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Analyzing the Ghana Draft Bill for Trusts and Non-Profit Making Civil Society Organizations

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INTRODUCTION

The Government of Ghana is currently considering the provisions of the **Draft Trust Bill 2006**. Although titled the “Trust Bill”, it seeks to regulate not only public and private Trusts but also Non Governmental Organizations (NGOs). The Draft Trust Bill appears to be accompanied by a set of **Draft NGO Policy Guidelines, 2007**, which are intended to be passed by Parliament as subordinate/subsidiary legislation and constitute the more detailed regulations that will govern the operations of NGOs in Ghana. There are indications that the Government wishes to pass the Bill into law this year. In the 2007 Sessional Address to Parliament, the President stated that Cabinet will be submitting the Trust Bill 2006 to Parliament for consideration and passage. This paper examines the provisions of both pieces of legislation with regard to the following:

1. The utility of regulating Public Trusts, Private Trusts, Charities, CSOs, NGOs, and CBOs in the same piece of legislation.
2. The possible implications of some of the provisions in the two pieces of legislation on the operations of NGOs in Ghana.
3. Various alternatives (regarding process and substantive content) for the legal regulation of NGOs in Ghana.

The paper is divided up into eleven (11) short sections under the following headings:

1. Do We Need a Law on NGOs In Ghana?
2. The Peculiar Character of NGOs in Ghana
3. Lumping NGOs with Trusts in a Trust Bill is not Good Enough
4. NGOs as a Junior Partner to Trusts in a Trust Bill
5. The Commission and the Commissioner Under the Trust Bill
6. Governance of the Commission
7. Regulation of the NGO Sector Under the Trust Bill and NGO Policy Guidelines
8. NGOs to Live Under the Facilitating or Terrorist Influence of Courts of Law

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9. Possibilities of Developing Pre-existing NGO Policies and Draft Laws into an NGO Bill to Regulate NGOs and CBOs
10. A One Size Fits All Approach to Regulating NGOs Will Not Work
11. Other Issues

As far as recommendations and the way forward are concerned, the argumentation in this paper is in the alternative. The primary argument is that the regulation of NGOs and the regulation of private and public Trusts should not be covered in the same piece of legislation for the various reasons we will provide. And just in case the Ministry, and ultimately Parliament, does not agree with this position, we underline the grave dangers of proceeding nevertheless and provide comments and suggestions for improving the current draft, which combines NGOs, Public Trusts, and Private Trusts for regulation in the same law.

1. DO WE NEED A LAW ON NGOS IN GHANA?

The simple answer to this question is yes. In as far as, the Trust Bill seeks to regulate the operations of NGOs in Ghana; it is a step in the right direction. The question is not whether, but how much regulation the NGO sector in Ghana needs.

Currently, NGOs are lumped together with profit making companies for the purpose of regulation. The separation of NGOs from for-profit companies for regulatory purposes is an advancement, both conceptually and practically. The consolidation of for-profit and not-for-profit entities for regulatory purposes has led, quite naturally, to the orphaning of the weaker partner in the regulatory marriage. Thus, NGOs receive far less attention from the regulator than for-profit companies do. This has virtually led to a situation of non-regulation of NGOs in Ghana even in the face of elaborate regulatory provisions in the Companies Code, 1963 (Act 179). The first and last interaction that the majority of NGOs have with the Registrar-General of Companies-their current regulator-is to apply for and receive a Certificate of Incorporation and a Certificate to Commence Business.

The extremely limited regulation of NGOs hurts NGOs themselves; their partners (donors, the individuals, groups and communities they work with and for); development partners who seeks to assist with Ghana's development by working with both government and NGOs; and Government which has to periodically answer to the people of Ghana for political, economic and social progress in the country.

The current regulatory framework for NGOs in Ghana is not working because the regulator of NGOs has its hands full regulating for-profit companies; and because the provisions in the Companies Code for the regulation of NGOs are so far from today's reality that NGOs flout them consistently. The APRM Report¹ recognized this and calls for the need for a national regulatory framework for CSOs because of duplication of some NGO activities, a weak

¹ African Peer Review Mechanism Country Review Report and Program of Action of the Republic of Ghana, (June 2005) p. 171.

presence of apex organizations in rural areas, little or no tax exemption for non-profit organizations, little regulation for transparency or accountability in the sector, and lack of State capacity to check accountability issues such as tracking expenditure. It follows that we need a new regulatory regime that facilitates the growth of NGOs as critical actors in Ghana's development agenda.

2. THE PECULIAR CHARACTER OF NGOs IN GHANA

A close reading of the Trust Bill and NGO Policy Guidelines (the pieces of legislation) shows that they are premised on a quite fundamental mis-appreciation of what NGOs are, their diversity, what they do, the challenges they face and the appropriate options for their regulation.

