THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION No. 07 OF 2019 20

1. **CHAPTER FOUR UGANDA**]
2. **CENTER FOR CONSTITUTIONAL GOVERNANCE**] **PETITIONERS**

VERSUS

ATTORNEY GENERAL] RESPONDENT

PETITIONERS' CONFERENCING NOTES

&

AUTHORITIES

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PETITIONERS' CONFERENCING NOTES

A. INTRODUCTION

1. The 1st Petitioner is an independent, non-profit, non-partisan organization registered under the Non-Governmental Organizations Act, 2016 ("NGO Act") as an indigenous organization dedicated to the protection of civil liberties and promotion of human rights for all in Uganda.

2. The 2nd Petitioner is a regional non-governmental organization established to promote constitutionalism, good governance and strengthening civil society and other social institutions in Uganda.

3. The Respondent is, by virtue of Article 119 and 250 (1) and (2) of the Constitution of the Republic of Uganda ("the Constitution"), the mandated legal representative of the Government of Uganda.

Background

4. In keeping with its constitutional mandate to make laws for peace, order, development and good governance of Uganda, Parliament passed the NGO Act.

5. The NGO Act, signed into law in January 2016, repealed and replaced the **Non-Governmental Organizations Registration Act, Cap 113** (as amended by the Amendment Act of 2006). In May 2017, **the NGO Regulations, 2017** made by the minister of Internal Affairs under Section 55 of the **NGO Act** were passed, revoking the **NGOs Registration Regulations, 2009** (SI No. 19 of 2009) which revoked the **NGOs Registration Regulations** (SI 113—1.)

6. The legal reforms in Uganda's NGO legal and regulatory framework account for the dynamic changes adopted in the regulation and licensing of NGOs. The changes, without limitation, include the replacement of the National Board of NGOs (the Board) with the National Bureau for Non-Governmental Organisations (the Bureau), introduction of new registration requirements and additional regulatory requirements.

7. Whereas Section 2(3) of the NGOs Registration Act, Cap 113 (as amended by Section 4(c) of the 2006 Amendment Act) expressly conferred corporate personality on an organization upon registration with the Board as an NGO, the NGO Act has no similar provision to that effect.

8. Unlike under Cap 113, where the promoters of an organization applying to the Board to be registered and incorporated as an NGO were, among others, only required to present a valid reservation of the organization's name with the Registrar of Companies under Regulation 5(1) (c) of the NGO's Registration Regulations, 2009, the registration of an NGO under the NGO Act is categorically reserved for incorporated entities.

9. Under Regulation 6 of the repealed NGOs Registration Regulations, 2009, the Board upon registration of an NGO, issued a certificate of registration and incorporation. That certificate in Form B of the Schedule issued under the 2009 Regulations categorically certified that the NGO had been registered and incorporated.

10. Regulation 7 of the same Regulations provided that once the Organisation had been issued with a certificate of registration and incorporation, it would then be issued with a permit under Form C in the Schedule to the said Regulations.

11. In these Conferencing Notes, and in further supplementary oral arguments to be presented before the court, the Petitioners shall demonstrate that: —

    11.1 The impugned provisions of the NGO Act read as a whole, have the effect of unjustifiably singling out NGOs for discriminatory treatment,

and thereby whittling away their rights to freedom of association, privacy, and a fair hearing guaranteed under the Constitution of the Republic of Uganda.

11.2 The impugned sections of the Act mentioned herein read as whole violate the principle of proportionality, are unjustified and inappropriate for achieving the overarching accountability and transparency objectives pursued by the Act and violate articles 29(1)(e), 27(2), 28(12) and 44(c), of the Constitution.

12. The Petitioners confirm the contents of and shall cross-refer to and rely on:

12.1 The Petition;

12.2 The supporting Affidavit of Nicholas Opiyo; and

12.3 The Petitioners' List of Documents and Authorities, which are filed in a separately bound and indexed bundle along with these Notes.

The NGO Act is enclosed under Tab 1.

B. PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

Principles of Constitutional Interpretation

13. The most precise guide on the principles that must underlie the process of constitutional interpretation in Uganda, which the Petitioners will variously refer this court to in its submissions is the case of **David Wesley Tusingwire** *versus* **Attorney General.**[1] While determining the constitutionality of certain acts in the appeal, the Supreme Court stated comprehensively as follows: —

13.1 The Constitution is the Supreme law of the land and forms the standard upon which all other laws [are] judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistency.[2]

13.2 In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either effect animated by the object of the legislation intends to achieve.[3]

13.3 The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness.[4]

13.4 A Constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive liberal and flexible interpretation keeping in view the ideals of the people, their social economic and political cultural values so as to extend the benefit of the same to the maximum possible.[5]

13.5 Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

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[1] Constitutional Appeal No.4 of 2016.

[2] Also known as the "*Sui Generis* Rule"; See Article 2 (2) of the Constitution; Also see Rtd Dr. Col. Kiiza Besigye *versus* Y. K. Museveni, Presidential Election Petition No. 2 of the 2006 (SC)

[3] See Attorney General *versus* Salvatori Abuki, Constitutional Appeal No. 1988 (SC)

[4] See P. K. Ssemogerere and Another *versus* Attorney General Constitution Appeal No 1 of 2002 (SC); and the Attorney General of Tanzania *versus* Rev Christopher Mtikila (2010) EA 13

[5] See Okello Okello John Livingstone and 6 others *versus* The Attorney General and Another Constitutional Petition No I of 2005, South Dakota *versus* South Carolina 192, USA 268. 1940.

13.6 Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous, a liberal, general or purposeful interpretation should be given to it.[6]

13.7 The history of the country and the legislative history of the Constitution is also relevant and useful guide to Constitutional Interpretation.[7]

13.8 The National Objectives and Directive Principles of State Policy are also a guide in the interpretation of the Constitution. Article 8A of the Constitution is instructive for applicability of the objectives.

Enclosed is a copy of the authority under Tab 2. [at pp. 16 and 17]

14. These principles of constitutional interpretation have all been iterated and reiterated severally in decisions by this Court. The Constitutional Court in **Kikonda Butema Farm Ltd** *versus* **Attorney General**,[8] cited with approval the decision of Hon E. M. Kikonyogo DCJ (as she was then) in the **Foundation for Human Right Initiatives** *versus* **Attorney General**,[9] that: —

14.1 "In matters involving interpretation of the Constitution or determination of the Constitutionality of Acts of Parliament, Courts are guided by well settled principles. *One of the cardinal principles in the interpretation of constitutional provisions and Acts of Parliament is that the entire Constitution must be read as an integrated whole and no one particular provision should destroy the other but sustain the other.*" [Emphasis Added]

14.2 Another important principle is that *all the provisions concerning an issue should be considered together to give effect to the purpose of the instrument.* [Emphasis Added]

14.3 Thirdly, *the purpose and effect principles apply where the Court considers the purpose and effect of an Act of Parliament so as to determine its constitutionality.*[10] [Emphasis Added]

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[6] See Attorney General *versus* Major David Tinyefunza, Constitutional Appeal No. I of 1997 (SC)
[7] See Okello John Livingstone (n 7).
[8] Constitutional Petition No. 10 of 2012
[9] Constitutional Petition No. 20 of 2006
[10] The Queen *versus* Big Drug Mark Ltd (1966) LRC (Const.) 332., Attorney General *versus* Abuki, (n 5).

14.4 Following the Constitution and in particular *that part which protects and entrenches fundamental rights and freedoms, must be given a generous and purposive interpretation."*[11] [Emphasis Added]

Enclosed is a copy of the authority under Tab 3. [at pp. 17 and 18]

15. The present Petition seeks both interpretation and redress from this court because the raft of legal reforms contained in the provisions of the NGO Act present a most imminent challenge to the enjoyment of rights which have been defined as universal and inalienable; indivisible, interdependent and interrelated.[12] Indeed, the **Vienna Declaration and Programme of Action**[13] states, *inter alia*, that "all human rights are universal, indivisible and interdependent and interrelated… It is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms."[14]

Enclosed is an excerpt of the relevant part of the Declaration under Tab 4. [at pp. 3]

16. The implication of these legal reforms that adversely affect one right trickle down to affect others. The Petitioners will also refer to the universality and inalienable nature of the rights violated or endangered by the legal reforms in the NGO Act, as well as their indivisibility, interdependence, and interrelatedness. This Court will be invited to rely on the principle of constitutional interpretation highlighted by the Supreme Court in **David Wesley Tusingwire** *versus* **Attorney General**[15] to the effect that "*a Constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people , their social economic and political cultural values so as to extend the benefit of the same to the maximum possible.*"

17. The Petitioners, in light of the above, submit that the instant Petition is properly before this Honourable Court and invites this court to consider the grounds of this Petition in line with the principles of constitutional interpretation highlighted above.

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[11] Attorney General *versus* Modern Jobe (1984) 689; Unity Dow *versus* Attorney General of Botswana 1992 (LRC) 662.
[12] See the Universal Declaration of Human Rights.
[13] Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
[14] Ibid. Para 5
[15] Tusingwire (n 3).

C. GROUNDS FOR CHALLENGE OF THE NGO ACT.

18. The grounds as set out in the Petition are as follows: —

18.1 Sections 29 (2), (3), and (4), 31(2), (3), (4), (5), (6) and (7), 44(a) and (h) of the NGO Act is in contravention of Articles 29(1) (e) of the Constitution of the Republic of Uganda.

18.2 Sections 40(1), (d) and 2, 44(c), (d), (f) and (g) of the NGO Act is in contravention of Article 28(12) and 44(c) of the- Constitution of the Republic of Uganda.

18.3 Sections 40(1) and (2); 41(7) of the NGO Act is in contravention and inconsistent with Articles 29(1) (e) of the 1995 Constitution of the Republic of Uganda, as amended.

18.4 Sections 29(1) of the NGO Act is in contravention of Article 29(1)(e) of the constitution of the Republic of Uganda.

18.5 Sections 29(1) and 31(2) of the NGO Act is in contravention of Article 29(1)(e) of the Constitution of the Republic of Uganda; Articles 2(1) and (2), 22(1) and (2) of the International Convention on Civil and Political Rights ("ICCPR") and Article 10(1) of the African Charter on Human and People's Rights.

18.6 Sections 39(3)(c) of the NGO Act contravenes Articles 27(2), 29(1)(e) of the Constitution of the Republic of Uganda.

D. RESOLUTION OF THE GROUNDS

GROUND 1

Whether Sections 29(2), (3), and (4), 31(2), (3), (4), (5), (6) and (7), 44(a) and (h) of the NGO Act is in contravention of Article 29(1)(e) of the Constitution of the Republic of Uganda.

19. The Petitioners submit that the net effect of the impugned provisions is to create an exceedingly lengthy and onerous registration process that: —

19.1 violates the State's negative obligation of non-interference with respect to the right to freedom of association, thereby contravening the Constitution; and

19.2 exceeds the State's margin of discretion in the limitation and derogation of fundamental human rights, thereby contravening the Constitution.

20. In addressing this ground, paragraph 24 above shall be subdivided further to address the renowned tripartite test of permissible limitations on fundamental human rights.

21. For this ground, the Petitioners invite this court to be guided by the *sui generis* principle of constitutional interpretation. The history of the country and the *legislative history* of the Constitution is also relevant and useful guide to constitutional interpretation. Coupled with these, is the principle requiring a *dynamic, progressive, liberal and flexible interpretation* to provisions containing fundamental human rights. The justification for reference to these principles is that the legal reforms introduced into the NGO Act come at the heels of a prior legal regime whose conformity with the supreme law was not the subject of controversy. Even more importantly, because this court is being invited to interpret Article 29 (1) (e) of the Constitution which contains the very fundamental right to freedom of association. The Petitioners accordingly attest to the relevance of the three aforementioned principles, whose applicability has been endorsed several times both by this court and the Supreme Court.

