

POLICY PAPER

Towards Creating an Enabling Environment:

Freedom of Association and the
Regulatory Framework for Civil
Society Organisations in Malaysia

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Executive Summary

Civil society organisations (CSOs) in Malaysia are limited in scope and form by a network of laws. The national legal framework in Malaysia with regards to registration and operation of CSOs is governed by several different laws including the Societies Act 1966, Companies Act 2016 (previously Companies Act 1965), Trustees (Incorporation) Act 1952 and the Universities and University Colleges Act 1971. Some of these laws remain unduly restrictive and heavily burdensome and the impact is particularly felt by advocacy orientated CSOs that work on human rights issues that are often considered controversial or sensitive. While Article 10(c) of the Federal Constitution guarantees the right to the freedom of association, the previous Barisan Nasional government consistently used legislation to restrict the formation of associations unwarrantedly, by denying registration or threatening to suspend or close groups. Due to these restrictions, over the years, many CSOs particularly those working on human rights issues have had to register as businesses and companies in order to operate legally. These forms of registration however presents legal and bureaucratic restrictions on their operation, for instance to recruit members and raise funds.

In the election manifesto of the *Pakatan Harapan* (PH) government, under Promise 54: “Empowering societal institutions, civil society and social entrepreneurship”, it stated that the process of establishing welfare bodies, foundations and legitimate non-governmental organisations will be simplified, so that a better and simple structure can be created to enable the smooth functioning of these outfits. International laws and standards recognize the importance of allowing citizens to set up associations in order for them to best achieve their purpose or shared goals. Freedom of association refers to not only the right to form, but also to join and participate in associations. As highlighted in the paper, many of the existing provisions in the law and regulations are onerous, burdensome and inconsistent with international laws and standards. The four main barriers for CSOs that have been identified include 1) barriers to entry and registration, 2) barriers to undertake operational activities, 3) barriers to resources such as receiving funds, and 4) barriers to advocacy due to the restricted space and constant threats face by CSOs.

This policy paper provides an overview of the existing legal framework in Malaysia that governs the CSOs, its barriers and also the international standards that are required in order to protect the right to form, join and participate in associations. The paper shows that existing government regulatory controls are a barrier to CSOs and restricts the right to freedom of association particularly for CSOs working on human rights. This report proposes eight recommendations namely, 1) ease the entry and registration of CSOs, 2) strengthen the independence of registration bodies, 3) the right to operate free without state interference, 4) recognize human rights CSOs with a public-benefit status, 5) omit the category of political parties in the Societies Act, 6) remove barriers to resources, 7) review charitable purposes under the tax exemption guidelines, and 8) remove the excessive amount required to be established as a foundation.

INTRODUCTION

This policy paper by SUARAM and CIVICUS provides an analysis and recommendations to the government of Malaysia in the light of the political changes in Malaysia after the May 2018 elections. The change of government offers an opportunity for the government to take measures to foster a safe, respectful and enabling environment for civil society, including by removing legal and policy measures that unwarrantedly limit the right to association. The analysis presented in this policy paper is derived from various sources including online questionnaires, two consultations with Malaysia CSOs¹, and secondary resources from March to July 2019.

Freedom of association, as guaranteed by the key international human rights treaties, is a fundamental human right that is crucial to the functioning of a democracy and an essential condition for the exercise of other human rights. On this note, CSOs play an important role in achieving goals that are in the public interest and are essential actors in supporting the protection of human rights and implementation of human dimension commitments. While Article 10(c) of the Federal Constitution guarantees the right to the freedom of association, the previous government consistently used legislation to restrict the formation of associations unwarrantedly, including by threatening to suspend or close and not legally registered, generally referring to the Societies Act 1966. Due to these restrictions, over the years, many CSOs particularly those working on human rights issues have had to register as businesses and companies in order to operate legally. These forms of registration however present legal and bureaucratic restrictions on their operation, for instance to recruit members and raise funds.

The regime change from *Barisan Nasional* (BN) after 61 years to the PH offers an opportunity for the government to take measures to foster a safe, respectful and enabling environment for CSOs. In its election manifesto under Promise 54: Empowering societal institutions, civil society and social entrepreneurship², it stated that:

“Social organisations, civil society and social entrepreneurship are important elements of a modern country. They also have a long history in Islamic and Asian civilizations and play an important role in complementing the role of the government. Pakatan Harapan is therefore committed to contributing to the growth of these organisations and to be an example to the ASEAN region. We will simplify the process of establishing welfare bodies, foundations and legitimate non-governmental organisations. Existing bodies, such as associations, limited company guarantees, trustees and others will be reviewed so that a better and simple structure can be created to enable the smooth functioning of these outfits. Additionally, the PH Government will also ensure that the process for welfare bodies get tax exemptions is more transparent, easier and free from abuse or interference of political power. For this purpose, a Commission on Charities and Non-Profit Organisations will take over the responsibilities of the Registrar of Societies and Companies Commission of Malaysia.”