NGOs in Ghana vary enormously according to their purpose, philosophy, sectoral expertise and scope of activities. Two broad types may, however, be distinguished from the maze. NGOs that concentrate on Service Delivery to individuals, groups and communities; and NGOs that work more to engineer individual, group and community political, economic and social empowerment. Self-help, Relief and Development oriented NGOs will fall into the first category, whilst capacity building, accountability and advocacy NGOs will fall in the latter category, although there are a few NGOs that may safely be located in both categories.

In a recent report prepared for the Rights and Voice Initiative (RAVI) the Legal Resources Centre² noted that the NGO/CBO sector in Ghana, organized as self-help projects, evolved slowly from the 1960s and peaked in the 1980s. In the 1980s, the revolutionary, socialist and people-centred military regime in Ghana, kept NGOs/CBOs alive through its various grassroots mobilization strategies, its project for the decentralisation of governmental functions and its huge insistence on self-help projects. It was, however, in the late 1980s and 1990s that NGOs/CBOs became a constant feature of Ghana's developmental landscape. The various programmes and projects to mitigate the social costs of the Structural Adjustment Programme the government of Ghana embarked upon in the mid-1980s needed a conduit. NGOs/CBOs were key allies for this. Second, with the return to constitutional democratic rule in 1993, coinciding with the huge global focus on "bottom-up", "pro-poor" development, which directly translated into some form of participation of communities in the design, implementation and monitoring and evaluation of development projects, NGOs/CBOs became an indispensable factor in development programming and implementation.

An examination of the pieces of legislation reveals that it is the above conceptualisation of NGOs and CBOs that operates in the mind of the draftsman-NGOs as self-help, relief and development oriented groups working solely and directly to assist government agencies to

² Nurturing and Empowering CBOs: Reflections for RAVI Intermediaries as they Work with CBOs. A Report Prepared by the Legal Resources Centre for the Rights and Voice Initiative (RAVI), January 2007 (On file with RAVI).

fulfil their social service obligations to the citizenry. This was true in Ghana until the mid-1990s.

NGOs in Ghana have experienced a major shift in focus, character and importance in the last one and a half decades. With the opening up of democratic spaces by the 1992 Constitution, the character of NGOs also began to change. They started to concentrate not only on self-help and livelihood projects, but also on campaigns and advocacy projects for accountability, transparency, non-discrimination and other issues that promote clean government, respect for human rights and the delivery of the right levels and right quality of social services and entitlements, especially by government, but also by private sector operatives such as mining, timber and industrial fishing companies. Even the NGOs that still concentrate on self-help and livelihood projects also engage in advocacy activities in support of their activities. Today, this new role of NGOs in the development equation has not diminished. If anything, it has been enhanced.

The Trust Bill does not appreciate the above nature and character of NGOs in Ghana today. Nowhere is this clearer than in Paragraph 1 of the NGO Policy Guidelines. The paragraph defines an NGO as follows:

“an independent, non-profit making, non-political and charitable organization, with the primary objective of enhancing the social, cultural and economic well being of communities, [and the operation of that organization does not have a religious, political or ethnic bias]...This Part applies to foreign, national and international, developmental, humanitarian or relief organizations with capacity to undertake active development or humanitarian or relief work” (the square brackets are theirs).

The draftsman assumes that NGOs in Ghana today are organizations, local and foreign, who dole out humanitarian largess and development assistance to passive recipients of such assistance in communities in Ghana. This is dead wrong.

I have already noted that only some, and an increasing minority of NGOs engage in humanitarian and hardware development assistance. The majority of NGOs in Ghana today have no handouts-in the traditional sense of the word-to give. They provide ideas, solutions, advocacy services, facilitation services, training services, capacity-building services, mentoring services etc. Again, there are many NGOs that deal with issues of a national character (Democratic Development, Governance, Legal Advocacy etc) and do not focus on any particular community(ies) for all time. Yet, the Trust Bill assumes that NGOs will have a community or communities as their focus and provides, for example, that that the board of trustees of an NGO must be “based in the community” (Paragraph 2(1) (g) of the NGO Policy Guidelines). It is important to note the use of the definite article in the expression “based in the community”.

Whilst it is very likely that government’s conceptualisation of what NGOs are in Ghana today may be a result of a genuine mis-appreciation of their current nature and character, it may be otherwise. Many governments are often uncomfortable with what they call “the involvement of NGOs in politics”. It is therefore possible that the pieces of legislation are meant to constrict the “political” activities of NGOs in Ghana. This thought process is itself a product

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of another level of mis-appreciation of the role of NGOs in Ghana. NGOs in Ghana are necessarily political (as contradistinguished from “partisan”) organisations. Even those who concentrate on humanitarian and development assistance are increasingly getting political as they work to ensure that Government fulfils its social service role or at least creates a conducive environment for others to share that responsibility with Government. And the political character of NGOs is very vital for Ghana’s democratic development as it provides the necessary monitoring and evaluation of Government’s programmes and ensures accountability in governance.

