

ENABLING ENVIRONMENT NATIONAL ASSESSMENT: SOUTH AFRICA

COUNTRY REPORT

AUGUST 2018



HUMAN RIGHTS INSTITUTE OF SOUTH AFRICA

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Corlett Letlojane
Executive Director: HURISA
August 2018

CHAPTER 1: INTRODUCTION

This research explores civil society monitoring of Sustainable Development Goal (SDG) 16.10 on fundamental freedoms and access to information, as well as SDG 17.17 on effective civil society partnerships in South Africa. In particular, the research examines the five dimensions associated with SDG 16.10 and SDG 17.17, which are: (1) freedom of association; (2) freedom of expression; (3) access to information; (4) peaceful assembly; and (5) effective civil society partnerships.

In September 2015, the United Nations (UN) Member States adopted the 2030 Agenda for Sustainable Development, which is aimed at guiding development efforts until 2030.¹ Known as “Agenda 2030”, it also recognises the importance of inclusive and peaceful societies for sustainable development, in order to foster accountable, inclusive and participatory governance, as well as to protect fundamental freedoms. The adoption of this universal and holistic agenda comprising 17 Goals and 169 associated targets represents a landmark achievement for rights advocates around the world. Supportive states and civil society organisations (CSOs) played a key role in ensuring the inclusion of governance and fundamental rights commitments in Agenda 2030. It needs to be noted however that the official SDG indicators are weak, and therefore this report takes a broader approach to the SDGs.

These SDGs and their targets provide guidance to the UN member states, other international organisations and stakeholders such as civil society organisations towards more sustainable development globally. Accordingly, the SDGs and their targets are found in the objective and purpose of many important international treaties in the field of sustainable development.

¹ United Nations General Assembly “Resolution on Transforming our World: The 2030 Agenda for Sustainable Development” A/RES/70/1 Sirte 25 September 2015 at Par 18. These goals are: End poverty in all its forms everywhere; End hunger, achieve food security and improve nutrition and promote sustainable agriculture; Ensure healthy lives and promote well-being for all at all ages; Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; Achieve gender equality and empower all women and girls; Ensure availability and sustainable management of water and sanitation for all; Ensure access to affordable, reliable, sustainable and modern energy for all; Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; Reduce inequality within and among countries; Make cities and human settlements inclusive, safe, resilient and sustainable; Ensure sustainable consumption and production patterns; Take urgent action to combat climate change and its impacts; Conserve and sustainably use the oceans, seas and marine resources for sustainable development; Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

In the context of this study, emphasis will be on SDGs 16 and 17 in order to understand and provide grounds on the conditions in which CSOs operate in South Africa. This is with a view to assessing South Africa commitments under the goal 16 and 17 of the Agenda 2030.

While South Africa has committed to Agenda 2030, it has its own home-grown development roadmap known as the National Development Plan (NDP)-2030.² The NDP was launched in 2012 and has as its central theme the objective of eliminating poverty and reducing inequality by 2030.³ The challenge now is to align the NDP with Agenda 2030, and address some of the weaknesses in the former such as food security and sustainable agriculture, gender, green industrialisation, labour rights and working conditions.⁴ It is unclear how Agenda 2030 will evolve alongside the NDP. So far, there has been little mention of Agenda 2030 in government's development plans. Likewise, there has been minimal engagement between government and civil society in respect of Agenda 2030.

Accordingly, the study findings reveal that between September 2015 when Agenda 2030 was adopted and June 2018 when this study was implemented, the situation in South Africa has remained more or less the same. But there are worrying signs of in-roads into the fundamental rights and freedoms guaranteed by the Constitution. These include a rising degree of coercion against CSOs and activists thus severely constraining their ability to associate and operate freely. In some areas, for instance, a number of CSO activists have been killed in very suspicious circumstances.

Incidences of violation of the right to freedom of expression have been well-documented in particular where such relate to well established media houses and media practitioners. The case of the "SABC 8" in 2016 is a poignant reminder of how the malaise of 'state capture' extended right into the heart of the country's public broadcasting system. At the same time, the introduction of the Preventing and Combating of Hate Crimes and Hate Speech Bill (2016) and the classification of the movie *Inxeba* ("the Cut") as pornography although there are no acts of explicit sex in the movie, points to a growing trend of limiting the available space for the contestation of different ideas in South African society.

² See the NDP Report at <https://www.gov.za/documents/national-development-plan-2030-our-future-make-it-work>.

³ See the report's introduction, at p24.

⁴ *Debate 6-O R Tambo Debate Series: Aligning the Sustainable Development Goals (SDGs) to the NDP: Towards domestication of the SDGs in South Africa*. Available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/wits-school-of-governance/documents/Report%20-%20Debate%206.pdf>

The right of access to information is constitutionally guaranteed and regulated through the Promotion of Access to Information Act (No 2 of 2000) (“PAIA”). While both the constitutional provision guaranteeing access to information and PAIA have been lauded as some of the most progressive enactments in comparison with other regimes around the world, the practice of accessing information from both public and private sources tells a very different story. More often than not, state and private functionaries have been using PAIA to frustrate rather than enable individuals to access information.

How the right to peaceful assembly should be exercised is a regular feature in public discourse given the many marches and demonstrations (protests) that take place in South Africa. As South Africa’s democracy continues to mature, so do the challenges associated with the praxis of a constitutional democracy. The Constitution and the Regulation of Gatherings Act (205 of 1993) both guarantee and regulate the right to peaceful assembly. The problem is that far too many protests turn violent, and protesters are injured or arrested and charged with a myriad of offences including participating in unlawful gatherings, or malicious damage to property. There is often a sense of frustration by many individuals, organisations and communities that they are not being listened to, or that they will not be heard by the state unless they destroy property or cause mayhem. This may perhaps explain why an increasing number of protests have turned violent in recent years.

Finally in this report, effective partnerships between civil society and the state are examined under the lens of participatory democracy. Again, the general sense that one gets is that there has not been much change in regards to the way civil society and the state relate to one another. What stands out nevertheless is that the relationship between the two parties is characterised by mutual tension and suspicion, and that the state perceives civil society as a threat rather than a partner.

It is important to mention that during the national consultation on 3 July 2018, participants made a number of recommendations many of which unfortunately fall outside of the scope of this study and therefore have not been incorporated herein. For example it was suggested that the study should have engaged the Lesbian, Gay Bisexual, Transgender and Intersex (LGBTI) community, that it should have emphasised the role of the judiciary and Chapter 9 (of the South African Constitution) institutions⁵, and

⁵ These are institutions provided for in Chapter 9 of the Constitution to support “Constitutional Democracy”. They include the South African Human Rights Commission, the Public Protector, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, among others.

also addressed the issue of gender-based violence within CSOs. All these are important issues and are all relevant in one way or another, to the realisation of the goals of Agenda 2030. However, the narrow scope of the study, the limited resources available to conduct the study and the tight time-line within which the study had to be completed necessarily meant that many of these and other relevant issues could not be addressed.

In the sections that follow, the five dimensions highlighted above are placed under critical scrutiny with a view to understanding the current situation in South Africa, and the progress, if any, that the South African government has made towards the realisation of SDGs 16.10 and 17.17. The analysis provided under these sections is for the need to understand the state of the implementation and the progress, if any, made by the South African government towards the realisation of SDGs 16.10 and 17.17. As a way forward, some recommendations are made on how the SA government may redress the challenges or improve in future.

At the end of the report, we have annexed an “Assessment Matrix” (Annexure 1) which evaluates the environment for CSOs in South Africa in terms of green (enabling), yellow (partially enabling) or red (impeding) flag ranking. The picture which emerges is a mixed bag of by and large good laws and policies, but poor implementation and in certain cases, an outright violation of some of the rights that constitute the five dimensions of the SDGs examined in this study.

CHAPTER 2: RESEARCH METHODOLOGY

This study has relied on the following three key data collection methods: (1) desktop research, (2) expert interviews and (3) focus group discussions.⁶ While the desktop research provided secondary data, the expert interviews and focus group discussions provided primary data. Both forms of data have been compiled, coded, analysed and used to write up this research report.

In 2015, HURISA, as the national partner, undertook a comprehensive national assessment of the enabling environment for civil society organisations (CSOs) in South Africa. The report containing the findings and recommendations from the 2015 study encompasses an extensive review of existing literature and for that reason; it was felt that the current literature review should be limited. Readers are therefore encouraged to refer to the 2015 report, copies of which are available from the Human Rights Institute of South Africa (HURISA) for a deeper and more substantive analysis of existing literature on the enabling environment for CSOs in South Africa. The report is also available online on the EENA website page of Civicus at: <https://www.civicus.org/index.php/eena-country/south-africa>.

