

THE COURT DECLARES KEY PROVISIONS OF THE PBO ACT UNCONSTITUTIONAL

INTRODUCTION

Barely one year after the commencement of the Public Benefit Organisation Act (the Act), the Constitutional court has declared several provisions of the Act unconstitutional. The Petition was brought to court by members of the civil society, concerned about certain sections of the Act, which according to them were flagrantly inconsistent with the Constitution, 2010.

The offending sections requiring; mandatory re-registration of NGOs, disclosure of information, constitution of both the Public Benefits Organisation Regulatory Authority (PBORA)and the Public Benefit Organisation Dispute Tribunal (PBODT), were among the various provisions that were cited for not meeting the threshold of constitutionality.

Below we look into the provisions and the reasoning that led to their downfall.

PROVISION REQUIRING MANDATORY RE-REGISTRATION OF ORGANISATION OF ENTITIES PREVIOUSLY REGISTERED UNDER THE NGO ACT

The court agreed with the civil society that the requirement for re-registration was unconstitutional. Why? Because the provision violated the constitutional right to association without providing a reasonable justification, the court noted that the respondents (the AG and the PBORA) in this case had failed to give a reasonable justification for requiring the mandatory re-registration.

The requirement for mandatory re-registration placed, according to the court an unnecessary burden upon the deregistered organisation to make fresh applications under new vetting process, which was unfairly burdensome with the effect of delaying their routine operations.

The blanket re-registration was also found to offend the right to fair administrative action, because it denied the NGOs of their legal status without an individual assessment or process.

The court further held that the requirement for fresh registration disproportionately affected NGOs that were properly registered under the previous regime, thereby violating their legitimate expectationthat registration would confer continued legal recognition and protection by the State.

PROVISION FOR REQUIRING DISCLOSURE OF CERTAIN INFORMATION

The Court also found that Section 32 of the Act requiring the disclosure of members' and officials' information, to be unconstitutional.

The court cautioned that while such disclosure would be necessary to enhance proper governance, transparency and accountability, it should be tempered with data privacy principles which include; proper purpose limitation, consent, and data collection minimization, which would ensure a proper balance between good governance and the constitutional right to privacy.

The court found that disclosures as envisioned by the Act, without proper safeguarding provisions, were disproportionate in the reach and therefore unconstitutional.

PROVISIONS EMPOWERING THE PBORA TO SUSPEND AND CANCEL THE REGISTRATION OF AN ORGANISATION

The Court equally took issue with the procedure provided under Section 18(1-3) for cancellation and suspension of registered organisation.

The Court found the provision that allowed the PBOs to only submit written representation, while giving no opportunity to make oral representation, upon service of default notice by PBORA, was against the tenets of fair hearing or fair administrative process.

The Court found that the time period given, within which the PBOs are required to make written representations was not sufficient to constitute a fair process.

The Court also found that the PBORA had been given the mandate to act as both the regulating authority, the investigating authority and the decision making authority against the constitutional tenent that required a fair hearing and the principle that one should not be an arbiter on their own cause.

Section 19(1b) of the Act that gave mandate to the Authority to cancel registration of a PBO for violating its own constitution was found to be unreasonable and unnecessary state interference with the private affairs of the organisation that would ultimately lead to the frustration of the freedom of association.

The Court citing various precedents concluded that even though the Act allowed for decisions made by PBORA to be appealed from at the PBODT, that allowance would not justify an unfair administrative process.

PROVISION COMPELLING MANDATORY MEMBERSHIP TO THE NATIONAL FEDERATION.

The Court heard and agreed with the civil society that the provision requiring the PBOs to mandatorily register for membership with the National Federation of PBOs was against the freedom guaranteed for association by the constitution, which included the right to not associate.

PROVISION RESTRICTION RECOGNITION OF PBO FORUMS

Conversely the provision of Section 23 (2) of the Act which provided that the Authority would only recognise forums (which are associations of more than one PBO with similar objectives) with significant number of organisations registered, was found to be offensive to the freedom of association guaranteed by the Constitution.

The court held that the term "significant number" was vague and undefined (the draft regulations specify the number to be not less than 10) granting the Cabinet secretary broad powers to set an arbitrary threshold that could potentially be subject to abuse of power by the Authority.