If we keep to the narrow definition of NGOs as provided for in the Guidelines and as surfaces at every turn in reading the Bill, the majority of NGOs in Ghana will have to shut down. To take one little example, all the NGOs that are currently part of the Department for International Development (DFID) funded (and Action Aid managed) Ghana Civil Society Rights and Voice Initiative (RAVI), and which focus on Citizen-Government Engagement for the promotion, protection and fulfilment of human rights will risk being outlawed when the pieces of legislation come into force. The Legal Resources Centre, by the way, is a RAVI grantee. The activities of RAVI grantees have very very little to do with what charities traditionally do. Indeed, they actually eschew the giving of handouts to their partners as a solution, by and of itself, to the myriad of development problems they face daily. On the contrary, they are political organisations which work to empower their partners to demand from duty-bearers (especially government) their rights and entitlements as full citizens of the Republic. This is a *political* process of building citizenship and has very little semblance to what charities traditionally do.

Whilst it may not be the calculated intention of Government to do so, the best way to depoliticize and emasculate NGOs, and ensure that they do only what government wants them to do, and not seek accountability from Government, is to pass the draft pieces of legislation into law. We will examine exactly how this will play out in the section below on “Governance of the NGO Sector under the Trust Bill and NGO Policy Guidelines”.

3. LUMPING NGOS WITH TRUSTS IN A TRUST BILL IS NOT GOOD ENOUGH

Currently, NGOs are mostly registered under Ghana’s Companies Code, 1963 (Act 179) as “Companies Limited by Guarantee”. This tag gives them non-profit status. There are special provisions in the Companies Code for the exclusive regulation of Companies Limited by Guarantee. Reading them, it is clear that they are oriented to the regulation of charities and the like. Enacted in 1963, these provisions were very very progressive, then.

In practice, NGOs ordinarily register with the Registrar-General of Companies, the authority charged with operationalizing the Companies Code, receive a “Certificate of Incorporation” and a “Certificate to Commence Business” and then start operating as NGOs. Most NGOs have either never fulfilled the most basic requirement of renewing their registrations annually and filing annual returns with the Registrar or are in arrears. I will not even comment on the

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several other forms that they need to file when they change the objects of the NGOs, their board members, their auditors etc. Recently, the Registrar-General started a process of withdrawing the certification of companies (including NGOs registered under the Companies Code) unless they met the basic requirements of renewing their registrations annually and filing annual returns with the Registrar.

The Office of the Registrar-General has over the half century concentrated on the regulation of for profit companies and has dealt with NGOs more as an incidental issue. This is partly because the Department of Social Welfare (DSW) of the Ministry of Manpower, Development and Employment (MMDE) has insisted that NGOs register with them in order to facilitate the work of the Ministry as the government Ministry in Charge of NGOs. The Registrar-General's Office is under the Ministerial oversight of the Ministry of Justice. If it was regarded as proper to also have NGOs under the oversight of the Ministry of Justice, there would have been a neat convergence in the regulation of NGOs where registration and oversight of NGOs will both fall under the Ministerial oversight of the same Ministry. This has not happened. Thus, whilst it is convenient for an over-worked Registrar to issue registration documents to NGOs and, when he is lucky, receive from NGOs requests for renewals and annual returns, and allow the DSW to have real administrative surveillance over the operations of NGOs, this creates a strange regulatory duality.

The Draft Trust Bill seeks to remove the registration of NGOs from the Registrar-General's Department and to create a convergence in the registration and oversight of NGOs under the same ministry-the MMDE. Witness the following from the Memorandum to the Draft Trust Bill: "Companies limited by guarantee have hitherto been registered as not-for-profit companies under the Companies Code, 1963 (Act 179). These corporate bodies are essentially similar to charitable trusts. This Bill seeks to remove their registration and management from the Registrar-General's Department to consolidate all not-for-profit entities under one umbrella, the Trusts Commission. It is the view of the Government that legislative matters which have a nexus should be brought together under one enactment to avoid a multiplicity of laws and streamline the operation of government agencies to avoid overlaps and improve efficiency.

"The Bill makes provision for the establishment of an independent body to oversee the activities of trusts and [NGOs]...These functions are currently by law vested in the Registrar-General...The Commissioner will also take over the administrative role of the Department of Social Welfare which currently registers non-governmental organisations. There will therefore be one body to manage the affairs of non-profit institutions."

There appears to be a number of fundamental flaws in the reasoning of Government as stated above. First, Government states that it is better to have NGOs registered and oversighted by the same ministry, the MMDE, to prevent regulatory duality. This makes complete sense. Government then proceeds to propose a draft law for the regulation of NGOs. And in this law, Government lumps together "Trusts" and "NGOs" for regulation by the same authority and to be oversighted by the same Ministry. Public and Private "Trusts", by their nature, are

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best administered by the Registrar-General under the Ministerial oversight of the Ministry of Justice. Although the Draft Trust Bill is said to be under the ministerial oversight of “the Minister to whom functions under this Act are assigned by the President” (Clause 116), the tenor of the Bill and the NGO Policy Guidelines affirm that it is the Minister for Manpower, Development and Employment. It appears therefore that the entities covered by the Draft Trust Bill cannot properly come under the ministerial oversight of one ministry. Thus, government’s aim to bring all “Trusts” and “Trust-like” entities under the oversight on one commission and one ministry will not be achieved by lumping NGOs with Trusts in one law.

