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FREEDOM OF ASSOCIATION AND ASSEMBLY IN THE SADC REGION

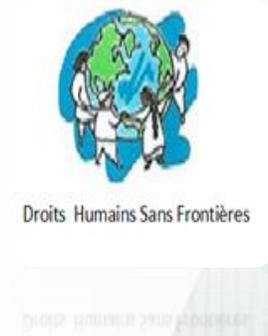


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Abbreviations and acronyms

ACC	Amadiba Crisis Committee
ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter on Human and Peoples' Rights
AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
BNP	Basotho National Party
CBO	Community Based Organizations
CHRR	Centre for Human Rights and Rehabilitation
CNDH	National Commission on Human Rights
CONGOMA	Council for Non-governmental Organizations
CRC	Convention on the Rights of the Child
Covid-19	Corona virus Disease 19
CSO	Civil Society Organizations
DRC	Democratic Republic of Congo
<i>Filimbi</i> (Swahili)	Whistle
FoAA	Freedom of Association and Assembly
GA	General Assembly
HRDs	Human Rights Defenders
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
IEMS	Institute of Extra-Mural Studies
ILO	International Labour Organisation
<i>LAMUKA</i> (Lingala)	Stand/Arise
<i>LUCHA</i>	Fight for change
NHRC	National Human Rights Commission
NGOs	Non-Governmental Organizations
NGO Board	Non-Governmental Organizations Board
NIA	National Intelligence Agency
NMDS	National Manpower Development Secretariat
NUL	National University of Lesotho
OSISA	Open Society Initiative for Southern Africa
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act (2 of 2000)
SALC	Southern African Litigation Centre

UDHR	Universal Declaration of Human Rights
UDSP	Union for Democracy and Social Progress
UN	United Nations
UNHRC	United Nations Human Rights Council

Preface

The African Commission on Human and Peoples' Rights is mandated by Article 45 (1)(b) among other prerogatives to formulate the ideal principles on which State Parties should base their legislation and policies.

In this regard, the Commission adopted the Guidelines on Freedom of Association and Assembly in Africa at its 60th Session held in Niamey, Niger, on 8-22 May 2017. This was with a view of encouraging the harmonisation of the provisions of the African Charter on Human and Peoples' Rights; the safeguarding of the individual's right to freedom of association guaranteed in Article 10; and the right to freedom of assembly guaranteed in Article 11.

These rights are also recognised by other international human rights instruments such as the International Covenant for civil and political rights, and the General Comment N°37 (Human Rights Committee) on article 21 of the International Covenant on civil and Political Rights as indispensable for democracy and essential for the realisation of other human rights, such as economic, social, cultural, and environmental rights.

It is encouraging to see the results of the study on the impact of the guidelines on freedom of association and assembly as carried out by human rights defenders in the DRC, Malawi, Lesotho and South Africa.

This is a remarkable work that asserts the implementation of the African human rights system on the territories of the AU Member States that are parties to the African Charter on Human and Peoples' Rights.

The results of this study confirm the positive provisions enshrined in the Constitutions of the Member States when it comes to guaranteeing the freedom of association and assembly.

However, in practice, restrictive laws are often adopted to prevent associations from exercising these rights. As a result, individuals encounter obstacles in administrative processes to form associations and perform their functions independently, especially in promoting access to information, good governance, public policies, human rights and regarding the existing funding models to support their programs.

Furthermore, the study uncovered cases of extrajudicial killings, summary executions, abductions, enforced disappearances of human rights defenders and CSO activists, especially in the context of the service delivery protests. This amounts to reprisals on which the African Commission adopted a progressive resolution to end the persecution of associations and the violation of the freedom of assembly.

The increasingly credible reports on the crackdown on civic space and the regressive norms in Africa cannot be overlooked as they aggressively contradict the principles of unity, solidarity and

social cohesion as set out in the African Charter. It is at times like these that we must remember that the African Charter imposes on States the duty to protect the lives of all people within their jurisdiction and to prosecute those responsible for human rights violations, in particular the persecutors of CSOs and HRDs.

Therefore, it is particularly important for Member States to use the Guidelines on Freedom of Association and Assembly in order to foster enabling environments for sustaining human rights work.

It is with heartfelt sense that I greet these courageous men and women who continue to promote the implementation of the ACHPR Guidelines on Freedom of Association and Assembly in hostile environments. I encourage all States Parties to accelerate the improvement of Freedom of Association and Assembly in their countries and to draw positive lessons from this report. I also encourage countries that are striving to change the situation of Freedom of Association and Assembly to work with the mandate of the Special Rapporteur on Human Rights Defenders in Africa, HRDs and CSOs to build the capacity of stakeholders to implement effectively the guidelines on Freedom of Association and Assembly.

Commissioner Rémy Ngoy Lumbu
Vice-Chairperson of the African Commission on Human and Peoples' Rights
Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa

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Glossary

Enabling environment	For purposes of this study, an enabling environment refers to a conducive legislative and operating environment that is necessary for the success and optimal participation of civil society. The environment must enable the unhindered exercise of the right to freedom of association and peaceful assembly.
Freedom of assembly	The right to take part in an intentional or spontaneous gathering in a private or public space for a specific purpose, including meetings, demonstrations, processions, rallies, strikes and sit-ins, among others.
Freedom of association	The right to voluntarily come together with persons sharing a common interest, activity or purpose. An association may be formal (de jure) or informal (de facto). ¹ A formal association is one that has and enjoys legal personality whereas an informal association does not possess legal personality but has some form of structure or institutional makeup.
Legal framework	Consists of a body of rules, procedures and policies that provide for regulatory and operational compliance.
Procession	An organised body of people moving from one place to another in public.
Public Meeting	An assembly, concourse or gathering of persons pursuing a common purpose.
Special Rapporteur	An independent expert appointed to carry out investigations, prepare reports or provide clarity on a specific issue affecting fundamental rights and freedoms.

¹ Guidelines on Freedom of Association and Assembly in Africa; adopted at the Commission's 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017; available on <https://www.icnl.org/post/tools/guidelines-on-freedom-of-association-and-assembly-in-africa>.

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Corlett Letlojane
Executive Director, HURISA
November 2020

1. INTRODUCTION

The rights to freedom of association and peaceful assembly serve as a precursor for the promotion and assertion of many other civil, political, economic, social and cultural rights. These rights are essential components of a functioning democracy as they empower citizens to:

“express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.”²

The United Nations (UN) Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has emphasized that:

“the freedoms of peaceful assembly and association are not cultural or specific to a particular place or time. They are born from our common human heritage. It is human nature-our human necessity-that people come together to collectively pursue their interests.”³

However, despite the creation of international principles meant to provide guidance towards the practical enjoyment of the rights to peaceful assembly and association, in reality, there is still a great degree of violation of these very same rights by states and even in some cases, by private actors. Many states have ratified or adopted key international instruments such as the Universal Declaration of Human Rights (UDHR)⁴, the International Covenant on Civil and Political Rights (ICCPR)⁵ and the guidelines set out by the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association.⁶ However, in most instances, there are no enabling mechanisms at the national level to ensure that the principles enunciated in these instruments are realized in practice.⁷

This report provides a bird’s eye-view of the rights to association and peaceful assembly in the Democratic Republic of Congo (DRC), Lesotho, Malawi, and South Africa. It is not a comprehensive assessment of the manner in which these rights are either respected or violated in these countries. On the contrary, the report looks at the existing constitutional and legislative

² UN Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, 21 May 2012, [A/HRC/20/27](#).

³ See www.icnl.org/our-work/freedom-of-assembly. Through the Guidelines on Freedom of Association and Assembly in Africa adopted in 2017 by the African Commission, the latter has also highlighted that the rights to freedom of association should underpin all democratic societies in which individuals can freely express their views on all issues concerning their society. Adopted at the Commission’s 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017; At page 4.

⁴ Available at <https://www.un.org/en/universal-declaration-human-rights/>.

⁵ The United Nations General Assembly. (1966) International Covenant on Civil and Political Rights. Treaty Series, Vol 999, p171, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. <https://www.ohchr.org/>

⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (2012). Available at: www.ohchr.org/Session20/A-HRC-20-27_en.

⁷ Unions, NGOs and Political Freedom in Sub-Saharan Africa: Article 19, The Global Campaign for Free Expression” available at <https://www.article19.org/data/files/pdfs/publications/sub-saharan-africa-freedom-of-association-and-assembly>.

mechanisms in each country, together with case studies, to get a better sense of whether these rights are realised in practice.

All four-research subject countries have ratified the key international instruments mentioned above, or they are otherwise bound by these instruments on the basis of customary international law. But the picture at the national level is rather disconcerting. The four-research subject countries were selected on the basis of their specific histories, and in order to provide an in-depth yet diverse sense of the theory and practice of the rights in question.

In the DRC, the rights to association and peaceful assembly are constitutionally protected, however, legislation and state practice simply make the enjoyment of these rights an impossibility. For instance, human rights defenders are only recognized and protected if they belong to formally registered civil society organisations. There is also a detailed list of requirements to be met before the authorities can recognize a person as a human rights defender. Similarly, and although the law merely requires persons intending to demonstrate in public spaces to give notice of the intended protest, administrators such as mayors and provincial authorities have simply imposed blanket bans on protests. Police routinely disperse protests using excessive force.

Lesotho's constitution guarantees the right to peaceful assembly and association. However, legislation passed in 2010 (the Public Meetings and Processions Act) requires individuals to obtain permission from either the police or the traditional authorities (headmen) of the area where the meeting or procession is planned to be held. Police or traditional authorities in the majority of cases simply refuse to grant permission for demonstrations to take place. Demonstrations have also been forcefully stopped because the organisers were not granted permission, or because the police deem the gatherings violent although the protestors are peaceful. Courts in Lesotho have increasingly been drawn into the terrain of administrative decision making as citizens are forced to rely on the judiciary to assert their rights.

In Malawi, individuals are free to associate, and to assemble and demonstrate for any cause. However, organisations that seek to advance the rights of Lesbian, Gay, Bisexual, Transgender, Queer and Intersexual Rights (LGBTQI) have faced discrimination and refusal of registration on the ground that the country's Penal Code prohibits their practices. Leading human rights organisations and defenders have also faced harassment and violence from law enforcement officials and supporters of the former ruling party. In a number of cases, police have violently dispersed largely peaceful protests. Meanwhile, Malawi's judiciary has received international recognition for its steadfast commitment to protect the rights to assembly and association, and its refusal to answer to the dictates of the executive.⁸

South Africa's constitution and legislation remain a beacon of hope in a region where fundamental rights and freedoms have unfortunately come under severe limitation. In line with international instruments, the constitution fully guarantees the rights to freedom of association and peaceful assembly. Legislation has also been passed to regulate the registration of civil society organisations (e.g. the Non Profit Organisations Act, 1997), and to govern assemblies and demonstrations (the Regulation of Gatherings Act, 1993). Of major concern however is that local authorities together with the police have turned what is essentially a notification procedure for gatherings into a

⁸ See e.g. the decision of the Malawi Supreme Court to set aside the Presidential elections held in May 2019. Available at Malawi court overturns 2019 presidential election result, <https://www.ft.com/content/fbd09b8e-46c2-11ea-aeb3-955839e06441>.

permission-granting exercise. On this basis, authorities routinely disperse protests and arrest protestors because they have ‘not been granted permission’ to gather or to demonstrate.

