Reflecting on the Closing of Civic Spaces and its Impact on Marginalised Groups in Southern Africa
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About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support to human rights and public interest initiatives undertaken by domestic lawyers and civil society organisations in Southern Africa. SALC works in Angola, Botswana, the Democratic Republic of Congo, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa, Zambia, and Zimbabwe. Its model is to work in conjunction with domestic lawyers and human rights organisations in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, as appropriate - including providing legal research and drafting, training and mentoring, and monetary support.

About the Africa Regional Grant on HIV

This publication is funded under the Africa Regional Grant on HIV - Removing Legal Barriers. To implement the Grant, a partnership of organisations has been formed to strengthen the legal and policy environment to reduce the impact of HIV and TB on key populations in 10 countries in Africa. These countries are Botswana, Cote D’Ivoire, Kenya, Malawi, Nigeria, Senegal, Seychelles, Tanzania, Uganda and Zambia. Over the past 3 years, the project has worked to assess, strengthen and monitor legal and policy environments for HIV and has provided capacity strengthening opportunities for key stakeholders and decision makers from these countries. The UNDP is the principal recipient of the Grant, which in turn collaborates with SALC, AIDS and Rights Alliance for Southern Africa (ARASA), ENDA Santé, and Kenya Legal and Ethical Issues Networks on HIV and AIDS (KELIN).

Authorship and Acknowledgement

This publication is a collection of articles from human rights practitioners, activists and human rights defenders (HRDs) operating in the Southern Africa region. The articles highlight contemporary issues of concern and paint a political and socio-economic context of the environment in which human rights defenders operate. The publication forms the background materials for a regional conference bearing the same title. The conference will take place in Johannesburg from 14 to 16 November 2018 and is a collaborative effort between SALC, ARASA, the International Commission of Jurists (ICJ), Media Legal Defence Initiative (MLDI), the Office of the High Commissioner of Human Rights, and the Southern Africa Human Rights Defenders Network (SAHRDN).

The report was edited by Anneke Meerkotter and Tyler Walton from SALC, with a range of contributions by human rights defenders in the region. In order to ensure the safety of HRDs some articles in this publication have been published anonymously. The views expressed in the articles do not necessarily reflect the views of SALC and the other co-hosts.

Southern Africa Litigation Centre

Second Floor, President Place, 1 Hood Avenue, Rosebank, Johannesburg, South Africa, 2196

Cover photo: Mayeso Gwanda is a vendor from Malawi. He was arrested for being a rogue and vagabond and successfully fought to have the offence declared unconstitutional by the court in 2017 © Open Society Foundations.
Reflecting on the Closing of Civic Spaces and its Impact on Marginalised Groups in Southern Africa
IN COURT COZ WE ASKED WHAT $42M WOULD DO TO PREVENT CHOLERA, KEEP KIDS IN SCHOOL, BUY MEDICINES.

WE ARE STILL WAITING FOR 42FOR42 ANSWERS.

ZAMBIANS STILL WANT ANSWERS #42FOR42.
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PART I

Introduction
Reflecting on Closing Civic Spaces and its Impact on Marginalised Groups in Southern Africa

2018 marks the 20th anniversary since the United Nations General Assembly adopted the landmark Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (commonly known as the UN Declaration on Human Rights Defenders). The adoption of the Declaration was a critical moment in human rights history because it recognised, in international law, the importance and legitimacy of fighting for human rights and the need to protect those who carry out the work. Since the UN Declaration on Human Rights Defenders (HRDs), there has been the appointment of a UN Special Rapporteur on HRDs (2000) and an African Commission Special Rapporteur on HRDs (2004). Subsequently, in 2009, the Pan African HRDs Network was established via the Kampala Declaration of Human Rights Defenders, which now includes the Southern Africa HRDs Network, established in 2013. More recently in 2014, the UN General Assembly adopted a resolution on protecting women human rights defenders and the African Commission adopted a resolution which seeks to protect HRDs working on sexual orientation and gender identity.

In 2017, the African Commission hosted the 2nd International Symposium on Human Rights Defenders in Africa, which adopted the Cotonou Declaration on strengthening and expanding the protection of all HRDs in Africa. The Declaration specifically noted concerns about “the human rights violations targeting specific groups of human rights defenders, including women human rights defenders, human rights activists working in conflict and post-conflict States, on issues related to land, health, HIV, sexual orientation and gender identity and expression, as well as sexual and reproductive health rights”. The Declaration further noted that “addressing structural causes of human rights violations affecting these human rights defenders should be prioritised since it requires repeal of legislation, removal of policies and practices that create or reinforce violence, discrimination and stereotypes.”

Increasingly, the discourse around human rights is being negated and human rights defenders are under attack in many countries in Africa. There is increased characterisation of HRDs as political opponents, threats to national security or promoters of foreign or Western values. There is also a consistent use of laws and the criminal justice system to deter HRDs, including through detentions without charges, prosecution on false charges, or the unwarranted use of criminal laws against HRDs.

In many instances we cannot rely on governments to automatically protect the rights to freedom of opinion, expression, association and assembly, even though these rights are critical to the protection and promotion of all human rights. It is important to sustain efforts to support civil society spaces at national and regional levels. It is also important to forge solidarity among human rights groups that face restraints on their ability to operate and to organise, including solidarity between the women-, children-, health-, environmental-, sex work, LGBTIQ-, criminal justice-, socio-economic-, refugee-, press freedom-, and anti-corruption sectors. It is only through such solidarity that civil society can effectively and sustainably engage against encroachments on civic space.

The free operation of health-focused CSOs is a critical component of any comprehensive national health response. The right to the highest attainable standard of health cannot be fulfilled...
without respect for other important human rights, especially the rights to freedom of expression, association and assembly. Our experience over the past two decades has shown that human rights organisations that seek to promote access to HIV treatment for key populations face denial of their rights to expression, assembly and association by their national governments. Regional interventions are critical to support key population groups as they demand these rights. It is further critical that key population groups are able to join forces with other sectors which face similar attacks on their rights to association, assembly and expression.

NOTE OF THE UN SECRETARY GENERAL ON THE SITUATION OF HUMAN RIGHTS DEFENDERS (JULY 2018)

“Everyone is a human rights defender when they take up the human right project through peaceful means. A human rights defender is any person who, individually or in association with others, acts or seeks to act to promote, protect or strive for the protection and realisation of human rights and fundamental freedoms, at the local, national, regional or international levels.” …

“New social movements have produced social and political revolutions in the past 20 years and yet these movements often have an uncomfortable relationship with the mainstream human rights movement, using the language of social justice rather than that of the defence of human rights. Children, the elderly, persons with disabilities and other marginalised groups continue to face barriers as defenders of human rights. It is imperative to seek ways to bring the perceptions and concerns of such individuals and groups into the discussion of the future of the human rights defender community.”
GLOBAL FUND FACT SHEET (JULY 2015)

Key Populations: A Definition

Key populations in the context of HIV, TB and malaria are those that experience a high epidemiological impact from one of the diseases combined with reduced access to services and/or being criminalised or otherwise marginalised.

Key populations in the HIV response: Gay, bisexual and other men who have sex with men; women, men and transgender people who inject drugs, and/or who are sex workers; as well as all transgender people are socially marginalised, often criminalised and face a range of human rights abuses that increase their vulnerability to HIV.

Key Populations in the Tuberculosis Response: Prisoners and incarcerated populations, people living with HIV, migrants, refugees and indigenous populations are all groups that are highly vulnerable to TB, as well as experiencing significant marginalisation, decreased access to quality services, and human rights violations.

Key Populations in the Malaria Response: The concept of “key populations” in the context of malaria is relatively new and not yet as well defined as for HIV and TB. However, there are populations that meet the criteria outlined above. Refugees, migrants, internally displaced people and indigenous populations in malaria-endemic areas are often at greater risk of transmission, usually have decreased access to care and services, and are also often marginalised.

People living with the three diseases: All people living with HIV, and who currently have, or have survived, TB, fall within this definition of “key populations”. Given that in some countries, a substantial proportion of the population has malaria, and the impact is not linked to systematic marginalisation or criminalisation, people who have had malaria are not included in this definition.

Stigma and discrimination toward people living with HIV is a major impediment to improving health outcomes. Such stigma particularly affects sex workers, drug users, transgender people and men who have sex with men who are living with HIV and/or TB.

The Global Fund also recognises vulnerable populations - those who have increased vulnerabilities in a particular context, i.e. adolescent/women and girls, miners and people with disabilities.
PART II

Challenges Faced by Human Rights Defenders in the Southern Africa Region
Brief Analysis of the Shrinking Civic Space for Human Rights Defenders in Southern Africa

Teldah Mawarire

Introduction

The Southern Africa region is a mixed bag when it comes to the state of civic space. Generally, space is enabled for human rights defenders only as far as it does not challenge power. The enabling environment legally is good on paper but remains a serious challenge in practice. Most constitutions in the region promote an open civic space protecting the right to freedom of assembly, freedom of association and freedom of expression. However, in practice, civil society organisations (CSOs) and human rights defenders face impediments especially on freedom of assembly and freedom of association. What CSOs face in practice is often very different to what is written in law. The same can also be said for human rights defenders who attempt to use the method of protest to make their concerns heard by authorities. Various hurdles are placed by the authorities for those trying to notify police of their intention to protest. The police often turn the process for notification into an authorisation process, which is not what is stipulated by the law.

In SADC, the most worrisome case on the state of civic space is the Democratic Republic of Congo where the authorities have in recent times used live ammunition on protestors resulting in deaths of unarmed civilians. Human rights defenders continue to be abused, tortured and killed. The death of human rights defender, Luc Nkulula, in a suspicious fire being one prominent case. Many other disappearances and violations against activists go unpublicized in the DRC.

State of civic space in the SADC region

The CIVICUS Monitor, a tool measuring civic space globally, shows that in the SADC region, the countries fall within the following categories;

- **CLOSED**: Democratic Republic of Congo. There is complete closure - in law and in practice - of civic space. An atmosphere of fear and violence prevails, where State and powerful non-State actors are routinely allowed to imprison, seriously injure and kill people with impunity for attempting to exercise their rights to associate, peacefully assemble and express themselves.

- **REPRESSED**: Angola, Eswatini, Zimbabwe. This means that civic space in these countries is heavily constrained. Active individuals and civil society members who criticize power holders risk surveillance, harassment, intimidation, imprisonment, injury and death. Although some civil society organisations exist, their advocacy work is regularly impeded, and they face threats of de-registration and closure by the authorities.

- **OBSTRUCTED**: Lesotho, Malawi, Mozambique, Madagascar, Zambia, Tanzania. Civic space is heavily contested by power holders, who impose a combination of legal and practical constraints on the full enjoyment of fundamental rights. Although civil society organisations exist, State authorities undermine them, including using illegal surveillance, bureaucratic harassment and demeaning public statements.
PART II Challenges Faced by Human Rights Defenders in the Southern Africa Region

- **NARROWED**: Botswana, Comoros, Namibia, South Africa, Mauritius, Seychelles. This means that while the State allows individuals and civil society organisations to exercise their rights to freedom of association, peaceful assembly and expression, violations of these rights also take place. People can form associations to pursue a wide range of interests, but full enjoyment of this right is impeded by occasional harassment.

- **OPEN**: None. There is no country in the SADC region that has open civic space. Open civic space means that the State both enables and safeguards the enjoyment of civic space for all people. Levels of fear are low as citizens are free to form associations, demonstrate in public places and receive and impart information without restrictions in law or practice.

Examples of laws in the region that are shrinking civic space and violations against defenders

For many human rights defenders, carrying out our work in the region is risky business. This includes both activists working in the formal civil society sector and those who do not work in formal civil society and act individually or informally as movements. Below are a few cases of violations in the region noted recently:

**Zambia**: Six Zambian civil society leaders, activists and a musician are currently on trial in Lusaka. On 29 September 2017, the six, Lewis Mwape, Laura Miti, Sean Enock Tembo, Bornwell Mwewa, Fumba Chama (also known as Pilato) and Mika Mwambazi, held a protest outside the Zambia Parliament. They demonstrated against the abuse of public resources, in a case where the state purchased 42 fire trucks for an alleged cost of USD 42 million. The six were charged with disobeying lawful orders.

Authorities have noted that they will soon table a Cybersecurity and Cybercrimes Bill in Parliament. This Cyber Bill is aimed at regulating citizen’s online interaction on social media platforms such as Facebook, WhatsApp, Twitter, and others. There is no consultation so far in its drafting. The Bill is likely to impact the work of human rights defenders as many now use new media platforms to mobilize citizens, spread information about human rights, and to keep themselves safe. When arrested upon his return from exile in South Africa, human rights defender Fumba Chama, one of the six accused in the firetrucks case, kept the outside world informed via these platforms. He updated on his situation behind the scenes, at the police station he was being taken to, and his experience with officials in the immigration queue.

**Democratic Republic of Congo**: It has become difficult for any work relating to civic space to be carried out in the DRC by human rights defenders. There are regular reports of killings of protestors and abductions of human rights activists. There are also high levels of impunity and little accountability for the killings of protestors. The space is very limited for human rights defenders to openly do their work without surveillance, arbitrary arrests, torture and death. For human rights defenders in the DRC, death is now always a possible reality due to the shrunken space and persistent threats. The threat is also not only from the State but also from non-State actors, for example, businesses in the extractives sector.

**Malawi**: Human rights activists in April organised anti-corruption protests over the misuse of government money that was paid to MPs individual accounts allegedly for passing Bills in favour of the ruling party. Following these protests, the President publicly singled out human rights defenders saying they were in pursuit of a regime changing agenda and were being paid money from the West. This narrative from the highest political office puts defenders at risk, is an
attempt to reduce their credibility and good standing in public, and deters them from continuing the work of holding the State accountable and demanding good governance, transparency and accountability.

**Tanzania:** The new Electronic and Postal Communications (Online Content) Regulations require bloggers and online publishers to pay about USD 900 to the government to be able to operate. These licenses can also be taken away by the State where it deems necessary. This has instilled fear in Tanzanian journalists and other citizens who want to discuss anything online. This limits freedom of expression and is evident in discussions with Tanzanian journalists and human rights defenders who no longer feel comfortable to discuss politics or criticise the government freely as they have done in the past.

**Zimbabwe:** Human rights organisations and individual human rights defenders were told post-election that they are no longer allowed to train Members of Parliament in governance matters and that any governance training must be done by the State. This poses a challenge to human rights defenders in the governance sector who would be keen to engage with MPs. The law in Zimbabwe also requires NGOs to register under the Public Voluntary Organisations Act. However, in rural areas, authorities ask for NGOs and HRDs to have a Memorandum of Understanding from the local police and District Administrator. This is very problematic because the District Administrator is a political appointee and the police are highly politicized, favoring the ruling party. This, therefore, has meant that defenders and programmes that have anything to do with governance are not able to operate freely in rural areas.

Another trend being seen in Zimbabwe is that State security is persecuting people based on social media posts. A man was recently brought before the court for retweeting a tweet on the disputed July 2018 election. There are also increased threats that seem coordinated against Zimbabwean defenders who work for formal international NGOs.

**How do we improve collaboration between human rights defenders in the region?**

- Improve the coordination of CSOs who work on civic space and are concerned with human rights defenders at the SADC Summits;
- Show solidarity in the region when violations occur e.g.: coordinated protests at various embassies of the offending State;
- Work collaboratively across issues;
- Work across movements;
- Improve working with non-formal CSOs;
- Joint statements when violations occur;
- Experience sharing platforms at regional levels;
- Set up a regional-research node on civic space; and
- Make joint funding applications rather than competing for funds for defenders. Competition weakens alliances and does not foster the spirit of working together.
ACHPR, RESOLUTION 393 ON THE HUMAN RIGHTS SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO (FEBRUARY 2018)

“Urges the authorities of the Democratic Republic of the Congo to... Put an end to arbitrary arrest and detention, and ensure the immediate release of arbitrarily detained protesters, political opponents, journalists and human rights defenders.”

Ibrahim Index of African Governance (2018)

Selection of scores (out of 100) for Southern Africa

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JOINT DECLARATION ON MEDIA INDEPENDENCE AND DIVERSITY IN THE DIGITAL AGE (MAY 2018)

“1(a) States are under a positive obligation to create a general enabling environment for seeking, receiving and imparting information and ideas (freedom of expression), including through the following measures:

v. ensuring that defamation laws are exclusively civil rather than criminal in nature and do not provide excessive damages awards...

2(a) States are under a positive obligation to provide protection to journalists and others who are at risk of being attacked for exercising their right to freedom of expression, to launch effective investigations when such attacks do occur, so that those responsible may be held accountable and to offer effective remedies to victims.”
The Shrinking Space for Civil Society in Mozambique

Mozambican Human Rights Defender

Political context

The space for civil society and human rights defenders to operate in Mozambique is shrinking. While the formal space for the participation of civil society at large and human rights defenders in particular in the public sphere is still written into the Constitution and laws of the country, the ability to exercise these fundamental rights on the ground is being interrupted by political barriers.

Soon after Filipe Nyusi was sworn-in as the President of Mozambique on 15 January 2015, succeeding Armando Guebuza, there were signs that a death and hit squad was emerging. This squad targeted political opponents, academics and human rights activists. At that moment, the country was experiencing a political standoff between the government, constituted by Frelimo, and Renamo, the leading opposition party. Renamo contested the election, claiming it was fraudulent. This standoff included armed confrontations between the militias of the two parties.

This political standoff remains unresolved, but peace negotiations are ongoing. Currently there is a Memorandum of Understanding between President Nyusi and Renamo interim leader, General Ossufo Momad. This has started the Demilitarization, Demobilization and Re-integration (DDR) of Renamo’s residual militia. The agreement is tenuous, and there are worries that current political conflict may cause the temporary peace to deteriorate.

On 10 October 2018, the 5th Local Elections were held in Mozambique. Renamo is claiming victory in 5 municipalities that the Electoral Management Bodies (EMBs) said to have been won by Frelimo. Civil society electoral observers substantiate Renamo’s position. The issue is now in the Constitutional Court, but the interim leader of Renamo has told a media teleconference that the issue may affect the recently started DDR process.

The last three and a half years have also been dominated by a debt scandal, which led to a financial blockage of the country from its traditional donors and budget support partners, including the IMF and the World Bank. The formerly ruling Guebuza administration contracted illicit debt amounting to more than two billion dollars in 2013 and 2014. This was done without obtaining consent from Parliament, which is required by the Constitution, and without informing its financial partners, as is required by IMF statutes and international best practices.

When the illicit debts were contracted, the current President of Mozambique, Filipe Nyusi, was Minister of National Defence. Since the debts were exposed by the Wall Street Journal and the Financial Times, the current government has said that they did not know about the debts, even though the funds were earmarked for strengthening the country’s security scheme. An external and independent audit by Kroll found that more than half of the money was reportedly used by the government, with USD 500 million having “disappeared” into the Ministry of National Defence.
Specific instances of human rights violations and larger trends

According to media reports, in the last four years more than 80 politicians, all of them belonging to Renamo, were killed. One of them is Jeremias Pondeca, who was a member of the State Council and of the Peace Negotiation Group. He was shot dead in broad daylight in Maputo. Another is Jose Manuel, who was a member of the National Defence and Security Council. He was killed in the city of Beira, the second largest city in Mozambique. Also, Manuel Bissopo, the secretary general of Renamo and a Member of Parliament, was shot in an attempted assassination. He survived and was evacuated to a clinic in South Africa.

Furthermore, the Franco-Mozambican constitutional law professor, Gilles Cistac, was killed in March 2015 by gun men in broad daylight in Maputo. This was just days after addressing the media, defending the possibility, under the Mozambican Constitution, to have municipalities at the provincial level. He was the leading constitutional lawyer in the country and stated this at the same time that Renamo was asking the government to allow it to appoint governors in the five provinces it won in the 2014 elections.

The pace of attacks and violations of human rights picked up after the illicit debts were exposed. These verbal and physical attacks targeted civil society organizations, independent academics, journalists and human rights activists. They became “everyday bread” in Mozambique:

- Professor Jose Jaime Macuane was a resident commentator on Pontos de Vista on STV, the leading independent TV station in the country. He was abducted in broad daylight in the heart of Maputo in May 2016. He was severely beaten, shot in one of his legs, and left unconscious in the outskirts of Maputo by the ring road;
- Ericino de Salema was a journalist and human rights lawyer who replaced Macuane on the Sunday TV Show. He was also abducted in broad daylight in Maputo, two years later in March 2018. He was severely beaten and left unconscious in the same area where Macuane had been left, with two legs and one hand broken;
- Over the last four years, the leaders of civil society organisations have been subject to recurrent attacks to their dignity in public, especially on social media. The attackers accuse the leaders of being against the “supreme interests” of the country and allege that they act on behalf of western governments. As a consequence, some civil society leaders were forced to leave Mozambique or relocate to residential complexes with rigid security protocols;
- When civil society organisations convene conferences and workshops to discuss public interest issues, people linked to the security services infiltrate the meetings with the objective of diverting the discussions by bringing in marginal issues and accusations against the organisers and speakers.

Beyond these specific situations, peaceful demonstrations are never authorised by the police, even though Mozambican law does not even require authorization, just notice given by the organisers to the police in order to provide relevant security.
Concerns about the future

As mentioned above, once the illicit debts were exposed, the IMF, World Bank and other partners stopped financially supporting the government. In Mozambique, this is particularly serious, as half of the State budget came from these donors and financial partners.

The blockage led to a budget crisis; the government now has to finance all public operations with internal public income, which is not enough to cover public expenses. In order to deal with the deficit, the government is contracting internal debt, which is now more than USD 15 billion, according to the Central Bank of Mozambique. This is greater than the GDP of Mozambique and is set to continue to grow. This puts pressure on businesses, raising the costs on bank loans and slowing job creation.

Although Mozambique is often considered the new *el dorado* when it comes to the extractive industries such as natural gas, incomes are not expected until 2022. For now, life is getting more and more difficult, which is leading to historic levels of government unpopularity. The results of the 5th Local Elections in the country demonstrate that: Frelimo had its worst results since the beginning of democratization in the country, losing 9-14 municipalities out of the 53 contested.

October 2019 will see presidential, parliamentarian and the first ever provincial governor elections in Mozambique. It is easy to see that the coming months will be difficult for civil society organisations, independent academics, journalists, and human rights activists. The government, through its control over the security and defence forces, may intensify attacks on its critics.

Persecution of civil society leaders, journalists and human rights activists are already ongoing, mainly in the Central and Northern regions of Mozambique where Frelimo’s popularity is waning. For example, in Nampula province the leaders of Radio Encontro, which belongs to the Catholic Church, have received death threats in October 2018. They are being accused of being responsible for the Frelimo defeat in the city of Nampula. Furthermore, in the same province, some human rights activists who were involved in the parallel counting of votes had to leave the province or even the country, after receiving serious death threats.

Because these times are dangerous, security protocols must be activated by every independent civil society organisation working in governance, political participation, democratization and elections. It is essential that human rights defender groups and organisations are vigilant and that dangerous threats are dealt with in a timely and meaningful manner.
Politics and Security Agencies Makes Journalism Unsafe in Lesotho

Keiso Mohloboli

When the new four-party coalition government led by Prime Minister Thomas Thabane took over power in June 2017, from the former premier Pakalitha Mosisili, hopes rose that the African Kingdom in the Sky had finally escaped its cycle of violence and impunity.

Thabane himself admitted when he got into the Prime Minister’s office last year that the Lesotho Defence Force (LDF) has held too much power in the country. Their influence created the need for Lesotho’s two consecutive snap elections in the space of two and a half years.

Lesotho has been on the agenda of almost every meeting of the Southern African Development Community (SADC) since 2013. International bodies such as the African Union, the Common Wealth and the United Nations have also shown concern through statements of intervention to address the country’s political and security instability. In a report by a SADC Commission of Inquiry, it was noted that there was a breakdown in rule of law and violent practices by State agencies which needed to be addressed by bringing the perpetrators of abuse before the courts.

Between 2015 and 2016, political activists who were supporters of opposition political parties were often arrested by police; sometimes they were released without charges. Home Affairs Deputy Minister Machesetsa Mofomobe was arrested more than once without a charge, although the police would claim that he was being interrogated for treason. Chief Executive Officer of Lesotho National Development Corporation (LNDC) Mohato Seleke was also arrested and harassed by police for allegations that he was “Makhaola Qalo”, a personality active on Facebook who published confidential government information on social media.

According to many Basotho who had hoped Prime Minister Thomas Thabane would usher in an era of change, Thabane has utterly failed to tackle human rights abuses in Lesotho.

ACHPR, RESOLUTION 185 ON THE SAFETY OF JOURNALISTS AND MEDIA PRACTITIONERS IN AFRICA (2011)

“Calls on States Parties to the African Charter and concerned authorities to fulfil their obligation on preventing and investigating all crimes allegedly committed against journalists and media practitioners and also to bring the perpetrators to justice.”
The risks inherent in critical journalism in Lesotho

Over the past few years, journalists who have sought to report on State practices have done so at great risk to their own safety.

