

RECLAIMING CIVIC SPACE THROUGH U.N. SUPPORTED LITIGATION

Maina Kiai

- *A UN special rapporteur explains how innovative*
- *legal action can protect fundamental human rights*

ABSTRACT

With the issue of shrinking civil space an ever lurking menace, the author discusses how new approaches are needed – not only to protect the civil space that still exists but increasingly to regain that which is already lost. Maina Kiai explains how the traditional tools alone – such as reporting – are no longer fit for purpose. Consequently, his mandate has developed a new litigation project which aims to support the rights to freedom of peaceful assembly and of association through litigation in domestic and regional courts. The project actively seeks to support cases related to these rights and focuses on providing technical assistance and advisory services to litigants, attorneys and civil society organisations. Moreover, the author's office submits amicus curiae briefs in relevant cases to add critical analysis and an international voice. The author presents his experience of lodging one such brief in Bolivia and encourages readers to get involved in the project.

KEYWORDS

Civil space | Litigation | Freedom of peaceful assembly | Freedom of peaceful association | Bolivia | NGOs

It is almost *passé* these days, as depressing as that sounds, to declare that civic space is shrinking across the globe. It is certainly true that in the last decade we have seen an unprecedented wave of repressive laws and practices sweep across the world, all designed to prevent people from organising, speaking out, and engaging in democratic rights and duties. But we are well past talking of “shrinking” in the present or future tenses. Data from the International Centre for Not-for-Profit Law (ICNL) indicate that between 2004-2010, more than fifty countries considered or adopted restrictive measures for civil society.¹ In many places, the deed has been done. There’s not that much space left to take.

Indeed the trend is so common and has spread to so many countries that it risks becoming the new norm. We are on the precipice of an era where countries will be bold in their repression, leaving ordinary people meek in asserting their rights.

Even more depressing, perhaps, is the fact that many of our traditional tools for combatting this trend are no longer working quite as well. Reporting, documenting, public pressure, guidelines, recommendations – none of these have been particularly effective in reversing the overall drift towards repression. I feel this currently in my work as UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. My duties include both a monitoring and reporting component – name and shame, if you will – and a technical assistance component, which means working behind the scenes to help states improve their enforcement of human rights norms. It is plain that some governments are not moved by either approach.

One reason for our collective failures is that these approaches stem from another era, back when we could still talk about protecting civic space. But what do you do when that space is already gone? How do you get it back? I believe part of the answer lies in stepping up enforcement efforts. At this point, real pushback will require more creativity, innovation and a multiplicity of approaches.

1 • A new way forward: litigation in domestic and regional courts

It was against this backdrop of stepping up enforcement efforts that my mandate began a new project in 2014, designed to advance the rights to freedom of peaceful assembly and of association through litigation in domestic and regional courts. The project actively seeks to support cases related to these rights and focuses on providing technical assistance and advisory services to litigants, attorneys and civil society organisations. An important part of the project is the submission of *amicus curiae* briefs in relevant cases to add critical analysis and an international voice.

The thrust behind this endeavour is simple: Get international human rights law and standards into local courts, so that they can filter into domestic law and – perhaps most critically – enjoy better enforcement. The UN system is notoriously impotent when it comes to enforcing the human rights it espouses; it simply does not have the tools, and its

Member States are not going to make them available anytime soon. National and regional courts or human rights commissions are often in a better position to do this.

This is not to say litigation in domestic and regional courts is a panacea. It has its inherent shortcomings: courts in many countries can be hopelessly corrupt or politically obedient, litigants may be fearful of reprisals, proceedings may only focus on a single litigant or narrow legal provision, and even following a positive judgment, real on-the-ground change can be slow. But litigation does present advantages unique among rights-promotion tools. When used in the right context, for example, it can ensure concrete remedies: accountability, compensation and some closure. Litigation can also shine a light on repression by forcing the government to address issues head-on in a public setting, whether through written procedures or open hearings. Independent courts and strong rulings can provide backing for activists, halt abuses and command societal change.

When opportunities do arise in the right context, it is crucial that attorneys, litigants and judges have adequate tools to help them to succeed. I have found that the legal profession worldwide often faces hurdles accessing and making use of international laws, standards and principles. This is where my mandate is trying to step in, whether through technical assistance, expert declarations or amicus briefs. Indeed, sometimes my mandate's involvement could be as simple as providing lawyers with ready-made arguments, including ones we have made in previous cases.