This report is divided into six chapters. After this introduction, we examine and discuss in Chapter 2 the methodology employed to conduct the study, which consisted primarily of desktop literature review, and questionnaire-based interviews. Chapter 3 is a detailed literature review of international and regional instruments on the rights to freedom of peaceful assembly and association. The key instruments considered include the UDHR, the ICCPR, the International Covenant on Economic, Social and Cultural Rights (1979) (ICESCR)⁹, the International Covenant on the Rights of the Child (1989) (ICRC)¹⁰, various conventions of the International Labour Organisation (ILO)¹¹ on the rights of workers and the African Charter on Human and Peoples’ Rights (1981)(ACHPR).¹²

Chapter 4 of the report deals with specific country reports. It presents an analysis of literature and empirical data in respect of the constitution and legislation governing the enjoyment of the rights to peaceful assembly and association in each country. Key to this enquiry is whether each country is meeting its international obligations to ensure that all individuals are able to freely associate and to peacefully assemble and demonstrate.

The last two Chapters-Chapters 5 and 6 contain our concluding remarks together with a brief set of recommendations. The recommendations are directed at both state and non-state actors including international bodies like the UN Human Rights Council (UNHRC) and the African Commission on Human and Peoples’ Rights as well as human rights organisations at national, regional and international levels.

⁹ Available at <https://www.ohchr.org/en/professionalinterest/pages/>.

¹⁰ Available at www.ohchr.org/documents/.

¹¹ They include the ILO Convention on Freedom of Association and Protection of the Rights to Organise (1948), and the Convention concerning the Application of the Principles of the Right to Organise and Collective Bargaining (1949).

¹² Adopted on 27 June 1981 in Banjul, Gambia, and entered into force on 21 October 1986. Available at <http://www.achpr.org/instruments/achpr/>.

2. RESEARCH METHODOLOGY

This study was conducted in four Southern African countries: DRC, Malawi, Lesotho, and South Africa. It entailed two key data collection methods; desktop literature review and questionnaire-based interviews with key informants. In a number of cases, the researchers held telephonic interviews with respondents using a semi-structured questionnaire as a guide.

The objective of the study was to establish the status of observance and enjoyment of the rights to freedom of association and assembly in the four Southern African states. In this respect, the study relied on key international instruments such as the UDHR and the ICCPR, as well as the guidelines laid down in the report of the United National Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, and those in the African Charter on Human and People's Rights.

At the onset of the study, an inception meeting was held in Johannesburg where a field research tool was developed. The tool was drawn from the Guidelines on Freedom of Assembly and Associating in Africa (FoAA).

There were slight divergences in the methodologies adopted by the researchers in each country. In the DRC, the researchers employed a thematic approach to categorise the two key rights (association and assembly) and thereafter focused on each of these themes in terms of e.g. general principles, creation or formation of national associations, goals and activities, government monitoring, sanctions and remedies, notification, conditions and prohibitions. To augment the literature review, researchers conducted twenty telephonic interviews with key informants. These interviews were held between 25 March and 17 July 2020 and took place primarily in Kinshasa, the capital city.

In Malawi, the researchers collected information from online sources as well as from publications including legislation, articles and reports on human rights in the country. Empirical data was collected through questionnaires emailed to key respondents. The respondents included civil society activists, lawyers and academics. Participation in the study was voluntary and respondents were informed, prior to completing the questionnaires, that they were free to not answer any question.

In Lesotho, the study identified and analysed the relevant binding international and regional instruments together with reports on the situation of human rights in the country. The study further examined constitutional and legislative mechanisms for the protection of the rights to free association and peaceful assembly in neighbouring countries such as South Africa and Namibia in order to get comparative best practices. In addition to the desktop study, researchers administered a questionnaire to various stakeholders regarding their experience and observations of freedom of association and assembly in the country.

The study in South Africa focussed on the legal framework that governs the establishment and operation of civil society organisations. This entailed an examination of the legal personality of associations, their purposes and activities, oversight, financing, federations and cooperation, among others. Regarding freedom of assembly, the study relied on the *Guidelines on Freedom of Assembly in Africa* to assess South Africa's legal framework, notification regime, scope of limitations, protection, and sanctions. Two semi-structured questionnaires were developed and

administered to key informants, followed by telephonic interviews. The informants were selected purposively based on their knowledge and experience of the rights to freedom of association and assembly.

Limitations

This study was conducted between March and July 2020, at a time when the entire globe was gripped by the Covid-19 pandemic. As a result, the bulk of the information used to compile the country reports is primarily desktop-based (secondary data) and thus lacks the force of empirical data. In all four countries, authorities either imposed hard lockdowns (as in the case of South Africa) or else severely restricted movement (as in the case of the DRC, Lesotho and Malawi).

In the few cases where it was possible to conduct interviews, these were done telephonically. In most cases, researchers were forced to rely on respondents completing and returning self-administered questionnaires. Focus groups would have been useful to interrogate individual experiences of the rights to free association and peaceful assembly but these could not take place.

Time and financial limitations also meant that the study focused largely on respondents in urban areas leaving out people in peri-urban and rural areas. Except for South Africa, which is relatively highly urbanized, the remaining three countries have significant rural populations. Traditional authorities working side by side with provincial administrations exercise significant powers in relation to public participation and as such, the study would have been enriched by data from rural areas about the right and ability of citizens to meet and articulate their issues publicly.

3. LITERATURE REVIEW

3.1 International Framework

Freedom of association has been described as:

“the liberty a person possesses to enter into relationships with others for any and all purposes, for a momentary or long term duration, by contract, consent or acquiescence. It likewise refers to the liberty to refuse to enter into such relationships, or terminate them when not otherwise compelled by anyone’s voluntary assumption of an obligation to maintain the relationship.”¹³ This freedom is ascribed particular importance by Tocqueville who asserted that no legislator could ‘attack freedom of association without impairing the very foundation of society’.¹⁴

The international instruments governing the right to freedom of association and assembly include the UDHR, the ICCPR, numerous UN Human Rights Council Resolutions,¹⁵ and reports of the UN Special Rapporteur on the Right to Freedom of Association and Assembly.¹⁶ Other general instruments that make provision for the right to freedom of assembly and association include the Convention on the Rights of the Child (CRC) 1989,¹⁷ the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW) 1990¹⁸ and the International Convention on the Rights of Persons with Disabilities (ICRPD) 2008.¹⁹

Article 20 of the UDHR provides that “everyone has the right to freedom of peaceful assembly and association.” In terms of article 21 of the ICCPR, “the right of peaceful assembly shall be recognized.” Furthermore, article 22 of the ICCPR states that:

“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

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

¹³ Alexander L “What is freedom of association, and what is its denial?” 2008 Social Philosophy & Policy Foundation at p8.

¹⁴ Alexis de Tocqueville, quoted by Woolman S, *Freedom of Association*, 2008, Constitutional Law of South Africa, January, Chapter 44.

¹⁵ Available at http://ap.ohchr.org/documents/dpage_e.aspx?m=189.

¹⁶ Ibid (n6) above.

¹⁷ www.ohchr.org/documents/

¹⁸ <https://www.ohchr.org/en/professionalinterest/pages/cmwa.aspx>

¹⁹ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

3. *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*"²⁰

At the same time, article 8 of the ICESCR states that everyone has the right to form or join a trade union of his or her choice.²¹ States must take legislative or other measures to ensure the enjoyment and protection of the right to free association and assembly²² Although the UDHR is not a treaty and as such does not directly create legal obligations for states, it is the foundation of most international instruments including the ICCPR. It is also part of customary international law and therefore binding.²³

General Comment No. 37 adopted by the UN Human Rights Committee in July 2020 elaborates on the right to peaceful assembly guaranteed under article 21 of the ICCPR.²⁴ Paragraph 9 of the Comment reminds states that they have a corresponding obligation to ensure that individuals enjoy the right to peaceful assembly without hindrance:

*"The recognition of the right of peaceful assembly imposes a corresponding obligation on States parties to respect and ensure its exercise without discrimination. This requires States to allow such assemblies to take place without unwarranted interference and to facilitate the exercise of the right and to protect the participants. The second sentence of article 21 provides grounds for potential restrictions, but any such restrictions must be narrowly drawn. There are, in effect, limits on the restrictions that may be imposed."*²⁵

Other specialist international instruments such the ICRPD requires states parties to ensure that persons with disabilities are not hindered in participating in all spheres of life including as members of NGOs.²⁶ At the same time, the ICRMW obliges states to ensure that migrant workers and members of their families are able to freely join and participate in the activities of trade unions.²⁷ The ICRC provides that state parties must recognize the rights of the child to freedom of association and to freedom of peaceful assembly.²⁸

In terms of various conventions adopted by the International Labour Organisation,²⁹ both workers and employers have the right to associate and to organize in the defence and advancement of their rights and interests. The right to freedom of peaceful assembly should be enjoyed to the greatest extent possible, and any restrictions must have a legal basis. Under international law, it is the duty

²⁰ Ibid (n5) above.

²¹ Article 8 of the Covenant.

²² Article 2(2) of the ICCPR.

²³ www.jstor.org/stable/

²⁴ Available at <https://www.justsecurity.org/71754/u-n-human-rights-committee-general-comment-no-37-on-freedom-of-assembly-an-excellent-and-timely-contribution/>

²⁵ Ibid.

²⁶ Article 29 of the ICRPD.

²⁷ Articles 26 and 40 of the Convention.

²⁸ Article 15 of the Convention.

²⁹ These include the ILO Convention on Freedom of Association and Protection of the Rights to Organise (1948), and the Convention concerning the Application of the Principles of the Right to Organise and Collective Bargaining (1949). Available at <https://www.ilo.org>.

of the state and its law enforcement agencies to facilitate the enjoyment of the right of peaceful assembly. According to the UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

*“in the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”*³⁰

The use of force against those exercising these rights under international law should at all times be governed by the principles of legality,³¹ precaution,³² necessity,³³ proportionality³⁴ and accountability.³⁵ Paragraph 36 of General Comment No. 37 provides a useful guide to states on the manner in which the right to peaceful assembly may be limited. It requires, among other things, for states to justify any restrictions on this right:

*“While the right of peaceful assembly may in certain cases be limited, the onus is on the authorities to justify any restrictions. Authorities must be able to show that any restrictions meet the requirement of legality, and are also both necessary for and proportionate to at least one of the permissible grounds for restrictions enumerated in article 21, as discussed below. Where this onus is not met, article 21 is violated. The imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations to it. Restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect.”*³⁶

In his report, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has cautioned that where limitations on the right to peaceful assembly are imposed, they must be ‘necessary’ and ‘proportionate’ to the aims sought to be achieved:

*“...where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”*³⁷

³⁰ The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) was adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders. It is not legally binding on member states, but rather provides clarity and guidelines on law enforcement officials in the use of force.

³¹ States have to enact domestic laws regulating the use of force especially lethal force, that complies with international standards. (A/HRC/26/36, para. 56).

³² Authorities must ensure that reasonable measures are taken during the planning and preparation stage of the assembly to avoid the use of force or, where force is the only option, to minimize its harmful consequences (A/HRC/31/66 para 51).

³³ Authorities may only use necessary and legitimate force, that is, the force must be provided for by law, and anything outside of the domestic legal framework would otherwise be arbitrary and unlawful (See <https://www.rightofassembly.info/glossary>).

³⁴ The amount of force used must be proportional to the threat posed (<https://www.rightofassembly.info/glossary>).

