely rely on the voluntary human resource contribution of their members, the same will be difficult for large formally organized CSOs with numerous transactions to sustain their operation and existence through the use of membership contribution. Hence, in order to create a strong and independent CSO, it is important that CSOs have diversified source of funding including fundraising from the public at large

An enabling law should therefore allow CSOs to engage in all kinds of public collection activities such as door-to-door, telephone, direct mail, television, campaigns, lotteries, raffles, auctions and other fundraising strategies.<sup>11</sup> However unlike other sources of funding such as membership dues and donations from private and public institutions that can easily be accounted through receipts and official documents from formal financial institutions such as banks, accounting some form of public collection can prove rather difficult. Thus, for the purpose of ensuring financial transparency of CSOs it is important that the law puts as a requirement for any public solicitation a prior registration with a CSOs regulating agency, which will issue

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<sup>11</sup> Benedict Iheme, 'The Legal and Regulatory Framework for Civic Organisations in Namibia' (2009) 11 (2) IJNL 76; See also Leon Irish and others, *Guidelines for Laws affecting Civic Organisations* (2<sup>nd</sup>eds, Open Society Institute 2004) 62.

permits, badges, and other identification materials to the fundraisers, provide information to the public, and sanction inappropriate conduct.<sup>12</sup> A robust regulatory regime will help to ensure the transparency of CSOs and to maintain the public confidence in the sector which in turn assists fundraising. However, the transparency mechanisms should not be bureaucratic or burdensome to the level that would inhibit CSOs ability to solicit fund from the public. Thus it is important that the fundamental right of CSOs to mobilize resource through public solicitation is clearly recognized by the law. The details of the regulations that sets out to ensure the financial transparency should not have a purpose of more than informing the regulating Agency to enable it undertake its supervisory role and any limitation on public collection should pass the test of ‘necessity to limit the freedom of mobilizing resources.’ Standards of fundraising should thus be clearly set out in advance in order to ensure predictability and objectivity of authorities on the one hand and legality and accountability of CSOs on the other.

#### **7.4.4 Public Collections under the Ethiopian Legal System**

The Charities and Societies proclamation clearly recognizes the fundamental right of CSOs to mobilize resource through public solicitation. In an ideal situation where the public has both the financial capability and the tradition of giving, public collection is the best means of fundraising compared to government grants or contracts, foreign grants or corporations funding in order to keep the independence of charities and societies. Currently however, such economic and social requisites are lacking in Ethiopia, forcing many of the CSOs to raise funds from foreign sources. Yet, public collection remains to be the major source of fundraising for Ethiopian charities and societies working on the institutional level of democratization since such groups are not allowed to raise more than 10% of their funding from foreign sources. Resource mobilization through public collection may also bring an incidental opportunity for CSOs to publicize themselves and their mission and thereby procure other intangible resources such as solidarity and sympathetic support. It may also help them grow to acquire the skill of initiating and running public events, and using new forms of social media that form essential moral and cultural resources for social movements.

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<sup>12</sup> Ibid, 63-64.

The CSP provides that, charities and societies can ‘appeal in any public place or by means of visits to places of work or residence; for money or other property whether for consideration or otherwise and which is made in association with a representation that the whole or any part of its proceeds is to be applied for charitable purposes.’<sup>13</sup> The CSP also sets out the details of conditions that CSOs need to fulfil for public fundraising in order to ensure their financial transparency. Charities and societies may thus conduct public collections only after applying to the Agency and being granted permission.<sup>14</sup> Upon receiving the application, the Agency may make inquiries as it deems fit and can determine to refuse or to issue a permit with or without conditions.<sup>15</sup> If a positive decision is made the Agency will decide the purpose of public collection, duration, place and any other criteria that the Agency deems relevant.<sup>16</sup>

The CSP also sets in advance the grounds whereby the Agency may deny CSOs a permit for public collection or revoke a permit. Thus, where the public collection is not going to be utilized for the purposes of the Charity or Society as determined during registration; where information provided by the applicant is false or misleading; and where any of the persons who are to conduct the fundraising do not fulfill ‘the requirements of the CSP’ set under article 70, ( i.e., where the person who is to conduct the fundraising has been convicted of a crime that involves fraud or other crimes that involves dishonest acts, or has been convicted of any crimes as a result of which he/she has been deprived of his/her civil rights and his/her civil rights has not been restored, or is an able to act by reason of incapacity within the meaning of the law, or has been interdicted by the court, or has been outside of Ethiopia and his/her absence impedes the proper administration of the charity,<sup>17</sup>) the Agency may refuse or grant conditional permission to the application and notify its decision to the applicant in writing.<sup>18</sup> Improper administration or failure to comply with the legal requirements and with the conditions set by the Agency could also be grounds for revocation of the public collection after the granting of permission.<sup>19</sup> Any money or property collected

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<sup>13</sup> CSP, Article 103 (1).

<sup>14</sup> CSP, Article 98 (1).

<sup>15</sup> CSP, Article 99 (1).

<sup>16</sup> CSP, Article 98 (2).

<sup>17</sup> CSP, Article 70

<sup>18</sup> CSP, Article 99 (2) and Article 100

<sup>19</sup> CSP, Article 101 (1)

in contravention of the CSP may thus be confiscated by the Agency and applied to similar charitable purposes.<sup>20</sup>

The exhaustive listing of the grounds for refusal or revocation of public collection facilitates non-bureaucratic process as it would not leave the Agency with a discretion that could affect the right of charities and societies to solicit fund. The requirement that the law puts on the Agency to notify the applicant of ‘its decision and the reasons for its decision’<sup>21</sup> on the application and to do it in writing is also appropriate as it would help the applicant CSO to take the necessary action and also to have an evidentiary document in hand if it decides to make an appeal against the decision. These legal requirements in general are enabling as they would ensure the predictability of the process; and the objectivity and answerability of authorities for their decisions. On the other hand, such standards will also help to ensure the legality and accountability of charities and societies.

Despite these enabling factors that balance CSOs right to mobilize resource with their fiscal transparency and accountability, however some of the legal conditions set by the CSP could pose a potential challenge for CSOs in their endeavor to mobilize resource through public collection. Firstly, the directive governing public collection provides that public collections can be made only when the charities and societies are able to prove that they are not able to raise funds by other means and that public collections should be their last resort to enable them discharge their purposes of establishment.<sup>22</sup> The directive did not provide how charities and societies would be able to prove their inability to raise fund by other means and that public collection is their last resort. Rather, the directive however put the burden of prove on the charities and societies. It is a difficult job to prove for charities and societies that would discourage them from applying for public collection. Thus, public collection is not encouraged by the law, although it is an ideal form of resource mobilization to keep the independence of CSOs and to solicit public support provided the social and economic requisites are available.

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<sup>20</sup> CSP, Article 101 (2)

<sup>21</sup> CSP, Article 99 (2)

<sup>22</sup> Charities and Societies Public Collection Directives No5/2011, Article 5 (4)

Secondly, there seems to be a wider discretion for the Agency. Although some form of regulation and control on CSOs public collection is required to serve the purpose of protecting the public from illicit acts under the cover of charity fundraising, yet much discretion seems to be given to the Agency to decide the purpose, the place and the duration of public collection. Once a CSO is registered as per the requirement of the CSP having either one of the legitimate charitable purposes set out by the law, public collections to accomplish such purpose must be a guaranteed right of CSOs. Thus the mandate of the Agency to determine the purpose of public collection seems an unwarranted discretion. The discretion of the Agency to determine the place and the duration of fundraising if at all necessary must also be limited to conditions necessary for the Agency to undertake its supervisory role and pass the test of ‘necessity to limit the freedom of mobilizing resources.’

Thirdly, the prohibition of anonymous funding<sup>23</sup> also challenges CSOs public collection. Apart from the general economic reality of the country, the prohibition of anonymous donations prevents those few who are able to donate for charities ‘because of fear that they might get reprisals for giving financial support particularly for advocacy CSOs.’<sup>24</sup> Although it is expected that the prohibition of anonymous funding is a procedural necessity in order to discern the citizenship and residence of donors, as funding from foreigners and Ethiopian Diasporas is prohibited, for advocacy CSOs it also brings negative repercussions on potential local funding.

In sum, while the legal recognition for public collection is commendable, lack of the social and economic requisites for public fundraising, prohibition of anonymous funding and wider discretionary power of the Agency might pose a challenge for CSOs. Given such challenges and the lack of experience of fundraising through public collection by the sector, an enabling condition demands that the Agency applies its discretion reasonably and encourages charities and societies to be engaged in public collection without difficulty. This is particularly relevant for advocacy organisations that should be raising 90% of the funds locally, and would much bank on public collection. Hence, if advocacy CSOs should have financial capability and autonomy,

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<sup>23</sup> CSP, Article 77 (3).

<sup>24</sup> Yoseph Mulugeta, former Executive Director of the Ethiopian Human Rights Council <<http://news.bbc.co.uk/1/hi/world/africa/7736417.stm>> accessed 14 August 2014.

the granting of permission should be as swift as possible and the grounds of denial and revocation of the permission should be narrowly construed to the extent possible and made effective only upon failure to rectify errors.

#### **7.4.5 Commercial Activities**

Engaging in economic activities is also another form whereby CSOs raise financial resources. This method is particularly crucial in countries where the accumulation of capital and philanthropic giving is limited. Engagement in economic activity gives CSOs two major advantages. Primarily, any kind of commercial activities helps CSOs to be financially sustainable thereby reducing the influence of external bodies be it donor agencies or government. Financial dependence on government and/or donors, not only will compromise CSOs' independence and their contribution to the democratization process but will also make them lose track of their strategic mission as they will try to appease their donors or focus their energy on where grants are available.

Secondly, some of the economic activities of CSOs, if related to their purpose, could indirectly help CSOs accomplish their intended objectives. For instance, when a think tank CSO that works on policy advocacy publishes and sells policy research it benefits financially while at the same time promoting its purpose of information dissemination and initiating public debates on policy matters. Hence CSOs that pursue not-for-profit activities and that do not distribute potential profits for founders, board or other members and employees should therefore be allowed to engage in lawful commercial activities.<sup>25</sup>

The breadth of this privilege may either be limited to related or incidental business activities or be unconstrained and include any economic activities permitted by the commercial law of the country. An enabling law should in general uphold the idea that the wider the economic activities CSOs can be engaged in, the better the opportunity

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<sup>25</sup> The experience of countries varies when it comes to economic activities of CSOs and the tax from their economic activities. For example, in England and Wales, a charity may engage in a trade or business but only indirectly, through a subsidiary. See Charity Commission CC35 <<http://www.charity-commission.gov.UK/publications/cc35.asp>> accessed 1 August 2013; In Poland, a foundation may engage in a trade or business directly. See, The Law on Foundations of the Republic of Poland, art. 5 (5) < [http://www.icnl.org/library/cee/laws/polfoundations1984\(eng\).htm](http://www.icnl.org/library/cee/laws/polfoundations1984(eng).htm)> 56.



for them to enhance their financial capabilities and autonomy. However, the engagement of CSOs in any economic activities just like the private sector might pose some risks. First CSOs may neglect or abandon the very purpose for which they are established for and focus more on the income generating activities. Secondly, unlimited engagement of CSOs in wider commercial activities may also threaten healthy business competition because of differential tax treatments that CSOs are likely to enjoy. Thirdly, unless properly regulated it also poses a risk of promoting fraudulent commercial entities with no genuine intention of promoting public purposes establishing themselves as CSOs in order to avert tax duty.

An enabling law for CSOs therefore needs to strike the right balance between providing enabling provisions for CSOs to mobilize resources through engaging in commercial activities and promoting a healthy competitive business environment in the society. The way to attain such a balance is by putting a maximum amount of money a CSO could involve in commercial activities or applying the rule of Principal purpose test. The Principal purpose test determines whether the organisation is principally or mainly commercial or non- commercial. According to this test, the volume of resources spent on the purposes indicates which purpose is the principal purpose of the organisation. Thus, under this test a CSO that consistently spends a significant part of its resources in commercial activity will be declared as a commercial organisation than a CSO and thus lose its tax benefit status. However, the particulars of the law regarding the ceiling need to be clearly and objectively determined depending on, among others, the economy of the country and the accessibility to other sources of funding.

#### **7.4.6 Commercial Activities under the Ethiopian Legal System**

The CSP stipulates that upon a written approval of the Agency charities and societies can be engaged in income generating activities that are incidental to the achievement of their purposes in accordance with the requirements and procedures laid down in other laws that govern the registration and licensing requirements of business entities.<sup>26</sup> The fact that the CSP for the first time permits CSOs to raise fund through engagement in commercial activities creates an enabling condition and broadens up the space for resource mobilization by CSOs in the country. In a country where there is limited

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<sup>26</sup> CSP, Article 103 (1).

philanthropic provisions and a law that constrains fundraising from foreign sources, the engagement of CSOs in income generating commercial activities is crucial.

The CSP also caters for sufficient protection to ensure the accountability of CSOs for their mission and a healthy business competition. Firstly it promotes healthy business competition by subjecting CSOs to others laws concerning the registration and licensing requirements for activities related to trade, investment or any profit making activities.<sup>27</sup> Secondly it ensures that the engagement of CSOs in commercial activities is merely to finance the charitable purposes for which they are established for by putting a nonprofit distribution constraint.<sup>28</sup> Since the purpose of their commercial engagement is to plough back the income and to further the charitable purposes for which they are established, the law requires that the proceeds shall not be distributed among the members or beneficiaries. Thirdly, in order to ensure CSOs accountability the CSP also requires that any charity or society engaged in income generating activities shall keep separate books of account with respect to such commercial activity.<sup>29</sup> Failure to comply with these requirements may entail cancelation of license.<sup>30</sup>

Despite these enabling factors that balance CSOs right to mobilize resource with their fiscal transparency and accountability, some of the legal conditions make resource mobilization through commercial engagement difficult for CSOs. Firstly, while the legislation requires CSOs to seek approval for commercial engagement from the Charities and Societies Agency, it nonetheless fails to state the grounds that the Agency must consider in approving or denying income generating activities. Neither has it required the agency to give reasons for its decision. It therefore leaves significant room for unpredictability, arbitrariness and discrimination in decisions. Such condition that could be amenable to abuse by authorities compromises not only CSOs fundraising through commercial engagement but also their operational independence and poses a threat to their contribution to the democratization process.

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<sup>27</sup> CSP, Article 103 (4).

<sup>28</sup> CSP, Article 103 (1).

<sup>29</sup> CSP, Article 103 (2).

<sup>30</sup> CSP, Article 92 and Article 103 (3).

Secondly, owing to the very nature of the charitable purposes they pursue which are not marketable the proviso that commercial engagement is limited only to activities that are incidental to the main objective of charities and societies is particularly restrictive for advocacy organisations. For instance, a charity that is engaged in economic empowerment of women through provision of technical and material assistance to open small scale enterprises or agricultural production may earn some resource from the sale of the production of those materials. Whereas another charity aimed at pursuing the promotion of women's rights would be highly restricted to be engaged in income generating activities owing to its very purpose of establishment. Thus in effect the law perhaps inadvertently limits advocacy CSOs from income generating activities, despite the fact that those organisations are the utmost financially challenged ones due to their disqualification for foreign aid.

#### **7.4.7 Tax Concession**

The tax regime has significant impact on the fiscal aspects of CSOs. A tax regime may enhance CSOs financial capability by providing tax concessions to CSOs and their donors. The amount and type of tax benefits that can be offered for CSOs often depends on the economic wealth of a nation, and fiscal policy considerations including the type of tax rationale the country is enforcing. Four different tax rationales are often forwarded for tax concessions for CSOs.

Firstly, a tax concession for donors to CSOs is justified on the basis of the underlying justification for taxes. Donors need to have tax concessions because people should only be taxed on the personal consumption or wealth accumulation, and money donated to charity does not count as either.<sup>31</sup> Hence it is reasonable to allow people to choose to contribute for social goods directly through charitable gifts rather than through paying their tax dues into government account. This encourages philanthropic giving for CSOs from individuals and corporates.

Second, akin to the first rationale applicable to donors, tax concession for public benefit CSOs can also be justified on the same ground of lack of personal consumption

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<sup>31</sup> Boris Bittker, 'Charitable Contributions: Tax Deductions or Matching Grants?' (1972) *Tax Law Review* 28, 37; Williams Andrews, 'Personal Deductions in an Ideal Income Tax' (1972) *Harvard Law Review* 86 (2) 309.

and wealth accumulation. Owing to the non-profit distribution orientation of CSOs, a tax privilege needs to be given for CSOs since any income they earn does not count either as personal consumption or wealth accumulation as it is reinvested to promote the purposes that are deemed to benefit the general public.

