

## From Geneva to Moscow: opposite poles of the freedom of association spectrum

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Freedom of association is conceived, practised and defended in very different ways by States around the world. Here, Kouassi Aimé Malanhoua attempts to present the widest possible spectrum which, spanning Geneva to Moscow, reveals all the nuances of a freedom under threat.

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As a hub for non-governmental organisations (NGOs), Switzerland has been the cradle of humanitarian aid since the establishment of the International Committee of the Red Cross (ICRC) in 1863. The development of “International Geneva” derives all its substance from this. As the headquarters of the ICRC, it brings together a multitude of associations, a reflection of the freedom of association that finds its simplest translation in Switzerland, since it does not require any declaration. Freedom of association has a natural home in the country as a right enjoyed by individuals under Article 60 of the Swiss Civil Code, which states that: “Associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association.”

In other words, whereas in France an unregistered association is regarded as *de facto* and without any legal personality, this legislation recognises the full extent of freedom of association. In Geneva, as in all other Swiss cantons, an association becomes a legal entity by private agreement as soon as it is mentioned in the statutes. This ease of recognition of legal personality for nonprofit entities is the territorial landmark of an area where freedom of association prospers, whereas at the opposite end of the spectrum – in Russia, for example –, this same freedom is subject to increasing threats and actual sanctions.

The variable geometry of this freedom, depending on the state, reveals a series of binding regimes ranging from prior declaration to prior authorisation and approval. It is in this variety of regimes that the threats to freedom of association proliferate, whether in the context of international solidarity or daily life. And the gap is widening at an alarming rate between the legal framework for the international recognition of the autonomy each individual or legal person has to associate – or otherwise – and its implementation. This hiatus continues to threaten a freedom that is arguably an integral part of the foundation of democracy.

This article aims to review the legal frameworks and practices that present a general threat and more specifically imperil the humanitarian field. This analysis, which must be carried out through the prism of historical evolution, law and sociology, will first shed light on the mixed recognition of freedom of association and then on its growing ineffectiveness in many countries, before appealing to the indisputable resilience of the nonprofit sector in order to meet the challenges presented by increasing numbers of States.

### **Mitigated recognition of freedom of association**

Although the legal framework for freedom of association is well-established at the international level, its recognition is nuanced by State. There are three variants: those which do not recognise freedom of association; those which reserve it only for certain kinds of association and those which seek to gag certain organisations.

#### **Non-recognition of freedom of association in general**

States have an obligation to respect, protect and guarantee freedom of association, and the strict prohibition of association must only apply in exceptional circumstances. This principle has been slow to be adopted. Thus, in France, the Le Chapelier Law of 1791 had prohibited association between members of a professional body. It was not fully challenged until 1864, 1884 and, of course, 1901.

Currently, in Libya for example, freedom of association is not generally granted but reserved exclusively for the defence of certain spheres of public life. Indeed, the Great Green Charter of Human Rights, adopted in June 1988 under the Gaddafi regime, gave citizens the right to be “free to form associations, trade unions and leagues in order to defend their professional interests”. In the Kingdom of Bahrain and Iran, although freedom of association is written in the constitution, there are so many texts that restrict this right that it is all but non-existent. This is also the case in Egypt and Syria, where this freedom must not be contrary to the regime of society, undermine the pride of the nation or serve to form popular organisations assembling active forces in the country. Other States impose conditions, such as the Democratic Republic of Congo (DRC), which requires a minimum of seven members for the creation of an association instead of two.

In Algeria, the State was able to refuse the declaration of an association because of “conduct contrary to the interests of the national liberation struggle” on behalf of one of its founders. Similarly, Saudi Arabia may refuse to recognise an association if it considers that the entity does not have a “serious social purpose”.

As we can see, many States find ways to circumvent freedom of association. However, the tendency of not recognising freedom of association in constitutions has largely improved, even though some countries, such as Moldova, are still resisting. Moldova, like other countries, simply prefers to select the types of organisation they wish to recognise.

#### **Non-recognition of certain forms of association**

In Moldova, only trade unions and political parties are recognised in the constitution, to the detriment of “public associations” governed by the “law no. 837 on public associations” of 17 May 1996. However, according to the European Convention on Human Rights (ECHR), an institution founded by the legislator under public law does not constitute an association. This is an important principle, since recognising only public associations makes it possible to prohibit rights of appeal against possible infringements by the State. In Chad, it is school associations that are prohibited. When States do not limit recognition to certain types of association, they try to establish legal constraints.

#### **Increased legal oversight for certain categories of association**

The two facets of freedom of association are the right to create an association and the right to freely join an association. In practice, however, legislation is developing which requires membership to an

association, an obligation whose only effect is weakening the right guaranteed by Article 11 of the ECHR.

