



**CIVIC SPACE IN THE SADC REGION**

**REPORT**

**JUNE 2020**

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## **CHAPTER 1: INTRODUCTION**

This is a brief study examining the current state of civil rights and liberties in five southern African countries, as well as the impact of the Covid-19 pandemic on basic human rights and fundamental freedoms in the region. The countries considered are Malawi, Namibia, South Africa, Eswatini (Swaziland) and Zambia. In each country, the study has been focused on the specific challenges that exist or which have been experienced in the past years.

In Malawi, the study has examined civic space restrictions in light of the highly contested May 2019 presidential elections, together with restrictions on freedom of association, assembly and expression. In Namibia, the focus has been on the general human rights situation, while in Eswatini (Swaziland) the attention has been on freedom of expression and assembly given recent protests (2019) and the many journalists who have come under attack in the country.

In South Africa, human rights defenders have also come under serious attacks. Human Rights Defenders (HRDs) have been subjected to unlawful surveillance, arrests, physical attacks, disappearances and even killings. Government's imposition of a national lockdown in response to the Covid-19 pandemic has also led to a plethora of human rights violations including the killing of civilians.

In Zambia, the focus of the study has been on HRDs and freedom of expression. HRDs and the organisations they lead or belong to have been subjected to increasing levels of harassment. The state routinely uses public order laws to restrict the ability of Civil Society Organisations (CSOs) and HRDs to assemble and demonstrate. It also uses, together with the courts, insult, defamation and contempt of court laws to curtail the ability of CSOs, HRDs, media houses and journalists to criticize government and those in power.

We have structured this report as follows: after this introduction, chapter two to chapter six analyse and discuss civil rights and liberties in each country using the past year as a timeframe. We also examine the impact of Covid-19 on human rights and freedoms. We conclude the report with brief remarks in chapter 7.

## CHAPTER 2: MALAWI

### 2.1. Civic Space-Contested Elections

In May 2019, Malawians went to the polls to elect their presidential, parliamentary and local government leaders. While it was widely expected that the elections would usher in a transition to a period of political stability and much needed development to address mass poverty and unemployment, the opposed has turned out to be the case.

The electoral results gave the incumbent president Peter Mutharika of the Democratic Progressive Party (DPP) 38.57% of the vote while his closest rival, Lazarus Chakwera of the Malawi Congress Party, garnered 35.41% of the vote.<sup>1</sup> Immediately after the announcement of the election results, opposition parties and CSOs rejected the outcome arguing that there were widespread malpractices including the alteration of ballot papers and electoral results by officials of the Malawi Electoral Commission.<sup>2</sup>

What has followed since then is a period of intense political tension characterized by nationwide protests by CSOs and citizens at large, the use of excessive force by the police to disperse protestors, and attacks on HRDs.

In July 2019, government approached the High Court for an injunction to stop the protests but the Court on 5 August 2019 dismissed the application. Government then appealed to the Malawi Supreme Court of Appeal (SCA), which in turn overturned the High Court decision and imposed a 14-day ban on protests.<sup>3</sup>

On 23 August 2019, government deployed soldiers on the streets of the capital city Lilongwe in a bid to quell the protests. On 30 September 2019, the Malawi SCA refused the government's application for an indeterminate ban on protests arguing that the right to protest is protected in the country's constitution and therefore a blanket ban would be a violation of the Constitution.<sup>4</sup> The Malawi Constitutional Court on 3 February 2020 declared the May 2019 presidential elections invalid citing "massive" poll irregularities.<sup>5</sup> The Court ordered a repeat of the elections within a period of 150 days.<sup>6</sup> The elections will be repeated on 2 July 2020.<sup>7</sup>

Whereas the Malawian court decision overturning the presidential election is a mark of judicial independence, observers have pointed out that the widespread electoral malpractices are

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<sup>1</sup> Electoral results available on the website of the Malawi Electoral Commission-  
<https://www.mec.org.mw/elections/#/>

<sup>2</sup> Amnesty International, Amnesty International Submission for the UN Universal Periodic Review 36<sup>th</sup> Session of the UPR Working Group, 4-15 May 2020 (Amnesty Shadow Report: Malawi). Available at <https://www.amnesty.org/en/documents/AFR36/1396/2019/en/>

<sup>3</sup> Ibid, Amnesty International.

<sup>4</sup> Ibid.

<sup>5</sup> Malawi court overturns 2019 presidential election result, <https://www.ft.com/content/fbd09b8e-46c2-11ea-aeb3-955839e06441>.

<sup>6</sup> Ibid.

<sup>7</sup> <https://www.nyasatimes.com/not-may-19-malawi-fresh-elections-slated-for-july-2-mec/>

symptomatic of a constrained political space in the country. HRDs in particular have come under serious attack in Malawi because of their relentless campaign against the flawed elections.

Ruling party youth cadres have attacked HRDs who have organized public protests and demonstrations. HRDs have also been intimidated and subjected to trump up charges.<sup>8</sup> Timothy Mtambo is one such defender; he is the immediate former chairperson of the Human Rights Defenders Coalition of Malawi (HRDC) and the Executive Director of the Centre for Human Rights and Rehabilitation based in the Capital City Lilongwe. He received death threats, and had his house petrol-bombed. In October 2019, gunmen fired shots at his vehicle as he drove home from a meeting.<sup>9</sup> There has been no credible investigation on those behind the attacks. Billy Mayaya has also been one of the leading protest leaders. On 25 September 2019, ruling party youth cadres attacked him with machetes, causing him serious injuries. No one has been arrested and charged for that attack.<sup>10</sup>

Commenting on civic space restrictions in Malawi, Lydia Mkandawire of the Centre for Human Rights and Rehabilitation says that since the May 2019 elections, police have used violence against largely peaceful civilians, and there has been a lot of damage to property as criminals have taken advantage of the situation to loot. Many people are fearful of participating in public protests because of potential injuries and arrests by the police. She also highlights a case in Karonga district in northern Malawi, where a protester died due to assault during one of the demonstrations.<sup>11</sup>

According to Tiseke Kasambala of Freedom House, there is a great deal of confusion regarding the election re-run. It is uncertain if the elections will take place at all on 2 July as scheduled. The elections are also likely to be marred by violence:

*Already we are seeing signs that these elections will be violent, the government has its back against the wall and it will do anything to retain power. The elections are likely to be highly contested.*

Human Rights organisations have reported that since the beginning of the year, the government has escalated its crackdown on HRDs. For instance on 8 March 2020, police arrested Gift Trapence, the deputy chairperson of the HRDC, together with Reverend Macdonald Sembereka.<sup>12</sup> They were charged with inciting the public to contravene the law for having threatened to march to State House in opposition to the rigged elections. They were released on 12 March 2020 on bail after spending four days in custody.<sup>13</sup>

There is a critical and vocal media in Malawi, which has sometimes been on the receiving end of government action. It has been reported that authorities routinely attempt to intimidate journalists who criticize the ruling DPP. Government leaders have also regularly barred critical, privately owned media from covering government events.<sup>14</sup> In June 2019, the Malawi Communications Regulatory Authority (MACRA) suspended phone-in radio programmes allegedly because they

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<sup>8</sup> Ibid, Amnesty International Report.

<sup>9</sup> <https://www.amnesty.org/en/countries/africa/malawi/report-malawi/>

<sup>10</sup> Ibid.

<sup>11</sup> Response to questionnaire, 29 May 2020.

<sup>12</sup> Front Line Defenders, *Arbitrary detention of HRDs Gift Trapence and Macdonald Sembereka*; <https://www.frontlinedefenders.org/en/case/arbitrary-detention-hrds-gift-trapence-and-macdonald-semberaka>

<sup>13</sup> Ibid.

