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Civil Society Law in Kiribati, Nauru & Tuvalu:
A Review of the Legislative Framework

Country Report

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I INTRODUCTION

This report will present a preliminary review of the laws affecting the functions and operation of CSOs in the subregion encompassing Kiribati, Nauru and Tuvalu. An underlying objective is to bring to the attention of law and policy makers legal and related issues that impinge on the present and future operation of CSOs in the above countries. It is anticipated that this report will make an appreciable contribution to future *law reform exercises* pursued in the same.

Kiribati, Nauru and Tuvalu are all located in the Central Pacific Ocean just south of the equator.¹ By international standard, the three countries are perhaps some of the smallest in the world in terms of land and population size.² Whilst Tuvalu is a constitutional democracy upon independence in 1978, both Kiribati and Nauru are republics having attained independence from Britain and Australia respectively in 1968 and 1979. Kiribati's economy is driven mainly by tuna exports, supplemented in part by trade in copra and seaweed, as well as remittances from its overseas-based seamen. With virtually no land-based resource of commercial value, Tuvalu, the world's fourth smallest economy, is heavily dependent on tuna access fees, and to some extent, remittances from its fishermen working on foreign fishing vessels. Nauru was once one of the wealthiest small states in the world with its affluent economy fuelled principally by rich phosphate deposits. But towards the end of the last millennium, its natural resource endowment has all but depleted resulting in its economy plummeting. Today, Nauru has turned to tuna access fees to keep its crumbled economy at least afloat. Secondary phosphate mining is currently pursued albeit on a limited scale with production output way below the peak years.

¹ Parts of Kiribati have straddled the equator

² Kiribati: 792km² land area with 93'000 people; Nauru: 21km² land area with 9'300 people; Tuvalu: 26km² land area with 12'000 people.

II ENABLING LEGISLATIVE & OPERATIONAL FRAMEWORK

A Constitutional basis and foundation

The constitutions of the small island states of Kiribati, Nauru and Tuvalu have all protected the freedoms of expression, assembly and association – the requisite ingredients for a functioning and thriving civil society.³ The exercise of such freedoms are subject however to the standard exceptions or limitations prescribed in most Pacific constitutions. Thus, any laws enacted by Parliament will not be held inconsistent if the same is made in the interest of defence, public safety, public order, public morality, public health, and for the purpose of protecting the rights and freedoms of other persons. Similarly, the exercise of any such freedom is subject to the cultural values and traditions of a country.⁴

B Nature and Types of CSOs

Given the small population size coupled with a relatively *underdeveloped* legislative framework in each of the three small island States, the types and nature of CSOs operating in each country are not that diverse as is the case in the bigger island countries. With the exception of Nauru, general enabling legislation is available for the incorporation of membership and non-membership organisations in Kiribati and Tuvalu, viz. societies, religious bodies, and credit unions.⁵ Except for the *Kiribati Red Cross Societies Act*, special legislation for the incorporation of specific CSOs is almost absent in this Pacific subregion.

C Purposes and roles of Civil Society Organisations

The purposes and objects of CSOs as prescribed by statute are set out under either general legislation or special legislation. The former represents the general legislative framework that provides the enabling environment whilst the

³ *Constitution of the Republic of Kiribati*, ss.12 & 13; *Constitution of the Republic of Nauru*, arts.12 & 13; *Constitution of Tuvalu*, ss.24&25

⁴ See *Constitution of Tuvalu*, s.29

⁵ Tuvalu only provides for cooperative societies.

latter is restrictive and applies only to statutorily-incorporated organisations. The principal legislative framework that will be discussed throughout this report includes the *Cooperative Societies Ordinance*,⁶ *Incorporated Societies Act 2002*⁷, and *Religious Bodies Registration Act*⁸, and the *Credit Unions Act*.⁹ Special legislation that will be briefly covered in this report is the *Kiribati Red Cross Society Act 1989*. Interestingly, Nauru has virtually no enabling legislation that regulates the incorporation and operation of CSOs. But in any event, this testifies to a characteristic feature of this sub-region in which the general populace forms part of and is absorbed into all three sectors of a country: government, private sector, and civil society. In effect, all three sectors are interwoven with little possibility of drawing a fine line between any two sectors. Thus, everybody is everything in these sparsely populated States.

1 Statutory Objects

What are the statutory objects as recognised and prescribed in the statutes forming part of this review? This will be briefly discussed below.

(i) General Legislation

(a) *Credit Unions Act*¹⁰

Credit unions are a popular choice within rural communities that aim to introduce a *savings culture* in order to meet the financial and related needs of members whilst similarly encouraging small-scale development activities at the local level. The credit union movement, which aligns itself with the civil society sector, is now at an advanced stage in Kiribati since the enactment of the *Credit Unions Act 1990*.