22. It is relevant to summarize the impugned sections of the NGO Act for ease of reference: —

22.1 Section 29 (2), (3) and (4) of the NGO Act provide for onerous procedures that govern the registration, incorporation and circumstances under which the registration will be cancelled.

22.2 Sections 31(2), (3), (4), (5), (6) and (7) provide that an organization shall not operate in Uganda without a valid permit issued by the Bureau.

22.3 Section 44 (a) and (h) prevent an NGO from carrying on any activities in any part of the country without having obtained multiple approvals from multiple government organizations, and even signing a memorandum of understanding with the local government and another with all their donors, affiliates, local and international partners.

23. The Petitioners' grievance with respect to this ground is particularized in the petition and supported by the Affidavit in Support of the Petition sworn by Nicholas Opiyo. It is to the effect that the NGO Act creates onerous bureaucratic procedures for an organisation to be registered and incorporated which effectively whittle away the right to freedom of Association.

I. The impugned provisions collectively violate the State's negative obligation of non-interference with respect to the right to freedom of association.

24. Article 29(1)(e) of the Constitution guarantees the right to freedom of association to include the freedom to form and join associations or unions including trade unions, political and other civil associations. The Constitutional Court in **Rwanyarare** *versus* **Attorney General**,[16] while discussing the constitutionality of various sections of the Political Parties and Organisations Act, 2002, affirmed the Constitutional place of the right to freely associate as being inherent and not granted by the State but emphasized that it must be exercised within the framework of the Constitution. In other words, the right to freely associate is not an absolute right. It can be limited as provided by Article 43 of the Constitution.

The Authority above is enclosed under Tab 5. [at pp. 9]

25. This right is also enshrined in a number of international conventions including: — the ICCPR,[17] the African Charter on Human and Peoples' Rights,[18] the European Convention on Human Rights which, despite not being part of the applicable law in Uganda, is the instrument along which our Article 29 is modeled.[19] Added to these, is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).[20] The total sum of these provisions is that every person shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests. An obligation is conferred upon states to ensure that men and women can equally participate in non-governmental organizations and associations concerned with the public and political life of the country.

Enclosed are excerpts of the relevant instruments under Tab 6.

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[16] Constitutional Petition No. 7 of 2002.
[17] Article 22.
[18] Article 10.
[19] Muwanga Kivumbi *versus* Attorney General: Constitutional Petition No. 9 of 2005.
[20] Article 7.

26. In the context of the foregoing, the obligation imposed upon the State is a negative obligation not to interfere with the enjoyment of this right. This position is in keeping with the duty of the State to afford protections to legal and natural persons in the exercise of their freedom of association from interference by public authorities. This position was underscored by the European Court of Human Rights (ECtHR) in **Brega and Others** *versus* **Moldova.**[21] In that case, the applicants were members of an NGO called Hyde Park who were arrested for protesting without a legal right to do so. The court, in concluding that their rights under Article 11 of the European Convention had been violated, reasoned that Moldova had breached its negative obligation not to interfere with the exercise of the freedoms guaranteed under that provision. In effect, the ECtHR held that people do not need the permission from the state to associate and assemble.

Enclosed is a copy of the authority under Tab 7. [at pp. 12, 13 and 14]

27. The reasoning of the court in the **Brega case** underscores a position consistent with the interpretation of the protections afforded to rights akin to the one guaranteed by Article 29 (1) (e) of the Constitution. Nicholas Opiyo deposed in paragraph 13.3 of his Affidavit in support of the Petition that the impugned Act requires NGOs to have State permission in order to operate thereby violating their internationally recognized right to freedom of association. This statement is justified by an assessment of the net effect of Sections 29(2), (3), (4); 31(2), (3), (4), (5), (6) and (7); 44 (a) and (h).

28. Indeed, the Petitioners' grievance in paragraph 12.1. of the Affidavit in support reveals that the processes that are imposed on an NGO, more so before it can even commence operations in any part of the country is nothing short of cumbersome and an unnecessary hinderance to the ability of persons to freely associate. Paragraphs 7-8 of the affidavit in rejoinder deponed by *Peter Magelah Gwayaka* also amplifies these hindrances to association posed by the fact that NGOs have no exclusive corporate personality unless they are incorporated as companies limited by guarantee under the Companies Act, 2012. This obviously means that they are subjected to unnecessary regulation by two separate Government agencies. Further to this, the multiple approvals and strict requirement for recommendation letters from several government agencies prior to commencement of operations exacerbates an already undesirable situation.

In his affidavit, Nicholas Opiyo explains the legislative history preceding this new cumbersome process in paragraphs 14-17 of his Affidavit; to wit: — the

[21] Application no. 61485/08, Paragraph 48.

organisation could start its operations only upon registration and incorporation with nothing more. In line with the principle of constitutional interpretation that legislative history is a relevant guide in the interpretation of the Constitution. The process under the new law departs from a legislative regime that appreciated the need for minimal State interference with the right to association to one that explicitly flouts international best practices beyond possible justification. Paragraph 25 of Opiyo's Affidavit highlights these international standards providing that those requirements should, as much as possible, be the least intrusive and restrictive that could be. This observation aligns with the observations of Maina Kiai, the Special Rapporteur on the right to freedom of peaceful assembly[22] to the same effect.

Enclosed is a copy of the report under Tab 8. [at pp. 14, 15, 16, 18, 19, 20 and 22]

29. The requirements in Sections 29(2), (3), (4); 31(2), (3), (4), (5), (6) and (7); 44 (a) and (h) of the NGO Act, placed against the principle in **Brega** *versus* **Moldova**[23] are not only an inhibitor to the exercise of the right of freedom of association but also place the State in a position where it must give permission to people to freely associate. **The Brega case is enclosed under Tab 7.**

30. The obligation of non-interference is then violated. The State is not called to permit enjoyment of the freedom of association; it is merely a protector and an enabler of the freedom of association. It is called to provide fertile ground not the proverbial rocky ground, for the freedom of association to thrive.

31. Provisions of the Constitution containing fundamental human rights must be given a dynamic, progressive, liberal, and flexible interpretation.

32. The Petitioners aver that Article 29, being such a provision, requires such an interpretation. For purposes of Article 29, worded as concisely as it is, leaves it to this Honorable court to offer guidance within its interpretive powers under Article 137, regarding the broader meaning that must be ascribed to the fundamental right that it guarantees. To ascribe broader meaning to the right under 29(1)(e), the international standards already cited above offer helpful insight. Nicholas Opiyo's Affidavit demonstrates under paragraphs 33 to 37 that requiring NGOs to obtain State permission to operate is a fetter on the right to freedom of association

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[22] In her First Thematic Report on the Rights to Freedom of Association of Peaceful Assembly and of Association accessible at UN Human Rights Council, *First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN Doc. A/HRC/20/27, para. 65.

[23] Brega, (n 23).

guaranteed under the Constitution. He further depones under paragraph 21, 22, 23, 24 and 26 that the excessively bureaucratic process introduced by the impugned Act makes the process more onerous, demanding immense time and resources from the persons intending to enjoy the right and impairs their ability to accomplish their objectives.

33. Nicholas Opiyo aptly referred to legislations in **Turkmenistan and Kyrgyzstan** which have been condemned by the Human Rights Committee[24] for imposing unnecessarily burdensome reporting requirements that allow for State intrusiveness and restrict the independence of associations. In Turkmenistan, the law on Public Associations severely restricts freedom of association in that it, inter alia, provides for the compulsory registration of public associations and contains onerous obligations on associations to report to authorities. Associations undergo cumbersome administrative processes for registration so that in some instances associations are forced to wait for a number of years before they obtain a registration certificate. The legislations in these countries much like the NGOs Act in Uganda impose an unwarranted burden to exist yet they should exist as a matter of right. With these criticisms in mind, this court already has a guide as to the ways in which the right to freedom of association which is in issue in the present matter has been interpreted. The only opposite conclusion from the flurry of authoritative interpretative guides cited, is that the impugned legislation has the effect of whittling down on a freedom yet the State, in the making of legislation ought to respect, protect and fulfill this obligation.

34. By extension, understanding the nature of a right as understood in the continental and international context makes for an interpretation of the Constitution that appreciates the purpose of the law. This makes the principle of purposive interpretation equally applicable to this ground. In the same breath, attention must be paid to the fact that Article 29 (1) (e) in providing that the freedom of association shall include "the freedom to form and join association or unions, including trade unions and political and other civic organizations" envisages a world where everyone under the law can form or join an association with ease, and with minimal State intervention. The State's duty in this case is clear and does not include the hampering of the operations of non-governmental organizations,

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[24] Human Rights Committee, Concluding Observations, Turkmenistan (2012), CCPR/C/TKM/CO/1, available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsu%2bQCGi7BpU%2byFnbJWmpGrUsvQF55drRirHgKGPQtwhardIkCm2t9d1n1Y6fcaAKTrx44mmYj8Ddx6htXWitHVP7I4aeARLf2Nw7BQZBRI8M (noting "onerous obligations on associations to report to authorities"); Human Rights Committee, Concluding Observations, Kyrgyzstan (2014), CCPR/C/KGZ/CO/2, available at: https://uhri.ohchr.org/Document/File/03e27d7f-7591-4a6b-8d22-b3509183c737/733c79f2-f1dc-4ef8-b498-187bff2ffbe3 (noting "reports of possible restrictions on non-governmental organizations in several legislative proposals, including restrictive reporting obligations to State authorities")

given its obligations under international law, as well as under Objective V (ii) of the National Objectives and Directive Principles of State Policy (NODSP), which mandates that: —

> The State shall guarantee and respect the **independence** of non-governmental organizations which protect and promote human rights. [Emphasis ours]

35. In keeping with the principles of constitutional supremacy (the "*sui generis*" rule) and the principle that the NODSPs are a justiciable part of the constitution by virtue of Article 8A, [25] it follows that a legislation that hampers as opposed to promoting the right to freedom of association is in contravention, not only of the Constitution but also of international human rights instruments.

II. The impugned provisions exceed the State's margin of discretion in the limitation and derogation of fundamental human rights, thereby contravening the constitution.

36. The averments notwithstanding, the Petitioners are well apprised of the fact that the right to freedom of association is not an absolute right.[26] Article 22 of the ICCPR proscribes imposition of restrictions on the exercise of this right other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety or public order, the protection of public health or morals or rights and freedoms of others. Article 29(1) (e) read together with Article 43 of the Constitution of Uganda are in tandem with Article 22(2) of the ICCPR in terms of their limitation clauses.

The excerpt of the ICCPR is enclosed under Tab 6.

37. In **Charles Onyango Obbo and Anor** *versus* **Attorney General,**[27] the Supreme Court, while discussing whether Section 50 of the Penal Code Act which made publication of false news a criminal offence, contravened the constitutional protection afforded to the freedom of expression including press freedom, laid down the test of the application of Article 43. The test in that case requires that for a limitation to be permissible,

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[25] In Male Mabirizi *versus* Attorney General, Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, And 13 of 2018 the Constitutional Court has held that by virtue of Article 8A, National Objectives and Directive Principles of State Policy are justiciable. See Judgment of Elizabeth Musoke at para.5, p.649.

[26] Article 43 of the Constitution; James Rwanyarare and Ors *versus* The Attorney General, Constitutional Petition No. 7 of 2002.

[27] Constitutional Appeal No. 2 of 2002.

37.1 it must be prescribed by law;

37.2 it must be to achieve a legitimate aim; and

37.3 that limitation must be proportionate to achieving that legitimate aim.