Until this date, my mandate has filed three amici curiae before domestic and regional courts. Besides the mandate's first amicus brief submitted in a case before the Constitutional Court in Bolivia, described below in more detail, in August 2015, an amicus brief was filed in a case before the Supreme Court of Mexico challenging the constitutionality of the "City Mobility Law", which I argued unduly restricts the right to freedom of peaceful assembly.² In November 2015, the mandate also filed a third party intervention – with the Human Rights Centre, University of Ghent (Belgium) – urging the European Court of Human Rights to adopt strong protective standards for the right to freedom of peaceful assembly in four cases against Azerbaijan.³

Given the worldwide patterns in restricting behaviour by authorities, I am convinced that the arguments in these cases will prove useful to litigants in many other cases around the world. To facilitate access and use of them, we upload all the amicus briefs we have filed on our website.⁴

2 • Bolivia: a first foray

My mandate submitted its first amicus brief in May 2015, before the Constitutional Court of Bolivia in Sucre. The case in question challenges Article 7.II.1 of the NGO Act (Law No. 351) and Article 19 (g) of its implementing Supreme Decree 1597. In September 2015 – this law was in the headlines after the government used it to declare 38 NGOs "irregular".⁵ The accused organisations face sanctions, including the loss of their legal personality, a

measure that would *de facto* shut them down. This situation clearly illustrates the far-reaching effects of the law and its impact upon the lives of associations.

Events were not quite as dramatic at the time we submitted the brief in May 2015, but there were clear signs that trouble was coming. And by August, both the Bolivian President and the Vice-President had made statements illustrating that NGO's were no longer considered relevant, and civil society was warned not to act against the policies of the government.⁶

The NGO law itself dates back to March 2013, when Bolivia adopted the legislation despite many analyses indicating that it contravened international law (see below). It was implemented in June 2013, by the equally contentious Supreme Decree.

In late 2014, the Ombudsman filed a petition with the Constitutional Court of Bolivia, challenging the constitutionality of Article 7.II.1 of the NGO Act (Law No. 351) and Article 19 (g) of Supreme Decree 1597. The first provision conditions acquisition or confirmation of legal personality upon an association's contribution to economic and social development. The second stipulates that legal personality of associations can be revoked when associations do not comply with sector policies and/or norms.

3 • Analysis of the Challenged Bolivia Provisions

My mandate submitted an amicus brief earlier this year arguing that the Bolivia provisions unjustifiably restrict the right to freedom of association under international law, standards and principles.⁷ The foundation for this assessment is Article 22 of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to freedom of association. Bolivia has been a party to the ICCPR since 1982.

The amicus brief notes that restrictions to the right to freedom of association are only permissible under the ICCPR when they are (1) prescribed by law; (2) for a legitimate aim; (3) necessary in a democratic society. Any restrictions to the right must be judged against this three-pronged test. Both of the articles challenged in the Bolivia case fail to meet this test.

First, they are not "prescribed by law" – primarily because they are too vague and broad. Both the UN Human Rights Committee and the Inter-American Commission on Human Rights have stated that laws must be clear in the obligations they set out.⁸ The vague notions referred to in the Bolivian laws, such as "contribution to social and economic development" and "sectoral policies and/or norms", are anything but clear. In theory, one can argue that all human rights causes should be considered as contributing to social and economic development, but there is no guarantee the relevant Bolivian official will interpret it that way. The same goes for "sectoral policies", which are constantly changing and virtually impossible to objectively document. The provisions simply leave too much room for abuse of power and arbitrary interpretations by state officials.

Even if the restrictions were properly prescribed by law, they do not serve a legitimate aim. To the contrary, they could be interpreted as an attack at the very foundation of the right to freedom of association. The law seems aimed squarely at hindering the work of associations that do not support the government's social and economic development platform. But the right to freedom of association explicitly applies to associations that do not toe the government line; in fact this is when enforcement of the right is most critical.⁹

Finally, even if the Bolivia provisions were prescribed in law and legitimate, they would not be necessary or proportional. Their effect – not obtaining or revoking legal personality from associations which hold different ideas than the politicians of the day – are simply too sweeping, particularly when you take account of the wide margin of discretion afforded to the authorities enforcing the law.¹⁰

The Constitutional Court of Bolivia is expected to rule on the case in early 2016. It is of course difficult to predict how the court will rule, but I am concerned by the recent statement by the Bolivian Minister for Decentralisation, who was quoted in news reports as saying that NGOs should observe national laws, regardless of what the UN thinks about them – likely a reference to my mandate's amicus brief.¹¹

4 • The way forward

The Bolivia case was just the first in what I hope will be a series of judicial interventions by my mandate. A number of cases are currently under review. Each case represents recurring challenges faced by associations and protesters worldwide, such as limits to access to legal personality for associations; burdensome registration procedures; barring access to foreign funding; limiting protest areas; authorisation regimes for peaceful assemblies, penalising participants to it and so on.