<sup>14</sup> United States-Human Rights Report on Malawi (2018), [www.state.gov/wp-content/uploads/2019/03/Malawi-2018](http://www.state.gov/wp-content/uploads/2019/03/Malawi-2018)

were “*indulging themselves in careless and unethical coverage of post-election events.*”<sup>15</sup> The ban was declared unconstitutional and unlawful by the court in September 2019.<sup>16</sup>

Kasambala says journalists are often under attacks by ruling party supporters, while MACRA has from time to time attempted to stifle the voices of critical radio stations:

*What often happens is that journalists are attacked by ruling party members and when they report to the police, arrests rarely happen. They usually face new attacks and excessive use of force by the police. In the case of media, a lot of the restriction is in the form of censorship. So in the past where radio stations such as Zodiac- which has a huge listenership in Malawi- has sought to report or broadcast the protests, it has been shut down or MACRA has sought to prevent them from reporting under threats of being shut down or facing fines.*<sup>17</sup>

CSOs continue to operate in Malawi despite the challenges highlighted above. However, one of the most concerning issues relates to government’s attempt in 2018 to amend the Non-Governmental Organisations Act to establish an NGO authority. A cabinet minister will appoint members of the authority, which will boast wide-ranging powers including the power to impose heavy fines on ‘errant NGOs’.<sup>18</sup> CSOs have criticised government’s move as an attempt to restrict the right to freedom of association and more importantly, to clamp down on their activities.<sup>19</sup> The organisations successfully challenged the Bill in Court and in December 2018, the Court granted an injunction temporarily barring Parliament from debating the Bill until the constitutional issues raised by its critics have been addressed.<sup>20</sup>

## **2.2. Impact of Covid-19 on Civil Rights and Liberties**

On 20 March 2020, Malawi’s President declared a state of national disaster under the Disaster Preparedness and Relief Act (No 24 of 1991) for a period of one month in response to the Covid-19 pandemic. He ordered all schools to close as of 23 March, and prohibited all gatherings of more than 100 persons. On 8 April, the Minister of Health issued public health rules to contain the spread of the Corona virus. Just over a week later on 17 April, Government announced a national shutdown, which was met with protests by informal traders who criticized government for its failure to include measures to address the socio-economic impact of the lockdown on them.<sup>21</sup>

The protests were peaceful but police used force to disperse the protestors arguing that the demonstrations were in violation of government’s prohibition on gatherings.<sup>22</sup> A group of CSOs

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<sup>15</sup> Amnesty Shadow Report: Malawi; *The Independent*, 5 December 2018, *Malawi court blocks contested NGO regulation law*, <https://www.independent.co.ug/malawi-court-blocks-contested-ngo-regulation-law/>

<sup>16</sup> Ibid.

<sup>17</sup> Interview, 29 May 2020.

<sup>18</sup> Malawi NGOs Protest Amended NGO Bill, <https://www.voanews.com/africa/malawi-ngos-protest-amended-ngo-bill>

<sup>19</sup> Ibid.

<sup>20</sup> Amnesty Shadow Report: Malawi.

<sup>21</sup> Freedom House, *Heavy-Handed Pandemic Responses Could Fuel Unrest in Southern Africa*, <https://freedomhouse.org/article/heavy-handed-pandemic-responses-could-fuel-unrest-southern-africa>

<sup>22</sup> Malawi Police Clash with Vendors Protesting Coronavirus Lockdown, <https://www.newsbreak.com/news/0OmQLe8m/malawi-police-clash-with-vendors-protesting-coronavirus-lockdown>

including the HRDC approached the Court on an urgent basis and successfully challenged the lockdown. The Court granted an injunction (interdict) suspending the lockdown for a period of seven days pending a review of government's decision.<sup>23</sup> The Court thereafter extended the interdict for a further five days. On 21 April, the Court referred the matter to the Constitutional Court for deliberation. To date, the lockdown remains suspended.<sup>24</sup>

Mkandawire points out that there have been attempts by the ruling party to use the pandemic as an excuse to delay the presidential election re-run:

*...there have been several attempts to delay the fresh presidential election by making it seem like nothing can be done because of Covid-19. Dates have been changed so as to confuse voters. There has also been no proper civic education and messaging on the procedures to be followed in the run up to the election. This has discouraged people from verifying their voter registration details.*<sup>25</sup>

Kasambala argues that the lockdown together with the state of national disaster have fallen flat as both the ruling party and opposition politicians have been holding campaign rallies around the country. The limit of 100 persons in public gatherings has not been enforced. Media censorship however, remains a major concern:

*MACRA warned broadcasters not to air anything by the country's Vice President Saulos Klaus Chilima. Chilima and the country's President Peter Mutharika do not see eye to eye. MACRA directed broadcasters to only broadcast statements issued by the Government about the Pandemic and no one else.*<sup>26</sup>

Kasambala adds that there have been attempts by the Malawi NGO Board to introduce regulations preventing NGOs from participating in service delivery during the Covid-19 pandemic unless such NGOs have the consent of government. Mkandawire on the other hand underscores the fact that whereas there have been no overt acts of censorship during the pandemic, there have been reported attacks on journalists and media houses. This however is part of a continuing trend for the past few years:

*There have been several attacks on journalists and media outlets. Brian Banda was attacked by alleged Democratic Progressive Party (DPP) supporters. Macmillan Mozeyo of Ufulu FM was also attacked because of a story he wrote about the inhumane treatment of a COVID-19 patient by health officials. The Times group has also faced a lot of challenges because of its strong criticism of corruption by politicians and well-connected individuals. Government has threatened to shut it down on several occasions.*<sup>27</sup>

According to the two respondents, there has been no marked increase in the violation of human rights and freedoms due to the Covid-19 pandemic. The current restrictions emanate from the contested May 2019 elections.

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<sup>23</sup> Malawi: High Court Temporarily Blocks COVID-19 Lockdown, <http://www.loc.gov/law/foreign-news/article/malawi-high-court-temporarily-blocks-covid-19-lockdown/>

<sup>24</sup> Malawi's cash handouts and the row about a coronavirus lockdown, <https://www.bbc.com/news/world-africa-52471276>

<sup>25</sup> Response to questionnaire, 29 May 2020.

<sup>26</sup> Interview on 29 May 2020.

<sup>27</sup> Response to questionnaire, 29 May 2020.



## CHAPTER 3: NAMIBIA<sup>28</sup>

### 3.1. Civic Space- Civil rights and freedoms<sup>29</sup>

Namibia is a multi-party democracy with a good track record of respect for political rights and civil liberties.<sup>30</sup> Notably, only one political party-the South West African People's Organisation (SWAPO) has dominated Namibian politics since the country's independence from South Africa in 1990. In general however, the country retains a strong, vibrant democracy, with a media that is critical and able to operate without hindrance.<sup>31</sup>

According to the US's Bureau of Democracy, Human Rights and Labour, Namibian citizens are able to enjoy their constitutional rights to freedom of association, assembly and expression. The most recent elections held in November 2014 were peaceful and generally free and fair. In those elections, the leader of SWAPO, Hage Geingob was elected with a vote of 87%, while the ruling party won 77 of the 96 parliamentary seats.<sup>32</sup> In the local government elections held in 2015, SWAPO won 112 of the 121 (92%) of regional council seats.<sup>33</sup>

### 3.2. Impact of Covid-19 on Civil Rights and Liberties

In response to the Covid-19 pandemic, President Geingob declared a state of emergency on 17 March 2020.<sup>34</sup> On 28 March 2020, the President issued a proclamation suspending the operation of certain laws including certain provisions of the Criminal Procedure Act (1977), the Magistrate's Courts Act (1944) and the High Court Act (1990). The country went into a national lockdown for an initial period of 21 days from 28 March to 17 April 2020.<sup>35</sup>

The Regulations closed all schools and institutions of higher learning<sup>36</sup>, prohibited public gatherings<sup>37</sup>, prohibited travel except with a permit to perform an essential service<sup>38</sup> and banned foreigners-except holders of permanent residence, from entering the country.<sup>39</sup> Drivers of vehicles transporting goods would however be permitted. In addition, the Regulations confined all people to their places of residence except for those traveling to perform a 'critical service' or to obtain

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<sup>28</sup> The research consultant was not able to hold any interviews on the civic space in Namibia. An interview scheduled with a key informant did not materialise.

<sup>29</sup> A detailed analysis of the state of civil rights and liberties in Namibia is available in the report by HURISA titled: *A Situational Analysis of Human Rights and Democracy in the SADC Region*, (May 2020), at pp 18-21.

<sup>30</sup> Chapter 3 (Articles 5-25) of the Namibian Constitution provides for fundamental rights and freedoms. See the Constitution at [http://www.gov.na/documents/10181/14134/Namibia\\_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb](http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb)

<sup>31</sup> Ibid, HURISA Report (n28 above).

<sup>32</sup> <https://www.state.gov/wp-content/uploads/2019/03/Namibia-2018>

<sup>33</sup> Ibid.

<sup>34</sup> Declared in terms of section 26(1) of the Constitution read with section 30(3) of the Disaster Risk Management Act (10 of 2012). Government Gazette, 7148 of 18 March 2020.

<sup>35</sup> Regulation 3 of the National Lockdown Regulations.

<sup>36</sup> Regulation 4

<sup>37</sup> Regulation 5.

<sup>38</sup> Regulation 6.

<sup>39</sup> Regulation 7.

essential goods or services.<sup>40</sup> The sale of alcohol was also prohibited<sup>41</sup> and all businesses, except those providing critical services<sup>42</sup>, were ordered to be closed.<sup>43</sup> Any violation of the Regulations will incur a penalty of N\$2000 or six months' imprisonment, or both.<sup>44</sup>

On 1 April 2020, The Finance Minister Ipumbu Shiimi announced that government would provide a grant to assist those impacted by the lockdown. Beneficiaries of the grant includes workers in the informal sector.<sup>45</sup> Like South Africa, Namibia has taken a 'stagist' approach to the Covid-19 pandemic. There are different stages of the lockdown, starting with stage 1-the most severe, to stage 4, the least severe. On 5 May 2020, the country transitioned to stage 2 which remained until 2 June 2020 when it transitioned to stage 3 of the lockdown.<sup>46</sup> As at the date of compiling this report (9 June 2020), the country has confirmed 23 Covid-19 cases and no associated deaths.<sup>47</sup>

There have been no formal reports of violations of human rights in the country during the pandemic. However, an article in the Maverick Citizen dated 17 April 2020 observed that the Police Inspector-General of Namibia had issued a statement denouncing violations of rights of individuals by the police at the beginning of April.<sup>48</sup>

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<sup>40</sup> Regulation 8.