The bulk of this report is therefore compiled using data collected through interviews with experts (key informant interviews) and the focus group discussion. Eight (8), face to face, key informant interviews were conducted with CSO activists and academics. Interviewers used a semi-structured questionnaire to gather the views and opinions of the experts on the five dimensions (themes) mentioned in the introduction section. Each interview took approximately an hour and a half to complete and covered a maximum of four questions under each theme. The interviews were conducted between May and June 2018. The questionnaire, re-formatted for length, is attached to this report as “Annexure 2”.

One focus group was held, on 15 June 2018, in Rustenburg in the North West Province. The North West Province was chosen given its current political instability as well as close proximity to Gauteng Province thus ensuring that at the planning and holding of the focus group would be effected with the most minimum of resources and delays. The objective of the focus group was to gain further perceptual insights in addition to the insights already obtained through the key informant interviews. There were nine (9) participants in the focus group representing a wide and divergent array of sectors including the media, local government, organised civil society and the old age and disability sectors.

⁶See p10 of the CIVICUS document titled: ‘Research Guide’, which was used to plan and implement this project.

Members of the research team facilitated the discussion using a discussion schedule. The discussion was also recorded with the consent of the participants.

The discussion guide is attached to this report as “Annexure 3”, the list of key informants is attached to the report as “Annexure 4”, and the list of focus group participants is attached as “Annexure 5”. A panel consisting of three experts, namely: Jayshree Pather, Thoko Mpumlwana and Professor Samadoda Fikeni was established to guide the study given their knowledge and expertise in South Africa’s civic space and fundamental civic freedoms.

On 3 July 2018, a national consultation was held to discuss and validate the findings. The presentations by the panel of experts together with feedback from participants during the question and plenary sessions have been used to enrich this report.

CHAPTER 3: THE FIVE DIMENSIONS

3.1. FREEDOM OF ASSOCIATION

3.1.1. Overview

The right to freedom of association encompasses the right of people to associate freely and voluntarily.⁷ This right has two important components. One is that freedom of association is a right in itself which allow an individual or a group enjoy or to be organised and secondly, it is an enabling right because people need to be organised in order to enable change on a broad level. This is the basis upon which civil society organisations are formed, and where people come together to achieve certain ends that are in their own interest, or in the broader interest of society. Freedom of association is about the rights and freedoms, and the capacity that citizens have and desire to act. Most importantly, it is about promoting transformation in society.

In the last few years, there have been a number of obstacles in relation to the exercise of the right to freedom of association. These have taken the form of legal and administrative barriers to the creation, functioning, communication and resourcing of CSOs in South Africa.

3.1.2. Challenges

Despite legal provisions from both international and national instruments, the implementation of the right to freedom of association still raised a fair amount deal of a concern. This is evidenced through responses from the key informants and focus group participants who shared their experience in the context of South Africa.

The 2015 EENA study found problems of incapacity in the Directorate of Non-Profit Organisations, as well as bureaucratic inefficiencies and the centralisation of the registration process as the key obstacles CSOs face when they seek to constitute themselves in a formal sense.

⁷ Section 18 of the Constitution of the Republic of South Africa (1996) makes provision for the right to freedom of association.

With the current study, the general response by both key informants and focus group participants was that in real terms, there has not been much change in the domain of freedom of association since the adoption of Agenda 2030 (i.e. 2015 to

the present). One fundamental explanation for this observation could be that the period under examination is far too short for there to have been visible change. It could also be that South Africa's constitutional democracy is resilient, with an active and vigilant civil society and judiciary and as such, significant negative shifts for example in respect of particular rights are an exception rather than the rule.

However, the period between 2009 and 2017 as a whole was characterised by what some respondents described as an onslaught by the state against the right to freedom of association. We examine the various informant responses below.

“Not many steps have been taken by the government; on the legal front, things have remained the same. Fear has definitely increased, especially in areas like Kwa Zulu-Natal with the recent cases of killings and threats, because the police are involved, local politicians are also involved in these corruption deals, etc. and anybody who is a whistle blower or raises these issues gets targeted including physical violence, threats, kidnappings and arrests. I think these kinds of issues have definitely gotten worse, and even within the government itself.” (K7)

One key informant observed that there is a need to first define what we mean by the term ‘civil society’ because by doing so, we will be able to understand how the different formal rights (as guaranteed in the Constitution of the country) manifest themselves in practical terms. He suggested that a nuanced approach, which locates the different civil society organisations in their different spatial localities, should be a guiding principle. Well-resourced CSOs in urban areas have a very different experience to poor and marginalised NGOs in rural and peri-urban areas:

“It’s quite important to define what we mean by ‘civil society organisations’. The problem here is that when people talk about civil society organisations, they talk about the well-resourced urban NGOs in office blocks, who get funding, and that’s one form of civil society, but it is not the only one. Civil society also consists of associations which citizens form in order to engage with government, those that you find at the grassroots level, who do not operate in office spaces. And the way in which you would answer these questions is fundamentally different because they both have different experiences. With the formal NGOs,

I would say there's really no problem there, you would have to work hard to find ways in which their right to freedom of association is negatively affected.” (K2)

For another informant, the right to associate is influenced by one's economic circumstances:

“Freedom of association is ‘I want to live where I want to live’, but economically the poor people become disadvantaged. So the unintended consequences are that it could be the minimum wage issue, economic freedom issues which then becomes freedom of association. For example, if I am a Minister who earns an amount of 6 zeros salary, how freely do I am to associate with the working class, do I even understand their realities. So the cracks from freedom of association essentially result from socioeconomic issues and radical transformation issues.” (K4)

Government has not taken any major steps to promote the right to freedom of association or, even, on the other hand, to undermine it. That is the view of at least one key informant. Many activists have reported of being subjected to surveillance by crime intelligence and state security officers.⁸ In some cases, activists have disappeared or been killed in suspicious circumstances. For example, in March 2016, Sikhosphi Bazooka Radebe, an activist from Bizana in the Eastern Cape, was gunned down for what many believe to be his role as a leader of a community-based campaign against an Australian company that is attempting to mine titanium in the area. The community is concerned about the possible negative effects of the mining on their ecologically sensitive coastal land and has been fighting against the company for over a decade.⁹ To date, no one has been arrested or charged for his murder.¹⁰

In areas like Kwazulu-Natal, a number CSO activists such as S'fiso Ngcobo of the social movement Abahlali base Mjondolo have been killed in very suspicious circumstances.¹¹ One informant felt that many CSOs and activists made a 'retreat' during this period as the onslaught by the state heightened. Nevertheless, all the key informants were of the shared view that during the period of the Zuma presidency between 2009 and 2017, there was a significant degree of coercion against CSOs

⁸ Amnesty International, Report 2015/16 - South Africa. Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=56d05b16a>. Accessed on 15 June 2018.

⁹ Greg Nicolson, Daily Maverick (24 March 2016). *Goodbye Bazooka: Wild Coast anti-mining activist killed*. <http://www.dailymaverick.co.za/article/2016-03-24-goodbye-bazooka-wild-coast-anti-mining-activist-killed/#.V1f1KKIjYuM>. Accessed on 15 June 2018.

¹⁰ See for instance the article titled: *Hawks accused of 'blocking' Bazooka murder probe*, available at <https://www.iol.co.za/news/south-africa/eastern-cape/hawks-accused-of-blocking-bazooka-murder-probe-13987141>. Accessed on 15 June 2018.