PROVISIONS CONSTITUTING THE PBORA BOARD AND THE PBODT

The court ruled the provisions constituting both the PBORA board and PBODT were unconstitutional.

The court agreed with the civil society that for the PBORA, the appointment of the majority of members of the Authority's board by the Cabinet secretary, denied the Authority of the independence, transparency and separation of powers required for decision making bodies.

The court termed the transition of members of the previous NGO board into the new board without proper vetting as controversial, citing that it was against the principle of constitutionalism as provided by Article 2 and 10 of the constitution.

The Court also heard form the civil society that in some instances the PBORA had been given the mandate to act as both the regulating authority, the investigating authority and the decision making authority against the constitutional tenets that required a fair hearing and the principle that one should not be an arbiter on their own cause.

The court emphasised that the right to a fair hearing as envisioned by Article 50 of the constitution included the right to be heard by an independent arbiter and the that the constitution of the PBORA as it were did not guarantee such independence.

The Court found similarly in deciding that the PBODT was unconstitutional.

The PBODT was found not to be independent in so far as the power of appointment and removal of members of the Tribunal was given to the Chief Justice. The court questioned the legality of the provisions that allowed for the bypassing of the constitutional authority of the Judicial Service Commission to make such appointment and removal for members of a judicial body. The court found that the members of the Tribunal could neither be guaranteed security of tenure nor freedom from arbitrary removal, to enable their independent decision making.

The approval of the salaries of members of PBODT by the PBORA was found to usurp the exclusive responsibility of the Salaries and Remuneration Commission, and also found to be offensive by denying the PBODT, the financial independence imperative for it to exercise, its judicial functions, contrary to the provisions of the Constitution.

The Court consistently found that the Act in limiting some of the rights and freedoms guaranteed by Constitution, failed to meet the justification for such limitation as guided by Article 24 of the Constitution.

NEXT STEPS

Following its judgment, the Court issued clear directives and recommendations to ensure the immediate alignment of the Public Benefit Organisations Act with the Constitution:

The Court ordered that all organisations previously registered under the now-repealed Non-Governmental Organisations Coordination Act be automatically and unreservedly recognised as Public Benefit Organisations.

In line with the constitutional guarantee of freedom of association, the Court affirmed that membership to the National Federation of PBOs shall remain **entirely voluntary**.

The constitution and functioning of both the PBORA and the PBODT must be restructured to comply with constitutional standards. This includes:

a) Reforming the appointment process of board and tribunal members to ensure independence and transparency.
b) Vesting disciplinary and removal powers with the appropriate constitutional bodies, such as the Judicial Service Commission for the PBODT.
c) Guaranteeing financial autonomy for the PBODT, including aligning remuneration structures with the mandate of the Salaries and Remuneration Commission.

PBORA must immediately halt implementation of any provisions declared unconstitutional, particularly those relating to:

a) Suspension or cancellation of registration without fair hearing procedures.
b) Requests for personal data disclosures without proper safeguards.
c) Enforcement actions based on vague thresholds such as "significant number" in forum recognition.

Pending legislative amendments, the Ministry responsible for PBOs and PBORA are expected to issue interim guidance on compliance with the court decision. This should include:

a) Clarification on revised registration protocols.
b) Updated compliance timelines.
c) Guidelines on privacy and data protection for PBO disclosures..

CONCLUSION

The ruling comes at a critical time when draft regulations to operationalise the PBO Act are under consideration. The court's findings will undoubtedly serve as a legal benchmark for revising or discarding unconstitutional elements in the regulations.

The civil society, having initiated this successful challenge, will likely continue monitoring implementation to ensure that the spirit of the judgment is honoured. Strategic litigation, advocacy, and capacity-building efforts will be key in reinforcing compliance and protecting civic space.

HOW WE CAN HELP

At **CM Advocates LLP**, we support civil society organisations to remain compliant, well-governed, and constitutionally protected. Our services include:

- **PBO registration and conversion** from trusts, NGOs, or companies;
- **Regulatory compliance advisory** under the PBO Act and Constitution;
- Drafting and review of **governance documents**;
- **Data protection compliance** for donor and member information; and
- Legal representation in **regulatory and constitutional disputes**.

Whether you're setting up a new organisation or adapting to legal changes, we're here to help you navigate the evolving landscape with confidence. Reach out to us at ***www.cmadvocates.com*** or contact our contributor.

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