³⁵ Individual law enforcement officials together with law enforcement agencies remain accountable for the unlawful use of force (<https://www.rightofassembly.info/glossary>).

³⁶ Ibid (n24) above.

³⁷ Ibid (n6) above, at para 17.

3.2 Regional Framework

At the continental level, the right to freedom of assembly is guaranteed under articles 10 and 11 of the ACHPR and article 8 of the African Charter on the Rights and Welfare of the Child (1990).³⁸ The general rule is that only peaceful assemblies are protected. The Guidelines on Freedom of Association and Assembly in Africa adopted by the African Commission on Human and People's Rights at its 60th Ordinary Session in May 2017³⁹ provide clarification and assist state parties to give effect to articles 10 and 11 of the ACHPR. Paragraph 66 of the Guidelines states that:

*“Where States enact laws on freedom of assembly, those laws shall aim primarily at the facilitation of the enjoyment of the right. Legislation and regulations on assemblies shall be drafted and amended on the basis of broad and inclusive processes including dialogue and meaningful consultation with civil society.”*⁴⁰

Article 10 of the ACHPR provides that every individual shall have the right to free association provided that he or she abides by the law, and no one may be compelled to join an association. It is worth noting that the word “peaceful” is absent from article 11 of the Charter which reads:

“every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

The qualification under article 10 (i.e. “*provided he (or she) abides by law*”) has been perceived as problematic for many years in that states ordinarily abuse their power and legislate against the very enjoyment of this right.⁴¹ The African Commission on Human and Peoples' Rights, which is established in terms of the ACHPR, has clarified that states should not adopt a rigid literal approach when interpreting article 10.⁴²

Some jurisdictions on the African continent have struck down the requirement that a permit must be obtained prior to the holding a peaceful assembly. For instance in *Re Munhumeso & Others*⁴³ the court in South Africa held that the permit requirement was at variance with the enjoyment of the right to peaceful assembly. Similarly, the court held in *Mulundika & Others v The People*⁴⁴ that the requirement to obtain a permit was “an obvious hindrance.”

The South African and Namibian constitutions provide for a general limitations clause for rights in their Bill of Rights.⁴⁵ However, the limitation may not negate the essential core content of the

³⁸ www.unicef.org/African_Charter_articles_in_full

³⁹ The Guidelines are available at www.achpr.org

⁴⁰ Ibid, at para 36.

⁴¹ Heyns, C., (ed), *Human Rights Law in Africa* (1977) p. 89.

⁴² The 5th Resolution on the right to freedom of association-ACHPR/RES.5 (XI) 92. Available at <https://www.achpr.org/sessions/resolutions?id=10>.

⁴³ 1995(1) SA 551.

⁴⁴ Supreme Court of Zambia, 1996 [unreported].

⁴⁵ See e.g. section 36 of the South African Constitution (1996).

right. This principle was endorsed by the Zambian Supreme court in *Mulundika*⁴⁶, where the court held that the limitation to assemble freely was no longer as of right if made subject to a license.⁴⁷ In *National University of Lesotho v Ntitsane & 61 Others*,⁴⁸ the High Court interdicted university staff members who were holding protests in the form of “prayer sessions”. The decision was set aside on appeal with the higher court holding that the prayer sessions were not in contravention of the Public Meetings and Processions Act because the gatherings were for a “genuine religious purpose.”⁴⁹

⁴⁶ Ibid (n39) above.

⁴⁷ Ibid.

⁴⁸ [CIV/APN/454/12] LSHC 99)31 December 2012

⁴⁹ *Thabo Ntitsane and Others v National University of Lesotho* (C of A (CIV) NO.43/2012) [2013] LSCA 13 (19 April 2013).

CHAPTER 4: COUNTRY STUDIES

4.1 DEMOCRATIC REPUBLIC OF CONGO

4.1.1 Introduction

The Constitution of the Democratic Republic of Congo (DRC), which was adopted on 18 February 2006, established a democratic political system as the basis of all institutions, including organs of justice, in the country.

Chapter 2 of the Constitution titled: “Human rights, fundamental freedoms and the duties of the citizen and the State” protects the major human rights and freedoms, including the right to freedom of association and assembly. The exercise of the right of freedom of association and of peaceful assembly are fundamental to the existence of a healthy democracy. It is for this reason that they these rights are not only protected by the Constitution, but they are also given legislative impetus.

By protecting the rights to free association and peaceful assembly, the DRC Constitution reaffirms the country’s adherence to international norms and standards and in particular, the principles enunciated by the UDHR, the ICCPR and the ACHPR, among others. The DRC has a monistic legal system meaning that both national and international law find equal application in the country. As such, international and regional conventions, which the country has either signed or ratified, or which are part of international law, are directly applicable in the country’s domestic legal order.

4.1.2 Freedom of Association

Freedom of association allows civil society to participate actively in the social life of the country and to raise the voices of citizens who can express their political preferences, their economic and social aspirations, their concerns in the field of human rights or nature conservation, and their commitments in the field of education, among other concerns.

Article 37 of the DRC Constitution guarantees “*freedom of association and public authorities to collaborate with associations that contribute to the social, economic, intellectual, moral and spiritual development of populations and to the education of citizens.*” To give effect to this constitutional provision, Law No. 004/2001 of 20 July 2001 lays down general provisions applicable to non-profit associations and public utility establishments in the country.

However, despite the existence of both the constitutional provision and legislation protecting the right to freedom of association, there have been many difficulties and challenges experienced by individuals wishing to associate. These include:

- Restrictions on the number of members who may found an organization;
- Cumbersome administration with regard to registration formalities, especially for associations governed by foreign law;

Human Rights Defenders (HRDs) have withstood the worst of state harassment in respect of defending and advancing the right to freedom of association. Between 2015 and 2019, many HRDs received threats for organizing demonstrations against the then President Joseph Kabila's bid for a third term in office. Some of the defenders indicated that they had received anonymous calls and SMSs warning them to stop working with civil society organizations. Agents of the country's intelligence services would also visit the offices of NGOs on a regular basis in order to intimidate activists.⁵⁰

Freedom of association is not restricted only to formally registered organisations. As the UN Special Rapporteur on the Right of Peaceful Assembly and Freedom of Association has emphasised: "*the right to freedom of association also protects associations which are not registered. Members of unregistered associations should effectively be free to carry out all activities and in particular have the right to organize and participate in a peaceful assembly, without being liable to criminal sanctions.*"⁵¹

However, in December 2016, the Minister of the Interior issued a circular directing all provincial authorities that 'citizen movements' such as *La Lucha* and *Filimbi* were unlawful as they were not registered.⁵² Such prohibition is a contravention of articles 25 and 26 of the DRC constitution, as well as international best practice.

4.1.3 Freedom of Assembly

Article 25 of the Constitution provides that: "*freedom of peaceful and unarmed assembly is guaranteed subject to respect for law, public order and good morals.*" At the same time, article 26 guarantees the right to freedom of demonstration; however, any person or group of persons wishing to gather and demonstrate in a public space must notify the competent administrative authority in writing of their intention to do so.

What the Constitution requires therefore is a notification of the intended gathering and not an application for permission. The purpose of the information that needs to be provided is in order to enable the competent authorities to take the necessary measures to facilitate the gathering, including, where appropriate, the protection of those participating in the demonstration.

In practice, however, contradictory legal provisions remain which whittle away the lofty provisions of the Constitution. To start with, article 4 of Decree-Law No. 196 of 29 January 1999 on the regulation of public demonstrations and meetings stipulates that demonstrations and public meetings are subject to a prior declaration to the competent politico-administrative authorities. The use of the term "declaration" connotes not just a notification exercise but possibly a permission seeking process. This means that meetings organized in the public domain may be subject to prior authorization.

⁵⁰ Information obtained from interviews with respondents.

⁵¹ Ibid (n6) above.

⁵² See Amnesty International, *Dismantling Dissent: DRC's Repression of Expression Amidst Electoral Delays*, available at www.amnesty.org.

Furthermore, the criteria for distinguishing cases requiring prior authorization are not clearly stated. According to the information gathered from the interviews, a proposal for laws on the holding of demonstrations, aimed, inter alia, at addressing this problem and harmonizing the contradictory provisions, is yet to be implemented.

4.1.4 The case of Human Rights Defenders

For many years, Congolese civil society has been calling for a law to protect HRDs. A bill on HRDs was eventually placed before parliament in October 2017; however, this bill incorporates worrisome provisions that go against the spirit and purpose of the UN Declaration on Human Rights Defenders (1998).⁵³

For example, article 2 of the bill states that the law applies to those persons exercising on a permanent basis the activity of promotion, protection and realization of human rights as enshrined in the Constitution of the DRC, international conventions and applicable laws.

Article 3 of the bill defines a Human Rights Defender as *"any person who, as a member of and within a non-governmental human rights organization and within this framework, ensures the promotion, protection and defense of human rights and fundamental freedoms."* This definition means that the proposed law on HRDS will apply only to defenders who engage in the promotion of human rights on a "permanent" basis, and within the exclusive framework of registered NGOs. This particularly restrictive definition of the term "human rights defender" fails to take into account the fact that any person can be a defender, and there is no time limit to which an HRD can be bound in his or her work as a human rights defender. Permanency is not definitive of the work of a human rights defender.

Article 7 of the bill sets the conditions necessary for one to be recognized as a human rights defender. These conditions include that one should be at least 18 years old, have a state diploma, should have undergone human rights training provided by the National Commission on Human Rights (CNDH), and should not have a criminal conviction.

Article 11 requires any person wishing to be a human rights defender to make an application accompanied by the relevant supporting documents to the state authorities. The minister under whose portfolio human rights fall together with the provincial governors are then required to prepare a list of defenders who meet the conditions laid down by law. This list is transmitted to the CNDH, which if satisfied, will issue the applicant with a "Defender Card".

In February 2016, the Provincial Assembly of South Kivu passed an edict to protect HRDs and journalists. Although the edict is a symbolic step forward, it is important to note that it defines a human rights defender more narrowly than the bill before the country's National Assembly.

Article 2 of the edict defines a defender as *"any legal or natural person working within an organization legally constituted under Congolese law and who, in the course of its activities,*

⁵³ *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*. Available at <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

contributes in a non-violent manner to the defense and promotion of human rights.” In essence, only members of legally constituted organizations can be considered as defenders, which effectively excludes a significant number of activists, especially members of citizen movements. To say the least, the proposed law on human rights defenders in the DRC is a sham. All attempts by organized civil society to address the problems posed by the bill have simply been ignored.

4.1.5 Case Studies⁵⁴

Prohibition of gatherings and demonstrations

In September 2016, the authorities banned several demonstrations, of which they had been informed well in advance, on the grounds that these demonstrations contravened public order. At about the same time, the governor of the province of Kinshasa banned all demonstrations on the public highway until further notice. Both central and provincial authorities routinely ban demonstrations for no reason.

It is difficult to fathom the rationale for the wholesale prohibition of demonstrations. While reasonable restrictions on gatherings and demonstrations are necessary, such restrictions must be commensurate with the legitimate objectives pursued in order to ensure that the core content of the right to association and assembly is not unduly compromised. Therefore, general prohibitions, including the total prohibition of the exercise of the right of peaceful assembly or the prohibition of these rights in specific places or at particular times, are inherently disproportionate, as they exclude consideration of specific circumstances at each proposed meeting.