In June 2016, Editor Lloyd Mutungamiri and Senior Journalist Keiso Mohloboli, of the Lesotho Times and Sunday Express Newspapers, were arrested for writing a story exposing corruption between the government of Lesotho and the army. The story was headlined, “Exit strategy for Kamoli”. After an intense and threatening interrogation, the duo was released without charges.

A week later on 5 July 2016, Lloyd was again arrested, this time with publisher Basildon Peta. Lloyd was released again, still with no charge, but Basildon was charged with criminal defamation and crimen injuria and was released on bail of M800.00 (USD 56.51) and surety of M30 000 (USD 2,118.79). Four days later, on 9 July 2016, unknown assailants attacked and shot Lloyd four times in the head. The Southern Africa Litigation Centre intervened and supported legal representation for Basildon, resulting in the offence of criminal defamation being declared unconstitutional.

In May 2018, the Lesotho Constitutional Court said criminalising defamation would have a frightening effect on freedom of expression for journalists and could lead to censorship and a less informed community.

A group of soldiers was abducted and detained in the Military Maseru Maximum Prison in May 2015. They were accused of mutiny. Some of the soldiers escaped the country, and are now in exile in South Africa. No activist or journalist has been able to freely report on the issue.
officers from Transformation Resource Centre (TRC), the only non-governmental human rights organisation which has observer status in the African Commission on Human and Peoples’ Rights, received threats for advocating for the release of soldiers who were abducted on suspicion of mutiny.

Lesotho Defence Force (LDF) Commander Lieutenant General Maaparankoe Mahao was fatally shot by his subordinates on 25 June 2015. Journalists and human rights activists who reported or spoke about the murder of the military boss were declared to be the opposition by former Prime Minister Pakalitha Mosisili’s government. Specifically, the head of the LDF Information Office, Brigadier Ntlele Ntoi, harassed Senior Journalist Keiso Mohloboli by writing a three page letter mocking her as being a half-baked journalist who acts as a prosecutor in all her reports. He later told the editor Lloyd Mutungamirri to stop his journalists from asking for any information regarding the army.

SABC Lesotho Correspondent Nthakoana Ngatane was allegedly harassed and forced into exile by the All Basotho Convention (ABC), a group which supports the Prime Minister’s party. She is still in exile.

Journalists and human rights defenders in Lesotho are often dragged to courts on defamation claims and crimen injuria. They are then forced to disclose sources of information. Under the Penal Code of 2010, police can force journalists to disclose sources for the sake of helping police with investigations.

Journalists cannot access information from government information officers because the Public Service Regulations of 2008 provides that a public officer shall take an oath of secrecy and an officer “who discloses information which is in his or her protection and confidentiality” commits a disciplinary offence.

The army, police, national intelligence and correctional officers have been used by politicians to perpetrate human rights abuses and violations. This has contributed to the country’s political and security instability and to self-censorship by the media.

PRESS RELEASE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS ON THE RULING BY THE LESOTHO’S CONSTITUTIONAL COURT DECLARING THAT CRIMINAL DEFAMATION IS UNCONSTITUTIONAL (1 JUNE 2018)

“The Special Rapporteur notes that this ruling represents an extremely important victory for freedom of expression in the Kingdom of Lesotho, and is in line with the Commission’s Resolution on Repealing Criminal Defamation Laws in Africa (ACHPR/Res.169 (XLVIII)10), which calls on States Parties to the African Charter on Human and Peoples’ Rights to repeal criminal defamation laws or insult laws which impede freedom of speech.”
Threats to HRDs Working for Promotion and Protection of Sexual and Reproductive Health Rights in the Region

Tambudzai Gonese-Manjonjo

Activists, lawyers, and other people who stand for the rights of others in promoting human rights are human rights defenders (HRD). In the Southern African region, HRDs are facing fierce opposition and hurdles that include harassment, restrictions on the ability to express themselves and criminalisation of their activities. Enforced disappearances, assault and extra-judicial killings are some of the worst effects being felt by HRDs in the region. This situation applies to broad-based human rights, as well as in the area of HRDs advocating for respect and promotion of sexual and reproductive health rights, and women human rights defenders (WHRD). The aim and effect of this opposition is to silence and weaken their ability to speak up and act on behalf of others by delegitimising and discouraging them. The use of criminalising and regularising provisions in the law are some of the strategies applied by State actors to reduce civic space. In addition, non-State or State-sponsored private actors have also participated in the melee with the use of the media, particularly social media, and gender-specific harassment of WHRD.

In Malawi, the case of Beatrice Mateyo illustrates the use of the criminal law to harass and restrict WHRD. At a march organised by civic society and women parliamentarians to push for more effective State action against gender-based violence in Malawi, Beatrice was arrested and detained by the police for a poster which had words which were deemed by the state to be inappropriate. She was charged with a colonial-era offence of “Insulting the modesty of a woman”, a charge aimed less at protecting women than silencing them. The ensuing public debate was aimed at delegitimising her cause, as the focus shifted from the issue of gender-based violence that she was marching against, to a personal moral issue. The purpose of the arrest, mere harassment, became clear subsequent to the arrest and release on police bail, as, a year later, Beatrice is yet to appear in court to answer to the charges. Meanwhile, the arrest has served its purpose, which is to silence and deter others from expressing themselves freely in defence of human rights.

In Tanzania, an increasingly autocratic President and government have brought credible fear of the imminent shutting down of civic space. The President’s remarks, reported in national and international press, reflect an intolerant attitude to sexual and reproductive health rights and to those who advocate for them. In June 2017, President Magufuli declared that girls who got pregnant whilst in school and gave birth should not be allowed to return to school. He then publicly threatened civil society groups that were lobbying the government to repeal the law that was used to expel pregnant girls from school, Regulation No.4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) G.N.No.295 of 2002. There were subsequent reports that the State arrested pregnant girls and forced them to disclose the men responsible for the pregnancies. This is unfortunate, in a country with high teenage pregnancy and child marriage rates.
The President’s hard stance has a chilling effect on the work of HRDs working to manage the effects of teenage pregnancy and child marriage. In addition, the Home Affairs Minister has made threats to deregister NGOs campaigning for teenage mothers’ return to school and has also threatened to fire school heads who do not comply with the directive. An opposition member of Parliament, Malima Mdee, was charged with insulting the President for speaking up about the issue and challenging the President on the legality of the policies and pronouncements in light of national and international laws that Tanzania is signatory to.

In September 2018, President Magufuli reportedly expressed disapproval of women using family planning to suppress births, and, despite the remarks being phrased as an opinion, there was governmental follow-up by the suspension of family planning commercials on television and radio by the Ministry of Health, Community Development, Gender, Elderly and Children. There have also been reports of intimidation by the State of those that provide information about family planning services. Clearly, any activism contrary to the pronouncements of the President, regardless of the legality thereof, is likely to be met with reprisals. This has rightfully sparked fear among civil society.

The need for activism to realise SRHR for vulnerable and marginalised groups in Tanzania, particularly adolescent girls, is imperative, with the high teen pregnancy and child marriage rates. The presence of contradictory and confusing laws makes advocacy for law reform crucial. The High Court, in Rebecca Gyumi v Attorney General (2016), outlawed sections of the Marriage Act, 1972, that allowed marriage of 14 and 15 year old girls in 2016, declaring that the law was out of touch with current sexual offences and education legislation that criminalises sex with school children and giving the government a year to change the law. The government, however, has appealed against that judgment, and indicated that there is no intention to outlaw child marriage.

The use of draconian legislation designed to muzzle and suppress dissent has increased, with laws like the Cybercrimes Act of 2015 and the Statistics Act of 2015. These laws have greatly increased the State’s powers of search and seizure, and make it an offence to publish statistics that are not in agreement with government statistics. As a result, arrests and detentions of HRDs have become prevalent. With the gaps evident in SRHR in Tanzania, and the need for HRDs to speak up and act, it is likely that the attacks will increase.

In Zimbabwe, social media has proved to be both an ally and a threat to HRDs, and in particular WHDRs and those working on SRHR. The State and State-allied parties continue to use draconian criminal and regulatory legislation to muzzle and silence, especially the “uncomfortable truths” that come out from working with vulnerable and marginalised groups and promoting their SRHR. Katswe Sisterhood, a youthful organisation working on SRHR and carrying out programs within informal settlements with vulnerable groups, including sex workers, discovered the existence of children engaged in sex work and being sexually exploited. They raised awareness to Members of Parliament, but no action was taken. They decided to air radio interviews with some of the children on social media to highlight the sexual exploitation and desperation of the situation. There was an immediate State reaction, in addition to public outcry, that resulted in many of the children being taken into protection by the ministry responsible for social welfare. However, the reprisals against Katswe Sisterhood included accusations of fabrication by the public on social media, and being called in for questioning by the police, accused of “communicating falsehoods”.

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In addition, the State also called into question the organisation’s registration status, as they were not registered as a Private Voluntary Organisation in terms of the law. This is illustrative of the dangers faced by HRDs in communicating and expressing sensitive information for the purpose of advancing the rights of vulnerable groups.

The issues and illustrations highlighted are not isolated; they are prevalent within the region. Violations or threats to freedom of expression, arbitrary arrests, threats to deregister organisations, assault and threats to security are all aimed at restricting or closing civic space for HRDs to be active in promoting human rights.
When Medical Treatment Itself Violates Freedom of Expression, Movement and Association

Annabel Raw

The delivery of psychiatric services in many countries in the Southern Africa region continues to operate in violation of international and regional human rights standards. The laws that frame these practices are not only contrary to the Convention on the Rights of Persons with Disabilities, but tend to entrench the silencing and disenfranchisement of individuals in our communities who have great potential to contribute to social progress.

In Zambia, the Mental Disorders Act of 1949, for example, entrenches a system of indefinite detention for persons deemed to be “idiots”, “imbeciles”, “feeble-minded” or “mentally disordered”. Community members, police and families can use the law to initiate detention and forced treatment by court order through procedures that offer minimal due process guarantees and which seldom implement the right to be heard in determining one’s own fate. Detention is permitted not only in psychiatric institutions but also in prisons. Once there, one has no rights to consent to psychiatric treatment, methods of which include physical restraints such as chaining, isolation, electro-convulsive therapy, and the overuse of anti-psychotics and sedatives. Where physical abuse occurs in these settings, ordinary healthcare is often not available. Studies by organisations like the Mental Health Users Network of Zambia (MHUNZA) and Mental Disability Advocacy Centre (MDAC, now Validity) have shown that the law is frequently misapplied in practice, with many people detained without court orders or without legal basis, making their detention arbitrary. Once subjected to the law, all control over one’s property and assets can be taken away, even to be liquidated to cover the expenses for one’s own abuse in detention. Additionally sinister provisions even permit a form of deportation of citizens classified under the Act.

Mental health users, who have fought against the law for decades, decry the absence of mental health services in communities. This means that people who wish to access mental healthcare have few choices but to risk the expense and abuse of the system through centralised psychiatric institutions. Without access to primary healthcare-level services, dealing with mental health crises through punishment, arrest and detention becomes inevitable.

Activists who have been subjected to these laws have to navigate their advocacy with the lifelong threat of arrest. Any conduct expressing public anger in protest is too easily deemed a justification for arrest of someone previously certified under the Act. These fears are not abstract. In late 2017, an activist from MHUNZA, who took the government to court to challenge the constitutionality of these laws in 2017 was, subsequent to the court’s decision, arrested at MHUNZA’s offices by heavily-armed police allegedly on the basis of his psychosocial disability.

The potential for the political abuse of these laws regionally has similarly manifested in Malawi when a land rights activist, Vincent Wandale, was arrested in 2017 for the crime of “publication of false statements”. Mr Wandale was arrested after declaring a secession in protest of government’s failure to accede to demands to return colonially-inherited land to communities. Subsequent to bringing the charges, the prosecution questioned Mr Wandale’s mental fitness to stand trial and had him forcibly committed to Zomba Mental Hospital. Mr Wandale strongly contested
the diagnoses but was not permitted the opportunity to be examined by a doctor of his own choice. At Zomba Mental Hospital, Mr Wandale was subjected to coercive psychiatric treatment, despite his verbal and written protest, physical resistance, his unmet demands to be treated by a doctor of his own choice, and multiple court applications he drafted in an effort to stay the administration of anti-psychotic drugs. After months he was eventually released on bail but remains subject to a gag order.

The rights of persons with psychosocial disabilities and mental health users to freedom of expression, movement, protest and association is violated through the abusive application of archaic mental health laws regionally. Their very application is harmful to mental health by perpetuating abuse and isolation. Advocating against those very laws and for improved access to community-based services poses a risk of indefinite and arbitrary arrest and abuse. At the same time, these laws provide a tool for targeted political oppression to silence political dissidents (who may or may not identify as persons with psychosocial disabilities) whose campaigns upset the dominant political discourse.

Old, colonially-inherited mental health laws applicable in many Southern African countries are rife with opportunity for abuse to squeeze rights defenders and restrict civil and political rights. Because of the entrenched stigma embedded in our thoughts about mental health, human rights defenders need to be particularly vigilant against abuses under these laws which are frequently socially sanctioned as a result of that stigma.

Human rights are inseparable and interdependent: it should come as no surprise that efforts to shrink civic space have health-rights implications. Human rights defenders need to work collaboratively in understanding the interdependence of rights conceptually and in practice.
Challenges Facing Human Rights Defenders in the Kingdom of Eswatini

Dumsani Dlamini

The Kingdom of Eswatini is one of the last absolute monarchies in the world. It has no regard for human rights or rule of law. Each and every day we wake up to witness the violation of the Constitution and in particular the most important provisions of the Constitution, Chapter 3. Even though we live in a constitutional dispensation, culture takes precedence over the provisions of the Constitution. A recent example was the appointment of the new Prime Minister on 27 October 2018 at eSibayeni. This violated section 67 of the Constitution which provides that the King shall appoint the Prime Minister from among members of the House acting on the recommendation of the King’s Advisory Council.

There is no gender equality and this is reflected in the laws and practices in this kingdom. Women are regarded as second-class citizens and are deprived access to and control of land. This contradicts section 211(2) of the Constitution which provides that citizens shall have equal access to land for normal domestic purposes without regard to gender.

There are cultural practices which discriminate against women even though sections 20 and 28 of the Constitution prohibit discrimination. This is also reflected in our laws. The Citizenship Act and the Constitution do not allow women to pass citizenship to their children if they are born by a foreign man. Furthermore, they cannot pass citizenship to their foreign spouse. If they marry a non-Swazi, they are expected to denounce their Swazi citizenship and regaining it is very tedious.

The rights of human rights defenders are violated and not protected simply because they believe in the rule of law. This is so serious that the families of human rights defenders are also targeted. Even children may be denied services, such as access to scholarships.

Human rights defenders are often followed by the police, harassed and questioned. They are detained whenever there are demonstrations especially those who are movement leaders. Their cellular phones are bugged and when they hold meetings which are perceived as political in nature, the police attend them and intimidate participants. In most instances they do not tell anyone that they are police officers.

Human rights defenders are often beaten up by the police for believing that the Constitution entitles them to human rights. A human rights defender who believes in women’s rights is always ridiculed for pushing the gender agenda and this is exacerbated by the patriarchal nature of our society.

Human rights defenders face danger from the police as they are seen as a threat to the current system. Eswatini needs to domesticate the Declaration on Human Rights Defenders. This will address a number of, if not all, the issues faced by human rights defenders. It would assist their recognition in the Kingdom of Eswatini.

There is serious need for the protection of human rights defenders. As a result of their commitment to human rights and fundamental freedoms, they are targets for cruelty by states, government
organs and individuals. Laws and practices regarding freedom of association, expression and assembly are restrictive in the Kingdom. Even though we have the Public Order Act of 2017, which allows for assembly, the Act is cumbersome and officials who have obligations under the Act to protect the right to assembly, do not know their duties.

These officials treat notification of a protest as a request for a favor. They act like we require permission from them, yet the only obligation is to notify them. The power given to the police and Magistrates are still too much. They request a lot of information such as an agenda, a list of guests and their speeches to be made on the day.

**ACHPR, COTONOU DECLARATION ON STRENGTHENING AND EXPANDING THE PROTECTION OF ALL HUMAN RIGHTS DEFENDERS IN AFRICA (2017)**

“In many countries, these laws, policies and measures are enforced without any judicial scrutiny or with limited judicial oversight. Counter-terrorism measures are being increasingly used to curtail the activities and work of human rights defenders who have been unduly referred to and targeted as terrorist groups when they challenge the adverse impact of the fight against terrorism or when they make demands for good governance, democracy or for the protection of human rights in general.”

“Ensure that responses to terrorism do not lead to undue restrictions of civil society space and are conducted in compliance with the Principles and Guidelines on Human Rights and on Terrorism in Africa.”
PART II Challenges Faced by Human Rights Defenders in the Southern Africa Region

Searching for Human Rights and Democracy in Eswatini

Mbongiseni Shabangu and Thamsanqa Hlatswayo

In Eswatini, political activism and human rights defence converge. The political parties who form part of the Swaziland Political Party Assembly support good governance and democratization. We fight to end corruption and the horrendous abuse of power by the monarchy and its footstools in traditional leadership positions at different levels of governance. We have raised serious concerns around the lack of legitimacy that underlies the elections in Eswatini, including the recent elections conducted in September 2018.

Activists for human rights, equality, democracy and workers’ rights in Eswatini have faced consistent repression since the country’s independence. Decades of pervasive arrests of activists have resulted in a weakened pro-democracy movement and a prevailing climate of fear within Eswatini.

This fear and paralysis is facilitated by the fact that the 1973 Proclamation, which dissolved and prohibited all political parties, has still not been explicitly revoked. The State has further continued to repress political activism after the new Constitution came into being in 2005. In 2009, the Supreme Court held that the right to freedom of association in the Constitution necessarily includes the right to form and join political parties. Repression faced by parties since the judgment however suggests the opposite. Members of all political parties, including the Swazi Democratic Party (SWADEPA), the Ngwane National Liberatory Congress (NNLC) and the People’s United Democratic Movement (PUDEMO), have in various ways been prevented from carrying out political party activities and have faced arrests, harassment and police abuse.

PUDEMO has been designated a terrorist organisation since 2008. In 2016, the High Court, in the case of Thulani Maseko and Others v Prime Minister and Others, ruled in favour of activists who challenged the constitutionality of certain provisions in the Suppression of Terrorism Act and Sedition and Subversive Activities Act, which have been used to repress political activism. The State has however persisted in its appeal of the judgment and many political activists and human rights defenders continue to have pending criminal charges and restrictive bail conditions hanging over them.

The current Constitution has significant limitations and inherent contradictions which require constitutional reform. Swaziland is an absolute monarchy and the King maintains far more power than parliament or the electorate. A few examples are mentioned below:

An apt example of the King’s power is the recent unilateral change of the country’s name without consultation with parliament or citizens, using his assumed royal prerogative. In the siSwati version of the Constitution, the country is referred to as kaNgwane, not Eswatini. The re-naming of the country has since been challenged in High Court and the State has objected to such challenge on the basis that the Royal Command is immune from judicial processes (Institute for Democracy and Leadership, Thulani Maseko and Thamsanqa Hlatswayo v Swaziland Government). For many Swazis it remains hard to suddenly call our country Eswatini instead of
Swaziland, especially knowing that we were denied the opportunity to participate in the decision whether the country should be renamed.

The Senate consists of 30 members. Only 10 of these senators are elected by members of the House of Assembly to represent a cross-section of Swazi society, whilst 20 senators are appointed by the King. The King’s appointments to the House of Assembly, Senate, and key positions in government, traditional institutions and the judiciary, are often filled by members of the royal family. The monarchy further exerts a monopoly over State resources and key areas of the economy, including through the royal institution Tibiyo TakaNgwane.

All Swazi Nation land vests in the King and individuals do not have individual title to it. The position of citizens who fall into disfavour with the King or his chiefs are accordingly precarious. This explains the reluctance of citizens to freely express political opinions or affiliate with political parties, when doing so can result in significant sanctions including their eviction.

The Constitution provides that any bill relating to Swazi law and custom need not be introduced in the House of Assembly and must be passed by two-thirds of the Senate before being assented to by the King. Swazi law and custom include matters relating to the King’s status and powers as iNgwenyama, the powers of customary and chiefs’ courts, and Swazi Nation land. Since the King appoints two-thirds of the members in the Senate and they are unelected, this leaves the power to determine laws which are of critical importance to the majority of Swazi citizens, in the hands of the King, without any electoral oversight or accountability.

Despite the rights to freedom of association and expression being entrenched in the Constitution, the government maintains that the electoral system is based on individual merit, and that there is no place for political parties within this system. This narrow reading of the Constitution impacts on the role political parties can play within Swaziland and indicates a country that is far from democratic and a State that avoids being held accountable by the electorate. Further, we have had to accept that the judiciary often does not have the ability nor inclination to hold the State accountable.

**AU, DECLARATION ON THE PRINCIPLES GOVERNING DEMOCRATIC ELECTIONS IN AFRICA (2002)**

Specifically provides that every citizen shall have the freedom to be a member of a political party; and that individuals or political parties shall have the right to freedom of movement, to campaign and to express political opinions with full access to the media.

**AU, AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE (2007)**

Provides that State Parties must strive to institutionalise good political governance through “consolidating sustainable multi-party political systems”.
In May 2018, the Swazi Democratic Party (SWADEPA), approached the High Court for an order to clarify the role political parties can play within the current electoral system. The case of *Mbongiseni Shabangu and Others v Elections and Boundaries Commission and Others* was about the rights to freedom of expression and association during the election campaign period. The applicants sought an interdict to prevent the Elections and Boundaries Commission from interfering with the rights of candidates for election to the House of Assembly to express their political and/or other views or policies; the rights of candidates to associate publicly with their chosen political parties; the rights of registered voters to exercise their right to vote knowing all relevant information about the candidates running for public office. As with most cases of a political nature, the State replied saying that the applicants had no legal standing to bring the case and no right to act on behalf of its members and in the public interest. The case was summarily dismissed by the High Court in July 2018 and by the Supreme Court in August 2018 and both courts refused to hear the merits of the case despite the fundamental rights at stake.

In the absence of multi-party democracy, we have seen an abuse of meagre State resources and the consolidation of resources in the hands of the monarchy and those businesses which support it. At the same time, our communities suffer from increased impoverishment and their rights are consistently violated.

As political parties and civil society we need support, knowledge and skills to engage strategically with bodies such as SADC, the African Union and United Nations. The terrain for pro-democracy activism has changed from 30 years ago when SADC States used to support freedom fighters with every possible resource. The same States have converged through our own regional body, SADC, to defend each other from human rights activists of all kinds. They have also successfully managed to remove the ability of human rights activists to hold their States accountable through the SADC Tribunal, by removing individual access to this body.

**ACHPR, RESOLUTION ON THE ADOPTION OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA (OCTOBER 2002)**

“Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.”
Southern Africa Human Rights Defenders Face Limitations to Accessing Justice at Regional Institutions

Suzgo Lungu

For human rights defenders, the ability to access justice beyond domestic courts is critical. At the continental and regional level, there is strong resentment by African leaders towards institutions meant to hold States accountable, such as the African Court on Human and Peoples Rights (African Human Rights Court), the African Commission and the SADC Tribunal, and States continue to disregard their decisions. Reports of non-compliance with decisions of both the African Court and the African Commission on Human and Peoples Rights have been brought to the attention of the Assembly of Heads of State and Government of the African Union (AU) with little or no success.

There is also growing pressure to abolish the African Commission by some African governments, which, if successful, would be a bitter blow to the African human rights architecture. Little is known about progress on this issue, but major challenges remain. The AU Assembly has appointed a consultant to advise the African Court on compliance. It is difficult to determine whether this initiative will bring positive changes. During the recently concluded AU Summit, the Permanent Representative Committee of the AU (PRC) adopted a decision requesting the Court to desist from the practice of naming and shaming States that have not complied with its decisions by highlighting such failure in the Annual Activity Reports of the Court.
In June 2014, the AU adopted the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). In August of the same year, states in the Southern Africa Development Community (SADC) adopted a new Protocol on the SADC Tribunal. Whereas the Malabo Protocol seeks to provide the African Court with jurisdiction over international crimes, the new SADC Protocol removed the SADC Tribunal’s jurisdiction to hear human rights complaints brought by individuals and/or non-governmental organisations (NGO’s). African Heads of State seem to be doing all they can to ensure that their interests are protected against the rights of individual citizens and the societies they ought to represent.

The Malabo Protocol, though not yet in force, grants immunities to Heads of State and government, ministers of foreign affairs and senior government officials from prosecution when they commit or are suspected of committing international crimes like genocide, crimes against humanity and war crimes. Notably, the fact that the Protocol concurrently extends the category of individuals entitled to immunities to include senior government officials from the traditional Troika, (namely, Heads of State and government and ministers of foreign affairs), reinforces the fear that this Protocol is probably a self-serving instrument shielding leaders from any form of accountability for committing these heinous crimes.