Enclosed is the Authority under Tab 9. [at pp. 11 and 20]

38. The same is indeed posited in a number of cases which although of only persuasive value to this court, are instructive on the question of permissible limitations. In **Brega** *versus* **Moldova,**[28] the ECtHR held that '*... interference will entail a violation of Article 11 [of the ECHR] unless it is "prescribed by law", has an aim or aims that are legitimate under paragraph 2 of the Article and is "necessary in a democratic society" to achieve such aim or aims.*' It follows therefore that for the State to justify the limitation of the right to freely associate, it must meet the standard of limitation set by the Constitution.

39. The impugned provisions require NGOs to be incorporated under the Companies Act, 2012 or the Trustees Incorporation Act; obtain a certificate of registration with the National Bureau for NGOs; apply for a permit from the districts NGO Monitoring Committees; and sign a Memorandum of Understanding with the Local Government prior to operating. At every stage, there are bureaucratic steps that are not only costly but cumbersome and whittle away the independence of NGOs. An organisation has to wait for a long time to be approved by different regulators and even if they meet the requirements of one, they are likely to be held back by another. At incorporation, they have to go through about 4 steps, at registration, they have to go through about 4 stages inclusive of obtaining recommendations from the local and central government and then they have to apply for a permit. The question is, do those requirements serve a legitimate aim? If so, are they the least intrusive means to achieve that aim?

40. We submit that even though there is a legitimate aim in requiring NGOs to go through the various stages before they can operate, the specific requirements under the NGO Act are not proportionate to achieving that legitimate objective.

41. Paragraph 25 of Mr. Nicholas Opiyo's affidavit in support of the Petition recognizes that there are legitimate aims of transparency and accountability in

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[28] Brega (n 23), Paragraph 47; Also see Handyside *versus* The United Kingdom, Merits, App No 5493/72, A/24, [1976] ECHR 5, (1976) 1 EHRR 737, (1979) 1 EHRR 737, IHRL 14 (ECHR 1976), 7th December 1976, European Court of Human Rights [ECHR].

requiring NGOs to fulfill certain obligations. However, the affidavit also reveals that these requirements must not be burdensome.

42. Why would a law require an NGO to incorporate with the Uganda Registration Services Bureau (URSB), register with the National Bureau for NGOs, then obtain a permit from the district and local government, etc.? Must there be a multi-level, three-tier system for a non-profit entity to operate? As demonstrated in paragraph 22-23, the persons seeking to be permitted to exercise their freedom of association are spending an immense amount of time and resources to exist in order to have a chance to enjoy their right associate.

43. Even more disturbing is the justification for these double registration processes provided by the Respondent at paragraphs 13 and 14 of the affidavit in reply deponed by Mr. Allan Mukama from the Attorney General's chambers. He stated that the only reason why the NGOs register with URSB now is because issuance of certificate of registration had been duplicated in the old law. However, if the intention was to cure duplication of roles, why did the law not transfer registration solely to URSB? Why did it have to require registration under two different entities? This court is invited to deduce that the intention was clearly not to cure anything, it was instead to make associating an undesirable inconvenience.

44. If registration is important, it is okay if it is done with one entity. Scholars on the right to civic space have argued that it is not proper that an entity which has been incorporated, which in itself amounts to authorization to operate countrywide, should be required to obtain a permit and obtain approval from other local government structures.[29] The reporting obligations should simply be compliant with international best practices in accountability of NGOs. This will save the members of NGOs from resource constraints and administrative impediments that would otherwise impose a price and possible unfair hindrances to their inherent freedom.

45. In the United States of America, any group of individuals may come together to form an informal organization in order to jointly discuss ideas or common interests and can do so without any government involvement or approval. If a group seeks particular legal benefits, such as an exemption from federal and state taxation, it may choose to formally incorporate and register as an NGO under the

[29] Christopher Mbazira & Teddy Namatovu, Civic space and human rights advocacy in the extractive industry in Uganda: Implications of the 2016 Non-Governmental Organisations Act for oil and gas civil society organisations, African Human Rights Law Journal, Accessible at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-209620`18000100005

laws of any of the 50 U.S. states. The US Department of State in its Bureau of Democracy, Human Rights and Labour fact sheet reveals that in the US: —

> Registration requirements, and forms of organizations, vary from state to state, but are generally very simple, so that anyone can incorporate an NGO in just few days at the state level. The process typically involves providing a short description of the organization, its mission, name, the address of an agent within the state, and paying a modest fee. Most states have a general incorporation statute that makes this process a routing matter, not subject to approval by the legislature or any other government official. This approach removes the risk that a government official might abuse his or her power in determining which organizations should be allowed to exist or not.[30]

Enclosed is the relevant excerpt of the Fact-Sheet under Tab 10. [at pp. 3 and 4]

46. In Belgium, there are no specific legal barriers as to the practice of NGOs except the formalities of registration which can be done by private deed and then deposited in the Commercial Court registry.[31]

Enclosed is the NGO Guide under Tab 11. [at pp. 6]

What is discernible from the above is that it should be made relatively easier and cheaper for NGOs to operate in free and democratic societies. Some scholars have even argued, that the thick bureaucracy does not make it easier for NGOs to operate.[32] Indeed, what we see in the countries where NGOs are not unduly restricted, is that the culture of democracy and transparency is prevalent.[33] This is because indeed, the freedom to associate is the cornerstone of democracy.[34]

Enclosed is the scholarly article under Tab 12. [at pp. 83, 84, 91 and 92]

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[30] https://www.state.gov/non-governmental-organizations-ngos-in-the-united-states/

[31] Advocates for International Development, EU registration options for NGOs Preparing UK-based NGOs for Brexit: A guide to establishing NGOs in Europe. http://www.a4id.org/wp-content/uploads/2017/02/EU-registration-options-for-UK-NGOs-post-Brexit-FINAL-PDF-1.pdf

[32] Christopher Mbazira & Teddy Namatovu, Civic space and human rights advocacy in the extractive industry in Uganda: Implications of the 2016 Non-Governmental Organisations Act for oil and gas civil society organisations, African Human Rights Law Journal, Accessible at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962018000100005

[33] Department of State Fact Sheet, (n 33).

[34] General Comment No. 37 on Article 21 of the ICCPR: The Right to Peaceful Assembly, Para. 1.

47. Therefore, we submit that the provisions of Sections 29(2), (3) and 4, 31(2) (3) (4) (5) (6) (7), 44(a) and (h) of the NGO Act are inconsistent with and in contravention of Article 29 (1) (e) of the Constitution. We pray that this Honourable Court be pleased to declare thus.

GROUND 2

Whether Sections 40(1), (d) and 2, 44(c), (d), (f) and (g) of the NGO Act is in contravention of Article 28(12) and 44(c) of the constitution of the Republic of Uganda.

48. The Petitioners will submit that the impugned Sections are unconstitutional because the crimes purportedly prescribed thereunder are so broadly defined and vague, as to be in conformity with international standards with respect to regulation of associations. The resultant effect is that they infringe the constitutionally protected rights such as the right to a fair hearing provided for under Article 44(c) of the Constitution and the presumption of innocence under Article 28(3)(a) of the Constitution.

49. Under this ground, this honorable court is invited to rely on the interpretive doctrine that provisions of the Constitution containing fundamental human rights must be given a liberal, progressive, and dynamic interpretation. In addition, the court ought to take cognizance of the fact that limitations to such rights must be construed narrowly to give effect to the rights.

50. The impugned provisions of the NGO Act are summarized below: —

    50.1 Sections 40(1)(d) and (2) provide that an organization or a person who engages in any activity that is prohibited by the Act commits an offence and is liable to conviction.

    50.2 Sections 44(c), (d), (f), and (g) of the NGO's Act provide for special obligations of the organization which include co-operation with local and national security agencies. NGOs are also expected to desist from any partisan political involvement either directly or indirectly. This read together with Section 40(1) (d) and (2), constitutes an offence, once these special requirements are reneged on.

51. Sections 40(1), (d) and 2, 44(c), (d), (f) and (g) of the NGO Act is in contravention of Article 28(12) and 44(c) of the constitution which provide for the principle of legality and the right to a fair hearing. Paragraphs 12.2, 16.5, and 16.6 of the petition and paragraphs 33 and 45 of Mr. Nicholas Opiyo's affidavit set out the

Petitioners' case in relation to sections 40(1), (d) and 2, 44(c), (d), (f) and (g) of the NGO Act.

52. Section 40(1), (d) and (2), 44(c), (d), (f) and (g) of the NGO Act provide overly broad, undefined, vague obligations, and create offences that are overly broad in contravention of the principle of legality under Article 28(12) of the constitution. The principle of legality is codified in Article 28(7) and (12) of the Constitution. In essence, the principle bars the criminal prosecution of any person in respect of an offence which did not constitute an offence at the time it was committed. It further provides that no person can be charged with and convicted of an offence that is not defined by law and whose punishment is not by law prescribed. This principle enshrined in Article 28 of our Constitution is part of the non-derogable right to a fair hearing guaranteed by our Constitution in Article 28 and Article 44.

I. The Broadly Defined and Vague Offenses Created under the Impugned Provisions are Remiss of International Standards and Best Practices on the Regulation of Associations.

53. The interpretation of our Constitution is guided by the understanding that Uganda is part of the international community and that as a progressively democratic nation, it must align itself with the set international standards for the respect, protection, and promotion of the rights of the people under its laws. This can be gleaned from the provisions of Objective XXVII (b).

54. The National Objectives and Directive Principles of State Policy are now a justiciable part of the Constitution following the promulgation of Article 8A. As such, in line with the interpretive principle of harmony, those objectives must be read as part and parcel of the Constitution. That said, as members of the African Union and having ratified the African Charter on Human and Peoples' Rights, it is imperative that in interpreting rights guaranteed thereunder that are materially the same as those guaranteed under our Constitution, we are guided by the standards set by the different structures under the said Charter.

55. The African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly[35] (**ACHPR Guidelines**) outline the sanctions appropriate in NGO laws, and directly reject the legality of imposing criminal sanctions in such laws. They also provide that sanctions shall be applied only "in

[35] African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa, available at: http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf

narrowly and lawfully prescribed circumstances" and "shall be strictly proportionate to the gravity of the misconduct in question."

Enclosed are the Guidelines under Tab 13. [at pp. 51 and 52]

56. Moreover, NGO laws must strictly define liability such that "liability shall not be imputed from associations to individuals or vice versa." Sanctions shall also "not be disproportionate." To this end, even "monetary penalties shall be avoided to the extent possible," and a failure to comply with a permissible State requirement shall be remedied with "compliance with that requirement":[36] The Petitioners aver that the impugned provisions run afoul of all these guidelines to the extent that they purport to impose criminal sanctions for any misstep under the Act.

57. The relevant ACHPR Guidelines, reproduced below for ease of reference, state thus: —

> "55. States shall not impose criminal sanctions in the context of laws governing not-for-profit associations.[37] All criminal sanctions shall be specified within the penal code and not elsewhere. Civil society shall not be governed by provisions of criminal law different from the generally applicable provisions of the penal code.[38]
> 56. Sanctions shall be applied only in narrow and lawfully prescribed circumstances, shall be strictly proportionate to the gravity of the misconduct in question, and shall only be applied by an impartial, independent and regularly constituted court, following a full trial and appeal process.
>
> 57. Liability shall not be imputed from associations to individuals or vice versa.[39] Offenses committed by particular members of associations shall not be taken as grounds to penalize the association itself, where the official decision-making structure of the association was not employed to pursue those offenses. Similarly, offenses committed by an association, for instance through decisions of its

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[36] African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa, at p. 27, available at: http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf

[37] On the related issue of the inappropriate application of criminal measures to associations, see Malawi African Association and others *versus* Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), paras. 106-7.