The third justification for tax concession for CSOs alludes to the shared responsibility of government and CSOs. Hence, tax should be appropriated to CSOs as they promote societal values<sup>32</sup> and provide public goods and quasi private goods that the government was supposed to provide.<sup>33</sup> Because CSOs are supporting the government in discharging its duties, they also need to share its revenues. Though very similar to the second rationale mentioned above in offering tax benefit for public benefit CSOs, this rationale however focuses on shared responsibility. Hence, for instance, corporate organisations whose main objective is the provision of public goods and quasi private goods may still benefit from tax concessions although such organisations may share out dividends to their members.

The fourth rationale for tax concession, that can be referred as the pluralism rationale is made on the basis that CSOs are themselves inherent public goods that promote plurality and hence deserve tax concessions.<sup>34</sup> This last justification for tax concession does not take the nature or purposes of CSOs into account. Thus according to the pluralism rationale tax concessions should be offered both for public benefit organisation or private interest organisation.

Thus the degree to which a law is enabling in terms of tax concession depends among others on which of the abovementioned tax rationale the government employs in regulating the tax regime of CSOs. The minimum a tax regime can tender for CSOs is income tax exemption from membership contribution because imposition of tax thereon could discourage the formation and the growth of associations. On the other hand, a liberal tax regime may offer tax concessions for all types of tariffs that are hypothetically due on CSOs and their donors for all types of CSOs irrespective of their

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<sup>32</sup> Ibid, 3.

<sup>33</sup> James Fishman and Stephan Schwarz, *Nonprofit Organisations: Cases and Materials* (3<sup>rd</sup> edn, Foundation Press 2006) 328.

<sup>34</sup> Reich R, 'Toward a Political Theory of Philanthropy' department of Political Science, Stanford University 3-10), 3.

purpose or membership, based on the pluralism rationale. Generally, a tax regime may offer one or more of such tax benefit as:

- i. Tax exemption or reduction for donors, i.e. individuals or corporations, for their charitable contributions of property or cash;
- ii. Income tax exemption or deduction for any revenue that CSOs receive i.e. incomes either in cash or other items of value earned from membership dues, from private and corporate donations, and funding agencies;
- iii. Tax exemption or deduction from incomes earned through CSOs commercial activities;
- iv. Any other exemption or deduction on taxes payable by CSOs necessary to run the organisation such as excise tax, customs tax, VAT, property tax, taxes from interests, dividends, or capital gains earned on assets or the sale of assets.

A liberal tax benefit for donors is important because it promotes individual and corporate benevolence, a social virtue in itself in addition to catering as financial aid for CSOs. Moreover, it enhances a 'tripartite partnership' among government, business and CSOs.<sup>35</sup> A liberal tax benefit for CSOs is also crucial for CSOs financial sustainability and the growth of the sector. This in turn contributes to the democratization process by promoting strong vibrant CSOs that pluralize the public sphere. Notwithstanding such benefits of a liberal tax concession for CSOs and their donors however, an enabling law must give due regard that such tax concessions for CSOs may not bring any negative repercussions on other institutions and societal values. Two examples of possible negative implications of an unsystematic tax concession can be given here.

First, tax concession for CSOs may affect healthy business competition. When a business entity competes with CSOs benefiting from tax concessions there is a risk that such tax benefit would cause a market distortion that could possibly force the private sector out of business. Thus a ceiling for the amount of tax concession for CSOs related to their commercial activities must be clearly and objectively determined considering the accessibility to other sources of funding for CSOs, the size of their commercial

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<sup>35</sup> Paul Bater, 'Evaluating Incentives for Donations to Public Benefit Organisations' (2000) 2 IJNL 3 < [http://www.icnl.org/research/journal/vol3iss2/art\\_2.htm](http://www.icnl.org/research/journal/vol3iss2/art_2.htm) > Accessed 10 August 2012.

engagement, their profit margin etc. since it would otherwise affect the business community.

On the other hand, an enabling legal framework for CSOs should also ensure that taxes imposed on any type of CSOs should not be higher than their business counterparts, as it would otherwise significantly undermine their contribution.<sup>36</sup> The imposition of more onerous taxes on CSOs than their business counterparts might render the rationale of market-failure theory unworkable as it adds cost to the public goods and services that CSOs provide. Moreover it significantly undermines the contributions of CSOs by adding the transaction cost of establishing and sustaining CSOs.

Second, uncontrolled and unwarranted tax concession for donors of CSOs may also affect democratic electoral competition. According to the plural rationale there is no doubt that even CSOs working on partisan politics must benefit from tax concessions as they also contribute to pluralize the public sphere. Yet allowing tax benefit to partisan politics poses a risk as it may lead to the distortion of the rules of the game in a democracy by unbalanced money politics. Although the role of CSOs in democratization through public policy deliberations and voters education is considerable, nonetheless ‘campaign-related speeches distort open, honest political discourse.’<sup>37</sup> Privately financed election campaigns have always given the wealthy minority disproportionate power.<sup>38</sup> Hence, tax deductions for contributions to partisan CSOs would make such disproportionate power even worse. Because the tax deduction for charitable contributions offers the greatest nominal financial benefit to taxpayers in higher income tax brackets, the electoral politics of charities favoured by the rich would likely receive a disproportionately large subsidy.<sup>39</sup> Hence no tax deductions should be given for donors supporting CSOs pursuing partisan politics since such tax concessions system would distort the procedure of fair election system. Thus a tax

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<sup>36</sup> Leon Irish above n 11 at 78.

<sup>37</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 409 (1984) (Stevens, J., dissenting) (‘Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of Government funds on pervasive and powerful organs of mass communication.’).

<sup>38</sup> Marty Jezer and Ellen Miller, ‘Money politics: campaign finance and the ‘subversion of American democracy’ (2012) *Notre dame journal of law ethics and public policy*, 8 (2)8.

<sup>39</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 409 (1984).

regime should set the right balance between the benefit of tax concession for CSOs and other societal values.

The tax regime should also be clear, objective, predictable, accessible and non-discriminatory. An enabling law therefore needs to ensure that tax concessions for CSOs are clearly provided and widely disseminated in order to enable objectivity and predictability. The predictability of rules governing tax privileges is very important to counteract arbitrariness and discrimination by authorities thus safeguarding CSOs particularly those that are deemed unpopular by the government.<sup>40</sup> The decision of authorities on tax concessions should also be subject to judicial appeal as it will give CSOs the chance to challenge arbitrary decisions.<sup>41</sup>

An enabling law must also recognize that tax concessions are voluntary that can be waived by CSOs, when some conditions that compromise their freedom are attached. For instance, where tax concession brings with it more strict regulation or prohibition of undertaking certain activities, CSOs should be able to choose more freedom than tax privileges. Tax privilege for CSOs should thus remain essentially voluntary allowing CSOs that prefer to operate without higher level of scrutiny to opt themselves out of such scheme.<sup>42</sup>

#### **7.4.8 Tax Concessions under the Ethiopian Legal System**

The legal provisions governing the tax duty of charities and societies in Ethiopia are found scattered in different legislation of the country posing challenges for consistency and reconciliation.

##### *Income Tax*

The FDRE Income Tax legislation provides CSOs with tax concessions for the income they earn from donations and membership dues.<sup>43</sup> This is reasonable as such income does not constitute personal consumption and wealth accumulation by CSOs as it is to be reinvested on charitable purposes.

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<sup>40</sup> Leon Irish, above n 11 at 78.

<sup>41</sup> Statement of the Sixteenth Annual John Hopkins International Fellows in Philanthropy Conference, 'Towards an enabling legal Environment for Civil Society' (2005) IJNL 8 (1) 3,4.

<sup>42</sup> Leon Irish above n 11 at 78.

<sup>43</sup> Income Tax Regulation No 78/2002, Article 11.

The same legislation also provides demarcated tax concessions for donors of CSOs. Thus, gifts and donations that do not exceed 10 percent of the taxable income of the donor are deductible.<sup>44</sup> This is commendable as it encourages philanthropy. Nonetheless, while one can clearly see the intent of the law for the provision of tax concession for donors of CSOs, unfortunately however the tax regime is far from clear and is amenable to unpredictable and discriminatory application.

Article 11 of the Income Tax Regulation provides that deductibility of donations or gifts is allowed in three situations:

*‘If the recipient of the donation is registered as a welfare organisation and the registering authority has certified that the organisation has a record of outstanding achievement, and its use of resources and accounting systems are transparent;*

*If the contribution is made in response to an emergency declared by the government to defend the sovereignty and integrity of the country, to prevent man-made or natural catastrophe, epidemic or for any other similar cause; or*

*If the donation is made to non-commercial education or health facilities.’*

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Firstly, in pursuant to the above provision, tax concession is permitted to ‘welfare organisations.’ However, it is not clear which organisations are considered welfare as the regulation fails to define the same. On the other hand, the CSP does not refer to any charity or society as welfare organisation. Since the tax regime is not reconciled with the provisions of CSP, what constitutes ‘welfare organisation’ is unclear and open for interpretation. Unfortunately, there is neither a case law nor any legislative guidance on the interpretation of ‘welfare organisations’. Thus if only ‘welfare organisation’ can be interpreted broadly to include all charities and societies, advocacy

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<sup>44</sup> Income Tax Proclamation No. 286/2002 Article 21 (1) (n) provides that in principle gifts and donations are not deductible from income tax. Nevertheless Sub Article 2 of the same provision gives the mandate for the Council of Ministers to issue a regulation to exempt charities and societies from the application of Article 21 (1) (n) and to exempt gifts and donations that are provided for public use. Accordingly Article 11 of the Income Tax Regulation No 78/2002 of the Council of Ministers has made conditional income tax exemptions for gifts and donations contributed to specific types of charities and societies.

<sup>45</sup> Income Tax Regulation No 78/2002 of the Council of Ministers of Ethiopia, Article 11 (1) (a).



CSOs would be able to benefit from such tax concessions offered to their donors. Yet as the law stands now clarity is lacking, failing the standard of an enabling fiscal administration and its application could be amenable to arbitrariness and discrimination.

Secondly, the merit - based condition requires charities and societies to adduce ‘certification of outstanding achievement’ from the registering authority (Agency) in order to benefit from income tax deductibility.<sup>46</sup> However the CSP does not mandate the Agency to assess and grade achievements of charities and societies. Neither does it contain any objective criteria to assess ‘outstanding achievement. Lack of case law from the cassation court which only forms a precedent in the country and lack of legislative guidance on the interpretation of ‘outstanding achievement’ leaves charities and societies to authorities’ discretion. This could also be amenable to abuse and discrimination particularly against those CSOs that are deemed unpopular by the government. The law also fails to stipulate the right to appeal against the decision of authorities in relation to the certificate, although the general ‘claims and appeals’ provision in the CSP can be invoked for the case and an administrative appeal can be made to the Director General of the Agency and the Board; or to the court as the case may be. Even so, it would be doubtful if the court can order the Agency to issue a certificate that is not so mandated by the legislation thereby rendering the applicability of the tax concession difficult.

The second and third conditions where deductibility of donations or gifts are allowed are less controversial in nature. They are contributions made in response to an emergency declared by law and donations made to non-commercial education or health facilities. Unfortunately, the tax deductibility of donations or gifts are limited to only these three kinds of organisations and the great majority of CSOs in Ethiopia are not benefiting from this tax deductibility provision which is disabling in substance.

#### *Value Added Tax*

The Value Added Tax (VAT) law singles out humanitarian organisations as beneficiaries of VAT concession. The VAT law did not define which organisations are

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<sup>46</sup> Ibid.

considered humanitarian organization, however, the practice in the country indicates that those CSOs working on emergency relief and rehabilitation programs are considered humanitarian organization. The Value-Added Tax (VAT) proclamation provides that any activity that involves the supply of goods and services which is carried on continuously or regularly by any person in Ethiopia or partly in Ethiopia whether or not for a pecuniary profit should pay VAT.<sup>47</sup> Thus, based on this provision as a matter of principle all Ethiopian and foreign charities and societies should pay VAT charges whenever they purchase goods and services locally.

However the VAT law also exempts the supply of some specified goods and rendering of services notwithstanding whether they are undertaken by charities and societies or business entities. Hence some charities and societies may indirectly get VAT relief from the provisions of these exempted goods and services such as the rendering of medical, educational and child care services; the supply of goods and services in the form of humanitarian aid, as well as import of goods transferred to state agencies of Ethiopia and public organisations for the purpose of rehabilitation after natural disasters, industrial accidents, and catastrophes.<sup>48</sup> In practice a list of charities that are exempted from VAT due to their objectives of provision of relief aid are identified by the Disaster Prevention and Control Authority and submitted to the Tax Regulating Authority, VAT department.<sup>49</sup> Other charities and societies however will be exempted through bilateral or multilateral agreements or understandings with the government.<sup>50</sup>

In general, it is commendable that the tax regime that governs the fiscal aspect of charities and societies offer them and their donors' with tax concessions. However, the fact that funding privileges do not benefit the majority of charities and societies registered as 'Ethiopian' pursuing the objective of multi-sectoral socio-economic development and democratization is rather limiting. In general international comparisons show although the national wealth of countries could be one factor that affects liberality in tax concessions, it does not necessarily match up with economic

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<sup>47</sup> Value Added Tax Proclamation No. 285/2002, Article 6

<sup>48</sup> Value Added Proclamation Tax No. 285/2002, Article 8

<sup>49</sup> Bekure Herouy, 'The VAT Regime Under Ethiopian Law with Special Emphasis on Tax Exemption: The Ethiopian and International Experience' (2004) Christian Relief and Development Association 18.

<sup>50</sup> Value Added Proclamation Tax No. 285/2002, Article 8 (4).

welfare. It is rather a matter of policy orientation that relies increasingly on the credence that policy makers have on the contribution of CSOs.

In conclusion, although the elements of the prevailing laws represent the intentions of providing an enabling environment, the vagueness of the relevant provisions governing the tax regime render the intents unserviceable. Moreover, when gauged vis-à-vis the absence of a culture of public giving and the restriction on foreign funding for Ethiopian charities and societies, one may argue that more generous tax concessions should have been set to enable CSOs contribution to democratization.<sup>51</sup> The reconsideration of policies on a more liberal tax rationale and the revision of the tax regime in line with the recent CSP in a manner that integrates more systematic tax concession for charitable purposes to which foreign funding is restricted are necessary to create a more meaningful and enabling environment.

#### **7.4.9 Public funds**

Public funds either in the form of government contracts or grants that ‘support socially responsible civic endeavours’<sup>52</sup> are another source of funding for CSOs. CSOs can bid on state contracts or be granted projects on the ground that they are more efficient and cost effective than private for profit organisations. However this source of funding often strongly and unduly politicizes the relation between the government and CSOs.<sup>53</sup> This might compromise the independence of CSOs and make them submissive. This poses a particular challenge on the effectiveness of CSOs working in democratization as they could show reluctance in monitoring and holding government accountable in fear of losing access to public funds. Although the law does not have a concrete and effective way to remedy this challenge, some contractual remedies that depends on the

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<sup>51</sup> A privilege for instance comparable to that of the Ireland, Australia, UK and USA will be more enabling. Ireland and Australia put a minimum threshold but no upper limit on donations eligible for tax relief applies; UK tax-deductibility is given for any amount if donations are made through Gift Aid or payroll giving schemes. USA also makes all donations fully tax deductible for those itemizing their tax returns. For further detail, See, ‘International comparison of charitable giving’ (2006), CAF briefing report, <http://www.cafonline.org/pdf/International%20Comparisons%20of%20Charitable%20Giving.pdf> accessed 03 September 2014.

<sup>52</sup> Alan Fowler, ‘An enabling environment for civil societies: What does it mean and how does law fit in?’ (2003), Centre for Civil Society, Research Report 7, 3.