A case in point is that of members of various organizations, including the citizen movements, who had informed the authorities of a peaceful protest planned for 31 July 2017 in Goma. The mayor of the city refused to allow the protest to go ahead on the grounds that the organizations that planned it were not legally constituted. While authorities may raise objections to the conduct of an event on grounds of public policy, good morals or respect for the law, such objections must be lawful and reasonable. The reason raised by the mayor for prohibiting the proposed demonstration is not a restriction that can validly be defended in law. This prohibition violates not only the DRC Constitution but also article 21 of the ICCPR as well as article 11 of the ACHPR.

Information collected during the study indicated that a number of defenders acting on the advice of their lawyers had contemplated to file complaints in terms of article 180 of the Criminal Code, against the authorities for the unlawful prohibition of their gatherings. However, defenders are also reluctant to challenge the state for fear of reprisals particularly from the police and the National Intelligence Agency (NIA).

⁵⁴ The information in this section is derived from interviews with respondents.

Arbitrary arrests and detentions

On 23 and 24 June 2020, protesters who had come together as a coalition consisting of among others, the Union for Democracy and Social Progress (UDPS), LAMUKA and the Citizen Movement, were arrested for participating in what the authorities deemed unlawful demonstrations. They are still in detention under the control of the country's intelligence services.

The protestors were demonstrating against three proposed laws in the DRC national assembly, which would significantly reduce the power and independence of the magistrates of the Public Prosecutor's Office. The proposed laws aim at putting the magistrates under the supervision of the minister of justice who would have the power to appoint, revoke and even stop investigations on any case. The fear is that the minister, being a political appointee, will interfere in cases of a political nature to shield those in power.

Information obtained from the interviews shows that there are:

- Arrests of members of human rights associations before planned demonstrations;
- Arrests during or after demonstrations for no lawful reasons;
- Arbitrary detentions including unlimited detention in police custody; and
- Interrogation or court appearance of arrested demonstrators in the absence of their lawyers.

Abuse of prosecutorial powers

In many cases, individuals or members of human rights organisations are prosecuted in circumstances where there is no evidence of guilt. These include being prosecuted for:

- Provocation and civil disobedience;
- Propagation of false noises;
- Rebellion;
- Public disorder; and
- Looting, robbery or malicious destruction to property.

Conversely, no state agent has been charged for crimes including the killing and maiming of protestors, extrajudicial executions and other serious human rights violations committed as part of actions to prevent and control demonstrations.

4.1.6 Conclusion

Despite the existence of laws regulating the right to freedom of association and assembly in the DRC, the reality on the ground shows that these rights are not effectively respected. It is important that changes be made, both in law and in practice, and in accordance with the principles enshrined in international legal instruments, in order to enable the citizens of the country to fully enjoy these rights.

Attacks against human rights defenders seeking to highlight the violation of human rights by way of assemblies and demonstrations remain a matter of serious concern in the country. Government has ruthlessly used the law to frustrate the ability of organisations to hold public officials to account. The rise of human rights defenders and citizen movements is a welcome and challenging change in the country's political scenario.

The different testimonies collected during this study demonstrate clearly that when the right to security and freedom of human rights defenders is violated, it results in the violation of other rights including the right to peaceful assembly, freedom of expression and opinion, freedom of association, and the right to participate in public life of one's country.

In the face of pressure by the executive against the judiciary, human rights defenders remain reluctant to seek the protection of the courts. The lack of trust in the independence and impartiality of the judicial system means that the system contributes to the increasing isolation and vulnerability of defenders.

4.2 LESOTHO

4.2.1 The Legal Framework for Freedom of Association and Assembly

Sections 15 and 16 of the Constitution of Lesotho (1993) guarantee the rights to freedom of association and assembly. These rights are however not absolute and they may be limited in the manner prescribed by international human rights instruments for, among other reasons, the protection of law and order, the protection of public health or morals, or the protection of the rights and freedoms of others. Any restrictions must meet a strict test of necessity and proportionality.⁵⁵

In 2019, Lesotho presented a combined second to eighth periodic report under the African Charter on Human and People's Rights, together with an initial report under the Protocol to the African Charter on the Rights of Women in Africa.⁵⁶ Regarding compliance in respect of freedom of assembly and association, the country reported on the legislative framework in place towards entrenchment of the freedom of association and assembly and gave a number of illustrative cases as examples under judicial measures.⁵⁷

The report highlighted challenges around enjoyment of the right to freedom of association. It pointed out that while individuals associating privately are able to enjoy their rights, there are challenges when it comes to freedom of association and assembly for public servants. Unlike the Labour Code Order, which does not have stringent conditions on recognition of workers' unions, the Public Service Act requires that such associations have to be registered as friendly societies under the Societies Act No. 20 of 1966.⁵⁸ Another challenge is that public officers' associations become legible for recognition by the employer for collective bargaining purposes, only when they have membership of over 50 percent of overall public officers in the area or sector concerned. The other limitation is imposed by section 19(1) of the Public Service Act, which contrary to the ILO conventions, prohibits public officers from engaging in strikes.

Assemblies and demonstrations in the country are governed by the Public Meetings and Processions Act in 2010,⁵⁹ ("the Act/ Meetings Act"). The Act makes it mandatory for anyone intending to hold a public meeting or procession to first seek and obtain permission⁶⁰ from either the police or the headman of the area where such meeting or procession is to be held. The Act

⁵⁵ See Articles 21 and 22 of the ICCPR.

⁵⁶ Presented at the 64th Ordinary Session of the African Commission on Human and People's Rights held in Egypt, between 24 April and 14 May 2019

⁵⁷ This includes the case of the *Lesotho Chamber of Commerce and Industry & Others v Commissioner of Police & Others* (CIV/APN/405/2011)[2011] LSHC 127 in which participants who had been granted permission to march to express their grievances about pay for textile workers and other problems in general had their permit cancelled at the last minute.

⁵⁸ See the ACHPR 2017 report page 41. available at

https://www.achpr.org/public/Document/file/English/lesotho_periodic_report_combined_2nd_8th_2001_2017_eng.pdf (accessed 11th July 2020.)

⁵⁹ Act No. 14 of 2010.

⁶⁰ Own emphasis.

gives the police and headman the discretion to allow or prohibit the holding of a gathering.⁶¹ In 2011, the Lesotho High Court held that the Act makes it mandatory for the Minister to make a decision when approached on appeal.⁶²

Section 3 of the Act provides that anyone wishing to hold a public meeting or procession must give written notice to the officer in command of police in the area where the meeting or procession is to be held seven days in advance (or two days in case of an urgent application). Permission may either be granted or refused. The circumstances under which the permission may be legally refused or revoked if granted, were discussed in detail in the landmark case of *Chamber of Commerce and others v. Commissioner of Police and others*.⁶³

In this case, the court emphasised that where permission is refused, exceptional and compelling circumstances of reasonably suspected threat or harm to peace, public safety, public security and public order must be shown to exist. The court added that reasons for the refusal must be given. If a permit that had previously been issued is cancelled, the cancellation will be lawful only if the officer has reasonable grounds to believe that the intended public meeting or procession has a real potential for causing threat or harm to public peace, public safety, public security of public order.⁶⁴

In similar vein, the Labour Code⁶⁵ permits freedom of association for both employers and employees.⁶⁶ It also allows for freedom of assembly in the form of strikes and lock-outs in the private sector.⁶⁷

The Meetings Act has faced controversy as it is regarded as limiting, rather than advancing, the right to freedom of association and assembly in Lesotho. On the other hand, there are those who view the Act as a necessity because it has introduced limitations on political interference with the rights to assembly, demonstration and many others.

Section 32 of the Penal Code (2010) allows the use of reasonable force to effect an arrest or prevent a crime. Police routinely use this Code to stop assemblies and demonstrations, even where such are peaceful. For instance in 2014, police were reported to have used live ammunition to disperse a strike by nurses.⁶⁸ The strike was largely peaceful. In 2018, police fired rubber bullets and water cannons on demonstrators who had gathered peacefully in an industrial area outside the capital city Maseru.⁶⁹

⁶¹ Roy Cobb 'Lesotho and democratic System Type' (2017) Lulu Press Inc.

⁶² <http://lestimes.com/judge-orders-lehohla-to-decide-on-protest-request/>.

⁶³ (CIV/APN/405/2011) [2011] LSHC 127.

⁶⁴ Section 5 of the Act.

⁶⁵ No.2 of 1992

⁶⁶ LabourCode Order 1992 sections 6 and 168, as amended.

⁶⁷ LabourCode Order section 229.

⁶⁸ See online CIVICUS, available at <https://monitor.civicus.org/updates/2017/02/01/peaceful-assembly-Lesotho>.

⁶⁹ <https://www.garda.com/crisis24/news-alerts/148026/lesotho-protests-reported-in-maseru-august-21-update->.

4.2.2 Case Studies

On its face, it appears that Lesotho's legal framework is in line with international standards; however, the practical implementation of this framework is seriously compromised. It is evident from the feedback received from the questionnaires and interviews that the power to grant or withhold a permit is exercised in a manner that does not give effect to the constitutional right to assembly and association in Lesotho. The application process is far from transparent and power remains overwhelmingly in the hands of the authorities to determine whether to grant permission.

Some of the challenges highlighted by the respondents include the fact that the granting of permission to assemble and demonstrate is often based on political considerations. In many cases, there seems to be no rational or reasonable basis to deny permits. Police routinely deny permission for meetings and processions especially to those deemed to be against the government. For example, the People's Matrix Association reported that it had applied for a permit to host an overnight assembly of LGBTI.

However, police intervened and chased away the Association's members before the event could be concluded. Similarly, the Independent Democratic Union of Lesotho has reported that its organizers have been arrested repeatedly for convening 'unlawful' gatherings. Communities affected by the Lesotho Highlands Water Project have also complained that police routinely and violently disperse their peaceful protests.

It often takes court intervention to have a gathering or demonstration take place. However, court processes take long and even those with the means to challenge the state for its refusal to grant permission are reluctant to do so. Many political parties have had to turn to the courts for relief. The period between 2017 and 2019 saw the Lesotho High Court intervene in a large number of cases to decide on applications that had been denied by the police. The end result is that courts are now inundated with the burden of adjudicating administrative matters, which ordinarily should be the reserve of the executive.

Additionally, the organizers of assemblies and demonstration are deterred by the fact that they are held liable should an assembly or demonstration become violent. Another hurdle identified by stakeholders is the lack of accountability of the police or oversight bodies in the exercise of the right to peaceful association and assembly.

Furthermore, protests are regularly dispersed by the police, and many gatherings convened by tertiary students usually lead to violent clashes with law enforcement authorities. This has resulted in students being reluctant to apply for permits to gather and demonstrate.⁷⁰ For instance, in 2016, four students were charged for contravening the Penal Code and the Meetings Act.⁷¹ A few years earlier in 2009, a police officer was found guilty of murder and attempted murder after he opened fire on a group of protesting students.⁷² These cases demonstrate the extent to which the authorities have undermined the right to freedom of association and assembly in Lesotho.

⁷⁰ <http://lestimes.com/rioting-students-shot/>.

⁷¹ See <http://lestimes.com/varsity-students-charged/>.

⁷² *Rex v Sello Jabavu Paamo* (CRI/T/98/2012)[2013]LSHC 53.

