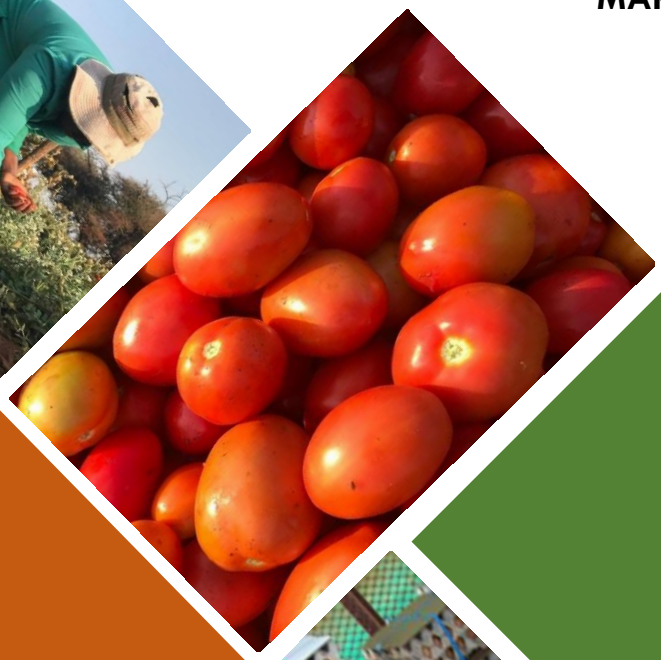
RESEARCH REPORT

REGULATORY FRAMEWORKS REQUIREMENTS FOR THE SOUTH AFRICAN CIVIL SOCIETY SECTOR TO PROMOTE THEIR ACTIVE PARTICIPATION IN A DEVELOPMENTAL STATE

MARCH 2021



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National Development Agency

social development
Department:
Social Development
REPUBLIC OF SOUTH AFRICA

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SOUTH AFRICAN SOCIAL SECURITY AGENCY

COMPREHENSIVE REPORT

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for the

Human Sciences Research Council

and the

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REGULATORY FRAMEWORKS FOR CIVIL SOCIETY IN SOUTH AFRICA

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National
Development
Agency

NDA
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ACRONYMS AND ABBREVIATIONS

CAOs	Community Advice Offices
CBOs	Community-Based Organisations
CSOs	Civil Society Organisations
EU	European Union
FHR	Foundation for Human Rights
GTZ	German Technical Cooperation
HSRC	Human Sciences Research Council
NDA	National Development Agency
NGOs	Non-Government Organisations
NPOs	Non-Profit Organisations
PDCs	Policy Documents on Cooperation
PBOs	Public Benefit Organisations
SDGs	Sustainable Development Goals
ToRs	Terms of Reference

EXECUTIVE SUMMARY

The ToRs for this study acknowledge that a capable, ethical, and developmental state cannot be achieved without an active civil society sector representing those who, for various reasons, are unable to ensure that their voices are heard in the South African democratic state.

The ToRs also acknowledge that civil society has had a profound influence on the emergence, shape and nature of South Africa's democratic society. For this reason, the sector 'is viewed by the public as the third democratic pillar of governance', the other two being the state (or, perhaps, government) and the private sector.

This research report aims to assist the National Development Agency (NDA), the sector and government with proposals for developing regulatory frameworks that can promote the active participation and independence of the sector in a range of development initiatives. This report and the related policy discussion paper are intended to enable debate and engagements between the state, and leaders, structures and members from the civil society sector.

The NDA, HSRC and FHR agreed to a qualitative methodology that included a desktop analysis involving a literature review of the current legislative, policy and regulatory environment and its impact on the functioning of the civil society sector in South Africa and a comparative analysis of other selected countries. This analysis informed a limited number of key informant interviews with representatives from government and the civil society sector. The methodological design of this phase of the study has its limitations, but further stakeholder engagements based on this paper may indicate the need to gather additional primary data.

The research found that there are a number of deficiencies in the current design of regulatory frameworks for the civil society sector:

- The regulations do not place appropriate responsibilities and accountability in the hands of the sector itself, instead assuming that the state must play an administrative justice role for the sector, while the sector's only role is to comply.
- The regulations apply a 'one size fit all' model that does not take into account the diversity of organisations operating in this sector. The design of the current regulatory framework fails to acknowledge the diversity among CSOs and results in burdensome overlaps, especially for smaller CSOs and CBOs.

The regulations have also been poorly implemented. Some of the reasons for this are closely related to misconceptions about the nature and role of civil society, and the role that 'regulation of CSOs' plays. In particular, government tends to conflate its regulatory role (which should be applicable to all CSOs) with its developmental and democratic role, creating the misconception of civil society as being a single, coherent and organised sector with one

overarching, organising vision. The NPO Directorate's ambitious mandate as the primary regulatory body has not been matched by the necessary resources to effectively implement its mandate, resulting in weak implementation of its mandate and declining levels of compliance by CSOs with reporting requirements.

Our key recommendations include:

1. The NPO Act should be amended as it does not adequately serve the purpose for which it was designed.
2. The amended NPO Act should:
    a. Limit its application to non-profit entities that provide an external public benefit;
    b. Continue to confer formal legal status on organisations that choose to register (e.g. community-based organisations); and
    c. Automatically register all participating organisations whose turnover falls below a certain threshold (say, R250,000) with SARS as public benefit organisations (PBOs)
3. The entity responsible for the implementation of the revised NPO Act should:
    a. Establish an online facility for the easy collection and dissemination of data on those organisations that choose to register; and
    b. Ensure that the information submitted is easily accessible online for public inspection.
4. The users of the database (other CSOs, donors, or government entities) should be able to use this information as inputs into their decisions about whether or not to support individual CSOs. In particular, the regulatory entity should not take responsibility for the accuracy or completeness of the data submitted.
5. CSOs providing services on behalf of or with government entities should continue to be regulated in terms of the requirements of the relevant professional field, such as healthcare, social services, education, and so on.
6. The regulatory authority should publish annual updates on the state of the database, including the number and type of CSOs registered, and those that have up-to-date information.
7. The question of whether to establish an independent entity with regulatory functions and a complaint mechanism should be investigated further, but this issue should be separated from the management of the registration process outlined above.
8. A separate framework to regulate organisations that solicit funds from the general public (and/or that receive funds above some threshold amount) should be put in place in order to ensure that such organisations are able to publicly account for any funds they receive.

1. INTRODUCTION AND BACKGROUND

The National Development Agency (NDA) is a Schedule 3A public entity in terms of the Public Finance Management Act of 1999 (PFMA). The Agency was established in terms of the National Development Agency Act of 1998, as amended. The NDA Act requires the NDA in s.3(2)(b) to 'Undertake research and publications aimed at providing the basis for development policy'. In terms of s.3(2)(a) of the Act, research undertaken by the Agency is for purposes of promoting debate on development policy, and promoting consultation, dialogue and sharing of development experience between civil society organisations (CSOs) and relevant organs of state on development policy.

One of the seven priorities of the Sixth Administration announced by President Ramaphosa in his State of the Nation Address on 20 June 2019, is to focus on 'A capable, ethical and developmental state'. A capable, ethical and developmental state cannot be achieved without an active and fully participating civil society sector, which represents those who, for various reasons, are unable to ensure that their voices are heard in a democratic state, such as South Africa (NDA, 2019).

The purpose of the commissioned research is to produce a report that can assist the civil society sector and government in proposing and developing regulatory frameworks (legislation, policies, regulations and procedures) that can promote active participation and independence of the civil society sector in all development discourse endeavours as a partner of a democratic state (NDA, 2019).

1.1. Terms of reference for the study

The NDA Terms of Reference (ToRs) for the present study acknowledge that civil society has had a profound influence on the emergence, shape and nature of our modern South African democratic society. The South African government enacted the Non-Profit Organisations Act 71 of 1997 (NPO Act) as part of the legal framework to create an enabling environment for the sector. The ToRs indicate, however, that the NPO Act has limitations that assume the state must play an administrative justice role for the sector, while the sector's only role is to comply. The ToRs record that NPOs are constituted in a variety of forms, viz. as voluntary associations that are established in terms of common law, as non-profit trusts established in terms of Trust Property Control Act of 1988, and non-profit companies incorporated in terms of the Companies Act of 2008 (previously Section 21 companies in terms of the Companies Act of 1973, as amended) (NDA, 2019: 3).

The ToRs suggest, however, that current legislative frameworks regulating the sector do not place appropriate responsibilities and accountability in the hands of the sector itself. Indeed, the ToRs recognise that the civil society sector, on one hand, has at times expressed frustration at being seen merely as service providers to the state and private sector. The ToRs also recognise that, on the other hand, some in the sector view the current regulatory frameworks as being discriminatory in effect, by not allowing civil society entities to enjoy an equivalent (i.e. equitable) status if they fail to register or they have no interest in registration as an non-profit organisation (NPO) or any of the other entities envisaged in these legislative frameworks. Current legislative frameworks authorise government to unilaterally develop regulations and apply those regulations without necessarily taking due account of the range of needs within the civil society sector on matters that affect organisations operating in the sector (NDA, 2019: 3-4).

The ToRs express the view that the South African context and environment for the civil society sector requires a legislative framework that does not only establish operations of these organisations through a registration process in terms of "one size fit all" legislation. Given the diversity of organisations operating in this sector, a regulatory framework that recognises this diversity is required. The legislative framework should recognise any organisation that does work for the 'public good' and there must be regulations that regulate their operations. The ToRs recognise a danger of over-regulation of the sector by the state, and acknowledge that there are examples elsewhere in the world where governments regulate the sector 'for purposes of suppressing organisations in the sector, for political, social or economic' reasons (NDA, 2019: 4).

In South Africa, however, the ToRs argue, the civil society sector 'is viewed by the public as the third democratic pillar of governance', the other two being the state [or, perhaps, government] and the private sector. Indeed, the ToRs go further to assert that the population widely sees civil society as the "voice of reason" on behalf of the population in citizens' experiences and engagements with the state and the private sector. 'In many instances, civil society [is] seen as the people['s] representatives to deal with policy, justice, social and development issues that affect the public. It is for this reason, the ToRs submit, 'that … the sector must be appropriately regulated taking into account the environment and context [in which] they are operating' (NDA, 2019: 4).

1.2. Research objectives

The purpose of the desktop research is to review and analyse the current legislative, policy and regulatory environment and its impact on the functioning of civil society in South Africa. The NDA envisages that the output of this study will ignite debate and engagements between the state (i.e. the legislature, the executive branch and its administration), and leaders, structures and general membership from the civil society sector. These engagements will focus on (a) how the sector can operate to meet its objectives in a supportive environment; (b) develop strategies and programmes to enhance or improve regulatory frameworks; and (c) the formulation of appropriate legislative, policy and regulatory frameworks for the sector. The NDA intends that the primary outcome of these engagements over the research report is the creation of a supportive environment for the sector to thrive as the 'third pillar of … democratic governance' (NDA, 2019: 4).

The aim of the research is therefore to improve understanding of the current regulatory frameworks for civil society in South Africa, and consider other countries' regulatory mechanisms that could be adapted and used to improve or enhance legislation, policies, regulations and procedures to promote and enhance the effective functioning of South Africa's civil society sector. The specific objectives are:

- describe the state of regulatory frameworks of the civil society sector in South Africa and contributory factors.
- produce analysis on the South African and global context on functional regulatory frameworks (legislation, policies, procedures) that promote a well-functioning civil society sector 'to support democracy and development'.
- provide clear proposals on regulatory frameworks that can be useful for promoting the operating environment of the civil society sector in South Africa.
- benchmark with other countries, especially developing countries, on how they have collaborated with CSOs in advancing 'their development agenda'.
- propose and recommend policy debate issues, policy proposals and discussions that can improve the South African regulatory framework for the civil society sector.

1.3. Key research questions

The broader questions the desktop research needs to answer include, but are not limited to:

- Does the civil society sector in South Africa need reforms in the legislative, policy and regulatory frameworks to improve its work?

- Can the state enact legislative, policy and regulatory frameworks for the sector without being perceived as interfering with its independence and the South African Constitution?
- Can legislative, policy and regulatory mechanisms improve the environment in which the sector operates, and thereby deliver enhanced benefits for both the state and the citizenry?
- What mechanisms, policies and legislation should be put in place to 'seamlessly regulate the sector', take into consideration the different development [objectives and roles] and the [legal] status of organisations in the sector?
- What are the challenges experienced by the sector with the current regulatory systems and processes that have resulted in the sector becoming 'dysfunctional' [in many ways] and [many organisations becoming] non-compliant with current regulations and legislation?
- What reforms [should] be undertaken by the sector and the state to address regulations and legislation of the sector?
- How does the sector see itself being regulated to ensure compliance, accountability and [either] delivering a better quality of services [or more effectively undertaking its other activities]? (NDA, 2019: 4-5)

1.4. Research methodology

At the start of the project, a detailed work plan was developed, and the nature and extent of activities was agreed upon with the NDA. This information was contained in the Inception Report. The HSRC and the FHR proposed a qualitative methodology that included primarily a desktop analysis. The desktop analysis involved a literature review on regulatory frameworks for the civil society sector in South Africa and in other selected countries to inform the agreed fieldwork interviews.

1.5. Research design

1.5.1. Approach

As indicated above, the study employed a qualitative approach, with a desktop literature review informing qualitative fieldwork and subsequent empirical analysis. Interviews with key informants from government and the civil society sector were undertaken using online electronic communication platforms.

1.5.2. Data collection methods

Primary data

Key informants (KIs) from South Africa were interviewed to inform empirical analysis of the national regulatory frameworks applicable to the range of stakeholders and entities in the civil society sector. KIs were drawn from both government and civil society. As this study was based primarily on desktop research, six stakeholders were identified to participate in key informant interviews (KIIs), as indicated in the table below.

Table 1: Key informants interviewed

Stakeholder type	**No.**
Senior ex-government official	1
Current mid-level government manager	1
Director of grantmaking organisation	1
Retired executive director of organisation providing research and advice to grant-makers and grantees	1
Attorney specialising in civil society law	1
Executive director of well-established CSO focusing on academic and applied research, and advocacy	1
Total	**6**

Secondary data

The desktop study was conducted using relevant scholarly literature, information from official websites and grey literature drawn from online platforms, as well as several research papers recently commissioned by the FHR.

In addition to the guidance contained in the ToRs, the literature review helped to contextualise the study and refine the team's understanding of the existing regulatory frameworks for civil society in South Africa, and in selected other developing and developed countries. The literature review and analysis thus provided a better understanding of the landscape and the main institutions, developments and debates. It also enabled a comparative analysis, which highlighted available regulatory forms and options, and their comparative advantages and disadvantages.

The literature review also provided a more detailed foundation for the development of the interview instrument.

1.6. Instrument design

Drawing on the comparative literature review, the design of the research instrument focused on questions about experiences of regulatory authorities and CSOs with the existing regulatory frameworks, including their strengths and weaknesses, their efficacy, and possible improvements or alternatives. The instrument also probed KIs' views on the relationship between the state, government and civil society, and whether the stated objectives of existing regulatory frameworks were, in practice, enabling of diverse civil society roles.

1.7. Ethical considerations

The HSRC subscribes to a strict internal Code of Ethics. The research team submitted the study design and research tools (interview instrument, and information and consent forms) for approval to the HSRC's Research Ethics Committee (REC). The interview instrument attached as an annexure was designed by the joint HSRC-FHR research team and was fielded only after approval by the REC. At all times, we have respected the undertaking of confidentiality given in the consent forms.

All participants approached agreed to participate in the study and signed the consent form. Participants were assured of anonymity and confidentiality at all times, and were informed of their right to withdraw from the study at any time.

1.8. Study limitations

The first phase of the study was limited largely to desktop analysis of literature from various sources. By agreement with the NDA, a small number of stakeholders was interviewed during the first phase in order to gather primary data to supplement the secondary data from the desktop comparative literature review. In the next phase, to be determined by the NDA, the study may give greater attention to more extensive primary data gathering and empirical analysis.

2. HISTORY OF CIVIL SOCIETY REGULATION IN SOUTH AFRICA

As demonstrated by a number of research studies analysing the civil society environment in South Africa,[1] civil society has played a key role over the last two decades, especially in shaping policy and legislative reform following the transition to democracy in 1994 and in delivering social welfare services to disadvantaged and marginalised individuals and communities. Like the South African state, civil society has undergone a transition from the apartheid period, where it was mainly divided into organisations that supported or opposed the apartheid regime, to democracy, where civil society has become the cornerstone of a new dispensation. The transition meant that civil society organisations broadly defined (CSOs) had to adapt to a new regulatory framework based on constitutional and fundamental rights, but also to compete for space in the new democratic environment by re-arranging their agendas. Other organisations that had previously operated on a racial basis had to transform themselves along non-racial lines (Camay and Gordon, 2004: 13).

Before the NPO Act was adopted in 1997, the policy and legal regime in South Africa had sought to restrict, in particular, the political and advocacy work of CSOs. These CSOs were either actively engaged in the struggle against the apartheid state as part of what was termed the Mass Democratic Movement, or were delivering services to vulnerable communities as a result of both state and market failure and neglect (Dangor, 2017). At the same time, the CSOs that were delivering services to vulnerable groups during apartheid operated along racial lines. The preferential treatment of certain CSOs over others was possible because of the Fundraising Act (107 of 1978) and the Affected Organisations Act (31 of 1974).

Following the transition to democracy, these two apartheid-era Acts were repealed, and CSOs were recognised as critical role-players within the new democratic state. This was unsurprising given the close relationship between the new political power (the African National Congress – ANC) and civil society. The ANC, which has been in power since 1994, 'had roots (if only symbolically) in community organisations that mobilised around grassroots issues. Indeed, what was characteristic about organisations that broadly worked under the banner of the United Democratic Front (UDF) [and other organisations engaged in the struggle] was that they linked struggles for affordable services (water, electricity, sanitation, housing) to larger national, political campaigns ' (PARI, 2016: 8).

1 See studies on CSOs in South Africa commissioned by the FHR: Camay (2016a); Camay (2016b); Camay (2016c); Dangor (2017); Dugmore (2017); and Dugmore (2018).

The reform of the regulatory framework for CSOs, which dates back to 1992, was seen as one of the key aspects of the transition. This reform was spearheaded by an NGO – the Development Resources Centre. As observed by Zane Dangor, 'The law reform project was entitled 'Creating an enabling environment for NGOs' and was geared to providing [support for] the [assumed] incoming African National Congress (ANC) leadership after the first democratic elections' (Dangor, 2017: 6). To initiate the law reform project, the Development Resources Centre commissioned four reports which constituted an independent study into the enabling environment for CSOs. These reports 'studied the South African policy and legal treatment of NGOs under apartheid and made proposals around policy changes for Post-Apartheid Governance' by dealing with issues of legal incorporation and accountability of CSOs, fundamental rights and freedoms, tax reform and the fundraising environments for CSOs in a post-apartheid dispensation (Dangor, 2017: 6). As further observed by Dangor, the findings of these reports were collated into a document in 1993 entitled 'Enabling environment for NGOs: Summary of issues and recommendations: Discussion paper' (Development Resources Centre, 1993). This document formed the basis for sector wide and provincial consultations with CSOs, which in turn led to the establishment of national and provincial steering groups, which were mandated to discuss the relevant regulatory issues further. Around the same time, the first umbrella organisation for CSOs was formed in South Africa when the South Africa NGO Coalition (SANGOCO) was created to co-ordinate non-government organisations' input into government policy (Pieterse, 1997).

Richard Rosenthal and Mary Honey were commissioned by the Development Resources Center to develop the first draft of the NPO law, in which they recommended a regulatory system based on the Charities Commission of the UK (Dangor, 2017: 36). Their proposal was that, given the size and scope of the civil society sector in South Africa, an independent commission be established comprising commissioners nominated by the public and appointed by Parliament. They suggested an annual income-based threshold of R50,000[2] as an indicator of whether the CSO should register with the independent commission. This was to ensure that smaller community-based organisations (CBOs) be exempted from any form of registration and related reporting requirements. As observed by Dangor, this draft was mired in public controversy for a number of reasons: an income-based threshold for registration; an obligatory registration for organisations that raised and spent above a certain quantum; appointment of commissioners (the South African Institute of Race Relations and later the Helen Suzman Foundation argued that South Africa's Parliament would not be impartial and would appoint

2 In some of the discussions an exemption threshold of R1 million was also proposed (see Dangor, 2017).

commissioners along ANC political lines); and the inappropriateness of a UK-style Charities Commission (which regulates charities in the UK) for an immature South African democracy and judicial system.

As a result of this criticism, the Development Resources Centre and the Independent Study withdrew this draft and continued working with a different team of lawyers on another draft after further consultations within civil society. As further reported by Dangor, this alternative draft recommended that the requirement for registration be made voluntary, and that the voluntary nature be made attractive to NPOs through an offer of tax-exempt status under Section 10(1)(f) of the Income Tax Act to all registering organisations. After discussions with tax authorities, however, it was decided that the second tier of tax benefits available to NPOs, that is, the public benefit organisation status (Section 18A status – tax-deductible donations) be the exclusive responsibility of the South African Revenue Service (SARS). The second and subsequent drafts of the NPO Act suggested that, in order for organisations to qualify for Section 18A status, they needed to register for public accountability purposes under the proposed NPO Act. This recommendation had the effect of making registration with the NPO Directorate compulsory for organisations seeking significant tax benefits from the fiscus (Dangor, 2017: 38).

The initial suggestion was for the Department of Finance to have oversight over the NPO institutional framework. This did not materialise, however, and the Department of Welfare and Population Development (as the Department of Social Development (DSD) was then known), was given the responsibility for drafting the NPO regulation – a proposal agreed to at the NPO Summit of 1996. The DSD used the work undertaken by the Development Resources Centre to revise the NPO Bill, which culminated in the NPO Act of 1997, which remains in force to this day. The adopted NPO Act omitted all the elements which sought to grant automatic basic tax exemption (Section 10(1)(f) of the Income Tax Act) for organisations registering as NPOs, and also delinked application for Section 18A status with SARS from the requirement of initial registration with the DSD under the NPO Act of 1997 (Dangor, 2017: 38).

Arising from these processes, the Nonprofit Organisations Act was promulgated in South Africa on 3 December 1997, and the first NPO in the country was registered on 1 September 1998 (DSD).

The centrality of civil society to the democratisation project was recognised in 1994 in the Reconstruction and Development Programme (RDP), which aimed to ‘foster a new and constructive relationship between the people, their organisations in civil society, key

constituencies such as the trade unions and organised business, the democratic government, and the workings of the market' (RDP, 1994: par.4.2.6). The RDP recognised the important role civil society played in the struggle against apartheid and in the democratisation of the country, called for an enabling environment and enhanced capacity for CSOs, and emphasised the importance of community development and participatory democracy (RDP, 1994: paras.5.2.7; 5.2.8).

In 1996, the RDP was dropped in favour of the economic policy known as the Growth, Employment and Redistribution Plan (GEAR). Developed with no civil society participation, GEAR marked a shift in a social compact that regulated civil society and government relations. In particular, 'GEAR prioritised the for-profit sector in economic growth and service delivery and the non-profit sector in poverty alleviation*'* (CCSRM, 2012: 12)*.* This resulted in a situation where many CSOs were cut out of the policy development process and cut off from funding. Since the breakdown of the RDP programme, the state-civil society relationship has changed and has been increasingly understood in instrumental terms, in which the government began to treat civil society as a way to realise its mandate (PARI, 2016). This shift in understanding of the role of civil society has impacted on the way in which the subsequent policy documents conceptualised the contribution of civil society in the democratic dispensation. As a way to fill the void after the RDP programme ended, in 1996 an advisory committee was established to consider the functional relationship between government and CSOs, and in 1997 the committee presented a report to the Deputy President entitled *Structural Relationships between Government and Civil Society Organisations* (CCSRM, 2012: 75). Consequently, the government adopted the NDA Act in 1998, which resulted in the establishment of the NDA in 2001 with the primary objective of eradicating poverty through funding CSOs.[3]

In January 2005, DSD concluded a study on 'An Impact Assessment of the NPO Act No. 71 of 1997', which identified a number of challenges within the current regulatory framework on non-profit organisations and it made specific recommendations. The 2005 assessment found that 'the resources and implementation capacity for the NPO Act is severely lacking' (DSD, 2005). In addition, it noted the lack of clear definition of the benefits of NPO registration and that the regulatory environment for CSOs was somewhat inconsistent and fractured, especially in light of problems with a 'one size fits all' approach to NPOs inherent in the NPO Act (DSD, 2005).

3 Sec. 3(1), NDA Act.

In 2010, the DSD's NPO Directorate published a study developed by DSD together with Inyathelo – The South African Institute for Advancement, into national non-profit bodies and national networking organisations, with a particular emphasis on current governance practices being employed by these two kinds of NPOs (DSD, 2010: 14). The study recommended appropriate interventions and organisational structural arrangements that would best promote good governance practices in such organisations.

These assessments and recommendations were followed by a series of Ministerial Provincial Dialogues that were conducted across all provinces in June and July 2012, and that resulted in the National NPO Summit held in August 2012. The inputs from the assessments, the provincial consultations and the Summit were collated and presented in the form of the Policy Paper that 'set[s] out the framework and guidelines for the foundation on the drafting of a new nonprofit organisations' legal framework that will regulate the nonprofit sector in South Africa.' (DSD, 2012). The 2012 Policy Paper identified a number of challenges that affected the CSO regulatory environment in South Africa. In particular, it referred to the:

- 'One size fits all' approach as developed under the NPO Act;
- Often unregulated governance practices of NPOs;
- Inherent constraints on the NPO Directorate, in particular the limited capacity to discharge its functions effectively;
- Lack of enforcement mechanisms that would ensure compliance with the NPO Act.

In the light of these challenges, the 2012 Policy Paper made a number of proposals suggesting in-depth revisions of the NPO regulatory environment that included (DSD, 2012):

- A better balance is needed between the mandatory regulatory provisions and the self-regulation requirements, and self-regulation among organisations should be encouraged;
- Establishment of a new independent regulator – the South African Non-profit Organisations Regulatory Authority (SANPORA) that would be responsible for encouraging the formation of NPOs, and their accountability through an efficient and effective registration facility as well as strong enforcement mechanism (sanctions);
- Establishment of the South African Non-profit Organisations Tribunal (SANPOTRI), which would be independent from SANPORA. It would play a mediatory role between SANPORA and the NPOs.