¹¹ According to Abahlali, five of its members were killed in a period of eight months. See <http://abahlali.org/node/16523/>

Similarly an activist named Nomawethu Kunene (“Papi”) who was instrumental in exposing the corruption underpinning the “Life Esidimeni” tragedy¹² simply disappeared from her house at the beginning of 2018. Her whereabouts remain unknown.¹³ Another activist named Papi Tobias from Boiketlong, Sebokeng in the Vaal, disappeared under mysterious circumstances in February 2016 and has not been seen since. He is believed to be dead.¹⁴

However, the period since the removal of Zuma as president of the country in February 2018 is seen as a welcome change and one that is increasingly characterised by openness, accountability and a willingness to correct the rights violations of the last ten years. We look at these viewpoints in more depth below:

“I think it is more civil society that has pushed government to implement what is contained in the legislation and the Constitution. I have not seen government really educate the police and the public sufficiently about the rights of citizens and hence we find many instances where people’s rights have been violated. In terms of freedom of association, I don’t think government has taken any major steps to promote it nor to consciously undermine this right. I think quite often and depending on where you are, like if you are in KZN it would be different from when you are in North of Johannesburg. I feel that during Zuma’s presidency, people were scared in many instances, and generally there was a real retreat.” (K3)

“We have been through a very difficult period. Space for civil society has been shrinking. In the last 9 years there have been significant threats to the right to freedom of association. Police have increasingly imposed a limit on the right to public association (marches and demonstrations). In 2015, we saw the rise of the Fees Must Fall Movement. Students were demanding free education. The state reacted in an extremely brutal fashion. Many students were arrested and denied bail. Many of them were brought to court and charged with all manner of offences. Some of them have received heavy sentences allegedly for participating in unlawful gatherings or causing malicious damage to property. Some CSO activists also disappeared. (K8)

“Violators have not been held to account but recently, with the coming in of the Ramaphosa (Cyril) presidency, we have begun to see some semblance of change.

¹² The *Life Esidimeni* tragedy relates to the deaths of 97 Psychiatric patients who died due to negligence when they were transferred from public health care facilities to private, poorly equipped care centres. The activist named Papi was one of the few people who pointed early on that the whole transfer process was underpinned by corruption. Some information on the tragedy can be accessed at: <https://www.enca.com/coverage/esidimeni-a-tragedy-unfolds>.

¹³ *Still no word on missing whistle-blower Nomawethu Kunene*, available at <http://ewn.co.za/2018/03/12/still-no-word-on-missing-whistle-blower-nomawethu-kunene>. Accessed on 15 June 2018.

¹⁴ *Papi Missing for a Year Now*, available at <https://www.pressreader.com/south-africa/sowetan/20170206/281689729548793>. Accessed on 15 June 2018.

The jury is still out but we can say that since at least the beginning of this year, we have seen some elements of change.” (K8)

3.1.3. How the identified challenges have affected the overall SDG implementation

It is difficult to provide an informed analysis of how the identified challenges have affected the overall SDG implementation given that there has not been much change since the commencement of Agenda 2030 in 2015. In any event, the very limited amount of data collected necessarily means that it is not possible to make a general assessment of how these challenges have impacted the implementation of the SDGs over the last about three years.

What can be said however is that the period during the Zuma presidency impacted to some extent on the right of individuals to associate-mostly in the public arena due to a very coercive response by the State. With the removal of Zuma, there has been some notable change as demonstrated by the willingness by the new administration to deal with corruption and state capture and thus ensure accountability. It is hoped that this change will also lead to a greater respect for the right of individuals to associate.

3.1.4. Steps taken by government towards the fulfilment of the SDG

No interviews were conducted with government officials to get an informed idea of the kind of steps taken by the state towards the fulfilment of SDG 16.10. It has also not been possible to make a determination based on the key informant interviews and focus group discussion about the kind of steps taken by the government to realise this SDG.

3.1.5. Recommendations

It is important for the state to respect, protect and promote the right of freedom of association.¹⁵ The often vicious response witnessed during the Zuma presidency against individuals freely associating is a negation of this constitutional command.

¹⁵ Section 7 of the Constitution of the Republic of South Africa (1996).

It is recommended that the state refrain from interfering with the right of individuals and organisations to associate and in particular, the right to associate for purposes of promoting any cause or policy, whether such be for or against the government or for any other reason.

3.2. FREEDOM OF EXPRESSION

3.2.1. Overview

Freedom of expression is an important element in determining the creation of an enabling environment for civil society organisations. Freedom of expression encourages a culture of being tolerant and respectful of everyone's views. Therefore empowering individuals, communities and the society at large to express themselves is a vital aspect of democratic practice.

As with the right to freedom of association, the overall response by both informants and focus group participants was that the right to freedom of expression is well protected by the Constitution, and that the government has not interfered with this right save in a number of limited instances. A deeper analysis of the data however reveals that the scenario is fairly mixed, with some respondents expressing serious concerns about the violation of the right to freedom of expression, yet others felt that matters have by and large been normal.

3.2.2. Challenges

The 2015 EENA study identified some challenges with the exercise of the right to freedom of expression in South Africa. These related primarily to the existence of legislation such as the Criminal Procedure Act (1977), the Promotion of Equality and Prohibition of Unfair Discrimination Act (2000), the Defence Act (2002), and the Protection of State Information Bill (2010) ("the Secrecy Bill"). Except for the Secrecy Bill, which remains with Parliament awaiting amendments, the remaining laws remain very much part of South Africa's legal framework.

Before examining respondents' views, it is useful to consider at least three well-known incidences of violation of the right to freedom of expression in the last few years. These incidences are symptomatic of a period during which the state, and some sections of the South African society, demonstrated an increasing degree of intolerance to radical or unconventional views.

Case 1: Censorship at the SABC (2016)

In the run up to the 2016 local government elections, the country was rocked by violent civic protests and demonstrations as various communities around the country vented their frustration at the lack of service delivery, corruption and the manipulation of electoral candidate lists.

The protests painted the ruling African National Congress (ANC) negatively and led to the imposition of a censorship policy by the SABC which declared in early June 2016 that it would no longer feature video footage of violent protests. Due to massive public pressure, the SABC eventually relented and rescinded the ban. Shortly thereafter, however, in August 2016, eight journalists were dismissed by the SABC for opposing the culture of censorship that had gripped the public broadcaster. The Labour Court ordered their reinstatement.

Case 2: The Hate Crimes and Hate Speech Bill (2016)

The Draft Prevention and Combating of Hate Crimes and Hate Speech Bill (Hate Speech Bill) was published on 24 October 2016.¹⁶ The Bill aims to inter alia, provide for the offences of hate crimes and hate speech, and the prosecution of persons who commit these crimes.¹⁷

There are understandable reasons why the state has moved to proscribe and punish the offences of hate crimes and hate speech. In the last decade or so, public sentiment has been growing in South Africa on the need to criminalise and punish hate speech and hate crimes in light of increased incidences of racially driven attacks against predominantly black people. Recently, the number of racially motivated attacks against blacks has increased in frequency and intensity.¹⁸

¹⁶ Through Government Gazette No. 40367. The Bill is available at <http://www.justice.gov.za>.

¹⁷ At section 1 of the Hate Speech Bill.

¹⁸ E.g. the cases of Penny Sparrow and Vicki Momberg who used racial epithets against black people. See <https://www.iol.co.za/>. See also <http://www.bbc.com/news/world-africa-41774938>; <https://www.thesouthafrican.com/coffin-assault-duo-sentenced-mpumalanga/>. Accessed on 18 June 2018.

There can be no doubt therefore of the need for the state to intervene and deal with what is a worrying rise in hate crimes in South Africa. However a number of organisations and individuals have criticised the Bill for its many shortcomings. For example, the Hate Crimes Working Group, an initiative consisting of advocacy based CSOs, has criticised the Bill for its lack of definition of racism, and for criminalising speech as opposed to racially driven acts.¹⁹ Similarly, Professor Jane Duncan who holds the chair of Journalism at the University of Johannesburg, and a renowned expert on freedom of expression has cited many of the Bill's shortcomings including its potential criminalisation of speech that may not necessarily constitute hate speech.²⁰

Case 3: The Film 'Inxeba' (The Cut) (2017)

The Film *Inxeba* has brought into sharp contrast the way in which South African society perceives and juxtaposes the right to freedom of expression against the right to culture. The film tells the story of a gay factory worker who travels from the city to the rural Eastern Cape Province to oversee the Xhosa initiation process of circumcision. Movie theatres around the country were forced to cancel screenings of the film after threats of violence by individuals and groups of people who opposed the film on the basis that it denigrated African culture.

The Film and Publication Board (FPB), which is constituted under the Film and Publications Act (No 65 of 1996) initially classified the movie as "16 LS" for language and sex. However, on appeal by among others the Congress of Traditional Leaders of South Africa, and the Boy and Man Foundation, the FPB Appeals Tribunal slapped an X18 rating on the film thus classifying it as content that is "presumptively harmful" and thus restricted to adult viewers.²¹ The film producer took the decision of the Appeal Tribunal on review and on 28 June 2018, the High Court sitting in Pretoria ruled in favour of the producers and reversed the decision of the Appeal Tribunal. This means that the film has now reversed to its 16LS classification.²²

¹⁹ Submission of the Hate Crimes Working Group: Prevention and Combatting of Hate Crimes and Hate Speech Bill. (2017) A copy of the Submission made by the Group to the Department of Justice is available on request.