<sup>53</sup> For discussion on the influence of CSO’s financial dependency on government fund, See Morris Debra, ‘Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict’ (1999) Charity Law Unit, University of Liverpool, <http://www.liv.ac.UK/media/livacuk/law/cplu/clurep1.pdf> accessed 2 August 2014.

political will of the government adopted by some countries can however be taken as best practice. A very good example is that of England where there is a specific agreement commonly known as ‘COMPACT’ between the government and representatives of CSOs whereby the former specifically undertakes to ‘Respect and uphold the independence of CSOs to deliver their mission, including their right to campaign, regardless of any relationship, financial or otherwise, which may exist.’<sup>54</sup>

Although the impact of the law in safeguarding the trading of autonomy for financial reliability is limited as access to public funds is primarily detected by the will of the government, it may at least proscribe that government contracts should not contain any gagging order or provisions that would prevent CSOs from pursuing their purposes autonomously including advocacy and campaigns against the policies of the government. Such legal stipulations may clarify the relationship between government and CSOs and thereby create more constructive partnerships to solve increasingly complex socio economic and political problems efficiently.

#### **7.4.10 Public fund under the Ethiopian Legal System**

The CSP does not envisage public resources either in the form of government contracts or grants as a source of funding for charities and societies. However recently, there was an instance whereby the Human Rights Commission gave funds for the two most leading charities<sup>55</sup> that provide pro bono legal aid. The funding is however limited to such specific activity and cannot be used for any other activity that help them pursue their general charitable purposes.

The selection of the two most prominent advocacy organisations could be attributed to their expertise. The funding from public account could also help them pursue their objectives amidst very challenging shortage of budget they faced after the enactment of the CSP that limits foreign funding. Nevertheless such arrangement could stultify the autonomy of the most vocal advocacy organisations in the long run and impair their

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<sup>54</sup> The full version of the COMPACT agreement is available on < [http://www.compactvoice.org.UK/sites/default/files/the\\_compact.pdf](http://www.compactvoice.org.UK/sites/default/files/the_compact.pdf)> accessed 14 April 20143.

<sup>55</sup> EWLA and EHRCO has for the first time received fund from the Human Rights Commission, a human right institution established by the Ethiopian parliament. The fund was only for the year 2010 and has not been continued (2010 Annual reports of EWLA and EHRCO).

effectiveness in the monitoring of government actions.<sup>56</sup> Yet with well-defined rules and procedures that define the relationship between the government and the charities in such a manner that their autonomy would not be compromised, enhancing positive relationship and more funding opportunities could create a more enabling operational environment for those charities and societies whose function is affected by the CSP restriction on foreign funding.

In sum, the funding privileges of advocacy CSOs in the form of tax concessions and public funds is very minimal and unsystematic, and does not boost their financial capability and efficiency. The reconsideration of policies to offer public funding particularly for charitable purposes to which foreign funding is restricted could create a more enabling environment provided such schemes are made free of any gagging clauses that compromise CSOs independence. Yet a more enabling approach that enables CSOs to withstand the pressure that compromises their operational autonomy due to public funding can be attained by broadening the sources of funding from individuals, corporations, and other local and foreign funding agencies.

#### **7.4.11 Foreign Funding**

In addition to ensuring the financial sustainability of CSOs from local sources, an enabling law may also broaden CSOs ability to solicit resources from overseas. However the issue of access to foreign source is the most contentious sources of funding for CSOs. It carries with it a controversy between the freedom of CSOs to solicit fund on the one hand, and the unwarranted influence of foreign governments or foreign companies on the other. Some governments such as Ethiopia, Eritrea, Zimbabwe and Russia for instance restrict access to foreign fund on grounds of protecting national security and sovereignty.<sup>57</sup>

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<sup>56</sup> The Human Rights Commission although constituted to be an independent institution, the fact that it is highly influenced by the government would still make the apprehension of challenging the autonomy of the charities plausible.

<sup>57</sup> Many countries including Ethiopia bans foreign funding on the pretext of national security and state sovereignty. For the global trend on the restriction of foreign funding, see The International Center for Not-for-Profit Law and World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society: A Report of the World Movement for Democracy* (World Movement for Democracy and ICNL 2008) 10-20.

Thus the main issue that an enabling law needs to address regarding foreign funding is how the concern of the government on unwarranted foreign influence can be addressed without compromising the freedom of CSOs to solicit funds. Such balance is particularly relevant in countries where foreign funding is particularly crucial due to the poverty of the nation and/ or limited local philanthropy owing to social or economic reasons. Thus, particularly in countries where local sources of financing are very limited, it is imperative for CSOs to broaden their resource base and solicit fund from foreign sources including bilateral and multilateral donors and international funding institutions.

Relatedly, the Special Representative of the Secretary General on Human Rights Defenders has recommended that CSOs be entitled to access foreign funds to the same extent as governments, as part of international cooperation given that mechanisms that ensure transparency are in place.<sup>58</sup> What is stressed under this recommendation and what an enabling law thus needs to ensure is the placement of safeguards to ensure the financial transparency of CSOs. Indeed financial transparency of CSOs is one of the major areas that an enabling law needs to ensure regardless of the source of funding. The placement of a system that ensures the financial transparency of CSOs through periodical financial reporting and auditing safeguards the public and the nation from any illicit acts by CSOs, while at the same time protecting the freedom of CSOs to solicit fund, which is an important aspect of the freedom to associate.

It is legitimate that the state would inspect the legality of the sources and purposes of foreign funding as national interests and security might be threatened as terrorists and extremist groups could be funded through CSOs or money laundering could be done under the cover of CSOs. While such covert acts would compromise the credibility of the sector, it would also endanger the democratization process of a nation as a whole. Hence, foreign funding needs to be well regulated to ensure the legality of foreign fund flow as well as its lawful usage.<sup>59</sup> Yet states must not interfere with overseas financial transfers for CSOs as long as the source of funding is legal and the fund is used for

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<sup>58</sup>Hina Jilani, 'Report submitted by the Special Representative of the Secretary-General on human rights defenders, in accordance with General Assembly resolution 58/178' 22; See also, Fundamental Principles on the Status of Non-governmental Organisations in Europe, Article 50.

<sup>59</sup> For further discussion on financial accountability see Chapter 8 below.

lawful purposes. Thus CSOs right to access funding may be restricted only on the same grounds that their purposes could be restricted i.e. where there is a legitimate state concern that warrants restriction for the protection of the public and the nation as is deemed relevant in a democratic society. An enabling law however should simultaneously encourage diversified local funding from corporate giving, tax concessions and commercial engagements to avert foreign aid-dependence.

#### **7.4.12 Foreign Funding under the Ethiopian Legal System**

The CSP limits Ethiopian Charities and Societies whose purposes are the promotion of rights, equality peace and justice not to solicit more than 10 percent of their funds from foreign sources.<sup>60</sup> The restriction on foreign aid has in effect violated the right of individuals to freely choose their purposes of associations, as it forces some CSOs to abandon some or all of their objectives. For instance, some of the prominent advocacy organisations such as APAP and OSJE which were previously involved in the promotion of democracy and human rights had to abandon their historic objectives for lack of funding and re-registered themselves as Ethiopian Resident Charities. This limitation is nonetheless against the commitment of the Ethiopian state ‘to protect the right of everyone to solicit, receive and utilize resources either individually or in association with others for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.’<sup>61</sup>

Ethiopia is a very poor country that stands 211<sup>th</sup> from 214 countries with a meager US\$380 Gross National Income per capita (2009-2013).<sup>62</sup> Reports also show that the country is one of the nations that still receives gross amount of foreign aid in humanitarian assistance. In 2011 alone the country received US\$3.6 billion in total assistance out of which US\$681 million constitutes a humanitarian assistance thus making Ethiopia the fifth largest recipient of official aid in the world.<sup>63</sup> Although the UN Agency recommends that CSOs be entitled to access foreign fund to the same

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<sup>60</sup> CSP, Article 2 (2).

<sup>61</sup>UN Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declarations on Human Rights Defenders), Article 13.

<sup>62</sup> The World Bank, ‘GNI Percapita, Atlas method’(2009-2013), <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD>> accessed on 1 December 2013

<sup>63</sup> Global Humanitarian assistance, <http://www.globalhumanitarianassistance.org/countryprofile/Ethiopia?>> accessed 12 January 2014.

extent as governments as we have seen above,<sup>64</sup> nonetheless the CSP puts a disabling measure against such recommendation denying Ethiopian charities and societies an entitlement to access foreign fund from international cooperation. The rejection of foreign aid for CSOs while the state itself is the major recipient of foreign aid simply under the pretext that CSOs unlike government cannot withstand undue pressure from foreign donors appears hypocritical. The restriction of foreign funding placed on CSOs by the CSP is nonetheless justified by the government as a necessary precaution measure to prevent meddling of foreigners in the internal political affairs of the country by pushing a model of democratization influenced by the neoliberal ideology.<sup>65</sup> When the restriction imposed on CSOs from accessing foreign fund is viewed in parallel with the fact that a significant percentage of the country's national budget is donor funded, it reveals that the government is not totally against foreign funding, but holds a presumption that the capacity of the sector is not strong enough to similarly withstand foreign pressure, unlike government.

Yet, given the socio economic reality of the country where local sources of funding are almost nonexistent<sup>66</sup> and also given the constitutional commitment made by the Ethiopian government to respect freedom of association, the CSP should have broadened the ability of charities and societies to solicit fund from overseas. Nevertheless, the restriction of the CSP on foreign funding is unbounded as it also excludes fundraising from Ethiopian Diaspora and UN Agencies which are assumed to operate independent of any foreign forces. The CSP defines income from foreign sources as 'a donation or delivery or transfer of any article, currency or security from the government agency or company of any foreign country; international agency or any person in a foreign country.'<sup>67</sup> Based on this definition, the CSP prohibits even Ethiopians living abroad from making contributions to Ethiopian charities and societies to accomplish charitable purposes, such as the promotion of democracy and

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<sup>64</sup> Hina Jilani, above n 58 at 22; See also Fundamental Principles on the Status of Non- governmental Organisations in Europe, Article 50.

<sup>65</sup> Amnesty International 'Stifling Human Rights Work, the Impact of Civil Society Legislation in Ethiopia' (Amnesty International 2012) 27.

<sup>66</sup> Ethiopia is one of the poorest country in the world with a per capita income of just 380 US dollar, lower than the average per-capita income of other Sub-Saharan countries which is 515 US dollar. Ethiopia is also the second most populous country in Africa with a population of 91.73 million (2012) with a GDP of 41.61 billion US dollar. The country's Poverty head count ratio (PPP) at national poverty line (% of population) is 29.6%. For detail poverty index and other data related to Ethiopian economic condition, See, World Bank website <http://data.worldbank.org/country/ethiopia> > accessed 1 Jan 2014.

<sup>67</sup> CSP, Article 2 (15).



human rights, equality, peace and justice. This particularly denies Ethiopian Diasporas who could have contributed better owing to their financial capacity and their freedom against fear of possible intimidation by the government. Moreover, the CSP also prohibits funding from International organisations such as UN Agencies that operates independent of any foreign forces unless they manage to procure an agreement with the Federal Government.

During the law crafting and consultation process the CSOs Taskforce that represents the sector presented alternative proposals which included considering a graduated self-sufficient scheme that starts from receiving 90% foreign aid for the first year and goes progressively towards reaching the 10% maximum foreign aid rule. Another proposal was to allow charities and societies to be a partner in the tripartite project agreement with government and the funding agency so that the transfer of the fund will be made through the government that enables it to have a direct control over foreign fund for CSOs<sup>68</sup>. Although these proposals could have brought the necessary balance between the rights of CSOs to solicit funds with that of the prevention of unnecessary foreign intervention, neither of these recommendation were accepted and no reason was given by the government why the recommendation were not accepted but the legislation was enacted without incorporating the proposals recommended by the coalition of CSOs.

Thus in a country where there is excessive reliance upon overseas donors; where there is nearly no opportunity to generate revenue from local source for charitable purposes; and where it is unrealistic to presuppose that there will be in the near future, setting a prohibitive law with a far-reaching implications on even citizens and independent institutions such as UN from making contributions, not showing willingness to accept plausible recommendations from the sector that enable sufficient government control and overseeing of such funds with no explanation, leaves one to discern that the concern or intention of the law goes far beyond what is being espoused as concerns of national security to possibly also curbing the role of charities and societies in the democratization process.

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<sup>68</sup> Taskforce for an Enabling Environment for CSOS in Ethiopia, Comments and Recommendation on the draft Ethiopian Charities and Societies Proclamation (2008) (Prepared in Amharic language). The author of this thesis had been working for the Taskforce and was one of the drafters of the comments and recommendation proposed by the Ethiopian CSOs

## **7.5 Resource Utilization**

The financial capability of CSOs is affected not only by the source and the amount of funding they solicit but also by the regulatory framework governing its utilization. The right to mobilize resources would be meaningless if CSOs do not have the freedom to utilize the resource that they solicited to accomplish their purposes of establishment. Thus CSOs right to utilize the fund to cover their administrative and operational costs necessary to run the organisation need to be recognized and enforced. Nonetheless the right to utilize funds also needs to be balanced with CSOs financial accountability. This requires among others that CSOs utilize the fund prudently and effectively in a manner that can best serve the charitable purposes. One way that a law may ensure the effective utilization of funds is by giving guidelines to determine a ceiling for administrative costs and operational costs. However, as what would be a reasonable administrative cost may vary depending on the purpose and the size of CSOs an enabling law may only give a flexible guideline as to what should constitute an administrative cost and what should be the maximum ceiling for administrative costs.

### **7.5.1 Resource Utilization under the Ethiopian Legal System**

In addition to the challenge of soliciting fund, the CSP also affects the operation of CSOs by the rigid administrative cost proviso that should not exceed 30 percent of their total budget.<sup>69</sup> ‘Administrative costs’ are defined to constitute those costs incurred for emoluments, allowances, benefits, purchasing goods and services, travelling and entertainments necessary for the administrative activities of a Charity or society.<sup>70</sup>

The stipulation of the ratio of administration cost and programme cost as a matter of principle is commendable to regulate that the charities and societies are investing the funding they solicit to the purpose or to the programme goal they claimed they would achieve. Even compared to other standards such as that of the Charity Watchdog<sup>71</sup> that considers 25% administration costs ratio as acceptable the CSP can be considered as reasonable. Nonetheless, beyond what constitute the conventional running costs of the

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<sup>69</sup> CSP, Article 88 (1).

<sup>70</sup> CSP, Article 2 (14).

<sup>71</sup> Charity Watchdog is a USA based NGO that monitors the activities of various charities to help one make informed donating decisions.

organisation, the CSP considers salaries, allowances and benefits of programme and project directors and coordinators; consultancy fees, monitoring and evaluation costs, and training costs except for preparation of training materials, allowance, and accommodation, and travel costs constitute administrative cost.<sup>72</sup> Hence the inclusions of costs which are necessary to implement the projects render this stipulation to be more impeding to realize the objects of CSOs.

On the other hand the directive governing the matter provides that the following costs are considered as operational cost for charities and societies working on human and democratic rights and conflict resolution: ‘costs incurred in relation to per diem payments to beneficiaries, training materials preparation, publication of human and democratic rights materials; materials purchased for survivors of human rights violations, following up and election observation and air time payments to the media; the provision of material and financial support for local institutions engaged in conflict resolution and reconciliation.’<sup>73</sup>

The much stretched definition of what constitutes administrative cost and the inflexibility standard of the 30% administrative cost ratio for all types of charities and societies particularly affect the operation of advocacy organisations as most of their expenses are considered administrative and are limited by the 30 percent rule. This is often related to the fact that advocacy organisations inevitably expend much of their budget on human resources. For example, the expenses related to the collection, investigation and dissemination of human rights monitoring are mainly related to the salary and benefits of the officer, cost of transportation during investigation and publication which are deemed administrative cost as per the Ethiopian legal framework.<sup>74</sup> Although such disbursements are made in order to achieve the programme of investigating and publicizing human rights information their classification as administrative critically affects advocacy CSOs to pursue such activities which are crucial in attaining their charitable purposes. The application of the 30% administrative cost would be challenging even for an organisation that has

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<sup>72</sup> Charities and Societies Operational and Administrative costs Directive No 2/2011, (2011), Article 8 (1) (a) and (b).

<sup>73</sup> Ibid, Article 6 (7) and 6 (8).

<sup>74</sup>CSP, Article 2 (14); See also Charities and Societies Operational and Administrative costs Directive No 2/2011 (2011) Article 6 (7) and 6 (8)

only legal aid service in focus since even the cost for the programme coordinator employed only for such purpose or project would constitute an administrative cost.

If we however compare this with a charity engaged in humanitarian relief, despite expenses related to the salary and benefits of the officers the procurement of materials and services such as food, shelter etc. which are considered programme cost would make the percentage of administration cost appear lower than 30 percent. Hence although the administration cost requirement may not be a serious impediment to some development-oriented organisations owing to the nature of their engagement, it however adversely and systematically affects the operation of Ethiopian charities and societies that play the role of promoting rights and democratization.