The introduction in July 2012 by the Non-Profit Organisations (NPO) Directorate within the Department of Social Development (DSD) of a discussion document on the 'Policy Framework on Nonprofit Organisations Law: Proposed amendments to the Nonprofit Organisations Act, … 71 of 1997' has led to a breakdown of trust between civil society and government. The latter has been further exacerbated by the sudden and unannounced deregistration in January 2013 (Inyathelo, 2014) by the NPO Directorate of tens of thousands of CSOs. The Policy Framework was amended following some indeterminate public consultation (Inyathelo, 2014) and a revised version of the 'Draft NPO Policy Framework' was produced on 3 March 2014. The proposed changes to the NPO Act were perceived 'through the prism of these threats' (Dangor, 2017). It is unclear why the Policy Framework apparently wasn't taken any further, although one KI interviewed (KI-1) suggested that the new administration no longer regarded it as a priority after the general elections held in May 2014.

Dangor (2017: 3) identifies 'some uncertainty' since 2015 'about the South African government's commitment to the generally enabling policy and legal framework established soon after the dawn of democracy'. He explains (2017: 4) that there were threats to civil society and fundamental freedoms from interrelated sources, including a 'growing and misguided decision by certain politician[s] about the nature of democracy and the role that civil society plays within it'. One particular concern related to the view that 'in an increasingly globalised world and transnational advocacy, that some organisations are being funded to effect regime change.' The 'desire to control the so-called "regime change agenda NGOs"' combined with certain international commitments made by South Africa in terms of the Financial Action Task Force (FATF) perhaps served to inform changes to the NPO Act that would restrict organisations that receive 'foreign funding' or would designate them as 'foreign organisations'. The uncertainty about government's commitment to the enabling environment for civil society also arose when the government (through the Ministry of State Security) tabled in Parliament the Protection of Information Bill [B6-2010].[4] The 'POI Bill', also dubbed the 'Secrecy Bill', galvanised cooperation and coordination across a remarkably broad spectrum of civil society, the South African Human Rights Commission, the media and the private sector united in strong opposition to some the Bill's more draconian provisions and to the Bill's philosophical orientation of imposing a blanket of secrecy over swathes of previously available and ordinarily innocuous information that supposedly required 'protection' (Calland, 2010; Ad Hoc Committee on the Protection of Information Bill, 2010). The Ad Hoc Committee's public hearings were characterised by ruling party MPs' *ad hominem* attacks against many of those

4 An earlier version of the Bill had been tabled in Parliament in 2008. See Committee on Intelligence Legislation 25 June 2008 'Submissions on Protection of Information Bill'.

CSOs making submissions, several of which were accused of being foreign-funded agents and 'spies' (Hartley, 2012).

Gumede (2018) has written about civil society's vital contribution to countering this narrative. In 2018, in his maiden State of the Nation Address, President Cyril Ramaphosa announced that government would convene a social sector summit that would, amongst others, seek to improve the interface between the state and civil society and also to address challenges facing the sector. Following this announcement by the President, in 2019 the DSD, in collaboration with the National Planning Commission[5] and the Presidency, held a series of provincial dialogues that discussed key issues in the sector, including the regulatory framework, capacity building, resource mobilisation and transformation of the sector.[6] The provincial dialogues culminated in the Social Sector Summit Roundtable that was held with civil society at the Union Buildings in Pretoria, on 19-20 September 2019.[7]

3. CIVIL SOCIETY REGULATORY FRAMEWORKS

States have adopted very different approaches towards civil society, which have been reflected in their respective regulatory frameworks. Most often, it is the context and the nature of state formation as well as the form of governance in these countries that shape the kinds of laws regulating civil society. The regulatory framework generally refers to all sets of state or non-state legal rules, policies or guidelines adopted or developed that govern the establishment, activities and functioning of civil society. Some of these laws, policies or soft-law regulations are enabling, while others are controlling and restrictive of civil society. In instances where civil society is seen as a cornerstone of a democratic state, these regulatory frameworks tend to be 'enabling' and supportive of civil society. Fioramonti (CIVICUS, 2013: 3) defines civil society's enabling environment as 'a set of conditions that impact on the capacity of citizens (whether individually or in an organised fashion) to participate and engage in the civil society arena in a sustained and voluntary manner.'

On the other hand, as observed by Moyo (2010: 20), 'restrictive laws in their negative nature curtail the activities of civil society and in the extreme render citizens' action for the public

5 It is unclear why the NDA wasn't involved as a co-host.
6 Social Development hosts Presidential Social Sector Dialogue in Western Cape. Department of Social Development, 28 to 29 May, 24 May 2019. Available at: https://www.gov.za/speeches/social-development-hosts-presidential-social-sector-dialogue-western-cape-28-29-may-24-may (accessed 2 October 2020).
7 It is unclear what outcomes emerged from this Summit.

good a dangerous activity.' Apart from a sometimes open hostility towards civil society that in extreme circumstances can lead to killings, arbitrary detention, persecution or other forms of intimidation, states tend to use more subtle ways of limiting civic space. Moyo cites the following barriers that are often created by states to restrict the free functioning of civil society: a narrow definition of CSOs, NGOs or NPOs; cumbersome registration; state-centric boards responsible for registration or regulation of the sector; barriers to freedom of expression, association and assembly; or barriers to the right to fundraise (Moyo, 2010). In addition, the International Center for Non-profit Law (ICNL) cites the following aspects of regulatory frameworks that typically limit the freedom of civil society to act: barriers to establishment, barriers to speech, barriers to advocacy, and barriers to international cooperation (ICNL, 2012).

Regrettably, there are a growing number of states (for example, The Democratic Republic of the Congo [DRC], Libya, Egypt, Somalia, Cambodia, Honduras, Cuba, Turkmenistan, Hungary, and Ukraine) that limit civic space not only by arguing that CSOs must be accountable to the people they serve but also by relying on the flawed arguments of 'international interference' and 'threat to internal order'.[8] Accordingly, in 2020 the CIVICUS Monitor rated 43 countries (out of 196 countries analysed) as Open, 42 as Narrowed, 49 as Obstructed, 38 as Repressed, and 24 as Closed.[9] The CIVICUS Monitor also found that today (in 2020) only 3% of the world's population live in countries with Open civic space. This has decreased from 4% in 2019.

Ideally, civil society should operate under limited restrictions while the state ensures the protection of rights and interests of third parties (for example, donors and the general public), and should be based on a legitimacy paradigm. Regulation may refer to statutory regulation, which 'is concerned with a government-driven process resulting in either primary or secondary legislation giving effect to the regulatory goals' (Breen and Sidel, 2017: 2) and applies universally to all entities covered by the legislation. Regulation may also involve self-regulation, in which case 'the sector rather than the state takes up the role of developer and

8 Examples of countries with closed civic space are: the DRC, South Sudan, Sudan, Libya, Egypt, Eritrea, China, Turkmenistan, Saudi Arabia, and Vietnam); examples of countries with repressed civic space are Algeria, Cameroon, Angola, Zimbabwe, Russia, Columbia, Venezuela, Myanmar, and Thailand); examples of countries with obstructed civic space are: Mali, Nigeria, Zambia, Mozambique, Brazil, Peru, Bolivia, Hungary, Ukraine, and Kazakhstan); examples of countries with narrowed civic space are: South Africa, Botswana, Namibia, Poland, France, Argentina, Chile, and the United States [US]); examples of countries with open civic space are: Costa Rica, Uruguay, Germany, Switzerland, and Sweden.

9 On the methodology used by CIVICUS, see https://monitor.civicus.org/Ratings/ (accessed 30 August 2020).

enforcer of the regulatory regime' (Breen and Sidel, 2017: 2). Unlike statutory regulation, non-statutory regimes usually rely on voluntary adherence and lack enforcement powers. Also, a changing CSO environment has resulted in the emergence of a third type of regulation that lies somewhere between the two, often termed co-regulation. This form 'tends to be developed by or on behalf of the sector (like self-regulation) but with the active funding or participation of the state (like statutory regulation)' (Breen and Sidel, 2017: 2).

Although not located within a regulatory framework strictly speaking, the role of civil society as conceptualised by the state may affect the way in which civil society is regulated. In this regard, some states have adopted policy documents on cooperation (PDC) that typically engage CSOs or a particular sector within civil society, for example, CSOs working in the field of international cooperation (Bullain and Toftisova, 2004). Whereas PDCs reflect a recognition by the state of the important role played by civil society, they are not a pre-requisite for a well-functioning and thriving civil society. By way of example, no such cooperation document exists in the US, but CSOs have continued to function there in an enabling environment.

PDCs are strategic-level documents that guide the relationship between state and civil society, support collaboration on jointly and inclusively decided themes, and help to build mutual confidence and trust. Bullain and Toftisova (2004: 35) list two main objectives of PDCs. First, they aim to encourage greater public participation in political life; and second, they tend to establish the mechanisms for cooperation between the government and CSOs. In addition, in our view, a PDC may foster understanding of the role and functions of civil society in a given context, which can further inform the scope and nature of civil society's collaboration or interaction with the government. The PDC may also set out a clear roadmap for any subsequent regulations or policy decisions affecting civil society. In South Africa, no specific civil society-oriented policy document exists, and therefore the role of civil society under a democratic dispensation and civil society's relationship with the government have largely been guided by the Constitution and the National Development Plan: Vision 2030 (NDP).

Considering this, we propose a multi-dimensional statutory regulatory framework for civil society. First, a regulatory framework for civil society entails a strategic-level understanding of the roles and functions of civil society in a given political, economic and social context. In some countries, this strategic dimension is guided by PDCs. In South Africa, as indicated above, this dimension is interpreted in accordance with the Constitution and NDP.

Second, a regulatory framework for civil society is closely linked to constitutionally guaranteed rights to freedom of association, freedom of expression, freedom of assembly, and the right to

property that provides a 'relevant and useful normative framework within which major aspects of CSO law and administrative practice can be tested' (Van der Ploeg, Van Veen and Versteegh, 2017a). This dimension also includes the right of the public to participate in decision-making by the state. The detailed regulations dealing with these aspects are typically contained in legislation.

Third, the operation and functioning of civil society are subject to the general provisions of state law, including administrative law, labour law, civil law, contract law, company law, tax law, criminal law and trust law, among others. In this regard, CSOs must operate within the general legal framework of the country in question.

Fourth, states have recognised the special role and features of civil society and the unique circumstances in which civil society operates, and hence virtually all countries in the world have enacted laws governing civil society. This field of law is sometimes referred to as non-profit law. Non-profit law regulations are either scattered across the legal framework in the form of *lex specialis* applicable to civil society generally, and/or enacted in the form of special legislation directed at civil society specifically. These laws provide for detailed regulations that govern multiple aspects of civil society's operations and functions, including: modes of establishment (available legal forms); registration; organisation and internal governance; possible funding instruments; and tax benefits. The laws also regulate external accountability and possible enforcement mechanisms that ensure CSO compliance with the laws in question. Typically, states provide for a more stringent regulatory framework and compliance requirements for CSOs granted tax-exempt and / or public benefit status.

Although the design of a regulatory framework for civil society is key to the establishment of an enabling environment, its proper and effective implementation and operationalisation is equally if not more important. Even the best regulatory framework will have limited value if executed poorly or not operationalised at all.

4. THEORETICAL FRAMEWORK: CIVIL SOCIETY

Any discussion of regulatory frameworks for civil society begs the question: what *is* civil society? This section considers some key conceptualisations of civil society and some of its component parts, such as CSOs, in order to identify the most appropriate focus of this study.

Before we explore the research questions, it is necessary to be clear about the definition of key concepts and terminology that arise in the literature and the current legislation. Primary among these are the meaning/s of 'civil society' and associated terms, such as 'civil society organisation' (and related terms), 'non-profit organisation', and 'civil society regulatory frameworks'. These will be examined in the various sections of the report.

The main difficulty facing any attempt to clearly define civil society and its institutional forms, primarily and most broadly termed CSOs, is their multi-faceted diversity. These differences are exacerbated in South Africa as a result of the continuing legacies of apartheid, including in the form of socioeconomic and spatial inequalities. This diversity has several features, including size, capacity, location, degree of formalisation, objectives, roles and functions, degree of autonomy, relationship with the state or government, and sources of funding.

We will proceed as follows: In Section 4.1 we set out some general definitions of civil society; in Section 4.2 we will review the practical definitions of civil society as reflected in current South African legislation and policy; in section 4.3 we examine the definitions proposed in the 2012 review process; in Section 4.4 we present a general classification schema for civil society (based on the work of Camay and Gordon). We conclude this chapter by briefly discussing the strengths and weaknesses of the various definitions and proposing a consolidated definition.

4.1. General definition of civil society

The 'nebulous notion' of civil society in the literature on philosophy, sociology and political science has arisen 'because of its variety of definitions' (Bouare and Naidoo, 2009: 3).[10] These authors argue that '[s]ince the eighteenth century, civil society has been a counter power to the State, leading countries to explore various roads of governance. From the creation of the United States through to the French revolution (i.e. from the absolutism to the creation of a democratic republic) civil society fought for the limitation of executive power, for freedom, and for the protection of individuals' rights, animals' rights and the environment'. Related to this was the evolving architecture of government including the separation of powers between the Executive, Legislative and Judiciary, each of which acts as a check on the other in a 'Republic' or democracy.

10 See, for example, Locke (1967), Hobbes (1962), Hume (1987), de Montesquieu (1979, vol.1 &2), Rousseau (1968) and Keane (1988), among others.

Relying on de Montesquieu, the authors explain that although the three branches of the state provide checks and balances against each other 'in governance', the system is 'not free from loopholes' (Bouare and Naidoo, 2009: 6). Consequently, the intervention of 'representatives of civil society' as unelected members 'of governance', which provides an additional constraint on the exercise of power, 'becomes a necessity if freedom and the protection of individuals' rights are to be secured in a republic'. Hence, the authors define civil society as the 'non-elected fourth branch of governance'. Crucially, because of 'the diversity of interests and voices in the fourth branch, there may be agreement or disagreement with the other three branches' of the state in the exercise of governance.

A PARI study (2016: 10) records that 'civil society is generally understood as the sphere separate from but related to … the state, the family and the market'. The study observes that scholars in the global North often narrowly conceptualise civil society as 'organisations that engage in legitimate and legal interactions with the state', which typically entail 'organisations such as trade unions, faith-based organisations and NGOs'. By contrast, the particular nature of South Africa's history necessitates 'a much broader conception of civil society that can capture the multiple and overlapping layers as well as the "civil" and "uncivil" elements which have historically characterised South African civil society' (PARI, 2016, citing Habib, 2013).

Habib (2013) argues that the fact that South African civil society is made up of a variety of actors engaged in a range of relationships with the state – 'from conflictual to collaborative' – should be regarded as 'a cause for celebration', as a diverse and vibrant civil society is an essential component of a robust democracy (PARI, 2016: 10). South African civil society has been compelled to take on a broad array of activities because of the failures by government and by the market, with a recent example being the laudable response by large and small CSOs to the heightened needs arising from the socioeconomic impacts of the Covid-19 pandemic (KI-5).

This framing echoes the analysis in an earlier review of the state of CSOs in South Africa undertaken for the NDA, which also explored the meaning and scope of civil society (CASE *et al*., 2008) and provides a useful global and local background for the nature of civil society at the time. The CASE review noted that '[f]orms of collective action that exist outside of the family, state and market have increased and taken on new forms over the last half century', and particularly in the decade and a half preceding that review (CASE *et al*, 2008: 3). The review observed that these 'structures form a powerful space for social cohesion and solidarity, service delivery and a voice of critique and expression.' For these reasons, civil society 'is thus a key partner in a democratic and free society'.

The CASE review asserted the particular pertinence of this partnership in South Africa, where civil society had played 'a fundamental role in the transition to democracy'. During apartheid, civil society 'was generally defined by its relationship to the state – either serving white interests and aligned to the state, or in opposition to the state'. After the democratic transition in 1994, CSOs 'have had to renegotiate their relationship to the state', with many organisations learning that the 'government has not delivered on its promises and as a result have focused on serving poor communities, often without state assistance or interest'.

Building upon the definition developed by CIVICUS, the Centre of Strategic and International Studies defines civil society as:

> An ecosystem of organised and organic social and cultural relations existing in the space between the state, business, and family, which builds on indigenous and external knowledge, values, traditions, and principles to foster collaboration and the achievement of specific goals by and among citizens and other stakeholders' (Van Dyck, 2017: 1).

The Foundation for Human Rights (FHR) has also highlighted the pivotal role played by CSOs, especially social justice and human rights organisations, in the struggle against apartheid (FHR, 2019: 6). The FHR cites a number of research studies[11] examining the civil society environment in South Africa that demonstrate the vital role played by civil society both in the fall of apartheid and 'during the last two decades, especially in shaping policy and legislative reforms following the transition to democracy in 1994, and in delivering social welfare services to disadvantaged and marginalised individuals and communities'. The FHR notes that social justice and human rights organisations in particular 'have played a pivotal role in the struggle against the apartheid state, its discriminatory and racist policies, socio-economic injustices and political violence. After the transition to democracy, they have emerged as key actors of democratic transformation by spearheading many of the initiatives [leading to] … constitutional and legal reforms, litigating public interest cases, contributing to … policy development, providing technical and professional expertise, research and analysis, and by raising constitutional awareness for the purpose of eradicating poverty and inequality'.

11 Studies on CSOs in South Africa commissioned by the FHR include: Camay (2016a); Camay (2016b); Dangor (2017); Dugmore (2017); and Dugmore (2018).

CSOs necessarily and legitimately play a far wider range of roles than suggested by the analysis described above. Indeed, the Minister of Social Development has acknowledged that implementation of the National Development Plan: Vision 2030 (NDP) 'requires … vibrant civil society organisations' one of whose key roles is the 'promotion and creation of [an] active citizenry' (NDA, 2016: ix). The Minister explains that realising the goals in the NDP's key focus areas, which 'amongst others include building safer communities, building a capable state, promoting accountability, fighting corruption, transforming society and uniting the country[,] requires a more organised civil society capable of undertaking all these important tasks' (emphasis added). She continued to acknowledge that '[d]uring the liberation struggle civil society organisations, working together with other likeminded formations played a very important role in bringing down the apartheid regime and in shaping the society we live in today' (Dlamini, 2016: ix).

4.2. Definitions in regulatory legislation

4.2.1. The Non-Profit Organisations Act 1997

The Non-Profit Organisations (NPO) Act 71 of 1997 does not include an explicit definition of civil society or of CSOs, but focuses narrowly on the scope of its mandate, namely non-profit organisations (NPOs). The NPO Act defines the term 'non-profit organisation' ("NPO") (in s.1(1)(x)) as:

> a trust, company or other association of persons
> (a) established for a public purpose; and
> (b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered.

The legislation focuses on the "intent" of the organisations to which it applies in that it specifies both that the entities have a public purpose and that they are not formed in order to personally enrich the members or office-bearers of the entity. 'Public purpose' is not defined in the NPO Act.

4.2.2. The Income Tax Act 1962

The Income Tax Act introduces the term 'public benefit organisation' ("PBO"), which refers to those organisations that have been granted tax exemption (Section 10(1)) and can receive tax-deductible donations (Section 18A). In order to qualify as PBO, a non-profit company, trust

or association of persons must carry on as its sole or principal object one or more public benefit activities[12] listed in the Income Tax Act, and must comply with all conditions and requirements contained in the Section 30 of the Income Tax Act i.e. the public benefit activity must be carried on in a non-profit manner and with an altruistic or philanthropic intent (SARS, 2017: 69).

4.2.3. The Value-Added Tax Act 1991

The Value-Added Tax Act (No. 89 of 1991) confers certain benefits on organisations that qualify as 'associations not for gain', 'welfare organisations' or both.[13] 'An association not for gain must be approved as a PBO which qualifies for exemption as such under the Income Tax Act before it can qualify as a "welfare organisation". Furthermore, a PBO is regarded as a welfare organisation only to the extent that it carries on one or more of the listed welfare activities.[14] These activities will include traditional welfare activities, i.e. among others: provision of care, counselling or provision of educational and rehabilitation services to children, the elderly, mentally abused and traumatised persons, prisoners, but also activities that do not necessarily relate to 'welfare' i.e. the promotion or advocacy of human rights and democracy; conflict resolution, the promotion of reconciliation, mutual respect and tolerance between the various peoples of South Africa; or the provisions of legal services for poor and needy persons (SARS, 2017: 79).[15]

4.2.4. National Development Agency Act 1998

The National Development Agency (NDA) was established to develop a partnership between government and CSOs for service delivery, and is intended to provide assistance and support to organisations working in service delivery and development with the aim of reducing poverty and its causes. Established in terms of the National Development Agency Act 1998, the NDA's objective is to promote 'an appropriate and sustainable partnership between the Government and civil society organisations to eradicate poverty and its causes' (NDA Act: Preamble). The primary mandate of the NDA (s.3(1)) is to contribute towards the eradication of poverty and its causes by granting funds to CSOs for the purposes of:

12 See Annexure 3.
13 Section 1, Value Added Tax (VAT) Act No. 89 of 1991 (hereinafter 'VAT Act').
14 Determined by the Minister in Government Notice No. 112 published in *Government Gazette* 27235 dated 11 February 2005.
15 See Section 1(i), (j) and (m), Government Notice No. 112 published in Government Gazette 27235 dated 11 February 2005.

- Carrying out projects or programmes aimed at meeting the development needs of poor communities; and
- Strengthening the institutional capacity of CSOs involved in direct service provision to poor communities.

Its secondary mandate (s.3(2)) is:

- To promote consultation, dialogue and sharing of development experience between CSOs and relevant organs of state; and debate on development policy; and
- To undertake research and publication aimed at providing the basis for development policy.

S.1(iii) of the NDA Act defines CSOs in even more laconic and narrower terms than the manner in which an NPO is defined in the NPO Act – a CSO is 'a trust, company or voluntary association established for a public purpose, but does not include an organ of state.'

In summary we have a hierarchy of definitions ranging from the most broad (NDA Act – all public benefit organisations (NDA) regardless of whether or not they are established on a non-profit basis), to only slightly less broad (NPO Act – all public benefit organisations established on a non-profit basis), to a more restricted version (Income Tax Act – non-profit entities working for the common good in certain areas), to the most restricted (VAT Act) which imposes further restriction on the activities that qualify). All of these definitions have a common thread – that they focus on the intent of the organisation rather than particular form it takes.

4.3. Definitions in DSD policy framework

The DSD's 2012 Policy Framework on Nonprofit Organisations Law (DSD, 2012: 3-4) and its 2014 Draft NPO Policy Framework (DSD, 2014: 3-4) constitute the most recent government initiative to revisit the way in which civil society is conceptualised, and the way in which its relationship with government is understood and governed. These policy frameworks approach the question of defining civil society in a different manner than that described in the legislative frameworks above by specifying the structure of the entities that make up civil society. These documents include definitions of various types of entities, including CSOs, CBOs, NGOs, and Non-Profit Companies (NPCs). For our purposes it is sufficient to note that the most general definition, that of a CSO, includes "all types of nonprofit organisations". CBOs are a subset of CSOs that are "created by communities to address local needs", and NGOs are "*private sector*, voluntary organisations that contribute to, or participates in, cooperation projects,

education, training or other humanitarian, progressive, or watchdog activities" (DSD, 2012 and 2014). There is some attempt to differentiate between NGOs and CBOs based on internal structure and complexity, but the intent of this exercise is unclear. Additional definitions include NPCs (which are indistinguishable from NPOs).

Finally, these documents define a voluntary association (VA) as an entity created in terms of 'the common law by an agreement between three or more people to form an organisation to work together to achieve a common non-profit objective. This written agreement or founding document is called [its] constitution'.

These definitions are a useful first attempt at unpicking the complexity hidden beneath the catch-all terms "NPO" or "PBO".

4.4. Typology of civil society

A different approach to defining civil society is one that attempts to list the types of activities that civil society organisations engage in. One such approach, by Camay and Gordon (1997), lists the following roles that CSOs continue to play in the democratic era:

- *Humanitarian relief* organisations provide humanitarian assistance to victims of famine and other natural disasters, as well as of wars and other conflicts
- *Welfare services* organisations provide basic services (health, education, housing, counselling, etc.) to children, or adults and / or communities in need. Many such organisations exist in South Africa operating at the local or regional level with specific mandates to care for children, the aged or the disabled
- *Service provision* organisations provide a range of services to other CSOs and community organisations, including training and technical assistance. These services support the efficient and effective operation of civil society in a democracy. Specific services include organisational and financial management, computer training, supply of relevant staff, staff appraisals, performance management systems and labour law advice, strategic planning and fundraising efforts
- *Technical innovation* is provided by CSOs that operate their own projects to pioneer new or improved approaches to problems. They work across a spectrum of fields from information technology (IT) to efficient waste disposal (recycling) to food gardens
- *Traditional community-based functions* such as stokvels and burial societies, having the nature of self-regulating credit unions

- *Co-operatives or other non-profit but income-producing associations* are formed at the local level to collect resources from group members to invest jointly in a specific economic activity, including agricultural production, housing, manufacturing, and taxi services
- *Religious / faith-based* organisations are created by religious organisations, often with the emphasis on providing welfare services, sometimes combined with religious teaching. Historically, some of these organisations have provided education, welfare and anti-apartheid / legal advice services to communities
- *Economic interest associations* enable cooperation and facilitate coordination of people with a similar economic interest – such as ratepayers' associations, professional associations and labour unions
- *Ratepayers associations* have established themselves to represent the shared interests of residents, and to improve their liaison and communication with local authorities
- *Professional associations* have been established to representing the interests of their profession and membership
- *Labour unions* have existed in South Africa for over 150 years to organise workers and achieve collective bargaining agreements at factory or industry-sectoral levels
- *Human rights promotion / protection* organisations have been formed to monitor abuses of human rights or failures to protect human rights, to lobby against such abuses, and to protect and assist victims of abuse, sometimes through litigation
- *Civic / democracy education* organisations undertake public education on civic rights and responsibilities. (They were particularly active when South Africa was newly democratised.)
- *Community development* organisations, sometimes termed community-based organisations (CBOs), have been formed at community level, sometimes with links to wider networks or associations of like-minded CSOs aimed at promoting the development of their community through service provision, education, skills development, advocacy, savings clubs, etc.
- *Advocacy CSOs* may have no 'field projects', but form alliances with other CSOs to educate, conscientise and lobby on specific policy issues. Since the advent of democracy many CSOs have undertaken focused campaigns, such as on a Basic Income Grant, children's and women's rights, and the provision of anti-retroviral medication, education norms and standards, and land reform. In other instances, civil society has opposed measures promoted by government, such as the Information Bill and e-tolling.

To this extensive list one could add CSOs that promote community development or community cohesion more indirectly, such as membership-based clubs focusing on sports, the arts, and hobbies as well as faith-based voluntary or membership groups such as churches and other congregations of believers and adherents.