<sup>41</sup> Regulation 11.

<sup>42</sup> Critical services are defined to include medical, pharmaceutical, hospitals, water, waste management, electricity distribution, electrical transmission and agriculture (Annexure B).

<sup>43</sup> Regulation 12.

<sup>44</sup> Regulation 16 of the Disaster Management Regulations,

<sup>45</sup> *Namibia cautiously eases lockdown as infections remain static*, <https://www.dailymaverick.co.za/article/2020-05-05-namibia-cautiously-eases-lockdown-as-infections-remain-static/>

<sup>46</sup> *Namibia: Government announces further easing of COVID-19 lockdown from June 2 /update 6*, <https://www.garda.com/crisis24/news-alerts/346626/namibia-government-announces-further-easing-of-covid-19-lockdown-from-june-2-update-6>.

<sup>47</sup> <https://www.worldometers.info/coronavirus/country/namibia/>

<sup>48</sup> *Maverick Citizen Southern Africa: Human Rights Locked Down – southern Africa human rights roundup*, <https://www.dailymaverick.co.za/article/2020-04-17-human-rights-locked-down-southern-africa-human-rights-roundup/>

## CHAPTER 4: SOUTH AFRICA

### 4.1. Human Rights Defenders in South Africa

On 8 March 1999, the General Assembly of the United Nations adopted the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*.<sup>49</sup> Article 1 of the Declaration states that everyone has the right, individually and in association with others, “to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.” The Declaration reminds states that they have a duty to “protect, promote and implement all human rights and fundamental freedoms.” It also requires states to adopt “legislative, administrative and other steps as may be necessary to ensure that all the rights and freedoms are effectively guaranteed and realised.”

Although the Declaration does not provide a definition of a ‘Human Rights Defender’(HRD), it has been pointed out that journalists, NGOs, whistleblowers, public interest lawyers, community activists, student leaders, trade union leaders, etc are all HRDs.<sup>50</sup> South Africa does not have specific legislation governing HRDs but there is an assortment of laws which have made it possible for them to operate in the country. These laws include the Constitution of the country, the Promotion of Access to Information Act (PAIA), the Promotion of Administrative Justice Act (PAJA) the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the Protected Disclosures Act (PDA).

HRDs in South Africa have actively used the Constitution and legislation to defend and advance constitutional rights and freedoms. Notable in this regard are organisations such as the Treatment Act Campaign<sup>51</sup>, Lawyers for Human Rights<sup>52</sup>, Legal Resources Centre<sup>53</sup>, Section 27<sup>54</sup>, the Human Rights Institute of South Africa<sup>55</sup>, Scalabrini Centre<sup>56</sup>, the Right to Know<sup>57</sup>, Equal Education<sup>58</sup> and Abahlali Base Mjondolo<sup>59</sup>, among many others.

It is undeniable that HRDs have contributed immensely to South Africa’s constitutional and democratic practice and are regularly mentioned in important court decisions. But that aside, HRDs in South Africa have also faced severe harassment by state and non-state actors including intimidation, arrests, detentions, disappearances and even killings. The South African Human Rights Commission (SAHRC) in a research brief titled: “*The Status of Human Rights Defenders in South Africa*”<sup>60</sup> observes as follows:

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<sup>49</sup> Available at <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

<sup>50</sup> South African Human Rights Commission: Research Brief, *the Status of Human Rights Defenders in South Africa*. Available at: [www.sahrc.org.za/files/HumanRightsDefenders](http://www.sahrc.org.za/files/HumanRightsDefenders)

<sup>51</sup> <https://tac.org.za/>

<sup>52</sup> [www.lhr.org.za](http://www.lhr.org.za)

<sup>53</sup> [www.lrc.org.za](http://www.lrc.org.za)

<sup>54</sup> [www.section27.org.za](http://www.section27.org.za)

<sup>55</sup> [www.hurisa.org.za](http://www.hurisa.org.za)

<sup>56</sup> <https://scalabrini.org.za>

<sup>57</sup> [www.r2k.org.za](http://www.r2k.org.za)

<sup>58</sup> <https://equaleducation.org.za>

<sup>59</sup> [www.abahlali.org](http://www.abahlali.org)

<sup>60</sup> Ibid, n50 above.

*Despite the rights and protections afforded in the South African Constitution, such as freedom of assembly, association, and the ability to actively participate in decision-making processes that shape their lives and promote good governance – all of which comprise the right to freedom of expression, and are fundamental for the full realisation of socio-economic rights – HRDs frequently experience multiple violations of these rights.<sup>61</sup>*

Women HRDs are particularly more at risk of certain forms of violence because they are:

*perceived as challenging accepted socio-cultural norms, traditions, perception and stereotypes about their femininity, sexual orientation, and the role and status of women in society.<sup>62</sup>*

The report goes on to identify the ways in which HRDs experience persecution in South Africa including:<sup>63</sup>

- Disruption of peaceful protests and assemblies by security agencies often resulting in the arrest of HRDs.
- Detention of HRDs in prison under conditions, which are often poor, with overcrowding and dilapidated infrastructure.
- During the disruption of often-peaceful protests, police use rubber bullets, stun grenades, water canons and sometimes live ammunition (as happened in Marikana in August 2012).
- Use of legislation such as the Regulation of Gatherings Act (205 of 1993) and the common law (malicious injury to property) against HRDs. This has resulted in some HRDs having criminal records.
- Use of interdicts against HRDs as happened with the Fees Must Fall Protests in 2015 and 2016, as a form of crowd management mechanism.

When Parliament passed the PDA in 2000, it warned that criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance. It went on to observe that such conduct could endanger the economic stability of the country and have the potential to cause social damage.<sup>64</sup> The PDA talks about the need to provide protection for employees who make disclosures in terms of the Act by ensuring that such employees are protected from reprisals. Unfortunately, the PDA (also known as the whistle-blower legislation) has not lived up to its reputation. As the SAHRC warns in the research brief mentioned above:

*Despite the PDA, corruption remains endemic in the country. It has been found that the progress around protected disclosures or whistleblowing has been met with hostility in South Africa resulting in whistle-blowers being threatened, killed, or unable to find subsequent employment.<sup>65</sup>*

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<sup>61</sup> Ibid, at p2.

<sup>62</sup> Ibid, at p3.

<sup>63</sup> Ibid, at pp18-20.

<sup>64</sup> Preamble to the PDA.

<sup>65</sup> Ibid, n50 above, at p30.

There is a worrying trend of disappearances or killings of HRDs in South Africa. Many such disappearances and murders remain unsolved. The following cases illustrate the severity of the problem:

1. Ngobile Nzuzwa of the *Abahlali base Mjondolo* movement in KwaZulu-Natal was killed by a police officer at a road block in 2013. The officer was convicted and sentenced to a term of 10 years imprisonment in 2018.<sup>66</sup>
2. Thulisile Ndlovu of *Abahlali* was killed in 2014. In May 2016, the Durban High Court found three accused persons guilty of her murder and sentenced them to 12 years in prison.<sup>67</sup>
3. Papi Tobias, a community activist from the Vaal in Gauteng province disappeared in February 2016.<sup>68</sup>
4. Sikhosphi “Bazooka” Radebe, from the Eastern Cape was killed in March 2016. He led a community-based campaign against an Australian company attempting to mine titanium in the area.<sup>69</sup>
5. Sindiso Maqaqa was a high profile politician, a local councilor and the former Secretary General of the African National Congress Youth League. He was killed in 2017 after exposing widespread corruption in the local municipality. Three men have been charged for his murder.<sup>70</sup>
6. S’fiso Ngcobo of *Abahlali* was killed in March 2018.<sup>71</sup>
7. Nomawethu Kunene disappeared from her house in Johannesburg at the beginning of 2018. She had blown the whistle on corruption linked to the transfer of psychiatric patients from state funded institutions to poorly run private NGOs. Many of those transferred later died in what became known as the “Life Esidimeni Tragedy”<sup>72</sup>.
8. Thabiso Zulu a close ally of Sindiso Maqaqa has been in hiding since the latter’s killing in 2017. He has faced assassination attempts and sought witness protection from the state.<sup>73</sup>

Given the risk faced by whistleblowers, the SAHRC has recommended that the Department of Justice and the Public Protector should investigate the establishment of a specialized unit to protect them.<sup>74</sup> Without adequate protection, whistle blowers will remain afraid for their lives and very few individuals will risk their lives or livelihoods to expose corruption or other misdeeds.

