

# CONSTRUCTING A DEVELOPMENTAL AND TRANSFORMATIONAL PHILANTHROPY IN AFRICA

Towards a new regulatory common sense



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FOR AFRICAN PHILANTHROPY

## FOREWORD

The African Grant Makers Network (AGN) and the Southern Africa Trust are excited to publish this report which covers not just the legislative environment for philanthropy in Africa but begins in many ways to paint a complete picture of the space that philanthropy occupies. There are many birds in the sky as Tade Aina-a renowned scholar and philanthropy expert once remarked in an African Grant Makers Affinity Group (AGAG) Retreat in 2013. But how these birds are regulated or regulate themselves in the sky while flying still remains a very fuzzy and unclear terrain. How they are also affected by existing regulations, policies or systems also remains undocumented and at worst unknown. This report - looking at seven countries (Angola, Egypt, Ghana, Kenya, Nigeria, Senegal and South Africa) - gives a detailed picture. And as expected, the countries studied are different in terms of culture, history, politics, legal regimes, economic development, identity formation and traditions of philanthropy among others. Yet they all have a culture of giving and all possess resources that can be harnessed for sustainable development, particularly in the era of the post 2015 Sustainable Development Goals. The report manages to profile these countries and contextualise philanthropy both in its practice and theorisation.

Ultimately it is in how these countries conceptualise philanthropy that determines how they regulate it. The report sheds light on what regulatory regimes exist in these countries. It goes on to suggest reforms where there are gaps or outdated approaches. But perhaps more revealing is that there is no country that has a single legislation on philanthropy, rather philanthropy is regulated by many statutes - financial, monetary, taxation and administrative among others. Philanthropy cuts across the regulatory and policy regimes of these countries. This means that governments play a particularly active role in how philanthropy operates in these countries. This intrinsic linkage between philanthropy and governments has not till now been debated or brought out as an area of scrutiny. The report kick starts this debate and the interrogation of the negotiation of the space between governments and philanthropic bodies. For AGN and the Trust, this is an important area of focus going forward. There is no doubt that philanthropy will be expected to bail out ever failing governments - now and again, but to do so effectively, there is need to understand very well these intricate relationships which on the one hand can be very catalytic but on the other can be very limiting as we see in many countries where the space for civil society and philanthropy is under stress.

Increasingly also is the space between philanthropy and the international system. This report and others conducted by the Trust begin to conceptualise the link between philanthropy and international instruments, for example around the role philanthropy plays in either promoting or curbing illicit financial flows. This is an area that is increasingly getting attention not just from policy makers but also from regulators. This has a potential to either hamper philanthropic transactions or help boost local productive economies. Related to this is the increased question of remittances and how they are regulated. In the Zero Draft of the outcome document for the UN Summit to adopt the Post 2015 Development Agenda, there is an attempt to reform financial instruments and policies to facilitate movement of remittances. But given the current interchanges between conceptions of remittances and philanthropy, there is likelihood that increased regulation targeting remittances will affect philanthropic flows. Only Kenya and Ghana in the report seem to have regulated the remittances under their law. Other countries have not dedicated specific attention or legislation to remittances.

The relation between civil society, the market and the state is discussed in the report. This is precisely because different ideological orientations of governments determine what space they give and how much they close for other actors. It is clear in the report that in creating an enabling environment for philanthropy, is far more than offering the civil libertarian rights to understanding the new and broader national strategic considerations such as fighting terrorism, money laundering, broadly captured as security concerns of the state. We live in an era where the promotion of human rights by groups is competing with the agenda of protecting human lives by the state. This makes it easy for the human rights agenda to be dominated and

sacrificed for the protection of human lives orientation. Countries such as Kenya, Egypt and Nigeria would therefore raise the security considerations in their dealings with civil society and philanthropy. Understanding these developments helps philanthropy position itself in these countries. The report is therefore useful in that it does carve out these peculiarities. In countries with a strong leftist orientation such as South Africa, philanthropy can easily negotiate its space in line with current practices within the trade union movement for example and the vibrancy that normally characterises civil society.

Overall however it is clear that all countries approach philanthropy and its friends from a supervisory, surveillance and compliance orientation, with punishment meted out in cases of non-compliance. The report however recommends a different approach, one that priorities innovation, transparency, accountability and mutual trust.

Finally philanthropy exists in a governance context in all these countries. How these countries are governed has a ripple effect on philanthropy. This too is an area of interest for AGN and its members.

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*“Africa’s people share deep- rooted values of social solidarity, human dignity and inter-personal connectedness which correspond to western notions of philanthropy- the desire to promote the wellbeing of others or, put simply, ‘to love people’.”*

**AGN Report, April 2013**

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## PREFACE

The adoption of new visions of African development such as the African Union (AU) Agenda 2063, the African Union Heads of State 50th Anniversary Solemn Declaration, the Africa Mining vision, the AU Shared Values instruments, including Charters and Protocols on the rights of women, youth and children, decentralisation and local governance, public service, democracy, elections and governance, the rights of Internally displaced Persons, and persons living with disabilities, as well as the Common Africa Position (CAP) on post-2015, epitomizes the renewed confidence and self-belief amongst African peoples, entrepreneurs and governments. These developments along with the rapid expansion of African cross-border investments and trade suggest that it is time the continent shed the historical yoke of borrowed western socio-economic development models. Development planning, performance management and a focus on results has created a greater consciousness regarding the processes and outcomes of development interventions.

African economic structural transformation and social change informed by African conceptions of humanity, solidarity, faith and collective citizenship 'UBUNTU' requires an equally transformative leadership, institutions, policies and regulatory frameworks to implement the ideals, ideas and visions aforementioned. African philanthropy - in particular - needs to be inclusive and context sensitive, informed by an understanding of local complexities, aspirations and values in order to be sustainable and not be entirely dependent on international skills, capacities, finances and ideas.

The dynamic of modern African philanthropy consisting of a heterogeneous mix of volunteerism, community based initiatives, ordinary individual givers, high net worth individuals (HNWI), corporate and mobilized virtual platforms requires a new common sense amongst regulators to ensure that this wide range of activities remain innovative though retaining older mechanisms that work well, equitable, transformational and sustainable. This new common sense demands that African States shed the old paradigm of regulation premised on State security and the rote supervision and surveillance of the non-profit sector without necessarily abdicating the concurrent responsibilities to catalyse and optimize the liberty of African citizens and private sectors to self-develop complimentary to the efforts of capable democratic developmental states. This new common sense approach to regulation seeks to empower, build trust and enhance self-reliance amongst African philanthropies, philanthropists, States, private sector and other key stakeholders.

Philanthropy is not only the highest expression of the African philosophies of Life lived in solidarity, with empathy, in collective partnerships and dignity, it is also a sustainable mechanism for domestic resource mobilization requisite to meet critical public needs and respond to the demands of public good. If appropriately supported by an enabling regulatory environment, African philanthropy could become the

## THE AFRICAN GRANTMAKERS NETWORK

African Grantmakers Network (AGN) - Voice and Action for African Philanthropy is a continent-wide network of African grantmaking organizations that facilitates networking and experience-sharing among established and emerging African philanthropic institutions. AGN aims at consolidating the voice for African philanthropy to address social injustice and development issues on the continent.

AGN addresses the weakening of the civic sphere and the relationship between state and non-state actors in the field of philanthropy in Africa. It works to develop the organizational, communication, fundraising, and leadership capacities of African philanthropic institutions. Through strategic interventions, AGN enhances the ability of African citizens to contribute more effectively to African development as well as their self-development.

democratic development African States' most reliable partner in alternative development financing; self-reliant economic structural transformation; universal social protection for the populace; raising household savings, income and purchasing power; enhancing local economic development; building local or micro infrastructure as well as developing micro-enterprises linked to the broader national economy. In the long run, the investments by philanthropy would contribute immensely towards political stability, social well-being, social cohesion and resilience. However, in order to optimize this potential philanthropy dividend, African regulators need to shed the notion of philanthropy as 'vulgar charity' and perceive its full potential as both a social impact investment and charity tool.



## ACRONYMS

ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter on Human and Peoples Rights
ARF	African Renaissance Fund
AU	African Union
AUC	African Union Commission
BRICS	Brazil, Russia, India, China and South Africa
CAP	Common Africa Position on the Post-2015 Development Agenda
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
DAC	Development Assistance Committee
ECOSOCC	AU Economic, Social and Cultural Council
FDI	Foreign Direct Investment
IFF	Illicit Financial Flows
GVTF	Ghana Venture Capital Trust Fund
HNWI	High Net Worth Individual
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Cultural and Social Rights
ICT	Information communication technology
NEPAD	New Partnership for Africa's Development
NPO	Not for Profit Organization
NSO	National Statistical Offices
ODA	Official Development Assistance
OECD	Organization for Economic Cooperation and Development
PBO	Public Benefit Organization (as known as Social Purpose Organization)
RECs	Regional Economic Communities
SME	Small to Medium Enterprise
UDHR	Universal Declaration of Human Rights
UNGA	General Assembly of the United Nations

## GLOSSARY OF TERMS

**Corporate Social Responsibility (CSR):** refers to an organizations' total responsibility towards the business environment in which it operates. CSR describes the broader solution to triple bottom-line matters of the three Ps (Profit, People and Planet). CSR generally refers to corporate initiative to assess and take responsibility for the companies' effects on the environment and impact on social welfare. The term applies to Company efforts that go beyond what may be required by regulators or environmental protection groups. CSR may also be referred to as "Corporate Citizenship" and can involve incurring short-term costs that do not provide an immediate financial benefit to the Company, but instead promote positive social and environmental change. CSI is a sub-component of CSR and aims to uplift communities in such a way that the quality of life is generally improved and safeguarded.

**Corporate Social Investment (CSI):** Is defined as contributions (either monetary, employee time and resources, or gifts in-kind) that bring benefits over and above those directly associated with core business activities

**Impact Investing:** refers to investments made into companies, organizations, and funds with the intention to generate a measurable, beneficial social or environmental impact alongside a financial return. It is a form of socially responsible investing that serves as a guide for various investment strategies.

**Philanthropy:** The desire to promote the welfare of others, expressed especially by the generous donation of money, property, expertise, time, compassionate care or work to good causes or needy persons. It may include the endowment of institutions or other socially useful purposes. The term philanthropy means "Love of humanity" in the sense of caring, nourishing, developing and enhancing 'what it is to be human' on both the benefactors (by identifying and exercising their values in giving and volunteering) and the beneficiaries (by benefiting) parts. It is sometimes defined as 'private initiatives, for public good, focusing on quality of life'. It combines the social scientific and the humanistic traditions. It contrasts with business and government, traditionally defined as 'private initiatives for private good, focusing on material prosperity or pecuniary interest' and 'public initiatives for public good, focusing on law and order', respectively. Philanthropy sometimes overlaps with 'Charity' though not all charity is philanthropy, or vice-versa. The key difference is that 'charity' relieves the pains of social problems, whereas 'philanthropy' is an attempt to solve those problems at their root causes.

**Philanthropreneurship:** Is a creative entrepreneurial approach to philanthropy that charitably donates all the rewards from successful business revenues towards assisting causes and founding philanthropic ventures.

**Social Purpose Organization (SPO):** Describes an organization whose primary objectives is to create social value in society and is generally independent of government or commercial sectors. Such organizations are otherwise describe as Philanthropies, Public Benefit Organizations (PBOs) or Charities.

**Venture Philanthropy:** Provides a blend of performance-based development finance and professional services to social purpose organizations, helping them to expand their social impact. This is a high engagement, partnership approach analogous to the practices of venture capital in building the commercial value of companies. Venture philanthropy is believed to have the potential to contribute to developing a more responsive and diverse capital market for the social sector. Its focus on building organizational capacity in entrepreneurial social purpose organizations, matching appropriate finance with strategic business-like advice, makes it a distinctive provide of capital. An approach to fund social causes using instruments and tools of venture funding to achieve social rather than a financial return. It may take several forms including promotion of start-up, growth and risk-taking social ventures. It is intended to diversify capital markets for non-profits and social-purpose organizations.

**Social Enterprise:** Is a revenue-generating business with primarily social objectives, whose surpluses are reinvested for that purpose in the business or in the community, rather than being driven by the need to

deliver profit to shareholders and owners. Such businesses that trade to tackle social problems, improve communities, people's life chances or the environment. They make their money from selling goods and services in the open market, but they re-invest their profits back into the business or the local community.

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# 1. EXECUTIVE SUMMARY

## Study Objective and Scope

The main purpose of this Report is to map existing regulatory frameworks for philanthropy in seven African countries (Angola, Egypt, Ghana, Kenya, Nigeria, Senegal and South Africa) with a view to contributing to the broader development of African philanthropy. This study thus aimed firstly, at creating socio-economic and political profiles and assessing the legal / regulatory context of philanthropy in these countries. These countries have different histories, social, ethnic and religious traditions as well as political and economic contexts.

Secondly, the study aimed at understanding the overall characteristics of contemporary African philanthropy as well as general philanthropy operating in Africa and not necessarily African. It explored questions regarding the relevance and adequacy of the legislative frameworks that regulate both African and other forms of philanthropy in Africa. It based the rationale for regulating or incentivizing philanthropy on its contribution to and impact on the African socio-economic transformation agenda and sustainable human development, generally. Attention is paid to certain specificities around process, experiences and outcomes, what factors help and / or hinder the growth of specific types of philanthropic interventions and what good lessons can be drawn for possible replication elsewhere.

Thirdly, the study sought to identify potential reforms to the existing regulatory frameworks in order to enhance the developmental impact of philanthropy. The aim is to obtain knowledge and understanding regarding the relevance and effectiveness of different approaches to the regulation of philanthropy by national governments and self-regulation by the philanthropic sector. The overall objective is to identify gaps and opportunities for advocacy with policy makers in order to strengthen the contribution of African philanthropy to the sustainable development of Africa and the wellbeing of Africans. Regulation is conceptualized within the context of this report not merely as sanction and censure, but as catalyst and enabler. We have taken the view that given the broad expanse of the field that currently constitutes the philanthropy sector several strategies are instructive, namely: **indigenization**, meaning the reliance on local knowledge; experience and evidence to construct regulatory frameworks; **diversification**, meaning the broadening of the traditions that are relied upon to conceptualize regulatory frameworks (i.e. the indigenous, western, eastern and religious traditions); and **heterodoxy**, meaning a deliberate mix between traditional charity, social engineering, innovation and modernization of traditional forms. We were also mindful of the contextual realities of weak leadership, weak institutions, relatively weak civil society, weak private sector and often intrusive and repressive State institutions in adopting a futuristic view of the potential role of Democratic Developmental African States in catalysing transformational and developmental philanthropy in Africa and by Africans (individuals, cooperatives, associations and corporations).

This report explores several policy issues relating to the regulation of African Philanthropy, including but not limited to the following categories:

- **Issue 1:** The pervading logic of country-level policy and legislative frameworks: socio economic transformation, vision and strategy or supervision and surveillance.
- **Issue 2:** The existence or otherwise of a regulatory consensus on the developmental role of philanthropy. Are there fiscal, monetary and exchange rate policy support for philanthropy?
- **Issue 3:** How much government involvement is there in financial intermediation and philanthropic sector?
- **Issue 4:** The role of bodies responsible for the registration of Intermediate support organizations ISO, civil society organizations (CSOs) and public benefit organizations (PBOs); the role of government grants, subsidies, customs duty exemptions and taxation.
- **Issue 5:** The existence of policies that serve to broaden and strengthen financial infrastructure and philanthropic sector with respect to Legal Models, Regulation and Supervision.

In dealing the above five issues, the report also considered the following inter-related sub-issues:

- **Sub-Issue 1:** Certainty / clarity within each national regulatory context about what, when and how to regulate African philanthropy.
- **Sub-Issue 2:** Application of tiered regulation and risk-based supervision to philanthropy by national regulatory authorities. In particular, how much specific attention do national regulatory authorities pay to risk such as money-laundering, illicit financial flows (IFF) and insecurity related to transnational crime and terrorism?
- **Sub-Issues 3:** The extent of focus or incentives dedicated by the national regulatory authorities on innovative and catalytic regulation as opposed to control and restraint.
- **Sub-Issue 4:** The primacy given within the national regulatory and policy frameworks to access to philanthropic services and products as a policy goal.
- **Sub-Issue 5:** The way in which the national regulatory and policy frameworks take into cognizance “New” regulatory issues that need to be considered in light of developments in financial services, technology and transnational nature of regular giving, including the interface between commerciality and traditional charity.

The foregoing issues and sub-issues create many possibilities for operational and programmatic level recommendations which were beyond the remit of this report. However, they were considered in order to inform the high-level policy recommendations and advocacy points required of this report. In essence, this report identifies several generic policy options to address the varied country contexts encountered in the research countries. These are enumerated below without consideration of any order to priority or importance.

## Policy Issues and Strategic Options

- **Option 1:** Strategic and deliberate government intervention in the philanthropy sector to ensure alignment with national development strategy, to strengthen local philanthropy actors and to create an enabling environment – how much intervention, what kind, where and when? How to conduct the baselines and validate the evidence?
- **Option 2:** National Philanthropy strategy and policy formulated through multiple stakeholder engagement, consent and consensus - what sort of stakeholders and dialogue platforms? What level of consultation and inclusion (local, national, regional and international actors)? In specific national and local contexts what might be the meaning and understanding of inclusive, sustainable and affordable philanthropic services?
- **Option 3:** Designing the public sector policy and support infrastructure for philanthropy. How to fashion a legislative and financial infrastructure for modern philanthropy? How to foster equitable growth of the philanthropy sector (e.g. through deliberate targeting and inclusion of historically marginalized and vulnerable groups such as women and youth)?
- **Option 4:** Designing an efficient, effective and non-intrusive Consumer protection regulation regime that serves to, inter alia: preventing illicit financial flows, money laundering and other unlawful activities.
- **Option 5:** Reviewing the fiscal policy provisions relating to ‘Commerciality Test’ or ‘business’ transactions of philanthropies as well as philanthropic investments of private corporations. How to construct a flexible, but sufficiently inclusive and non-porous regulation regime? How to protect the small to medium local / national philanthropic institutions from being crowded out of the emerging philanthropy market, without stifling the innovation requisite for the growth of a varied sector?
- **Option 6:** Rationalization and harmonization of different legislation dealing with philanthropy (one stop shop) and their respective registration requirements? How to create a simpler, easy to understand, use and access regulatory system with equally easy reporting process?

- **Option 7:** Building new 'capacities and competencies' for dealing with the online philanthropy ecosystem (including 'cause marketing', online resource mobilization ethics and accountabilities). How to integrate relevant aspects of online giving into national e-government and e-governance strategies? How to protect intellectual property rights (IPRs) of applications developers?
- **Option 8:** Clarifying the relationship between social enterprise, venture philanthropy, impact investing, corporate social responsibility (CSR) and philanthropy.

## Study methodology

The study has largely been desk-based with some key informant interviews via Skype, telephone and e-mail follow-up where possible. Documents that are relevant to global, regional and country contexts of philanthropy and specific studies on various aspects of philanthropy were compiled and analysed to establish the politics, trends, challenges and opportunities facing the sector. Recent publications on African philanthropy were referenced to establish the status of ideation and the impact of philanthropy on African development generally and country contexts, specifically.

This report represents the findings, conclusions, lessons learnt and recommendations on regulation of philanthropy within diverse socio-economic and political contexts in Africa. Specific case studies are drawn from Southern (Angola and South Africa), Eastern (Kenya), North (Egypt) and West Africa (Ghana, Nigeria and Senegal) that have seen a rapid growth of the philanthropic sector over the last decade. This is – partly - manifested by the number of High Net-Worth Individuals (HNWI) and members of the middle class in these countries that are engaged in impact investments, social enterprise or simply given back to their communities. These countries' citizens are very active in institutionalized, mobilized, individual and voluntarist forms of philanthropy.

Documents reviewed included reports by: philanthropic foundations, government statutes and policies, UN Agencies, African Union Commission (AUC), African Development Bank (AfDB), World Bank (WB), Regional Economic Communities (RECs), Western Philanthropies, Centre for Non-profit law, bilateral donors, civil society organisations and the media. Common themes, particularly around trends, traps, trip wires and golden opportunities in the philanthropic sector were identified and the regulatory aspects extrapolated or identified. The purpose of this wide-ranging literature review was to provide both a political economy perspective and understanding of how, why and when to regulate various forms of philanthropy. Target areas included social enterprise (SE), social impact investing (SII), corporate social responsibility (CSR), HNWI, mobilized / institutional philanthropy, self-donation and community based philanthropic interventions. We paid attention to the reach and distribution of support infrastructure, public and private finance and budget allocations towards philanthropy, social and economic policy mix and fiscal policies applicable to the philanthropic sector.

The study, however, was limited in scope given that it was largely desk-based and there is a paucity of online information regarding post-revolution Egypt and post-2012 Angola. Many websites do not carry up to date and balanced information on Egypt and Angola. Further examination by conducting semi-structured interviews with key informants has been limited due to the tight time-schedule and the nature of the assignment. In some countries like Kenya, Egypt and Angola the applicable legislation is still under review making it difficult to assess impact or to definitively project the outcome of on-going negotiations regarding the content and purpose of the laws.

It is important that this process of understanding specific country-level logic and context of regulating philanthropy be taken forward at a later date through in-country assessments and evaluation of identified study countries. Additional questions regarding the regulation of philanthropy can be drawn from ongoing work on illicit financial flows (IFF), tax and ecological justice as well as the indicators being developed for the Common African Position (CAP) on the post-2015 Development agenda. Key informants for this latter work should include corporate, investment and commercial bankers; tax consultants; accountants; lawyers;



development impact assessments experts; HNWI, corporate and community-based foundations and national chambers of commerce, philanthropy support institutions and business organizations. The limitations noted above, notwithstanding, the report was able to come up with concrete findings and recommendations which set out below:

## Key Findings

Overall, the contribution of various shades of philanthropy to development in Africa over the past 10 years has been astounding.

- The study found that mobilized, institutional, HNWI, Community-based and In-Kind philanthropy accounts for billions of dollars' worth of time, effort, material and financial investment in African development. This investment is poorly recorded and weakly appreciated. That giving, volunteering and social impact investing are on the rise in all seven countries studied.
- In Angola, Kenya, Senegal and Ghana the financial flows of philanthropic contributions from externally resident nationals (Diasporans) are significant or rising. In the case of Angola, flows of migrant remittances from South Africa and Portugal are significant but poorly recorded. The impact of diaspora remittances at the household and community levels is significant and their potential in the medium to long term for greater national developmental impact and domestic resource mobilization is equally significant. But the regulation of the relationship between the State and its Diaspora is best developed under Ghanaian and Kenyan legislation where dedicated government departments have been established to handle Diaspora matters. Regulation of money transfers and adjustment of stringent tax policies would encourage increased investment of diaspora resources into critical national development objectives or targeted social impact investing. Angola is still performing weakly on ease of doing business, CSO freedoms and governance indicators. Arguably, the preponderance of these factors adversely constrain the growth of an independent and robust philanthropic sector in Angola.
- Angolan, Egyptian, Kenyan, Ghanaian, Nigerian and Senegalese Diaspora's offer unique opportunities of transnationalism in African philanthropy. However, both national, sub-regional and Continental normative frameworks do not explicitly encourage, support or catalyse this transnational potential of Diaspora philanthropy. Faced with the threat of the Ebola virus, the combination of on-line giving, 'cause marketing' through mobile telephone companies and banks and diaspora trans-boundary giving proved a potent contribution. These, therefore, need to be explored and deliberately developed through well nuanced policies and strategies, especially as philanthropic solutions to transnational and trans-boundary challenges.
- The structure and nature of philanthropy in Africa is complex and mired in political and ideological controversies regarding the mutual roles of the State, market and Civil Society in the development process. Creating an enabling environment for philanthropy would have to take into account much more than the traditional civil libertarian considerations to include broader national development and other strategies, ideas, priorities and objectives. It would also have to take account of State Security considerations in a context where terrorist groups are prone to manipulate the relatively porous financial intelligence walls and opportunities offered by new philanthropic innovations and tools. The State Security considerations are increasingly being raised by Egyptian, Kenyan, and Nigerian governments.
- The study found that in the case of Angola and South Africa with strong left-leaning social and political actors, ideological considerations regarding State-Society and Market-Society relations will colour any proposed legislative reforms and the uptake of different forms of philanthropy. However,

the heterodoxy of South African and Angolan economic policies creates opportunities for re-imagining of the relationship between philanthropies, strong States and national development processes. In Egypt, the report found that, the major issue is separation of State and religion or preservation of a circular State administered on the basis of Sharia law. This constitutes an ideological terrain where any legislation is likely to be contested or supported. The deeply embedded historical culture of philanthropy as a familial and religious practice also shape how the State and publics conceptualize both traditional and 'new' forms of philanthropy.

- The report also found that those countries that fared better on ease of doing business; CSO freedoms and democratic space criteria tended to perform better on the basics of ease of doing philanthropy. This is certainly true of South Africa, Ghana, and Senegal and until recently, Kenya. However, it did not necessarily follow that philanthropies in these countries were more socially, politically, environmentally and economically accountable. Nor is it necessarily the case that the philanthropies in these countries have recorded greater development impact. This raises fundamental questions regarding the difference in regulation between administrative efficacy and broader accountability and development impact. For purely administrative reasons, in order to effectively regulate the philanthropic sector, there is need to create One-Stop-Shop regulatory centres that simplify registration and reporting procedures for Non-Profit Organizations.
- Global Integrity (2013) notes that all seven countries have over the last decade lost billions of dollars through various schemes and scams of illicit financial flows(IFF), tax evasion ,grand corruption and regulatory inadequacies. The potential that philanthropies could be abused by malevolent characters in society and used as conduits for IFF has raised the spectre of likely knee-jerk reaction by regulators. Over regulation would be inimical to the growth of both African SME's and philanthropy (national and transnational). In Egypt, Kenya and Nigeria where the scourge of terrorism has grown in the last five years, there are growing calls for tighter regulation of the non-profit sector by adoption of US-style anti-terror legislation. The trend in Egypt and Kenya in the period 2013/14 has been to sweepingly clamp down on civil society and limit its operational space. The two countries have adopted or proposed legislation to limit the access by CSOs to foreign funding as well as significantly intrusive surveillance of CSOs. The unwitting effect of this has been to constrain the growth and impact of the philanthropic sector. The legitimate right and obligation of States to protect their citizens, including by fighting terrorism should not be used as a guise to derogate from internationally and continentally agreed standards of human rights.
- Policies of the majority of the seven countries are steeped in a historical tradition or regulatory approach and logic that tends towards supervision and surveillance, compliance and punishment as opposed to responsible innovation, accountability, transparency and mutual trust. Equally so, fiscal policies of most of the seven countries tend to give either general or limited incentives, exemptions or allowable deductions especially to community-based organisations, volunteers, and non-corporate philanthropies. This skews the development of the sector and gives competitive and comparative advantage to large philanthropic institutions and super-wealthy individual philanthropists.
- One of the main factors adversely impacting the growth of African philanthropy and in particular nationally mobilized, institutionalized, HNWI, In-Kind and community based varieties is the lack of national philanthropy strategies aligned to national development plans and visions as the pillars upon which to develop national philanthropy policies and laws. At worst, the national, sub-regional and continental development strategies (including Agenda 2063, Common Africa Position on post-2015) are philanthropy blind. As a result, the impact of the investments made by the philanthropic sector are not adequately or appropriately reflected in macroeconomic data or social indicators in all seven countries. This alignment is a necessary pre-requisite for ensuring that the regulation of African philanthropy is not over-burdened by historical prejudices and imputations of subsidiarity to foreign

policy agendas of foreign governments and donors.