⁶ Cap 14, (Kiribati); Cap 64, (Tuvalu)

⁷ Kiribati

⁸ Cap 89, (Kiribati)

⁹ Kiribati

¹⁰ Kiribati

To qualify for registration, the objects as prescribed in s.15 of the Act needs to be satisfied. Thus, the objects of a credit union is '*(a) to promote thrift among its members; (b) to create a source of credit at fair and reasonable rate of interest primarily for provident and productive purposes; (c) to receive the savings of its members either as payment on shares or as deposits; and (d) to provide an opportunity for its members to use and control their own money in order to improve their social and economic well-being.*' It can be discerned from the prescribed objects that the credit union movement operates in parallel to a micro-banking scheme that purports to alleviate poverty within rural areas.

(b) *Incorporated Societies Act 2002*¹¹

Of the three countries, only Kiribati has an Incorporated Societies Act. The Act almost replicate provisions of corresponding legislation found throughout the region. By prescribing only one disqualifying criterion, this legislation adopts an inclusive approach by stipulating in s.3 that '*[a]ny society consisting of not less than 15 persons associated for any lawful purposes but not for pecuniary gain*' qualifies for registration under the Act. Thus, any object which does not promote pecuniary gain will, subject to its legality, be deemed to qualify as one for a lawful purpose. Whilst s.3 appears too wide and ambiguous, s.5 operates to remedy this defect as the rules of a society are to specify the objects for which the society is established.

(c) *Cooperative Societies Ordinance*¹²

Both Kiribati and Tuvalu each has a *Cooperative Societies Ordinance*. Given their identical provisions, there is no distinct difference in the approach in both countries. Thus, any society the principal object of which is '*the promotion of the economic interests of its members in accordance with cooperative principles*' or the facilitation of '*the operations of such a society*' qualifies to be incorporated as a cooperative society.¹³ Subsidiary legislation in both countries further

¹¹ Kiribati

¹² Cap 14, (Kiribati); Cap 64, (Tuvalu)

¹³ s.4, both Kiribati and Tuvalu

requires the bylaws a society to incorporate provisions relating, inter alia, to *the objects for which such society was established*.¹⁴

Note that cooperative principles founded on western legal systems are not readily compatible with the socioeconomic and cultural circumstances of some Pacific Island societies, thus, in dire need of adaptation to better enhance the important functions of such a vital sector. The failure or lack of success of most community-based cooperative societies in the region is clear testimony to this contradiction.

(ii) Special Legislation

(a) Kiribati Red Cross Society Act 1989

The objects of the Society are extensive and revolve primarily around humanitarian principles. Thus, at the centre are objects that obligate the Society of render assistance in times of war, disaster, catastrophe, and peace. Section 6 of the Act stipulates its objects as

to furnish volunteer aid to the sick and wounded in time of war and to non-belligerents, prisoners of war and civilians suffering from the effects of war; (b) in times of catastrophes and public disasters, to provide the victims thereof with relief; (c) in times of peace of war, to carry on and assist in the improvement of the health of members of the public, the prevention of diseases and the mitigation of suffering in Kiribati and throughout the world; (d) to promote the Red Cross youth movement among the youth of all races; and (e) to propagate the ideals and the humanitarian principles of the Red Cross with a view to developing a feeling of solidarity and mutual understanding among all peoples and nations

Red Cross Society objects are uniform throughout the world as all affiliates of the ICRC share the same values in international humanitarian work.

2 Determination of Status

¹⁴ *Cooperative Societies Regulations*, r.54(c), (Kiribati); *Cooperative Societies Regulations*, r.59(c), (Tuvalu).

None of the three countries has a state organ or independent institution such as a charity commission that determines the qualification of a CSO as a public benefit or charitable organisation. The status of a CSO is however dependent on a construction of its objects, assisted by reference to the statute under which it is incorporated or registered. As to the latter, the registration process may operate indirectly as a mechanism for determination of the status of an organisation. However, that is not conclusive as the certificate of registration issued by a registrar only goes to prove the registration of an organisation and not as evidence of confirmation of a charitable or public benefit status.¹⁵

3 Media Access and Exercise of Related Freedoms

Media freedom and access is generally guaranteed in all three countries, given the absence of strict censorship laws. In Kiribati however, any CSO resorting to publishing its own newspaper, information bulletin or material of a similar nature will be caught within the provisions of the *Newspaper Registration Act 1988*. The principal requirement of the Act is the need for registration of the proprietor, printer and publisher of a newspaper.¹⁶ There is absence of any special treatment for publications by CSOs of any form.

D Establishment and Incorporation

This section will briefly set out the process for registration under the *Cooperative Societies Act* of Tuvalu, and the *Cooperative Societies Act, Credit Unions Act*, and *Incorporated Societies Act* of Kiribati. No similar legislation is found for Nauru, thus, no discussion will be made in respect of that country.