4.2.3 Conclusion

Lesotho has what appears to be a comprehensive regulatory framework for the regulation of the right to peaceful association and assembly. However, a deeper examination of this framework demonstrates that it has been used to limit, rather than facilitate the ability of citizens to exercise their right to peaceful assembly and association.

It is imperative for Lesotho to create an enabling environment for the exercise of the rights to peaceful assembly and association. It can do this by capacitating its institutions to properly implement the provisions of the Meetings Act. The judiciary in Lesotho has been at the forefront of defending the exercise of these important rights and must therefore be applauded.

4.3 MALAWI

4.3.1 Freedom of Association

Section 32 of the Malawian Constitution (as amended in 2017) guarantees the right to freedom of association. This section provides that “*every person shall have the right to freedom of association, which shall include the freedom to form associations.*” The Constitution further states that “*no person may be compelled to belong to an association.*”⁷³

Under the NGO Act (2000), the government requires all civil society organisations (CSOs) to register with three different government institutions – the Registrar General’s office, the Council for Non-governmental Organisations in Malawi (CONGOMA) and the NGO Board. In addition, NGOs must pay a once-off registration fee of K50,000 (approx. US\$70)⁷⁴ as well as an annual fee of K50000 to the government.

However, according to the Non-Governmental Organisations (Fees) Regulations of 2017, (which was gazetted on 01 January 2018), the annual fee has been increased to K1 million (approx. US\$1,400) – a 1,900 per cent increase – which must be paid within the first three months of the year. There is also a requirement for CSOs to have agreements and a memorandum of understanding (MoU) with relevant government ministries and departments to enable them to implement their activities. In November 2018, the government introduced and presented to parliament a new bill to amend the NGO Act. The bill has a number of provisions that pose a threat to the exercise of the right to freedom of association, such as mandatory registration of all CSOs and imposition of additional criminal sanctions for non-complying CSOs.

The requirement for mandatory registration of CSOs is in direct conflict with best practices on freedom of association presented by the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association. It also violates paragraph 11 of the Guidelines on Freedom of Association and Assembly in Africa⁷⁵, which provides that:

“States shall not compel associations to register in order to be allowed to exist and to operate freely. Informal (de facto) associations shall not be punished or criminalized under the law or in practice on the basis of their lack of formal (de jure) status.”

Moreover, the Special Rapporteur notes that it is good practice to have a “notification procedure,” rather than a “prior authorisation procedure” which requires approval by the authorities before an association can be established as a legal entity.⁷⁶

Malawi has ratified a number of international and regional human rights treaties, which protect the right to freedom of assembly and association. These include the ICCPR, the ACHPR, the Convention on the Elimination of all Forms of Discrimination against Women (1979) (CEDAW)⁷⁷

⁷³ Section 32(2) of the Constitution.

⁷⁴ Malawi’s currency is called the “*Kwacha*” and denoted by the letter “K”.

⁷⁵ Ibid (n39) above.

⁷⁶ Ibid (n6) above.

⁷⁷ UN General assembly, *convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations Treaty Series, Vol 1249. Available <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

and the UN Declaration on Human Rights Defenders. In addition, Malawi's Constitution protects the rights to freedom of assembly and association.⁷⁸

4.3.2 Freedom of Assembly

Section 38 of the Malawi's Constitution provides that *“every person shall have the right to assemble and demonstrate with others peacefully and unarmed.”* According to section 92 of the Police Act⁷⁹, an “assembly” means any assembly, meeting, rally, gathering, concourse, or procession of more than fifteen persons in or on any public place or premises or on any public road:

- (a) *at which the views, principles, policies, actions, or failure to act of the Government or any other government, or of a political party or political organisation, whether or not that party or organization is registered under any applicable law, are publicly discussed, attacked, criticised, promoted or propagated; or*
- (b) *held to publicly hand over petitions to any person or to mobilise or demonstrate support for or opposition to the views, principles, policies, actions or failure to act of any person or of any body of persons or any institution, including the Government or any other government or any governmental institution.*

On the other hand, the Police Act defines the word “demonstration” as:

“any demonstration, whether by way of a procession, march or otherwise, in or on any public place or premises or on any public road, whether by one or more persons, for or against any person, organisation, cause, action or failure to take action, which is organised to be publicly held for the same purpose as in the case of an assembly.

According to Section 93 of the Act, any organisation, which intends to hold an assembly or a demonstration, must appoint a convenor and a deputy convenor. Details of the convenor and his/her deputy must be provided to the local administration and the police. The convenor is responsible for the arrangements of any intended assembly or demonstration and acts on behalf of the organisation at any consultations or negotiations with the state or law enforcement authorities. The convenor must give notice in writing, of not less than forty-eight hours and not more than 14 days to the District Commissioner (DC) with a copy to the officer in charge of the police station concerned.⁸⁰

The Notice must stipulate the name of the convenor, his or her addresses and phone numbers, the name of the organisation on behalf of which the assembly or demonstration is convened, the purpose of the assembly, and the place where the assembly or demonstration is to be held. In addition, the notice must indicate the anticipated number of participants, the exact route the assembly or demonstration will take, the time when and the place where the participants are to

⁷⁸ Sections 32 and 38 of the Constitution.

⁷⁹ Chapter 13:01 of the Laws of Malawi, 2010.

⁸⁰ Section 96 of the Police Act.

assemble, the time when the participants will disperse and the place where and the person to whom the petition will be handed.⁸¹The convenor must be present at the assembly or demonstration.⁸²

It is important to note that the Police Act does not require individuals to seek permission to assemble or to demonstrate; it merely requires a notice of the intended assembly or demonstration to be given to the DC and the police. Where the DC has received a notice in accordance with the Act or other information regarding a proposed assembly or demonstration, he or she must forthwith consult with the officer in charge of police concerned regarding the necessity for negotiations or any aspect of the conduct of, or any condition with regard to the proposed assembly or demonstration.⁸³

The DC and police on the one hand and the convenor on the other must negotiate to ensure that:

- (a) Vehicle traffic or movement of pedestrians on public roads, especially during traffic rush hours, is least impeded;
- (b) An appropriate distance is maintained between participants in the assembly and a rival or other assembly or demonstration;
- (c) Access to property and workplaces is least impeded; and
- (d) Injury to persons or damage to property is prevented.

Where the DC receives two or more notices for assemblies or demonstrations on or at the same place and time, the convenor or organisation whose notice was first received shall be the one entitled to hold the assembly or demonstration.

A DC who refuses a particular request regarding an assembly or demonstration or who imposes any condition shall give the convenor reasons in writing for his or her decision.⁸⁴ If an assembly or demonstration is postponed or delayed, the convenor must forthwith inform the DC who may in turn call for a meeting of all the parties to map the way forward.⁸⁵ A convenor, or any person whose rights may be affected by the holding of an assembly or demonstration, may apply to the High Court for relief including an amendment of any term or condition imposed by the state.⁸⁶

⁸¹ Ibid.

⁸² Ibid.

⁸³ Section 98.

⁸⁴ Section 99.

⁸⁵ Section 100.

⁸⁶ Section 102(5) of the Police Act.

4.3.3 Case Studies

i. Use of archaic colonial laws

Although freedom of association is constitutionally guaranteed in Malawi, government has sometimes restricted this right in ways that do not meet the constitutional standard. A case at hand is that of Nyasa Rainbow Alliance, a CSO which works on Lesbian, Gay, Bisexual, Transgender, Queer and Intersexual Rights (LGBTQI).

In July 2016, the Alliance filed an application for registration as an NGO with the Registrar General's Department. A year later, the Registrar informed the organisation that its application for registration had been denied on the grounds that the organisation's "membership practices" were recognised as an offence under the laws of Malawi. Government thus invoked the colonial-era Penal Code to restrict the Alliance's right to freedom of association.⁸⁷ The state further argued that the right to freedom of association is not absolute and can be limited in accordance with the constitution and the laws of the country.

ii. Internal Organisational Governance

Civil Society Organisations are permitted to determine their internal management structures and operations. It is not compulsory to obtain permission from authorities before changing internal management structures and rules of an organization. When respondents were asked to comment about this issue, most of them disagreed with the idea that organizations should obtain permission from authorities before changing their internal management structures and rules.

iii. Public Support through Tax Benefits

About half of all respondents indicated that tax benefits or other forms of public support is available for non-profit associations. It is not clear however how such benefits or support apply in practice.

iv. Establishment of local organisations

The majority of respondents indicated an awareness of the requirement for the registration of CSOs. Any person can start an organisation and there is no limit on the number of persons who may constitute an organisation for purposes of registration. The requirements for registration are:

⁸⁷ Penal Code Clause 153 on Unnatural offences; Clause 154 on Attempt to commit unnatural offences; and Clause 156 on Indecent practices between males.

- A constitution.
- Completion of the application forms.
- Payment of the registration fee.

Despite compliance with the set-out requirements, organisations routinely get rejected where the Registrar believes that the organisation's interventions are not in line with government policies and/or laws. This is unlawful.

v. Establishment of international organisations

International organisations are allowed to establish country offices. However, foreign and international organizations are not subject to the same registration process and requirements as domestic organizations. Some of the requirements are that the foreign organisations need to partner with local organisations. In addition, the NGO Act encourages foreign and international organizations to build the capacity of local organizations, however, such procedures are not followed. Despite the fact that international and local organisations have different registration processes and requirements, they are all treated in the same manner.

In theory, an organisation once registered may pursue all lawful activities. But what is lawful is contested because as pointed out above, an organisation that seeks to advance LGBTQI rights is unlikely to be registered or permitted to operate given the provisions of Malawi's colonial-era Penal Code.

Furthermore, what an organisation can do (political, social, economic and cultural issues, democracy and governance, and the formulation of law and policy) will depend on the nature of the activity. Activities that have a political bent (e.g. political education) are viewed with suspicion. Many organisations providing civic education have experienced threats, intimidation and harassment from the government. One respondent expressed the situation as follows:

“Our organization wanted to rebrand from Outreach Scout Foundation to Outreach Foundation Malawi. We were told that we cannot use the name ‘Malawi’. Our file full of documents went missing in the Office of the President. The electronic documents also went missing. We later discovered that this was because our organization had signed a letter against the NGO policy. We were being punished for our political stance.”

vi. Funding

In Malawi organizations freely seek, receive and use funds for their non-profit aims. However, in most cases, organisations have to be registered with the NGO Board in order to qualify for certain funds. The law permits organizations to seek and receive funds from foreign sources. Organisations can also seek and receive funds from private sources. Nevertheless, some organizations experience difficulties in this regard. For example, it was pointed out during the study that some organisations find it difficult to meet the criteria and qualifications required to receive grants. The NGO Act obliges organisations to disclose their source of funding. The bulk

of funding comes from foreign or international agencies with very little funds being sourced from local or private bodies. All organizations are subjected to the laws and policies governing money laundering, fraud, corruption and trafficking.

vii. Reporting

All CSOs must submit reports on an annual basis to the Malawi Council for NGOs. The information required in these reports include: personal information about the organisation, a description of the organisational projects and activities including funding, and the organisation's source of income.

viii. Freedom of assembly

Although freedom of assembly is guaranteed in the Constitution of Malawi, the government has routinely curtailed this right. In 2019, the Human Rights Defenders Coalition (HRDC) organized a series of protests following the disputed May 2019 presidential elections. Organizers and participants faced harassment, threats, and violence at the hands of law enforcement authorities and supporters of the then ruling party.