4.5. Conclusion

- Civil society can be usefully conceptualised as the public entities operating outside of the family, state and private sector that collectively form a powerful space for social cohesion and solidarity, service delivery and a voice of critique and expression, and that civil society is a key partner in a democratic and free society.
- The most general (top-down) approach is simply to specify all public benefit entities as CSOs, regardless of whether they are non-profit entities or not. This approach is perhaps too broad.
- The approach in the NPO Act is more tailored (limiting the scope to public benefit non-profit entities) but ignores the different types of entities and the particular purposes for which they have been established. In particular, the definition of 'public benefit' is open to fairly broad interpretation.
- The definitions used by SARS and mirrored to some extent by classifications such as that proposed by Camay and Gordon, attempt to restrict the scope of the definition by listing the types of activities that qualify for inclusion. There are obvious dangers to this approach since any such enumeration is bound to omit some types of entities.
- All of the above attempts treat the entities involved as homogeneous, and in doing so may overlook some of the complexities of different organisational forms. The definitions proposed by the 2012-14 policy framework are an attempt to uncover these differences by proposing definitions of the different forms that organisations may take.

Our proposed general definition of CSOs should take into account the theoretical and historical perspectives, as well as the practical difficulties of defining entities, and we suggest that we marry the approaches outlined above:

> CSOs are non-profit entities that may take on a number of forms (set out below) and operate for the public benefit (understood as either for the non-monetary benefit of the members of the organisation or for a specified group of beneficiaries).

The forms that the organisation may take include voluntary associations (religious groups, professional associations, sporting clubs, social groups), organisations focused on some general common good (such as humanitarian/poverty relief, literacy, breast cancer, etc.), entities that provide health or welfare services to the general public, entities that provide services including training and technical assistance, trade unions, social justice organisations focusing on advocacy, lobbying, awareness or access to particular rights.

The categories identified above are not necessarily mutually exclusive, nor are they necessarily homogeneous. Within any of these categories the types of entities could vary from small informal organisations to large multi-national organisations.

One aspect of this definition that will be of critical importance when discussing regulatory frameworks is the question of public benefit. The distinction between organisations that serve their members rather than some external group is key – although our definition of civil society includes both types, we will argue that the scope of regulatory frameworks should be limited to the latter group.

5. WORKING DEFINITIONS OF CIVIL SOCIETY AND REGULATORY FRAMEWORKS

5.1. Preliminary remarks

Several definitions of civil society and civil society organisations have been proffered and discussed above. We have adopted a working definition of civil society as non-profit entities operating for the public benefit, and that public benefit includes either benefit for the members of the organisation or for members of the public. We believe that, with respect to a regulatory framework, organisations acting on behalf of their members are adequately governed by their internal democratic practices, the existing legal framework (which offers relief to members whose interests may have been prejudiced), or by existing statutory regulations. In particular, private associations, associations for particular professions, labour unions, religious organisations, co-operatives, sports organisations, and community-based organisations like stokvels, burial societies, etc. are covered by existing legislation (trade unions by the Department of Labour), their own legal frameworks (sports entities, professional associations) and/or democratic practices (elections of office bearers, accountability to general meetings, etc.). There is thus, from a regulatory framework perspective, no added value in drafting further legislation to cover these entities.

We propose that the regulatory framework for civil society should be limited to those entities who act, or purport to act, on behalf of members of the public, but are not directly responsible or accountable to that constituency.[16]

Entities may have some limited form of internal accountability (boards of directors, management-staff reporting lines, etc.), but this is a poor substitute for broader stakeholder accountability. Most of what we traditionally think of as CSOs, NGOs, CBOs, etc. fall under this definition – as do social movements, in the sense that they often claim to represent a broader constituency than their registered members. With respect to regulation, then, we should restrict ourselves to providing an enabling environment and filling this "accountability gap".

6. THE CURRENT CIVIL SOCIETY REGULATORY FRAMEWORK IN SOUTH AFRICA

6.1. The Constitution and the NDP

The Constitution commits the state to the advancement of social justice and human rights. These values are reflected in the Founding Values of the Constitution and in Chapter 2 the Bill of Rights, which binds all organs of state, and natural and juristic persons. The Constitution further provides for a new relationship between the state and civil society, emphasising the importance of public participation and engagement as a central component of democratic governance. This is reinforced through the provision of a framework for public participation in policymaking and legislative processes in all spheres of government, as well as the establishment of mechanisms for civil society to actively participate in the affairs of government (Dugmore, 2018).

The National Development Plan 2030 (NDP) is also explicit in acknowledging the role of civil society:

> The Commission proposes that the National Development Plan serves as a basis for developing a broad social compact among critical role-players and society at large. See chapter 15. This should also find expression at local and regional levels, with greater engagement between businesses and provincial and local government, as well as trade unions and other sections of civil society (NPC, 2012: 155).

16 It may be necessary to consider a separate regulatory framework for those organisations that raise funding directly from the public.

The NDP also provides concrete recommendations for the role of civil society, emphasising the importance of a partnership approach between civil society and government, (including in safety and security, addressing corruption, developing spatial frameworks, protecting the environment, and promoting social cohesion plans). It further acknowledges the need to implement reforms and adequate funding schemes to support current state-civil society models for delivering of welfare services (NPC, 2012: 213-14, 376-77, 471).

6.2. Statutory regulatory framework

The legal framework for CSOs in South Africa consists of four primary tiers. The first tier (establishment) allows for the establishment of the organisation under statutory and common law of the three legal forms of CSOs, namely, voluntary associations, non-profit trusts and non-profit companies (NPCs). The second tier of legislation (voluntary registration) allows any of these organisational forms to apply for the status of a 'registered non-profit organisation' as provided for under the NPO Act. The third legislative tier (partial tax exemption) enables a CSO to apply for the status of 'public benefit organisation' (PBOs). Finally, the fourth legislative tier (donor deductibility status) allows PBOs to apply for the right to receive tax-deductible donations (ICNL for CoF, 2019).

However, the DPME rightly notes an additional tier of registration that is required from CSOs that work as service providers for the government. These organisations might be requested to register with line departments and / or with the National Treasury as service providers (DPME, 2016: 3).

6.2.1. Legal forms of CSO in South Africa

There are different ways to describe and analyse the range of legal forms that CSOs may take. CSOs may include different types of legal entities that can be categorised into two broad groups, namely, membership and non-membership organisations (Council of Europe, 2008). In addition, the CSOs in South Africa can be categorised into three main types of legal entities, voluntary associations, non-profit trusts and non-profit companies (StatsSA 2015: 11). Associations and cooperative societies are the most well-known forms of membership organisations, while the most common form of non-membership organisations are trusts and foundations. Typically, a trust lacks legal personality, whereas a foundation is an incorporated legal entity (Powell, 2014).

6.2.1.1. Membership organisations

South African law provides for legal forms of cooperation between individuals and/or legal entities who wish to achieve a certain shared goal. In this respect, a voluntary association is the most common legal form. Two forms of voluntary association are available. Voluntary associations under common law can have either the form of a corporate body with legal personality, known as a '*universitas*', or it can remain unincorporated. known as 'non-corporate associations.' When deciding how to classify a voluntary association, a court will consider the organisation's constitution as well as its nature, objectives, and activities. In order to qualify as a '*universitas*', the organisation must meet three requirements, viz. i) It must be structured to continue as an entity notwithstanding a change in membership; ii) It must be able to hold property distinct from its members; and iii) No member can have any rights, based on membership, to the property of the association (ICNL for CoF, 2019: 4).

It is relatively easy to establish a voluntary association, either with or without a legal personality, as the agreement establishing an association may be oral or written, although it is customary for the agreement to take the form of a written constitution. Since voluntary associations are governed by common law, there is no requirement of registration, even for associations with a legal personality. Typically, however, voluntary associations register as NPOs with the NPO Directorate, which in effect renders them 'corporate bodies',[17] enabling them to open a bank account in their own name, hold property in their own name, and to access public funding.

6.2.1.2. Non-membership organisations

As is the case for membership-based organisations, non-membership organisations may or may not have a separate legal personality. Trusts are the most common non-membership organisation and do not have their own legal capacity. They can be established for private benefit or for a charitable purpose. The Trust Property Control Act 57 of 1998 regulates trusts, which is a legal form utilised by some CSOs and philanthropic entities as an entity by means of which to conduct their activities. Trusts must be registered with the Master of the High Court and do not have legal personality, but trustees nevertheless enjoy limited liability (ICNL for CoF, 2019).

17 For more information See Chapter IV, Section 4(A).

6.2.1.3. Other entities – Non-profit companies

South African legislation provides for the establishment of the non-profit company (NPC) that can also be either a membership or non-membership in form. NPCs are governed by the provisions of the Companies Act of 2008, which requires them to have at least three directors, and to be incorporated for a public benefit objective or an objective relating to one or more cultural or social activities, or communal or group interests (Companies Act, Schedule 1 para 1).[18] NPCs are incorporated and registered with the Companies and Intellectual Property Commission (CIPC) and may also register with the NPO Directorate. Historically, many civil society structures and philanthropic entities have utilised the non-profit 'Section 21 company' provided for in the Companies Act 61 of 1973. The 2008 Companies Act was amended with effect from May 2011, providing for the transition of Section 21 companies into a new classification – the NPC. The amendment also enhanced standards of governance and introduced directors' liability for non-compliance with financial probity standards (Dugmore, 2018).

6.2.1.4. Cooperatives

Cooperatives, particularly social cooperatives, in South Africa are a grey area of the civil society sector (StatsSA, 2015: 4). These organisations are not classified as CSOs and are governed by the Cooperatives Act 14 of 2005. Sometimes described as 'businesses owned by the beneficiaries' (Parnell, 2007), these entities are voluntary, membership-based organisations registered with the CIPC. Cooperatives work on a majority vote basis in that anyone interested in becoming a member acquires shares in the organisation, which operates on a 'one-member, one-vote' system. While cooperatives are formed around a common goal and/or purpose, and the goals are aimed at social responsibility and development, they have been labelled as a vehicle of economic development for organisations that want some form of benefit attached to its membership (Parnell, 2007).

Though the Cooperatives Act describes these organisations as non-profit, they are not considered a non-profit entity and cannot be registered as such, mainly due to the fact that their intended beneficiaries are members of the cooperative. This understanding applies unless a co-op's Articles of Association prevent the distribution of profits to members (StatsSA,

18 The new Companies Act No. 71 of 2008 (hereafter 'the Companies Act [2008]') was signed into law in April 2009 and entered into force on 1 May 2011. The Companies Act establishes two categories of companies: 1) non-profit companies, and 2) for-profit companies. The Act contains a special set of fundamental principles that are applicable to non-profit companies and clearly sets out which parts of the Act are applicable to non-profit companies.

2015:4). Requirements for registration under section 12 of the NPO Act state that non-profit organisations are established for a public purpose, with income and property that is not distributable to members. Therefore, NPO beneficiaries are the public at large, and not exclusively its members. In addition, cooperatives are not eligible for PBO status under section 30 of the Income Tax Act (Parnell, 2007).

However, when considering the features they would like to benefit from, many founders of social enterprises have found traditional legal forms lacking. There is typically only a limited amount of flexibility contained in the law to adapt the features of a traditional legal form to the needs of a social entrepreneur.

6.2.2. Incorporation and registration

Incorporation and/or registration entails a number of advantages, including legal personality, clear legislative regulation concerning the governance and regulatory framework, limited liability of the directors and the company, as well as public accountability and availability of equity financing. At the same time, however, incorporation may not be the best option if the preference is informality and flexibility, with little regulation or control imposed by the state (Longley, n.d.).

South Africa has had a steady increase of 'non-profit institutions' (NPIs)[19] from the years 2012 to 2014. In 2015 Stats SA reported an increase from over 85 000 in 2012 to about 127 000 in 2014. Most of these organisations registered as voluntary associations, followed by NPCs and then non-profit trusts (StatsSA 2015: 12).

As previously explained, the legal framework for NPOs in South Africa consists of four primary tiers. (ICNL for CoF, 2019). However, a recent evaluation of legal frameworks applicable to NPOs delivering health, education, and social welfare services for or with government identified a fifth type of regulation, which applies when a CSO applies for state funding (see below) (DPME, 2016: 3).

The first type of regulation relates to the establishment of the legal entity and to legal or juristic personality, which confers on CSOs a set of legal rights that enables them to enter into contracts and agreements in their own name. There are several different 'routes' to establish a CSO. In South Africa, voluntary associations both with and without legal personality can be

19 NPIs are apparently equivalent to NPOs. See StatsSA 2015 at p11.

created under common law. In order to establish *universitas*, which is a form of an association with legal personality, no registration is required. Registration becomes a formal requirement only where organisations seek to operate formally, acquire legal personality, secure tax benefits, and apply for funding both nationally and internationally (Firmin, 2017: 8). The non-profit company on the other hand possesses legal personality only once the Companies and Intellectual Property Commission has approved a company's Notice of Incorporation.[20] Trusts, namely the *inter-vivos* trust and the testamentary trust do not possess legal personality in South Africa but must be registered with the Master of the Supreme Court in whose area of jurisdiction the greatest portion of the trust assets is situated (DOJ&CD, 2013). The formation of a non-profit trust in terms of the Trust Property Control Act 57 of 1988 does not confer legal personality, but does create a legal entity under common law. Trustees remain liable in their private capacity for any damages. A CSO may also choose to establish itself as a voluntary association in terms of common law and to provide for legal personality through its founding documents.

The second type of regulation is in terms of the Non-Profit Organisations Act 71 of 1997). Registration under this Act is voluntary and formalises the entity by entering its name in a register, signalling to the state and public that an NPO has complied with a basic set of governance standards. In practice it is often required in order to access funding from government departments and some corporate donors. Generally, voluntary associations, non-profit companies as well as non-profit trusts established for a 'public purpose' can register as NPOs with the NPO Directorate, which falls under the auspices of DSD. One of the main purposes of the NPO registration was to enable small CBOs to formalise their establishment and to acquire legal personality (KI-1). The voluntary associations that decide to register as NPOs with the Directorate for Non-Profit Organisations ('the NPO Directorate') will become the 'corporate bodies' (1997: s.16(1)(c)). It means that all organisations registered as NPO with the NPO Directorate become 'corporate bodies' (Dangor, 2017: 33-34) Section 8(1)(3) of the Companies Act 2008, which deals with Categories of Companies, recognises that the term 'body corporate' 'falls within the legal definition of 'company'.

The third type of regulation establishes tax exemptions and concessions for the non-profit sector. In particular, the Income Tax Act 58 of 1962 exempts entities registered as public benefit organisations (PBOs) from certain types of taxation and provides for the tax deductibility of donations to registered PBOs. The latter is often considered as a fourth-tier

20 Sec. 13 of the Companies Act 2008.

regulation. These types of regulation are separated from the NPO status and the latter does not automatically confer tax benefits on the CSOs.

The fourth type of regulation entails government regulating CSOs in respect of the types of service they offer on behalf of government, such as health, education and welfare. This form of 'service regulation' is applicable to CSOs and to other types of organisations wanting to provide similar services. They must all comply with certain governance, quality, health, safety, and organisational norms and standards. If an CSO applies for state funding, it becomes subject to the fifth type of regulation. The transfer of state funds to CSOs is regulated mainly by the Public Finance Management Act 1 of 1999, the National Development Agency Act 108 of 1998), and the National Lotteries Act 57 of 1997 (DPME, 2016).

Non-profit trusts, as accountable institutions under the Financial Intelligence Centre Act of 2001 (FICA), are also subject to registration with FICA (ICNL, 2019).

6.2.3. Summary of legal forms and registration bodies

Table 1 summarises the legal forms CSOs in South Africa may take and the bodies with which they need to register.

Table 1: Legal forms of CSO and registration bodies in South Africa

Legal form	Registration body
1. Voluntary associations	Common law / NPO Directorate
2. Non-profit trusts	Master of the High Court of South Africa
3. Non-profit companies	Companies and Intellectual Property Commission (CIPC)
4. Cooperatives	CIPC
5. CSOs looking for PBO status	SARS

Source: Authors

6.2.4. Regulatory frameworks

Supervision is closely related to ensuring compliance with the legal requirements and restrictions applicable to CSOs, and the imposition of sanctions where appropriate. Regulatory frameworks become more stringent when CSOs receive funds from the government or

perform functions related to the public benefit. In principle, external supervision can derive from the following threads: a) regulations involving a statutory framework for supervision developed by the state; b) self-regulation and c) co-regulation.

The civil society sector in South Africa is governed by the common law and various national laws, as well as the Constitution. The key pieces of legislation include: the Non-Profit Organisations Act 1997 (as amended); the Companies Act 71 of 2008 and the Companies Amendment Act, 2011; the Trust Property Control Act 57 of 1988; the Income Tax Act 58 of 1962 (as amended); the Value Added Tax Act 1991; and the Financial Intelligence Centre Amendment Act 2008. Organisations establish themselves, acquire legal personality and undertake their activities through these regulatory frameworks.

6.2.4.1. The Non-Profit Organisations Act (71 of 1997)

The NPO Act governs the regulation of NPOs. As Zane Dangor writes:

> The NPO Act was adopted following a protracted research and public engagement process. The changes were initiated by an NGO linked to the Mass Democratic Movement, the Development Resources Centre, which housed the Independent Study into an Enabling Environment for NGOs. The research and public discussion process [were] initiated in 1992 and concluded in 1997 when the Act was finally passed (Dangor, 2017: 43).

The Act defines an NPO as a 'trust, company or other association of persons established for a public purpose, and the income and property of which are not distributable to its members or office-bearers, except as reasonable compensation for services rendered' (s.1(x)).

The NPO Act also provides for the mechanisms that aim to institutionalise the recognition of CSOs by government for the benefit of all stakeholders, including partners and donors. In this regard, the NPO Directorate was established by the then-Minister for Welfare and Population Development. Section 10 of the NPO Act also stipulates that 'the Minister may appoint any advisory or technical committee in order to achieve the objects of this Act', with an obligation on government to 'determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of non-profit organisations to perform their functions' (s.3). Notably, s.1(2) of the Act requires any person interpreting and applying the Act to 'give a liberal construction to its provisions in a manner that is consistent with its objectives ('objects' - s.2) and 'accounts for the *particular* purpose,

role and circumstances of a *particular* nonprofit organisation' (emphasis added). This phraseology indicates that recognition and legitimacy is given to the full range and diversity of activities that may be undertaken by any particular CSO acting within the scope of the Constitution and the law.

This inclusive approach is further emphasised in the recognition, in the objects of the Act (s.2), of the diversity of needs in society and related activities by CSOs. Therefore, the objects of the Act are to '*encourage and support* nonprofit organisations in *their* [own] contribution to meeting the *diverse* needs of the population of the Republic by:

(a) creating an environment in which nonprofit organisations can *flourish*;
(b) establishing an administrative and regulatory framework within which nonprofit organisations can conduct their affairs;
(c) *encouraging* nonprofit organisations to maintain adequate standards of governance, transparency and accountability and to improve those standards;
(d) creating an environment within which the public may have access to information concerning registered nonprofit organisations; and
(e) promoting a spirit of *co-operation and shared responsibility within government*, donors and amongst other interested persons in their dealings with nonprofit organisations (emphasis added).

Chapter 2 of the Act, entitled 'Creating an *enabling* environment', is explicit concerning this inclusive and enabling approach, especially in s.3, which provides that '[w]ithin the limits prescribed by law, every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner *designed to promote, support and enhance* the capacity of nonprofit organisations to perform *their* functions' (emphasis added).

Read together, these provisions clearly signal the legislature's intention to create an enabling environment for civil society, *with its own agency and priorities*, to work in broad partnership with government. This understanding cannot, it is submitted, be consistent with a narrow definition of partnership that recognises only CSOs that undertake service delivery work on behalf of government. 'Partnership' between civil society and a developmental, capable and ethical state must mean that, where the state or its government administration is unable or unwilling to meet the constitutional standard of the prompt and diligent performance of its obligations (s.237 of the Constitution), civil society is free to engage with other branches of the state (such as the judicial branch) in pursuit of shared objectives and the realisation of

constitutional values. That, it is submitted, is the meaningful and substantive partnership envisaged by the NPO Act, which is supported by some interviewees (KI-2, KI-5).

In addition to providing for the establishment of the regulatory body - the NPO Directorate (s.4) – the Act sets out the requirements for the registration, compliance requirements and the deregistration / dissolution of NPOs. It is nevertheless limited to very technical aspects of registration and compliance.

Every NPO registered under the NPO Act must keep accounting records of its income, expenditure, assets and liabilities, produce annual financial statements and provide for the external audit. Moreover, within nine months after the end of its financial year, NPOs must submit these documents together with a narrative report of its activities to the NPO Directorate (sections 17-18). The Directorate is the primary regulator responsible for NPOs' compliance with the NPO Act. Where there is non-compliance, the Directorate must send a compliance notice to the NPO. If the organisation does not comply timeously with the notice, the Directorate can either refer the NPO to the SA Police Service for investigation or cancel the registration if the NPO.

Camay (2016) records that:

> In 2012/13 the DSD assessed the overall compliance risk profile of all registered NPOs. The DSD disaggregated the compliance risk data further by grouping all registered NPOs under High, Medium or Low Risk NPOs. However, according to the DSD, High and Medium Risk NPOs are considered as non-compliant whereas Low and No Risk NPOs are considered to be compliant with the NPO Act. Out of all registered NPOs in 2013, 36 428 or (36%) were at a high risk of being deregistered by the DSD. 35 190 NPOs (34%) were at a medium risk of being deregistered. Therefore, 71 618 (70%) of the total registered NPOs for 2012/13 were considered non-compliant' (2016: 4-5).

The NPO Directorate is perceived to be an ineffective regulator failing to implement the NPO Act and falling far short of its monitoring and compliance-enforcement functions (KI-1, KI-2, KI-5). In this regard, it is worth noting that in the last five years (28 May 2015 – 28 May 2020), 91 224 NPOs have been registered with the NPO Directorate whereas only 46 have been deregistered for non-compliance during the same period of time (DSD, n.d.). The DSD's function as regulator is also perceived to be conflicted as it is a major state donor to CSOs that deliver statutory welfare services and the apparent lack of legitimacy to have proper

oversight of social justice and human rights organisations (KI-1, KI-5). Regarding the latter, there seems to be little explanation for the DSD to be a regulator given their link to constitutionalism and democratisation, which have traditionally remained the domain of the Department of Justice and Constitutional Development (DOJ&CD).

Section 2(d) includes among the objects of the Act the creation of 'an environment within which the public may have access to information concerning registered nonprofit organisations.' To a significant extent, this accountability objective remains unfulfilled in that there is no centralised comprehensive up-to-date database of philanthropic / non-profit entities operating in South Africa. Neither is the fundraising or spending by this sector documented in a coordinated or consistent manner by government or the sector itself. The NPO Directorate lacks the resources and capacity to perform this task effectively (KI-1, KI-2).

As of 28 May 2020, there were 228 928 registered NPOs with the NPO Directorate at the Department of Social Development. Among those, the large majority were voluntary associations (209 959), followed by the non-profit companies (15 964), and trusts (3 005). As indicated in Table 2, the large majority of NPOs were located in Gauteng (32%), followed by KZN (18%) and Western Cape (10%). The search engine available on the NPO Directorate website does not provide information on the exact location of the NPOs (for example, whether they are located in urban or rural areas).

Table 2: NPOs in South Africa, by province, 2020

Province	***N***	**%**
Gauteng	73 373	32.1
KwaZulu-Natal	41 288	18.1
Western Cape	23 594	10.3
Limpopo	22 533	9.9
Eastern Cape	20 795	9.1
Mpumalanga	17 225	7.5
North West	13 158	5.8
Free State	11 487	5.0
Northern Cape	5 178	2.3
Total	**228 631**[21]	**100.0**

21 The number of all NPOs registered as at 28 May 2020 was 228 928. However, 228 631 are indicated only in the disaggregation by province.

Source: Calculation from DSD (n.d.)

On the other hand, neither are there any special rules prohibiting CSOs from receiving foreign funding. Moreover, CSOs are permitted to carry out commercial activities, either directly or through a for-profit subsidiary (within limits) and they compete for government funding (ICNL for CoF, 2019). However, in practice, CSOs must be registered with the NPOs Directorate in order to persuade donors and government that they do hold themselves accountable to at least these core standards and that they are, therefore, suitable entities to entrust with funding. In summary, it may be accurate to describe this aspect of the applicable regulatory frameworks as partly enabling and partly permissive.

6.2.4.2. Income Tax Act 58 of 1962 (as amended)

Only voluntary associations, trusts and non-profit companies established in South Africa, as well as a branch of a foreign tax-exempt organisation, can apply to SARS to be recognised as PBOs (SARS, 2017).

In order to obtain certain tax exemptions, an organisation operating for the public benefit first must qualify as a PBO in terms of Section 30 of the Income Tax Act. A PBO approved for exemption from income tax may also be exempted from other taxes, including capital gains tax, donations tax, estate duty, transfer duty, and – in certain cases – the skills development levy if the property will be devoted to public benefit activities (SARS, 2017: 41).

CSOs wanting to obtain the status of a PBO must apply to the South Africa Revenue Service (SARS) in accordance with the Income Tax Act. Assessment of the application is undertaken by SARS's Tax Exemption Unit and, if an application meets all the requirements, the Commissioner approves an organisation as a PBO (SARS, 2017: 3).

A PBO may carry on public benefit activities (PBAs) itself or it may provide funds, assets or other resources to enable other PBOs, institutions, boards or bodies, associations of persons, or the government to carry on these PBAs (SARS, 2017: 12).
In order to receive PBO status, the organisation's sole or principal purpose must be to undertake one or more public benefit activities as enumerated in Part I of the Ninth Schedule to the Income Tax Act. These activities must be carried out in a not-for-profit manner and with an altruistic or philanthropic intent (SARS, 2017: 6). However, the Act does not define 'altruistic or philanthropic intent'.

Each of the organisation's activities must be for the benefit of, or widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups). Once an organisation has been recognised as a PBO, it is eligible for the partial tax exemption. In order to then also receive tax-deductible donations, the PBO must conduct one or more of the public benefit activities approved by the Minister of Finance for purposes of Section 18A as set out in Part I or II of the Ninth Schedule to the Income Tax Act, and must lodge a separate application with SARS to be recognised as a 'Public Benefit Organisations with Donor-Deductible Status' (2017:63). The qualifying public benefit activities (PBAs) for partial tax exemption appear in Part I of the Ninth Schedule to the Income Tax Act, and those for donor deductible status appear in Part II.

The PBOs listed in Part I fall into the following categories:

- Welfare and humanitarian
- Health care
- Land and housing
- Education and development
- Religion, belief or philosophy
- Cultural
- Conservation, environment and animal welfare
- Research and consumer rights
- Sport
- Providing of funds, assets and other resources
- General

For purposes of the discussion above concerning the appropriate definition of 'civil society' and 'CSO' with regard to the NDA's mandate, it is important to note that the 'Welfare and humanitarian' category explicitly includes '(j) The promotion or advocacy of human rights and democracy'.

