



Freedom of Association And Assembly

**Unions, NGOs and Political Freedom
in Sub-Saharan Africa**

March 2001

**ARTICLE 19
The Global Campaign for Free Expression**

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ABBREVIATIONS

ACHR

American Convention on Human Rights

AWC	Association of Women’s Clubs
CCM	<i>Chama Cha Mapinduzi</i> (Revolutionary Party)
CIO	Central Intelligence Organisation
EHRR	European Human Rights Reports
FES	Friedrich Ebert Stiftung
GAPVOD	Ghana Association of Private Voluntary Organisations in Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
LOMA	Law and Order (Maintenance) Act, Cap 65 (Zimbabwe)
MINAT	Minister in Charge of Territorial Administration
NGO	Non-Governmental Organisation
NOA	Non-profit Organisations Act, 1997 (South Africa)
OATUU	Organisation of African Trade Unions
OAU	Organisation of African Unit
PNDC	Provisional National Defence Council
RDPC	Democratic Assembly of the Cameroonian People
SDF	Social Democratic Front
UDHR	Universal Declaration of Human Rights
UNDP	National Union for Democracy and Progress
ZANU-PF	Zimbabwe African National Union – Patriotic Front
ZCTU	Zimbabwe Congress of Trade Unions

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INTRODUCTION

It is a decade since the second 'wind of change' began to blow across the African continent in both the political and economic spheres. The changes in the former included 'construction of democratic institutions', the 'reform of authoritarianism', and the 'extension of basic freedoms'. From the one-party dictatorships and military rule which characterised the African political landscape, most states in the region have moved forward to embrace some form of political pluralism and constitutional order whereby political power and authority are divided among various bodies and their exercise is subject to legal and democratic control. Going hand in hand with constitutional change has been the loosening of state restrictions on civic associational life, including allowing greater room for the formation of voluntary organisations and trade unions. The sum of these developments has been a decisive move by African states towards becoming democratic societies.

One of the most important conditions for the existence of a democratic society is respect for fundamental rights and freedoms. Among these freedoms, freedom of expression is considered the most precious and, indeed, the very foundation of a democratic society.¹ As pointed out by Marcus and Spitz, "the exercise of democratic self-government, both in direct and representative forms, requires of the citizenry the capacity to make informed judgments about the manner in which they are to be governed. Extensive and participatory debate in turn requires free and open access to all available and relevant ideas and policies."² It is through their ability to express themselves that the governed people can voice judgement on government action, and thus ensure that they are properly and democratically governed.³

Freedom of expression consists of two elements: the first is the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers and the second is the right to

¹ *Handyside v United Kingdom* (1976) in EHRR 737 at para. 49 and Supreme Court of Zimbabwe, in *Retrofit (PVT) v PTC & ANOR*, 1995 (2) ZLR 199 (S) 210H-211A. See also Feltoe, G., 'Just How Precious is Freedom of Expression?' in *Legal Forum* (Vol. 9 No. 3, 1997) 23–32, 23.

² Marcus, G., & Spitz, D., 'Expression' in Chaskalson, P., *et al.*, *Constitutional Law of South Africa* (Juta & Co, Johannesburg, Revision Service 3, 1998) 20–1– 20–63, 20–8.

³ Kabudi, P.J., *Human Rights Jurisprudence in East Africa: A Comparative Study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda*, (Nomos Verlagsgesellschaft, Baden-Baden: 1995) 282.

choose the means to do so.⁴ Thus, the right to freedom of expression protects not only the substance of ideas and information, but also their form, their carriers and the means of transmission and reception. This view was supported by the European Court of Human Rights when it expressed the opinion that freedom of expression in Article 10(1) of the European Convention on Human Rights "applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information."⁵ This opinion was endorsed and adopted by the Supreme Court of Zimbabwe in *Retrofit (Pvt) Ltd*.⁶

Under Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), ideas and information may be received or transmitted "either orally, in writing or in print, in the form of art, *or through any other media*" [emphasis added] chosen by the communicant or recipient. Thus this list of means is not exhaustive.

The choice of means for communication of ideas depends on several factors, including the nature of the ideas to be communicated and the level of technological advancement in a given society. In developed countries, the principal media of communication are television, radio and print media and electronic mail. In parts of the developing world like Africa, these means are still unavailable to the majority of the population. The principal method of transmitting information and ideas is still via oral communication, in most cases unaided by any technological devices. For people to communicate in this way they must be able to come together and it is for this reason that the enjoyment of freedom of expression in Africa is dependent on the extent to which freedoms of assembly and association are guaranteed. Therefore freedom of assembly and association have been described as being not only cognate to freedom of expression, but as another essential element of any democratic system.⁷

The relationship between freedom of expression and freedoms of association and assembly is one of interdependence, in that the exercise of the latter set of freedoms may be seriously affected by the extent to which the former freedom is guaranteed. As Draht rightly points out:

In the absence of freedom of expression ... associations cannot make their objectives, interests and

⁴ICCPR, Article 19(2).

⁵In *Autronic AG v Switzerland* (1990) 12 EHRR 485, para. 47.

⁶*Retrofit (Pvt) Ltd vs Posts and Telecommunications Corporation (Attorney General intervening)* 1995 (9 BCLR 1262 (ZS), 196 (1) SA 847 (ZS)).

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demands openly known, much less publicise their activities as well as their views and comments on the government's policies and measures.⁸

The rights to freedom of assembly and association have been formally enshrined in the constitutions of almost all sub-Saharan countries. In this report, ARTICLE 19 shows how despite such entrenchment, these freedoms have not been enjoyed in the region because of the inadequacy of the laws that are supposed to give effect to these constitutional rights; oppressive practices by ruling parties against opposition groups; and legal regimes relating to public order.

⁷Kabudi, op. cit., 297.

⁸Drah, F.K., 'The Constitutional Framework and Civil Society' in Drah, F.K & Oquaye, M., *Civil Society in Ghana* (FES, Accra, 1996) 31–59, 35.

1. INTERNATIONAL AND REGIONAL STANDARDS ON FREEDOM OF ASSOCIATION AND ASSEMBLY

The principal sources of legal standards relating to freedom of assembly and association are human rights instruments both of a general and specialised nature, as well as instruments of regional scope. Among the former are the Universal Declaration of Human Rights, 1948 (UDHR) and the International Covenant on Civil and Political Rights, 1966 (ICCPR). Article 20(1) of the UDHR provides that "Everyone has the right to freedom of peaceful assembly and association" while sub-article (2) of the same Article provides that "No one may be compelled to belong to an association". Under the ICCPR, the right of peaceful assembly is recognised and protected under Article 21, while freedom of association is enshrined in Article 22 which provides:

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

The right to freedom of peaceful assembly and association is also provided for under Article 5(d)(ix) of the Convention on the Elimination of Racial Discrimination of 1966.

In addition to instruments of a global nature, the rights of peaceful assembly and freedom of association are provided for under various regional instruments on human rights such as the European Convention on Human Rights, 1950⁹, the American Convention on Human Rights, 1969¹⁰ and the African Charter on Human and Peoples' Rights, 1981.¹¹

Freedom of association in the field of labour relations is further provided for under Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which follows very closely the relevant provisions of two International Labour Organisation-sponsored instruments, namely the convention concerning Freedom of Association and Protection of the Right to Organise¹² and the convention concerning the Application of the Principles of the Right

⁹Article 11.

¹⁰Articles 15 (right of assembly) and 16 (freedom of association).

¹¹Articles 10 (right to free association) and Article 11 (right to assemble freely with others).

¹²No. 87. This Convention entered into force on 4 July 1950.

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to Organise and Bargain Collectively.¹³ Under the Convention concerning Freedom of Association, workers and employers have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.¹⁴ Organisations so established have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and to formulate their programmes without interference from authorities.¹⁵ Workers' and employers' organisations are also protected from dissolution or suspension by administrative authorities¹⁶ and are permitted to establish and join federations and confederations and any such organisations. Furthermore federations and confederations have the right to affiliate with international organisations of workers and employers.¹⁷

The convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively seeks, among other things, to enhance freedom of association in the labour field by affording protection to unionised workers from victimisation for union-related activities. The pertinent provision is Article 1, which provides:

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
4. Such protection shall apply more particularly in respect of acts calculated to:
 - (1) make the employment of worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (1) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2 prohibits workers' and employers' organisations from engaging in acts of interference with each other.

Freedom of association and assembly are subject to restrictions that apply specifically to these freedoms, as well as those which apply to human rights generally.

¹³ILO Convention No. 98.

¹⁴Article 2.

¹⁵Article 3.

¹⁶Article 4.

¹⁷Article 5.

Thus, almost all instruments providing for freedom of assembly include in the very provision in which the right is provided the requirement for the assembly to be "peaceful".¹⁸ The only instrument that does not use this term is the African Charter, which instead makes the exercise of the right to assemble subject to necessary restrictions provided for by law, in particular those enacted in the interest of national security and the safety, health, ethics and the rights and freedoms of others. Identical language is used to limit both freedom of assembly and freedom of association under the ICCPR¹⁹, the European Convention on Human Rights²⁰ and the American Convention on Human Rights.²¹

Under Article 10(1) of the African Charter on Human and Peoples' Rights, an individual has the right to free association "provided that he abides by the law." This is a particularly strongly worded qualification and fear has been expressed that the term "law" in this provision would be interpreted to justify and excuse any action whatsoever taken by governments, as long as such action is couched in legislation or otherwise conforms with "law".²² However, this fear has been laid to rest by the African Commission on Human Rights, established under the Charter, which has avoided a rigid and positivistic approach to its interpretation of Article 10. In its resolution on the right to freedom of association, adopted at the 11th Ordinary Session,²³ the Commission called upon governments not to "enact provisions which would limit the exercise of this Freedom". The resolution also stated that any regulation on the exercise of freedom of association "should be consistent with States' obligations under the African Charter." As Heyns notes, presumably the obligations referred to here are those relating to the enjoyment of the rights and freedoms guaranteed under the Charter²⁴, including the principle provision on freedom of association.

In addition to specific limitations, the freedoms of association and assembly are subject to general limitations which apply to all provisions.²⁵ In situations of emergency, states are permitted by international instruments to take temporary measures which may derogate from most human rights.²⁶

1. NATIONAL LAW AND PRACTICE IN SUB-SAHARAN AFRICA

¹⁸UDHR, Article 20; ECHR, Article 11; ICCPR, Article 21 and ACHR, Article 15.

¹⁹Article 22(2).

²⁰Article 11(2).

²¹Article 16(2).

²²Heyns, C., (ed), *Human Rights Law in Africa (1977)* p. 89.

²³Fifth Annual Activity Report, at 28.

²⁴Heyns, *ibid*, p.104.

²⁵See e.g. Article 30 of the UDHR and Article 4 of the ICESCR.

The evolution of laws and practices relating to freedoms of association and assembly in sub-Saharan Africa follows closely the political history of the region. During the colonial period freedom of association in the political sphere was restricted. However, colonial regimes were relatively liberal with regard to the formation of non-governmental and labour organisations. The situation in West Africa under British rule is described by Drah as follows:

It is true to say that British colonial rule in West Africa was, on the whole, autocratic. But, paradoxically, it did not prevent the colonial subjects from establishing a variety of voluntary organisations, especially from the end of the 2nd World War onwards ... the British colonial authorities even encouraged and guided the growth of labour and cooperative movements; their motives were, however, far less benevolent.²⁷

The same could be said of other parts of sub-Saharan Africa during the colonial period. So important were the institutions of civil society during this time that it was civic organisations, particularly trade unions, which played a key role in the struggle for independence and produced many of the first generation of presidents and ministers in Africa.²⁸ In South Africa, one of the consequences of apartheid was the creation of a mass culture of community organisations – the mushrooming of non-governmental organisations partly as a means of resistance to apartheid, and also as a result of external donors refusing to channel their resources through an illegitimate regime. "Many of the estimated 54,000 non-governmental organisations (NGOs) in South Africa were established at the zenith of anti-apartheid resistance, the 1980s."²⁹

In relation to freedom of assembly, the story was slightly different. Throughout sub-Saharan Africa assemblies, processions and demonstrations were restricted by an array of laws including provisions of penal codes relating to breach of the peace; disorderly behaviour at public meetings; unlawful assembly; riot; duel; illegal training and drilling; prohibition of quasi-military organisations; and other offences against public tranquillity.³⁰ The holding of processions and assemblies was subject to the requirement of obtaining permits, normally from District

²⁶See e.g. Article 4 of the ICCPR; Article 15 ECHR.

²⁷Drah, F.K., 'The Concept of Civil Society in Africa: A View Point' in Drah, F.K., and Oquaye, M., *Civil Society in Ghana*, (FES, Accra, 1996) 1–29, 9.

²⁸Sunmonu, H.A., 'Democracy, Development and Trade Unions' in Adewumi, F., (ed.), *Trade Unions, National Development and Military Rule* (FESS & OATUU, Ibadan, 1998) 1–10, 1.

²⁹Harding, T., 'NGOs: From Comrade to Competitor?' in *Public Forum*, 24 August 1994, p. 1.

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Commissioners; the relevant provisions gave wide-ranging powers to the police to break assemblies whether or not they had been so authorised.³¹

After independence things took a turn for the worse as freedom of association was curtailed and colonial restrictions on freedom of assembly were retained and sometimes augmented. This was so, notwithstanding the fact that many sub-Saharan countries became party to the international and regional instruments on human rights³² and some had incorporated these provisions in their constitutions. The right to form political associations was the first casualty as some states, whether following a socialist or capitalist ideology, adopted a one-party policy and others fell under military rule. Civic associational rights followed suit as organisations such as youth and women's groups and credit unions were by law forcibly incorporated into the party-government structures. The logic of this transition, as Hyden points out, was that the post-colonial state was the true representative of the people, and so there was little need for autonomous voluntary organisations.³³ In the field of labour relations, governments adopted highly interventionist policies resulting in restrictive legal structures and tight control over associational activities. The situation that resulted is well summarised by Takirambudde thus:

Labour law in most states reflected their authoritarian orientation, allowing an autonomous association only if it was functional to its objectives. Unions were, therefore, made to function as administrative and disciplinary arms of the state and management and invested their energies in performing production assignments and motivating the labour force. In sum, trade unions were mere cogs in the transmission belts.³⁴

Meanwhile repressive laws relating to assembly were retained and in some instances augmented by additional laws relating to emergency powers and restriction of strikes. These laws were constantly used by governments to suppress political agitation as well as industrial strife.

Things began to change for the better in the early 1990s when, due to internal and external factors governments in sub-Saharan Africa (as elsewhere on the continent) were compelled to undertake

³⁰See e.g. Tanzania's Penal Code, Sections 74–90. The law was the same in many other British colonies.

³¹Stevens, J., 'Colonial Relics I: The Requirement of a Permit to Hold Peaceful Assembly' in *Journal of African Law* (Vol. 41, 1997) pp.118–133.

³²On the ratification status of United Nations Human Rights Treaties in Africa see Heyns, op. cit., pp. 2–3.

³³Hyden, G., 'Bringing Voluntarism Back In: Eastern Africa in Comparative Perspective, in Semboja, J. & Therkildsen, O., *Service Provision under Stress in East Africa* (James Currey, London: 1995), pp. 35–50, 40.

³⁴Takirambudde, P.N., 'Protection of Labour Rights in the Age of Democratization and Economic Restructuring in Southern Africa' in *Journal of African Law* (1995 Vol. 39, No. 1), pp. 39–63, 41.

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political reforms in order to allow pluralistic societies and a more liberal legal order. One factor which contributed to the changes was the collapse of communism in Eastern Europe, which led to the agitation for political pluralism in Africa. Another important stimulus was the vacuum in economic and social welfare provision left by shrinking government services in the wake of economic decline in many African countries in the 1970s and 1980s. Voluntary associations, both local and international, moved in to fill this gap and came to be regarded in official circles as an alternative to development agencies.³⁵ Accordingly, a conducive legal framework had to be put in place for their existence and smooth operations.

As a result of these changes, virtually all sub-Saharan African countries have become, at least formally, multi-party democracies with constitutions containing bills of rights which allow, among other things, freedom of expression, association and assembly. In some constitutions these freedoms are provided for in the same article, indicating the linkage between the three freedoms.³⁶ Most provisions relating to freedom of association cover all forms of association including associations of general nature, political parties, and trade unions. However, some constitutions, in addition to a general provision relating to freedom of association, make separate and specific provision relating to political parties.³⁷ The majority of sub-Saharan constitutions also make separate provisions for labour organisations.³⁸

As far as the content of the freedoms is concerned, the constitutions of sub-Saharan Africa follow the formulation in the corresponding provisions of the relevant international instruments, particularly the Universal Declaration on Human Rights and the ICCPR. This is particularly so with regard to provisions on freedom of expression, most of which closely follow Article 19 of the ICCPR in providing that the freedom includes the right to seek, receive and impart information and ideas of all kind by any means.³⁹

³⁵Fowler, A., 'NGOs & the Globalization of Social Welfare' in Semboja, J. & Therkildsen, O., *Service Provision under Stress in East Africa* (James Currey, London: 1995) 51–69.

³⁶See e.g. the Constitutions of Angola (1980), Art. 22; Benin (1990), Art. 25; Botswana (1966, 1992), Art. 35; Burundi (1992), Art. 28; Central African Republic (1994), Art. 12; Chad (1993), Art. 34; Djibouti (1992), Art. 15; Equatorial Guinea (1991), Art. 13; Ghana (1992), Art. 21; Kenya (1969 as amended in 1991), Art. 70(b).

³⁷Constitutions with separate provisions on political parties include those of Cameroon (1972, as amended in 1996), Art. 3; Cape Verde (1992), Art. 56; Equatorial Guinea (1991), Art. 9; Liberia (1984), Art. 77; Malawi (1994), Art. 40; Mozambique (1990), Art. 77; Namibia (1990), Art. 17; South Africa (1996), Art. 19.

³⁸See e.g. the Constitutions of Burkina Faso (1991), Art. 20–22; Cameroon, Preamble, Cape Verde (1992), Art. 61–64; Central African Republic (1994), Art. 10; Chad (1993), Art. 35; Ethiopia (1994), Art. 42; Guinea (1990), Art. 18; Guinea Bissau (1991), Art. 36A–37; Madagascar (1992), Art. 31; Mali (1992), Art. 18; South Africa, Art. 27; Togo (1992), Art. 39.

³⁹See e.g. the Constitutions of Kenya, Art. 79; Mozambique, Art. 74 and Sierra Leone (1991), Art. 25(1);

Similarly, provisions relating to freedom of association and assembly follow Articles 21 and 22 of the ICCPR and some constitutions go beyond these provisions to pronounce themselves on some controversial issues, such as whether freedoms of association and assembly can be subjected to prior authorisation. For example Article 29 of the Constitution of Congo makes it clear that all citizens have the right to peacefully assembly "without previous authorisation or declaration". Also, Article 19 of the Constitution of Rwanda of 1991, while providing that liberty of association shall be guaranteed within conditions determined by law, goes on to make it clear that "prior authorisation may not be prescribed."

Like the corresponding provisions of the ICCPR, provisions relating to freedom of expression, assembly and association under sub-Saharan African constitutions are subject to certain limitations. The limitations to freedom of expression are similar to those found under Article 19(3) of the ICCPR. The limitations on freedom of assembly and association are also similar to those found under Articles 21 and 22(2) of the ICCPR. However, in relation to political association, many provisions impose additional conditions proscribing racist, tribal or regionalist parties. For example, Article 9 of the Constitution of Equatorial Guinea provides that:

The political parties of Equatorial Guinea may not have the same name as parties prior to 12 October 1968, and they must have national character and scope; they may not be based on tribe, ethnic group, region, district, municipality, province, sex, religion, social condition, profession or occupation.

Similar provisions are found under Articles 79 and 20(2) of the Constitutions of Liberia, 1984, and of Tanzania, 1977, respectively.

Judiciaries around the sub-continent have taken advantage of the changed political-legal environment to take a bold stance in protection of human rights. From east to west, judiciaries have used powers conferred on them by the bills of rights to strike down laws found to be in breach of fundamental rights and freedoms, even on the basis of international instruments signed but not yet ratified by the relevant parliaments.⁴⁰ Among the statutes that have been so purged are

Senegal (1963 as amended in 1992), Art. 8; Togo (1992), Art. 26.

⁴⁰See e.g. the Ghanaian case of *New Patriotic Party v Inspector General of Police*, Writ No. 4.93 in which Chief Justice Archer said that "I do not think that the fact that Ghana has not passed specific legislation to give effect

those which impinged on freedom of association and assembly; they have been declared "colonial relics" which no longer have a place in Africa.⁴¹ As Takirambudde surmises, the foundations have been laid for the rediscovery and realisation of civil society.⁴²

The above developments were greeted with much euphoria and hope both within and outside Africa. However, the question remained as to whether these constitutional developments would actually trigger change, new constitutional provisions notwithstanding.

3. FREEDOM OF ASSOCIATION AND ASSEMBLY IN PRACTICE: FIVE SUB-SAHARAN AFRICAN COUNTRIES

to the (African) Charter, means that the Charter cannot be relied upon."

⁴¹For a review of cases in various jurisdictions in which this position was taken see Stevens, J., 'Colonial Relics I: The Requirements of A Permit to Hold Peaceful Assembly' in *Journal of African Law* (Vol. 41, No. 1), pp. 118–133.

⁴²Takirambudde, P. N., 'Protection of Labour Rights in the Age of Democratization And Economic Restructuring in Southern Africa' in [1995] *J.A.L.* (Vol. 39, No. 1) pp. 39–63, 39.

The effect, if any, of incorporating freedom of assembly and association in sub-Saharan African constitutions may be gleaned by looking at the law and practice of five countries in the sub-region. These have been geopolitically selected to represent all parts the sub-region and the various political backgrounds from which sub-Saharan Africa embarked on the road to democratisation at the beginning of the 1990s. The countries are Cameroon in West Africa and Tanzania in East Africa, which up to 1990 had been one-party states; Ghana in West Africa which was under military rule until 1993; Zimbabwe in Central Africa which, since independence in 1980, has been constitutionally a multi-party country but is a *de facto* one party state; and South Africa in Southern Africa, which entered the family of democratic nations from the apartheid background. The constitutional foundation of freedoms of assembly and association in each of these countries will be set out, followed by an examination of whether and to what extent the legal environment and government practice facilitate or hinder freedom of association in three main areas of associational life: the political, civic (NGOs) and labour spheres. This will be followed by an examination of the extent to which associational activities are affected by the laws relevant to freedom of assembly, particularly public order laws.

1.0 Cameroon⁴³

The source of freedom of association and assembly in Cameroon is its Constitution of 1972, as amended by Law No. 96 of 18 January 1996, whose preamble provides, *inter alia*, that "the freedom of communication, of expression, of the press, of association, and of trade unionism ... shall be guaranteed under the conditions fixed by law." By virtue of Article 65 of the Constitution, introduced by the 1996 Constitutional amendments, the preamble is part and parcel of the Constitution. Additional protection of freedom of association in the political sphere is provided for by Article 3(1), which provides that "Political parties and groups may take part in elections. They shall be formed and shall exercise their activities in accordance with the law." Under Article 3(2), such parties are bound to respect the principles of democracy and of national sovereignty and unity.