- In all countries studied, the situation is complex and a holistic approach is needed to ensure that the regulatory framework for philanthropy is inclusive, but aligned to consensually agreed vision and trajectory of sustainable development. The sector is faced with both internal and State-based governance challenges.

## Key Lessons and Recommendations

In light of the foregoing the first set of recommendations pertain to knowing and understanding the field of philanthropy and the critical actors, namely:

- There is need to scope the range of national and transnational actors in the field of philanthropy, their interests, motivations, needs, contributions, perceptions and legal status.
- Creating an official process of engagement and dialogue between the African State, RECs and AU, philanthropists regarding the issue of regulation through credible, bias-free and non-political platforms. Utilize such platforms to identify areas of convergence and disagreement as well as concern. Set up mechanisms for resolving identified concerns as a prelude to developing a consensually agreeable regulatory framework or set of standards.
- Expand public support for philanthropy, including through targeted tax and other incentives; public financial support; creating investment opportunities within local economies and local government areas; training and skills development, especially for community-based philanthropies.
- Promote policies that encourage African working and middle classes to contribute to philanthropy, social impact investing and other philanthropic initiatives, including amongst and by non-resident nationals (Diasporans). Tax and other incentives for care work, volunteerism, self-donation, contributions to causes would serve as great stimulants. However, it is important to note that most Africans do not engage in philanthropy for the tax benefits, their engagement arises more out of their social or moral consciousness.
- Review and upgrade incentives that are offered to individuals irrespective of class that give in-kind or cash towards philanthropic causes.

Moreover, the growth of new philanthropic instruments and actors, has amplified the fact of the inadequacy of existing regulatory frameworks across the seven countries. Where the regulatory frameworks exists and are up to date, they tend to be fragmentary, incoherent or contradictory. In other instances, the regulatory frameworks are outdated or decades behind modern innovations and practice. In this regard, the second set of recommendations address concerns relating directly to these regulatory frameworks. In particular, it is recommended that:

- Angola, Egypt, Senegal and Nigeria review and consolidate procedures for setting up and registering philanthropies (e.g. through a One-Stop-Shop approach, in order to avoid multiple registration points with different government departments. The One-Stop-Shop would create centres with differentiated support services for different categories of philanthropies. One of the main hindrances to effective advocacy for fairer regulation for philanthropies is the dearth of data and indicators for measuring success and impact of the sector. The one-Stop Shop regulatory hub would resolve this.

- All countries simplify the requirements for qualification for tax benefits, incentives, exemptions for each category of philanthropic organizations. This would include asset and gift declaration as well unrelated business tax initiative (UBTI), simplification of 'commerciality and / or commensurate commercial transactions tests'. The desire to rely less on external donors as well as to increase the engagement of African private economic actors and members of the middle class in philanthropy dictates that the fiscal benefits and implications of philanthropic investment and giving be revisited in all countries studied. For example, a new South African law requiring payment of an additional 15% service tax by foreign service providers seems inconsistent with the proposed changes. Equally so, the absence of specific regulations governing cross-border philanthropy by corporations and individuals in all the study countries requires review.
- Create decentralized government information centres to disseminate and receive information and views from both philanthropic organizations and beneficiary communities. These centres would explain both the regulatory requirements, benefits and implications of registering under one or other type of philanthropic organization. They would-overall- offer public information, data and compendium of laws on philanthropy.
- Amend current philanthropy laws to capture clearly and in a consolidated manner provisions and approaches to the following: cause marketing, social impact investing and social enterprise (with clear thresholds and requirements), online giving, self-giving (including special provisions and incentives).
- Lower registration costs (direct and indirect) and reporting requirements, especially for community based organizations. However, create supportive public financial incentives to enable graduation and growth of those CBOs that so desire.
- Establish national and local self-regulation bodies for the philanthropic sector, in order to strengthen local participation and ownership of the sector. These self-regulation bodies would also serve to strengthen common values, standards, equity and equality within the sector.
- Facilitate the establishment - in collaboration and partnership with national statistical offices (NSOs) - of indicators to help measure the impact of philanthropy. Regulatory models require evidence and data in order to be effective and responsive. This effort would help strengthen the evidence base for effective regulation.
- Review and strengthen laws and policies governing online philanthropy and responsible use of ICTs in the sector.

Ensuring that regulatory frameworks fosters accountability, transparency, and effective agency of the intended beneficiaries by:

- Creating a more inclusive regulatory and financial inclusive policy framework. In particular, strengthen the enabling environment for Africa-to-Africa cross-border philanthropy, by reviewing regulations on remittances, money transfers, and money transfer agencies as a means of strengthening monitoring and evaluation of financial flows. Expand the capabilities within the State to support the changing faces of African philanthropy.
- Undertaking specific assessment of the philanthropic sector to establish key actors, key trends, risks and entry points for designing and implementing new enabling laws and policies.
- Increasing investment in legal awareness of procedures, expectations and benefits available to philanthropies as well as support (capacity development) of key stakeholders - both beneficiary

constituencies and service providers/givers.

- Building strategic partnerships between the government, private sector and CSOs. This should include law-makers, government tax authorities, judicial bodies, investigatory and prosecutorial authorities as well as business organisations and local authorities (and where applicable faith based and traditional institutions). This is key to ensuring follow-up and implementation of recommendations, especially as the law makers and government bureaucrats are key to implementation of new laws. Kenya is in the nascent stages of establishing a corporate social investment multi stakeholder platform championed by its Deputy President's Office.
- Facilitating community based philanthropies and beneficiary communities to create self-regulation platforms and other locally relevant solutions instead of inflexibly imposing the dictates of national laws, policies and regulations or inorganic ideas from elsewhere.
- Avoiding the tyranny of complicated legal reforms and burdensome regulations, use simple and affordable mechanisms, forms and processes, including increased use of mobile telephony and new social media to engage.
- Using locally / community generated data, ideas and information to generate the baselines for the legal reforms.

## 2. INTRODUCTION

This report analyses the political economy of legislation governing the doing of philanthropy in Africa. It pays particular attention to trends and specific country contexts<sup>1</sup> and how these drive national or global agendas. It analyses the enabling environment, including freedoms of association, expression, assembly, right to information and to raise and access resources. It also analyses actions taken by national governments to support, promote and encourage philanthropy. It also looks at how philanthropic organizations are using innovation to open space or ensure that the space is protected, including their access to best practices and lessons learnt.

The Report also reflects on Islamic philanthropic institutions in Nigeria, Ghana, Senegal and Egypt. For ease of analysis the paper merges the literature on regulation, specifically private provision of public goods, and governance with the literature on philanthropic Institutions (*awqaf*) in Egypt. Traditionally, *awqaf* (plural for the *waqf*) have underpinned the socioeconomic fabric of Muslim societies. On the other hand, the provision of public goods is at the centre of all State pre-occupations with regulation and governance of philanthropy in Africa, particularly the property rights and fiscal benefits.

The Report analyses the role of *waqf* beyond its status as a charitable organization in Muslim societies to include its role as an economic agent in Egypt for instance. *Awaqf* has for a long-time been a provider of public goods, repository of significant property rights. This makes its regulation and organizational structure a subject of both economic, political and security interest in post-revolution Egypt. Philanthropic institutions in Muslim communities in Africa have evolved in that organizational structures and relationship to the changing governance structures in the respective countries. This calls for an analysis of the similarities and differences in the regulation of the *awqaf* and Western-type charitable organizations in respect of the following; registration, organizational structures and governance, financing, property rights, legal persona and generally rule of law and contract enforcement.

Philanthropic Institutions occupy the entire value-chain of interventions aimed at reducing vulnerability, building resilience, providing universal social services and protection and creating wealth. Some philanthropic institutions focus on preventative measures such as: financial intermediation and regulation; climate change mitigation and adaptation; early childhood development; macro-economic policies, including youth employment; women's economic empowerment and investment in SME's; natural disaster risk reduction; social justice; social cohesion and broader social justice. Other philanthropic organizations work to promote individual and community capabilities through: universal provision of education and health; full employment; promoting gender and group equality; disaster preparedness and making institutions more responsive to the needs of the citizenry. There are also other philanthropic institutions that work on protecting choices<sup>2</sup>, though, amongst others: social protection; job creation; building social cohesion and competencies; tackling discrimination by changing laws and norms and crisis, conflict recovery, addressing inequitable power relations, governance, accountability and transparency.

Underlying these philanthropic endeavours is a broad set of principles, including the need to ensure universal protection of all individuals in society. Those most exposed to risk and threats such as children, persons living with HIV/AIDS, persons living with disabilities, persons living in informal settlements, the rural poor, homeless and the elderly may require special assistance to ensure that their life opportunities and choices are equal to others. Unequal treatment and unequal entitlements for these categories of people might be required as the only means to achieve genuine equality<sup>3</sup>. A rights-based approach to human development requires that all people be empowered to live lives they value in dignity and equality with others. To this end,

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<sup>1</sup> The Report analyses trends in seven African countries, namely: South Africa, Angola, Kenya, Egypt, Senegal , Ghana and Nigeria

<sup>2</sup> Policies may seek to prevent shocks and make individual and societies more resilient, this does not preclude the occurrence of natural or man-made disasters or humanitarian emergencies. Those people that unable to cope with shocks will need help.

<sup>3</sup> UN Charter posits development as the promotion of equal life for all, based on the principle that all people are of equal worth.



both economic and social policies wittingly-or unwittingly- affect and influence people's life chances, choices, opportunities and capabilities.

Philanthropic organizations globally find themselves between a rock and a hard place. On the one hand, the rise and dominance of western-style free-market economics and culture expects them to be entrepreneurial and bottom line-oriented. This relates specifically to philanthropies that have to solicit funds to survive, but not to endowed foundations. Governments and traditional financiers are calling for them to be lean and efficient, establish metrics to measure and ensure organizational outcomes, develop synergistic partnerships with for-profit-organizations, identify and exploit their comparative advantages, recruit leadership with vision and entrepreneurial zeal, market themselves effectively, articulate their "deliverables" and, often times, find ways to charge fees or otherwise generate earned income so that they can pay their own way. In short, there is a call for philanthropic organizations to retool to approximate successful commercial enterprises.

On the other hand, courts and governmental agencies, the tax commissioners in particular, caution philanthropic organisations that if they pursue commercial or economic activities, they risk loss of their tax exemptions and customs privileges. Further, confusing and contradictory legal doctrines such as the operational test, the commerciality doctrine, the unrelated business income tax ("UBIT"), and the commensurate-in-scope doctrine, are all designed, at least in part, to prevent philanthropies from looking and acting too commercial. These provisions were imported into African municipal jurisdictions from the U.S. and former colonial powers such as the United Kingdom and France. The new common sense in regulation requires a review of these doctrines with a view to ensuring greater flexibility and adaptability to modern realities within the philanthropy sector and the exigencies of raising domestic resources for national development.

The present contradictions and confusion in the regulation of philanthropic institutions has deep historical roots in the Anglo-American legal tradition<sup>4</sup>. For several hundred years, the Anglo-American and European cultures have developed a vibrant charitable tradition without ever agreeing as a matter of culture or law on what "charity" means. In traditional Euro-American cultures, charity is a compassionate act of aiding the poor, of distributing alms to the needy, and spooning soup to the hungry. At the same time, it is a tool for social engineering, for efficiently producing socially beneficial results that will lighten the burdens on the government or public purse. These are evidently two very different conceptions of philanthropy, but the legal doctrines that govern charity in the United States and Europe do not clearly distinguish between them.

This Report will argue that the increasing confusion in the contemporary African laws governing philanthropy of charity stems from the fact that our society has moved and is continuing to move toward a results oriented, quasi-commercial<sup>5</sup>, social engineering conception of charity, while our law has continued to encourage, and often insist upon, a compassionate brand of "vulgar" charity. Part I of this Report will take us back to the origins of African Philanthropy so that we can understand where the definitional split began and how it and its allied Anglo-American charity evolved to the point that vexes us today.

The Report will then discuss how global conceptions of charity were transplanted to Africa and

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<sup>4</sup> See also Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* 87 (7<sup>th</sup> ed. 1998). The Filer Commission of the 1970s, which was charged with studying philanthropy and charity in the United States, avoided using those terms because it feared they smacked of *noblesse oblige*. It preferred the term "private giving for purposes." Comm'n on Private Philanthropy & Pub. Needs, *Giving in America: Toward a Stronger Voluntary Sector* 53 (1975). In the realm of American law, the term "charity" is exasperatingly variable and confusing. In cases and statutes charity is sometimes used in the general dictionary sense, described above. See, e.g., *Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303, 311 (1877); *Bok v. McCaughn*, 42 F.2d 616, 619 (3d Cir. 1930). It also is used to refer to the general category of non-profit organizations that qualify for tax exemption under section 501(c) (3) of the Internal Revenue Code. This broad category includes organizations that "test for public safety" and "foster national or international amateur sports competition[s]." I.R.C. § 501(c) (3) (2000); see Hopkins, *supra*, at 85.

<sup>5</sup> See also Dennis R. Young & Lester M. Salamon, *Commercialization, Social Ventures, and For-Profit Competition, in The State of Nonprofit America*, *supra* note 2, at 423.

superimposed on existing and varying forms of African philanthropy, giving rise to our current legal confusion and contradictions. Part II will focus on laws regulating African CSOs, African Philanthropy and Social Impact Investment, paying particular attention to four doctrines that are causing confusion and consternation for today's entrepreneurial charities because they are premised upon an unsettled cultural and legal definition of charity.

This Report will not attempt to resolve the question of whether contemporary African Philanthropy and the unwitting embrace of market-oriented, entrepreneurial charity is a positive or negative phenomenon. Nor will it provide a detailed policy prescription for getting us out of the mess we find ourselves in.

However, recommendations will offer a broad suggestion for adapting our laws to better fit our society's evolving conception of philanthropy, and will put forward the simple conclusion that we as a society should not continue to do what we are doing. We should not force philanthropic institutions to embrace the marketplace and pay their own way, and at the same time leave in place legal doctrines that punish them for doing so. If we as a society are going to force philanthropy institutions and the people they serve to fend for themselves, then we have a moral, if not legal, obligation to get our legal system off their backs or get activist fiscal policies to aid them.

### 3. BACKGROUND: GLOBAL CONTEXT OF PHILANTHROPY

#### A Brief History of Philanthropy

In an oft-cited case from 1899, the Supreme Court of New Jersey<sup>6</sup> was asked to decide whether a home for aged and disabled men qualified for property tax purposes as charitable where it paid for its operations—including a mortgage note and superintendents' salaries—by purchasing firewood, requiring residents to turn it into kindling, and then selling it for a profit.<sup>7</sup> The court had no trouble finding that "[w]here the objects and purposes of the institution are wholly charitable, with no element of private gain, the receipt of compensation from those who enjoy the benefits do not affect its nature."<sup>8</sup>

In Massachusetts, the Supreme Judicial Court was called upon in 1905<sup>9</sup> to decide whether a home for young workingwomen was charitable where it rented its rooms to the young women at moderate cost.<sup>1</sup> The court pointed directly to the "supportation, aid and help of young tradesmen" language in the preamble to the Statute of Charitable Uses<sup>10</sup> in deciding that launching young women into employment was a charitable purpose, even where they were paying nominal rent to cover the costs of the charitable operation." Beginning in the late 1800s and continuing through the roaring decade of the 1920s it became increasingly acceptable in the eyes of judges and policymakers for charity and enterprise to grow toward one another. This trend slowed with the onset of the Great Depression, but as we shall see, arose again in modern times and has moved toward the core of American charity.

The word charity denotes a still-broad subcategory comprised of those organisations and activities that engage in relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organisations designed to accomplish any of the above purposes, or (i) to lessen neighbourhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency<sup>11</sup>. In spite of these broad uses of the term charity, it sometimes is used more narrowly in the law to mean "assistance to the poor, the indigent, and the destitute." Hopkins (2003:86) refers to this latter use as the vulgar meaning of charity.

This 'vulgar' construction of charity colours—for the most part—how philanthropy is regulated from a fiscal and customs benefit perspective. Much of the confusion regarding the tax treatment of philanthropies is a borrowed problem inherited from British, American and Continental European laws and usages. We wish to demonstrate the nature of the challenge by reference to specific legal cases handled by the American legal

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<sup>6</sup> *Fire Ins. Patrol v. Boyd*, 15 A. 553, 554 (Pa. 1888).

<sup>7</sup> *Patterson Rescue Mission v. High*, 44 A. 974, 974-75 (N.J. 1899).

<sup>8</sup> 130. *Id.* at 975.

<sup>9</sup> 128. *See id.* at 555-56; *see also* *Trs. of Ky. Female Orphan Sch. v. Louisville*, 36 S.W. 921, 923 (Ky. 1896) (charity does not lose its character as such if it receives revenue from the recipients of its bounty sufficient to keep it in operation); *Contributors to Pa. Hosp. v. Delaware County*, 32 A. 456, 457 (Pa. 1895) (holding that a convalescent farm used by a hospital is charitable and thus exempt from property tax even though the farm produces a profit for the hospital); *Trs. of Acad. of Protestant Episcopal Church v. Taylor*, 25 A. 55, 57 (Pa. 1892) (holding that the definition of "charity,"

which had been steadily broadening, now included a school open to the public that charged students enough to maintain itself in operation); *House of Refuge v. Smith*, 21 A. 353, 354 (Pa. 1891) (holding juvenile correction home charitable for property tax purposes even though residents work at jobs that produce some income for organization).

<sup>10</sup> *Franklin Square House v. Boston*, 74 N.E. 675, 675 (Mass. 1905); *See supra* note 76; *Read v. Tidewater Coal Exch., Inc.*, 116 A. 898 (Del. Ch. 1922) (finding a trade association formed to move coal efficiently through tidewater ports charitable); *Franklin Square*, 74 N.E. at 676; *see also* *House of the Good Shepherd of Omaha v. Bd. of Equalization (In re House of the Good Shepherd of Omaha)*, 203 N.W. 632 (Neb. 1925) (ruling a laundry that produces considerable revenue at a home for fallen women is charitable).

<sup>11</sup> US Treasury Regulations § 1.501(c) (3)-1(d) (2) (as amended in 1990). US Internal Revenue Service ("IRS") regulations do little to clarify the legal meaning of charity. Regulations accompanying section 501(c) (3) state only that the word "charity" is used by the IRS in its "generally accepted legal sense." Globally there are layers of confusion in both literature, common-speak and legal systems on the meaning of charity and by parity of reasoning philanthropy.

system.

## Corporate Philanthropy in Africa

Modern corporate philanthropy operating in Africa operates in an environment where tax laws are increasingly complex and there are high corporate governance standards that have a bearing upon the duties of due diligence incumbent upon grant makers, impact investors, venture philanthropists and etcetera.

Since the September 11, 2001 terrorist attacks in the United States (U.S.) and subsequent launch of the global War on Terror, there has been a growing global crack down on civil society which observers argue has the risk of undermining the very idea of democratic society. The UN Special Rapporteur on Freedoms of Association and Expression has argued that: "Several governments are sharing worst practices amongst each other". There have also been increased demands by regulators regarding the design and implementation of a more accountable corporate philanthropy sector. The laws in all seven countries have a basic menu of tax choices for PBOs and perhaps a recent additional requirement that PBOs should comply with anti-terrorism laws. Thus in thinking about the relevant pieces of legislation and the regulatory Ecosystem, it is useful to refer closely to the Finance, Company, Income tax, Insurance, Banking, Freedom of Information laws of each country and in particular those provisions pertaining to tax exemptions, tax deductibility and customs waivers for public benefit organisations.

Public policy in five of the seven countries (Ghana, Kenya, Nigeria, Egypt and South Africa) has historically favoured particular constructions of philanthropy deemed to be of public benefit. This has largely been philanthropy deemed to be assistance for the poor and needy or for religious purposes. The law has not - until recently - and only in a few countries been as favourable towards corporate philanthropy let alone local philanthropy efforts. As such, lingering questions regarding the legal rationale of corporate philanthropy are yet to be settled within regulatory environments. As in English and American law, courts in the African countries studied always encouraged corporations to pursue the profit or bottom line objective. Corporate grant making was justified to the extent that it was seen to be contributing to the profit objective and thus satisfying the interests of the shareholders. There were also other competing views that favoured broader managerial discretion and a nuanced balance between the interests of a broad cross-section of stakeholders beyond the shareholders. This view saw no conflict of interest between the public benefit to communities and the long term interests of corporate shareholders. This latter view seems to have won the day as most statutes reviewed now encourage or do not prohibit corporate grant making. In a 1953 case, *A.P. Smith v. Barlow* - the US New Jersey State Supreme Court upheld a statute that expressly permitted charitable donations, and in so doing observed as follows:

*corporate power to make reasonable charitable contributions exists under modern conditions , even apart from express statutory provision....[F]ree and vigorous non-governmental institutions....are vital to our democracy and ....withdrawal of corporate authority to make ...contributions within reasonable limits would seriously threaten their continuance.*

Laws in Egypt, Angola, Ghana, Kenya, Nigerian, Senegal and South Africa have borrowed the notion of a modern law right of corporations to make 'reasonable charitable contributions' from American and British law without necessarily embracing the rest of the logic anchored on the necessity of 'free and vigorous non-governmental institutions to democracy'.

On the other hand, the Federal Tax laws in Nigeria and national tax codes in Angola, Egypt, Ghana, Kenya,

Senegal and South Africa have borrowed heavily from American and British tax jurisdictions. Historically, the British, French and US Federal Tax systems have evolved along the following convoluted path from opposition to corporate philanthropy to tolerance to encouragement:

- a) In the early 20th century, the systems were opposed to extension of charitable contribution deductions from individuals to corporations. As late as 1934, the U.S. Supreme Court in ***Old Mission Portland Cement Co. v. Helvering***, in upholding the denial of federal income tax deductions for corporate contributions of \$ 1,000 per year over a four-year period to the San Francisco Community Chest, remarked that Congress had not extended the charitable contribution deductions to corporations, although the expenditure in question had “resulted in good will” toward the corporation. The court further found that there was no evidence “of any direct benefit” to the corporation’s business.
- b) Deductions by Companies for donations or other payments to charity were only allowed if they satisfied the test that they “*represented consideration for a benefit flowing directly to the company*”.
- c) U.S. Companies could engage directly in charitable investments and maintain their tax benefit status provided that they satisfied the following four doctrines: ***the operational test; the commerciality doctrine; the Unrelated Business Income Tax (UBIT), and the Commensurate-in-Scope Doctrine.***

These doctrines resulted in what some analysts have called “*an incompatible patchwork of laws and regulations governing entrepreneurial charities*”. These doctrines have - to different extents - been imported into African Company’s and Tax Laws. We proffer a truncated explanation of each doctrine and its relevance and where possible its historical application:

1. The **Operational Test**: US Treasury Regulation Section 1.501(c)(3)-1(e), which applies to commercial activity of and by Not-for-profit organisations states that: “*An organisation may meet the requirements of section 501 (c)(3) although it operates a trade or business as a substantial part of its activities , if the operation of such trade or business is in furtherance of the exempt organisation’s exempt purpose or purposes and if the organisation is not organised or operated for the primary purpose of carrying on an unrelated trade or business*”. In simplified terms, the provision envisages that a charity may operate a trade or business that is in furtherance of its charitable purpose without limitations and without violating the Operational Test. This privilege would, however, not extend to situations where the charity engages in commercial activity or business that is not in furtherance of its exempt purpose and also in instances where the commercial activity or business becomes the primary purpose of the organisation. In the latter situation, the non-profit organisation deemed in violation will lose its charitable status and tax exempt status.

Thus in terms of the Operational Test regulations, the analysis of the commercial or business activities of a philanthropy should focus on the purpose of the activity, not its nature. If you literally apply these regulations it would be inconsequential whether an organisation that serves persons living with HIV/AIDS (PLWHA) engages in a commercial activity X and sells its product directly to the public at a profit (a description of the nature of the activity) as long as that commercial activity is intended to provide universal care, treatment and support to persons PLWHA (a description of the activity’s purpose). Such a literal interpretation would suggest the following simple steps in applying the Operational Test, namely: first, identify which commercial

activities are in furtherance of the particular Philanthropy's exempt purposes; second, ensure that that any activities that are not in furtherance of the organisation's philanthropic purposes are not the organisation's primary purpose.

2. The **Commerciality Doctrine**: Is often characterised by practitioners as vague and malleable. It is particularly difficult to understand its extent and the implications of this on its application are dire. In short, commerciality doctrine holds that: *'A tax exempt organisation is engaged in a non-exempt activity when that activity is engaged in a manner that is considered commercial. An act is commercial one if it has a direct counterpart in, or is conducted in the same manner as is the case in the realm of for-profit organisations'*.

This confusion does not bode well for entrepreneurial philanthropies. In strict sense, the commerciality test seems to be a sub-set of the Operational Test. It has been suggested that to harmonise the two doctrines in operation, when a court or tax authority is applying the operational test to determine whether a philanthropy engages in more than *"insubstantial amount"* of non-philanthropic activity, and if the activity is of a commercial nature unrelated to the organisation's mission (as opposed to, for example, lobbying and advocacy), then such court or tax authority could apply the Commerciality doctrine.

The practice in the United States over the last fifty years has been eclectic. Courts and the Internal Revenue Service (IRS) sometimes assess commercial activity using the broader operational test without ever mentioning the commerciality doctrine; others take a totally opposite approach. In the case of ***Trinidad v. Sagrada Orden*** - the U.S. Supreme court had to decide whether a religious order could be considered charitable and thus exempt from federal income taxation where the order produced revenue through real estate and stock investments as well as through the limited sale of commercial products such as chocolate and wine. The U.S. Supreme Court ruled that the organisation was not in competition with for profit firms and that the profits that were generated by its various activities were a "negligible factor" in its overall funding. The Supreme Court's decision encouraged the rise of the U.S. commercial enterprises run by charities. The Trinidad decision became known as having applied the "destination of income test", which held, in sum, that so long as the organisation's commercial profits were destined to fund its charitable goals, its status as a tax-exempt philanthropy was safe. Commercial feeder organisations mushroomed which generated commercial profits and then fed these profits directly to their parent philanthropies. Until they were reined in, U.S. philanthropies ran businesses that were completely unrelated to their charitable missions, and whose profits supported their philanthropic work. In the current moment, we are seeing US and African business moguls who are setting up private corporate foundations.