[38] Relating, for example, to fraud, embezzlement and similar offenses.

[39] See International Pen and others (on behalf of Ken Saro-Wiwa) *versus* Nigeria, Comm. Nos. 137/94, 139/94, 154/96 & 161/97 (1998), para. 108

officers, shall not be imputed to members of the association who did not take part in the offenses in question.

58. Suspension or dissolution of an association by the state may only be applied where there has been a serious violation of national law, in compliance with regional and international human rights law and as a matter of last resort.[40] Suspension may only be taken following court order, and dissolution only following a full judicial procedure and the exhaustion of all available appeal mechanisms. Such judgments shall be made publicly available and shall be determined on the basis of clear legal criteria in accordance with regional and international human rights law.

59. Sanctions shall not be disproportionate or aimed at tightly controlling or penalizing associations without strong grounds.

58. In the same breath, the African Commission on Human and Peoples' Rights, Report of the Study Group on Freedom of Association and Assembly in Africa (2014) also reinforces the idea that restrictions must be narrowly defined and that sanctions must be proportionate. It should be remembered that civil societies are protected because they play a critical role in the advancement of democratic practices such as accountability and transparency of government.[41] It notes that *"permission should not be required to undertake particular activities."* Its inclusion of this statement in its discussion of acceptable limitations underscores that a permission requirement constitutes an overly broad restriction. It outlines examples of permissible and impermissible restrictions: [42]

46. Restrictions placed by states on permissible activities should be clearly defined in law and be in accordance with international human rights instruments. Compliance with the principle of legality means any limitations must not be overly broad or vague.

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[40] The requisite level of gravity is only reached in cases involving the pursuit of illegitimate purposes, such as for example where the association in question aims at large-scale, coordinated intimidation of members of the general population, for instance on the basis of a racially-motivated position.

[41] Godfrey Musila, The Spread of Anti-NGO Measures in Africa: Freedoms Under Threat: A Freedom House 2019 Special Report, https://freedomhouse.org/report/special-report/2019/spread-anti-ngo-measures-africa-freedoms-under-threat

[42] African Commission on Human and Peoples' Rights, Report of the Study Group on Freedom of Association and Assembly in Africa (2014), pp. 37-38, available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf

> 47. Acceptable limitations on the activities of civil society associations include limiting engagement in for-profit activity (although fundraising initiatives to support the association's not-for-profit activities should be allowed), anti-democratic activities, incitement to hatred, or establishing an armed group. All such limitations must be interpreted and applied strictly and not abused.
>
> 48. There should be no blanket restrictions on permissible activities, and associations should be expressly permitted, *inter alia*, to engage on matters relating to politics, public policy, and human rights, as well as to conduct fundraising activities.
>
> 49. The receipt of foreign funding should in no way effect an association's ability to engage in the full range of legitimate activities.
>
> 50. Permission should not be required to undertake particular activities.

59. The ACHPR Report states unequivocally that criminal sanctions are inappropriate in NGO laws. Moreover, even civil sanctions *"should only be considered in grave offenses,"* and these must not be imputable from the organization to the individual and vice-versa: —

> 119. Criminal sanctions are inappropriate in an associations law.
>
> 120. In all cases sanction should apply only to the entity that has committed the offense, and not be improperly imputed from association to individuals or *vice versa*.
>
> 121. Civil sanctions, suspension or dissolution of an association should only be considered in grave offenses. In all cases such action may only be taken following court judgment, and the exhaustion of all available appeal mechanisms.[43]

More specifically, with reference to reporting requirements, the ACHPR Report concluded that a law requiring "organizations to furnish any information or document in their possession," among other requirements, went "far beyond regulation, into an intrusive and institutionalized form of State oversight and

[43] African Commission on Human and Peoples' Rights, Report of the Study Group on Freedom of Association and Assembly in Africa (2014), pp. 51-52, available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf

control."[44] It further specified that "criminal penalties for failure to report are excessive."[45] The Report is important as it facilitates the interpretation of the right to freedom of association. As such, the report is an interpretative guide to the extent that it leads to better appreciation of the rights enshrined in the African Charter on Human and People's Rights. The net effect of the impugned provisions is to impose criminal penalties for failure to adhere to already onerous reporting requirements and is thus explicitly excessive.

Enclosed is the Report of the Study Group under Tab 13. [at pp. 51 and 52]

60. By imputing possible criminal liability on "any organization or person," Section 40 falls short of the guidance espoused in paragraphs 119-121 of the ACHPR Report as reproduced above to the extent that it leaves uncertainty regarding whom the purported criminal liability will be borne by.

61. The sum total of the criminal sanctions imposed by Section 40 is an absurdity regarding the nature of the offense as well as who the subject of possible prosecution may be. This is especially true in view of the provisions of the Article 28(12) of the Constitution codifying the principle of legality that demands, *inter alia*, that there is certainty in any provisions imputing criminal liability (*nulla crimen sine lege certa*).

62. The African Commission on Human and Peoples' Rights in **Malawi African Association and Others** *versus* **Mauritania**[46] gave relevant insights into whether criminal sanctions are appropriate in the regulation of NGOs. This case is relevant to the extent that it was dealing with the place of criminal sanctions in the NGO regulatory regimes. In this case, some presumed supporters of the Ba'ath Arab Socialist Party in Mauritania were arrested, charged and subsequently imprisoned for participating in the activities of a political movement considered by the State as a "criminal association." The government did not provide any argument to establish the criminal nature or character of these groups. The Commission took the view that any law on associations should include an objective description that makes it possible to determine the criminal nature of a fact or organisation. The Commission considered that none of these simple rational requirements was met

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[44] African Commission on Human and Peoples' Rights, Report of the Study Group on Freedom of Association and Assembly in Africa (2014), p. 41, para. 58, available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association_assembly_in_africa.pdf

[45] African Commission on Human and Peoples' Rights, Report of the Study Group on Freedom of Association and Assembly in Africa (2014), p. 41, para. 62, available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association_assembly_in_africa.pdf

[46] Malawi African Association and others *versus* Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000)

and that there was violation of Article 10(2) of the African Charter on the freedom of association. It should be remembered that the African Commission is the one charged with the mandate of protecting the rights enshrined under the African Charter. Its views on the same are therefore highly persuasive on Ugandan Courts which in the exercise of judicial power must be mindful of Uganda's obligations under international law.

Enclosed is the Authority under Tab 14. [at paragraph 107]

63. The Commission's observations are relevant to the present Petition to the extent that, as observed under paragraph 41 of Nicholas Opiyo's Affidavit, the NGO Act threatens criminal prosecution of the representatives of the association for merely failing to comply with administrative requirements.

64. The foregoing coupled with the observation under paragraph 38 of Nicholas Opiyo's Affidavit which clearly highlights the vagueness of the language used in NGO Act such as "threatening national security" without laboring to define what that entails makes for a situation akin to that dealt with by African Commission in **Malawi African Association and Other** *versus* **Mauritania**.

65. For instance, what constitutes "threatening national security" in the absence of a definition under the NGO Act? In such a case, anything fitting the fancy of the security personnel can be used as an excuse to unduly interfere with the operations of any targeted NGO. Consequently, the result of this arbitrariness would be a naked violation of the right to freedom of association.

66. The effect of creating arbitrary offenses that an NGO or its officials may be prosecuted for such as "threatening national security" or engaging "in any act which is prejudicial to the interests of Uganda and the dignity of the people of Uganda" is akin to prosecution of the Ba'ath Arab Socialist Party in Mauritania for belonging to a criminal association. For a law creating an offense to satisfy the principle of legality, the offense must be clearly defined in that law. The principle of legality comprises written as well as unwritten law and implies qualitative requirements, notably those of *accessibility and foreseeability*.[47] The requirements are satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of courts' interpretation of it, what acts and omissions will make him criminally liable.

[47] Sunday Times *versus* United Kingdom, Judgement 26 April, 1979;

67. The ECtHR dealt with the principle of liability in the case of **Cantoni** *versus* **France**[48], which although not binding on this court offers valuable insight into the standard that must be met for a law to satisfy the principle of legality. In that case, the applicant complained that the statutory definition of medicinal product lacked sufficient clarity and precision to satisfy the requirements of Article 7(1) of the European Convention of Human Rights. The court, in interpreting Article 7(1) of the ECHR which is substantively similar to Article 28(12) of Uganda's Constitution stated that what is required is that the law is "*sufficiently clear in the large majority of cases… the applicants must have known on the basis of their behavior that they ran a real risk of prosecution.*" In the present case, the Petitioners aver that the impugned provisions, by making vague statements such as "incomplete information"; "non-partisan": "threatening national security"; "prejudicial to the interests of Uganda" or the "dignity of Ugandans" the object of possible criminal prosecution leaves NGOs in a place where they can barely tell what conduct, for instance, would be partisan or non-partisan given that as part of their organizational mandate, they are mostly entitled to civic participation, and that can take potentially partisan form.

Enclosed is the Authority under Tab 15. [at pp. 15]

In the Kenyan case of **Geoffrey Andare** *versus* **Attorney General**,[49] the Petitioner challenged the provisions of Section 29 of the Kenya Information and Communication Act, Cap 411A. It provided that a person who sends a 'grossly offensive or indecent, obscene or menacing message' by means of a telecommunications system or who knows to be false for the purpose of causing 'annoyance, inconvenience or needless anxiety' to another person commits an offence. He argued that section 29 of the Act was vague and over-broad especially with regard to the meaning of '*grossly offensive', 'indecent', 'obscene 'menacing', 'causing annoyance' 'inconvenience' or 'needless anxiety'*, thereby offending the principle of legality. This principle requires that a law, especially one that limits a fundamental right and freedom, be clear and precise enough to cover only the activities connected to the law's purpose. The court reasoned that as the Act did not define the words used, the meaning of those words was left to the subjective interpretation of each judicial officer seized of a matter. The law was therefore vague, broad, and uncertain and it was declared as unconstitutional. The same thing applies to the language applied in the impugned provisions and is thus deserving of the same treatment.

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[48] Judgement 22 October 1996

[49] Kenyan High Court, Constitutional Petition No. 149 of 2015.

Enclosed is the Authority under Tab 16. [at paragraph 77]

68. Relatedly, in the case of **Gwanda** *versus* **S**,[50] the applicant was arrested by the Malawi Police Service at Chichiri in the City of Blantyre in the Republic of Malawi on 20 March 2015 at around 4:00 a.m. He was then charged with the offence of being a rogue and vagabond contrary to section 184(1)(c) of the Penal Code. In this case, which is of persuasive value to this honorable court, the provision under challenge was found to be vague and overly broad and was thus declared unconstitutional. In coming to that conclusion, the court reasoned that there was too much discretion to law enforcers with the absence of the word "reasonable" in the text. It should also be noted that parliament has a duty to provide law enforcers with clear and precise parameters within which to exercise their discretion to avoid leaving the determination of policy issues which are ordinarily the domain of the legislature into the hands of the judiciary and the police.

69. The Petitioners submit that Sections 40(1), (d) and (2), 44(c), (d), (f) and (g) of the NGO Act are unconstitutional because the indication of the crime to be committed is so broadly defined and vague and as a result infringes on Constitutionally protected rights like the right to a fair hearing provided for under Article 44(c) of the Constitution and the presumption of innocence under Article 28(3)(a) of the Constitution.

70. A person should not be punished for violating a rule that is unclear and vague at the time he acted. Paragraph 12.2 of the Petition faults the impugned sections as being overly broad, undefined, imposing vague obligations, and creating an overly broad offence. Section 40(1) creates an offence against an organisation in its corporate legal capacity. It also creates an offence against a person who is not clearly defined as being associated with the NGO or otherwise. The Section does not define certain terms such as "incomplete information." Among the others already highlighted above, these are very vague provisions.