Further to the above, the standard form “Agreement Between the Government and [NGOs]” (an Annex to the Guidelines), provides in paragraph 1 that “Guidelines” will be issued “under the Act” and will relate only to NGOs. If by progressive consolidation of legislation, the Government means lumping things together and separating them up in subsidiary/subordinate legislation, then there will be very little change from what was before. Paragraph 18(4) of the Guidelines clearly states that there will be a Trust Act, NGO Policy Guidelines and Regulations made under the Act. This is the strongest evidence that NGOs and Trusts need to be decoupled in the Trust Bill and a separate Bill prepared for NGOs. Ordinarily, there is an Act and then Regulations. In this case, it was thought necessary to have an Act, Guidelines for only NGOs and not Trusts, and then Regulations.

It is possible that the fears being expressed about regulatory non-convergence will be solved by the President designating (under Clause 116 of the Bill), one ministry (say the Ministry of Manpower and Employment or the Ministry of Justice) and charging it with oversight of both “Trusts” and “NGOs”. Yet, this solution will end up the same way that the false convergence created by lumping for-profit and non-for-profit agencies under the regulatory oversight of the Registrar-General of Companies and the Ministry of Justice ended. As noted in the Memorandum to the Bill, the Registrar was “clearly over-burdened having regard to the enormous work on [for-profit] companies alone” and simply ignored the not-for-profit sector that was then very minuscule.

Again, the wrong choice of Ministry has grave implications for the operationalization of laws. Part of the problem with the operationlization of the Human Trafficking Act, 2005 (Act 694), is that it is potentially under the oversight of a Ministry that is not capable by itself, and without the serious involvement of the MMDE, to operationalize the provisions of the Act. If the Trust Bill is put under the ministerial oversight of the Ministry of Justice, NGOs will suffer, if it is put under the ministerial oversight of the Ministry of Manpower and Employment, Private and Public Trusts will suffer. And we are yet to see in our legislative history, a law that has been put under the ministerial oversight of two ministries, for all purposes.

It is also the case of Government that because Trustees and NGOs both stand in a fiduciary relationship with the beneficiaries of the trust and the communities NGOs work with and for, they should both be regulated by one piece of legislation. This is a very weak argument. The Directors of for-profit Companies stand in a fiduciary relationship to the companies of which

they are directors and to the shareholders of the company. Will be include for-profit companies under the Trust Bill?

The lumping of NGOs with Trusts in one law also has very grave legal consequences in the actual operationalization of the law. A most enduring and age-old rule of Statutory Interpretation, and which makes perfect commonsense, is that a statute must be interpreted, construed as a whole. The real effect of this rule is that provisions from any part of the statute may be drawn upon and used for the interpretation of any other part of the statute. This means that lumping Trusts and NGOs in one bill will ensure that all the rules applicable to the one are also, through the mechanism of Statutory Interpretation, potentially applicable to the other. Thus, all the provisions regulating Trusts in the Trust Bill may be made partially or wholly applicable to NGOs. One practical effect of this is that the traditional heavy hand of the courts in the management of very very minute aspects of public and private trusts will be easily applied to the management of NGOs in Ghana. I will return to this later on in the analysis.

For now, it suffices to note that we coupled NGOs with Limited Liability Companies, Unlimited Companies, and External Companies in the Companies code and met with failure in the regulation of NGOs. This time round we should not couple NGOs with other things. Especially as the dangers that attended the previous coupling exercise attend the current attempt also. It appears that it is the act of coupling, not what it is coupled with that is the problem. We may not like NGOs, we may be suspicious of them, we may be uncomfortable about the amount of money and power they garner, but we need to acknowledge that the NGO sector in Ghana today is far too important and sophisticated to be effectively coupled with other sectors, especially when they are so coupled as a junior partner in an uncomfortable marriage.

For me, the clearest evidence why Trusts and NGOs should not be lumped in the same law is in the way the draftsperson struggles to keep them together in Clause 17 of the Bill on the functions of the Board of the Trust Commission. Some of the functions relate to both Trusts and NGOs and others to either one or the other. The merger of Trusts with NGOs is very very artificial in the draft bill. Clauses 1-8 deal with Trusts; 9-13 deal with NGOs; 14-27 deals with Trusts with very few passing references to NGOs; and the rest of the bill from clause 28-117 (except clauses 41-49 which deal with NGOs and 93-117 which deal with both) launches into a discussion of the intricacies of Trusts.

It is clear that the Bill has bundled together quite incompatible constructs and has been compelled to concentrate on one whilst making the other a junior partner in the scheme of things.

4. NGOs AS A JUNIOR PARTNER TO TRUSTS IN A TRUST BILL

The Bill makes NGOs a junior partner in a Bill that seeks to regulate both Trusts and NGOs. Indeed, reading the Bill, one gets the impression that NGOs were added as an afterthought to a Bill that was originally drafted to regulate only Trusts.