²⁰ *What Constitutes Hate Speech?* Available at <http://www.702.co.za/articles/193857/what-constitutes-hate-speech>

²¹ See <http://www.mambaonline.com/2018/03/01/film-publication-board-trashes-inxeba-ban/> Accessed on 18 June 2018.

²² News article available at <https://www.news24.com/SouthAfrica/News/inxeba-the-wound-court-rules-that-film-is-not-hardcore-porn-20180628>. Accessed on 18 June 2018.

Respondents' views

According to a number of respondents, the challenge that the right to freedom of expression has faced in South Africa has to do with the harassment and intimidation of media practitioners. Some of these cases of harassment and intimidation are discussed below. On the other hand, there are individuals who have misused the right to freedom of expression to either advance hate speech or to generally create suspicion and discord in South Africa. The responses captured below provide a snap shot of the views and sentiments of both the key informants as well as the focus group members.

“In the last 3 years, I am not aware of any killings; it has mainly been cases of intimidation, harassments, death threats, temporary detention, threatening phone calls, attacks from police – taking their cameras, etc. In my view, I don’t think government has done much to fulfil the right to freedom of expression. The Film and Publications Board issue is one example I can mention- it’s not just about inxeba and wanting to ban the film, but it’s this sense of cutting people’s freedom of expression on particular issues because they are not ‘socially and morally acceptable’.” (K3)

“In South Africa, everyone has the right to freedom of expression. You can say what you want say, even if you want to call the President a pumpkin head, you can do that. Everyone is protected by the Constitution.”(Focus group member)

“Yes it is true that everyone is protected by the Constitution, and we can say what we want to say. The problem is that when for example you start reporting about corruption or the collusion between the police and drug dealers, then you get intimidated. You may even be killed.”(Focus group member)

Harassment of media practitioners

The two-year period between 2016 and 2017 was a particularly difficult period for media practitioners in South Africa. Journalists reporting on sensitive matters such as on ‘state capture’ by corrupt senior politicians and well-connected businesspersons were often intimidated by the police and intelligence services, while those reporting during violent public demonstrations found themselves harassed or assaulted.²³

²³ See report titled: *So this is Democracy? State of Media Freedom in Southern Africa*, available at: <http://pensouthafrica.co.za/a-deteriorating-freedom-misas-national-overview-of-media-freedom-in-south-africa/> Accessed on 18 June 2018.

In a number of cases, demonstrations and pickets were held outside the homes of journalists (e.g. Peter Bruce, the editor of *Business Day*), while death threats were levelled at journalists such as Siphon Masondo of City Press, Vuyo Mvoko (previously working with the public broadcaster, the SABC) and Mzilikazi wa Afrika of the *Sunday Times*.²⁴ Responses by a number of key informants confirm the above analysis that media practitioners have been under a severe degree of attack.

“Generally, the situation is uneven. We have those powerful investigative journalist bodies such as Amabungane, Scorpio and Ground Up, which have the resources and the ability to withstand harassment but the average journalist feels intimidated. We have also seen journalists being harassed by e.g. Black First Land First. It is worse at the provincial and local level where media practitioners have fewer resources and networks of support. That has been the dark and ugly side in the freedom of expression space. For example we saw how media was used to create racial discontent in this country (Bell Pottinger) and how supposedly independent media was bought over and transformed into the service of certain individuals and their political backers.” (K8)

“Freedom of expression is more than just a rhetorical commitment. If you look at the cases and issues the Freedom of Expression Institute has raised, there are numerous instances where this right has been violated, both at the macro and micro level. I think what happened with the SABC saga is one such instance. I know there were a number of physical threats against those journalists for speaking out. One of the journalists died not directly from torture or anything like that, but there were a number of mysteries around for example, an assault that took place, and also when she died many people believed it was due to the pressure she was under because of the harassment she faced. We also have journalists like Jacques Pauw who revealed the extent of the rot between Zuma, his backers and their exploitation of the South African state, and he was threatened with arrest and prosecution. Given these incidences, I would not say that media in this country is completely free to enjoy its right to freedom of expression.” (K4)

²⁴ See: *National Overview of Media Freedom in South Africa* by Raymond Louw on pps 87-97 of the report mentioned in footnote 15 above.

3.2.3. How the identified challenges have affected the overall SDG implementation

The right to freedom of expression is an associative right. It can be exercised either on its own or in association with other rights such as the right to peaceful assembly. While generally the right to freedom of expression finds respect in South African law, it has come under threat on a regular basis either from the state itself, or from individuals. These threats are likely to impact the full and proper implementation of the right to freedom of expression in terms of SDG 16.10.

The national consultation considered a number of steps that may help make the right to freedom of expression more realisable. These are:

- CSOs must initiate and implement strong campaigns to challenge the state's often unlawful surveillance of individuals.
- CSOs should embark on education and awareness campaigns in rural areas about the Constitution, the Bill of Rights and legislation that impact the right to freedom of expression.
- Communities need to be educated about government programmes; they also need to be encouraged to get involved in these programmes.
- CSOs should make use/greater use of existing mechanisms such as the Chapter 9 institutions to help individuals and communities exercise their right to freedom of expression.

3.2.4. Steps taken by government towards the fulfilment of the SDG

It is unclear what steps government has taken towards the fulfilment of SDG 16.10 in relation to the right to freedom of expression, except that during the period under research (2015-2018) there has not been much change in terms of advancing or limiting the right to freedom of expression. This however does not mean that there have not been incidences of violation of the right to freedom of expression. Some of the notable cases include the censorship at the public broadcaster, the introduction of the Hate Speech Bill, and the problematic classification of the film *"Inxeba"*. There may be many cases of violation of the right to freedom of expression, most likely at the local community level, which never make it to the national discourse. This is primarily a function of the social and economic level at which an individual or organisation is located.

Corruption remains a major point of concern and the lack of adequate mechanisms to protect whistle-blowers, including journalists, has seen this malaise permeate every facet of South African society, from national to local government, and in both public and private sectors. For example, journalists like Mzilikazi wa Afrika who has reported extensively on high level corruption including state capture has been the target of unlawful surveillance and arrest on dubious charges.²⁵

3.2.5. Recommendations

It is recommended that:

- i. The Hate Speech Bill should be extensively reviewed and all references to hate speech removed. The Bill should only deal with hate crimes.
- ii. Hate speech should be dealt with under current legislation such as the Promotion of Equality and Prohibition of Unfair Discrimination Act (4 of 2000) and also as a crime under the common law offence of *crimen injuria* but not through a separate and potentially unconstitutional Hate Speech Bill.
- iii. The government should bolster mechanisms for reporting corruption at all levels and in particular ensure that whistle blowers are protected.
- iv. The editorial independence of the SABC should be ensured through the appointment of an independent board.

²⁵See for example: *Journalist Mzilikazi wa Afrika opens up about death threats*, available at <http://www.702.co.za/articles/253601/journalist-mzilikazi-wa-afrika-opens-up-about-death-threats>. In 2009 Jimmy Mohlala, the speaker of the Mbombela Municipality (Nelspruit) in Mpumalanga Province was shot and killed after blowing the whistle on massive corruption around the construction of the 2010 Soccer World Cup Stadium in the area. His killers have never been brought to book. Article available at: <https://www.news24.com/Opinions/Voices/when-will-there-be-justice-at-last-for-jimmy-mohlala-20170113>. Accessed on 18 June 2018.

3.3. ACCESS TO INFORMATION

3.3.1. Overview

Access to information underpins and is a catalyst for freedom of expression in all its forms. It is not surprising therefore that the right to freedom of expression lacks meaning and cogency in the absence of a framework that would enable individuals to access information. Nevertheless, the sentiment that emerges from a reading of both the literature and the responses from key informants and focus group participants is that whereas the Constitution and legislation provide a progressive and enabling environment for the realization of the right of access to information, the practice on the ground is often very different. Section 32 of the Constitution of South Africa (1996) establishes a right of access to information held by both public and private bodies. It states that:

“(1) Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

The Promotion of Access to information Act (2 of 2000) (PAIA) is the national legislation envisaged in section 32(2) of the Constitution. It was enacted in order to give effect to the right of access to information and to promote the values of openness, transparency, accountability and good governance.²⁶

Below we examine the various responses by the respondents.