1 The list of the CSOs consulted included: Amnesty International (AI), ASEAN Parliamentary for Human Rights (APHR), Bersih 2.0, Freedom FilmFest Network (FFF), Human Rights Committee of the Malaysian Bar Council, Justice for Sisters, Knowledge and Rights with Young People Through Safer Spaces (KRYSS), North South Initiative (NSI), Persatuan Kesedaran Komuniti Selangor (EMPOWER), Pusat KOMAS (KOMAS), Sisters in Islam (SIS) and Sinar Project.

2 Buku Harapan Rebuilding Our Nation, Fulfilling Our Hopes. Retrieved from https://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf, p. 114.

In the international arena, including at the Universal Periodic Review (UPR) at the UN Human Rights Council, numerous states have also made recommendations to the Malaysian government, which it accepted, to respect and protect freedom of association and civic space and to remove all undue restrictions on the ability of CSOs to be established in line with best practices as articulated by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Furthermore, the 2030 Agenda for Sustainable Development contains commitments to civic space that are enshrined in Goal 16.7 on responsive, inclusive, participatory and representative decision making; Goal 16.10 on public access to information and protection of fundamental freedoms; and Goal 17.17 on encouraging and promoting effective civil society partnerships.

In view of this, there is an urgent need to revisit existing legislation and policies so to provide an enabling environment for CSOs to enjoy the freedom of association. This policy paper covers four key sections. The first section deals with the existing legal framework with regards to the freedom of association for CSOs in Malaysia. The second section explores the barriers for CSOs to register to register and operate, in which it looks into the challenges for CSOs to register, recruit members, receive donor funding, fundraising and other related issues. The third section covers the international laws and standards on freedom of association and best practices in other countries while the final section sets out recommendations to the government.



The regime change from Barisan Nasional (BN) after 61 years to the Pakatan Harapan (PH) offers an opportunity for the government to take measures to foster a safe, respectful and enabling environment for CSOs.

SECTION

1

EXISTING LEGAL FRAMEWORK

The legal framework governing the operations of CSOs in Malaysia remains unduly restrictive and heavily burdensome. The impact is particularly felt on CSOs that work on human rights issues that are often considered controversial or sensitive. In particular, the Societies Act, which governs the formation of associations, societies and political parties, prohibits the formation or operation of unregistered groups. For instance, organizations, particularly those involved in human rights work, that have attempted to register with the Registrar of Societies (RoS) previously, have experienced excessive waiting periods of months and even over a year before being rejected.³ This process has been selective, as some CSOs do not face the same barriers, for instance, CSOs closely connected to any government agencies or work on welfare related issues.

In Malaysia, the legal basis for the right to form of associations is guaranteed under the Article 10(c) of the Federal Constitution, which provides that “all citizens have the right to form associations”. Statutory law further restrains the right as Article 10(2)(c) states that this right can be limited if it is necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality. Furthermore, Article 10(3) of the Constitution stipulates that any law relating to labour or education may also impose restrictions on the right to form associations.

CSOs in Malaysia are limited in scope and form by a network of laws. The national legal framework in Malaysia with regards to registration of CSOs is governed by several different laws that work simultaneously to govern CSOs, among them are: the Societies Act 1966, Companies Act 2016 (previously Companies Act 1965), Trade Unions Act 1959, Trustees (Incorporation) Act 1952, Universities and University Colleges Act 1971, Income Tax Act 1967, and Police Act 1967.

Societies Act 1966

The Societies Act and the regulations made thereunder, namely the Societies Regulation 1984 is the principal Act governing the registration, control and supervision of the societies. The law has been amended several times and is supplemented by other enactments. There are three key parts in the Act: Part 1 contains provisions applicable to societies generally, in which in its Part 1(A), it also includes provisions applicable to political parties. Part 2 contains provisions applicable to mutual benefit societies and Part 3 contains miscellaneous provisions applicable to societies generally.

According to Section 2 of the Societies Act, society is defined as “any club, company, partnership, or association of seven or more persons whatever its nature or object, whether temporary or permanent”. It excludes registered businesses, trade unions and schools. In accordance with Section 6(1) of the Societies Act, it is a requirement for associations to be registered under the purview of the Registrar of Societies. In addition, Section 6(2) prescribes that an unregistered society is illegal to function as a society.⁴

³ Under the section on FAQ in the ROS, it is stated that the application will be process within five working days. Details available at <https://www.eroses.gov.my/faq/>

⁴ As articulated by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai underlines that associations which are not registered shall be equally protected under the right to freedom of association and should be allow to function freely.