Moreover, the one-size-fits all application of the 30/70 ratio would affect smaller organisations with smaller number of projects worse than those bigger organisations with more funding. This also incidentally puts advocacy CSOs in a far worse situation since they will not have more projects and plenteous funding because of the financial limitation they would face regardless. Thus the inflexible administrative cost ratio exacerbates the challenge for advocacy CSOs.

The law also imposes a penalty against the organisations and individual officers for failing to meet this administrative cost- and operational cost ratio requirement. Failure to comply with the 30% administrative cost entails a criminal liability punishable with a fine not less than five thousand and not exceeding ten thousand birr on the organisation.<sup>75</sup> Officer(s) responsible for such failure are more liable than the organisation and face penalty with fine not less than ten thousand and not exceeding twenty thousand birr notwithstanding the applicability of the relevant provisions of the criminal code prescribing a penalty of imprisonment.<sup>76</sup> Although which officer would be responsible is not clearly designated and perhaps remains to be a matter of evidence, nonetheless, even a very slight non-compliance to the 30-70 administrative cost ratios entails such serious penalty including incarceration. This might bring practical complications as even a single project might involve many different officers such as the project coordinator, the programme manager, the accountant, the head of finance

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<sup>75</sup> CSP, Article 102 (2) (d)

<sup>76</sup> CSP, Article 102 (3)

or the executive director. The management also becomes more and more complicated with the increase in number of projects. While restricting administrative cost is important in spite of such complications, the penalty is however unjustified as it is comparable to most of the penalties imposed against a person. Moreover, the liability that is beyond administrative charge could possibly deter qualified individuals not to join the sector for fear of excessive penalty thereby limit the human resource mobilization capacity of the sector.

Nonetheless, ‘much less than 50% compliance to this requirement was witnessed’<sup>77</sup> by charities and societies owing to both unclear application of what constitutes administrative cost and impracticability of project implementation during the first year of implementation of the proclamation. Although no prosecution was instituted by the Agency against those who failed to meet this legal proviso hitherto, nonetheless the level of non-compliance shows the onerous nature of the legal framework that exposes many in the sector to excessive penalties.

In sum, an enabling law recognizes the inherent linkage between the right to associate and the right to resource, since freedom of association would be of a diminished value if CSOs would be impelled to abandon some or all of their purposes and activities due to an inability to generate or access resources. Therefore, an enabling law governing the fiscal aspects of CSOs should primarily uphold a guarantee for CSOs to solicit, receive and utilize funds from any lawful sources for any legitimate purpose.

In order to enforce the CSOs right to resource mobilization, an enabling law may need to protect the workforce in the sector and to provide incentive to volunteers; to facilitate public collection; to permit commercial engagements of CSOs; to provide liberal tax concessions for CSOs and their donors; to facilitate their access to public financial resources such as grants or contracts; and to allow access to foreign resource. The freedom to mobilize resource to ensure CSOs financial sustainability and financial autonomy also needs to be balanced with their fiscal transparency and accountability.

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<sup>77</sup> Development Assistance Group-Ethiopia, ‘Guideline to determine operational and administrative (70/30): early evidence of impact’ Tracking Trends in Ethiopia’s Civil Society, Policy Brief 5, 2-3

The Ethiopian legal framework gives recognition for CSOs right to mobilize resource and allow resource mobilization through public collections, commercial engagement, tax concessions and foreign funding sources. Although such elements of the prevailing legal framework signify the intentions of providing an enabling environment, some enabling legal conditions are still lacking. CSOs right to raise funds locally through public collection and income generating activities is challenged as the provisions are snagged with vague and subjective criteria that opens room for arbitrary decisions that could compromise the autonomy of CSOs and put them at the mercy of the Charities and Societies Agency. The vagueness of the relevant provisions governing the tax regime also renders the limited tax concessions available for CSOs unviable. The funding rights of advocacy CSOs is limited as they are precluded from accessing overseas fund including fund from Ethiopians living abroad. This rule added to the tremendous challenge of local fundraising manifestly affects the overall operation of advocacy CSOs. Moreover the application of a 30% administrative cost ceiling with overextended list of what constitutes administrative cost impedes the effective utilization of the hard-fetched fund.

All these factors limit the financial capability and the autonomy of CSOs and critically undermine their efficiency and effectiveness. Thus the prevailing legal framework of the country creates an impediment for CSOs effort to contribute to democratization.

## CHAPTER 8

### ACCOUNTABILITY AND TRANSPARENCY OF CSOs

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#### 8.1 Introduction

The fourth and the last pillar of enabling legal conditions for CSOs that we are going to discuss under this chapter focuses on CSOs accountability. CSOs accountability is a mechanism by which CSOs are held answerable for their action and/or as a means by which they take internal responsibility for shaping their organisational mission and values, for opening themselves to public or external scrutiny, and for assessing performance in relation to goals. Thus accountability has both an external dimension in terms of ‘an obligation to meet prescribed standards of behaviour’<sup>1</sup> and an internal dimension motivated by ‘felt responsibility’ to act in concert with organisational mission and values to attain prescribed goals.<sup>2</sup> The focus of the chapter is on the external dimension of accountability that can be regulated by the law.

The previous chapters of this thesis concluded that laws governing CSOs may enable the sector by recognizing and enforcing the fundamental freedom of CSOs to form, to mobilize resources and to pursue any lawful purposes. The recognition of such freedoms reduces the supply-side transaction cost for CSOs thereby facilitating their existence, operation and financial sustainability. The purpose of the law is not however limited to reducing the supply-side cost and sanctioning wider rights and freedoms to CSOs. With rights certainly come responsibilities as the freedom to associate is not an absolute right. Therefore an enabling law should also regulate the accountability of CSOs. Although independence that allows CSOs to exercise autonomy and to self-govern their own internal business is one of the basic facets of CSOs, nevertheless information asymmetry between CSOs and their beneficiaries demand a need to regulate some broad internal governance arrangements by the law to promote their fiscal transparency and operational accountability for their stakeholders and the public at large.

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<sup>1</sup> Laura Chisolm, ‘Accountability of nonprofit organisations and those who control them: The legal framework’ (1995) *Nonprofit Management and Leadership* 6 (2) 141

<sup>2</sup> Roland Fry, ‘Accountability in organisational life: problem or opportunity for nonprofits?’ (1995) 6 (2) *Nonprofit Management and Leadership* 181-195, 189

This chapter examines the features of an enabling law that ensures the accountability and transparency of CSOs without however undermining CSOs freedom of formation, operation and sustainability. Thus it discusses ideally enabling legal conditions necessary to ensure the good governance of CSOs; and their operational and fiscal transparency. It also assesses the prevailing accountability rules provided under the Charities and Societies Proclamation of Ethiopia in light of the ideal enabling conditions.

## **8.2 The rationale for an enabling legal conditions for the accountability of CSOs**

The legal regimes that govern the accountability of CSOs are important to ensure the credibility of individual CSOs and the trustworthiness of the sector as a whole. Such regulation firstly promotes the trustworthiness of CSOs which makes them a preferred institution in the provision of public goods and quasi private goods. Secondly, regulations that ensure the financial accountability of CSOs could save the public money obtained from public collection and tax concession from embezzlement. Thirdly, regulation helps to screen out uncivil organisations that could disguise themselves as CSOs and cause a threat not only to the democratization process but also to a public safety and security. While the potential roles of CSOs for the democratisation of a nation are asserted, it would however be naïve to assume that all CSOs are inherently good. Indeed, some CSOs that are sectarian, undemocratic and fanatic could undermine the democratisation of a nation as they work against pluralism, tolerance and other democratic principles.<sup>3</sup> An enabling law in governing CSOs accountability must therefore provide the public reasonable reassurance that CSOs are what they say they are, and in particular that they are not covertly abusing their position or finance in ways that go beyond the legitimate exercise of individual freedom.<sup>4</sup> Hence, in general an enabling legal framework in addition to granting CSOs with the necessary freedoms for the best realisation of their objectives should also ensure that they are accountable.

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<sup>3</sup> Larry Diamond, 'Toward Democratic Consolidation' (1994) *Journal of Democracy* 5 (3) 4, 11.

<sup>4</sup> Richard Fries, 'The legal Environment of Civil Societies' in Helmut Anheier and others (eds) *Global Civil Society* 2003 (LSE 2003) 226.



Moreover, the accountability of CSOs is also particularly important for those working on the promotion of democratization for two reasons. Firstly the aptitude of CSOs to contribute to pluralism and democracy depends on certain internal governance dynamics that inculcate democratic norms and consensus building such as participation, transparency, voluntary and open recruitment membership, and accountable and responsive leadership.<sup>5</sup> Thus if CSOs should serve as a school of democracy, they need to exercise good governance and ensure their accountability to the public at large. Secondly, accountability of CSOs to the public promotes their legitimacy which is essential in broadening stakeholders and mobilizing the community for a social cause.

It is important, however, that the laws should not over-regulate and over-restrict the sector in a manner that compromises the autonomy of CSOs. Accountability mechanisms should not be used as a tool for the government to harass CSOs. Thus while the law needs to provide the government with specific tools necessary to regulate the sector, it must also put a limit to it not to exercise excessive control and not to impose unwarrantedly excessive penalties. Hence, the legal framework should not be rigid and must balance the value of non-interference by the state in the internal affairs of the organisation and the need for CSOs to be publicly accountable.<sup>6</sup> While ensuring accountability may help to minimize the demand-side transaction cost, by enhancing CSOs legitimacy and credibility, unwarranted intrusion against CSOs freedom to associate and operate would increase the supply-side cost. Hence the transaction cost analysis may be taken into consideration in determining the equilibrium between accountability and autonomy. Questions raised in relation to the accountability of CSOs such as: to whom should CSOs be accountable; and what are the mechanisms of accountability, should thus be answered within the context of this necessary balance.

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<sup>5</sup> Axel Hadenius and Fredrik Uggla, 'Making Civil Society Work, Promoting Democratic Development: What Can States and Donors Do?' (1996) *World Development* 24 (10) 1621-1639; Mark Robinson and Steven Friedman, 'Civil society, Democratisation and Foreign Aid in Africa' (2005) Institute of Development Studies, IDS Discussion paper 383, 6 < <http://www.ids.ac.uk/files/dmfile/Dp383.pdf> > accessed on May 2013.

<sup>6</sup> Lester Salmon and Flaherty Susan, 'Nonprofit Law: Ten Issues in Search of Resolution.' in Lester Salmon and Helmut Anheier (edn), *In Working Papers of the Johns Hopkins Comparative Nonprofit Sector Project*, (1996) 20 (6) The Johns Hopkins Institute for Policy Studies.

Thus the first underlying principle of an enabling law in the regulation of CSOs accountability should be balancing the fundamental freedom of CSOs to associate, express themselves, communicate, network and negotiate with their accountability. Striking the right balance between recognising and protecting the rights of CSOs on the one hand and ensuring their accountability on the other, first and foremost necessitates a legal framework that objectively stipulates standards in line with the constitutional guarantee provided for the freedom of association. Thus the implementation of any accountability mechanism should pass the test of ‘necessity for a democratic society.’<sup>7</sup>

Secondly, the rules governing the sector should also be, undemanding, clear and simple enough for an administration free of abuse and discrimination.<sup>8</sup> Furthermore, the law should provide for the right to a judicial appeal to challenge adverse decisions by administrative agencies.

Thirdly, the rules should also consider the diverse nature of CSOs when governing their accountability. CSOs have a diverse nature in terms of their size, issues and mandate.<sup>9</sup> For instance, while it may be easier to establish an accountability mechanism for small community based organisations working on single issues, the same may not be true for large national and international organisations that work on a variety of issues.<sup>10</sup> The accountability of public benefit organisations may also be treated differently from those that pursue private interests as the resource mobilization and financial governance of the two may be distinct. Hence, an enabling law must consider that there cannot be a universal approach and ‘one size fits all’ set of accountability mechanisms applicable to all kinds of CSOs.

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<sup>7</sup>The requirement of ‘necessary for a democratic state’ is well recognized in many international legal instruments such as the ICCPR, Article 22 (2), ECHR, Article 11 (2). For further explanation, See Klingelhofer Stephan and Robinson David, ‘Law And Civil Society in The South Pacific: Challenges and Opportunities; International Best Practice and Global Development’, International Center for Not-for-profit Law (ICNL) 8-9 <[http://www.vanuatu.usp.ac.fj/sol\\_adobe\\_documents/world/icnl/klingelhofer2.htm](http://www.vanuatu.usp.ac.fj/sol_adobe_documents/world/icnl/klingelhofer2.htm) > accessed 4 April 2015.

<sup>8</sup> Klingelhofer Stephan and Robinson David, above n 7 at 12.

<sup>9</sup> Mark Ginsburg, ‘NGOs: What’s in an Acronym?’ (1998) Current Issues in Comparative Education 1 (1) 2-5.

<sup>10</sup> Hetty Kovach and others, ‘Power without accountability? Execute Summary of the Global Accountability Report’ (One world Trust 2003) <<http://www.oneworldtrust.org/htmlGAP/>> accessed 2 March 2015.

Fourthly, an enabling legal framework should also recognize the unique feature of the sector and provide tailor-made accountability mechanisms that are different from those designed to govern corporate accountability. CSOs accountability is a complex notion due to their multi-level accountability to several actors: downwards to their constituents;<sup>11</sup> upwards to the government and donors<sup>12</sup> and internally to themselves and their missions.<sup>13</sup> Thus accountability mechanisms of CSOs should be designed taking the distinct nature of the entities to which they are accountable to.

Furthermore, an enabling law should also be designed considering the multiple purposes of accountability. CSOs are expected to be accountable for different but interrelated matters such as accountability to their mission, performance, governance and finance.<sup>14</sup> Accountability for mission increases CSOs' legitimacy; performance accountability enhances efficiency; governance accountability increases organisational reliability; and financial accountability encourages transparency. This can be achieved through different accountability mechanisms. For example, '*participation*' serves to inform and engage stakeholders in a meaningful way, thereby increasing CSOs legitimacy.<sup>15</sup> '*Evaluation*' and '*performance assessment*' can also demonstrate the performance of CSOs (efficiency).<sup>16</sup> On the other hand '*disclosure of statements*' '*reports*' and auditing builds organisational reliability, and transparency.<sup>17</sup>

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<sup>11</sup> Michael Edwards and David Hulme, 'Too close for comfort? The impact of official aid on nongovernmental organisations' (1996) *World Development* 24 (6) 967.

<sup>12</sup> Adil Najam, 'NGO Accountability: A conceptual framework' (1996) *Development Policy Review* 14, 342.

<sup>13</sup> Michael Edwards and David Hulme, *Beyond the Magic Bullet: NGO Performance and Accountability in the Post-Cold War World*, West Hartford (Kumarian Press 1996); Kevin Kearns, *Managing for Accountability: Preserving the Public Trust in Nonprofit Organisations* (Jossey-Bass 1996); Adil Najam, 'NGO Accountability: A conceptual framework' (1996) *Development Policy Review* 14, 342; Mark Lindenberg and Coralie Bryant, *Going Global: Transforming Relief and Development NGOs* (Kumarian Press 2001).

<sup>14</sup> Robert Behn, *Rethinking Democratic Accountability* (Brookings Institution Press 2001); Alnoor Ebrahim, 'Placing the Normative Logics of Accountability in 'Thick' Perspective' (2009) *American Behavioral Scientist* 52 (6) 885-904.

<sup>15</sup> Alnoor Ebrahim, 'Accountability in Practice: Mechanism for NGOs' (2003) *World Development* 31 (5) 813-829, 816.

<sup>16</sup> *Ibid*, 816-818.

<sup>17</sup> Alnoor Ebrahim, above n 15 at 816.

### 8.3 Regulation of CSOs Accountability

Although an enabling legal framework should encourage as different accountability mechanism as possible, nonetheless, not all of these accountability mechanisms can be equally influenced by the law. Evaluation and performance assessment for instance are accountability mechanisms that are often used by CSOs themselves and their donors to ensure efficiency and effectiveness.<sup>18</sup> Self-regulation by CSOs and networks of CSOs is also another strategy to ensure accountability. As the role of internal accountability is almost as important as that of external accountability the sector itself can play an important role on its own to ensure ethical and responsible conduct<sup>19</sup>. The idea behind self-regulation mechanisms is therefore that the sector itself should be actively engaged in promoting certain set of values and norms as part of maintaining a public reputation for transparency, professionalism and high ethical behavior. However, such forms of accountability mechanisms though may be encouraged by the law cannot however be specifically and thoroughly governed by the law.