Section 30(3)(h) of the Income Tax Act restricts PBOs from using their resources to directly or indirectly support, advance, or oppose any political party. South African law does not restrict the political activities of organisations that are not approved as PBOs, however. Moreover, the law does not clearly restrict lobbying by any organisations. (ICNL, 2020). Moreover, organisations, including NPOs, that have been granted PBO status must comply in practice with s.30 by undertaking the public benefit activities stipulated in their founding documents.

A PBO is permitted to carry on a business undertaking or trading activity provided its sole or principal object remains the carrying on of PBAs. Section 10(1)(cN) of the Act explicitly limits the economic or business (i.e. revenue-generating) activities of organisations recognised as PBOs and adopts a so-called hybrid approach to its tax policy. This approach requires that, cumulatively, economic activities be sufficiently related to the public benefit purpose, and at the same time places a ceiling on the organisations' tax exemptions in monetary and percentage terms. In this regard, the economic activity that: i) Is integral and directly related to the sole objective of the public benefit organisation; ii) Substantially the whole of its revenues are directed toward the recovery of its costs; iii) It does not result in unfair competition in relation to taxable entities; and iv) Generates the revenues that do not exceed the greater of 5% of the PBO's total receipts and accruals during the relevant year of assessment, or R200,000, will typically benefit from the tax exemption. Moreover, some volunteering activities, as well as certain activities and undertakings approved by the Minister of Finance by notice in the Gazette, can also qualify for tax exemption (ICNL, 2019). Moreover, the Act further empowers the Minister of Finance to expand the scope of activities classified as having a public benefit, exemptions from tax in respect of property acquired, as well as tax deductions for donations made to public benefit organisations in terms of Section 24 (Dugmore, 2018: 9).

As observed in the Davis Tax Committee's report (2018):

> The NPO sector has to comply with the dictates of multiple regulatory organisations, including the non-profit organisation directorate, SARS, the Master's Office and the Companies and Intellectual Property Commission […] There is a clear misalignment or limited alignment within the regulatory system and between governing Acts across the different types of regulation. Legislation governing legal form, governance and taxation is not harmonised and congruent with each other. As a result, NPOs have to register multiple times with different regulators submitting the same information more than once […] Each regulator functions in its own sphere but does not look at the general burden of compliance it is creating on the sector as the whole. Manifestly this is an area that requires a specific and coherent response (DTC, 2018: 18-19).

Challenges identified with the current tax system are addressed in the *Report of the Davis Tax Committee on Public Benefit Organisations* (2018), which recommends a number of changes, including further amendments to the Ninth Schedule of the Act to correct anomalies and omissions (DTC, 2018: 5). The Ninth Schedule is currently 'bifurcated' in two Parts that list

'preferred' and 'general' PBAs, to which there is differential entitlement to tax exemption and other fiscal benefits. The Report notes that, although the list of exempt PBAs has been amended several times since its initial promulgation, there remains a need to correct further important 'unintended' omissions, such as: the promotion and advancement of constitutionalism; certain types of public education; legal services in the general public interest; research; and entrepreneurship development, which is identified as a priority in the NDP. Additional concerns noted in the Report include the failure of the Minister to prescribe required regulations and conditions for loans to emerging micro-enterprises, as well as the granting of loans for construction of social housing or basic shelter (DTC, 2018: 19—24).

The Report also acknowledges the need to reduce the administrative burden on small PBOs required to issue tax-deductible donations receipts, challenges resulting from the limitations of the 50% distribution rule in respect of conduit organisations (s18A of the Income Tax Act), as well as delays in processing of applications by the Tax Exemption Unit. Another challenge impacting on the ability of small CBOs to access tax benefits includes the arduous process of establishing an NPO in order to access tax exemptions (2018: 24-26). Further, tax laws, it is argued, constrain 'cost recovery and income-generating activities by compelling organisations that want to access the exemptions to rely primarily on grants and donations' (Camay, 2016).

6.2.4.3. Trust Property Control Act (57 of 1988)

Voluntary associations can conduct subsidiary activities that generate some income, provided that this is not their primary objective or activity. Trusts are generally flexible structures that can be used for a variety of purposes. In terms of the Trust Property Control Act, the Master of the High Court oversees the registration of not-for-profit trusts. The Act allows the trust instrument to designate the objective or beneficiaries, but it does not specify limitations to such objectives or beneficiaries. If a trust has a charitable primary purpose, the fact that it has a non-charitable subsidiary purpose will not invalidate it. The flexibility of a trust is also realised through the discretion given to trustees concerning use of the trust property (ICNL, 2019), for which they are, however, accountable to the Master.

6.2.4.4. Companies Act 71 of 2008 (as amended)

The establishment of a non-profit company (NPC) is provided for by the 2008 Companies Act (as amended), and the Companies and Intellectual Property Commission CIPC is responsible for registration of incorporation. The NPC is 'a company incorporated for public benefit or other

object relating to one or more cultural or social activities, or communal or group interest'. The income and property of such an entity are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by Schedule 1 (2008: section 1). NPCs may carry on any business or trade, provided that it is consistent with its objectives and must be used to 'advance the purpose for which it was created' (2008: Schedule 1).

The Companies Act provides that an NPC must have at least three directors and can be incorporated for a public benefit objective or an objective relating to one or more cultural or social activities, or communal or group interests. However, the NPC possesses legal personality only once the CIPC has approved a company's Notice of Incorporation (2008: section 14). NPCs that are incorporated and registered with the CIPC may also register with the NPO Directorate. Historically, many civil society structures and philanthropic entities have utilised the Section 21 company provided for in the Companies Act 61 of 1973. The 2008 Act was further amended in May 2011 to provide for the transition of Section 21 companies to an NPC. The amendment also introduced more stringent governance standards of governance, including the requirement that NPCs submit audited annual financial statements to the CIPC, as well as directors' liability for non-compliance (Dugmore, 2018: 8). The NPC is 'usually an appropriate vehicle for larger NPOs with complex programmes, a large employee base, or large budgets' (Wyngaard, 2017).

6.2.4.5. Financial Intelligence Centre Amendment Act (FICA) 2017

Apart from compliance requirements that various CSOs must meet under the NPO Act, Tax Income Act, Companies Act or other relevant legislation, non-profit trusts must also comply with requirements of the Financial Intelligence Centre Act 2008 (FICA) and the Amendment Act, 2017. The Act lists 'non-profit trusts' as 'accountable institutions' that must register with FICA and that must notify the Centre of any changes to their registration details. The Centre is empowered to issue directives to ensure monitoring and compliance with FICA (ICNL, 2020).

6.2.5. Summary of regulatory frameworks and oversight bodies

Table 3 summarises the regulatory frameworks and oversight bodies responsible for them.

Table 3: Regulatory frameworks and oversight bodies in South Africa

Regulatory framework	Oversight / regulatory body
1. Non-Profit Organisation Act, 1997	NPO Directorate
2. Companies Act, 2008	CIPC
3. Trust Property Control Act, 1988	Master of the High Court
4. Income Tax Act, 1962 (as amended) 5. Value Added Tax Act, 1991	South African Revenue Services
6. Financial Intelligence Centre Act, 2008; 7. FIC Amendment Act, 2017	Financial Intelligence Centre

Source: Authors

7. THE NEED FOR A NEW REGULATORY FRAMEWORK

The development, in the 1990s, of a regulatory framework for CSOs in South Africa was led by civil society and was adopted after a consultative process characterised by the meaningful participation of a broad range of actors across civil society.

In particular, the NPO Act was adopted in 1997 following South Africa's transition to democracy to validate civil society's role in the democratic dispensation, to introduce new solutions after the Fundraising Act had been repealed, and to improve the accountability of CSOs. In addition, the NPO Act offered voluntary associations (established under the common law system) a route through which they could formalise their existence, allowing them to incorporate as entities with a legal personality. It was an important development as it allowed many smaller organisations to open bank accounts and to access funding (KI [Key Informant] 1). The initial design of the regulation also envisaged the establishment of an independent regulator whose main function would be to ensure the public accountability of CSOs, especially those that accessed state resources or raised funds from the general public.

Our study has shown that although the regulatory framework in South Africa was designed to protect and promote freedom of association, expression and assembly, in practice the policy has been beset by a range of challenges. These include conceptual challenges with respect to the role of the regulatory framework, challenges within the design of the regulatory framework itself, and challenges related to the practical implementation of the regulations. The implementation challenges are themselves often linked to a shortage of resources (both human and financial) as well as some questionable design decisions.

7.1. Challenges at the conceptual level

Many difficulties related to recent government initiatives on the regulatory framework for CSOs are closely related to misconceptions about the nature and role of civil society, and the role that "regulation of CSOs" plays. We would argue that the policy environment has incorrectly conceptualised civil society as being a single, coherent and organised sector with one overarching, organising vision. There has been a clear divergence of opinion between respondents working in civil society and those located in government – with the former referring to the diversity of the sector while the latter refer to 'fragmentation' within civil society, pointing out that 'now there is a lot of fragmentation, lot of [incoherent] different actions. As a result, there is no coherence, there's no coordination' (KI-2). In particular, one of the civil society respondents has said 'I think the beauty in the non-profit, civil society sector is in fact … that it plays a diverse role within a democratic society' (KI-3). Fragmentation is also the result of an uncoordinated legal framework, as well as being a reflection of diverse needs in society and the diversity of responses by CSOs, including service provision, advocacy or accountability (KI-2).

Secondly, there is a tendency within the state to limit its understanding of civil society only to those organisations that to some extent realise governments objectives (on behalf of or in collaboration with the government). However, 'there are organisations which have the right to exist who prefer to operate outside of the goals of government and they should have the right to do so. Any attempt to have this single umbrella approach to civil society actually leads to more conflicts than is necessary' (KI-1, KI-2).

These two misconceptions have resulted in two phenomena. Firstly, government's willingness to adopt PDCs as a high-level and overarching policy framework developed with the aim of guiding the relationship between (the entirety of) civil society and the state. And secondly, conceptualising this overarching vision of civil society as part of the regulatory framework whereas, in reality, it constitutes a strategic-level engagement between the government and civil society for developmental / democratic purposes. In our view, there is no compelling reason why the role of the state to regulate CSOs (dealing with a route for legal existence, providing a portal for information on the activities / status of CSOs or dealing with governance / oversight) should be conflated with the democratic and developmental role of the state, i.e. enabling and supporting civil society's meaningful role in meeting major societal challenges, and the consultation around policy development and implementation.

Regarding the above, the following further observations should be made. Firstly, in South Africa there exists no overarching policy guiding the relationship between civil society and the state. One previous attempt to develop such an overarching policy was made in 2012-2014 by DSD. The proposal was eventually withdrawn by the government, apparently because the new administration no longer regarded it as a priority after the general elections held in May 2014 (KI-1).

Even if no overarching policy exists, the state continues to look at the entirety of civil society through the lenses of the NDP and the NDA's mandate. Although the NDP may serve as a reference point for some parts of civil society, it will not necessarily apply to the entire spectrum of CSOs (perhaps, apart from some general statements) (KI-2). It is worth noting what one of our interviewees observed in this regard:

> I think civil society, as mentioned earlier, is diverse and people organise for very different reasons, politically diverse. The kinds of objectives they have in an organization may not necessarily align with what is in the NDP. It is a mistake to try and box all of civil society into this homogenous, 'one vision' kind of entity whereas in fact civil society, advocates / motivates / mobilises … around a diversity of issues and ideas (KI-1).

In the light of the above, the NDP should not be treated as an overarching document setting out a strategy for the entire civil society sector (KI-1, KI-2, KI-3, KI-4, KI-5). One respondent proposed the United Nations' Sustainable Development Goals as a more suitable source of an overarching and uniting vision (KI-2), while another identified the transformative vision of the Constitution 1996 as the appropriate set of guiding values and principles (KI-5). In any event, any high-level strategic engagement between government and civil society should rather involve relevant CSOs (those interested in supporting the state's developmental goals) and should be treated as part of the strategic interaction between the state and CSOs on a sectoral basis. By a way of example, the consultations on policy development and implementation of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, or the Regulatory Framework for the Community Advice Offices have naturally engaged CSOs operating in the human rights and social justice sector, or large CSOs that have been supporting the CAO sector through funding or capacity building, but will not necessarily be a platform for interaction with an association for orchid lovers.

7.1.1. The purpose of the NPO Act

The objectives of the NPO Act have been broadly framed and include both the strategic-level commitments (e.g. Section 2(a) and (e)) and commitments that deal with the details of the regulatory framework itself (Section 2(b)-(d)). In addition, Section 3 of the NPO Act stipulates that 'Within the limits prescribed by law, every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of non-profit organisations to perform their functions.'

This broad mandate vested on the NPO Directorate and, in particular, Section 3, might have introduced further confusion into the NPO Directorate's understanding of its role within the regulatory framework for CSOs. Given their functions and responsibilities, similar confusion could have been created on the part of the NDA and DSD that have been portrayed as the main centres for the government's interaction with civil society regarding policy development and implementation.

The NDA, DSD or NPO Directorate (whether independent or a government department) should not conflate their transactional role (providing a route for legal existence, providing a portal for information on the activities / status of CSOs; governance / oversight or grant-making), with the developmental role (ensuring that civil society plays a meaningful role in meeting major societal challenges) and the democratic role (consultation on the policy development and implementation). In our view, the last two will fail if implemented at this general level – either because the practical implementation is then limited to a subset of civil society (as has been the case with intiatives implemented by the DSD and the NDA) or because the problem at that level is intractable (simply, it is too difficult to consult the entirety of civil society on each issue). As mentioned previously, these types of interventions should be left to detailed interactions around particular issues, which would be best served by a general strategic policy guideline that can be interpreted and implemented by departments on a case-by-case basis.

7.2. Challenges related to the design of the regulatory framework

Initially, the regulatory framework established under the NPO Bill had been conceptualised as being complementary to, and mutually reinforcing of, other regulatory regimes, and in particular tax regulation. In practice, however, tax and VAT legislation were developed without taking account of NPO registration, and consequently, the NPO Act and "registration as an NPO" have become an additional layer of regulation without meaningful benefits for CSOs or for the general public. The result has been a set of overlapping regulatory regimes that are often inaccessible, confusing or burdensome (KI-1, KI-2, KI-3, KI-5). This is particularly the

case for smaller organisations such as CBOs or CAOs, thus raising concerns about their ability to comply with all the requirements of the regulatory framework, such as the cost of producing audited annual financial statements, in order to exercise their right to enjoy the constitutionally guaranteed freedom of association.

We mention some of the major issues related to the overlapping regulatory regimes below.

Firstly, the NPO Act has created an additional level of "non-profit" assessment. The non-profit character of CSOs is closely linked to a legal form available to organisations – voluntary associations, non-profit companies or non-profit trusts. The NPO Act requires that any voluntary association, non-profit company or non-profit trust wishing to be registered as such and in order also to benefit from tax benefits, must be established in accordance with a "non-distribution" criterion. According to s.12(2)(f) and (o) of the NPO Act and s.30(3)(b)(ii) of the Income Tax Act, this rule must be explicitly written into these organisations' constituting documents. Any form of accountability and compliance with regard to "non-profit status" is therefore prescribed by the law dealing with these legal forms. As pointed out by one of our respondents 'You can't legally register [merely] as an NPO in this country. You can be a trust, a non-profit company, or a voluntary association…. People are so confused about the difference between an NPO and [the legal forms available to CSOs]… they think it's another category of non-profit registration. It has created huge confusion' (KI-4).

Secondly, the CSOs that receive special treatment from the state (for example, tax exemption, tax-deductible donations, and VAT privileges) are subject to an additional level of control by SARS under the Income Tax and VAT Acts. In this regard, the VAT and income tax regimes for CSOs have become overcomplicated. For example, there are two parts to the Ninth Schedule to the Income Tax Act. Part I lists all the 'public benefit' activities that enable an applicant CSO to qualify for tax exemption, while Part II is a subset of Part I, listing those fewer public benefit activities in respect of which donors are eligible for tax relief for donations made to further those activities.

CSOs that deliver services to the line departments are further requested to provide proof that they have the necessary properly qualified and registered staff members (for example, nurses or social workers) to lawfully render those services.

Lastly, as observed by one of the respondents, the issues related to the overlapping regulatory frameworks have been further exacerbated by a siloed approach between regulatory bodies (CIPC, SARS and NPO), which in turn has led to the ineffectiveness of the sector (KI-2).

7.2.1. One-size-fits-all approach

In particular, the current regulatory framework has failed to acknowledge the diversity of civil society in South Africa in terms of size, scope of work, functions, and funding opportunities. What is particularly disturbing is the lack of recognition of significant discrepancies between the large and professionalised NGOs that operate predominantly in large urban centres and small grass-roots organisations that work in rural and peri-urban areas. The differences are apparent, especially regarding access to funding and donors (in particular an inability to raise money locally); the ability to comply with often onerous donor requirements of monitoring and reporting; access to internet, computer and office space; and an ability to access technical expertise locally.

Second, the current regulatory framework fails to take account of the diversity of functions that CSOs play in South Africa. Typically – as is evident from our review (below) of international models of regulation – the extent of regulation depends on whether a CSO is granted financial or tax privileges by a state or whether it raises money from the general public. Those CSOs that do so will typically be subject to more stringent regulation.

Third, the one-size-fits-all approach has had a negative impact on the smaller grass-roots organisations that undertake critical work in their communities but do not have the capacity and resources to meet the registration requirements provided for by the NPO Act, and to register with SARS in order to access tax exemptions and other benefits. Such organisations tend to operate in legal limbo as in principle they are eligible to be registered with SARS in order to receive tax-exempted grants and donations from donors, but in practice, they often lack the knowledge and capacity to go through the application process. The NPO Act and tax regime under the Income Tax and VAT Acts do not differentiate between smaller organisations that have a relatively low annual turnover and larger organisations that may operate with budgets in the millions of Rands.

Fourth, the two registration processes (in terms of the NPO Act and the Income Tax Act are separate, which in practice means that all CSOs must submit applications at least twice with the respective regulators (KI-2). The information provided by the government on various websites (for example, DSD, n.d.; South African Government, n.d.) does not provide clear guidance on the process or on what information and documents are required. As a consequence, even if internet access is available and affordable, smaller CSOs and CBOs find themselves at a disadvantage, and are often faced with insurmountable red tape. Small

CSOs and CBOs do not have in-house capacity to deal with the requirements of registration as prescribed by the regulators; neither do they have the resources to outsource the service. The compliance requirements to maintain NPO status are exactly the same for all types of organisations and are very burdensome (for example, having an annual financial report prepared by the accounting officer and thereafter independently audited), especially for small organisations. This was pointed out by a number of our respondents. In this regard, one interviewee emphasised:

> [Compliance is] ... one of the key points in the NPO Act and that is that you need to have an accounting officer certify your accounts. Now that sounds like a very basic requirement; however, if you have an organisation that has an annual income of ten thousand [Rands], they don't want to spend three to five thousand [Rands] on paying for an accounting officer (KI-3).

7.2.2. The NPO Directorate as funder and regulator

Key informants criticised the fact that the initial design of the NPO Directorate as an entity independent from the government had been abandoned and that the Directorate had effectively become one of the units within DSD. Its broad and unwieldy mandate has resulted in the NPO Directorate having been termed a conceptually "flawed" institution (KI-1). In particular, the NPO Directorate as currently understood and operationalised has been vested with a regulatory mandate but it sits within the government department that is also one of the major government donors for the CSO sector.

Initially, the NPO regulator had been envisaged as 'independent, a government institution but sitting outside of government, with the necessary information technology capabilities to firstly, show that people are able to register simply and easily and secondly, that the regulator would be able to ensure that fund-spending accountability is administered' (KI-1). However, for political reasons, the Directorate was established initially as a fully-fledged department directorate and then as a unit within DSD.

The fact that the NPO regulator was set up within DSD is reflective of government's narrow understanding of civil society as being limited only to those organisations that take on part of the state's service delivery role. An effective NPO regulator should have been set up to operate for the benefit of the whole sector.

Having the NPO Directorate (with its current broad mandate) as part of the DSD is also problematic because the NPO Director remains organisationally and functionally subordinate to the Director General of DSD and to the Minister (KI-3). This is of course unwelcome given the 'independence from the state' that characterises the civil society sector, but concerns about its location and independence would be less significant if its mandate was more sharply focused on transactional aspects of registration and reporting.

Lastly, a large proportion of CSOs receive funding from DSD. An immediate precondition to qualify for state funding is registration as an NPO – although there are additional qualifications and requirements before a contractual relationship can arise. It creates an obvious conflict, where the major government donor to a CSO is in fact the same entity that decides on whether the CSO should be registered, or whether it has complied with the NPO Act.

7.2.3. Accountability under the NPO Act

The major purpose of the NPO Act was to make NPOs accountable to the general public by creating a publicly available database and by introducing sanctions for non-compliance (that is, deregistration). In practice, however, deregistration has not been implemented, leaving the directorate toothless. (See the section dealing with the mandate of the NPO Directorate).

In addition, deregistration with the NPO Directorate does not automatically mean that a non-compliant organisation is dissolved and ceases to operate. As noted by one of the respondents, it simply means that the CSO has been deprived of its NPO status but is nevertheless allowed to continue operating (KI-2). At the same time, however, Section 20 of the NPO Act stipulates that the NPO Director must refer a law-breaking NPO to the South African Police Service for criminal investigation if satisfied that any noncompliance may constitute an offence.[22]

One of the respondents observed that there is no procedure that would allow a member of the general public to report a CSO whose operations are questionable to any independent institution, such as an ombudsman. The same person also observed that the lack of regulations dealing with the issue of whistle-blowers within the civil society sector has been one of the serious omissions of the regulatory framework (KI-4). The respondent pointed out that:

22 Sec. 20(1)(b) of the NPO Act.

> There should be a place where whistle-blowers could go, whatever structure it is; I know some years ago they were talking about a tribunal and that is really scary because it makes me think of military tribunals. Let's not have a tribunal but rather a kind of Public Protector [i.e. an ombudsman] – not the one we have with government but something where people can go with complaints (KI-4).

According to Section 9 of the NPO Act, the Minister appoints the Arbitration Panel, which is responsible for considering and deciding on appeals and arbitrations where an organisation lodges an appeal against cancellation of registration or refusal to register (DSD, 2020). Although the 'call for nominations of candidates' for the Panel has been recently published, there is no information that can be found online on the Panel itself. The Panel's mandate is also limited to dealing with appeals regarding the two issues mentioned above.

7.2.4. Misplaced mandate of the NDA

The NDA was created in 1997 to fill the funding void after the RDP programme was changed to GEAR, to create a funding conduit for CSOs, and to engage in dialogue with the civil society sector. As one of the respondents observed:

> The mandate of the NDA should have been one that is responsible for engaging with resource-rich sectors of society: local donors, community-givers, big donors, international givers and become a grant-maker for civil society .... There was an agreement between most of the major donors that this is a way that they would prefer to engage with government so that there's an institution that they know is going to have the capabilities to develop mechanisms to manage the funds they get through bilateral aid and ensure that there is effective distribution to NPOs. That was [initially intended to be] the primary mandate and objective of the NDA. The secondary mandate was around engaging dialogues in civil society (KI-1).

One of the reasons why the NDA has been envisaged as a conduit for CSO funding was to 'ensure that the kind of money that came through bilateral aid, which bypassed the legitimate government and then went into [unreliable institutions]…' was legally and transparently distributed (KI-1). Another reason for the NDA being a funding conduit was to improve the process of distributing government funding to the civil society sector in instances where CSOs had been pursuing the developmental goals of the state. It was hoped that it would decrease the pressure on DSD provincial departments, which were under-staffed and under-capacitated to perform grant-making functions (KI-1). However, the NDA had never really developed into

a conduit for CSO funding, but instead had become an institution for 'CSO capacity building'. As pointed out by one of the respondents, the key problem with the NDA being the 'capacity building' institution for civil society sector was that:

> Capacity-building is something that [some civil society] organisations have set themselves up to do and [have] a key set of competencies that would be able to do strategic planning for organisations, to ensure that there are model constitutions, ways to assist organizations with strategy; which … a government organisation sitting in Pretoria will not be able to do (KI-1).

The shift towards 'capacity building' initiatives has been reflected in the financial management of the NDA, which in 2018 allocated ZAR 39 million for capacity building activities, while only ZAR 25 million went to support for the work of CSOs (NDA, 2018: 56).

Similarly, it does not seem that the NDA is best placed to engage in dialogue with the civil society sector as whole given the sector's diversity and functions, which do not all necessarily align with the state's more narrowly focused developmental goals.

7.2.5. Specific issues under the regulatory framework

The Davis Tax Committee (DTC) report on PBOs and the Tax System (2018) identified a number of significant disincentives facing would-be philanthropists and donors in South Africa. Their pertinence was confirmed by KI-4 who explained that the sustainability of CSOs and their programmes of work are undermined by the low ceiling on tax-deductible donations, and the very onerous requirement for spending very large proportions of donations or grants within a short period of time (i.e. two financial years), lest they lose their tax-deductible status. The report 'is concerned with the relationship between tax and philanthropy in South Africa and, in particular, whether the encouragement and the enablement of philanthropic giving which may be an important aspect of domestic resource mobilisation for the provisioning of social and economic goods can be enhanced by amendments to the overall tax environment relating to philanthropy' (DTC, 2018: 3). We will mention two here, as the other two (the 'bifurcation or splitting of functions' between SARS and the NPO Directorate; and the smaller category of public benefit activities in Part II of the Ninth Schedule to the Act that are eligible for tax-deductible donations) were mentioned earlier.

The third is the very low ceiling imposed by section 18A of the Act on the quantum of donations (currently 10%) which may be recognised as tax deductible in a particular year, and the fourth

is the requirement in the Income Tax Act to distribute an 'unreasonably large amount of the funds received in the particular tax year by the end of the succeeding tax year' (DTC, 2018: 3-4). This latter requirement undermines attempts by a CSO (whether donor or recipient) to build up reserves, or to invest a donation or endowment to establish a fund or foundation for a sustainable, long-term programme strategy (KI-4).

7.3. Challenges with the operationalisation of the current regulatory framework

The NPO Directorate, which was created under the NPO Act as the main regulator for CSOs, was given a broad and extensive mandate. This mandate includes (a) facilitating the process for developing and implementing policy; (b) determining and implementing programmes; (c) liaising with other organs of state and interested parties; and (d) facilitating the development and implementation of multi-sectoral and multi-disciplinary programmes. The Directorate has been mandated to register NPOs for the purpose of public accountability and to assess NPOs' compliance (based on narrative reports and financial statements) with the requirements of the NPO Act. The Directorate has been given powers to issue compliance notices and decisions on de-registration for those NPOs that have remained non-compliant despite the notices. The Directorate has been also mandated to make information on NPOs available to the public.