The Societies Act requires that seven or more persons in any association should be registered otherwise, it is considered as an offense. This group of persons should register to become at least a company, statutory body, trade union, or society. The fine for non-registration is RM5,000 and RM500 for each day it remains unregistered. Registration allows a CSO to have a legal personality; this would entail the body to be able to sign leases, enter contracts, hire personnel, receive funding, and open a bank account.

Section 5(1) of the Societies Act confers the RoS enormous power in regulating CSOs registration and make it only answerable to the Minister of Home Affairs who has “absolute discretion” to declare any society unlawful. The RoS also has broad powers to refuse registration. This provides the government with the justification to curtail freedom of association for political purposes. While the decisions and actions by RoS are appealable before the Minister, however, the Minister has full discretion to make a final decision.

For instance, the then-BN government declared the Negara-Ku⁵ an illegal society for having an inappropriate name in 2014⁶. In the same year, two CSOs, namely the Sarawak Association For Peoples’ Aspiration (SAPA) and the Penang Voluntary Patrol Unit (PPS) were declared illegal on grounds that they posed a threat to national security and public order⁷. Also, in 2014, the Ministry of Home Affairs deemed the Coalition of Malaysian NGOs in the UPR Process (COMANGO) as an “illegal entity” after it made a critical UPR submission on Malaysia’s human rights performance at the UN Human Rights Council. In November 2016, the government announced a ban on the activities of the Coalition for Clean and Fair Elections (Bersih), just two weeks before a planned mass protest, on the specious grounds that they were not registered under the Societies Act.

Upon receiving the application for registration, the RoS retains the right to refuse the registration of any existing association for violating the act and may reject the registration of organizations that it deems of having unlawful purposes under Section 7(3)(a). It may also cancel and suspend the registration of any registered society. Since 2012, the RoS introduced an online system (eROSES) to receive application for societies. However, for political parties, the application has to be done manually.⁸

Many CSOs, considered to be political or activist-oriented have had difficulties registering their organisation under the Societies Act as the Act contains several barriers and restrictions for societies and associations to fully enjoy their right to freedom of association guaranteed under the Federal Constitution. (Persatuan Kesedaran Komuniti Selangor, 2016: 28). Hence, some eventually chose to register their non-profit organizations under the less restrictive Companies Act 1965.

According to officials from the Registrar of Societies, in a meeting with SUARAM in August 2019, they are undertaking a review of the Societies Act this year in accordance with Pakatan Harapan’s manifesto commitments.

5 The Negara-Ku is a human rights movement coalition endorsed by more than 60 CSOs; launched by lawyer Datuk Ambiga Sreenivasan and national laureate Datuk A. Samad Said in 2014.

6 Malay Mail. (2014, July 26). *Negara-Ku an ‘illegal’ society, Home Ministry says*. Retrieved from Malay Mail: <https://www.malaymail.com/news/malaysia/2014/07/26/negara-ku-an-illegal-society-home-ministry-says/714513>

7 The Star. (2014, November 15). *Home Ministry declares Sapa an illegal organisation*. Retrieved from The Star Online: <https://www.thestar.com.my/news/nation/2014/11/15/sapa-illegal-says-home-ministry/>

8 Borneo Post Online. (2012, July 10). *eROSES makes registration of new societies a breeze*. Retrieved from Borneo Post Online: <https://www.theborneopost.com/2012/07/10/eroses-makes-registration-of-new-societies-a-breeze/>

Companies Act 2016 (previously Companies Act 1965)

The Companies Commission of Malaysia (CCM) registers and regulates all companies in Malaysia. The Companies Act 2016 came into operation on 31 January 2017 replacing the Companies Act 1965. The revamp of the Companies Act was driven by the need to further facilitate Malaysia's status as the place to do business. Due to the restrictions as imposed in the Societies Act, at times, CSOs especially those working on human rights issue opt to register under the Companies Act as a company limited by shares. Organizations that are registered as a company are required to submit audited accounts and pay taxes unless they it is a Company Limited by Guarantee and is able to obtain tax exemption status.

Under the Companies Act, a non-profit is permitted to be incorporated as a company limited by guarantees (CLBG) as defined by Section 10(3) of the Act, "A company is limited by guarantee if the liability of its members is limited to such amount as the members undertake to contribute in the event of its being wound up". Section 45 of the Act provides provisions governing the CLBG. Some advocacy civil society organisations have been able to register as a CLBG.