The very first clause of the Bill provides the essentials for the creation of a trust. The definition section, clause 117, provides that a “trust” includes an executorship, administratorship, guardianship of children or the office, committee or receiver of the estate of a person with mental disorder or a person incapable of managing that person's own affairs, a charitable trust *and organisation* [NGO]”. While the Bill contains detailed provisions with respect to the internal governance of “trusts,” it is largely silent with respect to the internal governance of NGOs. The Bill also makes provision for the establishment of an independent body to oversee the activities of trusts and NGOs. The chief executive of the body is designated as the *Trusts* Commissioner.

Generally, the greater part of the Bill, including the Preamble, is skewed in favour of Trusts. The NGO part is not adequately reflected. No more than 5-7.5% of the text of the Bill is devoted to NGOs exclusively.

As noted earlier, the inclusion of the regulation of NGOs in the Bill is like an afterthought in a Bill which itself primarily deals with Trusts. Witness the opening sentence of the Memorandum to the Bill:

“TRUST BILL MEMORANDUM

The purpose of this Bill is to provide for the creation of, and the registration of trusts by the Trust Commission as established under the law.”

Whatever you do, a Commission and a Commissioner who is charged primarily with managing Trusts and then, as a junior partner or even an appendage, NGOs, will adopt the line of least resistance, which is also the cheaper option, and apply Trust principles to NGOs. They will also most likely develop forms, procedures, protocols, rules of engagement etc that are appropriate for Trusts for blanket application to all within its purview, including NGOs. When this happens, NGOs will be underserved and/or constrained.

5. THE COMMISSION AND THE COMMISSIONER UNDER THE TRUST BILL

As already noted, the Bill lumps NGOs and Trusts together in the same law and provides that they will both be supervised by one Commission. The supervision of the operation of trusts and NGOs is a confusing mandate for the Commission, since each operates in quite different ways. The difference between a trust established for the benefit of a minor and a large

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advocacy organization with hundreds of employees who work to empower millions of citizens to engage with Government on governance and livelihood issues is striking indeed.

Flowing from the above, lodging the supervision of the operation of Trusts and NGOs in one Commission is a confusing mandate for the Commissioner and the Commission. It is to be wondered what mix of skills the Commissioner would need to have to be effective. The same Commissioner must:

1. Be an administrator of registries;
2. Resolve “complaints against [NGOs]” [Clause 25, subsection (3)];
3. Have technical expertise to carry out delicate trusteeship responsibilities [Clauses 27, ff.];
4. Act as a judicial trustee;
5. Act as a custodian trustee;
6. Act as a constructive trustee;
7. Act as an ordinary trustee;
8. Act as trustee for persons with mental disorders [Clause 27];
9. Be available for appointment as a new, sole or additional trustee under the same conditions as an ordinary trustee [Clause 34];
10. Have the same powers, duties, liabilities, rights and immunities as a private trustee acting in the same capacity;
11. Be subject to the same control of the courts as any other trustee;
12. Be available to be directed to oversee settlement of the property of a person with mental disorder [Clause 36];
13. Be empowered to accept probate of a will or letters of administration [Clause 37];
14. Be available to be ordered by a court, upon applications to the court by executors or administrators of the estate of a deceased person, for an order of the court to transfer the estate to the Commissioner to administer.

It is clear that the Commissioner and the Commission risk concentrating on their numerous responsibilities relating to Trusts and neglecting their other role of supervising NGOs.

6. GOVERNANCE OF THE TRUST COMMISSION

The Governing Council/Board of the Trust Commission has too few representatives from Civil Society Organizations (CSOs). Even if we count the representative from the Faith-Based Organizations (FBOs) as a CSO representative, it brings the total number to three (3) clear CSO representatives in a Board numbering nine (9) members. If we take the representative of the FBOs out, it comes down to two (2) clear NGO representatives.

What is worse, the representative from the FBOs is nominated by the President and those of CSOs by the Minister of Manpower, Development and Employment! All the other members of the Board of the Commission are nominated for appointment by the President, the Minister for Manpower, Development and Employment or the Minister for Women and Children’s Affairs. And they are all appointed by the President.

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If the Trusts Commission is to regulate NGOs, then they should have greater representation amongst the proposed numbers for the Board of the Commission. The Government's response to this proposal will be that the Bill is also meant to regulate Trusts. This answer actually makes the case for a separate law on NGOs.

It will be better, following the example of the National Media Commission (NMC), to have a Board of the Trust Commission that is made up of representatives nominated by the organizations they represent for appointment by the President. Again, as is the case with the NMC, the Chair of the Commission should not be appointed by the President but should be chosen by the members of the Commission. This will not be inconsistent with the powers of appointment to public office conferred on the President by articles 70 and 195 of the 1992 Constitution.

