



To cite this article: Belete Addis Yemata, *Assessing the Nature of Civil Society Organizations and the Place Given for the Public Benefit Organizations Under the New CSO Proclamation of Ethiopia*, *HARAMAYA LAW REVIEW* 10: 65-83 (2021)

ASSESSING THE NATURE OF CIVIL SOCIETY ORGANIZATIONS AND THE PLACE GIVEN FOR PUBLIC BENEFIT ORGANIZATIONS UNDER THE NEW CSO PROCLAMATION OF ETHIOPIA

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Abstract

Civil society organizations (CSOs) have peculiar features that distinguish them from the commercial sectors and governmental organizations. Owing to the dearth of literature on the subject, this paper tries to highlight on the notion and legal forms of CSOs in Ethiopia as recognized under the CSO Proclamation. Most importantly, it intends to examine the place given to the Public Benefit Organizations (PBOs) and the types of CSOs required to be established for the benefits of the general public. To this effect, the paper used a desktop research method by which it made a critical analysis of the relevant legislations and literature, including the prevalent international practices. The discussion revealed that the CSO Proclamation unveils important developments such as; providing a guiding definition for “CSO” and relaxing the operational freedom of CSOs. However, it has also shortcomings such as; clarity problems in its characterization of CSO, failure to adequately identify what constitutes ‘public benefits’ which is a basic nature of PBOs, failure to provide differential treatments and ignoring some important prescriptions of the repealed CSO laws. The need of adequate determination of the ‘public benefit’ clause, inclination to a differential treatment approach which takes in to account essential factors like types and purposes of CSOs to draw relevant lessons from the prevalent international practices are the points of analysis made to evaluate the CSOs Proclamation. The author holds that these propositions should be reflected at least, in the coming regulation and directives.

Keywords: *association, charities, civil society organizations, CSOs Proclamation, public benefit organizations*

I. INTRODUCTION

There are three important sectors in a society; the government (state) sector, the commercial sector, and the civil society or the not-for-profit sector.¹ The civil society sector is most

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¹ Peter Pajas, *Economic Activities of Not-for-Profit Organizations*, Conference Report in Regulating Civil Society Conference, Hungary, (1996), at 1.

importantly represented by the civil society organizations or as sometimes known as not-for-profit organizations (NPOs). These organizations are basically characterized by being; not-for-profit, non-governmental, charitable or mutually beneficial, independent and volunteers.² Based on the nature of whose interest they are established to serve, CSOs are classified as private/mutual and public benefit CSOs.³ Those which pursue the public benefit purpose are termed as Public Benefit Organizations (PBOs), while those which are established for the benefits of few are considered as private or Mutual Benefit Organizations (MBOs).

In Ethiopia, the concept of CSOs, in its modern sense, has emerged recently mainly after the 1974 famine and the 1984 drought.⁴ The earliest forms of CSOs in Ethiopia were traditional community-based organizations such as *idir*, *iqub* and other informal self-help organizations.⁵ For a long period of time, the sector has been mainly regulated by the 1960 Civil Code of Ethiopia without having separate legal and institutional frameworks.⁶ It was in 2009 that the country enacted a law that separately and specifically deals with CSOs known as the Charities and Societies Proclamation (here in after CSP).⁷ After receiving several critics, mainly for the foreign fund restriction it imposed on Ethiopian Charities and areas of operation of Resident and Foreign Charities, the CSP was repealed by the Civil Society Organizations Proclamation (here in after, The Proclamation).⁸

Taking into account the classification of CSOs based on whose interest they serve, the Proclamation basically recognized two forms of CSOs; Charitable Organization and Association. While the latter is established primarily to serve the interest of its members, a Charity is established for the benefit of the general public.⁹ Thus, both PBO and non-PBO forms of CSOs are recognized under the new Proclamation.

Within this context, the focus of this paper is to make a highlight on the nature of CSOs recognized under the Proclamation. Owing to the absence of adequate domestic literatures and to build a foundation for the main inquiry of the paper, the author focuses on brief discussion about the concept, characteristics and organizational forms of CSOs in Ethiopia. As a main objective, this paper aims at examining the place given to PBO form of CSOs under the Proclamation. The basic function of these forms of CSOs is to serve the benefit of the general public.¹⁰ However,

² Salmon Lester and Helmut Anheier, *The International Classification of Non -Profit Organizations*, ICNPO-Revision 1, Johns Hopkins Comparative Non-Profit Sector Project No. 19, (1996), at pp. 2-3.

³ Klaus J. Hopt, Thomas von Hippel, Helmut Anheier and Volker Then, *Feasibility Study on a European Foundation Statute*, Final Report to European Commission, (2015), at 52.

⁴ International Center for Not-for-Profit Law (ICNL), *NGO Law Monitor: Ethiopia*, (2017), at 2 available at <http://chilot.files.wordpress.com> (Accessed on 19th of December, 2019).

⁵ *Id.*

⁶ CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 165/1960, NEGARIT GAZETA, 19th Year No. 2, 5th May 1960, Addis Ababa (here after Civil Code), Arts. 404-544.

⁷ *Charities and Societies*, Proclamation No. 621/2009, FED. NEGARIT GAZETA, 15th Year, No. 25, 2009. [Here in after, CSP].

⁸ *Organizations of Civil Societies*, Proclamation No. 1113/2019, FED. NEGARIT GAZETA, 25th Year, No. 33, 2019. [Here in after, the Proclamation]. As of September 2019, the Government is also preparing a draft regulation to supplement this Proclamation, the Civil Society Organizations, Council of Ministers Regulation, (2019) [here in after draft CSOs Regulation].

⁹ *Id.*, Arts. 2 (4) (5), 18 and 19.

¹⁰ Hopt *et al*, *supra* note 3, at 52.

the Proclamation and other relevant legislations fail to appreciate such peculiar features of PBOs which in turn leads to inadequate treatments and regulations. Not only legislations, the available domestic literature in the area also mostly discuss CSOs in their generality without appreciating the distinction between PBOs and non-PBO CSOs. This paper intends to shed a light in this regard and sought to convey a message as to why more emphasis should be given to PBOs.

To address the above concerns and meet the objectives thereof, the paper employed a desktop research method whereby the relevant legislations and literature are used to analyse the core issues of the paper. In doing so, the general literature and prevalent international practices are also used as a mirror to reflect on the case in Ethiopia.

This paper is organized into four sections. The first section, being the introduction; describes the general literature in the area as a spring point. Section two is dedicated to make a general discussion on the nature and organizational forms of CSOs in Ethiopia. This will lay the ground for the discussion to be made in the subsequent sections. The third section focuses on examining the place given to PBOs type of CSOs (*i.e.*, Charitable Organizations) in Ethiopia. Here, the peculiar nature of PBOs, the justifications for their recognition and why they need to have separate treatment is emphasized in light of the prevalent international practices. The paper will be summarized by concluding remarks in the final section.