In Section 45(1), a CLBG may be formed for the purpose of providing recreation or amusement or promoting commerce, industry, art, science, religion, charity, pension or superannuation schemes or any other object useful to the community. The Guidelines on a CLBG further defines what is considered 'useful for the community or country'. This includes the environment; health; education; research; social or sports.⁹ In Section 45(5), it allows for the Minister to have full power for the purposes of approving licenses under this section, where "... the Minister may prescribe regulations or impose any conditions as he thinks fit".

Upon successful registration through the application, a CLBG is prohibited to have a share capital and must be a public company.¹⁰ Further, it is a requirement to have at least two directors for a public company, who each has a principal place of residence within Malaysia.¹¹ The Companies Act also limits the age of the directors, as they must be between the ages of 18 to 70 years old.¹²

According to the CCM guidelines¹³, a CLBG may apply to the Minister for a licence to omit the word "Berhad" (Limited) or the abbreviation "Bhd" from its name after three years of its formation. Any CLBG intending to use the words "Yayasan" or "Foundation" must omit the word "Berhad" or "Bhd" from its name. The basis to support the approval of omitting the word "Berhad" or "Bhd" is that the CLBG must have a fund amounting to RM1 million cash.

Trustees (Incorporation) Act of 1952

In addition, Section 2(1) of the Trustees (Incorporation) Act of 1952 states that, a trust may be established for any religious, educational, literary, scientific, social or charitable purpose. The Minister in the Prime Minister's Department is in charge of deciding whether to issue a certificate as a body corporate for each trust.

9 Guidelines on Company Limited by Guarantee, https://www.ssm.com.my/bm/Pages/About_SSM/Organisation/Registry-and-Business-Services/guidelines_on_clbg_31_1_2017.pdf

10 Section 12 and Section 11(2), Companies Act 2006.

11 Section 196(1)(b) and 196(4)(a), Companies Act 2016

12 Section 196, Companies Act 2016.

13 Guidelines on Company Limited by Guarantee, https://www.ssm.com.my/bm/Pages/About_SSM/Organisation/Registry-and-Business-Services/guidelines_on_clbg_31_1_2017.pdf

Universities and University Colleges Act 1971 (UUCA)

For student societies or organizations in the university, its registration is governed by the UUCA and any constitution, rules, statutes, regulations made thereunder which mandate university approval for student associations¹⁴. Although the UUCA does not have provisions explicitly mentioning the registration of student associations, however, it provides that, “The University shall regulate the activities of students and a society, an organization, a body or group of students of the University within the Campus” under Section 15(5) of the Act. Hence, the university has absolute power on the process of registration and de-registering any student associations established under the laws of the university.

In 2017, the Chinese Language Society of Universiti Malaya was suspended from 3 September 2017 to 4 February 2018, after two “show cause letters” were issued to the society from the Department of Student Affairs and Alumni. The Department alleged that the society advertised and held events without the permission of the university and for using Mandarin in their event letter without Malay or English translations¹⁵. As for some CSOs whom are registered as youth organizations, they can register through the Registrar of Youth Societies under the portfolio of the Ministry of Youth and Sports, as provided under Section 7 of the Youth Societies and Youth Development Act 2007.

Section 5(1) of the Societies Act confers the RoS enormous power in regulating CSOs registration and make it only answerable to the Minister of Home Affairs who has “absolute discretion” to declare any society unlawful

14 International Center for Not-For-Profit Law, Open Government Partnership. (2018). *The Guide to Opening Government An Enabling Environment for Civil Society Organizations*. Washington, DC : Open Government Partnership.

15 Fortify Rights. (2018). *“No Politics on Campus”: Violations of the Rights to Freedom of Expression, Peaceful Assembly and Association Against University Students in Malaysia*. Bangkok: Fortify Rights.

SECTION 2

BARRIERS FOR CSOs TO REGISTER AND OPERATE

Based on consultations undertaken, most CSOs are supportive of reform to the current legal framework that governs the operation and activities of CSOs. This is particularly evident for CSOs who work on advocacy including human rights issues. Many of the existing provisions in the law and regulations are onerous, burdensome and inconsistent with international laws and standards. There are four main barriers for CSOs that have been identified. They include 1) barriers to entry and registration, 2) barriers to undertake operational activities, 3) barriers to resources such as receiving funds, and 4) barriers to advocacy due to the restricted space and constant threats they face.

Barriers to Entry and Registration

Barriers to entry and registration include the use of law to discourage, burden, or prevent the formation of organizations. Under the Societies Act, a minimum of seven founders is required to establish a society. The founders must be from seven different states if it is a national organisation. This is an onerous requirement and an unnecessary restriction on the formation of a CSO. At the inaugural meeting, the seven founders must agree on several formalities regarding the formation of the society for which provisions must be made in the constitution of that society, including: name, registered place of business, insignia, aims and objects, and appointed office-bearers. The founders must then submit an application, with all documents incorporated, to the RoS, for a small fee. While the RoS sets five working days to decide upon a registration application¹⁶, in practice, waiting periods have been excessive for some.