For many years, the SADC Tribunal was the only sub-regional court within the SADC region to hear cases filed by individuals, provided that they had exhausted all local remedies. Looking at the cases that the Tribunal presided over since its inauguration in 2005, the independence and impartiality of the Court was not in doubt. The boldness displayed by the Court, as demonstrated by its decisions, was admirable and gave hope to over 277 million people in the region. It is not surprising that the SADC leaders saw the institution as a threat to their self-serving interests, hence the suspension.

The suspension and eventual adoption of the new SADC Tribunal Protocol that changed the Court’s jurisdiction is now the subject of at least three lawsuits, in South Africa, Mozambique and Tanzania. The regional tribunals are important because they provide an avenue for human rights defenders to seek redress outside their country, particularly where those in authority have established an authoritarian regime that frustrates its citizens’ access to local remedies.
PART III

Criminal Laws Affecting Freedom of Assembly
Overview of Criminal Laws Affecting Freedom of Assembly

Tyler Walton and Anneke Meerkotter

Freedom of assembly is a fundamental right that is protected in Constitutions, international human rights treaties, and regional law. The African Commission Special Rapporteur on Human Rights Defenders defined assemblies as:

“an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in. Assemblies play a vibrant role in mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States’ public policy.”

Because freedom of assembly is a fundamental right, it must be protected by State actors, including police. While the right to assemble is not absolute, it should only be limited when it is absolutely necessary, and those limitations should be proportionate. In a 2017 report, Guidelines on Policing Assemblies, the African Commission stated:

“The enactment, interpretation, implementation and enforcement of national laws and regulations governing the right to assemble freely with others must...require law enforcement responses that favour the presumption of the exercise of the right to assemble freely ... limitations and restrictions on the right to assembly freely with others must be treated as an exception, and ... any limitations or restrictions imposed must be necessary and proportionate.”

The Guidelines went on to describe the narrow situations in which dispersal of assemblies might be necessary:

“The dispersal of assemblies should be a measure of last resort, and law enforcement officials must act on the presumption that although they have powers to intervene in an assembly, they should only do so in circumstances in which it is legal, necessary, proportionate and non-discriminatory to do so.”

Despite this clear framework on freedom of assembly, and the important role that assemblies play in the civic life of an open democracy, countries around the Southern African region continue to unjustly limit assemblies using an assortment of laws.

Disobedience of lawful orders

Many countries have criminal offences that penalise disobeying lawful orders from properly authorised government officials. Not all of these offences violate the freedom of assembly of citizens, but when they are crafted too broadly, they can create impermissible limitations on freedom of assembly. One such example of an overly broad offence is found in section 127 of the Zambia Penal Code. It provides that:

“Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised
in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years."

Botswana, Tanzania, Kenya, Uganda, and Seychelles all have this exact same wording. The primary concern with this statute is its broad framing. It relates to “any order, warrant or command duly made” but does not define what “duly” means. Furthermore, it makes it an offence to disobey the order of any person “acting in any public capacity” even if the person who is alleged to have disobeyed the order was not aware of the public capacity of the person or his/her duty to obey that person’s orders. Lastly it neglects to include the defence of a lawful reason to disobey. Overall, this wording leaves the right to assemble completely up to the discretion of police officers, without due protections of the right for those assembling.

The Supreme Court of Nigeria examined a statute similar to this in the case of Chief Olabode George and Others v Federal Republic of Nigeria SC 180/2012. The Court held that the section of the Criminal Code is at variance with the Constitutional protection from conviction of a criminal defence that is not defined at the time the act is committed. They therefore declared it unconstitutional and null and void.

**Public order laws**

Another area of law that is often used to curtail the freedom of assembly is public order laws. In general, public order laws target one of the permissible justifications for limiting the right to freedom of assembly. As is stated in article 21 of the ICCPR, “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of …public order.” In addition to targeting public order, however, limitations must be in conformity with law and necessary. Often, countries’ public order laws do not live up to these standards. One such law that was recently struck down was a provision of the Public Order and Security Act (POSA) of Zimbabwe.

In September of 2016, the regulating authority of the Harare Central Police District banned all public protests, marches and assemblies for two weeks in terms of section 27 of POSA which reads:

“If a regulating authority for any area believes on reasonable grounds that the powers conferred by sections twenty five and twenty six will not be sufficient to prevent public disorder being occasioned by the holding of public demonstrations or any class thereof in the area or any part thereof, he may issue an order prohibiting, for a specified period not exceeding one month, the holding of all public demonstrations or any class of public demonstrations in the area or part thereof concerned.”

Civil society organisations sued, claiming that this section of the POSA was unconstitutional and violated their right to assembly. The case, Democratic Assembly for Restoration Empowerment and Others v Newbert Saunyama and Others, ended up before the Constitutional Court of Zimbabwe, which found the provision unconstitutional in October 2018.

In striking down the law, the Court found that the blanket ban cast too wide a net, stifling assemblies which could have been peaceful. Furthermore, the court was concerned that no time limitation was included in the provision. The police could, in theory, have stacked one ban on top
of another, each with less than a month’s duration, but which in reality extended in perpetuity. This would have meant a complete evisceration of the freedom of assembly. The Court properly applied the Guidelines of the African Commission which reinforce that limitations on the right to freedom of assembly should be the exception, and that bans on assembly should be used only as a last resort.

In addition to this case, other restrictions on protests justified under POSA have been reviewed. For example, in November 2017, the Supreme Court of Zimbabwe set aside a decision of the High Court of Zimbabwe, in which the High Court refused the Sexual Rights Centre (SRC) in Bulawayo the right to hold a peaceful demonstration. The purpose of the peaceful demonstration was to create public awareness of ongoing violence and abuse faced by sex workers.

Section 12 of South Africa's Regulation of Gatherings Act, 1993 made it a criminal offence to “convene a gathering in respect of which no notice or no adequate notice was given”.

The High Court of South Africa struck down this provision as unconstitutional in *Mlungwana and Others v State* in 2017. The Court found that criminal sanctions for lack of notice had an impermissible chilling effect on freedom of speech and freedom of assembly. While the objective of notice in providing better safety and security for the public was a permissible objective, being criminally liable for failing to provide that notice was too restrictive. This result is in line with the Guidelines set out by the African Commission on Policing Assemblies in Africa, where it stated:

> “The conduct of an assembly without prior notice to public authorities, and spontaneous or small assemblies, are protected by the right to freedom of assembly pursuant to regional and international law... Spontaneous assemblies should be protected by law enforcement officials to the extent that they are peaceful.”

Assemblies, gatherings, and protests are not a privilege, they are fundamental rights in a democratic society. Any restrictions on assemblies must be necessary and proportional. The goals of countries should be to create ample civic space for both planned and spontaneous assemblies to occur, in order to have a more vibrant and participatory democracy.
Using Litigation as an Advocacy Strategy to Champion Sex Workers’ Freedom of Assembly in Zimbabwe

Humphrey Ndondo

Globally, the 17th of December marks the commemoration of the International Day to End Violence Against Sex Workers. In 2015, the Sexual Rights Centre lodged an application with the Officer Commanding Bulawayo District for a peaceful demonstration to observe the International Day to End Violence Against Sex Workers. The idea of a march was borne out of frustrations and anger from the sex workers community and human rights defenders at the Sexual Rights Centre (SRC), a community-based human rights advocacy organisation that seeks to champion the rights of sexual and gender-diverse persons, particularly the lesbian, gay, bisexual and transgender communities and sex workers. The SRC had documented an increase in the incidents of violence against sex workers, including reports of sex workers being murdered in the city. In the last quarter of 2015, four sex workers had been murdered in the city and investigations by the police had not resulted in arrests. A murderer was on the loose, and sex workers continued to face police brutality and abuse from clients without recourse to the law.

Scores of sex workers were arbitrarily arrested and detained, rounded up each night in routine raids and clean-up campaigns. Most were forced to pay bribes in exchange for their freedom. Sex workers who could not afford a bribe or would not exchange sexual favours with the police for their release would be charged with various crimes including loitering, soliciting for sex work, being in possession of condoms, and other nuisance charges such as blocking the pavement, disturbing the peace, public indecency, etc. Women were profiled as sex workers merely for being unaccompanied by a male companion at night or wearing “short skirts” or “too much make up”. Treatment during their arrest and detention was inhumane. Sex workers were chased on the streets, kicked with booted feet, clapped and arm twisted and assaulted with baton sticks. In the cells, they were forced to sleep in a fenced enclosure, drenched in water and forced to clean the detention facilities. Those in need of medication faced challenges accessing treatment and most would default on their treatment for HIV and other chronic ailments. Food was not provided in the detention facilities.

In light of the aforementioned, the SRC sought to create public awareness of the ongoing violence and abuse faced by sex workers in Bulawayo by holding a peaceful demonstration. Preliminary discussions were held with various stakeholders including the local police from Bulawayo Central Police Station, Abammeli Bamalungelo Abantu Human Rights Lawyers (Abammeli), Zimbabwe Lawyers for Human Rights and the paralegal team from the SRC. The aim was to raise consciousness and gain impetus for the commemoration. Upon seeking clearance to march from the Police Officer Commanding Bulawayo Central District, the request was turned down and the protest march was barred, under claims that prostitution was illegal. Irked by this decision, the SRC, in partnership with the Southern Africa Litigation Centre (SALC) and Abammeli Bamalungelo Abantu filed a High Court application, challenging the police action and citing the Police Commissioner and the Minister of Home Affairs as respondents. The SRC
argued that sex workers had a constitutional right to demonstrate and petition. Further, that the police in their refusal of the march had not cited any law to substantiate their decision to ban the march nor had they followed the procedure set out in the Public Order and Security Act (POSA). The SRC was aware that there were no provisions in Zimbabwe which explicitly criminalize the act of exchanging sex for money. The SRC lodged subsequent notices to march which were denied and compelled the SRC to take legal action.

The first attempt to hear the case before the High Court was unsuccessful after the lawyers of the State failed to file their heads of argument. The High Court Judge presiding over the case cautioned the State Lawyers for taking a *laissez faire* approach to matters of national importance. An *amicus curiae* was appointed to represent the state and the case was postponed to a later date. In July 2017, the High Court dismissed the application by the SRC to march and to prohibit the police from interfering with future marches. In his ruling, the High Court judge, Justice Makonese cited that sex work was immoral:

“If this court allows prostitutes to parade, promote and glorify their trade, other groups of like-minded persons will be encouraged to promote perverse acts. A court of law cannot sanction such an absurdity. I am of the view that the enjoyment of the fundamental rights under section 58 and 59 of the constitution must recede and give way to the values of decency, human dignity and morality...I hereby dismiss the application with costs”.

The SRC filed an appeal with the Supreme Court challenging the High Court ruling. In November 2017, the Supreme Court issued a favourable ruling which set aside the High Court ruling and allowed the SRC to proceed with the march to highlight the discrimination and harassment faced by sex workers. On 15 December 2017, more than 300 sex workers from Bulawayo and the surrounding areas, along with their allies, victoriously held their march to commemorate the International Day to End Violence against Sex Workers.

This case study is a demonstration of how litigation can be a successful advocacy strategy in environments where civic society space is compromised by restrictive interpretations and application of legislation, particularly towards minority groups such as sex workers.

However, it is very important that we appreciate that judges may interpret laws from a prejudiced lens, and hand over judgements that further disadvantage groups already living in the margins of the society and curtail their freedoms to assemble, associate and express themselves. Human rights arguments are often less compelling to conservative and religious fundamentalists. Like with the High Court ruling in this case, courts can push towards using arguments for morality and culture, rather than a framework of human rights as a basis for championing justice.

Litigation is an expensive exercise and time consuming. The costs for legal representation are prohibitive for most community-based organisations. There is need for sustained investments in community organisations to strengthen their capacity to handle a legal case load through sustainable strategies such as employment of paralegals from within marginalised communities themselves and building critical consciousness and human rights literacy among community members. It is also prudent that community organisations forge partnerships with human rights lawyers and benefit from the legal expertise required for successful litigation.
Moreover, legal representatives of minority groups need to be sensitive to the specific needs of their clients. Sometimes during the course of litigation, legal counsel may act without taking instruction from the client and at times fail to communicate important information such as dates set down for appearance in court. Such practices reflect a lack of appreciation of the client as the primary focus of the process of addressing injustice. Sexual minorities should be consulted in the pursuit of the desired legal outcome. Overall, litigation is often emotionally taxing if community members are litigants in the case. Therefore, litigation should only be pursued after other alternatives have been exhausted. Furthermore, psychosocial support should be provided to litigants and safety and security should be taken into consideration prior to litigation. This is especially true in countries like Zimbabwe, where human rights defenders have encountered violence and reprisals from state agents.

Documentation also plays a pivotal role in ensuring successful litigation. It is important that litigants preserve evidence to be presented. It is commonplace that files continually get lost and documentation goes missing in the legal system. It is important to keep copies of all information supplied as evidence so that threads of valuable evidence are not lost and the case compromised. The SRC employs paralegals that are tasked with documenting all cases prudently and archiving evidence that can be useful in court such as letters, medical records, photos, etc.

The gains of advocacy should be sustained through building a strong sex worker-led movement that jealously guards these achievements and monitors backlash and efforts by the State and other non-State partners to reverse these gains. It is also important to cultivate a culture of comradeship among sexual minority groups and other social justice movements to encourage an intersectional strategy to movement building.

In conclusion, it is very important that human rights defenders engage with wellness and self-awareness with the same vigor that they approach their work with and for marginalised communities. Part of the challenge with a shrinking civic society space is unhealthy workplace culture and poorly motivated and overworked personnel. It is imperative that we begin a culture of introspection and that we apply our modus operandi about social justice internally within the civil society movement, and protect ourselves from ourselves.
Most public health laws in Southern Africa contain extensive powers permitting wholesale restrictions on civil and political rights on public health grounds. These typically include broad powers to restrict freedom of movement and association to prevent transmission of infectious diseases, limitations on freedom of expression to prevent the dissemination of inaccurate or misleading health information, powers to detain persons with infectious diseases and subject them to forcible testing and treatment, and powers to evict people from houses and destroy buildings. These laws typically permit the application of criminal sanctions in cases of non-compliance and often bestow forms of policing authority on agents outside of the formal security sector.

Governments indeed have a duty to prevent the spread of disease and ensure a healthy environment in order to fulfil and protect the right to the highest attainable standard of health. Indeed, human rights law recognises, that in certain circumstances, restrictions on individual liberties may be necessary to protect the health of the community. Many constitutions in the region contain explicit limitations to rights on public health grounds. But the devil is in the application.

Human rights law permits only those limitations to rights based on public health grounds that are strictly justified in terms of human rights principles. Critically, limitations to rights on public health grounds must not be arbitrary, must be non-discriminatory, and the measures employed must be “strictly necessary” and only applied in a manner that is the least restrictive to the individual. In the height of public health crises, however, a cold and rational application of human rights principles are seldom adhered to, a situation exacerbated by the absence of procedural protections and other human rights guarantees being built into our public health laws. The potential for abuse is inherent.

Two recent examples of government responses to cholera exemplify this potential for abuse. Following a cholera outbreak in Zambia, the 2017 Cholera Regulations included an explicit ban on gatherings of more than five persons (including weddings and funerals) without the written permission of a local authority or Medical Officer and gave sweeping powers to authorised officers to prohibit street vending. Lusaka’s Passport and Citizenship Office was closed in an alleged effort to prevent travel (but likely also to prevent gathering at the office) and in Kanyama township an 18:00 curfew was imposed. When residents protested against the curfew, police arrested 55 people. In Zimbabwe, efforts to control the outbreak of cholera in 2018 were used to justify restrictions on mass gatherings as well as a ban on street vendors selling fresh foods in urban areas, with no measures to mediate or compensate for the dire implications on the livelihoods of these informal traders.

Cholera is transmitted by ingestion of contaminated food or water. When basic cholera prevention interventions are not applied, however – such as ensuring access to potable water and sanitation infrastructure – markets and public gatherings can become places of transmission. Some of the above measures may indeed have been justifiable in theory. But without procedural protections and careful scrutiny over the proportionality and strict necessity of those measures, unjustifiable rights violations are inevitable. Many street vendors in both Zambia and Zimbabwe had goods confiscated or destroyed without any resort to due process or compensation, leaving economically vulnerable sectors of society facing debt and destitution.
It is also no secret that the measures implemented in Zambia were in a period of political turmoil marked by political arrests and states of emergency, closing civic space on spurious grounds. In Zimbabwe the deaths of more than 4,000 people from a 2008 cholera outbreak have been linked to the destabilisation of political elites at the time, raising the political stakes towards heavy-handed responses. Worse yet, disproportionate measures that target individuals as culpable agents of disease contamination invariably distract our attention from the real political failures that underlie these public health crises – in the case of cholera, the persistent failures in places like Lusaka and Harare to provide universal access to potable water, functional sewage systems, refuse removal and safe housing, particularly in informal settlements.

The unnatural divide between the “health rights” sector and activists in traditionally civil and political rights needs to be challenged to ensure that as a region, we do not permit the abuse of outdated public health laws for political purposes and the persecution of individuals in our communities as scapegoats for systemic failures in government service delivery. The insistence of human rights defenders on measured responses in times of public health crises is vital to ensure that we do not tacitly endorse an erosion of democratic rights because of the deep, personal fear that underlies social responses to infectious diseases.

STATEMENT BY MR. MAINA KIAI, UN SPECIAL RAPPORTEUR ON FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION: “FUNDAMENTAL RIGHT TO STRIKE MUST BE PRESERVED” (9 MARCH 2017)

“As stated in my 2016 thematic report to the General Assembly (A/71/385), the right to strike has been established in international law for decades, in global and regional instruments, such as in the ILO Convention No. 87 (articles 3, 8 and 10), the International Covenant on Economic, Social and Cultural Rights (article 8), the International Covenant on Civil and Political Rights (article 22), the European Convention on Human Rights (article 11), and the American Convention on Human Rights (article 16). The right is also enshrined in the constitutions of at least 90 countries. The right to strike has in effect become customary international law.”

“The right to strike is also an intrinsic corollary of the fundamental right of freedom of association. It is crucial for millions of women and men around the world to assert collectively their rights in the workplace, including the right to just and favourable conditions of work, and to work in dignity and without fear of intimidation and persecution. Moreover, protest action in relation to government social and economic policy, and against negative corporate practices, forms part of the basic civil liberties whose respect is essential for the meaningful exercise of trade union rights. This right enables them to engage with companies and governments on a more equal footing, and Member States have a positive obligation to protect this right, and a negative obligation not to interfere with its exercise.”

“… I deplore the various attempts made to erode the right to strike at national and multilateral levels … I urge all stakeholders to ensure that the right to strike be fully preserved and respected across the globe and in all arenas.”
PART IV

Criminal Laws Affecting Freedom of Association
The Impact of Criminal Laws on Freedom of Association

Tyler Walton and Anneke Meerkotter

One of the fundamental rights in a democratic society is the freedom of association. As the African Commission’s Guidelines on Freedom of Association and Assembly in Africa state, “the right to freedom of association is a right enjoyed by both individuals and groups.” Furthermore, “[e]very person has the right to establish an association together with another, free from limitations violating the right to equality and the guarantee of nondiscrimination.” One group of people that face discrimination in Southern Africa is the LGBT community. Sometimes governments attempt to justify their discrimination against LGBT people because certain consensual same-sex sexual acts are criminalised in their countries and because constitutions allow for the limitation of rights based on public morality grounds.

In a promising 2016 judgment from the Botswana Court of Appeal, the Court ordered that the Registrar of Societies register the civil society grouping, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). LEGABIBO, a group seeking to promote and advocate for the rights of gay and lesbian individuals, applied for registration in 2012 as is required by the Societies Act. The Registrar informed LEGABIBO that its application was unsuccessful as the Constitution did not recognise homosexuality and that, therefore, a group seeking to protect the rights of that vulnerable group would not be permitted. The High Court overturned the Registrar’s decision and affirmed the right of freedom of association and explained why it is so fundamental for the achievement of true democracy. The judge rejected the Attorney General’s argument that because same-sex sexual acts are still criminalised in Botswana, any group seeking to advocate for the rights of LGBT individuals would be encouraging the commission of criminal acts. The Court dismissed this reasoning, and upheld the democratic right of individuals to lobby politically for legal reform. This was confirmed by the Court of Appeal.

Both court judgments confirm that considerations of “public morality” cannot play a role in determining the registration of an organisation, and that there is nothing unlawful about lobbying for the decriminalisation of practices that are, themselves, currently unlawful. The Court further emphasised that whilst certain sexual acts might be prohibited it is not, and never has been, a crime to be homosexual. This is a critical distinction to make as it creates the space for LGBT persons to come into public spaces to fight for their rights without fear of arrest. Notably, Botswana’s legal provisions are similar to those in many other African countries and the same legal reasoning should apply.

As courts are protecting the right of LGBT persons to create associations, despite the continued criminality of same-sex sexual acts, other groups which face elements of criminality should also feel bolstered to assert their freedom of association. For example, a sex worker, like any other person, has rights to dignity, freedom of person and personal privacy. These rights are protected by constitutions, regional instruments, and international conventions. It is important that sex workers, like LGBT people, are able to form associations to advocate for their governments, health systems, and legal systems to better protect them. They do not lose this right just because sex work or activities related to sex work are criminalised. All people have a fundamental right to freedom of association. This right should be protected.
The year 2018 marks 20 years since the United Nations General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders). In the same year, the UN Committee on Economic, Social and Cultural Rights (UNCESCR) released concluding country observations expressing its concern regarding the treatment of human rights defenders (HRDs) in South Africa. In particular, the UNCESCR noted the intimidation and harassment of HRDs working as individuals or in association with others to promote and defend human rights in the mining and environmental sectors. It further noted the application of laws, policies and bureaucratic processes that limit citizens’ enjoyment of the rights to freedom of assembly and association when claiming socio-economic rights, such as education, healthcare and basic services. This all has contributed to the closing of political space.

Despite the formal recognition and equal protection of civil, political, economic, social and cultural rights in the South African Constitution, many South Africans experience numerous human rights violations by the State. This is evidenced by the number of complaints received by the South African Human Rights Commission (SAHRC). Between 2015 and 2016, the SAHRC recorded 2,307 complaints specifically related to civil and political rights violations. These violations involved issues of personal privacy and surveillance, political violence, excessive use of force during protests, freedom of association, access to justice, just administrative action and freedom of expression. These problems have become increasingly worrying as the country grapples with the triple threat of unsustainable levels of inequality, high unemployment and extreme forms of poverty.

The observations made by the UNCESCR is not the first time that concern has been raised by international human rights bodies regarding the status of HRDs in South Africa. In its 2016 concluding country observations, the UN Human Rights Committee noted reports of threats, intimidation, harassment, and excessive use of force by private security personnel and police forces against HRDs, particularly those working on corporate accountability, land rights, transparency issues, LGBTI rights, and HIV issues. It also highlighted law enforcement officers’ lack of due diligence in protecting HRDs, including the registration and investigation of allegations of human rights violations and achieving accountability for such violations.

Regionally, the African Commission on Human and People’s Rights (ACHPR) has recommended that the government provide specific information on the status of HRDs in its next Periodic Report, which is due in 2018. Therefore, there is an apparent need for clear domestic policy and legislation on the protection of HRDs in South Africa.

In support of the work of HRDs, and in response to its complaints and observations made by the domestic, regional and international human rights bodies that remain unaddressed by the South African government, the SAHRC released its first report on the ‘Status of Human
Rights Defenders in South Africa’ in April 2018. The SAHRC was concerned that despite the formal recognition and protection of rights afforded in the Constitution, there is a glaring lack of information on the status of HRDs in South Africa due to the absence of a clear domestic legal definition of who constitutes an HRD. This gap creates difficulties in monitoring the State’s obligation to promote and protect the rights of HRDs. The SAHRC report provides an overview of the current landscape and environment for human rights activism in South Africa. The report further highlights the complex manner in which the deliberate application of a number of laws, policies and bureaucratic processes limit citizens’ enjoyment of various constitutionally guaranteed human rights, particularly as it relates to freedom of assembly association, expression and access to information.

For example, the Regulations of Gathering Act of 1993 (RGA) regulates public demonstrations in South Africa. Under the RGA, legitimate use of force by the police against protestors is only applicable in instances where it is necessary to prevent injury or death to a person or destruction of property, and when negotiation and all other measures have failed. Given the country’s apartheid past, the RGA was drafted with the intention of recognising public demonstrations as essential forms of democratic expression, requiring the State to facilitate rather than repress gatherings and to treat activists with tolerance and empathy to avoid provoking confrontation that may result in violence.

Yet, rather than facilitating the right to freely assemble, many local government authorities apply the provisions of the RGA in a manner that restricts its intended purpose. Bureaucratic obstacles and misinterpretations of the RGA have led to an increasing number of unauthorised and unregulated gatherings that have been deemed “illegal.” The failure to allow protected demonstrations and the breakdown in community-police relations has had devastating consequences, including the destruction of both private and public property, such as schools, libraries and hospitals, and an increase in the loss of lives.