Baldwin and Cave recognize models of regulation of CSOs such as: (i) disclosure requirements (ii) command and control regulation (iii) incentive based regulation such as tax concessions and public grants and contracts (iv) public ownership (v) regulation through rights and liabilities; and (vi) regulation by means of advice and education.<sup>20</sup> The third paradigm of regulation i.e. incentive based regulation has been discussed in detail in chapter 7 above. We may also reject the fourth model that suggests the nationalization of CSOs extremely ‘threatens their role in democratization and other social functions as it compromises their independence’ and thus not considered as enabling condition for CSOs regulation.<sup>21</sup> The last model, education and advice, if at all can be considered as a model of regulation is least influenced by the law. Since the focus of this chapter is however to look into accountability mechanisms that can be specifically governed by a legal regime, it singles out the first two types of strategies of regulation i.e. (i) accountability through disclosure requirements; and (ii) accountability by means of command and sanctions.

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<sup>18</sup> Alnoor Ebrahim, above n 15 at 816.

<sup>19</sup> Klingelhofer Stephan and Robinson David, above n 7 at 8-9.

<sup>20</sup> Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press 1999) 34-62, 97.

<sup>21</sup> Jonathan Garton, *The Regulation of organized Civil Society* (Hart Publishing 2009) 207.

The first type of accountability strategy, regulation through disclosure, requires CSOs to disclose and report on their operational and financial performance so as to reduce the information asymmetry between the public and the organisations. In this chapter we will have a closer look at the requirements of disclosure and reporting that ensures CSOs transparency without infringing their autonomy.

The second, command and sanction type of accountability strategy, requires CSOs either to perform or to refrain from certain activities that enforce accountability goals such as those that promote CSOs legality and civility, transparency, legitimacy, reliability and efficiency. It is not the intent of this chapter to discuss all possible rules that require CSOs to perform or to refrain from certain activities. It focuses upon the fundamental elements of good governance that could be commanded or recommended to CSOs and enforced through legal sanction in order to promote CSOs legality and accountability. Yet it may be important to underscore that all rules that we discussed under chapters 5-7 related to CSOs existence, engagement and resource mobilization also constitute part of the command and sanction forms of regulation to ensure CSOs accountability.

Nonetheless this section focuses on the enabling rules that promote CSOs accountability by requiring them to practice good governance and report on their financial and operational activities. It also sees to reasonable sanctions that may be enforced on CSOs for failure to comply with the legal rules. It also assesses the rules under the Charities and Societies Proclamation of Ethiopia governing CSOs good governance, disclosure and reporting, sanctions and the right to judicial appeal in light of the enabling legal conditions.

### **8.3.1 CSOs Governance**

The law may ensure the accountability of CSOs by putting requirements that ensure functioning governance of CSOs. Governance of CSOs entails the totality of functions that are required to be carried out in relation to the internal functioning and external relations of organisations.<sup>22</sup> The governance of CSOs as related to their external relations with the government and the community pertains to their civility and legal

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<sup>22</sup>Rajesh Tandon, “Board Games”: Governance and Accountability in NGOs’ 2<<http://www.wtrc-med.org/resources/Board%20Games.pdf>>Accessed 20 July 2014.

compliance as well as effective functioning and performance in society. The internal functioning of the governance of CSOs on the other hand is related to such dynamics as: vision, mission, goals and strategies (shared values); institutional governance system (power structure of the leadership); internal programming, financial and human resource management; professional and ethical norms and values for institutional functioning.<sup>23</sup>

The level of influence the law may have on these dynamics varies. Generally, however an enabling law may regulate the governance of CSOs either by detecting mandatory minimum provisions in the governing documents of CSOs; or recommending optional provisions by giving broad discretion to set and change the governance structure and operations of the organisation within the limits provided by the law.<sup>24</sup> We will discuss below what such rules that regulate the internal and external governance of CSOs should entail in order to promote the accountability and transparency of CSOs.

#### *Legality of CSOs*

The law can enhance CSOs legitimacy and their contribution to democratization by ensuring their legality and civility. Legitimacy is ‘the right to be and to do something in society—a sense that an organisation is lawful, admissible, and justified in its chosen course of action.’<sup>25</sup> Similar to any other institution, CSOs should be civil and operate within the legal bound of the country. Incivility and non-compliance to the law, in addition to legal sanction causes CSOs to lose their trustworthiness attribution and thereby negatively impact their relationship with the government and the community.

#### *Effective Functioning and Performance*

CSOs should work effectively to achieve their vision, mission and values. CSOs effective functioning and performance involves among others greater participation of stakeholders; better assessment and analysis of their interventions and strategies; realistic and time framed planning; cost-effective and sustainable implementation of

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<sup>23</sup> International Center for Not-for-Profit Law, ‘Checklist for CSO Laws’ (2006) 3 < <http://www.humanitarianforum.org/data/files/resources/704/en/ICNL-NPOChecklist.pdf> > Accessed 12 May 20115; See also, Rajesh Tandon, above n 22.

<sup>24</sup> Ibid, 3.

<sup>25</sup> Mark Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) *Academy of Management Review*, 20 (3) 571-610, 574; Meyer John and Richard Scott, *Organisation Environments: Ritual and Rationality* (Sage 1983).

programs; regular monitoring of activities and evaluation of outcomes. Effectiveness will help to instill confidence of the public on the one hand and to make CSOs responsive to the community they are meant to be serving.<sup>26</sup> Ensuring effectiveness is even more compelling for CSOs having public benefit status since the state extends benefits to them based on their efficiency attribution in the provision of public goods.<sup>27</sup> This requires that the structures and processes to evaluate the ongoing effectiveness of CSOs based on their vision, mission and goals be in place. Although the impact of the law in determining the effectiveness of CSOs could be rather remote, it may still facilitate that by requiring CSOs to regularly report on their performance and utilization of funding. The law also establishes a regulating Agency which will follow up on the reports and thereby facilitate CSOs effectiveness.

#### *Vision, Mission and Goals*

Vision, mission and goals in addition to giving CSOs a clearly defined identity, also help them to set a direction and to make transparent and efficient decisions towards that direction. Although CSOs have the freedom to freely choose their vision, mission and purposes, the law may require them to clearly define the same as it carries with it a practical and legal relevance. From a practical point of view, clearly defined vision and mission helps to track CSOs performance and to monitor the progress or achievement of programmes and thereby enhance efficiency. From the legal point of view however, setting the vision and purposes of CSOs is particularly important for the following reasons.

First, the very purpose of verifying the legality of the purposes demands that they are clearly spelt out. Secondly, clearly defined purposes transparently communicate to the public what the CSO stands for and thus help the public to make an informed decision to join or to fund the organisation. Thirdly, defining the purposes of the organisation is important as it distinctly characterizes the identity of the organisation. Since not all CSOs have equal privileges and responsibilities, the purpose of any particular CSO needs to be clearly defined. For instance, the purposes of CSOs demarcate whether it

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<sup>26</sup> Rajesh Tandon, above n 22.

<sup>27</sup> For a detail discussion on the role of CSOs on the promotion of public goods, See Jonathan Garton , *The Regulation of organized Civil Society* (Hart Publishing 2009)

is a public benefit organisation or not and consequently the type and amount of tax privileges the legal system offers it. Thus a law requiring CSOs to clearly but freely define their purpose will take a preliminary step in ensuring CSOs legality and transparency without however restricting their autonomy in choosing their purposes.

### *Institutional Governance System*

The governing body of CSOs also needs to be accountable and participatory. CSOs acquiring legal personality as juridical persons must have well established structure and predictable procedures. Thus they need to have ‘a governing body’ that represents, and accounts to the organisation. The governing body will be responsible and accountable to the stakeholders when its mandates, responsibilities and liabilities are clearly defined in advance. Accountability of the governing body is important because the autonomy of CSOs should be safeguarded not only from the dominance or control of the state, but also from the governing bodies.<sup>28</sup> If not, CSOs would fail to play a role of ‘school of democracy’ as weakness in autonomy limits CSOs effectiveness and ability to develop a democratic culture.<sup>29</sup> Thus a law may facilitate a workable institutional governance system with an accountable governing body by stating or directing the bylaws to set out the respective rights, duties, powers and also the liabilities of governing bodies such as the board, trustees and executive bodies that represent the organisation in a hierarchy.<sup>30</sup>

### *Participation*

Legitimacy is grounded in the perceptions of stakeholders in the larger environment in which the organisation is embedded.<sup>31</sup> Participation of stakeholders is therefore particularly crucial for the legitimacy of CSOs. Moreover participation enhances the quality of the social capital as communities learn the principles of democracy through engagement. Hence, by stipulating or guiding the bylaws to contain provisions that

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<sup>28</sup> Melek Saral, ‘Civil society and Human Rights Protection in Iraq since 2003’ (2009), paper presented for the final Shur Conference , Human Rights in Conflict the role of civil society Rome, Italy, 8 < <http://shur.luiss.it/files/2009/05/saral.pdf> > accessed 02 April 2015.

<sup>29</sup> Ibid.

<sup>30</sup> Klingelhofer Stephan and Robinson D, above n 7 at 8; See also Leon Irish and others, *Guidelines for Laws affecting Civic Organisations* (2<sup>nd</sup>eds, Open Society Institute 2004) 36.

<sup>31</sup> Mark Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) *Academy of Management Review* 20 (3) 571-610, 574; Meyer John, and Richard Scott, ‘*Organisation Environments: Ritual and Rationality*’ (Sage 1983).



promote open recruitment and voluntary membership the law may encourage the participation of stakeholders and consequentially strengthen the legitimacy of CSOs.

*Professional and ethical norms*

The ‘trustworthiness’ attribution of the sector demands a better professional and ethical standard. The law may thus require CSOs officers and board members to be loyal, to be diligent and to maintain the confidentiality of nonpublic information about the organisation.<sup>32</sup> Although self-perpetuating boards guarantee independent governance for CSOs it should also be carefully circumscribed and reinforced by rules of fiduciary responsibility that require the governing bodies to act in the interests of the public and not those of any private person such as the founders. The requirement of fiduciary responsibility and the protection against private benefit generate public trust and enhance the legitimacy of CSOs thereby creating an enabling environment for membership and support. The rules of fiduciary responsibility that are particularly relevant to ensure CSOs credibility are discussed below.

*i. Restriction on the distribution of profit*

The non-distribution constraint is crucial to prevent undue private benefit. CSOs are not-for-profit entities. That is, profit earned, cannot be distributed to the founders, board members, members, employees etc. Thus the rules governing the sector should contain a prohibition on the distribution of profits. Without the non-distribution constraint CSOs would lack their attribution of trustworthiness. A comparative country study has also shown that in nearly all countries where non-distribution constraints are stipulated by the law, consumers tend to support CSOs more than in countries where the legal system does not provide such constraints.<sup>33</sup>

Nevertheless, the law may also make an exception to the general principle of non-distribution constraints. The strict application of non-distribution constraint risks the exclusion of a significant proportion of ‘non-statutory’ and ‘non-profit’ community-based development organisations and cooperatives which distribute dividends to their

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<sup>32</sup> Leon Irish and others, above n 30 at 43.

<sup>33</sup> Lester Salmon and Stefan Toepler, ‘The Influence of the Legal Environment on the Development of the Not profit Sector’ (2000) Center for Civil Society Studies, Working Paper Series 17 (7).

members. Nevertheless, such organisations as cooperatives, social enterprises and mutual benefit organisations also contribute to pluralize the public sphere and represent interests of segments of groups in a society. This exception is justified because despite the fact that they fail the test of non-profit distribution, the basic objectives of these organisations were not to make profits but to improve the livelihood of the general community.<sup>34</sup> Hence, an enabling law also needs to take the nature of CSOs into consideration in making an exception to the rule of non-profit distribution.

*ii. Restriction on Private Inurement*

The law should also deter undue private benefit through the prohibition of private inurement.<sup>35</sup> While it is quite acceptable that persons who provide services for CSOs should be permitted to get reasonable reimbursement and appropriate benefits, however there is a strong and a salutary tradition that board members serve on a voluntary basis and without compensation since otherwise people would tend to form organisations to earn benefit rather than to pursue a social cause. Yet the law may permit that in situations where the work is very demanding even board members can be reasonably compensated and decisions regarding compensation must be made in a judicious manner and according to the organisation policy.<sup>36</sup>

*iii. Restriction on Self-dealing*

The law should also put a limit on Self-dealing so as persons in a position to influence or control a CSO shall not cause it to undertake a contractual transaction that constitutes an unreasonable self-benefit detrimental to the organisation by draining its assets and damaging its public image.<sup>37</sup> Such transactions would only be valid after legitimate negotiation and if done at a price and on terms that are not disadvantageous to the CSO.

Public trust also demands that CSOs in principle should not be permitted to share out assets to the founders, officers, board members, employees, donors, or members upon

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<sup>34</sup>Lester Salamon and Helmut Anheier, *Defining the Non-profit Sector: A cross-national Analysis* (Manchester University Press 1997) 33.

<sup>35</sup> Leon Irish and others above n 30 at 48.

<sup>36</sup> Leon Irish and others above n 30 at 48.

<sup>37</sup> Leon Irish and others above n 30 at 49.

its liquidation.<sup>38</sup> Otherwise, such persons would have an incentive to dissolve and liquidate an organisation to obtain assets to which they are not otherwise entitled.<sup>39</sup>

*iv. Restriction on Conflict of interest*

Additionally the law and internal regulations should in general terms require that, officers, board members, and employees of CSOs disclose and also avoid any actual or potential conflict between their personal or business interests and that of the CSO. Once the person in a fiduciary position discloses a potential conflict of interest, an organisation can address it either by way of waiver, recusal or review. The decision whether a conflict exists or not shall be determined by the agency regulating CSOs and, when contested, reviewed by the court on a case-by-case basis.

To sum up, the law may influence the accountability of CSOs by regulating the dynamics of its governance. CSOs are said to have a ‘functioning governance’ or ‘good governance’ when they are mission- based and performs efficiently to attain such mission; has a structure with clear mandates and liabilities of its governing body; exercises responsible resource mobilization and management; promotes the highest professional and ethical standards. A CSO that exhibits such characteristics of a functioning system of internal governance not only better serves the public interest but also inculcates the principles of democracy.

### **8.3.2 CSOs Governance under the Ethiopian Legal System**

The CSP provides a number of mandatory and recommendatory provisions that could potentially enhance well-functioning governance of CSOs that promote their accountability and transparency. It also appoints the Charities and Societies Agency and sector administrators to enforce the accountability measures. Although it would be unnecessary to list out all the accountability measures that we have discussed in the preceding chapters for the sake of avoiding repetition, it may however be relevant to recap some of them at this juncture.

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<sup>38</sup> Leon Irish and others, above n 30 at 50.

<sup>39</sup> Stephan Klingelhofer and Robinson David, above n 7 at 8.

### *Legality*

Firstly, in order to ensure the legality of charities and societies, the CSP requires their periodical registration.<sup>40</sup> As the law requires Charities and Societies to let know the Agency or sector administrators in their proposals required for registration, the purpose of establishment of the organisations and their activities that would help the Agency to screen out any illegal organisation or illegal activity. The CSP also requires Charities and Societies to provide fiscal and operational reporting to the Agency annually which can also allow as a tool to ensure CSOs engagement in lawful purposes. Article 81 of the CSP also requires that ‘an annual activity report or other documents be kept by the agency, when requested by a concerned body, may be made open to the public at any reasonable time if the agency or the sector administrator or the charity and society so decides’. All these measures would enable to ensure CSOs legality which is necessary to promote their legitimacy and also to protect the public.

### *Effective Functioning and Performance*

The CSP also ensures that CSOs are working and efficiently utilizing their budget in order to promote their purposes of formation. The CSP requires Charities and Societies to spend 70 or more percent of their total budget as their operational cost and only 30 percent on administrative cost. Although what constitutes administrative cost is broadly defined by the law thus causing a possible challenge for some organisations as we have seen in the previous chapter, such requirement nonetheless would in general help to promote the effective functioning and performance of Charities and Societies.