According to CSOs working on human rights issues who have attempted to register under the Societies Act, the process has been tedious or often has been a long-drawn out process. Based on the feedback from the data collected, CSOs would often have their applications rejected or would not receive a reply from the ROS on their applications. For example, Amnesty International Malaysia attempted to register as a society at least three times since 2000. All three times they were rejected after excessive waiting periods without reason. Many human rights groups reported that they were told that their applications had to be vetted by the police intelligence Special Branch which is an extra-legal procedure, and this has been time consuming. This process for Special Branch vetting continues to occur after the change of government¹⁷ as in the case of Liga Rakyat Malaysia.

There are also some other forms of restrictions imposed on society. For instance, English names are not allowed and certain terminologies such as “centre” or “trust fund” have been rejected. Furthermore, if the actual name of the CSO and its registered name are different, there is a potential that their the registration status could be at risk.

16 The information can be found at, <https://www.eroses.gov.my/faq/>

17 This was confirmed during a meeting between SUARAM and officials of the Registrar of Societies in Putrajaya on 9 August 2019. SUARAM was told that the need for Special Branch vetting was contained within an internal document that was not available publicly and the ROS had little say in this matter if it was rejected by them.

While the Societies Act does not explicitly prohibit the participation of non-Malaysians, the Registrar may require the office-bearers to be Malaysians due to the arbitrary powers afforded by Section 7 of the Act. The Societies Act specifies that the head of a society should be a Malaysian as well as its seven founders, but its membership could consist of foreigners. However, in reality, many foreigners, especially migrant workers, in Malaysia are often hesitant to join human rights organisations because of restrictions in their work visas, which states that they are not allowed to engage in any political activities. LGBT organisations have also been hesitant to register under the Societies Act because discrimination against them in law and practice is pervasive and there are serious concerns about their security.

The vagueness on the grounds for refusal of an application for registration is also a major issue. For instance, under Section 7 of the Act, the Registrar may refuse to register a local society “where it appears to him that the local society is unlawful under the provisions of the Act or any other written law or is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia.” The Registrar may also refuse to register a society where “the name under which the society is to be registered (i) appears to the Registrar to mislead or be calculated to mislead members of the public as to the true character or purpose of the society or so nearly resembles the name of such other society as is likely to deceive the members of the public or members of either society; (ii) is identical to that of any other existing local society; or (iii) is, in the opinion of the Registrar, undesirable.” The Registrar may also prescribe other criteria for registration under the wide discretionary powers afforded to him or her under Section 67(2)(a) of the Act. This vagueness in the Act opens the door to a range of possible constraints and abuses.

Finally, the right to appeal is governed under Section 18 of the Act. Any person who is aggrieved by the decision of the Registrar to cancel registration, refuse registration, prohibit foreign affiliations or the involvement of foreign persons within the society, order amendments to the rules or constitution of the society, or make a provisional order for the dissolution of a society is given 30 days from the date of the decision of the Registrar to appeal against the decision to the Minister. This provides excessive power to the Minister or Head Registrar, whose decision will be final to confirm, reject or alter the decision of the sub-Registrar.

Barriers to Resources

CSOs in Malaysia that register under the Companies Act often face restrictions in term of receiving funding from donors be it local or foreign funding, as well as from the federal or state governments. For instance, some donors have reservations in channeling funds to these CSOs due to questions around “legitimacy” as these organisations are not registered under the Societies Act.

Obtaining tax exemptions is another challenge facing CSOs in Malaysia. Firstly, it has to be registered as a society under the RoS, as a CLBG (under Companies Commission) or as an incorporated trust (under the Prime Minister’s Department). Next, they have to obtain tax exempt status from the Income Tax Department under the Finance Ministry.¹⁸ However, the organisations that qualify to apply for tax exemptions are limited to certain forms of organisations.¹⁹ Further the criteria for approval are limited to organisations established in Malaysia for charitable purposes including ‘for the relief of poverty’ for the advancement of education; for the advancement of religion; and for other purposes beneficial to the community. The advancement of human rights as a charitable purpose is not considered as a specific criterion for tax exemption.