The right to freedom of association entails the right of organisations to solicit, receive and utilise resources (including international resources) for the express purpose of promoting and protecting human rights. States are therefore obliged to adopt legislative and other measures to facilitate, and not hinder, the ability of human rights organisations to access funding required to perform their activities. In addition to monitoring the advancement of human rights, non-profit organisations (NPOs) play a crucial role in assisting the State to provide services to communities, particularly in the care sector and to vulnerable groups.

The Non-Profit Organisation Act of 1997 (NPO Act) provides that 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. Noting the constrained resource environment and bureaucratic challenges in accessing funding from the State, NPOs in South Africa have also had to depend on external sources of funding to do their work. Executive members of the State security agencies have subsequently proposed to monitor international funding sources of NPOs under the guise of protecting the State from potential financing of terrorist activities. This has been viewed by many in the NPO sector as a means of closing the space of civil society’s agency. While it is recognised that NPOs should be held publicly accountable in terms of its governance structures, civil society organisations (CSOs) have cautioned that the legislation regulating the non-profit sector in South Africa may become a tool used by the government to restrict community activism and prevent the legal formation of NPOs.
Freedom of expression constitutes a vital component for HRDs to undertake their activities. Core to this right is the ability access to information, which is required for citizens to make informed decisions when claiming rights and for the advancement of a democratic society. The right to access information entails the right to know, seek, receive and hold information about all human rights. In addition to the right to access information, everyone has the right to freely publish, impart or disseminate to others their views, information and knowledge of all human rights, and to draw public attention to these matters.

Numerous challenges have been identified with South Africa’s existing access to information laws, including that information from public and private bodies is only available on request as opposed to proactive release. The legislative challenges inherent to the Promotion of Access to Information Act of 2000 (PAIA) have hindered the implementation and utilisation of the right to access information. The formalised nature of the process has limited the ability of communities to utilise the right independently without assistance from lawyers. Other challenges involve the inconsistency and uncertainty of grounds of refusals of disclosure of information and the lack of an independent, swift and inexpensive appeal mechanism.

Consequently, not only is information to which communities are entitled denied as a result of bureaucratic failures, but the uncertainty surrounding reasons for the lack of disclosure presents fertile ground for secrecy. This leads individuals and groups to take risks—at great personal costs to themselves—to ensure that the public is able to make an informed assessment of the current status of South Africa’s democracy.

In addition to regulatory challenges in accessing information, regulatory frameworks aimed at protecting democracy have also been used to violate rights. The Regulation and Interception of Communications and Provision of Communication-Related Information Act of 2002 (RICA) allows law enforcement, intelligence agencies and the military to intercept communications with permission from a judge. Activists, union leaders and community leaders in South Africa have alleged that this legislation has allowed their activities to be monitored by the State. In terms of RICA, cellular telephone companies are required to retain the data of cellular telephone users’ information, particularly who they communicated with, when, where and for how long. Although RICA requires police and intelligence agencies to obtain permission from a judge to listen to the content of the communication, the Criminal Procedures Act allows law enforcement officials to bypass RICA and approach a lower court magistrate for a warrant to access the data logs. Consequently, surveillance operations are taking place outside of the oversight of RICA, and thus information that users may want to keep private is being provided to the State without their knowledge, thus violating their right to privacy.

The South African experience demonstrates that even when the rights of HRDs are guaranteed in the Constitution, the manner in which democratic laws are conceptualised and implemented can have the adverse impact of violating those rights. Noting that democratic laws are being utilised to intimidate, harass and ultimately silence HRDs seeking to advance civil, political, social, economic and cultural rights in South Africa, it is imperative that regional solidarity networks are strengthened and that the work of HRDs is supported by national human rights institutions such as the SAHRC. Importantly, it has become crucial that African citizens remain resolute in their support and protection of HRDs, who are the driving force behind achieving a vision of a democratic society infused with the values of justice, equality and peace.
NGO Regulation as a Barrier to Advocacy by Civil Society in Zambia

Arthur Muyunda

Introduction

Twenty eight years since the reintroduction of multi-party democracy in Zambia, many stakeholders expected the Zambian democracy to have matured into a full functioning democracy where rule of law, State accountability, political transparency, respect for human rights, political equality, separation of powers, political tolerance or free and fair elections are the political norm. However, Zambia continues a democratic backslide with shrinking space for civil society, civil society organisations (CSOs) and opposition political parties. Though the Zambian Constitution guarantees fundamental freedoms and liberties for all citizens and the country has domesticated key regional and international treaties that are anchored on the Universal Declaration of Human Rights, there has still been notable rights violations. For example the Public Order Act (Act) has been enforced in a biased and discriminatory manner by the Zambia Police.

The main tools of NGO regulation and shrinking civil society space in Zambia

There are two major pieces of law which are a threat to civil society existence in Zambia. They are used to close existing spaces where civil society works by clamping down on the freedom of assembly, association and expression. These pieces of legislation are the Non-Governmental Organisations Act, 2009 (NGO Act) and the Public Order Act, 1955.

NGO Act of 2009

As was stated in its preamble, the NGO Act was enacted to:

“provide for the co-ordination and registration of non-governmental organisations; establish the Non-Governmental Organisations’ Registration Board and the Zambia Congress of Non-Governmental Organisations; to constitute the Council of Non-Governmental Organisations; enhance the transparency, accountability and performance of non-governmental organisations; and provide for matters connected with or incidental to the foregoing.”

This is a piece of legislation aimed at regulating civil society operations. While the regulation of NGOs can have benefits, such as opening up funding avenues to civil society and helping to stop the funding of terrorism and money laundering through them, most CSO’s argue that the Zambian NGO Act was developed with ill intentions and is used as a tool to close civil society space. The enactment of the NGO Act has been met with resistance by civil society because there is concern over certain provisions. For example, one controversial clause of the NGO Act establishes a fifteen members NGOs Board which is mandated to manage the registration, regulation, operations, existence and deregistration of NGOs in Zambia. Eight of these members are to be civil servants while only the remaining seven are to be NGO representatives. Furthermore the NGO representatives must be approved by the Minister of Community Development. This
provision curtailed the independence of civil society in Zambia. Those NGOs perceived to be anti-government would be deregistered by either the Minister of Community Development and Social Welfare or the NGOs Board members, which are a majority government officials.

In a joint press release on the implementation of the NGO Act issued on 15 July 2013, Zambia’s civil society organisations noted that they:

“do not oppose the idea of being regulated by an Act of Parliament. The position of Non-Governmental Organisations is that the legislation ought to be used to enhance transparency, accountability and independence of Non-Governmental Organisations so that Civil Society Organisations could increase space in their operations and existence, which is not the case in the current state of the Act”.

There was strong opposition to the Act, and the government was compelled to adjust. The Minister of Justice and Attorney General met with a consortium of Non-Governmental Organisations (NGOs) and agreed on 8 September 2014 to suspend punitive measures under the NGO Act and review the Act. A consultant was to help the government address the contentious issues observed by civil society stakeholders. While this process is ongoing, the Zambian government is allowing NGOs to keep their registration under the old Societies Act of 1958. The amendment process was set to be completed in July 2015, however the process stalled and has remained unfinished at the time of writing. However, this has not stopped the closure of space for civil society.

**The Public Order Act (POA)**

Passed in 1955 during the colonial era and partially amended in 1996, the Public Order Act (POA) aims to regulate or stop public meetings and gatherings of more than three people. As such, the Act calls for citizens to officially notify the police in advance about any public meeting with a clear venue, date, agenda and would-be speakers in the spirit of maintaining law and order. The notification of the meeting must be put in writing and given seven days prior to its occurrence. This has become the main tool of the Zambian police to regulate and harass NGOs. There is rampant abuse of the law, and it is applied in an unfair and imbalanced manner.

For example, in July 2016, the Law Association of Zambia (LAZ) and the Human Rights Commission (HRC) collectively agreed that they were concerned with the manner in which the Public Order Act was being applied by the police. They stated that opposition politicians and civil society organisations were being treated unfairly and that the police were not balancing protection of human rights with the need to maintain law and order. To date, the POA is still being abused and unfairly applied by the police as demonstrated by the reports below.

Examples of NGO regulation and shrinking civil society space and voice in Zambia

a. On 26 May 2017, the Zambian immigration authority denied entry at the Kenneth Kaunda International Airport in Lusaka to South Africa’s opposition leader, Mmusi Maimane on account that his presence was inimical to the rule of law in Zambia. On 29 September 2018 the same entity denied entry to Kenyan lawyer, academic and Pan Africanist advocate, Professor Patrice Lumumba on account that his presence was a security threat to Zambia.

c. On 29 September 2017, the police charged and arrested six peaceful marchers with disobeying a lawful order after they marched on Parliament to protest the corrupt procurement of 42 fire trucks for USD 42 million. The six activists are musician Pilato, Alliance for Community Action (ACA) executive director Laura Miti, Patriots for Economic Progress (PeP) president Sean Tembo, ZCSD executive director Lewis Mwape, Bornwell Mwewa and Mika Mwambazi. In this instance, the police used the Public Order Act.

d. On 27 September 2018, Maiko Zulu, a renowned reggae artist and civil rights activist was arrested for staging a lone protest against the owners of Konkola Copper Mines (KCM) at the British High Commissioner’s office in Lusaka. His protest followed a call by the United Kingdom’s opposition Labour Party for Vedanta Resources to be delisted from the London Stock Exchange. The call for delisting was spurred by the death of thirteen people during violent protests against Vedanta Resources in India. The police charged Maiko Zulu under the Public Order Act.

e. On 5 October 2018, a female UNZA student, Vespers Shimuzhila suffocated to death after police fired tear gas into her room in her university hostel, following a peaceful protest over delayed meal allowances. The police justified their response saying that the students’ conduct had violated the Public Order Act.

f. On 12 October 2018, police in Chingola disrupted the National Democratic Congress (NDC) indoor meeting at Chingola Arts Society due to “security circumstances in the district”. The police stopped the meetings, saying that they did not have police approval to proceed and that the Public Order Act was violated.

g. On 21 October 2018, Copperbelt Police Commissioner, Charity Katanga confirmed that police in Ndola arrested five pastors and three officials from the Centre for Trade Policy and Development (CTPD) for unlawful assembly for organising a meeting of religious leaders who had gathered to analyze the 2019 Zambia National Budget. The police argued that the meeting was political and as such, they were required to give a notification in accordance with the Public Order Act provisions.

**Strategies to counter shrinking civic spaces**

The above physical, legal and political environment continues to suffocate and negatively impact HRDs in Zambia. Currently, court litigation, joint press statements, social media advocacy, advocacy from regional and global players and public media discussions seem to be among the effective platforms of advocacy in this changing climate. The POA alone is a serious threat to HRDs and as long as it remains un-reformed, a safe environment for HRDs will never exist in Zambia.

**Improving regional responses to attacks on HRDs**

Regional responses that can be used to address closing civic spaces include enhancing collaborations and joint advocacy with regional and international civil society players such as Amnesty International, CIVICUS, and others, as well as consistently engaging and lobbying regional and global interstate actors such as SADC, AU, COMESA, EU or UN. Furthermore, there is need to improve HRDs’ access to financial resources and technical materials so they can more effectively lobby and are able to continue their advocacy work in Zambia. As individuals and in collaboration, we can work together to continue fulfilling the goals of the UN Declaration on Human Rights Defenders.
Despite pronouncements of democracy, the presence of multi-party politics, and the holding of elections across the continent of Africa, there has been a growing trend of authoritarianism and autocratic leadership. One way that this is manifested is in the drafting of laws and regulations that are incongruent with democratic ideals.

On paper, Africa has recorded an increase in “democratic elections” of political leaders in the recent past, but what is occurring on the ground is not real democracy. The laws and regulations that should give actual rights and freedoms to the people remain unchanged; deliberately formulated to suppress citizens.

In Zambia, there are sets of laws and regulations such as the NGO Act of 2009, the Public Order Act of 1955, the Penal Code Act of 1931, as well as the common law offence of contempt of court, contribute to barriers to CSO advocacy.

These laws are a danger to the advancement of human rights and the very existence of CSOs. Their provisions restrict CSOs from operating efficiently by curtailing the rights to free assembly, free movement, free association, free expression, and others.

The NGO Act

In 2009, the Zambian Parliament enacted the NGO Act which is considered by many to be a bad law. The NGO Act gives too much power to the Government in the registration process of NGOs as well as the implementation of the NGOs’ work and operations. Additionally, the Act criminalises both the NGO and the leaders in the event of any wrongdoing. Punishments for infractions include long term custodial sentences.

The Public Order Act

The Public Order Act is a 1955 law that was amended only once in the 1990s. Zambia has maintained the use of this colonial piece of legislation despite numerous outcries from the general citizenry.

The successive governing parties in Zambia have used the Public Order Act as a tool to deter CSOs and others that are perceived to dissent from the government from gathering. This infringes on citizens’ right to assembly, freedom of expression and to access to information.

Recently, on 19 October 2018, five pastors and three NGO staff members were arrested by the police in the Copperbelt Province of Zambia using the Public Order Act provisions for unlawful assembly. They had convened an indoor meeting of faith leaders to discuss the 2019 National Budget and debt crisis in Zambia. They have been released and are awaiting prosecution.

There is another case that is known colloquially as the 42 for 42, where NGO members and other members of society were arrested by the police in September 2017 for picketing Members of Parliament at the grounds of Parliament building. Although they notified the police in writing in
accordance with the provision of the Public Order Act, they were still arrested. They have been charged with disobedience of lawful orders and their case is currently before the courts.

The Penal Code

The Penal Code is an archaic piece of legislation that was enacted in 1931. Despite the new Constitution and other international conventions and protocols which protect human rights, there have been no substantial amendments to the Penal Code. Zambia turned 54 this year, but still uses an 80 year old piece of legislation which limits constitutional rights through provisions which criminalise defamation and insulting the President.

Contempt of Court

On 10 July 2018, Bishop John Mambo and I were charged by the Supreme Court with a charge of contempt of court under the inherent jurisdiction of the court and under order 52/1/23 of the rules of the Supreme Court 1965 (1999 Edition).

Bishop Mambo and I had separately written letters to the Judicial Service Commission and the Chief Justice to complain about a case that was closed and judgment passed by the same Supreme Court. Later, the court brought a similar contempt of court charge against a journalist by the name of Derrick Sinjela. Trial is closed awaiting judgment and sentencing on 28 November 2018. I believe that I was within the confines of the law to exercise my freedom of expression and that the court had no power to charge me over a matter that was long closed by the court.

Contempt of court in Zambia carries a six months custodial sentence as provided in the law, but the Supreme Court of Zambia in 2010 jailed a Lusaka-based Lawyer Nsunka Nsambo and his client, a human rights activist, Victor Chilekwa, for three years for calling the Judges corrupt. The duo was later released through a Presidential pardon.

Another journalist, Masauso Phiri, was convicted and jailed in Zambia for contempt of court. He served 2 months of a 3 months sentence under this repressive law. Masauso wrote that the Supreme Court Judges were bribed by the Republican President Frederick Chiluba. He was summoned to appear before the Supreme Court to show cause as to why he should not be cited for contempt of court. As a journalist, Masauso argued his case, but refused to reveal his source, a senior intelligence officer, because of his journalistic ethics. It was later revealed in an anti-corruption investigation ordered by the late President Levy Mwanawasa that the Chief Justice had actually received a bribe.

It is imperative that advocacy efforts are scaled up to lobby for more progressive laws and regulations. Good laws and strong institutions are the pillars of a genuine democracy and provide an enabling environment for the respect of human rights.
Use of Criminal Laws as Barriers to CSO Advocacy in Tanzania

Jebra Kambole

Tanzania is a country located in East Africa. It is composed of two countries that attained their independence at different times: Tanganyika in 1961 and Zanzibar in 1963 respectively. However, in 1964 following the Revolution of Zanzibar, these countries consensually united. It is this union that resulted into Tanzania. In the initial draft of the Tanzanian Constitution, there was no freedom of expression nor freedom of assembly. It was not until 1987 when the Bill of Rights was introduced and incorporated in the Constitution that freedom of expression and assembly were protected in Tanzania.

Most Tanzanian human rights defenders are experiencing harder times as there is limited freedom of assembly and expression. Certain sectors of society have been especially targeted, such as those who belong to opposition parties, the independent media, regional leaders and human rights defenders. They are unable to express their concerns or criticize the government when they think it has gone wrong. It is difficult, and sometimes impossible, to activate meetings or political demonstrations.

Those who dare to speak out are arrested, sent to prison, attacked, kidnapped by unknown assailants, and even killed.

Laws and Regulations

Additionally, there are newly enacted laws that violate the people's right to freedom of expression. These laws include:

**Statistics Act of 2015, amended 2018**

This law prohibits publications of research, making analysis, giving comments on or elaboration of the official government statistics. Infractions of the Act result in criminal liability. Citizens are no longer free to make publications which question, comment on or make analysis of their own elected government.

**Media Services Act of 2016**

This law has made the government the controller of news content, journalistic ethics and journalists themselves. It criminalises defamation, false news, and any speech against the government (sedition). Being found guilty of any of these crimes can result in heavy punishments.

**Cybercrimes Act of 2015**

This is another bad law. Section 16 establishes the criminal offence of publication of false information. Worse still, the definition of what is false information is left mainly to be determined by the government. Many people have been prosecuted, convicted or sentenced under the new law. Recently, a person was charged and convicted for simply saying “Rais kitu gani?”, which literally means “Who is president by the way?” This makes the effort and work of human rights defenders very difficult and they are unable to conduct their activities freely and effectively.
Electronic and Postal Communications (Online Content) Regulations of 2018

This regulation is a barrier for the development of online freedom of expression. It imposes strict terms and conditions for online communication. For example, all bloggers and online video production must register with the government before selling advertisements. Failure to register is prosecuted as a criminal offence with minimum penalties of 5 million Tanzanian shillings (USD 2,500 USD) or 12 months imprisonment. As of October 2018, more than seven bloggers are in court facing charges.

Other Rights Violations

In addition to the legal and regulatory environment, there are many other terrible incidences that have chilled the ability for civil society to exercise their right to free expression.

Banning of newspapers

There is an increasing practice of shutting down any newspaper challenging, criticizing or giving comments that seem unfavorable to the government. Some newspapers that faced closures include Tanzania Daima, Mwanahalisi and Mseto. This is in contrast to the State newspapers or those insulting or criticizing the opposition, which do not experience this challenge.

Fine and punishments to televisions and radio stations

In 2017, seven television and radio stations were fined by the State through the Tanzania Telecommunications Regulatory Authority for covering a story on the analysis of the election that was done by the Legal and Human Rights Center in Tanzania. The media is now afraid of covering stories brought to their attention by CSOs and human rights defenders.

Forceful disappearance and kidnappings

There is an increase in people disappearing. Those who are disappearing have been portrayed as dangerous citizens who are a threat to the government. Some have managed to escape or fight back and have revealed that it was State agents who attempted their abduction. For example, a rich man by the name of Zakaria fought back with a privately-owned gun. He managed to injure one security officer who was said to be a government official. He was later charged for attempted murder of a national security officer. Furthermore, the list of those who have disappeared include Simon Kanguye (mayor of Kigoma Region), Azory Gwanda (a journalist who was reporting about police officers fighting with an unknown group in Kibiti area), Ben Saanane (a politician from the main opposition party), and many others.

Attempted Assassinations

Hon. Tundu Lissu is a Member of Parliament, chief whip, head of the legal unit of the main opposition party CHADEMA and was the president of Tanganyika Law Society. He often criticizes the leadership of Magufuli, even calling him a dictator. He has been prosecuted many times for sedition. In September 2017 he was shot 16 times while he was sitting in his car. He survived the assassination attempt, however, the government has not shown any effort in investigating the attack. Worse still, the government has refused to pay for his treatment.
Prohibitions of live coverage of parliament sessions

During prior administrations, members of the public were able to watch broadcasts of parliamentary debates. The current administration prohibits live coverage of parliament, stating that it is too expensive. When the private media decided to provide live coverage of these sessions, the government interfered and claimed that the opposition was using that live coverage platform to boost their political careers. Not allowing live coverage of parliamentary sessions is a violation on the right to access information.

Banning of political activities and public meetings

The government has repeatedly banned political activities and public meetings on the ground that they hinder development. The new regime discourages citizens and opposition parties from becoming involved in politics. The ruling party, however, holds many political activities without challenge. This is a violation of not only freedom of expression but also freedom of assembly.

Persecutions of opposition and those criticizing the government

The new regime often prosecutes those who oppose the government or seem to oppose the government with unscrupulous charges like unlawful assembly, sedition, or insulting the president.

Conclusion

It is very challenging to work as a human rights defender in Tanzania. There are terrible, humiliating, inhuman, segregating and discriminatory things happening under the current regime that rival the atrocities that occurred under colonialism and dictatorships. Tanzania is no longer an island of peace. The international community must intervene before things become intolerable.
NGO Regulation as a Barrier to Advocacy by Civil Society in Tanzania

Samwel Gerald

In recent years, the Tanzanian government has increased non-governmental organisation (NGO) regulation in a manner that impedes on their ability to work independently and fulfill their objectives. The government is attempting to control how these organisations work. This is partially accomplished through acts and directives of the government which target the operation of NGOs, such as the Non-Governmental Organisations Act of 2002. This current trend of “strict regulation” began in 2015. Notably, the government has demanded compliance, with threats to deregister those NGOs which fail to comply. Furthermore, the government closely scrutinizes NGOs' budget and work load, directly interferes with the implementation of their projects, and threatens their officials with prosecution and other forms of harassment. The most common targets for government interference are those NGOs which seem to be critical of the government’s policies.

In 2015, CSOs started to offer civic education to the public regarding the proposed draft constitution of the United Republic of Tanzania. This was not well received by the government. The then Minister for Home Affairs barred CSOs from doing that and threatened to deregister all CSOs which would not comply. Since that time, the government has continued to use this strategy of controlling the activities of NGOs, and prohibiting work which is not in line with government interests.

The government started to emphasize the requirement that all NGOs needed to comply with the NGOs Act of 2002. For instance, in March 2015, Action Aid Tanzania (AATZ) presented a research report on the government’s involvement in a 20,000 hectares land investment scandal. After this presentation, AATZ started to face threats of deregistration from the NGO unit. The NGO unit demanded that they comply with the NGOs Act as they were originally registered as a company. After submitting all the required documents, they were informed that the process had been halted and that they had to restart their registration application process.

The requirement to register under the NGOs Act has been stressed this year. All of the CSOs that are registered under different laws are being required to obtain certificates of compliance under the NGOs Act. There is a lot of confusion among CSOs regarding what is required to be in compliance; the law is not clear.

Not only has the government openly issued threats, but they have actually suspended the operation of some NGOs. For instance, in June 2017, the Minister for Home Affairs threatened to deregister all NGOs challenging the President’s ban on schooling for pregnant girls. Furthermore, the Minister vowed to prosecute or deport any person or organisation working to protect the rights of LGBT people. Following this statement, some organisations were suspended.

In August 2017, the Registrar of Non-Governmental Organisations also issued a public notice requesting all NGOs operating in Tanzania to verify their registration status. Non-compliant NGOs were to be de-registered. Most of the NGOs complied with this directive, however some authorities have continued to demand reverification of some NGOs. For instance, the Tanzania
Human Rights Defenders Coalition (THRDC) complied with the initial directive, but subsequently, the Kinondoni District Authority demanded registration documents, activity reports, sources of funds and other information from THRDC. This occurred even though, the District Authority has no legal mandate over the operation of the NGOs.

The attempt to control the activities of the NGOs led to harassment of the senior officers of these NGOs. For instance, in early 2018, the Immigration Department started to probe the citizenship of the coordinator of THRDC and Executive Director of Twaweza. The investigations occurred directly after the release of reports by these organisations that were critical of the government.

In early October 2018, the Ministry of Health, Community Development, Gender, Elderly and Children issued a 30 days’ notice to all NGOs (local and international) to do the following:

- Submit their audited financial statement of the last two years;
- Submit information on their funding sources, the use of these funds and copies of reports for projects implemented and expected to be implemented soon;
- Submit their funding contracts/agreements for the period 2016 to date;
- Ensure that the projects they implement focus on government’s priorities, programmes and strategies at national, regional and district levels; and
- Obtain authorisation prior to the implementation of any project from the Registrar of NGOs or President’s Office- Regional Administration and Local Government.

The notice stipulates further that non-compliance with these requirements within the specified period will attract legal action by the government.

Close examination of all these events and acts by the government leads to the conclusion that the government is inhibiting NGOs from operating freely and independently. The government is attempting to control the type of activities carried out by NGOs and the manner of their implementation. Keeping the NGOs under this strict government spotlight bars effective advocacy. This is because some NGOs may fear implementing projects which are in the interest of justice, but against the priorities and programmes of the government. The recent directive that all projects to be implemented by NGOs should focus on government’s priorities and programmes is indeed disturbing, as is the requirement that NGOs must gain government approval before the implementation of their projects.