3.1.1 Political Association

The law presently governing political parties is Law No. 90/56 of 19 December 1990. This law defines political parties as associations which may take part in elections⁴⁴ and offers guarantees

⁴³For basic facts of the political history of Cameroon see Taku, N.A., 'Cameroon' in Heyns, C. (ed.), *Human Rights Law in Africa 1997* (The Hague, Kluwer International, 1998) pp. 135–145, 135–139.

⁴⁴Section 1.

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that no-one shall be forced to belong to a political party, nor shall anyone be harassed because s/he does or does not belong to a political party. Personnel of the armed forces and police are prohibited from joining political parties.⁴⁵ A leader of a political party must be of Cameroonian nationality, over 21 years of age, enjoying civic rights, not belonging to any other political party, and must be resident in the national territory.⁴⁶

Forming a political party is achieved by submitting a complete file to the Office of the Governor with territorial jurisdiction, who will issue a receipt. The contents of the file are set out in Section 5 and must include a written statement that the party complies with Section 9, which stipulates the attributes which disqualify an association from being registered as a political party. Upon receipt of the completed file, the Governor must forward it within 15 days to the Minister in charge of Territorial Administration who will decide whether or not to authorise the legal existence of the party. In the absence of a response within three months following receipt of the file by the Governor, the party is deemed to exist legally.⁴⁷

A party can only be refused registration if the information supplied is incomplete within the terms of Section 5, or if it threatens territorial integrity; national unity; national integration through any type of discrimination based on tribe, province, linguistic group or religious denomination; advocates violence or setting up of military groups; receives subsidy from abroad or has a leader based abroad⁴⁸; or receives foreign funding.⁴⁹ Refusal of registration must be in writing and reasons must be given. Any person aggrieved by refusal of registration may, within 30 days, appeal to the Administrative Court and the President of the Court must determine the grievance within 30 days.

The rights of registered political parties are wide-ranging and they include the right to launch and manage newspapers, to hold meetings and rallies in accordance with the law, and to receive gifts.⁵⁰ Registered political parties are protected against searches at their headquarters, except in connection with legal proceedings.

⁴⁵Section 3.

⁴⁶Section 11.

⁴⁷Section 7.

⁴⁸Section 9.

⁴⁹Section 10.

⁵⁰Sections 12 & 13.

The minister in charge of Territorial Administration may, in a reasoned decision, suspend for three months the activities of any political party, or dissolve the party altogether, if it is in serious breach of specified provisions of the Law.⁵¹ The decision to suspend or dissolve the party is subject to appeal to the Administrative Court. Dissolution of a party does not preclude the taking of legal proceedings against its leaders for the acts that lead to dissolution.⁵²

In practice, there have generally been no problems with getting a political party registered. Indeed, the problem in Cameroon today is seen to be that of too many political parties, some of which emanate from state-instigated splits of existing political parties. The existence of about 140 opposition parties at the moment is itself testimony to the relative ease with which such parties can be formed. That said, it does not mean that all is well with freedom of association in the political sphere. Opposition political parties face other problems which affect their ability to compete fairly with the ruling party for the opportunity to form the government of the country, which is the ultimate objective of political parties.

One major problem which opposition parties in Cameroon face is that of unequal resource distribution between them and the ruling party, the RDPC. Political parties in Cameroon are not entitled to receive funding from the State except during general elections, when there is a possibility of receiving some kind of state subvention.

The decision on, and the size of, this state subvention and the disbursement modalities are at the discretion of the President of Cameroon.⁵³ In the absence of state funding, political parties obtain their funding from private sources including membership dues, contributions from members, subscriptions, donations, grants and proceeds from works of art and activities organised by the parties. However, in a poor country like Cameroon, such sources are not likely to generate any meaningful funds for parties to be able to function effectively.

While lack of state funding is a problem for opposition parties, it does not affect the ruling RDPC party, which manages to draw on state resources in a variety of ways. First, because of the lack of distinction between the ruling party and the government, the former is able to rely on the

⁵¹Sections 18 & 19.

⁵² Section 20.

⁵³Greddes, C., 'Financing Political Parties in a Multi-party Democracy: The Experience of Cameroon' in Kumado, K. (ed.), *Funding Political Parties in West Africa* (Accra, FES, 1996), pp. 81–104, 87.

state's material, financial and human resources for its own activities. For example, "during RDPC meetings, and congresses by its regional branches, it is the national treasury that bankrolls the party. The funding is done through ministers who run "big budgets". The Minister of Finance offers free cloths bearing the head of State's effigy".⁵⁴ The RDPC also benefits from resources in kind such as the free use of official vehicles, office stationery, water, electricity, telephones, fuel security services and free media coverage.⁵⁵ Additionally the ruling party receives huge donations from dishonest businessmen who owe the treasury, or banks headed by public officials, who in return turn a blind eye to the debts owed. Finally, the ruling party has arrogated to itself all properties which were built for the party during the one-party era, including those which were built with loans charged to the public exchequer and those built with contributions – voluntary or compulsory – from citizens.⁵⁶ All these resources have placed the RDPC in an advantageous position vis-a-vis the opposition, who have to pay for everything – especially during elections. The other impediment to political association is attacks perpetrated by the government on the opposition, particularly during election time. For example, members of opposition political parties were harassed and intimidated in a variety of ways during the run-up to the National Assembly elections of 17 May 1997 and the Presidential elections of 12 October 1997. An account of specific incidents of harassment, attacks, detentions and killings of members or supporters of the opposition are detailed in another report by ARTICLE 19.⁵⁷

Political association has also been undermined by frequent recourse to public order laws by various levels of government to interfere with the activities of opposition parties, a point which will be elaborated further below.

0.0.0 Civic association

The principal legislation presently governing freedom of association outside the political sphere in Cameroon is the Freedom of Association Law, No. 90/053 of 19 December, 1990. This law replaced Law No. 67/LF.19 of 12 June 1967 on Freedom of Association, which, among other things, required all associations to be authorised by the Minister in charge of Territorial Administration. The new law does away with the requirement of prior authorisation and replaces it with a system of registration and regulation.

⁵⁴ *Ibid*, p. 91.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

In accordance with Section 4 of the Law, "Associations ... contrary to the Constitution, the law and public policy, as well as those whose purpose is to undermine especially security, the integrity of the national territory, national unity, national integration or the republican character of the State shall be null and void."

There are two systems for setting up associations. The first is the "authorisation system" which applies to foreign and religious associations; the second is the "declaration system" which applies to all other associations. Exempt from these systems are "*de facto* economic or social-cultural associations" and political parties and trade unions, which are governed by separate laws.⁵⁸

Under the System of Declared Associations, no association which falls within its ambit can have legal status until it has declared its formation and provided two copies of its constitution to the Divisional Office of the area where the association has its headquarters.⁵⁹ If an association is not considered "null and void", the Divisional Office will issue a receipt as soon as the file is complete.⁶⁰ Any changes in the name, objectives, headquarters, names/addresses and occupations of those responsible for running an association must be notified to the Senior Divisional Officer within two months. Silence on the part of the Office after such changes have been submitted implies acceptance on their part of the proposed changes. If an association is considered by a court decision to be "null and void" under the provisions of Section 4, its premises will be closed and all meetings of the members will be prohibited, notwithstanding any appeal which may be lodged.⁶¹

The Minister in charge of Territorial Administration may, upon a reasoned recommendation of the Senior Divisional Officer, suspend for a period of up to three months the activities of any association for "disturbance of public order." The Minister can dissolve any association which departs from its original objectives or whose activities seriously undermine public order or the security of the State. Any party aggrieved by the decision of the Minister may lodge an appeal with the President of the Administrative Court. Any such appeal must be lodged within 10 days and a ruling must be made within 10 days of an appeal being received.⁶²

⁵⁷See ARTICLE 19, *Hollow Promises; Freedom of Expression in Cameroon Since 1995*, October 1999, pp. 10–12.

⁵⁸Article 5 of Law No. 90/053.

⁵⁹Section 6.

⁶⁰Section 7.

⁶¹Section 12.

⁶²Section 13.

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Under the System of Authorised Associations, an association is defined as foreign if it is registered abroad, managed by foreigners, or if half of its members are foreigners (Section 15). No foreign association is permitted to carry out activities in Cameroon unless and until it has obtained authorisation from the minister in charge of Territorial Administration upon recommendation from the Minister of External Relations, through whom applications for registration are made.⁶³

Authorisation can be temporary, subject to certain conditions, and can be withdrawn at any time. If a foreign association is refused an authorisation, or such authorisation is withdrawn, it must cease its activities forthwith and liquidate within three months.⁶⁴ Anyone administering, or continuing to administer, a foreign association or establishment without authorisation is liable to imprisonment for 15 days to six months, or a fine, or both.

Authorisation for religious congregations and congregational establishments is granted by way of a decree of the President of the Republic upon a reasoned recommendation of the Minister in charge of Territorial Administration. There are strict financial provisions which religious congregations are required to comply with and failure to do so can lead to a congregation being declared "null and void". Representatives or officials of a religious congregation who issue 'false statements', or refuse to comply with the instructions of the Minister in Charge of Territorial Administration, are committing a criminal offence under various provisions of the Penal Code and are liable to imprisonment or a fine.

The Minister for Territorial Administration enjoys powers to suspend religious organisations for disturbances against public order. S/he enjoys similar powers in relation to associations falling under the system of declaration.⁶⁵ Authorised religious associations may be dissolved by the President⁶⁶ and any person who continues to operate, re-establishes a dissolved association, or encourages meetings of its members commits an offence and is liable to imprisonment or a fine, or both.

Although many of the provisions of the law relating to civic associations are reasonable, some of

⁶³Section 16.

⁶⁴Section 17.

⁶⁵Section 30.

⁶⁶Section 31.

them fall short of international standards on freedom of association as stipulated under international instruments. For example, although the law requires local associations simply to 'declare' themselves, making such 'declaration' a condition for acquiring legal status (and the powers given to the authorities to determine null and void any organisation that has so declared itself), effectively renders the right of civic organisations to exist in Cameroon subject to the government's fiat. Also, the powers of various government officials to dissolve organisations, whether local or international, are too wide. Further, such powers are exercisable under ill-defined circumstances and therefore capable of being misused.

As with political parties, the other problem faced by non-governmental organisations is the use by the state of public order laws to interfere in the affairs of civic associations whose objectives or activities are perceived as challenging to the ruling elite.

3.1.3 Freedoms of assembly, association and Public Order Laws

The principal legislation governing public meetings and processions is Law No. 90/55 of 1990. Section 3 of the Law requires that all meetings intended to be held in public places, or in a place open to the public, be declared in advance. It also prohibits meetings on public highways, except on special authorisation. Declaration of a meeting must be made three days ahead of the event and must be made to the District Head or Sub-Divisional Officer with jurisdiction over where the meeting is planned. The declaration must state the names and residence of organisers, the purpose of the meeting, venue, date and time, and must be signed. The authorities are required to issue a receipt in acknowledgement of receipt of the declaration.⁶⁷

Any public meeting must have an "Executive" comprising of three persons responsible for keeping the peace. They must prevent any violation of the law and prohibit speeches that conflict with public policy or are likely to incite people to commit felonies or misdemeanors. The administrative authorities reserve the right to send a representative and may put an end to the meeting if it gets out of control and the Executive request it. Only the Executive may stop or adjourn the meeting.⁶⁸

Public processions, demonstrations and the like on public highways are also subject to prior declaration, with the exception of those processions which are in keeping with local or religious

⁶⁷Section 4.

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traditions and practices.⁶⁹ The declaration must be made seven days in advance, must give full details and must be signed by one of the organisers.⁷⁰

Upon receiving the declaration, the District Head or Sub-divisional Officer must immediately issue a receipt. However, if s/he deems the procession or demonstration is likely to disturb the peace seriously, s/he may schedule another venue or route, or prohibit it altogether by an order which must be immediately notified to the signatory. If a procession or demonstration is prohibited, the organisers can appeal to the President of the High Court within eight days, in accordance with the ordinary legal procedures.⁷¹

Any person who takes part in the organisation of a public meeting which has not been subject to a prior declaration, or makes a declaration which is intended to mislead the authorities about the conditions or purpose of the meeting, commits a criminal offence punishable under Section 231 of the Penal Code. Also punishable under the provision are those who convene a procession without filing a declaration, or after it has been legally prohibited, or make a false/incomplete declaration in order to conceal the conditions of a planned procession. The normal penalties range from fifteen days' to six months' imprisonment and fines of between 5,000 and 10,000 francs. Section 234 of the Penal Code states that when an offence is of a political nature, the penalty shall be detention in a place of imprisonment.⁷²

Public meetings during election campaigns are governed by electoral law.⁷³ The right of political parties and groups to take part in elections is provided for under Article 3 of the Constitution which, as already pointed out, requires political parties to exercise their activities in accordance with the law. There a number of laws relating to elections, the most important being Law No. 91/020 of 16 December 1991.

There are myriad other laws which, though not specifically about assemblies are relevant, including Law No. 90-46 of 19 December 1990 relating to State of Emergency. Under this legislation, in the event of a State of Emergency being proclaimed by decree (including national disasters, a series of disturbances undermining public order or the security of the State, or a

⁶⁸Section 5.

⁶⁹Section 6.

⁷⁰Section 7.

⁷¹Section 8.

⁷²Sections 9 & 10.

⁷³Section 11.

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foreign invasion), the administrative authorities of the particular territory under State of Emergency can issue orders which, *inter alia*, prohibit all meetings and publications that "foster disorder"; call in the military to maintain law and order, or order the detention of persons "deemed dangerous to public security".⁷⁴

Another relevant law is Law No. 90/054 of 19 December 1990 relating to Maintenance of Law and Order which, while forbidding the use of arms in routine operations for the maintenance of law and order,⁷⁵ does authorise administrative authorities to use the same when force and serious and widespread interference, or firearms, are used against the forces of law and order. The use of firearms is allowed only if the forces of law and order cannot otherwise defend themselves and only after several warnings through a loud-speaker or other means.⁷⁶

Although the provisions relating to holding assemblies may appear liberal and reasonable, in practice they have been applied in such a way as to impinge severely on freedom not only of assembly but also of association, for both political and civic associations. In particular, although the 1990 law relating to public meetings only requires planned meetings to be declared in advance, it has been applied in such a way as to effectively require meetings to be authorised by the relevant officials.

For instance the launching of a splinter faction of the SDF in Yaoundé in December 1998 was suspended by the authorities on the grounds of threat to public order, amidst fears that SDF militants would interrupt the proceedings. *Ordre public* provisions have also been employed to prevent meetings by opposition parties in the Central and South Provinces on the grounds that the local populations, who strongly support the CPDM party, would violently disrupt opposition meetings. Thus, SDF rallies in these areas during the 1997 electoral period were either banned or interrupted, often on the grounds that they disturbed public order. Similarly, rallies by the largely northern UNDP party in the campaign period prior to the May 1997 legislative elections in parts of the Central province were banned. Party officials travelling from Yaoundé were prevented from entering these areas at road-blocks staffed by security forces.⁷⁷ The banning of meetings of a political party on the basis that its stronghold is in a different part of the country contradicts the spirit of the law on freedom of association, which seeks to promote national integration.

⁷⁴Section 5.

⁷⁵Section 3(1).

⁷⁶Section 4(2).

⁷⁷See memo from Paul Simo to Carolyn Norris, Consultant to the ARTICLE 19 Africa programme, 25 August

According to Simo:

Some public officials ... and influential traditional rulers ... have forged a complacently partisan view of "danger to public order". The former MINAT had virtually made it clear that opposition demonstrations, as such, tend to disturb public order. The traditional rulers either proscribe, or call for bans on rallies by the UNDP, or groups such as the SCNC. This is not so much a result of any physical danger or incidents they provoke, but rather because the agenda, platform or [the] very existence of these groups in the areas they rule is alleged to 'stir up trouble/instability/ethnic division' etc.⁷⁸

Even civic organisations have not escaped government abuse of the law relating to holding meetings. A good example of this is the saga involving a registered NGO called MBOSCUDA. This is a voluntary association registered under Law No. 90/053 whose objective is to advance the interests of the Mbororo people, a pastoral minority scattered all over Cameroon. Because of its championing of the rights of pastoralists, this organisation has been at loggerheads with one Alhaj Baba Ahmadou Danpullo (see page 22), a rancher with strong connections with the ruling party who has been competing for grazing land with the Mbororo community in North Western Cameroon. Through the undue influence of Mr Baba, MBOSCUDA has on several occasions had its planned meetings disrupted through the refusal to grant a receipt of declaration of meeting. One such instance is recounted by Sarle Sardou Nana, a member of the Mbororo community now in exile in England:

During the National Assembly held in Sabga in December 1994, it took ten (10) months for the Divisional Officer of Tubah, in Mezam Division, North-West Province to issue the receipt, which has been turned into some kind of authorisation, though the law only talks of declaring the meeting. We had to get the then Prime Minister Achidi Achu and other sympathetic individual government officials involved and also threaten a court action. Baba Ahmadou had instructed the DO not to allow the assembly to be held. In another occasion the DO of Santa in Mezam Division came to stop our meeting in session despite the fact that he issued a receipt accordingly for the declaration.⁷⁹

Paul Simo also notes that the *sous-prefets* often subvert freedom of assembly by refusing to issue receipts on the grounds that the meeting will perturb "public order", or by not responding to the notification of an impending meeting and then issuing a ban shortly before the meeting is held, or while it is in progress. The security officials (gendarmes, police etc) sent to interrupt so-called

1999, p.5.

⁷⁸*Ibid.*

⁷⁹Memo from Sarli Sardou Nana to Carolyn Norris, Consultant to ARTICLE 19's Africa programme, August 7 1999, p. 1.

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unauthorised meetings are generally unaware of the law on public meetings and sometimes they ask to see an "authorisation notice" for the meeting.⁸⁰ In Bafoussam, several human rights training seminars organised by the Human Rights Defence Group with financial support from the British Council were interrupted by gendarmes and police, having been declared unauthorised. At one of these meetings, the British Ambassador to Cameroon was in attendance.⁸¹ From the above, it is fair to conclude that the requirement for the organisers of public gatherings to obtain a 'receipt' is a euphemism for a requirement for public gatherings to obtain *permits*. Therefore, although the law says that persons wishing to hold public meetings have to make a 'declaration', in reality the law requires them to *make an application* for authorisation to do so.

Finally, freedom of association is undermined by misuse of the law relating to defamation. NGOs which have spoken out against agencies or individuals that undermine their interests have found themselves faced with spurious legal suits intended to silence them. For example, members of MBOSCUDA (which has been speaking against the marginalisation, exclusion and persecution of the Mbororo pastoral communities) have had several defamation suits brought against them. These have been brought at the behest of the aforementioned Baba Ahmadou, whose encroachment on the land of the pastoral Mbororo people MBOSCUDA has challenged. For standing up against Baba, several members of MBOSCUDA were charged with injuring his reputation by imputation of facts which they were unable to prove: to wit: "persistent intimidation, browbeating, extortion of wealth, blackmail, ridicule and slander ...", contrary to and punishable under Section 305(1) of the Penal Code.⁸² The defendants were also charged with using, without provocation, insulting expressions against the person of Alhaj Baba Ahmadou Danpullo, contrary to and punishable under Section 307(1) of the penal code. This case was eventually dismissed after five adjournments for failure of the prosecution to prosecute the case. In fact there had never been any evidence to sustain the charges.

The above account shows that hopes for greater freedom of association and assembly in Cameroon, raised by constitutional amendments which affirmed that the preamble to the Constitution constituting the Bill of Rights was part and parcel of the Constitution, and by the

⁸⁰ Memo from Paul Simo to Carolyn Norris, Consultant to ARTICLE 19's Africa programme, 25 August 1999, p.3.

⁸¹ *Ibid.*

⁸² See charge sheet in *The People vs Musa Usman Ndamda et al.*, BA/59c/96-97.

enactment of the so-called "liberties laws" of 1990 remain exactly that: hopes.

3.2 Ghana

At the beginning of the 1990s, Ghana was under the government of the Provisional National Defence Council (PNDC), a military regime headed by Flt. Lt. Jerry Rawlings. Under pressure from internal groups and the international community, the PNDC embarked on a constitutional reform process which resulted in the making and adoption by a referendum of the Constitution of Ghana of 1992. Among other things, this made provisions for a Bill of Rights. The provisions relating to freedom of assembly and association can be found under Article 21 which provides, *inter alia*, that:

21(1) All persons shall have the rights to –

.....

(d) freedom of assembly including freedom to take part in processions and demonstrations;

(5) freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interests;

An additional guarantee for the right to freedom of association in the political sphere is found under Article 21(3) which provides:

(3) All citizens shall have the right and freedom to form or join political parties and to participate in political activities subject to such qualifications and laws as are necessary in a free and democratic society and are consistent with this Constitution.

Sub-Article 21(4) allows derogation from certain of the freedoms guaranteed under Article 21(1), but the sub-Article does not appear to allow abridgment of freedom of association and assembly. There is no other provision under the Constitution that permits derogation from these rights, except the carefully crafted Article 31 which permits derogation from all fundamental rights during a state of emergency.

Article 44 provides a more specific and detailed provision on political parties, reiterating the right to form political parties⁸³ and the right of every citizen of Ghana of voting age to join such parties.⁸⁴

⁸³Article 55(1).

⁸⁴Article 55(2).

Under Article 55(3), political parties are free to participate in shaping the political will of the people, to disseminate information on political ideas, social and economic programmes of a national character, and sponsor candidates for elections to any public office other than to District Assemblies or lower local government units.⁸⁵

Article 55(4) requires political parties to have a national character and prohibits membership based on ethnic, religious, regional or other sectional divisions. The internal organisation of political parties must conform to democratic principles, and their actions and functions must not contravene or be inconsistent with the Constitution or other law.⁸⁶

For an organisation to operate as a political party, it must first be registered with the National Electoral Commission.⁸⁷ To obtain registration, an organisation must satisfy the Commission that:

- there is an ordinary resident, or someone registered as a voter, in each district of Ghana, and at least one founding member of the party;
- the party has branches in all the regions of Ghana and is, in addition, organised in not less than two-thirds of the districts in each region; and
- the party's name, emblem, colour, motto or any other symbol has no ethnic, regional, religious or other sectional connotation or gives the appearance that its activities are confined only to a part of Ghana.⁸⁸

Additionally, a political party is required to ensure that every founding member, leader or member of its Executive must be qualified to be elected as a Member of Parliament, or hold any other public office.⁸⁹ Members of the national Executive committee must be chosen from all

⁸⁵It is the same Article 5(3) which bars party politics in local government. For comment see Oquaye, M., 'Democracy Without Political Parties: The Case of District Assemblies' in Ninsin, K. A. & Drah, F.K., *Political Parties and Democracy in Ghana's Fourth Republic*, (Woeli Publishing, Accra, 1993), pp. 154–174.

⁸⁶Article 55(5).

⁸⁷Article 55(6).

⁸⁸Article 55(7).