The ambitious mandate of the NPO Directorate and the lack of adequate funding to realise this mandate have resulted in poor implementation of the provisions of the NPO Act. The key challenges related to the operations of the NPO Directorate are summarised below.

First, the NPO Directorate has been unable to deliver on its mandate to register NPOs. Although over the years the Directorate has improved the process and has made on-line registration available, it still takes about three months to register an NPO. In addition, as outlined earlier, the process remains burdensome for smaller organisations, which are often unable to present all the documents required by the Directorate and receive little assistance from the Directorate if the application is incomplete (KI-4).

The lack of properly functioning online systems has also been a challenge to the civil society sector when dealing with registration (Firman, 2017: 12). While CSOs that function in metros have easier access to the state offices, it is difficult for organisations functioning in rural areas to physically go to government offices located in urban centres. This means incurring additional expenses at the inception stage with very limited funding.

Second, the NPO Directorate has been mandated not only to register NPOs in accordance with the Act but also to assess their compliance with the provisions under the Act. In order to exercise the accountability and compliance function properly, the NPO Directorate has been given powers to deregister NPOs that are not compliant. However, according to our research, in the last five years (2015-2020) only 46 NPOs have been deregistered. In this regard, one of the respondents emphasised that without the proper implementation of compliance requirements, the public accountability purpose of the NPO Act has been compromised:

> A few years ago, about a third of those on the database have either been deregistered or marked as non-compliant. A lot has changed since that time: apparently there was a moratorium on the deregistration of organisations, which also is a problem because this impacts on the integrity of the database; if you want to promote donor confidence within South African society, if you look at the objectives of the Act to improve governance and introduce standards of governance, [the fact that] you have a database that you can't rely on is usually problematic (KI-3).

Third, the Directorate has not delivered on its function of ensuring public accountability by failing to produce or disseminate updated information about NPOs and the status of their compliance with the Act. The current database does not play its role as it indicates only the list of CSOs that have been registered as NPOs, but does not disclose their compliance status or other information: the names of office bearers, scope of activities, financial statements, etc. This is partially linked to the lack of capacity and capability within the NPOs Directorate to assess the documents submitted annually by NPOs, and to the fact that the NPO Directorate is located within the DSD, which is both funder and regulator. As observed by one of the respondents:

> Right now, because of where it is located, the fund-spending accountability, which is the core of the objective of the Act, is being neglected completely. If you want to click on a button to find out whether organization X is operating effectively and submitting annual reports, because you'd like to give them money, you won't be able to get that information – which was the intention of the Act (KI-1).

Lastly, the resources allocated to the NPO Directorate have reportedly been decreasing annually, thus making it increasingly difficult for the Directorate to fulfil its mandate.

7.3.1. Lack of comprehensive data on the civil society sector

A failure by the NPO Directorate to establish a publicly available database and an adequate system of registration has led to the unavailability of data on (at least) part of the civil society sector. This in turn has resulted in a limited acknowledgment of the economic benefits that are generated by civil society (for example, through taxes, creating employment, and providing assistance on behalf of the state) and its overall contribution to nation-building and democracy.

8. POSSIBLE MODELS OF REGULATORY FRAMEWORKS: COMPARATIVE INTERNATIONAL EXPERIENCES

Over the past decades, the roles and functions of CSOs globally have evolved significantly because of diminishing funding, emerging of new forms of businesses, and the increasing role of CSOs as public service providers, as well as their growing contribution to social and economic development of states. As explained previously in the report, these regulatory framework for CSOs are multidimensional and engage multiple fields of law and regulatory regimes (i.e., statutory regulation, self-regulation or co-regulation). The regulatory environment for CSOs is also informed by multiple factors: political regime; relationships between states and civil society; globalisation (an ability to operate in multiple countries); the growing importance of new technologies; and transnational funding opportunities. For these reasons, states regulate CSOs differently.

This section analyses solutions adopted in a number of countries worldwide. In this regard, the countries can be broadly divided into three categories: those that regulate CSOs under general laws (for example, the Netherlands, where CSOs are regulated under a civil code); those that provide for special CSO regulation under the tax regime (for example, the US); and those that have adopted specific non-profit legislation (for example, England, Wales, Kenya, and Poland). The case studies include examples from all three categories.

The section is divided thematically into five sub-sections that deal with various aspects of CSO regulatory frameworks. The first sub-section describes the types of legal forms that are available to CSOs and analyses these models from a comparative perspective. The second sub-section examines the modalities for incorporation and registration of CSOs in various countries, whilst the third sub-section deals with the privileged status often granted to charities and public benefit entities. The fourth sub-section discusses two aspects that lie at the core of the regulatory framework and that remain inherently interlinked, namely compliance and accountability of CSOs, including enforcement mechanisms. The fifth and last sub-section

analyses the extent to which states have regulated the political and lobbying activities of CSOs.

8.1. Types of legal forms available to CSOs

CSOs may include different types of legal entity, which can largely be categorised into two groups, namely membership and non-membership organisations (CoE, 2008). Associations and cooperative societies are considered to be the most well-known forms of membership organisations, while the most common form of non-membership organisations are trusts and foundations. Typically, a trust lacks legal personality, whereas a foundation is an incorporated legal entity (Powell, 2014).

8.1.1. Membership organisations

Countries provide for legal forms of cooperation between individuals and / or legal entities who wish to achieve a certain shared goal (membership organisations). In this respect, it appears that an association is the most common legal form (as, for example, in South Africa). However, in countries like Poland, Hungary and Sweden, the limited liability company or cooperative society are also commonly recognised as membership-based legal entities (Van der Ploeg, Van Veen and Versteegh, 2017b: 77). In many countries, the formation of an association with legal personality is possible, with England and Wales being one of the exceptions. In England and Wales, the unincorporated association is the most common form of membership organisation, and incorporation of this association is not possible. Therefore, if one wants to establish a membership organisation with legal personality one must select one of the following: a Co-operative and Community Benefit Society, a Community Interest Company (CIC), or a company limited by guarantee (Van der Ploeg, Van Veen and Versteegh, 2017b: 77). In Australia, on the other hand, an association can be incorporated either under the respective states' legislation on associations, or as a company limited by guarantee under the Commonwealth Corporations Act 2001 (at the national level) (Peacock, n.d.). In South Africa, both forms of voluntary association are available. Voluntary associations under common law can either have a form of corporate bodies with legal personality, known as a 'universitas', or bodies that remain unincorporated, known as 'non-corporate associations' (ICNL for CoF, 2019b).

In most countries, an association can obtain legal personality only after complying with certain formal requirements that must be performed before the designated body (court, notary or an administrative body). In Bulgaria, associations must be registered with the Register for not-

for-profit legal entities by the Registry Agency to the Minister of Justice in order to have a legal personality (BCNL, 2019). However, in Poland, a written document is sufficient for establishment of an association with legal personality, while in the Netherlands and Sweden even this is not necessary (Overes, 2017: 466). Accordingly, in The Netherlands a distinction can be made between formal and informal associations,[23] where the latter by law have limited legal capacity (Overes, 2017: 467). In Germany, an informal association is considered to have limited legal capacity to the extent to which it engages in economic activities that are subordinate to the non-economic purpose of the association and when profit-making is not the main purpose of the association (Von Hippel, 2017: 385). In South Africa, it is fairly easy to create a voluntary association both with or without a legal personality, as the agreement establishing an association may be oral or written, although it is customary for the founding agreement to take the form of a written constitution. Since voluntary associations are governed by common law, there is no requirement of registration, even for associations with a legal personality (ICNL for CoF, 2019b).

In many countries, it is possible to form informal associations without a legal personality (for example in the UK or US). By way of example, in Belgium two or more people (meaning either physical persons or legal entities) can agree to work together to realise a long-term common purpose on a non-profit basis, thus establishing a *de facto* association (Denef and Verschaeve, 2017: 327). In Hungary, on the other hand, groups that do not have registered membership and an organisational structure or operate informally cannot be recognised as associations but can rather form a civil group (*civil társaság*), which is a legal form without legal personality and does not have to be registered in court (Van der Ploeg, Van Veen and Versteegh, 2017b: 78). Similarly, in Bulgaria, two or more physical persons who come together for the accomplishment of mutual economic purpose can establish a civic association without a legal personality that is governed by the Law on Contracts and Obligations (BCNL, 2018).
Australian legislation provides for a very country-specific legal form of NPO. Aboriginal and Torres Strait Islander organisations can apply to be registered as a separate legal entity with the Office of the Registrar of Indigenous Corporations under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act). There are a number of advantages associated with the registration of an indigenous corporation, such as: limited liability; the rule book that governs how the corporation is run can take into account Aboriginal or Torres Strait Islander customs and circumstances; nation-wide operation; no fee for registration; reporting according to the size and income of a corporation; and incorporation for business purposes being

23 Informal associations are established by at least two people without any formal action and its statutes are not laid down in a notarial deed.

possible (NIAC 2020; ORIC 2018). Similarly, in Kenya, there are grassroots organisations that include *harambee* or self-help groups and CBOs such as neighbourhood associations. Self-help groups and CBOs are formally recognised through registration under the Department of Social Services in the Ministry of Gender and Children Affairs. As the largest category of organisations in the NGO sector, they operate primarily at the village and community level (ICNL, 2020c) but according to a new Public Benefit Organisation (PBO) Act (2013) they cannot be classified as PBOs.[24]

In democratic states, governments do not usually regulate the purposes for which associations or other CSOs can be formed (other than when they wish to benefit from charitable, tax-exempt or PBO status). Typically, the non-distribution constraint is the only restriction imposed on the CSOs' purpose, which is sometimes complemented by the lawfulness requirement – meaning that this purpose must be lawful (Van der Ploeg, Van Veen and Versteegh, 2017b: 87). As discussed above, people can typically form associations if they share a common purpose, which usually is not restrictively defined. Registration is typically necessary for associations with legal personality but there are exceptions even to this rule (for example, in South Africa).

In Algeria, on the other hand, associations are the most common and, it seems, the only available legal form for CSOs, yet freedom of association is significantly restricted by the Law on Associations (Law 12-06 of 2012).[25] The Law includes a closed list of the permissible purposes for the establishment of an association: 'professional, social, scientific, religious, educational, cultural, sports, environmental, charitable and humanitarian'.[26] Moreover, the Law requires a high minimum number of founding members: 10 for a local group, 15 if the group is regional, and 25 if it is national.[27] All associations in Algeria, depending on the geographical scope of their operations, must be registered with the relevant government body.[28] The Law gives very broad discretion to the government to refuse to register an association if the purposes and goals of the association's activities are not 'in the general interest' or are contrary to Algeria's 'national principles and values, public order, morality, and

24 Public Benefit Organisations Act (2013) (No. 18 of 2013), Kenya.
25 Law on Associations (Law 12-06 of 2012), Algeria, at 28.
26 Sec. 2, the Algeria Association Law (2012).
27 Sec. 6, the Algeria Association Law (2012).
28 The President of the People's Communal Assembly (for communal associations); the governor of the province in which the association is headquartered (for Wilaya, or provincial, associations); and the Ministry of the Interior for national or inter-Wilaya associations. See Sec. 7 of the Algeria Association Law (2012).

the laws and regulations in force.'[29] The Law also requires associations to secure approval from the Ministry of the Interior before entering into a 'cooperation agreement' with any international entities (ICNL, 2020a).

8.1.2. Non-membership organisations

Most countries have also included in their legal system the legal forms that provide a vehicle to designate property or assets for a specific purpose (non-membership organisations). These are either foundations (predominantly in the continental system) or trusts (predominantly in the Anglo-Saxon legal system). Like membership organisations, non-membership organisations can either possess legal personality or not.

Trusts, which are the most common form of non-membership organisation in Anglo-Saxon countries, generally do not have legal capacity and can be established for charitable purposes only (Powell, 2014). However, in England and Wales, trusts may acquire a legal personality either by incorporation as a charity with trustees, or by registering as a Charitable Incorporated Organisation (CIO) or as a company limited by guarantee (Van der Ploeg, Van Veen and Versteegh, 2017b: 79). As in the countries of the Anglo-Saxon tradition, in South Africa a trust constitutes a legal structure available for a non-membership organisation, but unlike in the UK, a trust can also be established for private benefit or for a charitable purpose. The Trust Property Control Act 57 of 1998 regulates trusts that are utilised by some CSOs and philanthropic entities as a vehicle to conduct their activities. Trusts that must be registered with the Master of the High Court do not have legal personality, but trustees nevertheless enjoy limited liability (ICN for CoF, 2019b).

In continental Europe and in Brazil, non-membership organisations typically take the form of a foundation, which is defined by law. Most countries have one type of foundation with legal personality, but there are some exceptions, including Belgium, where both private and public foundations with legal personality can be formed. Public foundations in Belgium serve a 'public interest' that is defined as being philanthropic, philosophical, religious, scientific, artistic, pedagogic or cultural in nature (Denef and Verschaeve, 2017). A public foundation is established by notarial deed and can obtain legal personality only after approval by a Royal Decree (Denef and Verschaeve, 2017: 333). Another type of public foundation includes those entities that have been established by the state body either at local or national level. The Croatian National Foundation for the Development of Civil Society (*Nacionalna Zaklada za*

29 Sec. 2 and sec. 10 of the Algeria Association Law (2012).

Razvoj Civilnoga Drustva) is a notable example of a public foundation as it was established by the Croatian Parliament in 2003. The foundation carries out a mix of operating and grant-making activities funded by the Croatian lottery, state budget and EU funds (EFC, n.d.; National Foundation for the Development of Civil Society, n.d.). The Brazilian legal form of public foundation combines these two features and is defined as a 'not-for-profit private legal entity created by the government upon legislative authorisation to undertake public activities not necessarily assigned to the government' (ICNL for CoF, 2019a). Such foundations can be established and operate under either a public law or a private law regime and their assets may come from the state or other sources (ICNL for COF Brazil, 2019a).

8.1.3. Other entities – the Charitable Incorporated Organisation (CIO)

An interesting legal entity – the CIO – was introduced in UK law in 2013 and is available both in membership and non-membership form.[30] Like a trust, a CIO can only be established in certain circumstances and for charitable purposes only. Many aspects of the CIO are similar to those of a company limited by guarantee, but unlike the latter the CIO must comply with only one set of laws as it is regulated solely by the Charity Commission and the Charities Act.[31] Accordingly, the CIO is similar to a company limited by guarantee in the sense that it behaves as a legal person with the limited liability of trustees, but unlike a company it does not have to register with the Companies House but only with the Charity Commission. Moreover, in order to register with the Charity Commission, a company limited by guarantee must have a minimum annual income of £5,000, which is not required of a CIO. Overall, the main difference is that the charitable company limited by guarantee has to comply with two sets of laws (company and charity law) while the CIO must abide by only one, the Charities Act (Johnson-Cameron, n.d.).

South African legislation, on the other hand, provides for the establishment of a non-profit company that likewise can take either membership or non-membership form and is governed by the South African Companies Act of 2008.[32] Non-profit companies are incorporated and

30 Section 11, Charities Act of 2011, England and Wales.
31 A company limited by guarantee, on the other hand, is regulated by company law and charities law if registered as a charity. The legal framework for CIOs is set out in the Charities Act (2011) and subordinate legislation: Charitable Incorporated Organisations (General) Regulations 2012; Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012; and The Charity Tribunal (Amendment) Order 2012.
32 The new Companies Act No. 71 of 2008, South Africa was signed into law in April 2009 and entered into force on May 1, 2011.

registered with the Companies and Intellectual Property Commission and may also register with the NPO Directorate.

8.2. Incorporation and registration

Incorporation comes with a number of advantages, such as: legal personality, clear legislative regulation concerning the governance and compliance requirements, limited liability, public accountability and availability of equity financing. At the same time, incorporation may not be the best option if one prefers to keep the organisation informal and flexible, with minimal external control or regulation imposed by the state (Longley, n.d.). Typically, in most countries, the establishment of CSOs with legal personality requires certain formalities, including incorporation or/and registration. The organ or entity responsible for incorporation and/or registration differs between the countries and depends on the legal structure that has been adopted for the establishment of CSOs.

8.2.1. Incorporation and registration of a legal entity

By way of example, in Germany, an association wanting to obtain legal personality must be registered in the Register of Associations, which is kept by the local court (*Amtsgericht*) (Von Hippel, 2017: 390).[33] Foundations wanting legal personality in Germany must be approved by the respective government authority (Von Hippel, 2017: 390). In most countries, registration of a CSO leads to obtaining legal personality. An exception is The Netherlands, where both foundations and associations are established by notarial deed in accordance with the Civil Code and must be included in the Commercial Register, which is kept by the Chamber of Commerce. However, these organisations are legal persons regardless of their registration (Overes, 2017: 473). Similarly, in Brazil CSOs (both associations and foundations) are recognised as legal persons automatically upon filing their by-laws with a notary service, without the need for government authorisation. At the practical level, however, they are forced to register with the federal tax authority to be able to open bank accounts and enter into contracts with third parties (Nieva and Guadamuz, 2015).

As discussed before, only in a few countries can CSOs be formed without public deed or involvement of a public official, with Sweden being a notable example. In Sweden, two or more legal or natural persons may form an association with legal personality merely by agreeing on

33 Para. 55, Civil Code in the version promulgated on 2 January 2002, last amended by Article 4, para. 5 of the Act of 1 October 2013.

its founding charter that must include the name of the organisation and its objective. In order to complete the establishment of the association with legal personality, the board must be appointed (Karlsson and Engvall, 2016). Only large non-profit associations (defined as associations exceeding certain thresholds in terms of number of employees, balance sheet total and net turnover) that conduct commercial business[34] must register with the Companies Registration Office in Sweden (Karlsson and Engvall, 2016). On the other hand, a foundation in Sweden is set up when the founder signs a formation document, specifying the intent to create a foundation and to separate certain property that must be used for a specified purpose (Karlsson and Engvall, 2016). Karlsson and Engvall add that 'Although not a requirement for its formation, a foundation must be registered within six months from formation with one of the County Administration Boards (*Länsstyrelser*) appointed by the government, in or near the county where the foundation has its seat of administration.'

In the UK, a company exists and has legal personality once registered at the Companies House and cannot operate in its own capacity before that happens (Synge, 2017: 367). Incorporating an organisation in the US takes place at the level of state law (as opposed to federal law) and is relatively easy. The process typically entails providing a short description of the organisation, its purpose, powers, name, the address of an agent within the state, and paying a fee (US DoS, 2017). Most states have adopted general statutes governing the creation and operation of non-profit corporations (Fremont-Smith, 2009: 151). Incorporation of non-profit corporations is similar to the process for for-profit entities, with instruments being filed with the secretary of state or other state official (Fremont-Smith, 2009: 151). Some US states may, however, require registration of a charity. In California, charitable corporations, unincorporated associations and trusts must file articles of incorporation with the Attorney General's Registry of Charitable Trusts, or other documents governing the organisation's operations (for example, articles of association or trust instrument) within 30 days after initial receipt of property (CRCT, 2005).

8.2.2. Registration of charities and public benefit entities

Having a public benefit status may be a legal requirement for a specific legal form, or it may be a prerequisite for preferential tax treatment. This is the reason why states often require the

34 In Sweden non-profit associations include non-profit associations that are not engaged in economic activities or do not further the economic interests of their members or are neither engaged in economic activities nor concerned with furthering the economic interests of their members. Accordingly, it is it is perfectly acceptable for a non-profit association to become involved in business as long as the association does not combine economic activities with the purpose of furthering the economic interests of its members (Giertz, 2017: 557).

registration of charities or public benefit entities, either by independent bodies or other organs of state.

Subject to some exceptions,[35] all charities in England and Wales, regardless their legal form, must be registered in the Register of Charities, which is maintained by the Charity Commission and is open to the public.[36] If the charity is based in England or Wales and it is not a CIO, it does not have to be registered if its annual income is less than £5,000. However, such a charity can still apply to Her Majesty's Revenue and Customs (HMRC) for recognition as a charity (GOV.UK[a], n.d.) in order to benefit from tax concessions available to charities and to claim gift aid,[37] which is a form of incentive for individual donors.

In the US, there is no nation-wide registry for charitable organisations. At the federal (national) level, non-profit organisations (as incorporated under the regulation of the individual states' law) may wish to register for tax-exemption purposes. The Internal Revenue Service (IRS) under the Department of Treasury is responsible for maintaining the registry of tax-exempt organisations, which includes public charities and private foundations (so called '501(c)(3) status organisations'). In Hungary and Poland, it is a court that decides on the registration of CSOs with public benefit status. If registration is refused, the organisation may appeal to the court of second instance (Van der Ploeg, Van Veen and Versteegh, 2017b: 199).

In 2007, a government decree in Brazil established the National System of Entities Qualified by the Ministry of Justice. Under this decree, all organisations that qualify as CSOs for the Public Interest or holding Public Utility Status, along with all foreign organisations authorised to conduct activities in Brazil, must register with the Ministry of Justice and submit annual financial and activity reports (ICNL for COF Brazil, 2019).

In South Africa, organisations willing to obtain the status of a PBO must apply to the South Africa Revenue Service (SARS). Assessment of the application is later conducted by the

35 The exceptions are (i) exempt charities (e.g. certain museums, galleries, educational institutions and social housing providers), (ii) excepted charities (e.g., church and armed forces charities and scout groups) whose gross income does not exceed £100,000 and (iii) charities (other than CIOs) whose gross income does not exceed £5,000. See Sec. 30 of the Charities Act (2011).
36 Sec. 30 of the Charities Act (2011). Similarly, in Australia, charities must register with the Australian Charities and Non-Profits Commission. See Australian Government (a) (n.d.).
37 Gift Aid is a form of benefit available to charities. Under the Gift Aid scheme a donor may provide a declaration to the recipient charity stating that the donor i) pays income tax, and ii) agrees that the charity may claim the tax paid by the donor on the amount of the donation, which is equal to 25% of the donation. Accordingly, donating through Gift Aid means that charities and community amateur sports clubs can claim an extra 25p for every £1 the donor gives. See GOV.UK(b) (n.d.).

SARS's Tax Exemption Unit. If an application meets all the requirements, the Commissioner approves an organisation as a PBO (SARS, 2018). An organisation with PBO status is entitled to certain tax exemptions and may also apply to SARS to be recognised as a PBO eligible for tax-deductible donations.

8.3. Charities and public benefit entities

CSOs that advance or promote purposes that benefit wider society, or a particular section of society, are often granted a privileged status under the regulatory framework. These organisations are often referred to as public benefit organisations (PBOs) or charities, and are typically subjected to a more stringent regulatory framework than CSOs without this special status. However, there is sometimes a risk of tension or conflict between a government and these CSOs that take upon themselves some responsibility in the public domain, such as policy advocacy, legislative reform or even some form of service provision. Countries adopt various approaches towards public benefit status, and freedom to act of organisations with this status also differs between countries (Van der Ploeg, Van Veen and Versteegh, 2017b: 192-193). Thus, in some countries, public benefit status gives access to tax-exempt benefits, while in others also to governmental grants and subsidies (Van der Ploeg, Van Veen and Versteegh, 2017b: 192-193).

8.3.1. Legal forms available to PBOs and charities

In some countries, there are specific legal forms that must be used by organisations serving the public benefit. As opposed to many European countries (for example, Germany, Poland, and The Netherlands), where all legal entities may qualify as PBOs, in England and Wales there are four main types of legal form available to a charity:

- CIO (legal personality)
- Charitable company (limited by guarantee) (legal personality)
- Unincorporated association (no legal personality); and
- Trust (in principle, no legal personality).

Similar legal structures may qualify as a charity under the US tax law; however, as opposed to the UK, where the trust is the most common legal form for a charity, in the US it is the

corporation (Dirusso, 2011: 61) while in Australia it is an incorporated association.[38] In South Africa, only voluntary associations, trusts and non-profit companies (NPCs) established in South Africa, as well as a branch of a foreign tax-exempt organisation, can apply to SARS to be recognised as a PBO (SARS, 2018).

In Belgium, on the other hand, the only legal form available for a PBO is a foundation established for the public interest (Van der Ploeg, Van Veen and Versteegh, 2017b: 194). In Germany, all CSOs may qualify for public benefit status, and it is within the exclusive power of the tax office to determine their status, based on the legal criteria as provided for in the relevant legislation (Von Hippel, 2017: 393).

According to Article 5(1) of the new PBO Act (2013) in Kenya, 'PBO' means 'a *voluntary membership* or *non-membership* grouping of individuals or organisations, which is autonomous, nonpartisan, non-profit making and which is: i) organised and operated locally, nationally or internationally; ii) engages in public benefit activities in any of the areas set out in the Sixth Schedule; and iii) is registered as such by the Public Benefit Organisations Regulatory Authority' (emphasis added).[39] Article 5(1) provides for the list of organisations that cannot be considered as a PBO, for example, trade unions, political parties, and religious organisations.

8.3.2. Public benefit or charitable purpose

The primary difference between a public benefit or charitable organisation and other CSOs is their public benefit or / and charitable purpose. States define this purpose differently, with some providing only general guidance, while others have developed an exhaustive or exemplary list of qualifying 'purposes'.

8.3.2.1. <u>The Netherlands</u>

One of the key criteria with respect to public benefit status is that the purpose of the CSO must benefit society at large or a sufficiently wide section of society. In The Netherlands, any CSO can qualify as an organisation pursuing the public benefit. In order to obtain such status, an organisation must apply to the Tax Administration Office Oost-Brabant, Department of

38 Charities in Australia may adopt the following legal structures: incorporated associations, companies limited by guarantees, no-trading co-operatives, indigenous corporations, trusts, or unincorporated associations. See Australian Government (b) (n.d).
39 Public Benefit Organisations Act (2013) No. 18 of 2013, Kenya.

Eindhoven, and its inspectors will decide whether or not a CSO should be granted public benefit status. In The Netherlands, public benefit purposes have not been defined in statute and therefore the assessment is conducted based on tradition and case law. However, the law states that the purpose of the CSO and its activities must be directly related to the public interest. This is deemed to be the case if the organisation serves the public interest exclusively or almost exclusively (90%). In the event of liquidation, any budgetary surplus must be used for a purpose comparable to that of the organisation, or for another organisation recognised in law as for the public benefit (Overes, 2017: 479).

8.3.2.2. England and Wales

The distinction between charitable and non-charitable organisations remains most important in English law. The charitable status of an organisation does not depend on legal structure or registration, but is determined as a matter of law – having regard to the charitable and public benefit purpose of the organisation as established under the Charities Act, 2011 (Synge, 2017: 364).[40] The Charity Commission for England and Wales can decline an application for registration only on the basis that the applicant does not meet the legal requirements for charitable status. A charitable purpose requires that the charity be established for one of the enumerated twelve aims as listed in the Charities Act (which includes promotion of human rights)[41] or for the public benefit as defined in the case law.[42] However, the list of charitable purposes is not exhaustive as it provides for additional qualifying purposes if these are analogous to any of the listed purposes or are otherwise recognised as charitable under prior case law (Van der Ploeg, Van Veen and Versteegh, 2017b: 194).[43] In accordance with the Charity Commission's guidelines, 'public benefit' in the UK is composed of a 'benefit aspect', which requires the purpose to be beneficial in a way that it is not based on personal views, and that any detriment or harm that results from the purpose must not outweigh the benefit. Moreover, the 'public aspect' must be satisfied, meaning that the purpose must benefit the public or part of it and must not give rise to more than incidental personal benefit (CC, 2013a).