### *Professional and ethical norms*

In order to promote an ethical and professional norm in the sector, the CSP also restricts private inurement and distribution of profit. Article 41 (1) and (2) of the CSP for instance stipulates that a trustee shall not be entitled to remuneration unless such entitlement is given to him either by the trust instrument or by a law or by the consent of all trustees as a reasonable remuneration for the services he rendered in his professional capacity. A restriction on the distribution of profit from income generating activities is also provided under Article 103 of the CSP. The proceeds from income generating activities shall be used to further the purposes for which the charity or

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<sup>40</sup> CSP, Article 65 (2).

society was established. Moreover with respect to promoting professional and ethical norms within the sector and protecting public property, the CSP penalizes any misconduct or mismanagement in the administration of the charity or society.<sup>41</sup>

### *Institutional Governance System*

The CSP provides a number of provisions that deal with the institutional governance system of Charities and Societies. It requires that charities and societies are established having clear structure and predictable procedures with a governing authority that assumes well-defined responsibilities, powers and liabilities. Thus, charities shall be organized with the structure of the Board of management, manager, auditor and other departments as may be necessary.<sup>42</sup> Societies on the other hand should be structured according to their bylaws, however having regard to the mandatory provision requiring a General Assembly, an internal auditor and the necessary officers.<sup>43</sup> In order to facilitate the constitution of the structure and governance of charities and societies, the Agency draws up model rules in pursuance of Article 17 of the CSP.<sup>44</sup>

The CSP also ensures the accountability of the governing bodies in particular and that of the organisations in general. Thus in addition to allowing the bylaws to set out the respective rights and responsibilities of the governing bodies such as the board and trustees; it also contains provisions governing the same. Hence, among others the CSP sets rules of appointment and dismissal of the boards or trustees of charities; defines the rights and duties of the boards, the trustee, the manager, the auditor and members; and stipulates the number of members of the board and trustees, their remuneration and the number of meetings they should conduct.<sup>45</sup> It also determines the entitlements that private beneficiaries may have from the charitable trusts; and other issues related to the governance and structure of charities.<sup>46</sup>

The CSP also contains provisions that govern the structure and governance of Societies which include the powers and functions of the General Assembly and the auditor;

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<sup>41</sup> CSP, Article 102 (1) and (2).

<sup>42</sup> CSP, Article 19.

<sup>43</sup> CSP, Article 58.

<sup>44</sup> CSP, Article 17 (5).

<sup>45</sup> For issues related to the structure and governance of charities, see CSP, Article 20- 54.

<sup>46</sup> CSP, Article 45.

election of manager; amendment procedure of bylaws; membership; manner of conducting meetings if not provided on the bylaw etc.<sup>47</sup> The CSP also in particular demands the legitimacy of Societies through open membership and effective participation of stakeholders.<sup>48</sup> This is commendable as open and voluntary membership would make the constitution of charities and societies democratic. The mandatory stipulations that regulate the structure and governance of charities and societies; optional ones that fill up the gaps left by the bylaws; and the provision of model bylaws are acceptable means to ensure that accountability mechanisms are in place. However the excessive legal stipulations such as the requirement on the number of meetings and the number of board members or trustees; and the forceful application of presupposed optional provisions might come out as a challenge for the exercise of autonomy. In general, the CSP ensures accountability by requiring CSOs to have good and functioning governance, failure of which entails a range of sanctions.

### **8.3.3 Reporting and Disclosure of Information**

The second model of regulation of accountability of CSOs that we are going to discuss under this chapter is the reporting and disclosure of information. The law may promote CSOs accountability and transparency through both voluntary and compulsory disclosure of information and reporting. Reporting of activities will ensure that the organisation is engaged in permissible lawful purposes and pursue the same in effectively. Reporting of accounts will also help to see that the organisation is efficiently using its finances and tax benefits, if any, for its purposes of establishment.<sup>49</sup> Disclosing of information about its governance system also helps the public to make an informed decision towards any of their dealings with the organisation. In general accountability through disclosure requirements helps to tackle the information asymmetry that is inherent in CSOs provision of public goods, complex private services, and the redistribution of wealth.<sup>50</sup>

However reporting requirements that aim at ensuring accountability must not unwarrantedly infringe CSOs freedom. Reporting requirements thus need to be guided

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<sup>47</sup>For issues related to the structure and governance of societies, see CSP, Article 55-Article.

<sup>48</sup> CSP, Article 57.

<sup>49</sup> Stephan Klingelhofer and David Robinson, above n 7 at 9.

<sup>50</sup> Jonathan Garton, *The Regulation of organized Civil Society* (Hart Publishing 2009) 217.

by the principles of proportionality, necessity and confidentiality in order not to affect the fundamental freedom of CSOs existence and operation. Thus, firstly, reporting requirements should be proportionate to the scope, size and capacity of CSOs.<sup>51</sup> Otherwise burdensome reporting requirements could increase the supply side transaction cost and discourage people not to form CSOs or to close down already established ones. For instance it may be enough to require CSOs to present their activity and budget reports and audit reports annually or bi- annually. Secondly, the principle of proportionality also entails that the reporting obligation needs to be commensurate with the benefits the organisations obtain from the state.<sup>52</sup> It is thus appropriate to require detailed and extensive reporting from CSO that are registered as public benefit organisations and receive the highest level of financial benefits. Thirdly, taking the challenge of CSOs accountability to many actors including the general assembly, government and donor agencies, easy to complete and standardized reporting requirements that communicate only the necessary information would be more enabling for CSOs.<sup>53</sup> Fourthly, although the publication of the report may enable communication to the wider public and contribute to enhancing public trust and serve as a form of ‘passive enforcement’, the specific rules requiring the dissemination of reports should not however be expensive and onerous to CSOs.<sup>54</sup> Moreover, the principle of necessity also demands that reporting requirement should take privacy and confidentiality into consideration.

In as much as the disclosure of information helps CSOs to build trust and credibility, the full transparency may not always be possible and necessary.<sup>55</sup> This is particularly important for CSOs working in a difficult political environment because disclosure of information may put people in danger.<sup>56</sup> For example, it may well be inappropriate or

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<sup>51</sup> Mark Ginsburg, ‘NGOs: What’s in an Acronym?’ (1998) *Current Issues in Comparative Education* 1(1) 2-5; Hudson Alan, ‘Making the Connection: Legitimacy Claims, Legitimacy Chains and Northern NGOs’ *International Advocacy* (2000) In Lewis, D. and Wallace, T. (Eds.) *After the 'New Policy Agenda'? Non-Governmental Organisations and the Search for Development Alternatives* (Kumarian Press 2000).

<sup>52</sup> Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association, source book 171* <<http://pilnet.org/public-interest-law-resources/30-enabling-civil-society-practical-aspects-of-freedom-of.html>> accessed on 14 April 2015; Leon Irish and others, above n 30 at 32.

<sup>53</sup> Ibid, 94; Leon Irish and others, above n 30 at 32; Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association, source book 171* <<http://pilnet.org/public-interest-law-resources/30-enabling-civil-society-practical-aspects-of-freedom-of.html>> accessed 14 April 2015.

<sup>54</sup> Klingelhofer Stephan and Robinson David, above n 7 at 10.

<sup>55</sup> Leon Irish and others, above n 30 at 32.

<sup>56</sup> Leon Irish and others, above n 30 at 32.

impossible for human rights organisations to disclose some of their sources of information, identities of clients or even the identities of donors and members. To do so could trigger the closure or repression of the organisation and the end of its work. It may also put their members and supporters at risk.<sup>57</sup> The respect for privacy and confidentiality, however, is not without limits and should not prevent government from doing its primary task of protecting the public from unlawful criminal activity.

Within these general guiding principles, regulation through disclosure may ensure the accountability of CSOs. Thus the law may require formally established CSOs, having more than minimal activities or receiving more than minimal funding or benefits from private donors and the state to periodically publish or otherwise create public accessibility to their activity and financial management.<sup>58</sup> The publication and accessibility of reports may potentially open access to a public scrutiny by stakeholders who could lodge a complaint or initiate an inquiry to be made by the Agency which is given the mandate to regulate CSOs. Hence, the disclosure of information serves as a supervisory tool for the state, it also assists citizens to play their watchdog role. Thus, disclosure of basic information is in the interest of both the state and the public to tackle the information gap between CSOs and stakeholders and thereby enhance CSOs legitimacy and accountability.

#### **8.3.4 Reporting and Disclosure of Information under the Ethiopian Legal System**

Like many other charity laws of different jurisdictions, the CSP also provides voluntary and compulsory disclosure of information and reporting by charities and societies as the major accountability mechanism. It requires charities and societies to submit an activity report; to keep accounting records; to submit statements of accounts, particulars of bank accounts and external audit report to the Agency.<sup>59</sup> Generally speaking, all these are necessary measures that ensure the accountability of charities and societies by ensuring their financial transparency and legitimacy to their stated mission. The requirement that ‘annual activity report or other documents kept by the

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<sup>57</sup> International Council on Human Rights, ‘Human Rights Organisations: Rights and Responsibilities’ Final Draft Report (2009) 28.

<sup>58</sup> Leon Irish and others, above n 30 at 32.

<sup>59</sup> CSP, Articles 77, 78, 79 and 80.



agency... be made open to the public at any reasonable time if the agency or the sector administration or the charity and society so decides’<sup>60</sup> also ensures downward accountability of charities and societies to their constituencies and the public at large. The reporting requirement of the CSP also fulfills the principle of proportionality as it takes regard of the scope, size and capacity of CSOs. It exempts small organisations whose annual flow of funds does not exceed fifty thousand Birr from submitting an annual statement of accounts.<sup>61</sup> They can instead prepare receipts and payments account and a statement of assets and liabilities. On the other hand, charities and societies whose annual gross income is more than Birr 100,000 are required to be audited by an external auditor in addition to submitting an annual activity and financial reports.<sup>62</sup> This helps charities and societies with lesser financial and human capabilities not to be overburdened with the reporting requirements and got discouraged to form or to sustain their associations.

Nonetheless the discretionary powers invested in the Charities and Societies Agency demand a careful application of the rules if the autonomy of CSOs is to be maintained and the supply side transaction cost reduced. For instance, the CSP provides that in addition to submitting an annual statement of accounts, charities and societies are required to keep accounting records that explain all the transactions and contain the identity of all donors for a minimum of five years in order to disclose the same at any time the Agency requests.<sup>63</sup> In addition to the annual reports, the Agency may also at any time require the submission of an activity report and annexed financial report.<sup>64</sup> It may also order the examination of accounts anytime it thinks necessary by external or internal auditor or an auditor designated by the Agency.<sup>65</sup> Thus, although periodical and timely presentation of financial and activity reports could serve as an accountability mechanism, the requirements of keeping and adducing these documents any time as requested by the Agency could be cumbersome and meddlesome for charities and societies.

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<sup>60</sup> CSP, Article 81 and 82.

<sup>61</sup> CSP, Article 78 (2).

<sup>62</sup> CSP, Article 79 (3) and (4).

<sup>63</sup> CSP, Article 77.

<sup>64</sup> CSP, Article 80 (2) and (3).

<sup>65</sup> CSP, Article 79.

A second example that could give leeway to unfettered authority of the Agency unless properly enforced is stipulated under Article 84 which states that the Agency may at any time either for general or for particular purposes institute inquiries with regard to a specific or class of charities or societies. Nevertheless, the law fails to provide possible grounds that could allow instituting such inquiry. Such a sweeping power that allows the Agency to make such inquiry for whatsoever reason without justifying itself could create a loophole for possible abuse. Nonetheless such inquiry must be justified in terms of its necessity, proportionality and transparency not to jeopardize the autonomy of the organisations. Good practice that protects the autonomy of CSOs and limits the discretion of the regulating body only to the limited necessity thus demands that the Agency has to provide reasons for its decision to bring an inquiry to let the organisation defend itself. If prima facie evidences still prove the necessity of the inquiry after the organisation was given the opportunity to defend itself, the principle of transparency may require that the Agency publicize the reason of its inquiry and the results of the inquiry to let all stakeholders and the public.

Furthermore, the Agency or sector administrators may require the charity or society or its representative or an employee to furnish accounts and statements, documents and '*any other evidence*' either in writing or orally for such inquiry or for any other purpose.<sup>66</sup> Such requirements that demand the provision of 'any requested evidence' should also be construed in line with the principles of 'necessity and proportionality' not to intrude so much against organisational privacy and confidentiality. The application of this rule for instance needs to be seen in light of protection of informants and witnesses of human rights violation as it would otherwise trigger the repression of clients and witnesses and cripple the contribution of the sector in human rights monitoring.

Further intrusion in the functioning of societies is made possible by the law as it requires societies to notify the Agency in writing of the time and place of any meeting of the General Assembly not later than seven working days prior to the meeting.<sup>67</sup> Although the purpose of the notification is not clarified by the legislation, it nonetheless shows the degree of intrusiveness the law has permitted against societies.

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<sup>66</sup> CSP, Article 84, 85 and 87.

<sup>67</sup> CSP, Article 86.

Before the enactment of the CSP the preceding draft documents contain a provision which requires similar notification to enable the representatives of the Agency and even the police to be present.<sup>68</sup> Such clearly marked out threatening purposes of the notification are omitted in the final draft after the sector representatives made a plea to that effect during discussions before the enactment.<sup>69</sup> Although the police presence is omitted, nonetheless the requirement to notify the Agency by itself still shows the level of intrusiveness that can be exercised by the Agency. Moreover, given the number of charities and societies and the human capacity of the Agency<sup>70</sup>, it is evident that the attendance of the Agency will be limited to a few. Hence, this might open a room for the arbitrary selection of charities and societies which might challenge government policies and legislations.

To sum, even though the need to ascertain the accountability of charities and societies through disclosure and reporting is appreciated, the excessive and erratic requirement to disclose all types of information any time requested, and the condition of notifying and allowing the regulating agency in the meetings of CSOs may however have the potential of jeopardizing the independence of charities and societies.

### **8.3.5 Sanction**

Accountability mechanisms be it command and control or incentive based regulations need to be enforced and thus failures need to be sanctioned. Moreover Reports though necessary are not often sufficient;<sup>71</sup> they must also receive scrutiny by concerned authority.<sup>72</sup> The law should therefore stipulate who should inspect the reports and what actions need to be taken. Improper and deceptive matters and questions on the report should trigger inquiries, inspections and formal audits as deemed necessary.

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<sup>68</sup> First draft Proclamation issued by the Ministry of Justice (MoJ) as Charities and Societies Proclamation No.00/2008, Article 16.

<sup>69</sup> Several formal and informal discussions have taken place between the MoJ-Ethiopia and the representatives of the Ethiopian CSOs. The author of this thesis has been present in many of the discussions representing the Coalition of 16 local CSOs and networks which was established as an ad-hoc Taskforce dubbed as 'Taskforce for an enabling environment for civil society in Ethiopia'.

<sup>70</sup> In 2009 where all Ethiopian CSOs were requested to re-register, there were only 12 officers assigned to supervise and advise the more than 2000 charities and societies (See the Agency's website at <[www.chsa.et.org](http://www.chsa.et.org)> accessed on 12 25 May 2015.

<sup>71</sup> Klingelhofer Stephan and Robinson David, above n 7 at 8-9.

<sup>72</sup> Ibid.

If formal auditing or an inquiry by the regulating Agency or an investigation by the police or any legally authorized personnel discloses failure of CSO to comply with the law or to fulfill its stated purposes or to use its funds in a legal and satisfactory manner, it is appropriate for the law to impose reasonable sanctions. Although education and advice are also paradigms of regulation of CSOs, in the event that CSOs committed a crime or made a serious fault a reasonable and proportionate sanction, clearly provided in advance of the act or omission that warrants the penalty, may be imposed.

The law needs to sanction CSOs that are illegal or fail to comply with the mandatory accountability requirements in order to protect the public from the wrongdoings of those that the public often considers trustworthy. However, it is important that the sanction should not be used beyond a means of regulating the legality and accountability of CSOs and not discourage the formation and the operation of CSOs. Thus, an enabling environment for CSOs demands that any sanction must be, (i) reasonable; (ii) predictable; (iii) and appealable.

#### *Reasonable*

Reasonable sanctions take into account the nature, severity and recurrence of the wrongdoing. Thus firstly, sanctions may increase in severity with the severity of the acts of violation. Thus for instance non-flagrant wrongs may be tolerated with a warning notice. Secondly, sanctions imposed need to be graduated and served after prior notices. Thirdly, sanctions also need to take the nature of the wrong committed. Thus for instance, improper or illegal acts related to private benefits such as self-dealing and distribution of profits to members may be sanctioned by the suspension or removal of the governing body or employees responsible for the act since the unlawful enrichment of individuals in CSOs should not be reasons to affect the organisation as a whole. On the other hand, unlawful activities such as terrorism may face severe sanctions including involuntary termination of the organisation since such act would cause a serious threat for the peace, safety and security of the public.