In order to ensure effective advocacy by civil society, organisations should have ample space to work independently of the government and without fear of reprisals for their work. This is an essential condition for effective advocacy by civil society.
The Threat Posed by the Global Gag Rule to HRDs working on SRHR and the Right to Safe Abortion

Tambudzai Gonese-Manjonjo

Free and unrestricted access to adequate funding is a very important enabler to the effective functioning of Non-Governmental Organisations (NGO), and most do not receive meaningful funding from governments. International funding has therefore become the means of survival for most NGOs and has enabled civil society to carry out their mandate of promoting respect and protection for human rights.

A major threat to the viability of human rights defenders (HRD) working in the field of sexual and reproductive health rights (SRHR) is the Mexico City Policy (MCP), a 1984 imposition by the US government which restricts access to funding. The policy has required, as a condition for receiving US government global family planning funding, foreign (non-US) NGOs to agree not to perform or promote abortion as a method of family planning with their non-US funding. Known colloquially as the “Global Gag Rule” (GGR), because of its suppressive effect on freedom of expression and activities of HRD advocating for the right to safe abortion, the policy has been consistently removed and reinstated by succeeding Democratic and Republican presidents respectively since its inception. In January 2017, President Donald Trump reinstated the policy and expanded it to cover US global health funding and in May 2017 it was operationalised in The Protecting Life in Global Health Assistance Policy. The expanded policy prohibits US global health funding provision to foreign (non-US) non-governmental organisations that perform, advocate for, counsel or refer to abortion as a form of family planning in their own country, even if the funding for these activities is sourced from other sources that are not US government sources.

The policy applies to, among others, HIV funding, including, the President’s Emergency Plan for AIDS Relief (PEPFAR), funding for Tuberculosis, Malaria, pandemic influenza and other threats, global health security, non-communicable diseases, strengthening of health systems, maternal and child health, family planning and reproductive health, household and community sanitation, water and hygiene (WASH) and nutrition. Acceptance of the provisions is a precondition for funding and compliance with the policy is required at the time of acceptance of the provision in the funding agreements.

The definition of “abortion as a method of family planning” is very wide, described in terms of the policy as a method for spacing births. The only exceptions are termination when the pregnancy poses a danger to life of the pregnant woman, or is a result of rape or incest. The exceptions do not cover cases where the pregnancy poses a danger to the physical or mental health of the woman, or where the foetus is likely to have a disability, or where there may be socio-economic grounds to procure an abortion.

Promotion of abortion as a method of family planning in terms of the policy includes provision of counselling, advice and information on the benefits and accessibility of abortion for family planning purposes, lobbying and advocacy on abortion law reform and public advocacy campaigns highlighting the benefits and propriety of abortion as a family planning method. This
means that organisations that are recipients of US global health funding would be in breach of the obligations of receiving that funding by carrying out those activities.

US NGOs receiving US government funding are not subject to the policy, but they have to pass on the restriction to non-US NGOs that they sub-grant. Governments, State-assisted institutions like universities and multi-lateral international institutions like the United Nations are also not subject to the policy, and they are not obliged to pass on the restrictions to sub-grantees.

Traditionally, the US government has provided over USD 8 Billion in global health funding, of which about USD 6 billion of that is PEPFAR. The simplest way to avoid the “gag” is to decline to take up US government funding for health, meaning a huge loss of funding assistance for health programs. So, not taking up the funding, or non-compliance with the terms, effectively leads to scaling down or shutting down of organisations due to lack of funding, and thus further shrinking of civic space.

Since the policy was reintroduced in 2017, the actual impact of the GGR has not yet been completely quantified. However, the threat it poses, especially in its expanded version, on organisations carrying out SRHR work is immense, and greatly threatens progress on women’s rights and the fight against diseases like HIV, as the trend has been to offer integrated health services. To comply, an organisation offering integrated services would have to disintegrate programmes on access to safe abortion, likely including counselling and provision of family planning, advocacy on adolescent sexuality and access to reproductive services and advocacy for law reform regarding SRHR. This obviously affects programming and organisational mandates. Some organisations, like Marie Stopes International, have declined to comply and therefore have lost US funding, leading to scaling down of operations and closing down of services in some countries like Zimbabwe.

The implications for activism and advocacy for SRHR are chilling, especially in the space where there is great need for change. The right to access to safe abortion in the Southern African region is a pertinent issue and a major part of the work of HRD advocating for protection and promotion of SRHR. Abortion laws in the region vary greatly. There is outright prohibition except for necessity or to preserve life (e.g. Malawi, Lesotho, Angola, Tanzania), limited sanction under restricted grounds, where abortion is allowed on grounds of danger to health, in the case of rape or incest, or foetal disability (e.g. Zimbabwe, Namibia, Democratic Republic of Congo, Eswatini) and relatively liberal legal regimes, where abortion is allowed on request, or on socio-economic grounds (e.g. Zambia, South Africa, Mozambique).

A great percentage of the countries that are recipients of PEPFAR assistance have laws that allow for legal abortion and despite the varying levels of restriction to access safe abortion in the region, what is common is that the law and practice is not satisfactory. There is need for law reform and advocacy to ensure that women have access to safe abortion. In Malawi, for example, the Penal Code only allows for abortion to preserve the life of the pregnant woman, but the parameters of the exception are not clear as to whether or not this may include where there is danger to mental or physical health, leading to an arbitrary application of the law that leaves women’s lives in the hands of health workers without any formal guidelines. The law does not, as presently interpreted, allow for termination on the grounds that the pregnancy is a result of rape. The law reform process of enacting a comprehensive law regulating abortion, which began a decade ago has effectively stalled. The progress that has been made is as a result of sustained
lobbying and advocacy by SRHR advocacy organisations like Ipas-Malawi and the Coalition for the Prevention of Unsafe Abortion (COPUA), a network of non-governmental organisations in Malawi. Due to opposition from mainly religious groups, and a seeming reluctance by lawmakers to pass the law, there is need for continuous activism by HRDs. Other strategies that may be employed by HRD are strategic litigation around the existing law. The NGOs carrying out these activities, however, are threatened by the impact of the GGR directly in not being able to access US funding for their other activities. For example, Women and Law in Southern Africa (WLSA)-Malawi, a member of COPUA, is an organisation advocating for women’s rights. Under the GGR, it would not be able to access US funding for its broader work without giving up on its work on access to safe abortion. This is because the law in Malawi as it stands complies with the accepted exceptions to the GGR (abortion allowed on the grounds of danger to life), but any liberalisation would put it in conflict. Therefore, any activities aimed at liberalising the law qualify as promoting abortion as a method of family planning under the GGR.

In addition to greatly curtailing the activities of HRD in SRHR and threatening their survival, the GGR has caused confusion and a fragmentation of civic society. The actual provisions, exceptions and implications of the policy are not very clear to a lot of people. As a result of the confusion, according to a research report by the International Women’s Health Coalition of May 2018, there is a lot of under-compliance, over-compliance, fear and self-censorship amongst NGOs. The fear of collaboration between a complying NGO and a non-complying one means that organisations no longer work together well, stunting the impact of interventions.

A counter movement has emerged in response to the threat, in the form of other international players mobilising funding to try and cover the gap created by the loss of US funding. For example, there is the “She Decides” movement and funding from countries like Sweden and the Netherlands. This is encouraging but has not yet been able to fully provide alternative funding. Worrying news is the stated intention by the Swedish Development Agency (Sida) to withhold funding to organisations that choose to comply with the GGR, effectively forcing NGOs to choose between US funding and non-US funding. Organisations that are able to find a way of complying with the GGR, consequently risk losing their non-US funding as a result.
PART V

Criminal Laws Affecting Freedom of Expression and Access to Information
Overview of Criminal Laws Affecting Freedom of Expression and Access to Information

Anneke Meerkotter

In its Resolution on Human Rights Defenders in Africa (2011), the African Commission called on States to recognise the role of human rights defenders to promote the rights in the African Charter, and urged States to release human rights defenders who were arbitrarily detained and end judicial harassment and other acts of intimidation against human rights defenders. Most recently, in a 2014 Resolution, the African Commission called on State Parties “to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals and criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities.”

One of the enduring legacies of colonialism is the creation of fairly uniform Penal Codes throughout our continent. Whilst some countries have been robust in reforming their criminal laws, others have been reticent to remove some archaic offences, especially when these offences protect the government from criticism. Courts in Africa have gradually started to explore the extent to which some criminal offences can comfortably co-exist with human rights provisions.

The ease with which governments are able to use the police and prosecutors to pursue human rights defenders is worrisome and seems undeterred by what is said at regional fora and in courts. Our responsibility is to support these courageous individuals, including by raising our voices with them, so that they do not have to face persecution alone, and demanding that national governments adhere to their obligations to respect, protect and promote human rights, including freedom of expression.

Sedition

Seditious intent is linked to an act of exciting disaffection against the President, government or administration of justice. However, the term “disaffection” is broad enough to include expressive conduct that would ordinarily constitute an essential element of democratic discourse. The vagueness of the offence makes it hard to know with reasonable certainty what conduct is prohibited and arguably violates the principle of legality.

In most of the countries in Southern Africa, a seditious intention is defined as the intention “to bring into hatred or contempt or to excite disaffection against the government.” However, if the intention is to show that the government has been misled or is mistaken, then that would not amount to seditious intention.

The offence of sedition was declared unconstitutional in Nigeria in 1985, in Uganda in 2010 (Andrew Mujuni Mwenda and Another v Attorney General) and in Eswatini in 2016 (Maseko and Others v Prime Minister of Swaziland and Others). The most recent judgment declaring the offence contrary to the African Charter, was that of the ECOWAS Community Court of Justice in a decision in February 2018 in the case of Federation of African Journalists and Others v Republic of Gambia. In February 2018, the Botswana Court of Appeal, in the case of Outsa Mokone v Attorney General and Others, when confronted with a case which challenged both a warrant of
arrest and the constitutionality of the offence of sedition, held that it was possible to decide the case without making a constitutional determination.

**CHIEF ARTHUR NWANKWO V STATE, NIGERIA (1985)**

“The whole idea of sedition is the protection of the person of the sovereign... The present President is a politician and was elected after canvassing for universal votes of the electorate; so is the present State Governor. They are not wearing the constitutional protective cloaks of their predecessors in 1963 Constitution...”

“Those who occupy sensitive posts must be prepared to face public criticisms in respect of their office so as to ensure that they are accountable to the electorate... They are within their constitutional rights to sue for defamation but they may not use the machinery of the government to invoke criminal proceedings to gag their opponents as the freedom of speech guaranteed by our constitution will be meaningless.”

A number of countries have repealed the offence of sedition. Ghana repealed the offence of sedition in 2001. The United Kingdom abolished seditious libel in 2009. Similarly, in New Zealand, sedition offences were repealed in 2007. Earlier that year, New Zealand’s Law Reform Commission conducted an investigation into the sedition offence and endorsed the conclusions of the Canadian Law Reform Commission, the Law Reform Commission of Ireland and the United Kingdom Law Commission—that sedition laws should be abolished. The Law Reform Commission found that New Zealand’s sedition provisions were “steeped in a history of abuse or inappropriate use”. Most recently, in June 2018, Liberia’s President, George Weah, submitted a Bill to repeal the offences of sedition and criminal libel against the President. In July 2018, the Liberia House of Representatives passed the Kamara Abdullai Kamara Act of Press Freedom.

Sometimes however, the content of sedition laws find their way into other legislation, including terrorism and public order legislation.

**Criminal defamation**

In many Penal Codes and in common law, it is an offence if a person publishes defamatory matter concerning another person, with intent to defame the other person. This is referred to as the offence of criminal libel. Defamatory matter is defined as matter that is likely to injure the reputation of a person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation. Importantly, the publication is not unlawful if it is both true and in the public benefit, or if it is privileged. In some countries there are a range of defences available to the charge, while in others, the offence is overly broad in that it applies in cases where only the person defamed becomes aware of the defamatory matter. There is also often a defence of good faith. The presumption of good faith applies “if the matter is an expression of opinion, in good faith, as to the conduct of a person in a judicial, official or other public capacity, or as to his personal character so far as it appears in such conduct.”

The majority of cases dealing with the constitutionality of the offence of criminal defamation have found that it is reasonably required to protect the reputations of other persons and justifiable in a democratic society. In Africa, the courts have been more critical of criminal defamation on
the basis that the sanction of imprisonment is not proportional given the horrific conditions prevailing in prisons.

In earlier cases around criminal defamation, courts have focused on narrowing the interpretation of the offence, for example by requiring consent from the Attorney General or Director of Public Prosecutions before prosecution is instituted. Other courts have said that the offence is reasonably required in a democracy to protect the right to reputation. This was the position of the South Africa Supreme Court of Appeal in 

_Hoho v State_ (2008), the Uganda Constitutional Court in _Buwembo and Others v Attorney General_ (2009) and the Supreme Court of India in _Swamy v Union of India_ (2016). The Seychelles Constitutional Court in _Sullivan v Attorney General and Another_ (2013) held that whether there is a reasonable limitation of the right to freedom of expression would depend on the defences available to a charge of defamation.

However, some courts have gone further to say that the offence of criminal defamation is disproportionate in its limitation of freedom of expression because of the chilling effect of the offence, the existence of a civil remedy, and the severe impact of imprisonment. This position was taken by the Zimbabwe Constitutional Court in _Mandahire and Another v Attorney General_ (2014), by the African Court on Human and Peoples’ Rights in _Lohé Issa Konaté v Republic of Burkina Faso_ (2014), by the Kenya High Court in _Okuta and Another v Attorney General and Others_ (2017) and by the Lesotho Constitutional Court in _Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights and Others_ (2018).

### Defamation of the President

The offence of defaming the President or Head of State or Monarch is a specific form of criminal defamation and overlaps with the offence of seditious libel. It dates back to the 13th century when the offence was designed to protect the reputations of the “great men of the realm”. This offence persisted in England until it was abolished by the Coroners and Justice Act in 2009. The offence is usually contained in either the Penal Code or other laws.

#### MALAWI, SECTION 4, PROTECTED FLAG, EMBLEMS AND NAMES ACT OF 1967 MAKES IT AN OFFENCE TO INSULT THE PRESIDENT:

“Any person who does any act or utters any words or publishes or utters any writing calculated to or liable to insult, ridicule or to show disrespect to or with reference to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, shall be liable to a fine and to imprisonment for two years.”

The offence continues to exist in many monarchies around the world and helps them maintain some veneer of legitimacy in an era when monarchies have become obsolete. In contrast, Heads of State are elected to the position on a periodical basis in democratic countries. For the elections to be free and fair it also requires that people are able to effectively criticise the actions of the incumbent President. For this reason, many countries have either repealed the offence or it is limited to cases of severe insult with the need for permission of the Directorate of Public Prosecution to institute prosecution.

In some countries the Penal Code extends the offence of defamation of the President to include insult, without defining what would constitute insult. Some courts have held that the offence is
important to protect the office of the President and is a prerequisite for the effective performance of constitutional duties assigned to the Head of State.

The Botswana High Court in *Mokgothu v State* (1986) said that obscene language used against the President at a private home did not constitute a public place.

The applicable defences are not entirely clear from the offence itself, since it does not, as is the case with criminal defamation, contain the defences explicitly. Thus it appears that defences of truth, good faith and public interest do not necessary apply to this offence, making it less likely that the offence passes the test of proportionality.

**Publication of false news**

In many countries it is an offence to publish orally or in writing a statement, rumour or report which is likely to cause fear and alarm to the public or disturb the public peace. The offence can be contained in the Penal Code and/or other legislation. The offence is usually not committed where the person believed that the report was true and took reasonable steps to verify it.

**TANZANIA, SECTION 16 OF THE CYBERCRIME ACT STATES:**

“Any person who publishes information or data presented in a picture, text, symbol or any other form in a computer system knowing that such information or data is false, deceptive, misleading or inaccurate, and with intent to defame, threaten, abuse, insult, or otherwise deceive or mislead the public or counselling commission of an offence, commits an offence, and shall on conviction be liable to a fine of not less than five million shillings or to imprisonment for a term of not less than three years or to both.”

In Uganda, the Supreme Court declared the false news offence unconstitutional in 2004 in *Obbo and Another v Attorney General*. The Court examined the offence in the context of the scope and importance of the right to freedom of expression and held that the wording of the offence was vague.

In Zimbabwe, the Supreme Court struck down the offence of false news in 2000, in *Chavunduka and Others v Minister of Home Affairs and Another*. The Court discussed the subjective nature of the concept of “truth.” - “Often the line between fact and opinion is blurred. There is a danger that the accepted view becomes confused with the right or correct view.” The Court held that because the provision did not require proof of actual negative consequence, merely the likelihood of such a consequence, it was too vague and creates a chilling effect on the practice of journalism.

In Zambia, the High Court declared the false news offence unconstitutional in 2014 in *Chipenzi v The People*. The Court recognised the colonial history of the offence, and that the context in which the offence was introduced differed markedly from the present day. The Court explained that the flaw in the offence was that it presupposed knowledge of the falsity of the statement, and placed a reverse onus on an accused that, notwithstanding its objective falsity, they had made efforts to verify its truth, thus infringing the presumption of innocence. In addition, the Court highlighted that the existence of the offence can contribute to a culture of fear amongst journalists.
Contempt of court

At common law, contempt of court is an act or omission calculated to interfere with the due administration of justice. To so qualify, there must be a real risk of prejudice to the due administration of justice.

Contempt of court is broadly divided into two categories: contempt *in facie curiae* which relates to contempt committed in the courtroom; and contempt *ex facie curiae* which refers to contempt committed outside the courtroom.

Contempt *ex facie curiae* is then further broken down into smaller categories: reference to a pending case (often referred to as the *sub judice* rule); and reference unrelated to a pending case (including conduct or a publication scandalising the court may be contempt). It has however been held that the courts must be slow to hold that criticisms of judges or of the court system itself amount to contempt. There must be a real risk of undermining the public confidence in the administration of justice.

It has frequently been recognised that the offence of scandalising the courts creates a tension between the perceived need to protect the administration of justice from unwarranted attack, and the right to criticise officials of the State, including judges. Hence, the courts have emphasised the need to permit a wide latitude for free expression.

Courts in the region have declined to declare the offence of scandalising the court unconstitutional. The Zimbabwe Supreme Court *In re Chinamasa* (2000) gave a detailed consideration to the offence of scandalising the court and upheld its constitutionality. In South Africa, the Constitutional Court in *S v Mamabolo* (2001) also declined to declare the offence unconstitutional but held that the threshold for conviction is extremely high and that there will be very few incidences when criticism would constitute contempt.

**NOTE**

- The distinction between civil and criminal contempt of court is no longer prominent in the UK and other countries as both forms of contempt have the same effect.
- The practice to refer to the defendant in a contempt case as a “contemnor” is to be discouraged as it insinuates a presumption of guilt before the person has been found guilty of contempt.

Offences relating to confidential information

A number of laws throughout the region have the potential to stifle press freedom and to prevent the exposure of corrupt practices.

The Namibia High Court in June 2018, in the case of *Director General of the Namibia Central Intelligence Service v Haufiku*, declined to grant an interdict against a newspaper journalist and editor to prevent them from publishing an exposé on alleged corrupt activities by the Namibia Central Intelligence Service. The NCIS had sought the interdict in terms of the Namibia Central Intelligence Service Act of 1997 and the Protection of Information Act of 1982, which prohibited the publication of classified information that threaten the operations of the security service. The Court held that the State could not simply raise the excuse of “national security” without providing information, as the court had inherent powers to hear a case in camera if needed. The Court further held that the laws could not have intended to prevent the exposure of corrupt activities and that the Namibian public had the right to information.
Section 44 of the Corruption and Economic Crime Act in Botswana provides that any person who without lawful authority or reasonable excuse publishes details of an investigation, shall be guilty of an offence. Using this provision, the Botswana Attorney General sought an interdict against the Sunday Standard preventing it from publishing information relating to investigations by the Directorate of Corruption and Economic Crimes. The Sunday Standard, with MISA as amicus curiae, has argued that section 44 infringes the right to freedom of expression to the extent that it curtails the public’s freedom to receive ideas and information without interference. The case is currently before the High Court.

**Soliciting for an immoral purpose**

Sometimes when the police want to prevent freedom of expression they use random offences as an excuse to arrest and detain human rights defenders, such as common nuisance, breach of peace, incitement to violence, and even offences such as insulting the modesty of women or soliciting for an immoral purpose.

One such example is the case of human rights activist Paul Kasonkomona in Zambia. Kasonkomona appeared on a television show in April 2013, where he spoke about the importance of respecting the rights of sexual minorities if the State is to effectively address the HIV epidemic. Kasonkomona was immediately detained and only days later was he charged with the offence of “soliciting for immoral purposes”. This offence dates back to the English Vagrancy Act of 1898. The purpose of the Vagrancy Act of 1898 was, as explained in the English House of Commons by the Secretary of State for the Home Department, “intended for the purpose of bringing under the Vagrancy Act, 1824, as rogues and vagabond, those men who live by the disgraceful earnings of the women whom they consorted with and controlled.” The offence was certainly not intended to be used against human rights defenders.

In February 2014, the magistrate ruled that the State had not made out a prima facie case and acquitted Kasonkomona. In an unusual step, the State appealed this acquittal. The State argued that, prosecution of Kasonkomona constituted a justifiable limitation of the accused’s right to freedom of expression since such limitation is reasonably required in the interests of public morality. Justice Mulongti, on 15 May 2015, confirmed Kasonkomona’s acquittal, reiterating the ruling of the magistrate which distinguished between soliciting someone to engage in same-sex sexual acts, which is currently a criminal offence in Zambia, and advocating for the rights of persons.

Even when the charges against activists are weak, the States’ actions in prosecuting them, have fundamental implications for freedom of expression in those countries. Such arrests have the effect of silencing many critical voices on human rights issues for fear of similar persecution.

**ACHPR, DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA (2002)**

“Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination. No one shall be subject to arbitrary interference with his or her freedom of expression… Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.”
Colonial and Apartheid Era Laws Still Govern Press Freedom in Southern Africa

Jonathan Rozen, additional reporting by Junior Sikabwe

They came for her on her way home. Walking from the offices of her newspaper on 10 October 2018, Sylvanie Kiaku did not expect to be arrested by officers of the judicial police. Kiaku, the editor of the *La Percée*, also did not expect to be detained for over a week or to be charged using a 1940 law originally written by the European colonizers of her country, the Democratic Republic of the Congo. She had in early September published two articles describing the lasting damage caused by a major Congolese bank’s failure to pay salaries for over 10 years. Her alleged crime was journalism.

Across Southern Africa, colonial and apartheid era laws are still being used to prosecute and harass the press.

Eswatini has numerous pre-independence laws that may be used against journalists. According to CPJ research and MISA-Swaziland director Vuyisile Hlatshwayo, this pre-independence legal framework was used in September 1999 to jail overnight and (unsuccessfully) prosecute Swaziland journalist Bheki Makhubu after he was charged with criminal defamation for an article about King Mswati’s fiancée.

Nearly a decade later in Namibia, a country frequently lauded for its free press credentials, laws from decades under South African apartheid rule continue to be used against the press. In April 2018, the 1982 Protection of Information Act was cited in an effort by the Namibia Central Intelligence Service (NCIS) to halt *The Patriot* newspaper from publishing about former NCIS members and land deals. Despite a June 2018 High Court decision in favour of *The Patriot*, the Protection of Information Act remains part of Namibian law. Local press freedom group Namibian Media Trust claimed the law is “unconstitutional as it violates both freedom of speech and the media” and called for the law to be scrapped. The Protection of Information Act No. 84 of 1982 also remains law in South Africa, and was used to justify a police raid on the home of journalist Jacques Pauw in February 2018. The Act prohibits the disclosure of confidential information for a purpose deemed prejudicial to the security or interests of the State.


The NCIS applied for an interdict to prevent an article written by *The Patriot* about corruption from being published. The court ruled that the NCIS had not produced any evidence of the alleged national security concerns that they based their application on. The court held that the intention of the law could not have been that it be used to cover up potentially illegal and corrupt activity.

The government of Zambia similarly targeted five journalists from Mano Radio in November 2016, detaining them and charging them for using “insulting language” under section 179 of Zambia’s Penal Code, according to CPJ reporting and Nzala Hangubo, one of the five journalists
PART V Criminal Laws Affecting Freedom of Expression and Access to Information

arrested. Zambia’s modern criminal code originates significantly from the Queensland code applied by the British to the Northern Rhodesia colonial territory in 1931, according to research by legal scholar John Hatchard. “After independence there was little or no law review to isolate the provisions that had colonial connotations,” Zambian lawyer Milner Katolo told CPJ.