²⁶ Preamble to PAIA.

3.3.2. Challenges

For some respondents, the question of access to information is like with all the other fundamental rights and freedoms, one of resources and affordability. In this sense therefore, it all depends on one's social and economic location in society.

"With many of these rights, the steps only exist on paper, but it's also the functioning of systems, the society, so if you have more money you can have access to the internet, but for many poor people who don't have the means, it is very different. I think that the process of obtaining information exists and I think a number of organisations and civil society in general are knowledgeable about how to obtain it; but I don't think there has been any kind of government process which educates people so that ordinary citizens could access information. I think the state of service delivery protests around the country which has now stopped tells you that it has been partly a result of not having access to government officials. But then again there are certain areas where they are accessible." (K3)

"Obtaining information is difficult. We have a huge contradiction in South Africa, that is, we have a supposedly very progressive piece of legislation, the Promotion of Access to Information Act, which gives us the right to request all information, both from the public and private sectors, which is unusual in the world, but the practice is something completely different. We have the same legislation being used to block access to information, because essentially they say they refuse on the basis of national security or on the basis of confidentiality, and then you appeal, get 60 days, they refuse the appeal, and the only option you have is to go to court. So essentially, our right to access information in South Africa is dependent on how much money you have to get your lawyers to contest in court. It makes it very difficult for most organisations and individuals to enjoy this right."(K1)

"The Promotion of Access to Information Act has now become a block to access information as opposed to being a facilitator and catalyst to accessing information. It has become a problem; and so far I haven't seen any move by government to change this situation." (K3)

One respondent worried that the Protection of State Information Bill ("the Secrecy Bill") which was passed by the National Assembly in April 2013, sent to the President for his assent, and thereafter returned to Parliament for reconsideration, may be revived and signed into law. This legislation would have a severe negative impact on the right of access to information held by the state as a lot of information that should be publicly accessible is likely to be classified under the general rubric of national security.

"The Secrecy Bill was a major issue. I am interested in seeing how the new administration of President Ramaphosa deals with this Bill which has been lying somewhere in Parliament for the last four years or so. If this Bill becomes law, a lot of information will be placed beyond access and shut out of the public domain." (K7)

There are also a large number of avenues and forums for engagement between government and the citizenry, but the bureaucratic processes often in place mean that many individuals and organisations are simply unable to participate in those forums or to even access information that may be relevant to their lives and activities.

“At the grassroots level, it is incredibly difficult to access information. Government officials are not much accessible to the public because those local civil society organisations are not taken seriously. There are more opportunities in this country for accessing information, than any other country; you can join a community policing forum, a health committees, water committee, the Integrated Development Plan (IDP) processes, there are city council meetings, ward committees, etc. The point about them is that they are there for a particular type of engagement between citizens, which is ideal for CSOs but not ideal for anybody else, because they take an existing organisation and put it to sit on the table to provide opportunities for people who are already in organisations to have a say. So, even if it’s a genuine process, it’s only a process for organisations and that means you cannot say that most citizens are involved. The opportunities are there, but they are channelled in a very bureaucratic way.” (K2)

The Integrated Development Plan (IDP) is meant to be the guide document for development at the local government level. It is supposed to encompass the inputs of all residents of the municipality. In many cases, residents are simply unable to access this document. Many councillors make little or no meaningful contribution to the IDP.

“...in the local municipality, we have the Integrated Development Plan. This is the plan that is supposed to guide the municipality in all its development projects. However many of the councillors and even municipal officials do not understand the basics of an IDP, or even budgeting. So when it comes to voting, councillors just sit there and say yes or no depending on what they have been told by their leaders.” (Focus group member)

For one informant, the problem is that many officials in the public service are afraid of being exposed or of being criticised.

“Government officials are not very accessible to the public. I would say that generally, government officials have become increasingly arrogant, and increasingly distanced themselves from the public. Although there are exceptions, I think generally the majority of government officials are often afraid of the public, they are afraid of being exposed, afraid of being criticised for not doing their job, so the best option for most of them is to stay away from the public to avoid exposing themselves and threatening their jobs. The lack of participatory mechanisms has increasingly created a huge gap between government officials and civil society.”(K1)

Existing legislation (e.g. PAIA) is one step towards an open and accountable government. But this has not been sufficient. According to one respondent, government officials only respond when there is violence or threats of violence by the community.

“Government officials are mainly accessible when there is a chaos in the country. Look right now in the North West Province, because the ground is burning, we always see them visiting these areas for some intervention. You can go to Luthuli House now (head office of the African National Congress), for example, to see one of the people there and you will be asked all sorts of questions about why you want to see them. So there is a barrier, tight security to have access to these officials. I don’t think the public can just walk in and request to see them. There are protocol issues. The Access to Information Act is one step the government has taken; but the practice of it is what we still need to consider.” (K4)

For another respondent, the end of the Zuma administration signals the on-set of a friendlier and more easily accessible bureaucracy as well as political leadership. For newsrooms however, the lack of resources means that they will continue to be hamstrung and thus unable to optimise their skills when it comes to collecting information.

“We have seen unbelievable investigative journalism in this country in the last few years. Because of their work, members of the public have been able to know of the deep rot that characterised the Zuma administration in all its facets. Luckily now, there is what I can call a ‘thawing out’ in the environment since Zuma was removed from power. There is now less hostility. The challenge with many newsrooms is that they are under-resourced and seriously incapacitated and as such, journalists are not able to work in an environment that enables them to optimise their skills.” (K7)

3.3.3. How the identified challenges have affected the overall SDG implementation

The views expressed earlier are worth repeating here that this study was far too limited to demonstrate how the identified challenges have affected the overall implementation of the right to freedom of expression in the last three years. What can be said however is that the existence of any threat against the right of access to information is likely to impact the proper and full realisation of SDG 16.10.

3.3.4. Steps taken by government towards the fulfilment of the SDG

There was limited participation by government officials and bureaucrats in this study thus making it difficult to conclude with any degree of certainty the steps taken by government towards the fulfilment of the SDG. In addition, the existing literature contains little if any mention of government's participation and efforts in the implementation of Agenda 2030, leave along the specific SDGs.

What is certain is that there are areas of concern regarding the realisation of the right of access to information. This has to do with the fact that rather than being used as an enabler to access information, existing legislation (PAIA) is increasingly being used to block access to information. Furthermore, the question of how well one is able to access information depends on their social and economic status.

It was suggested during the national consultation that CSOs should take advantage of the newly established Office of Information Regulator²⁷ to examine ways in which that office can assist individuals, communities and organised civil society to access information held by public and private entities. This is in addition to making use of CSOs such as the Freedom of Expression Institute and the South African History Archive to access information.

3.3.5. Recommendations

In light of what has been discussed above, it is recommended that:

- i. The Secrecy Bill should be shelved once and for all as it will seriously negate the gains through the Constitution and PAIA in respect of facilitating the right of access to information.
- ii. Where possible, funding should be provided to CSOs to enable them to assist communities and individuals to access information from both public and private sources.

²⁷ It is established in terms of section 39 of the Protection of Personal Information Act, 4 of 2013.

3.4. PEACEFUL ASSEMBLY

3.4.1. Overview

Perhaps no other constitutional right has come under more scrutiny in the last few years than the right to freedom of assembly. This is because of the manner in which this right has been exercised at all levels, from urban to rural areas, from informal settlements to urban townships, and the concomitant response to the exercise of this right by the state. Both the 2015 EENA study on an enabling environment for CSOs, together with the 2016 EENA *Baseline Survey of Laws that Impact on Freedom of Expression*²⁸ found extensive violation of the right to peaceful assembly.

One of the most concerning aspects of the state response to the right to peaceful assembly is that local authority functionaries have routinely imposed all manner of obstacles on the path of those who wish to publicly express their views through gatherings and demonstrations. For instance, a march may be prohibited at the eleventh hour on spurious grounds (such as that the target of the march is unavailable to accept a memorandum of complaints or demands) that find no sustenance in the Regulation of Gatherings Act (205 of 1993) (“the Gatherings Act”).²⁹

Or there may be unbearable conditions imposed on those planning to hold a demonstration such as that they first pay an administration fee, or that they follow a particular route and no other, thus making it impossible for them to proceed legally. Also, it has become evident that the state has consciously targeted radical organisations (mainly social movements) and used the Gatherings Act as a tool to frustrate and curtail them by among others, routinely denying them ‘permission’ to march or monitoring their communications.³⁰

Protests and mass demonstrations have made a massive impact on societal dynamics and transformation in South Africa in the past few years.