18 See: Guidelines for applying for Income Tax Exemption under the Income Tax Act, section 44(6), http://lampiran2.hasil.gov.my/pdf/pdfam/Guidelines_Section446.pdf

19 They include those involved in conservation or protection of animals; which maintains or assists in maintaining a zoo, museum, art gallery or similar undertaking or is engaged in or in connection with the promotion of culture or the arts; a Government-assisted organisations established and maintained exclusively to administer and augment a fund established or held solely for promoting national union organisation established exclusively for the conservation or protection of the environment; an international organisation as defined under the International Organisation (Privileges and Immunities) Act 1992 carrying out such charitable activities as determined by the Minister; an organisation established and maintained exclusively to administer or augment a fund established or held for the purpose of carrying out projects towards the acculturation of the community in information and communication technology, approved by the Minister

For CSOs that are registered under Companies Act, which are companies that are limited by shares, theoretically can distribute its profit among shareholders thus are structurally for-profit companies. Therefore, they do not qualify to apply for tax exemptions, unlike companies limited by guarantee. This has an impact on funding resources, as there is a need to allocate a certain amount of funding that is meant for advocacy work for the purpose of paying taxes.

Barriers to Operational Activities

While CSOs are not required by law to notify the government of the details of project activities or meetings, however the Societies Act contains provisions that may subject them to a wide range of constraints on legitimate activities. In cases where there is a reason to believe that any registered society is being used for purposes prejudicial to peace, welfare, good order or morality in Malaysia, the RoS or police may enter and search the place of business of such society without prior notice and use force if necessary, in the process. They are even granted powers of searching persons suspected of hiding evidence. The RoS may also prohibit the use of illegal or undesirable badges and insignia by registered societies.

For the CSOs registered in the form of CLBG, they are required to provide the CCM with annual returns, audited accounts and an auditor's report under the Companies Act. To ensure compliance with the Act, the Registrar may access the offices of any companies to inspect and make copies of any relevant documentation. The Act does not explicitly require notice be given before conducting inspections.

These supervisory oversight mechanisms such as repeated inspections and requests for documentations can be deemed as rather "invasive" to some extent where it can potentially open up for arbitrary interference, usually justified in the name of security, that limit the CSOs' space to play their role as critical watchdog on issues and interfere into their internal management.

Barriers to Advocacy

Barriers to advocacy include restrictions in law and practise for CSOs, particularly those engaged in human rights and democracy promotion, the ability to speak freely, raise awareness, and engage in advocacy is fundamental to fulfilling their mission.

Under the Companies Act, CSOs can be incorporated as private companies but this comes with various restrictions on advocacy and resources particularly, as well as its legitimacy as a CSO. Moreover, the restriction imposes under the Societies Act also put registered societies under constant threat of de-registration. This leads to the challenge in term of limited spaces for advocacy work especially when there is critical issue made to the media that is not in favor with the advocacy work of these CSOs.

For instance, the Ministry of Home Affairs in 2014 deemed the Coalition of Malaysian NGOs in the UPR Process (COMANGO) as an illegal entity as it is not registered under the RoS. It labeled COMANGO as an organisation that championed LGBT rights and that it was not based on Islamic teachings²⁰. Another example is the various forms of harassment faced by the human rights NGO SUARAM in 2012 when SUARAM's staff were served with multiple notices from the CCM and the RoS regarding its registration, accounts and activities²¹. Such action did not only obstruct the advocacy activities of SUARAM but also its operational activities.

Under the Societies Act, foreign CSOs are not allowed to register as societies in Malaysia if they do not fulfil certain requirements. Section 4 of the Act specifies that different organizational forms will be considered as "established in Malaysia" if (a) a society has its headquarters or chief place of business in Malaysia; (b) any of its office members are residing in Malaysia; or (c) any person who manages, assist or fundraises on the society's behalf does so in Malaysia. Alternatively, foreign CSOs may exist as a CLBG under the Companies Act. One limitation, however, is that it requires its two founding directors to have Malaysia as their primary place of residence.

20 The Star. (2014, January 8). *Home Ministry: Comango is an illegal entity, not registered with ROS*. Retrieved from The Star Online, <https://www.thestar.com.my/news/nation/2014/01/08/comango-illegal-home-ministry/>

21 SUARAM statement (2012, October 22). *Malaysia: Escalating harassment of several members of SUARAM*. Retrieved from SUARAM website, <https://www.suaram.net/2012/10/22/malaysia-escalating-harassment-of-several-members-of-suaram-last-update-19-october-2012>

SECTION 3

INTERNATIONAL LAWS AND STANDARDS ON FREEDOM OF ASSOCIATION AND BEST PRACTICES IN OTHER COUNTRIES

International laws and standards recognize the importance of allowing citizens to set up associations in order for them to best achieve their purpose or shared goals. Freedom of association refers to not only the right to form, but also to join and participate in associations. Article 20 of the UDHR recognizes that everyone has the right to freedom of peaceful assembly and association. Articles 21 and 22 of the ICCPR provide that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest. Any eligible founders or members of association can include citizens, foreigners, members of minority groups, migrant workers, refugees, stateless persons and any other legal entities. As part of the reform agenda prior to the 2018 general elections, the PH government in its manifesto under Promise 54 has vowed to “[empower] societal institutions, civil society and social entrepreneurship”.