71. Besides the foregoing, this court is also invited to specifically consider the effect of Section 40 (1) (d) and Section 40(2) read together with Section 44(g). The net effect of those provisions is that an NGO that engages in any political activity is considered to have done something prohibited by the NGO Act and is therefore liable under Section 40(2) to a fine of up to 72 [*Seventy-Two*] Currency Points or UGX. 1,440,000 [*Uganda Shillings One Million, Four Hundred and Forty Thousand*].

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[50] (Constitutional cause No. 5 of 2015) [2017] MWHC 23 (10 January 2017)

72. We invite the court, to consider the National Objectives and Directive Principles of State Policy. Article 8A which was enacted to give effect to the application of NODSPs has been unequivocally affirmed as being justiciable. A reading of Objective V, paragraph (ii) makes for an inevitable rude awakening that the regulatory regime under the NGO Act flouts this Objective. This Objective mandates the State to guarantee and respect the independence of non-governmental organizations which protect and promote human rights. This creates a responsibility on the part of the State to facilitate the promotion and fulfilment of human rights. Objective V is framed in such terms, cognizant of the right of everyone to participate in peaceful activities to influence the policies of government through civic organizations guaranteed under Article 38(2). To criminalize the political participation of NGOs, thereby require them to be apolitical, is to circumscribe their right to civic participation. Political participation that is based on advancing a value or mission of the organization is different from engaging in 'partisan' political activities.

73. While indeed, there are justifications across various common law jurisdictions that restrict partisan participation of NGOs in politics,[51] they do not go as far as criminalizing it. This is akin to killing a fly with a sledge-hammer as was discussed in **Charles Onyango Obbo and Anor** *versus* **Attorney General**,[52] where the Penal Code Act prescribed an imprisonment sentence for publication of false news. In this case, the Supreme Court was emphatic in its persuasion that such punishments are not consistent with a human rights regime that seeks to guarantee the right as a general rule and have the limitation as the exception.

74. It follows therefore that a criminalization of participation in peaceful political activities, is a violation of the right to freedom of association. This is the import of the General Comments on rights covered under Article 29 of our Constitution such as free speech and freedom of association.[53] Criminalization is to be considered in the gravest of circumstances and if anything, punishment is never an appropriate penalty.[54] It follows therefore that criminalization even of partisan politics is inconsistent with the guaranteeing of the right to freedom of association.

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[51] NGOs in the Political Realm Political Activities of NGOs: International Law and Best Practices, The International Journal of Not-for-Profit Law, Volume 12, Issue 1, November 2009. Accessible at: https://www.icnl.org/resources/research/ijnl/political-activities-of-ngos-international-law-and-best-practices

[52] Onyango Obbo (n 30).

[53] General Comment 37 on the Right to Peaceful Assembly, paras. 67 and 71; General Comment 34 on the Freedom of Expression, paras. 9 and 47.

[54] Ibid.

II. The Impugned Provisions of the Act are not Demonstrably Justifiable in a Free and Democratic Society.

75. Without prejudice to the submission made under the first limb of argument above, the Petitioners submit that the impugned provisions, worded as broadly and vaguely as they are, are in violation of constitutionally guaranteed rights and are not demonstrably justifiable in a free and democratic society.

This court has expressed itself regarding propriety and constitutionality of legislative provisions that creates vague offenses. In the case of **Andrew Mujuni Mwenda and Anor** *versus* **Attorney General**,[55] this court noted that the provision in the Penal Code Act creating the offence of sedition is worded in a manner that is "so vague that one may not know the boundary to stop at, while exercising one's right under [Article] 29(1) (a)." The Court following from that reasoning, held that "the way [the] impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1) (a)."

Enclosed is the Authority under Tab 17. [at pp. 23 and 24]

76. In the same breath, the Petitioners submit that the wording of Sections 40(1), (d) and 2, 44(c), (d), (f) and (g) of the NGO Act to the extent that they purport to criminalize any failure to adhere to any of the provisions of the Act, infringe on the principle of legality. The Petitioners aver that the enjoyment of the freedom of association is closely linked to the comfort of the people entitled to enjoy it. In other words, that they will not be hemmed in, cloistered or otherwise constricted directly or indirectly by the threat of possible criminal penalties at every turn.

77. In the **Andrew Mujuni Mwenda** case, court rightly observed that "the burden of proof was on the Respondent to prove that the… sections complained of fall under acceptable limitations." In that case, this court found that the Respondent had failed to discharge that burden to prove why the sedition laws should be found to be permissible limitations on the right to freedom of expression. In the present case, it is the Petitioners' submission that the blanket criminal sanctions contained under Section 40(1) and (2) and Section 41(7) have no place in a free and democratic society. It is not an exaggeration to call those sanctions, in their vague and arbitrary nature, a wild card for the State to intrude into the workings of NGOs and potentially also the personal lives of its members.

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[55] Constitutional Petition No.12 of 2005.

GROUND 3

Whether Section 40(1) and (2) and 41(7) of the NGO Act is inconsistent with and in contravention of Article 29(1) (e) of the Constitution of the Republic of Uganda.

78. For this ground, the Petitioners will adopt, *mutatis mutandis*, their averments, and authorities under Ground 2 above to submit that the impugned provisions of the Act, by criminalizing the failure to perform administrative functions which by themselves are already intrusive, infringe on the right to freedom of association guaranteed under the Constitution. The Petitioners shall further aver that such infringement is unjustifiable since it does not seek to fulfill a legitimate purpose and is not necessary in a free and democratic society given its disproportionately intrusive nature.

79. For this Ground, the Petitioners invite this court to rely on the interpretive principle requiring a liberal, dynamic, and progressive interpretation of constitutional provisions containing fundamental rights. This is pertinent given that Article 29 (1)(e), guarantees everyone the freedom to form and join civic organizations. The understanding of the freedom of association requires a liberal interpretation. The international standards cited under Ground 2 above offer a practical guide for such a liberal, dynamic, and progressive interpretation. The test on permissible limitations under Ground 1 above offers this honorable court a proper guide on the principles applicable to find an infringement of a guaranteed right justifiable.

80. Put precisely, the Petitioners' submission under this ground is that: —

    80.1 the NGO Act sets onerous administrative requirements that no other organization has to follow which is itself contrary to international best practices with respect to the right to freedom of association and in conflict with the State's negative obligation not to interfere with the freedom of association;

    80.2 the Act exacerbates its unconstitutionality where it criminalizes any failure to meet those intrusive, onerous administrative requirements; and

    80.3 although the freedom of association is not absolute, there is no justification for the infringements since they exceed any permissible limitations that can be envisaged in a free and democratic society.

81. Section 40(1) and (2) of the NGO Act provides that it is an offence to omit to produce requisite documentation, knowingly conceal or give false information in order to obtain a permit or operate contrary to any requirements under the law. Upon conviction, an offender is liable to a fine of **UGX 1,440,000** [*One Million Four Hundred and Forty Thousand Uganda Shillings only*] or imprisonment for a term not exceeding three years or both. The punishment also has a continuous breach element which attracts a further fine of not more than **UGX 300,000** [*Three Hundred Thousand Uganda Shillings Only*] for each day that the breach continues.

82. Section 41(7) of the NGO Act makes it an offence for a person to unlawfully deny an inspector access to the premises and property of the Organisation or falsifies and fabricates any document with the intention to mislead the inspector. Refusal to comply with any order or direction of the inspector is also an offence under this provision. Upon conviction, the offender is liable to a fine not exceeding **UGX 480,000** [*Four Hundred and Eighty Thousand Uganda Shillings only*] or to imprisonment not exceeding one year or both.

83. The Petitioners case on Section 40(1) and (2) and Section 41(7) is set forth in Paragraph 12.3 of the petition and paragraphs 13.1, 13.2, 25, 26, 27, 28, 29, 30, 31 and 32 of the Petitioners' affidavit. In imposing criminal sanctions of imprisonment against anyone or members of an organization for default in administrative obligations, the State severely and unjustifiably restricts the freedom of assembly, expression and association. The Petitioner avers that the severe and unjustified restriction is a violation of Article 29(1) (e) of the Constitution.

84. The imposition of criminal sanctions of imprisonment against anyone or members of an organization for failure to carry out administrative requirements constitutes severe, unjustifiable restrictions of the freedom of assembly, expression, and association in contravention of Article 29(1) (e) of the Constitution.

85. Article 29(1)(e) of the Constitution, guarantees every person the right and freedom to associate which includes freedom to form and join associations, or unions, including trade unions and political and other civic organizations.

86. Freedom of association has been recognized as a fundamental human right and is rooted in international instruments such as: —

    86.1 Article 20 of the Universal Declaration of Human Rights of 1948,

    86.2 Article 11 of the European Convention on Human Rights (ECHR), and

Article 22 of the ICCPR

Enclosed are the relevant excerpts of the instruments under Tab 6

87. The freedom of association is conceived in international law as a subjective right of the individual to found an association with those like-minded or to join an existing association. However, it also covers the collective right of an existing association to perform activities in pursuit of the common interest of its members. The States are thus obligated not to prohibit or otherwise interfere with the founding of associations or their activities[56].

Enclosed is the Background Paper under Tab 18. [at pp. 4]

88. The right to freedom of association, and the only grounds on which it may be restricted, are set out in Article 22 of the ICCPR which provides that: —

88.1 everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

88.2 No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right."

89. As can be seen from the foregoing, limitations on freedom of association are permissible only in clearly specified circumstances. The Petitioners under paragraph 13.1 of the 1st Petitioners Affidavit in support, state that the NGO Act provides for needlessly burdensome reporting requirements that hamper the functioning of NGOs contrary to the Constitution and international legal instruments to which Uganda is a party such as the ICCPR.

90. Section 40(1) and (2) and Section 41(7) of the NGO Act criminalize non-compliance with administrative reporting requirements. Additionally, the Act provides for excessive and intrusive oversight powers as stipulated under Paragraph 28 and 31 of the 1st Petitioners' affidavit. The Petitioners further state in Paragraph 25 of the affidavit in support that while in the legitimate interest of

[56] OSCE Human Dimension Implementation Meeting, Freedom of Association: Question of NGO Registration, Background Paper 5, 1998. Accessible at: https://www.osce.org/files/f/documents/3/1/16645.pdf.

transparency and legitimacy States may require that certain types of associations file reports in accountability, international standards provide that the requirements should as much as possible be the least intrusive and restrictive.

91. The Petitioners therefore submit that criminalizing the failure to carry out administrative requirements as stipulated under the NGOs Act constitutes severe, unjustifiable restrictions of the freedom of association beyond the standard reflected under Article 22 of the ICCPR, as well as under the international standards discernible from the Special Rapporteur's Report, the ACHPR Guidelines and ACHPR Report cited above.

GROUND 4

Whether Section 29(1) and (2) of the NGOs Act discriminates against incorporate persons and effectively whittles away their right to freedom of association in contravention of Article 29(1) (e) of the Constitution of the Republic of Uganda.

92. Under the Constitution, freedom of association is not a preserve of corporates. The Petitioners contend that the right extends to all persons, corporate or otherwise.

93. The Petitioners submit that the right to freedom of Association is fundamentally tied to the ability of persons to freely join associations, notwithstanding whether they are corporate or incorporate persons. The Petitioners shall submit under this ground that: —

    93.1 making incorporation a precondition for registration as an NGO in Uganda is discriminatory, and accordingly unconstitutional; and

    93.2 the requirement to be incorporated pursues no legitimate aim and is not necessary in a free and democratic society, and thus unconstitutional.