#### *Predictable*

An enabling environment for CSOs require that the law must clearly provide the grounds of sanctions, the types of sanctions and the power of the sanctioning authority not to leave unlimited and arbitrary discretion of application of sanctions.

### *Appealable*

The right of judicial appeal is also a key provision that an enabling law must contain in parallel to sanctioning of CSOs. CSOs need to have the right of appeal to challenge the form of sanction or the decision that warrants sanction itself. This is particularly important for CSOs engaged in unpopular activities such as public advocacy or watchdog against government action. The ever-present danger of over-regulation by the state or the use of reporting and audit requirements to harass CSOs that are critical of the state or otherwise unpopular can be checked only through judicial appeal. While administrative decisions should be subjected to appeal to be challenged in the court of law for correction of governmental abuse and to deter possible future abuses, any criminal sanction should be enforceable only through independent court order.<sup>73</sup>

### **8.3.6 Sanction under the Ethiopian Legal system**

In order to enforce the accountability measures, the CSP provides a number of sanctions for non-compliance. For instance failures related to the disclosure and reporting of fiscal matters are punishable as follows. Failure to submit Annual Statements of Accounts will result in a fine with not less than ten thousand birr and not exceeding twenty thousand Birr.<sup>74</sup> Failure of the duty to Keep Accounting Records is punishable with fine between Twenty thousand and Fifty thousand Birr.<sup>75</sup> Failure to notify the particulars of Bank Accounts is also punishable with a fine between fifty thousand birr and hundred thousand Birr. This helps to ensure the financial transparency of CSOs and may be considered reasonable and predictable.

However the law seems to impose a severe penalty on officers failing to comply with the above requirements. Thus, any officer, employee or person who participates in the above acts is punishable with fine not less than ten thousand Birr and not exceeding Twenty thousand Birr; or imprisonment not less than five years and not exceeding ten years or both. Such severe punishment that entails five to ten years of imprisonment for failure to submit the particulars of the bank account and/or financial report could

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<sup>73</sup> Leon Irish and others, n 30 at 32.

<sup>74</sup> CSP, Article 80.

<sup>75</sup> CSP, Article 79.

have been rectified easily with a warning. This could however increase the supply side transaction cost for the formation and sustainability of CSOs.

The Agency also has a power to suspend officials<sup>76</sup> and to suspend or dissolve charities and societies<sup>77</sup>, even devoid of appeal to court<sup>78</sup>. For instance, when the Agency is satisfied that there is or has been any misconduct or mismanagement in the administration of the charity or society, it can suspend the responsible officer and order the organisation to improve its system of operation and to assign another officer.<sup>79</sup> It may also suspend some operation of the charities and societies at fault meanwhile.<sup>80</sup> This decision is not however subject to judicial appeal for the Ethiopian resident and foreign charities.

The Agency may also either suspend or cancel the license of charities and societies and dissolve them for reasons of failing to comply with the legislation governing them or the Agency's orders; submitting falsified accounts and reports; procuring registration by fraud or misrepresentation; undertaking unlawful purposes or purposes prejudicial to public peace, welfare and security; failing to renew its license or committing a crime.<sup>81</sup> Even if some of these measures are necessary to ensure the accountability, legality and legitimacy of charities and societies, the wider discretion of the Agency and the ambiguity of some of the grounds of sanction, added to the severity of the measures that can be taken even for minor faults in degree and without a single warning, could threaten the independence of individual organisations as well as the sector as a whole.

Regarding the right of appeal, the Proclamation provides Charities and Societies the right to an administrative appeal against any decision made by the registering and supervising agency. Any organisation which is aggrieved by the decision of the director of the Agency can lodge its appeal to the Board within 15 days from the date of the decision<sup>82</sup>. The board that has seven members out of which two of them

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<sup>76</sup> CSP, Article 91.

<sup>77</sup> CSP, Article 91, 92 and 93.

<sup>78</sup> CSP, Article 104 (2).

<sup>79</sup> CSP, Article 90 (1).

<sup>80</sup> CSP, Article 90 (2).

<sup>81</sup> CSP, Article 92.

<sup>82</sup> CSP, Article 104(2)

nominated from the charities and societies is nonetheless far from ‘independent’ as all members including those that represent the sector are nominated by the government.<sup>83</sup> However the CSP limits the right of judicial appeal to only Ethiopian charities and societies denying the Ethiopian resident charities and societies and foreign charities against the constitution, which provides the Right of access to justice for ‘everyone’ including any association representing the collective or individual interest of its members, to bring a justiciable matter to a court of law.<sup>84</sup> The right to appeal is denied for foreign charities on the ground that the right to access justice is a democratic right not a fundamental right reserved only to citizens. Following this argument, the law treats the Ethiopian resident charities and societies that receive more than 10% of their annual income from foreign sources as foreign entities regardless of the citizenship of their members and the workplace of the organizations and therefore denied them the right to judicial appeal.

Ethiopian Charity or Society, or Ethiopians aggrieved by the decision of the Board may however appeal to the Federal High Court within 15 days from the date of the decision.<sup>85</sup> When an organisation appeals to Court, it might also apply for a stay of execution of the decision to dissolve it. If the court grants the stay of execution, the organisation can continue operating until the court gives a final decision on the appeal. On the other hand the CSP in contravention of the basic constitutional principle of ‘access to justice’ denies Ethiopian Resident charities and societies as well as Foreign Charities the right to judicial appeal against the decision of the Board of the Agency.<sup>86</sup> Incidentally, it is good to note that CSOs working on democratization are allowed the right to judicial appeal since they all are required to be registered as Ethiopian charities or societies.

In sum, the CSP is commendable in stipulating legal provisions that ensures the accountability of the civil society sector. It provide different mechanisms whereby Charities and Societies remain accountable by commanding the exercise of good governance enforced through sanctions; and requiring disclosure and reporting. Such

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<sup>83</sup> CSP, Article 8.

<sup>84</sup> The FDRE Constitution, Article 37.

<sup>85</sup> CSP, Article 104 (3).

<sup>86</sup> CSP, Article 104 (2).

accountability measures are necessary to ensure the legality and trustworthiness of the sector. Nonetheless the wider discretionary power of the Agency in enforcing accountability measures, severe penalties on officers; and the lack of judicial appeal for Ethiopian resident and foreign organisations could remain as challenge to the functions of CSOs. Although accountability is necessary, extreme caution owing to fear of severe penalties however may possibly cause CSOs to undertake self-censorship thus compromising their voice or influence and threatening the autonomy the sector. However, if CSOs have to be effective in their contribution to democratization or any other social good, the accountability mechanisms should be limited only to judicious actions that made them answerable to the public.

Both autonomy and accountability are essential features of CSOs and indispensable means to play their role in democratization. Thus, it is necessary that the accountability mechanisms that are set by the CSP should be applied within the constitutional framework that guarantees freedom of association; and individual cases should be assessed in line with the requirement of ‘necessity in a democratic society.’ Any accountability and punitive measures should thus be taken in a manner that should not threaten the autonomy, existence and healthy functioning of CSOs. Measures should thus be taken in good faith, and to the extent that is deemed possible CSOs need to be given a chance to rectify errors before resorting to severe actions such as suspension of license, dissolution or criminal conviction of officers.



## CHAPTER 9

### CONCLUSION AND RECOMMENDATIONS

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As indicated in the introduction this thesis aims to answer the question whether the law governing CSOs has a role to play in assisting CSOs contribution to democratization. It does so firstly by laying the conceptual framework for what constitutes CSOs and what is democracy. It also explores if CSOs have any contribution to democratization and concludes that lawful CSOs that have democratic mission and organization, exercise autonomy, and are representative and inclusive will contribute to democracy by building the social capital, influencing policies and legislations and holding government accountable. The thesis further explains that in addition to exhibiting such characteristics, CSOs further need enabling environment to play such democratic functions. The thesis argues that one of such enabling environment necessary for CSOs democratic functions is the legal framework. Hence, focusing on the enabling legal framework, and taking the Ethiopian law as a case study it analyses such aspects of CSOs as their formation, purposes, resources and accountability that are specifically governed by the legal regime, and answers beyond a reasonable doubt that laws may either assist or hinder CSOs contribution to democratisation.

Democracy as a system of governance enshrines liberty, equality and the protection of human rights. The protection and enforcement of such fundamental rights require some procedural mechanisms such as free, fair, inclusive and periodical election that ensures the rule of the people. Moreover, democracy entails a system that ensures the participation of the electorate in the public sphere beyond election periods, and the accountability of the elected officials throughout their office term.

Among others, the existence of strong CSOs plays a crucial role in the initiation and consolidation of democracy. In an authoritarian regime that does not constitutionally guarantee fundamental rights CSOs may have a role of delegitimising the authoritarian government and fighting for a regime change. Once the democratization process is initiated, CSOs contribute to electoral democracy through voters and civic education and election monitoring to ensure peaceful and fair elections. CSOs also offer procedural guarantees for sustainable democracy as they can provide a forum of

participation and civic engagement for citizens and empowering them by planting democratic ideas and civic skills. They also reinforce government accountability serving as a watchdog, enhancing regulatory quality and promoting transparency.

However an enabling legal environment for CSOs is a fundamental prerequisite that together with other socioeconomic and political conditions co-determine the role CSOs can play in the democratization process. As is elucidated in the previous chapters in detail by taking the Ethiopian legal framework as a case study, the law may either assist or hinder the democratization role of CSOs. The law in particular regulates CSOs legal existence, purposes of formation, resource mobilization, and accountability. In regulating these aspects of CSOs the law influences the essential facets of CSOs in their democratization role, including the growth and the plurality of CSOs, their operational and financial autonomy, activism, legitimacy and accountability.

For CSOs the most favourable legal framework means constitutionally recognized freedom to associate for any lawful purpose; freedom to form and to get legal personality free of red tape; freedom to express themselves without frontiers; freedom to solicit legitimate funds from any legal source of their choice; freedom to have a day in court; predictable and non-discriminatory rules and regulations and minimised limitations and sanctions<sup>1</sup>. These freedoms, however also need to be balanced with their accountability.

The Federal Democratic Republic of Ethiopia constitution lays an enabling general framework for CSOs by recognizing freedom of association and other fundamental rights such as the freedom of assembly, the freedom of information and the freedom of expression. The constitution also stresses the fundamental nature of such freedoms and ensures their protection by specifically allowing their interpretation according to the international human rights treaties such as the UDHR and the ICCPR ratified by the nation.<sup>2</sup> However, instead of getting advanced along with the constitution and enforcing such constitutional principles, the Charities and Societies Proclamation (CSP) that governs the sector rather regressed and contravenes the supreme law of the country in many aspects. It restricts such fundamental rights as freedom of association,

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<sup>1</sup> For a detail discussion on favourable legal environment for CSOs, See chapter 4 above.

<sup>2</sup> The FDRE Constitution, Article 9 and Article 13.

freedom to access justice, freedom of communication and networking; and contravenes democratic and constitutional principles such as equality before the law, and sovereignty of the people. Consequently the CSP negatively impacts on the engagements of CSOs and most notably the advocacy CSOs and their contribution to democratization. It does so by discouraging the growth of the sector; and systematically suppressing their activism, resource mobilization capability, and autonomy.

Firstly, the CSP curtails the growth of the sector by putting intricate procedures to form and to sustain CSOs and networks of CSOs. The mandatory requirement for charities and societies to get registered; the cumbersome procedures to get legal personality; the obligation to renew license every three years; and the discretion of the registering Agency that leaves wide scope for motivated procedural delays increases the supply-side transaction cost of the formation of CSOs. The restrictions on the formation of consortiums also impacts on the strengthening of the sector and their capacity to become a voice. Moreover, the unconstitutional denial of the right of judicial appeal against administrative grievances and unwarranted dissolutions for Ethiopian resident and foreign charities threatens the existence of CSOs. These in turn affect the growth of the sector and the engineering and strengthening of the social capital that facilitates the democratization of the country.

As Robert Putnam argues<sup>3</sup> ‘networks or organisations can contribute to mediating between citizens and the state; mobilizing and conveying citizens’ interests to government; constraining government actions by stimulating citizens’ actions and inculcating democratic values.’ Indeed many other scholars also concur with the contribution of social and political capital<sup>4</sup> engineered by CSOs for economic

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<sup>3</sup> Robert Putnam, ‘Bowling Alone: America's Declining Social Capital’ (1995) *Journal of Democracy* 6 (1) 65-78, 67.

<sup>4</sup>John Booth and Patricia Richard, ‘Civil Society, Political Capital and Democratization in Central America’ (1998)*The Journal of Politics* 60 (3) 780-800.

development<sup>5</sup>, political participation,<sup>6</sup> democratic values<sup>7</sup> and democratization,<sup>8</sup> save the ‘uncivil ones.’<sup>9</sup> However, the cumbersome procedures of formation, resource mobilization and accountability imposed by the CSP would affect the engineering and the growth of a social capital that could stir communal empowerment and activism that makes demands from the public authorities and influences government decisions, policies and legislations. Thus by impeding the growth and activism of CSOs, the law plucks out the social force that is indispensable to push the nascent democratization process.

Second, it suppresses the activism of CSOs by barring the engagement of CSOs in the democratization purposes. Despite the constitutional recognition of the freedom of association for any lawful purpose as is relevant in a democratic society, the CSP discriminately denies nearly 80% of CSOs, that it classifies as Ethiopian Resident Charities and Societies and Foreign Charities, not to be engaged in scores of lawful purposes. The restricted areas of engagement include the promotion of human rights, the promotion of democracy including election monitoring; the promotion of equality of gender, religion and minority groups; the promotion of efficiency of the justice sector; the promotion of conflict resolution and conflict management.<sup>10</sup> This comes from a construal of political purpose to include nearly all the engagements of the community in the public sphere, beyond what is conventionally considered as partisan purposes. All these roles having a pronounced contribution to the nascent democratization the country was experiencing, the restriction of financial resources for the promotion of such democratic purposes has expelled many of the CSOs that could have shaped the contours of democracy in the country.

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<sup>5</sup>Albert Hirschman, *Getting Ahead Collectively: Grassroots Experiences in Latin America* (Pergamon 1984); John Clark, *Democratizing Development: The Role of Voluntary Organisations* (Kumarian press 1991).

<sup>6</sup> Steven Rosenstone and John Hansen, *Mobilization, Participation and Democracy in America* (Longman Publishing Group 2009); Conway Margaret ‘Political participation in the United States’ (1991) congressional quarterly press.

<sup>7</sup> John Booth and Patricia Richard, ‘Repression, Participation and Democratic Norms in Urban Central America’ (1998) *American Journal of Political Science* 40, 1205-32.

<sup>8</sup> Larry Diamond, ‘Introduction: Civil Society and the Struggle for Democracy’ in the Larry Diamond (eds) *Democratic Revolution: Struggles for Freedom and Democracy in the Developing World* (Freedom House 1991); Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press 1992).

<sup>9</sup> Monga Célestin, ‘Uncivil Societies: A Theory of Socio-political Change’ (2009) Policy Research Working Paper The World Bank, Development Economics Policy Review Unit, 4942, 2.

<sup>10</sup> CSP, Article 14 (5).

The contours of democracy in a country depend on the inputs of society who are the social forces in ‘defining, controlling and legitimating state power.’<sup>11</sup> CSOs as institutions created by the different segments of society would have an important and integral role to play in participating and empowering the society to shape such contours. Thus any restriction against such role of CSOs would significantly affect the way the contour of democracy will be formed. The establishment of democratic structures and institutions, however well-meaning they may be, would only make an imperfect contour without the full-fledged participation of the society. Sustaining democratic principles and cultivating democratic culture requires that the society and their organisations need to forge ahead with the democratization process. Adam Przeworski argues along these lines asserting that ‘democracy is consolidated when compliance- acting within the institutional framework-constitutes the equilibrium of the decentralised strategies of all the relevant political forces.’<sup>12</sup> Moreover CSOs create and sustain the asset of new democratic norms which regulate the behaviour of the state and the character of political relations between the state and the public sphere of society and individual citizens.<sup>13</sup> Thus, the CSP’s prohibition of a very large group of CSOs from such democratization role will certainly have an adverse consequence to the democratization process of the nation.