Equal Treatment and Non-Discrimination

First, there shall be no legislation that has differential treatment on individuals or any specific limitation on personal character or status without reasonable justification.²² In particular, minors and foreign nationals or non-citizens shall enjoy this right equally on the basis of equal treatment before the law²³. As Malaysia lifted its reservation on Article 15 on freedom of association and participation from the Convention on the Rights of the Child²⁴ (CRC) in 2011, it ought to comply with the international standards as a state party to recognize children’s right to freedom of association.²⁵ For instance, in Turkey, children over the age of 15 may form associations and from the age of 12 may join those associations. In countries like Slovenia allow children under the age of seven years old to be a member of an association under Article 5 of its Associations Act.²⁶

Registration and Operations

As articulated by the Special Rapporteur, registration of CSOs as a legal entity should not be required by law²⁷. Informal and unregistered associations should be allowed to carry out its activities freely and individuals involved in such associations should not be subject to criminal sanctions²⁸. How the law addresses the issue of entry and registration is critical as it has potential to lead to direct interference with the freedom of association.

22 Articles 2 and 26 of the ICCPR state that everyone regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” is guaranteed the right to freely form associations and without discrimination in the law and in practice.

23 Human Rights Council, A/HRC/20/27. (2012). *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*. UN General Assembly.

24 Malaysia ratified the Convention on the Rights of the Child in 1995.

25 Currently in the 1966 Societies Act membership is allowed for minors but committee positions can only be held by individuals aged 21 and above.

26 International Center for Not-For-Profit Law, Open Government Partnership. (2018). *The Guide to Opening Government An Enabling Environment for Civil Society Organizations*. Washington, DC : Open Government Partnership.

27 Human Rights Council, A/HRC/20/27. (2012).

28 In Malaysia, Section 6(2) of the Societies Act criminalizes unregistered society.

Moreover, the legislation concerning freedom of association shall incorporate the principle of presumption in favour of the establishment, objectives, aims, and goals as well as activities of associations to comply with international standards²⁹. This is to prevent authorities to make vague assumptions to criminalize against CSOs and individuals involved. As a result, violations must be proven with evidence otherwise, the state should presume that a given association is lawful in its establishment and activities.

Informal and unregistered associations are considered as an integral part of a vibrant civil society in any country. This is particularly referring to the cases when the registration process is slow, arduous, and complex and possibly subject to authorities' discretion, voluntary registration provides legitimacy and protection from criminalization³⁰.

In related to that and of the recommendation by the Special Rapporteur, states should have minimal legal and administrative provisions in CSOs registration³¹. Governments should not disproportionately target or burden CSOs using burdensome vetting regulations and procedures, tax pressure or other CSO-specific requirement that do not apply to the business entities³². Instead, governments should assist CSOs in the forms of funding, tax and duties exemption and other benefits and incentives³³.

It is emphasized that a notification procedure without compulsory registration requirement, rather than a prior authorization procedure³⁴ to a neutral body is the best practice for freedom of association³⁵. Even if it involves a registration procedure, the procedures should be simple and non-onerous expeditious with little or no charge. Upon submission, the supervisory body shall automatically register the applicant. This means, an association is automatically granted legal personality after the notification procedure.

On the other hand, if the government had adopted to use a prior authorization procedure, the registration bodies shall process the application in good faith, in a speedy and non-selective manner to process the application in a limited timeframe³⁶. The government should also refrain from imposing frequent, onerous and bureaucratic reporting requirements, which can obstruct the legitimate work of CSOs³⁷.

Ability to Access Resources

The right to association also encompasses the ability of CSOs to seek, receive and use human, material and financial resources from domestic, foreign, and international sources and is protected under Article 22 of the ICCPR³⁸. The Human Rights Committee adopted that, "... no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto"³⁹. Informal, unregistered associations including individuals should have the right to seek and secure funding without authorities' authorization⁴⁰. While governments may use legitimate justifications such as terrorism, money laundering and foreign interference to deny CSOs ability to access funding, however, it should comply with Article 22(2) of the ICCPR in accordance to the restrictions and interpretation made by other human rights treaties⁴¹.

29 OSCE's Office for Democratic Institutions and Human Rights. (2015). *Guidelines on Freedom of Association*. Warsaw: OSCE's Office for Democratic Institutions and Human Rights.

30 Human Rights Council, A/HRC/20/27. (2012).

31 Human Rights Council, A/HRC/32/20. (2016). *Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned*. New York: United Nations General Assembly.

32 Human Rights Council, A/HRC/23/39. (2013). *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*. New York: UN General Assembly.