In August 2019, the home of Timothy Mtambo, chairperson of the HRDC, was attacked with petrol bombs. A month later, youth cadres of the then ruling Democratic Progressive Party (DPP) hacked HRDC leader Billy Mayaya and four others with machetes, leaving them with serious injuries. In October, Mtambo was shot at multiple times in the capital city Lilongwe.

In July 2019, the government used a vague provision in the Police Act to take the HRDC to court to force the organization to pay costs for damages allegedly suffered during the post-election demonstrations. Earlier in the same month, the Ministry of Homeland Security had released a statement directing government ministries, departments and agencies to claim for damages to property from organisers of nationwide protests. The protests had been called to force the chairperson of the Malawi Electoral Commission -Jane Ansah to resign. Civil society organisations and Human Rights Defenders correctly viewed these actions as intimidation and an attempt to silence them.

The majority of respondents also condemned the payment of fees, which is a requirement alongside the notification for the intended assembly or demonstration. Some respondents were unaware whether prior approval is required before an assembly or demonstration can proceed. In a number of cases, it was pointed out that authorities had "allowed" assemblies to proceed on very short notice. However, in many cases, the authorities have simply prohibited proposed assemblies or demonstrations for no good reason. This is especially the case with demonstrations or protests directed against the government.

Assemblies highlighting certain issues (e.g. electoral malpractices, corruption or police brutality) experience a higher rate of prohibition, or stricter conditions than those dealing with less politically sensitive matters. The quotations explain the situation:

“In Malawi, conditions are usually political. If the assemblies are deemed critical to the government, the conditions are more prohibitive. However, for pro-government assemblies, the conditions are favorable.”

“Recently we have seen assemblies against the present government being prohibited.”

“Demonstrations against [the] political leadership[are usually not allowed.]”

A number of respondents expressed the view that counter-demonstrations or simultaneous protests are usually not permitted. For instance if a pro-government demonstration has been organized, the authorities will not permit a counter-demonstration. Also, while authorities routinely prohibit or restrict the use of flags, masks or symbols bearing political content, demonstrators usually ignore such restrictions.

Media in Malawi is allowed to cover assemblies freely, however, in some cases; the authorities prohibit coverage of some events. These are usually events that are critical of government. However, pro-government assemblies experience no such restrictions. In addition, it is clear that the state exercises double standards when it comes to pro and anti-government protests. The former are hardly dispersed or interfered with while anti-government protests are as a matter of routine either prohibited, and where they take place without “permission”, dispersed using force.

Assemblies are not permitted within the vicinity of State House (the residence of the President) and around security areas such as military bases. In addition, authorities usually prohibit demonstrators from marching through business areas due to fears of vandalism. The study established that authorities often set a strict time limit for assemblies and demonstrations and require convenors to abide by those restrictions. However, in many cases, these time-limits are not followed.

One of the questions posed to respondents was whether the authorities as a matter of practice set up meetings as required by the Police Act. The responses were evenly balanced in respect of whether these meetings take place or not. This is a surprising fact as the meetings are supposed to iron out key aspects of the proposed assemblies including the number of participants, route to be taken and the time of the demonstration, among others.

A concerning issue which arose from the field responses relates to criminal sanctions for what may be termed “riot damage”. Demonstrations or protests which become violent often result in damage to property. By law, it is the convenor and the demonstrators who will be held liable for such damage. However, none of the respondents indicated that they were aware of anyone who had been subjected to criminal sanctions for such damage. This notwithstanding, it must be noted that leaders of the HRDC have faced threat of criminal sanction from the police for demonstrations convened under their auspices in cases where such demonstrations turned violent.

4.3.4 Conclusion

It is concerning that while some countries on the African continent have moved to repeal colonial-era legislation prohibiting homosexuality (“offences against the order of nature”), Malawi still retains and uses such legislation to restrict the right of individuals to associate. It is also concerning that despite a Constitution which clearly guarantees the right to peaceful assembly and association, and legislation which merely requires individuals to notify the authorities of their intention to assemble and demonstrate, many gatherings are still violently dispersed by the police.

Like the South African and Kenyan judiciaries, the Malawian judiciary is an outlier on the continent. It has demonstrated a remarkable ability to maintain its independence in the face of often hostile pressure from the executive. Human rights defenders and organisations are encouraged to make greater use of the judiciary in that country to entrench the rights to free association and peaceful assembly. These rights are the very lifeblood of a healthy democracy.

4.4 SOUTH AFRICA

4.4.1 Introduction

South Africa is a state party to the ICCPR, the ICESCR and CEDAW. It has also ratified the International Labour Organisation's Freedom of Association and Protection of the Right to Organise Convention (No 87 of 1948), which represents the legal standard protecting the principle of freedom of association.⁸⁸

The African Charter on Democracy, Elections and Governance (ACDEG), to which South Africa is a state party, guarantees the right to freedom of association.⁸⁹ The African Charter on Human and People's Rights recognises the right of Africans to freedom of association.⁹⁰

Domestically, sections 17 and 18 of the Constitution of South African (1996) guarantee the right to freedom of association and assembly. National legislation, in the form of the Regulation of Gatherings Act (205 of 1993) ("Gatherings Act") has been promulgated to give effect to these constitutional provisions.

Section 23 of the Constitution enshrines labour rights, which at their core protect the right to associate freely through the formation of trade unions. The right to freedom of association of employees is protected by section 4 of the Labour Relations Act (66 of 1995) (LRA). Furthermore, section 5(1) of the LRA prohibits discrimination against employees for any rights conferred by the LRA like being a member of a trade union. The courts have recognised the right to associate freely whether through voluntary associations or trade unions as legitimate in the realisation of the rights protected in the Constitution.⁹¹

Other decisions have confirmed the importance of the right of voluntary organisations to control their own processes⁹², the right of every person to not associate⁹³ and the right of all workers, including members of the armed forces, to form and join trade unions of their choice.⁹⁴

4.4.2 Freedom of Association

Section 18 of the Constitution guarantees the right of every person to freedom of association. This right may however be limited in terms of section 36 of the Constitution provided that such

⁸⁸ Servais J "ILO standards on freedom of association and their implementation" 1984, *International Labour Review*, Vol 123, No 6, November-December.

⁸⁹ African Union, *African Union Charter on Democracy, Elections and Governance*, 30 January 2007, Arts 12(3), 27(2) & 28.

⁹⁰ Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights ('Banjul Charter')*, 27 June 1981, CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982), Art 10.

⁹¹ *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T).

⁹² *Ward v Cape Peninsula Ice Skating Club*, 1998 (2) SA 487 (C); *Wittman v Deutscher Schulverein, Pretoria, and Others* 1998 (4) SA 423 (T).

⁹³ *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275, 1280-1281, [1999] 4 All SA 59, 66-67 (T)

⁹⁴ *South African National Defence Force Union v Minister of Defence* (2000) 16 SAJHR 324.

limitation is reasonable and justifiable in an open and democratic society. Sections 23(2) and (3) of the Constitution guarantee the rights of employers and workers to form employer's organisations and trade unions.

The South African parliament has passed legislation to govern non-governmental organisations (non-profit sector) as well as labour relations. The Non-Profit Organisations Act (71 of 1997) (NPO Act) was passed by parliament following a process of negotiation and consultation with civil society.⁹⁵ The Act describes the state's responsibility to NPOs using the following terms: "*within the limits prescribed by law, every organ of state must determine and coordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of NPOs to perform their functions.*"⁹⁶

NPOs can acquire the following different forms including as:

- (a) Non-governmental organisations (NGOs).
- (b) Community-based organisations (CBOs).
- (c) Faith-based organisations (FBOs).
- (d) Organisations that have registered as Non-Profit or Section 21 companies.
- (e) Trusts that have registered with the Master of the High Court.
- (f) Approved Public Benefit Organisations.

In terms of the number of people required to found an association the requirements differ depending on the type of association. While the NPO Act does not specify a minimum number of founders of a CSO, three founders are needed to establish a voluntary association by common law.⁹⁷ A Non-profit Trust requires a minimum of two founders⁹⁸ while a Non-profit Company requires a minimum of three directors.⁹⁹

A criminal conviction or record is not an absolute bar to membership of a non-profit organisation. However, section 69 of the Companies Act (71 of 2008)¹⁰⁰ states that a person who in the past had either been removed from an office of trust due to dishonesty, been declared insolvent or criminally convicted and/or imprisoned could be disqualified from founding a company. This section applies

⁹⁵ Du Toit, C. *Reports and rumours About a New NPO Act-What should civil Society be Doing?* NGO Pulse.org Thursday, 23 June 2016.

⁹⁶ Non-Profit Organisations Act, 71 of 1997.

⁹⁷ Wyngaard R, *South Africa: Sub-Saharan Africa Country Reports*, International Journal of Not-for-Profit Law, Vol 12, Issue 2. Feb 2010.

⁹⁸ Trust Property Control Act, 57 of 1988.

⁹⁹ Companies Act, 71 of 2008.

¹⁰⁰ The new Companies Act (71 of 2008) replaced the Companies Act (61 of 1973).

to directors, alternate directors, prescribed officers and members of the board committee whether such persons are members of the board of directors or not.

Requirements for registration are standard and non-discriminatory and the procedures simple and clear. The assistance rendered at many registration service points has served to level the playing fields for those who could have found problems with literacy and navigating the registration systems. A level of automation of aspects of the registration processes have taken out potential discretion in the systems. Where rejections occur, the reasons are clear and standard. Registering an NPO is done free of charge, on a prescribed application form accompanied by the founding documents which contain the compulsory name, objectives, non-profit distribution constraint and governance structures. A fee of between R425 and R475 is however payable to the Companies and Intellectual Property Commission (CIPC) to register a Non-Profit Company.

Associations determine their purposes and activities subject to legality and the limitations and non-discrimination clauses in the South African Constitution. Furthermore, the purposes and activities should not unfairly discriminate against others in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (2 of 2000) (“PEPUDA”). Voluntary associations can pursue any lawful and legitimate activities that are aligned with their founding document and are not for profit.

4.4.3 Freedom of Assembly

The right to freedom of assembly has been succinctly described as “*amongst the most important human rights we possess.*”¹⁰¹ Simply put, the right to assembly protects the ability of individuals to come together for the common good. The right to assembly is a vehicle for the exercise of many other civil, political, economic, and social cultural rights, allowing people to express their political opinions, engage in artistic pursuits, engage in religious observances, form and join trade unions, elect leaders to represent their interests and hold them accountable.¹⁰²

Section 17 of the South African Constitution guarantees the right to freedom of assembly. It states that: “*everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.*”

At the same time, South Africa is a state party to the ICCPR, the ICRC, and the First Optional Protocol to the ICCPR, which grants individuals the right to petition the Human Rights Committee of the UN on issues relating to the violation of their fundamental rights and freedoms.¹⁰³ All these international instruments guarantee the right to peaceful assembly. At the continental level, South Africa is a state party to the ACHPR, as well as the African Charter on the Rights and Welfare of

¹⁰¹ Delaney, S. The right to freedom of assembly, demonstration, picket and petition within the parameters of South African law, p2.

¹⁰² Ibid.

¹⁰³ The United Nations General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations Treaty Series, Vol 999, p171.

the Child (“Children’s Charter”).¹⁰⁴ Article 8 of the Children’s Charter guarantees the right to freedom of assembly.