94. The justification for these is that the constitution contains a specific prohibition against discrimination under Article 21 which the Petitioners aver has been flouted. Human rights are indivisible, interrelated and interdependent. The impugned section's flouting of Article 21 is what has by extension, culminated into the unjustified derogation of Articles 29(1) (e) on the right to freedom of association, and axiomatically, the right to civic participation under Article 38(2).

    The right of association cannot be tied to being an incorporated person. To do so would run afoul of the multiple prohibitions against discrimination in the Constitution, the UDHR, ACHPR, ICCPR and multiple attendant guidelines.

    The relevant excerpts of the instruments are enclosed under Tab 6

95. A liberal interpretation of constitutional provisions containing fundamental rights is required to appreciate the gravity of the discriminative character of the impugned provisions. This justifies the averment of the Petitioners that the said discrimination against incorporate persons is heedless of the principles of

permissible limitations. This is to the extent that there is no legitimate aim for the requirement that before registering as an NGO, there must be incorporation. Even if one could be cited, the requirement cannot be justified in a free and democratic society as it is not the least intrusive way in which the legitimate aim pursued could be achieved.

96. The impugned Section 29(1) and (2) of the NGO Act provides for the requirements for the registration of an NGO with the bureau and stipulates that for any person or group of persons to be registered as an NGO, they must be incorporated as an organization and must submit a certificate of incorporation as proof of the same.

97. The Petitioners' case regarding Section 29(1) and (2) of the NGOs Act is stipulated in Paragraph 12.4 of the Petition and Paragraphs 13.6, 35, 43 and 45. The total sum of these provisions viewed in light of the evidence adduced, is that by restricting registration to incorporated persons, the Act actively discriminates against unincorporated persons. By doing this, the Act effectively whittles away their right to freely associate and thus violates Article 29 (1) (e) of the Constitution.

98. Under the NGO Act and the Regulations thereunder, the registration requirements limit eligibility for registration as an NGO to an already incorporated entity as seen under Section 29 (1) and (2) of the Act, and Regulations 3 (1) and 4 (1) (a) of the NGOs Regulations, 2017. Regulation 3 (1) of the NGO Regulations, 2017 specifically provides for registration of 'a person or group of persons incorporated as an organization under the Companies Act or Trustees Incorporation Act,' and organizations that fall within the definition of an organization under the Act. Section 3 of the NGOs Act defines an organization as "*a legally constituted non-governmental organization under (the) Act, which may be a private grouping of individuals or association established to provide voluntary services to the community..., but not for profit or commercial purposes.*"

99. From the above definition it can hardly be perceived that the registration requirements under the NGO Act encompasses unincorporated persons. Under paragraph 43 of the affidavit in support of the petition, it is stated that the NGOs Act, specifically limits registration as an NGO to any person or group of persons incorporated as an organization.

100. Section 29(1) does not consider the fact that unincorporated persons have a right to freedom of association guaranteed under the law and they are entitled to equal protection of their rights under the law by virtue of Article 21 (1) of the Constitution.

I. Making incorporation a precondition for registration as an NGO in Uganda is discriminatory, and accordingly unconstitutional.

101. The right to freedom of association is imperatively tied to the right to equality before and under the law. The right to freedom of association envisages the ability of every person under the law to enjoy the right notwithstanding whether or not they are, before their registration as an NGO, already a corporate personality.

102. The legislative history under the now repealed NGOs Registration Act, Cap 113 (as amended in 2006) as attested to in paragraphs 14 and 15 of Nicholas Opiyo's Affidavit conferred corporate personality on an organization upon registration with the Board as an NGO. This enables individuals seeking to enjoy their freedom of association as an NGO to be registered as one. The absence of a similar provision in the Act essentially communicates the idea that for recognition as an NGO to become possible, one must have gone through the onerous process of incorporating a company limited by guarantee under the Companies Act, 2012, or an incorporated trust under the Trustees Incorporation Act.

103. The imperative relationship between the right to freedom of association and equality can be demonstrated in the persuasive case of **Attorney General of Botswana** *versus* **Thuto Rammoge**,[57] where the Court of Appeal of Botswana ruled that the right to freedom of assembly and association protected the rights of an LGBT advocacy group to promote the rights of LGBT individuals and to lobby for legal reform. The Minister of Labour and Home Affairs upheld the decision of the Department of Civil and National Registration refusing to register Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) on the grounds that the organisation's objectives were either contrary to public morality or would encourage the commission of criminal offences. The Court of Appeal reasoned that the right to form associations to advocate for legal change is a fundamental element of the right to freedom of assembly and association and that the refusal to register LEGABIBO was an unjustifiable limitation of its members' rights.

104. By analogy, the LGBT individuals that were refused registration in the **Thuto Rammoge case**, occupied a similar peculiar position as incorporate persons in Uganda seeking to associate as an NGO. The similarity in their position is exacerbated by the fact that the NGO Act does not even leave the NGO Bureau the option of registering an association unless it presents itself as an already existing corporate body. This requirement gives corporates an edge over those

[57] [2016] CACGB-128-14

that incorporate where the enjoyment of the freedom of association is concerned. The Petitioners submit that that is nothing short of discriminatory treatment.

Enclosed is a copy of the authority under Tab 19. [at pp. 32 and 50]

105. The Supreme Court of Uganda has already expressed its views on the prohibition of discrimination under the Constitution in the case of **Caroline Turyatemba** *versus* **Attorney General**.[58] In that case, the court discusses the notion of discrimination and the circumstances in which the legislature may discriminate. Their Lordships observed that: —

> "Article 21 (1) provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect, and enjoy equal protection of the law. Under Article 21 (2) a person shall not be discriminated against on the ground of sex, race, social or economic standing, political opinion or disability."

106. According to the Court, *Article 21 (4) allows discrimination to be done by Parliament for purposes of implementing policies and programmes for affirmative action in the social, economic, educational and other imbalances in society*. In the present Case, the NGO Act could never be further from the affirmative action exception given how it cripples the ability of incorporates to be register as NGOs.

107. Article 21 also has its foundation in several international legal instruments that preceded the 1995 Uganda Constitution including: —

107.1 the Universal Declaration of Human Rights (Article 2 (1)),

107.2 the ICCPR (Article 18),

107.3 the American convention of Human Rights, (Article 12),

107.4 the European Convention on Human Rights (Article 9) and

107.5 the African Charter on Human and Peoples' Rights (Article 8)

all of which their Lordships took cognizance of in the **Caroline Turyatemba case**.

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[58] Constitutional Petition No.15 of 2006

108. Their Lordships in this case further opined that: —

> "on the basis of the above international instruments, as well as the case law on their interpretation, and taking the Uganda Constitution as a whole, the term "discrimination" has come to imply a distinction, exclusion, restriction, or preference based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."

109. The Court went further to note that: —

> "The prohibition against discriminatory conduct is based upon the universal principle of equality before the law. The human race as a family is characterized by the attribute of oneness in dignity and worthiness as human beings. Therefore, there ought not to be one group of human beings entitled to privileged treatment as regards enjoyment of basic rights and freedoms over others, because of perceived superiority. Likewise, no group of human beings should be taken as inferior and not entitled, and be treated with hostility, as regards enjoyment to the full of the fundamental rights and freedoms."

Enclosed is a copy of the authority under Tab 20. [at paras. 530, 545 and 560]

110. The Act makes the enjoyment of the right to freedom of association a luxury only affordable at the option of the State. This is only to those already incorporated under the Companies Act, 2012 or the Trustees Incorporation Act. In doing this, the Act violates **Article 21** and the international obligations in respect of the right to non-discrimination.

II. The Discrimination does not pursue a legitimate aim and is not justifiable in a free and democratic society.

111. The Petitioners recognize and take into consideration Court's observations in the **Turyatemba Petition** to the effect that the *"right against discrimination is however not absolute."* The Petitioners also agrees with the reasoning of the Court explaining why this right is not absolute, to wit that *"this is because, in the activities of human beings, not all differences in treatment are in themselves offensive to human dignity. Some inequalities in*

treatment of fellow human beings are necessary so as to achieve justice or to offer protection to those in weak or vulnerable situations of life." This is the import of **Article 21 (4)** of the Uganda Constitution.

112. Furthermore, the Petitioners also recognize the ECtHR's reasoning in the **Cha'are Shalom Ve Tsedek** *versus* **France**[59] case, the applicant association alleged a violation of Article 9 of the Convention on account of the French authorities' refusal to grant it the approval necessary for access to slaughterhouses with a view to performing ritual slaughter in accordance with the ultra-orthodox religious prescriptions of its members. The court in maintaining this restriction observed that discrimination is justified where it complies with the principle of legality of being prescribed by law to ensure public safety, order, health, morals, and fundamental rights and freedoms of others; or where it is necessary to achieve a concerned objective in the nature of affirmative action. Discrimination is also allowed where it is necessary in a democratic society.

Enclosed is a copy of the authority under Tab 21. [at pp. 28]

113. The Petitioners, however, aver that the discrimination against incorporate persons cannot be considered to be pursuing a legitimate aim or for the safety, order, health, morals or fundamental rights and freedoms of others. The Petitioners have already averred under the first limb of argument on this Ground that the discrimination has no intent of affirmative action for anyone.

114. It simply creates an arbitrary proscription to the ability of incorporate persons to associate, and as a result requires them to go through a bureaucratic procedure. No justification has been cited for the shift from the regulatory regime that allowed such persons to apply for a certificate of incorporation and registration.

[59] Application no. 27417/95.

GROUND 5

Whether sections 29 (1) and 31 (2) of the NGO Act are inconsistent with and in contravention of Articles 2 (2), 20 and 29 (1) (e) of the Constitution of the Republic of Uganda.

115. The Petitioners contend that by requiring only an incorporated body to be registered and obtain a permit to operate as a non-governmental organization in Uganda, the impugned sections impose an unnecessary preliminary process and thereby contravening Article 29 (1) (e) of the Constitution of Uganda which guarantees the right to freedom of association. The Petitioners also contend that the restrictions imposed by the impugned sections of the NGO Act of 2016 are not justifiable in a free and democratic society and do not meet the proportionality test.

116. Sections 29 (1) and 31 (2) of the NGO Act require only an incorporated body to be registered and obtain a permit to operate as a Non-Governmental Organisation in Uganda.

117. Paragraph 12.5 of the petition and paragraphs 33 to 37 of the Affidavit of Nicholas Opiyo in support of the petition set out the Petitioners' case in relation to sections 29 (1) and 31 (2) of the NGO Act.

I. Restriction of the right to freedom of association and the proportionality test.

118. The right to freedom of association is not absolute and may be restricted for a legitimate purpose as laid down under Article 43 of the Constitution of the Republic of Uganda and Article 22 (2) of the ICCPR. Article 22 (2) of the ICCPR sets out the grounds upon which the right to freedom of association may be restricted:

> "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right."

119. The requirement that only an incorporated body should be registered and granted a permit by the NGO Bureau to operate as a non-governmental organization is not a justifiable restriction on the right to freedom of association and neither does it meet the proportionality test.