II. CSOS IN ETHIOPIA: EXAMINING THEIR NATURE AND ORGANIZATIONAL FORMS

A. The Concept of CSOs: A Brief Overview of their Features and Forms

CSOs are part of the civil society whose concept is widely understood as the space outside family, market and state.¹¹ In this context, the sector comprises wide ranges of organized groups of different forms, functions, sizes and platforms ranging from international to small grassroots organizations.¹² This includes; CSOs, non-governmental organizations (NGOs), trade unions, mass social movements, grassroots organizations, online networks and communities, and faith groups.¹³ These all actors of civil society can operate in organizational or non-organizational form even if scholars try to distinguish them as organized or organic, formal or informal and traditional or new forms of civil society actors.¹⁴ With this purview, CSOs are categorized as the organized, formal, and traditional form of civil society.

CSOs are defined to include all non-market and non-state organizations outside of the family in which people organize themselves to pursue shared interests in the public domain and encompass organizations that are known by different names such as; non-profit organizations, NGOs, charities, foundations, associations, community-based organizations, trade unions,

¹¹ World Economic Forum (WEF), *The Future Role of Civil Society*, World Economic Forum in collaboration with KPMG International, (2013), available at http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf (Accessed on 21st June, 20, 2020).

¹² Rachel Cooper, *What is Civil Society? How is the Term Used and what is Seen to be Its Role and Value (internationally) in 2018*, K4D Helpdesk Report, (2018), available at <https://www.academia.edu/38133172/What-is-Civil-Society-pdf> (Accessed on 17th of June, 2020).

¹³ *Id.*, at 2.

¹⁴ *Id.*, at 6.

independent research institutes and the not-for-profit media.¹⁵ The variation in terminologies, forms and objectives of the organizations has created a difficulty to have a uniform definition for CSOs. However, this difficulty can be mitigated by identifying the common features of the organizations. There are the five basic elements mostly used to characterize a certain entity as a CSO or an NPO¹⁶ which can be discussed as follows.

First, they are organized and have some institutional reality.¹⁷ Second, they are non-governmental and does not form part of the government's apparatus.¹⁸ Third, they are not-for-profit entities, and thus, they shall be organized and operate primarily without the aim to gain profit.¹⁹ However, generating some income in the forms of profit is not prohibited as long as the organization's primary purpose is not for profit and it is abided by the general principles of non-profit operation including the principle of non-distribution.²⁰ Fourth, they are voluntary or involve some meaningful degree of voluntary participation.²¹ As a voluntarily organization, they are established by a private instrument (like contract, act on establishment) than by law.²² Fifth, they are self-governing and as such they must have their own internal governance procedures and enjoy a meaningful degree of autonomy.²³

Having the above features, CSOs play a vital role in a society under different capacities including providing services, advocating/campaigning, serving as a watchdog, and other related roles such as building active citizenship and participating in global governance processes.²⁴

When it comes to their categorization, CSOs can be categorized into various types based on different grounds. Based on nature of their role, they can be classified as either advocator or service provider. Depending on the level of their geographic operations, they are either national or local CSOs.²⁵ However, other ground of categorization, which this paper is more concerned with is, the one based on the nature of their beneficiaries or whose interest they are established to

¹⁵ UNDP, *NGOs and CSOs: A Note on Terminology*, Annex 1, available at <https://www.undp.org/publications> (Accessed on 16th of April, 2020). Those who adopt a broader definition of CSOs also include other forms such as political parties, and religious organizations. The African Development Bank's definition of CSOs even considers informal organizations as CSO. See African Development Bank, *Framework for Enhanced Engagement with Civil Society Organizations*, (2012),

'available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/PolicyDocuments/Framework%20for%20Enhanced%20Engagement%20with%20Civil%20Society%20Organizations.pdf> (Accessed on 13th of January, 2021).'

¹⁶ Lester & Anheier, *supra* note 2, at 2-3

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ European Center for Not-for-Profit Law (ECNL), *Legal Regulation of Economic Activities of Civil Society Organizations*, POLICY PAPER, (2015), at 3 - 4.

²⁰ *Id.* When we see the principle of non-distribution, it prevents non-profit legal entities from distributing profits to owners, members, officers, directors, agents, employees and other private parties that may directly or indirectly exercise control over the organization.

²¹ Lester & Anheier, *supra* note 2, at 2-3.

²² ECNL, *supra* note 19, at 3-4

²³ Lester & Anheier, *supra* note 2, at 2-3. The World Bank summarized the above five features as: not-for-profit; non-governmental; being charitable or mutually beneficial; independent and volunteers. See Leon E. Irish, Jin Dongsheng and Karla W. Simon, *China's Tax Rules for Not-for-Profit Organizations*, A Study Prepared for the World Bank, (2004), at VIII.

²⁴ Cooper, *supra* note 12, at 9.

²⁵ *Id.*, at 8.

serve. In this regard, CSOs are divided into public and mutual/private benefit organizations.²⁶ Private CSOs are mainly allowed to pursue any lawful purpose including for example, the advancement of one's family interest such as trust fund for education of founder's children, while MBOs stand to serve the interests of their members.²⁷ Whereas, PBOs are established and required to serve the benefit the public at large; *i.e.* they have the public benefit status.²⁸

B. Assessing the Features of CSOs Recognized under the CSO Proclamation

The newly enacted Proclamation preferred the name Civil Society Organizations (CSOs) than Charities and Societies. Further, it also provides a definition for CSOs which was not considered under the repealed CSOs regime. It defines CSOs as;

a Non-Governmental, Non-partisan, Not for profit entity established at least, by two or more persons on voluntary basis and registered to carry out any lawful purpose, and such CSOs include Non-Government Organizations, Professional Associations, Mass based Societies and Consortiums.²⁹

The way this definition characterizes CSOs is almost in line with the general understanding discussed in the preceding sub-section. The definition can be broken down into certain basic elements which may be considered as the defining features of CSOs in Ethiopia. First, they are established by two or more persons. The proclamation, thus, prescribes the minimum number of founders required to establish a CSOs. Article 17 of the Proclamation also provides similar stipulation such that two or more persons may establish local CSOs. However, it has to be noted that the Proclamation is also permissive of a unilateral establishment of CSOs. For instance, the provisions dealing with Charitable Endowment and Charitable Trust (the types of Charitable Organization) repeatedly use the expression "the founder" which is a clear indication that they can be established by a single founder.³⁰ In addition, conventionally, as can be understood from the Civil Code, trust and endowments can be established by single individual.³¹ Furthermore, five or more members are required to establish an Association (one type of CSO) and a Charitable Committee (another type of Charitable Organization.)³² Therefore, while reading the expression 'two or more persons' under the definition, there is a need to appreciate that there are exceptions or disparities regarding the required number of founders to establish a certain type of CSO.

Second, they are established on a voluntary basis depicting the voluntary nature of CSOs. Third, they are non-governmental. This does not; however, mean that they have no relation with

²⁶ Hopt *et al*, *supra* note 3, at 52.

²⁷ European Foundation Centre (EFC), *Comparative Highlights of Foundation Laws: the Operating Environment for Foundations in Europe*, Brussels, Belgium, (2015), available at <https://efc.issuelab.org/resource/comparative-highlights-of-foundation-laws-the-operating-environment-for-foundations-in-europe-2015.html> (Accessed on 10th of June, 2020).