There are other worrying provisions related to the governance of the Commission. It is provided in Clause 18(5) of the Bill that "The President may by letter addressed to a member [of the Board of the Commission] revoke the appointment of that member." Again, Clause 23 provides that "The Minister may give policy directives in writing to the Commission and the Commission shall comply." These provisions make it abundantly clear that the Commission is not meant to be an independent body.

Clause 46 of the Bill provides that the "The Commissioner may apply to the Court to appoint trustees of a trust or an [NGO] where there are no trustees or a vacancy occurs in the number of trustees of a charitable trust or [NGO]." This makes perfect sense in the case of a Trust, but not in the case of an NGO. NGOs have their own internal governance structures that allow the Directorships/Board Memberships of the NGOs to be filled. This is not necessarily the case with a Trust. There are many Trusts that do not provide for how vacancies in the group of Trustees may be filled. Thus, it makes sense for the Commissioner to seek to fill such vacancies. In the case of NGOs, this provision will be a solution in search of a problem, an unnecessary intrusion into the affairs of NGOs and must not be allowed to become law. The Commissioner has no business deciding who should sit on the board of NGOs. If we note that the Civil Society Index³ states that "Although CSOs enjoy autonomy under the law, certain remarks voiced by state authorities still undermine this autonomy in practice...[and] a reasonably large number (44%) of [Regional Stakeholder Survey] respondents were of the view that the state sometimes interfered with CSOs," then Clause 46 becomes ominous indeed.

It might be useful to remember that NGOs mobilised to thwart the passage of the 1993 NGO Bill chiefly because they objected to the creation of a National Council on NGOs headed by a Minister of State and dominated by Government appointees with the power to micro-manage NGOs and to de-register NGOs who refused to cooperate with Government.

³ Akosua Darkwa, Nicholas Amponsah and Evans Gyampoh, *Civil Society in a changing Ghana: An Assessment of the Current State of Civil Society in Ghana*, (CIVICUS, June 2006) p. 9.

7. REGULATION OF THE NGO SECTOR UNDER THE TRUST BILL AND NGO POLICY GUIDELINES

Clearly, the NGO sector needs to be governed. Many times, the sector is chaotic with many NGOs working on the same issues in the same and different ways without as much as finding out what each is doing. At other times, intense rivalry and turf fights amongst NGOs ensure that communication amongst them is limited. It is therefore legitimate for government to be interested in moderating the chaos, streamline interventions in the execution of projects and thereby seek to maximize value.

Whilst it may not be right to impute any ill will on the part of Government, there is a clear intention of government to moderate the large number of NGOs, control the monies they receive and ensure that their activities are consistent with government's own development plans. The following is taken from the Memorandum to the Draft Trust Bill:

“Non-governmental organisations, which are civil society groups formed for public benefit are increasing in number daily. There are now more than three thousand in the country. They play a vital role in the public or private partnership development of the country and enjoy privileges such as tax exemption and waiver. The Government has an interest in their matters because of public finance issues. Indeed, in accordance with article 174 of the Constitution it is Parliament which is the ultimate authority on issues of public finance and decisions on this are based on recommendations made by the Executive.

“Furthermore, the directives of state policy in Chapter 6 of the Constitution mandate the Government to be responsible for development in the country but the Government cannot do this alone. It is for the Government to ensure that non-governmental organisations provide service which is lawful to the deprived, under privileged and the general public.”

The reasons given by government appear to be compelling indeed, however, the best approach is not to whip all NGOs into line, and tell them what to do, how they may do it, and when they may do what they do. Such an approach hits at the root of freedom of association as guaranteed under article 21 (1) (e) of the 1992 Constitution and could easily be struck down by the courts as unconstitutional.

Flowing from this, the regulation of the NGO sector that is contemplated by the Bill and the Guidelines are draconian. These include, from the Guidelines, paragraph 6 on project formulation and implementation; paragraph 7 on Registration of Projects; paragraph 8 on Details of programmes; and paragraph 10 on Monitoring and Evaluation of Projects. All these processes are subjected to the penetrating searchlight and prior endorsement of the Ministry of Manpower and Employment (MME). According to the terms of paragraph 8(2), “A project shall not be implemented unless it has been approved by the relevant Ministry and registered with the Ministry [of Manpower, Development and Employment (MMDE)]”! This means that if the Legal Resources Centre, as part of its accountability programme, decides to do a project on the financial accountability of the MMDE, it must first get approval from the

minister for MMDE before it embarks on the project. And it must be monitored by the MMDE throughout the project period. Again, according to the terms of paragraph 11 of the Guidelines, “assets transferred to build the capacity of an [NGO] should be done through the [MMDE] which will identify the operation criteria”.

These are very restrictive provisions indeed and will lead to a stifling of the growth of the NGO sector if passed into law.