⁸⁹Article 55(8).

regions of Ghana.⁹⁰

Freedom of association in the employment sphere is also accorded a specific provision in Article 24(3) which provides that "Everyone has a right to form or join a trade union of his choice for the promotion and protection of his economic and social interests". No restrictions are to be imposed on this right "except restrictions prescribed by law and reasonably necessary in the interests of national security or public order or for the protection of rights and freedoms of others."⁹¹

3.2.1 Political Association

The principal law relating to political association in Ghana is the Political Parties Law, 1992, PNDC Law 281. The right to form and join political associations is found under Section 1. Sections 2 to 6 of the Law lift and re-enact in almost identical terms the provisions of Article 55 of the Constitution relating to the conditions of establishing political parties in Ghana.

The procedure for registering political parties is outlined under Sections 8 and 9 of the Political Parties Law. A party wishing to be registered is required to file an application accompanied by two copies of its Constitution and rules or regulations, if any, signed by the party's interim chair or leader and by the interim national or general secretary. It must also provide a list and full addresses of at least one founding member from each district and such other particulars as the National Electoral Commission may require, as well as a full description of its symbols, slogans and colours, if any, plus the specified application fee. Upon receipt of the application, the Commission must ensure it is published in *The Gazette* within seven days, inviting objections from any person concerning the name, aim, objects, constitution, rules, symbols, slogans or colours of the party. Additionally, the Commission may additionally cause independent inquiries to be made so as to ascertain the truth or correctness of the particulars submitted with the application for registration. An organisation that meets the conditions for registration must be given the final certificate of registration within 30 days of the gazetting of its application for registration.

⁹⁰Article 55(9).

⁹¹Article 24(4).

A party which has been refused registration is entitled to apply to the Commission to have its application reconsidered. If, within 14 days after an application for reconsideration has been made, the Commission refuses or fails to register a political party, the party may appeal to the Court of Appeal against the decision of the Commission. The decision of the Court of Appeal is final.⁹²

Most, if not all of the requirements for registration appear to be geared towards ensuring that political parties in Ghana are truly national in character and scope of operation and not tribal, religious or factional. This is because in Ghana, as elsewhere in Africa, society is heterogenous and the task of forging national identity and unity remains an unfinished business. Also, some political analysts have held that the regional parties that emerged in the late 1950s were not helpful to the cause of national integration because of their sectarian nature.⁹³ These requirements are, therefore, understandable.

These conditions are, however, so numerous and cumbersome that they may have financial implications beyond the capacity of the parties to bear. Effectively, the law requires every party to have branches in all the regions of Ghana and in not less than two-thirds of the districts of each region. In Ghana, political parties do not receive any subsidies from the government and as Ayee points out, "the logistics involved in this requirement, operating at the ward, branch, constituency, district, regional and national levels, runs into billions of cedis, which membership dues, sale of 'T' shirts and fund raising per se (the only legal sources of party funding in Ghana) cannot adequately take care of".⁹⁴ This leaves political parties with no choice but to rely extensively on individual contributions⁹⁵ which is generally not healthy for democracy. In any event, Section 20 of PNDC Law 281 imposes limits on what individuals may contribute to party funds and bans contributions from companies, partnerships, firms or business enterprises. The question of what the limit on individual contributions should be has been controversial. The imposition of onerous obligations on political parties without providing them with the means to meet them could put opposition parties at a disadvantage *vis-a-vis* the ruling party, which is normally able to rely on government resources.

4.2.3 *Civic association*

⁹²Section 12 of the Political Parties Law.

⁹³Larvie, J. & Badu, A., *Elections in Ghana, 1996*, Part I (FES, Accra, 1996), p. 45.

⁹⁴Ayee, J.R.A, 'Financing of Political Parties in Ghana: An Exploratory Study' in Ninsin & Drah, op. cit., pp. 246–257, 251.

In Ghana, there is no specific legislation relating to formation of civic associations or any other voluntary organisations. Hence NGOs in Ghana derive their legitimacy directly from Article 21 of the Constitution and operate in accordance with the common law of non-governmental organisations. In 1995, a bill was introduced which the government said was intended to facilitate the registration and operation of NGOs in Ghana. It received a hostile reception from civil society and was shelved. The idea of an NGO law was recently revived and the Ministry of Employment and Social Welfare is currently working out a policy which, as the sector minister said in September 1999 while opening an NGO workshop, aims primarily to integrate and co-ordinate the activities of NGOs in order to eliminate duplication of efforts and promote efficiency.⁹⁶

At the moment, most local NGOs wishing to operate in Ghana register with the Registrar General or the Ministry of Labour. However, some NGOs register with the sector ministry responsible for activities falling within the objectives of NGOs. Despite the absence of the obligation to do so, many NGOs register in order to acquire legal status with the attendant benefits, such as ability to sue and be sued and charitable status. They also do so in order to be known and gain credibility in the eyes of potential beneficiaries, partners and donors.

There is, however, a requirement for foreign NGOs wishing to operate in Ghana to obtain permission and registration. Until 1992, foreign NGOs wishing to operate in Ghana had to sign a Memorandum of Agreement with the Ministry of Employment and Social Welfare which would suffice as a permit. However, since then, the power to approve international NGOs was transferred to Parliament. The Ministry of Employment now only issues a temporary permit pending ratification by Parliament. In practice, the ratification never comes so the "temporary" permits foreign NGOs obtain from the Ministry of Employment become, by default, permanent permits.⁹⁷

The 1990s have witnessed a phenomenal growth in the number of non-governmental organisations – from around 350 in 1990 to about 900 in 1996 – which include local self-help groups, non-profit voluntary development associations at the village or community level,

⁹⁵*Ibid.*

⁹⁶See Van-Ess, A., 'Ministry to Regulate Operations of NGOs' in *Daily Graphic*, 5 October 1999, p.1.

⁹⁷Information in this paragraph was supplied by Kofi Edu, the Executive Secretary of Ghana Association of Private

charitable institutions engaged in relief work, and local branches or affiliates of foreign international organisations.⁹⁸ Most local organisations are church-based or have some links with established church denominations. There are also a few umbrella organisations, of which the most significant is the Ghana Association of Private Voluntary Organisations in Development (GAPVOD), which has a membership of over 200 NGOs both local and international.⁹⁹ There are also other NGO networks which are issue-specific, such as the Network of Environmental NGOs (NRNGO) and those which are regional in scope, such as the Association of Church Development Projects (ACDEP) in northern Ghana, which co-ordinates the activities of church-based projects in that region.

Overall, the relationship between civil society and the state in Ghana seems to be reasonably healthy. Ghana is one of the few countries in Africa with constitutional provisions aimed at institutionalising channels of communication and co-operation between elements of civil society and certain state organs. One such channel is the mandatory representation of civil associations on several state bodies. State bodies on which specified associations must be represented include the judiciary, Rules of Court Committee, National Media Commission, Police Council, Regional Police Committees, Prisons Service Council, Regional Prisons Committees, Lands Commission and the Regional Lands Commissions.¹⁰⁰ NGOs also collaborate closely with the government in delivering certain services, particularly in rural areas. As Denkabe notes:

The government has also come to see NGOs as an important agent in rural development and has expressed willingness to develop collaborative ventures. NGOs are seen as important implementers of rural development with particular skills in community organisation.¹⁰¹

Despite these positive developments, the government is still doing the best it can to claim much of the social and political space in which civil associations operate through certain organisations and policies. One way this is achieved is through state support of associations which masquerade as NGOs, but which would appropriately be called GONGOs (Government NGOs). The most famous of these is the 31 December Women's Movement (31st DWM), which was formed by President Rawlings and his wife in 1982 to support the 'revolution'. Since 1984, its president has

Voluntary Organisations in Development (GAPVOD), in an interview with the writer in Accra, 6 October 1999.

⁹⁸ Denkabe, A., 'An Overview of the Non-Governmental Sector in Ghana' in Drah, F.K., and Oquaye, M., *Civil Society in Ghana*, (FES, Accra, 1996), pp. 137–162, 137.

⁹⁹ Edu, K., interview, op. cit.

¹⁰⁰ For which civic institutions are involved and the state bodies on which they are represented, see Drah, F.K., 'The Constitutional Framework and Civil Society' in Drah & Oquaye, op. cit., pp. 31–42, 37–38.

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been Nana Konadu Agyeman Rawlings, the First Lady. The Movement has since absorbed a motley assortment of women's groups in Ghana. "Though its cardinal objective is the 'emancipation of Ghanaian Women', and though it describes itself as a non-governmental organisation it is, for all intents and purposes, the women's wing of the ruling party. During the PNDC era its activities were financed by the State, there is no reason to think that this is not still the case."¹⁰²

Prior to the emergence of the 31st DWM, the principal body responsible for advancing women's issues was the National Council on Women and Development (NCWD), which was established by the Government of Ghana in 1975 as a response to the International Women's Year and to ensure that the objectives of the United Nations Decade for Women were achieved in Ghana. On the current state of this organisation, Sandra Pepera had this to say:

Unfortunately, the NCWD has suffered in its ability to work effectively for women in Ghana in two ways: first, because it is essentially a bureaucratic arm of the State, it has been unable to take up an aggressive political campaigning role; and secondly, in more recent times, it has suffered political marginalisation as the PNDC established its own "women's wing" to mobilise the women of Ghana behind its own programme – the 31 December Women's Movement (31st DWM).¹⁰³

At the Sixth African Regional Conference on Women's Rights held in Addis Ababa in December 1999, the 31st DWM was singled out by women's rights activists one of the women's organisations headed by First Ladies which was receiving millions of US dollars in the name of women, but whose real motives were thought to be shoring up the regimes headed by their husbands. Other such organisations mentioned were Vera Chiluba's "Home Foundation" in Zambia, and Stella Obasanjo's "Children's Programmes" in Nigeria.¹⁰⁴ Other organisations through which the NDC government has sought to reintroduce the corporatist State through the back door are the Council of Indigenous Business Associations (CIBA) and the Association of the Committee for the Defence of the Revolution (ACDR). Both the CIBA and the ACDR were formed in 1993 after the formal abolition of a one-party state by the Constitution. Both have President Rawlings and his wife, Nana Rawlings, as patrons of the former and the latter

¹⁰¹ Denkabe, op. cit., p. 156.

¹⁰² Drah, F.K., 'The Concept of Civil Society in Africa: A view Point' in Drah, F.K., and Oquaye, M., *Civil Society in Ghana*, (FES, Accra, 1996) pp. 1–29, 20.

¹⁰³ Pepera, J.S., 'Political Parties and Social Representation: The Case of Women' in Ninsin, K.A., & Drah, F.K., *Political Parties and Democracy in Ghana's Fourth Republic* (Woeli Publishing, Accra, 1993) pp. 133–145, 139.

associations respectively. CIBA is managed by state functionaries and enjoys government financial patronage and its purpose, according to one observer, is to draw as many of the indigenous business associations as possible into the business wing of the ruling party.¹⁰⁵ In return for patronage, economic-oriented GONGOs are expected to use their resources to support the ruling party and campaign for it during general elections.¹⁰⁶

The ACDR emerged from the Workers' and People's Defence Committees, two of the three Defence Committees that had been established by the Rawlings regime after the 31 December Revolution in order to promote participatory democracy within the revolutionary movement. The Workers Defence Committee was responsible for the promotion of industrial and occupational democracy, whereas the People's Defence Councils (PDCs) were intended to promote geographical participation by involving ordinary Ghanaians in the decision-making process in their communities and the nation as a whole.¹⁰⁷ The ACDR has been implicated in the killing of four people participating in a demonstration organised by the opposition party, the Alliance for Change (AFC) in 1995.¹⁰⁸ The government refused to commission an inquiry into this affair and an internal departmental investigation set up by the Ministry of Interior was a whitewash.

These kind of tactics vindicate Drah's summation that even though a constitution may prevent Parliament from enacting a law establishing a one-party state, as the Ghanaian Constitution does, a *de facto* one-party state may still emerge in certain circumstances. One is where a ruling party harbouring hegemonic or proprietary ambitions covertly or overtly sponsors and finances organisations euphemistically called non-governmental organisations, and through them seeks to monopolise the associational landscape of the country.¹⁰⁹

Apart from the constraints emanating from state action, NGOs in Ghana suffer from the weaknesses faced by NGOs all over Africa: lack of sound administrative systems for finance, personnel, monitoring and evaluation – in short, deficiencies in administrative capacity.¹¹⁰

4.2.4 *Labour association*

¹⁰⁴ See 'Activists Urge First Ladies to Take Back Seat' in *The Daily News (T)* 26 November 1999.

¹⁰⁵ Drah, F.K., 'The Concept of Civil Society in Africa: A view Point' in Drah, F.K., and Oquaye, M., *Civil Society in Ghana*, (FES, Accra, 1996) pp. 1–29, 20.

¹⁰⁶ Bluwey, G.K., 'The Opposition in Democratic Government: Reflections on the Ghanaian Experience' in Ninsin & Drah, op. cit., pp. 207–223, 218.

¹⁰⁷ Oquaye, M., 'Youth, Politics and Society in Ghana' in Drah & Oquaye, op. cit., pp. 163–202, 192.

¹⁰⁸ *Ibid*, p. 21.

¹⁰⁹ Drah, F.K., 'The Constitutional Framework and Civil Society' in Drah & Oquaye, op. cit., pp. 31–42, 36.

¹¹⁰ Denkabe, op. cit., p. 152.

The legislation presently governing trade unions in Ghana is the Trade Unions Ordinance, 1941, Cap 91, as amended from time to time. The purpose of the Ordinance is to provide for the registration and regulation of trade unions and for other purposes connected therewith. Under the Ordinance, any five or more workers can form a trade union. All trade unions are required to register with the Registrar of Trade Unions, in the person of the Chief Labour Officer.¹¹¹

The Industrial Relations Act of 1965¹¹² established the Trade Union Congress as the sole representative of the trade union movement in Ghana, to which all other trade unions must affiliate.¹¹³ Only the Trade Union Congress can apply to the Registrar of Trade Unions for a certificate to appoint a trade union as the appropriate representative to engage in collective bargaining on behalf of its members.¹¹⁴ At present there are 17 Unions affiliated to the Trade Union Congress,¹¹⁵ the same number as in 1990.¹¹⁶ The legalisation of a single trade union has been rightly criticised by the ILO as not complying with ILO Conventions No. 87 and No. 98 discussed in Chapter 1, which respectively concern "freedom of association and the protection of the right to organise" and "the application and protection of the right to organise and to bargain collectively". It is certainly not in conformity with the provision of the Constitution, which guarantees workers the right to join trade unions of their own choosing.

There are also labour associations, not classified as trade unions which therefore cannot be members of the TUC. These include the Ghana National Association of Teachers, the Civil Servants' Association and the State Registered Nurses' Association. In 1985, these associations came together with the TUC to establish a National Consultative Forum of Ghana Labour (NCFGL), in order to foster unity among the workers in Ghana.¹¹⁷ In addition to trade unions and labour associations, there are also professional bodies which individually, and through the Association of Recognised Professional Bodies (ARPB) played a crucial role in keeping the spirit of civil society alive during the era of repressive regimes, and continue to have a key part in ensuring that civil society plays a role under democratic political dispensation.¹¹⁸

¹¹¹Obeng-Fosu, P., *Industrial Relations in Ghana, The Law and Practice* (Ghana University Press, Accra, 1991), pp. 32–33.

¹¹²Act 299, of 1965.

¹¹³Section 1(3) & (4) of Act 299 of 1965.

¹¹⁴Section 3(3).

¹¹⁵'The Trade Union Congress (TUC) (Ghana): Highlights of its Development and Experiences' in Adewumi, F. (ed.), *Trade Unions, National Development and Military Rule*, (FES, Lagos, 1998) pp. 66–69, 66.

¹¹⁶Obeng-Fosu, op. cit., p. 11.

¹¹⁷Obeng-Fosu, op. cit., p. 17.

¹¹⁸See Okudzeto, S., 'The Role of the Association of Recognised Professional Bodies in the Political Struggles

The principal impediments to freedom of association in the workplace are the stringent laws relating to collective bargaining which make lawful strikes virtually impossible in Ghana. Under the existing law, if a trade union wishing to call a strike is locked in a labour dispute with an employer who wishes to call a lockout, both must first inform the Minister for Employment. Strikes and lockouts are permissible only when the Minister has been informed and has not referred the dispute to arbitration within four weeks. However, as Obeng-Fosu notes, there has been no occasion when the Minister has failed to refer a dispute notified to him to arbitration. Therefore all the strikes and lockouts that have taken place have been illegal because they occurred before the legal procedure had been exhausted.¹¹⁹ The effective denial of the right to strike necessarily affects freedom of labour association for, as a Canadian judge pointed out, "the freedom to bargain collectively, of which the right to withdraw services is integral, lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour is to sterilise their association."¹²⁰

3.2.4 Freedoms of assembly and association and Public Order laws

The law currently governing assemblies in Ghana is the Public Order Act, 1994.¹²¹ This law repeals the Public Order Decree, 1972 (N.R.C.D. 68) whose key provisions, requiring anybody desirous of holding an assembly to obtain a permit, had been declared null and void by the Supreme Court in *New Patriotic Party v Inspector General of Police*.¹²² Under the 1994 law, any person who wishes to hold a special event in a public place is required to notify the police of their intention not less than 5 days before the date of the special event.¹²³ A special event is defined as a procession, parade, carnival, street dance, celebration of traditional custom, outdoorings of traditional ruler, demonstration, public meeting and similar event" but does not include religious meetings, charitable, social or sporting gatherings, nor any lawful public entertainment or meeting.¹²⁴

The notification of a special event must be in writing and signed on behalf of the organisers of the special event. It must specify the place and hour of the special event, its nature, the time of commencement, the proposed route and destination if any, and the proposed time of closure of

of Ghana' in Drah & Oquaye, op. cit., pp. 109–128.

¹¹⁹Obeng-Fosu, op. cit., p. 75.

¹²⁰Per Cameron J.A., *Re Retail Wholesale Union and Govt of Saskatchewan* (1985) 19 DLR (4th) 609, at 639.

¹²¹Act No. 491 of 1994.

¹²²Writ No. 4/93.

¹²³Public Order Act, Section 1(1).

¹²⁴Section 10.

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the event.¹²⁵ The notification must be submitted to a police officer not below the rank of Assistant Superintendent or to the police officer responsible for the police station nearest to the location of the proposed special event.¹²⁶

Where a police officer notified of a special event has reasonable grounds to believe that the event, if held, may lead to violence or endanger public defence, public order, public safety, public health or the running of essential services, or violate the rights and freedoms of other persons, s/he may request the organisers to postpone the special event to any other date or to relocate the special event.¹²⁷ An organiser requested to postpone or relocate the holding of a special event must notify the police officer in writing of his willingness to comply within 48 hours of the request.¹²⁸

Where the organisers refuse to comply with the request or fail to notify the police officer of their willingness to comply with the request, the police officer may apply to any tribunal judge or chairperson for an order to prohibit the holding of the special event on the proposed date or at the proposed location.¹²⁹ The judge or chairperson to whom such an application is made may make such orders as s/he considers to be reasonably required in the interest of defence, public order, public safety, public health, the running of essential services or to prevent violation of the rights and freedoms of other persons.¹³⁰

Every police officer has a responsibility to take such steps as are reasonably necessary in any public place to assist the proper conduct of any special event, by directing the routes of such event to prevent obstruction of pedestrian or vehicular traffic, and to disperse crowds at any special event where they have reasonable grounds to believe that a breach of the peace is likely to occur or, if any breach of the peace has occurred, or is occurring, in order to prevent violence, restore and preserve the peace.¹³¹

Both the Public Order Act¹³² and the Police Service Act of 1970¹³³ give the police power to control human and vehicular traffic in order to preserve public order. Participants in special events have an obligation to behave themselves and to obey any directions the police officers

¹²⁵Section 1(2).

¹²⁶Section 1(3).

¹²⁷Section 1(4).

¹²⁸Section 1(5).

¹²⁹Section 1(6).

¹³⁰Section 1(7).

¹³¹Section 2(1).

¹³²Section 2(3).

¹³³Section 32.

may give in this context.¹³⁴ Where any damage is caused to public property during a special event the organisers, or any other person found to have been responsible for the damage caused, will be liable to pay for the cost of the damage.¹³⁵

The Public Order Act 1994 has a number of notable progressive provisions. First, organisers of a public event no longer have to obtain police permits. They only have to give notice to the police of their intention to hold such an event. Secondly, where the police believe there are good reasons why such an event should not be held, they no longer have automatic powers to prevent it. Instead, the matter must be submitted to an independent judicial tribunal for adjudication. Third, the police are enjoined to *facilitate* the exercise of freedom of assembly rather than to *control* it. The other laws relevant to the exercise of the right to freedom of association and assembly in Ghana are those which regulate what may be said in public and printed in news media. In this category, the most troublesome law is that of sedition.¹³⁶ The philosophy of the law of sedition is that there are some things that are better left unsaid since they present a real threat to the maintenance of public order or the security of the state. For this reason, the accuracy of the information is irrelevant,¹³⁷ as is the real intention with which the information is communicated.¹³⁸

Under the Criminal Code of Ghana, a charge of sedition can be brought against a person who disseminates ideas suggesting the desirability of overthrowing the government by unlawful means; or bringing the government into hatred or contempt; or exciting dissatisfaction against it; or bringing into hatred or contempt or exciting disaffection against the administration of justice in Ghana; or promoting feelings of ill-will or hostility between different classes of the population of Ghana; or falsely accusing any public officer of official misconduct."¹³⁹ A seditious intent may be established by the inflammatory nature of the language used, the timing or the target audience.¹⁴⁰

Some elements of the offence of sedition are particularly tricky for opposition politicians, as they criminalize the essence of opposition politics. The offences of bringing the government into hatred or contempt or exciting disaffection against it provide good examples of this. How are

¹³⁴Section 3(2) & (3) of the Public Order Act.

¹³⁵Section 3(1).

¹³⁶On the law of sedition in Ghana see Mensa-Bonsu, H.J.A.N., *The Law and the Journalist* (FES, Accra, 1997) pp. 40–42.

¹³⁷*Service Press Ltd v Attorney General* (1952) 14 WACA. 176.Z.

¹³⁸Section 183(1)(13) of the Criminal Code.

¹³⁹Section 183(11) of the Criminal Code.

opposition parties expected to convince the electorate to vote for them and not the incumbent government if they cannot excite at least a modicum of hatred and disaffection against it?

The offence of sedition is particularly dangerous in a country like Ghana, where the political-legal culture is such that government has been highly intolerant of opposing views¹⁴¹ and the political-cultural orientation is such that the idea of a permanent group of opponents (opposition) pledged to unseat the leadership is seen as a taboo, rather than as an integral part of the democratic landscape.¹⁴² Therefore, opposition leaders who propagate certain views which the government of the day do not approve of are likely to be subjected to the unpleasantness of the criminal justice system, and, as Mensa-Bonsu rightly points out, "it is no consolation that the matter would be subjected to judicial inquiry because all that is needed to create a chilling effect on those inclined to raise such issues in the future, is a sensational case."¹⁴³

The other related provision which raises similar issues is Section 183A of the Penal Code, which makes it an offence to publish, concerning the president, any defamatory or insulting matter "with intent to bringing the President into hatred, ridicule or contempt." That the matter uttered is true does not seem to be a defence under this provision. Misconduct or corruption by the President is of great public interest, particularly when determining the suitability of the incumbent for re-election. This provision, which was originally introduced by a military regime, is therefore an affront to democratic governance.¹⁴⁴

Overall, the legal environment relating to freedom of association and assembly is generally satisfactory. The constitutional provisions are in consonance with international standards and so are the laws relating to formation of political parties and public order. The problem areas are the legal regime applicable to civic associations, which seems a bit confused, the law of sedition, which is outdated and incompatible with both international standards and the relevant provisions of the Constitution of Ghana, and defamation laws.