²⁸ The World Bank defined a PBO as; "An NPO that is organized and operated exclusively for public benefit purposes by engaging in public benefit activities that benefits all members of the community or some particular group that is disadvantaged or otherwise deserving of special assistance". See Irish *et al*, *supra* note 23, at VIII.

²⁹ The Proclamation, Art. 2 (1).

³⁰ *Id*, at Arts. 21 (3), 32 (1) and 34 (1).

³¹ Civil Code, Arts. 483 and 516.

³² The Proclamation, Arts. 19 (1) and 48.

the government. This is due to the fact that regulation is made by the government and there are areas of cooperation on shared interests between NGOs and the government. Hence, the notion that says they are ‘Non-governmental’ basically points out that CSOs are private and not directly controlled by the government or do not form part of any government structure.

Fourth, they are not-for-profit entity. Hence, CSOs should not be established with a profit making motive. This, however, should not be confused with the right they are granted under the Proclamation to engage in any lawful business and investment activity to raise funds for the fulfilment of their objectives as long they are made in accordance with the relevant trade and investment laws and, importantly, the profit to be obtained from such activities cannot be transferred for the benefit of members, employees or management bodies.³³

Fifth, they are non-partisan. The Amharic version is more informative as it clearly stipulates “ከማናቸውም የፖለቲካ ድርጅት ያልወገነ” . Thus, the Proclamation does not prohibit CSOs from engaging in political activities. In fact, it grants them the right to engage in lobbying political parties, voters’ education or election observations.³⁴ So, the test seems ‘partisan to a political party’ shall be understood as CSOs should avoid partisanship in their activities towards a certain political party like; being supporter/opponent of a certain political party or making the ideology and program thereof as their own. However, the Proclamation does not provide any additional detail as to the specific types of activities that could make CSOs a partisan. Thus, the one in power may abuse it to its own advantage by interpreting it subjectively as it suits its own interest. Mostly commonly, CSOs are not allowed to engage in direct lobbying and campaigning for political parties to finance or provide any other direct support to political parties or candidates.³⁵ Such kinds of clear tests need to be adopted in the regulation which is currently being drafted or under the subsequent directives.

Sixth, CSOs have to be registered. The registration requirement is regulated in detail under Articles 57-61 of the Proclamation and they affirm that registration is the only way to get legal personality.³⁶ Some view the registration requirement as a hurdle to the formation of CSOs.³⁷ However, when we see the African Charter of Human and Peoples’ Rights (ACHPR) Guidelines on Freedom of Association and Assembly in Africa (which Ethiopia has adopted) stipulates that states shall not compel associations (including the CSOs) to register in order to be allowed to

³³ *Id.*, Art. 63 (1) (b).

³⁴ *Id.*, Art. 62 (5). By contrast, foreign CSOs and local CSOs established by foreign citizens residing in Ethiopia may not engage in these activities, unless permitted by other law.

³⁵ Natalia Bourjaily and Melanie Lyon, Comparative Study of Laws and Regulations Governing Charitable Organizations in the Newly Independent States, *International Charity Law: Comparative Seminar*, Beijing, China, (2004).

³⁶ Starting operation without registration is attached with administrative and criminal liabilities. See Proclamation, Art. 78. Also the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Art. 791. Charitable Committees are exceptions to the registration requirement since they are unincorporated entities.

³⁷ Selam Tesfaye, A Critical Legal Analysis on the CSO Proclamation of Ethiopia in Light of Freedom of Association, (Unpublished, LL.B Senior Essay, University of Gondar, December 2020), at 31.

exist and their legal status is presumed up on receipt of notification.³⁸ This is also supported by the UN Special Rapporteur on Freedom of Association and Assembly.³⁹ The core argument for such positions is that since CSOs are established for non-commercial purposes, they should be free to operate in order to achieve their aim once authorities are notified of the creation of the organization by the founders.⁴⁰ Of course, the other side can argue that the registration requirement is rather the effective tool for governments to regulate and supervise and follow up the activities of CSOs than being a challenge to their operation.

Seventh, they are registered to carry out any lawful purpose. Article 62 (1) of the Proclamation clearly stipulates that “an Organization shall have the right to engage in any lawful activity to accomplish its objectives.” The Proclamation adopts the extreme operational freedom of CSOs, especially if we compare it with the restriction imposed on the area of operations under the repealed legislations.⁴¹ Now, as long as their objectives are lawful, they are not challenged by the substantive restrictions regarding their area of operation. The visible restriction under the Proclamation is that foreign and local CSOs established by resident foreign nationals may not engage in lobbying political parties, voters’ education or election observations, unless otherwise permitted by law.⁴² In this regard, the electoral regimes are permissive for foreign CSOs to observe elections upon invitation and licence from the government; however, local CSOs allowed engaging in voters’ education without any condition.⁴³

CSOs with foreign elements are restricted from political related activities mostly due to the fear of undesirable foreign interference in domestic political matters.⁴⁴ However, it is hard to see how this objective can be fully realized while the Proclamation has no foreign fund restriction on local CSOs by which foreign CSOs can engage in political related activities. The Proclamation itself allows for the establishment of foreign CSO that aims at funding local CSOs (than to undertake projects by itself).⁴⁵ It was said that one of the reasons to put a foreign fund restriction

³⁸ African Commission on Human and Peoples` Rights (ACHPR), Guidelines on Freedom of Association and Assembly in Africa, adopted on 22 May 2017 at Niamey, Niger and entered in to force on 3 October 2017, paragraphs 11 and 13.

³⁹ United Nations (UN), Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, (2012)

available at <https://www.ohchr.org/en/issues/assemblyassociation/pages/srfreedomassemblyassociationindex.aspx> (Accessed on 16th of April, 2020).

⁴⁰ Selam, *supra* note 37, at 31-32. But, here, it should be noted that neither the Guideline nor the statements of the Rapporteur super rides the prescriptions of the Proclamation. Though the Guideline is adopted with a view that states will use it as a basis for drafting their domestic laws, it is not a binding one.

⁴¹ Under the CSP, Ethiopian Resident and Foreign Charities were not allowed to work in promotion of human and democratic rights. See CSP, Art. 14 (5).

⁴² The Proclamation, Art. 62 (5).

⁴³ *Ethiopian Electoral, Political Parties Registration And Election’s Code Of Conduct*, Proclamation No. 1162/2019, FED. NEGARIT GAZETA, 25th Year, No. 97, 2019, Arts. 114 (2) and 125 (1) (a).

⁴⁴ Debebe Hailegebriel, *Restrictions on Foreign Funding of Civil Society: Ethiopia*, 12 (3), INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW, 18-27 (2010).