The purpose must also be certain so that, if necessary, it could be enforced by the court. As such, the following purposes are precluded from being charitable: political purpose, a purpose

40 There are a number of legal documents that regulate charities in England and Wales, including: the Charities Act (2011); the Charities (Protection and Social Investment) Act 2016, which strengthens the powers of the Charities Commission; the Trustees Act 1925 and 2000; and the Charities Commission's regulations.
41 Sec. 3 of the Charities Act (2011) provides a description of purposes, including partial definitions of some of them.
42 Sec. 2 of the Charities Act (2011).
43 Sec. 3(1) of the Charities Act (2011).

that is unlawful or against public policy or that is intended to serve a non-charitable motive (CC, 2013b). The Charity Commission is ultimately mandated to decide on the charitable status of the entity, and it does so, based on its internal guidelines and case law. In case the application to register is unsuccessful, the Charity Commission must notify an applicant stating the reasons therefor. The applicant can either reapply by addressing the reasons for the rejection, asking the Charity Commission to review its decision, or appeal to the Charity Tribunal. It is not necessary to exhaust the review procedure before appealing to the Charity Tribunal (GOV.UK(c), n.d.).

8.3.2.3. The US

As opposed to the UK or Australia, in the US there is no specific non-profit legislation, but it is the Internal Revenue Code (IRC) that lists the permissible purposes for non-profit organisations, limits the private benefits of transactions in which non-profits engage, and restricts the activities and investments of various types of non-profit organisations (Dirusso, 2011: 65). In principle, in the US one must differentiate between a non-profit legal entity (established under a state law) and tax-exempt status at the federal level. Some states offer additional or separate tax exemptions from those granted at the federal level (Picard, Belair-Gagnon and Ranchordás, 2016: 84).[44] Whether the NPO is entitled to a federal tax exemption is a matter of law as stipulated under the IRC.[45] In order to receive tax-exempt status at the federal level, some NPOs are required to apply to the IRS for the registration of that exemption (IRS, 2018). For other NPOs desiring a tax-exemption status, application to IRS to have this status recognised is voluntary, but it provides some assurance as to the claimed exempt status (Hopkins and Gross, 2016: 44). Among more than seventy types of organisations that may be classified as tax-exempt, the majority are charities as defined under §501(c)(3) of the IRC (Guidestar, 2015). The realm of charitable organisations in the US is divided into two classes – public charities and private foundations – which are distinguished primarily by the level of public involvement in their activities. Public charities are the most numerous of the tax-exempt

44 While most states streamline their tax exemption applications with the IRS, some states, like California, have a separate tax exemption procedure.

45 In order to determine whether an organisation qualifies as a charitable tax-exempt 501(c)(3) organization, the IRS performs a number of tests. The organisational tests requires that a Sec. 501(c)(3) organisation is an unincorporated association, corporation or trust established for the purpose as listed under Sec. 501(c)(3) and permanently dedicating its assets to exempt purposes. The operational test requires that a substantial portion of an organisation's activities must further its exempt purpose (no political activities, lobbying activities limited to an insubstantial part of its total activities, no private inurement, no illegal activities, must not operate for the primary purpose of conducting a trade or business that is not related to its exempt purpose). Lastly, a Sec. 501(c)(3) organisation must be established for exempt purpose.

organisations, making up 69% of all tax-exempt organisations and accounting for more than 1 million entities as of July 2015 (Guidestar, 2015). As per §509 of the IRC, every tax-exempt charitable organisation is presumed to be a private foundation until it rebuts this presumption. As in the UK, having the status of a §501(c)(3) organisation (charity) in the US attracts certain benefits, including exemption from federal income tax and eligibility to receive tax-deductible charitable contributions.

In case of an adverse determination of §501(c)(3) status, an applicant can file a protest statement with an independent dispute resolution forum within the IRS – the Appeals Office. If the Appeals Office is unable to solve the dispute, the case can be brought to a federal court, assuming that procedural and jurisdictional requirements are met (IRS, n.d.). The federal court can issue a declaratory judgment as to the organisation's qualification for exempt status, or its classification as a private foundation or publicly supported organisation.

An interesting concept introduced in the US is to the so-called 'supporting' organisation – a public charity that constitutes an alternative to applying separately for exemption.[46] As observed by the Council of Foundations, 'supporting organisation' is 'an organisation that attaches itself to or supports another public charity (or charities) and – in effect – acquires the public charity status of the organisation it supports' (CoF, n.d.). By virtue of attaching itself to or supporting a recognised public charity, this organisation may obtain many of the benefits of §501(c)(3) status, including the public charity status of the organisation it supports. The philanthropic arm of a university or hospital is an example of a supporting organisation. Certain grants to specific kinds of supporting organisations are prohibited or can be made only within strict guidelines (CoF, n.d.).

8.3.2.4. Other examples

As in South Africa, in Brazil there is a distinction between the designations that allow CSOs to benefit from tax-exemption and those that enable access to public funding. The first designation is Social Assistance Beneficent Certification, which might be granted to a Social Assistance Beneficent Entity (ICNL for COF Brazil, 2019). Two additional designations, Civil Society Organisations for the Public Interest, and Social Organisations, allow CSOs to access public funding (ICNL for CoF, 2019a). The Law[47] was meant to facilitate the process of

46 Sec. 509(a)(3) of the US Internal Revenue Code (IRC).
47 Unofficial translation: https://www.icnl.org/research/library/brazil_brazilframework2/ (accessed 19 October 2020). Legal Framework for Civil Society Organisations, 13.019 of 31 July 2014.

accessing public funding even for organisations without the relevant certifications; however, in practice the designations are still required.

In Algeria, according to Article 34 of the Law on Associations (2012), associations regarded as 'being in the general interest and / or of public utility' are eligible to access funding from the government. However, the law fails to define either 'public utility' or 'general interest', thus leaving it in the hands of government officials to determine public benefit status. In practice, no direct or indirect financial benefits, such as tax exemptions or public utility discounts, are available to associations in Algeria (ICNL, 2020a).

In Kenya, apart from providing a definition of PBOs, Schedule Six of the PBO Act (2013) provides a non-exhaustive list of objectives that qualify as being of public benefit. As specified under the Act, the PBO must register with the PBO Regulatory Authority in order to enjoy the benefits contained in the Act.[48] Under the Act, international non-governmental organisations may also register as PBOs in Kenya.

In Poland, CSOs are granted public benefit status by a court after meeting all the requirements as provided for in the public benefit law on public benefit activities.[49] According to this law, public benefit activity 'shall mean work performed to the benefit of society by non-governmental organisations in the area of public tasks as set out herein.' The law exhaustively lists permissible public benefit activities, but the Council of Ministers can expand this catalogue by ordinance, in recognition of a particular benefit for society.[50] Interestingly, in Poland a distinction is made between organisations having a public benefit status and organisations that operate in the sphere of public benefit activities. All PBOs must be engaged in public benefit activities; however, there are CSOs that do not have public benefit status, although their activities are conducted in accordance with public benefit principles. The latter may enjoy some advantages provided by public benefit law even though these organisations are not recognised as such. For instance, all CSOs are entitled, under certain conditions, to engage in 'paid public benefit activity'.[51]

8.4. Compliance and accountability

48 The Public Benefit Organisations Act (2013) No. 18 of 2013, Kenya.
49 The Act of 24 April 2003 on Public Benefit Activity and Volunteering, Poland.
50 Sec. 3(1) and Sec. 4 of the Act on Public Benefit Activity and Volunteering (2003), Poland.
51 Section II, Chapter 1 of the Act on Public Benefit Activity and Volunteering (2003), Poland.

8.4.1. Preliminary observations

CSOs engage in a wide range of activities that have a range of impacts, including on individuals and groups in society, and on policy and legislation. They deliver services to vulnerable groups, provide services on behalf of governments, advocate for policy and legislative change, hold governments to account, and demand greater accountability and transparency from the private sector. In doing so, they often also spend public money. Therefore, there have been repeated calls for higher 'professional' governance standards within the civil society sector, including greater information transparency, increased financial openness, and greater coordination or self-regulation among CSOs themselves (KI-2, KI-5). Regulations dealing with compliance and accountability can be either statutory (imposed by the state), self-regulatory (imposed by the sector itself), or take the form of co-regulation (based on cooperation between the state and civil society). A concern often expressed is that statutory regulation is more likely to have meaningful enforcement mechanisms (for example, in the form of sanctions), as opposed to self-regulation, which is predominantly voluntary and, by implication, rather less stringent. On the other hand, co-regulation by professional associations, often in terms of a statutory regulatory framework, can be an effective middle path.

CSOs must comply with the general laws of the country where they have been established (for example, criminal and tax law), as well as specific non-profit or charity laws that frequently impose additional compliance requirements. The respective authorities typically have various powers to ensure compliance, which nevertheless differ significantly between jurisdictions. In countries with specific non-profit laws, compliance is dealt with at various levels. Firstly, the future CSO must comply with the requirements needed for it to become a type or form of CSO, and then to incorporate and / or register as a legal entity (as discussed above). Secondly, CSOs must comply with specific requirements as prescribed under non-profit law and with tax regulations, which are often distinct from regular tax regulations. In this regard, compliance requirements normally entail: periodic (perhaps annual) financial and / or narrative reporting; adherence to recognised bookkeeping standards; conducting activities in accordance with prescribed internal procedures (for example, keeping minutes of regular board meetings; adhering to workplace safety laws and labour legislation); independent financial audits; limitations on certain activities; and an obligation to acquire certificates or permits. In addition, CSOs must also comply with the monitoring and reporting obligations required by donors. Sometimes CSOs that are members of self-regulatory bodies will be asked to comply with requirements imposed by a coalition or network of organisations, such as a code of conduct.

The issue of compliance is closely linked to the question of accountability, which is both internal (good governance and internal systems of checks and balances) and external (external supervision by the state or other relevant organ). Accountability creates a system of processes and mechanisms (including sanctions) that ensure that CSOs remain complaint with regulations. The concept of accountability is complex and dynamic, and sometimes includes competing standards of accountability or different forms of accountability to different stakeholders (Ebrahim, 2003).

Accountability comprises responsibility for behaviours, actions, services, decisions, and the provision of reasons that must be perceived as satisfactory by their recipients. In relation to civil society, the notion of accountability is related not only to governance, organisational purpose and legal status, but also 'relates to how an organisation engages, communicates and listens to stakeholders' (CF, 2013).

In the context of the civil society sector, one can differentiate between various types of accountability chains, both internal and external, namely: (1) accountability within the organisation; (2) accountability of CSOs to their constituencies; (3) accountability of CSOs to the government; (4) accountability of CSOs to their donors; and (5) accountability to other CSOs or partners (Camay and Gordon, 1998). Accountability that is voluntarily and willingly accepted can have a direct impact on self-governance and resulting credibility in the sense that it can serve to decrease the perceived need for external oversight, thereby fostering organisational independence and autonomy.

These accountability chains are described below:

- *Accountability within the organisation.* This includes internal accountability mechanisms that exist within the organisation, namely financial, programmatic and management systems and processes aimed at ensuring accountability. This also includes accountability between employee and employer in terms of performance, integrity and professionalism, lawful and fair workplace treatment, as well as accountability of staff to the Board (Camay and Gordon, 1998). Internal accountability is also inherently linked to the notion of good governance, which ensures the existence of effective checks and balances within the organisation, which promotes its independence from the government or other external interference.

- *Accountability of CSOs to their constituencies*. This form of accountability is intended to create a credible civil society sector and to ensure that the rights and interests of

beneficiaries and rights-holders in communities are protected against possible abuses. It is critical that the civil society sector delivers quality services (of all kinds, ranging from welfare to advocacy) that meet the needs of the community. This form of accountability creates a system that allows communities to control and hold CSOs accountable, through a number of accountability mechanisms – for example: a credible complaints mechanism, such as an independent ombudsman; a public register of CSOs, with annual narrative reports and audited annual financial statements; and reporting back to constituencies on completed activities.

- *Accountability to donors.* Accountability between donors and CSOs allows for the establishment of long-term partnerships based on credibility and mutual trust, which contributes to the sustainability of CSOs. This form of accountability typically ensures accurate and efficient financial and project management, transparent and timely reporting, and monitoring and evaluation. If donors feel confident about all aspects of a CSO's accountability they are likely to be less prescriptive and interfering, and more open to innovation and flexibility.

- *Accountability to the government.* This is another form of mutual accountability, creating a system of checks and balances aimed at protecting the public interest and preventing possible abuses by CSOs, while at the same time ensuring that CSOs operate within the prescribed regulatory framework and provide quality services to their constituencies. Ideally, this system of checks and control measures should be limited to overseeing the financial affairs and management of CSOs. The government should not interfere with the types of services rendered and with the general internal affairs or external activities of CSOs, other than in cases in which the project is governed by a contractual agreement specifying the CSO as a service provider. At the political level, in a democratic state the government constantly remains accountable to CSOs for its actions and inactions. At the level of the regulatory framework, this means that the government is under an obligation to adequately operationalise statutory regulations and to act within its mandate. It also means that the government remains responsive to CSOs' concerns and requests for information.

- *Accountability to other CSOs and partners.* This form of accountability creates mutual trust and fosters efficient collaboration between various actors within civil society (Camay and Gordon, 1998).

In what follows we deal firstly with the compliance and accountability mechanisms under statutory regulatory frameworks in various countries. In particular, we shall describe the compliance requirements in some of the countries considered and what 'external supervision' mechanisms have been put in place to monitor compliance with the applicable legal provisions. The notion of 'supervision' may entail control over activities or legal acts as performed by CSOs (for example, special permits required) and / or enforcement mechanisms aimed at monitoring, investigating or correcting any act or conduct that is in violation of the law (Van der Ploeg, Van Veen and Versteegh, 2017b: 145). We then discuss examples of self-regulation before considering emerging models of co-regulation.

8.4.2. Statutory regulation – Compliance and accountability

Compliance requirements and accountability mechanisms vary from country to country. In countries where no special non-profit legislation exists, compliance requirements tend to be dealt with at the level of tax regulation. In many countries, the level of complexity with regard to compliance requirements is linked to the type of legal entity, level of income, or whether or not the CSO has been granted public benefit status. The most typical compliance requirements include disclosure statements and reports, performance assessment and evaluation, and financial auditing.[52]

In some countries, 'supervisory' entities have been endowed with only limited powers, thus leaving the enforcement of harsher sanctions to courts of law. Van der Ploeg, Van Veen and Versteegh (2017b: 178), in a study focusing on twelve member states of the Council of Europe, identified a number of instruments that are typically used by states as sanctions in case of non-compliance:

- Advice
- Warning notices
- Administrative fines
- Injunctions or issuing instructions
- Suspension or dismissal of directors / trustees
- Personal liability of trustees
- Dissolution of the CSO; and, in the case of CSOs with special status
- Loss of public benefit-, charitable-, or tax-exempt status.

52 See Ebrahim (2003: 815-820) for a discussion of certain compliance tools.

8.4.2.1. The US

Many of the tax-exempt organisations in the US are required by federal law to file an annual information return by submitting the relevant 990 Form to the IRS. Smaller tax-exempt organisations, which normally have annual gross receipts of $50,000 or less, must submit only a so-called 'e-postcard' electronically (IRS, 2018). Any organisation that fails to file a required annual return or notice for three consecutive years will automatically lose its tax-exempt status (automatic revocation of the tax-exempt status), by act of law, as of the due date of the return for the third consecutive year (IRS, 2018). Moreover, the IRS may also impose penalties for failing to file a return, for failing to provide all the information required on the return, or for failing to provide correct information. This penalty varies from $20 to $50,000 a day, depending on the organisation and its gross receipts (IRS, 2020: 12). Tax-exempt organisations must also file another form if they earn $1,000 or more in gross income from an unrelated trade or business during the year (IRS, 2018). Some further compliance criteria apply at the state level. By way of example, as part of its charity law, the state of California requires that charitable corporations with gross annual revenues of $2 million or more prepare annual financial statements audited by an independent certified public accountant. Moreover, in California charities with gross annual revenues of $2 million or more must establish and maintain an audit committee appointed by the governing board. There are also several regulations relating to solicitation campaigns, including a requirement to notify the Attorney General's Registry of Charitable Trusts (CRCR, 2005).

8.4.2.2. England and Wales

The Charities Acts of 2011 and 2016 endowed the Charity Commission with advisory, administrative, supervisory and quasi-judicial powers with regard to non-exempt charities.[53] Exempt charities, on the other hand, are supervised by the respective Principal Regulators, such as the Higher Education Funding Council (Dunn, 2017: 24-27). Moreover, as stipulated in the Charities Act 2011, the High Court has jurisdiction in respect of charities,[54] as does the Attorney General, based on other laws of general application (Synge, 2017: 372). Companies are subject to regulation by the Registrar of Companies, the Financial Conduct Authority, or other company-specific regulators.

53 See Parts 4-6 of the Charities Act (2011).
54 Sec. 1 of the Charities Act (2011).

Since charities constitute a significant proportion of the CSOs in England and Wales, the Charity Commission remains one of the most relevant bodies for CSO compliance with the Charities Act. While the Charity Commission is not a government body it is nevertheless subject to audit and parliamentary reporting.[55] The Commission possesses significant powers in case of mismanagement, which include powers to: i) restrict transactions a charity may enter into; ii) appoint additional trustees; iii) 'freeze' a charity's bank account; iv) suspend or remove a trustee; v) appoint an interim manager; and vi) make a referral for investigation to the police and other law enforcement agencies. Under The Charities (Protection and Social Investment) Act 2016, the Commission has been granted further extensive statutory powers, including to issue official warnings and to disqualify individuals from trusteeship.

As a result of various concerns in relation to new powers of the Charity Commission, it published a policy paper in 2016 entitled the 'Charity commission regulatory and risk framework', which was updated in 2020 (CC, 2020). According to this document, the Charity Commission adopted a risk-based approach, which meant 'being proactive in identifying risks and intervening, where possible; to prevent harm before it occurs; addressing harm effectively where it occurs; focusing [its] resources effectively on the highest risks' (CC, 2020). The risk policy further specified that the Charity Commission had the option of 'determining whether institutions are charities; encouraging and facilitating the better administration of charities; identifying and investigating apparent misconduct or mismanagement in the administration of charities; and taking corresponding remedial or protective action' (CC, 2020). It further specified that since the trustees were at the front line of addressing risks, the Commission would first assess the conduct and responses of trustees before deciding on its approach (CC, 2020).

8.4.2.3. Sweden

In Sweden there is no nationwide regulatory body overseeing CSOs, and therefore compliance by CSOs is very much tax based (Karlsson and Engvall, 2016). In this regard, non-profit associations must prepare either an annual narrative or accounting report if its assets exceed SEK1.5 million (app. 145,000EUR), if the association operates a commercial business, or if it is the parent entity of a group of entities.[56] An annual report must be submitted by the parent entity and by other organisations in the group if they, in two consecutive years, exceeded one or more of the following:

55 Sec. 13 of the Charities Act (2011).
56 Sec. 2, Chapter 2 of the Sweden Accounting Act (1999:1078) as cited in Giertz (2017).

- More than 50 employees
- Balance sheet total exceeded SEK40 million; and / or
- Net turnover exceeded SEK80 million.

Other organisations that are required to keep books must submit an annual financial report instead of an annual report (Karlsson and Engvall, 2016). Fundraising foundations, collective agreement foundations, foundations operating commercial business, as well as foundations with assets exceeding SEK1.5 million in value must keep books and are generally required to submit an annual report to the relevant county administration board (Karlsson and Engvall, 2016).

With respect to external accountability, the Swedish Tax Agency supervises CSOs in the same way as all the other entities, while the local county administration boards register and supervise the foundations (Karlsson and Engvall, 2016).[57] Supervision by the local county administration can be either complete or limited. The latter means that there is no general right for the supervisory authority to carry out checks and intervene (Giertz, 2017: 563). Giertz further reports that the following foundations fall within the category of limited supervision (2017: 564):

- Foundations founded by or together with the state, a municipality or a county
- Foundations managed by a state authority; and
- Foundations of limited size if (i) legislation states that they shall not be under supervision and (ii) they are neither undertaking any business nor are parents of groups of enterprises.

The foundations that do not fall under the categories mentioned above are under complete supervision, which includes three levels, (i) control, (ii) intervention and (iii) assistance.[58] The powers of the supervisory authority are limited to requesting information and documentation from the foundations, and, if necessary, searching the premises, or ordering or halting certain actions by board members. In certain instances, a fine can be imposed. However, the

57 The county administration boards are the representative authorities of the government in the 21 counties of Sweden, responsible for among other things the supervision of foundations.
58 Secs. 3-9, Chap. 9 of the Sweden Foundations Act (1994:1224) as cited in Giertz (2017).

supervisory authority does not have the authority to dismiss a board member, which is a sanction that lies exclusively within the power of the courts.[59]

An interesting feature of Swedish non-profit law relates to the ability of the supervisory authority to hold the directors of a foundation liable for damages and to initiate proceedings to that end on behalf of the CSO.[60] Interestingly, in Belgium, any such claim against the director of a foundation may also be brought by a founder, the public prosecutor, or interested parties (Van der Ploeg, Van Veen and Versteegh, 2017b: 180). Usually, such a procedure can be launched only by the CSO itself.

8.4.2.4. Algeria and Kenya

In terms of supervision and sanction, Algeria constitutes an extreme example. The Law on Associations (2012) imposes penalties, including imprisonment, for belonging to an association that is not yet registered,[61] and permits the government to dissolve an association or suspend its activities for interfering with the 'internal affairs of the country' or posing a 'threat to national sovereignty.'[62]

Also, in Kenya there have been reports of widespread repression of CSOs. Allegations have emerged that the regulatory authority has been used for political ends. In 2017, during the year of presidential elections, the Kenya Non-Governmental Organizations Co-ordination Board (a regulatory body for NGOs under current legislation)[63] banned '*Kura Yangu, Sauti Yangu'* ('My Vote, My Voice'), an election campaign initiative by a coalition of civil society groups, and 'We the People,' a citizens' alliance that focuses on good governance, for allegedly operating illegal bank accounts. The Board also announced that it had cancelled the registration of the Kenya Human Rights Commission – one of the oldest human rights groups in Kenya – and the Africa Centre for Open Governance (AfriCOG). De-registration was later put on hold pending investigation. In November 2017, days ahead the deadline for submitting

59 Chap. 9 of the Sweden Foundations Act.
60 Sec. 6, Chap. 9 of the Sweden Foundations Act.
61 Three months and six months imprisonment or a fine of 100,000 dinars ($1,350) to 300,000 dinars ($4,040) for being part of an association that is "not yet registered." *See* Sec. 46 of the Algeria Association Law (2012).
62 Sec. 39 of the Algeria Association Law (2012).
63 The Public Benefit Organizations Act (2013) No. 18 of 2013, Kenya is yet to be operationalized. Currently in force under the Non-Governmental Organizations Coordination Act (1990), the Kenya Non-Governmental Organizations Co-ordination Board is composed entirely of members of the government and therefore is highly politicized. See The Non-Governmental Organizations Coordination Act No. 19 of 1990. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Non-GovernmentalOrganizationActNo19of1990.pdf (accessed 3 October 2020).

petitions against a rerun of the presidential election, the Board summoned three CSOs – Inuka Kenya, Katiba Institute, and Muslims for Human Rights (MUHURI) – to respond to allegations of money laundering and employing foreigners without valid work permits, among other reasons (Abdi, 2017).

As opposed to Kenya or the UK, in Brazil there is no CSO principal regulator at the federal level. 'However, there are several practical barriers that impede the regular institutional development of CSOs in Brazil. Government harassment of CSOs is generally linked with questions of access to public funding and tax exemptions, and is being called "bureaucratic criminalization". For example, all organizations are subject to burdensome reporting requirements when they have to prove their "not-for-profit" status in administrative or judicial procedures relating to tax exemptions' (ICNL, 2020b).

8.4.3. Self-regulation

Paraphrasing the understanding of self-regulation as developed by Warren and Lloyd (2009), the concept can be understood as CSOs coming together at national, regional and international levels to develop common norms and standards in order to build a credible, transparent, accountable and trustworthy civil society sector. Generally, 'self-regulation can be seen as an exercise of self-definition for the civil society sector as CSOs are developing their own standards rather than having them imposed by governments or donors' (CIVICUS, 2014). Olbrecht (2012: 5) makes a distinction between three types of self-regulation, namely 'passive self-regulation', which is based on voluntary adherence and does not involve any reporting or any active engagement with the structure; 'engaged self-regulation', which is characterised by proactive mechanisms, including recertification or regular reporting; and 'extractive self-regulation' with proactive mechanisms, which, however, do not originate from the regulated organisations themselves but are extracted (or imposed) by a third party sponsor. The One World Trust has identified five different modalities of self-regulation (CIVICUS, 2014):

1. Working groups – a collective of CSOs that get together to share information and best practices
2. Information services – which require a participating organisation to share the specific information or data
3. Awards – which are given (by some kind of central coordinating body) in recognition of achievements in transparency and accountability practices through a competitive process

4. Codes of conduct or ethics – a set of standards proactively and voluntarily developed and agreed upon by a group of CSOs; and
5. Certification or accreditation schemes – which are evaluated by a central coordinating body that evaluates an organisation's governance, programmes and practices against a set of standards and norms as developed by a collective of CSOs, and awards certification or accreditation.

In some countries and regions there has been a high level of self-regulation (for example, in the US, the UK, and Western Europe), while in others this approach is still emerging (Warren and Lloyd, 2009). Olbrecht (2012: 5) identifies three drivers for civil society self-regulation, namely, low stakeholder trust, restrictive state regulation, and the need for capacity building and learning. With respect to African countries, Gugerty (2010: 1092) argues that self-regulation of the civil society sector between 1990 and 2009 emerged in two waves. The first wave occurred largely in response to perceived threats of increased government regulation, while the second wave of initiatives typically took place in more liberal political environments and in the context of maturing NGO sectors, which complemented or supplemented government regulation.