The reining in, happened in the case of ***Better Business Bureau v. United States***. Better Business Bureau qualified for tax exemption as an educational organisation. The Court stated that the "exclusivity" requirement of section 501(c) (3) of the Tax Code meant that "the presence of a single non-educational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes. It thus ruled that an activity by the organisation aimed at promoting a profitable local business community of a "commercial" nature and was "largely animated by this commercial purpose. In applying the commerciality test the U.S. Tax Court in the case of ***Living Faith, Inc. v. Comm'r***, the U.S. Tax Court denied the tax status to an organisation affiliated to the Seventh Day Adventist Church (SDA) that, as part of its church mission, maintained vegetarian restaurants and health food stores. This decision was upheld by the Seventh Circuit of the U.S. Court of Appeals, which in turn found that the organisation violated the commerciality doctrine by: (1) selling goods and services to the general public; (2) engaging in direct



competition with commercial stores and restaurants; (3) setting prices based on formulas common in the retail food businesses rather than below cost; (4) using promotional materials to increase sales; (5) maintaining regular business hours of operation; (6) paying professionals to run the operations rather than relying on volunteers; and (7) failing to elicit charitable contributions. This court decision does not give adequate guidance regarding the determination of whether ‘substantial unrelated purpose exists’, which facts should be considered, and what weight the different facts should be accorded. The court did not at all consider whether the commercial activities in question were in furtherance of the organisation’s philanthropic purpose and thus permissible under the operational test.

In essence, this doctrine is anchored on the faulty reasoning that - of necessity- commercial activity is incompatible with tax-exempt status, even though reality as well as other laws seem to actually confirm the opposite. This legal ambivalence and confusion is inimical to the growth of modern philanthropy and in particular entrepreneurial philanthropy.

3. The **Unrelated Business Income Tax (UBIT)**: This doctrine has been variously imported into African regulation of philanthropies from the U.S. as part of the logic of protecting interests of private business or regulating competition. In 1950, the U.S. Congress passed UBIT to prevent non-profit charities from engaging in unfair competition with for-profit enterprises. This provision was the result of intense lobbying by American Small business interests. The prevailing context at the time of enactment of UBIT was prevalent and unlimited commercial activity by charities following the permissive rules implied in the *Trinidad* decision above, including the destination of income test. These rules permitted charities to compete with for-profit enterprises and the U.S. small businesses argued that this was happening unfairly. UBIT’s object was not to ban all commercial activity carried out by charities, but rather to force charities engaged in commercial activities to compete fairly in the market place by taxing at normal corporate rates all of their profits resulting from trade or business that was not “**substantially related**” to the performance of their exempt purposes. Thus according to the U.S. IRS regulations, a charity’s income is subject to UBIT when: (1) the income at issue results from a trade or business; (2) the trade or business is regularly carried on by the organisation; and (3) the conduct of the trade or business is not substantially related to the performance by the organisation of its tax exempt functions. The U.S. Tax Code and regulations specify other exceptions, including that of income resulting from business conducted by volunteers, for the convenience of the organisation’s members, students, patients, officers or employees; or income derived from thrift shop sales. The adoption of UBIT by the U.S. Lawmakers was a tacit acceptance of the fact that Philanthropies would engage in commercial activities unrelated to or not necessarily in furtherance of the exempt purposes, and that those activities would be compatible with the organisation’s tax exempt status under the operational test, so long as their primary purposes remained charitable. In essence, an evaluation under UBIT proceeds from the premise the organisation’s profit-generating activity should be “related” to its exempt function. The Operational Test, on the other hand, proceeds from the premise that an organisation can maintain its tax exempt status based on whether its “primary purpose” is charitable.

For modern venture philanthropists and entrepreneurial charities, the technical and operational challenge is to ensure that income-generating activities that are ‘un-related’ to their exempt purpose (and therefore ordinarily subject to UBIT) are substantially in furtherance of their primary purpose such that they can pass the operational test. In all seven African countries studied by this report there is an acceptance of that not all unrelated commercial activity jeopardises income exemption status. But the regulations are scant in most

instances leaving the matter for and to judicial interpretation.

4. The **Commensurate-in-Scope doctrine**: This doctrine evolved over time and is often used to fill in the gaps so glaring in the other three doctrines. The Commensurate-in-scope doctrine suggests that the fundamental issue in determining whether a substantial unrelated business activity (or in terms of the operational test, substantial activity not in furtherance of the exempt purpose) is consistent with the organisation's underlying exemption is whether the revenue from such commercial activity is spent to further the organisation's charitable purpose. In sum, if the authority finds that the organisation's charitable programme is "commensurate in scope" with its financial resources, it should ideally uphold the organisation's exemption even if the money is being produced through an activity that has nothing to do with the charitable mission. In essence, this doctrine applied to its logical conclusion suggests that philanthropies that engage in commercial activities unrelated to their missions should not necessarily lose their tax exemptions. In the American case *Aid to Artisans, Inc. v. Commissioner*— an organisation that produced a substantial amount of its income from selling goods produced by poor artisans from other countries was permitted to keep its tax exemption where most of the profits generated by the commercial activity were being re-invested back into the organisation's philanthropic work. In another similar case, *Industrial Aid for the Blind v. Commissioner*, an organisation that bought and sold goods made by blind individuals was able to maintain its tax exemption where the facts indicated that most of the income went to fund the organisation's philanthropic work. However, and in contrast, a religious publisher, Scripture Press, was found by the court to have been guilty of hoarding profits and paying its employees high salaries without spending significant sums on activities that were necessarily philanthropic. As a result it lost its exemption. The commensurate in scope doctrine is somewhat aligned to notions of destination – of - income There is a growing tendency amongst U.S. tax administrators and Courts to hold that as long as the money is going to serve genuine philanthropic purposes, the regulator should not be hung-up or unduly concerned with the fact that it is being produced by unrelated commercial activity. In essence, despite the contradictions arising out of the eclectic - at times contradictory - application of these different doctrines, recent American Legal decisions have tended to permit and even encourage commercial activities that support traditional charity work whilst discouraging commercial activities that are deemed not sufficiently aligned or beneficial to the philanthropic cause.

It follows then that both American and British law that the seven countries have heavily relied upon in developing their statutes, have historically been premised on an inconsistent understanding of what charity means. This meaning has vacillated between: aid to the poor based on indiscriminate compassion and / or social engineering based on the Protestant work ethic. This definitional uncertainty has led to contemporary legal doctrines that are largely vague and difficult to apply. A cursory analysis of American Federal and State tax law decisions by courts and tax administrators alike confirms the interchangeable application of the Operational test and Commerciality doctrines in order to grant or revoke charitable exempt status based on factors that seem to shift with each case. But these factors - if simplified - amount to whether the mission and activities of the philanthropic institution in question are palatable. Some judges find commercial activity unpalatable and thus unlawful, particularly in instances where the philanthropy's mission focuses more on public benefit and social engineering than services to the poor.

The Commensurate-in-scope doctrine is sometimes (and at times not) applied as an alternative to the Operational test's "substantiality" test. Its import seems to be to allow administrators and courts to approve of philanthropic status for commercial philanthropies whose missions are palatable and that spend most of the income (or profits) raised from commercial ventures on philanthropic causes.

On the other hand, the application of UBIT is less predictable due to its overlap with both the Operational test and Commerciality doctrine. Legal authorities in the U.S. have not been able to resolve which activities are “substantially related” to charitable purposes of a given philanthropy in a context where the very definition of charity is both confused and confusing. From the perspective of income generating charities - and arguably the modern social enterprise and impact investor - decision makers wield this law rather arbitrarily. This unbridled discretion allows the tax administrators and courts to limit the entrepreneurial activities of philanthropies based solely on an intuitive sense that commerce and philanthropy are incompatible.

Thomas Kelley argues that this confusion in American Law of charity can be traced to the history of America. That it can be traced back to a cultural and legal definition of charity evolved since the time of Henry VIII and Elizabeth I to encompass a broad array of socially-beneficial activities having nothing to do with aiding the poor and needy. This historiography of charity law notwithstanding, American courts and administrative authorities seem to favour a stricter definition of charity as ‘aid to the poor and distressed’. In the penultimate analysis American decision-makers and courts have tended to frown upon “too much commerce” by and in philanthropy. They invoke the law and legal mechanisms to re-orient philanthropy back toward its compassionate, Judeo-Christian origins. This is particularly complicated given the lack of a concise definition of a compassion-based, poverty-focused philanthropy. The idea that philanthropy is only about ‘loving and serving the poor and distressed, regardless of what the tax codes state about the permissibility of general “public benefit” and commercial activities is deeply ingrained in Laws that regulate philanthropy in Africa.

The primary approach of African regulators to the regulation of philanthropy has two strands to it, namely:

- State security, suppression and surveillance of associations and citizen activities; and
- Fiscal concerns with permissibility of business activities of philanthropies.

The former conception insists on compassionate help for those in need regardless of their worthiness and also has elements of social engineering that emphasises elements of work or employment and holds that the poor must be capacitated to work and earn a living for themselves. The latter is based often on the misconception that the intention of the legislature in enacting provisions relating to exemptions of philanthropies from income tax, was to restrict the extent of engagement by philanthropies in business activities. In this approach exempt philanthropies are those that are either not in any way or to any substantial extent engaged in commercial activities. Within the context of this report, we argue for a new ‘common sense’ in the regulation of philanthropies that accepts that entrepreneurial, fee-generating organisations - especially those that do not serve the poor and distressed - can be philanthropic.

Given the global economic crisis and the relative reduction of funds available for philanthropic work from traditional donors, African regulators must now apply their minds to two key issues, namely: how to ensure that philanthropies are financially viable and at the same time ensure that the aggressive posture towards the marketplace by entrepreneurial philanthropies does not undermine organic philanthropy nor create an apartheid system within the sector dominator by external philanthropies. Our recommendation in this report is for African regulators and policymakers to curb the anti-commercialisation sentiment and at the same time promote responsive, responsible and accountable commercialisation within the philanthropic sector.

In order to expand the potential of the philanthropic sector in Africa there is need to deliberately formulate

a definition of philanthropy that is all-encompassing of private, for-profit and non-profit activities intended for “public benefit”, whether targeted at the poor or not. Such a definition envisages two-tier organisations and possibly with two-tier structure of tax exemptions. On the one hand would be those organisations that qualify generally under national “public benefit organisation” exemptions and serve the general public (e.g. arts or health programmes geared towards the general public; high and middle-income neighbourhood associations; soccer or sporting clubs; Rotarians, Lions Clubs, Boy Scouts etcetera). On the other hand, will be those organisations that specifically serve the poor and underprivileged (e.g. job training programmes, community economic development, low cost housing, slum-upgrading, no-cost community health care centres, organisations dealing persons living with HIV/AIDS, organisations of poor farmers, organisations working with mining communities, poor workers welfare organisations etcetera).

Specific advantages could be designed and earmarked for those organisations that work specifically with the poor. Those organisations dedicated to serving the poor would be entitled to broad latitude to earn income to support their missions in whatever way they decide. They can also launch commercial activities related to their philanthropic missions and they could also be permitted to engage in commercial activities that are unrelated to their philanthropic missions in order to cross-subsidise their philanthropic programmes. All that the regulator should seek to ensure is that the profits earned from such commercial activities are applied towards the core mission of serving the poor. Doing this is to acknowledge the fact that in all African economies characterised by jobless growth and deepening inequality, the work of serving the poor is unavoidable, even if its only purpose is to create conducive conditions for the poor to help themselves. It is also to further acknowledge that there is a diminishing number of people and institutions that are willing to pay for the required work from the residue of their income after taxation. It is also to further acknowledge that the prevailing operational context forces philanthropies to embrace entrepreneurial solutions to meet their operational and programme costs. It is to further acknowledge that it is mere rhetoric to insist that African philanthropies should become more self-reliant and less dependent on donor funds and that they should adopt ‘business unusual’ approaches if the law and policy frameworks do not incentivise and catalyse these new approaches. This realisation saves the regulators of philanthropy to avoid stifling modern philanthropy through out-dated approaches to regulation. Finally, such a conception dispassionately acknowledges the potential role that African entrepreneurs and commerce could play in the development of philanthropy on the continent. In essence, such an approach to the regulation of philanthropy would reconcile two inescapable realities of the development of philanthropy in Africa, namely: that commercial enterprise is a potential tool for addressing the needs of the poor, although not necessarily ‘public benefit’; that social solidarity interventions are a critical unique African approach for serving both the needs of the poor and collective social good.

The proposed approach to regulation of philanthropy has several downsides and these would need to be carefully considered by the regulators:

- 1. Creation of an Uneven Playing Field:** The suggestion that those philanthropies that focus on aiding the poor should get special treatment and greater tax exemptions might be contested by some as distorting markets by creating unfair competition in the form of non-profit philanthropies that engage in commerce. Historically this objection applies to two likely consequences of a special exemption as envisaged by this report. First, potential predatory pricing by the tax exempt philanthropies, using their comparative advantage of a lighter tax burden, to steal clients and unfairly lower their prices. Second, such philanthropies would enjoy comparatively large profit margins due to their tax-advantaged status,

and can re-invest the profits into market expansion thus threatening the viability of for-profit businesses. These fears are rather contrived as the goal of managers of tax exempt philanthropies would be to produce revenue to subsidise their philanthropic missions. It is unlikely that they would be inclined to price their goods uncompetitively. It is also unlikely that subsidised market expansion would occur given the demands of the core philanthropic mission of the organisations concerned. It is arguable that what is unfair is to ask philanthropies to compete in the market whilst shackled by charity doctrines mentioned above. The jury is out regarding whether there will be an uneven playing within the philanthropic sector itself between the highly organised, mechanised, financed philanthropies and the community-based types in their ability to utilise the proposed exemptions.

- 2. Potential Erosion of Tax Base:** Across all African countries there are often Media reports about wastage, fraud, and abuse in the non-profit sector. There are similar concerns in the developed world. There are economists and lawyers who believe that subsidising philanthropic activities through tax exemption is an economically inefficient means of accomplishing socially necessary objectives. These suggest that philanthropic activity should be left to private actors impelled by their conscience. It is beyond the scope of this report to interrogate the economic efficiency arguments. Our societies are likely to be conflicted regarding this economic efficiency argument. First, the seven countries reviewed by this study are in favour of providing social services through the mediating influence of capable, democratic developmental States. Second, the political posture, notwithstanding, the policies point to a preference that the work of aiding the poor and distressed be financed outside of the State Consolidated Revenue Fund. And to the extent that direct government intervention is unavoidable, the dominant approach has been to furnish the State funding directly to consumers and letting service providers compete against one another in the market for the limited public funds. Most countries studied have chosen as a matter of policy not to directly subsidise charitable work but to indirectly support its socially beneficial work by exempting such work from taxation. Given this political choice it might be disingenuous to critique the current proposal as potentially eroding the tax base. The work of capacitating and taking care of Africa's poor as well as accomplishing social benefits not provided by the market, is expensive. There are two possibilities of paying for this work, namely: through direct subsidies to the poor such as the basic income grants in South Africa or through indirect subsidy of a tax exemption. If the regulator chooses the latter option, it cannot be heard to allege that indirect subsidy is excessively burdensome.
- 3. Bastardisation of Philanthropy:** The criticisms regarding erosion of tax base and unfair competition are largely raised from outside the philanthropic sector. However, the suggestion to allow traditional philanthropies to go full throttle commercial in order to raise operating funds in whatever commercial manner they deem fit is likely to have dissenters from within the philanthropic sector. We foresee three main criticisms, namely: First there is what has been termed the 'diversion problem' or the fear that managers of philanthropies would have their attention diverted from core philanthropic objectives to commercial activity. Second that the philanthropy sector is a repository of the values of our society and people trust it. People trust philanthropies because they assume that philanthropic organisations are actuated by love and compassion, not by desire for 'filthy lucre'. The fear therefore is that permitting philanthropies to engage in commercial activity will blur the boundaries that exist between for-profit and non-profit organisations. Commercial activity will displace and dominate the philanthropic objective and its core values of love and compassion. When this happens, society will lose its trust and confidence in the philanthropic sector. In essence, the sector will become bastardised. Third, that the commercialisation of philanthropies will kill a key sector within and amongst philanthropies by discouraging traditional givers from donating to the sector and eventually such discouraged persons will

oppose tax exemptions that are designed to enable the work of philanthropies. In reality the sectoral or functional boundaries between for-profit and non-profit philanthropies are largely imaginary. Modern policy should be oriented towards funding socially beneficial work regardless of whether it emanates from business or philanthropy sector. It is, therefore, useful that mechanisms be put in place that enable managers of philanthropies to continue to focus on their core philanthropic mandates while raising money through entrepreneurial and commercial activities. Ultimately it is useful to note that it may be too late to wish for a status of 'vulgar charity' that is 'uncontaminated' by commercialisation. It is good economics and even better politics for African regulators to embrace the potential of commerce and entrepreneurship as critical tools for advancing philanthropy in Africa.

The proposal above and some of the potential criticisms highlight the need for a dialogically evolved regulatory framework for philanthropy. It is useful to note that traditional charity aimed at aiding the poor is by its very nature donor-focused; it unwittingly tends to be condescending and denies the broad mass of the people (its intended beneficiaries) the opportunity to be innovative and to take initiative; it also kills the idealism within the African middle class and petit bourgeoisie who are committed to giving back to their society beyond just doling out trinkets and free meals. African regulators must take note of the need to transform and safeguard these ideals.

The proposals above are anchored in the belief that the eradication of poverty and inequality is not to be left to well-meaning volunteers alone. Person-to-person, charity has and continues to accomplish great work across the seven countries studied by this report and it is at the heart of Africa's values of social solidarity and UBUNTU. But it is not and never will be enough to address the structural challenges of impoverishment and under-development in Africa as well as the legitimate needs of those at the bottom of the social ladder. Although, this report encourages African regulators to embrace and not resist the increasing commercialisation of African philanthropy and we argue that African laws should be adapted to accommodate new trends, we have not made a value judgment whether such commercialisation is entirely a good thing. We suggest though, that great value might come out of it, especially if philanthropy is enriched with a spirit of entrepreneurship that enables poor, marginal and excluded communities to assume full agency and leadership in their self-development. We do think that the loss of public trust is a real possibility that the regulator must guard against. Ultimately, African philanthropy must remain as a sector where communitarian values of solidarity, compassion, love and mutual support are promoted and protected as means to focus on the needs of the less privileged rather than generating profits. Whatever position, regulators in each country take, it is useful to act decisively in order to put an end to the legal confusion pervading our laws and sadly inherited without interrogation from Africa's former colonial masters.

The logic of the regulatory frameworks and policies governing African philanthropy is premised on the definitional, historical and epistemic challenges relating to its definition or non-definition. The space of philanthropy essentially falls within the realm of freedom of association and right to development. There is a general synergy between international, sub-regional and national laws on the recognition and enunciation of these rights. However, there exists a marked difference in how these freedoms are applied in different contexts. These differences are - in turn - determined by both historical and contemporary political economy factors, and arguably global geo-economic and political factors.

## Global and Regional Legislative Frameworks for Philanthropy in Africa

The Universal Declaration of Human Rights (UDHR) states that: 1) Everyone has the right to freedom of



peaceful assembly and association..., and 2) No one may be compelled to belong to an association.<sup>12</sup>

Similarly, Article 22 of the International Covenant on Civil and Political Rights (ICCPR) states that:

- 1) 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 interests;
- 2) No restriction may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of the public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and the police in their exercise of this rights.

In March, 1999, the General Assembly of the United Nations approved through resolution no.53/144, a Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms<sup>13</sup>. The declaration (article.5) states that: *"(...) For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right individually and in association with others, at national and international levels: (a) To meet or assemble peacefully; (b) To form, join and participate in non-governmental organisations, associations or groups."*

The Declaration further states that (article.13): *"Everyone has the right, individually and in association with others, to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means..."*

The Declaration notes that limitations and restrictions to the foregoing rights and freedoms should only be permitted when they are (article.17): *"In accordance with the applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society"*<sup>14</sup>.

General Comment 15 of the Human Rights Committee on the position of aliens under ICCPR<sup>15</sup> buttresses the position that fundamental rights should be enjoyed by anyone in a given territory, not just citizens. It specifically states that: *"Aliens ...have an inherent right to life, protected by law, and may not be arbitrarily deprived of life...Aliens receive the benefit of the right of peaceful assembly and of freedom of association...There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the covenant"*.

In similar vein the African Charter on Human and Peoples Rights (ACHPR)<sup>16</sup> states that: *"Article 10 states that: Every individual shall have the right to free association provided that he abides by the law; and Article 3 states as follows:-"Recognizing on the one hand, that fundamental human rights stem from the attributes of Human beings which justifies their national and international protection and on the other hand that the reality and respect of people's rights should necessarily guarantee human rights."*

Provisions of constitutions of all seven countries studied by this report as read with the ACHPR Resolution on

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<sup>12</sup> UDHR Article 20(1) and (2). See also ICCPR ,Articles 21 and 22

<sup>13</sup> UNGA doc. A/RES/53/144,8 March 1999

<sup>14</sup> The ICCPR and Declaration require that any restriction to fundamental freedoms and rights must be done within the limits of a democratic society. That is, they must be consistent with democratic values and principles ; must not arbitrary or mere political whim and they must on a balance of probabilities be necessary and proportionate

<sup>15</sup> Compilation of General Comments and General Recommendations Adopted by Human rights Treat Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18(1994).

<sup>16</sup> Unlike the UDHR and ICCPR, the ACHPR does not make restrictions on freedom of association contingent upon compliance with democratic values, they only have to be provided for by law and be necessary.



the Right to Freedom of Association (1992)<sup>17</sup> require consistency with the parameters set out in the UDHR and ICCPR.

The Cairo Declaration's preamble, amongst other things, states as follows: *"Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights; We therefore renew our commitment to the principles and values of popular participation in the process of governance and democratic transformation as well as the emphasis on rectitude and accountability on the part of all those who hold public office and the principle of participation in politics by all our citizens, especially women and the youth."*

The African Charter for Popular Participation in Development and Transformation, adopted in Arusha, 1990<sup>18</sup> recognizes the need to, *"ensure the effective participation of the people and their organisations and associations in in political and development processes"*.

The African Charter for Popular Participation calls for the establishment of an enabling environment thus: *"(...) equally important are the actions of the State and the international community, to create the necessary conditions for such an empowerment and facilitate effective popular participation in societal and economic life. This requires that the political system evolve to allow for democracy and full participation by all sections of [African] societies"*.

The Charter also calls for the establishment of a healthy and collaborative relationship of partnership between civil society organisations and African States: *"(...) The International Conference on Popular Participation is clear in its recognition of the value of the contribution of grassroots organisations and NGOs to Africa's development and demonstrates that effective dialogue between governments, NGOs and grassroots organisations is essential and valuable. This Conference recommends that there be honest and open dialogue between African Governments, grassroots organisations and NGOs in order that the experience of grassroots participatory development informs national policy-making"*<sup>19</sup>.

The African Charter on Democracy, Elections and Governance (ACDEG) article 2, calls upon African States to: *"promote the establishment of the necessary conditions to foster citizen participation, transparency and access to information, freedom of the press and accountability in the management of public affairs"* as well as (article.3), *"conducive conditions for civil society organizations to exist and operate within the law,"* and fostering popular participation and partnership with civil society organizations (article.27) and promoting strong partnerships and dialogue between government, civil society and private sector (article.28).

The Lagos Plan of Action, the New Partnership for Africa's Development (NEPAD's) Declaration on Democracy, Political, Economic and Corporate Governance African Charter on the Rights of Women, the African Charter on the Rights of the Child, the African Youth Charter, the Human Rights Strategy for Africa and other AU Shared Values Instruments call for the development and enabling of a vibrant civil society.

These instruments, amongst others, all stipulate that the realization of freedom, justice and human dignity are the legitimate aspirations of all peoples. They undertake to promote the rights and freedoms of our peoples and to enhance the democratic values, ideals and institutions of African States in cultural, social,

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<sup>17</sup> ACHPR/ Res.5 (XI) 92, 11th Ordinary Session, Tunis, Tunisia, 2 to 9 March 1992 available on [http://www.achrp.org/english/\\_doc\\_target/documentation.html?.../resolutions/resolution10\\_en.html](http://www.achrp.org/english/_doc_target/documentation.html?.../resolutions/resolution10_en.html)

<sup>18</sup> The International Conference on Popular Participation in the Recovery and Development Process in Africa, Arusha, United Republic of Tanzania, 12-16 February 1990.

<sup>19</sup> The Charter establishes indicators which , amongst others, highlight the centrality of "Freedom of association , especially political association, and presence of democratic institutions, such as political parties , trade unions, people's grass-root organisations and professional associations, and the guarantee of constitutional rights"

linguistic and religious diversity and on the basis of respect for the sovereignty of all African States as spelt out in the Constitutive Act of the African union. The AU Economic, Social and Cultural Council (ECOSOCC) has objectives that include, amongst others: *“promoting and strengthening the institutional, human and operational capacities of the African civil society ... [and] promoting the participation of African civil society in the implementation of the policies and programmes of the Union.... [as well as] forging strong partnerships between governments and all segments of civil society.”*

## 4. CONCEPTUAL ISSUES: DEFINING AFRICAN PHILANTHROPY

Conceptions and definitions of philanthropy are as varied as the history, economic assumptions and politics that impels and informs the field. In western literature philanthropy is often defined as: *“The desire to promote the welfare of others or private initiatives for public good.”*

A standard dictionary definition provides that charity is

1. *The love of God for man or of man for his fellow men or,*
2. *An act of good will or,*
3. *Affection the feeling of good will; benevolence... a) voluntary giving of money or other help to those in need b) money or help so given c) an institution or other recipient of such help ....*

Webster's New World Dictionary (Second College ed. 1972) - Used in this sense, charity is a general term that encompasses everything from an individual giving to a homeless person on the street to private foundations that fund complex social purpose enterprises. Some commentators distinguish charity from philanthropy, defining the former as person-to-person attempts to alleviate suffering and the latter as more ambitious efforts that devote private resources to systematic social problems, not necessarily those that affect only the poor<sup>20</sup>.