1 Registration

¹⁵ See eg. *Incorporated Societies Act 2002* (Kiribati), s.8

¹⁶ ss.4&5

(i) *Credit Unions Act*¹⁷

Section 5 of the Act provides that *'any 15 or more persons resident in Kiribati who desire to associate themselves together as a credit union...may, in the presence of a witness, sign in duplicate the Articles of Association of the proposed credit union and cause it to be filed in the Office of the Registrar'* of Credit Unions appointed under s.3 of the Act. Furnished with such application are (i) an affidavit verifying signatures to the applicant's Articles, (ii) copy of supplementary bylaws, (iii) report of preliminary meeting authorising such authorising such application, and (iv) prescribed fee.

(ii) *Incorporated Societies Act*

Only Kiribati has an *Incorporated Societies Act* which was enacted recently in 2002. No similar legislation is found in the other two countries. To qualify for registration society must have at least 15 persons whose majority resolution authorising incorporation is similarly required for consideration of the application by the Registrar of Incorporated Societies.¹⁸ Section 6 of the Act requires two copies of the rules of the applicant society to be sent together with the application for registration. Such copies are to be signed by at least 15 members, or in the case of a body corporate, the affixing of the resolution of that body's board or members. Note however that each signature of a subscriber is to be attested by an independent witness who is not a subscriber. Section 6(b) further requires such application to be accompanied by the prescribed fee *'together with a statutory declaration made by an officer of the society or a solicitor to the effect that a majority of the members of the society have consented to the application, and that the rules so signed or sealed are the rules of the society'*. Registration is completed with the issuance of a certificate of registration by the Registrar.

(iii) *Cooperative Societies Ordinance*

¹⁷ Kiribati

¹⁸ s3

Legislation in both countries is identical in terms of substance and enumeration. Thus, where applicable, a single provision will be quoted for both countries. Minimum membership that qualifies a society for registration in both Kiribati and Tuvalu is 10.¹⁹ Applications for registration are to be made to the Registrar of Cooperative Societies appointed under s.3 of the Act of both countries. Additional matters of qualification for membership include attainment of 16 years of age and residency '*within or in occupation of land within the society's area of operations as described by the by-laws*'.²⁰ An application is to be accompanied by copies of proposed bylaws of the society and signed by at least 10 persons qualified to be members.²¹ Note that in the case of a registered society being a corporate member of the applicant society, s. 6(2)(b) requires the signature of a duly authorised person on behalf of the former, '*and where all the members of the society are not registered societies, by 10 other members, or when there are less than 10 other members, by all of them*'. Such application is to be accompanied by copies of the proposed bylaws of the applicant society.²² Registration is complete with the issuance of a certificate of registration by the Registrar²³ subsequent to payment of the prescribed fee.²⁴

(iv) *Religious Bodies*

The *Religious Bodies Registration Act*²⁵ of Kiribati regulates the registration of a religious body which is defined as '*any congregation, society or body [Kiribati] consisting of or representing not less than 2% of persons of the age of 18 years and upwards as indicated in the latest report of the Census Commissioner on the census of the inhabitants of Kiribati taken pursuant to the Census Ordinance*'. Section 4 of the Act also requires registration of trustees of the body.

2 Administering Authority

¹⁹ s.5

²⁰ s.23

²¹ s.6(2)

²² s.6(3)

²³ s.9

²⁴ s.7(2)

²⁵ Cap 89

Kiribati has three Registrars appointed under the *Cooperative Societies Ordinance*,²⁶ *Credit Unions Act*²⁷, and *Incorporated Societies Act*²⁸ respectively. Tuvalu has a Registrar of Cooperative Societies appointed under the *Cooperative Societies Act*.²⁹ The absence of an enabling legislation makes Nauru a country without a dedicated Registrar for purposes of the CSO sector in the country. Unless specified to the contrary, all Registrars appointed under the above legislation are deemed to be public officers and receive directives from State Ministers or from the President in the case of Kiribati.

3 Management of Registry & Accessibility

Registries are established under each piece of legislation in each country. Thus, in Kiribati, separate registries are established and administered under the *Credit Unions Act*, *Cooperative Societies Ordinance*, and *Incorporated Societies Act*. A registry is similarly established under the *Cooperative Societies Act* in Tuvalu, whilst none is identified for Nauru. Note however that in addition to the principal registry kept by the Registrar, cooperatives and incorporated societies are similarly required to keep and maintain internal registries of members. As for the latter, particulars in the registry include names, occupations, addresses and dates of membership.³⁰ The principal registry for cooperative societies is to contain information relating to registration and the bylaws of societies.³¹ It is unclear what additional information is required to be entered in the registry. A register of credit unions is similarly established under the *Credit Unions Act* of Kiribati, and in which will be entered particulars relating to the registration, bylaws, and any changes to the status of a credit union.³²

Public access to the aforesaid registers for purposes of viewing or inspection by interested members of the public is guaranteed under the *Credit Unions Act*, and the *Cooperative Societies Ordinance* of both Kiribati and Tuvalu. The

²⁶ s.3

²⁷ s.3

²⁸ s.34

²⁹ s.3

³⁰ *Incorporated Societies Act*, s.22 (Kiribati)

³¹ *Cooperative Societies Regulations*, r.2, (Tuvalu); identical provision for Kiribati.