Each case is a small step towards reclaiming civic space, but the biggest impact will come when we reach a critical mass of interventions. Finding appropriate cases, though, depends on our networks and partnerships – and that means you. Special Rapporteur mandates are vast, often covering the entire globe, and resources are limited. We need you, as partners, to alert us to cases which might benefit from an intervention, flag the legal challenges you face, re-use international-law based arguments in your domestic jurisdictions, and to let us know the outcome of these cases.

If you have a case that might be relevant to the mandate, please get in touch with us via our website¹² or by contacting our litigation project coordinator Heidy Rombouts.¹³ Or if you simply want to inject international law into a current case on assembly or association rights, have a look at our previous briefs. For the moment there are only a handful, but the library will grow. They will all be publicly available on our website, so that lawyers and litigants can learn from our approaches, successes and failures. Indeed we hope that these filings will be viewed as model briefs to be recycled and reused around the world – each of them a catalyst to help enforce and reclaim civic space.

NOTES

1 • Douglas Rutzen, "Aid barriers and the rise of Philanthropic protectionism," *International Journal of Not-for-Profit Law* 17, no. 1 (March 2015): 5.

2 • United Nations Special Rapporteur, "Mexico: Special Rapporteur weighs in on case challenging constitutionality of protest laws," August 24, 2015, accessed October 9, 2015, <http://freeassembly.net/rapporteurpressnews/mexico-amicus/>.

3 • One such standard we urge the Court to adopt is recognition that the exercise of the right to freedom of peaceful assembly should not be subject to authorization by national authorities, as this it turns the right into a privilege to be dispensed by authorities. See United Nations Special Rapporteur, "Third Party Intervention Urges European Court to Establish "Clear and Strong Protective Standards" on Assembly Rights," November 12, 2015, accessed October 9, 2015, <http://freeassembly.net/rapporteurpressnews/azerbaijan-intervention/>.

4 • United Nations Special Rapporteur, "Using litigation to advance the rights to freedom of peaceful assembly and of association," accessed October 9, 2015, <http://freeassembly.net/litigation>.

5 • The reasons for declaring these NGOs "irregular" included the fact that they had not completed the process of renewal and revision as stipulated by Law 351. See "Gobierno declara 'irregulares' a 38 ONG, entre ellas, el Cedib y la Cinemateca," *Correo del Sur*, September 6, 2015, accessed October 9, 2015, http://www.correodelsur.com/politica/20150906_gobierno-declara-irregulares-a-38-ong-entre-ellas-el-credib-y-la-cinemateca.html.

6 • Luis Mealla, "García advierte que si ONG se entrometen en el país, 'se van'," *La Razón*, August 11, 2015, accessed October 9, 2015, <http://www.la-razon.com/nacional/Vicepresidente-Garcia->

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7 • In August 2015, Human Rights Watch submitted an amicus brief in the same case, coming to the same conclusion. (Human Rights Watch, "Bolivia: Amicus brief on NGO regulations," August 5, 2015, accessed October 9, 2015, <https://www.hrw.org/news/2015/08/05/bolivia-amicus-brief-ngo-regulations>).

8 • United Nations, Human Rights Committee, "General Comment no. 27", UN Doc CCPR/C/21/Rev.1/Add.9 (13), 2 November 1999; Inter American Commission on Human Rights (IACHR), *Second Report on the Situation of Human Rights Defenders in the Americas* (Washington, D.C: IACHR, 2011), 234-35, recommendation 19.

9 • United Nations, General Assembly, "Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," UN General Assembly, UN Doc. G.A. Res. 53/144, 9 December 1998, articles 2, 5 and 7 and explicitly article 8 on criticism to governmental bodies and agencies.

10 • The full brief can be found on our website in both Spanish and English, via the following link: <http://freeassembly.net/rapporteurpressnews/bolivia-amicus/>.

11 • “Ministros dicen que ONG alineadas a planes del Gobierno serán respetadas,” Página Siete, August 26, 2015, accessed October 9, 2015, <http://paginasiete.bo/nacional/2015/8/26/>

ministros-dicen-alineadas-planes-gobierno-seran-respetadas-67917.html.

12 • <http://freeassembly.net/litigation/>.

13 • Heidy.Rombouts@freeassembly.net.



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