4.3 Tanzania

¹⁴⁰ Mensa-Bonsu, op. cit., p. 41.

¹⁴¹ *Ibid.*

¹⁴² Bluwey, G.K., op. cit., pp. 215–216.

¹⁴³ Mensa-Bonsu, op. cit., pp. 41–43.

¹⁴⁴ *Ibid.*, p. 43.

Unions, NGOs and Political Freedom in Sub-Saharan Africa

The right to freedom of association was introduced in the Constitution of Tanzania with the other provisions of the Bill of Rights, by Act No. 15 of 1984, when the country was still under a one-party system. The Bill of Rights did not come into force until 1988. The right to freedom of assembly, association and expression is found under Article 20 of the Constitution which, as amended by the Eighth Constitutional Amendment Act, 1992¹⁴⁵ provides as follows:

20-(1) Every person is entitled to freedom, subject to the laws of the land, to freely and peaceably assemble, associate and cooperate with other persons, express views publicly, and more specifically to form or join associations or organisations formed for the purposes of preserving or furthering his belief or interests or any other interests.

20-(2) Notwithstanding the provisions of sub -article (1) it shall not be lawful for any political entity to be registered which according to its Constitution or policy –

- (1) aims at promoting or furthering the interest of:
 - (1) any religious faith or group;
 - (2) any tribal group, place of origin, race or gender;
 - (3) only a particular area within any part of the United Republic;
- (2) advocates for the breakup of the United Republic;
- (3) accepts or advocates for the use of force or violent confrontation as means of attaining its political goals;
- (4) advocates or intends to carry on its political activities in only one part of the United Republic;
- (5) does not permit periodic and democratic election of its leaders.

20(3) Parliament may enact legislation which makes provisions for ensuring that political parties operate within the limits and adhere to the conditions set out in sub article (2) concerning the freedom and the right of persons to associate and assemble.

20(4) Subject to the relevant laws of the land, it shall be unlawful for any person to be compelled to join any association or organisation, or for any association or any political party to be refused registration on ground only of its ideology or philosophy.

Article 30 of the Constitution authorises the imposition of limitations on fundamental rights and freedoms aimed at, among other things, ensuring that the rights and freedoms of other people, or of the interest of the public, are not prejudiced by the wrongful exercise of the freedoms and

¹⁴⁵Act No. 4 of 1992.

rights of individuals,¹⁴⁶ and imposing restrictions, supervising and controlling the formation, management and activities of societies and organisations in the country.¹⁴⁷

0.0.0 Political association

Pursuant to Article 20(3) of the Constitution, Parliament enacted the Political Parties Act, 1992,¹⁴⁸ providing for registration of political parties. The Act, among other things, establishes the office of the Registrar of Political Parties who is to be appointed by the President of the United Republic of Tanzania and who operates under the Prime Minister's Office.¹⁴⁹ The powers of the Registrar include granting provisional and permanent registration to political parties,¹⁵⁰ overseeing subsidies given to political parties¹⁵¹ and cancelling registration of political parties that have lost qualification for such registration.¹⁵²

Any organisation wishing to operate as a political party must formally apply to the Registrar for registration. The only exception is the ruling party, CCM, which obtained automatic registration by operation of law.¹⁵³ No organisation is permitted to operate as a political party unless and until it has obtained registration in accordance with the Political Parties Act.¹⁵⁴ The Act provides for a two-stage registration – provisional and full registration.

To obtain provisional registration, a party must present to the registrar a formal application submitted by the founding members, accompanied by a copy of the constitution of the proposed party.

Membership of the party must be voluntary and open to all citizens of the United Republic of Tanzania, without discrimination as to gender, religious belief, race, status or occupation.¹⁵⁵ In addition, the Constitution or policies of the proposed party must conform with Section 9(2)

¹⁴⁶Article 30(a).

¹⁴⁷Article 30(e).

¹⁴⁸Act No. 5 of 1992.

¹⁴⁹Political Parties Act, Section 4(1).

¹⁵⁰Section 4(3).

¹⁵¹Sections 16–18.

¹⁵²Section 19.

¹⁵³Section 7(1) & (2).

¹⁵⁴Section 7(3).

¹⁵⁵Section 9(1).

which lifts and re-enacts in its entirety Article 20(2) of the Constitution (as above).

Upon obtaining provisional registration, a political party has 180 days to apply for full registration.¹⁵⁶ In accordance with Section 10 of the Act, a political party shall not be qualified to be fully registered unless-

- (1) it has been provisionally registered;

- (2) it has obtained no less than two hundred members who are qualified to be registered as voters for the purpose of parliamentary elections, from each of at least ten Regions of the United Republic of Tanzania, of which at least two Regions are in Tanzania Zanzibar, one Region each from Zanzibar and Pemba;

- (2) it has submitted the names of the national leadership of the party and such leadership draws its members from both Tanzania Zanzibar and Tanzania Mainland;

- (3) it has submitted to the Registrar the location of its head office within the United Republic and a postal address to which notices and other communication may be sent.

These provisions impose conditions for registration which, whatever their justification, are so cumbersome that only those with deep pockets are likely to be able meet them. Therefore, as with its counterparts under the Cameroonian and Ghanaian laws, the question arises of the compatibility of these provisions with the right to form political parties.

This question was specifically raised in Tanzania in the case of *Christopher Mtikila v Attorney-General*.¹⁵⁷ Here the petitioner asked the High Court to declare Sections 8, 9, and 10 of the Political Parties Act, 1992 unconstitutional since they imposed onerous conditions on the

¹⁵⁶Section 8(4).

¹⁵⁷High Court of Tanzania at Dodoma, Civil Case No. 5 of 1993. Reported in Vol. 1 *Commonwealth Human Rights Digest*, 1996, p. 11.

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formation of political parties and thereby inhibited the enjoyment of the freedom of association enacted in Article 20(1) of the Constitution. This issue was stayed because it had already been raised in another case between the same parties, which was pending in the Dar es Salaam registry of the Court. However, the Judge spoke approvingly of Article 20(2) of the Constitution, which suggests that he would not have had any problem with Section 9(2) of the Political Parties Act, which re-enacts the former. Similarly, the judge remarked that in a young country like Tanzania, licensing parties based on tribe, race or religion would be suicidal. This suggests that the Judge would also have had no problem with Section 9(1). However, it is not clear what he would have said of the more controversial Section 10. This provision, which is really the only one with logistical and financial implications, seems to be geared towards compelling all political parties to support the policy – very dear to the ruling party – of keeping the union between Tanganyika and Zanzibar. While the Union may be desirable, it is not evident why all political parties should support it on pain of being denied registration. The issue of a union between Tanganyika and Zanzibar is a political matter; it is therefore appropriate for political parties to hold and propagate different views.

A matter of crucial importance in the ability of political parties to realise their primary objective of winning elections and assuming governmental powers is the lack of resources. As the Chairman of the Electoral Commission has observed, "almost all new political parties in Tanzania do not have funds required for campaigns let alone effective campaigning."¹⁵⁸ This puts them at a great disadvantage *vis-a-vis* the ruling party which has numerous resources, including property in virtually every region of the country acquired during the one-party era, largely from public funds and by way of compulsory contributions. It has refused to surrender this property, in defiance of the recommendation that it should do so by the Presidential Commission which, with the Chief Justice in the Chair, did the groundwork that led to political transformation in Tanzania.

That the regulations required for political parties to acquire and retain registration are onerous, and that lack of resources compound this situation, was confirmed recently in an interview by Mr Liundi, the Registrar of Political Parties. Mr Liundi said that all 13 political parties in the country have committed serious political mistakes in one way or another over the last seven years,

¹⁵⁸Ramadhani, A.S.L., 'The Electoral Process in a Multiparty Democracy' in Peter & Juma, op. cit., pp.

warranting their removal from the register. Among the legal infringements they committed was the receipt of assistance in some form from sources outside the country; failure of all parties, including the ruling Chama Cha Mapinduzi (CCM) to submit to the Registrar biannual reports disclosing the sources of their funds and the amount and reason for receiving the funds; failure to conduct periodic meetings and elections in accordance with their constitutions; and the practice of small parties maintaining party offices in their residences in obscure areas, contrary to the requirement that parties should have offices located in clearly defined geographical areas. Mr Liundi clearly linked most of these problems to lack of resources of the majority of parties. The Registrar said that the reason he had not struck any of the parties from the register was because if he had applied the law strictly he would have been obliged to de-register all political parties and this would have resulted in a political vacuum in the country.¹⁵⁹

Thus, the reason why there are still any political parties in Tanzania today is because the custodian of the law that was enacted supposedly to 'facilitate' their existence has been unable to apply it because of the consequences. This surely calls into question the law itself.

The danger of political parties being de-registered for failure to meet legal conditions for existence due to lack of resources has been cited as one of the justifications for state funding of political parties. According to Kumado, if legislation requires that political parties meet certain obligations, "it is only fair that the State which imposes these requirements should pick up part of the bill arising therefrom."¹⁶⁰ The extension of subsidies to political parties has also been defended on other grounds, including strengthening democracy by ensuring that there are viable alternatives to the ruling party and enhancing the quality of the electoral process by enabling political parties and individual candidates to participate in elections on a 'level playing field.'¹⁶¹

While the above reasons are compelling, the question of subsidies to political parties needs to be handled carefully lest it is misused to undermine the very objectives which subsidies are said to be capable of promoting. The experience in Tanzania may be used to illustrate this point. Section 16 of the Political Parties Act allows the Government to give subsidies to political parties to enable them to meet the costs of participating in elections, to enable parties with MPs to fulfil

185–197, 188.

¹⁵⁹ 'All Political Parties Deserve De-Registration, Says Liundi' in *The Sunday Observer (T)* 9 January 2000.

¹⁶⁰ Kumado, op. cit., p. 11.

¹⁶¹ Kumado, op. cit., pp. 10–13.

their parliamentary duties and to enable parties which obtained at least five per cent of the vote during the last General Elections to meet the day-to-day costs of maintaining offices. The power to oversee the subsidies is vested in the Registrar of Political Parties.

Among the problems with the subsidy system in Tanzania are the following. First, the formula used to determine how much money each party receives from the Government has tended to favour the ruling party which, thanks to the one-party legacy, at the last General Elections scooped more than two-thirds of MPs in Parliament, as well as the same proportion of the total electoral vote. Thus, the subsidies have had the effect of widening the wealth gap between opposition parties and CCM, the ruling party.

Second, subsidies have contributed to intra-party conflicts as the various leaders and factions have fought for their fair share. There is also evidence that the government has used subsidies to intensify such intra-party disputes. For example, when the NCCR-Mageuzi Party was engulfed in a dispute which saw the party divided into two factions, one headed by Mr Mrema, the Chairman and another one by Mr Marando, the Secretary General, the Registrar consistently gave the subsidy to the Secretary-General's faction. This went against the request of the Chairman that the subsidy be either withheld or passed on to the party trustees in accordance with the Party's constitution.¹⁶² This led Mr Mrema to charge that the "time had come to believe that even the Registrar of Political Parties was on the side of the ruling Chama Cha Mapinduzi".¹⁶³ Eventually the dispute, which lasted for two years, ended in early 1999 with the resignation of the Chairman of NCCR from the party. One can reasonably conclude that the government subsidies helped the Marando faction to win this internal dispute. The resignation of the popular Mr Mrema left the NCCR, hitherto the strongest opposition party, in a very weak state, contributing to the present pathetic situation of the opposition in the country.

Finally, subsidies which are distributed on the basis of the number of MPs a party has and its share of the electoral vote at the last elections, discourage the opposition from fielding joint candidates and encouraging tactical voting, as this has financial implications lasting for five

¹⁶²See e.g. Mbogora, A., 'Call Back Subsidy Cheque, Mrema tells PMO' in *The Guardian (T)* Tuesday, 24 June 1997, p. 1; Mwambende, L., 'BoT (Bank of Tanzania) Orders NCCR to Deposit Subsidy Cheque' in *The Guardian (T)*, 28 June 1997, p. 1 and Mninga, M., 'Mrema faction wants subsidy cheque dispatched to Manzese' in *The Guardian (T)*, 15 August 1997, p. 1.

years. These may be the very tactics which the opposition need if they are to make a dent in the ruling party's monopoly on the political life of the country.

As well as direct funding from the state, the ruling party receives indirect subsidies through the use of public resources which opposition parties are not able to gain access to. For example CCM, the ruling party, has a monopoly over Radio Tanzania, which is the sole nationwide broadcaster. The radio station, which is wholly publicly-owned and publicly-financed, continues to give special treatment to the ruling party, just as it did during the one-party era. In *Mabere Marando & Edwin Mtei v The Attorney General*,¹⁶⁴ one of the petitioners (both petitioners were chairmen of registered political parties) told the High Court how his request in August 1992 to the Director of Radio Tanzania for airtime was expressly declined. By contrast, when CCM held its national convention in October 1992, Radio Tanzania suspended all its programmes in order to broadcast live the proceedings of the convention. When NCCR-MAGEUZI had its own convention a few months later, the petitioner applied again for airtime to cover proceedings, even on payment basis, but the Director of Radio Tanzania refused to grant the time. The publicly-owned radio did not send a single reporter to cover the convention.¹⁶⁵ Another episode of Radio Tanzania's bias against opposition parties is recounted by the Chairman of the Electoral Commission:¹⁶⁶

During the last (1994) civic elections, CCM held various meetings for selecting persons to be their candidates for the various wards. The names of these persons were announced over Radio Tanzania. The names of the candidates of the other parties were not announced. This misled some people to believe that those persons whose names had been announced by the Radio were already councilors for various wards. Some people did not see the point of going to register themselves as voters since they thought that no elections would be held. This particularly affected those who would have voted for other parties. The National Electoral Commission clarified the situation but some damage had already been done.¹⁶⁷

Another form of indirect subsidy to the ruling party raised in the *Marando & Mtei* case was that leaders of CCM were appointed to high positions of authority in the Government, putting public resources at their disposal while they were in pursuit of their politic duties. At the same time, leaders of the opposition were denied government facilities even if they were prepared to pay for them.¹⁶⁸

¹⁶³Edwards, M., 'Mrema Hits at Liundi Over Subsidies' in *The Guardian (T)*, 11 July 1997, p. 1.

¹⁶⁴Civil Case No. 168 of 1993.

¹⁶⁵*Ibid*, p. 11.

¹⁶⁶See also *2000 Interim Report on the Tanzania Media Monitoring Project*, available from ARTICLE 19.

¹⁶⁷Ramadhani, op. cit., p. 186.

¹⁶⁸*Marando & Mtei v Attorney General*, cyclostyled transcript p. 12.

Another factor affecting freedom of association in the political sphere in Tanzania is the requirement that every candidate for political office must be sponsored by a political party. This requirement is found under Articles 39, 67, and 77 of the Constitution and Section 39 of the Local Authorities (Elections) Act, 1979 which generally require one to belong to, or to be sponsored by, a political party in order to stand for election to political office at both local and national level. In *Rev. Christopher Mtikila v. Attorney General*¹⁶⁹ the petitioners argued that these provisions infringed Article 21(1) of the Constitution which, as it then stood, provided that "Every citizen of the United Republic is entitled to take part in the government of the country either directly or through freely chosen representatives, in accordance with the procedure provided by or under the law". They also challenged the then Article 20(4), which provided that "without prejudice to the relevant laws, no person shall be compelled to belong to any party or organisation ...". Justice Rugakingira agreed with the petitioner that the two sets of the provisions of the Constitution were indeed contradictory. Applying the principle of harmonisation, the judge ruled that "notwithstanding the exclusionary elements to that effect in Articles 39, 67 and 77 as well as Section 39 of the Local Authorities (Elections Act), 1979, I declare and direct that it shall be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and local council elections." Unfortunately, rather than obeying the Court's ruling, the Government quickly moved a Bill¹⁷⁰ which amended Article 21(1) and effectively overruled the judgment of the Court by reinstating the requirement that the right to participate in national affairs can only be exercised through a political party.

One of the factors the Judge had taken into account in reaching his decision was the absence, at this juncture of the country's history, of any serious political parties. The Judge observed that apart from CCM, whose presence is all pervasive, the rest of the parties existed more in name than practice. Following this he opined that this situation could be abused to confine the right of governing into the hands of members of a class and to render illusory the emergence of a truly democratic society. Although this reason does not seem to have impressed the Government, it certainly holds great truth. Establishing and maintaining a political party under the conditions stipulated under the Political Parties Act is a very expensive business. Accordingly, very few people are capable of establishing parties which any serious person, desirous of participating in national political life, can join. This then gives enormous powers over the membership to the leaders of the few credible political parties – power which could be used to stifle internal party

¹⁶⁹ High Court of Tanzania, Civil Case No. 2 of 1993.

democracy. Already there have been cases where leaders of political parties experiencing internal strife refuse to endorse the nomination by local constituencies of parliamentary candidates of persons who are not in their camp.¹⁷¹ In some instances, this has resulted in constituencies without any opposition party candidates being fielded, which in turn has led to the candidates of the ruling party being declared winners without any vote by the electorate. The requirement of party sponsorship has meant that MPs are more accountable to the parties that sponsor them than the constituencies which they represent, prompting one MP to attempt to introduce a motion in Parliament to protect MPs expelled from their political parties. The motion was rejected by the majority of the MPs of the ruling party.¹⁷²

The other threat to freedom of political association is the harassment of leaders of the opposition. Whereas in the past political opponents were dealt with in extra-legal attacks, now they are pursued through legal system on trumped-up or flimsy charges. An early example of this tactic was the charge brought against Seif Sharif Hamad, former First Minister of Zanzibar, for organising an illegal meeting and possession of government documents. Mr Hamad was denied bail, his counsel was terrorised into withdrawing from defending him and repeated changes were made in the charges against him.¹⁷³

More recent cases include the prolonged detention on charges of treason of 18 members of the CUF in Zanzibar, including four elected members of the Zanzibar House of Representatives (Parliament). The 18 were released in November 2000, following three years incarceration and after the national elections, in which they were prevented from standing as candidates.

1.0.0 Civil association

There are currently five laws under which civic associations can be registered in Tanzania: the Societies Ordinance of 1954,¹⁷⁴ the Trustees Incorporation Ordinance, 1956,¹⁷⁵ the Companies

¹⁷⁰Act No. 34 of 1994, S. 4.

¹⁷¹See e.g. Msanjila, A., 'Mrema Refuses to Endorse Makongoro's Nomination' in *The Guardian (T)*, Monday, January 25, 1999, p. 1. (Makongoro was in the faction of the Secretary General).

¹⁷²See Mbogora, A., 'Many parliamentarians Reject Ndobho's Motion to Protect Expelled MPs' in *The Guardian (T)*, June 7 1997, p. 1.

¹⁷³Full account of this incident and commentary is found in Peter, C.M., op. cit., pp. 661–663.

¹⁷⁴Cap. 337.

¹⁷⁵Cap. 376.

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Ordinance,¹⁷⁶ the National Sports Act¹⁷⁷ and, in the case of Zanzibar, the Zanzibar Societies Act of 1995.¹⁷⁸ Commenting on these laws, the National Steering Committee for National Policy on NGOs had this to say:

The content of the basic structure of the Societies Ordinance together with the Rules made thereunder have remained virtually unaltered since 1954. The same applies to Trustees Incorporation Ordinance. None of the pieces of legislation which are currently used for purposes of formation, operation and coordination of the various activities of the NGOs were enacted with a clear vision of the nature, roles and varieties of activities currently being carried out by NGOs.¹⁷⁹

Of these laws, the one which is most widely used in Tanzania Mainland is the Societies Ordinance. Under the Societies Ordinance, all 'local societies' operating in Tanzania must apply to the Registrar for registration.¹⁸⁰ A 'local society' is defined as "any society formed or established in Tanganyika or having its headquarters or chief place of business in Tanganyika", or is deemed under Section 5 to be established in Tanganyika.¹⁸¹ This provision, and the Societies Ordinance in general, is targeted at local not-for-profit organisations and does not normally apply to organisations established under any other law. However, the Minister of Home Affairs is empowered by Section 6(a) to require under certain circumstances any organisation, including any company, partnership, association or organisation formed for the purpose of conducting any lawful trade or business, to apply for registration under the Ordinance. This means the Ordinance could potentially apply to all associations in Tanzania.

The Registrar may refuse to register an association where s/he is satisfied that such a local society is a branch of, or is affiliated to or connected with, any organisation or group of a political nature established outside Tanganyika.¹⁸² Registration may also be denied by the Registrar on other grounds including "if it appears to him that such local society is being or is likely to be used for any purpose prejudicial to, incompatible with the maintenance of peace, order and good government"¹⁸³ or if the the local society "is, in the opinion of the Registrar, undesirable."¹⁸⁴

¹⁷⁶Cap. 212.

¹⁷⁷Act No. 12 of 1973.

¹⁷⁸Act No. 5 of 1995.

¹⁷⁹NSCNP, The Fifth Draft of Tanzania National Policy on Non-Governmental Organisations, June 1999, para. 5(a).

¹⁸⁰Section 7 of the Ordinance.

¹⁸¹Section 2(1).

¹⁸²Section 8.

¹⁸³Section 9(a).

¹⁸⁴Section 9(d)(iii).

What would amount to an "undesirable" local society is not defined by the Ordinance. Clearly these provisions are not compatible with the freedom of association guaranteed under the Constitution in that they subject that right to the subjective opinion of the Registrar, may be exercised in poorly-defined circumstances and are therefore open to abuse.

Section 12 empowers the Registrar, at their discretion, to cancel at any time the registration of any local society if it acquires the attributes which would warrant the Registrar to refuse to register an association; or if it has altered its objectives or pursues objects other than its declared objects; or if the association has failed to comply with an order made by the Registrar to the society, under Section 16, to provide him/her with audited accounts in the time stated in such order. Prior to cancelling any registration, the Registrar must notify his/her intention to the society concerned and must give it an opportunity to submit reasons (if any) why the registration should not be cancelled. Any society which is aggrieved by the decision of the Registrar may appeal to the Minister, whose decision is final.¹⁸⁵

Any local society which is not registered, or which has lawfully applied for registration but the application remains undetermined, or which has a pending appeal against refusal of registration or cancellation of such registration, is deemed by Section 1(h) to be an "unlawful society." Under Section 20, any person who is, or acts as, a member of an unlawful society, or attends a meeting of an unlawful society is guilty of a felony and is liable, on conviction, to a fine not exceeding five thousand shillings (approximately US\$6), or to imprisonment for a term not exceeding three years, or both.