³² s.12

Incorporated Societies Act of Kiribati is ambiguous in this respect. Whilst a nominal fee may be charged for the inspection of register of credit unions,³³ the inspection of the register of cooperative societies is free in both countries. It remains unclear whether the information and records forming part of the particulars of a register accessible to the public also include annual audited accounts and financial statements of societies and credit unions.

E Termination of Operation

This section will consider in brief the processes and grounds of winding up or liquidation of a society or credit union. Also covered in the discussion will be the types of remedies available to a society or union aggrieved by acts or decisions taken towards or in the course of liquidation. Generally, three mechanisms are available for the liquidation or termination of registration of a society or credit: (i) voluntary winding up, (ii) winding up by court, or (iii) dissolution and cancellation by the Registrar.

1 Cancellation, Dissolution & Winding Up

(i) *Credit Unions Act*³⁴

No mechanism for voluntary winding up by resolution of members is provided in the Act. Section 66 however empowers the Registrar, with prior approval of the Minister, to cancel by order the registration of a credit union on grounds specified in the Act. Thus, registration of a credit union may be cancelled as a result of an investigation into affairs of the same under s.51 or...'*(b) the incorporation of the credit union was obtained by fraud or mistake; (c) the number of members of the credit union is less than 15; or (d) the credit union has, willfully, after notice by the Registrar, violated any of the provisions of this Act, the regulations made hereunder or the by-laws.*³⁵ Note however that in respect

³³ s.12(3)

³⁴ Kiribati

³⁵ s.66(1)

of the cancellation by virtue of s.51, the credit union investigated is to be afforded reasonable opportunity to make representations.

(ii) *Incorporated Societies Act*³⁶

By virtue of provisions of the Act, an incorporated society can be wound up voluntarily by resolution of its members confirmed at a subsequent meeting,³⁷ or it can be wound up by petition to the Supreme Court with such action to be instituted by the society or a member thereof, a creditor or the Registrar.³⁸ The grounds for winding up by the High Court are prescribed under s.27 of the Act which provides for winding if:

(a)...the society suspends its operations for the space of a whole year or (b)...the members of the society are reduced in number to less than 15 or (c)...the society is unable to pay its debts or (d)..the society carries on any operation whereby any member thereof makes any pecuniary gain contrary to the provisions of... [the] Act or (e)...the High Court or a judge thereof is of the opinion that it is just and equitable that the society should be put into liquidation.

Further, the Registrar may by virtue of s.30(1) of the Act dissolve a society if he or she *'is satisfied that a society is no longer carrying on its operations or...has been registered by reason of a mistake of fact or law...or has failed, for a period of at least 9 months from providing information or financial statements'* as required under the Act. Note that the Registrar's power to carry out dissolution also includes the power to revive and reinstate a society to the register by revoking the earlier declaration in the event the latter is made on the basis of error or mistake.³⁹ The provision for reinstatement merely gives the Registrar discretion to rectify, thus, raises the issue of whether he or she can be compelled to reinstate a society to the register in the event he or she has failed or refused to do so despite having full or reasonable notice of such error or mistake.

³⁶ Kiribati

³⁷ s.24(1)

³⁸ s.26(1)

³⁹ s.30(3)

(iii) *Cooperative Societies Ordinance*

Two mechanisms are present in the legislation of both Kiribati and Tuvalu for the cancellation of registration of a cooperative society. The first is for dissolution after an inquiry into the constitution, working and financial condition of a registered society or upon application of at least three-quarters (¾) of members of the society.⁴⁰ The second is for a cancellation of registration by the Registrar in the event membership of a society is proved to be less than 10.⁴¹ Unfortunately, there is absence of provision in neither country's legislation for the revival and reinstatement of a society to the register in the event of cancellation by the Registrar on the basis of error, mistake or inaccurate information. This issue needs to be considered against the backdrop of an *innocent* society being forced to '*cease to exist as a corporate body from the date in which the...[Registrar's order for cancellation] takes effect...*'⁴²

2 Liquidation

Liquidation processes are prescribed in the *Credit Unions Act*, *Cooperative Societies Act*, and *Incorporated Societies Act* of Kiribati, as well as the *Cooperative Societies Ordinance* of Tuvalu. Thus, liquidators are to be appointed by the Registrar or court for the liquidation of a society or credit union. No similar provisions are available in Nauru which has virtually no corresponding legislation. This section provides in brief the process involved in the disposal of assets of a liquidated society or credit union.