⁴⁵ The Proclamation, Art. 62 (3). The matter is also not adequately regulated either under the Electoral Proclamation or NEBE’s directive on voters’ education and code of conduct, Directive No. 4/2012 (E.C). Per Art 21 of the latter, NEBE may even help local CSOs in their effort to generate funds for their election related endeavors from various sources, which can be from foreign CSOs.

on Ethiopian Charities under the CSP⁴⁶ in which authorities stressed that the restriction was intended to avert foreign influence in domestic matters and to reduce the vulnerability of sensitive domestic issues to manipulation by imported agendas.⁴⁷ Besides, a restriction on foreign funding is one of the main trending issues in the field of CSOs around the world (both in democratic and non-democratic countries) which calls for the concerns related to invoking national security, sovereignty and increased transparency.⁴⁸ This may invite us to question whether or not the Proclamation's move to totally lift the foreign fund restriction is appropriate in light of this trend and the justifications accompanied it.

Regarding operational freedom, under the current arrangement, CSOs are also presumed to be permitted to operate in the sector of its choice unless another law requires it to get licence to practice in its desired area. Accordingly, if the sector which a CSO is seeking to engage in requires additional permit by law, it must obtain the necessary permit from the government body overseeing that sector (sectors like health and education).⁴⁹ This may be seen as a hurdle on the operational freedom of CSOs even if it can be justified on regulatory grounds.⁵⁰

Lastly, the definition of CSOs indicates that the term 'civil society organization' is an umbrella term that encompasses several sub-types. It provides an illustrative list of entities considered as CSOs such as NGOs, professional associations, mass based societies and consortiums. Seeing NGOs in the list, it may be asked if the Proclamation is making a distinction between CSOs and NGOs. Though NGO is sometimes used interchangeably with 'CSO', the term 'NGO' is a contested one.⁵¹ In defining local CSOs and foreign CSOs, the Proclamation uses the term 'civil society organizations' for the former and 'non-governmental organization' for the latter.⁵² If so, it implies that the Proclamation still holds the previous characterization in which the government considered Ethiopian (local) charities and societies as civil society entities while the foreign ones were referred as NGOs.⁵³ However, whatever understanding of CSO vs. NGO the drafters of the Proclamation had in mind, legally speaking, it makes no difference. Unlike the repealed CSO laws, the Proclamation provides almost the same treatment for both local and foreign CSOs.

⁴⁶ Ethiopian Charities were not allowed to raise more than 10% their annual income from foreign sources. See CSP, Art. 2 (2).

⁴⁷ Yntiso Gebre, *Reality Checks: The State of Civil Society Organizations in Ethiopia*, 211 AFRICAN SOCIOLOGICAL REVIEW, 20-42, 25 (2017).

⁴⁸ Julia Kreienkamp, *Responding to the Global Crackdown on Civil Society*, Policy Brief, Global Governance Unit, UCL, (2017) available at <https://www.ucl.ac.uk/global-governance/news/2017/sep/responding-global-crackdown-civil-society> (Accessed on 10th of June, 2020).

⁴⁹ The Proclamation, Art, 62 (10).

⁵⁰ In this regard, Charitable Committees are more constrained than other CSOs, since they must obtain the approval from the CSOs Agency before they may undertake any activities. See *Id.*, Art, 49 (1).

⁵¹ The general understanding is that NGOs should be properly understood as a subset of CSOs involved in development cooperation, albeit often with no clear boundaries. International aid actors are mostly referred as 'NGOs', particularly among governments in developing countries, while, constituency-based organizations, such as trade unions or professional associations, for example, often do not self-identify as NGOs, but rather as CSOs. See UNDP, *supra* note 15, at 123-124.

⁵² The Proclamation, Art. 2 (2) and (3).

⁵³ African Civil Leadership Program (ACLP), *User's Manual on Ethiopia's CSO Law*, (2019), at 6 available at https://www.africancivilleadership.org/wp-content/uploads/2019/11/ACLP_V7.pdf (Accessed on 19th of December, 2019).

Apart from providing example of entities considered as CSO, the Proclamation also explicitly excludes some entities such as religious institutions,⁵⁴ traditional institutions (idir and iqub), and organizations formed under other laws from its scope of application.⁵⁵ The expression ‘an organization formed under other laws’ refers to entities such as trade unions and cooperative societies which already have their own legal framework.⁵⁶ What does the exclusion of these entities imply? Does it mean that they are not considered as CSO? Or they are considered as CSO, but they are governed by their own separate legal framework? The response to these questions will have implications on the sphere of institutions we can call CSO and argue whether the Proclamation understood the concept of CSOs narrowly or broadly. The intention of the author here is to indicate that in addition to the CSOs as defined by the Proclamation, there may be other forms of organizations which may meet the definitional elements of a CSO or can be considered as the same though they are not governed under the Proclamation.⁵⁷

The author also wishes to note that the fact that traditional and religious institutions are excluded from the scope of application of the Proclamation does not mean they are less important to work on civic causes. In a country like Ethiopia, formally established CSOs are small in number and are inaccessible to most parts of the country due to the various reasons including the financial instability, for mostly foreign fund dependent ones.⁵⁸ Traditional civil society institutions can balance most of these deficits as they are accessible and have strong community base to effectively mobilize the public towards some collective actions far more than the formally established CSOs. This is why some countries move to formalize traditional institutions and engage them in the activities of the formal system.⁵⁹ Such moves are backed by arguments which hold that the dominant conception of civil society in Africa is Eurocentric and an imposition of African local realities on civil societies which are occupied by Western-type NGOs to promote more traditional and ignored forms of African civil society is necessary.⁶⁰ If traditional organizations are more effective in mobilizing the community, they should rather be formalized, reshaped and funded than being totally excluded from the formal CSOs framework.

C. The Organizational Forms of CSOs Recognized under the CSO Proclamation

When it comes to categorization, the Proclamation has, first, grouped CSOs into local and foreign. Local Organization is defined as “a civil society organization formed under the laws of

⁵⁴ It should be noted that Charitable Organizations established by religious institutions are governed under the Proclamation. See the Proclamation, Art. 3 (1) (e).

⁵⁵ *Id.*, Art. 3 (3).

⁵⁶ Trade unions are governed by the *Labor Proclamation*, Proclamation No. 1156/2019, FED. NEGARIT GAZETA, 25th Year, No. 89, 2019; and cooperative societies under the *Cooperative Societies*, Proclamation No. 147/1998, FED. NEGARIT GAZETA, 5th Year, No. 27.

⁵⁷ For instance, based on the UNDP’s definition, faith and community-based organizations as well as labor unions are considered as CSOs. See UNDP, *supra* note 15, at 123-124.

⁵⁸ Yntiso, *supra* note 47, at 38.

⁵⁹ Tanja Kleibl and Ronaldo Munck, *Civil society in Mozambique: NGOs, Religion, Politics and Witchcraft*, 38 (1) THIRD WORLD QUARTERLY, (2017); in Cooper, *supra* note 12, at 9.

⁶⁰ *Id.*

Ethiopia by Ethiopians, foreigners resident in Ethiopia or both.”⁶¹ It alternatively takes in to account the founders’ residential status and nationality. So, foreigners can establish a local CSO in Ethiopia as long as they are residents of Ethiopia, and an organization formed under foreign laws by Ethiopians will not be considered as a local CSO. Foreign Organization is defined as “a non-governmental organization formed under the laws of foreign countries and registered to operate in Ethiopia.”⁶² The founder’s nationality and residential status seems irrelevant here, as long as the CSO is established under the laws of a foreign country. Hence, the question here is, if foreigners, who are not resident in Ethiopia, establish a CSO based on Ethiopian laws, would it be local or foreign? The definition is silent. However, reading the two definitions together would make it clear that foreigners not resident in Ethiopia cannot establish a local CSO.