8.4.3.1. England and Wales

In England and Wales, 'the use of self-regulation by non-profits is now so extensive it is an industry' (Dunn, 2017: 24). There are a number of umbrella organisations that provide information and advice to their members on issues related to best practices and accountability. These umbrella organizations include the National Council for Voluntary Organisations (NCVO), which helps to build non-profits' governance capacity, and the Association of Chief Executives of Voluntary Organisations (ACEVO, n.d.), which focuses on governance. Many of the self-regulation quality standards have been developed for activity-specific organisations or under the auspices of groups or umbrella organisations. In many countries, the most successful self-regulatory measures have been developed in the field of fundraising. By way of example, in England and Wales, to date only one comprehensive sector-wide self-regulation model / scheme has been initiated, with an overarching regulatory body – the Fundraising Regulator –possessing enforcement and sanctioning powers (Fundraising Regulator, n.d.).[64] This has evolved to become a voluntary membership-based scheme for fundraising

64 Similarly, in Sweden, there is the Swedish Fundraising Council (Frivilligorganisationernas Insamlingsråd, SFC) – which, however, does not have enforcement and sanction powers. See Karlsson and Engvall (2016).

organisations (Dunn, 2017: 24-27). In particular, the Fundraising Regulator is responsible for dealing with complaints by the general public in relation to fundraising activities of charities.

8.4.3.2. Australia

Similarly, in Australia self-regulation by umbrella bodies has developed significantly over the years, especially in the light of the absence of a regulatory framework until 2012, when the Australian Charities and Not-for-Profits Commission was established at the national level.[65] The Code of Conduct developed by the Australian Council for International Development (ACFID) constitutes probably the purest self-regulatory example in Australia (ACFID, n.d). The Code is mandatory for ACFID members and, since 1997, for all those wishing to access government funding. Accordingly, compliance with the Code is a prerequisite for AusAID's accreditation for some government funding (McGregor-Lowndes, 2017: 193). An independent code committee established under ACFID's auspices has been tasked with hearing public complaints in terms of the code and with examining member organisations' public annual financial reports for compliance with the code (McGregor-Lowndes, 2017: 192).

8.4.3.3. Kenya

In Kenya, the Preamble to the PBO Act (2013), which has been enacted but is yet to be operationalised, provides that satisfactory self-regulation is critical for a successful civil society sector. It further stipulates that one of the key objectives of the PBO Act is to 'to promote the development of self-regulation among PBOs'.[66]

The PBO Act specifically states that each organisation registered under this Act may voluntarily join and maintain membership in a self-regulation forum of registered PBOs. However, the Act requires such a forum to 'enter into a recognition agreement with the [PBOs Regulatory] Authority upon proof to the satisfaction of the Authority that the forum represents a significant number of organisations registered by the Authority.'[67] Section 24 of the same Act further stipulates that such forums may organise themselves in a federation of forums. Also, Section 28 of the PBO Act provides that: 'The [PBOs Regulatory] Authority shall encourage umbrella associations for public benefit organisations to develop and publish codes of conduct applicable to members, governing body officials, staff and volunteers of the public benefit organisations.'

65 The Charities and Not-for-Profits Commission Act 2012, Australia.
66 Sec. 3(c) of the Public Benefit Organizations Act (2013) No. 18 of 2013, Kenya.
67 Sec. 23 of the Public Benefit Organizations Act (2013) No. 18 of 2013, Kenya.

8.4.3.4. Sweden

Because of the lack of a public regulatory framework in Sweden, an interesting concept has developed. Non-profit associations, foundations and religious organisations can apply to the Swedish Fundraising Control (*Svensk Insamlingskontroll, SFI*), a private entity, for a so-called '90-account.' A 90-account is a seven-figure bank account starting with the number 90 that is granted to these types of CSOs in recognition of their charitable work. Among the general public, CSOs awarded the 90-account are regarded as reliable and worthy of receiving financial donations. The primary purpose of this regulation is to control fundraising activities of these CSOs, in particular, the way in which they raise and spend money from the public. For an organisation to qualify for 90-account status, it must meet a number of requirements, such as being a legal person with headquartered in Sweden and raising money for specific public-interest, charitable or humanitarian purposes. The organisation must keep books of accounts, and the SFI can examine the finances and administration of the organisation at any time. If the costs of the fundraising activities and administration of the organisation exceed 25% of the organisation's total income for three years in a row, the organisation will be disqualified as a 90-account user (Karlsson and Engvall, 2016).

8.4.4. Co-regulation

One can say that 'co-regulation' combines the advantages of predictability, oversight and enforcement, on the one hand, with the more flexible self-regulatory approach, on the other. The European Union defines co-regulation as 'the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations' (EC, n.d.). Eijlander (2005: 6) also explains it in the following terms: '…a mixture of instruments is brought to bear on a specific problem, typically involving both primary legislation and self-regulation or, if not self-regulation, at least some form of direct participation of bodies representing civil society in the rule-making process.'[68] Eijlander (2005) further observes that an essential aspect of co-regulation is cooperation between public and private actors in the process of creating new rules.

8.4.4.1. England and Wales

68 Referring to the Commission of the European Communities, White Paper on European Governance, Brussels, 25.7.2001 COM (2001) 428 final, (2001).

In terms of co-regulation, the Charity Commission in England and Wales 'works with other agencies, regulators and government departments to help it achieve its statutory objectives, to complement its work and to minimise dual regulation' (CC, 2020). The Commission has also stepped up its partnerships with umbrella / 'infrastructure' bodies as a means for the sector to take greater responsibility and ownership of accountability, and for the Commission to focus more on delivering its core regulatory functions (Dunn, 2017: 30-31). During the Commission's review (in 2012), it was even recommended that the Commission have delegation powers that would allow the passing of some of its functions onto other bodies (not necessarily governmental) (Hodgson, 2012: para. 5.12; cited in Dunn, 2017). However, the idea has not been met with equal enthusiasm among all stakeholders, and therefore at this stage the Charities Act 2011 does not endow the Commission with any powers of delegation.

8.4.4.2. The US

The complementary responsibilities of the IRS and umbrella organisations in the US constitute a good example of co-regulation. As in other countries, the regulation of fundraising has been developed especially given the need to ensure transparency relating to solicitations from the general public. The growing importance of technology and the internet has further contributed to this co-regulation. As such, the IRS Form 990 requires organisations with more than USD 200,000 in annual revenue to detail costs related to fundraising. Moreover, many states in the US accept Form 990 as a supplement to or replacement of their own specific financial reports. Initially, Form 990 was available, upon request, to anyone interested. However, it became even more readily available in the 1990s, when the Guidestar (an NPO) in an agreement with the IRS began scanning submitted Form 990s for online posting. Furthermore, in 2001 the Charity Navigator (also a non-profit) began publishing the rating of larger charities based on their IRS financial reports. In both instances, the umbrella bodies have relied on data received from the IRS. Since 2006, the public has been able to request access to a charity's financial report directly at from the filing organisation (Barber and Farwell, 2017).

8.4.4.3. The Philippines

In the Philippines, in response to government's concerns that many NGOs had been established to serve merely as tax shields, in 1997 the Philippine Council for NGO Certification (PCNC) was established. The PCNC was created by six of the country's largest NGO networks in order to evaluate and certify NGOs on the basis of six criteria: vision, mission, and goals; governance; administration; programme operations; networking; and financial management. The PCNC was authorised by the Department of Finance to certify NGOs for 'Donee Institution

Status', subject to the final approval of the Bureau of Internal Revenue (PCNC, n.d.). The evaluation of classifying organisations is performed by a team of NGO officers as volunteer evaluators (Ebrahim, 2003: 821).

8.5. Lobbying and political activity

Legislation in an open democracy should take a broad view of the scope of activities in which CSOs can legitimately engage. In this regard, there exists an area of CSO activity that has been contested or significantly limited by states around the world, namely, the ability of CSOs to engage in activities that influence politics and policymaking. This area of work is particularly important for those CSOs that engage in advocacy by taking an active part in policymaking, promoting and defending human rights, and advancing democratic values and the rule of law. Some countries, under the guise of limiting the "political activities of CSOs", have undermined CSOs' ability to advocate for social change or take part in policy development. In this regard, it is worth noting that the United Nations (UN) Human Rights Committee – a treaty body tasked with interpreting and monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR) – has issued a General Comment on the right of every citizen to 'take part in the conduct of public affairs, directly or through freely chosen representatives' (OHCHR, 1996). The UN Human Rights Committee has stipulated that any restriction on this right shall be based on 'objective and reasonable criteria' (OHCHR, 1996: para.4). Moreover, the General Comment further states that 'Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly and association' (OHCHR, 1996: para.8) and 'The right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25' (OHCHR, 1996: para.26). In Europe, the Council of Europe further specified that 'the definition of political activities is not tied to areas of work or influence of CSOs (such as human rights, children, women, disabilities, science, culture, arts) but follows the nature of what constitutes engagement in the political arena' (Hadzi-Miceva Evans, 2015: para.35).

Considering the above, CIVICUS (2018: 4) suggests that a distinction be drawn between activities which fall within the realm of 'electoral' and those which could be considered 'political' activities by CSOs. In this regard, they propose the following interpretation:

1. That it is legitimate and permissible for CSOs to engage in electoral politics and referendums, and that reasonable, necessary and proportionate regulatory measures can apply to those activities; [and]
2. That those activities should be clearly distinguished from the other kinds of public advocacy activities, including human rights promotion, which CSOs can engage in and which are protected by states' commitments in international law to the freedoms of association, peaceful assembly and expression.

The limitations on political activity of CSOs differ between countries and can be generally grouped into the following categories: those that generally allow or prohibit engagement in political activities (common law vs. civil law), types of legal entities (for example, associations, funds, foundations or non-profit corporations), and acquisition of status or benefits (for example, tax exempt, public benefit or charity status) (Hadzi-Miceva Evans, 2015: para.40). Generally, in common-law countries there are more direct limitations to political activities of CSOs as most of the sector operates for the broad public benefit – that is, the sector is non-partisan. Some European countries allow, or do not explicitly prevent, CSOs from engaging in political activities.

8.5.1. Poland

By way of example, in Poland (a civil law jurisdiction) there are no restrictions on the involvement of CSOs (both associations and foundations) in political activity. Indeed, at the local level, associations and foundations become involved in politics by having their own candidates taking part in the local elections or supporting particular candidates. However, as opposed to Germany (another civil law jurisdiction), in Poland there is no specific legal form of 'political foundation' (Krajweska and Makowski, 2017: 496).[69] In Poland, there are special committees and bodies in both houses of parliament responsible for issues related to CSOs (Krajweska and Makowski, 2017: 496). The Public Benefit Activity and Volunteering Act 2003 established the Public Benefit Activity Council, composed of representatives from local government, ministries and CSOs, which is tasked with giving opinions on legislation and other policy documents and decisions affecting the situation of CSOs.[70] Political parties and the foundations established by political parties are, as such, excluded from obtaining public benefit

69 However, the functioning of organisations specialising in political activities is regulated by the Act of 27 June 1997 on political parties.
70 Section II, Chap. 5 of The Act on Public Benefit Activity and Volunteering (2003).

status.[71] However, the 2003 law does not include an explicit provision that would preclude NGOs with public benefit status from engaging in political activities.

Slovenia represents another interesting example. There, the law exempts activities aimed at promoting democracy, human rights and the rule of law from registration and reporting requirements on lobbying (FRA, 2018: 23).

8.5.2. The US and UK

In the US there is a strict separation between lobbying and engaging in political activities. In the UK, on the other hand, these terms are used interchangeably together with the notion of campaigning. In the US, the IRS provides guidelines on how the term 'attempting to influence legislation' (lobbying) should be understood. In this context, any attempt to influence any legislation through an effort to affect the opinions of the general public or through communication with any member or employee of a legislative body or any individual who may take part in the formulation of legislation is considered 'a legislative activity' (IRS, 2020: 45). The guidelines further list activities that do not qualify as lobbying, including, for example, '[e]xamining and discussing broad social, economic, and similar problems' (IRS, 2020). Similar activities are defined as 'political activity' by the guidelines developed by the Charity Commission in the UK (CC, 2008).

Generally, in both countries, lobbying by charitable organisations is permitted to a certain extent. In the UK, charities can generally engage in lobbying / political activity as long as it is in the context of supporting the delivery of its charitable purposes; but lobbying or political activity cannot be the sole purpose of the charity. A charity may choose to focus most, or all, of its resources on political activity for a period but it cannot become the reason for the charity's existence (CC, 2008). In the US, public charities may engage in legislative activity to the extent that lobbying is 'not substantial' to their overall activities. Accordingly, although public charities may engage in insubstantial lobbying functions, the term is not clearly defined. Some public charities (churches are excluded, for example) can choose to replace the default 'substantial part' of activities test with the so-called 'expenditure test'. Pursuant to this principle, generally 20% of the public charity's expenditure can be for lobbying. Several exceptions related to lobbying are available under this rule (Hopkins and Gross, 2016: 52). Excessive lobbying may lead to some sanctions, such as imposition of excise taxes or even revocation of tax-exempt status.

71 Sec. 3(4) of The Act on Public Benefit Activity and Volunteering (2003).

The 501(c)(3) status organisations in the US and charities in the UK cannot engage in supporting or funding a political party, a candidate, or an elected politician (CC, 2008).[72] In the US 501(c)(3) organisations are prohibited from directly or indirectly participating or intervening in any political campaign on behalf of or in opposition to any candidate for public office. This includes any activity that would mean using its money or resources in a campaign or showing a bias towards a specific candidate (Friedman and Arritola, 2020). However, this prohibition applies to the activities conducted by or on behalf of the organisation. The leaders of charitable organisations may engage in political activity in their personal capacity (Hopkins and Gross, 2016: 53). This means that 'Board members, staff, and other individuals associated with a 501(c)(3) organization must be careful to avoid making any partisan comments in official organization publications, at official functions of the organization, or otherwise in a manner that would be attributed to the organization' (Tracy, 2015).

In the UK, a distinction is made between lobbying in general and lobbying during the period between the announcement of an election and the date on which an election is held (CC, 2014). CSOs and the former UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, have expressed concern about the 2014 Lobbying Act (UNGA, 2017: para.29). The Act requires campaigners, including charities, to register with the Electoral Commission if their spending during an election period passes a certain threshold and if their activities could be perceived as intended to influence how people vote. In order to legally advocate and campaign before elections, charities must register as a party-political organisation or face a fine (CCSDE, 2014). This requirement presents charities with a dilemma, since as such they are ordinarily prohibited from political activity.

Following an outcry from CSOs, the government commissioned a review undertaken by Lord Hodgson, in which he observed that one must get the balance right in order to ensure 'that no one individual or organisation is able to unduly influence an election through excessive spending' (Hodgson, 2016: 6). Lord Hodgson made a number of recommendations, including 'reducing the regulated campaign period to four months before an election [from the twelve-month period currently stipulated in the Act], changes to the rules on joint campaigning and reducing the scope of the lobbying act to include only activity intended to influence how members of the public vote' (Liam Kay, 'Lord Hodgson disappointed his lobbying act recommendations will be ignored, *Third Sector*, 15 September 2017). In particular, Hodgson

72 In the US this activity is distinct from lobbying and is understood as a 'political activity.' See Hopkins and Gross (2016: 53).

specified that the Act should only apply to ‘electoral campaigning’ and should not deal with ‘advocacy’ and ‘political campaigning’ (Hodgson, 2016). Surprisingly, however, in September 2017 the government refused to introduce his recommendations and therefore the Lobbying Act remains unchanged (‘UK’s charity sector outraged by government's rejection of amendments to the Lobbying Act’, *Bond*, 15 September 2017.

8.5.3. The Netherlands

The Netherlands has created a very conducive legal framework for CSOs with few restraints and thriving self-regulation. Dutch law provides for the establishment of public benefit organisations (PBOs) dedicated to the ‘general good’ and working towards one of 13 aims set down in law. As such, there are no regulatory limitations on CSOs’ activities, including lobbying, public policy advocacy, or other activities that could be deemed “political” in nature. Generally, PBOs can engage in lobbying or other political activities, including those related to elections or referendums, which do not exclude them from accessing tax exemptions or other privileges (CIVICUS, 2018: 9).

8.6. Conclusions from comparative studies

States have adopted very different approaches to regulating CSOs, which differ from country to country and are conditional upon multiple factors, such as their understanding of and the role of the CSOs in the social, historical and political context, the country’s model of governance and political regime, as well as economic and social circumstances. Whereas the regulatory and self-regulatory frameworks complement each other in the UK and US, there exists very little expectation on the part of CSOs for self-regulation in Brazil due to very diversified civil society operations at national, regional and community levels. In Kenya there was an attempt by the government to promote self-regulation, with special provisions being included to this effect in the PBO Act (2013); however, the process stalled as the Act is still waiting to be operationalised.

It is against this background that states differently regulate the establishment, registration, governance and supervision of CSOs. While in most countries both membership and non-membership organisations can be established, the difference between these two types is not always very clear-cut. Moreover, countries differ in aspects such as whether one or more legal forms are available for both membership and non-membership organisations, and to what extent CSOs possess legal personality. Although a number and types of legal forms for CSOs are usually a matter of legal culture, and the fiscal and political environment, it would indeed

seem preferable that different legal forms are available. In this context, the UK can be mentioned as a good practice, where many different legal forms have been designed, offering a broad range of solutions and combinations, with a notable example of a CIO that can adopt both a membership and non-membership form. Another example is an indigenous corporation in Australia – specifically tailored to the Australian context and having its own regulator. On the other side of the spectrum one can find Algeria, where only association as a legal form for the CSOs is available. Moreover, while all the countries provide for at least one legal form with legal personality, some of them limit the scope of legal personality in certain instances.

The establishment of CSOs should be restricted only on the basis of clear and unambiguous provisions that serve justified interests and are proportionate (Van der Ploeg, Van Veen & Versteegh, 2017: 263). In this context, referring to 'national morality' as a criterion for rejection of an association's registration in Algeria significantly limits people's freedom of association and has been arbitrarily used by government officials to refuse registration. Whereas in most countries registration is required to obtain legal personality, it should only be conducted on the basis of legitimacy test (Van der Ploeg, Van Veen & Versteegh, 2017: 280). Moreover, since registration fosters transparency and increases public trust, CSOs without legal personality should be able to register on a voluntary basis. A national public registry that is easily accessible, like the Registry of Charities at the Charity Commission in England and Wales, undoubtedly constitutes a good practice in this regard.

Further to the above, countries designate very different bodies or state organs to supervise and to ensure compliance by CSOs with the relevant laws. These supervisory bodies include government bodies such as the attorney general or public prosecutor, courts or other special entities. In other instances, states opted for the establishment of independent regulatory bodies, such as the Charity Commission for England and Wales, or the Charities and Not-for-profits Commission in Australia. Practice also shows that sometimes these special authorities might be prone to political interference, especially if not granted enough independence from the government, for example in Kenya. Practice from other countries also demonstrates that as a way to maintain civil society independence, any regulatory and sanction powers that go beyond administrative fines and warning notices, should always be subject to judicial review.
All countries studied recognise to certain extent the charitable or public benefit designation of qualified CSOs that is either a pre-requisite for tax benefits for CSOs and donors, or for public funding. Apart from their practical and financial importance, such benefits are also an acknowledgment of the significant role that CSOs play in a pluralistic society. Countries differently assess and grant public benefit status; however, it appears that the model in which there is an open list of public benefit purposes should be preferred. In a changing world, it

provides greater flexibility and reduces unnecessary constraints. Moreover, in the US or UK, bestowing charitable status on CSOs requires CSOs to act in accordance with public policy. As such, it does not appear to be a good practice as it gives broad room for interpretation and ultimately may limit CSOs' freedom and agency.

9. FINDINGS, LESSONS LEARNED, AND RECOMMENDATIONS

9.1. Findings

States have adopted very different approaches to regulating CSOs, which differ from country to country and are conditional upon multiple factors, including their understanding of and the role of the CSOs in the social, historical and political context, the prevailing model of governance and political regime, as well as the country's economic and social circumstances. There is therefore no single model of a regulatory framework for CSOs that could be identified in its entirety as a best practice and then replicated in South Africa. Some elements of regulatory frameworks that have been adopted in analysed countries constitute interesting examples of good practices, but we do not believe that they would necessarily work in the South African context. In other instances, we believe that South African regulatory solutions have not been necessarily bad but have rather, for various reasons, been poorly implemented or have become too complex and complicated over time.

When it comes to the availability of legal forms for CSOs, our study has shown that there are three major legal forms available to CSOs in South Africa. They are available in both membership and non-membership forms, with and without a legal personality, and are flexible enough to accommodate various CSOs regarding their functions and scope of activities. Social enterprises can be set up as non-profit companies, while voluntary organisations established under the common law are free to exist with or without a legal personality and are not required to register. Only if a voluntary association wishes to open a bank account, enter into a contractual agreement or receive a grant or donation, it is obliged to register with the NPO Directorate to acquire a legal personality 'officially' and formalise its existence. In light of the above, we believe that there exists a sufficient diversity of legal forms in South Africa that are flexible enough to meet the needs of civil society.

On the other hand, our study has shown that the current difficulties related to the regulatory framework are largely linked to challenges with respect to the role and design of the regulatory framework, and challenges related to practical implementation. The implementation

challenges are themselves often linked to inadequate resources (both human and financial), as well as some questionable design decisions, such as the location of the regulator within a government department. The main findings are summarised here.

Firstly, many difficulties related to recent government initiatives concerning the regulatory framework for CSOs are closely related to misconceptions about the nature and role of civil society, and the role that "regulation of CSOs" plays. The government tends to conflate its regulatory role, which should be applicable to the entirety of CSOs, with its developmental and democratic role (i.e. ensuring meaningful participation of civil society in policy development and implementation to meet agreed / shared developmental goals). This leads to a situation where government inappropriately wishes to conceptualise civil society as being a single, coherent and organised sector with one overarching, organising vision. It also results in a tendency within the state to limit its understanding of civil society only to those organisations that to some extent realise government's objectives (acting on behalf of or in collaboration with government).

Secondly, the design of the current regulatory framework has resulted in a number of significant challenges. The regulatory frameworks for CSOs often overlap and are burdensome for smaller CSOs and CBOs. In particular, it has failed to acknowledge the diversity among CSOs in terms of size, scope of work, functions, and funding opportunities. This has culminated in a one-size-fits-all model, which is not fit for purpose as it imposes obligations and an undue burden on smaller CSOs, especially CBOs. Current regulatory frameworks are complex, and considerable resources are required by both relevant state agencies and CSOs in order to navigate them and achieve compliance. This regulatory burden has meant that an increasing number of CSOs have become non-compliant.

The misunderstandings at the conceptual level have resulted in often flawed, broad and overlapping mandates of a number of state agencies that deal with CSOs. The broad mandate vested in the NPO Directorate might have introduced further confusion into the NPO Directorate's understanding of its role within the regulatory framework for CSOs. Given their functions and responsibilities, similar confusion could have been created on the part of the NDA and DSD that have been portrayed as the main centres for the government's interaction with civil society regarding policy development and implementation.

In light of the overly broad mandate of the NPO Directorate, its location within DSD is problematic because it is organisationally and functionally subordinate to the Director-General of DSD and to the Minister. Moreover, a large proportion of CSOs receive funding from DSD.

In order to qualify for this support, they must be registered as NPOs, in addition to other requirements. This registration requirement creates an obvious conflict of interest in which the major government donor to a CSO is essentially the same entity that decides whether that CSO should be registered in terms of the NPO Act and whether it remains in compliance with the Act.

The NDA has shifted from its initial mandate of becoming a conduit for CSO funding and grant-making and has instead become focused on CSO capacity building. However, capacity-building is provided by some CSOs that specialise in this and related services, such as internal governance and strategic planning. Similarly, it does not seem that the NDA is best placed to engage in dialogue with the civil society sector as whole given the sector's diversity and functions, which do not all necessarily align with the state's more narrowly defined developmental goals.

Thirdly, the ambitious mandate of the NPO Directorate as the primary regulatory body, and the lack of adequate funding and other resources to enable it to effectively implement its mandate, including to ensure compliance or sanction non-compliance, has resulted in weak implementation of its mandate. Consequences have included declining levels of compliance by CSOs with annual reporting requirements and the Directorate's website becoming a less complete and reliable database of functional and well-governed CSOs.

Further, a failure by the NPO Directorate to establish an adequate system of registration, and a comprehensive and publicly available database, has led to the unavailability of data on (at least) part of the civil society sector. This in turn has resulted in a limited acknowledgment of the socio-economic benefits generated by civil society (for example, through taxes, creating employment, and providing assistance on behalf of the state) and its overall contribution to nation-building and democracy.

9.1.1. Accountability

Although the NPO Directorate was meant to ensure a certain level of transparency and accountability by CSOs to a broad range of stakeholders, in practice this function has limited impact. While some CSOs have voluntarily adopted some level of self-regulation, for example, by disclosing the identity of their donors on their websites and by publishing annual (narrative) reports on their websites, reports on whether or not their activities are underpinned by sound administrative and staffing systems, fair employment practices and financial probity are

usually provided only to donors. Other stakeholders have to rely on ad hoc responsiveness to requests.

There is no procedure that facilitates / allows a member of the general public to report a CSO whose operations or activities are questionable to any independent institution, such as an ombudsman. Similarly, the absence of regulations dealing with the issue of whistle-blowers within the civil society sector remains one of the regulatory framework's serious omissions.

9.2. Lessons learned

The comparative study of regulatory frameworks for CSOs as adopted internationally has shown that there exists no model regulatory framework that can be easily replicated across countries. Although some elements of regulations undoubtedly constitute useful examples of good or best practices, they will not necessarily constitute the best solution in South Africa. In some instances, they may serve only as guidelines in designing a regulatory framework. As regards the availability of legal forms for CSOs, there is a variety of approaches adopted by various countries which are also closely linked to the political regime and specific local circumstance.[73]

The setting up of independent regulators in England and Wales, and in Australia, has been closely linked to the context and historical underpinnings behind their charity laws, as well as the large income that charities in these countries derive from individual giving (soliciting funds from the general public.) The independent regulators (vested with active oversight powers) require significant resources to ensure their independence and the effective operationalisation of their activities. In addition, most often in countries where the independent regulators exist (such as the UK or Australia), civil society has also initiated a degree of self-regulation.

One notable example of good practice is when registration with the CSO regulator makes a subsequent registration for the tax benefits a mere formality. For example, UK charities registered with the Charity Commission can register with the HMCS for the tax relief purposes by simply submitting an on-line application. Accordingly, the HMCS must recognise the decision of the Charity Commission on the charitable status of the organisation.

73 It is perhaps worth noting that in Brazil a new legal form has been recently enacted regulating 'endowments' through 'endowment funds'.

The practice in the US shows how the administrative and compliance burden on smaller organisations can be eased. For example, smaller tax-exempt organisations that normally have annual gross receipts of USD 50,000 or less must submit electronically only a so-called 'e-postcard' (an annual electronic filing requirement).