Take Akin Aina argues that: *“Philanthropy is the terrain of the social relations of acts and forms of institutionalised giving and care as derived from the needs of others. It is often intrinsically connected to the nature and dynamics of the dominant social and political order, either through contributing to maintaining and stabilising it by alleviating and palliative measures, or through questioning its underlying structural inequities through transformational and, at times, subversive and critical interventions<sup>21</sup>.”*

Schervish (1998:600-1) defines philanthropy as: *“the social relations of care in which individuals (and groups) respond to the moral invitation to expand the horizons of their self-interest to include the meeting the needs of other<sup>22</sup>.”*

Tade Akin Aina (2013)<sup>23</sup> argues that: *“Philanthropy, no matter how we define it and whatever form it takes, does not operate in a vacuum. It exists and it is expressed in a social and historical context. History, politics, culture and economy all to a greater or lesser extent define and are defined by the varieties of philanthropic experiences found in any society or groups of societies. This is because the act of giving, either to help or transform, is an expression of political and economic relations. The acts and forms of giving are socially constructed and socially changed. They are often expressed and defined by how history has shaped the relationships between groups and individuals and consequently their social positions, access to and opportunities for wealth, as well as material and cultural goods, power and privilege. They are also further determined by the way values and norms of reciprocity, solidarity, charity and domination have been structured, defined, challenged and transformed. **In other words, the acts and forms of institutionalized giving and the social relations they carry are neither innocent nor neutral. They embody, and are implicated in, the economic, social and political structures in which they are found. The also express the basic relations and structures of domination and power in these societies. The philanthropic experience contributes either to re-affirming the structures they are found in, or to questioning the underlying values and norms that allow or define positions of givers and receivers and produce the suffering, poverty and alienation that philanthropy then attempts to alleviate, palliate or eliminate. In a fundamental sense, philanthropy is political”** (emphasis added).*

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<sup>20</sup> See, e.g., Maurice G. Gurin & Jon Van Til, Philanthropy in Its Historical Context, in Critical Issues in American Philanthropy: Strengthening Theory and Practice 3 (Jon Van Til et al. eds.,1990) (calling philanthropy the "prudent sister" of charity"

<sup>21</sup> Aina.Ibid,pp4-8

<sup>22</sup> Cited in Aina & Moyo, Op.Cit.p 4-5

<sup>23</sup> Aina, T.A and Moyo, B (2013) 'Giving to Help, Helping to Give : The Context and Politics of African Philanthropy,' Trust Africa, pp.1-36

The socio-economic context in Africa as well as the transformation imperatives are partly captured by the following excerpts from the Common Africa Position on the Post-2015 Development Agenda (CAP) which argues -amongst other things -that: *“The post-2015 Development Agenda provides a unique opportunity for Africa to reach consensus on common challenges, priorities and aspirations, and to actively participate in the global debate on how to provide fresh impetus to the MDGs and to examine and devise strategies to address key emerging development issues on the continent in coming years. The post-2015 Development Agenda should also affirm the Rio Principles ,especially the principle of common but differentiated responsibilities, the right to development and equity, and mutual accountability and responsibility, as well as ensure policy space for nationally tailored policies and programmes on the continent ..... The rising trends such as population growth, the youth bulge, urbanisation, climate change and inequalities (emphasize) **the importance of prioritizing structural transformation for inclusive and people-centred development in Africa.....Such a development approach requires: development of adequate policy space and productive capacities, notably through infrastructure development; science, technology development, transfer and innovation; value addition to primary commodities; youth development; women’s empowerment. It also requires addressing the challenges posed by climate change, desertification and land degradation, drought, loss of biodiversity, sustainable natural resource management; and promoting responsive and accountable global governance architecture, including through the full and equitable representation of African countries in international financial and economic institutions;.....[There] is an urgent need to end poverty in all its forms and achieve an integrated, prosperous, stable and peaceful Africa that is effectively engaged in the global arena, which is Africa’s vision in this development agenda”** (emphasis added).*

CAP (para.70) underscores the fact that *“each country has primary responsibility for its own economic and social development, and that the role of national policies, domestic resources and development strategies; African countries need additional resources for sustainable development .... (There) is need for significant mobilization of resources from a variety of sources and the effective use of financing”*.

CAP (para.71) insists that a stable global financial architecture that supports global systemic economic risk management and that emphasizes the importance of financial investment flows as opposed to aid as well as fair and inclusive multilateral trading systems is vital for financing development in Africa CAP (para.72 & 73) call upon African States and governments to improve domestic resource mobilization by: *“ensuring financial deepening and inclusion (e.g. domestic savings and micro-finance) and strengthening tax structures, coverage and administration; carrying out fiscal reforms; encouraging private-public partnerships; and deepening capital markets. It is imperative to curtail illicit financial flows and fight corruption in a way that ensures the efficient and effective use of resources and domestic long-term financing, such as insurance, pension schemes and capital market instruments”*.

CAP (para.74) on Maximizing Innovative Financing calls upon African States *“to promote and enhance the efficiency of innovative financing mechanisms,...develop mechanisms to harness and invest remittances; reduce remittance transfer costs and enhance their effective management; strengthen long-term, non-traditional financing mechanisms.”*

In every historical epoch, the nature and relationship between the State, Non-State actors and the private sector in the process of economic production and exchange – in part - form the basis upon which can be explained the political and intellectual history of that particular historical epoch. Consequently, the legislative and policy environment, is often the result of the assertion of conflicting or competing interests of those that wield power and those who feel either excluded or oppressed by such exercise of power<sup>24</sup>. It is also the result of negotiations of both the national questions of the day and the State-building project by various forces,

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<sup>24</sup> See, Friedrich Engels (1888), *“The Condition of the Working Class in England in 1844,”* Translated by Florence K. Wischnewetcky, New York: Lovell-London: W. Reeves, 1889. See also Marx. K & Engels. F (1886) , *‘The Communist Manifesto : The Revolutionary Economic ,Political, and Social Treatise that has transfigured the world ,* Joseph Katz ed. Pocket Books , a division of Simon and Schuster ,1964 .pp.40-

classes and interests in society. No factor, dramatizes more the contradictions and confusion associated with such an evolution of national meaning and priorities as does African Philanthropy.

These processes of social conflict and dialogue inform both the meaning and contours of citizenship, including corporate citizenship. Through social struggles a society enshrines in its laws and policies those basic tenets that it views as of mutual importance to the social cohesiveness, policy coherence, economic viability and political stability of the Nation-State. African macro-economic policies and laws have been disproportionately influenced by entrenched beliefs that only markets and privatization would yield growth and development for Africa. Governments across Africa wholesale privatized poor performing Public Enterprises, reduced controls on the movements of capital, deregulated labour markets and introduced new intellectual property regimes.

Aina further observes that *“The State and Politics are closely related notions that refer to specific institutions, practices and actions around the organisation and deployment of institutionalised power and domination in society”*. In the discussion of regulation of the philanthropic sector, it will be critical to keep in mind these factors and the contest of ideas each regulatory framework engenders. In the Washington consensus era certain meta-narratives regarding philanthropic freedom emerged as prescriptive global blue prints. However, in the post-Washington consensus era, the re-imagination of regulation for the philanthropic sector must steer Africa towards a new common sense of context sensitive, specific and relevant regulations neither over-universalizing nor becoming so relativist as to defeat relevance to continental and international reality and contexts.

## 5. THE CONTEXT OF PHILANTHROPY IN AFRICA

Many elements that make up philanthropic practice in Africa are not included in the classical definition of the word “philanthropy”. According to a study done by AGN<sup>25</sup> the philanthropic landscape in Africa is characterized by the following realms:

**Horizontal Philanthropy** – consisting mostly of informal giving and done through indigenous vehicles such as self-help groups, cooperatives, rotation and savings clubs, church/mosque funds, communal collective efforts, one to one efforts and burial societies.

**Vertical Philanthropy** – A more formal, institutionalized form of philanthropy which is – for the most part - vertical in nature, consisting of giving or helping of the poor by the rich through various vehicles such as private foundations, trusts, corporate foundations, family trusts, community chests and more recently, community foundations. The latter are not necessarily only sourced through donations of the rich. There are cases where individual contributions by poor community members play an important role.

By all measures, horizontal philanthropy is more organic and by parity of reasoning more inclusive with beneficiaries as active participants and not merely recipients of assistance. However, in most development literature and national policies, the agenda of vertical philanthropy takes precedence over that of horizontal philanthropy.

As with the so-called “informal sector” in Africa, horizontal philanthropy has since time immemorial helped, employed and empowered more poor people than vertical philanthropy. A case in point would be the Harambee’s in traditional Kenyan society. The critical role and contribution to African development of non-financial forms of giving and horizontal philanthropy remains under-researched, under-theorized and unappreciated. In the majority African countries several factors make horizontal philanthropy unavoidably important as a vehicle of self-development, namely: the social dislocation caused by rapid urbanization; the swelling armies of internal and external diasporas; the collapse of traditional social safety nets; the ravages of disease, poverty and hunger; the rampancy of conflicts and the insecurities caused by environmental and climatic disasters. These factors shape the contours of self-development programmes in poor societies and make it an imperative to have a response that is supportable through indigenous resources and initiative.

Notably, practices of African philanthropy are shaped by one’s location and focus. An important challenge for most African philanthropic institutions is how to influence an uneven national and global playing field as well as how to measure the impact of philanthropic work.

While there are significant development funds flowing into Africa via remittances, trade receipts, foreign direct investment (FDI) and official development assistance (ODA) a very important resource that has been neglected is the African people themselves. There is a general failure to tap local resources which are critical

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<sup>25</sup> See African Grant Makers Network(AGN) ,2013 “SIZING THE FILED : Frameworks for a new narrative of African Philanthropy”

in bringing lasting change in Africa. To move the African philanthropic agenda forward, there is need for deliberate and strong collaboration between communities, grant making organizations and other actors. Grant makers should engage in 'strategic giving' with the aim of moving affected communities towards self-development and empowerment to hold the government and corporate sector accountable. AGN insists that in the tapestry of African development, money is only one form of power, while self-determination is another. That for development to be sustainable it is important to connect / engage with communities and letting their agenda define the framework for grant making. AGN believes that it is important that grant makers should invest in strengthening the capacities of the communities they are supporting, to set their own agenda/s. This will enable communities to be effective drivers of their own development.

Many African grantmakers have comparatively modest resources compared to their Euro-American and Asian counterparts. In terms of innovation, they have also lagged behind and remain less visible and assertive at the global level partially because institutionalized philanthropy is a fairly new phenomenon; because there has been a lack of voice and knowledge on African philanthropy and because the infrastructure is only emerging since last 15 years. These facts notwithstanding, African grantmakers' potential strengths lie in the following:

- A mission to serve the public good in diverse ways.
- Organic partnerships with local communities and community foundations.
- Flexibility of programmes that permits them to respond more innovatively and strategically to local contexts and unfolding situations.
- Administrative flexibility that allows for more timely action.
- A long-term perspective arising from the fact that continental development is not seen as a short-term issue.
- An ability to serve as a catalyst for cross-cutting and cross-sectoral collaboration based on their ability to convene a broad range of actors.
- The legitimacy, understanding and capacity to highlight political, economic and social policies that exacerbate vulnerability of populations to poverty, inequality and other forms of human insecurity.
- A niche to support locally-driven research and dissemination of the results to affected and interested stakeholders.

In the majority of cases, African grantmakers do lack in-house expertise, experience and resources to deal with increasing requests for support especially in specialized areas such as environment, disasters, ICTs and renewable energy. Africa has one of the highest absolute numbers of people living in poverty compared to other continents. Africa has also been subject to recurrent conflicts, natural disasters and economic difficulties. This has essentially made Africa an experimentation field for all forms of philanthropic adventurers. The continent is a litany of failed philanthropic experiments that have deepened poverty, inequality and dependency. Very often grant making decisions made in Africa are subject to emotional appeals and often made within perceived time pressures. AGN seeks to change this *ad hocism* by assisting global foundations and corporate grant makers to understand the African developmental challenges, understand self-development processes, the importance of direct agency of local actors and make their grant making developmental as opposed to purely humanitarian.

The AGN seeks to establish a strong voice for African philanthropy in order to address the growing challenges of conflict, poverty and poor governance in Africa alluded to above. AGN believes that Africa can effectively mobilize and harness domestic resources for its own development. Domestic resource mobilization creates opportunities for building innovative partnerships for development; achieving universal social protection for the poorest of the poor; enhancing domestic capital formation through asset building; recognizing creative means of citizen participation; reducing dependence on external aid and progressive private sector contribution to development. AGN, therefore, seeks to strategically position itself as a critical player in grant making partnerships as well as strategic policy issues.



## Philanthropy in Muslim communities in Africa

For centuries, philanthropic institutions have played an important role in Islamic traditions. A specific organization called *Al-Waqf* has achieved a significant socioeconomic position in the Islamic world that is comparable to its counterpart in Western societies. Functioning beyond private philanthropic institutions, *awqaf* (*waqfs*) possess a wide range of contributions to social welfare. *Al-waqf* literally means to stand, to allocate, and to immobilize (to make dependent and conditional). Both in Arabic literature and religious law, it refers to a special type of donation in which the donor is not the beneficiary of the revenues, and profits stem from the assets donated. In the pre-modern history of the Islamic societies, usual types of the waqfs are the family waqfs. They aim to make ongoing revenue sources for the descendants and their lineage. Such an endowment is characterized as being *mu'aqqab* (for a descent group). Since waqfs are based on interpretation of the Prophet's *hadith* (words and deeds), this judicial attempt is also driven by the social and economic complexity of Islamic society along with the religious motivation behind them. With the expansion of Islam throughout western Arabia, Northern Africa and the East (Iran, Afghanistan and India), Islamic societies became even more developed and sophisticated. In the early Islamic period under the rule of Umayyad and Abbasid dynasties for instance, Muslims tried to answer the needs of this complex social structure. Therefore, early examples of awqaf (with its judicial grounds) are observed in the first and second century of Islam.

The finance of the *jihad* (struggling for God's sake) is considered as an important motive during the early periods of the Islamic state [quoted in Gil (1998)]. Therefore, chief function of the waqf was to finance the Muslim fighters for the Faith and for the early Muslim brotherhood. It was a benefaction for God's sake without seeking any worldly reward. Later periods of whatever the motives are, the waqf institution has played an important role in Islamic societies as it was both common and economically significant. In the example of Ottoman State's classical age for instance, it is quite impressive to witness how comprehensive and common are waqfs and their properties in the Turkish society. These properties once constituted one third of the cultivatable lands in the Ottoman State, including the Middle East and the Balkans. Waqf prevailed as a private provider of public goods and services until the modern type municipalities were founded in 19th century Islamic world.

Provision of public goods and the definition of property rights have been a challenge for every society regardless of their development level (Quran, 2001). Public goods are defined as goods that are non-excludible (not requiring special authorization to consume) and non-rival (to be consumed by many of the demanders at the same time). Waqfs, acting as intermediaries between localities and the central government which produced public goods, should also be analysed with regard to the Islamic countries' economic development and their adaptation of global governance bodies. A private institution (i.e. waqf) can supply any good or service that is defined to be public in an efficient way, even if it creates an incentive for monopolistic behaviour in some cases. Due to the issues regarding economies of scale in provision of such goods, government intervention might even lead to losses in social welfare. However, it is argued that under the private provision of the public goods there may still be some need for government regulation of market functioning and maintaining competition (Kahn, 1988).

In this Report, historical significance or the "history of waqf system" is alluded to as part of an enquiry into the broader question regarding the regulation of African philanthropy, i.e. the modern regulatory context, processes and governance structures. We seek to answer the question whether this institutional basis is an obstacle to the development of advanced social and economic bodies. Regulations on the provision of public goods constitute the first dimension of the relationship between the waqf institutional base and modern governance structures. The second discussion with that regard focuses on the normative arguments (such as Quran's arguments) around the waqf system. The normative arguments against the history and role of the waqfs define such institutions as a result of inadequate governance structures and the lack of secular law

practices in the Islamic world. Accordingly, waqf system emerged in those societies which lacked well-defined property rights or a functioning democracy and rule of law. Additionally, this is said to have granted an excessive role of government bureaucracy and thus led to high levels of corruption (Quran, 2007 and 2011). Our argument in the last section of this paper however contends that the long-prevalence of waqf system in Islamic societies could not justify such normative arguments.

Historically, waqfs as institutions played a complementary role to the government's provision of public goods, with both rises and falls throughout the mediaeval and early modern ages of the Islamic world such as in Turkey. Their counterparts (i.e. western charitable organizations) have also prevailed for centuries in other societies that demonstrate well-defined governance structures. For instance, recent figures on the waqfs established in Turkey after 1980s clearly indicate the rise of waqfs is not associated with the decline of governance bodies in a society. Rather, they play a complementary role to the government policies regarding their social dimensions.

## 6. THE POLITICAL ECONOMY OF PHILANTHROPY IN AFRICA: African philanthropy: A Moving Target or Targeted move?

Three realities define narratives about African political economy, namely:

- Conceptions of imperialism, colonialism (neo-colonialism), apartheid, globalisation and the popular struggles against these forms of domination and power.
- Democratisation and human rights struggles to in the post-colony, post-independence, post-apartheid, post-revolution or pre-multi-party eras. You could read into this perceptions and conceptions of externally driven regime change agenda.
- Under-development, development, economic liberalization and economic structural transformation (or economic structural adjustment).

These narratives are highly contested with supporters and malcontents alike. The polemics that characterize the narratives also inform and shape the behaviours and policy choices of various political and economic elites as well as subaltern classes that are the biggest targets of philanthropic investments and interventions. It is not within the remit of this report to unpack the narratives and the polemical views they engender, but rather to highlight how they shape conceptions of both philanthropy and its regulation. Viewed from this perspective philanthropy - however interpreted - is tainted by historical, ideological and cultural baggage, not least particular dominant Euro-American conceptions of economic development and progress.

In every one of the seven countries there have been instances of abuse of philanthropies by boards, employees or individuals associated in one way or another with their work. The recent boom in the assets and income of philanthropic ventures such as impact investments and venture philanthropy has come with new organisational structures that mix non-profit and for-profit models and practices. There is a general impression in some circles that the public need to be protected through effective and comprehensive regulation from comprador corporate predators who abuse and/or misuse tax-exempt resources with a measure of impunity and little social and financial accountability. Current laws regulating philanthropy have not been updated since the 1990s and those that have been have tended to ape regulatory confusion and contradictions of the U.S. system. Those in favour of increased regulation of philanthropies often point to: the percentage of income / assets that private foundations are supposed to spend; counting of inflated administrative costs as programme costs ; prohibition of trustees of PBOs from paying themselves exorbitant amounts for their board service; closing loopholes that allow foundation executives and executives to engage in self-dealing and conflicts of interest; need for clear standards regarding what constitutes fair and reasonable compensation for trustees and board members; and generally the need to ensure good governance of philanthropies. The pro-regulation advocates argue that preventing abuse, closing loopholes; and strengthening accountable governance of philanthropies is necessary because tax exempt funds are not private funds of foundations and non-profits. In essence that tax exempt funds are public funds held in trust by PBOs and NPOs for the public benefit. Strong regulation - it is argued - reinforces a commitment to accountability by NPOs / PBOs. However, such regulation requires an increased investment by States in critical capacities and competences to provide the required oversight and new laws to address the evolving growth and diversity of the NPO / philanthropy sector.

Those critical of increased regulation point to the fact that all breaches by PBOs / NPOs thus far recorded in all seven countries do constitute crimes or are adequately provided for in existing legislation. What, therefore, is required is not a raft of new laws, but rather vigilant enforcement of existing ones? This view holds that what is needed - at most- are a few new narrowly focused laws to deal with matters not already or insufficiently covered in existing statutes. At best, therefore, this view calls upon African States to shun the temptation to re-write the fundamental public policy framework governing philanthropy which has historically-for the most part- given NPOs / PBOs discretion regarding the utilization of their resources.

## African Philanthropy is rising?

Recent years have seen the flourishing of philanthropic endeavour across the world.<sup>26</sup> This has been accompanied by the growth of innovative financing instruments such as Impact Bonds and a general increase in social enterprise and associated social impact investments<sup>27</sup>. David Moore and Douglas Rutzen (2011)<sup>28</sup> note that: “In Brazil, the number of private foundations increased by 300 percent in 20 years and by 2008 Brazilian foundations gave away more than us\$5.4 billion; In Russia was virtually non-existent in 1991 and by 2008 exceeded US\$2.5 billion. In China, the number of private foundations has grown by over 95 percent in eight years”. In most instances the growth in philanthropy has coincided with the rise in private wealth in Brazil, Russia, India, China and South Africa (BRICS) as well as Angola, Nigeria, Ghana, and Kenya. The number of High Net-worth Individuals (HNWI) in Angola, Kenya, South Africa, Egypt and Senegal has grown by between 15 to 30 percent in just under 10 years.

There is also a growing phenomenon of trans-border philanthropy, especially from the BRICS and G20 nations. For instance, International giving from the largest U.S. Foundations rose from US\$ 680 million in 1994 to US\$ 6.2 billion in 2008. As shall be discussed below, the flow of private philanthropy from OECD countries to developing countries grew from approximately US \$5 billion in 1991 to \$57 billion in 2012. The main drivers of cross-border philanthropy have varied from government departments, specialized State Agencies, foundations, donor-advised funds, and corporations as well as private donors. It is however important to distinguish philanthropy (which is private resources) from international aid (which is state resources).

The AGN (2013)<sup>29</sup> observe amongst others that:

- In the past, we have had philanthropy done to us as Africans with little recognition that there is a vast field of philanthropic practice alive and active in Africa.
- There is a fair body of literature that has emerged on African philanthropy, though the focus has primarily been on the vertical forms. There is likely more literature than recognized on horizontal philanthropy but this is under rubrics of social solidarity, safety nets, anthropology etcetera and needs to be unearthed. Comprehensive literature on African philanthropy has focused on easily identifiable and reportable acts of philanthropy, to the exclusion of “**Organic philanthropy**” that occurs on a daily basis in community and family ecosystems across the continent.
- The narrow definition of African philanthropy often means that -beyond “Organic Philanthropy”- newer or innovative forms of philanthropy are often left out. Therefore, mapping African philanthropy in an inclusive way can help change its definition.
- The recent global economic downturn has amongst others , propelled the emergence of the African middle class and a growing pool of super-rich African men and women - many of whom are attentive to their social responsibilities and want to somehow give back to their communities. Among these African HNWI reporting on and quantifying philanthropic activity may be deliberately limited given sensitivities about wealth, the source of funds, and potential tax implications linked to such reporting.
- The outwardly visible and reported examples of African philanthropy can often overshadow other forms of philanthropy in Africa, which are more difficult to track. In part, the perception and definition of the term “philanthropy” may mask some activities. Extensive philanthropic activity taking place around the

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<sup>26</sup> See Global Philanthropy-International Journal of Not-for-Profit Law(IJNL) Vol.13 Iss.1-2 “Legal Frameworks for Global Philanthropy: Barriers and Opportunities ,”[http://www.icnl.org/research/journal/vol\\_13\\_iss/special\\_1.htm](http://www.icnl.org/research/journal/vol_13_iss/special_1.htm)

<sup>27</sup> Darko, E. and Quranteng, K. O. (2014) Social Enterprise Landscape in Ghana, ODI-UK, British Council-Ghana, Accra Ghana.

<sup>28</sup> IJNL op.cit, vol.13, Issues 1-2, April 2011

<sup>29</sup> Sizing The Field: Frameworks for a New narrative of African Philanthropy,2013 African Grant-makers Network

continent needs to be recognised and documented. If not, its exclusion can lead to a focus on “the poor” as purely recipients of philanthropy, rather than part of a class from which the largest volumes of philanthropy in Africa likely flow.

- Existing ways of thinking about philanthropy are heavily grounded in the culture and economic structures of Western countries and may not fully capture the range of ways in which giving happens across the African continent.
- It is time to tell our own story; construct our own narrative. To do this we must generate new knowledge about the extent and nature of the field of philanthropy. We need to scope its dimensions.

AGN further prefers a framework for analysing African Philanthropy looking at the ‘fundamental structures around the basic act of giving and focuses on the nature of the giver and of the beneficiary as follows:

**Table 1: Givers & Recipients**

GIVERS /PHILANTHROPISTS	RECIPIENTS/ BENEFICIEARIES
ONE GIVER - Individual or very tightly knit group that independently determines a cause to support and the nature of that support	ONE BENEFICIARY/KNOWN BENEFICIARY - Individual or cause that is directly known to and connected with the giver (e.g. extended family member, neighbour, colleague)
MANY GIVERS - Collectives that organize larger groups or networks of givers to combine resources in support of a given cause	MANY BENEFICIARIES /UNKNOWN BENEFICIARIES – Individuals or causes that are not directly linked to the giver but speak to their particular philanthropic aspirations in some way

*Adopted from AGN<sup>30</sup>*

AGN estimate that Africa’s HNWI constitute the top 0.1 percent of African households and they have a combined total annual income of US\$1.57 trillion. They contribute approximately 5% of their wealth towards philanthropy and this translates to between US\$2.8 to 7 billion per annum. Mobilized philanthropy on the other hand relies on the active virtual and physical recruitment of individual or institutional donors in support of specific causes or philanthropic initiatives. In Kenya and South Africa mobilized philanthropy was key in responding to the 2007/8 post-election violence and the famine in Northern Kenya<sup>31</sup>.

**Table 2: Categories of Philanthropy**

<sup>30</sup> AGN (2013) op.cit pp.7-12 states that: One-to-One giving covers the many acts of individual generosity among extended family and friends that cement social bonds (e.g. payment of medical bill or educational costs of an extended family member, friend or colleague). One-to-Many- category describes often large gifts from wealthy individuals towards causes that they care about but not beneficiaries that are directly linked to them, or at least not solely linked to them(e.g. donations towards the eradication of EBOLA , HIV/AIDS or river blindness) ; Many-to-One category describes instances where multiple givers are mobilized in support of a cause or individual that directly affects or is linked to them; Many-to-Many - involves raising resources from a large group of individual givers towards a shared cause or objective that does not directly impact their immediate circle(e.g. disaster response initiatives )

<sup>31</sup> In 2011, Kenyans for Kenya initiative was launched with the backing from Safaricom Foundation, the KCB Foundation, the Media Owners Association and Kenya Red Cross Society. The Initiative raised USD\$6 million from over 250,000 individuals in KENYA to provide famine relief to over 3 million Kenyans. It creatively used a rapid awareness campaign in the media and used the M-Pesa mobile payments platform to quickly aggregate contributions. In this way the initiative was able to rapidly tap into desire to give.

CATEGORY OF PHILANTHROPY	COUNTRY OF PREVALENCE	DESCRIPTION	FORM OF REGULATION
<b>IN-KIND &amp; SERVICE (SELF-DONATION)</b>	All seven countries	Donations of time, labour, knowledge, care and support, influence and visibility in support of a cause	None. No tax incentives or other public benefit other than the feel-good effect
<b>COMMUNITY/FAITH-BASED</b>	All seven countries	Community initiatives to collectively resolve an identified problem or proffer a solution to a specific need	Regulated under NPO and Public Benefit Organisations (PBO) legislation. In exceptional cases some apply for and receive tax exemption
<b>MOBILIZED</b>	South Africa, Nigeria, Kenya, Ghana	A Campaign or Cause Marketing effort aimed at aggregating contributions from a broad cross section of givers to help address the needs of beneficiaries outside their circle	Regulated under the Income tax Act; Public Advertising Act; Information and Communication Laws; Company's Act; State Security, Anti-terrorism Act, and PBO/NPO legislation
<b>HIGH NETWORTH &amp; INSTITUTIONAL</b>	Nigeria, South Africa, Kenya, Egypt, Senegal	Centrally controlled and managed pool of (mostly private) resources targeted at beneficiaries outside the immediate personal circle	Company's Act; Income Tax Act; NPO / PBO and Anti-Terrorism legislation

*Adopted from AGN, 2013*

## 7. PHILANTHROPY APARTHEID: WOMEN AND YOUTH LEADERSHIP, PARTICIPATION AND AGENCY

The report found that women remain significantly marginalized within the growing African economies and political processes in all countries under this study. Women produce more than 80 percent of the locally produced food consumed within the non-rice importing countries. It is estimated that – in the study countries - African women control less than 7 percent of land and other productive assets. They lead the statistics in terms of both leadership of and participation in horizontal philanthropy ranging from burial societies, cooperatives, merry-go-round clubs, Susu's and Harambee's. Women also carry the disproportionate burden of care and support for the terminally ill in both urban and rural areas, as evidenced by the HIV/AIDS and EBOLA pandemics.

According to an International Labour Organization (ILO) report, sub-Saharan African has the world's highest proportion (40%) of women who are just contributing family workers and are only supportive of the primary income earner. Only 15% of sub-Saharan African women are salaried (compared to approximately 90% in developed countries). For the majority of women in the countries studied by this report a job is both about building a career and the social and maternal obligation to nurture and cater for the family and community. The burden of socially constructed gender roles as well as associated historical impacts of rural-urban migration has often meant that women are the quintessential bread producers and de facto heads of family income and budgetary processes without the requisite socio-economic recognition. Notwithstanding the fact that women play such a key role in the home, and economy, they are not properly recognized and rewarded for their contribution. For the most part, African women 'bail out' the State in its primary obligation to provide basic services such as universal care, treatment and support to persons living with or affected by terminal illness. There are no fiscal benefits or other recognition associated with this critical public good that African women have and continue to offer within and outside philanthropic organizations and families. The report found that African women do 'philanthropy' almost automatically as part of their everyday social interventions.