Within the above two categories, Article 18 of the Proclamation lists down the organizational forms of local CSOs such as: Association, Board-led Organization, Charitable Endowment, Charitable Trust and Charitable Committee. These can further be reduced into two major forms: Charitable Organization and Association. The various forms of CSOs mentioned in other parts of the Proclamation can also fall under either of these two forms.

Charitable Organization is defined as “an organization established with the aim of working for the interest of general public or third party.”⁶³ This makes Charities a PBO type of CSOs (a detail discussion about this is made under section three). Again, the Proclamation has recognized three types of Charities. First, ‘Charitable Endowment’ which refers to “an organization by which a certain property is perpetually and irrevocably destined by donation, money or will for a purpose that is solely Charitable.”⁶⁴ Second, ‘Charitable Trust’ which is “an organization established by an instrument by which specific property is constituted solely for a charitable purposes to be administered by the trustees in accordance with the instructions given by the instrument constituting the charitable trust.”⁶⁵ Here, it has to be noted that ‘trust’ can be established for private benefit as a ‘private trust’ or for public benefit as a ‘charitable trust.’ The Proclamation only recognizes and governs the latter and as such, whether private trusts exist in Ethiopia and if so, whether the regulation is (including the relevant provisions of the Civil Code still governs them) is still a contested issue.⁶⁶

The third one is a ‘Charitable Committee’ which is defined as “a collection of five or more persons who have come together with the intent of soliciting money or other property from the public for purposes that are Charitable.”⁶⁷ Charitable Committees are unincorporated and their activities are event based (established to raise funds from the public to address a specific

61 The Proclamation, Art. 2 (2). In dealing with formation of Local Organizations, Art 17 of the same uses the terminology “Indigenous Organization.” Whether the terms ‘Local’ and ‘Indigenous’ connote similar meanings may create confusions, hence, it is better to employ consistent naming. For instance, the Amharic version consistently uses the term “አገር በቀል ድርጅት”.

62 *Id.*, Art. 2 (3).

63 *Id.*, Art. 2 (4).

64 *Id.*, Art. 21 (1).

65 *Id.*, Art. 31.

66 See Yibekal Taddese, *Private Trust under Ethiopian Law: Its Nature, Constitution and Administration*, 11 (2), BAHIR DAR UNIVERSITY JOURNAL OF LAW, (2021), (forthcoming).

67 The Proclamation, Art. 48.

contemporary problem).⁶⁸ By large, all of the three forms of Charitable Organization share the same rules as other CSOs, but they are subject to some unique requirements related to their registration, structure, and governance. Their classification is mainly based on the structure of their governance; Endowments are board-led, Trusts are governed by trustees while Charitable Committees are member-led.⁶⁹

The second main operational form of CSOs is ‘Association.’ Association is defined as “an organization formed by five or more members and governed by a General Assembly as the supreme decision-making body.”⁷⁰ This definition is not informative of the very basic nature of Associations, which is for whom they are established. In this regard, the definition of ‘professional association’ is rather helpful. Professional association is defined as “an organization formed on the basis of a profession and its objectives may include; protecting the rights and interests of its members, promoting professional conduct, building the capacities of members or mobilize professional contributions of its membership to the community and the country.”⁷¹ From this, it is possible to discern that ‘Association’ is basically established for the promotion and protection of the rights and interests of its members. The related characteristic feature of an Association is that it is members-led, where its general assembly is the highest decision-making organ.⁷² These imply that Associations are recognized as MBOs. Therefore, as it is common in other jurisdictions, the Proclamation has ‘beneficiaries-based’ classification and as such, serving the public at large is not the immediate goal of Associations, but Charitable Organizations.

A Board-led Organization is also considered as one type of Local Organization. This form is a new introduction under the current Proclamation though it is not clear as to what necessities it. In fact, much is unclear about this organization. The Proclamation dedicates only one provision for it and defines it as “Organization formed by two or more founders, its Board being the supreme organ.”⁷³ This is not informative of its nature.⁷⁴ The manual prepared by the CSO Agency (to explain the Proclamation) stated that “Board-Led Organization is typically used by think-tanks and other CSOs which have thematic purpose that constituency based focus of works.”⁷⁵ This shows that Board-led CSO is suitable for think-tanks and has no immediate constituency to serve. For instance, it can serve as a research based CSO, which is common in other jurisdictions. It is not clear whether a Board-led Organization operates as a Charity or

⁶⁸ Their other distinct feature is that most commonly they are composed of only natural persons. See, ACLP, *supra* note 53, at 26.

⁶⁹ See the Proclamation, Arts. 24-27, 35-40 and 51-52.

⁷⁰ *Id.*, Art. 19 (1).

⁷¹ *Id.*, Art. 2 (5).

⁷² *Id.*, Art. 19 (1).

⁷³ *Id.*, Art. 20 (1).

⁷⁴ Nothing informative is also said about Board Led Organizations under the draft Regulation.

⁷⁵ ACLP, *supra* note 53, at 25.

Association. However, the fact that it is a ‘board-led’ entity makes it unlikely for it to be an Association (as they are ‘member-led’) It rather resembles Charitable Organizations.⁷⁶

Before closing this sub-section, the author wishes to say a few words about the current legal status of party affiliated Charitable Endowments. The notable ones in this regard are; the Endowment Fund for the Rehabilitation of Tigray (EFFORT) and Amhara Endowment Fund, (TIRET Corporate) in the Amhara region.⁷⁷ Lately, the respective regional states Council has decided that these entities should be accountable to the respective councils and that their ownership should be a public one (*i.e.*, peoples of the respective regions).⁷⁸ Prior to this, as a matter of practice, the administration of the Endowments were accountable to their affiliated political parties and several concerns were raised against them including their vague administration, accountability and, most importantly, their adverse impacts on the market competition.⁷⁹ Either to renew their name or by whatever reason, their ownership is currently said to be transferred to the public. However, this still raises further questions. Does the Proclamation allow the establishment of ‘public owned CSOs’? Moreover, when an entity is said to be under public ownership? Is it either the government or public body representing the public to administer it on behalf of the public? The government or its affiliates are not allowed either to establish or to directly administer CSOs as CSOs, by nature, are required to be ‘non-governmental.’ Therefore, legally speaking, both TIRET and EFFORT cannot be made under government control as a ‘charitable endowment’ unless they re-organize themselves as a public enterprise or other appropriate forms which the government is allowed to administer and own.