By these provisions, a local association is as such an "unlawful society" if it is not registered. It continues to be so even after it has lawfully submitted an application for registration, until such time as the certificate of registration is given. This can only mean that local associations are presumed to possess the attributes that disqualify associations from registration, unless and until they have proved that they do not possess such characteristics. In other words, under the Ordinance, there is a presumption of illegality of local associations that have yet to obtain registration, even if they have already lawfully applied for it. This provision is clearly in conflict with Article 21(1) of the Constitution which guarantees freedom of association. And this

¹⁸⁵Section 13(2).

provision cannot be saved by Article 30(e) of the Constitution because Sections 1(h) and 20 of the Ordinance criminalize the very existence of associations, while the sub-Article saves only legislation which is enacted for purposes of "imposing restrictions, supervising and controlling the formation, management and activities of societies and organisations in the country." However one reads the phrase "controlling the formation" of organisations, it cannot not include legislation which makes associations illegal *ab initio*.

During the one-party era, these powers were used extensively to force societies and associations to affiliate with others in order to obtain or keep registration. Many were denied registration outright.¹⁸⁶ The introduction of multi-party constitutionalism has not yet eased executive control over civil society and organisations. For instance, individuals wishing to vie for leadership of sports clubs or associations still have to be screened and approved by Cultural Officers or District Sports Councils which are heavily controlled by the Executive.¹⁸⁷ The Ministry of Home Affairs has also continued to exercise its power of registering and de-registering associations in a manner that might suggest that in some instances the decisions are politically motivated.

A case in point is the de-registration of the the Women's Council of Tanzania, better known as BAWATA, the acronym of its name in Swahili: *Baraza la Wanawake Tanzania*. BAWATA was formed and registered by the Registrar of Societies under the Societies Ordinance on 16 May 1995, as an autonomous non-governmental organisation independent and free from any political or religious affiliation.¹⁸⁸ According to Article 4 of its constitution, the objectives of BAWATA are:

- (0) to liberate the woman from all forms of gender exploitation, oppression, discrimination and degradation and to condemn the same;
- (1) to work as an institution or a forum on behalf of all women and through which they will be able to initiate and further their targets and interest in all aspects of social life;
- (2) to unite all women without regard to their religions, colour, age, creed, status, levels of education or authority, political parties, ideologies or any other thing so as to strengthen their efforts in the struggle for protecting their rights and equality;
- (3) to mobilise all women for purposes of giving them leadership whereby

¹⁸⁶Juma, I., 'Public Order Laws in Changing Political Landscape: The Role of the Executive, the Legislature and the Judiciary' in Peter, C.M., & Juma, I.H., *Fundamental Rights and Freedoms in Tanzania* (1998), pp. 82–100, 94.

¹⁸⁷*Ibid*, pp. 94–95.

they will effectively be participating in bringing about economic and social development;

- (4) to educate women on their basic rights and duties in society;
- (5) to maintain women's respect;
- (7) to foster women's participation in planning and implementing various national projects;
- (7) to follow up on law reforms, particularly on the area affecting women activities.¹⁸⁹

By coincidence 1995, the year BAWATA was established, happened to be the year of the first general elections under the multi-party system. Under the Chairpersonship of Anna Tibaijuka, a University Professor, BAWATA produced a document outlining the prominent women's issues and began a campaign to educate women on whether, and to what extent, these issues were reflected in the election manifestos of the various parties and the platforms of individual candidates. Because of this activity, BAWATA received several warnings from the then President of Tanzania, Ali Hassan Mwinyi, to stop getting involved in politics or else risk de-registration. Although BAWATA toned down its sensitisation campaigns, its relations with the State did not improve, resulting in the cancellation of its registration certificate by the Minister of Home Affairs "for reasons that the particulars in the application for registration of that society were false."¹⁹⁰

Although this letter did not give further details, it would appear that the Minister might have been referring to the parts of the organisation's constitution which allowed BAWATA to carry out advocacy and sensitisation work. Earlier, the Minister had told BAWATA to amend its Constitution to remove provisions that he claimed gave it attributes of a political party. According to one human rights scholar, BAWATA was de-registered because its assertiveness and competent handling of women's issues was too much to stomach for a government which, throughout the one-party era, had known only one women's organisation, the Women's Organisation of Tanzania (UWT). UWT's role as an affiliate of the ruling party was to praise and

¹⁸⁸BAWATA Constitution of 1995.

¹⁸⁹Reproduced in Peter, C.M., *Human Rights in Tanzania* (1998), p. 733. For more facts on the BAWATA saga see the same source, pp. 730–753.

¹⁹⁰See Notice of De-registration issued to BAWATA through a letter dated 5 June, 1997, with reference HAC

not question what the government did. But since the country's Constitution made it no longer possible to decree BAWATA out of existence, the government took recourse to legal technicalities to achieve the same ends.¹⁹¹ The matter is now before the courts. However, it is unlikely that whatever the outcome BAWATA will ever regain its momentum, contacts and partners.

Interestingly, just as the wings of BAWATA had been clipped by the State, another women's organisation, Equal Opportunity for All Trust Fund (EOATF), emerged from nowhere to become the most prominent women's organisation in the country. Registered under the Trustees Incorporation Ordinance, EOATF is chaired by Mrs. Anna Mkapa, the wife of the current President of the United Republic of Tanzania. The NGO is involved in a wide range of activities, including supporting smaller women's organisations, donation of educational supplies and medical equipment and distribution of food supplies to drought-affected areas in the country. Recently, it was revealed that EOATF had acquired a property worth \$812,500 on credit from the state-owned NBC Holding Corporation, contrary to the relevant Act which required the NBC Holding Corporation to dispose of the assets of the defunct NBC bank on cash term basis only. This case, which was debated in parliament, led to charges that EOATF had acquired this property by virtue of its chair being the President's wife. Whether or not this charge is justified, the circumstances surrounding EOATF make it look increasingly like a phoenix that has risen out of the ashes of the practically defunct UWT and taken over its role of boosting the image and popularity of the ruling party and its government.

3.3.3 Labour association

During the one-party era, the trade union movement was an integral part of the state-party machinery. In 1990, the government embarked on a legislative programme in the field of industrial relations which, among other things, aimed at changing this situation. The principal legislation in this regard is the Organisation of Tanzania Trade Unions (OTTU) Act.¹⁹² However, apart from changing the name of the umbrella organisation from JUWATA to "OTTU" (which in Swahili would still be JUWATA), the Act did virtually nothing to change the structure of the trade union movement, which was designed to function in a one-party corporatist state. OTTU

24/04/B/6.

¹⁹¹Peter, *ibid*, 731.

¹⁹²No.3 of 1993.

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replaced JUWATA as the sole representative of employees in Tanzania¹⁹³ and like its predecessor, OTTU was insulated from the provisions of the Trade Union Ordinance, which is supposed to be the principal legislation governing trade union affairs in the country. However, OTTU also remained under the firm control of the State, which could dissolve it at any time and designate any organisation as the sole representative of workers in Tanzania, to which trade unions affiliated to OTTU would have to affiliate automatically.

In short, the OTTU Act of 1991 did not restore freedom of association as stipulated under international labour instruments. Workers were still compelled to organise through OTTU, the state-created sole trade union in the country. The organisation was still patronised by the State by being exempted from exercising key provisions of the principal trade union law. But this favour came at a price: OTTU, which later changed its name to Tanzania Federation of Free Trade Unions (TFTU), existed and functioned at the pleasure of the State.

In November 1998, Parliament passed the Free Trade Unions Act¹⁹⁴ which received Presidential assent and became law on 24 January 1999. The new law repeals the OTTU Act 1991 and establishes a legal regime for a truer freedom of association and reinstates the power of the Registrar of Trade Unions to carry out the actual registration of trade unions, oversee their operations, examine financial management of union funds and scrutinise their annual returns.

The application of this law was delayed by logistical problems, including preparation of the regulations that would guide the registration exercise, the appointment of the Registrar and the establishment of the Registrar's office. However, it was recently reported that all these matters have now been resolved and the registration of free trade unions began in January 2000.¹⁹⁵

The other constraint on freedom of association in the labour sphere in Tanzania is the law relating to collective bargaining which, as in Ghana, requires all disputes between trade unions and employers or employers' organisations to be reported to the Labour Commission before any party takes industrial action. Once a dispute is referred it is then transferred to the Industrial Court for adjudication. The decision of the Court is final and any industrial action taken after that is illegal. The law in Tanzania does not allow strikes under any circumstances.¹⁹⁶ Therefore, the observations

¹⁹³Section 40 of the Act.

¹⁹⁴Act No. 10 of 1998.

¹⁹⁵See 'Registration of Free Trade Unions to Start' in *Daily Mail (T)*, 27 December 1999.

¹⁹⁶See Rutinwa, B., *Legal Regulation of Industrial Relations in Tanzania: Past Experience and Future Prospects* (Labour Law Unit, University of Cape Town, 1995) pp. 8–16 and 29–32.

made in relation to the Ghanaian law apply to the Tanzanian law as well.

3.3.4 Freedom of assembly, association, and Public Order laws

There are two sets of public order laws in Tanzania which have implications for the exercise of freedom of assembly, association and expression. The first set is those laws which address themselves to the question of assemblies and processions. The second is those which criminalize certain forms of speech and expression. Foremost in the first category are the Police Force Ordinance,¹⁹⁷ the Penal Code and, in relation to political gatherings, the Political Parties Act of 1992.¹⁹⁸

The relevant provisions of the Police Force Ordinance at the time political transformation began in Tanzania were found in Section 40, which required one to obtain a permit from the District Commissioner in order to hold meetings or organise processions and Section 41 of the same Ordinance, which provided thus:

The officer in charge of police, any police officer above the rank of inspector or any magistrate, may stop or prevent the holding of any assembly or procession in any place whatsoever, whether or not a permit in respect thereof is required or has been issued under this Section, if in the opinion of such officer or magistrate, the holding continuance, as the case may be, of such assembly or procession is imminently likely to cause a breach of the peace, or to prejudice the public safety or the maintenance of public order or to be used for any unlawful purpose, and may, for any of the purposes aforesaid, give or issue such orders as he may consider necessary or expedient, including orders for the dispersal of any such assembly or procession as aforesaid.

Section 42 made any assembly that did not conform with the provisions of Section 40 or 41 an unlawful assembly within the meaning of Section 74 of the Penal Code, which was punishable under Section 43 of the Police Force Ordinance as well as under the Penal Code.

Section 11 of the Political Parties Act grants registered parties the right to organise and address

¹⁹⁷Cap 322.

¹⁹⁸Other public order laws relevant to assemblies are the Public Order Ordinance, Cap 304; the Local Government (District Authorities) Act, Act No. 7/82 (Rules 55 and 59 which deal respectively with prohibition, regulation and control of meetings, processions, dance, beer parties and other assemblies; and prohibition of riot or any disturbance or breach of peace); similar provisions under the Local Government (Urban Authorities) Act, No. 8 /1982; the Highways ordinance (S. 39(g) which criminalizes obstruction of highways) and the Road Traffic Act, No. 30/1973 (whose Section 66 requires a permit by the Inspector General of Police before a procession of more than 200 people or 50 vehicles can take place).

assemblies anywhere in the United Republic for the purposes of publicising themselves and to attract membership, after giving notice to the Officer in Charge of Police in the area concerned.¹⁹⁹ However, the same provision reaffirms the applicability of Sections 40, 41, 42 and 43 of the Police Force Ordinance to such assemblies.²⁰⁰

In the early days of political pluralism, the permit system was used extensively by District Commissioners, most of whom were senior cadres of the ruling party, to prohibit or frustrate political rallies of the opposition. In one of the early cases in which the opposition brought this matter before the courts, the catalogue of misuse of the permit system outlined in the petition included denial of permits to hold rallies without reasons being given; flimsy pretexts such as the District Commissioner being new, on leave, or away on safari; and denial on pretexts of failure of the applicant party to attach a photocopy of its certificate of registration or to give adequate notice. In the same case, it was shown that these situations did not prevent the DCs from issuing permits to rallies organised by the ruling party.²⁰¹

In one instance, a permit was denied because the applicant party wanted to organise a rally in support of constitutional changes whereby there would be three governments in Tanzania, one each for Tanganyika and Zanzibar and a Federal Government. This policy was opposed by the ruling party, which favours the present two-government structure: one government for Zanzibar and another one for both Tanzania Mainland and the Union.

In a subsequent case,²⁰² Sections 40 of the Police Force Ordinance and 11(1)(a) of the Political Parties Act were declared by Judge Lugakingira to be void on grounds that the requirement for a permit to hold an assembly infringed the freedom of peaceful assembly and procession enshrined in Article 20(10) of the Constitution. However, the judge found Section 41 to be in conformity with the Constitution in that the powers of the police and the magistracy to prohibit assemblies was "clearly conditioned on clear and present danger where the substantive evil is extremely serious and the degree of imminence extremely high."²⁰³ *Ipsa facto*, Sections 42 and 43 were

¹⁹⁹Section 11(1)(a).

²⁰⁰Section 11(2).

²⁰¹See *Mabere Nyaicho Marando and Edwin Mtei v The Attorney General*, High Court of Tanzania at Dar es Salaam Civil Case No. 168 of 1993, cyclostyled copy of judgment, pp.6–9.

²⁰²*Rev. Christopher Mtikila v Attorney General*, High Court of Tanzania at Dodoma, Civil Case No. 5 of 1993.

²⁰³See Peter, *op. cit.*, p. 694.

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constitutional, except to the extent to which they related to the offence of holding a meeting without a permit. The judge directed that from then on, all that was required in order to hold an assembly was to issue the police with sufficient notice of such assembly or procession, with a copy of the notice being delivered to the District Commissioner.

Although the requirement for permits has been removed, life has not become any easier for opposition parties seeking to hold rallies because of the way the police have come to apply Section 41. Rather than invoking this provision only in extraordinary situations, as Judge Lugakingira had intimated, the police have, on being issued with notice of a planned meeting, issued prohibition orders claiming that they had information that the meetings were likely to cause chaos, but without giving evidence.²⁰⁴ Opposition leaders have expressed suspicion that the police department might be acting on orders of the CCM government²⁰⁵ and have on occasion threatened to take the matter to court.²⁰⁶

In some instances, charges have been brought against opposition leaders for holding unlawful assemblies.²⁰⁷ Thus, Section 41 of the Police Force Ordinance has come to be applied in such a way as to effectively reimpose the requirement of permits for processions and assemblies.

The second set of public order laws relevant to freedom of assembly and association is that relevant to free speech. These laws include the Newspapers Act²⁰⁸ and the Penal Code, both of which contain provisions relating to the offence of sedition.²⁰⁹ The definition of sedition under Tanzanian law is similar to that under Ghanaian law, discussed previously. The other provision is Section 89(1)(a) of the Penal Code, criminalizes the use of abusive and insulting language in such a manner as to be likely to cause a breach of peace. Since the coming into force of multi-party politics, the offence of sedition has increasingly been employed against fiery politicians critical of the Government and the leaders of the ruling party.

²⁰⁴ See e.g. Mwambande, L., 'Cancelling Rallies was Arbitrary-Marando' in *The Guardian (T)* 16 September 1996, p. 1 and Lyimo, H., 'Holding Peaceful Demonstrations a Right-Mrema' in *The Guardian (T)*, 6 May 1997.

²⁰⁵ See Kivamwo, S., 'NCCR-Mageuzi Rejects Police Assurances' in *The Guardian (T)*, 17 July 1997, p. 1.

²⁰⁶ See Ng'wanakilala, F., 'Mrema to Sue Government Over Refusal to Hold Rallies' in *The Guardian (T)* 27 February 1998, p. 1.

²⁰⁷ See e.g. Staff Reporter, 'Marando Charged with Illegal Demo' in *Daily News (T)*, 20 March 1997, p. 1.

²⁰⁸ Act No. 3 of 1976.

²⁰⁹ Section 55 of the Penal Code and Sections 31 and 32 of the Newspapers Act.

In *Rev. Christopher Mtikila and 3 Others v. Republic*, the first appellant had been convicted by a magistrate's court under Section 89(1)(a) for uttering the following words:

- (2) That [the then] Present Mwinyi is a thief who has bankrupted the United Republic of Tanzania to Zanzibaris;
- (b) The retired President Nyerere has sold Tanzania;
- (2) Police are dogs of *Chama cha Mapinduzi* (the ruling party);
- (3) That *Chama cha Mapinduzi* is a party of thugs.

Overturing the conviction on appeal, Judge Mwalusanya ruled that in determining whether words spoken came within the provisions of Section 89(1)(a), they had to be taken in the context in which they were spoken. In this case, since the first appellant was a politician, his words had to be taken to have been mere *political propaganda or a political harangue* which no reasonable person who was in the audience could have taken at their face value or in their literal meaning. These words were a figure of speech. Accordingly, they could not amount to abuses and insults.

Despite this sound guidance from the High Court on the interpretation of the law, the police have continued to arrest, charge and sometimes obtain conviction of politicians for uttering similar words in similar contexts. For example, the same Reverend Mtikila who was involved in the above precedent was sentenced to a one-year jail sentence in December 1999 for "uttering filthy words" against former President Nyerere and President Benjamin Mkapa, saying that they were devils, calling the incumbent CCM Secretary General, Phillip Mangula "a stupid dog" and referring to CCM as "a devil's organ" and "a party of thieves."²¹⁰ Mr Augustine Mrema, who is now Chairman of the Tanzania Labour Party (TLP) was recently arrested with six other people and charged with sedition for uttering disparaging words against top government and CCM leaders and the Father of the Nation, the late Julius Nyerere, even though the alleged words were uttered at a rally, lawfully organised, during campaigns for local elections.²¹¹ Another casualty of this set of laws is Wilfred Rwakatare, the Acting Secretary General of CUF, who was also charged with uttering seditious words at a political rally lawfully held in Bukoba town in late December 1999. Such recourse to sedition, libel and defamation laws risks rendering freedom of assembly meaningless if politicians come to fear that what they say at such gatherings may result in prosecution and imprisonment.

²¹⁰See 'Government Critic Receives One Year jail Term' in *The Daily News (T)*, 15 December 1999.

²¹¹See 'Mrema to Face Sedition, Defamation Charges in Moshi' in *The Guardian (T)*, 29 December 1999.

1.0 South Africa

In accordance with the Final Constitution of South Africa of 1996²¹² everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and present petitions,²¹³ as well as to enjoy freedom of association.²¹⁴ The Constitution also guarantees political rights, including the right of every citizen to make free choices, which include the rights to form a political party; participate in the activities of, or recruit members for, a political party; campaign for a political party or cause;²¹⁵ to stand for public office and, if elected, to hold office.²¹⁶

Section 236 provides that "to enhance multiparty democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis." Workers and employers are guaranteed the right to form, join and participate in the activities of trade unions and employers organisations respectively.²¹⁷ The right of workers to strike is expressly guaranteed under the Constitution.²¹⁸

Like all other provisions of the Bill of Rights Charter, these rights may be limited, but only in terms of a law of general application to the extent in which the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.²¹⁹ These rights may also be derogated from in a state of emergency, but only in terms specified under Article 37 of the Constitution.

*0.0.0 Political association*²²⁰

²¹²Passed as the Constitution of South Africa Act 108 of 1996 and entered into force on 4 February 1997.

²¹³Article 17 of the Constitution.

²¹⁴Article 18.

²¹⁵Article 19(1).

²¹⁶Article 19(3)(b).

²¹⁷Article 23(2) and (3).

²¹⁸Article 23(2)(c).

²¹⁹Article 36(1).

²²⁰This section draws most of the information from de Waal, J. 'Political Rights' in Chaskalson, P. *et al.*,

One of the characteristics of the apartheid regime was the use of law to proscribe political activity. Among the laws employed for this purpose were the Internal Security Act of 1982 (previously the Suppression of Communism Act of 1950), Unlawful Organisations Act 34 of 1960 (under which the African National Congress (ANC) and Pan African Congress (PAC) were banned), the Affected Organisations Act of 1974 and the Fundraising Act of 1978. Some of these laws were repealed by the last apartheid government of F.W. De Klerk between 1989 and 1992 and the remainder were purged from the statute book following the adoption of the Interim Constitution of South Africa in 1993. This was the first instrument to guarantee freedom of association, as well as specific legislation such as the Abolition of Restrictions on Free Political Activity Act.²²¹ Thus, in South Africa, freedom of association in the political sphere has largely been characterised by removing the impediments to enjoyment of this right which had been imposed by the apartheid regime.

In addition to legislation removing restrictions on free political association, the South African Parliament has passed laws aimed at facilitating the realisation of that right. Among these is the Electoral Commission Act.²²² The Act makes provisions, among other things, for parties to register.²²³ It is not quite clear whether every political party must register in terms of this Act, whose primary objective is not to legalise or regulate political parties, but simply to enable the Electoral Commission to maintain a register of parties for the purposes of the Electoral Act of 1993. However, the regulations for registration are relatively lenient and during the first democratic election political parties were able to comply with them very easily.²²⁴ The only hurdle would appear to be the requirement of a deposit of R25, 000 for national elections and a R5,000 deposit for provincial elections both of which, in terms of Section 67 of the Electoral Act, are forfeited if a party fails to secure at least one seat. According to one observer, a deposit which has the effect of substantially limiting access to the ballot may well be open to constitutional attack under Article 19(1) of the Constitution.²²⁵

Section 56(1) of the Electoral Act gives specific protection to the right to make free political choice by making it an offence for a person to use force or threats, sexual harassment or damage

Constitutional Law of South Africa (Juta & Co, Johannesburg, 1998 Revision), pp. 23–1 – 23–7.

²²¹Act 206 of 1993.

²²²No. 202 of 1993.

²²³See Ss. 15–17 of the Electoral Commission Act.

²²⁴De Waal, J., *op. cit.*, 23–5.

²²⁵*Ibid.*

to property or disadvantage to compel a person to participate in political activities. For the same reason, Section 56 prohibits bribery to achieve the same results.

Section 74 of the Electoral Act set up a State Electoral Fund in order to provide parties with financial support to conduct their electoral campaigns. The fund was originally administered by the Independent Electoral Commission.²²⁶ After the 1994 Elections, an amount was divided equally between all successful parties and a further amount was distributed between them proportionally on the basis of the votes each party had attracted.²²⁷ In order to qualify for the initial amount, a party had to prove that it had obtained at least two per cent of the electoral vote. Alternatively, the party could submit a list of 10,000 signatures of National Assembly voters or 3,000 signatures of provincial legislature voters. In this case however, the party would be entitled to only 50 per cent of the sum it would have obtained under the first alternative.

The procedure adopted to distribute funding was generally regarded by all parties as fair. However, it did not overcome the situation noted in relation to Tanzania of bigger parties ending up with a larger share of the fund.²²⁸ Moreover the funding did not seem to have had much effect on the outcomes, as some smaller and resource-strapped parties did much better than larger and better-funded parties. This was partly due to the fact that because of the historical context of South Africa, most voters knew well before the elections which party they would support and why. So there were not many of the 'floating voters' who are normally the target of electoral campaigns.²²⁹

Nevertheless, the fair funding by the state of all parties achieved two important objectives. The first was to equip as many parties as possible to fight the elections and thereby permit as few parties as possible to claim that they had been robbed of voter support by wealthier parties. To that extent, the fund increased the legitimacy of the elections, and that of the new democratic Parliament. Second, since the formula adopted to distribute the fund was perceived by all parties to be fair, this played a role in increasing the election's credibility.²³⁰

Section 74 of the Electoral Act was a sort of a temporary arrangement and not the law envisaged by Article 236 of the Constitution. This law was eventually enacted in 1997 as the Public

²²⁶The Independent Electoral Commission has been now replaced by the Electoral Commission following the repeal of the Independent Electoral Commission Act 150 of 1993 by the Electoral Commission Act 1996.

