Spaces for Change [S4C]

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MEMORANDUM SUBMITTED TO THE HOUSE OF REPRESENTATIVES' COMMITTEE ON CIVIL SOCIETY ORGANIZATIONS AND DEVELOPMENT PARTNERS

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Established in May 2011, SPACES FOR CHANGE works to increase the participation of women, youth and communities in the development of social and economic policy, and also help public authorities and corporate entities put human rights at the heart of their decision-making. Famed for leveraging digital technology and crowdsourcing tools to conduct researches and execute high-profile policy campaigns, S4C continues to create spaces for inclusion, debate and reflection, and in the process, facilitates public participation in the promotion, evaluation and setting of strategic policy directions on specific social and economic priorities.

SPACES FOR CHANGE is legally registered as a non-profit with the Nigerian Corporate Affairs Commission. The registered name is Spaces for Youth Development and Social Change. Registration number: CAC/IT/NO 51043

Introduction:

In June 2016, Honorable Umar Jubril Ibrahim, representing Lokoja/Kogi Federal Constituency of Kogi State in Nigeria's House of Representatives, sponsored a bill to supervise, coordinate and monitor nongovernmental organizations (NGOs) and civil society organizations (CSOs) in Nigeria. Among other objectives, the bill, popularly known as the NGO Bill, seeks to "to regulate CSOs on matters relating to their funding, foreign affiliation and national security, and … to check any likelihood of CSOs being illegally sponsored against the interest of Nigeria." The Bill has since passed second reading from where it was referred to the House Committee on Civil Society Organizations and Development Partners in August 2017. In consideration of the NGO Bill, the House Committee has now called for a public hearing scheduled to hold on December 13 &14, 2017.

Beginning from November 2016, SPACES FOR CHANGE conducted an indepth analysis of the NGO Bill, examining its implications for international development, civil society and charitable operations in Nigeria. The memorandum draws substantially from the organization's rigorous research, monitoring and extensive advocacy around the legal restrictions to civic spaces in Nigeria. By submitting this memorandum to the House of Representatives' Committee on Civil Society and Development Partners, SPACES FOR CHANGE indicates its intention to participate in the public hearing and to publicly present its position on the bill under consideration.

This memorandum outlines FIVE (5) key issues that are strongly recommended for review and reconsideration by the distinguished lawmakers. They are as follows:

1. The NGO Bill is inconsistent with the 1999 Nigerian Constitution and other national laws
2. The NGO Bill reproduces new rules and regulations already covered by existing legislations
3. The NGO Bill inverses government's efforts to improve ease of doing business in Nigeria
4. The Bill tilts towards over-regulation of the non-profit sector
5. The NGO Bill holds enormous potential to undermine the independence of non-governmental bodies
6. S4C recommends the National Assembly to strengthen the investigative, prosecutorial and adjudicative capacities of existing regulatory bodies that exercise oversight over corporate entities

The NGO Bill is inconsistent with the 1999 Nigerian Constitution, national laws

First off, the NGO Bill seeks to proposes to create an NGO Regulatory Commission that would undertake a number of statutory functions such as overseeing the finances and operations of non-profits, licensing NGOs, and deciding which NGOs to license(register) and which not to. Sections 11 - 13 of the NGO Bill prescribes that every NGO operating in Nigeria shall be registered with the proposed NGO Regulatory Commission.

On the issue of compulsory registration for NGOs, Sections 39 and 40 of the 1999 Nigerian Constitution guarantee the assembly and association rights of all Nigerians. The two sections safeguard the rights of persons to form themselves into a group, to hold, express and propagate any views, for whatever lawful purposes as they may decide. Because these rights are not predicated on any legal registration status, organizations, including NGOs and CSOs, are under no obligation to be registered in order to assert or enforce them. The effect of legal registration is only to confer legal personality, extending certain privileges and status which it would otherwise not enjoy should it remain unincorporated. In a series of cases, the Supreme Court has found that an unincorporated organisation can lawfully exist under the laws of Nigeria although it would not be recognized as a legal entity, capable of suing or being sued in its own rights but may only act through its appointed representatives. See the case of Fawehinmi v. N.B.A (No. 2). [S.C. 229/1986]

Furthermore, the Bill seeks to introduce multiple registration for NGOs. The range of organizations compulsorily required to register with the proposed regulatory body are already corporate entities legally incorporated and registered by the Corporate Affairs Commission (CAC) and the National Planning Commission (NPC) as the case may be.