²⁸ This report is available on request from HURISA and CIVICUS.

²⁹ For instance that the person or department against whom the march is being organised is not willing to receive a memorandum of demands from the marchers.

³⁰ Prof Jane Duncan’s “*Protest Nation: The Right to Protest in South Africa*” (2016) provides a thorough and detailed analysis of state interference with the right to peaceful assembly. See e.g. <http://ukznpress.bookslive.co.za/blog/2016/09/06/a-call-to-action-to-defend-the-right-to-protest-read-an-excerpt-from-protest-nation/>. Accessed on 18 June 2018.

Freedom of assembly has helped to create a space for collective politics. For instance, due to the “*Fees Must Fall Movement*”³¹ which began in 2015 and continued until the end of 2016, the government announced in December 2017 that all indigent students in the country would get free tertiary education. In February 2018, the newly elected President of the country Cyril Ramaphosa stated during his State of the Nation Address (SONA) that government would provide subsidised higher education for all poor students in institutions of higher learning.³² Collective mass demonstrations are a crucial way of addressing societal issues. As such, freedom of assembly is an important political tool for those who feel that their demands are not being attended to by the government.

Views expressed by participants during the national consultation included that the state (municipalities and the police) should be held accountable for violating the people’s right to protest, and that peaceful assembly should be the collective responsibility of all CSOs. In addition, it was suggested that the Department of Cooperative Governance and Traditional Affairs should be approached to assist communities and individuals particularly those in rural areas to enjoy their right to peaceful assembly.

3.4.2. Challenges

In theory, at least, there are no legal limitations imposed on individuals who may want to gather and demonstrate for or against any cause. However, this is not necessarily borne out in practice as the Act can and has been misused extensively by local authorities and by the police to frustrate the right to individual and collective assembly. Mostly importantly, local authorities and the police have turned what is a notification process as prescribed by the Gatherings Act into a permission granting exercise. This is not only contrary to the Act itself but also contrary to the finding of the Supreme Court of Appeal in the matter of *South African Transport and Allied Workers Union and Another v Garvas and Others*³³ (the SATAWU Case) where the court made it clear that what is in place is a notification process.

³¹ The *Fees Must Fall Movement* began in October 2015, at the University of the Witwatersrand to protest against the proposed increase of university education fees. The protests quickly spread to other universities throughout the country including at the University of Pretoria, the University of Cape Town, the University of the Free State, the University of South Africa and others. The protests continued for about a year until the end of 2016. For more information, please visit: <http://www.ibtimes.com/south-africa-student-protests-5-facts-know-about-fees-must-fall-education-movement-2430375>

³² The SONA is available at <http://www.thepresidency.gov.za/state-of-the-nation-address/state-nation-address-president-republic-south-africa%2C-mr-cyril-ramaphosa>

³³ 2011 (6) SA 382 (SCA); 2011 (12) BCLR 1249 (SCA); [2011] 4 All SA 475 (SCA); [2011] 12 BLLR 1151 (SCA); (2011) 32 ILJ 2426 (SCA) (27 September 2011).

The court added that what is required is for the convener of a gathering to inform the relevant local authority of the intention to hold a gathering. It is not a permission seeking exercise.

Concerns have also been raised about Section 11 of the Gatherings Act which deals with the liability for damage arising from gatherings and demonstrations.³⁴ In terms of this section, the organisers of a protest march or demonstration could be held vicariously liable for the damage (riot damage) done by the marchers or demonstrators. This means that even if organisers of a protest march or demonstration took steps to prevent the destruction of property, the organisation may nevertheless be sued for the damages that occurred because of a riot that ensues.

On appeal to the Constitutional Court in the SATAWU Case mentioned above, the court found that while section 11(2) of the Gatherings Act limited the right to freedom of assembly, it did not do so 'impermissibly' and is therefore not unconstitutional.³⁵ There is evidence that municipalities have requested additional documents such as permits to use public roads, letters of permission from the local tribal councils, and acknowledgement letters from the intended recipients of memoranda of demands.³⁶

In some cases, a municipality will inform a convenor that its gathering has been prohibited because the said gathering should have been directed at a different person or entity. This has been the case with the Southern Cameroon Forum in South Africa (SCACUF), an organisation established by Anglophone Cameroonians in South Africa, and which has been protesting against state repression and the gross violation of human rights taking place in the southern and south western parts of Cameroon.

On several occasions, SCACUF's proposed marches have been prohibited by the Johannesburg Metropolitan Police Department (JMPD) as well as by the Tshwane Metropolitan Police Department because according to the two metro police authorities, the organisation should have marched to other entities and not the ones the organisation had in mind.

³⁴ 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." One does not need to notify the authorities to hold a demonstration.

³⁵ *South African Transport and Allied Workers Union and Another v Garvas and Others*, 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012). At paras 83-84.
³⁶ Duncan, J. 2013. Inside Rustenburg's banned protests. *Daily Maverick*, 7 March 2013.

For instance in January 2017, SCACUF's planned march to the head office of mobile phone operator MTN was prohibited because, according to the JMPD, *"the protest should [have been] directed to the Pan African Parliament not to MTN."*³⁷

Most of the requirements cited by the metro authorities as the reasons for prohibiting a gathering (e.g. that a protest should be directed at a different entity) are not mentioned at all in the Gatherings Act and are therefore illegal.

We turn to examine the responses by respondents with a view to getting a better sense of how the right to peaceful assembly finds implementation at the ground level.

"Service delivery protests are a good indicator of how protracted the right to peaceful assembly has become in our country. In general, the right to peaceful assembly is there but it depends on where you are and who it suits. Different people and organisations get treated very differently. Ordinary people protesting are likely to be met with violence by the state through the police and local authorities. We saw for instance during the Fees Must Fall protests that the police were very brutal. There was active harassment against students and student leaders by the police. But there was also harassment from other students." (K6)

The fact that local authorities and the police have turned what is essentially a notification process into a permission granting exercise is one reason why individuals and organisations have found it so difficult to exercise the right to peaceful assembly, and the reason why so many protests turn violent. Participants at the national consultation suggested that CSOs should at least initiate a campaign to educate communities, municipalities and the police about the right to peacefully assemble and in particular that one does not need permission to protest. The responses captured below demonstrate that the right to peaceful protest has been extensively compromised.

"When it comes to peaceful assembly, my colleague [...] made a good point in one of her writings that there is misconception which the police encourage which says if you want to have a march you have to ask the police for permission, and that is not correct. What you have to do in terms of the law is inform the police that it is happening, and what the police can do is if they feel that there is threat to public order, it is vital for them to make necessary arrangements."

³⁷ For instance in a notice of march prohibition issued to the Southern Cameroon Forum on 25 January 2017, the JMPD stated as follows: *"Your notice for a gathering in terms of section 3 of the Gatherings Act 205 received on 18/01/2017 is acknowledged. Subsequently the section 4(2)(b) meeting that was held at the Johannesburg Metro Police Department Head Office on 25 January 2017 at 09h00.(sic) After considering the submission that were made by the security cluster that the protest should be directed at the Pan African Parliament not MTN (sic)....Responsible Officer reached the conclusion that the permission for the Concerned Southern Cameroonian Forum South Africa to march and hand over a memorandum at the MTN head office on 27th January 2017 from 10h00 to 14h00 is hereby prohibited in terms of section 5(2) of the Regulation of Gatherings Act 205 of 1993."*(sic)

So, there hasn't been any steps taken by government to facilitate the right of peaceful assembly. Grassroots organisations still have a hard time trying to assemble and demonstrate.” (K2)

“Our experience has been in the opposite direction, there has been more attempts to restrict freedom of peaceful assembly, particularly the right to protest. This has exploded over the last 3 or 4 years across the country. So the extent to which government is able to restrict this right depends on the extent to which civil society itself is or is not well-organised.” (K1)

“Look at the Fees Must Fall movement, students were being violated for exercising their right, and that scene alone says a lot about police brutality and the prevention of protests.” (K4)

“I witnessed so many violations of the rights of students by the private security, by the police as well as by the university administrations. And this cuts across freedom of association, freedom of expression and freedom to assemble. Students could not assemble around their own campuses anymore. And therefore the worrying thing is that many of these rights we enjoy on paper can be violated, so we really need to safeguard and not become comfortable with the rights that are on paper.” (K3)

“It is a big problem to get your march ‘authorised’. You will inform the municipality and the police that you want to march say against lack of service delivery and the police will simply ban your proposed march. The community then gets angry and says ‘it is our constitutional right to march, why should we be stopped by the police. The community members then march and the police stop the march with rubber bullets, water cannons and stun grenades. That is why the protests turn violent.” (Focus group member)

Contestation for political power at the local community level is also another reason why many protests turn violent as some community leaders want to ‘stand out’ and be seen as the authentic voices of the community. This way, they are ensured of being elected into local municipalities as councillors or even as members of the provincial legislature.