²²⁷Pursuant to Section 74(5) of the 1993 Electoral Act.

²²⁸Friedman, S., 'Public Funding of Political Parties in South Africa' in Kumado, K., op. cit., pp.168–181, 172.

²²⁹*Ibid*, p. 175.

²³⁰*Ibid*, p. 176.

Funding of Representative Political Parties Act.²³¹ Like its predecessor, the Act is intended to enable funding of political parties participating in Parliament and provincial legislatures. It establishes a special fund, to be managed by the Electoral Commission, from which money may be disbursed to political parties, taking into account their number of seats.

A further provision aimed at enhancing freedom of political association is Section 22(5) of the Independent Media Commission Act of 1993²³² which stipulates that state-financed publications may not be used to advance the interests of political parties and that the Commission shall endeavour to ensure that all political parties are given equitable treatment by the broadcasting service. Sections 58 to 61 make provisions aimed at achieving this result.²³³

3.4.2 Civic association

During the apartheid era, the law relating to the establishment of civic associations was mixed. The formation of social and intimate association was restricted by laws such as the Group Areas Act 41 of 1950; Prohibition of Mixed Marriages Act 55 of 1949 and the Separate Amenities Act of 1953. But the law was generally very liberal with regard to the formation of voluntary organisations. An NGO wishing to set itself up and start operating could choose one of the three legal forms: a voluntary association, whose formation was not regulated by any legislation but the common law; a trust under the Trust Property Control Act 57 of 1988; or a non-profit company under Section 21 of the Companies Act, 1973.²³⁴ Associations formed under these laws could, however, be affected by the legislation noted in the previous section as affecting freedom of association in the political sphere. For example, under the Internal Security Act 1982, the government could declare any organisation to be unlawful. Under the Affected Organisations Act of 1974, the government could prohibit specified organisations from receiving any funds from outside South Africa, while under the Fundraising Act of 1978, it was a crime for any person, including organisations, to solicit or receive donations from the public unless it was authorised to do so by the Director of Fundraising.²³⁵

²³¹Act 103 of 1997.

²³²Act No. 148 of 1993.

²³³For a detailed discussion of these provisions see ARTICLE 19 *et al.*, *Media Law and Practice in Southern Africa: South Africa*, November 1996, pp. 14–15.

²³⁴On the details of these laws see Emdon, E. *et al.*, Establishment, Registration and Administration of NGOS, Report Commissioned by the Independent Study into an Enabling Environment for NGOs (in South Africa), July 1993, pp. 3–15.

²³⁵See Budlender, G., 'The Legal and Fiscal Environment of Voluntary Organisations in South Africa' in Micou,

Although by the mid-1990s the laws restricting civic association in South Africa had been repealed, other problems of a technical nature remained which continued to impede the enjoyment of the right of freedom of association in the civic sphere. Among these problems were state bureaucracy, and the complexity of the law and regulations relating to registration of trusts and non-profit companies which forced NGOs to rely unduly on legal experts.²³⁶ It was these problems which inspired the enactment in 1997 of the Non-profit Organisations Act (NOA).²³⁷

As stated under Section 2:

2. The objects of this Act are to encourage and support nonprofit organisations in their contribution to meeting the diverse needs of the population of the Republic by –

- (2) creating an environment in which nonprofit organisations can flourish;
- (3) establishing an administrative and regulatory framework within which nonprofit organisations can conduct their affairs;
- (4) encouraging nonprofit organisations to maintain adequate standards of governance, transparency and accountability and to improve those standards;
- (5) creating an environment within which the public may have access to information concerning registered nonprofit organisations; and
- (6) promoting a spirit of co-operation and shared responsibility with government, donors and amongst other interested persons in their dealings with nonprofit organisations.

As is clear from the above provision, the purpose of the Act is to encourage the formation of non-profit organisations and facilitate their operations. Towards this end, Section 3 requires every state organ to determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of non-profit organisations to perform their functions.

The Act establishes, within the Ministry of Welfare and Population Development, the Directorate of Non-profit Organisations,²³⁸ which is responsible for facilitating the process for developing

A.M., & Lindsnaes, B., *The Role of Voluntary Organisations in Emerging Democracies*, The Danish Centre for Human Rights, 1993) 85–95; and ‘Response to Questionnaire: South Africa’ by the same author in the same volume, pp. 92–98, p. 92.

²³⁶Emdon *et al.*, op. cit., pp. 14–15.

²³⁷No. 71 of 1997.

²³⁸Section 4.

and implementing policy; determining and implementing programmes, including programmes to support nonprofit organisations in their endeavour to register and to ensure that the standard of governance within non-profit organisations is maintained; liaising with other organs of state and interested parties; and facilitating the development and implementation of multi-sectoral and multi-disciplinary programs.²³⁹

The Act heeds the call by Emdon *et al* for "the information pertaining to the registration and administration of NGOs [to] be demystified and the need to rely on experts reduced"²⁴⁰ by specifically requiring the Directorate to prepare and issue model documents, including model constitutions for non-profit organisations; models of the narrative report to be submitted by registered non-profit organisations to the Directorate; codes of good practice for non-profit organisations and those persons, bodies and organisations making donations or grants to non-profit organisations.²⁴¹ In preparing the above documents, the Directorate must consult the public and all interested parties in accordance with an elaborate procedure stipulated under Section 28 of the Act. Comments received and the content of any discussions must be considered before making the instruments.²⁴²

The NOA does not make it mandatory for non-profit organisations to register with the Directorate but permits them to do so if they wish.²⁴³ However, many NGOs are likely to seek registration in order to enjoy the benefits and allowances applicable to registered non-profit organisations which only the Act empowers the Minister to declare.²⁴⁴ Also, under Section 16, a registered body becomes a body corporate with all the attendant legal benefits, such as capacity to enter into transactions in its own name, to sue, be sued and to acquire and dispose of property in its own name.

Section 12(2) enumerates matters which must be contained in the constitution of a non-profit organisation which wishes to register under the Act. Additionally, Section 12(3) lists matters relating to the conduct of internal affairs which may be contained in the constitution of a non-

²³⁹Section 5.

²⁴⁰Emdon *et al.*, op.cit., p. 16.

²⁴¹Section 6(1).

²⁴²Section 6(2) read together with Section 28(d).

²⁴³Section 12.

²⁴⁴Section 11.

profit organisation which wishes to register.

A party wishing to register must make an application to the Director in charge of the Directorate for Non-profit Organisations by submitting two copies of its constitution and any other information which the Director may require.

Upon receiving the application, the Director must consider the application within two months and if s/he is satisfied that the requirements for registration have been complied with, must register the applicant. If the Director is not satisfied that the applicant satisfies the requirements for registration, s/he must send the applicant a written notice, giving reasons for the decision and informing the applicant that it has one month from the date of the notice to comply with those requirements. Upon complying with the requirements, the Director must register the applicant. If the applicant does not comply with the requirements set out in the notice then the Director will refuse to register it and notify the applicant in writing of the refusal and the reason for it.²⁴⁵

Appeals against refusal to register are referred to the Panel of Arbitration Tribunal. Established under Section 9, the Tribunal comprises at least seven persons nominated by the Minister from a shortlist of nominees. The list is compiled by the Minister from recommendations made to them after they have published a notice calling for nominees and stating the criteria for nominations in *The Gazette* and by any other widely circulated means of communication.²⁴⁶ If the Tribunal upholds an appeal, the Director must register the organisation by entering its name in the register.

The Act requires registered non-profit organisations to provide the Directorate with accounting records, reports and information at specified intervals and gives detailed guidance as to what such records and reports should contain and by whom they should be prepared.²⁴⁷

Section 20 requires the Director to send a compliance notice in the prescribed form to a registered non-profit organisation if the organisation has not complied with a material provision of its constitution and other obligations for registered non-profit organisations.²⁴⁸ Such compliance notice must be in writing and must notify the organisation of the non-compliance and the steps it

²⁴⁵Section 13.

²⁴⁶Section 9(1) and (3).

²⁴⁷Sections 17 and 18.

²⁴⁸Section 20(1).

is required to take in order to comply within one month of receiving the notice, or within such other period as may be extended by the Director on good cause shown by the organisation.²⁴⁹

The Director may refer a non-profit organisation to the South African Police Service for criminal investigation if satisfied that any non-compliance may constitute an offence.²⁵⁰

The Director may cancel the registration of a non-profit organisation which, having received a notice of non-compliance, does not comply in time, or makes false representations in any document or narrative, financial or other report submitted to the Director.²⁵¹ Any non-profit organisation which is aggrieved by the decision of the Director may appeal to the Arbitration Tribunal. If the Tribunal upholds the appeal, the Director must re-issue the certificate of registration and amend the register accordingly.²⁵² The Act also makes provisions for voluntary de-registration and winding up or dissolution by non-profit organisations and lays down the procedures to be followed in that eventuality.²⁵³

Overall, the provisions of the Non-profit Organisations Act live up to the objective of the Act, which is to support non-profit organisations and to facilitate their operations. The conditions imposed on non-profit organisations for obtaining and retaining registration are not only reasonable and justifiable in a democratic society, they constitute the bare minimum requirements for any efficient and accountable organisation. The powers given to the various government officers under the Act are reasonable. Accordingly, this Act is compatible with freedom of association under both the international standards and the South African Constitution.

0.0.0 Labour association

The constitutional right to freely associate, to participate in the activities of trade unions, to form a trade union, and to strike²⁵⁴ is implemented through the South African Labour Relations Act of 1995 (LRA). The Act re-enacts these rights but provides that members of trade unions can only

²⁴⁹Section 20(2) and (3).

²⁵⁰Section 20(1)(b).

²⁵¹Section 21(1).

²⁵²Section 22.

²⁵³Section 23.

²⁵⁴Section 18 and 23(2) of the South African Constitution.

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participate in the lawful activities of trade unions.²⁵⁵ Additionally it provides that every trade union and employers' organisation has the right to plan and organise its administration and lawful activities.²⁵⁶ The LRA prohibits discrimination or termination on account of trade union membership or activities.²⁵⁷

Under the LRA, trade unions are not obliged to register, but registration is a pre-condition for participation in the system of industrial relations established under the Act. To obtain registration, a union must be independent, with a distinct name, an address in the Republic and a constitution which meets certain legal requirements. Unlike legislation of many other jurisdictions, under the South African system, effectiveness and level of support are irrelevant to registration.

1.0.0 Freedoms of assembly, association and Public Order laws

During the apartheid era, the National Party government passed several laws aimed at suppressing political activity through restriction of assemblies and gatherings. Among such legislation were the aforementioned Suppression of Communism Act of 1950 and the Internal Security Act of 1982. Other laws included the Criminal Law Amendment Act of 1953,²⁵⁸ the Riotous Assemblies Act of 1956,²⁵⁹ the emergency regulations issued under the Public Safety Act²⁶⁰ and the General Law Further Amendment Act 92 of 1970. These laws empowered specified authorities to prohibit assemblies and public gatherings on various specified reasons all of which had a political and ideological flavour.²⁶¹

Under Section 15 of the General Law Further Amendment, holding of assemblies was subject to both the local authority's consent and the approval of a magistrate in the district in which the assembly was to take place. Under the Internal Security Act, the Minister annually issued a notice which declared outdoor gatherings illegal – with the exception of *bona fide* sporting and religious purposes – unless permission was obtained from a magistrate. Thus, while assemblies played a

²⁵⁵Section 4 of the South African Labour Relations Act (LRA) of 1995.

²⁵⁶Section 8 of the LRA of 1995.

²⁵⁷Section 5(1)–(2) of the LRA of 1995.

²⁵⁸Act No. 8 of 1953.

²⁵⁹Act No. 17 of 1956.

²⁶⁰Act 3 of 1954.

²⁶¹For the pertinent provisions of these laws see *ibid*, Section 21.2(a).

central role in bringing down apartheid, they did so almost entirely without legal sanction.²⁶²

Following the political transformation and the adoption of the Interim Constitution of 1993 which guaranteed freedom of assembly, Parliament passed the Regulation of Gatherings Act of 1993²⁶³ which transformed the law on assemblies and processions in South Africa. First, the Act removes the requirement of permits before holding gatherings and assemblies.²⁶⁴ All that is required is that notice for demonstrations or gatherings be provided to local authorities and police seven days in advance.²⁶⁵ If the organisers cannot give the seven days' notice, then they can still hold the demonstration at 48 hours' notice.²⁶⁶ Failure to meet the 48 hours-in-advance deadline gives the local authorities almost unfettered discretion to issue blanket prohibitions.²⁶⁷ This provision is worrisome for, as Woolman points out, "this extraordinary power to silence opposition is an unnecessarily blunt cudgel to place in the hands of individuals unlikely to place expressive interests on a par with public order concerns."²⁶⁸

As under Ghanaian law, section 4 of the Act imposes joint and several civil liability on each member of the demonstration for any damage caused by a demonstration they have participated in. Woolman opines that this provision could also undermine freedom of assembly and puts his argument thus: "We must ask how many members of the public would be willing to risk personal bankruptcy to challenge some undesirable state of affairs? Only those, we suppose, who have nothing left to lose. However, the freedoms guaranteed in the Constitution are intended to protect the expressive interests of all, not just those on the margin."²⁶⁹ Although this criticism is valid, it is also right for the State, having liberalised the right to call demonstrations, to make provisions aimed at deterring those enjoying this right from infringing proprietary rights of other individuals and where they do, to make appropriate amends. In order to address the concern raised by Woolman, it might be sensible to amend this provision and adopt the Ghanaian position where responsibility for any damage occurring in the course of demonstrations is borne not by all demonstrators jointly and severally, but by those individuals proved to have caused it.

²⁶²Woolman, S., 'Freedom of Assembly' in Chaskalson *et al.*, op. cit., 21-1 – 21-12, 21-2.

²⁶³Act 205 of 1993.

²⁶⁴Section 4(3).

²⁶⁵Section 3(3).

²⁶⁶*Ibid.*

²⁶⁷*Ibid.*

²⁶⁸Woolman, 21-4.

²⁶⁹*Ibid.*

Finally, the Act addresses the problem that was endemic in apartheid South Africa of the use of deadly force by the police to disperse demonstrations. While Section 9(2)(d) permits the use of ‘firearms and other weapons’ for crowd control and permits the use of force where there are apparently ‘manifest intentions’ to kill or to seriously injure persons, or to destroy or seriously damage property, Section 9(2)(e) provides that such use of firearms or force must be necessary, moderate and proportionate to the circumstances. Overall, the new legislation is balanced and is in keeping with the spirit and the letter of the provisions of the Constitution relating to the right of freedom of assembly.

Gatherings held for political purposes are further governed by Section 61 of the 1993 Electoral Act, which makes interference with free political canvassing and campaigning an offence. Violation of political rights by rival political parties is addressed by the Code of Conduct made under the Electoral Act,²⁷⁰ to which every party participating in an election must subscribe, thereby making it binding on the officials, members and supporters of the party. Among other things, the Code of Conduct enjoins political parties to take reasonable steps to prevent their members from contravening the Code or any other law.²⁷¹ In addition, the Electoral Code prohibits false, defamatory or inflammatory remarks and the use of language which may lead to violence and intimidation.²⁷²

The Electoral Act confers extensive powers on electoral tribunals to fine parties acting in breach of the Code of Conduct. The Penalties range from a warning or R 100 000 fine (approximately US\$13 000) to disqualification of candidates or even political parties from participation in the elections.²⁷³ Political parties are also vicariously liable for acts committed by their members when facts are proven which give rise to such liability under the common law.²⁷⁴

Unlike Cameroon and Ghana, South Africa’s law relating to freedom of speech is fairly liberal and case law on constitutional provisions relating to freedom of speech has afforded special

²⁷⁰See Schedule 2 of the Electoral Act.

²⁷¹Para. 4(n) of the Code of Conduct.

²⁷²Para. 4(d).

²⁷³See S. 69 of the Electoral Act.

²⁷⁴*National Party v Jamie NO & another* 1994 (3) SA 483 (EI AT: WCD) at 494; *Inkatha Freedom Party v African National Congress* 1994 (3) SA 578 (EI AT: ND) at 588.

protection to expression in a political context. In *Gardner v Whitaker*²⁷⁵ the Court ruled that in the light of the constitutional provisions on freedom of expression (then Article 15 of the 1993 Interim Constitution), the burden of proving that, on the facts of the case, the right of privacy had precedence over freedom of expression lay with the plaintiff and not the defendant as was the position under common law.²⁷⁶ This was more so where the person claiming to have been defamed was a public figure. The substantive law relating to this was propounded in the case of *Mandela v Falati* where the Supreme Court had been called upon to consider an application for an interdict to prevent the publication of defamatory remarks against a politician on the basis of his public status. The Court expressed its opinion as follows:

[although] this is a private dispute it is a matter of grave social and political importance. There may be a few exceptions but in general no politician should be permitted to silence his or her critics. It is a matter of the most fundamental importance that such criticism should be free, open, robust and even unrestrained. This is so because of the inordinate power and influence which is wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity was hidden from public scrutiny.²⁷⁷

In *Holomisa v Argus Newspapers Limited*²⁷⁸ the South African Supreme Court held that, having due regard to the spirit, purport and object of the Fundamental Rights Chapter developing the common law, a defamatory statement which related to free and fair political activity was constitutionally protected, even if false, unless the plaintiff showed that in all the circumstances of its publication it was unreasonably made.

Mandela and *Holomisa* seemed poised to break new ground in cases concerning defamation of public officials, going so far as to suggest that public figures, even in private disputes unrelated to their public duties, must to a large extent tolerate even defamatory remarks. However, later authorities seem to be shrinking back from this ideal and the law in this area is currently rather unsettled.²⁷⁹

²⁷⁵1994 (5) BCL 19(E).

²⁷⁶For a detailed discussion of the position of the South African law before and after this case see ARTICLE 19 *et al.*, *Media Law and Practice in Southern Africa: South Africa*, November 1996, pp. 21–23.

²⁷⁷1994 (4) BCLR 1 (W) at 9b–c.

²⁷⁸1996 (6) BCLR 836.

²⁷⁹See N. Mue, *Where art thou, Oh Sullivan?* Southern African Media Law Briefing, Vol. 3, No. 3, August 1998.

3.5 Zimbabwe

The right to freedom of assembly and association in Zimbabwe is guaranteed under Article 21 of the Constitution of Zimbabwe which provides:

21 Protection of freedom of assembly and association

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

(2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.

(3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

- (3) in the interests of defence, public safety, public order, public morality or public health;
- (4) for the purposes of protecting the rights or freedoms of other persons;
- (5) for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations; or
- (6) that imposes restrictions on public officers except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

Commenting on this provision and Article 20 on freedom of expression, in *re Munhumeso & Ors*,²⁸⁰ the Supreme Court of Zimbabwe emphasised that "the importance attaching to the exercise of the right to freedom of expression and assembly must never be underestimated. They lie at the foundation of a democratic society and are one of the basic conditions for its progress and for the development of every man."²⁸¹

Articles 20(2)(a) and 21(3)(a) of the Constitution permit the enactment of laws which derogate

²⁸⁰1994 (1) ZRL 49 (S).

²⁸¹*Ibid*, p. 56.

from freedom of expression and assembly in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society.

0.0.0 Political association

As noted above, Article 21 guarantees the right to form or belong to "political parties". The use of the plural in the word "parties" implies the endorsement of the multi-party system. By virtue of Article 21(c), political parties need not be registered in order to exist or operate lawfully. Read together, these two provisions would appear to suggest a strong protection of freedom of political association in Zimbabwe. In practice, however, Zimbabwe has one of the most hostile environments for multi-partyism in Africa. Right from independence in 1980, the ZANU–PF government consistently made it clear its intention to turn Zimbabwe into a one-party state.²⁸²

As the immediate establishment of a *de jure* one party-state was not possible due to the Lancaster House Constitution of 1979, which entrenched the right to political association for at least ten years after Zimbabwe's independence, the Mugabe regime took other measures which amounted to the establishment of a *de facto* one-party state. Prominent among these measures were the establishment of the Ministry of Political Affairs in January 1988 specifically for the purposes of rendering services to the ruling party. Effectively, this Ministry became the vehicle through which ZANU–PF was subsidized by the taxpayer.²⁸³ Another method by which a *de facto* one-party state was institutionalised in Zimbabwe was by filling senior civil service positions only with members of the ruling party.²⁸⁴ This compelled all those wishing to work their way up the civil service hierarchy to join the ruling party and, in discharging their governmental duties, to do its bidding. The merger of ZANU–PF and ZAPU–PF in 1987 marked the end of any pretence of a multi-party system in Zimbabwe.

ZANU–PF formally abandoned the plan to entrench the one-party system in law in 1991 when the government realised that it could not swim against the tide of democratisation. However, the ZANU–PF government switched to other tactics aimed at entrenching and perpetuating itself in power.

²⁸²Samnoy, A., 'Zimbabwe' in Andreassen, B., & Swineheart, T., *Human Rights in Developing Countries Yearbook 1991* (Scandinavian University Press, 1992), pp. 378–424, 386.

²⁸³*Ibid*, pp. 387–388.

²⁸⁴*Ibid*, p. 388.

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In the 1990 general elections, ZANU–PF employed various techniques to undermine campaign efforts of the Zimbabwe Unity Movement (ZUM), the main opposition party, including using the Central Intelligence Organisation (CIO) to intimidate, arrest and temporarily detain ZUM candidates. In one incident Paul Kombay, the ZUM candidate who was standing against the then Vice President, Simon Muzenda, was shot and seriously wounded. Large crowds of ZANU–PF youth and women are reported to have burnt or damaged houses belonging to ZUM members and demanded their dismissal from government jobs. Those responsible were eventually granted blanket amnesty. In contrast, ZUM members convicted of painting their party’s campaign message in public places were not offered any amnesty.²⁸⁵ During the 1995 general elections, no violence on this scale was experienced. However, various reports of intimidation by the CIO were reported.²⁸⁶ There is no doubt that these tactics contributed to ZANU-PF winning the lion’s share of the seats in both elections.

The run-up to the 2000 elections, which included a government defeat in a referendum on a new draft constitution, saw a dramatic deterioration in the human rights situation in Zimbabwe. Hundreds of farms were invaded by so-called "war veterans" as the ruling ZANU-PF adopted a desperate policy of supporting illegal land seizure. Violence and intimidation of supporters of the main opposition party, the Movement for Democratic Change (MDC), was endemic and overt. Farm workers and MDC supporters were often directly attacked by supporters of ZANU-PF. At least 31 people were killed. Independent observers agree that the MDC would have won the election in the absence of such state-orchestrated brutality. ZANU-PF only secured a narrow majority in parliament because President Mugabe exercised his constitutional right to appoint 30 MPs himself.

The other way the right to political association has been undermined in Zimbabwe is through the use of public resources and funds by the ruling party for its own political activities. One such resource is the public media, which the government controls and uses effectively for its own advantage.²⁸⁷ In 1996, the Zimbabwe Broadcasting Corporation is reported to have issued an order banning coverage of several businessmen and opposition politicians.²⁸⁸

²⁸⁵ *Ibid*, p. 393-394.

²⁸⁶ Thiis, & Feltoe, op. cit., p. 393.