### African Women's Economic Empowerment

African economies are largely dependent on rain-fed agriculture and extractive industries with no meaningful value addition or local procurement. Women often lack the requisite access to and control of productive assets and other resources such land, water, seeds, technology and finance to enable them to be truly economically empowered. The impact of this disempowerment, exclusion, marginalization and other social barriers in rural and poor urban economies is dire. African women are conscripted as cheap labour on commercial farms in South Africa, Ghana and Kenya for example and within rural farm settings across the seven countries they work the land that they neither own nor control. The drudgery of rural existence and the socially assigned gender roles effectively result in rural African women spending a disproportionate amount of time in reproductive and household work such as gathering water and wood for fuel, caring for infants, the elderly and sickly, harvesting crops and cooking for the family or clan.

Efforts by philanthropic organizations at both national and community levels to build micro-enterprises and micro-infrastructure within rural setting is a critical contribution towards women's economic empowerment, poverty alleviation, the eradication of inequality and sustainable human development. Better rural infrastructure is also key to making rural communities more resilient to exogenous and endogenous shocks. Programmes by philanthropic organizations to promote organic agriculture, improve seed varieties and increase resistance of crops and livestock to diseases as well as subsidies for agricultural inputs and equipment could greatly enhance the economic potential of African women. These interventions could help free the entrepreneurial edge of rural African women whilst at the same time significantly increasing



household income and savings necessary for greater investment in education and health care. Improved household savings and income would also benefit the entire family. Current philanthropic interventions have the potential to reduce gender inequalities between girls and boys by reducing the amount of time girl children spend away from school work assisting with household chores, farming tasks and care work. For instance, local economic development would improve girls' education and life options.

All the seven countries studied had aspirations within the national vision documents and developments plans to reduce poverty, eradicate inequality and achieve gender parity in education. These aspirations require a holistic partnership between the African State, the private sector, civil society and communities. Whilst the State has the obligation and mandate to set the broader policy framework for development, it requires the participation and partnership of philanthropic organisations and the private sector to ensure that development is both effective, sustainable and truly owned by its intended beneficiaries. Regulating how these critical non-State partners operate, contribute and participate can either catalyse or optimise the intended results or it can stifle progress by weakening the freedom of society and individuals in society to act in transforming their development contexts and circumstances.

## Women's Political Agency and Participation in Decision Making

**The African Union declared 2015**, the Year of African women within the broader decade of African women. The number of women occupying senior government positions has either increased or stagnated in South Africa, Kenya, Ghana, Nigeria and Senegal in comparison to the situation a decade ago. On the whole, women have made significant political strides since the turn of the century. South Africa, Senegal, and Angola are in the world top 24 in terms of percentage of women in Parliament. There is a general positive trend in the seven countries studied to include women in the decision making process, both in business and politics. In Nigeria, South Africa and Kenya for instance, the powerful ministerial dockets of Finance, Foreign Affairs and Defence are held by very capable women ministers. Despite this progress the numbers are unflattering when it comes to overall women's share of the real economy and women in local government and cabinet generally and also to ordinary women's power and voice in the homes and communities.

Empowering women makes developmental, political and economic sense given their central role in Africa's rural and urban economies as well as the human development processes. The regulation of philanthropies must not assume a gender-blindness to Africa's contextual realities (historical and contemporary socio-economic, cultural, environmental and political) regarding the situation and condition of women. Where relevant and desirable, regulation of philanthropy must be in sync with the broader national objectives on empowerment of women and youth as the demographic majorities. This report is calling for regulation and incentives, including through fiscal tools (monetary, exchange rate and tax policies) that enable the doubling of available talent pool for Africa's economic structural transformation based on inclusive development pathways where men and women are both procedurally and substantively equal. This will - amongst other things - require a re-orientation of public policies towards the following objectives in the field of philanthropy:

- Addressing issues of access to capital and productive assets for women run philanthropies and general financial flows (domestic and international; public and private) to philanthropies working on issues of women's economic, social and political empowerment. This should also include reducing barriers to Diaspora financing of philanthropies working on women's empowerment.
- Addressing political and accountability questions relating to how philanthropies and public bodies actually address the mission to empower women and girls.
- Addressing the developmental factors such as availing non-financial support (ease of registration, office space, equipment, and transport) to community-based organisations working on empowering

women in rural and poor urban areas.

- Addressing the capacity and capabilities issue with respect to management, accounting, fund raising, research, reporting and sustaining operations for philanthropies working on women's empowerment.
- Addressing social constraints by reviewing and repealing those laws and policies that reinforce gender inequalities and discrimination against women within both the economy and social settings. There is need for structures to support women in their three-in-one role as mothers, economic and political citizens. These structures and policies might include things such as women's banks, means and ways of banking the unbanked rural women, micro-finance facilities, capacity development in specific skills, crèches, maternity leave, flexi-time, and mobile information platforms. In essence, enabling women's agency in philanthropy and as philanthropists requires a regulatory view that looks at the entire eco-system and not just laws relating to registration, governance, reporting and financing of philanthropic endeavour.

## Women in Science and Technology

The centrality of science, technology, engineering, and mathematics (STEM) to the agenda of African industrialisation, economic transformation and diversification makes it even more imperative to increase both public and private investments in processes that will enable African women to pursue educational opportunities, careers, and to self-actualise beyond the traditional socially constructed gender roles relating to reproduction, maternal and nurturing functions. Africa needs to double its talent pool by giving girls the chance to take their rightful place in the formal economy. This report found that philanthropic investments targeting women in STEM are too few.

STEM skills are in short supply in Africa, and women are particularly under-represented in these fields. In Africa (as in most parts of the world) the STEM professions are seen as a male preserve, and women tend to go into the social sciences. Government policy - in part - can help encourage girls to embrace maths and science from an early age. However, the most effective intervention to reverse the under-representation of women in STEM will be that made by women role models, private sector investments and philanthropic interventions. The critical role of philanthropic investments in order to ensure the achievement of this imperative cannot be over-emphasized. This, therefore, requires a re-thinking of the following aspects of philanthropic regulation, namely:

- Deliberate targeting of women as a demographic group and women's organizations as entities for specialized policy and financial support by both the private and public sectors.
- Establishment of specific monetary and non-fiscal incentives for the roles that women perform in 'bailing out' the State in terms of social-service provisioning.
- Establishment of data collection, collation and analysis tools for measuring the gender-specific impact of philanthropic interventions.
- Establishment of intermediate support organizations for female philanthropists engaging in new areas such as humanitarian philanthropy, environmental philanthropy, STEM promotion and online giving.
- Establishment of 'new' funding and investment incentives for those private sector investments that are intended to benefit women as a demographic group. Also, relaxation of 'commerciality tests' to enable female headed philanthropies to engage in commercial activities to supplement currently

dwindling resources from both domestic and external sources.

- Putting in place government policies that focus on giving scholarships and bursaries to young women, thus increasing their number in the STEM fields. Further to put in place support structures and mechanisms to ensure that women who do land up in engineering (and other technical fields) do not drop out, or move into management as a result of hostility of the working environment/context. Women in the technical fields need support and encouragement in the work-place; corporate and government policy can help to build work environments whereby young women receive the necessary support to succeed in their careers. Thus regulation must encourage participation of philanthropies and private sector investors in accompanying women in this career path.

### Locating African Youth within Regulation of African Philanthropy

The research found that the majority of 'new' philanthropic interventions across Africa now focus on trying to either: resolve the 'youth bulge' or optimize the 'youth dividend', through a wild mix of entrepreneurship promotion programmes, self-employment schemes, career development, volunteerism promotion and so on and so forth. Regulation of philanthropy is not entirely about tax incentives and big financial flows from the very rich to the poor. There are also several philanthropic organizations founded and run by youth and young people focusing on issues such as ICTs, innovation and public participation. It is fair to say that youth dominate the African technology space and philanthropies related to these.

Philanthropy, most fundamentally, is about people, and how effectively people are empowered to realize their full potential and dignity. A re-thinking of how, when and why to regulate different types / forms of philanthropic endeavour is now overdue. But more poignantly a re-imagination of how to regulate philanthropy in the long-term interests of African youth is even more complicated.

First, African countries are now flooded with Angel funds, venture capitalists, NGOs, private foundations, HNWI, grant making institutions and community foundations all competing for the right to develop various constituencies of the poor, marginalized, and excluded. As a result, the wide range of charity and investment capital laying claim to be classified as philanthropic has given rise to justifiable suspicions that Africa might be opening itself up to exploitation by its erstwhile helpers. In fact, for the bulk of these philanthropic interventions and organisations, the participation of the beneficiary constituencies in shaping the types of intervention, the rationale for such interventions and the outcome of the same remains either dismally low or lacking. This is often not helped by a rent-seeking social culture institutionalized amongst African urban poor by political parties that hire crowds and purchase votes.

Second, there are suspicions that the hugely expanded and culturally laden field of 'philanthropy' might have become the conduit for embedding failed Washington Consensus dogma within African societies. The "hidden costs" of doing philanthropy in Africa – costs related to weak infrastructure, red tape, archaic and formulaic regulations, corruption, economic unpredictability, insecurity, intrusive States and political instability – have taken their toll in some countries on the visible impact of institutionalized philanthropy on the broader public good and purpose.

Third, although banal ideological rigidities of the cold war have receded to a pragmatism based on the need to survive and access largely global neoliberal economic spaces. Debates regarding Africa's relations with both global and local finance capital rage on amongst the youth, working classes and social movements in Ghana, Kenya, South Africa, Nigeria and Senegal largely away from mainstream media. In South Africa, these ideological battles have been fought over electricity and water costs; in Kenya over land and in Nigeria cost of petrol. The ideological paradigms still inform development trajectory in South Africa and Angola, although to a lesser extent. Increasingly, in Egypt, Ghana, Kenya, Nigeria and Senegal contestations based on the class divide are emerging such as labour versus capital, government versus multinational, local versus foreign as

actors compete for relevance and dwindling national cake .

In 2008 and 2015, the worst manifestation of this in South Africa was a series of well-orchestrated attacks against non-South African, Africans from neighbouring countries. Scores were murdered and tens of thousands displaced. The concern for public good has thus tended to falter between national consensus amongst elites, xenophobia amongst the poor and ambivalence within the middle classes. The instinctive resort to indigeneity, nationality and religion to protect identities that viewed as under threat from the other essentially complicates perceptions of philanthropy within certain communities. Philanthropic interventions targeting foreign nationals are few and far between. It marks them out from normalcy and exposes them to the hostility of xenophobic forces. Notably for countries with high migrant labour and refugee populations like Egypt, Kenya and South Africa national resources are not bringing the rewards that everyone (regardless of their ideological disposition) had expected.

There is a growing rift between the governors and the governed in Africa as well as between the poor and the rich. These social rifts and attendant disenchantment with the State, authority and government cannot be cured through philanthropy. In poor communities, especially in urban areas, historical ideologies and new pragmatism, battle for the control of the hearts and souls of poor and unemployed youth. Institutionalized philanthropy finds itself stuck in the middle. Philanthropists find themselves steering in murky waters where the radicals accuse them of being agents of imperial interests or pacifists disabling organic social struggles against non-performing States through their social bail outs.

In reality, under the surface, Nigeria, Kenya, South Africa, Egypt and Senegal are radicalizing fast. The long-term question will remain essentially how philanthropy will handle, engage or address this growing radicalisation especially of African youth. Philanthropy would also have to answer the critical question of the sector's relationship with faith on the one hand and social movements on the other. Institutional African philanthropy has rarely engaged with movements of the poor. Instead it has tended to, for the most, adopt an approach that deals with the symptomatic effects of poverty and inequality or individual skills and business development. Engagement with longer term systemic issues, human rights violations, governance and support for social movements is the exception, rather than the norm. In essence, African philanthropy is also precariously stuck and dangling between movements of the poor and increasingly dominant market forces pushing a free market neo-liberal agenda. This growing uncertainty, unpredictability and ambiguity requires that the regulator and philanthropist alike consider the following five imperatives:

- **Understanding Evolving Context beyond sterile statistics:** Step one requires that States and other development actors thoroughly understand each national demographic, governance and development context, taking into account factors such as group and resource base dynamics. These factors must be understood through multi-disciplinary lens: scientifically, environmentally, socially (with special reference to communities, local peculiarities, local aspirations, grievances, identity dynamics, culture and politics) and in global market terms (e.g. connections, alliances and influence). There is an increased utilization of statistics by governments in the countries studied, but this is not necessarily followed by deep and honest analysis of the attitudes of young people towards government and public institutions. The statistics are often gathered to confirm an analysis of social phenomenon borrowed from a totally different context and history. As such statistics most often describe without fully diagnosing the extent of the challenges and possibilities within the African youth space. Linearity in reasoning and interventions tends to cloud the judgment of regulators who simplistically assume that every deficit identified by the statistics (e.g. 35% unemployment) is curable by, for example, creating contrary conditions (e.g. 15% employment).

The report found that statistics about the numbers of unemployed youth and graduates should be related to broader social, economic, political and faith-factors. The African regulator must of necessity avoid a mechanistic creation of X-number of jobs for individuals whose orientation might be fundamentally anti-State, anti-national or anti-development. Equally so, we would avert a situation whereby we adopt an economic approach to resolving the youth empowerment question as purely about jobs as opposed to

broader cause, identity, grievance and greed related factors. Philanthropy should not be posited either as a quick or mechanistic fix to complex social phenomena or as the substitute for thorough development planning.

- **Creating an enabling Policy and Regulatory environment:** The second step is to create a supportive regulatory environment. The tax and administration policies that apply to the philanthropic sector have to be both activist enough to achieve socio-economic ends of equitable and inclusive development whilst remaining friendly to capital (especially the local and regional variety), and they have to be clear. Training for government officials – in drawing up clear regulations, and interpreting regulations consistently – is among the vital solutions. Government departments will also, ideally, become embedded with a client-service culture (as is being accomplished, with great success, in Senegal, South Africa and Kenya). In the governmental client-service arena there are strong international benchmarks; investors are keenly aware of these, and every investment-hopeful government needs to measure itself against them. The onus is not only on the public sector. The private sector can assist enormously – by sponsoring educational programmes that will provide a flow of highly skilled graduates to government departments, to give just one core example.
- **Expanding relevant Human Capital Base for Modern African Philanthropy:** Third, there is need to conceptualize the philanthropic sector both as a calling and a career field. As such there is need to develop labour holistically to achieve a healthy, stable workforce in this sector. This step goes far deeper than the obvious demand for education and training; it requires that those involved attend fully to the rights of the communities around specific philanthropic projects; consult with them about their real needs and sensitivities, strengthen the capacity of local voices and agency to help them in claiming power to hold development actors accountable and then make meaningful, lasting social investments. Here, green innovation – in food-security and sustainable energy technologies, for example – are some of the philanthropic interventions that can play a vital role.
- **Creating a Common Market for Africa Philanthropy:** Fourth, Philanthropy has to become part and parcel of the African regional integration ambition as well as the mantra of African solutions to African problems. Africa's philanthropic infrastructure components (as well as the emerging support mechanisms) need to be integrated at all levels – local, national, regional and continental. The growth of philanthropy as a continental market requires rationalization and harmonization of tax, banking and other laws and policies. All the stakeholders need to share an integrated growth, diversification and transformation plan. Trans-frontier agreements can smooth the passage of resources from country to country, to the benefit of all the governments involved – and the same applies to the transmission of knowledge and skills across our continent. Trans-frontier agreements should not, incidentally, imply any form of monopolisation by government-favoured or externally or big-corporate funded philanthropies. Africa's philanthropy markets must inevitably remain open, competitive and inclusive bearing in mind the disparities in power, information and resources between local and transnational actors.
- **Knowledge Economy, Media and Marketing of African Philanthropy:** Fifth, there is need to aggressively market Africa's philanthropy sector, attractively packaging the demographic, geographic and social impact and other research referred to above. The question of marketing underlines the power of collaboration, changing mind-sets and building a culture of change readiness. If Africa is to decrease reliance on external resources within the philanthropic sector, there is need for more African middle class to engage in targeted and institutionally directed philanthropy on sustained and regular basis. This is only possible, if the appropriate conditions are created through both policy and practice. African governments often perceive themselves to be in competition with each other – but generally, for all parties, far more stands to be gained from regional or trans-frontier-based marketing of philanthropy initiatives as evidenced by the Ebola fight. It is in the very nature of challenges such as youth unemployment, radicalization and outward migration with its need for wide infrastructural and policing networks, to demand more than a narrow national scope. This calls for creative utilization of social media and other forms of ICTs on concerted and

big scale.

- **Collaborate at every level:** In every step described above, the question is not whether African philanthropies have the resources. The sheer immensity of Africa's resources is the continent's inbuilt advantage. The question is whether African governments, Regional Economic Communities (RECs) and the African Union Commission (AUC) have the will to collaborate at every level, externally and internally, in understanding their resources, creating supportive regulatory environments, integrating regional infrastructure, and so on. Collaboration will in turn require tremendous leadership by civil society, business sector and public sector. Throughout Africa, in both the public and private sectors, there are capable, committed, talented, and transformational leaders. In an Africa empowered by leadership, collaboration and cross-sector synergies require the strengthening of national, regional and continental philanthropic platforms and funding mechanisms.

## Africa's Regional Economic Communities and Philanthropy

The African Regional Economic Communities and African Union must take special cognizance of the contribution of African philanthropy to domestic resource mobilization, universal social protection and sustainable development by adopting enabling legislation and policies. For this to happen there is need for focused dialogue between the relevant policy-making structures and African external and Internal Diaspora groups to build synergies. These platforms will need to engage a broader set of development partners including OECD-DAC countries, especially in order to: develop mechanisms to harness and invest remittances; reduce remittance transfer costs and enhance their effective management. The North-South engagement is also necessary for purposes of curtailing illicit financial flows and fight corruption associated with the philanthropic sector.

Terrorism and IFF are transnational issues that require transnational solutions and cooperation. There is a case to be made for the AU and RECs to adopt more inclusive and consensually agreed standards and laws on fighting terrorism. Indeed, there must be a mechanism of peer and independent review to ascertain whether country's legislations is in keeping with a rights-based approach that favours the continued growth of African philanthropy.

## The Contradiction of Philanthropic Freedom

The report concludes that composite judgment based on a set of indicators often throws up partially correct answers, which in effect are partially incorrect. Applying existing matrices we have come up with two matrices below, namely Graph 1 and the Annexure. Graph 1 applies limited criteria and concludes that South Africa and Senegal are the best performing countries in terms of ease of giving. Table 3 does not use the ranking method. It uses narrative and employs broader criteria. Table 3 finds much more mixed results depending on which sector one is looking at<sup>32</sup>.

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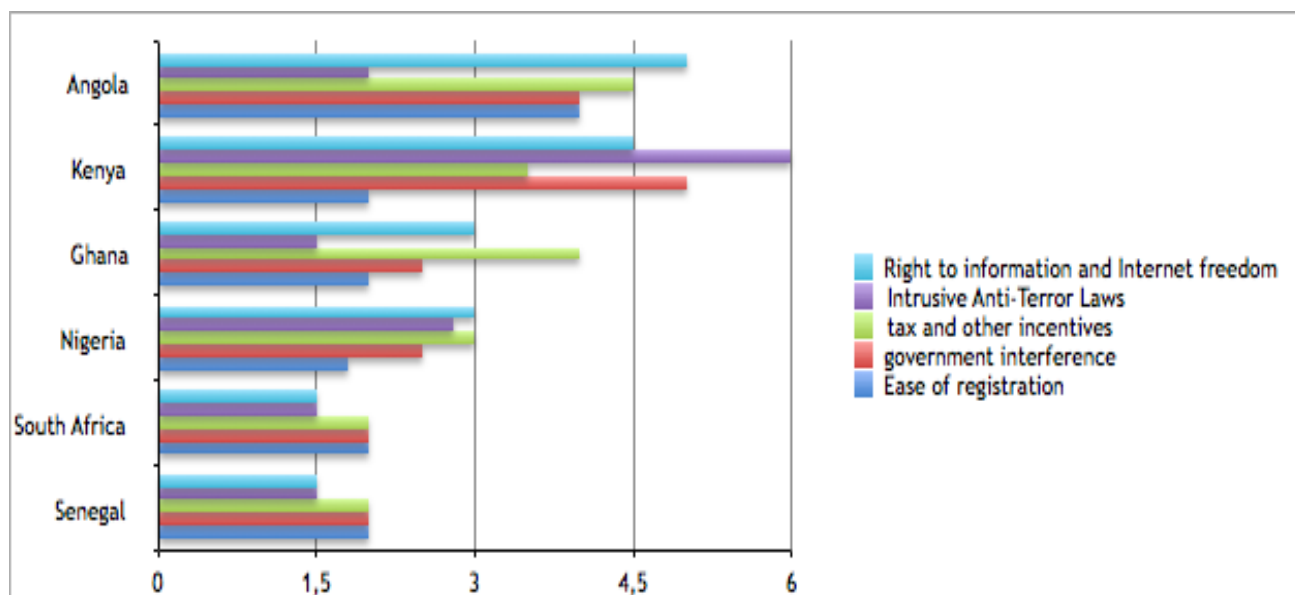
<sup>32</sup> Graph 1 below: Philanthropic Freedom Ranking follows the following ranking

Philanthropic Freedom Strong (1-3): The legislative and regulatory framework makes special provisions for the needs of Philanthropic organizations or gives not-for-profit organizations special advantages such as: significant tax deductions for business or individual contributions, significant tax exemptions for Philanthropic contributions, open competition among CSOs to provide government-funded services, etc. Legal reform efforts at this point are primarily a local NGO advocacy effort to reform or fine-tune taxation laws, procurement processes, and permissible activities. Local and comparative expertise on the NGO legal framework exists, and legal services and materials are available.

Mixed Positives and Negatives in Evolving System (3-5): philanthropic organizations have little trouble registering and do not suffer from state harassment. They are permitted to engage in a broad range of activities, although taxation provisions, procurement procedures, etc. may inhibit the operations and development of the philanthropic sector. Existing NGO legislation has not kept



**Graph 1: Philanthropic Freedom indicators**



The rationale for the ranking in Graph 1 above, is based on an analysis of government policies, legal provisions and practices as at 15<sup>th</sup> January 2015. The philanthropic freedom ranking Kenya and Egypt takes into account the adverse net effect of Anti-terror laws and the recent clamp down on civil society in the two countries. Angola also scores low owing to the pervasive restrictive environment for CSO operational space in the country and attendant restrictions on foreign funding.

Kenya had until the beginning of 2015 ranked highly in terms of philanthropic freedom alongside South Africa and Senegal. The country has very strong infrastructure for civil society organizations (CSOs), a wide range of intermediary support organizations and resource centres. Kenya is also host to some of the continent’s best-known grant making organizations and community foundations. It boasts of well-established training programmes and local grant making expertise. Kenyan philanthropic organizations offer a wide range services in wide field of activity, including social justice, social entrepreneurship, service provisioning, environmental services, acute social and humanitarian situations. Kenya – like Nigeria - has in recent times had to deal with the destabilization from the terrorist organization, Al Shabbab. Al Shabbab has carried out sustained and consistent attacks against members of the Kenyan publics. In response to this precarious security situation, the government has sought to tighten its security grips by strangling the financial supply conduits to Al Shabbab.

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abreast with developments within the philanthropic sector. Non-Profit entities are not allowed to engage in revenue raising and commercial activities. As such philanthropic organizations are not able to bid for the provision of goods and services to national or local governments. Focus of local and national advocacy is to change national legislation and local government byelaws to address basic tax and fiscal issues for philanthropic organizations. The legal environment is still characterized by definitional confusion and contradictions as to what constitutes philanthropy. Legal reform is needed to clarify the remit of work and organizations that can be considered as philanthropic.

Philanthropic Freedom Constrained (5-7): The legal environment severely restricts the ability of CSOs and/or philanthropic organizations to either register and/or operate, partly through the absence of legal provisions, the confusing or restrictive nature of legal provisions (and/or their implementation), or government hostility towards, suspicion and harassment of CSOs. A recent phenomenon has been the catch all provisions of security legislation meant to curb the activities and financial dealings of suspected terrorist organizations in countries like Kenya and Egypt. The net effect of these blanket provisions is to undermine in a significant way philanthropic freedom in a manner inconsistent with what can be considered as reasonably necessary for the maintenance of law and order in a democratic society governed by the rule of law.



The adoption by the Kenyan legislature of the new Security Bill in the last quarter of 2014 constituted a serious reversal of the critical gains made in terms of philanthropic freedom following the adoption of the new Kenyan constitution in 2008. The new Security Bill and attendant policy reforms resulted in the arbitrary closure of 250 CSOs. Government can focus on giving scholarships and bursaries aimed at women, thus increasing their number in the STEM fields. Women who do land up in engineering (and other technical fields) are often daunted by the challenges of a male dominated environment. They are prone to drop out, or move into management. Women in the technical fields need support and encouragement in the work-place; corporate and government policy can help to build work environments whereby young women receive the necessary support to succeed in their careers. Thus regulation must encourage participation of philanthropies and private sector investors in accompanying women in this career path.

This report is calling for regulation and incentives, including through fiscal tools (monetary, exchange rate and tax policies) that enable the doubling of available talent pool for African's economic structural transformation based on inclusive development pathways where men and women are both procedurally and substantively equal. The will, amongst other things, requires an orientation of public policies towards the following objectives:

- Addressing issues of access to capital and productive assets for women run philanthropies and general financial flows (domestic and international; public and private) to philanthropies working on issues of women's economic, social and political empowerment. This should also include reducing barriers to Diaspora financing of philanthropies working on women's empowerment.
- Addressing political and accountability questions relating to how philanthropies and public bodies actually address the mission to empower women and girls (corruption, performance and results matrix).
- Addressing the developmental factors such as availing non-financial support (ease of registration, office space, equipment, and transport) to community-based organisations working on empowering women in rural and poor urban areas.
- Addressing the capacity and capabilities issue with respect to management, accounting, fund raising, and research, reporting and sustaining operations for philanthropies working on women's empowerment.
- Addressing social constraints by reviewing and repealing those laws and policies that reinforce gender inequalities and discrimination against women within both the economy and social settings. There is need for structures to support women in their three-in-one role as mothers, economic and political citizens. These structures and policies might include things such as women's banks, means and ways of banking the unbanked rural women, micro-finance facilities, capacity development in specific skills, crèches, maternity leave, flexi-time, and family planning. In essence, enabling women's agency in philanthropy and as philanthropists requires a regulatory view that looks at the entire ecosystem and not just laws relating to registration, governance, reporting and financing of philanthropic endeavour.