(i) *Credit Unions Act*

Upon cancellation of registration of a credit union, the Registrar is required under s.68 to appoint a liquidator who will be vested with all property, books

⁴⁰ ss.39 & 41 (Kiribati and Tuvalu)

⁴¹ s.42 (Kiribati and Tuvalu)

⁴² s.43 (Kiribati and Tuvalu)

and documents of the former. The functions of the liquidator, which are to be exercised subject to the controlling power of the Registrar,⁴³ are set out in s. 69(2) of the Act. Thus, a liquidator is empowered to perform such prescribed functions including the distribution of assets, selling of property, and determining the question of priority arising between creditors of the credit union. Note that the actions of the liquidator or orders of the Registrar are enforceable in a court,⁴⁴ albeit limited by s.72 which denies the courts jurisdiction to hear matters relating to the dissolution of a credit union except those expressly stated in the Act. The cost of liquidation takes first priority, followed by payment of union liabilities, and repayment of deposits share-capital dividend and the balance to members proportionate to their respective shareholding.

(ii) *Incorporated Societies Act*

Upon liquidation or dissolution of a society by the Registrar, the surplus assets of the same will be disposed of according to its society's rules or in the absence of any such rules, assets will be disposed of as directed by the Registrar.⁴⁵ *Surplus assets* refer to the remainder of the total assets of the society after the payment of costs, debts and liabilities. Any assets affected by a trust will be disposed of in two forms: (i) as directed by the High Court in the case of a court-appointed liquidator, or (ii) as directed by the Registrar in the case of dissolution by the same or a liquidator being appointed by resolution of members.⁴⁶

(iii) *Cooperative Societies Ordinance*

A liquidator is to be appointed by the Registrar under s.44 in the event of cancellation of a society under ss.41 and 42 of the Act.⁴⁷ The liquidator

⁴³ See s.70 which prescribes the powers of the Registrar over a liquidator.

⁴⁴ s.71

⁴⁵ s.29

⁴⁶ s.29(2)

⁴⁷ Identical provisions in both Kiribati and Tuvalu

exercises his or her powers under s.45 subject to the controlling powers of the Registrar who can, *inter alia*, remove the liquidator.⁴⁸ In essence, the powers of a liquidator include, *inter alia*, determining the question of priority arising between creditors, taking possession of the books and documents of the society, determining the contribution of members (both past and present) towards assets of the society, and determining the extent of liability of members. The liquidator's powers are thus wide and extensive, manifesting the importance of the liquidation process.

3 Appeals

In Kiribati and Tuvalu, a fundamental protection is afforded to CSOs aggrieved by decisions or actions of authorities. The absence of legislation in Nauru renders the exact position in that country uncertain. All legislation reviewed provided for avenues of appeal. Thus, appeals can be lodged by members of a society to the Minister (i) within one month against refusal of the Registrar to register a society⁴⁹ or within two months against the cancellation of registration by the Registrar,⁵⁰ or (ii) within 21 days against an order of the Registrar for repayment or restoration of property or money in cases of alleged misapplication, retainer, dishonestly or breach of trust.⁵¹ Similarly, any party aggrieved by the award of the arbitrator appointed by the Register for purposes of resolution of a dispute relating to business of the society may appeal to the Registrar.⁵² No time period is specified for such appeals. Further, decisions to appeals under ss.51 and 52 are deemed final and conclusive. However, the Registrar or Minister (whichever is the case) do have the discretion under s.53 to refer a question of law for the court's opinion, with such opinion to be final and conclusive.

⁴⁸ s.46

⁴⁹ s.7(1)

⁵⁰ s.41(2), *Cooperative Societies Act* (Kiribati and Tuvalu)

⁵¹ s.51

⁵² s.52(3)

Appeals under the Credit Unions Act⁵³ lie to the Minister within one month of notice of refusal by the Registrar to register a credit union⁵⁴ or its supplementary bylaws,⁵⁵ or within two months of cancellation of registration.⁵⁶ Additionally, a member expelled by the board of directors may appeal against such decision at the next general meeting of a credit union, provided a 30-day's notice to that effect has been served on the secretary of the credit union. This approach is distinctive as the appeal will be considered by all members at a general meeting as opposed to consideration of appeal by an individual in authority.

Any interested person may appeal within one month to the High Court the decision of the Registrar relating to surplus assets of a liquidated society under the *Incorporated Societies Act*.⁵⁷ Similarly, an appeal can be made to the High Court within 21 days of the Registrar's decision in refusing to register a society or to receive and registers any documents, or in relation to any acts and decisions of the Registrar under the Act generally.⁵⁸ Note that the time limit can be extended beyond 21 days as appeals can be lodged '*within such further time as the High Court may allow*'.⁵⁹

III ADMINISTRATION AND GOVERNANCE

A Umbrella Organisations

⁵³ Kiribati

⁵⁴ s.8(2)

⁵⁵ s.18(4)

⁵⁶ s.66(2)

⁵⁷ Kiribati

⁵⁸ s.37(1)

⁵⁹ *ibid*

1 Kiribati

The umbrella body for CSOs in the country is the Kiribati Association of Non-Governmental Organisations (KANGO), which was established in 1986. Current membership of the body is not confirmed, but it is estimated to be around 37 permanent or full members, excluding those that are informally affiliated to KANGO. The body is a voluntary non-statutory organisation with the mission to *'work with National, Regional and International organizations with the ultimate aim of improving the standard of living through good governance practices for the betterment of Kiribati Community'*.⁶⁰

2. Nauru

Very little or no information is available in respect of this country. However, the absence of an enabling legislative environment does not preclude the establishment of an umbrella body for the country's civil society – NIANGO. It remains uncertain (at the time of review) the current membership of the body, if at all.