III. THE PLACE GIVEN FOR PUBLIC BENEFIT CSOS IN ETHIOPIA

A. Characterization and Justifications for the Recognition of PBOs: General Overview

Not all CSOs are recognized as PBOs. Rather, those with the ‘public benefit’ purpose are regarded as such. The important question here would be what constitutes ‘a public benefit’? The answer to this question depends on the criteria employed to differentiate PBOs from the rest of CSOs. The criteria for receiving the public benefit status differ among jurisdictions and they are

⁷⁶ One visible difference between Board-led Organization and Charitable Endowment or Trust is the required minimum number of founders. While the minimum number for the former is two or more, an Endowment or Trust can be formed by a single founder. See Proclamation, Arts. 20 (1), 21 (3) and 32 (3).

⁷⁷ The former is affiliated to the Tigray Peoples Liberation Front (TPLF), while *TIRET* is affiliated to the Amhara National Democratic Movement (ANDM, now functioning as the Amhara branch of the national Prosperity Party).

⁷⁸ Natnaiel Tigabu, *TIRET Corporate would be accountable to the Amhara Regional Council*, Fana Broadcasting Corporation, November 11, 2019 available at <https://m.facebook.com/fanabroadcasting/posts/2590627734361283/> (Accessed on 25th of January, 2020); G/Egziabher Hailu, *EFFORT would be accountable to the Tigray Regional Council*, Ethiopian Broadcasting Corporation, March 25, 2019 available at <https://m.facebook.com/EBCzena/posts/2416661805032348/> (Accessed on 25th of January, 2020).

⁷⁹ These entities are best known for their aggressive engagement in profit making activities all over the country using their huge and numerous business corporations, despite they registered as non-profit entities. See Sarah Vaughan and Mesfin Gebremichael, *Rethinking business and politics in Ethiopia: The role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray*, RESEARCH REPORT, (2011), at 61.

drafted to reflect the goals of the legislation, the needs of the society and the local circumstances and traditions.⁸⁰ Generally, the criteria discussed below are considered as important.⁸¹

Qualifying activities: This criterion holds three basic issues.⁸² First, the purposes considered as publicly beneficial are those activities which laws enumerate to be serving the common good. The second is the exclusion of certain goals from qualifying as ‘public benefit.’ These are commonly related to political activities such as direct lobbying and campaigning for political parties. The third criterion is whether the list of public purposes provided by the law is exclusive or not. The list of public-benefit purposes could be open-ended and flexible at the cost of legal certainty than being exclusive and rigid.⁸³ Most countries prefer the ‘catch-all’ category of public benefit which is an effective way to ensure that enumerated purposes are not interpreted in an overly restrictive manner.

The principal purpose test: This test is used to decide the extent to which PBOs must be organized and operate for ‘public benefit.’ To do so, the organization will be assessed by two cumulative tests.⁸⁴ The first is the ‘benefit test’ which requires the existence of an ‘identifiable benefit.’ Hence, the undertaking of the organization must confer an objectively verifiable ‘benefit.’ The other is the ‘public test’ which again constitutes three requirements.⁸⁵ One, the benefit must be to the public at large or to a sufficient section of the public. Two, any private benefit must be incidental. Third, the service should not discriminate potential beneficiaries of the organization.

The eligible entities: It deals with the question of which type of CSOs should have a public benefit status.⁸⁶ As noted in the first sub-section of section two, there are various forms of CSOs such as; charities, foundations and associations. However, the important thing mainly is, whether they really engage in public benefit activities regardless of the name they got.

Other conditions: As per this condition, in addition to the above tests, countries use governance requirements by which they prescribe a special governing structure for organizations that wish to get the public benefit status.⁸⁷ The requirements are stricter on PBOs than others. There are also conditions provided in the form of restrictions. These include; conducting commercial activities, engagement in political activities, financial management and distribution, remuneration of board members and employees.⁸⁸

It is worth to ask why countries go through the above characterization. The underlying rationale for introducing the public benefit status or PBOs is usually to promote public benefit

⁸⁰ David Moore, Katerina Hadzi and Nilda Bullain, *A Comparative Overview of Public Benefit Status in Europe*, 11 (1) INTERNATIONAL JOURNAL OF NOT-FOR-PROFIT LAW, 11 (2008)

⁸¹ *Id.*, at 11-17.

⁸² *Id.*

⁸³ There are also few countries which simply provide a general ‘public benefit clause’ without any list. This would give a wider discretion to the regulator but with the risk of uncertainty and possible misuses. See EFC, *supra* note 27, at 14.

⁸⁴ *Id.*, at 15.

⁸⁵ *Id.*

⁸⁶ David *et al*, *supra* note 80, at 14.

⁸⁷ *Id.*, at 16.

⁸⁸ *Id.*, at 17.

activities. Governments have recognized that PBOs serve more effectively the needs of local communities and society at large as potential public service delivery agents than private organizations or MBOs.⁸⁹ They work to expand the public goals that are supported and provided by a government such as health care, education, and other social assistance. The other rationale of granting public benefit status is related to the eligibility requirements of state which provides fiscal and tax benefits to publicly beneficial activities?⁹⁰ Accordingly, many countries have special tax rules for PBOs different from the rest CSOs.⁹¹ Moreover, PBOs are mostly allowed to engage in commercial and investment activities in order to generate income for their charitable purposes.⁹² However, these activities are either prohibited or allowed under exceptional circumstances for non-PBOs.⁹³

B. The Characterization and Place of PBOs in Ethiopia

When it comes to Ethiopia, charitable organization is recognized as a PBO. The Proclamation defines PBO as “an organization established with the aim of working for the interest of general public or third party.”⁹⁴ The definition is indicative of the public benefit nature of charity’s main features that differentiate them from associations. In fact, charities are the most common forms of CSOs recognized as PBOs and none of the concepts and principles underpinning charity law is more important than the requirement that a charity must contribute to the ‘public benefit.’⁹⁵ The Proclamation’s recognition of charities as PBOs goes in line with this assertion. However, the expression ‘third party’ in the definition is confusing. There is no clue in the Proclamation as to what constitutes ‘third party’ other than the requirement of general public. It seems that third party would be people other than members, founders, and employees of the charities. Hence, regulations or directives shall clarify who the third party is by significantly narrowing the groups or section of the public that charitable organizations should serve not to diminish the public purpose nature of Charities.

If Charities are recognized as PBOs, then, the next important question will be what constitutes ‘public benefit.’ The Proclamation simply uses the general expression “for the interest of general public or third party” without providing any illustrative list of activities which can be considered as ‘public benefits.’ The provisions governing the specific types of charitable organizations also employ the expression ‘charitable purpose’ without still indicating what types of activities are to be considered as ‘charitable.’⁹⁶ Providing such general ‘public benefit clause,’ without any list would give a wider discretion to the regulator but with the risk of uncertainty

⁸⁹ *Id.*, at 7

⁹⁰ Irish *et al*, *supra* note 23, at VIII.

⁹¹ *Id.*, at 30. Many countries exempt only PBOs, from taxation on business and passive income.

⁹² *Id.*

⁹³ *Id.*, at VIII.

⁹⁴ The Proclamation, Art. 2 (4).