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<sup>66</sup> <http://abahlali.org/taxonomy/term/nqobile-nzuzwa/nqobile-nzuzwa/>

<sup>67</sup> <https://hrdmemorial.org/hrdrecord/thuli-ndlovu/>

<sup>68</sup> *Papi Missing for a Year Now*, available at <https://www.pressreader.com/south-africa/sowetan/20170206/281689729548793>.

<sup>69</sup> See also the article by Greg Nicolson, Daily Maverick (24 March 2016). *Goodbye Bazooka: Wild Coast anti-mining activist killed*. <http://www.dailymaverick.co.za/article/2016-03-24-goodbye-bazooka-wild-coast-anti-mining-activist-killed/#.V1f1KKIjYuM>

<sup>70</sup> <http://www.capetalk.co.za/articles/363747/sindiso-magaqa-murder-trial-postponed-for-april-2020>

<sup>71</sup> According to Abahlali, five of its members were killed in a period of eight months. See <http://abahlali.org/node/16523/>.

<sup>72</sup> This refers to the tragic circumstances surrounding the deaths of 143 people who were unlawfully moved from government psychiatric facilities to private, often unregistered non-governmental organisations. See e.g. Mpumelelo Mkhabela, News24, 23 March 2018: *The reasons for the Life Esidimeni tragedy hidden in Moseneke's report*. At [https://www.news24.com/Columnists/Mpumelelo\\_Mkhabela/the-reasons-for-the-life-esidimeni-tragedy-hidden-in-mosenekes-report-20180323](https://www.news24.com/Columnists/Mpumelelo_Mkhabela/the-reasons-for-the-life-esidimeni-tragedy-hidden-in-mosenekes-report-20180323)

<sup>73</sup> <https://www.news24.com/citypress/voices/why-is-whistle-blower-thabiso-zulu-in-hiding-in-a-free-sa-20191126>

<sup>74</sup> *Ibid*, n50, at p31.

Nikiwe Kaunda warns that the situation of HRDs in South Africa “is precarious” and that the state deals with them in an ‘arrogant manner:

*Look at those representing migrants, refugees and asylum seekers. Or women human rights defenders advocating for access to clean water. They have been marginalised and are dealing with an arrogant State that refuses to hear them or to support their causes and the constituencies they represent.*<sup>75</sup>

Kaunda describes the environment for HRDs in South Africa as ‘hostile’ and warns that whistleblowers or anyone exposing injustice is at risk of being killed:

*Whistle-blowers tend to get killed. Anyone exposing injustice – whether it is in the mining sector, tenders in municipalities, or when dealing with natural resources management – the trend in South Africa is that people are killed. It is a travesty and great injustice that we need to pay more attention to. Perhaps through more investigative journalism and exposes. The environment is hostile.*<sup>76</sup>

Samkhelo Mokhine of the Freedom of Expression Institute makes the point that while the overall human rights picture in South Africa is ‘rosy’; the reality is that there has been a clampdown on HRDs. There is systematic repression of whole communities with killings and disappearances of HRDs. This situation is compounded by the fact that many CSOs and HRDs do not have adequate funding to operate and are thus put under a lot of pressure by the state.<sup>77</sup>

## **4.2. Impact of Covid-19 on Civil Rights and Liberties**

On 23 March 2020, South Africa’s President Cyril Ramaphosa announced that the country would be placed under a stringent national lockdown commencing on 27 March for a period of 21 days. This period was subsequently extended by 15 days to 30 April.<sup>78</sup> With the onset of the lockdown, police, supported by the military, were deployed to the streets of the country to enforce the lockdown regulations with civilians only allowed to travel to shops to buy food or to receive medical care, among other limited purposes.

There have been widespread reports of violence including the killing of civilians by the police and the military during the lockdown. It has been reported that the police oversight body, the Independent Police Investigative Directorate (IPID), received 828 complaints between 26 March and 5 May 2020. Of those cases, 376 (45%) were lockdown-related.<sup>79</sup> At a webinar hosted by HURISA , Ditshwanelo – The Botswana Centre for Human Rights, Transformation Resource Centre based in Lesotho, on 8 April 2020. to discuss the impact of the lockdown on human rights, panelists noted that;

*Since the start of the lockdown, there had been an increase in reports of abuses by law enforcement officers, ranging from unnecessary and arbitrary arrests, harassment and*

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<sup>75</sup> Response to questionnaire, 3 June 2020.

<sup>76</sup> Ibid.

<sup>77</sup> Interview, 27 May 2020.

<sup>78</sup> See presidential announcements at [www.gov.za](http://www.gov.za)

<sup>79</sup> Daily Maverick, 26 May 2020, *Lockdown ‘has made ordinary people criminals’*, <https://www.dailymaverick.co.za/article/2020-05-26-lockdown-has-made-ordinary-people-criminals/#gsc.tab=0>

*“milder” forms of punishment to extreme and excessive uses of force, leading to grave injuries and tragic deaths, especially among the most vulnerable.*<sup>80</sup>

One of the most disturbing killings has been that of Collins Khosa. Security officers allegedly found him drinking alcohol in his yard and assaulted him following an altercation. Khosa later died of his injuries.<sup>81</sup> The family initially approached the Constitutional Court for direct access asking among other things, that the Court order the government to adopt a code of conduct to guide the police and the military on their interaction with civilians. The Court denied the application for direct access.<sup>82</sup>

The family then applied to the High Court in Pretoria for the same relief. On 15 May 2020, the Court handed down a ground-breaking judgment (“the Khosa Judgment”) in which it affirmed that all persons within the territory of the Republic of South Africa are entitled to the non-derogable rights contained in the Constitution.<sup>83</sup> These include the rights to human dignity, life, not to be tortured in any way and not to be subjected to cruel, inhuman or degrading treatment.<sup>84</sup>

The Court ordered the police, including metro police, and the military to “*act in accordance with the Constitution and the law including customary international law.*”<sup>85</sup> In addition, the Court ordered that within five days of the judgment, all military officers who were adjacent to the deceased’s house at the material time be placed on suspension. Similarly, the police and military, together with their entire chains of command, were directed to warn their members that “*any failure to report, repress and prevent acts of torture or cruel, inhuman and degrading treatment or punishment shall expose them each individually to criminal, civil, and/or disciplinary sanctions.*”<sup>86</sup>

The Court also ordered the Minister of Defence and the Minister of Police, within five days of the judgment, to publish a code of conduct and operational procedures regulating the conduct of the military and the police (including metro police) during the state of disaster.<sup>87</sup> The Khosa Judgment has been widely welcomed by CSOs and HRDs.<sup>88</sup> A plethora of applications has also been brought

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<sup>80</sup> Ibid.

<sup>81</sup> This case was widely reported in South Africa mainstream and social media. See e.g. SABC, Family of Alexandra man allegedly killed by soldiers doesn’t trust SANDF probe. <https://www.sabcnews.com/sabcnews/family-of-alexandra-man-allegedly-killed-by-soldiers-doesnt-trust-sandf-probe/> See also the HURISA Report *A Situational Analysis of Human Rights and Democracy in the SADC Region*, (May 2020), at pp 22-27.

<sup>82</sup> Franny Rabkin, Mail and Guardian online, 27 Apr 2020. Khosa case: Going straight to the Constitutional Court isn’t always the right path. Available at <https://mg.co.za/article/2020-04-27-khosa-case-going-straight-to-the-constitutional-court-isnt-always-the-right-path/>

<sup>83</sup> *Khosa and 2 Others v Minister of Defence & Military Veterans and 4 Others* (Case No: 21512/2020).

<sup>84</sup> Ibid, at para 146.

<sup>85</sup> Ibid, at para 146: 2.2.

<sup>86</sup> Ibid, at para 146: 3.3.

<sup>87</sup> Ibid, at para 146: 4.1.