3. Tuvalu

The Tuvalu Association of Non-Governmental Associations (TANGO) is the non-statutory umbrella body for CSOs in the country. Membership of TANGO is currently set at 47, with focal areas being good governance, marine conservation, environment, education and awareness, and HIV/AIDS. TANGO's vision is to work *'for the betterment of the NGOs and CBOs in Tuvalu to deliver activities that promote sustainable total human development and heightening the level of awareness of and different relevant issues affecting the lives of the local people'*.⁶¹ It similarly aims to promote cooperation amongst its members as well as facilitating a collaborative relationship with the government.

B Management

⁶⁰ www.kango.org.ki

⁶¹ www.piango.org/tuvalu

This section will briefly set out the types and forms of internal management bodies that exercise executive and management functions over the affairs of societies and bodies registered under the *Cooperative Societies Ordinance*, *Incorporated Societies Act* and *Credit Unions Act* of Tuvalu and Kiribati respectively.

(i) *Credit Unions Act*⁶²

A credit union is governed by its articles of association and bylaws administered by (i) a board of directors, (ii) credit committee, and (iii) supervisory committee - the same being elected at annual general meetings of the union. The constitution of such committees are set out in s.53 of the Act, which prescribes minimum membership at 5 for the board of directors, 3 for the credit committee and 3 for the supervisory committee. Distinct from the organisational setup of registered societies, credit unions are more regulated and structured. Registered credit unions can similarly pursue their common interests by forming into a league by virtue of s.65 of the Act.

(ii) *Incorporated Societies Act*⁶³

An incorporated society is governed principally by its rules lodged with the Registrar. Management and executive functions are exercised by a committee or number of sub-committees as per a society's rules. The noticeable silence in the Act thus implies that the organisational structure of a society is left to be specified the rules of such society.

(iii) *Cooperative Societies Ordinance*⁶⁴

⁶² Kiribati

⁶³ Kiribati

⁶⁴ Both Kiribati and Tuvalu

The supreme authority of a cooperative society is vested in the annual general meeting⁶⁵ at which is to be elected members of the management committee. The organisational structure and composition of such committee is left to be determined in the bylaws of a registered society.

(iv) *Religious Bodies Registration Act*⁶⁶

Affairs and property of a religious body are to be managed by trustees registered under the Act. Any board of trustees of such religious body must not exceed 5 members.

C Powers & Duties

Outlined below are the statutory powers of registered credit unions and societies prescribed under general legislation. Whilst the prescribed powers may appear broad, detailed powers and functions are normally set out in the rules or bylaws of registered societies and credit unions.

(i) *Credit Unions Act*

A credit union, upon being registered under s.8 of the Act '*shall be a body corporate with limited liability,...perpetual succession and a common seal with power to purchase take hold or dispose of land and other property;...enter into contracts;...sue and be sued in its own name; and...do all things authorised to be done by or under...[the] Act*'.⁶⁷ The credit union may similarly borrow money,⁶⁸ and invest or deposit its funds in any financial institution in the country.⁶⁹

(ii) *Incorporated Societies Act*

⁶⁵ *Cooperative Societies Regulations*, r.21 (Kiribati and Tuvalu)

⁶⁶ Cap 89 (Kiribati)

⁶⁷ s.9

⁶⁸ s.41

⁶⁹ s.40

Upon incorporation, the subscribers to the rules of the society⁷⁰ will become ‘*a body corporate...having perpetual succession and a common seal, and capable forthwith...of exercising all the functions of a body corporate and of holding land*’. As a provision with a wide scope, it is anticipated that the rules of a society will further translate the same into specific powers that can be exercised by the society.

(iii) *Cooperative Societies Ordinance*⁷¹

By virtue of s.8, the registration of a society renders it a body corporate ‘*with perpetual succession and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings, and to do all things necessary for the purpose of its constitution*’. A society can similarly make loans to another society subject to consent of the Registrar,⁷² receive deposits and loans from non-members,⁷³ and invest its funds in approved schemes including securities.⁷⁴

D Audit and Inspection of Accounts & Related Matters

The Registrar is empowered to audit or cause to be audited and inspect the accounts, books, papers or securities of societies registered under the *Cooperative Societies Ordinance*.⁷⁵ Further, statements of a society’s income and expenditure, assets and liabilities, mortgages, charges and securities are to be furnished annually to the registrar under the *Incorporated Societies Act*.⁷⁶ Credit unions are similarly subjected to stringent audit requirements under the *Credit Unions Act*.⁷⁷ Thus, their accounts are to be audited annually by an auditor authorised by the Registrar with approval of the supervisory committee.⁷⁸ Such

⁷⁰ Including subsequent members

⁷¹ For both Kiribati and Tuvalu

⁷² s.32(1)

⁷³ s.33

⁷⁴ s.35

⁷⁵ s.39 (Kiribati and Tuvalu)

⁷⁶ s.23

⁷⁷ Kiribati

⁷⁸ s.48

requirements also empower the Registrar to access and inspect documents, cash and securities of a credit union.⁷⁹

E Distribution of Profit & Gains

This section briefly discusses whether legislation permits the distribution of the income and profit of registered societies and credit unions.