The foundational legislation governing the right to assembly in South Africa is the Regulation of Gatherings Act of 1993. The president of the last apartheid government Frederick de Klerk assented to this legislation on 14 January 1994. This was about three months before the country’s first democratic elections, and well before South Africa’s Final Constitution.¹⁰⁵ The Gatherings Act was thus not a constitutionally-compelled legislation.¹⁰⁶ However, the Gatherings Act was seen as ground-breaking and progressive as it repealed a host of the draconian apartheid era law.¹⁰⁷

The Gatherings Act was the product of a panel of local and international experts who consulted with various interest groups in the process of looking into the regulation of gatherings and protests during the transition from apartheid to democracy.¹⁰⁸ The Act defines a gathering as an assembly:

*“in or on any public road as defined in the Road Traffic Act 29 of 1989, or any other public place or premises wholly or partly open to the air.”*¹⁰⁹

A demonstration is defined as including *“any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.”*¹¹⁰ As such, a gathering of 15 or less participants does not need a notice or compliance with the procedure laid down in the Act.

Section 3 of the Act requires a convenor of a gathering to give notice of such gathering in writing to “a responsible officer”.¹¹¹ In *Mlungwana and Others v S and Another*¹¹², the Constitutional Court struck down as unconstitutional section 12(1) (a) of the Gatherings Act which criminalised the convening of gatherings, including peaceful gatherings, without a notice.

The notice in terms of section 3 of the Act must be given at least seven days before the date of the gathering.¹¹³ However, if the convenor gives less than 48 hours’ notice, the responsible officer

¹⁰⁴ 1990. OAU Doc. CAB/LEG/24.9/49. Entered into force on Nov. 29, 1999. South Africa ratified this Charter on 7 January 2000.

¹⁰⁵ Hanekom, E. *“Freedom of assembly and democracy in South Africa”* 2019. The Final Constitution was assented to by President Mandela on 8 December 1996 and came into effect on 4 February 1997. It replaced the interim constitution of 1993 (No 200 of 1993).

¹⁰⁶ Memeza “A critical review” *Freedom of Expression institute* 12. See also Freedom of Expression Institute (FXI) *The right to protest: A handbook for protestors and police* (2007).

¹⁰⁷ The gatherings and demonstrations in the Vicinity of Parliament Act 52 of 1973 (as amended in 1992); s46(1) and (2), 47, 48, 49, 51, 53, 57 and 62 of the Demonstrations in or near Court Building Prohibition Act 71 of 1982; the gatherings and Demonstrations at or near Union Buildings Act 103 of 1992. The passing of the Gatherings Act saw the repeal of section 46(1) of the 1982 Internal Security Act.

¹⁰⁸ Hanekom (n93 above).

¹⁰⁹ Section 1(vi) of the Act.

¹¹⁰ Section 1(v) of the Act.

¹¹¹ Local authorities are required in terms of section 2(4)(a) of the Act to appoint a suitable person as the “responsible officer”. Metropolitan Municipalities such as Johannesburg and Tshwane have designated their Metropolitan Police Departments for this role.

¹¹² (CCT32/18) (2018) ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) 19 November 2018).

¹¹³ Section 3(2) of the Gatherings Act.

may by notice prohibit such gathering.¹¹⁴ The information required in a notice includes the name, address and telephone number of the convenor and his or her deputy, the organisation or branch name on whose behalf the gathering is convened, the purpose of the gathering, and the time, duration, date and place of the gathering.¹¹⁵ In terms of section 12 (2) of the Act, a gathering that takes place spontaneously affords full defence to a convenor where no notice had been given. If the convenor is not called to a meeting within 24 hours after submitting a notice, the assembly may proceed in terms of the notice.¹¹⁶ Section 4(4) (b) (ii) of the Act makes provision for the responsible officer to impose conditions to ensure, among other things, “*the prevention of injury to persons.*”¹¹⁷

There are a number of limitations imposed on the right to assembly. Firstly, section 17 of the Constitution guarantees the right to ‘peaceful assembly’. It means that a violent assembly does not enjoy the protection of the Constitution. In addition, those assembling must be unarmed. Section 8(5) of the Gatherings Act prohibits the propagation of hate speech at a gathering.¹¹⁸ Similarly, section 8(6) of the Act prohibits incitement to violence.¹¹⁹ It should be noted however that in *South African Transport and Allied Workers Union v Garvas*,¹²⁰ the Constitutional Court held that participants and organisers who exercise their right to assemble with a peaceful intent will not lose such protection where there are isolated acts of unlawful behaviour.¹²¹

Taken together, it is evident that sections 8(5) and (6) of the Gatherings Act closely reflect the wording of sections 16 (right to freedom of expression) and 17 of the Constitution. In interpreting section 17 of the Constitution as well as the Gatherings Act, courts have re-affirmed that the right to assembly is fundamental to democracy.¹²²

4.4.4 Case studies

In general, organisations are able to carry out their activities without harassment, interference, intimidation or reprisals. However, associations critical of government have not escaped threats, harassment, interference, intimidation or even death. In 2015, the Association of Mineworkers and Construction Union (“AMCU”) which is a trade union dominant in the mining sector was accused by the ruling African National Congress (“ANC”) of being controlled by “white foreign nationals”.¹²³ The ANC went to accuse the trade union of being bent on “*destabilising [the]*

¹¹⁴ Ibid.

¹¹⁵ Section 3(3) of the Act.

¹¹⁶ Section 4(3) (a) and (b) of the Act.

¹¹⁷ Gatherings Act, section 4(4)(b)(iv).

¹¹⁸ “No person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language and religion.”

¹¹⁹ “No person present at or participating in a gathering or demonstration shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.”

¹²⁰ 2013 1 SA 83 (CC).

¹²¹ At, para 53.

¹²² *South African Defence Force Union v Minister of Defence* 1999 4 SA 469 (CC) paras 7-8/1999 4 SA 469 (CC) paras 7-8.

¹²³ Davis R, *of governments, NGOs and spying*, Daily Maverick, 2015.

economy.¹²⁴ The Sunday Times newspaper also reported informal probes having been launched into five NGOs, among them the Southern African Litigation Centre (SALC) by ANC leaders and the security cluster ministers.¹²⁵

In the same year (2015), campaign group, *Right2Know*, released a report, which concluded that there was strong evidence of South African state security agencies monitoring the work of some activists and civic organisations.¹²⁶ S’bu Zikode, leader of the shack dwellers organisation *Abahlali baseMjondolo*, confirms surveillance on his organisation and him being sometimes phoned immediately upon arrival from international trips by security agents known to him enquiring about the content of discussions at the meetings he had attended.¹²⁷

Nonhle Mbuthuma is a leader of the Amadiba Crisis Committee (“ACC”). The ACC successfully took the Department of Minerals and Energy to court to block the awarding of a mining license to a multinational company. Mbuthuma told the 10th Alternative Mining Indaba that “*we are facing death threats, murder and intimidation. The state of South Africa is part and parcel of supporting that. I’m not even ashamed to say what I’m saying.*”¹²⁸ Mbuthuma was confirming this on the basis of at least 12 people who were against the proposed mining having been murdered in the area since 2002 and none of the murders having been solved.¹²⁹ Mbuthuma temporarily dropped her bodyguards after 2 years of close protection but reengaged them after fresh rumours of a threat to her security emerged.¹³⁰ She had been under close protection since the murder of one of her close associates Sikhosiphi “Bazooka” Rhadebe in 2016.

Abahlali ba seMjondolo’s offices in Kennedy Road, Durban, were ransacked, attacked and destroyed in September 2009. Two of its members were killed. The attack was linked to a failed conspiracy to assassinate Mr Zikode and other *Abahlali* leaders. The then MEC for Safety and Security Liaison in Kwazulu Natal Province apparently celebrated the “demise” of *Abahlali*. In further incidents *Abahlali* student Nqobile Nzuzwa was shot dead by police during a peaceful protest, while *Abahlali* Chairperson in KwaNdengezi was assassinated at the behest of two ANC councillors. The councillors and the hitman were subsequently sentenced to life imprisonment.¹³¹

HURISA’s Corlet Letlojane has pointed out that the disappearances of Papi Tobias, an activist based in Gauteng Province, February 2016, as well as Nomawethu Kunene who blew the whistle

¹²⁴ Ibid.

¹²⁵ Stuart Wilson, *When attacking NGOs, the government is rendering the poor invisible*, 23 June 2015. Available at <https://www.dailymaverick.co.za/opinionista/2015-06-23-when-attacking-ngos-the-government-is-rendering-the-poor-invisible/>.

¹²⁶ Ibid.

¹²⁷ Interview with respondent, 2 August 2020.

¹²⁸ Ledwaba L, “Xolobeni judders as mining hovers”, *Mail and Guardian*, 19 Feb 2019.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ “*Abahlali to Commemorate our Fallen Heroes through the Annual Thuli Ndlovu Memorial Lecture*”, *Abahlali baseMjondolo* press statement.

on the infamous Life Esidimeni tragedy¹³², in 2018, is further evidence of the consequences of state displeasure with the activism of human rights defenders.¹³³

The purpose and spirit of the Gatherings Act is laudable and its promulgation into law changed much of the prohibitive practices of the apartheid government. But the Act has not been without its challenges as discussed below:

- Section 8(4)(b) of the Act prohibits the possession of dangerous weapons as defined in the Dangerous Weapons Act (15 of 2013). This means that even cultural items such as knobkerries fall under the broad ambit of this section and are therefore prohibited.¹³⁴
- A significant number of demonstrations in South Africa are service delivery protests against the very municipalities tasked with administering the Act.¹³⁵ A study conducted by Professor Jane Duncan and Andrea Royeppen showed that in the case for instance of the Rustenburg Municipality, the municipal officials extensively abused the Gatherings Act to deny protestors the right to demonstrate against the lack of service delivery.¹³⁶
- This notification regime created by the Act is often subverted under the erroneous belief that in the absence of a written permit from the municipality, the gathering is illegal. This has led to the creation of an unintended and unlawful permission granting procedure by local authorities.¹³⁷, *Abahlali* has often had a difficult engagement with the *eThekweni* municipality. The municipality often kept the organisation in abeyance insisting that it was still considering its applications for ‘permits to march’.¹³⁸ Once however the organisation became informed of its rights under the Act, the Municipality switched gears and would sometimes deliver the ‘permit’ after the march had already begun.¹³⁹
- Section 4(1) of the Act requires the responsible officer to “*consult with the authorized member¹⁴⁰ regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.*” If after such consultation the responsible officer is of the view that negotiations are necessary, he or she shall inform the convenor of such negotiations.¹⁴¹ These meetings are popularly known as “Section 4

¹³² 143 people died after they 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.

¹³³ Interview with respondent, 13 October 2020.

¹³⁴ Hanekom (n93 above), p57.

¹³⁵ Delaney (n89 above), p8.

¹³⁶ Ibid.

¹³⁷ Ibid, at pp8-9

¹³⁸ Ibid (n127) above.

¹³⁹ Ibid.

¹⁴⁰ Section 1(1) of the Act defines “authorized member” as meaning “*a member of the police authorized in terms of section 2(2) to represent the police.*”

¹⁴¹ Section 4(2) of the Act.

meetings”. The difficulty with these meetings is that section 4 appears to grant the responsible officer extensive discretion to decide on the kind of conditions to impose on the gathering.