Botswana, South Africa, and Angola all also retain vestigial laws from their time under British and Portuguese colonial rule that may be used to criminalize journalism. Outsa Mokone, editor of the Sunday Standard in Botswana, in September 2018 won a long legal battle against a sedition charge for his reporting. But the law persists. “We still have this sedition thing hanging over our heads. It’s still there and I know a lot of journalists censoring themselves because there is sedition on our books,” Mokone told CPJ.

Colonial or apartheid era laws continue to threaten press freedom across Southern Africa. This does not mean they are popular. In Eswatini, for example, survey results published by UNESCO in 2017 indicate 56.8% of respondents agreed that “the existing defamation laws and their application inhibit real public debate in the conduct of public officials and entities.” Only 5.4% disagreed. In Botswana, Mokone told CPJ: “Sedition is very alien to [our] tradition...it goes against our culture.”

There are, however, some signs of change across the region. In February 2016 and May 2018, Zimbabwe and Lesotho respectively declared criminal defamation unconstitutional; the Windhoek Declaration, signed in 1991, offers guidance for African governments to promote independent and pluralistic media; the 1997 Declaration of Table Mountain called for the abolition of insult laws and criminal defamation in Africa; a November 2010 African Commission on Human and Peoples’ Rights resolution stood firmly against criminal defamation laws; African national constitutions have enshrined fundamental principles of freedom of expression and information; and countless African journalists and media rights groups continue to tirelessly advocate to be able to work without fear of reprisal.

Makhubu remembers how journalists’ solidarity in 1999 helped pressure the Eswatini government to drop the defamation case against him. “People in power tend to underestimate the blowback they’ll get from the media, and when it won’t go away, it helps,” Makhubu told CPJ.

Colonial and apartheid era laws were not written for democratic African societies or a free press. Yet they remain at the behest of independent African governments. As long as these laws remain on the books, the intentions of their authors will continue reaching forward through history to define what African journalists report, as they did for Kiaku on her way home from work.
The Use of Contempt of Court Charges to Inhibit Criticism of the Judiciary

McQueen Zenzo Zaza

Introduction

Freedom of expression is a bedrock of any civilized democratic society. It has, in recent years, been under heavy attack from both the executive branch and, to a lesser extent, the legislative branch of government. The judicial arm of government has also contributed in the violation of this important freedom.

African courts have been using criminal contempt of court proceedings to infringe the enjoyment of freedom of expression and prevent criticism of the judiciary. This is somewhat baffling given the fact that the judiciary forms part of the three arms of government, therefore, it should be amenable to accountability just like the other organs. Those that aspire to public offices should grow a thick skin to criticism. Because of the power entrusted in them, they must be answerable to citizens.

In Zambia, the offence of criminal contempt of court charges has been applied in a manner that potentially silences those who scrutinize courts’ actions. Courts in Zambia, just like in other jurisdictions, are accountable to the people in whose name they administer justice. We are well guided in this instance by Article 118(1) of the Constitution of Zambia which states that “the judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability.” Furthermore, we learn from one of Lord Atkin’s frequently quoted dicta that “justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men”. The Zambian judiciary system seems to have taken a zero-tolerance approach towards criticism of its actions towards the very people from whom it derives its judicial authority.

Freedom of expression

The Constitution of Zambia, just like any other constitution anchored on democracy, protects many rights and freedoms to be enjoyed by its citizens. Freedom of expression is fundamental to any democratic dispensation and its importance cannot be over emphasized. In Zambia, Article 20(1) of the Constitution of Zambia provides for the protection of freedom of expression, stating:

“Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.”

Although freedom of expression is guaranteed and protected by the Constitution, it is not absolute. The Constitution itself allows instances where the freedom may be derogated from. Article 20(3) reads as follows:
“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.”

Additionally, Zambia is a State party to the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR contains similar provisions as those espoused in Article 20 of the Constitution of Zambia.

Freedom of expression as seen above can only be derogated by satisfying the elements provided under Article 20(3) of the Constitution of Zambia. The use of contempt of court proceedings to curtail freedom of expression does not even meet the criteria allowable under the Constitution and ICCPR.

Therefore, the judiciary in Zambia must be cautious in citing individuals for scrutinizing their conduct. The judicial arm just like any other arm of government is not exempt from criticisms and accountability. All organs of State are bound by the Constitution and must uphold the constitutional guarantees provided for in the Bill of Rights. We are fortified in this argument by Article 1(3) of the Constitution of Zambia which provides that “this Constitution shall bind all persons in Zambia, State organs and State institutions.” If the Judicial arm of the State is bound by the Constitution, it follows that it must champion the enjoyment of human rights and freedoms in the country. It follows further that courts must be champions in defending the protection of rights and freedoms in Zambia. Thus, the use of criminal contempt of court in order to punish those that criticize or insult the integrity of the judiciary or its officers is a violation.
The Protection of Judicial Integrity vs Freedom of Expression: How Far is Too Far?

Kaajal Ramjathan-Keogh

The use of the contempt of court charge as a tool to protect the judiciary

The independence and accountability of judges is fundamental to an impartial judicial process. As a result it is important to have mechanisms to protect judges from undue influence or interference. The offence of “contempt of court” is one such tool which can be used to protect the integrity and standing of the judiciary. Contempt of court is designed to protect the administration, functioning and integrity of the judiciary. Jonathan Burchell defines it as “unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it”. This offence can also however be abused.

Cases where judges have used their margin of discretion to make biased decisions demonstrates the need for accountability and oversight. International law and other international standards relevant to the rule of law, the administration of justice and corruption all include an obligation on States to ensure access to a competent, independent, impartial and accountable judiciary.

One needs to consider the intention behind a charge of contempt which is considered central to protecting the administration of justice: but also to create a balance between fair trial concerns and freedom of expression. There are two types of contempt of court: criminal contempt and civil contempt. Civil contempt often involves the failure of someone to comply with a court order. Judges tend to use civil contempt sanctions to coerce such a person into complying with a court order the person has violated. We have seen criminal contempt misapplied and even abused in cases where courts attempt to harass and intimidate individuals.

The following two cases from Eswatini and Zambia are illustrative.

Eswatini case of R v The Nation

In 2014 in Rex v The Nation, the High Court convicted human rights lawyer Thulani Maseko and editor of The Nation Magazine, Bheki Makhubu of contempt of court and sentenced them to two years’ imprisonment. They had written and published two articles criticising the Swazi judiciary and then Chief Justice Michael Ramodibedi. The articles related to the judiciary’s handling of the arrest of a government vehicle inspector. The High Court held that the right to freedom of expression was not absolute, and that it did not extend to comments made in the media which destroy public confidence in the judiciary. The Court in favouring dignity of the court over freedom of expression, failed to understand who the holders of the right to freedom of expression really are. In their disdain and scorn for Maseko and Makhubu they failed to appreciate that it is the public, and not the journalists themselves, who most benefit from the protection of freedom of expression. During the appeals process however the Office of the Director of Public Prosecutions stated that they were not defending the appeal and Maseko and Makhubu were acquitted and released after spending 15 months incarcerated.
**Zambia case of Gregory Chifire**

In 2018 Zambian anti-corruption activist Gregory Chifire was charged with contempt of court for publishing an article in which he called a Supreme Court judge “the most corrupt judge”. This was in response to the Zambian Supreme Court’s controversial reversal of the High Court’s judgment in *Savenda Management Service Limited v Stanbic Bank Zambia Limited*. Following several irregularities the trial concluded in August and a finding will be handed down in November. The charge sheet alleged that the words are contemptuous without setting out all the elements of a contempt of court charge and does not explain on what basis they were “calculated to interfere or prejudice the course of justice”. If convicted Chifire could be imprisoned for two years.

**Judicial integrity vs fair trial rights**

Corruption in the judicial system has a harmful impact on citizens and can compromise the legitimacy and stability of democratic institutions. Judicial integrity is of utmost importance: a fair and impartial judicial process can be said to be a precondition for accountable governance and for anti-corruption safeguards to take effect. The right of everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law in all criminal and civil legal proceedings, is recognised by the art 14 of the ICCPR and Art 10 of the Universal Declaration of Human Rights and several other human rights treaties. As a balance on unchecked judicial power it is necessary for democratic accountability to be able to critically assess the performance and conduct of the judiciary. Criticisms which attempt to raise fair comment or purport to publish the truth should be protected. No one should be above scrutiny but the judiciary need to maintain some means of protecting itself from scurrilous abuse. However, fair reporting must also be protected. But how far is too far?

Independence and impartiality of the judiciary requires integrity of individual judges and judicial institutions. Accordingly, there must be accountability for judicial corruption and judicial involvement in human rights violations. Accountability mechanisms must themselves be independent, fair and transparent, in order to ensure that they do not undermine the independence of the judiciary and that victims and the broader population see them as credible. These include fair and transparent procedures for the appointment of judges.

**Defamation of the President and criminal defamation**

The offence of “defaming the President” is frequently used in Southern Africa. This is a great cause of concern and requires clarity from the courts to narrow the application of the offence and emphasise the importance of criticism in a democratic country. To see the extent to which the offence can be abused and the reason why it should be removed from the statute books, one can look at the example of Turkey. Turkey has over the past few years arrested and detained thousands of people under the offence. The people detained ranged from those who insulted the President to journalists, children, academics and opposition parties who exercised their right to legitimate criticism of the President’s actions. Zambian opposition leader, Fresher Siwale was charged with “defamation of the President” in early 2018 for alleging that President Edgar Lungu was guilty of identity theft. In the prosecution of trivial cases of defamation of the President, a perception can easily be created that the judiciary is influenced by the executive, jeopardising the integrity of the courts.

Criminal sanctions on free speech should be challenged and their ambit ought to be narrowed. Criminal sanctions for defamation are overly harsh are best left behind in our collective colonial
past. This has been the position recently taken by courts in Lesotho, Zimbabwe and Kenya in relation to laws which criminalise defamation.

In May 2018 the Lesotho Constitutional Court declared the offence of criminal defamation unconstitutional in the case of Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights and 2 Others. Mr Peta was charged with the offence of criminal defamation after the Lesotho Times in 2016 published a satirical column relating to the then-Commander of the Lesotho Defence Force, Tlali Kamoli. The decision to challenge the offence was in response to the repression journalists that the country faced at the time. In 2016 Zimbabwe’s Constitutional Court struck down criminal defamation laws which had in previous years led to the arrests of journalists (Madanhire and Another v Attorney General). The Kenyan High Court in 2016 also declared the offence of criminal defamation unconstitutional. Kenya High Court Judge John Mativo, in declaring the offence of criminal defamation unconstitutional in 2017, noted: “Criminal defamation has a stifling effect, of its very existence, on the right to speak and the right to know. Freedom of expression is secured by the Constitution and can only be limited by the same Constitution. A drastic punishment cannot, therefore, be justified in our society.”
The Use of Criminal Law in Zimbabwe to Inhibit Civic Participation by Transpeople

Ricky Nathanson

I am a transgender woman who transitioned in 2005, and have lived full time as a woman since then. On 14 January 2014, whilst sitting and socializing with friends at a local hotel in Bulawayo, Zimbabwe, I was asked by someone to pay him and his friend $20. He said at the time, the “friend” he was with didn’t like what I was doing. “What exactly am I doing?” I asked, only to be told that the friend worked for the President’s Office, and that I should go and sit down. Within forty-five minutes, six riot police arrived, complete with visors and rifles to arrest me. I was taken to the Central Police Station, where I was treated in the most humiliating way. I was forced to remove my pants and show my genitalia to five male police officers, all in the name of “gender verification”. After that, I was taken to two public hospitals, again as a means of “verifying my gender”. I was kept at the police station for three days and two nights. I was charged with Criminal Nuisance under the Criminal Law (Codification and Reform) Act [Chapter 9:23], for using the female bathroom, when I was in fact “male”. Those three days at the Central Police Station were made a living hell for me. I was periodically removed from the cell to be paraded, mocked and ridiculed by the police officers that came on duty. It was serious mental torture. However, on going to court, I was acquitted of the charge because nowhere in the Third Schedule of offences, was it listed that anyone can be arrested for using a public bathroom.

My ordeal, however, did not end with the acquittal of the criminal case against me. I became an overnight media sensation in Zimbabwe, regionally, and internationally. Foreign press was kind, fair and sympathetic in its reporting. The local press on the other hand were cruel, with headings like “Shemale Causes Stir in Court”, and “Gay Glee” referencing the acquittal of the case. The ramifications of the negative publicity were so bad, that I had to close the business I was running at the time. As a Chartered Secretary, I provided accounting and secretarial services to several small businesses, and also ran a modeling agency and events company. The bad publicity led to me losing my clients, students and business associates.

Zimbabwe is notorious for its anti-LGBT stance, which is clearly reflected in its draconian laws, with common law prohibiting sodomy, defined as the “unlawful and intentional sexual relations per anum between two human males”. The common law crime was codified in 2006 and criminalises any acts perceived to be homosexual, where it is an offence to hug, kiss or even hold hands. Prior to that, the laws were only limited to sexual activity. Furthermore, the Censorship and Entertainments Control Act prohibits the importing, printing, sale and distribution of “undesirable material” – pornography.

Although the law is silent on transgender persons, trans men and trans women are still perceived as and therefore classified as being lesbians and gays, and subjected to the same provisions. But then, how does the law deal with a transgender woman, who has because of the call of nature, decided to use a public convenience in order to relieve herself? Or what measures can be taken against an individual because they are seen to be offensive to another cisgender, heterosexual, prejudicial and biased citizen in a country so steeped in subjugating gender and
sexual minorities? Clearly, at the restaurant, there was no act that could be seen as sodomy, no pornographic literature to be found, and not even anything homosexual for that matter.

Trans diverse people have borne the brunt of arbitrary arrests under the law. Until 2016 police used charges such as “women to loiter in the streets soliciting for intimacy” to arrest trans women. This was until these charges were challenged in the Constitutional Court in 2015. In my case, in 2014, I was arrested at the instigation of someone with political connections, however I had not been caught in compromising sexual act, nor was I caught with illicit material. I was certainly not standing on a street corner or walking along a dark street, or even with some dark immoral intention. But being “different” there was this need to “punish” me for my mere existence, so therefore upon arriving at the police station, the police on duty decided to charge me under the Criminal Law (Codification and Reform) Act [Chapter 9:23], Third Schedule (Section 46).

This Act is a serious piece of legislation and is used to punish perpetrators of treason, terrorism, subverting the constitutional government, public violence, murder, infanticide, witchcraft, rape, bestiality and other acts of gross sexual misconduct. Other offences are wide ranging from insulting the President, to weaponry and computer fraud. Under the Third Schedule acts constituting criminal nuisance include “wanton and mischievous” trivial offences, such as ringing a bell, knocking on doors, giving off false fire alarms, obstructing a path, skating in public to the annoyance of people and setting a dog after a person or a vehicle. Nowhere in this Third Schedule is it an offence to use a public restroom.

Therefore, the obvious conclusion to my ordeal is that what transpired, and what I endured, can only be seen as an act of punishment against my person by virtue of the fact of who I am, and what I am perceived to represent. Evidently, there was nothing to justify my arrest, and time in the police station holding cells; the cruel humiliation I was made to suffer, and the mental anguish I was made to undergo. They saw this as a form of punishment, a way of teaching me a lesson. On the contrary, they did not realize the person they were dealing with. This suffering led me to be the activist I am, fighting for the social inclusion of all trans diverse persons, not only in Zimbabwe, but globally. It has led me to ensure that the same does not happen to other trans diverse people - not in a holding cell, a hospital, a school or other institution. It has led to the formation of the first trans led organisation in Zimbabwe, the first research to look at the plight of trans and gender diverse persons, not only in Zimbabwe, but the region of Southern Africa.

SECTION 46 OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT, 2007

“Any person who does any of the acts specified in the Third Schedule shall be guilty of criminal nuisance and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both.”

The Third Schedule [Acts Constituting Criminal Nuisance] goes on to say that “2. Any person who—...(v) employs any means whatsoever which are likely materially to interfere with the ordinary comfort, convenience, peace or quiet of the public or any section of the public, or does any act which is likely to create a nuisance or obstruction; shall be guilty of criminal nuisance.”
ND V ATTORNEY GENERAL OF BOTSWANA AND ANOTHER HIGH COURT OF BOTSWANA (2017)

The Botswana High Court recognised that the ability to express one’s gender identity is an integral part of the right to freedom of expression:

“The refusal to change the Applicant’s gender marker violates his right to freedom of expression...The Applicant as a transgender man has expressed his desire to be identified and live as a man, which is part of his constitutional right to define his own personal identity. In my opinion therefore as an expression of free choice, the decisions to live his life in accordance with his gender identity must be respected. His male gender identity is innate from which he cannot dissociate.”
The Use of Criminal Laws as a Barrier to Advocacy by Civil Society in Malawi

Beatrice Mateyo Mkanda

There are various constitutional provisions that allow Civil Society Organizations (CSO) to operate freely in Malawi, unfortunately these provisions are only on paper and most of the CSOs that are critical of the government find it hard to exercise their rights. This has contributed to the shrinking space for civil society in Malawi. Coupled with the cultural challenges around gender, women human rights defenders (HRDs) face a double threat.

I have been a gender and women’s rights advocate for the past 10 years and have been involved in lobbying for various issues and legislation affecting women and girls in Malawi. It was in the course of my work that I experienced firsthand the use of State institutions to intimidate and stifle the voice of women HRDs. There had been an increase in the number of cases of gender-based violence in the country, including some involving high profile individuals in State institutions. In reaction to this, CSOs organized a solidarity march to petition the Malawi government to do something to address this. I, being a human rights defender felt duty bound to take part in the march.

It was a beautiful sunny day and I decided to carry several placards during the march. I eventually ended up carrying one that was deemed controversial due to the media frenzy that followed “Kubadwa ndi nyini sitchimo/my pussy my pride”. I carried this placard with pride as I believed that it carried a strong message because women are abused in most cases for being women; for owning a vagina. We marched peacefully until the end where we were supposed to present the petition to the Minister of Gender, Disability, Children and Social Welfare. As the march was nearing the end, I got called aside by police from the Criminal Investigations Department. I tried to resist, but they would hear nothing of it and they bundled me up in their vehicle and took me to the police station like a common criminal. There was a lot of excitement at the police station where I was humiliated further as every police officer present wanted to have a look at the “explicit placard lady” and express their disgust.

At the police station, I was charged with the offence of indecent assault on females. The Malawi Penal Code in section 137 (3) states:

“137. Indecent assaults on females

(3) Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or intrudes upon the privacy of such woman, shall be guilty of a misdemeanor and shall be liable to imprisonment for one year.”

This is similar to a case that also happened in Malawi in 2010 when one activist was convicted for conduct likely to cause breach of peace for displaying a poster written “Gay rights are human rights”.

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According to the police officer in charge, I was guilty of insulting the modesty of ALL Malawian women. Didn’t I know that we are a God-fearing nation and should not mention the vagina at all, especially in public, lest we fear corrupting the minds of our young ones? This is just one isolated story of the things that are done to women including women HRDs to intimidate and stifle their voice.

In Malawi, the environment is not only conducive for HRDs in general but as demonstrated above, it is worse for female HRDs who risk a lot. Women must deal with State intimidation and the social implications that come with being a “loud and active” female. After my arrest, the media covered my story extensively. I have had people recognize me and walk up to me in the street and say some insulting words such as “prostitute” or “the one who defends the gay people”. This public shaming can be equally traumatizing.

In the future, there should be collective lobbying for the repeal of laws that inhibit freedom of expression by HRDs. Furthermore, we must hold governments accountable for abuse of State institutions against HRDs.

GENERAL ASSEMBLY RESOLUTION ON PROTECTING WOMEN HUMAN RIGHTS DEFENDERS, 18 DECEMBER 2013

“Gravely concerned that women human rights defenders are at risk of an suffer from violations and abuses, including systematic violations and abuses of their fundamental rights to life, liberty and security of person, to psychological and physical integrity, to privacy and respect for private and family life and to freedom of opinion and expression, association and peaceful assembly, and in addition can experience gender-based violence, rape and other forms of sexual violence, harassment and verbal abuse and attacks of reputation, online and offline, by State actors, including law enforcement personnel and security forces, and non-State actors, such as those related to family and community, in both public and private sphere.”

“Calls upon States to ensure that human rights defenders, including women human rights defenders, can perform their important role in the context of peaceful protests, in accordance with national legislation consistent with the Charter of the United Nations and international human rights law, and in this regard to ensure that no one is subject to excessive or indiscriminate use of force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment of punishment, enforced disappearance, abuse of criminal and civil proceedings or threats of such acts.”
Closing Civic Spaces in Tanzania: The Media, Sexual and Reproductive Health, and Working on Issues of Sexual Orientation and Gender Identity

Tanzanian human rights defender

Human rights defenders are one of the key actors in the promotion of human rights in Tanzania. Unfortunately, the space for human rights defenders to operate within is shrinking. This phenomenon is evident in various sectors including defence of the media, health advocacy and fighting for the rights of sexual minorities.

Human rights defenders in the media

Human rights defenders working in media are facing a host of challenges in Tanzania. Police officers have stopped journalists from documenting news in certain areas and on certain topics. Failure to observe these restrictions has caused some within the media to face violence and human rights violations including arbitrary arrest, destruction and confiscation of equipment by police officers and severe brutality. Furthermore, reporting on human rights abuses has led to the forced disappearance of some within the media.

The police have been emboldened and empowered in their attack on the media through the passage of the Media Services Act of 2016. This Act was enacted to arbitrarily limit the freedom of the media, and created a powerful tool for the current regime. The Act prohibits publication of any statement which threatens the, “interests of the defense, public safety, public order, the economic interests of the United Republic, public morality or public health or... [is] injurious to the reputation, rights and freedoms of other persons”. To avoid criminal prosecution, many people working in the media have had to compromise their professional ethics. Human rights defenders working in media are not at liberty to report on the newsworthy events occurring in Tanzania, but rather only that which suits the status quo.

Human rights defenders working in health, including sexual and reproductive health

People who advocate for the right to health in Tanzania also face a lot of challenges, especially when raising issues of sexual and reproductive health. Culture and religion are often used to limit the work which can be done in this sector. Access to certain sexual and reproductive health services are restricted because they are considered contrary to Tanzanian “culture”. Often times, even the ability to access information is hindered. The problem is even worse when trying to engage adolescent girls. Government and society praise the culture of silence which surrounds girls and young women. Human rights defenders working in this area are forced to avoid taboos and tailor their intervention to suit cultural mores around sex. When advocates fail to do this, there have been reports of arrest and intervention closures.
The appeal to Tanzanian culture has gone to the highest levels of the State. Even the Head of the State has said he is against family planning and abruptly required a review of all family planning interventions in September 2018.

**Human rights defenders working around issues of sexual orientation and gender identity**

Working in Tanzania to defend the rights of LGBT people is not an easy task. The government stigmatizes and discriminates against human rights defenders who work with and for this group. This is despite the fact that the Tanzania National Multi Sectoral Strategic Framework on HIV and AIDS 2014-2018 recognises part of the SOGI community among the key populations with high HIV prevalence and higher risk of transmission. Furthermore, the government has even admitted that stigma and discrimination hinders their efforts to address the needs of key populations.

Section 154 of the Penal Code of Tanzania is often used as a justification for abuse and discrimination against LGBT communities. This law criminalises the act of “carnal knowledge of any person against the order of nature”. Beyond its use for individual criminal liability, this law is also used to deny organisations which advocate for SOGI rights the right to formally register. There is no direct registration of any organisation working directly on SOGI issues. Many organisations register as public health organisations and work on SOGI issues informally. This greatly restricts their freedom of assembly and association in Tanzania. Once organisations are registered under different auspices, there are sometimes suspensions and threats to deregister if the organisation is working with LGBT persons. The government justifies deregistration on the ground that the organisations are “promoting homosexuality”. There is no clear demarcation between rights promotion and promotion of homosexuality. In addition, many SOGI human rights defenders are arbitrarily arrested.

**ACHPR, RESOLUTION 275 ON PROTECTION AGAINST VIOLENCE AND OTHER HUMAN RIGHTS VIOLATIONS AGAINST PERSONS ON THE BASIS OF THEIR REAL OR IMPUTED SEXUAL ORIENTATION OR GENDER IDENTITY (MAY 2014)**

“Calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities”.

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Cybersecurity Laws and Freedom of Expression in Southern Africa

Tyler Walton

The changing landscape of civic spaces

Civic spaces are the public places created or used to converse, organise, debate, and communicate about the social, political and legal systems which impact daily life. For much of human history, civic spaces were physical locations, such as town squares, market places, or community centers where people could come together and exercise their freedoms of expression, assembly and association. With the advent of the internet, much of daily life has shifted online. Along with the new digital marketplaces, social networks, and news outlets, the internet has become host to a multitude of online civic spaces.

Global internet penetration surpassed 50% of the human population in 2017, according to the Digital in 2018 report by We Are Social and Hootsuite. Much of the recent growth is occurring in Africa, which saw a 20% bump in internet users over the course of 2017. There are now half a billion users across the continent, with some of the highest percentage of connectivity occurring in Southern Africa. As the African continent has become more connected, it has changed how citizens participate in civic life, as well as how governments respond to their citizens.