(i) Cooperative Societies Ordinance

By virtue of s.36 of the Ordinance in both Kiribati and Tuvalu, the balance of the profit made in any financial years may be divided among members by way of dividend or bonus. However, such distribution can only be made after a minimum of at least a quarter ($\frac{1}{4}$) of the total profit made is carried to the society's reserve fund. A general or special order of the Minister is required for such distribution in the case of a society with unlimited. A society is also given the option of contributing '*an amount not exceeding 10 per cent of the remaining net profit to any charitable purpose or to a common good fund*'.⁸⁰

(ii) Incorporated Societies Act

The Act prohibits pecuniary benefit to members as the objects of any registered society must not be one for pecuniary gain.⁸¹ Private benefit by way of pecuniary gain is however defined as excluding pecuniary gain earned by a member of the society by way of salary as servant or officer of the same,⁸² or a gain to which such member would be equally entitled if he or she were not a member.⁸³ Any pecuniary gain earned by such society is likewise excluded as gain for private benefit prohibited under the Act provided the same is not for distribution between members as dividend or bonus.⁸⁴

⁷⁹ s.50

⁸⁰ s.36(2)

⁸¹ s.3

⁸² s.4(d)

⁸³ s.4(e)

⁸⁴ s.4(a)

(iii) *Credit Unions Act*

Given their similarity to companies in terms of formation and shareholding, credit unions do operate for private gain. However, credit unions have objectives that aim generally to raise the standard of living of members as well as within their territories of operation. In terms of profit distribution, the net surplus of a union's income can be paid to members by way of dividend on shares.⁸⁵ Such distribution can only be made after a minimum of 10% of the gross income is transferred to a union's reserve fund.⁸⁶

F Conflict of Interest & Accountability

Given the popular perception that CSOs are private organisations not subjected to the same regime of public scrutiny applying to public institutions, the affairs of such organisations are often regulated in detail by internal rules that do not necessarily operate to serve public interest. Such rules nonetheless incorporate limited forms of transparency and accountability mechanisms that purport to protect and advance only the interests of members of a society and not otherwise. It is rather unfortunate that current legislation operates to preserve the status quo by remaining silent on this vital issue. In other words, matters of transparency, accountability and conflicts of interest are normally left to be dealt with in detail in the rules and bylaws of societies. Apart from the power of a registrar to audit and inspect accounts, matters of conflicts of interest are not satisfactorily addressed, if at all, in the *Incorporated Societies Act*, *Cooperative Societies Ordinance*, and to some extent, *the Credit Unions Act*.

IV TAX EXEMPTION & DEDUCTIONS

This part briefly looks at whether and how societies, credit unions or other associations (whether incorporated or not) may be entitled to tax exemption as set out under the tax regime of the countries studied. The objective is to review

⁸⁵ s.47

⁸⁶ s.45

the extent to which charitable, benevolent or public benefit causes are promoted through mechanisms prescribed, if any, under a country's tax laws.

A Exemptions

(i) Stamp Duty

The Minister is empowered under s.58 of the *Cooperative Societies Ordinance* to remit the stamp duty chargeable for any instrument relating to the business of a cooperative society executed by or on its behalf by an officer or member. No similar exemption is available for credit unions or incorporated societies under the *Credit Unions Act* and *Incorporated Societies Act* respectively.

(ii) Customs Duty and Import Levy

The *Customs Act 1993* of Kiribati provides extensive exemption for goods, material, equipment, and products imported for purposes of education, religion, sports and youth organisations.⁸⁷ No discretion is available to those in authority as regards such exemption as the provision is mandatory and absolute. The position in Nauru is unclear as no similar provision is found in the country. In the case of Tuvalu, the Imports Levy (Special Fund) Act 1997 empowers the Ministers to exempt from import levy chargeable under the Act any goods or class of goods imported into the country. This is an open provision which can be invoked by CSOs importing goods for purposes of their charitable programs in the country.