Sections 14 – 17 of the Bill stipulate that a certificate of registration issued by the new regulatory body is to last for a period of two years. Failure to renew every two years shall attract termination and deletion from the register. This multiple registration requirement is not only onerous, but also defeats the well-settled principle of legal personality. Under Nigerian law, legal registration presupposes that an organization once registered, assumes in perpetuity, the status of a body corporate with perpetual succession and a common seal. It is instructive to note that corporate entities that operate for profit do not have a validity period to be registered as legal entities. Targeting only NGOs for multiple registration is symptomatic of a wider crackdown on civil society. This should not be encouraged.

2. **The NGO Bill reproduces new rules and regulations already covered by existing law**

The stipulated functions of the proposed NGO regulatory body includes facilitating and coordinating the work of all national and international NGOs, maintaining a register of NGOs, receiving annual reports of NGOs, and advising the government on the activities of NGOs. The Companies and Allied Matters Act (CAMA) of 1990 has already covered the field on matters relating to the regulation of corporate entities. That is, CAMA has already made robust provisions covering most of the issues replicated in the NGO Bill. Regulatory functions of the CAC includes the supervision of company formation, incorporation, legal registration, management, and winding up of companies; establishing and maintaining a company's registry and offices in all the States of the Federation; arranging or conducting investigations into the affairs of companies where the interests of the shareholders and the public so demand, and so forth. The NGO Bill replicates these roles and reassigns them to the proposed NGO regulatory body.

Part C of CAMA specifically regulates the registration of incorporated trustees, which is the form under which most NGOs are registered. The October 2016 three-in-one National Code of Corporate Governance issued by Financial Reporting Council of Nigeria ("FRCN") also seeks to regulate public and private companies as well as non-profit organizations and NGOs. The National Planning Commission registers organizations that rely on donor funds especially international non-governmental organisations. As seen above, different institutions are already statutorily mandated to register and regulate the activities of for-profit and non-profit entities in Nigeria. Reassigning these functions to a new regulatory body without repealing subsisting legislations that have already covered the field will breed confusion and unleash a maze of conflicting legal frameworks. Creating a new regulatory body charged with the responsibility of an additional layer of registration and regulatory functions is not only awash in red tape, but will also bring about overlapping roles and duplicity between different agencies, piling up regulatory burdens on NGOs. Jettisoning the idea of a new regulatory body for NGOs is strongly recommended. This will enable NGOs spend less time complying with bureaucracy, and more time increasing productivity.

3. The NGO Bill inverses government's efforts to improve ease of doing business in Nigeria

Nigeria now ranks 145th position out of 190 countries in the Ease of Doing Business index for 2018, according to the World Bank. As grim as this result looks, reports show that Nigeria, alongside some other countries, were listed among the top 10 improved countries worldwide, after carrying out numerous reforms to improve their business environments. An additional legislation targeted at NGOs and CSOs will not only constrain the civic space, but also stifle the enabling environment for doing business in Nigeria, rolling back the improvement recorded in the last year.

NGOs, particularly service delivery and humanitarian groups, are filling gaps where governmental presence is lacking, reaching out to harder-to-reach groups and populations with goods, services and empowerment. Overburdening NGOs with regulatory responsibilities will increase the operational cost of filling these gaps. For instance, ccertificate renewal is required every two years, with enormous official discretion to refuse to renew. This type of discretion is prone to abuse and clearly impedes the ease of doing business in Nigeria. It may further lead to the targeting of certain groups.

Section 25 and 26 of the NGO Bill imposes burdensome requirements on NGOs, especially with regards to project formulation, implementation, funding and monitoring. The requirement to secure the approval of the Minister of Interior before implementing projects will lead to serious delays in getting projects up and running. Relevant contractual agreements between NGOs and their donors usually contain adequate clauses for project take-off, execution and monitoring. Those agreements usually stipulate even stiffer due-diligence and internal control mechanisms for project implementation, monitoring and evaluation according to scope, size and budget. Every additional minute NGOs spend pandering to these repetitious restrictions is a worthwhile time of service deprived of vulnerable groups that typically benefit from NGO interventions.