“Local community leaders also incite community members because they want to gain political mileage. They want to be seen by the community to be the more radical ones and the ones that will help the community members to achieve what they want. You watch and see now that we have elections next year. You will see a lot of violent protests.”(Focus group member)

Resources also determine how far and how well a CSO is able to exercise its right to peaceful assembly.

“I think confidence in organising protests depends on the CSO. Here in Jo’burg, when we go and notify the police about a protest seven days in advance, they will call you if they have anything to discuss regarding the protest. Our experience, again, is that those organisations, which are

capacitated, well-resourced and have legal representatives, etc, have very few problems with organising protests. The police back off. However for a small organisation, their protest will be refused because the authorities think the organisation has no political capital and cannot do anything. I think the bigger the organisation, the more the confidence to protest. That is why you often find the smaller organisations engaging in illegal protests.” (K1)

3.4.3. How the identified challenges have affected the overall SDG implementation

There can be no doubt that the right to peaceful assembly has come under severe strain in South Africa. It is one of the rights in the Bill of Rights that is continuously violated. In this regard, we can reasonably conclude that the challenges identified have negatively affected the overall implementation of goal 16.10 in regards to the realisation of the right to peaceful assembly.

3.4.4. Steps taken by government towards the fulfilment of the SDG

It does not appear that there are any steps taken by the government towards ensuring that the right to peaceful assembly is exercised without undue interference. As discussed above, the activities of local authorities in requiring that marches be ‘permitted’ as opposed to merely giving notices, means that the state at the local level continues to violate the right to peaceful assembly.

3.4.5. Recommendations

In light of what has been discussed above, it is recommended that:

- i. The state and civil society engage in a nation-wide campaign to educate local authorities and communities about the Regulation of Gatherings Act.
- ii. In particular, the education campaign should underscore the fact that the Gatherings Act merely requires a notice to be given to the local authorities regarding a proposed march. The Act does not give the local authorities or the police the power to grant ‘permission’ to individuals and organisations in order to gather.

In addition, the training content should include the Guidelines on Policing Assemblies in Africa which have been developed under the auspices of the African Charter on Human and Peoples' Rights.³⁸

- iii. CSOs need to build a network of progressive lawyers to be available to intervene at short notice when local authorities unlawfully and unreasonably prohibit gatherings.
- iv. Parliament should pass regulations for the proper implementation of the Gatherings Act.

3.5. EFFECTIVE CIVIL SOCIETY PARTNERSHIPS

3.5.1. Overview

This section explores the effectiveness of public-private and civil society partnerships in South Africa over the years in advocating for public participation, promoting cooperation, decision-making processes, timely consultations, transparency and accountability as well as the nature of the relationships between the government and civil society organisations.

Civil society organisations include any association in which citizens demonstrate common interests and associate with each other or to engage with the government; they range from human rights defender's, trade unions and business associations to small grassroots organisations of the poor. Among this group is a social movement, which have emerged over the past few years to take up causes that are often unpopular, but which speak to the interests of the majority in the community.

Like much else that defines post-apartheid South Africa, laws and policies have placed a premium on good government-CSO relations, but the practice unfortunately reveals a different reality. More than two decades since South Africa's transition from apartheid to constitutional democracy, government and civil society (in its formal sense) have a relationship that is characterized by mutual distrust and tension. Key informants interviewed for this study used words such as 'hostile', 'conflict-ridden',

³⁸ These Guidelines are available at http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr_guidelines_on_policing_assemblies_eng_fre_por_ara.pdf. Accessed on 13 August 2018.

'mixed', 'not genuine' 'complicated' and 'it depends on the issue' to describe the relationship between the state and civil society. Worryingly, in April 2016, the then Minister of State Security David Mahlobo was reported in the media as having stated that "*some NGOs are security agents of foreign forces*".³⁹ The article went on to quote Mahlobo as saying that some of these NGOs were "*just security agents that are being used for covert operations*", that they "*could not explain their funding*" and that they were the ones funding the then ongoing university student protests.⁴⁰

In South Africa, CSOs have historically played and continue to play an active role in social justice advocacy, raising awareness, education and campaigning for a myriad of human rights issues as well as raising service delivery issues to complement government social service programmes. However, in recent years there has been a sense of crisis in the sector due to issues around the sector's financial sustainability, capacity, ability to do advocacy work, and accountability towards the public.

With the foregoing in mind, we now turn to examine the responses collected during the field research in order to get an in-depth sense of the nature of the relationship between the state and civil society organisations in South Africa.

³⁹ Article available at <https://www.news24.com/SouthAfrica/News/some-ngos-are-security-agents-of-foreign-forces-mahlobo-20160426>. Accessed on 18 June 2018.

⁴⁰ These were protests against decolonization of the university curriculum and also for affordable university education.

3.5.2. Challenges

It appears that over time, the relationship between government and civil society has gradually deteriorated to the extent that, as one respondent observes, the state sees civil society in general as “a threat”. Or, as another respondent pointed out, it depends on whether a particular CSO is an ‘advocacy’ or a ‘service delivery’ organisation. If the former, then the relationship is characterised by tension and mutual suspicion but if the latter, the state is much more willing to work with such organisation and to support it where necessary.

“I think there is a lot of tension between CSOs and government, and I think the government feels very defensive when they are challenged instead of seeing it as a healthy development. I don’t think there has been an attempt to involve CSOs in government activities. I think there’s a difference between meaningful representation and political representation, so when government goes to international forums, etc. and say they will bring a representative from civil society, but it’s normally not a thorough-going programmatic involvement of civil society, it’s a once-off, it’s not deep, it’s a very superficial relationship.” (K3)

“I would say the vast majority of CSOs is probably perceived as a threat. I would say there is a section of civil society that the government has no problem with, the ones that help them where they fail... It depends on which part of civil society you’re talking about. I think government has good relations with certain CSOs, the ones which are non-political, the ones which are service-oriented organisations.” (K1)

“I can think of organisations such as Section 27, they are seen as a threat more than as a partner. and many other instances. I don’t necessarily think it’s a case of threatening though, but rather the government is just disconnected from civil society, they are not on the ground hearing what’s happening; and the psychosocial tension comes out there...and it manifests in different ways. The same with Fees Must Fall, the recent chaos in the North West province, and many others.” (K4)

Grassroots organisations are usually the worst disenfranchised when it comes to the relationship between the state and CSOs.

“At the grassroots level, there is not much of a relationship. Grassroots people do not feel that they are meaningfully involved. They are clearly seen as threats. With the formal NGOs, I would say the partnership with government is complicated, because the government’s general attitude is that it is the job of CSOs to be helpful.” (K2)

One respondent defined the relationship between the state and CSOs as ‘a critical relationship’ in which the two parties collaborate if necessary and differ where this is warranted.

“We have a critical relationship with the state. We collaborate where necessary and differ and criticise where we have to do it. In general, however, I feel things are looking better. We are gradually moving away from where we were between 2009 and 2017.” (K8)

Focus group members expressed the view that it is individuals in government, rather than the state as a whole, who make the relationship between the two sides to be characterised by tension, acrimony and suspicion.

“I don’t think that it is the state as a whole that is problematic, it is certain individuals in government. For instance when you apply for funding from government, they want to stop you so that that money can go to their friends or relatives. They will even set up a bogus NGO and give funds to that organisation, yet it does not exist or it has no programmes.”(focus group member)

“We have to remember that government cannot do everything. It needs civil society to assist it to implement its (government) programmes. So the tension will often arise when certain individuals in government feel that you are succeeding and they are not. Because this might put them in a bad light. They will then do everything possible to shut you down by denying you access to funds, or bad-mouthing you and saying you are this or that.”(Focus group member)

Civil society in South Africa, its form and substance, and its mode of operation was one of the most hotly debated issues by participants at the national consultation. The debate can be summarised as follows:

- We should not only think of CSOs in a progressive sense. There is a tendency to think of CSOs as inherently progressive. That is erroneous. Those few well-resourced, well-connected, “blue-chip” CSOs are not a reflection of most NGOs in this country. Most of the big CSOs are funded to focus only on certain aspects of work (e.g. education, HIV/AIDS, water, etc).
- Despite the above, the existence of NGOs alone, especially those that have been in existence for quite some time, means a lot for the development of this country.
- There should be more focus should be on rural CSOs as they get very little if any media attention. That is where we might get some interesting views about the SDGs.