Another example of a good practice is so-called 'co-regulation'. An interesting model of co-regulation has been developed in the US, where Guidestar (a non-profit organisation), in an agreement with the IRS, has been scanning submitted Forms 990s (an annual return by tax-exempt organisations) for online posting. Furthermore, in 2001 the Charity Navigator (also a non-profit entity) began publishing ratings of larger charities based on their IRS financial reports.

Some states have also made the list of "public benefit" objectives required for tax benefits non-enumerative or non-exhaustive. Examples include the PBOs Act 2013 in Kenya or the charity law in England and Wales. The latter includes an 'other purposes' clause that allows an assessment officer to apply a certain discretion. This would avoid the need for the repeated amendment of the Ninth Schedule to the South African Income Tax Act in an effort to keep up with developments in a dynamic civil society sector. For example, in the UK the clause provides for 'other purposes that are analogous to any of the listed purposes or otherwise recognised as charitable under prior case law'.

Several countries also provide good examples of the development of a database of CSOs. This database may serve as a simple register or as a tool for data and information collection with a view of ensuring public accountability and a way of better informing any decision-making in relation to CSOs in the future. Good practices include the civil society-run UK Civil Society Almanac that has been developed by the NCVO – one of the biggest umbrella organisations in the UK,[74] or CSOs map in Brazil.[75]

9.3. Recommendations

Our recommendations relate largely to the scope and function of a new regulatory framework for CSOs.

74 UK Civil Society Almanac. Accessed October 2020 https://data.ncvo.org.uk
75 CSOs Map. Accessed October 2020 https://mapaosc.ipea.gov.br

1. **The NPO Act should be amended.** The Act was too ambitious and was poorly implemented. As it is currently constituted and implemented, we believe that it does not serve the purpose for which it was designed.

2. The amended NPO Act should:
   2.1 Limit its application to non-profit entities who provide an external public benefit
   2.2 Continue to confer formal legal status on organisations who choose to register; and
   2.3 Automatically register all participating organisations whose turnover falls below a certain threshold (say, R250,000) with SARS as Public Benefit Organisations.

This recommendation implies that the amended NPO Act should focus on the transactional components of the regulatory framework (KI-1, KI-5) rather than the developmental (such as assisting civil society in playing a meaningful role in meeting major societal challenges, collaboration in the formulation and execution of government policy) aspects, and democratic (civil society's role in advocating and representing sub-groups of citizens) aspects. In our view, these two components are likely to fail if implemented as part of a general civil society regulatory framework. In practice, implementation is limited to a subset of civil society (as has been the case with the DSD and the NDA) or because the problem at that level is intractable (simply, it is too difficult to consult the entirety of civil society on each issue). These types of interventions should be left to detailed interactions around particular issues, which would be best served by a general strategic policy guideline that can be interpreted and implemented by departments on a case-by-case basis.

The regulatory entity should automatically register all CSOs with turnover below R250,000,00 with SARS, thus ensuring that these organisations enjoy applicable tax benefits. CSOs with annual budgets above this threshold should continue to apply to SARS for tax exemption and donor relief.

3. The entity responsible for the implementation of the revised NPO act should:
   3.1 Establish an online facility for the easy collection and dissemination of data of those organisations who choose to register; and
   3.2 Ensure that the information submitted is easily accessible online for public inspection.

Adherence to the principles of transparency and accountability by CSOs should be encouraged and supported by the regulatory framework. Compliance with the framework

should be facilitated by making registration and ongoing compliance as simple and efficient as possible, and by ensuring that the information collected meets the needs of potential users (KI-1, KI-5). In particular, published information should be arranged and presented in respect of each year for which information was submitted, which will allow users to assess whether information is being updated regularly.

The information collected should include a statement about the intent (i.e. purpose or mission) and basic capabilities (i.e. staff and main activities) of the CSO (and should be updated only when changes occur), a description of governance structures (including names and ID numbers of board members and office-bearers), and a summary of activities over the past year.

Organisations with a turnover of more than R250,000 per year should also submit annual financial statements, including the source of all income and a summary of expenditure.

4. The users of the database (other CSOs, donors, or government entities) should be able to use this information as inputs into their decisions about whether or not to support individual CSOs. In particular, the regulatory entity should not take responsibility for the accuracy or completeness of the data submitted.

The fact of registration on the database should not be taken as certifying that the CSO possesses the claimed capabilities. Entities that wish to provide funds to CSOs, be they some form of funder or a state entity, should have the systems in place to verify that the recipient has the capabilities to deliver on the outputs required. The basic information available, and the fact that the organisation concerned is able, or not, to regularly update their information, should be taken into account by the funding entity, but should be treated only as a preliminary requirement.

CSOs providing services on behalf of or with government entities should continue to be regulated in terms of the requirements of the relevant professional field, such as healthcare, social services, education, etc. While, therefore, an immediate precondition for state funding may include registration with the regulator as an NPO, there should be additional stringent conditions related to internal governance and financial reporting, as well as the professional registration related to the nature of services they provide before a contractual relationship with government can be contemplated.[76]

76 The intention here is to prevent a repeat of the Life Esidimeni experience, for example.

5. The regulatory authority should publish annual updates on the state of the database, including the number and type of CSOs registered, and the proportions within certain categories that have up-to-date information.

6. The question of whether to establish an independent entity with regulatory functions and a complaint mechanism should be investigated further, but this issue should be separated from the management of the registration process outlined above. In the meantime, CSOs should give serious consideration to voluntarily holding themselves / each other more accountable to objective standards of good governance, for example, through adoption and implementation by their boards of the letter and spirit of the *Independent Code of Governance for Non-profit Organisations in South Africa* (Inyathelo, 2012).

7. We do not have any firm views on the location of the regulatory authority. Given that it will perform purely transactional and administrative functions, we do not believe that the location of the entity will make a substantial difference.

8. A separate framework to regulate organisations that solicit funds from the general public (and that receive funds above some threshold amount) should be put in place in order to ensure that such organisations are able to publicly account for any funds they receive (KI-5).

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INFORMATION SHEET AND CONSENT FORM

Title of research study:
Regulatory frameworks for active civil society participation in a developmental state

Who we are

Hello, I am [XXX]. I work at the Human Sciences Research Council (HSRC).

What we are doing

The HSRC and the FHR have been commissioned by the National Development Agency (NDA) to conduct research on the regulation of civil society organisations (CSOs). Please see the attached letter of authority. The South African context and environment for the civil society sector requires a legislative framework that 'does not only establish operations of these organisations through a registration process' in terms of "one size fit all" legislation. Given the diversity of organisations operating in this sector, we also need a regulatory framework that acknowledges that diversity. The legislative framework should recognise any organisation that does work for the public good and there must be regulations that regulate … their operations' (NDA ToR). There are sensitivities, however, arising from the potential 'danger of over-regulation [of this sector] by the state' (NDA ToR); indeed, elsewhere in the world there are examples of states wanting [to] regulate the sector 'for purposes of supressing organisations in the sector, for political, social or economic interest of the state' (NDA ToR). The civil society sector therefore needs to be 'appropriately regulated[,] taking into account the environment and context [within which it is] operating' (NDA ToR).

Your participation

We would like to ask you, as an expert in the civil society sector, to participate in a one-hour interview to gauge your perceptions about the sector, the need for regulating it, and ways in which it might be appropriately regulated.

Confidentiality

All identifying information will be kept in a locked office and/or password-protected computer, will not be available to others, and will be kept confidential to the extent possible

by law. The records from your participation may be reviewed by people responsible for making sure that the research is executed properly, including members of the Research Ethics Committee at the Human Sciences Research Council. All of these people are required to keep your identity confidential. Otherwise, records that identify you will be available only to people working on the study, unless you give permission for other people to see the records.

Your answers will be stored electronically in a secure environment and, if you agree, used for research or academic purposes now or at a later date in ways that will not reveal who you are. All future users of the stored data are required to apply for further Research Ethics Committee review and approval for secondary use of the stored data. Publication in some international journals requires that anonymous data be made available. This will mean that researchers from other countries will also be able to use the data. Importantly, nobody will be able to identify you from any such publication.

Your answers will be linked to a fictitious code number or a pseudonym and we shall refer to you in this way in the data, any publication, report or other research output, where applicable. No one will be able to connect you to the answers you give; the data will therefore be anonymised.

Risks/discomforts

At the present time, we do not foresee any risk of harm from your participation. The risks associated with participation in this study are no greater than those encountered in daily life.

Benefits

There are no immediate benefits to you from participating in this study.
If you would like to receive feedback on our study, you will be able to request a copy of the report, which we shall send you in due course.

Whom to contact if you have been harmed or have any concerns

This research has been approved by the HSRC Research Ethics Committee (REC). If you have any complaints about ethical aspects of the research or feel that you have been harmed in any way by participating in this study, please call the HSRC's toll-free ethics hotline 0800 212 123 (when phoned from a landline from within South Africa) or contact the Human Sciences Research Council REC Administrator Ms Khutso Sithole at research.ethics@hsrc.ac.za.

If you have concerns or questions about the research you may call the Principal Investigator, Dr Michael Cosser, on +27 82 900 9288 or email him at mcosser@hsrc.ac.za.

CONSENT TO INTERVIEW

I hereby agree to participate in an interview for the study on 'Regulatory frameworks for active civil society participation in a developmental state'. I understand that I am participating freely and without being forced in any way to do so. I also understand that I can stop participating at any point should I not want to continue, and that this decision will not in any way affect me negatively. I understand that this is a research project whose purpose is not necessarily to benefit me personally in the immediate or short term. I understand that my participation will remain confidential.

…….. ……

Signature of participant **Date**

CONSENT FOR ELECTRONIC RECORDING

I hereby agree to the electronic recording and subsequent transcription of the interview.

…….. ……...

Signature of participant **Date**

CONSENT FOR FUTURE RESEARCH USE

I agree that the information that I provide now will be stored electronically and can be used for research purposes now or at a later stage, subject to the preconditions stated above.

…….. ……..

Signature of participant **Date**

Thank you in advance for your participation in the study.

ANNEXURE 2: INTERVIEW SCHEDULE

National Development Agency: Regulatory Framework Requirements for the South African civil society sector to promote their active participation in a developmental state

Interview schedule: Human Sciences Research Council and Foundation for Human Rights

August 2020

1. Please introduce yourself, briefly describing your organisational and sectoral role/s, responsibilities and experience.
2. What do you understand by the 'civil society sector in South Africa'?
3. Is it realistic and practical to conceptualise of 'civil society' as a single, coherent and organised sector with one overarching, organising vision – particularly an explicit subscription to the National Development Plan: Vision 2030?
4. What are the primary roles and responsibilities of the civil society sector in South Africa's constitutional democracy, given current social, economic and political realities?
5. How effective do you think civil society organisations have been in (a) achieving their own objectives, and (b) making a palpable difference to the lives of people in the sectors in which they work?
6. Should civil society, either in whole or in part, be regulated – and if so, by whom? What is the primary objective of regulation?
7. Do you think that the current design of regulatory frameworks for civil society organisations (CSOs) is adequate?
8. What is your perception of how the regulatory framework has been operationalised, and what are its strengths and weaknesses?
9. What are your views on possible alternatives, both in terms of conceptual design and implementation?
10. Do you think that the civil society sector should itself be doing anything differently in terms of self-regulation – especially in terms of holding itself more accountable for the ways in which it conducts its activities?
11. Could the NPO Directorate in the Department of Social Development be an effective regulator of the entire civil society sector?
12. How best does one strike a balance between regulation and the exercise of the constitutional rights and freedoms of CSOs?

13. In your view, what are the prospects for improving the working relationships between civil society and government and between civil society and the private sector?

ANNEXURE 3: NINTH SCHEDULE TO THE INCOME TAX ACT 1962

NINTH SCHEDULE

PUBLIC BENEFIT ACTIVITIES

(Section 30)

PART I

WELFARE AND HUMANITARIAN

1. (*a*) The care or counseling of, or the provision of education programmes relating to, abandoned, abused, neglected, orphaned or homeless children.

(*b*) The care or counseling of poor and needy persons where more than 90 per cent of those persons to whom the care or counseling are provided are over the age of 60.

(*c*) The care or counseling of, or the provision of education programmes relating to, physically or mentally abused and traumatized persons.

(*d*) The provision of disaster relief.

(*e*) The rescue or care of persons in distress.

(*f*) The provision of poverty relief.

(*g*) Rehabilitative care or counseling or education of prisoners, former prisoners and convicted offenders and persons awaiting trial.

(*h*) The rehabilitation, care or counseling of persons addicted to a dependence-forming substance or the provision of preventative and education programmes regarding addiction to dependence-forming substances.

(*i*) Conflict resolution, the promotion of reconciliation, mutual respect and tolerance between the various peoples of South Africa.

(*j*) The promotion or advocacy of human rights and democracy.

(*k*) The protection of the safety of the general public.

(*l*) The promotion or protection of family stability.

(*m*) The provision of legal services for poor and needy persons.

(*n*) The provision of facilities for the protection and care of children under school-going age of poor and needy parents.

(*o*) The promotion or protection of the rights and interests of, and the care of, asylum seekers and refugees.

(*p*) Community development for poor and needy persons and anti-poverty initiatives, including—

(i) the promotion of community-based projects relating to self-help, empowerment, capacity building, skills development or anti-poverty;

(ii) the provision of training, support or assistance to community-based projects contemplated in item (i); or

(iii) the provision of training, support or assistance to emerging micro enterprises to improve capacity to start and manage businesses, which may include the granting of loans on such conditions as may be prescribed by the Minister by way of regulation.

(*q*) The promotion of access to media and a free press.

HEALTH CARE

2. (*a*) The provision of health care services to poor and needy persons.

(*b*) The care or counseling of terminally ill persons or persons with a severe physical or mental disability, and the counseling of their families in this regard.

(*c*) The prevention of HIV infection, the provision of preventative and education programmes relating to HIV/AIDS.

(*d*) The care, counseling or treatment of persons afflicted with HIV/AIDS, including the care or counseling of their families and dependants in this regard.

(*e*) The provision of blood transfusion, organ donor or similar services.

(*f*) The provision of primary health care education, sex education or family planning.

LAND AND HOUSING

3. (*a*) The development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000 or any greater amount determined by the Minister of Finance by notice in the *Gazette* after consultation with the Minister of Housing.

(*b*) The development, servicing, upgrading or procurement of stands, or the provision of building materials, for purposes of the activities contemplated in subparagraph (*a*).

(*c*) The provision of residential care for retired persons, where—

(i) more than 90 per cent of the persons to whom the residential care is provided are over the age of 60 and nursing services are provided by the organisation carrying on such activity; and

(ii) residential care for retired persons who are poor and needy is actively provided by that organisation without full recovery of cost.

(*d*) Building and equipping of—

(i) clinics or crèches; or

(ii) community centres, sport facilities or other facilities of a similar nature, for the benefit of the poor and needy.

(*e*) The promotion, facilitation and support of access to land and use of land, housing and infrastructural development for promoting official land reform programmes.

(*f*) Granting of loans for purposes of subparagraph (*a*) or (*b*), and the provision of security or guarantees in respect of such loans, subject to such conditions as may be prescribed by the Minister by way of regulation.

(*g*) The protection, enforcement or improvement of the rights of poor and needy tenants, labour tenants or occupiers, to use or occupy land or housing.

(*h*) The provision of training, support or assistance to emerging farmers in order to improve capacity to start and manage agricultural operations.

EDUCATION AND DEVELOPMENT

4. (*a*) The provision of education by a "school" as defined in the South African Schools Act, 1996, (Act No. 84 of 1996).

(*b*) The provision of "higher education" by a "higher education institution" as defined in terms of the Higher Education Act, 1997, (Act No. 101 of 1997).

(*c*) "Adult basic education and training", as defined in the Adult Basic Education and Training Act, 2000, (Act No. 52 of 2000), including literacy and numeracy education.

(*d*) "Further education and training" provided by a "public college" or "private college" as defined in the Further Education and Training Colleges Act, 2006 (Act No. 16 of 2006), which is registered in terms of that Act.

(*e*) Training for unemployed persons with the purpose of enabling them to obtain employment.

(*f*) The training or education of persons with a severe physical or mental disability.

(*g*) The provision of bridging courses to enable educationally disadvantaged persons to enter a higher education institution as envisaged in subparagraph (*b*).

(*h*) The provision of educare or early childhood development services for pre-school children.

(*i*) Training of persons employed in the national, provincial and local spheres of government, for purposes of capacity building in those spheres of government.

(*j*) The provision of school buildings or equipment for public schools and educational institutions engaged in public benefit activities contemplated in subparagraphs (*a*) to (*h*).

(*k*) Career guidance and counseling services provided to persons attending any school or higher education institution as envisaged in subparagraphs (*a*) and (*b*).

(*l*) The provision of hostel accommodation to students of a public benefit organisation contemplated in section 30 or an institution, board or body contemplated in section 10(1)(*c*A)(i), carrying on activities envisaged in subparagraphs (*a*) to (*g*).
(*m*) Programmes addressing needs in education provision, learning, teaching, training, curriculum support, governance, whole school development, safety and security at schools, pre-schools or educational institutions as envisaged in subparagraphs (*a*) to (*h*).
(*n*) Educational enrichment, academic support, supplementary tuition or outreach programmes for the poor and needy.
(*o*) The provision of scholarships, bursaries, awards and loans for study, research and teaching on such conditions as may be prescribed by the Minister by way of regulation in the *Gazett*e.
(*p*) The provision or promotion of educational programmes with respect to financial services and products, carried on under the auspices of a public entity listed under Schedule 3A of the Public Finance Management Act.

RELIGION, BELIEF OR PHILOSOPHY

5. (*a*) The promotion or practice of religion which encompasses acts of worship, witness, teaching and community service based on a belief in a deity.
(*b*) The promotion and/or practice of a belief.
(*c*) The promotion of, or engaging in, philosophical activities.

CULTURAL

6. (*a*) The advancement, promotion or preservation of the arts, culture or customs.
(*b*) The promotion, establishment, protection, preservation or maintenance of areas, collections or buildings of historical or cultural interest, national monuments, national heritage sites, museums, including art galleries, archives and libraries.
(*c*) The provision of youth leadership or development programmes.

CONSERVATION, ENVIRONMENT AND ANIMAL WELFARE

7. (*a*) Engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere.
(*b*) The care of animals, including the rehabilitation, or prevention of the ill-treatment of animals.

(*c*) The promotion of, and education and training programmes relating to, environmental awareness, greening, clean-up or sustainable development projects.

(*d*) The establishment and management of a transfrontier area, involving two or more countries, which—

(i) is or will fall under a unified or coordinated system of management without compromising national sovereignty; and

(ii) has been established with the explicit purpose of supporting the conservation of biological diversity, job creation, free movement of animals and tourists across the international boundaries within the peace park, and the building of peace and understanding between the nations concerned.

RESEARCH AND CONSUMER RIGHTS

8. (*a*) Research including agricultural, economic, educational, industrial, medical, political, social, scientific and technological research.

(*b*) The protection and promotion of consumer rights and the improvement of control and quality with regard to products or services.

SPORT

9. The administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime.

PROVIDING OF FUNDS, ASSETS OR OTHER RESOURCES

10. The provision of—

(*a*) funds, assets, services or other resources by way of donation;

(*b*) assets or other resources by way of sale for a consideration not exceeding the direct cost to the organisation providing the assets or resources;

(*c*) funds by way of loan at no charge; or

(*d*) assets by way of lease for an annual consideration not exceeding the direct cost to the organisation providing the asset divided by the total useful life of the asset, to any—

(i) public benefit organisation which has been approved in terms of section 30;

(ii) institution, board or body contemplated in section 10(1)(*c*A)(i), which conducts one or more public benefit activities in this part (other than this paragraph);

(iii) association of persons carrying on one or more public benefit activity contemplated in this part (other than this paragraph), in the Republic; or

(iv) department of state or administration in the national or provincial or local sphere of government of the Republic, contemplated in section 10(1)(*a*).

GENERAL

11. (*a*) The provision of support services to, or promotion of the common interests of public benefit organisations contemplated in section 30 or institutions, boards or bodies contemplated in section 10(1)(*c*A)(i), which conduct one or more public benefit activities contemplated in this part.

(*b*) The bid to host or hosting of any international event approved by the Minister for purposes of this paragraph, having regard to—

(i) the foreign participation in that event; and

(ii) the economic impact that event may have on the country as a whole.

(*c*) The promotion, monitoring or reporting of development assistance for the poor and needy.

(*d*) The provision of funds to an organisation—

(i) which is incorporated, formed or established in any country other than the Republic;

(ii) which is exempt from tax on income in that other country;

(iii) the sole or principal object of which is the carrying on of one or more activities that would qualify as public benefit activities listed in Part I of this Schedule if carried on in the Republic; and

(iv) that carries on each of its activities—

(*aa*) in a non-profit manner;

(*bb*) with altruistic or philanthropic intent;

(*cc*) in a manner which does not directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation other than by way of reasonable remuneration; and

(*dd*) for the benefit of, or is widely accessible to the general public of that country including any sector thereof (other than small and exclusive groups).

NINTH SCHEDULE

PART II

WELFARE AND HUMANITARIAN

1. (*a*) The care or counseling of, or the provision of education programmes relating to, abandoned, abused, neglected, orphaned or homeless children.

(*b*) The care or counseling of poor and needy persons where more than 90 per cent of those persons to whom the care or counseling are provided are over the age of 60.

(*c*) The care or counseling of, or the provision of education programmes relating to, physically or mentally abused and traumatised persons.

(*d*) The provision of disaster relief.

(*e*) The rescue or care of persons in distress.

(*f*) The provision of poverty relief.

(*g*) Rehabilitative care or counseling or education of prisoners, former prisoners and convicted offenders and persons awaiting trial.

(*h*) The rehabilitation, care or counseling of persons addicted to a dependence-forming substance or the provision of preventative and education programmes regarding addiction to dependence-forming substances.

(*i*) Conflict resolution, the promotion of reconciliation, mutual respect and tolerance between the various peoples of South Africa.

(*j*) The promotion or advocacy of human rights and democracy.

(*k*) The protection of the safety of the general public.

(*l*) The promotion or protection of family stability.

(*m*) The provision of legal services for poor and needy persons.

(*n*) The provision of facilities for the protection and care of children under school-going age of poor and needy parents.

(*o*) The promotion or protection of the rights and interests of, and the care of, asylum seekers and refugees.

(*p*) Community development for poor and needy persons and anti-poverty initiatives, including—

(i) the promotion of community-based projects relating to self-help, empowerment, capacity building, skills development or anti-poverty;

(ii) the provision of training, support or assistance to community-based projects contemplated in item (i); or

(iii) the provision of training, support or assistance to emerging micro enterprises to improve capacity to start and manage businesses, which may include the granting of loans on such conditions as may be prescribed by the Minister by way of regulation.

(*q*) The promotion of access to media and a free press.

HEALTH CARE

2. (*a*) The provision of health care services to poor and needy persons.

(*b*) The care or counseling of terminally ill persons or persons with a severe physical or mental disability, and the counseling of their families in this regard.

(*c*) The prevention of HIV infection, the provision of preventative and education programmes relating to HIV/AIDS.
(*d*) The care, counseling or treatment of persons afflicted with HIV/AIDS, including the care or counseling of their families and dependants in this regard.
(*e*) The provision of blood transfusion, organ donor or similar services.
(*f*) The provision of primary health care education, sex education or family planning.

EDUCATION AND DEVELOPMENT

3. (*a*) The provision of education by a "school" as defined in the South African Schools Act, 1996, (Act No. 84 of 1996).
(*b*) The provision of "higher education" by a "higher education institution" as defined in terms of the Higher Education Act, 1997, (Act No. 101 of 1997).
(*c*) "Adult basic education and training", as defined in the Adult Basic Education and Training Act, 2000 (Act No. 52 of 2000), including literacy and numeracy education.
(*d*) "Further education and training" provided by a "public college" or "private college" as defined in the Further Education and Training Colleges Act, 2006 (Act No. 16 of 2006), which is registered in terms of that Act.
(*e*) Training for unemployed persons with the purpose of enabling them to obtain employment.
(*f*) The training or education of persons with a severe physical or mental disability.
(*g*) The provision of bridging courses to enable educationally disadvantaged persons to enter a higher education institution as envisaged in subparagraph (*b*).
(*h*) The provision of educare or early childhood development services for pre-school children.
(*i*) The provision of school buildings or equipment for public schools and educational institutions engaged in public benefit activities contemplated in subparagraphs (*a*) to (*h*).
(*j*) Programmes addressing needs in education provision, learning, teaching, training, curriculum support, governance, whole school development, safety and security at schools, pre-schools or educational institutions as envisaged in subparagraphs (*a*) to (*h*).
(*k*) Educational enrichment, academic support, supplementary tuition or outreach programmes for the poor and needy.
(*l*) Training of persons employed in the national, provincial and local spheres of government, for purposes of capacity building in those spheres of government.
(*m*) Career guidance and counseling services provided to persons attending any school or higher education institution as envisaged in subparagraphs (*a*) and (*b*).

(*n*) The provision of hostel accommodation to students of a public benefit organisation contemplated in section 30 or an institution, board or body contemplated in section 10(1)(*c*A)(i), carrying on activities envisaged in subparagraphs (*a*) to (*g*).

(*o*) The provision of scholarships, bursaries, awards and loans for study, research and teaching on such conditions as may be prescribed by the Minister by way of regulation in the *Gazette*.

(*p*) The provision or promotion of educational programmes with respect to financial services and products, carried on under the auspices of a public entity listed under Schedule 3A of the Public Finance Management Act.

CONSERVATION, ENVIRONMENT AND ANIMAL WELFARE

4. (*a*) Engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere.

(*b*) The care of animals, including the rehabilitation or prevention of the ill-treatment of animals.

(*c*) The promotion of, and education and training programmes relating to, environmental awareness, greening, clean-up or sustainable development projects.

(*d*) The establishment and management of a transfrontier area, involving two or more countries, which—

(i) is or will fall under a unified or coordinated system of management without compromising national sovereignty; and

(ii) has been established with the explicit purpose of supporting the conservation of biological diversity, job creation, free movement of animals and tourists across the international boundaries of the peace park, and the building of peace and understanding between the nations concerned.

LAND AND HOUSING

5. (*a*) The development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000 or any greater amount determined by the Minister of Finance by notice in the *Gazette* after consultation with the Minister of Housing.

(*b*) The development, servicing, upgrading or procurement of stands, or the provision of building materials, for purposes of the activities contemplated in subparagraph (*a*).

(*c*) Building and equipping of clinics or crèches for the benefit of the poor and needy.

(*d*) The protection, enforcement or improvement of the rights of poor and needy tenants, labour tenants or occupiers, to use or occupy land or housing.
(*e*) The promotion, facilitation and support of access to land and use of land, housing and infrastructural development for promoting official land reform programmes.

[END]