⁹⁵ KERRY O’HALLORAN, RELIGION, CHARITY AND THE LAW, IN KERRY O’HALLORAN (ED.), THE CHURCH OF ENGLAND - CHARITY LAW AND HUMAN RIGHTS: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE, (Springer International Publishing, Switzerland, 2014), at 35

⁹⁶ See CSOs Proclamation, Arts. 21 (1) and 31 for Charitable Endowments and Charitable Trust, respectively.

and possible misuses.⁹⁷ Even if the Proclamation prefers not to have a list of charitable activities, at least, it should have provided the tests of public benefit which the regulator will employ to determine whether a certain activity qualifies a public benefit or not. Let alone in the absence of a list of charitable purpose, even a legislation having such an open ended list has to provide these tests.

Regarding the characterization of ‘public benefit’, the CSP was far better than the current Proclamation. Thus, it is vital to highlight it in order to clearly identify where the gaps lay in the current laws and to figure out the lessons to be. The CSP had an illustrative list of activities that were considered as ‘charitable purposes.’⁹⁸ Seeing the activities listed as ‘charitable/public purposes’ together with the area of operations, restriction imposed on foreign CSOs and local CSOs with more than 10% foreign funding, it is clear that the CSP favoured CSOs engaged in service delivery and development than the rights based/advocacy ones. This was one of the fierce critics raised against the CSP which finally contributed for its repeal.

In criticizing the CSP on this, its success stories should not; however, be overlooked.⁹⁹ It is true that the CSP had adversely affected the area of engagements of CSOs working in rights advocacy. Nevertheless, the new proclamation brought some changes by which civil society groups have mushroomed and the roles of the conventional CSOs in service delivery and development has increased.¹⁰⁰ But, the human rights issue overshadows many positive developments than what have happened in the other areas.¹⁰¹ As a matter of fact, the 10% foreign fund restriction under the old CSP was not imposed on all local CSOs and such restriction is imposed only on the CSOs that preferred to operate in the areas of human rights. Hence, if these entities were allowed to engage in service delivery and development areas like Ethiopian resident CSOs, they would be to raise 90% of their fund from foreign sources.

The author believes that in countries like Ethiopia, where poverty and lack of valuable public services/social institutions such as; education and health care are dire problems to the society at large, it is not unreasonable to show some preferences to the service delivery and development based CSOs. Besides, one of the main global trending issues in the sector is a shift of CSOs engagement towards service delivery as development actors than their traditional advocacy role.¹⁰² The rights based CSOs shall to also be aware of the fact that the current social movements using social media can collect more people together for common cause than

⁹⁷ EFC, *Comparative Highlights of Foundation Laws: the Operating Environment for Foundations in Europe*, *supra* note 27, at 14.

⁹⁸ CSP, Art. 14 (2).

⁹⁹ In this regard, the author recommends Yntiso Gebre’s work which examined the opposing views raised against the CSP using empirical data. See Yntiso, *supra* note 47, at 20-42.

¹⁰⁰ *Id.*, at 20.

¹⁰¹ *Id.*

¹⁰² Clayton Andrew, Peter Oakley and Jon Taylor, *Civil Society Organizations and Service Provision*, Geneva: UN Research Institute for Social Development, (2000) Available at <http://www.unrisd.org/80256B3C005BCCF9/search/19AB2640214382A380256B5E004C94C5?> (Accessed on 3rd of January, 2021). The funding is also following the same trend where donors are favoring development based CSOs and a decline in funding available for advocacy, rights-based activities challenges the *status quo*. See WEF, *supra* note 11, at 7.

traditional advocacy organizations which typically rely on known supporters.¹⁰³ There should be no surprise if the regulatory frameworks embrace these trends. Therefore, in criticizing the CSP, we should put things in perspective and the fact it gave priority for development based CSOs is a value that the current Proclamation should have rather upheld. As much as it is improper to totally ban or put excessive restrictions on rights based CSOs, it is equally inappropriate not to provide special benefits for development based CSOs.

In addition to listing charitable purposes, the CSP had also provided tests of public benefit. Accordingly, the mere fact a charity aimed to engage in the listed charitable activities do not necessarily grant it the public benefit status. To qualify for the status, there were three basic requirements. First, the purposes of the Charity should result in ‘identifiable benefit’ to the public.¹⁰⁴ Second, there should be ‘non-discrimination of potential beneficiaries.’¹⁰⁵ Therefore, the beneficiaries should neither be selected arbitrarily nor discriminated on the grounds of sex, ethnic background, and religion.¹⁰⁶ Third, any private benefit could be acquired only as an incidental and secondary consequence of the activities of the charity.¹⁰⁷ Such requirements tried to draw a line between private and public benefit CSOs. It did not totally exclude private benefits, but limited the benefit to be secondary to the primary objectives of the charity.

When it comes to the current Proclamation, it has neither list of public benefits nor a separate provision to outline the tests of public benefit. What we can possibly do is trying to infer some conditions from the scattered provisions of the Proclamation. For instance, according to Art 62 (9) of the Proclamation, Charities shall ensure that their activities take into account the interests of women, children, persons with disabilities, the elderly and others exposed to threat or vulnerable groups of the society. The question would be as to whether we can we take this as a complementary to the principle of non-discrimination (of beneficiaries) to assess whether the activity of the Charitable Organization is a public benefit or not. Even so, it is not still clear whether the provision is prescribing the principle (the assessment of which depends on the area of operation of a charity) or saying that whatever the area of operation of a charity is, it should benefit these vulnerable groups.¹⁰⁸

¹⁰³ Shannon N. Green, *Civil Society at a Crossroads: Exploring Sustainable Operating Models*, Centre for Strategic and International Studies, Washington DC, (2017), at 13 available at https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/171012_Green_CivilSocietyCrossroads_Web.pdf (Accessed on 19th of July, 2020).

¹⁰⁴ CSP, Art. 14 (3) (a). ‘Identifiable benefit’ can be assured by bringing physically tangible results or non-physical deliverables like providing training or undertaking human rights research. See Taskforce on Enabling Environment for Civil Society in Ethiopia (TECS), *Users’ Manual for the Charities and Societies*, (2011), at 18 available at <http://docplayer.net/25381417-Users-manual-for-the-charities-and-societies-law.html> (Accessed on 19th of December, 2019).

¹⁰⁵ *Id.*, Art. 14 (3) (b).

¹⁰⁶ However, this does not mean that a Charity could not target a specific group. If it is established to provide health services for children living in a certain area, it will not be discriminatory because it does not serve adults. TECS, *supra* note 104, at 19.

¹⁰⁷ CSP, Art. 14 (3) (c).

¹⁰⁸ The principle of non-discrimination is also mentioned under Art 16 of the Proclamation. But reading the relevant sub-articles, the prescriptions are related to members or membership of a CSO. Thus, they are more relevant to Associations which are member-based than Charities which have beneficiaries, not members.

In another section, while prescribing the contents of the internal rule of a CSOs, the Proclamation requires the stipulation which indicates the organization's income and resources may not be distributed to members or employees except for payment of 'legally permitted service fees.'¹⁰⁹ CSOs are also prohibited from distributing profits obtained from business or investment activities to members or employees of the organization.¹¹⁰ These can be taken as the prohibition of private benefits. However, unless the coming subsidiary legislations come up with a clear description for the expression 'legally permitted service fees', these alone cannot prevent the possible misuses of Charities for private gains.