Thirdly, the CSP also incapacitates the vibrancy and the efficiency of the rest of a handful of active advocacy CSOs by imposing barriers to access resources. It denies such CSOs classified as Ethiopian Charities and Societies, their freedom to solicit funds from any legal source, and restricts them only to local funding with identified donors. Such restriction imposed notwithstanding the unfavourable socio-economic reality of the country has essentially rendered them unable to function and stultified their role in democratization. Furthermore, vague and very limited tax concessions; cumbersome public fundraising procedures; prohibition of anonymous donations; limited engagement in only ‘incidental’ income generating activities; and the wide

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<sup>11</sup> Gordon White, ‘Civil Society, Democratization and Development: Clearing the Analytical Ground’ in Peter Burnell and Peter Calvert (eds) *Civil Society in Democratization* (Franc Cass 2004) 13.

<sup>12</sup> Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press 1991) 26.

<sup>13</sup> Gordon White, above n 11 at 15.

discretion of authorities to make decisions on these matters significantly impede the financial capability and the financial autonomy of CSOs.

Gordon White drawing on some theories of collective action asserts, ‘the capacity for collective action is affected by factors such as diseconomies of numerical scale, or the resources available to potential actors (for example, it is usually easier for a small group of large landowners to organize and exert influence than a large number of small tenants).’<sup>14</sup> Without underestimating the worth of constituency, this assertion clearly shows the worth of financial capability to influence the democratization process by exerting pressure on government to respect the rule of law and human rights. The CSP however by depleting the financial resource of advocacy CSOs left them incapable to influence the democratization process. Thus in general the facts that a very large number of CSOs are denied and the rest incapacitated from participating in the democratization of the country would in general make the community fail to internalize the democratic ideals, and disengage them from shaping the contours of democracy.

In addition to the financial limitations, the CSP also unclearly but seemingly rules out the engagement of such advocacy CSOs in electoral democracy, by singling out mass based organisations to undertake such purposes as voter education, organizing seminars on current affairs and the platforms of candidates and election monitoring. This is like giving a double sentence for vibrant advocacy CSOs in the country that are restrained not to access foreign funding, as most of them do not have mass membership.

Fourthly, the CSP also impinges on the autonomy of CSOs through unwarranted and unchecked discretion of the regulating Agency beyond what is reasonably necessary to ensure the sector’s accountability. It is true that the advance of a civil society which does not necessarily contain the democratic ideal does not in itself ensure the democratization of the political system.’<sup>15</sup> Thus, the resolve of the CSP to ensure the accountability of CSOs is commendable and could be enabling to decrease the demand- side transaction cost of CSOs. Nonetheless, it contains unwarranted

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<sup>14</sup>Ibid, 12.

<sup>15</sup> Jean-Francois Bayart, ‘Civil Society in Africa’ in Patrick Chabal (ed.) *Political Domination in Africa* (Cambridge University Press 1986) 118.

limitations and disproportionate sanctions that affect their autonomy. It puts an inflexible 30% administrative cost limit; requires the submission of an activity report, financial report, audit report, bank accounts not only periodically, but any time the Agency requests to; requires the disclosure of any types of information or documents anytime. It also gives excessive authority to the Agency to permit or deny registration and renewal of license; to approve or deny fundraising; to investigate the organisations anytime it deems necessary; to suspend officers and the operation of CSOs; to dissolve Ethiopian Resident charities and societies and Foreign charities without court order; and to confiscate properties of CSOs found to be in violation of the law and to give it to another charity or society that it hand-picks. The CSP also imposes severe pecuniary penalties on charities and their officers. It also puts ‘undefined’ terms of imprisonment on officers even for minor administrative or professional faults. The CSP thus infringes on the ideal notion of CSOs as an autonomous entity and cause them to operate in a state of fear and unwarranted self-censorship.

Such evasion in the operational autonomy of CSOs and threat of grave sanctions make their survival questionable, let alone pressurising the government and pushing for the democratization process. Such threat against autonomy is by itself a deterring factor not to establish CSOs and an impending cause to dissolve existing ones. Even those CSOs that endure the pressure may contribute little to democratization, if at all, in terms of what Warren has referred as ‘developmental effects’<sup>16</sup> or Uhlin designates as ‘the individual aspect of democracy.’<sup>17</sup> This is to say that while the enduring CSOs may still serve as a school of democracy by bringing ‘developmental effects’ on individuals in the form of capacity enhancement in networking and collective decision-making process, nevertheless, their effect on the ‘institutional aspect’<sup>18</sup> of democracy will however be minimal. Thus CSOs in Ethiopia will be essentially limited to contribute to democratization in terms of promoting rights, equality, justice and peace; forging the public opinion; influencing the democratic institutions, monitoring the state’s action and ensuring accountability. The CSP also weakens the potentially

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<sup>16</sup> Mark Warren, *Democracy and Association* (Princeton University Press 2001) 97

<sup>17</sup> Anders Uhlin, ‘Which Characteristics of Civil Society Organisations Support What Aspects of Democracy? Evidence from Post-communist Latvia’ (2009) *International Political Science Review* 30 (3) 271–295, 275

<sup>18</sup> *Ibid*, 277.

crucial intermediary role between state and society and affect the political communication that is held to be a characteristic of democratic consolidation process. Although the developmental CSOs would still serve as transmission-belt in socioeconomic matters by transmitting the demands of the public, the political communication would however be lacking owing to the diminished size and capacity of advocacy CSOs.

Thus the CSP rather than enforcing the constitutionally guaranteed freedom of association and creating a legally protected enabling environment for CSOs, has weakened the democratization process by limiting citizens' engagement in the public sphere and reinforcing excessive government control. It even defeats the very purpose for which the proclamation is enacted, which according to the preamble is to 'ensure the realization of the rights to association enshrined in the constitution; ... and aid and facilitate the role of charities and societies in the overall development of Ethiopian peoples.'

Hence, if the principle of constitutionalism has to be respected and the nascent democratization process of the country has to continue and be sustained, the current legal framework governing the Ethiopian CSOs needs to be amended in line with the constitution of the country that guarantees individuals rights to participate in the public sphere. This in particular calls for the following recommendation points.

The recommendations to follow are made based on the legal analysis made in the preceding chapters taking the Ethiopian legal framework as a case study but can be applicable to a broader cases of laws governing CSOs Thus the following section provides some recommendations that help to draw an enabling legal framework for CSOs in general and for the case of Ethiopia in particular.

The recommendations are therefore framed in two parts. Although there may not be a one-fits-all' regulation that best serves all legal systems the first section of the recommendation provides general principles that can be commonly applicable. The second part provides specific recommendations that the Ethiopian legal framework needs to take in to consideration.



## **Recommendations**

### **A. General**

1. The legal existence of CSOs needs to be facilitated to allow the growth of the sector as it contributes to the democratization of a nation and the provision of public and quasi private goods. These among others require the legal recognition and the enforcement of the right to form various types of CSOs constituted either formally or informally to pursue any lawful purpose that benefits either their own members or the public at large. Thus, the legal requirements laid down to regulate the formation of CSOs and their coalition, the acquisition of legal personality and registration as well as their dissolution needs to be well-defined, undemanding and non-discriminatory. Moreover CSOs needs to have the right to appeal against any administrative decision that affect their legal existence. Such legal rules that ensure the formation and the sustainability of CSOs increases CSOs representation, autonomy and the growth of the sector and thereby enhances their contribution to democratization.
2. The legal framework needs to uphold a constitutional doctrine that CSOs are entitled to do what its members can do in their individual capacity to the extent that the applicability of such right permits, as the right to association is derived from the individual liberty. Thus it needs to recognize the right of CSOs to pursue any lawful purpose that do not threaten the rights, freedoms, safety and security of other individuals, groups or the public as a whole. The right to pursue any lawful purpose shall also include among others the right of CSOs to independently choose their own purposes of formation; to pursue the same autonomously without any undue interference from the government or any other organ; and the freedom to choose any lawful operational strategies, approaches and activities that leads to the attainment of such purpose; and the freedom to solicit fund from any lawful purpose and to utilize the solicited fund for the purpose. Thus CSOs need to have the freedom to engage in any purpose as long as both the end and the means involved are lawful.

Such recognition offers CSOs the right to pursue democratic promotion as a legitimate purpose and allows them to employ any lawful operational strategies

such as government accountability, community empowerment, capacity building of democratic institutions, lobbying and advocacy for reforms of laws and policies etc. and thereby greatly contribute to the institutional aspects of democracy. Moreover the recognition to pursue any lawful purpose allows the formation of diverse types of CSOs which serves as a school of democracy and thereby enhances the developmental aspects of democracy.

While the requirement of legality is a general precondition for all CSOs, the purposes of CSOs may also need to be nonpartisan in order to ensure their neutrality. While the contribution of strong political parties that provide alternative policies for the public is indispensable for the consolidation of democracy, as they need to be governed by a distinct law, the legal framework governing CSOs may also require CSOs to limit their objectives of formation to non-partisan purposes. Thus the laws governing CSOs may sanction typical partisan purposes such as provision of financial or in kind support; campaigning against or in support of any political party or a candidate; or any form of direct or indirect support to the promotion of the interest of any political party or a candidate.

3. The rights of CSOs to mobilize both tangible and intangible resources as a fundamental right consequential to the freedom of association needs to be recognized as the right to form associations is of no value or a diminished value without the necessary human and financial resources. Owing to their non-profit orientation CSOs need to rely on resource mobilization and the law needs to broaden up their potential source of fund such as membership fee, public collection, tax concessions, public grants, foreign aid and commercial income generating activities that will be reinvested for the purpose of the organization. Moreover the rules that govern the resource mobilization of CSOs needs to be well-defined and non-discriminatory. The law also needs to facilitate the mobilization of intangible resources by providing enabling conditions for CSOs that encourage volunteers and employees to engage in the sector.

Such legal framework that clearly recognizes and enforces the right of CSOs to mobilize resources from different sources, in addition to ensuring the sustainability and financial autonomy of CSOs and thereby enhance the democratic and overall contribution of CSOs, it is particularly important for those CSOs that represent the less advantaged community whose interest would otherwise be compromised owing to the impact of money-politics in the governance system. Thus the law needs to recognize the right of CSOs to solicit fund from any lawful sources, and to utilize the fund for any lawful purpose that does not compromise the safety and security of the public as is required in a democratic society.

4. Last but not least, the legality and credibility of CSOs need to be ensured through accountability measures to protect the public safety, security as well as the public fund. The accountability measures however needs to be well-defined, not costly, easy, undemanding, non- discriminatory and must strike the necessary balance with the autonomous and sustainable existence of CSOs. Such balanced measures in addition to ensuring the trustworthiness of CSOs allows mutual acceptance and respectful cooperation between States and CSOs.

### **B. Specific Recommendations to Ethiopia**

1. In light with the above-mentioned enabling legal conditions for the formation of CSOs, the CSP in particular needs to be reformed
  - a. to give recognition to informal CSOs;
  - b. to allow coalition of all types of CSOs with no restriction as to their nature and to allow network CSOs pursue any lawful purpose and implement any lawful activities;
  - c. to recognize CSOs right to independently determine their place of formation in any or all part of the country;
  - d. to amend the excessive scrutinizing power of the Charities and Societies Agency and sector administrators in the process of registering CSOs, and to limit their mandate only to the necessary minimum that is required to regulate the accountability and legality of the sector;
  - e. to improve the representation of CSOs in the Board of Charities and Societies that serves as an administrative appellate organ; and to allow

CSOs to make their own decisions in who will be representing the sector in the Board

- f. to provide specific time limit within which the Board of Charities and Societies must pass a decision on appeals presented to it;
  - g. to make the Charities and Societies Agency accountable to the legislature instead of the executive branch of the government;
  - h. to amend the re-registration requirement recognizing the perpetual existence of CSOs once registered and operating lawfully;
  - i. to revise the conditions of dissolution of CSOs so as to limit dissolution only to serious causes that threatens the public safety and security by the standard of a democratic society; and
  - j. to grant all types of CSOs the right to judicial appeal on all matters that affect their legal existence.
2. While the Constitution of Ethiopia clearly recognizes freedom of association and other rights such as freedom of expression, assembly, communication, networking that facilitates CSOs democratic functions, in light with the above-mentioned enabling legal conditions that facilitates the free engagement of CSOs in all lawful purposes, the Ethiopian legal framework specifically needs to:
- a. Broadly conceptualize the freedom of association as a fundamental right and interpret it in line with the constitution and other international treaties such as the ICCPR ratified by the nation.
  - b. Narrowly define partisan purposes so as to allow CSOs engagement in all lawful public matters other than campaigning for political parties or candidates; and financial or in kind support to political parties or candidates.
  - c. Balance the need to protect state sovereignty with people's sovereignty as is necessary in a democratic society to allow wider engagement of the public and their organisations' in the public sphere.
  - d. Most decisively, revise the CSP so as to allow CSOs engagement in any lawful purpose including 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; and the promotion of conflict resolution or reconciliation, notwithstanding the source of the income for the implementation of such purpose as long as the source of income is legal. Such reforms will positively influence the engagement of citizens in shaping the democratization contours of the county.

3. In line with enabling legal conditions, the legal regime of Ethiopia that govern the resource mobilization of CSOs needs to:
  - a. Collect and reconcile all the legal rules that govern the resource mobilization of the sector found scattered on different legal instruments for the purpose of avoiding inconsistent rules and ensuring clarity, predictability, accessibility and non-discrimination.
  - b. Revise some of the harsh penalties that the CSP imposed on officers of CSOs not to discourage qualified personnel and volunteers from the sector
  - c. Provide some encouraging benefits to volunteers in the form of tax concessions or otherwise
  - d. Allow public collection whenever CSOs choose to undertake such form of mobilization and not limit public collection only as a last resort when other means of resource mobilization has become impossible
  - e. Limit the discretion of the Charities and Societies Agency in giving permission to public collection only to the conditions necessary for the Agency to supervise any illegality thus revising its mandate to determine the purpose of public collection; and allowing CSOs to undertake public collection for any purpose as long as their purposes of formation was determined to be lawful when registered.
  - f. Limit the discretion and arbitrariness of the Charities and Societies Agency in determining the commercial income generating activities of CSOs by clearly stipulating the grounds whereby the Agency shall refer in making its decisions to allow or deny such undertaking.
  - g. Revise the condition that income generating activities must be limited only to incidental activities to the main objectives of the organizations to enable CSOs engage in better income generating activities to ensure

their financial sustainability and probably apply a ceiling to the amount of money an organization could annually earn from the commercial activity.

- h. Revise the tax regime to allow a more liberal tax concession for public benefit CSOs and to clarify the vague provisions not reconciled with the CSP.
  - i. Consider policies that allow accessibility of public fund to CSOs in a systematic manner that doesn't compromise their autonomy but ensure their financial sustainability.
  - j. Allow foreign funding for all types of CSOs indiscriminately as long as the source of funding and the means used to access the fund are legal; and the purpose for which the fund will be utilized is lawful and not threatening the public safety and security by the standard of a democratic society. Thus consequently revise the rules that classify CSOs as Ethiopian and Ethiopian resident, which doesn't have any jurisprudential backing and made only to distinguish those that receive more than ten percent of their funding from foreign sources.
  - k. Ensure that foreign funding will not threaten the autonomy of CSOs and create allegiance to the protection of foreign interest by allowing a systematic tripartite partnership between CSOs, the Government and foreign donors and requiring the prohibition of any gagging order that threatens the autonomy of CSOs and the sovereignty of the state.
  - l. Provide a more flexible approach as to what constitutes an administrative cost of CSOs and as to the ratio of administrative and operational cost taking the nature, the size and the financial capability of CSOs.
4. Ensuring the accountability of CSOs without unwarrantedly infringing on the freedom of CSOs also calls for revising all the legal provisions of the Charities and Societies Proclamation and the regulations and directives issued to implement the proclamation that gives stretched and arbitrary discretion to the Charities and Societies Agency, the Sector Administrators, and the Charities and Societies Board. This in particular calls for reforms:

- a. To give guidelines or to specifically provide the grounds whereby the Charities and Societies Agency may ask for additional reports other than the periodical ones; and the grounds whereby it may institute general or specific inquiry, in order to avoid the exercise of unfettered discretion that threatens the autonomy of CSOs.
  - b. to revise some of the harsh penalties imposed against Charities and Societies and their officers
  - c. to allow access to justice for all types of Charities and Societies regardless of their source of income or nature whatsoever
5. Further to revising the particular legal impediments imposed on CSOs, creating an overall enabling and conducive environment that broadens the operational space for all democratic actors such as the media and political parties and facilitating partnership with the government will enable the consolidation of the nascent democratization process Ethiopia has started exercising.

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