(iii) Income Tax

Section 81 of the *Income Tax Act 1993* of Kiribati expressly provides for the exemption from tax the income of religious, benevolent, charitable and educational institutions. Note that any such organisation and the status thereof

⁸⁷ Schedule I, para.7

is to be approved by the Board first so as to qualify for exemption. There is a similar approach in Tuvalu by virtue of the *Income Tax Act 1992*. Thus, exempt from tax will be the income of ‘any benevolent, religious, educational, charitable, cultural or amateur sporting institution or organisation approved by the Minister by regulation [or] any organisation which is at the time an approved community service organisation....’⁸⁸ Given its relatively small tax base, no tax deduction is available in Tuvalu for purposes of acknowledging donations made towards charitable and purposes. A similar approach is found in Kiribati. In both countries, no recognition is accorded to private donors making donations towards charitable and related causes. The position in Nauru is unclear given the absence of legislative provisions addressing this issue.

(iv) *Copra Tax*

The *Copra Tax Act 1986* of Kiribati empowers the Ministers to exempt from tax chargeable under the Act any cooperative society engaged in buying copra from primary producers.⁸⁹ It is unclear whether the export of such copra by any such cooperative society will similarly attract exemption from export duty.

B Commercial Undertaking

Generally, CSOs are not prohibited from owning and operating business enterprises in the countries studied. The key issue however is whether the profit made by any such enterprise forms part of the income of a CSO⁹⁰ in respect of which tax exemption will apply. Whilst the income made from private investments of CSOs is excluded from tax exemption in some countries such as Tonga and Solomon Islands, the position is ambiguous in both Kiribati and Tuvalu. The income tax legislation of both countries fails to provide any insight into this important issue, and can be attributed to the failure to define, *inter alia*, the components of *exempted income* of CSOs.

⁸⁸ Sch.1, part.2, para.2

⁸⁹ s.7

⁹⁰ As including religious, benevolent, charitable, cultural, sports, community service or educational institutions

V CONCLUSION

Outstanding issues commonly identified with the situation in most Pacific Island countries can also be found in the three countries. These include the need for more transparency and accountability, outdated legislation, and tax regimes that operate as a disincentive thus less attractive to potential donors. The subregion also has its unique circumstances, characterised by multiple factors including small populations and economies which contribute to the inherent overlap between government, civil society and the business sector. The latter presents a complicated situation as law needs to draw a fine line between civil society and the other sectors in order to achieve an appreciable level of independence for the CSO community.

Whilst Kiribati and Tuvalu do have few pieces of legislation to provide a basic enabling legal environment for a functioning civil society, Nauru has offered virtually nothing for this sector. No enabling legislation enacted or adopted by the country's legislature is identified in the course of the review. This questions the level of recognition, if at all, accorded by Legislature towards this important sector.

Further, the enabling environment for organisations that are charitable *stricto sensu* remains yet to be fully defined in all three countries. The *Incorporated Societies Act* of Kiribati is too general and vague to provide for this special category within the CSO sector. Similarly, the *Cooperative Societies Ordinance* of Tuvalu only operates to accommodate cooperative societies and not otherwise. Note that the constitutions of both countries do not contain provisions prescribing the application of statutes of the UK Parliament in the country made before their attainments of independence in 1978 and 1979 respectively. However, the *Tuvalu Independence Order 1978*, and the *Laws of Tuvalu Act 1987* provide for the continued operation of existing laws and imperial enactments that apply in the country on Independence Day. There is strong argument that any UK charitable and non-profit laws classified as statutes of

general application existing on Independence Day, if any, would qualify to apply in the country as part of its applied laws.

Finally, CSOs must be encouraged to engage in private enterprises and investments to achieve some level of self-reliance, thus, sustainability of programs. It is a common trait in the region for CSO projects to be donor-driven, supported and funded with little or no prospects of long-term sustainability in the event of withdrawal of such support. In other words, a CSO project would most likely die a natural death immediately after external funding is ceased or withdrawn. Thus, to achieve self-reliance, profit made from private investments should be classified as forming part of the exempted income of *investing* CSOs. Unfortunately, the income tax legislation of both Kiribati and Tuvalu falls short of providing this mechanism for self-reliance and sustainability.

*****the author is solely responsible for any errors found in the content hereof.***

Table of Legislation

Constitution of Kiribati 1979

Constitution of Nauru 1968

Constitution of Tuvalu 1978

Cooperative Societies Ordinance [Cap.14] (Kir)
Cooperative Societies Ordinance [Cap.64] (Tuv)
Copra Tax Act 1986 (Kir)
Credit Unions Act 1990 (Kir)
Customs Act (1993) (Kir)
Import Levy (Special Fund) Act 1997 (Tuv)
Income Tax Act 1900 (Kir)
Income Tax Act 1992 (Tuv)
Incorporated Societies Act 2002 (Kir)
Kiribati Red Cross Society Act 1989 (Kir)
Laws of Tuvalu Act 1987 (Tuv)
Newspaper Registration Act 1988 (Kir)
Registration of Religious Bodies Act [Cap 89] (Kir)
Registration of Religious Bodies (Amendment) Act 1985 (Kir)
Tuvalu Independence Order 1978 (Tuv)