## 8. PRINCIPLES OF GOOD GOVERNANCE FOR AFRICAN PHILANTHROPIES

The governance of philanthropies can be in terms of written legal codes or a set of principles, standards and practices established by the sector for its own self-regulation, or hybrid systems that combine statutory and self-imposed sector principles, and standards. In the U.S., Europe and most of Asia and Latin America, the statutory regulation predominates. The U.S. in particular has stringent legal sanctions against certain legal violations of legal standards by philanthropies. Non-compliance is punished and the investigatory and prosecutorial capacities are available to follow-through the enforcement regime. The seven countries studied by this report all have – on paper - legal sanctions for non-compliance, especially for institutionalized, mobilized and corporate philanthropies. There are allowances in South Africa and Ghana for recognition of common law associations (or voluntary associations) on the basis of their constitutions or other constitutive document signed by the organisation’s recognized officials. These jurisdictions carry a measure of limited hybridity. The incidence of organised and / or sophisticated economic / financial crime also influence the choice of regulators regarding hybridity or full compliance options.

In this report we gleaned out three typologies of philanthropy regulation regimes as illustrated in Table 3, below<sup>33</sup>. The first typology of regulation is, therefore, the strict compliance. It tends to adopt a one-size-fits-all approach to regulation of non-state actors. This model of regulation no longer suffices for the needs of a philanthropic sector that has grown rapidly in size, sophistication, structures of governance, use of Information communication technologies (ICTs) and financing instruments. Stringent licensing, operational and oversight requirements tend to be particularly burdensome, time consuming and costly for the smaller philanthropies which can hardly afford the costs of compliance.

**Table 3: Regulation Typologies**

STRICT COMPLIANCE	SELF REGULATION	HYBRID SYSTEM (Self-Regulation & Statutory Regulation)
Statutory provisions determine requirements from registration to dissolution to distribution of assets post dissolution of PBO.	An independent body constituted in a participatory manner by stakeholders within the sector sets out norms and standard of the sector. PBO is constituted by its own constitution, articles of association or memorandum of understanding. These set out powers and privileges of members, beneficiary and leaders alike.	Statutory provision sets out the legal requirements for acquisition of Status of NPO / PBO.  Self-regulation body establishes a set of norms and standards applicable once the organization is legally constituted.

<sup>33</sup> The table above, is based on an analysis of government policies, legal provisions and practices as at 15th January 2015. The philanthropic freedom ranking Kenya and Egypt takes into account the adverse net effect of Anti-terror laws and the recent clamp down on civil society in the two countries. Angola also scores low owing to the pervasive restrictive environment for CSO operational space in the country and attendant restrictions on foreign funding.

STRICT COMPLIANCE	SELF REGULATION	HYBRID SYSTEM (Self-Regulation & Statutory Regulation)
Statute sets out qualification of trustees or board members, the process of appointing and removing them as well as their duties.	MOU, AOA or constitution of the PBO sets out the qualifications of Trustees or Board of Directors (BOD) as well as their duties.	Statute sets out legal duties of BOD and Trustees AOA, MOU or Constitution of the PBO sets out the process of appointment and removal as well as qualifications and tenure of office.
Statute spells out the nature and contents of reports to be submitted to the regulator, the periodicity, and M&E process.	MOU and AOA sets out M&E Framework reports required and periodicity.	Statute sets out requirement for financial and narrative reports to be submitted annually. AOA, MOU or Constitution of PBO empowers the BOD to determine the nature, structure and content of the narrative report.
Statute sets out parameters of activities that the PBO can carry out as well as penalties/sanctions for non-compliance.	MOU and AOA/Constitution as well as strategic plan define the focus areas, activities and budget of the PBO.	Statute sets out a generic or indicative set of activities that all PBOs can carry out without excluding those not mentioned.
Statute sets out requirements for receipt of funds from both domestic and external sources as well as the accountabilities required pre and post expenditure.	MOU/AOA or Constitution of PBO together with by-laws set-outs the resource mobilisation plan and they determine sources of income, accountabilities and audit periodicity.	Statute sets out generic principles prohibiting criminality in resource mobilisation (e.g. terrorism, money laundering, tax evasion and illicit financial transfers) AOA, MOA and Constitution of the PBO establishes principles, procedures and ethical parameters for soliciting for and receiving money from various sources.
Impact assessment and shared learning often not a concern of the strict legal position.	Strategic plan and Annual Work Plan and Budget of the PBO includes space for shared learning and impact assessment, including a knowledge management strategy.	Statute requires a generic measure of Administrative and social accountability. The AOA/ MOU and Constitution as well as strategic plan of the PBO sets out all operational and other strategies to ensure financial, economic, social, political accountability.

Conceptually, strong compliance overtones in regulation of all philanthropies are ill-conceived. Hasty or rigid ideologically, state security, IFF or terrorism induced regulation cannot necessarily pre-empt future problems in a sector that has embraced fast-paced technological advances. The responsiveness, efficiency and effectiveness of strict compliance laws in addressing current philanthropy sector specific needs is highly debatable. The temptation to make regulations complicated and all-embracing is always high for non-discerning regulators. The presumption of perfect foresight and genius on the part of - even well intentioned regulators - is a myth.

Regulators seeking to address ethical and governance challenges in the philanthropy sector may enact regulations that unwittingly stifle innovation, motivation and entrepreneurial edge in what is largely a voluntary sector. It is useful to keep in view the fact that the actual process of changing any law once enacted is often long and involved. Ghana, Kenya, Nigeria and South Africa adopted the types of regulations that require philanthropic organisations to comply with the law or explain any failure to do so<sup>34</sup>. This type of regulatory framework is more dialogic and does not shy away from the need to enforce 'compliance' and the notion of adherence that this connotes. It, however, provides limited room for some form of explanation for some types of derogations from the strict letter of the law. In so doing, these countries, in principle, leave some room for flexibility. The annual reports submitted by NPO / PBOs in terms of Ghanaian, Kenyan, Senegalese and South African laws, should contain narrative statements of activities, an indication of resources received and their application and statements on compliance with other mandatory aspects of the regulations. In other words, the law expects NPO / PBOs to provide explanations of what they did to approximate regulatory standards and requirements.

The best practices in Kenya, Senegal and South Africa have arisen from NPOs / PBOs taking the initiative to establish their own accord 'good governance principles, standards and practices' for their self-regulation. These emerging practices point to possible ways and means to strengthen the regulation of philanthropies in the future. It is for this reason that this report recommends a hybrid regulatory framework with a mix of responsive and directory regulations as opposed to entirely peremptory statutory provisions. These directory provisions are equitably combined with non-legislated code of standards, principles and practices that enunciate philanthropic governance and justice tenets.

## General Principles on Regulation of African Philanthropies

There are three general principles under the international and human rights norms and standards cited above regarding the ability of civil society to seek, receive and use resources and practice has derived some specific aspects that flesh out these general principles. Civil society is a core centre-piece for the promotion of inclusive development, sustainable human development, human rights, democracy and rule of law. Therefore, States should create and maintain an enabling legal and policy environment in which civil society organisations can operate freely and without fear or undue restraint.

The first principle is that ability to seek, receive and use resources. This is an integral part of the right to freedom of association and essential to the existence and effective operations of any association. The general derivative principle is that in order for human rights organisations (including philanthropies working on socio-economic justice issues) to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediment, including funding restrictions. Consequently any funding restrictions that impede the ability of associations to pursue their statutory activities constitute a violation of Article 22. Article 13 of the Declaration of Human Rights Defenders states that "everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms (including the rights to development, health, education, social protection and healthful ecology)", emphasis added. Thus International human rights law and standards such as Article 22 of the International Covenant on Civil and Political Rights (ICCPR) categorically recognises and protects access to resources (including fundraising activities) as part of the right to freedom of association. Access to resources is, therefore, deemed important not only for the existence and operational efficacy of associations, but also to the ability to claim and enjoy other human rights and freedoms that flow from the ability to form and operate associations, such as philanthropy.

The second principle is that 'States must allow associations to seek, receive and use foreign funding as a part of their obligation under international human rights law to mobilise resources available within the society as

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<sup>34</sup> See for comparative analysis a discussion of this type of regulation for the corporate sector, King Code III (2013), pp 5-15.

a whole and from the international community'. The principle is that States should not restrict the means of financing of human rights organizations. Instead States are legally bound to allow and facilitate human rights organizations access to funds in the context of international cooperation, in transparent conditions. International human rights law and standards require that, "Any limitation must pursue a legitimate interest and be necessary in a democratic society; restrictive measures must be the least intrusive means to achieve the desired objective and be limited to associations falling within the clearly defined aspects characterising terrorism only". Article 22, para. 2 of the ICCPR states that no restrictions may be placed on the exercise of the right to freedom of association other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

The third principle is that: "Civil society and the corporate sectors should be governed by an equitable set of rules and regulations (sectoral equity)". The principle is that governments must refrain from adopting measures that disproportionately target or burden civil society organisations (CSOs), such as imposing onerous vetting rules, procedures or other CSO-specific requirements not applied to the corporate sector. Further, that States should not resort to tax pressure to discourage associations from receiving funds from abroad. Tax exemption and other privileges for associations should be considered positive examples. In sum, the argument from CSOs is that Companies have been more susceptible to hijack and abuse by terrorist organisations and money laundering syndicates than CSOs. Consequently, the discriminatory treatment of CSOs and the corporate sector is not based on any evidence. There are also arguments to the effect that "NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions and credits".

Overall determinations of appropriateness of restrictions to the right to freedom of association are matters that in practise are resolved by reference to municipal law and the national constitution as read with the directory or peremptory force of the above international law principles. Existing case law suggests that the Courts will apply both the principle and test of proportionality. The test asks whether the proposed restriction on the rights is legitimate, which means that: first the restriction is foreseen by the constitutional provision or applicable international human rights instrument or determined by the court to constitute or server a legitimate democratic purpose; second whether the restrictive measure is suitable to achieving the identified objective or resolving the mischief aimed at; third, whether it is necessary for the accomplishment of the purpose (i.e. whether it is the least restrictive measure available for achieving the purpose in question; fourth the court must decide whether the measure is proportionate (i.e. whether it strikes a balance between the purpose of State and the human rights of individuals and groups in question).

## Conceptualizing the Self-Regulation Option

Self-regulation presumes the existence of an organised sector and consensus within that sector regarding a core set of standards, values and principles. It further presumes trust between the government and the Philanthropy organisations. This relationship of trust with government and measure of self-organisation capabilities makes this approach a possibility. The trans-boundary or cross-border nature of philanthropy makes it difficult to propose total self-regulation of the philanthropic sector. First because donors (Über-rich individuals, arms of foreign governments and trans-national external foundations) may not be allowed by their governing statutes to subordinate themselves to such a structure or process. The likelihood of serious criminality within the sector also requires that sanction of law on some set of behaviours and practices deemed either as criminal or illicit.

Self-regulation is not the same as optional compliance, but rather compliance based on a set of consensually agreed sector principles, values and standards judged by peers within the sector. In practical terms self-

regulation as an approach places a legal obligation upon the governance structures of philanthropies (trustees and boards of directors) to act in the best interests of the NPO / PBO. In following the values, principles, standards and practices, the board or trustees may apply a different practice as long as doing so does not detract from the achievement of the objective of the over-arching values, principles and standards of good governance of philanthropy. The underlying principles of good governance of philanthropy are: effective beneficiary participation; fairness, accountability, responsibility, transparency and socio-economic justice. In the penultimate analysis compliance with values, principles and standards is not the preserve of State bureaucrats and inflexible statutory provisions, but the inclusive and participatory will of stakeholders.

In this report we have suggested a hybrid regulatory regime combining self-regulation elements with flexible directory statutory aspects in view of the huge disparities in power, wealth, resources and information between different types of philanthropies, intended beneficiaries and even African States. Different national contexts also present different challenges, especially regarding the level of development, legitimacy and capacities of the non-profit sector.

### Linking Self-regulation and Statutory regulation

The values, principles and standards of practice that inform self-regulation codes should ideally be derived from domestic laws - and where applicable international and continental best practices and shared values on development financing, social accountability, citizen participation, development effectiveness, social protection and private sector development. In other words, self-regulation does not exist separately from the law of the land nor does it separate the governance of philanthropies totally from statutory compliance.

Self-regulation shifts the compliance burden to the boards and trustees of philanthropies who must ensure that a clear set of values, standards and principles are adhered to. The trustees and boards have a further duty of care, skill, diligence and fiduciary duties.

A cursory analysis of the existing legislation in all seven countries under review confirms the preponderant concern with establishing good governance of NPOs / PBOs. All the laws make provision for NPOs / PBOs to establish governance structures (boards or trustees), have governing statutes, memoranda of understanding, and articles of association, by-laws or constitutions. This constitutive documents are expected to enunciate how the NPO / PBO will be governed; checks and balances on the use of NPO / PBO resources and mechanisms of vertical and horizontal accountability. The laws in existing legislation already delegate to directors/trustees of NPOs / PBOs the duty to ensure compliance with legislation.

Other generic statutory provisions found in different forms in the seven countries and patch work of self-regulation codes and standards help to determine parameters of appropriate conduct by directors/trustees of philanthropies. It is possible - where a trade practice or usage is well established - for courts of law to regard such a code of practice or set of standards as the yardstick for measuring the reasonable standard of compliance within the sector. A failure to measure up to the agreed standard of conduct or the yardstick may render a director / trustee liable at law. The recommendation of this report is that a hybrid system allows for some principles of good, inclusive and accountable governance of philanthropies to be partly legislated and also partly self-regulated by codes of conduct, sector standards and principles. An example of such codes from Europe is the Principles of Accountability for International Philanthropy.

In April 2007, the European Foundation and Council of Foundations published a handbook or Aspirational Tool for International Donors of “Principles of Accountability for International Philanthropy<sup>35</sup>”. The aspirational tool defines accountability for international philanthropies as consisting of four commitments, namely:

- **Upholding the core mission** in a manner that is consistent with the wishes of your benefactors, donors or corporation.
- **Serving the Public good** as defined by national laws and international conventions in your own country and the recipient country.
- **Engaging and Informing your stakeholders<sup>36</sup>** with respect to your intentions and decision-making processes, and provide a mechanism for input and feedback from those affected; and
- **Assuring positive impact** through your grant making and operating activities with respect to the people and communities affected by your interventions.

The Aspirational Tool sets out seven principles intended to guide the *international philanthropic* work of independent funders<sup>37</sup>, namely:

- **Integrity:** Engaging in international philanthropy in a way that is truthful the mission, values, vision and core competencies of the funder. It includes showing genuineness of intentions throughout all aspects (programmatic, operational and financial) of the work and being honest and transparent with stakeholders.
- **Understanding:** Ensuring that work is preceded by research into the political, economic, social, cultural and technological context of the operational field. Tapping into expertise that already exists, including at the local level, and developing a philanthropic strategy that is realistic and appropriate.
- **Respect diversity, autonomy and knowledge:** Avoiding cultural arrogance by respecting cultural differences and human diversity.
- **Recognizing local knowledge, experience, and accomplishments:** Being modest about what you know, what you can accomplish with the resources you have, and what you have yet to learn.
- **Responsiveness (Inform, listen and respond):** Listening carefully to international grantees and partners in order to understand and respond adequately to their needs and realities. Being open and prepared to adjust original objectives, timeline, and approach to the local context and capacity. Resisting the temptation to impose your own models and solutions. Building relationships of trust with international grantees and partners and with communities where you work.
- **Fairness:** Being reasonable and flexible in what you require from your grantees and partners, ensuring that your demands are proportionate to the level, purpose, and nature of your support. Being mindful of the possibility that partners might have limited capacity to deal with multiple funders, and not demand of them undue standards/reports and accountabilities.
- **Cooperation and Collaboration:** Recognizing the centrality of high levels of cooperation and collaboration with other funders and with a variety of actors, including non-governmental organizations (NGOs), businesses, governments, and multilateral organisations. Always striving to work collaboratively in order to maximize resources, build synergies, boost creativity, and increasing learning and impact.



- **Effectiveness:** Assessing whether your philanthropy is effective by engaging in a process of mutual learning with peers, grantees, and partners and demonstrate how your philanthropy contributes to the achievement of your organisation’s mission and the advancement of the public good. Planning for sustainability and committing to staying long enough to be effective.

These principles have resonance with the provisions of existing statutes in the seven countries considered by this study. We would add to these three key aspects, namely:

- **Socio-economic justice:** ensuring that philanthropy adopts a rights-based approach and contributes to realisation of effective and informed agency by the intended beneficiaries, reduces dependency and counters unjust socio-economic and political conditions that reinforce poverty, inequality and underdevelopment.
- **Inclusive, accountable and good governance of philanthropy:** Ensuring that philanthropy reflects mutually agreed national development aspirations, visions and plans as wells adherence to national laws and policies. Where the national laws are hostile to NPOs / PBOs / CSOs following applicable continental and/or international conventions. Ensuring that all stakeholders in philanthropy abide by the highest standards of financial, social and moral accountability. Ensuring that philanthropy re-humanizes its main beneficiaries and empowers them to act with or without external support.
- **Sustainability:** Ensuring that philanthropic investments have a long-term perspective and invest in skills, knowledge and technology transfer in order to ensure sustainability of investments. This requires that there be clear benchmarks and indicators for assessing the performance of philanthropic institutions and progress of your philanthropic activities set dialogically with the active participation of grantees, partners and communities. It also generally requires the creation of a participatory and mutual learning environment. Being prepared to take risks and incubate ideas that might fail. Ensuring regular reflections on the ethical, ideological and broader implications of your philanthropic work and how philanthropy wittingly or unwittingly lend itself in support of certain dogmas and meta-narratives about development, wealth and poverty.

## Specific Country Legal Contexts

Kenya had until the beginning of 2015 ranked highly in terms of philanthropic freedom alongside South Africa and Senegal. The country has very strong infrastructure for civil society organizations (CSOs), a wide range of intermediary support organizations and resource centres. Kenya is also host to some of the continent’s best-known grantmaking organizations and community foundations. It boasts of well-established training programmes and local grant making expertise. Kenyan philanthropic organizations offer a wide range services in wide field of activity, including social justice, social entrepreneurship, service provisioning, environmental services, acute social and humanitarian situations. Kenya – like Nigeria - has in recent times had to deal with the destabilization from the terrorist organization, Al Shabbab. Al Shabbab has carried out sustained and consistent attacks against members of the Kenyan publics. In response to this precarious security situation, the government has sought to tighten its security grips by strangling the financial supply conduits to Al Shabbab.

The adoption by the Kenyan legislature of the new Security Bill in the last quarter of 2014 constituted a serious reversal of the critical gains made in terms of philanthropic freedom following the adoption of the new Kenyan constitution in 2008. The new Security Bill and attendant policy reforms resulted in the arbitrary closure of 250 CSOs.

Senegal and South Africa have the supportive legal environments for philanthropy of the seven countries

under review. This applies to both vertical and horizontal philanthropy, including social impact investments; corporate social responsibility (CSR), social service provisioning, social entrepreneurship initiatives, employment creation and social justice initiatives. Whilst tax incentives are offered for a wide range of philanthropic endeavour, the law in South Africa –for instance- excludes certain activities such in the arts and culture field. It also requires organizations to register as a Public Benefit Organization (PBO) before it can qualify for tax exemption. These pre-conditions might prove onerous for those philanthropic organizations that have no access to expensive legal services and technical expertise or that operate at a community level. South African law also allows cross-border philanthropic endeavour, although it has fairly stringent restrictions aimed at curbing money laundering and illicit financial flows.

The difficulties in countries that have tax exemption and incentive provisions such as South Africa, Senegal, Ghana, Nigeria and Kenya are for horizontal philanthropy structures who due to capacity and other constraints are unable to qualify for or take advantage of the legal incentives.

South Africa and Senegal have very vibrant CSO and philanthropy sectors. Both have witnessed an upward trend towards the establishment of national funding mechanisms. However, over the last seven years both countries have experienced a hollowing out of the CSO sector characterized by amongst others, the following:

- Relative decline in donor funding owing to the global financial crisis.
- Less cohesion within the CSO sector generally, although the unity and collaboration amongst grant making institutions and community foundations has actually increased brain drain to Multilateral organisations, private and public sectors, as well as International NGOs (INGOs) and academia has progressively either weakened or whittled down the sector in Senegal the cost of registration and operational licenses has stifled community based organisations and poses a great threat to philanthro-preneurship.
- A further challenge these two countries is that of corruption in the broader public sector.

Nigeria's legal environment for philanthropy is – on paper - one of the most progressive and supportive of the seven countries studied. Philanthropic organisations are subjected to relatively easy registration processes; they have comparatively light annual reporting requirements; have freedom to choose and establish their governance structures; the law provides for tax exemptions and the right to receive foreign funding as well as to engage in commercial activities. In general Nigerian Law provides for both freedoms of Association and Assembly, thus guaranteeing philanthropic organisations the right to engage in a wide range of philanthropic initiatives, including social justice and policy issues, humanitarian interventions and philanthro-preneurship (Philanthro-capitalism).

As the most populous country in Africa, Nigeria has historically faced huge challenges with both public and private sector corruption. Most recently with the advent of Boko Haram, Nigeria has had to contend with the added menace of terrorism. Thus Nigeria's challenges and opportunities for philanthropy require a clear appreciation of both the historiography of development governance and this recent phenomenon of a country under siege. Nigeria's CSO sector flourished in earnest in 1999 in the period immediately following the country's return to democratic civilian rule. The bulk of CSO endeavour was aimed at ensuring greater transparency in the extractive / oil sector, responding to instances of State incapacity and ineffectiveness in the provision of basic service. The philanthropic sector that emerged in this context thus assumed a very positive public image. With time, Nigeria recorded the highest number of Impact investment initiatives, CSR and Corporate Foundations. Nigeria's mega-rich have also been at the fore-front of cross-border philanthropy in Africa and cases in point are the Tony Elumelu, Dangote and Danjuma Foundations.

In Senegal, Nigeria and South Africa the legislative and regulatory framework makes special provisions for the needs of Philanthropic organisations or gives not-for-profit organisations special advantages such as: significant tax deductions for business or individual contributions, significant tax exemptions for Philanthropic contributions, open competition among CSOs to provide government-funded services, etc.

Legal reform efforts at this point are primarily a local NGO advocacy effort to reform or fine-tune taxation laws, procurement processes, and permissible activities. Local and comparative expertise on the NGO legal framework exists, and legal services and materials are available.

In Kenya and Ghana there Mixed Positives and Negatives in Evolving System. Philanthropic organisations have little trouble registering and do not suffer from state harassment. They are permitted to engage in a broad range of activities, although taxation provisions, procurement procedures, etc. may inhibit the operations and development of the philanthropic sector. Existing NGO legislation has not kept abreast with developments within the philanthropic sector. Non-Profit entities are not allowed to engage in revenue raising and commercial activities. As such philanthropic organisations are not able to bid for the provision of goods and services to national or local governments due to rigid procurement rules and standards. Focus of local and national advocacy is to change national legislation and local government bylaws to address basic tax and fiscal issues for philanthropic organizations. The legal environment is still characterised by definitional confusion and contradictions as to what constitutes philanthropy. Legal reform is needed to clarify the remit of work and organisations that can be considered as philanthropic.

In Egypt, Angola and most recently Kenya as well, philanthropic space is significantly constrained or shrinking. The legal environment severely restricts the ability of CSOs and / or philanthropic organisations to either operate, partly through confusing or restrictive nature of legal provisions (and / or their implementation), or government hostility towards, suspicion and harassment of CSOs. A recent phenomenon has been the catch all provisions of security legislation meant to curb the activities and financial dealings of suspected terrorist organisations in countries like Kenya and Egypt. The net effect of these blanket provisions is to undermine in a significant way philanthropic freedom in a manner inconsistent with what can be considered as reasonably necessary for the maintenance of law and order in a democratic society governed by the rule of law.

## 9. FINANCIAL IN-FLOWS TO AFRICA AND THE CHANGING FACE OF PHILANTHROPY

ODA and investment flows from the developed world to Africa have on average increased between the years 2010 to 2014. However, the most remarkable growth areas have been in remittance flows and intra-African trade figures. The 2013 Global Philanthropy Index observes an increase in the private financial flows of selected emerging economies to the developing world. Through partnerships with philanthropic institutions in Brazil, China, India, and South Africa (BRICS), the Global Philanthropy Index have measured and reported on BRICS' government aid, philanthropy, remittances and private investment to developing countries noting a marked increase in total economic engagement with the developing world. They further observe that the types of philanthropic programs and the organization of the philanthropic infrastructure in the BRICS countries has grown in sophistication and modus operandi<sup>38</sup>. They note that out of the total financial flows from developed to developing countries, over 80% are private. Government aid, at less than 20%, is now a minority shareholder, the opposite of 40 years ago. The growing elite of the "BRICS" economies are now engaging in overseas philanthropy and government aid. They are being joined by other countries such as Turkey, and Mexico, whose overseas private aid flows are also growing.

With regard to all countries' financial flows to the developing world, after a substantial rise from 2009 to 2010, they held steady in 2011. As some countries continued to recover from the global economic crisis, others adopted austerity measures, which has resulted in little change in both private and government flows. In 2011, private capital investment, philanthropy and remittances from the 23 developed donor countries who are members of the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development (OECD), amounted to \$577 billion, holding steady from 2010. These combined private flows of investment capital, philanthropy and remittances were over four times larger than official flows in 2011. Thus, over 80% of all DAC donors' total economic engagement with the developing world is through private financial flows.

Private capital flows remained the largest financial flow from developed to developing countries in 2011, amounting to \$322 billion. Total remittances from all DAC donors to the developing world were \$196 billion, a slight increase from \$190 billion in 2010. Total philanthropy from all DAC donors was \$59 billion in 2011. While poverty is still of huge concern throughout the world, many nations have prospered economically over the last 30 years, and we are seeing these results in the 21st Century. In fact, the OECD reports that over 80 countries have doubled their per capita growth rates in the 2000s, as compared to only 12 countries doubling in the 1990s. Africa, a continent with some of the poorest people in the world, has shown some of the fastest growth.

The OECD reports that the continent grew on average 5% in 2012. Furthermore, out of the ten countries that experienced the fastest growth in 2012, six were in Africa. The World Bank reports that as poverty is decreasing, and countries in Sub-Saharan Africa are expected to reach targets established by the Millennium Development Goals soon after 2015, presuming that economic growth and domestic reforms continue. Some health indicators are showing improvement already. For example, under-5 mortality and maternal mortality have both dropped by about 40% from 1990 to 2011. As growth continues, emerging economies are beginning to take on new roles including engagement with other developing nations. While various nations are considered emerging economies, Brazil, China, India, and South Africa were selected for an in-depth evaluation of their emerging philanthropy and government aid to the developing world.

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<sup>38</sup>See generally reports of Comunitas and Grupo de Institutos Fundações e Empresas (GIFE) in Brazil, the China Foundation Center, the Sampradaan Indian Centre for Philanthropy, and Charity SA; See also opinion pieces in the 2013 Global Philanthropy *Index* by Dr. Pradeepta Kumar Nayak, the Executive Director of Sampradaan, writes about philanthropy in India, and Shelagh Gastrow, Executive Director of Inyathelo: The South African Institute for Advancement, provides her insights on South African philanthropy.

The involvement of BRICS nations - and arguably both Kenya and Nigeria as well - in foreign assistance and investment, through government aid, philanthropy, remittances, and private investment has become widely accepted, and the OECD has started to report estimated government aid flows for these countries. In 2011, Official Development Assistance (ODA) from Brazil, China, India, and South Africa amounted to \$3.7 billion. While the OECD reports these figures as “ODA-like flows,” there is still debate on whether these values can be counted as ODA since the countries do not abide by strict OECD definitions of ODA. According to World Bank data, remittances from these countries to developing countries amounted to \$14.2 billion in 2011. Foreign direct investment is estimated at \$88.0 billion based on data from the International Monetary Fund.