²⁸⁷ For further information see the Media Monitoring Project's website <http://mmpz.icon.co.zw/>. The Project is a joint project between the Media Institute for Southern Africa, ARTICLE 19 and the Catholic Commission for Justice and Peace in Zimbabwe. Set up in 1999 it monitors all news and current affairs coverage in the publicly owned media.

Other methods that have been used by the ruling party to subsidise itself from state coffers include renting out its buildings to government departments at high rents; using the National Army to provide catering, medical and other facilities during ZANU–PF's party's national congress in 1994;²⁸⁹ and commandeering government vehicles to transport ZANU-PF supporters to rallies and polling stations during general elections.²⁹⁰

Perhaps the most blatant and disingenuous example of recourse by ZANU–PF to state funds to support itself is the scheme of funding political parties under the Political Parties (Finance) Act of 1992.²⁹¹ The Act purports to make provisions for payment of subsidy to every political party. However, when read carefully, it becomes clear that the sole intended beneficiary of the Act is the ruling party. The Act empowers the government to set up a fund every year after the general elections from which political parties may receive payment in accordance with the terms of the Act. To obtain such funding, a party must register and have no fewer than 15 seats out of the 120 elective seats in the Parliament.²⁹² It is obvious how Parliament was able to put the threshold of qualification at 15 seats: at that point in time ZANU–PF held 118 out of the elective 120 seats.²⁹³ The only inference is that this clause, if not the entire Act, was intended to ensure that only the ruling party, ZANU-PF, received state funding every financial year.²⁹⁴

At the 1995 general elections, ZANU–PF obtained exactly the same number of seats and thus recreated the scenario with regard to qualification for state funding under the Act. Between 1992 and 1995, ZANU-PF received about US\$8 million under the Act. For the most part, this money is used for routine administration of the party offices at various levels. However, in election year, the funds are also used for political campaigning,²⁹⁵ putting opposition parties at a financial disadvantage.

It is hardly surprising, therefore, that in 1998 the Supreme Court of Zimbabwe, in the case of

²⁸⁸*Ibid*, p. 396.

²⁸⁹Makumbe, J., 'Proposed Bill to Fund Political Parties: Implications for Democracy in Zimbabwe' in Kumado, (ed.), *op. cit.*, pp. 182–192, 185–186.

²⁹⁰Samnoy, *op. cit.*, p. 394.

²⁹¹Act No. 14 of 1992.

²⁹²Section 3(3).

²⁹³Samnoy, *op. cit.*, p. 390.

²⁹⁴Makumbe, *op. cit.*, p. 188.

²⁹⁵*Ibid*, p. 188.

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United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others,²⁹⁶ held that this patently unfair system of funding political parties violated the applicant party's freedom of speech. In striking out the Political Parties (Finance) Act, the Court remarked that "in poorer societies, where private funding is either not available or offers inadequate assistance, the inability to obtain state funding, because the qualification is set too high, causes the reduction of the effective freedom of expression of political parties."²⁹⁷

1.0.0 Civic association

The principal legislation in Zimbabwe relating to civic institutions other than political parties and trade unions is the Private Voluntary Organisations Act of 1995 (PVO).²⁹⁸ This Act effectively replaced the Welfare Organisations Act (WOA),²⁹⁹ which since 1966 had been the main legislation regulating activities of NGOs in the country. The purpose of the Act, as stated in its preamble, remains the same as that of its predecessor: "to provide for the registration of private voluntary organisations, for the control of the collection of contributions for the objects of such organisations and of certain institutions, and matters incidental thereto." However, the two statutes differ in the way they seek to achieve the same objectives in that while under the WOA the government had only a general advisory and administrative role in relation to NGOs, the PVO Act gives the government, through the Ministry for Labour and Social Welfare, total control over NGOs and their activities.³⁰⁰ The motives of the government, were, by its own admission, to empower the Ministry to act against abuses by NGOs which were receiving large amounts of donor funding.³⁰¹

In accordance with Section 6 of the PVO Act, no private voluntary organisation can commence or continue to carry on its activities or seek financial assistance from any source unless it has been registered. Any person who takes part in management or control of an unregistered

²⁹⁶1998(2) BCLR 224 (ZS).

²⁹⁷*Ibid*, at 237F.

²⁹⁸Act No. 6 of 1995. Chapter 17:05 of the Laws.

²⁹⁹Chapter 93.

³⁰⁰See Maphosa, N.G., 'A Critical Analysis of Non Governmental Organisations' Right to Autonomy and Government Regulation Under the Private Voluntary Organisations Act' [Cap 17:05], a dissertation submitted in partial fulfilment of the Bachelor of Laws Degree (LL B), Faculty of Law, University of Zimbabwe, April 1999, pp. 12-13.

³⁰¹*Ibid*, p. 13, quoting the Director for Social Services in the Ministry of Public Service, Labour and Social

voluntary organisation is guilty of an offence.

A striking feature of the PVO Act is the wide and discretionary powers it vests in the key government officers responsible for registration and regulation of NGOs, namely the Private Voluntary Organisations Board and the Minister for Public Service, Labour and Social Welfare.

Established under Section 3 of the Act and appointed by the Minister, the Board is the key government institution responsible for registration of organisations under the Act. Section 9 requires the secretary of any private voluntary organisation which is required to be registered to submit an application for registration to the Registrar of Private Voluntary Organisations who is also the Director of Social Welfare. Upon satisfying himself that certain conditions have been met, the Registrar submits the application to the Board. After considering the application, the Board may direct the Registrar to issue the organisation concerned with a certificate of registration, subject to conditions that the Board may impose or reject the application if it judges that the organisation is not genuinely operating in furtherance of the objects mentioned in its application for registration, or the organisation does not, in respect of its conditions and management, comply with the provisions of the Act.³⁰² The Board may also at any time cancel any certificate of registration on the basis of a number of reasons, some of which give the Board undue power over the internal management of NGOs. For example, one of the grounds on which a certificate may be cancelled is "if any remuneration or reward, which in his opinion is excessive in relation to the total value of the contributions received by the organisation concerned, has been retained or received by any persons other than the person for whose benefit the contributions were intended".³⁰³ This provision effectively gives the Board power to determine wage policies and scales for NGOs, a matter which is best left to the donors and the Executive of the recipient NGO. At any rate, the reason for imposing on an organisation the ultimate penalty of de-registration just because its officers have over-remunerated themselves or any person is not entirely evident.

The Board may also amend a certificate of registration, including for purposes of varying the conditions attached thereto, or deleting therefrom, any of the objects in respect of which the

Welfare.

³⁰²Section 9 of the Act.

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organisation was registered, if in the opinion of the Board the organisation is no longer genuinely operating in furtherance of those objectives.³⁰⁴ Effectively, this provision gives the Board powers to prevent an organisation from carrying out an objective which is relevant under its Constitution, but which the organisation is not carrying out at a particular time. Again, the purpose of this provision is not clear. Before exercising its powers of cancellation and amendment, the Board must afford the secretary of the affected organisation an opportunity to be heard. The decision of the Board is also subject to appeal to the Minister.

Even more uncontrolled are the powers conferred by the Act on the Minister of Public Service, Labour and Social Welfare. As pointed out above, the Minister is responsible for appointing all the members of the Board. It is true that the Minister has to appoint Board members from among persons nominated for that purpose by appropriate associations, organisations and four named ministries of the government. However, unlike under South Africa's NOA, a Minister is not obliged to select members of the Board from the list recommended to them. In fact, the Minister may even "appoint a person to be a member of the Board who has not been so nominated and he may decline to appoint any person so nominated"³⁰⁵ without having to give any reason. As Maphosa justifiably remarks, this Board may well be called the 'Minister's Board' and its independence and objectivity must be doubted.³⁰⁶

The powers of the Minister under the Act are wide ranging and they include the designation of the Chairman of the Private Voluntary Organisation Board,³⁰⁷ hearing and determining appeals against decisions of the Board³⁰⁸ and appointment of public officers to inspect any affairs and examine accounts of voluntary organisations.

Under Section 21(1) the Minister may, by notice in *The Gazette*, suspend all or any of the members of the Executive committee of a registered private voluntary organisation from exercising all or any of their functions in running the affairs of the organisation "if it appears to the Minister on information supplied to him ... that:

³⁰³Section 10(1)(b).

³⁰⁴Section 10(2).

³⁰⁵Section 2(3) & (4).

³⁰⁶Maphosa, op. cit., p. 15.

³⁰⁷Section 3(6).

- (3) the organisation has ceased to operate in furtherance of the objectives specified in its Constitution; or
- (4) the maladministration of the organisation is adversely affecting the activities of the organisation; or
- (5) the organisation is involved in any illegal activities; or
- (6) it is necessary or desirable to do in the public interest."

If the Minister does not revoke the suspension within thirty days, then the offices of the person so suspended will become vacant and whether or not they have earlier resigned their office, the person affected shall become disqualified from being nominated as a candidate for election to any office of the organisation until such time as the Minister, by notice in *The Gazette*, removes such disqualification.³⁰⁹ The remaining members of the Executive, if any, must immediately call elections to fill the vacant position.³¹⁰ If the Minister suspends all the members of the Executive of a voluntary organisation, the Act empowers him or her to appoint trustees to run the organisation until a new Executive is elected. The tenure of the trustees is sixty days, renewable for a further thirty days, within which time the trustees must organise elections for the new Executive.³¹¹ However, since everything done under this provision is "subject to the directions which the Minister may give", the tenure of the trustees could be extended for a longer period if the Minister so directs. The Minister may authorise the payment of salary to trustees from the funds of the organisation under their trusteeship.³¹²

The above provision is so vague and ambiguous that the potential for its abuse cannot be over-emphasised. As Maphosa notes, "all the Minister needs to hear is a 'likely tale', vaguely incriminating, about an NGO and he dangles the rope. If the 'culprit' happened to be a thorn in the flesh to the Minister or to anyone he sympathises with, he/she is done for."³¹³

Moreover, Section 21 gives the Minister enormous powers to take draconian measures against the Executive of registered organisations, some of the ground for which are hard to justify. For

³⁰⁸Section 14.

³⁰⁹Section 21(2).

³¹⁰Section 21(3).

³¹¹Section 22(1) & (2).

³¹²Section 22(5).

³¹³Maphosa, op. cit., p. 21.

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example it is not clear why if an NGO ceases to operate, even temporarily, its Executive must be suspended and even disqualified from running it. After all, the institution is both "private" and "voluntary" with no obligation as such to act. Moreover, there could be good reasons why an NGO might cease its operations temporarily.

By allowing the Minister to terminate the employment of the Executive of NGOs in such a arbitrary manner, this provision infringes the right to work of the members of the Executives without following the procedures laid down under labour legislation.

The devastating effect of Section 21 was demonstrated in the case involving the Association of Women's Clubs (AWC) in which the constitutionality of the section was also tested.³¹⁴ The AWC was an association of women whose main objective was to organise and empower both urban and rural women to make them self-reliant. This was to be done through skills training; women, family health and early childhood education; environment and natural resources management; and farming, business and income-generating projects. AWC also promoted literacy and pre-school education and taught principles of elementary nursing and hygiene. As of 1997, it had up to 40,000 members country-wide with 1,800 clubs and projects. The AWC projects were funded by donors and by mid-1995, the amounts involved ran into several million US dollars. After the Beijing Conference on Women, AWC drew up a five-year programme to implement the resolutions of the Conference. Three major agreements were signed with donors, including a capacity-building programme targeted at marginalised rural women which was worth \$11 million.³¹⁵

On 2 November 1995 the Minister, purporting to act in terms of S. 21 of the PVO Act, caused the publication in *The Gazette* of General Notice 636 A of 1995, suspending the AWC Executive committee from exercising all their functions in running the affairs of the organisation. The Executive Committee was charged with maladministration and misappropriation of funds, but without the claims being substantiated. The Minister went on to appoint a board of trustees, and charged it with "investigating" the activities of the suspended Executive and organising elections under the terms of the Act. The new trustees were allowed to meet their travel and subsistence allowance from project funds. According to Maphosa the trustees, as well as the new Executive

³¹⁴The account of this case is taken from Maphosa, op. cit., pp. 29–36.

³¹⁵*Ibid*, p. 30.

that was eventually appointed, were all members of the ruling party's Women's League.³¹⁶

Meanwhile, the ousted Executive took the matter to court³¹⁷ and in February 1997 the Supreme Court held that Section 21 of the PVO Act was in contravention of Article 18(3)(a) of the Constitution, under which every person must be presumed to be innocent until he or she is proven, or has pleaded, guilty. Nevertheless, NGOs and human rights observers were disappointed with the decision in that it eschewed the wider issue that had been brought before the court, as to whether the very nature of the powers of the Minister under Sections 21 and 22 of the Act violated the right to free speech and assembly.

Although the victorious Executive were able to regain their positions with AWC, the damage that had been done was irreparable. Programmes had stalled, the beneficiaries were confused, and donors' confidence in AWC was irreversibly damaged.³¹⁸ Thus, although the AWC had won in court, it was a paper victory and perhaps the Government had achieved its primary objective – to clip the wings of the assertive women's group. No wonder, as of April 1999, no report on the investigations by the so-called trustees or evidence to substantiate the allegations had been made public.³¹⁹ To avoid suffering the same fate as the AWC, many newly-formed NGOs have decided to register their organisations as "associations" connected with established NGOs so that their Executive bodies will not be subject to government interference.³²⁰

2.0.0 Labour association

The formation of trade unions, employer organisations and federations of trade unions and employers' organisations is provided for under the Labour Relations Act.³²¹ The Act provides that any group of employees and any group of employers may form a trade union and an employers' organisation respectively.³²² In keeping with the Constitution, the Act does not require trade unions to be registered. However, registration is required for trade unions and employers' organisations in order to obtain legal personality enabling them to become a body corporate,

³¹⁶*Ibid.*, p. 32.

³¹⁷In *Sekai Holland v Minister* SC 15/97.

³¹⁸Maphosa, op. cit., p. 35.

³¹⁹*Ibid.*

³²⁰Thiis, O & Feltoe, G., 'Zimbabwe' in Stokke, H., et al., *Human Rights in Developing Countries Yearbook 1997* (The Hague, Kluwer Law International, 1998), pp. 377–440, 391.

³²¹Chapter 28:01 of the Laws.

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capable of suing and being sued and purchasing or otherwise acquiring, holding and alienating property.³²³ Also, only registered organisations enjoy collective bargaining and other representational rights.³²⁴ As of 1998 there were 30 unions, representing approximately 30 per cent of the formal sector work force.³²⁵ These unions belong to an umbrella labour confederation, called the Zimbabwe Congress of Trade Unions (ZCTU).

As in Ghana and Tanzania, one of the factors which affects the effectiveness of labour associations is an array of laws including the Labour Relations Act itself, the Emergency Powers Act³²⁶ and the Law and Order (Maintenance) Act,³²⁷ which contain provisions whose cumulative effect is to ban strikes in virtually all sectors of employment in Zimbabwe.³²⁸ This emasculates trade unions by denying them the use of their most potent tool in the pursuit of the main objectives of forming labour associations, which is to strengthen the bargaining power of workers *vis-a-vis* employers through a credible threat of withdrawing labour. Other impediments to freedom of association in the labour sphere are the frequent arrest and detention of trade union leaders, and the use of police to violently break strikes.³²⁹

3.0.0 Freedom of assembly, association and public order laws

The area of law which has most seriously affected the enjoyment of the right to freedom of assembly and association in Zimbabwe is public order law. The key legislation in this regard is the Law and Maintenance Act (LOMA)³³⁰ which, among other things, regulates the holding of processions, gatherings, and meetings. The Act designates the police officer in command of each police district as the regulating authority for the area of that police district.³³¹ Under Section 6(2):

Any person who wishes to form a procession shall first make an application in that behalf to the regulating authority of the areas in which such procession is to be formed, and if such authority is

³²²Section 27 (1) & (2).

³²³Section 29(1) & (2).

³²⁴Section 29(4) and Section 30.

³²⁵Thiis & Feltoe, *op. cit.*, p. 415.

³²⁶Chapter 83.

³²⁷Chapter 65.

³²⁸See Nzombe, S., 'Restrictions on Strike Action in Zimbabwe' in *Legal Forum* (1990, Vol. 2 No. 1) pp. 29–31; and Hatchard, J., 'The Implementation of Safeguards on the Use of Emergency Powers: A Zimbabwean Perspective' in *Oxford Journal of Legal Studies* (Vol. 9 No. 1, 1989), pp. 116–131, 123.

³²⁹See Amnesty International Report, 1998, p. 367.

³³⁰Chapter 11:07, Revised Edition, 1996.

³³¹Section 5(2).

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satisfied that such procession is unlikely to cause or lead to a breach of the peace or disorder, he shall ... issue a permit in writing authorising such procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such procession as the regulating authority may consider necessary to impose for the preservation of public order.

The conditions which can be imposed may relate to the date on which and the place and time at which the procession is authorised to take place, the maximum duration of the procession and any other matter designed to preserve public order.³³² Any person who convenes, directs or takes part in a public procession for which a permit under Section 6(2) has not been obtained is guilty of an offence, may be arrested without warrant and is liable to a fine or imprisonment.³³³

In *re Munhumeso & Ors*,³³⁴ the Supreme Court upheld a constitutional challenge to Section 6 of LOMA, ruling that the section was plainly at variance with the enjoyment of the freedom of expression and assembly protected under Articles 20 and 21 of the Constitution, because it imposed a prohibition on the right to take out a public procession unless permission is first applied for and obtained from a regulating authority. It also empowers the regulating authority to whom such an application has been made to issue directions which may amount to an absolute ban, irrespective of any consideration of the procession causing breach of peace.³³⁵ The Court went on to rule that Section 6 of LOMA could not be saved under the claw-back clauses of the Constitution because the provision was not reasonably justifiable in a democratic society in the interest of public safety or public order.³³⁶

As a result of the above decision, permits are no longer required for meetings or demonstrations.³³⁷ However, the police, under instructions from the government still interfere with processions even where notice has been given. For example, on 26 January 1999, a peaceful march by a large number of lawyers to protest against the illegal detention of a journalist was broken up by the police, despite the fact that notice had been issued and, indeed, the marchers had obtained an Order from Justice Chinhengo of the High Court of Zimbabwe preventing the police from interfering with the march.³³⁸

³³²Section 6(3).

³³³Section 6(6).

³³⁴1994(1) ZLR 49 (S).

³³⁵*Ibid.* pp. 62–63, paras G-H.

³³⁶P. 64 para. B.

³³⁷Thiis & Feltoe, *op. cit.*, p. 400.

³³⁸Mavhunga, M., 'Zimbabwe in Transit: From the Law and Order (Maintenance Act (Chapter 11: 07) Towards the (Public Order and Security Act: The Problem of Striking A Balance: A Comparative Approach', a dissertation submitted in partial fulfilment of the Bachelor of Laws Honours Degree, Faculty of Law, University of Zimbabwe,

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The other provisions which are specifically made to regulate freedom of assembly are sections 7 to 17. The constitutionality of most of these provisions is also dubious. Section 7 prohibits the holding, addressing or attending of public gatherings on Christmas Day. This prohibition appears to be restricted to gatherings of a political nature, for it is expressly stated that it does not cover gatherings listed in the First Schedule which include public gatherings held for, *inter alia*, bona fide religious, educational, recreational, sporting or charitable purposes, or public gatherings held by, or for the purposes of, "any club, association or organisation which is not of a political nature and at which matters dealt with are not of a political nature."³³⁹ A 'no politics at Christmas' law is certainly a restriction on the fundamental right to freedom of assembly which is unreasonable and therefore not justifiable in a democratic society.

Section 8 bestows upon the regulating authorities powers to issue various directions for the purposes of controlling public gatherings, including the power to record the proceedings "in such a manner and by such person or class of persons as such authority may specify."³⁴⁰

Under Section 14, any person who in any manner prevents, obstructs, or interferes with the recording under the terms of Section 8 is guilty of an offence, may be arrested without warrant and is liable on first conviction to imprisonment for up to one year, and on subsequent conviction, to imprisonment for up to five years. As Dinner points out, "the presence of recording or security agents monitoring meetings has serious unsettling effect on those mapping to democratically unseat the government. This is more serious where ... the CIO, police and State security agents owe allegiance to the ruling party."³⁴¹

Under Sections 10 and 11 of the Act any regulating authority may prohibit the holding of public processions and gatherings respectively in their jurisdiction for up to three months, if the authority "is of the opinion that by reason of particular circumstances existing in his area or an part thereof, serious public disorder may be occasioned by the holding of public processions or gatherings in that area." This order is subject to confirmation by the Minister. As Dinner rightly

April 1999, p. 31.

³³⁹First Schedule, paragraphs (a), (h) and (i).

³⁴⁰Section 8(5).

³⁴¹Dinner, T.M., 'A Critical Analysis of the Law and Order (Maintenance) Act (Chapter 65) from a Human Rights Perspective and Its Impact on Democracy in Post-Colonial Independent Zimbabwe', LL B Dissertation, Faculty of Law, University of Zimbabwe, 1994, p. 78.

points out, all the grounds on which Section 6 of the Act was invalidated by the Supreme Court apply to these provisions as well. The sections set no criteria to be used to determine that a planned procession or gathering may lead to public disorder. The regulating authority has only to form an opinion and prohibit processions or gatherings and then obtain ministerial endorsement of the prohibition. This leaves the authorities with unfettered discretion to prohibit processions and gatherings at will. Accordingly, the sections are unreasonable and therefore not justifiable in a democratic society.³⁴² The above reasoning could also be applied to Section 12, which empowers the Minister to directly prohibit public gatherings "at any time [he] considers that it is desirable" to do so for the maintenance of law and order. This provision is so vaguely formulated that it is open to misinterpretation and abuse.

Under Section 13 of LOMA the Minister may, by notice, prohibit any individual from attending any public gathering in Zimbabwe for up to twelve months if the Minister considers it desirable for maintenance of law and order. The notice so issued takes effect immediately. The affected person may make representations in writing to the Minister within seven days and the Minister may vary or revoke the notice. Any person who, in contravention of the notice delivered or tendered to them under this section attends any public gathering commits an offence and is liable to a fine not exceeding two hundred dollars (approximately US\$4), or to imprisonment for a period not exceeding one year. This is a particularly dangerous provision which can be used by the ruling party to prevent political opponents from contesting elections or campaigning for their parties. Indeed, it would appear the original aim of this provision was to enable the government to ban eloquent nationalists and trade union leaders from attending and addressing political meetings during the colonial era.³⁴³ It is ironic that ZANU-PF leaders, who were once at the receiving end of this provision, should want to keep it on the statute book.

Under Section 15 a police officer may declare any gathering of three or more persons an "illegal gathering" and order them to disperse if the police officer has reasonable grounds to believe that they conduct themselves in such a manner that a breach of peace is likely to be occasioned. It is hard to see how a gathering of as few as three people can threaten a breach of the peace to a degree which cannot be dealt with by any other means except to prevent altogether the exercise of the constitutional right to freedom of assembly, association and expression. This provision is therefore too broad and unconstitutional.

³⁴²*Ibid*, p. 76. Dinner's discussion is restricted to Section 10 only.