<sup>88</sup> Carmel Rickard, *Collins Khosa judgment: A win for all of South Africa against brutality by security forces*, Daily Maverick, 18 May 2020; <https://www.dailymaverick.co.za/article/2020-05-18-collins-khosa-judgment-a-win-for-all-of-south-africa-against-brutality-by-security-forces/>. See also, Mia Swart, 17 Ma 2020: *S Africa court issues orders to end police abuse during lockdown: Praise for court order compelling gov’t ministers to stop security forces’ brutality following death of Collins Khosa*, available at <https://www.aljazeera.com/news/2020/05/africa-court-issues-orders-police-abuse-lockdown-200516105512595.html>

in the courts challenging one or the other aspect of the lockdown regulations.<sup>89</sup> But a far reaching decision has been that of the Pretoria High Court in the case of *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*.<sup>90</sup> On 28 May 2020, the Court held that whereas the Minister's declaration of a national state of disaster was rational, the regulations promulgated by the Minister under the Act "in a substantial number of instances are not rationally connected to the objectives of slowing the rate of infection or limiting the spread thereof."<sup>91</sup> The Court declared the regulations to be unconstitutional and invalid and gave the Minister 14 days within which to "review, amend and republish" them in order to bring them into conformity with the Constitution. Government has appealed this judgment.<sup>92</sup>

Both Mokhine and Kaunda who were interviewed for this study observed that there have been undue restrictions on civil rights and liberties in the country during the lockdown. It is a sentiment supported by journalist Ferial Haffajee in an article titled: "*Ramaphosa calls 11 lockdown deaths and 230,000 arrests an act of 'over-enthusiasm' – really!*" where she points out that:

*Over 230,000 people have been arrested for violating the draconian measures put in place to keep people safe while 11 South Africans (all black men, like George Floyd, the American killed by police) have died in police action during the lockdown. .... This is a breathtaking level of police violence and only Kenya and Nigeria have seen more people killed, according to this Al Jazeera report of a UN Human Rights Commission report on toxic lockdowns in which South Africa got a starring role. As Carte Blanche reported, 230,000 South Africans now face having criminal records for often minor infringements such as being on a road walking but without a till slip to prove a purchase, out walking (within the exercise window), or smoking a cigarette without a slip to prove historic purchase.*<sup>93</sup>

Migrants including refugees and asylum seekers have also been excluded from many of the interventions put in place by government to ameliorate the plight of the most vulnerable.<sup>94</sup> Some

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<sup>89</sup> The official opposition party the Democratic Alliance has challenged the constitutionality of the lockdown regulations (<https://www.702.co.za/articles/383815/da-challenges-lockdown-regulations-validity-in-court>) while in Cape Town, the High Court declined an application sought to compel government to allow hairdressers to resume their activities (Jenni Evans, *Hairdressers lose court bid to return to work during lockdown*, <https://www.news24.com/news24/southafrica/news/hairdressers-lose-court-bid-to-return-to-work-during-lockdown-20200528>

<sup>90</sup> (21542/2020) [2020] ZAGPPHC 184 (2 June 2020), <http://www.saflii.org/za/cases/ZAGPPHC/2020/184.html> , at para 9.1.

<sup>91</sup> Ibid, at para 9.2.

<sup>92</sup> In its application for leave to appeal the judgment, government cites four main grounds for its challenge: (1) that the applicants failed to raise a valid constitutional attack; (2), that the court strayed beyond the pleadings; (3), that the wholesale declaration of invalidity was not justified and (4), that the High Court's orders are unduly vague. , <https://www.iol.co.za/pretoria-news/news/governments-appeal-against-lockdown-regulations-judgment-is-surprising-49046745>

<sup>93</sup> <https://www.dailymaverick.co.za/article/2020-06-01-ramaphosa-calls-11-lockdown-deaths-and-230000-arrests-an-act-of-over-enthusiasm-really/>

<sup>94</sup> Human Rights Watch, *South Africa: End Bias in Covid-19 Food Aid*, <https://www.hrw.org/news/2020/05/20/south-africa-end-bias-covid-19-food-aid>



commentators have termed this exclusion as ‘deeply troubling’ ‘inhuman’, and against the spirit of *Ubuntu*.<sup>95</sup>

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<sup>95</sup> Njabulo S Ndebele and Judy Sikuza, Daily Maverick, 19 May 2020, <https://www.dailymaverick.co.za/opinionista/2020-05-19-african-foreign-nationals-are-being-ignored-in-the-fight-against-covid-19-where-is-our-ubuntu/>

## CHAPTER 5: ESWATINI (SWAZILAND)

### 5.1. Severely Restricted Civic Space

Eswatini (formerly Swaziland) is a dictatorship in every conceivable way. Political parties are banned and leaders of organisations seeking to express political views or to challenge the government are routinely arrested and held in jail for lengthy periods. Freedom of expression and freedom of association are severely restricted. Academic freedom is limited by prohibitions against criticizing the monarchy while government restricts freedom of assembly and association by using the sweeping powers granted to it under the 2008 Suppression of Terrorism Act.<sup>96</sup> Journalists face intimidation, harassment, and assault, and are arrested on a regular basis.<sup>97</sup>

It is this background, which informs any analysis of civil rights and freedoms in the country. The King exercises total control over the lives of Swazi citizens, while is immunized from criticisms and civil or criminal prosecutions. Criticizing the King or the royal family is prohibited, and the king has the final say in the appointment and removal of judges. HURISA has described the absolutist nature of the Swazi kingdom in the following terms:

*Mswati is the head of state; he retains absolute control over the executive, the legislature and the judiciary. He is also immune from civil suits and criminal prosecution.... [He] wields absolute power in the kingdom. He appoints 10 of the 65 members of the House of Assembly (parliament) as well as the Prime Minister, who is the head of Government. He also appoints 20 members of the 30-seat Senate (upper house of parliament). Only two women have been directly elected to Parliament. The King has tight control over the Country's political system with candidates being vetted and approved through what is known as the Tikundla system. Tikundla is a system under the control of chiefs who vet and approve candidates, and therefore determine the outcome of elections. The majority of Swazis live in rural areas under the control of chiefs, who are appointed by the king. The King controls most of the public land in the country.*<sup>98</sup>

Chapter III of Eswatini's Constitution passed in 2005 guarantees the usual rights and freedoms found in the majority of constitutional democracies around the world. However, this is where the similarity ends. Practically, Swazi citizens enjoy very few if any rights. Theoretically, Swazi citizens have the right to personal liberty<sup>99</sup>, equality before the law<sup>100</sup>, freedom of conscience or religion<sup>101</sup>, freedom of expression<sup>102</sup> and freedom of assembly and association.<sup>103</sup> Security agencies routinely monitor personal communications including social media<sup>104</sup>, protestors are

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<sup>96</sup> Swaziland: History and Politics, available at <https://www.issafrica.org/af/profiles/Swaziland/Politics.html>.

<sup>97</sup> This information comes from the HURISA Report titled: *A Situational Analysis of Human Rights and Democracy in the SADC Region*, (May 2020), at pp 28-30.

<sup>98</sup> *Ibid*, at p28.

<sup>99</sup> Section 16(1) of the Constitution.

<sup>100</sup> Section 20 of the Constitution.

<sup>101</sup> Section 24 of the Constitution.

<sup>102</sup> Section 24 of the Constitution.

<sup>103</sup> Section 25 of the Constitution.

<sup>104</sup> Freedom House Report on Eswatini (2019), <https://freedomhouse.org/country/eswatini/freedom-world/2019>

violently dispersed and risk arrest and detention, and surveillance of protests is common with information collected reportedly used to deny protestors access to government jobs and services.<sup>105</sup> Trade union leaders are arrested on a regular basis while CSOs are not able to operate due to sedition and terrorism laws as well as police monitoring and interference. Advocacy organisations are banned.<sup>106</sup>

Mary Da Silva is a human rights activist who works with local organisations in Eswatini on the rule of law, independence of the judiciary, women rights, children's rights and HRDs. She has worked with most of the human rights CSOs in the country as well as regional bodies in southern Africa, together with the International Commission of Jurists. She was interviewed for this study and characterized civic space in Eswatini as follows:

*Civic space has always been severely restricted in this country. The Constitution of 2005 came with a Bill of Rights that guaranteed basic rights and fundamental freedoms. But that did not translate into an enjoyment or realization of these rights. Since the Constitution was passed, we have been struggling with freedom of expression, freedom of association and freedom of assembly more so in relation to political rights and trade union rights. All the powers of the three arms of government rest with the King. He has ultimate control over those arms of government although they seem to operate autonomously. There has been arrest of political activists and political leaders, political parties remain banned and the moment you speak about issues of governance or democracy, you face serious problems.<sup>107</sup>*

On 25 September 2019, civil servants took to the streets of the capital Mbabane to protest low wages and the rising cost of living. Although the demonstration was peaceful, police violently dispersed the protestors using tear gas and water cannons.<sup>108</sup> But perhaps the most glaring example of the Swazi government violation of fundamental rights and freedoms is the severe repression of media and journalists. The country has about 32 laws that restrict freedom of expression and media freedom.<sup>109</sup> There is no broadcasting legislation or legislation to facilitate access to information.<sup>110</sup>

Given the very restrictive civil and political environment in Eswatini, the African Media Barometer (2018) scored Eswatini at a lowly 2.4 on media and freedom of expression<sup>111</sup>, and a marginal 1.5 on the right to report without fear.<sup>112</sup> In 2019, the international media freedom organization Reporters without Borders placed Eswatini at position 147 out of 180 in the world and described the country as one where there is “no media freedom.”<sup>113</sup>

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Interview, 30 May 2020.

<sup>108</sup> Timeslive, 25 September 2019: *Chaos in eSwatini as anti-monarchy protests turn violent*, <https://www.timeslive.co.za/news/africa/2019-09-25-chaos-in-eswatini-as-anti-monarchy-protests-turn-violent/>

<sup>109</sup> African Media Barometer (Eswatini 2018), available at <https://www.fesmedia-africa.org/media-and-publications/african-media-barometer-publications/> at p5.

<sup>110</sup> Ibid, at pp 6 & 10.