8. NGOS TO LIVE UNDER THE FACILITATING OF TERRORIST INFLUENCE OF COURTS

The mechanism of a Trust is such that someone has to constantly watch over it less there is theft or dissipation of trust property through the conscious or unconscious acts or omissions of the trustee. This someone is the court. This is why there are references to the court in many clauses all through the Bill. In addition, an omnibus clause (Clause 109) provides that “A person who is aggrieved by an act, omission or a decision of the Commissioner in relation to a trust or an [NGO] may apply for redress to the Court which may make the appropriate order.

The Trust Bill will mean a far-reaching dance of NGOs in the courts of law, a situation that has not been the case and that is not in the best interest of NGOs and Ghana. Litigation is expensive, unpredictable and often disruptive of relationships. NGOs do not want to dissipate their time, resources and energies on court proceedings.

Indeed, the best way to emasculate NGOs is to treat them as Trusts and subject them directly or indirectly (through the Commission or the Commissioner) to the supervision and orders of a court of law every step of the way.

9. POSSIBILITIES OF DEVELOPING PRE-EXISTING NGO POLICIES AND DRAFT LAWS INTO AN NGO BILL TO REGULATE NGOs AND CBOs

There have been many efforts at developing National NGO Policies and Draft NGO laws by several civil society groups. The Draft National Policy for Strategic Partnerships with NGOs, December 2004 prepared by a National Consultative Group made up of Government and Civil Society Operatives is important both in content and in the processes that were used to arrive at the final draft. There are also other documents doing the rounds including some that have reached the stage of a draft bill for NGOs.

It should be possible for Government to work from the Draft NGO Policy and the existing drafts of NGO legislation to produce a Draft NGO Bill for Ghana. In the last decade, Government has been very receptive to the initiation of pieces of legislation from outside of the executive branch, which are then taken over as Government Bills. The Domestic Violence Act, recently passed by Parliament, is a good example of this. So too is the Whistleblower’s

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Act, 2006 (Act 720), the Freedom of Information Bill and the Draft Telecommunications Bill. When in 2001, the Legal Resources Centre (LRC) sued the Speaker of Parliament and the Attorney-General in the Supreme Court for not enacting a law to regulate the property rights of spouses according to the terms of article 22 of the 1992 Constitution, the then Attorney-General prevailed on the LRC to hold off on the suit and draft the relevant bill for the consideration of his office. Government is increasingly getting comfortable with collaborating with the citizenry in the law making function.

Flowing from the above, it is recommended that the Government works with NGOs to develop the NGO Policy into a Draft NGO Bill that provides a sound foundation for developing a regulatory framework specifically suited to the NGO sector in Ghana. The NGO Policy document is a policy consensus between Civil Society and Government for promoting “durable partnerships” arrived at over the course of five years and we cannot just discard it!

The current draft of the NGO Policy recommends the provision of a single registry for all NGOs at the Registrar Generals Department; accreditation from the MMDE; providing NGOs access to various benefits; Government support of funding efforts by NGOs; and accountability on the part of recipient organizations. The draft also recommends the establishment of a “National Commission for NGOs (NCNGO) whose membership would include both Government and NGO representatives, as well as other “stakeholders.” The NCNGO would undertake the accreditation of NGOs on behalf of MMDE, and provide various forms of support and encouragement to the sector, as well as advice to the Government on NGO-Government relationships, working closely with MMDE. NGOs will provide annual reports of their activities and finances to the NCNGO and the MMDE may access these. As part of an effort to decentralize NGO oversight and registration, NGOs would also register in the districts within which they work. NGOs would also be encouraged to coordinate their activities with one another and the various levels of government throughout the country. There is provision for involving “Development Partners” in the planning and development processes to ensure maximum, coordinated, and efficient use of resources.

If the NGO Policy is used as a basis for an NGO Bill for Ghana, it will constitute one of the few instances where laws are passed on the basis of people’s lived experiences (as all laws should be), in this case the lived experiences of NGO operatives and Government officials who deal with them. Fifty years after independence, we must be capable of generating the key building blocks of any piece of legislation from within Ghana and ensure that the legislation is directed at solving the particular social problems that the country encounters. This is what the NGO Policy seeks to do. This is not what the Trust Bill seeks to do.

10. A ONE SIZE FITS ALL FOR ALL NGOs WILL NOT WORK

If NGOs succeed in decoupling themselves from the Trust Bill, they must work with Government to develop a law that provides differential treatment, in the details, for NGOs

and CBOs and possibly for different types of NGOs and CBOs. NGOs are very different out there and it is necessary to prove a legislative framework that is not imprisoning of NGOs and CBOs but is liberating and facilitative of their enterprise. Small CBOs are currently over-regulated under the law (as they will be under the Trust Bill), whilst big ones are under-regulated. A legislative framework that takes account of the diversity (in size and in function) of the sector will be far more useful than a one-size-fits-all legislative framework.

The Bill and the Guidelines do not make provision for a distinction between NGOs and CBOs. It is to be wondered whether a start-up CBO will be able to, according to the terms of the Guidelines, maintain at least three (3) permanent staff and pay taxes and Social Security Contributions for the staff (paragraph 2(1) (d); have an office; maintain a bank account-bank charges and all; maintain a postal address etc etc.