33 Council of Europe. (2007). *Legal Status of non-governmental organisations in Europe*. Strasbourg: Council of Europe Publishing. Retrieved from <https://rm.coe.int/16807096b7>

34 The prior authorization procedure requires the approval of the authorities to establish an association as a legal entity.

35 Human Rights Council, A/HRC/20/27. (2012).

36 Ibid.,

37 Human Rights Council, A/HRC/23/39. (2013).

38 Ibid.,

39 Ibid.,

40 Human Rights Council, A/HRC/20/27. (2012).

41 Human Rights Council, A/HRC/23/39. (2013).

SECTION

4

RECOMMENDATIONS

This policy paper has sought to provide an overview of the existing legal framework in Malaysia that governs CSOs, its barriers and also the international laws and standards that are required in order to protect the right to form, join and participate in associations. The paper shows that existing government regulatory controls are a barrier to CSOs and restricts the right to freedom of association. The followings are a list of recommendations for reforms to laws, policies and practices in Malaysia so as to create an enabling environment for civil society in accordance with international standards and the government's commitments:

1. Ease the entry and registration of CSOs

The laws should facilitate the formation and establishment of CSOs including those undertaking human rights advocacy either as a society under the Societies Act, as a CLBG under the Companies Act, or other relevant legislation so that all individuals may freely exercise their freedom of association. Registration of societies should be simplified and freedom to be registered legally without needed to hide the nature of activities undertaken. Further internal regulations requiring approval of the police intelligence Special Branch should be removed. The right to form or join an association should be accessible to all regardless of citizenship or nationality. Registration should be voluntary and not to be made compulsory for the CSOs that choose not to be registered. The laws should recognize the right of unregistered groups to exist and operate.

2. Strengthen the independence of registration bodies

Currently under the law, the Minister is given absolute discretion to make decisions related to the registration and functioning of a society. This opens up the potential to abuse of powers. The Societies Act should be amended to reduce the powers of the Minister limiting the role to oversight of criminality. There must also be an independent and separate governing body or board to oversee the registration of CSOs or for appeals if applications are rejected, consisting of individuals from different backgrounds including from civil society, in order to ensure meaningful independence from political influence. A Charities Commission as proposed by the Pakatan Harapan manifesto (Promise 54) could play this role. All decision of the registrar should fulfill due process and must be transparent and accountable.

The paper shows that existing government regulatory controls are a barrier to CSOs and restricts the right to freedom of association.



3. Ensure the right to operate free without state interference

The right to freedom of association should be applied in the entire cycle of the life of the association. This includes protection to operate their daily activities, in which they should have broad discretion to formulate their internal structure and operating procedures. The Societies Act as it stands contravenes this by prescribing a structure for a society and also the geographical location of their executive board members. Any form of interference must have basis in the law and the law must be accessible for everyone where there must be foreseeability on the consequences of non-compliance and there must be legitimate state interests.

4. Recognize human rights CSOs with a public-benefit status

Due to the various barriers as mentioned above, the CSOs working on human rights issues constantly need to deal with issues such as time-consuming registration requirements, complicated tax regulations and ambiguous administrative procedures. Human rights CSOs should be recognized as entities with public-benefit status. In order to pursue this, the government is urged to provide comprehensive guidelines to facilitate and enable the system of granting tax benefits to these CSOs.

5. Omit the category of political parties in the Societies Act

One of the main reasons of the restriction in freedom of association as found in the Societies Act is partly due to the inclusion of political parties in the Act itself. The Act was often being used by the previous regime to curb the activities of opposition political parties. Therefore, it is recommended that the government omit the category of political parties in the Act and place political parties under the purview of the Election Commission (EC).

6. Remove barriers to resources

CSOs in Malaysia registered under the Companies Act and Societies Act often face barriers in obtaining funding. The government must ensure that associations – registered and unregistered – can seek, receive and use funding and other resources whether domestic, foreign or international, without prior authorization or other undue impediments. There must be an innovative mechanism for independent grant-based local funding in which CSOs can apply to from national to local levels to ensure meaningful public policy development and implementation.

7. Review charitable purposes under the tax exemption guidelines

As mentioned above in the section on barriers to resources, the criteria for obtaining an income tax exemption for CSOs under the Guidelines for the Application of Approval under Section 44(6) of the Income Tax Act are limited and do not include advocacy-based groups working on human rights to qualify as charities. Therefore, it is recommended that the guidelines be amended to do so.

8. Remove the excessive amount required to be established as a foundation

Currently, for a CLBG to apply to the Minister for a licence to omit the word “Berhad” (Limited) from its name and intending to use the words “Yayasan” or “Foundation”, it must have a fund amounting to RM1 million cash under the CCM guidelines. This is an excessive amount and should be reviewed to make it easier for the formation of foundations.