In part, the internet has opened up new avenues for human rights defenders (HRDs) to pursue their advocacy. Hash tags that highlight human rights issues are able to spread information quickly and broadly across a country and even internationally. This has been demonstrated in Zimbabwe with Evan Mawarire’s #ThisFlag campaign, in South Africa with the student-led #FeesMustFall, and in Angola with #LiberdadJa and #Angola17 highlighting the arrest and imprisonment of 17 young adults who met to discuss ways to challenge the Angolan dictatorship.

As human rights defenders and activists have adapted to using digital tools to spread their message, governments around the region have started responding in kind. Below, the developments in Tanzania and Zambia over the past several years are followed as a demonstration of how governments have operated to restrict online expression, the impacts that has had on human rights defenders, and what human rights defenders should be on guard for from their own governments.

Tanzania develops a stranglehold on online expression

Tanzania was at the forefront of continental movement to regulate the internet when it passed its Cybercrimes Act in April of 2015. While the law has some benefits, such as the criminalisation of child pornography and incitement to violence, critics contest that sections of the law are too broad and that it violates rights protected in the Constitution and international human rights law. Specifically, sections 31 to 37 give police officers the right to search and seize computers without a court order. Additionally the act makes it an offense to send any unsolicited electronic messages, or to publish any information that is “false, deceptive, misleading or inaccurate”. These provisions give the police and government too much discretion in enforcement, and indeed have led to the harassment and arrest of human rights defenders.
For example, on 29 October 2015, 36 human rights defenders were arrested at the offices of TACCEO election observation center. They were taken to the police station and questioned for over eight hours on pretenses that a report they published about the election was “false, deceptive, misleading or inaccurate”. 27 computer and 36 phones were confiscated and searched, and were not returned for weeks. This greatly hampered the human rights work that TACCEO was doing in ensuring free and fair elections.

Following the Cybercrimes Act, the Tanzanian government continued to pass laws which gave it greater control over the internet, to the detriment of its citizens’ freedom of expression. This includes the Media Services Act 2016 and most recently the Electronic and Postal Communications (Online Content) Regulations 2018. These regulations give the Tanzania Communications Regulatory Authority sweeping discretion to remove content from the internet, and provides little to no safeguards to protect freedom of expression. The regulations require anyone who is posting content online to register and pay a large fee, over USD 900. This includes even small organizations and individuals as the regulations apply to, “application services licensees, bloggers, internet cafes, online content hosts, online forums, online radio or television, social media, subscribers and users of online content, and any other related online content.” Furthermore, the regulations have broad categories of prohibited content which include “indecent content”, “violent content”, “annoyances”, or content that “leads to public disorder”. Without precise definitions, this can curtail even essential content, such as civil society reporting on violence against human rights defenders.

International rights organisations like Reporters without Borders have decried that the new regulations will kill the independent Tanzanian blogosphere. Following government threats of prosecution in June 2018, whistleblower website JamiiForums had to temporarily shut down. They currently have a law suit against the government challenging some of the new laws. Any activist or civil society organization who maintains a blog or website, who has not paid the registration fees is liable for a USD 2500 fine or up to a year in prison.

**Zambia’s growing crackdown on digital spaces**

In the past two years, the government of Zambia has repeatedly targeted digital spaces for suppression, tighter regulation, and outright censorship. This trend began after the hotly contested elections of 2016. Following the declaration of President Edgar Lungu’s election victory, there were service provider outages for 48-72 hours in much of Southern and North Western Zambia. These are the same regions of Zambia that are strongholds for the main opposition party, the United Party for National Development. There were never any official reasons given for the outages, but employees of some of the major internet service providers reported that the government instructed them to turn off the network in opposition strongholds. The outages mainly affected mobile broadband services, but were followed by temporary shut downs of private television and radio stations. The following month the Zambian Watchdog and Zambian Accurate and Balanced News, two online newspapers that were critical of the president, were temporarily forced offline.

Following these ad-hoc attacks on freedom of expression, the Zambian government started a more concerted effort to regulate and control digital spaces. In April of 2017, President Edgar Lungu instructed the Zambia Information and Communication Technology Authority (ZICTA) that they needed to control what he described as “the threat of social media abuse.” This was
shortly followed by the introduction of a trio of bills to better regulate the internet, which came with comments from Brian Mushimba, the Minister of Communications and Transport, saying that the bills would help the government be able to restrict access to social media platforms.

As of August of 2018, the Cybersecurity and Cybercrimes Draft Bill was approved by the Zambian cabinet and awaiting parliamentary debate. The exact details of its wording and provisions have not been made public and will not be revealed until the Bill is tabled in parliament.

The closed process of the crafting of the Cybersecurity Bill is one of the main critiques by members of civil society. They are concerned that the passage of the Bill will result in the infringement on Zambian citizens’ right to freedom of expression, access to information, and freedom of assembly online. Activists have rallied using the hashtag #OpenSpaceZM to follow news on the Bill and advocate for a more open process.

**Our role as human rights defenders**

As human rights defenders continue to call out human rights violations and hold governments accountable, it is important that they develop strategies to stay effective with changing civic spaces. While street protests, court room litigation, and advocacy will continue to play important roles in the toolboxes of human rights defenders, the digital landscape of the internet will continue to grow as an effective and essential tool for fighting for human rights. Human rights defenders should view the internet as an opportunity to be taken advantage of and an important resource to be defended.

Already, there are other cyber security and cybercrime bills in the pipeline. For example, a Cybercrime and Cyber Security Bill in Zimbabwe is in the final stages of review before being tabled in Parliament. Concerns about its impact on online civic spaces in Zimbabwe are already being raised by activists. Repressive cyber security laws should be fought against to preserve free and open access for the greater exchange of ideas. At the same time, human rights defenders should develop their online presence to reach larger audiences, and wield more influence over the decision makers of our societies.
PART V Criminal Laws Affecting Freedom of Expression and Access to Information

Digital Rights are Human Rights

Media Legal Defence Initiative

With the advent of the internet and exponential growth in access to information and communications technologies (ICTs), digital rights have become indispensable for people around the world to exercise and enjoy their fundamental rights. It is now firmly entrenched by both the African Commission on Human and Peoples’ Rights (ACHPR), through its Resolution on the right to freedom of information and expression on the internet in Africa (November 2016), and the United Nations (UN), through its Resolution on the promotion, protection and enjoyment of human rights on the internet (June 2016), that the same rights that people have offline must also be protected online, in particular the right to freedom of expression.

While it is clear that the right to freedom of expression and digital rights are intrinsically linked, there is an array of other rights that are also implicated, including the right to equality, education, freedom of assembly, and healthcare. The exercise of digital rights also enables access to a range of services, including online banking and trade, and plays a critical role in achieving both public and private accountability and transparency by realising the right of access to information.

However, with the growth in access to the internet and other ICTs, there has also been an increase in States and other actors seeking to encroach on these rights, for instance through intentional network disruptions, the promulgation of cybercrime laws and other repressive laws, and expansive digital surveillance operations without proper oversight.

New cybercrime legislation, drafted on the pretext of preventing online harassment, stopping fraud and limiting offensive content such as pornography, is being used by governments from Tanzania to Nigeria to shrink the space for dissenting voices. The laws target bloggers and other content producers, as well as ‘intermediaries’ who host content produced by others (a category which includes bloggers and media outlets which allow others to post comments underneath their posts or articles). Failure to abide by these laws may lead to websites being taken down, the imposition of fines or even imprisonment. In Nigeria, according to CPJ, at least five bloggers have been charged under the country’s 2015 Cybercrime Act.

There have also been attempts to ‘regulate’ internet content and online activity, for example, by requiring bloggers who attract a certain threshold size of audience to register with a central authority, or using broadcasting laws to license online content.

Internet providers and website owners are being put under pressure to disclose information about anonymous posters, putting at risk many bloggers and online activists who post anonymously to protect their identities and their sources.

“False news” laws have been around for centuries - tools of the powerful to silence dissent and, in recent decades, especially used against journalists. Recognised as incompatible with the principles of democracy and free speech, these old laws were steadily being expunged from statute books. In the last ten years, the Supreme Courts of Uganda, Zimbabwe, and the Gambia struck down false news laws as unconstitutional because they violate the right to freedom of expression. However, spurred by revelations of election misinformation campaigns, and backlit
by the US President’s rhetoric, in recent months a wave of hastily crafted “false news” laws have been enacted around the world. In Kenya, a new cybercrimes act was introduced that criminalizes the publication of “false, misleading, or fictitious data,” with a penalty of a USD 50,000 fine, up to two years in prison, or both. In July, Egypt passed a new media law criminalizing the spreading of “false news” for anyone with more than 5,000 social media followers.

Allegations of disseminating false information are also regularly used to justify internet shutdowns. In 2017, internet access was cut off at least 62 times by governments around the world, with “public safety” and “stopping rumors and dissemination of illegal content” cited as the most common justifications.

Cameroon shut down internet access in the country’s English-speaking regions in January 2017 for 93 days, and then again from October 2017 until the time of this writing. Internet shutdowns are invariably disproportionate and severely restrict the enjoyment of a range of other rights and services, including email and mobile communications, mobile banking, online trade, and the ability to access government services via the internet.

In Togo, following a proposed amendment to the Constitution, widespread protests took place and the government shut down the internet between 6 September and 10 September 2017 and again between 20 September and 21 September 2017 and additionally prevented access to other means of digital communication.

Affected parties have turned to the courts to seek recourse where their digital rights have been violated. MLDI is currently working on legal challenges to the shutdowns in Uganda and Cameroon. We are also supporting the defence of journalists charged under cybercrime legislation in Tanzania and a strategic challenge to Nigeria’s cybercrime act.

The internet is one of the most powerful tools for facilitating the receiving and imparting of information and ideas. As legislators and courts around the world grapple with this new digital landscape, human rights defenders must also turn their attention to defending civic space online.
The Health Benefits of Access to Information and Institutional Transparency

Annabel Raw

Restrictions on information access regarding the conduct and spending of government agents, the state of government institutions and the effectiveness of State-run programmes impede the right to health in Southern Africa.

In South Africa, HIV activists were able to improve access to antiretroviral treatment, for example, by exposing anti-competitive practices of big international pharmaceutical companies that drove up the prices of certain drugs domestically. These efforts by activists ultimately led to pharmaceutical companies agreeing to permit the production, sale and importation of generic drugs which drove down prices and expanded access to HIV treatment. The prospect of using competition law and taming the excesses of intellectual property barriers to advance access to treatment in Southern Africa has been highlighted repeatedly by organisations like the United Nations Development Programme and others, but this potential is yet to meaningfully manifest outside of the few South African examples.

It can be argued that the inability to access information (including on the nature of procurement agreements and costs of medical supplies and drugs that are imported by governments, whether procured by governments directly or through development partners) significantly impedes the ability of people in the region to question the legality, competitiveness, and underlying incentives that determine which medications are available to them when attending a local clinic. While initiatives like the Southern African Programme on Access to Medicines and Diagnostics (SARPAM) have assisted to bring a measure of transparency to medicine pricing regionally, most activists at country level simply don’t have the legal mechanisms, even where a right to access information exists on paper, to access information that would enable them to evaluate the billions spent annually on drug procurement. In the context of significant portions of the region’s population continuing to lack access to essential medicines, the consequences pose a grave threat to the right to health.

Prisons can be cited as another example of opaque governance that has shown mortal consequences in the region. Prisoners are internationally a politically inexpedient population – investing in their wellbeing is seen to offer few direct benefits for politicians. The lack of transparency about what goes on behind bars is also seldom a significant concern for citizens, despite that prisons are institutions that ought to be subject to democratic scrutiny and are operated on tax payers’ funds. Research is also increasingly revealing the public health and health security risks of operating inhumane and unhealthy prisons - for example, as seen through the high burdens of tuberculosis including drug-resistant forms in prisons, which in some cases is being shown to sustain countries’ disease burdens despite effective community prevention efforts.

In Botswana, for example, the Prisons Service by its own admission has generally adopted a “guarded culture”, emphasising security over community involvement in matters of imprisonment. This culture is legally and institutionally sanctioned. There is no formalised judicial inspectorate
of prisons or human rights commission with permanent and budgeted mandate to provide oversight over the prisons. Judges and magistrates may by law visit prisons but their findings are not made public in practice. Prison “visiting committees” are appointed by the Minister of Defence, Justice and Security and may conduct inspections but their reports are not made public and research indicates their recommendations are frequently not adhered to. While the Office of the Ombudsman has potentially broad powers to look into the prisons, its mandate is restricted to complaints of maladministration. While the breadth of that mandate keeps alive the prospect of investigation into some issues in prison administration it also inevitably stretches the Office’s focus away from prisons into all areas of governance. Personal visits and communications by prisoners are also significantly limited under law. This is all despite the requirement under human rights law to establish transparent and independent systems for regularly supervising and monitoring places of detention, amongst others, based on the duty to prevent violations of the prohibition against torture and inhuman and degrading treatment which thrive under conditions of secrecy. 

International expert consensus also links transparency and institutional task delineation in the prisons to successful HIV treatment and prevention outcomes. This includes fostering the active involvement of non-governmental organisations in HIV prevention and treatment efforts, the independence of public health officials from the prison administration, independent oversight on patient ethics and rights, and conducting studies and collecting data on HIV in prison populations. Despite this, and the international recognition of prisoners as a key population at high risk of HIV, healthcare in Botswana’s prisons is a closed system. Healthcare is not provided through the Ministry of Health but separately through health officials employed by the prisons. Non-governmental organisations have almost no access or role in HIV services in prisons despite publically-stated desires to do so. There is no up-to-date data available on the prevalence, incidence or nature of HIV services in the prisons. And even though the courts have ordered access to healthcare where rights violations have come to light, the enforcement of those judgments cannot be secured as there is simply no effective way to access information on health services in the prisons or monitor rights compliance. This lack of democratic accountability and independent oversight in the prisons leaves persons in detention extraordinarily vulnerable to abuse, exacerbates public health threats of ineffective healthcare, and increases the prospect for corruption and mismanagement to thrive unchecked.

A final example illustrates the importance of transparency and access to information particularly where healthcare services are provided in partnership between governments and development partners. Between 2016 and 2017, a number of infants died and suffered severe adverse events following vaccination campaigns in Lesotho and Namibia in which vaccine safety protocols were alleged to have been breached and vaccines inappropriately administered to ineligible children without the children’s or parents’ informed consent. Ministries of health in both countries deferred to the World Health Organisation (WHO) to investigate allegations because the vaccination campaigns were funded and implemented through development partners. But the contents of WHO investigations on the events surrounding the deaths have still not been made public, leaving the causes of the deaths and adverse events unknown and questions of liability not determined. The result is that instead of a transparent accountability process that preserves public confidence in the life-saving necessity of immunisation, angry and fearful parents have been reported to be withholding their children from vaccinations subsequent to these events, not
knowing whether they can trust the healthcare system. The breach of confidence in vaccinations is potentially deadly for the millions of children in the region whose survival is dependent on either timely immunisation or the benefits of “herd immunity” for those children too sick to be vaccinated.

Raising human rights concerns in the midst of an outbreak of an infectious disease or in the context of a critical programme reliant on generous support from development donors is difficult and unpopular work. This kind of work tends to expose ugly truths in governance and health systems failures that beset all governments in the region.

Restrictions on access to information and the lack of transparency in government institutions (particularly when services and programmes are delivered in collaboration with external partners and non-governmental organisations) create barriers to health and entrench impunity for abuse and mismanagement. The democratic accountability of all organisations providing services on behalf of or together with government institutions (whether international development partners, non-governmental organisations or private facilities) needs to be strengthened, including through transparency and access to information on their activities.
The importance of civil society participation in the affairs of the government

Civil society organisations are important for monitoring the activities of the government. Because of this, there should be some form of liaison between the government and these civil society organisations. It is important for a State to enact laws that assist CSOs to hold the State accountable. Citizens require access to public information that will enable them to know how the government is running their affairs on their behalf. In order to encourage civil society participation, some countries have enacted legislation aimed at giving civil society and the public at large access to information on the activities of the government. Sometimes, these include public meetings that explain how a decision was arrived at.

The laws, policies and practices which hinder access to information and civil society participation

The right of access to information is an important human right, necessary for the enjoyment of other human rights. Access to information requires not only that public bodies accept requests for information, but also that they should publish and widely disseminate documents of significant public interest. Such information should be available to everyone, not only to those specifically requesting it.

As is stated by MISA Zambia:

“Freedom of expression refers to your right to seek, receive and impart information and ideas without fear or restriction from surveillance, censorship or laws silencing dissent. As people turn to various media as a way of expressing their views they may not feel safe as more governments are using legislation to stifle free speech.”

Article 20(1) of the Zambian Constitution guarantees freedom of expression and of the press. On the face of it, the guarantee afforded by Article 20(1) seems very broad, however just like any other it is not absolute, and legislation has been enacted to restrict the exercise of the right to freedom of expression in order to prevent abuse of the right. Importantly, any limitations to constitutional rights must be interpreted narrowly and cannot negate the core content of the right.

Some laws in the Zambian Penal Code tend to be used to undermine the freedom of expression. For example, section 53 allows the President to unilaterally declare that a publication or class of publication shall be a prohibited publication. Section 54 makes it an offence to sell, possess or reproduce a prohibited publication. Section 67 criminalises a false publication “likely to cause fear and alarm to the public or to disturb the public peace”. Section 69 makes it an offence to publish defamatory or insulting material “with intent to bring the President into hatred, ridicule or contempt”, whilst section 191 criminalises defamation (libel).
The government has taken a passive approach when it comes to upholding the right to freedom of expression. In some instances, journalists have been assaulted because of their work, but there were no serious investigations into the reported assaults. We have also seen abuse of court proceedings to punish people who comment on public issues. Recently there has been an increase in contempt of court cases against people because of comments they made in the media relating to the actions of holders of public offices, including the judiciary. When concerns are raised about certain decisions by the government, the State’s failure to investigate the concerns raised by the public is in itself a violation of the right to public and free expression of information.
Extractive Industries, Human Rights Defenders, and Access to Information

Suzgo Lungu

The Nation, a daily Newspaper from Malawi, uses the phrase *freedom of expression: the birthright of all* as its motto. It is a powerful motto, highlighting the importance of people being able to freely express themselves. Accessing information is important in any democratic society, as it helps in the formation of opinions and holding those in authority accountable for their wrongs.

The right to expression is enshrined in a number of international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Article 19 of these instruments provides that every person has a right to freedom of expression including the right to seek, receive and impart information. This provision establishes permissible parameters and limitations within which governments can limit the right for the purposes of respecting the rights or reputation of others, national security, public order, health, and morals. For people to fully enjoy this right to seek, receive and impart information and ideas, information must be accessible. The State must, therefore, ensure that mechanisms and conditions conducive for peoples’ enjoyment of their right are available at all times. In the event that such mechanisms are not available, the State must be held accountable. This is where the role of human rights defenders comes in. They should have the ability to stand up and be the voice of the marginalised by taking measures to access information relevant to the communities they represent and make it available to the public.

The reality on the ground, however, indicates that human rights defenders do not have safe spaces to assume this role. A number of cases have been reported of human rights defenders being victimised because of their work across the region. They face enormous challenges, including threats to their lives, torture and sometimes death. Common areas of work where these incidents have been prominent include in politics, particularly around elections; the fight against corruption, and the scramble for natural resources by multinational corporations. This can be seen in countries like Zambia, Zimbabwe and the DRC, where multinational companies are involved in the mining and farming sectors, often at the expense of local communities.

STATE REPORTING GUIDELINES ON ARTICLES 21 AND 24 OF THE AFRICAN CHARTER RELATING TO THE OPERATIONS OF EXTRACTIVE INDUSTRIES – EXPLANATORY NOTE (MAY 2018)

“Human rights defenders who speak out and advocate for measures to ensure the respect of human rights of affected people must be able to assist affected people without fear of reprisals from the government or the company involved in the extractive industries and the State should ensure that there is not impunity for threats, attacks and acts of intimidation against those advocating for the rights of affected communities irrespective of their designation as human rights defenders, including women human rights defenders” (para 24).
Standing up to multinational corporations

The advent of globalisation has given rise to the growth of multinational corporations that have businesses in almost every corner of the world. The African continent, with its riches in mineral resources and fertile soils, has seen a rise in the numbers of multinational corporations present in the region. Unfortunately, governments enter into agreements and other commitments with these corporations without involving the local communities around the area of their operations, even though they are the most affected by these developments. Profits and revenues are prioritised at the expense of communities’ human rights. To make matters worse, local communities in the areas of these companies’ operations have no power against these big corporations and they are often forced to suffer silently.

Some of these corporations take advantage of poor corporate governance frameworks in these countries and they are able to operate without any checks and balances. According to international human rights standards, multinational corporations also have a responsibility towards people to ensure that their rights are protected and promoted. In the event that they do not do so, they must be held accountable. Consequently, multinational corporations must ensure that they do not destroy the environment or risk people’s lives, health and living conditions.

To avoid oversight by human rights defenders, some of these multinational corporations conduct their business in a clandestine and shrewd manner, hiding most of their compliance measures so that the public cannot determine the extent of their operations. In short, they beat the system in which they operate. This is why human rights defenders are important; they must remain vigilant in holding these corporations accountable. They can push governments to be transparent on regulations and monitoring mechanisms that the corporations must comply with in accordance with local laws and international standards. This entails accessing information on compliance reports that the corporations submit to government. Very few governments are willing to disclose this information to the public, but human rights defenders must ensure that this is done; it is for the betterment of the public. The African Commission recently launched State Reporting Guidelines on Articles 21 and 24 of the African Charter Relating to the Operations of Extractive Industries. This will be a useful tool for human rights defenders as it sets out the range of information States are required to report on.

**ARTICLE 21(5) OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS**

“States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”

**ARTICLE 24 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS**

“All peoples shall have the right to a general satisfactory environment favourable to their development.”
NOTE OF THE UN SECRETARY GENERAL ON THE SITUATION OF HUMAN RIGHTS DEFENDERS (JULY 2017)

“The Special Rapporteur adopts a broad and inclusive definition of defenders working on business and human rights, including affected communities and individuals, members of the media, lawyers, judges and academics. Defenders working on business and human rights may also be government officials and civil servants or members of the private sector, including company employees such as trade unionists and whistle-blowers. Human rights defenders are often ordinary people living in remote areas, who may not even be aware that they are acting as human rights defenders. What members of this broad and diverse group have in common is the exercise of peaceful activities to address adverse business-related human rights impacts and seeking remedy.” (13)

“Companies belonging to land-consuming industries, such as mining, agribusiness, oil, gas and coal and dam constructions, remain the most dangerous for defenders. However, defenders working to address human rights violations in other sectors, such as finance, information and communications technology and garment manufacturing, are not immune from threats and retaliation. Attacks have been reported in all sectors and regions and the Special Rapporteur continues to receive credible allegations about many attacks against defenders that have sought to address human rights violations relating to taxation and corruption” (16).

“In many cases, a growing number of defenders that have sought to address labour rights violations, corruption, lack of transparency and other issues pertinent to business and human rights have been charged and jailed for a range of criminal offences, including ‘misleading propaganda’, ‘infringement of State security’ and ‘public unrest’. Similarly, an increasing number of business enterprises are pursuing retaliatory lawsuits, commonly under the guise of strategic lawsuits against public participation, against defenders. Such harassment takes a substantial financial and psychological toll on defenders and has a chilling effect, ultimately undermining their capacity and willingness to bring human rights abuses to light. Moreover, defenders are often denied access to State legal aid when confronted with fending off lengthy and costly lawsuits” (43).
PART VI

Impact of Discrimination on Human Rights Defenders
Strategies to Counter Shrinking Civic Spaces: The Case of the Disability Movement

Bruce Chooma

Introduction

There is a growing culture of intolerance and impunity by some African leaders. This makes it increasingly difficult for civil society movements to play an effective role in keeping governments in check, particularly on their observance of human rights and the rule of law.

Persons with disabilities are a historically marginalised group who experience some of the highest levels of poverty and illiteracy on the continent of Africa. They are often not included in public programmes aimed at delivering social and economic services and benefits on an equal basis with others.

Many persons with disabilities, especially women and girls, fall prey to all forms of violence and abuse including gender-based violence and heinous crimes. Often times, derogatory terms are used in reference to persons with disabilities and parents, especially mothers, are often subjected to ridicule and shame because of having children with disabilities.

Most counties have for decades viewed persons with disabilities as a separate group. They were objects for charity and public sympathy with no regard to their potentials, individual talents, or dignity as people.

Because of this history, persons with disabilities have grown a thick skin to public ridicule and have learnt over the years to forcefully demand necessary services and support. They have over the years taken a militant approach to advocacy, where public protests became an important tool to air their grievances. Street begging has also been used as a tool of protest by persons with disabilities against a society that does little or nothing to understand them and their plight.