The OECD reported that South African ODA amounted to \$95 million in 2011. While South Africa has been involved in providing development assistance to developing countries for 15 years, it only decided to establish a centralized Agency for this purpose in 2013. Thus, until 2013, South African aid was fragmented and distributed by various organizations, such as the African Renaissance Fund (ARF), government departments such as defence, education, and foreign affairs, and other government agencies, including the Development Bank of Southern Africa. The recently created South African Development Partnership Agency seeks to solve the historical fragmentary approach by providing more complete and coherent information on South Africa’s international aid.

The majority of South African loans and grants have gone towards peacekeeping, education and public sector reforms. Since 2001, South Africa has consistently sent missions and sponsored projects to promote peaceful and fair elections in countries such as the Democratic Republic of Congo, Zimbabwe, and Burundi. South Africa has also started to focus on long term development issues, becoming involved with African infrastructure projects. South African aid is largely focused on other African countries, however, it is actively involved in South to South cooperation agreements within BRICS, as mentioned above.

This context of an increasingly confident set of South-Global Powers and a renascent Africa as well as the evolving global compact on the Post-2015 development Agenda will enable the establishment of national commitments that have both domestic relevance and global support. The Post-2015 development Agenda would only be meaningful if it includes the issues of: national universal public services; national social protection floors and full employment as key goals for the global community<sup>39</sup>. The aspiration amongst African leaders to maximize the benefits of integration must be accompanied by a realistic desire to minimize the social, political and environmental costs and insecurities associated thereby. There is need to open both global, regional and national policy space for the achievement of the goals of sustainable and also for States to determine approaches for creating sustainable local and national economies while providing context-sensitive quality social services and protection.

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<sup>39</sup> UNDP 2014, *Infra.cit.* pp.118

## 10. CONCLUSION

While African philanthropy is growing in leaps and bounds, the national policy and regulatory context has significantly lagged behind. Policy and legislative reforms are required to enable increased contribution of philanthropy to sustainable human development; domestic resource mobilisation and broader economic structural transformation in Africa. Such reforms would among other things, serve to catalyse increased social enterprise and impact investing; support to existing organisations and associations; and create an ecosystem that incentivises partnership and collaboration between community based associations, small private foundations and big capital investors for instance. National governments should play a critical leadership role by guiding the process of multi stakeholder development of national philanthropy strategies, policies and regulatory frameworks. Inclusive and accountable governance of philanthropy requires dialogue approach to regulation amongst all stakeholders. It also requires a set of shared values, principles, standards and practices enforced through flexible self and statutory regulation processes and procedures.

In the short term, African regional and national players could:

- Do a comprehensive scoping of the different types of actors in the field of philanthropy; their developmental impact and contribution to social wellbeing (both financial and non-financial). In this process, also assess their actual potential contributing to a wide range of social and economic indicators including domestic resource mobilisation, augmenting household income, savings, social protection and reduction of poverty and inequality.
- Create continental, sub-regional and national multi stakeholder philanthropy forums to allow for dialogue and collaborative action between traditional philanthropic organisations local leaders, professional associations, CSO platforms, researchers and academics, HNWI and diaspora nationals involved in philanthropy. These forums would help to define the parameters of strategies, policies and appropriate regulations that capture the concerns and interests of all stakeholders.
- Harmonise, synergize and facilitate increased collaboration between and amongst the various legislative focal points for philanthropy; impact investing; corporate social responsibility and social enterprise generally. The idea is to create one stop shops for the equitable regulation of philanthropic endeavours, without necessarily destroying the notion of differentiated responsibilities and accountabilities. As noted in this report, the regulatory field in all the seven countries studied is fragmented and the access to and availability of central information and data grossly uneven across the sector. Part of the process of strengthening synergies, harmony and coordination within the sector should include creation of information, knowledge, innovation and data hubs for the sharing of best practices in policy regulation and philanthropic practice. Those could be both virtual platforms and physical offices. In Senegal, for example, the government created a Presidential Investment Council (CPI) charged with the responsibility of identifying and addressing constraints faced by local business, with the goal of increasing private sector investment, contributing to sustainable economic growth and poverty reduction. The CPI engages international and domestic investors, policy makers, entrepreneurs to formulate and implement policy reforms.

The UNDP (2014) notes that CPI's advocacy work contributed significantly to the lowering of Senegal's corporate tax rate from 33 percent to 25 percent. Further, that CPI has developed recommendations to create a Senegalese Impact Investment Fund. Related to the above, African policy makers should support the development and official recognition of ideas, dialogue and



networking platforms for African philanthropy at the continental, sub regional, national and local levels. This requires a close collaboration between continental bodies (AUC, RECS, ECA, AFDB); African Corporations; CSOs; Central Bank Governors; Tax Commissioners; Universities and Business School Networks. This should build on the already ongoing work such as that led by the African Grant Makers (AGN); Southern Africa Trust (The Trust); East Africa Grant Makers Network; African Women's Development Fund (AWDF); Urgent African Fund for Women; the Aspen Network for Development Entrepreneurs (ANDE); to mention but a few.

- Effective and progressive regulation of modern philanthropy requires some measure of public funding to complement incubators, accelerators and innovation hubs for early stage philanthropreneurs, impact entrepreneurs and community empowerment with resources to develop and pilot ideas, products and business models.

In the medium term, regulatory reforms should enable African States and policy makers to:

- Address concerns with high risks associated with impact investing or so perceived within national and regional financial services sectors. Owing to paucity of data and the fact that both traditional and new philanthropic organisations are neither publicly listed nor rated, most financial analysts categorise the sector as a high risk to capital. Public funding helps to decrease these perceptions of risk.
- Utilise public sector initiatives to incentivise both mainstream and new forms of philanthropy; by – amongst others – providing seed capital, financial intermediation. Public agencies can co-invest in funds and thereby improve the risk return profile. Two examples from South Africa and Ghana illustrate the possibilities. The Business Partner Limited Fund in South Africa was created as a joint venture between the South African Private Sector and the government. The fund's estimate value in 2013 was US\$ 333 million. It provides debt equity and quasi-equity to SMEs, notably underserved ones such as those in the rural areas or those led by women. The Ghana Venture Capital Trust Fund (GVTF) set up in 2004 with the objective of "providing financial resources for the development and promotion of venture capital for financing for SMEs". By 2013, GVTF had invested about US\$17 million in approximately 50 SMEs across key sectors such as education, healthcare and agriculture creating 1000 direct jobs and nearly 3000 indirect ones. GVTF also provides technical assistance to SMEs to become more investment ready for commercial capital.
- Public financing could take the form of convertible grant funding for innovative philanthropreneurs and nascent philanthropies. If the initiatives succeed the grant can be converted into a loan, or equity have – thus creating a sustainable financing mechanism. The regulatory frameworks must establish the levels for Government to establish such capital as well as clear criteria for qualification by individuals and organisations for pre-seed, pilot stage, or research and development requisite for improving the business models, thus positioning them to potentially attract larger private investment. The rationale for such regulation and ultimate justification for public sector financial support and other incentives is the realisation that the institutions are pioneering new ways of doing philanthropy and new commercial approaches to social or environmental impact investing.
- The new forms of social enterprise and impact investing could be supported through micro-infrastructure development in the areas of operation as well as strengthening state-civil society and market relations. Making funding available for local impact investment side by side with micro-infrastructure ensures that local communities doubly benefit. Regulators can either fluctuate or



impede the growth of social enterprise and impact investing by restricting capital from flowing into impact investments. For example, most African pension funds cannot invest in unlisted assets (including private equity and venture capital funds). This is the case in Nigeria whose pension funds are not allowed to invest in private equity. Ghana, on the other hand removed such restrictions and thus enabled the Ghana national social security fund to diversify its portfolio, investing small percentage in private equity. Incentives are not enough, regulators have to introduce mandatory requirements for institutional investment to consider social and environmental impact when making investment decisions. For example, regulation 28 to the South African Pension Fund Act, required public pension funds to take into account environmental, social and governance criteria when making investments. Thus regulation applies to approximately US\$200 billion and in the long term is likely to have significant results.

- Modern regulation of philanthropy must also serve to improve the operational environment by reducing red tape, starting with registration and set up requirements. Simplification of the registration process will make it easier for more and diverse actors to enter the sector. Elsewhere in this report we have recommended establishment of one-stop-shops for regulatory compliance agencies for philanthropy, creating dedicated access for community based associations; women and youth. The one-stop-shops would need complementary reforms to NPO / PBO registry and streamlining of procedures to establish a new PBO, access to support and context specific information; creation of outline technical support facilities and removal of barriers to cross-border, intra-African philanthropy. Tax benefits for impact investors who establish community ownership schemes is a good form of public-private partnership. In South Africa, the Enterprise Development Programme awards companies that spend 3 percent of profits for enterprise development (e.g. training, support, equity and debt finance) with more than ZAR 5 million in turnover as well as 15 points in the Black Economic Empowerment Scorecard, giving them increased access to government business opportunities. Tax relief for targeted social investments consistent with national development plans is both good law and good economics.
- Social enterprise, venture philanthropy, CSI and impact investing in Africa as well as the methodologies they use are relatively new in all seven countries studied. As a result the development of appropriate regulatory standards for reporting and quality control will require significant research and development and not just an inorganic fixation into the African context of borrowed models. This will require a close collaboration between African governments; RECs; Professional Associations of Bankers; Micro-financers; Accountants; Lawyers and development experts. Impact investors' domain of work is in often highly regulated sectors (including public services and financial services). It is important that in designing regulations and incentives, the policy makers should clearly identify social and environmental policy areas where impact investment can have the greatest contribution to national development in each of the seven countries. The regulatory framework should be designed to enable philanthropreneurs and impact investors to assess the impact investment market.
- Strengthening existing scalable Public-Private-People Partnerships should inform State intervention in regulating 'new' forms of philanthropy. For example, The Business Partner Limited Fund in South Africa was created as a joint venture between the South African Private Sector and the government. The fund's estimate value in 2013 was US\$ 333 million. It provides debt equity and quasi-equity to SMEs, notably underserved ones such as those in the rural areas or those led by women. The Ghana Venture Capital Trust Fund (GVTF) set up in 2004 with the objective of "providing financial resources for the development and promotion of venture capital for financing for SMEs". By 2013, GVTF had

invested about US\$17 million in approximately 50 SMEs across key sectors such as education, healthcare and agriculture creating 1000 direct jobs and nearly 3000 indirect ones. GVTF also provides technical assistance to SMEs to become more investment ready for commercial capital.

Public financing could take the form of convertible grant funding for innovative philanthropreneurs and nascent philanthropies. If the initiatives succeed the grant can be converted into a loan, or equity have – thus creating a sustainable financing mechanism. The regulatory frameworks must establish the levels for Government to establish such capital as well as clear criteria for qualification by individuals and organisations for pre-seed, pilot stage, or research and development requisite for improving the business models, thus positioning them to potentially attract larger private investment. The rationale for such regulation and ultimate justification for public sector financial support and other incentives is the realisation that the institutions are pioneering new ways of doing philanthropy and new commercial approaches to social or environmental impact investing.

## Recommendations

In light of the foregoing the first set of recommendations pertain to knowing and understanding the field of philanthropy and the critical actors, namely:

- There is need to scope the range of national and transnational actors in the field of philanthropy, their interests, motivations, needs, contributions, perceptions and legal status.
- Creating an official process of engagement and dialogue between the African State, RECs and AU, philanthropists regarding the issue of regulation through credible, bias-free and non-political platforms. Utilize such platforms to identify areas of convergence and disagreement as well as concern. Set up mechanisms for resolving identified concerns as a prelude to developing a consensually agreeable regulatory framework or set of standards.
- Expand public support for philanthropy (including through targeted tax and other incentives; public financial support; creating investment opportunities within local economies and local government areas; training and skills development, especially for community-based philanthropies.
- Promote policies that encourage African working and middle classes to contribute to philanthropy, social impact investing and other philanthropic initiatives, including amongst and by non-resident nationals (Diasporans). Tax and other incentives for care work, volunteerism, self-donation, contributions to causes would serve as great stimulants. However, it is important to note that most Africans do not engage in philanthropy for the tax benefits, their engagement arises more out of their social or moral consciousness.
- Review and upgrade incentives that are offered to individuals irrespective of class that give in-kind or cash towards philanthropic causes.

Ultimately, there is need to develop – through a collaboration by AGN, AUC, RECs, Corporations, etc. – a common framework or integrated reporting standard of financial and social impact assessment. This should be underpinned by a culture of open governance and sector wide collaboration and information sharing and cooperation. The key values that should inform regulation of African philanthropy, philanthropy by Africans and philanthropy in Africa are:

- Paradigm shift and transformation readiness: Implied in this, are the corresponding capacities to manage an increasingly radical departure from ‘vulgar charity’ as well as the need to modernize traditional African philanthropy without mutilating its core values.
- Commitment to effective, efficient and developmental philanthropy: This requires a commitment by all stakeholders within the sector towards retooling the sector to serve the agreed objectives and priorities of national development.
- Centrality of development impact, performance management and results: The focus of African States in regulating the philanthropic sector should not be the rote compliance with bureaucratic processes, procedures and legal rituals but ensuring delivery of development results in an efficient, effective, inclusive, transformational and ethical manner. Equally so, self-regulation in this context transcends rigid assertion of private organizational mandates and tedious adherence to internal governance processes, but the transformational value of philanthropy within local economics and the broader society, in other words, the broader social good.
- Strengthening resilience and enhancing African Human and Institutional Capacities: Philanthropy must not reinforce inequitable power imbalances in society and the underlying structural spatial economic, social, gender and political inequalities in society. It must be guided – through appropriate policies and regulations – towards empowering local communities to become masters of their own destinies, self-determination and self-develop. The starting point of ensuring full participation of citizens in analysing their problems; conceptualizing their solutions and implementing their visions of transformation.
- Equity, Equality and Management of Diversity: In a sector currently dominated by entrepreneurs and private foundations; HNWI and foreign capital, it is useful not to lose sight of context specific role and importance of community based philanthropy; self-giving and volunteerism. The regulatory framework must cater for these varying multi-stakeholder interests, roles and responsibilities, by providing differentiated benefits, incentives and support to ensure compliance with both general and specific standards and principles of good governance of philanthropy.
- African Ideas, Agency and Innovations. Power and domination in the field of philanthropy is often through hegemonic ideas that imposed alongside the flows of capital or technical assistance from external sources. The regulatory framework must embed in itself the prioritization of data for the development, evidence based and regulation of philanthropy. As a corollary to this, local foundations and community based associations must be empowered to tell stories; document their experiences; manage knowledge; share experiences and develop an evidence base of what works best as well as innovations in the sector.<sup>40</sup>

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<sup>40</sup> Africa’s Capacity Development Strategic Framework (CDSF), 2012 Africa Union and Nepad Agency

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## ANNEXURE 1: COMPARATIVE INDEX OF TRANSFORMATIONAL & DEVELOPMENTAL PHILANTHROPIC FREEDOM<sup>41</sup>

### Southern Africa Trust Country Case Studies

SECTION	ANGOLA	EGYPT	GHANA	KENYA	NIGERIA	SENEGAL	SOUTH AFRICA
<b>I. Formation, Registration, Operations &amp; Dissolution of Philanthropies (e.g. Stokvels, SACCOs, Community Foundations, Individual Foundations, Corporate Foundation, Commercial Philanthropies, Venture Philanthropies &amp; Impact Investment Schemes)</b>							
1. Is there a National philanthropy Strategy and policy that defines the strategic and developmental value of Philanthropy to national and local economic development & also defines the premise of collaboration between the State, CSOs, Business, Academia and Communities?	Angola has one <i>public and foreign</i> fund, namely the World Bank-financed and -initiated <i>Social Action Fund (FAS)</i> in the Ministry of Planning. Then, there are a number of <i>private and domestic</i> funds, financed by private Angolan companies and donations (sometimes also by public money).	There is no unified government approach, toward philanthropy in Egypt, each ministry's officials exercise considerable discretion in the regulatory treatment of their sector.  The government however launched a national center for corporate responsibility in	Ghana does not have a National philanthropy Strategy and policy which has clear strategic and developmental goals of philanthropy. The country however has civil society organisations legislative frameworks which also govern philanthropy.	Kenya does not have a philanthropic strategy but has a complex regulatory framework which provides substantive and procedural statutes, common law rules found in case law and administrative practices.	Nigeria does not have a national philanthropy strategy. A significant part of the philanthropic work is done by High Net worth Individuals independently. There is however a central reporting arm of the government called the Corporate Affairs Commission (the	Senegal does not have a philanthropy strategy even though it has several frameworks that overlap on philanthropy like the Investment Code of 2006, the Investment promotion Agency and the Civil and Commercial Obligations Code of 1968.	The South African Development Partnership Agency (SADPA) of 2014 was set up to coordinate various state development aid efforts and provide an interface with South African civil society and/ or philanthropic initiatives in the area of international aid. However, the country does not

<sup>41</sup> Matrix adopted from the Hudson Institute Philanthropic Freedom Assessment tool to suit SAT Report findings and rationale

	Besides this, Angola does not have a national philanthropy strategy	2009 and introduced the Environment, Social and Governance (ESG) Index to incentivize sustainable business practices.	Philanthropic activities are guided by the same legislative framework as civil society organisations (CSOs) and non-governmental organisations (NGOs).		“Commission” or “CAC”)	Philanthropic activities are guided by the same legislative framework as civil society organisations (CSOs) and non-governmental organisations (NGOs).	have a National Philanthropy Strategy with clear goals
2. To what extent can individuals, groups, corporations form and incorporate Different Types of philanthropic organisations?	The law provides for formation of philanthropic organizations but the rigorous vetting process delays and sometimes deters the registration of new organisations. Often new registrations are denied due to several factors and mostly their intended objectives.	Article 75 of the 2014 Constitution of Egypt states that “Citizens shall have the right to form non-governmental associations,” It further states that such associations and foundations, “have the right to practice their activities freely, and administrative agencies may not interfere in their affairs or dissolve them.” What then follows is a raft of claw	The Ghana Companies Act of 1963 and the Trustees Act of 1962 and the Professional Bodies Registration Decree of 1976 provide the legislative framework for individuals, groups and corporations to form different types of philanthropic organisations. Largely, the law is permitting for these	The 2010 constitution of Kenya provides for civil liberties and rights which permit anyone to form philanthropic organizations. The recent legal amendments such as the 2014 Kenya Security Laws Amendment Bill provides for thorough vetting of individuals wanting to form an organization and the government through the PBO	There is no statutory restriction on those who wish to join together for any kind of purpose, provided that the purposes for which the group is formed, or the methods that it uses are not themselves illegal	The legislative frameworks of Senegal provides a liberal environment for NGOs to define their goals, their internal governance structure, and their activities provided that these are not contrary to the national constitution or a violation of the Criminal Code	The law provides for individuals, groups and corporations to form philanthropic organizations without difficulties.

		back clauses and pre-conditions	aforementioned groups to form philanthropic organisations.	Regulatory Authority can use its discretion not to allow registration. Already in 2015 some existing organisations have been de-registered.			
3. To what extent are Philanthropies free to operate without excessive government interference, supervision, or surveillance?	State supervision and surveillance of social justice focused philanthropy is beyond what is considered reasonable in a democratic society. In principle, the Angolan Constitution provides for the freedom of association. But in practice these freedoms are not a reality. The country has been classified as not free by Freedom house while Transparency International and	Article 18 of the 2014 Egyptian Constitution provides for philanthropies to operate without excessive government interference. However, NGO Law 84/2002 takes away most of these rights by allowing the state to keep surveillance and supervision excessively.	The AfroBarometer of 2008 considered Ghana to be a country that is not overly repressive through its laws. As such, philanthropies are relatively free to operate without excessive government interference or surveillance. The only requirement is on annual statutory reports of progress of work and finances	Article 19 of the <i>National Intelligence Service Act</i> urges the Director General to order mass surveillance of online communication for purposes of national security	Due to the security situation in Nigeria, the country is on high alert therefore provides relatively more supervision to all sectors including philanthropic organizations' operations	Philanthropies are provided with relatively free environment to operate without interference and excessive surveillance from the government.	The South African Government has provided the legislative and policy environment for the operations of philanthropic organisations therefore there is no excessive surveillance and supervision of the operations of the organisations save for mandatory statutory reports of programmes and finances as well as FICA related reports.



	the World Bank considered it as having oppressive laws for civil society organizations.						
4. Are Non-resident nationals and Diasporans allowed to form and register philanthropies on the same terms as resident nationals?	Nonresident national and Diasporans are not allowed to form philanthropies without locals unless if they will be registering as international NGOs a process which will go through the <i>Unidade técnica de coordenação da ajuda humanitária</i> (UTCAH) which is responsible for registration and monitoring of NGOs	<p>Foreigners must be legally resident in Egypt in order to qualify. Foreign juridical persons must be established in Egypt or authorized to conduct their activities in Egypt, otherwise they cannot be Founders</p> <p>Furthermore, if strictly applied, the NGO Law 84/2002 does not permit nonresident nationals and diasporans to register philanthropies on the same terms as resident nationals.</p>	<p>There are no restrictions on the kind of persons that can be directors of CSOs.</p> <p>In essence the existing laws do not bar nonresident nationals and diasporans to form and register philanthropies</p>	These will be subject to clearance first before they are allowed to register. The clearance process is with both the PBO and the state security agencies	Philanthropic organizations can be set up by both nonresident Nigerian citizens and foreigners without any difficulties as long as the trustees are cleared for terrorism	The Civil and Commercial Obligations Code of 1968 provides for nonresident nationals and diasporans to form and register philanthropies with the Directorate of General Affairs prior to implementing activities.	This depends with the type of organization that one will be trying to form. South African nonresidents and diasporans are allowed to form philanthropic organisations as long as they have addresses in SA

<p>5. What is the extent of traditional &amp; social media appreciation of and reporting on the developmental and transformational value of Philanthropy</p>	<p>The Angolan <i>Law to Combat Crime in the Area of Information and Communication Technologies and of information Company Services</i> criminalizes the use of the internet and mobile phones to send information, photographs, or text messages without the prior written consent of those mentioned in the contents. Reporters without Borders and Freedom house rank Angolan press freedom as very restricted. As such reporting on development and transformational value of philanthropy is primarily controlled by the state and does not receive the attention it could</p>	<p>Due to the rule of the securocrats, there is a lot of media censorship therefore its reporting on developmental and transformational value of philanthropy has not been documented</p>	<p>The Mo Ibrahim Foundation 2011 report, considers Ghana as an open society with available platforms for open dialogue both using social and traditional media. The extent to which the media has been used to report developmental and transformational value of philanthropy has not been systematically documented.</p>	<p>New laws like the <i>Publication of Offending Material within the Prevention of Terrorism Act</i>, especially Section 30(A)(3) might criminalize legitimate expression, such as satirical art, writings, poems or songs about political or social justice matters. This means that there is a lot of censorship of what the media can report on in issues of philanthropy and on the reports done, they are not produced in a systematic manner that can chronologically see through an issue</p>	<p>According to the provisions of the constitution, media has freedoms but due to the volatile nature of the country, there is substantial censorship. As pertaining reporting on the developmental value of philanthropy, this has not been systematic and collaborated.</p>	<p>The constitution provides for media freedom and there are no overly repressive mechanisms even though there have been disparate incidences of violation of media. What however is required is to provide the media with direction on reporting the developmental and transformational value of philanthropy in a systematic way</p>	<p>Both traditional and social media is not censored excessively. There is media plurality not all owned by the state or partisan to the state. There however is no coordination and systematic coverage in how the media reports on development impact of philanthropic work.</p>
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	have there been media freedom						
6. Are there effective intermediate support organizations (ISOs) and Financial Intermediation Agencies (FIA), e.g. Angel Funds, preferential banking facilities and State public benefit funds to support philanthropy?	Through the District Master Plans, each District receives close to US\$ million implementation of developmental initiatives. This is however state initiated and run. Philanthropy is not always guaranteed to be a priority though the approach assists the districts in setting their own development agendas.	The Global Financial Inclusion Database (Global Findex), noted that Egypt has among the worst levels of financial inclusion of the poor.	The Venture 11 Capital Trust Fund (VCTF) along with Ghana Institute of Management and Public Administration (GIMPA) have established the Centre for Impact Investing, which has funding from the Global Impact Investing Network (GIIN), Rockefeller Foundation, Tony Olumelu Foundation, VCTF and GIMPA. The Centre for Impact Investing, housed at GIMPA, seeks to provide research, advocacy and support services by influencing	<i>Harambee</i> is a Kenyan tradition of community self-help initiatives and activities that include, amongst others, fundraising and development activities. It is entrenched in the culture of the people hence organic and effective when functional. <i>Harambee</i> is however under the threat of a new proposed law that is impending	Since the government is run in a federal system, each state initiates its own intermediary support but currently there is no empirical evidence of these at national level.	The Microfinance Act (2004) and the Law Governing MFIs (2008-47) promote the sustainable access to micro-finance services by marginalized communities and micro-enterprises. The extent to which these instruments are a reality still needs to be investigated especially for the remote and rural areas outside Dakar.	There is the National Stokvel Association of South Africa (NASASA) which has in excess of 811000 stokvels around South Africa with a membership of 11.4 million individual <i>stokvel</i> members

			government policy in favour of impact investing activities, advocating for incentives to encourage private sector impact investing, drive public awareness and play a leading role in shaping impact investing activities.				
7. To what extent does the country have ONE-STOP SHOP regulatory centers that provide registration and reporting requirement information for different types of philanthropies	The country does not have one stop shop regulatory centers. Registration process starts at local level and a certificate of registration is obtainable from the Ministry of Justice or a Provincial Commissioner. The Unit for the Co-ordination of Humanitarian Aid (UTCAH) is however the government agency mandated	There is no one stop shop regulatory center that provides registration and reporting requirements information, each government ministry official exercises their own discretion.  Overall, the sector is controlled by the NGO Law 84/2002	The registration and regulation of philanthropies is scatter in different legislations that are overseen by different government departments.	The country does not have a one stop shop regulatory center. There are more than 10 laws that provide for registration of philanthropies in Kenya	The Companies and Allied Matters Act, Cap. C20, is the principal legislation that regulates Corporate entities registered in Nigeria and the Corporate Affairs Commission (the "Commission" or "CAC") is the supervisory regulatory body for registered corporate entities.	There is the "One-Stop-stop" service of Senegal's Investment Promotion Agency (APIX) for registration and obtaining APIX, in the Ministry of Finance, and can also assist in securing licenses to operate in Senegal. The Directorate of General Affairs (DAGAT) in the Ministry of Interior provides one stop shop services for philanthropic organisations.	The Directorate of Social Development (DSD) is the regulatory body charged with vetting and processing applications for Registered Non-Profit Organisations under the NPO Act.