<sup>111</sup> Ibid, at p10.

<sup>112</sup> Ibid, at p12.

<sup>113</sup> Reporters without borders (Eswatini), <https://rsf.org/en/eswatini>

Scores of journalists have fled Swaziland to seek safety mainly in South Africa. Martin Dlamini, Eugene Dube and Mfomfo Nkambule are three recent examples. Dlamini is the editor of *Swaziland News*, one of the leading, independent newspapers in the country. He fled Swaziland in December 2017 after threats from a local businessman. The government shortly thereafter shut down another of his newspaper called *Swaziland Shopping*.<sup>114</sup> He returned to the country in 2018 but in March 2020, He once again fled to South Africa after receiving death threats. Shortly before his flight, police had arrested and tortured him. His wife Nompendolo Mkhonta was arrested in a bid to force her to reveal the whereabouts of her husband. She approached the Court on an urgent basis to seek protection from harassment by the State.<sup>115</sup>

Eugene Dube's case is another example of the precarious conditions facing journalists in Swaziland. Dube is the editor of *Swati Newsweek* a newspaper that covers political, economic and social news. In May 2020, he fled the country following a brutal attack and raid by police officers for publishing articles criticizing the king. He had also posed questions on whether civilians should be assisted with food or cash during the Covid-19 pandemic lockdown.<sup>116</sup>

There is little recourse to the courts for protection because as Da Silva points out, far from being independent, the judiciary too is complicit in the persecutions of HRDs and political activists:

*The most prominent case is that of Thulani Maseko and Bheki Makhubu, which was basically about freedom of expression. They wrote articles, which were unpalatable to some people in power. That was a high profile case, which demonstrated how the courts can be used as a tool for persecution of human rights defenders. The Chief Justice drove that case. He was manipulating the judge who was handling the case.*<sup>117</sup>

Da Silva adds that those in power have systematized the regime of persecution. From time to time, it may appear that different prime ministers allow for greater exercise of some of the fundamental rights and freedoms. The reality however is that:

*You can be beaten up at protests, meetings can be disrupted, you can be detained arbitrarily and without any charges being brought against you, and you can be placed under house arrest, etc. There are so many things that can happen in this country.*<sup>118</sup>

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<sup>114</sup> Committee to Protect Journalists (CPJ), (15 May 2020) *Swazi editor flees to South Africa, wanted in false news investigation*, <https://cpi.org/2020/05/swazi-editor-flees-to-south-africa-wanted-in-false/>; *Newspaper editor flees Swaziland for second time after arrest and police torture* (9 March 2020) <https://swazimedia.blogspot.com/2020/03/newspaper-editor-flees-swaziland-for.html>

<sup>115</sup> Ibid, CPJ (n112 above).

<sup>116</sup> *Swaziland journalist critical of King flees, hides in forest five days*, Swazi Media Commentary, 15 May 2020; <https://swazimedia.blogspot.com/2020/05/swaziland-journalist-critical-of-king.html>.

<sup>117</sup> Interview, 30 May 2020.

<sup>118</sup> Ibid.

## 5.2. Impact of Covid-19: Potential for more repression

On 17 March 2020, King Mswati invoked the Disaster Management Act of 2006 and declared a state of national health emergency.<sup>119</sup> Ten days later on 27 March, government imposed restrictions on freedom of movement and trade. All non-essential movement was suspended while public gatherings of more than 20 people were prohibited.<sup>120</sup> In mid-April, the restrictions were slightly relaxed but a week later; they were reinstated in light of rising Covid-19 infections in the country.<sup>121</sup>

Part five of the Corona Virus Regulations (sections 25-33) contains general prohibitions, which invariably affect the fundamental rights of freedoms of the citizens. Some of the more prominent prohibitions are the following:

- In terms of section 25(1), there may not be a gathering of more than 20 people. Section 25(4) requires funerals and memorial services not to last more than two hours.
- Section 29 criminalises and punishes “*spreading rumours or unauthenticated information on COVID -19.*” In terms of section 29(1)(b), no person may “*use any print or electronic media for information regarding COVID-19 without prior permission of the Ministry of Health.*”
- In terms of section 29(1)(e), no person may “*spread...any rumour or unauthentic information regarding any measure taken by the Government to address COVID-19.*”
- Contravention of Section 29 exposes a person to imprisonment for a maximum term of five years or a fine of E20 000.
- In terms of section 30, law enforcement officials are immune from liability for anything done in good faith under the Regulations.

The imposition of the Covid-19 restrictions, according to Da Silva, has not altered the general climate of repression and persecution in Eswatini. From a general point of view, everything is about enforcement. There have been cases of assaults of activists and lawyers, as well as the humiliation of individuals as attested to by the following three extracts from the interview:

*There have been problems at the roadblocks with the police or the military who are manning those roadblocks. One of the activists who is also from a minority group was going to buy bread. He was stopped at a roadblock. Because he is well-known for his activism, the security personnel refused to let him go and buy bread. They manhandled him and assaulted him and he had to return home without buying food. The following day he attempted to go and seek medical treatment and report the violation of his rights by the*

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<sup>119</sup> Eswatini Observer (18 March 2020), *His Majesty Declares National Emergency*, <http://new.observer.org.sz/details.php?id=11972>

<sup>120</sup> The Coronavirus (Covid-19) Regulations, 2020, Legal Notice No: 72 of 2020, issued under the Disaster Management Act (Act No. 1 of 2006).

<sup>121</sup> Timeslive (22 April 2020), *Eswatini reinstates lockdown rules as infections rise*, <https://www.timeslive.co.za/news/africa/2020-04-22-eswatini-reinstates-lockdown-rules-as-infections-rise/>

*security forces but he was arrested allegedly for violating the Regulations. We are still monitoring that case.*<sup>122</sup>

*There was an attorney who had gone to consult with clients and he was beaten up. He was standing outside the gate speaking to the people inside the house. The [police] didn't ask any questions, they beat him up and cracked his ribs. And no matter how much he protested that he and the people there were not drinking, they [police] insisted that their version was the correct one and that the people were violating the lockdown Regulations.*<sup>123</sup>

*We have the case of an old woman who wanted to go and replenish her supply of ARVs (anti-retro virals) at the hospital. At the checkpoint, police asked her where she was going and she indicated that she was going to the hospital. The police demanded to know why she was going to the hospital and she said she was going to collect her ARVs. There is a lot of stigma in Swaziland about HIV/AIDS and the old woman was speaking softly so that her medical condition could remain confidential. However, the security officers were shouting for everyone to hear. They demanded proof that she was going to the hospital and so she had to give them her medical card. She eventually returned home without her ARVs. She was deeply embarrassed and humiliated.*<sup>124</sup>

The above are a few of the reported incidents of violation of the rights of individuals during the lockdown in the country. There are, according to Da Silva, many unreported cases primarily in the rural areas where people have been assaulted and the security forces have used excessive force. Da Silva worries that the pandemic is a tool in the hands of the Government, which it may use to further repress the citizenry:

*They are a brutal regime. Now they have this new tool, which they can add to their arsenal. If they decide to take advantage of the situation, then we are in deep trouble. We are seriously going to have problems in terms of protecting people from violations and in terms of calling for accountability. We will not be able to access the victims of the violations. Although the courts are operational, attorneys are not able to travel. At one point, attorneys were being refused passage to go to court. Should the Government decide to use the pandemic to crack down on political activists and on human rights defenders, then we are going to be in real problems.*<sup>125</sup>

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

## CHAPTER 6: ZAMBIA

### 6.1. Under attack: Human Rights defenders and freedom of expression

For a country long synonymous with political stability, the rule of law and respect for fundamental rights and freedoms, Zambia has recently become a matter of serious concern for many observers of human rights and democracy. A range of human rights organisations including Amnesty International, Civicus, the Media Institute of Southern Africa, the Southern Africa Human Rights Defenders Network and the Southern Africa Litigation Centre have all condemned the continuing repression against HRDs, as well as the violation of the right to freedom of expression and the right to assembly.

In an article documenting the rising censorship in Zambia a few years ago<sup>126</sup> Garrido, argued that Government controlled the majority of the media in the country as well as the type of information that could be disseminated, while journalists practiced self-censorship to avoid attacks on themselves and their families. In addition, those in power used the Zambian Revenue Authority (ZRA) to close down critical media houses. The author cited the case of *The Post*, one of the leading newspapers in the country, which was targeted and eventually closed down by the ZRA. In April 2016, the paper's Managing Editor Joan Chirwa-Ngoma and reporter Mukosha Funga were detained for an article they wrote criticising President Edgar Lungu. In June of the same year, the papers' Editor in Chief Fred M'membe was criminally charged for allegedly disclosing confidential information. In the same month, the ZRA closed down the paper allegedly for unpaid taxes.