Section 17 empowers any police officer to prevent any person from addressing any public gathering, and from entering and remaining on any premises - including private premises – at which three or more persons are gathered, wherever s/he has reasonable grounds for believing that a breach of peace is likely to occur or that a seditious or subversive statement is likely to be made. This is clearly an intimidatory act which unduly interferes with freedom of speech. The entry by a police officer into private premises merely to prevent seditious statements from being uttered in private is an infringement of the right to privacy enshrined under Article 17(1) of the Constitution. The Section is not saved by sub-clause (2)(a) of Article 17, which exempts laws which make provisions in the interests of defence, public safety, public order, public morality, public health or town and country planning, because the measures permitted by the Section do not relate in any way to any of these enumerated grounds and, in any event, they cannot be shown to be reasonably justifiable in a democratic society as required by the last paragraph of Article 17(2).

Another provision of LOMA with serious adverse effects on the enjoyment of the rights to freedom of assembly and association is Section 44, which relates to "subversive statements." As noted in the introduction to this report, freedom of assembly and association have a symbiotic relationship with freedom of speech. Anything that impinges on the latter necessarily infringes on the former. Section 44(1)³⁴⁴ defines a "subversive statement" as a statement which is likely:

- (8) to bring the President in person into hatred or contempt; or
- (9) to excite disaffection against the President in person or the Government or Constitution of Zimbabwe as by law established or the administration of justice therein; or
- (10) to incite any person to attempt to procure, other than by lawful means, the alteration of any matter by law established in Zimbabwe; or
- (11) to incite any person to commit an offence in disturbance of the public peace; or
- (12) to engage or promote feelings of hostility to or expose to contempt, ridicule or disesteem any group, section or class in or of the community of a particular race, religion or colour;

³⁴³*Ibid*, p. 78.

³⁴⁴For a detailed analysis of this provision and related sections of LOMA see Maganga, R.T., 'A Critical Analysis of the Freedom of the Press in Post Independent Zimbabwe with a Specific Reference to Newspaper Reporting', a dissertation submitted in partial fulfilment of the Bachelor of Laws Honours Degree, Faculty of Law, University of

or

- (13) to induce any person to resist, either actively or passively, any law or lawful administrative measure in Zimbabwe; or
- (14) to incite any person to resist or oppose the Government or any Minister or official or police officer, otherwise than by lawful means, in the maintenance of public order or safety or the application of any law; or
- (15) to lead to public disorder or to the disturbance, disruption, hindering of or interfering with any undertaking, industry, trade or occupation or the carrying on thereof.

Commenting on an identical provision in the Zambian Penal Code, Chanda had this to say:

These sections are a serious fetter on press freedom and freedom of speech generally. In a democratic society many of the activities prohibited by (the) section are normal. Opposition parties, for example, work day and night to create disaffection against the government so that they can be elected at the next elections. What makes this section pernicious is not only the prohibition of peaceful opposition to the government, but the fact that truth is not a defence.³⁴⁵

This observation is apposite here. The Act seems to appreciate this point and purports to address it through Section 44(3) which provides:

- (3) A statement which is made with the intent of
 - (3) showing that the President or the Government has been misled or mistaken in any measure; or
 - (4) pointing out errors or defects in the Government or Constitution of Zimbabwe as by law established or in the administration of justice therein with a view to the reformation of such alleged errors or defects; or
 - (5) urging any person to attempt to procure, by lawful means, the alteration of any matter in Zimbabwe by law established;

shall not be regarded for the purposes of subsection (2) as being a statement which is likely to have the effect mentioned in paragraph (b) of the definition of "subversive statement" in subsection 1 if the accused satisfies the court that the statement concerned was made in good faith and was made fairly, temperately, with decency and respect and without imputing any corrupt or improper motive.

If the purpose of this section is to isolate legitimate political speech and exempt it from the ambit of subversive statements, then it is nonsensical since all the statements referred to are legitimate

Zimbabwe, 1994.

³⁴⁵Chanda, A.W., 'Freedom of Expression in Zambia' in *Zambia Law Journal* (Vol. 30, 1998), pp. 123–145,

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political speech. It is therefore preposterous to require them to be made in good faith, fairly, temperately and with decency. The section is also disingenuous in excluding statements about corruption from protected political speech, when corruption in government is one of most important issues in Zimbabwe today. Any person who utters any "subversive" statement to any person, other than in the course of investigation of an offence or of proceedings in court, is guilty of an offence and liable to imprisonment for a period not exceeding five years.³⁴⁶

Where a court convicts a person of making a subversive statement it *must* "make an order prohibiting that person from attending any public meeting within Zimbabwe for such period, being not less than one year and not more than three years, as the court may specify in the order."³⁴⁷ It is not clear whether this additional penalty is to run concurrently or consecutively with any prison term which may be imposed on the convicted person under Section 44(2).

Where a court has made an order banning a person from attending a meeting as above, no person is permitted, except for the purposes of any proceedings in any court, to print, publish or disseminate any speech, utterance, writing or statement which is made or purports to have been made, by that person during the period he is prohibited from attending meetings.³⁴⁸ Contravention of this provision is an offence which on conviction carries a prison sentence of up to five years.

Thus, once a person is found guilty of making a subversive statement, s/he loses not only the right to make political speech, but to communicate publicly on anything and through any means whatsoever. It is hard to imagine a more draconian infringement on freedom of expression.

Finally, the President can order a person who has been prohibited from attending public meetings upon being convicted of making subversive statement not to enter or be in any area specified in the order or any other place.³⁴⁹

With legislation like LOMA on the statute book it is hardly surprising that Zimbabwe has to be, in formal terms, a multi-party state, but remains a *de facto* single-party regime.

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³⁴⁶Section 44(2)(d).

³⁴⁷Section 44(4).

³⁴⁸Section 44(5).

In 1997, Parliament passed the Public Order and Security Bill (POSB), which was intended to repeal and replace LOMA. Compared to LOMA, the POSB was to be a fairly reasonable Act, though not perfectly in consonance with the provisions of the Constitution relating to freedom of assembly, association and expression. Among other things, the POSB removed the requirement of permits for public gatherings and replaced it with a seven-day notice period, also vesting many of the regulatory powers in relation to public gatherings in magistrates. The harsh penalties under LOMA were moderated and some were replaced with civil liability. The definition of a subversive statement under POSB was greatly curtailed.

However, the POSB did not come into force immediately and now it seems it may never do so, at least in its present form. This indication was given by the Minister for Home Affairs following critical comments by the opposition and the media on the role of the Zimbabwean army in the war in the Democratic Republic of Congo. The government felt a LOMA-like law was necessary to deal with such "subversion". Speaking on 22 January 1999 at the funeral of two army officers who had died in that war, the Minister is quoted as saying: "We have reverted back to LOMA to deal with [this] and protect the security of this country and I will not hesitate to make amendments if need be to protect the military."³⁵⁰

³⁴⁹Section 44(7).

³⁵⁰*Herald*, 23 January 1999, reproduced in Mavhunga, op. cit., p. 45.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

The constitutional changes which have taken place in sub-Saharan Africa since the early 1990s have resulted in, among other things, entrenchment of bills of rights, including provisions relating to freedom of association, assembly and expression. These provisions approximate to the standards provided for under international standards on human rights. However, the constitutionalisation of freedom of assembly and association has not resulted in the enjoyment of these rights because the entrenchment of these freedoms has not, in most instances, been followed by the creation of an enabling environment in law and in practice. The legislation that presently regulates the formation and running of political parties, voluntary organisations and trade unions does not give full effect to freedom of association and assembly as provided for under international instruments. In some countries, these freedoms are severely limited by claw-back clauses found in constitutions, or legislation supposedly enacted to facilitate the enjoyment of these rights.

As far as freedom of association in the political sphere is concerned, laws which have been

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enacted ostensibly to facilitate the registration and functioning of a multi-party system are cumbersome and onerous. They are such that forming and/or sustaining a political party has mostly become a privilege of the rich few and not the right of everyone, as the constitutions stipulate. The other problem in the political sphere is the lack of a level playing field because of the disproportionate resources put at the disposal of ruling parties. In most countries, the parties in power are still those parties which were in power before the return to multi-party democracy. These parties have retained the resources that they amassed during that era, irrespective of how they got them and have, through a variety of ways, managed to fund their activities (including election campaigning) from state coffers.

Opposition parties, on the other hand, have to rely on traditional methods of party funding such as membership dues, sale of party T-shirts and donations. However, in poor countries (as most sub-Saharan countries are) such sources do not generate anything like enough to run political parties in accordance with the demands of the cumbersome laws. In some countries laws have been passed to enable political parties to get subsidies from government. However, the conditions set for obtaining such subsidies are often such that they result in the ruling parties receiving a disproportionate share of the funds. Finally, opposition political parties have been affected by the constant harassment of their leaders by the regimes in power.

The laws that still govern freedom of association in the civic sphere are also inadequate. Many countries still retain colonial laws which require all non-governmental organisations to register as a pre-condition for operating and grant wide discretionary powers allowing de-registration of organisations for almost any reason to the Executive. In some countries, these laws have been used in the multi-party era to silence or even shut down NGOs which are perceived to be sympathetic to opposition political parties, or which challenge government policies affecting their constituencies or membership. A single exception in this regard is the new South African Non-profit Organisations Act of 1997, whose objectives and provisions can truly be said to be aimed at assisting NGOs with enjoyment of their right to freedom of association under the Constitution.

In the area of labour, the laws relating to formation of trade unions and employer's associations are generally reasonable. However, the effective enjoyment of freedom of association by trade unions is undermined by collective bargaining laws which make strikes under any circumstances virtually impossible, or illegal.

Freedom of Association and Assembly

The greatest impediments to the enjoyment of the rights of freedom of assembly, association and expression are the rafts of public order legislation on many statute books, most of which date from colonial times. These laws vest wide discretionary powers in law enforcement agencies, allowing them to ban or restrict public rallies and demonstrations, as well as what can be said at such gatherings.

These laws, whose intention was to prevent political activity during colonial times, are currently being used extensively by regimes in power to stifle political opposition by, for example, preventing them from holding political rallies, and jailing opposition leaders for holding 'illegal' assemblies or uttering 'seditious' statements at such gatherings. Notwithstanding the express provisions of constitutions protecting freedom of assembly in all the countries studied, public assemblies, especially those organised by political parties, are presumed to be a threat to public order and therefore unlawful, with the exception of South Africa and, to some extent, Ghana. Courts have done a commendable job of upholding the constitutional rights to freedom of assembly and association by declaring unconstitutional, whenever an opportunity has arisen, the provisions of both old and new laws which impinge on these rights. However, the efforts of the judiciary to purge colonial relics from the statute books have been undermined by governments which have reacted by legislatively overruling courts with draft laws which reinstate the provisions declared unconstitutional. This has happened in Tanzania, where a High Court decision invalidating the provision of the Political Parties Act which prohibited independent candidates from standing for election was legislatively reversed.³⁵¹ In Zimbabwe there were 14 constitutional amendments in the first 15 years of independence, many of them with the sole purpose of reversing decisions of the Supreme Court, and not a single one extending rights.³⁵²

Some countries, including both Tanzania and Zimbabwe, have enacted laws which make the legal challenge of constitutionality of laws extremely difficult. They effectively convert the power of superior courts to invalidate laws which they find unconstitutional into power to 'advise' the government on the constitutionality of laws, so that the government can, should it so choose, take appropriate action.³⁵³

³⁵¹See the Eleventh Amendment to the Constitution.

³⁵²Thiis & Feltoe, *op. cit.*, p. 382.

³⁵³In Tanzania, this was done through the Basic Rights and Duties Enforcement Act, 1994 on which see Peter, *op. cit.*, pp. 54–55. In Zimbabwe this has been achieved through amendments to Article 24 of the Constitution

Where governments have not re-introduced the offending provisions, they have interpreted the remaining ones so as to achieve effectively the objectives of the expunged laws. For example, many jurisdictions have done away with provisions requiring prior permission for associations wishing to hold public meetings, gatherings and demonstrations and substituted them with the requirement of notice to the relevant authorities, who should issue a 'receipt' or acknowledgement of some sort that notice has been issued. However, as the Cameroonian and Tanzanian case studies have shown, the provisions relating to notice have been applied in such a way as to reinstate the requirement of permits in all but name.

The net result of an unfavourable legal environment, abuse of laws by governments of the day, and disparity in resource bases between governing parties and the opposition, is that while freedom of assembly, association and expression have been *constitutionalised* they have not been enjoyed because they have not been *institutionalised*.

0.0 Recommendations

The picture painted above proves beyond reasonable doubt that there is not yet democracy in sub-Saharan Africa. If the situation is not rectified, the sub-continent could very easily slide back into a system of monolithic one-party states in which all associational activity, whether political or civic, is conducted through the state-party structure. In order to arrest this situation a number of steps need to be taken by parties, including African governments, the international community and international institutions. In the last case it is particularly important that the African Commission of Human Rights, which is charged with promotion of human rights in Africa, takes a leading role.

0.0.0 African governments

- Three concrete steps must be taken by African governments:
 0. governments must cause their constitutions to be comprehensively reviewed to ensure that they accord full protection to freedom of assembly, association and expression;
 1. those countries which have amended their constitutions in order to abridge these rights should repeal such amendments;
 2. where this has not been done, governments must allow the revision of constitutions by

(enforcement of protective provisions) through Section 13 of Act 25 of 1981 and Section 9 of Act 15 of 1990.

Freedom of Association and Assembly

national constitutional conferences at which all stakeholders are represented.

- The process of constitutional review should not be carried out by parliaments which are dominated by the ruling parties. This is essential not only to prevent the manipulation of the process to suit the parties in power, but also to enhance the legitimacy of the new constitutions and thereby reduce the potential for rebellion by dissatisfied groups. The chances of a constitution functioning effectively without having to be backed by the coercive instruments of the state depends on the extent to which the procedures which led to its formation were effective and acceptable to all stakeholders.³⁵⁴
- Governments in Africa should carry out a comprehensive review of their laws in order to abolish provisions in legislation which impinge on freedom of assembly, association and expression. In particular, the laws relating to public order and sedition must be extensively revised to expunge colonial relics which have no place in democratic societies of the twenty-first century. African governments are party to international instruments, including the African Charter on Human Rights, which provide for these freedoms and, as a longtime member of the African Commission on Human and People's Rights has counselled, the first step in implementation of this obligation by states is the harmonisation of domestic laws with the provisions of the Charter.³⁵⁵
- Laws enacted to translate fundamental rights, including freedom of assembly, association and expression, into municipal legislation should not contain derogating sections which restrict unduly the guaranteed rights and freedoms.
- Governments and ruling parties in Africa should refrain from attempting to harass opposition parties out of existence. Instead, they should appreciate the fact that opposition parties are an integral part of democratic governance. As Bluwey points out:

Organised opposition confers three main benefits on the political system, namely: representation of minority interests and values; provision of rare or restricted information both to government and the public; and the exercise of surveillance and control over the policies and actions of the government. In sum, the opposition tells the government what the public cannot stand and motivates the populace to

³⁵⁴Hatchard, J., 'Establishing Popular and Durable National Constitutions in Commonwealth Africa' in *Legal Forum* (Vol. 10, No. 3 1998) pp. 9–15.

³⁵⁵Kisanga, R.H., 'Fundamental Rights and Freedoms in Africa: The Work of the African Commission on Human and Peoples' Rights' in Peter & Juma, op. cit., 25–35, 29.

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take steps which would compel the government to rule largely in accordance with the spirit of the Constitution.³⁵⁶

- Governments should treat opposition parties fairly with respect to gaining access to government financial subsidies where they exist, as well as granting access to publicly funded media and other government resources.
- Opposition parties must be allowed to conduct their rallies and demonstrations without being harassed by the organs of security and order.
- Political parties which during the one-party state were the sole political organisation, should surrender the assets acquired during that period into trust funds which should be used to support democracy, for example by providing subsidies to political parties during elections.
- Other organs of civil society, such as NGOs and trade unions must also be allowed performance space. Civil society enhances democracy by providing a means for decentralised decision-making which modern states find difficult to provide themselves. NGOs constitute important mechanisms for popular participation in exercising control of every day life.³⁵⁷

It is true that the role of the non-governmental sector in social and economic development processes has expanded rapidly and the level of resources involved is so high that there has to be some institutional mechanism for ensuring that non-governmental organisations do not end up unscrupulously exploiting the public rather than benefiting them.³⁵⁸ However, regulatory control should not become an unnecessary and unjustified interference in the affairs of non-governmental organisations in violation of their fundamental rights of freedom of assembly and association. South Africa's Non-profit Organisations Act of 1997 serves as a good model in this regard.

- While it is legitimate for governments to enact laws for the maintenance of law and order, these laws should not be of such a nature, or should not be employed in such a way, as to stifle political opposition. Otherwise the laws liberalising the formation of political parties will be worthless. As Folson points out:

³⁵⁶Bluwey, *op. cit.*, p. 209.

³⁵⁷Haysom, N., *et al.*, 'Civil Society and Fundamental Freedoms', report commissioned by the Independent Study Into an Enabling Environment for NGOs, Johannesburg, July 1993, pp.1–2.

³⁵⁸Feltoe, G., 'Regulating the Operations of Non-Governmental Organisations in Zimbabwe' in *Legal Forum* (Vol. 9 No. 2, 1997) pp. 6–10, 7.

The existence of several parties *per se* is *not* a requirement of democracy. What in this respect is a requirement of democracy is freedom of speech and association, and the existence of political parties is the inevitable consequence of this.³⁵⁹

The cardinal principle which should guide the reform of laws relating to assembly remains the one laid down in the case of *Beatty v Gillbanks*.³⁶⁰ In this case, the Salvation Army was stopped from marching because of fears that it would incite a disorderly rabble, loosely organised as a so-called 'skeleton army', to acts of violence against it. Having observed that the Salvationists had gathered "for a purpose which cannot be said to be otherwise than lawful and laudable, or at all events cannot be called unlawful", and noting that what disturbances there had been, or might be, were, or would be caused by, "a body of persons opposed to the religious views of ... the Salvation Army", the Queen's Bench went to rule that to prevent the procession amounted to saying "that a man may be punished for acting lawfully if he knows that his so doing may induce another man to act unlawfully – a proposition without any authority whatever to support it." This case is regarded as a classic illustration of the common law presumption in favour of freedom of assembly.³⁶¹ Of the public order laws reviewed, Ghana's Public Order Act seems to be the most faithful to this principle and could be emulated by other sub-Saharan countries.

4.2.2 The International Community

- **Ongoing support for democratisation**

The international community, particularly donor states and institutions, have an interest and an important role to play in ensuring that freedoms of assembly, association and expression are respected in sub-Saharan Africa. It must be recalled that donors played a crucial role in bringing about constitutional amendments which resulted in the abolition of one-party systems and the introduction of multi-party systems, independent trade unions and other associations in Africa. Unfortunately, the donors have not gone far enough beyond that to ensure that the democratic rights they helped to constitutionalise are entrenched in practice. Sometimes it appears that the only aspect donors are interested in is periodic general elections, on which they spend literally tens of millions of dollars and to which they send

³⁵⁹Folson, K.G., 'Political Parties and the Machinery of Democratic Government' in Ninsin, K. A. & Drah, F.K., *Political parties and Democracy in Ghana's Fourth Republic*, (Woeli Publishing, Accra, 1993) pp. 12–34, 32.

³⁶⁰(1882) 9 QBD 308.

³⁶¹Ewing, K.D. & Greaty, C.A., *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford, Clarendon Press, 1990) p.86.

observers to 'ensure' that the election campaigning and voting were fair. Democracy is not an event, it is a process. Election campaigns are not likely to do much good for little-known opposition parties when they have been denied the right to mobilise. Furthermore, election campaign periods, which usually last for a month or so, are not long enough for opposition parties to reach all constituencies and explain their policies. Lack of resources and poor means of communication often mean that opposition parties are unable to reach the far-flung parts of their countries within such a short time. Therefore, donors interested in supporting democracy in Africa must do so on an ongoing basis, not just at election time.

This should be a priority for donors because multi-party democracy is necessary in order to achieve government accountability, mass participation, rule of law and respect for human rights, all of which are necessary for social and economic development. However, these values cannot be achieved merely because the government in power was democratically elected. Rather, as Bluwey rightly points out, these values "flourish only where an alternative government lurks in waiting for the peaceful replacement of an unpopular government."³⁶²

The practical measures which donors could take include:

- * continuously engaging African governments to ensure that they make further constitutional amendments to give effective protection to freedom of assembly, association and expression;
 - * provision of financial and, where necessary, technical support to legislative review processes (as proposed above) aimed at removing from the statute books laws which impinge on these rights;
 - * supporting civil society by sponsoring studies aimed at creating an enabling environment for NGOs and supporting capacity-building activities;
 - * scrutinising the recipients of their donations carefully to ensure that such donations do not go to government-linked NGOs whose activities result in undermining independent NGOs with similar objectives, or whose ulterior motive is to gain popular support for the governments of the day to which they are linked.
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- It is a matter of common knowledge that the African Commission on Human and Peoples' Rights suffers from an acute shortage of resources. In fact, "financial constraint is perhaps the most serious problem encountered by the Commission in carrying out its functions."³⁶³ Accordingly, if the Commission is to implement the recommendations below, its resources

³⁶²Bluwey, op. cit., p. 208.

must be augmented. The primary responsibility for providing the Commission with resources rests with the OAU and the member states. However, given the economic conditions prevailing on the African continent at the moment, it would be unrealistic to expect adequate funds for the proposed exercise from these sources. Accordingly, external governments and institutions should consider supporting the Commission financially generally, and/or providing resources for specific projects on promoting freedoms of assembly, association and expression.

0.0.0 The African Commission on Human and Peoples' Rights ('The Commission')

- **Using mandates**

Established under the African Charter on Human and Peoples' Rights of 1981, the Commission has various mandates which could be employed to address some of the problems outlined in this report with respect to the enjoyment of freedom of assembly, association and expression in Africa.

- * Under Article 45(1)(a) of the Charter, the Commission has a mandate "to collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments." The Commission should use this provision to undertake, or to commission, reviews of domestic legislation affecting freedom of assembly, association and expression. It should then give the reports to the relevant governments with recommendations for appropriate action.
- * Under Article 45(1)(b) of the African Charter, the Commission is empowered "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation." Under this provision, the Commission could develop guidelines as to how the provisions relating to freedoms of assembly, association and expression under the African Charter should be interpreted. In doing so, the Commission can, under Article 60 of the Charter, draw inspiration from international law on human

³⁶³Kisanga, op. cit., p. 32.

and peoples' rights, including the Charter of the United Nations, the Universal Declaration of Human Rights, the international covenants on human rights, as well as the various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the African Charter on Human rights are members.

- * The Commission should also develop guidelines in controversial areas, such as the system of funding political parties; access to public media by various political parties; and regulation of public assemblies and rallies. These guidelines could reduce the incidents of unfairness towards opposition parties, some of which may be a result of sheer ignorance of the law.
- The Commission has a mandate under Article 45(1)(c) of the Charter to co-operate with international and national human rights organisations which are committed to promoting freedom of expression. The Commission should seek to co-operate more actively with such organisations as they could assist the Commission in promoting freedom of assembly and association, given the inextricable link that exists between these two sets of fundamental rights.³⁶⁴

³⁶⁴*Ibid*, p. 28.