11. OTHER ISSUES

Definition of NGO

The definition of a NGO in the Bill appears to be a limited one. It seems to be limited to CSOs, which normally means associations of people or groups of people coming together as a membership organization. This may exclude NGOs (research institutions, tink-tanks, etc) that are made up of experts who engage in, say, public interest research exclusively. The clause also states in subsection 4) that the NGO “may provide service to the deprived, underprivileged or the general public.” We need to clarify that provision of services is not used as a term of art to mean tangible services (food, capacity building, etc.), and excluding others such as advocacy or human rights promotion.

Terrorism

The Memorandum to the Bill provides that “In accordance with the United Nations Security Council Resolution 1373, which enjoins United Nations member states to enact laws criminalising the financing and other acts in support of terrorism, the Bill prohibits the use of trusts to finance terrorists and other criminal acts.” Thus, “The Bill empowers the Board to refuse or revoke the registration of a charitable trust where the Board has received information that an applicant for the registration of a charitable trust is making available resources to a terrorist group or that the applicant is using the resource for any other criminal act...”.

Flowing from this, there are many references to “criminal/terrorist” activity in the Bill. This is superfluous. A criminal activity as defined by Ghana law (including international law that applies to Ghana) includes terrorist activities. The constant reference to “criminal/terrorist” activity is not only superfluous but creates the impression that terrorist activities are either sub-criminal or super criminal. They are not.

The Devil is in the Details

As the Legal Resources Centre is well aware from its analysis of Bills, Acts and Subsidiary/Subordinate legislation since 2001, there are many instances where civil society groups have prevailed upon the Executive and Parliament to remove or attenuate the effects of controversial issues in a Bill; and these provisions have reappeared in full force in Regulations made under the Act. Whilst this is strictly unconstitutional, and contrary to Parliament's own Standing Orders (which provide that a piece of subsidiary/subordinate legislation must be consistent with the Parent Act), it is happening. Thus, advocacy around the Trust Bill must include advocacy around any subsidiary legislation that may be passed under it.

In a sense, the provisions of the NGO Policy Guidelines are already beginning to do this. For example, the definition of an NGO in the Trust Bill is far broader than the definition of an NGO in the Guidelines. If you recall that civil society groups raised the issue of the restrictive definition of NGOs with the Ministry of Manpower and Employment and with the Attorney-General's Department, and that the definition was subsequently reviewed and expanded in the latest draft of the Bill, then the more restrictive definition of "NGO" in the Guidelines falls squarely within the strategy of Government, conscious or unconscious, of taking back, in the context of making detailed regulations, what it has conceded in the Parent Act.

CONCLUSION

The truth is that without NGOs, the current development trajectory of Ghana and Her development partners will fail. NGOs are now so important a sector that they are mentioned by name in Acts of Parliament. The Ghana Institute for Management and Public Administration (GIMPA) Act, 2004 (Act 676), for example, mentions one of the purposes of the Institute as training manpower for the NGO sector. The Ghana Growth and Poverty Reduction Strategy I and II also recognize the critical role of NGOs in Ghana's development.

Globally, the World Bank talks seriously about "a continuing high-level commitment to engaging civil society" and "the key role of civil society in development". "Both the Bank and its government shareholders recognize the critical role civil society plays in helping to reduce poverty and promote sustainable development"⁴ from information exchange through policy consultation to operational collaboration.

NGOs are not begging for space to operate in Ghana. Morally, legally and in practice, they deserve and they have a space. They deserve that space because they have earned it. NGOs must work to preserve that space and to improve upon it by being no-profit, non-partisan, distinct, and credible.

⁴ World Bank-Civil Society Engagement Review of Fiscal Years 2005 and 2006 (The World Bank, 2006) at p. vii and viii.



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The provisions of the Trust Bill may be very well intentioned. They may only be suffering from the draftsman's mis-appreciation of the real character of the NGO sector in Ghana, and the various antecedent efforts made by NGOs and Government for the regulation of the sector. It may also be that government has noticed the sheer amount of money that is controlled by the NGO sector in Ghana and seeks to control same by closely monitoring NGOs. We simply cannot tell at this stage. Whatever it is, the provisions of the Trust Bill and the NGO Policy Guidelines are not good enough and need to be drastically reviewed.

I will like to end this paper with an interesting observation. My involvement with this effort by NGOs to engage with a process of Government regulation of NGOs, and the current effort by the Ghana Advocacy Steering Committee for a Broadcasting Law for Ghana reveals that NGOs and Broadcasters alike are far more engaged with analysis, discussion and advocacy around laws that regulate the operations of others than they are about laws that regulate their own industries. The Legal Resources Centre itself has since 2001 facilitated and co-ordinated efforts by hundreds of interest groups to engage with Parliament around many Bills that affect their interests. I do not currently see the Centre as active with the Trust Bill and NGO Policy Guidelines. I will urge you to do so in partnership with the many actors who are now ready and willing to engage with Government and Parliament on this.

Thank you.