120. The principle of proportionality requires that States make a careful balance of the intensity of a measure with the specific reason for the limitation. It is not enough that the limitation serves a legitimate objective, which may include public security, protection of public order. The restrictive measures imposed must be the least intrusive means to achieve the given purpose in a free and democratic society.[60]

121. In the case of **Gorzelik and Others** *versus* **Poland**[61], which is of persuasive value to this Honourable Court, the applicants, who described themselves as "Silesians", decided together with 190 other persons to form an association (*stowarzyszenie*) called "Union of People of Silesian Nationality" (*Związek Ludności Narodowości Śląskiej*). They applied to be registered as an association, however their application was declined on ground that Poland did not recognize the Silesian notion. The European Court of Human Rights was invited to decide whether the failure by the Respondent State to register the applicant's association was a violation of Article 11 of the European Convention on Human Rights. the Court stated and reasoned that: —

> "The right to freedom of association laid down in Article 11 incorporates the right to form an association. The ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning. Indeed, the state of democracy in the country concerned can be gauged by the way in which this freedom is secured under national legislation and in which the authorities apply it in practice. In its case-law, the Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association and has established the principle that only convincing and compelling reasons can justify restrictions on that freedom. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual

[60] Charles Onyango Obbo & Anor *versus* Attorney General, Constitutional Appeal No. 02 of 2002.
[61] Application no. 44158/98.

heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively. (Emphasis added)

Enclosed is a copy of the authority under Tab 22. [at pp. 88 and 92]

122. In **Vladimir Petrovich Laptsevich** *versus* **Belarus**,[62] the Petitioner had his leaflets concerning the independence anniversary of Belarus confiscated and he was fined because he had not registered his publication. The Human Rights Committee (HRC) found that the State authorities of Belarus had failed to explain why this requirement was necessary. It declared that registration requirements cannot be deemed necessary for the protection of public order or for the respect of the rights or reputation of others.

Enclosed is a copy of the authority under Tab 23. [at para 8.5]

123. Equally in this case, the requirements in Sections 29 (1) and 31 (2) of the NGO Act do not serve any legitimate purpose but rather whittle away the right to freedom of association. These requirements are also not necessary for the attainment of any of the legitimate purposes laid down in either Article 43 of the Constitution of Uganda or Article 22 (2) of the ICCPR.

Further, as rightly noted in the ECtHR in **Gorzelik and Others** *versus* **Poland**, where the Applicants had been denied the right to register an organisation, NGOs play a key role in ensuring the rule of law, democracy, and respect for human rights among others. In Uganda, NGOs such as the Petitioners have been at the fore front of ensuring respect and promotion of human rights in Uganda further affirming the reasoning of the Court that the right to freedom of association is

[62] Communication 780/1997 of the Human Rights Committee.

crucial in ensuring democracy. As a country still grappling with issues of democracy, rampant abuse of human rights by the State and private actors, it is important that restrictions on the right to freedom of association such as those in impugned sections are declared unconstitutional by this Honourable Court. This is what will ensure that more people freely associate so as to champion causes geared towards ensuring the rule of law, democracy, respect for human rights, economic empowerment, among others.

Enclosed is a copy of the authority under Tab 22. [at pp. 88 and 92]

124. We therefore pray that this Honourable Court finds that the Ss.29 (1) and 31 (2) of the NGOs Act 2016 are inconsistent and in contravention of Article 29.

II. Not justifiable in a free and democratic society

125. Further, the restrictions are not justifiable in a free and democratic society. Justice Oder in the case of **Charles Onyango Obbo & Anor** *versus* **Attorney General**[63] stated that the measure for a democratic society is not limited to the standards of Uganda and all that it entails but rather the phrase "in a free and democratic society" as used under Article 43 of the Constitution of Uganda means democracy as universally known.

126. Thus, it is imperative to weigh the restrictions imposed by the impugned sections of the NGO Act against restrictions imposed in other democratic countries so as to ascertain whether they are justifiable in a free and democratic society.

127. The European Council in its guidelines on the freedom of association notes that: -[64] in European countries, registration of corporate legal entities as NGOs is only relevant if these want to exist as separate legal entities with capacity to sue and enter into contracts. It further observes that an agreement between two or more individuals would be enough to establish an association without a requirement for registration. The Council considers that registration of corporate status should be viewed as a right and not an obligation.

128. Whereas provisions in other democratic countries such as those in the European Union provide for simple registration procedures, not as complex such as those of businesses, the impugned sections make it more cumbersome to register an NGO than it is to register a company or a business thereby infringing on the right to freedom of association.

129. Mr. Nicholas Opiyo, in his affidavit in support of the petition at paragraph 18 states that the effect of the impugned sections is to require an NGO to go through multiple unnecessary steps before obtaining legal recognition as they are required to be incorporated under the Companies Act 2012 or the Trustees Incorporation Act before applying to the NGO bureau. Further at paragraph 21 of his affidavit in support he states that the requirements imposed by sections 29 (1) and 31 (2) of the NGO Act, make the process of registering an NGO strenuous and bureaucratic. In the Affidavit in support at paragraph 36 also alludes to the fact that the demonstrably justifiable registration procedures in free and democratic societies are governed by a notification rather than an authorization regime. The

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[63] Ibid.

[64] OSCE's Office for Democratic Institutions and Human Rights (ODIHR), (2015), "Guidelines on the freedom of Association, Pg. 55 – 57.

notification regime only requires associations to notify authorities that they have been created and, on such notification, they become legal persons.

130. Mr. Stephen Okello in his supplementary affidavit in support to the answer to the petition relied on jurisdictions such as Serbia, India, Kenya and Peru to justify the onerous pre-registration requirements. We shall take the experience of Kenya for context. In 2013, Kenya enacted the Public Benefit Organisations (PBO) Act, 2013. The law while assented to by the President was blocked from operating for a long time. Perhaps Kenya is not the best place to go to in order to show free and democratic societies for purposes of civil societies. Be that as it may, the Non-Governmental Organisations Co-ordination Act of 1990 which was the precursor to the PBO Act did not require prior registration under any other law for an association to be registered under that Act. In fact, in its Section 12, once registered by the NGO Board, the certificate of registration without more was conclusive proof of evidence of authority to operate in the whole of Kenya. It means that the learned Respondent's officers did nor appreciate Kenya's context before relying on it to justify the unreasonable requirements of Uganda's NGO Act. In Serbia, which the Respondent relied on to justify the use of the law, informal associations are allowed to operate unlike in Uganda where all [65]NGOs must be formalized as companies before operating. Uganda is one of very few nations that have an over-regulated civil society space.

131. It is evident that the requirements imposed under sections 29 (1) and 31 (2) of the NGO Act are a sharp contrast to those in other democratic countries which provide a simple registration procedure and thus cannot be said to be justifiable in a free and democratic society.

GROUND 6

Whether sections 39 (3) (c) of the NGO Act is inconsistent with and in contravention of Articles 27 (2), and 29 (1) (e) of the Constitution of the Republic of Uganda.

132. Under this Ground, the Petitioners contend that section 39 (3) (c) of the NGO Act contravenes Articles 27 (2) of the Constitution which guarantees the right to privacy and contravenes Article 29 (1) (e) of the Constitution of Uganda which guarantees the right to freedom of association.

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[65] https://www.cof.org/content/nonprofit-law-serbia#end2

133. Section 39 (3) (c) of the NGO Act mandates NGOs to submit any other information required of them by the NGO Bureau, the District NGO Monitoring Committee, and the sub-county NGO monitoring committee.

134. *Paragraph 12.6* of the petition and *paragraphs 14 to 27* of the affidavit of Nicholas Opiyo in support of the petition set out the Petitioners' case in relation to section 39 (3) (c) of the NGO Act.

I. Principle of minimum state interference in the operations of an association.

135. International best practices require all regulations and practices on oversight and supervision of associations to take into account the principle of minimum State interference in the operations of an association.[66] The right to freedom of association entails the right of associations to be free from interference of the State in their internal affairs. However, openness and transparency are fundamental for establishing accountability of Associations and public trusts.[67] The obligation of the State is not to demand for the accountability but rather to facilitate associations to be accountable and transparent. Where reporting requirements exist, they should not be burdensome. They should be appropriate to the size of the association and the scope of its operations. Associations should not be required to submit more reports and information than other legal entities, such as businesses, and equality between different sectors should be exercised.[68]

In **Lovrić** *versus* **Croatia**,[69] which is of persuasive value to this Honourable Court, the applicant who was a member of an association in the Respondent State had been dismissed from the association. He applied for judicial review to the High Court but his application was dismissed on grounds that State could not interfere with the affairs of the association under the Association Act of Croatia. The European Court of Human Rights was invited to make a determination on whether the restrictions in the Act were justifiable. The Court held that the restrictions on the applicant's right of access to court pursued the legitimate aim stated by the Government, namely respect for the autonomy of associations. The Court reasoned that the organizational autonomy of associations constitutes an

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[66] OSCE's Office for Democratic Institutions and Human Rights (ODIHR), (2015), "Guidelines on the freedom of Association, Pg. 76.
[67] Council of Europe, *Fundamental Principles on the Status of Non-governmental Organisations in Europe*, 2002, paras. 60-65.
[68] OSCE's Office for Democratic Institutions and Human Rights (ODIHR), (2015), "Guidelines on the freedom of Association, Pg. 75 – 76.
[69] Application No. 38458/15.

important aspect of their freedom of association protected by Article 11 of the Convention as does Article 29 of the Ugandan Constitution.

Enclosed is a copy of the authority under Tab 24. [at paragraph 71]

In **Cheall** *versus* **The United Kingdom**[70], before the European Commission on Human Rights which decision is cited for persuasive purposes, the question that arose concerned the extent to which Article 11 of the European Convention on Human Rights obliged the State to protect the trade union member against measures taken against him by his union. The Commission held that in the exercise of their rights under Article 11, unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union. The commission reasoned that the protection afforded by the provision is primarily against interference by the State.

Enclosed is a copy of the authority under Tab 25. [at pp. 185]

136. Although, the two decisions deal with expulsion of members from an association, they emphasize that the right of freedom from State interference in the affairs of associations forms an integral part of the right to freedom of association. They underscore that as much as is possible, the State should keep out of the internal governance and workings of the associations.

137. Mr. Nicholas Opiyo in his affidavit in support of the petition at paragraph 29 alludes to the fact that the Respondent subjects NGOs to undue audits, warrantless searches permitted under the Act as well as the power to force an association to produce any document at any time. He further underscores the need for associations to disclose and or publish their funding sources and details of their key staff for accountability purposes in paragraph 32 of his affidavit but notes that the oversight under section 39 (3) exceeds the permissible standards in a free and democratic society.

138. Mr. Okello Stephen contended at Paragraphs 16-18 of his supplementary affidavit in support of the answer to the Petition that inspections and disclosure requirements are intended to ensure oversight and prevent money laundering. The Petitioners differ. Whereas the Respondent may exercise oversight powers over associations for accountability purposes, the powers conferred onto the Respondent under section 39 (3) of the NGO Act are intrusive and infringe on

[70] Application No. 10550/83.

the right to freedom of association by interfering into the affairs of the associations.

139. To conduct warrantless searches, undue audits on NGOs and to require them to submit any document at any time amount to interference with the internal governance and workings of NGOs. NGOs have internal audits for purposes of accountability and therefore should not be subjected to other audits by government as these only interfere with the internal workings of NGOs as opposed to achieving accountability.

140. If anything, any kind of mismanagement of funds by any member can be revealed through the internal audits by the NGOs and such a member can be prosecuted under the Anti-Corruption Act.[71] The oversight by the Respondent should thus be limited to ensuring that the internal audits by the NGOs are compiled with so as to achieve accountability.

141. Warrantless searches and requests to submit any document at any time have the effect of allowing the Respondent into the internal governance and activities of the NGOs. Through such searches, the government gets access to various documents of the NGOs pertaining to their activities and governance. These may include, board minutes which are documents touching the governance and operations of the NGO. This kind of intrusion is not justifiable. We therefore pray that the Honourable Court is persuaded by the reasoning of the European Court on Human Rights in **Lovrić** *versus* **Croatia** and that of the European Commission on Human Rights in **Cheall** *versus* **The United Kingdom** and finds that s.39 (3) (c) of the NGO Act is inconsistent with Articles 29 (1) (e) of the Constitution in as far as it allows the Respondent to interfere with the operations of NGOs over and above what is permissible by subjecting them to undue audits, warrantless searches and requiring them to submit any documents to the Respondent's agencies at any time.