	to monitor the work of NGOs.						
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<p>8. To what extent is there government discretion in shutting down Philanthropies? Are there effective appeal remedies available to affected philanthropies?</p>	<p>Through the revised Law of Associations (14/91) and the related decree (Decree 84/02), government has all the powers at its discretion to shut down philanthropies. There is little room for appeals as the UTCAH under the Ministry of Social Affairs is a partisan body.</p>	<p>The NGO Law 84/2002 introduced compulsory registration of NGOs and empowered government and Egyptian security agencies to dissolve groups and refuse license to new groups they deem to be a threat to national security. The Law also allowed State officials to inspect premises of any group engaging in NGO work. This is despite that fact that Article 37 of the national constitution or provides for independence and protection of cooperatives by the state.</p>	<p>The government has provided leeway for philanthropies to operate under the earlier highlighted frameworks. Shutting down and appeal processes are outlined in those legislative frameworks.</p>	<p>Due to the terrorism scare, the promulgation of the Statutes Law Miscellaneous (Amendments) Bill of 2014 and the Kenya Security Laws Amendment Bill give wide discretionary power for the PBO Regulatory Authority to impose terms and conditions for granting certificates of registration.</p>	<p>The President may issue an order to prohibit a CSO that is “dangerous to the good government of Nigeria or of any part thereof.”</p>	<p>The Directorate of General Affairs of the Ministry of Interior has the discretion to shut down an NGO or Association that is deemed to be in violation of Articles 4 and 5 of the national constitution. Also law 79-02 of 1979 provides dissolution of any association, registered (and even unregistered) whose activities “harm public order”.</p>	<p>There seems to be no untamed discretion by the government in shutting philanthropic organizations. Because of the legislative environment set, there are clear parameters for shutting down of any philanthropic organisations with room for appeals.</p>
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**II. Domestic Tax and Fiscal Issues**

<p>9. To what extent are national and local fiscal policies definitions of “philanthropy”, ‘charity’, ‘public benefit’ inclusive, if at all?</p>	<p>The understanding of philanthropy at a formal level is in two parts, firstly as the work of NGOs which means all philanthropic institutions are enveloped in that category. Secondly philanthropy is linked to be transnational oil companies’ corporate social responsibility which contribute significantly to the country considering their humongous profits.</p>	<p>Philanthropy in historical Egypt is both an act of charity, social obligation and conceptions of being and social solidarity. Fiscal policies’ definitions however are encapsulated in the NGO Law 84/2002 which recognises two main types of NGOs, namely: Community Development Associations (CDAs) and Civic Foundations (CFs).</p>	<p>The national and local fiscal policies adopted the legal conceptual understanding of philanthropy as encapsulated in the Ghanaian law which borrowed heavily from the US and British legal systems</p>	<p>It seems the country has not adopted organic definitions in its fiscal policies. The fiscal laws speak to formal philanthropy while there has not been much encapsulation of the <i>Harambee</i> tradition in the laws. The country has waqf law as well.</p>	<p>The fiscal policies adopted the British conceptualizations of these issues even though at local levels the Nigerian people use their own definitions which are defined in their various cultures.</p>	<p>The formal definition seeks to encapsulate all elements and groups of vulnerable people.</p>	<p>The fiscal laws of the country seek to provide for all the various definitions available that is why there is no single way of registering a philanthropic organization in SA</p>
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<p>10. To what extent do national laws and policies recognize, regulate and/or incentivize new forms of philanthropy (e.g. venture philanthropy, impact investing, online-giving, cause-marketing, etc.)</p>	<p>The internet is strictly controlled therefore there is not much that happens on it. The law however provides for corporate social responsibility on oil and diamond companies.</p>	<p>Article 36 of the Egyptian Constitution states that, “the State shall motivate the private sector to undertake its social responsibility in serving the economy and society.” Beyond this provision, there is no particular law in the country that incentivizes new forms of philanthropy.</p>	<p>Tax exemptions are provided to all registered philanthropic initiatives. These exemptions have to be applied for when it comes to international agencies while it is automatic for the local philanthropic organisations. The laws are yet to adapt to issues of venture philanthropy, impact investment, online giving and so forth.</p>	<p>There is no evidence of the laws and policies recognizing, regulating and incentivizing the new forms of philanthropy.</p>	<p>The laws have not been adapted to include the new forms of philanthropy in their scope</p>		<p>The conventional philanthropic ways are provided for in the law. Tax exemptions are provided to all registered philanthropic initiatives. The laws are yet to comprehensively adapt to issues of venture philanthropy, impact investment, online giving and so forth.</p>
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<p>11. To what extent do the fiscal laws address issues of equity and developmental impact in the incentives offered to different types of philanthropies</p>	<p>This aspect has not received any attention both in literature and through the fiscal laws.</p>	<p>Article 27 of the Constitution states that, “the economic system shall ensure equal opportunities and fair distribution of development returns, reduce the difference among incomes and adhere to a minimum wage and pension ensuring a decent life”.</p>	<p>There has not been a body of evidence to show how fiscal laws address issues of equity and developmental impact in incentives offered to different types of philanthropies.</p>	<p>There has not been a body of evidence to show how fiscal laws address issues of equity and developmental impact in incentives offered to different types of philanthropies.</p>	<p>There is no empirical evidence of this component since most philanthropic interventions at national government level are not coordinated.</p>	<p>The Investment Code (2004) for example provides incentives to investors that ‘create new enterprises, create jobs, and develop enterprises in underserved regions of the country’</p>	<p>Since the inception of the inception of the SADPA, this has not been researched on to empirically appreciate issues of equity and developmental impact of incentives proffered to philanthropic organisations</p>
<p>12. To what extent do the tax laws and policies offer special incentives for charitable donations and/or philanthropic investments in programmes /projects targeting specific marginalized or excluded geographic zones (women, youth and rural poor)?</p>	<p>Due to the record which the Angolan government has had on corruption, international investors have been shying from putting their monies into government coffers</p>	<p>Community Development Associations are exempt from most taxes and customs, and may accept contributions and donations from abroad, with permission of the Ministry of Social Solidarity</p>	<p>The Personal Income Tax Ordinance of 1961 guarantees tax deductibility of contributions to those philanthropy organisations recognised by the 1947 Legislative Assembly Ordinance. All organisations classified as non-profit receive</p>	<p>PBOs in Kenya are exempt from taxation on: Any funds received from membership subscriptions, and any other donations or grants (Income Tax Act Second Schedule (1)(a)(i) and (1)(a)(ii)); For other entities to qualify for tax exemption (Income Tax Act</p>	<p>Registered non-profit organizations are exempt from tax. The Companies Income Tax Act (CITA) provides for tax exemption on the profits (so long as such profits are not derived from a trade or business) of any statutory or</p>	<p>The tax system is favorable to making charitable donations, but requires greater clarification, coordination and synergy. The current framework addresses donations made by non-commercial entities more comprehensively than donations or social impact investments by for-</p>	<p>The Tax Act (58) of 1962 and the Taxation Laws Amendment Act (3) 2008, provides the framework through which organisations qualify as PBOs and therefore qualify for tax exemption. There is indeed sufficient support through tax exemption except the Customs and Excise Tax Act which does not</p>
<p>12(a) Is there adequate public support for philanthropy (e.g. through targeted tax and other incentives; public financial support; creation of investment opportunities</p>	<p>considering the misappropriations that were noted by the World Bank and IMF. Instead most FDI has been</p>	<p>The national constitutions provides that 4%</p>					

<p>within local economies and local government areas; training and skills development for community based organizations)?</p>	<p>targeting CSO in return the government toughened its legislation on receiving charitable donations or philanthropic investment. There are also no policies that encourage middle and working class to contribute to philanthropy as it is part of the Angolan culture already.</p>	<p>of the GNP will be invested in health and wellbeing of the people.</p>	<p>similar tax treatment</p> <p>The Company Investment Act of 1963, amended in 1985 by the National Investment Code, also made specific provisions allowing tax deductions and exemptions from custom import duties for corporations and certain individuals. The scope of these exemptions has been extended (Provisional National Defence Council - PNDC Law 224 of 1989) to non-profit as well as commercial organisations providing nursing and hospital care, as well as services for the elderly and the handicapped.</p>	<p>First Schedule, Paragraph, 10 as amended by Legal Notice No. 6 of 2001):</p> <p>Income acquired from income generating activities used to support public benefit purposes; Tax on interest and dividends on investments and gains earned on assets or the sale thereof; and Stamp duty.</p>	<p>friendly society, co-operative society registered under any law, a company engaged in ecclesiastical, charitable, or educational activities of a public character, a company formed for the purpose of promoting sporting activities of a public character and trade union.</p>	<p>profit organizations.</p>	<p>recognize philanthropic work on making importations. There is no policy that encourages philanthropic work for the citizens as this is part of the South Africans' culture of <i>Ubuntu</i>.</p> <p>The BBBEE law incentivizes corporate giving in exchange for points on the scorecard. There is no tax incentive for establishing endowments, this has been identified as a key barrier. There is also a proposal under review that interest on endowments be spent within a specific time frame, thus limiting long-term endowment building</p>
<p>12(b) Are there specific policies that encourage the middle and working classes (including the Diaspora) to contribute to philanthropy through community donations, grants, social impact investing, inclusive business models, and etc?</p>	<p>targeting CSO in return the government toughened its legislation on receiving charitable donations or philanthropic investment. There are also no policies that encourage middle and working class to contribute to philanthropy as it is part of the Angolan culture already.</p>	<p>of the GNP will be invested in health and wellbeing of the people.</p>	<p>similar tax treatment</p> <p>The Company Investment Act of 1963, amended in 1985 by the National Investment Code, also made specific provisions allowing tax deductions and exemptions from custom import duties for corporations and certain individuals. The scope of these exemptions has been extended (Provisional National Defence Council - PNDC Law 224 of 1989) to non-profit as well as commercial organisations providing nursing and hospital care, as well as services for the elderly and the handicapped.</p>	<p>First Schedule, Paragraph, 10 as amended by Legal Notice No. 6 of 2001):</p> <p>Income acquired from income generating activities used to support public benefit purposes; Tax on interest and dividends on investments and gains earned on assets or the sale thereof; and Stamp duty.</p>	<p>friendly society, co-operative society registered under any law, a company engaged in ecclesiastical, charitable, or educational activities of a public character, a company formed for the purpose of promoting sporting activities of a public character and trade union.</p>	<p>profit organizations.</p>	<p>recognize philanthropic work on making importations. There is no policy that encourages philanthropic work for the citizens as this is part of the South Africans' culture of <i>Ubuntu</i>.</p> <p>The BBBEE law incentivizes corporate giving in exchange for points on the scorecard. There is no tax incentive for establishing endowments, this has been identified as a key barrier. There is also a proposal under review that interest on endowments be spent within a specific time frame, thus limiting long-term endowment building</p>
<p>12(c) Are there tax and other non-monetary incentives for Care work, volunteerism, and self-donation by individuals and groups?</p>	<p>targeting CSO in return the government toughened its legislation on receiving charitable donations or philanthropic investment. There are also no policies that encourage middle and working class to contribute to philanthropy as it is part of the Angolan culture already.</p>	<p>of the GNP will be invested in health and wellbeing of the people.</p>	<p>similar tax treatment</p> <p>The Company Investment Act of 1963, amended in 1985 by the National Investment Code, also made specific provisions allowing tax deductions and exemptions from custom import duties for corporations and certain individuals. The scope of these exemptions has been extended (Provisional National Defence Council - PNDC Law 224 of 1989) to non-profit as well as commercial organisations providing nursing and hospital care, as well as services for the elderly and the handicapped.</p>	<p>First Schedule, Paragraph, 10 as amended by Legal Notice No. 6 of 2001):</p> <p>Income acquired from income generating activities used to support public benefit purposes; Tax on interest and dividends on investments and gains earned on assets or the sale thereof; and Stamp duty.</p>	<p>friendly society, co-operative society registered under any law, a company engaged in ecclesiastical, charitable, or educational activities of a public character, a company formed for the purpose of promoting sporting activities of a public character and trade union.</p>	<p>profit organizations.</p>	<p>recognize philanthropic work on making importations. There is no policy that encourages philanthropic work for the citizens as this is part of the South Africans' culture of <i>Ubuntu</i>.</p> <p>The BBBEE law incentivizes corporate giving in exchange for points on the scorecard. There is no tax incentive for establishing endowments, this has been identified as a key barrier. There is also a proposal under review that interest on endowments be spent within a specific time frame, thus limiting long-term endowment building</p>

<p>13. To what extent is the tax system favourable to making charitable donations or philanthropic investments (i.e. as groups, individuals or corporations)?</p>	<p>Companies involved in charitable donations however receive tax rebates There are three streams of money from private petroleum companies that finance social projects in Angola within their <i>corporate social responsibility</i> (CSR) activities. These are moneys paid according to the <i>signature bonus system</i>, according to <i>production sharing agreements</i> (PSA), and projects financed by the companies as voluntary <i>post-tax contributions</i>.</p>	<p>The NGO Law stifles such donations and incentives are limited to corporations to make charitable donations</p>	<p>The tax system is favourable though it is subjected to a lot of bureaucratic processes through the Overseas Gift Committee of the Department of Social Welfare; the National Revenue Secretariat and the Ministry of Finance and Economic Planning.</p>	<p>The Statute Law (Miscellaneous Amendments) Bill of 2013 proposed several amendments to the PBO Act. One of the most significant amendments is to cap the amount of funding NGOs can receive from external donors at 15% of their budgets</p>	<p>Tax benefits in form of allowable deductions are available to any company which makes a donation to certain Nigerian funds and institutions specified in the fifth schedule</p>	<p>Senegal's Investment Code created a platform that incentivize corporations to make charitable donations. To qualify for significant investment incentives, firms must invest above 100 million CFAF (approximately USD 200,000) or in activities that lead to an increase of 25 percent or more in productive capacity.</p>	<p>Individuals and companies in South Africa that make donations in cash or in kind are permitted to a tax deduction from their taxable income as long as this donation has been made to a PBO carrying out applicable public benefit activities. Corporate organized volunteering activities holds weight on the BEE scorecard incentive. Individual volunteering on its own has no incentive.</p>
<p>14. To what extent is the tax system favorable to CSOs and other entities in</p>	<p>The tax system has been tightened to encourage investor into</p>	<p>While the system does not provide a lot of inhibitive hurdles on</p>	<p>The Trustees (incorporation) Act, 1962 (Act 106),</p>	<p>Due to the capping of the amount that can be received to</p>	<p>Philanthropic organizations are tax exempt</p>	<p>Since 2012 Senegal's National Investment Promotion Agency</p>	<p>There are several tax exemptions for philanthropic organisations which</p>

receiving charitable donations?	giving the money to government.	receiving charitable donations, there is fear that any time those donations may be taken by the state through the NGO Law which empowers the state to dissolve any philanthropic organization at its discretion.	provides that the income of organisations incorporated under this statute that are not derived from commercial activity should be tax-exempt Ghana Internal Revenue Act of 2000 permits the exemption of income not derived from business Activities. It's only the bureaucracy in the processes that act as an inhibitive to accessing the facility.	15% of the total budget, the laws are not favorable to CSOs and other entities in receiving charitable donations.	as long as they are legal entities	(APIX) has advocated for the use of policy tools to catalyze impact investment aimed at directing private capital in pursuit of solutions to major social problems.	include capital gains tax, donations tax, estate duty, transfer duty and in particular circumstances, the skills development levy when property is dedicated to public benefit activities. Customs and Excise Act however does not specifically define a PBO and as such there are no import duty exemptions available to NPOs
<b>III. Cross-Border or Transnational Philanthropic Flows</b>							
15. To what extent is the legal regulatory environment favorable to receiving cross-border donations?	The legal regulatory environment is not favorable to receiving cross border donations as the government wants to receive	A foundation may receive funds from third parties subject to approval by the Minister of Social Solidarity	There are no restriction on receiving cross border donations from any institution. Most of the philanthropic work	Section 52 (2)(b) and (c) amends the Investment Promotion Act, 2014, empowering the Minister to make regulations prescribing	The newly published Foreign Contribution (Regulation) Bill is regarded as an attempt by government to	Associations and NGOS are free to solicit and receive cross border donations without any restriction - both domestic and foreign funding.	The legal environment is friendly for receiving cross border donations but will have to be cleared by the Reserve Bank
15(a) From Non-Resident Nationals and African Diaspora?							

15(b) From Foreign Benefactors governmental, non-governmental and corporate?	these for itself so it makes it difficult for civil society to receive funding.		in Ghana is supported through cross border and transnational philanthropic flows.	procedures for vetting investments and all cross border donations	crack down on foreign donations which then filter to finance terrorism	They are also free to deal directly with donors in the process of fundraising. There are no legal barriers that inhibit Senegalese CSOs from receiving donations of a charitable nature.	before effected into the philanthropic organization's account.
16. To what extent is the legal regulatory environment favourable to sending cross-border donations?	Government has put some restriction on moving Kwana out of the country in doing cross border transactions	There has not been evidence or precedence of this scenario to assist with relevant information that will substantiate any claim	There has not been evidence or precedence of this scenario to assist with relevant information that will substantiate any claim	There has not been evidence or precedence of this scenario to assist with relevant information that will substantiate any claim	The Foreign Contribution (Regulation) Bill regulates these even though they are permissible	There is no restriction on the transfer or repatriation of capital and income earned in Senegal, or on investments financed with convertible currency. The Government does however limit the amount of foreign exchange individuals may take with them outside Senegal on trips.	The Index of Global Philanthropy and Remittances (2013) notes that South Africa has increased international aid especially in the areas of education, medical assistance and responses to conflict situations. The laws are favourable albeit under the clearance of FICA
16(a) From funds raised locally by nationals							
16(b) From funds secured either nationally or internationally by non-nationals (i.e. individuals or juristic persons)							
<b>Alignment between national development plans and the vision, objectives and outcomes of philanthropy</b>							
17. To what extent are there consensually agreed principles on the	Except for the UTCAH's monitoring	Except for the legislative framework, there	Ghana is yet to develop principles on the governance	There are as yet no agreed	Any CSOs desiring to register as legal	The government has done its part of setting an	While the Department for social development

governance of philanthropies?	mechanisms of NGOs' work, there have not been consensually agreed principles on governance of philanthropies	is no consensually agreed principles on the governance of philanthropies.	of philanthropies. However in the meantime, they are classified under civil society organizations.  Beyond the set legislative framework, the philanthropies are supposed to have a self-regulatory system under the government set parameters	national performance management or monitoring and evaluation systems to measure the impact of philanthropy	entity is required to get its structure approved by the government and there is no specific procedure for securing such approval.	environment for the operation of philanthropies. What however is missing is evidence of consensually agreed principles on the governance of philanthropies.	provides and enforces the legislative framework for philanthropic organizations in SA, there have not been consensually agreed principles of governance for the philanthropic organizations
17(b) Is there a statutory body constituted and operational that enforces these principles?	UTCAH is the body mandated on enforcing NGO operational guidelines.  There is little room for self-governance of the philanthropic sector since UTCAH has authority to monitor how the institutions run their affairs on a yearly basis. It has also set parameters of how the philanthropic institutions should be run	The launch of the national center for corporate responsibility in 2009 and the introduction of the Environment, Social and Governance (ESG) Index to incentivize sustainable business practices were also positive steps. These bodies will provide the frameworks for philanthropy in Egypt when fully functional		The PBO Regulatory Authority enforces government statutes that govern the work of philanthropies.	The Corporate Affairs Commission is responsible for supervising and regulating registered corporate entities.	The Directorate of General Affairs (DAGAT) in the Ministry of Interior is responsible for enforcing set principles of the Government	The Department for Social Development. One waits to see how the SADPA will also work in ensuring compliance of government set parameters.
17(c) Is there a self-regulation mechanism in place for the governance of philanthropic sector?				This is heavily in check due to the new regulations put to curtail terrorism. Under the 2010 constitution however, this element was well covered.	Self-regulation is available under the close watch of the Corporate Affairs Commission.	Since the government has given philanthropies room to operate liberally within the set framework, there is indeed room for self-regulation	The regulation mechanism has been set by the government except for voluntary associations which will have to self-regulate since they will not be registered.
17(b). Is there an agreed Corporate governance code for the philanthropy sector				Registration is only granted to philanthropies	The federal government set its corporate	At registration, the Directorate of General Affairs	The government has set its principles of



determining principles, values, qualification of trustees, fiduciary duties, impact assessment, including M&E?				that would have demonstrated a certain level of corporate governance in their founding documents.	governance code which philanthropic organisations have to adhere to for them to be registered.	only registers entities that exhibit certain corporate governance principles in their constitutions. Beside this, there is no corporate governance code for the philanthropy sector that is agreed by all parties.	requisite corporate governance requirements and qualifications of trustees. The King III codes on corporate governance are seen as a self-regulatory standard for corporate governance reporting These however have not been agreed with the other stakeholders.
18. Are national security laws aligned with national development policies and International human rights laws as far as the governance of philanthropy is concerned?	The spirit of the constitution and practice on the ground as well as other subsequent decrees contradict each other. There is no alignment of international human rights instruments to national laws on governance of philanthropy.	Due to the governance of seurocrats security nature of the country, security is institutionalized in all spheres including philanthropy work. In some boards of philanthropic organisations, the government reserves a seat or two for their security details.	Domestication of international human rights laws has been piecemeal. The Government of Ghana has ratified several international instruments but domestication and implementation still remains as a gap	The Kenya Security Laws Amendment Bill, 2014 seeks to introduce punitive measures for those deemed as a threat to national security and gives more powers to the President on matters of security.	Due to the security situation of Nigeria, security has been put on the top of the agenda for the governments in a bid to ensure the international human rights laws are adhered to and development is achieved.	The government has promulgated requisite laws though domestication of international human rights instruments has been piecemeal. The governance of philanthropies is affected by the national laws that provide space for operating without many inhibitions.	Through the Financial Intelligence Centre Act 38 (2001) regulations (FICA) the national development goals are harmonized.

<p>19. Are national laws and policies designed to promote, strengthen and reward the domestic philanthropy sector?</p>	<p>The laws governing corporations incentivize corporate social responsibility beside which there are no laws that seek to institutionalize domestic philanthropy as it is part of the Angolan culture</p>	<p>National constitution promotes and strengthens philanthropy, though there is a gulf between what is on paper and reality.</p>	<p>While informal philanthropy has been a part of Ghana's life, generally, the tax regime of the country promotes and reward domestic philanthropy sector</p>	<p>The <i>Harambee</i> tradition and other forms of vertical giving that are entrenched in the Kenya culture makes it unnecessary to come up with laws that promote, strengthen and reward domestic philanthropy. There is however a proposed law that puts Harambee under threat.</p>	<p>There is no deliberate effort to promote philanthropy as it is part of the Nigerian peoples' culture</p>	<p>Senegal established a Presidential Investors Council (PIC) designed to improve the business climate and reduce obstacles to domestic and foreign private investment and also impact investment</p>	<p>The national laws to a great extent reward domestic philanthropy through the tax exemptions especially.</p>
<p>20. To what extent does the national statistical bureau, academia, civil society or private sector accurately document and produce data on the developmental and transformational impact of philanthropic donations and/or investments?</p>	<p>This data has not been available and the developmental outcomes of philanthropy accumulatively are still to be documented at national level</p>	<p>There has not been systematic evidence to prove that national statistical bureau, academia, civil society or private sector accurately document and produce data on the developmental and transformational impact of philanthropic donations.</p>	<p>This has been the Achilles Heel of the Ghana system as there has not been systematic documentation of the quantitative and qualitative data on developmental and transformational impact of philanthropic donations and investments</p>	<p>While there are significant amounts of literature on more formalized activities of NGOs, there remains a dearth of data and information on the less formalized philanthropic entities such as community groups, cooperatives etc.</p>	<p>There is no data or attempts made at systematically accounting for the sector's activities.</p>	<p>There is a challenge of coordination of the various legislative and policy frameworks and the institutions that are involved in philanthropic work as a result consolidation of data on developmental and transformational impact of philanthropic donations has not been consistent.</p>	<p>Attempts by philanthropy support institutions to get Stats SA to collect and release data on philanthropic flows have been made, but these have not as yet yielded any results. As it stands no comprehensive information on individual or corporate donations is made public by the Statistics agency,</p>

							although an institution called Trialogue, produces a yearly CSI handbook with estimated figures on corporate giving (these figures are extrapolated from a very small sample of large corporates and so cannot be reflected with certainty). With the establishment of SADPA, a lot can be done in improving this area.
21. To what extent are there consensually agreed and uniformly applied benchmarks for measuring the developmental/transformati onal impact of philanthropy?	There are no set benchmarks that are consensually set	There are no consensually agreed and uniformly applied benchmarks for measuring development impact of philanthropy	There are not set benchmarks that are consensually set.	There are not set benchmarks that are consensually set.	There are no set benchmarks for measuring developmental impact of philanthropy due to the lack of coordination at national level	There are no consensually agreed and uniformly applied benchmarks measuring developmental impact of philanthropy. Monitoring and evaluation seem to be a gap that can be worked on.	This area still needs to be improved as there seems to be no evidence of consensually agreed benchmarks for measuring development impact of philanthropy
22. To what extent are there laws, policies and mechanisms in place to	The legal system pays particular attention to the	There are security details in almost all strategic	The new tax exemption system does not make it	The Investment Promotion Act of 2014, empowers	The special control unit against Money	Part of the Presidential Investors Council	The Financial Intelligence Centre Act 38 (2001)

<p>prevent illicit financial flows (IFF), organized crime and money laundering by Philanthropies?</p>	<p>financial laws of corporations and NGOs through a new law that was promulgated. Some corporate organizations contribute their money to government projects or through existing philanthropic organizations or to the Social Action Grant that was initiated by the World Bank in 1994.</p>	<p>organizations to watch out for illicit financial flows, organized crime and money laundering by philanthropies</p> <p>The working relationship between government and philanthropic organizations has not been mutual to come up with joint mechanisms of ensuring effectiveness and shared learning from the interventions. While this may exist, it is not systematic and is stifled by the NGO Law 84/2002</p>	<p>automatic for philanthropies to receive exemption, the entities will have to apply to be considered in trying to avoid illicit financial flows.</p> <p>There has not been a clear coordination mechanism between government and key stakeholders in philanthropic work to create platforms for shared learning and development evaluations in a systematic way</p>	<p>the Minister to make regulations prescribing procedures for vetting investments and all cross border donations. This law seeks to guard against money laundering and IFF.</p> <p>Shared learning and impact assessments have not been systematic and collaborated</p>	<p>Laundering (SCUML) of the Economic and Financial Crimes Commission (EFCC), are charged with monitoring, supervising and regulating the activities of Designated Non-Financial Institutions (DNFI) in line with the Money Laundering (Prohibition) Act ML (P) Act 2011 and the Prevention of Terrorism Act (PTA) 2011</p> <p>Under the Foreign Contribution (Regulation) Bill, non-governmental organisations (NGOs) wishing to receive foreign funding must register with the</p>	<p>(PIC)'s mandate is to ensure that investment is done properly in the areas identified so there is no room for IFF when the set systems area efficient in doing their work.</p> <p>Shared learning and impact assessments have not been systematic and collaborated.</p>	<p>regulations (FICA) ensures that there are no IFF. Further, the South African Reserve Bank monitors transactions together with the South African Revenue Authority to make sure that there is no money laundering. There is no evidence of collaboration between government and philanthropic organizations in ensuring effectiveness and flexibility of FICA. Collaboration between government and other stakeholders is not well pronounced on monitoring and evaluation</p>
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					government regulator, detail the amount to be received and how it will be used, secure authorization to receive the funds and get permission to spend them on its specified projects.		
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