In 2019, Amnesty International warned that the right to freedom of expression in Zambia was under attack through “*the use of oppressive legislation and arbitrary regulation.*”<sup>127</sup> Furthermore, the authorities “*increased the use of criminal defamation laws to silence critics of President Lungu or the judiciary.*”<sup>128</sup> At the beginning of 2020, Amnesty International once again sounded alarm at the escalating level of harassment, intimidation, attacks and repression of HRDs:

*Authorities are using intimidation and harassment against human rights defenders, activists and political opponents as a strategy to instill fear across Zambian society. Human rights activists have been increasingly targeted in Zambia recently for demanding accountability and challenging corruption.*<sup>129</sup>

At the same time, the organization called for the immediate reinstatement of the broadcasting license for Prime TV, which had been suspended by Zambia's Independent Broadcasting Authority

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<sup>126</sup> Mariateresa Garrido, Freedom of Expression Under Threat in Zambia, [http://www.monitor.upeace.org/innerpg.cfm?id\\_article=2107](http://www.monitor.upeace.org/innerpg.cfm?id_article=2107)

<sup>127</sup> <https://www.amnesty.org/en/countries/africa/zambia/report-zambia/>

<sup>128</sup> Ibid.

<sup>129</sup> *Zambia: Activists in court on escalating crackdown on human rights*, <https://www.amnesty.org/en/latest/news/2020/03/zambia-activists-in-court-on-escalating-crackdown-on-human-rights/>

allegedly for reasons of ‘public safety, security, peace, welfare and good order’.<sup>130</sup> As the organization further pointed out, there had been a trend in recent years in the country, where “*the right to freedom of expression and media freedom have been under attack*” with newspapers being closed and journalists being brutalized by the police.<sup>131</sup>

Besides the blatant violation of the right to media freedom and the right to freedom of association, the repression of HRDs by the Zambian authorities (including by the judiciary) has also become a matter of serious concern. Many of those harassed, intimidated, arrested and charged have suffered for raising their voices against the staggering levels of corruption. They include Laura Miti, Fumba Chama (Pilato), Sean Tembo, Bonwell Mwewa, Lewis Mwape, Mika Mwambazi and Gregory Chifire.<sup>132</sup>

Civicus has warned that police selectively apply the colonial era Public Order Act (1955) to arrest and charge HRDs and others who criticize either the President or the government. The misuse of the Act involves:

- Using the Act to “grant” or “deny” permission to gather or demonstrate;
- Often breaking up gatherings convened by CSOs, HRDs and opposition parties; and
- Condoning the non-compliance with the law by government and ruling party supporters.<sup>133</sup>

As Beth Van Schaack has warned, the (Act):

*....carries rather stiff criminal penalties, which put individuals who might criticize or peaceably demonstrate against the government at acute risk of unfair and abusive prosecutions. Police regularly invoke the Act to limit opposition activities, for example by arbitrarily denying or cancelling permits for opposition demonstrations. Prosecutors then bring sham charges against critics of the government on spurious grounds.*<sup>134</sup>

The so-called *42-for-42 Case*<sup>135</sup> lays bare the government’s unconcealed and blatant misuse of the law to repress HRDs in Zambia. Six anti-corruption activists (as mentioned above)<sup>136</sup> were arrested and charged for allegedly holding an illegal gathering on 29 September 2017. The activists had been protesting the corruption surrounding the purchase of 42 fire trucks at a hugely inflated price of 42 million US dollars. The activists sent a notice to the police as required by the Public Order Act of their planned protest outside Parliament. There was no immediate response. Three days before the planned event, and two days after the deadline for the authorities to respond, police

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<sup>130</sup> *Zambia: Authorities Must Immediately Reinstate Broadcasting License Of Prime TV and Stop Targeting the Station*, <https://www.amnesty.org/en/documents/afr63/2140/2020/en/>

<sup>131</sup> Ibid.

<sup>132</sup> See e.g. the press statement by SALC, 23 December 2019: *Concern As Zambia Police Detains Human Rights Defenders*, <https://www.southernafricalitigationcentre.org/2019/12/23/concern-as-zambia-police-detains-human-rights-defenders/>

<sup>133</sup> *Case of Zambia’s 42-for-42 tests freedom of expression and assembly*, <https://www.civicus.org/index.php/media-resources/news/interviews/3166-case-of-zambia-s-42-for-42-tests-freedom-of-expression-and-assembly>

<sup>134</sup> Trial Monitoring of *People v. Miti et al.* (Zambia 2018), at p13.

<sup>135</sup> This case is documented in the report cited in n134 above.

<sup>136</sup> See footnote n132 above.



responded indicating that 29 September was not convenient. They asked the organisers to ‘choose an alternative date’.

Arguing that they had complied with the law, and that the police had deliberately delayed responding to them, the activists decided to go ahead with their protest and marched to Parliament. Their protest was peaceful but they were arrested and charged with contravening the Public Order Act. The police did not touch a group of ruling party youth who confronted the activists with violence during the march. One of the activists, Pilato, who is a well-known musician in the country, fled to South Africa in December 2017 after receiving death threats from supporters of the ruling party.

In the ensuing criminal trial, the Court, (for once), was scathing of the police and the prosecution. The magistrate acquitted the accused on all charges, finding, among other things, that the police “*did not act professionally and lawfully and that [they] are indeed the major obstacle in the proper administration of the Public Order Act.*”<sup>137</sup> Repression against HRDs continues unabated in the country. Van Schaack cautions that:

*Despite Zambia’s reputation as a stable democracy, human rights organizations have called attention to a worrisome slide towards authoritarianism, as evidenced by crackdowns on free speech and public opposition activities. In recent years, Zambia’s human rights record has been marred by concerns over the use of arrests, selective prosecutions, and arbitrary detention, most notably against critics of the Government and/or the ruling party, the Patriotic Front.*<sup>138</sup>

In March 2020, the Southern Africa Human Rights Defenders Network issued a statement expressing its concerns about the disturbing signs “*of systematic repression, attacks on human rights defenders and closure of civic space especially in the face of the general elections constitutionally scheduled for August 2021.*”<sup>139</sup> The organization criticised the barring of John Sangwa, a Senior Counsel and respected human rights advocate, by the Registrar of the Court from appearing in any court in Zambia ‘until further notice’. As the organization warned, “*the persecution of human rights defenders or people who constructively criticize the Government seems to be becoming a norm rather than an exception in Zambia.*”<sup>140</sup> On 2 June 2020, it was announced by the judiciary that Advocate Sangwa’s right of appearance in the courts had been reinstated after the Constitutional Court decided to not proceed with contempt charges against him.<sup>141</sup>

The case of Gregory Chifire is another reminder of just how precarious HRDs live and operate in Zambia. He is a prominent anti-corruption activist and the former Executive Director of the

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<sup>137</sup> People v. Miti et al. (Zambia 2018), at p10.

<sup>138</sup> Ibid, at p4.

<sup>139</sup> SAHRDN Calls on Authorities in Zambia to Stop Persecuting Human Rights Defenders (23 March 2020), <https://africandefenders.org/sahrdn-calls-on-authorities-in-zambia-to-stop-persecuting-human-rights-defenders-and-demands-immediate-reinstatement-of-sc-john-sangwa-a-prominent-lawyer-arbitrarily-banned-from-appearing-in-any-court/>

<sup>140</sup> Ibid.

<sup>141</sup> Statement signed by Charles Kafunda, the Chief Registrar of the Zambian Judiciary.

Southern Africa Network Against Corruption (SANAC) based in the capital Lusaka. He is currently seeking asylum in South Africa. In May 2018, he addressed a letter to Justice Irene Mambilima, the Chief Justice of Zambia, calling her attention to alleged corruption by Supreme Court of Appeal judges presiding over the matter of *Savenda Management Services v Stanbic Bank Zambia Limited* (SCZ Judgment No. 10 of 2018). He requested the Chief Justice to initiate a review of the Court's judgment given that there had been a massive public outcry regarding it.<sup>142</sup> Chifire was charged, together with Bishop John Mambo and a journalist named Derick Chinjera, with the offence of contempt of Court.

In a clear departure from the law, the Court went beyond the prescribed maximum penalty of six months for contempt of Court and sentenced Chifire to a term of six years direct imprisonment. Mambo received a fine of about USD 2000 while Chinjera was sentenced to a term of one year 8 months direct imprisonment. Chifire says the Court's approach was unprecedented:

*Of the three of us, I am the one who received the harshest sentence. Not to mention that in the laws of Zambia contempt of Court attracts a penalty of six months. But the Court used what it called its inherent jurisdiction to punish me. It is the third time that the Court has gone beyond the prescribed sentence in the law. The first time was in the case of a journalist called Maso Phiri, he was working for the Post Newspaper. He alleged corruption involving the Chief Justice but he could not prove it although this was later proven to be true in the so-called 'Chiluba is a thief' Case. Phiri was sentenced to three years imprisonment but he was later pardoned. The second case involved another activist called Chilekwa and his lawyer Sambo. They alleged that there was corruption in the judiciary because of the way the Court handled their matter. They were both sentenced to three years imprisonment. They were however released through a presidential pardon. There has been a consistent use by the court to silence criticism<sup>143</sup>*

Chifire observes that since the current governing party (Patriotic Front) came into power in 2011, individual rights and freedoms have been severely curtailed. He describes the situation of human rights and HRDs in Zambia as follows:

*Human rights are being curtailed in so many ways today in Zambia. It is not uncommon for authorities to use the law to crackdown on dissent. There are many examples. The first and major weapon used by the current administration is the Public Order Act. This Act was used by the colonial masters and they (current government) are using the same law to stop gatherings of civil society, their political opponents, and anyone else who they deem to not be supporting them. The second one is the use of the Penal Code. In the Penal Code, that is where you find the defamation of the President and the use of insulting language. So anyone who dares to speak against the 'king' is charged for defamation. There is also the use of the common law of contempt under which I was charged and fell victim.<sup>144</sup>*

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<sup>142</sup> Chifire has launched a judicial review application in the Gauteng High Court, Pretoria, against the decision of the Department of Home Affairs to deny him asylum. The firm of Ndungu Attorneys Inc. is representing him in that matter.