[71] Section 2 defines a Public body to include NGOs for purposes of the Anti-Corruption Act, 2009.

Right to privacy

142. Article 27 (2) of the Constitution of Uganda guarantees the right to privacy for associations and their members. It states that:

> "No person shall be subjected to interference with the privacy of that person's home, correspondence, communication, or other property."

143. Whereas the right is not absolute and may be limited in certain instances through oversight and supervision, the oversight and supervision must have a clear legal basis and be proportionate to the legitimate aims they pursue. International best practices require that oversight and supervision of associations should not be invasive, nor should they be more exacting than those applicable to private businesses.[72]

144. Obtaining a warrant before one limits the right to privacy is the widely-accepted safeguard against abuse of power granted in legislations that limit the right to privacy.

145. It is important to note there are a number of exceptions to the requirement for a warrant, for example, instances of regulatory inspections. The exception is founded on the idea that a requirement of a prior warrant is likely to frustrate the State objectives behind the search and thus regulatory authorities should be allowed to conduct searches with or without premises to ensure compliance from the entities that they regulate.

I. Regulatory inspections exceptions

146. Sachs J in **Mistry** *versus* **Interim Medical and Dental Council of South Africa and Others**[73], which is of persuasive value to this court, in relation to 'periodic inspections' and 'warrantless regulatory inspection', stated that: —

> "In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials, and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation."

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[72] *Ibid.*

[73] [1998] ZACC 10, 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC).

147. The primary issue in **Mistry** *versus* **Interim Medical and Dental Council of South Africa and Others**, was whether s 28(1) of the Medicines and Related Substances Control Act of South Africa, which granted wide powers of warrantless search and seizure to inspectors as part of a scheme to regulate medicines, was consistent with the right to privacy in s 13 of the interim Constitution of South Africa. The Constitutional Court notwithstanding its commentary on 'warrantless regulatory searches' struck down the provision on the basis that it: —

> "...gives the inspectors carte blanche to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the most intimate kind. The extent of the invasion of [privacy] is substantially disproportionate to its public purpose; the section is clearly overbroad in its reach."

Enclosed is a copy of the authority under Tab 26. [at pp. 30 and 37]

148. In **Magajane** *versus* **Chairperson, North West Gambling Board**[74], though not binding on this Honourable Court is cited for persuasive purposes, *the* Constitutional Court of South Africa further considered the extent of application of the 'warrantless regulatory searches.' On this occasion, the Petitioners challenged the constitutionality of the Section 65(1) and (2) of the North West Gambling Act 2 of 2001. In this case, the provisions authorized coercive, warrantless invasions on the basis of a suspicion of criminally illegal gambling or unlicensed premises. The Court held that the legislation limited the right to privacy unjustifiably due to over breadth. The court noted that although it served to prevent illegal, unlicensed gambling, it authorized inspections aimed at collecting evidence of criminal activity on the basis of a mere suspicion, rather than a reasonable suspicion. 'Seizable items and searchable premises' were defined very widely, thus potentially including private homes. The provisions also conferred too much discretion on inspectors, failing to guide searchers and the searched as to the limits of a search. A scheme requiring a warrant for inspections of unlicensed premises would be a less restrictive or better tailored means to the same valuable end.

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[74] [2006] ZACC 8, 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC).

149. The exception of 'regulatory inspection' is only justifiable and applicable where the intent of the search is to ensure compliance as opposed to enforcement. Where the intent and effect of the legislation allowing for warrantless regulatory inspection is enforcement, then the legislation does not fall within the exception and thus violates the right to privacy. In **Magajane** *versus* **Chairperson, North West Gambling Board**, the Court drew a distinction between compliance and enforcement. The Court Stated that: —

> "One of the most common problems present in the context of administrative or regulatory searches is the movement of regulatory activity between what is commonly called 'compliance' and 'enforcement'. The former is generally seen as the random, overarching supervision of an industry at large, with particular actors within the industry 'targeted' without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general. Enforcement, however, is generally used to describe the notion that, at some point in the process, the focus moves from the integrity of the scheme of regulation in general to a focused investigation of a particular actor under that regime, often with a view to quasi-penal consequences. The trend in the cases has been towards a position that was more generous to inspectors involved in compliance than it was to regulatory investigators involved in enforcement. The position looked to the need to ensure that compliance was not hobbled by unnecessary limits on the unavoidable randomness of inspection powers."

Enclosed is a copy of the authority under Tab 27. [at pp. 32]

150. In **Gaertner and Others** *versus* **Minister of Finance and Others**[75], which is of persuasive value to this Honourable Court, South African Revenue Service (SARS) officials conducted a warrantless search in terms of s.4 of the Customs and Excise Act of the licensed commercial premises of a company importing and distributing frozen foodstuffs as well as the home of one of its directors on the basis of a suspicion of tax fraud. The Constitutional Court of South Africa in dealing with the issue of whether the impugned section was justified under the exception of regulatory inspections, adopted the holding in **Magajane** *versus* **Chairperson, North West Gambling Board**, and reasoned that: –

[75] [[2013] ZACC 38, 2014 (1) SA 442 (CC), 2014 (1) BCLR 38 (CC).

> "Provisions that more closely resemble traditional criminal law require closer scrutiny. The distinction will often be between compliance and enforcement. Inspections aimed at compliance are unlike criminal searches and are likely to limit the right to privacy to a lesser extent. Searches aimed at enforcement are akin to criminal searches, especially if there are penal sanctions under the regulatory provision or if the target may be charged criminally. Enforcement searches of this nature – as was the case here – are generally more invasive and involve a greater limitation of the right to privacy."

Enclosed is a copy of the authority under Tab 28. [at pp. 65]

151. Mr. Nicholas Opiyo at paragraph 29 alludes to the fact that the Respondent subjects NGOs to undue audits, warrantless searches permitted under the Act as well as the power to force an association to produce any document at any time.

152. The effect of S.39 (3) (c) NGO Act is that the Respondent is clothed with powers to conduct warrantless searches and the power to force an association to produce any document at any time. Whereas such powers could be argued to fall under the exception of 'regulatory inspection' it does not achieve compliance but rather enforcement. This is because they are akin to criminal searches, can happen at any time and the subject of the search can be criminally charged under s.40 of the NGO Act as a result of any information obtained during the searches. S.39 (3) (c) of the NGOs Act 2016 is thus not aimed at ensuring compliance of NGOs with existing legal requirements and to that extent infringes on the right to privacy. We therefore, invite Court to declare it unconstitutional as it contravenes Article 27 (2) of the Constitution.

II. Not justifiable in a free and democratic society

153. Further, international best practices require that oversight and supervision of associations should not be invasive, nor should they be more exacting than those applicable to private businesses.[76] Only such oversight and supervision is permissible in a free and democratic society.

154. In **Charles Onyango Obbo & Anor** *versus* **Attorney General,** the Court emphatically stated that the measure of a free and democratic society is not what

[76] Tusingwire (n 3).

is acceptable in Uganda but what is permissible in all free and democratic societies. The international best practices are a reflection of what other free and democratic societies have in place as permissible practices on oversight and supervision against which those under s.39 (3) (c) of the NGOs Act 2016 must be weighed against to ascertain if they are permissible in a free and democratic society.

155. Mr. Nicholas Opiyo in his affidavit in support of the petition at *paragraph 30* states that international best practices relating to the regulation of NGOs underscores the impermissibility of inspections aimed at verifying the compliance of associations with their own internal procedures.

156. Section 39 (3) of the NGO Act by granting the Respondent with the power to conduct undue audits, warrantless searches, and force associations to produce any document at any time infringes on the associations' right to privacy which contravenes Article 27 (2) of the Constitution. In Uganda, private businesses such as companies and partnerships engaging in any economic activity are not subjected to such warrantless searches. To subject NGOs to such warrantless searches and force them to produce any document while the same is not required of other private entities amounts to subjecting them to invasive oversight and supervision. This is not acceptable in a free and democratic society. International best practices require that oversight and supervision of associations should not be invasive, nor should they be more exacting than those applicable to private businesses.

E. PRAYERS

157. The Petitioners pray that the court makes the following declarations: —

157.1 THAT **Section 29 (1) of the NGO Act**, in restricting registration to a person or group of persons incorporated as an organization effectively whittles away their right to freedom of association in contravention of **Articles 20, 21 and 29 of the Constitution of the Republic of Uganda.**

157.2 THAT **Section 29(1) and 31(2) of the NGO Act**, by requiring only an incorporated body may be registered and obtain a permit to operate as a non-governmental organization, creates an unnecessary preliminary process prior to the registration and obtaining of a permit in contravention of the negative duty of the State in respect of the right to freedom of association in contravention of **Articles 20, 29 (1) (e) of the Constitution of the Republic of Uganda; Articles 2 (1) & (2), 20, 22, 22(2) of the**

ICCPR and Article 10 of the African Charter for Human and Peoples Rights.

157.3 THAT **Sections 29 (2), (3) and (4); 31(2), (3), (4) (5), (6) and (7); 44 (a) and (h) of the NGO Act** in requiring non-governmental organizations to incorporate under the Companies Act, 2012 or the Trustees Incorporation Act; obtain a certificate of registration with the National Bureau for Non-governmental Organizations; apply for a permit from the National Bureau for Non-governmental Organizations; obtain the approval of Districts Non-governmental Monitoring Committees and Local Government of an area; and sign a memorandum of understanding with the Local Government prior to operating establishes a cumbersome administrative procedure, inhibits other than promote the right to association provided under Articles 29 (1) (e) of the Constitution of the Republic of Uganda 1995 and is therefore a violation of Article 20, 29 (1) (e) of the Constitution of the Republic of Uganda and international and regional human rights standards thus null and void.

157.4 THAT **Sections 40 (1), (d) and 2; 44 (c), (d), (f) and (g) of the NGO Act** in requiring non-governmental organizations to cooperate with local councils, District Non-governmental Monitoring Committees and Sub-county Non-governmental Monitoring Committees; prohibiting non-governmental organizations from engaging in acts prejudicial to the security or laws of Uganda; prohibiting non-governmental organizations from engaging in acts prejudicial to the interest and the dignity of the people of Uganda; and to be non-partisan and not engage in supporting or opposing any political party or candidate for an appointive or elective office provides overly broad, undefined, vague obligations and creates offence that is overly broad and is in contravention of the principle of legality under **Articles 2 (1) & (2), 28 (1),(3) (b), (12), 42 and 44 (c) of the Constitution of the Republic of Uganda and international and regional human rights standards thus null and void.**

157.5 THAT **Sections 40 (1) and (2); 41 (7)** of the **NGO Act** in imposing criminal sanctions of imprisonment against anyone or members of an organization for failure to carryout administrative requirement constitute a severe, an unjustifiable restrictions of the freedom of assembly, expression and association and are therefore in contravention and inconsistent with Articles (2) (1) and (2), 29 (1) (a), (d) and (e) of the Constitution of the Republic of Uganda and international and regional human rights standards thus null and void;

157.6 THAT **Sections 39(3)(c) and (4)(c) of the NGO Act and Regulation 45 of the NGOs Regulations** that mandate NGOs to submit any other information required of them by the NGO Bureau, the District NGO Monitoring Committee and the Sub-county NGO Monitoring Committee thereby compromise the rights to freely associate and to privacy contrary to Articles 29 and 27 of the Constitution respectively as well as Uganda's international legal obligations.

157.7 Costs of the Petition.

Dated at Kampala this 05 day of April 2022

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