Although section 4(2)(d) of the Act requires the responsible officer to ensure that the discussions take place in “good faith”, the experience of many civil society organisations and activists has been very different. In many cases, municipalities and police have sought to impose conditions that serve to compromise the purpose of the protest and alter its message.¹⁴² On occasion, municipalities have also been known to invite individuals such as councillors to the meetings with the purpose of discouraging the holding of the gathering.¹⁴³ In many cases, gatherings have simply been prohibited without any meeting having taken place.

- Some municipalities levy a fee in order to ‘permit’ a gathering to take place.¹⁴⁴ Cases in point are the Emfuleni local Municipality in Gauteng Province, which allows a gathering upon protestors paying R165.00 per traffic officer per hour or part thereof and the Johannesburg Metropolitan Police Department’s R129.34 ‘planning cost’.¹⁴⁵
- Checklists have become prevalent whereby the convenor needs to provide a list of documents before “permission” is granted for a protest. Popular amongst these is a requirement that if the purpose of the march is to hand over a petition (memo), the convener should notify the target of the memo so that s/he is there to receive it. The police justify this requirement on the basis that when the target of the memo fails to be present to receive it, this angers the protestors and makes them difficult to control.¹⁴⁶ Despite the fact that the Gatherings Act only requires the names of marshals where possible¹⁴⁷, some checklists include permission letters from the ward councillor, a permission letter for the place of gathering as well as copies of identity documents for the conveners.
- The Gatherings Act only allows the prohibition of gatherings in circumstances where there is likely to be serious disruption of traffic, and injury to people and property.¹⁴⁸ However, some gatherings have been prohibited on the basis that grievances be first formally presented to government prior to resorting to protest,¹⁴⁹ that no official is available to accept a memorandum¹⁵⁰ and that because of other gatherings taking place on the same day, overstretched police resources do not allow for the policing of that particular

¹⁴²Delaney (n89 above), p9.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Omar, B. *Capacity to perform public order policing: Practical and logistical challenges*.

¹⁴⁷ Section 3(3)(g) of the Act.

¹⁴⁸Section 5(1) of the Act.

¹⁴⁹ The Mogalakwena Municipality in Limpopo banned a march by the Ga-Phila community, as the organisers of the march had not presented their grievances to the Ward Committee first.

¹⁵⁰ The Emfuleni and Rustenburg municipalities require that the convenors of marches secure a written undertaking that the target of their march will avail a representative to accept the memorandum.

gathering.¹⁵¹ In addition, the Gatherings Act indicates that only on affidavit confirming credible information of uncontrollable threats to safety of persons and property may a responsible officer prohibit a gathering. However, the Gatherings Act neither provides the option for a convenor to receive nor challenge the affidavit prior to the responsible officer making a decision, thus robbing the decision-making process of a competing narrative. Delaney argues that the absence of an alternative narrative makes the process inherently one-sided and ripe for manipulation by municipalities and the police.¹⁵²

- *Abahlali's* leader, S'bu Zikode has noticed that when he attends the section 4 meetings as convenor, the process is usually smooth and without difficulties. However, when he sends a representative, a great deal of questions and difficulties are raised, and unnecessary conditions are often imposed.¹⁵³ It seems evident therefore that his personality as a leader of a major civil society organisation in South Africa has an effect on the conduct of the authorities.
- Delaney points out that compliance with the procedure laid out in the Act is but the first hurdle. The second hurdle is that protestors are regularly assaulted or arrested by the police and charged for public violence, or damage to property. Where demonstrators have not been "granted permission", chances are very high of them being arrested and charged for holding an illegal gathering.¹⁵⁴
- A lack of education about the Gatherings Act and its requirements makes it difficult for many members of the public to know how to go about exercising their right to peaceful assembly and demonstration. *Abahlali's* exercise of the right to freedom of assembly has improved through workshops in which its members are made aware of the Act and its requirements. This has also made it possible to have competent and confident convenors and marshals. The organisation also makes sure to insure its gatherings to mitigate the possibility of claims for damage to property or injury to individuals.

On the part of local authorities and the police, a lack of human rights education regarding the centrality of their role in ensuring the proper and fair facilitation of the right to assemble inevitably feeds into an attitude that gatherings and protests are not a matter of right, but must be "permitted". Education would assist the police to not only understand the constitutional right to assembly and demonstration, but also to better deal with the challenges they face regarding the management of gatherings.

- There has been a sharp increase in the use of force to disperse gatherings. The most tragic example was the killing of 34 mineworkers at Marikana, in South Africa's North West

¹⁵¹ The High Court in Pretoria granted the organisation *The Right2Know* permission to picket at Sammy Marks Square where the Seriti Commission was based, thus interdicting the Tshwane metro police from dispersing, obstructing and interfering with the gathering. SAPA, *Court rules in favour of right2Know campaign*, Times Live 12 June 2014.

¹⁵² Delaney (n89 above), p10.

¹⁵³ Ibid (n127) above.

¹⁵⁴ Ibid (n140) above.

Province in August 2012, during a labour dispute. Police brutality has been evidenced by the sharp rise in the use of force to manage gatherings. Between 2001 and 2002, there were 416 incidents of police use of force to stop gatherings. This number rose to 1722 between 2011-2012. Amidst this trend is the worrying tendency for what are largely peaceful protests turning violent in reaction to police brutality.¹⁵⁵

4.4.5 Conclusion

South Africa's constitution and legislation have laid a solid foundation on which to build a proper, constitutionally aligned framework for the enjoyment of the rights to free association and peaceful assembly. But this is only the beginning, what is more important is to ensure that every individual in the country is able to enjoy these rights, and that everyone actively participates in the building of the country's democratic project.

¹⁵⁵ Delaney (n89 above), p11.

CHAPTER 5: CONCLUSION

This study has been useful in identifying the theory and practice of the right to freedom of association and peaceful assembly in select Southern Africa countries. The right and ability of individuals to freely associate and to demonstrate for any cause or purpose is fundamental to the existence of democracy. A cohort of international instruments including the UDHR, ICCPR, ICESCR, and ACHPR require states to guarantee the enjoyment of the rights to free assembly and association. Yet, in many cases, states have simply paid lip service to their international commitments by enacting constitutional provisions and legislation to regulate the enjoyment of these rights and immediately clawed back the same rights through limitation clauses and provisos.

Constitutional provisions and legislation are but a first step towards the realization of the rights to free assembly and association. More important is the need to actively promote the observance by states of their commitment to respect, protect and promote these critical rights. Without pressure from below, states will simply carry on as they have done and limit the enjoyment of these rights under the guise of 'law and order' or 'public safety' or in defense of 'public morals'.

The four Southern African countries featured in this study are no exception to the general approach by states of seeking to limit what is otherwise guaranteed by international law. Civil society has a critical role to play in ensuring that states are held to account and that the democratic space is continuously expanded.

CHAPTER 6: RECOMMENDATIONS

While the recommendations presented in this chapter are country-specific, they are also broad in nature and can be replicated, with the necessary changes as demanded by context, across the different countries. The recommendations are geared towards a practical realisation of the rights to free association and peaceful assembly. Civil society is encouraged to take an active role in raising awareness about the scope and practice of these rights in the Southern African region.

Democratic Republic of Congo

- Respect the right to freedom of association, in particular by ending the formal prohibition of all organizations without legal status, and by ceasing to make the activities of unregistered organisations illegal.
- Abolish the law that makes the establishment of an association and the acquisition of legal personality conditional on not having a criminal record. Also, repeal all criminal sanctions against associations.
- Create a right of appeal to an independent body for any organization whose registration has been refused.
- Grant tax benefits to foreign human rights associations in the same way as national human rights organisations.
- Protect associations against interference by third parties.
- Guarantee members of every association the right to express themselves freely and the freedom to criticize the authorities.
- Amend Decree-Law No. 196 of 29 January 1999, which regulates public events and meetings, by abolishing prior authorization in order to comply with article 26 of the DRC constitution.
- Prosecute the perpetrators of violence against demonstrators and human rights defenders and guarantee human rights defenders the right to petition public authorities individually or collectively.
- Respect the independence of the judiciary. In particular, refrain from interfering with the duties and functions of magistrates.
- Develop a human rights based curriculum for the training of law enforcement agencies on the right to freedom of association and assembly, the use of force to disperse gatherings and conditions of detention, among others.

- Revise as soon as possible the draft law on the protection of human rights defenders, so that it complies with international human rights standards, including the UN Declaration on Human Rights Defenders.
- In the event that the government does not amend Decree-Law No. 196 of 29 January 1999, adopt legislation setting out the modalities for the exercise of the right of peaceful assembly in accordance with article 26 of the Constitution.
- Ensure that members of human rights associations that cooperate with the international and regional human rights mechanisms are not subject to reprisals, by taking all necessary measures within the framework of their respective mandates.
- Continue to monitor the situation of human rights defenders in the DRC and denounce any violation of their rights of association and peaceful assembly.
- To the United Nations Human Rights Council: consider the creation of a special procedure mandate relating specifically to the DRC.
- To the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, continue to monitor the situation in the DRC, and publicly denounce violations of the right of defenders to association and assembly.
- Continue to demand that the DRC respect the rights of freedoms of association and assembly in accordance with international law.
- Continue to train defenders and other members of citizen movements on their rights to peaceful assembly and association, and on security and protection measures.

Lesotho

- Ensure that administrative and law enforcement officials are adequately trained on the nature and practice of the rights of assembly and association.
- Review national legislation so that the exercise of the right to freedom of assembly and association is subject only to “notification” and not “authorization”.
- Engage stakeholders including CSOs, human rights defenders, students, women organisations, traditional authorities, etc, in order to increase accountability in the exercise of the right to freedom of assembly and association, and to eradicate impunity.
- End practices of intimidation and the arbitrary closure of digital platforms (e.g. Twitter, Facebook and WhatsApp) which is often done to curtail the ability of individuals to mobilise.

Malawi

- Remove the requirement for compulsory registration of CSOs.
- Remove or reduce to a minimum the registration fees applicable to CSOs. Remove the annual fees payable to government by civil society organisations.
- Shelve the proposed NGO Amendment Bill (2018) as it poses a grave danger to the right of individuals and organisations to associate.
- Ensure that human rights organisations and human rights defenders are able to operate freely without hindrance.
- Arrest and prosecute individuals who harass, threaten or intimidate human rights organisations and defenders
- Establish a human rights training curriculum for law enforcement agencies so that they understand their duties and responsibilities under Malawi's constitution and legislation, as well as in terms of international law regarding the right to free assembly and association.

South Africa

- Review the Regulation of Gatherings Act to ensure that it complies with the constitution as well as with court decisions which have found certain of its provisions (e.g. liability for spontaneous gatherings) to be unconstitutional.
- Enact regulations to among other things clearly spell out the factors to be taken into account by a responsible officer when imposing conditions, or prohibiting a gathering.
- Eliminate the unlawful practice by some local authorities of demanding that convenors pay an application fee before a gathering can take place, or that convenors provide evidence that the target of the gathering has agreed to accept a memorandum.
- Government and CSOs should set up training programmes to educate the public including local authorities and law enforcement agencies about the requirements of the Gatherings Act.
- Establish a helpline/s for convenors of gatherings to provide quick access to information and advice. Additionally, create a dedicated network of lawyers to intervene on short notice where gatherings are prohibited for no good reason, or where protestors are arrested.
- Engage in strategic litigation on those sections of the Gatherings Act that may not stand up to constitutional muster should also be considered.

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