However, with a growing culture of intolerance and use of oppressive laws like the repressive Zambian Public Order Act, persons with disabilities have sometimes found themselves on the wrong side of the law and have become victims of brutality at the hands of law enforcement personnel.

On 22 April 2017 video footage emerged of a uniformed police officer in Angola’s capital, Luanda, beating a peaceful protester in a wheelchair until he fell to the ground. As was reported by Human Rights Watch:

“More officers wrenched banners and leaflets from other protesters with physical disabilities. The police then left the scene, as people struggled to help the beaten man. The activists, including those in wheelchairs, had gathered in Luanda to protest the lack of accessible infrastructure for people with physical disabilities. It is estimated that more than 650,000 of Angola’s 25 million people have a physical disability, according to Angola’s 2016 census.”
This example among many others across the continent demonstrates the need to entrench a culture of tolerance among African leaders. It also points to the need for innovative ways to carry out advocacy in order to get the change desired even in the face of hostile regimes and unsupportive legal frameworks.

It is important therefore for the disability rights movement to develop synergies with the wider human rights defence mechanisms in their countries and work using the media, online platforms and the courts to achieve respect for their rights.

**Strategic advocacy and innovation for disability rights**

In addressing the need for innovative advocacy strategies, disability rights movements in Africa are increasingly using strategic advocacy approaches. They are testing the law and using the courts to denounce laws that fly in the face of the rights of persons with disabilities.

These strategies are even more necessary for groups that are more disadvantaged within the disability community. These groups include persons with psychosocial disabilities, persons with albinism and women and girls.

Without strong laws and effective enforcement mechanisms, these groups often need more intensive support, or they will continue to suffer and die in silence.

The case of advocacy for the repeal of Zambia’s archaic Mental Disorders Act is an important example of how a good mix of advocacy actions can lead to public demand for reform and improved practices by State institutions.

Activists used the media, strategic engagements with duty bearers, strengthened self-advocacy capacity and vocal initiatives by human rights defenders to advocate for the rights of persons with mental and psychosocial disabilities in Zambia. Because of these efforts, changes in mental health policy and practices are beginning to roll out and the new Mental Health Act is close to being passed.

When three persons with psychosocial disabilities in Zambia under the auspices of the Mental Health Users of Zambia (MHUNZA) decided to petition the Lusaka High Court seeking a declaration that the Mental Disorders Act be annulled on account that it violated their rights, the republican Constitution and the international human rights standards that Zambia subscribed to, they had no idea of the far reaching implication of their action [*Mwewa and Others v Attorney General and Another*, (2017)].

The judiciary was at pains to nullify the whole law but agreed with the petitioners on all grounds and strongly called for a review of the law by the other arms of government. This approach demonstrates that strategic action can achieve amazing results, even if it sometimes takes time.

**Using compelling laws and policies**

Zambia has a favourable legal and policy environment for the protection and promotion of the rights of persons with disabilities. The 2012 Persons with Disabilities Act does, to a large extent, domesticate the UN Convention on the Rights of Persons with Disabilities (CRPD), which Zambia ratified in 2010.

The State has developed a national policy on disability which, despite not being compliant with the CRPD, does attempt to put in place some framework for implementation of measures
aimed at addressing identified priority areas for the achievement of the rights of persons with disabilities.

Human rights defenders continue to use these documents to highlight failures of State proclamations and to demand improved delivery of services to persons with disabilities.

International commitments

The Zambian government has also made global disability commitments. These commitments include signing on to the 2018 Global Disability Summit - Charter for Change, with specific benchmarks such as to promote inclusive education at all levels by 2022.

The government also committed to increase budgetary allocation towards purchase of assistive technology and capacity building of local manufacturers; to mainstream disability in all sectors through focal point persons; and initiate and improve targeting and programming of projects for girls and women with disabilities in rural areas.

All these commitments together with the targets and activities spelled out in the National Disability Policy call for effective monitoring including the deployment of budget tracking processes by civil society and like-minded human rights defenders.

Popular culture, mass media and social media innovations

Whilst old style public mobilisation tactics send a strong signal to duty bearers and communicates their direct feelings on a matter, governments continue to hold dear to laws that make it easy to quell public gatherings.

For persons with disabilities, who have limited capacity to escape physical danger or defend themselves from attack, they increasingly now depend on the media to get their messages across. Popular theatre and cultural performances are now responding to the disability inclusion agenda. For example, Zambia now has film productions that depict a positive message on persons with disabilities.

The campaign for the repeal of the Mental Disorders Act has taken over a decade and over hundred radio programmes and hundreds of news items and interviews have been given on the subject. This has helped build some of the momentum we hope will lead to the new Mental Health Act.
The Criminalisation of HIV and the Plight of Women in Zimbabwe

Lizwe Jamela

Introduction

HIV is a worldwide pandemic that affects many individuals of varying social, economic and cultural status. People living with HIV (PLHIV) usually face numerous challenges, including societal stigma and discrimination. Legal responses to this stigma and discrimination have resulted in a number of changes—some of which are progressive while others actually perpetuate stigma and discrimination.

Currently, Section 79, Chapter 9:23 of the Criminal Law (Codification and Reform) Act criminalises HIV transmission, stating that:

(1) Any person who –

(a) knowing that he or she is infected with HIV; or

(b) realising that there is a real risk or possibility that he or she is infected with HIV;

intentionally does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realises involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.

(2) It shall be a defence to a charge under subsection (1) for the accused to prove that the other person concerned

(a) knew that the accused was infected with HIV; and

(b) consented to the act in question, appreciating the nature of HIV and the possibility of becoming infected with it.

The inclusion of the phrase ‘realising that there is a real risk or possibility’ seems to allow the mere possibility of infection to sustain a conviction since the actual knowledge of infection is not required. Accordingly, the language of this law is overbroad and susceptible to arbitrary application. In fact, this law has already been used in Zimbabwean courts and has resulted in numerous criminal convictions.

Overbroad criminal laws such as section 79 contravene the internationally accepted standards for HIV laws, specifically the 1996 International Guidelines on HIV and Human Rights.

Possible effects of the law on women

In as much as the punitive law on HIV transmission in Zimbabwe appears to be facially gender neutral, it can negatively impact on women. Notably, the law does not attempt to address the specific issues women living with HIV face, including gender-based violence and critical economic, social and political inequalities that make women specifically vulnerable to HIV.
While CEDAW contains progressive provisions outlawing any form of discrimination against women, Zimbabwe’s HIV criminalisation law can increase the likelihood that women will be prosecuted as a result of their HIV status. Public health policies in Zimbabwe encourage HIV testing during pregnancies, often resulting in women knowing their HIV status before their partner. Upon a pregnant woman’s discovery of being HIV positive, they are legally obliged to disclose to their status to their partners. Pregnant women can also be prosecuted on the basis of mother-to-child transmission. For many women, the result is further victimization through violence, evictions, rejection, disinheritance and other abuses, which are owed to the prevailing patriarchal society in Zimbabwe.

Thus, women are faced with two options: disclose their HIV status to their partners and risk being subjected to violence or refuse to disclose and risk criminal prosecution. Given this context, the facially neutral section 79 can therefore result in discriminatory consequences for women living with HIV.

Discrimination and stigma can lead to devastating consequences for individuals and communities. Often times, those facing discrimination turn to isolation and self-censorship, which greatly inhibits their freedom of expression. Furthermore, with the threat of criminality hanging over them, people will feel restricted in advocating for changes to these repressive policies.
The Use of Criminal Laws as a Barrier to Advocacy by Civil Society, including Key Populations, in Eswatini

Melusi Simelane

Eswatini still bears the mark of many colonial hangovers, evidence of which can be found in its laws. As an advocate for the equality of LGBTI persons, gaining access to a seat at the policy decision-making tables has taken time and the road to decriminalisation is still ahead.

Currently, LGBTI identities are not criminalised in Swaziland, but ancient colonial laws that included the “crime” of sodomy criminalise homosexual sex, suggesting it is simply a sexual act rather than a broader issue of love and respect. These outdated laws violate rights protected in the Constitution and international human rights encoded in the International Covenant on Civil and Political Rights (ICCPR). Furthermore, they are no longer in force in the colonizing countries that first set them. Should anyone be suspected of having committed sodomy, or even found to have had the intention to, they are liable to arrest without a warrant in accordance with the Criminal Procedure and Evidence Act of 1938. This was confirmed by a senior police officer in the Domestic Violence and Child Protection Unit of the Royal Swaziland Police. Furthermore, a National Register for Sex Offenders will enlist them, under clause 59 of the Sexual Offences and Domestic Violence (SODV) Act of 2018.

The circumstances set out above impair and hinder advocacy in many ways and on many levels. In order to do advocacy constant consultation, discussion, demonstration and persuasion is necessary. Ideally, advocacy is done at both the societal and government levels. Laws such as these are used to instill fear in advocates. This is further aided by discriminatory coverage by the media. This environment scares people into self-regulating their behaviour and also encourages a culture of secrecy which has devastating consequences for the health and wellness of LGBTI people. Many young LGBTI people in Swaziland live “After Nine” lives, conducting their relationships and sexual practices in secret at night, without the prying eyes of society. These laws embolden healthcare providers to deny services to LGBTI people and makes it difficult to bring health services to LGBTI people who do not seek them. This kind of secrecy creates an invisibility that also bolsters the narrative that LGBTI people do not exist in Africa and hence their rights are irrelevant to equality.

When addressing policy makers, evidence of human rights violations is necessary to make the case for LGBTI equality. In a society that scares people into silence and invisibility, evidence becomes a scarce commodity. The erasure caused by these laws fundamentally impacts advocacy by stifling meaningful engagement with citizens who could be allies of the LGBTI community. Opportunities for learning become difficult when sentiments of criminality are attached to LGBTI people, and fear of being identified as a part of the community stops people from learning or offering allyship.

Although LGBTI voices have made inroads in many spheres of society, the energy to achieve full decriminalisation is low; decriminalisation remains unprioritized. The challenges above continue
to shut down or seclude civic spaces for engagement on LGBTI equality, thereby stifling impact and progress. Anyone seen as a criminal cannot fully engage power on how to make society a better place for those like them. We must first be emancipated from the suspicion of unjust laws and societal stigma.

Another challenge, which recently presented itself, is that of occupying public space. On 30 June 2018, Swaziland, now called Eswatini, hosted its inaugural LGBTI Pride event, which included a customary march through the streets of the capital city, Mbabane. Permission for this march to take place was requested from the Local Authority, City Council, under the Public Order Act of 2017. Under the rightful assumption that the march was as commonplace as any other, the permission was granted and a route was provided which would see the procession move through the city centre. Upon realising that the event was about celebrating LGBTI pride, resistance from the police surfaced. They claimed that they had been “approached under false pretenses”.

The Royal Swaziland Police had indeed been approached, as the main provider of security in the city. This had to happen once permission was granted by the city authorities. They did not want to be seen as endorsing a “gay event”. The application to march had not violated any laws and hence could not be stopped, but the route was redirected away from the city centre and kept largely out of sight. This act by the police demonstrates impunity to the law. Firstly, the police had no legal standing to redirect the route. They were further, under the Public Order Act, not empowered to redirect the route without consultations. Instead, what they did was call a last-minute meeting, motivated by fear, stating that they would not be able to provide security if the event took place in the busier streets, because there was a “spirit of dissent” amongst the Swazi people. They based this on the irresponsible media reports.

Although the laws enabled the event to proceed, one can see how laws which are fundamentally incompatible create constant risk of abuse. In a context where all citizens are not equal, laws which do not specifically provide protection for marginalised groups are always prone to manipulation. This scenario would have played out differently had same-sex relations already been decriminalised. The social stigma and prejudice enabled by the law allowed members of the police force to personalise their execution of their duties, under the guise of legality. With the common law offense of sodomy, law enforcement comes to the seemingly fair conclusion that the Public Order Act, which does not condemn discrimination against LGBTI events or gatherings, does not cover LGBTI citizens. This kind of manipulation remains a risk to all LGBTI advocacy and freedom of movement and right to protest.

In Eswatini, rampant homophobia is built not only into laws but into the social fabric of the country. A country’s laws and the values of its people are a symbiotic relationship. In an absolute monarchy, laws are based on the preferences of a select few and citizens often have little choice but to abide, in the midst of private and public protest. If LGBTI advocacy is to progress beyond proclaiming the valid existence of LGBTI people, decriminalisation of same-sex relations and dissociation from sexual offence must be prioritized as a matter of urgency. The will to see the process through is also of paramount importance. Supported by legal reform, advocacy to change societal perceptions of the LGBTI community stands a greater chance of being effective. With more LGBTI living their lives in full public view, without fear, evidence of the need for equality further bolsters the case for all social structures and services to conform.
Legal, healthcare, correctional and religious structures should make sure that conditions are set up for no-one to be left behind and enables a comfortable and healthy existence for citizens. Although this analysis focuses on two areas of concern, there are many other intersecting consequences for LGBTI people such as unemployment and homelessness which feed into larger problems within governance and economics. These problems also affect all citizens and compound the challenges to advocacy further.

With that acknowledged, it becomes clear that criminalization, in addition to the challenges which exist within Eswatini, restricts LGBTI life to a greater extent than other citizens. Decriminalisation first, is our mandate.
Challenges and Successes of LGBTI Human Rights Defenders in Lesotho

Sheriff Mothopeng

Despite the existence of several challenges, there have been small gains for LGBTI human rights defenders (HRDs) in Lesotho. Lesotho is one of the few countries where the registration of human rights advocacy organisations usually proceeds unchallenged, as evidenced by the first-ever LGBTI organisation’s registration within two years of its inception. Additionally, Lesotho’s government is usually open to dialogue with HRDs. Furthermore, the codification of criminal law in the 2010 resulted in the removal of the common law colonial sodomy offence. Notwithstanding these positive developments, the government has remained less committed to creating protective laws specific to the fundamental rights and freedom of LGBTI communities. For example, Lesotho has not yet domesticated the international instruments it has ratified.

Generally speaking, HRDs face a number of legal challenges in their advocacy work. Specifically, there are laws criminalizing their area of work, vague laws or an absence of protective laws. Despite the existence of formal constitutional rights, there are no provisions that specifically protect sexual orientation or gender identity and expression. Transgender activists have been at the forefront of LGBTI advocacy work in Lesotho; nevertheless, lawmakers have afforded little attention to issues of gender identity. In particular, Lesotho does not have any comprehensive laws that allow a person to change their legal gender marker. Consequently, various leaders of the LGBTI movement are unable to fully perform their work as HRDs given the many obstacles they face when attempting to travel or access healthcare due to incorrect gender markers reflected in their official documents.

Another major issue is the use of cultural practices to degrade members of the LGBTI community. There is a growing number of femme-presenting gay men and transgender women, who are mainly based in rural areas, who have been forced into initiation schools in an attempt to force them to conform to patriarchal, cis-heteronormative systems. Moving forward, the government of Lesotho needs to prioritize the fundamental human rights and freedoms of the marginalised and remove all laws that hinder the enjoyment of such rights.
Conclusion
Strategies to Counter Shrinking Civic Spaces: Learning from the LGBTI Movement in Eswatini

Chunky Sithembile Gumede

Background

When the lesbian and gay movement in Eswatini gained momentum in the early 2000s, a lot of activists stood up and fought for their beliefs in human rights for all against loud and open criticism from the government, other civic groups, religious leaders, media and the society at large. Organisations such as Gays and Lesbians in Swaziland (GALESWA) rose against all odds to advocate for the recognition and acknowledgement of lesbian and gay people in a country where their existence was criminalised by the law and shunned by the citizens. Stigma and discrimination was at its all-time worst and there was zero mention of transgender or bisexual people.

A decade later, in 2011, a second organisation called Rock of Hope was formed in the country amidst the global call for protection of most at risk populations (MARPS) or marginalised populations. Even political parties joined the bandwagon, calling for the end to abuse of key populations. In this way, LGBTI organisations were able to seek registration under the guise of working with these groups which was limited to MSM (men who have sex with men) and FSW (female sex workers). However, the funding and global support was a health-based advancement which only focused on how men who have sex with men are at high risk of getting and spreading HIV. This put all the other issues of LGBTI in the corner of silence and non-action.

As this second movement was happening, the founders of the previous movement went quiet. What had happened to them, why were they not as vocal anymore? Was it because no further work needed to be done because of the advancements made? The truth is, they were censored by the state to the point of being obsolete. They were silenced for their beliefs and told to put the interests of the country first; not to tarnish the Christian values of the country. The longest serving Prime Minister went on record saying homosexual practices were non-existent and such people would be dealt with harshly were they to ever show themselves. Because of all of this harsh rhetoric from the government, the LGBTI rights movement considered being included in national health strategies a victory and a form of acceptance.

Little did the movement know that they were reducing the fight for LGBTI rights to a health fight and further perpetrating homophobia. Sexual minorities could only be talked about in public in conjunction with their need for condoms and how acknowledgement of MSM could help fight HIV; nothing else. This was the major downfall of the movement and is why it is difficult to gauge where Eswatini is in terms of human rights for LGBTI people.

The environment of Eswatini does not permit human rights defenders to do their work with integrity and honesty. It has focused on some and left others behind. The movement risks further alienation from inclusive, meaningful achievements. This is because the system has said that conversations about sexuality, sexual orientation and gender identity will be limited to health. Any other work that organisations do on the rights of LGBTI persons will not be seen or recognised.
and they will not be given a platform to discuss that work at national level. The systematic silencing of issues creates a vacuum which makes it difficult for human rights defenders to work with integrity. To respond to this, it is necessary to come up with strategies of working so that we may truly say we have a movement that can achieve great progress. Some strategies are outlined below.

**Strategies**

*Demand and defend independence*

Human rights defenders must have the nerve to stand up and demand independence of organising without government influence. It has become clear that the involvement of the State is a systematic vehicle meant to suppress instead of elevate the call for human rights recognition. Human rights defenders must be given the respect and protection they deserve. Their work comes with scrutiny and risks, which can have a negative impact on their everyday lives.

*Consciousness*

Be aware of the issues and challenges at hand and care enough to be able to see the differences between the needs of rural and urban communities. There is a huge gap between advocating for equal human rights in urban and rural areas. Advocacy in rural areas is basically non-existent, which is a cause for concern. Many people are not included when all advocacy efforts focus on urban centers. How can we genuinely say we are human rights defenders when our efforts are not addressing everyone in the community? Having this awareness will help recognise the real challenges and develop better strategies of how to deal with issues arising from the majority of people whose rights need to be defended. By doing this, human rights defenders create for themselves a healthy working environment in which they will be appreciated and recognised for work done fairly.

*Communication*

It is important for human rights defenders to talk to each other about the state of human rights, challenges faced and try to find better ways of working together. It is also imperative to devise ways to listen to people from the community’s voices and opinions without dictating the community’s needs. This combined effort will play a role in rebuilding our shrinking civic spaces the way we want it to look, and will help us truly work for the people we work for.

*Collaboration*

When we speak in one voice we are more likely to be heard than when each individual comes with a different perspective. Human rights defenders can learn from the experiences of other civil society organisations that have succeeded in their advocacy. Women’s rights advocacy in Eswatini started with many challenges, but major strides have been made towards recognition of women as equal citizens. We can learn from collaborative efforts with the civil society organisations that achieved this.

*Research*

A lot of countries within the African region and beyond have done great advocacy work. It might help to research how they managed to advance society and what we might learn from their achievements and process getting there.
**Movement building**

It is important to mobilize the masses, ensuring that we have a common goal in our advocacy. There should not be confusion around the fact that we are trying to build a strong movement that seeks freedom from stigma and discrimination. There should not be exclusion of who we work with; let it be clear that the LGBTI movement will not be reduced to non-entities. Movement building should draw on passion, like the kind that was evident among human rights defenders who worked within the first Eswatini LGBTI movement. Advocacy should not be motivated by greed, this could create huge setbacks for advocacy.

**Recognition of activists**

Appreciate the efforts of activists who have stood up in the face of adversity and risked their lives. Often we forget about the people that do the work. It is disheartening for people to constantly work for a cause they are not appreciated for.

**Fearless lobbying**

Engage our parliamentarians and political representatives and seek their support and voices in calling for equality. Call them out for the decisions they make which exclude human rights defenders but which directly affect human rights and demand for them to recognise the conventions and human rights declarations that the country has. Also call for legislation such as same sex marriage and adoption and call for the repealing of the sodomy offence which is commonly used as a tool to justify discrimination against LGBTI people in the country. Our lobbying must not just focus on provision of lubricants and flavoured condoms.

**Remuneration**

Most of the time there is very little or no remuneration for the work that is done by human rights defenders. This often causes strong activists with the most brilliant minds to leave the movement. In this way there is no continuation and instead of moving forward we have to start afresh with new ideas all the time because people have left and the new ones are pushing a different agenda.

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**COTONOU DECLARATION ON STRENGTHENING AND EXPANDING PROTECTION OF ALL HUMAN RIGHTS DEFENDERS IN AFRICA, 2017**

“Various political, social and contextual factors such as patriarchy, gender stereotypes, heteronormativity, militarization, religious and other forms of extremism and globalization undermine the activism and work of certain categories of human rights defenders including women human rights defenders, activists working on the right to land, in conflict and post-conflict States, on issues related to health, HIV, sexual orientation and gender identity and expression as well as sexual and reproductive health rights. Addressing the underlying and structural causes of human rights violations affecting these human rights defenders should be prioritized since it requires repeal of legislation, removal of policies and practices that create or reinforce violence, discrimination and stereotypes.”
ANNEXURE

UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1999)
The General Assembly,

Reaffirming the importance of the observance of the purposes and principles of the Charter of the United Nations for the promotion and protection of all human rights and fundamental freedoms for all persons in all countries of the world,

Reaffirming also the importance of the Universal Declaration of Human Rights and the International Covenants on Human Rights as basic elements of international efforts to promote universal respect for and observance of human rights and fundamental freedoms and the importance of other human rights instruments adopted within the United Nations system, as well as those at the regional level,

Stressing that all members of the international community shall fulfil, jointly and separately, their solemn obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinction of any kind, including distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and reaffirming the particular importance of achieving international cooperation to fulfil this obligation according to the Charter,

Acknowledging the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, including in relation to mass, flagrant or systematic violations such as those resulting from apartheid, all forms of racial discrimination, colonialism, foreign domination or occupation, aggression or threats to national sovereignty, national unity or territorial integrity and from the refusal to recognize the right of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources,

Recognizing the relationship between international peace and security and the enjoyment of human rights and fundamental freedoms, and mindful that the absence of international peace and security does not excuse non-compliance,

Reiterating that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner, without prejudice to the implementation of each of those rights and freedoms,

Stressing that the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State,

Recognizing the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels,

Declares:

Article 1

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.
Article 2

1. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.

2. Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed.

Article 3

Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted.

Article 4

Nothing in the present Declaration shall be construed as impairing or contradicting the purposes and principles of the Charter of the United Nations or as restricting or derogating from the provisions of the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments and commitments applicable in this field.

Article 5

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

(a) To meet or assemble peacefully;

(b) To form, join and participate in non-governmental organizations, associations or groups;

(c) To communicate with non-governmental or intergovernmental organizations.

Article 6

Everyone has the right, individually and in association with others:

(a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

(b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

(c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.
**Article 7**

Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.

**Article 8**

1. Everyone has the right, individually and in association with others, to have effective access, on a nondiscriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.

2. This includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

**Article 9**

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

3. To the same end, everyone has the right, individually and in association with others, inter alia:

   (a) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay;

   (b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

   (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

4. To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.
5. The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

**Article 10**

No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.

**Article 11**

Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.

**Article 12**

1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.

2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

**Article 13**

Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.

**Article 14**

1. The State has the responsibility to take legislative, judicial, administrative or other appropriate measures to promote the understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights.

2. Such measures shall include, inter alia:

   (a) The publication and widespread availability of national laws and regulations and of applicable basic international human rights instruments;
(b) Full and equal access to international documents in the field of human rights, including the periodic reports by the State to the bodies established by the international human rights treaties to which it is a party, as well as the summary records of discussions and the official reports of these bodies.

3. The State shall ensure and support, where appropriate, the creation and development of further independent national institutions for the promotion and protection of human rights and fundamental freedoms in all territory under its jurisdiction, whether they be ombudsmen, human rights commissions or any other form of national institution.

**Article 15**

The State has the responsibility to promote and facilitate the teaching of human rights and fundamental freedoms at all levels of education and to ensure that all those responsible for training lawyers, law enforcement officers, the personnel of the armed forces and public officials include appropriate elements of human rights teaching in their training programme.

**Article 16**

Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas to strengthen further, inter alia, understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities.

**Article 17**

In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

**Article 18**

1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.

2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.

3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.
Article 19

Nothing in the present Declaration shall be interpreted as implying for any individual, group or organ of society or any State the right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms referred to in the present Declaration.

Article 20

Nothing in the present Declaration shall be interpreted as permitting States to support and promote activities of individuals, groups of individuals, institutions or non-governmental organizations contrary to the provisions of the Charter of the United Nations.