<sup>143</sup> Interview on 26 May 2020.

<sup>144</sup> Ibid.

CSOs cannot be able to gather and express themselves freely while media houses face the constant threat of being shut down by the country's broadcasting regulator, the Independent Broadcasting Authority. There have also been attempts to introduce cyber laws and cybercrimes laws in order, according to Chifire, to further curtail the right to freedom of expression. HRDs have been under increased surveillance and infiltration:

*We don't have room to conduct our business. We cannot gather and we cannot use mass communication. ... at one time, the minister said that police would arrest Whatsapp Group administrators if a member of the group says something contrary to what power wants to hear. They would arrest that person as well as the administrator. It is also common that mobile phones of civil society organisations are tapped. They bought new software called Pegasus from China to monitor calls between those that are critical of government.*<sup>145</sup>

In 2009, Government attempted to pass the NGO Act, which criminalises the activities of civil society and puts in place stringent measures in respect of registration, funding and reporting by CSOs. The Act was shelved because of widespread condemnation by HRDs, opposition parties and human rights organisations both within and outside the country. HRDs in Zambia operate under a climate of severe repression. The use by Government of the law to attack HRDs has seen a significant number of activists hauled before the courts to answer to all manner of charges. In some cases, HRDS have been left with no alternative but to flee to exile. Government also uses financial incentives combined with divide and rule tactics to break the unity of HRDs:

*The biggest challenge that we have is infiltration amongst ourselves. The state is using money to plant certain unwanted elements among us. These individuals are used as spies to get information on behalf of the state. There are very few human rights defenders of note in Zambia perhaps because of the challenge of poverty and the state knows that and uses that very well. The state also sponsors new CSOs who pose as genuine human rights defenders but they are not. Others do not even pretend and they sing the song of those in power. There is also struggle for power amongst the leadership of civil society organisations.*<sup>146</sup>

## **6.2. Covid-19 and Human Rights**

Zambia is one of the few countries in the region that has not imposed a lockdown to address the Covid-19 pandemic. Instead, the country has introduced restrictions on public gatherings and movement to control the spread of the disease. In March 2020, the President invoked the Public Health Act to impose measures to contain the spread of the virus. These measures included the closure of schools, colleges, universities and the country's borders, as well as the restriction of international travel.<sup>147</sup> Chifire argues that the Government and ruling party are using the pandemic

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<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Alexander Mutale (16 April 2020), *Zambia feels the coronavirus fallout*, <https://www.businesslive.co.za/fm/features/africa/2020-04-16-zambia-feels-the-coronavirus-fallout/>

as a tool to limit the rights of opposition parties, their supporters, CSOs and other critical voices in the country.

Furthermore, whereas meetings of more than 50 people are prohibited, the ruling party has gone around holding political meetings across the country without hindrance yet, opposition parties and CSOs are not permitted to gather. No preparations have been put in place for the general elections planned for 2021; this includes a lack of registration of persons who have turned 18 years. Chifire fears that the ruling party is taking advantage of the pandemic campaign for the 2021 elections while prohibiting opposition parties from doing the same. As Chifire says:

*The party in power is using Covid-19 to stop their opponents and civil society from gathering whatsoever. Zambia is going to elections next year. By this time, there is supposed to be activities in preparation for the elections. The Government, the Electoral Commission and the Central Statistics Office have not announced what measures they have put in place to ensure that the elections are not disrupted. The ruling party has organized registration in its own strongholds to ensure that the youth get IDs. When it was pointed out that a similar exercise needs to take place in the opposition strongholds, the government said that such could not take place because of the Covid-19 pandemic.<sup>148</sup>*

There have been a few reported incidents of violation of human rights since the onset of the restrictions in March 2020. In one incident, according to Chifire, the minister in charge of Lusaka District harassed and allegedly assaulted commuters who were found traveling without face masks. In the second incident, police in Lusaka assaulted a number of people for allegedly drinking alcohol. One concern that has been raised relates to the right to education especially for children from poor families. At the onset of the restrictions, Government announced that learners would access teaching material online. However, Zambia is a poor country and many families can barely afford to put food on the table, leave alone buy electronic devices or access the internet.

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<sup>148</sup> Interview on 26 May 2020.

## CHAPTER 7: CONCLUSION

This brief study has examined the nature and status of civic space in five southern Africa countries. In doing so, the study has shined the light on issues such as the enjoyment of civil rights and liberties including the right to freedom of expression, assembly and demonstration, and the right and ability of HRDs to carry out their activities without undue hindrance. To a lesser degree, the study has also examined the impact of the Covid-19 pandemic with a specific focus on whether government response to the pandemic has resulted in the undue violation of basic rights and freedoms.

It is evident that the situation in several of the countries under consideration is a matter of serious concern. In Malawi, the civic space has been characterized by an on-going battle around the disputed May 2019 presidential election. Government has attempted to ban public protests and demonstration but thanks to the active work of HRDs, and the pronouncements of an independent judiciary, these efforts have been put in check. An attempt by Government to impose a national lockdown in response to the Covid-19 pandemic and thus restrict movement and gatherings has been unsuccessful.

Namibia generally has a respectable record of observance of civil rights and civil liberties, and citizens are able to associate, to demonstrate and to express themselves. The imposition of a state of emergency in March 2020 accompanied by a concomitant restriction on various rights including the right to movement, and the right to associate and demonstrate has not resulted in undue violations of civil rights and liberties.

In South Africa, the greatest concern has been the high degree of harassment of HRDs. As documented in this report, many HRDs have been killed, or disappeared while others have been arrested and charged in court usually for convening or participating in ‘illegal gatherings’ or malicious injury to property. Whistleblowers have not fared much better despite the existence of legislation protecting them. Worryingly, the imposition of a national lockdown in the country has resulted in the widespread abuse and violation of human rights and freedoms by security forces. At least 11 people are alleged to have been killed by security forces during the on-going lockdown, and a staggering 230 000 have been arrested for allegedly violating the lockdown regulations. Thousands have been charged in courts.

Eswatini remains an outlier in the region, with an absolute monarchy, ruling by royal decree. All forms of civil rights and liberties are restricted, political parties are banned, trade union leaders are harassed and journalists are routinely attacked, arrested and charged for writing or saying anything critical of the king and those in power. A number of journalists have been forced to flee the country in fear for their lives. The declaration of a state of national health emergency has done little to diminish the brutal nature of the Swazi regime. Instead, as the respondent interviewed for this study so poignantly warned: *“if they decide to take advantage of the situation, then we are in deep trouble. We are seriously going to have problems in terms of protecting people from violations and in terms of calling for accountability.”*

Lastly, Zambia is a country that has enjoyed respect as a stable democracy in the region and continentally for many years. However, this is now a façade as the Government has embarked on a campaign of systematic repression of HRDs, restriction of the civic space, and curtailment of voices critical of the State and those in power. Vocal HRDs and CSOs who have dared to highlight the staggering levels of corruption in the country have found themselves on the receiving end of Government intolerance. Sadly, the judiciary, which is meant to be a bastion of integrity, ethical conduct and moral uprightness, has not lived up to these principles. On the contrary, HRDs like Gregory Chifire, Bishop John Mambo, Advocate John Sambo, Derick Chinjera and Maso Phiri, among many others, have been charged by the very same courts with contempt of court and slapped with hefty fines or lengthy jail terms.

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## LISTOF RESPONDENTS

<b>No</b>	<b>Name</b>	<b>Organisation</b>	<b>Country</b>	<b>Interview date</b>
1	Gregory Chifire	Southern Africa Network Against Corruption (SANAC)	Zambia	26 May 2020
2	Samkelo Mokhine	FXI	South Africa	27 May 2020
3	Tiseke Kasambala	Freedom House	Malawi	29 May 2020
4	Lydia Mkandawire	Centre for Human rights and Rehabilitation (CHRR)	Malawi	29 May 2020
5	Mary Pais Da Silva	Independent	Eswatini	30 May 2020