4. The Bill tilts towards an over-regulation of the non-profit sector

The Bill is replete with vague phrases framed around the objective of 'national security and national interest.' What constitutes national security threats against the interest of Nigeria was not defined just as the criteria for making such determinations were not stipulated. Vague and overly-broad representations in rule books often leave ample opportunities for state misuse of power. From that

vagueness springs legal uncertainty and discretionary power so wide, and often exercised without accountability.

Substantiated media reports suggest that the NGO Bill forms part of a broader objective to ensure that NGOs are not used as conduit pipes for financing terrorism. Nigeria already has in force, a plethora of laws and agencies that monitor the flow of money in and out of Nigeria and to corporate entities. These laws include the Economic and Financial Crimes Act (EFCC Act), Terrorism Prevention Act (TPA), Money Laundering Prevention Act (MLPA), National Financial Intelligence Agency Act 2017 and so forth. Part of the mandate of the Special Control Unit against Money Laundering, SCUML, under the Ministry of Industry, Trade and Investment, is to "monitor, supervise and regulate the activities of Designated Non-Financial Institutions (DNFIs) in Nigeria in consonance with the country's Anti-Money Laundering and Combatting of the Financing of Terrorism regime. NGOs and CSOs are categorised as DNFIs. The SCUML and the NFIU take the lead for the monitoring the source of funding for DFNIs, including NGOs.

Each of these agencies subject corporate entities, including NGOs, to varying levels of financial and operational scrutiny. For instance, NGOs are required to report suspicious transactions to the NFIU, and to maintain all necessary records of transactions, both domestic and international, for at least five years following completion of the transaction (or longer if requested by the NFIU in specific cases. The CAC also receives annual returns and financial statements from NGOs.

The NGO Bill did not only reproduce these reporting obligation, but went further to reassign the statutory roles of the EFCC, NFIU, SCUML, TPA etc to the new NGO Regulatory Commission. While replicating these regulatory functions, it neither repealed the laws establishing existing regulatory agencies nor abrogated them, creating confusion on where final NGO oversight and responsibility lies. Apart from that, the proposed reassignment is tantamount to passing a vote of no-confidence of existing regulatory agencies. These reassignments subject NGOs to additional restrictions, filings and reporting requirements. This move ostensibly tilts towards an over-regulation of the sector.

The pile of regulatory burdens that the NGO Bill is about to introduce will leave organizations with less time and money for their actual charitable and advocacy activities. The bigger organizations, especially international organizations, with fatter bottom-lines and connections, will definitely find it easier to scale through these hurdles. The hammer of [over]regulation will fall disproportionally on smaller (Nigerian-owned) NGOs and indigenous organizations playing important roles as watchdogs of the State and as defenders of human and civil rights.

5. **The NGO Bill holds enormous potential to undermine the independence of non-governmental bodies**

One of the risks inherent in the move for the targeted regulation of NGOs includes jeopardizing their independence. The governing body of the proposed NGO regulatory commission will be composed mainly of government officials drawn from different government ministries. That sort of composition only serves to enhance governmental ability to interfere in the operation of NGOs. For organizations that engage in human rights advocacy, government accountability, and the promotion of democracy, interference in their operations portends grave risks to both their work and on the lives of their personnel. NGO bill further requires an official of the NGO regulatory commission to supervise the activities and procedures of the National Council of Voluntary Agencies (NCVA).That again, puts a

question mark on the independence of NCVA as the Bill clearly seeks to enlarge governmental powers to interfere with all aspects of NGO activities.

Previous experiences, especially during the military era, reinforce widely-held assumptions that legislation enacted for the regulation of NGOs in Nigeria could be hijacked and used to legitimize the tightening environment for civil society action, including the restrictions on basic freedoms of expression and assembly, persecution of political dissent, and increased surveillance of citizens. For these reasons, the bill should not be considered for adoption.

Conclusion:

- Strengthen democratic institutions, particularly the investigative, prosecutorial and adjudicative capacities of existing regulatory bodies that exercise oversight over corporate entities.
- Instances of overlap and fragmentation of regulatory functions are commonplace in Nigeria. The NGO Bill should not create more, but rather, improve coordination of related agency responsibilities, especially agencies applicable to NGOs (CAC, NPC, SCUML, FIRS, EFCC)
- Empower NGOs to develop self-regulatory codes of conduct to guide their operations and corporate governance. For instance, the National Council of Voluntary Agencies (NCVA) may be an alternative self-regulating body for NGOs and not the NGO Regulatory Commission.

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