Another important point related to PBOs, as noted in the preceding sub-sections, is that countries make distinctions between PBOs and other forms of CSOs mainly based on eligibility requirements of state benefits to be provided to PBOs. Asking if this is the case in Ethiopia, we can find certain state benefits provided for CSOs. For instance, to attain their objectives, CSOs are permitted to engage in wider income generating activities which can be both commercial and non-commercial one.¹¹¹ The income they generated from these activities is also exempted from income tax except for unrelated business income (i.e., income derived from business activities not related to the core missions of organization core).¹¹² Further, there is also an indication that CSOs may be allowed to import goods duty free.¹¹³

As the practice elsewhere tells, it is important that the public benefit status should confer a special benefit/state support than the one provided for non-PBOs. For instance, in most countries (despite the difference in the model of permissibility they follow), it is CSOs with public benefit status (PBOs) that are allowed to engage in business activities while non-PBO CSOs are in most cases either totally banned from engaging in such activities or allowed to engage under exceptional circumstances.¹¹⁴ The same goes to tax treatments where by PBOs are more favoured. For instance, many countries exempt only PBOs from taxation on business and passive income.¹¹⁵ Then, in exchange for the advantages, PBOs are generally subjected to more stringent supervisions to ensure that they are using the benefits for the public good.¹¹⁶

However, the Proclamation has no such differentiation. All the benefits mentioned above are equally provided for all forms of CSOs without any distinction. It grants no special benefits for

¹⁰⁹ The Proclamation, Art. 60 (1) (d).

¹¹⁰ *Id.*, Arts. 61 (4), 63 (1) (b) and 64 (4).

¹¹¹ *Id.*, Art. 63 (1) (b) and (c).

¹¹² *Federal Income Tax*, Proclamation No. 979/2016, FED. NEGARIT GAZETA, 22nd Year, No. 104, (2016), Art. 65 (1) (m) (here in after, Income Tax Proclamation). The main reason unrelated business income of non-profit organizations is not exempted is, because, the CSP required a direct relationship between the organizations business activities and their objectives (CSP, Art. 103 (1)). Since this is no more required under the current Proclamation, it is not clear whether the income tax laws are going to operate as they are or need to re-shape themselves in line with the prescription of the current CSO laws.

¹¹³ The Proclamation, Art. 46

¹¹⁴ For instance, such differential treatment is reflected in the regulatory frameworks of EU member countries, Central and Eastern European countries and others. See Hopt *et al*, *supra* note 3, at 86-92; EFC, *supra* note 27, at 9-13; Bourjaily and Lyon, *supra* note 35, at 47-56; and ECNL, *supra* note 19, at 23-24.

¹¹⁵ Irish *et al*, *supra* note 23, at 30.

¹¹⁶ However, the degree of supervision and sanction should be proportionate to the benefits provided, and not so intrusive as to compromise the organization's independence. See David *et al*, *supra* note 80, at 34.

CSOs primarily working for the public interest. Thus, charitable organizations, which are established to benefit the general public and associations which are primarily established to promote their members interest are provided with equal treatments. For instance, both are granted with equal opportunity to engage in business activities¹¹⁷ and equally privileged regarding taxation.¹¹⁸ If the public benefit status does not entail any special financial benefits, the organizations may have no incentive to get the public benefit status.¹¹⁹ So, the Proclamation's failure in this regard not only diminishes the rationale for the recognition of public benefit status of CSOs, but also, has a potential to discourage their establishment. If the government is keen to provide the privileges for both, it should, at least, give more space to PBOs than the other forms of CSOs as the nature and services of the former deserve special consideration. Thus, as the impact may be felt in the long term, the CSO laws should adopt a differential treatment approach which takes in to account important factors such as the types and purposes of CSOs.

IV. CONCLUDING REMARKS

This paper attempts to analyse the nature and type of CSOs recognized under the CSO Proclamation. The Proclamation has set out the non-profit, non-governmental, non-partisan and voluntary nature of CSOs as their important features. Its characterization largely reflects the prevalent international practices. However, the author believes that the government should start to re-consider the definition given to 'CSOs' so that it can include vital traditional and grass root organizations that can be found more effective at mobilizing the public for civic causes than the 'western model' CSOs.

The Proclamation also gives recognition for both PBO and non-PBO CSOs. Accordingly, charitable organization is recognized as a PBO since it is required to be established for the benefits of the general public or third party. Though the expression 'third party' is not clear enough, the Proclamation underscores the 'public benefit' nature of charitable organizations. However, the Proclamation has failed to adequately identify what constitutes 'public benefits' which is a basic nature of PBOs. The 'public benefit' clause needs to be sufficiently elaborated so that a clear distinction can be easily made between PBOs and non-PBO CSOs. In doing so, the concept of public benefit should be left flexible so that it can keep its pace with changing social circumstances and, at best, it should be defined in light of the current needs and priorities of the country.

Moreover, PBOs are not treated appropriately under the Proclamation. The Proclamation failed to adopt a differential treatment approach as it provides the same conditions for all forms of CSOs. This diminishes the rationale for the recognition of public benefit status and has also a potential to discourage the establishment of PBOs as there are less incentives that would motivate persons to establish PBOs than MBOs. Of course, this is a problem reflected in other areas too as the Proclamation, by large, adopts the "one fits for all approach" than having

¹¹⁷ The Proclamation, Art. 63 (1). This provision, which allows CSOs to engage in any lawful income generating activities (including businesses) has employs the term 'any organization', without any qualification.

¹¹⁸ See Art. 65 (1) (m) of the Income Tax Proclamation, which talks about income tax exemption, employs the term 'non-profit organization' without qualification.

¹¹⁹ David *et al*, *supra* note 80, at 8.

prescriptions tailored according to the nature of the various types of CSOs. The author believes that the absence of a clear border line between PBOs and non-PBO CSOs is one of the gaps of the Proclamation, which needs serious attention. PBOs should be set out distinctively and be given much more emphasis (from regulation to state advantages) than other forms. It is not unjustified to treat the two forms differently, as their nature warrants differential treatment and this is also what the practices elsewhere testify.

The other weak side of the Proclamation is that though it is supposed to uphold the relevant workable prescriptions of the previous CSO laws, it still has some limitations. Even, in some cases, it makes things more worrisome than before. For instance, it totally discards important prescriptions such as; the list of charitable purposes, tests of public benefit and the special treatment given to the service delivery and development based CSOs. In the latter case, it is good to remind that the society needs not only those who inform it what its abstract rights are but also those that fulfil the rights as a matter of fact or create an enabling environment for their realization.

Hence, the author believes that the concerns discussed in the paper should not be ignored. At least, the coming regulation (which is currently at draft level which is inadequate to address most of the concerns) or directives should be crafted in a way that they will be able tackle the gaps of the Proclamation. There are ample international experiences where the concerned organs can draw lessons from. Nothing is wrong also to bring back good lessons from the repealed CSO legislations after making the necessary modifications.

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