- Access to justice is extremely expensive in this country, especially for CSOs. Unfortunately, existing pro bono organisations only have limited resources. The transition in CSOs has shifted drastically due to South Africa's expensive legal system. Now you find that only those CSOs with the means and access to good funding are able to bring up cases in the courts thus growing their public profile.
- For CSOs to be effective, they must also have an introspective mirror amongst themselves and the work they do. They also need to come clean about their work and take responsibility for their actions.
- For example, the case of Life Esidimeni, some NGOs were reported to have taken the mental health patients to their unlicensed institutions in order to gain money. CSOs also need to account on issues of money and corruption.
- As CSOs, we need to go back to our history, reflect and understand why things have revolved the way they have, and what power we have as organized civil society.
- Urban CSOs get more attention than the rural-based, non-organised CSOs. This gives the wrong impression that all CSOs are organised and well-resourced.
- No one ever talks about transformation (racial and gender) in the CSOs sector, and that is also a big challenge for the development of CSOs in this country.
- CSOs still exist because there are people who still believe there are problems out there that need solutions, people who believe there is still hope for CSOs in South Africa's democracy.
- As organised civil society, we are sometimes afraid to face our own demons. What are the actual principles that we need to embrace as CSOs to redefine ourselves? That is the question we need to ask.

3.4.3. How the identified challenges have affected the overall SDG implementation

An effective realisation of the various SDGs means that the state and civil society have to work together. But this does not mean that civil society has to be less critical of the state, or that it should not point out the failures of the state. On the contrary, it means that civil society must be forthright about the failures of government and equally forthright as well about the solutions to these failures.

Unfortunately, it does not seem that the divide between the state and civil society in South Africa will narrow down any time soon. This is more so in light of government's inability to fulfil the social and economic needs of its citizens, which has resulted in widespread protests for service delivery, and more recently, for land. That being the case, it is unlikely that SDG 17.17 on effective civil society partnerships will be realised in the foreseeable future.

3.5.3. Steps taken by government towards the fulfilment of the SDG

There is very little evidence of government taking or having taken steps to ensure the fulfilment of SDG 17.17 and thus lead to the building of effective civil society partnerships. It would seem that the relationship between the state and civil society depends on the stance taken by a particular civil society organisation. Where an organisation is critical, then the relationship is one of tension and suspicion but where an organisation serves as a service-implementing partner on behalf of government, then there is mutual collaboration and assistance.

3.5.4. Recommendations

In light of what has been discussed above, it is recommended that:

- i. There should be greater dialogue between the state and civil society on the respective roles that each party can play in order to strengthen South Africa's constitutional democracy. A national summit would be a good way to kick-start such a dialogue.

- ii. Many CSOs have collapsed due to a lack of funding. It is imperative for the roles, responsibilities and functions of bodies such as the National Development Agency (NDA) and the National Lotteries Distribution Trust Fund (NLDTF) be appraised in order to re-orient them towards their initial mandate which was to support civil society in South Africa.

CHAPTER 4: CONCLUSION

What has emerged from this study is a picture of a society anchored on constitutional values, in which there has not been much change in the period since Agenda 2030 was adopted in 2015, but also a society where increasingly, there are worrying signs of in-roads into the four fundamental rights researched and discussed in this report. For instance, whereas all the four rights: (1) freedom of association; (2) freedom of expression; (3) access to information; and (4) peaceful assembly; are constitutionally guaranteed, and whereas there are various pieces of legislation governing the manner of enjoyment of these rights, there are many instances in which these rights have been honoured more in their breach.

At the continental level, the adoption by the African Commission on Human and Peoples' Rights ("the Commission") in 2017 of the Guidelines on Freedom and Assembly in Africa ⁴¹ provide an opportunity for member states, including South Africa, to improve their commitments on the promotion and protection of fundamental freedoms and liberties such as those under scrutiny in this study. These Guidelines, which are the first instruments of their kind on the continent in strengthening the promotion and protection of freedom of assembly and association, reinforce state commitments and obligations under the African Charter on Human and People's Rights and other international instruments.⁴²

Although considered as "soft law," the guidelines constitute a barometer for the Commission to assess Member States' compliance with international and regional standards on the Freedom of Association and Assembly. Likewise, the Guidelines constitute a powerful policy and advocacy tool for African civil societies as they seek to engage their national governments, or the regional economic communities, such as the Southern Africa Development Community (SADC), on improving and expanding civic space and promoting the freedoms as enshrined in the African Charter.

⁴¹ African Commission Guidelines on Freedom of Association and Assembly in Africa. Available at http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf. Accessed on 13 June 2018.

⁴² Articles 10 (Freedom of Association), article 11 (Freedom of Assembly) and (article 45(1)(b) of the African Charter, which mandates the Commission to formulate principles and rules to guide African States' legislation and implementation. the Universal Declaration of Human Rights/UDHR (Article 20), the International Covenant on Civil and Political Rights/ICCPR (Article 22), and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 26).

It is in this line that South African institutions entrusted with the power to interpret and apply these instruments to provide measure ensuring that South African people do enjoy fundamental freedoms, including freedom of Association and Assembly.

This is with a view to addressing the significant degree of coercion against CSOs which occurred during the Zuma presidency between 2009 and 2017, and which severely constrained the ability of individuals and organisations to enjoy their right to freedom of Association and Assembly. In some areas, a number of CSO activists were killed in very suspicious circumstances. However, the period since the removal of Zuma as president of the Republic of South Africa in February 2018 has been seen as a welcome and much needed change, an era increasingly characterised by openness, accountability and a willingness to move away from the dark period of the last ten years.

Like freedom of association, freedom of expression is also one of the cornerstones of South Africa's constitutional democracy. Unfortunately, this right has also come under a significant degree of pressure. This is exemplified by incidences such as the entrenchment of censorship at the South African Broadcasting Corporation- South Africa's national broadcaster- the introduction of the Hate Speech and Hate Crimes Bill, and the classification of the movie *Inxeba* ("*the Cut*") as pornography although there are no acts of explicit sex in the movie. There have also been many instances of intimidation and harassment of journalists.

South Africa has one of the most progressive laws in relation to the right of access to information. This right is guaranteed in the Constitution (section 33) and facilitated through a specific piece of legislation- the Promotion of Access to Information Act (No 2 of 2000) ("*PAIA*"). The challenge being experienced however is that more often than not, state and private functionaries have been using PAIA to frustrate rather than enable individuals to access information in the public and private domains. As such, the question of accessing information has become one of 'means', in other words, it depends on whether one has the financial ability to legally challenge decisions to refuse to provide information. In the majority of cases, ordinary citizens are way too poor to afford the exorbitant legal fees necessary for litigation in order to vindicate one's right of access to information.

The right to peaceful assembly regularly features in public discourse given the many marches and demonstrations (protests) that take place around the country on any given day.

Nevertheless, it has become increasingly worrisome that far too many protests turn violent, and protesters are injured or arrested and charged with a myriad of offences including participating in unlawful gatherings or malicious damage to property. A closer look at the underlying problem reveals a sense of frustration by many people that they are not being listened to or that they will not be heard by the state unless they destroy property or cause mayhem.

In addition, local authorities and the police have turned the notification procedure legislated in the Regulation of Gatherings Act (205 of 1993) into a permission granting exercise. In doing so, both municipalities and the police make some of the most spurious demands on potential marchers (e.g. that the entity being marched against must first agree to receive a memorandum from the marchers) before 'permission' to march can be granted. As this report notes, *"most of the requirements cited by the metro authorities as the reasons for prohibiting a gathering (e.g. that a protest should be directed at a different entity) are not mentioned at all in the Gatherings Act and are therefore illegal."*

The last theme discussed in this report is effective partnerships between civil society and the state. Again, the general sense is that there has not been much change in the last three years in regards to the way civil society and the state relate to one another. What stands out is that the relationship between the two parties is characterised by mutual tension and suspicion, and that the state perceives civil society as a threat rather than a partner and enabler for the realisation of the country's political, social and economic objectives.

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