In a similar context, some States formed from the dissolution of the USSR have adopted legislation specifically aimed at foreign associations. Starting with Russia, which excludes the recognition of foreign associations and foundations, labelled as “foreign agents”, on the pretext that they were the origin of the so-called “colour revolutions” that occurred in Ukraine and Georgia. Other States such as Albania, Belarus, Kazakhstan and Uzbekistan have strict conditions for recognition. Although this practice no longer exists in France, it has inspired many African States to impose prior authorisation on foreign associations.

Whilst this type of legislation appears to be strategic for a significant number of States – for the sole purpose of better controlling the legal persons concerned – the nature of certain associations is a factor in intensifying the conditions for their legal recognition. This is the case for religious or human rights organisations, trade unions and in particular many foreign NGOs.

According to the ITUC Global Rights -Index,<sup>1</sup> trade union freedom is restricted in China, the Philippines and Cambodia. In Africa, there is political will to reaffirm the sovereignty of the State through an increasingly strict legal framework for NGOs. Thus, in Cameroon and Senegal, an organisation must prove its worth for three years and two probationary years respectively to receive certain benefits. In Burkina Faso, Chad, DRC and Central African Republic (CAR), the NGO category is recognised and has a precise legal framework, always under the express condition of a contract with the public authority. In Latin America, in Peru and Venezuela in particular, NGOs must declare funding received from abroad.

We can see that in order to exist, freedom of association must be recognised by States as a fundamental right. But even where recognition is granted, the effectiveness of freedom of association remains uncertain.

### **A controversial implementation of freedom of association**

The recognition of freedom of association has no real meaning unless it is effective in its implementation. A variety of seemingly purely technical instruments actually increase restrictions, with regard to both legal regimes and practices.

#### **A profusion of restrictive legal regimes**

Despite the theoretical consecration of freedom of association by almost all States in the world, legal restrictions abound, whether in the form of preliminary declarations, prior authorisations or other approval systems.

The preliminary declaration – a system adopted by the 1901 law on associations in France – consists of a simple registration of the association. However, this technique is sometimes biased and may be akin in some countries to a stealth conditional authorisation regime.

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<sup>1</sup> The International Trade Union Confederation brings together the national trade union federations of many countries. Its mission is to promote and defend the rights and interests of workers through international cooperation between trade unions, global campaigns and activism in key international institutions, <https://www.ituc-csi.org/about-us.html>

As for prior authorisation, the situation in Chad is unique and emblematic. Section 5 of order no. 23/PR/2018 states that “an association must be authorised before it begins its activities”. The absence of such a formality is punishable by an offence and “imprisonment ranging from one to five years and a fine of 500,000 to 3,000,000 CFA francs [approximately €760 to €4,500]”. This application of prior authorisation to local associations is certainly the most severe in the world. To be approved, NGOs must declare expatriate staff whilst also transmitting their employment contracts and proof of their qualifications to the Ministry of Planning.

In CAR, relationships between NGOs and the State are particularly strained. NGO employees are regularly warned that any denunciation of human rights violations on social networks can lead to expulsion. In June 2022, a Doctors Without Borders humanitarian worker was shot dead by CAR armed forces. On a daily basis, the authorities rigorously apply the double prior authorisation required for any foreign NGO established in CAR, whether according to the conditions set forth by Article 11 of the Law of 27 May 1961 on Foreign Associations or by the Law of 16 January 2019 governing NGOs. Article 17 of the Convention stipulates that any foreign NGO must sign an establishment agreement with the Ministry of Territorial Administration.

### **A variety of oppressive practices and decisions**

Although the principle of freedom of association is strictly appreciated as regards the freedom of creation and the freedom to join, it can be undermined by variations in other respects.

Associations have the freedom to define their objectives and activities. Thus, an association should not be forced to opt for a legal form that it does not want. There is an analogy to be made with trade union freedom. Indeed, by a judgment on 30 July 2009 (the case of -Danilenkov and others against -Russia), the ECHR condemned Russia for the non-respect of equal treatment and non-discrimination regarding the conditions of membership of the Kaliningrad branch of the Russian Dockers Union.

Certain financial constraints imposed by governments may be placed in the same category of interference with freedom of association. In Chad, for example, 1% of the budget of international NGOs has to go to the State. This stealth tax can also be found – curiously – in Switzerland, with the application of a negative interest rate of 0.75% on the bank accounts of NGOs and associations when their savings exceed 100,000 Swiss francs [around €100,000]. Yet the corollary of freedom of association is the freedom to independently seek, receive and use resources.

Other States go further with their restrictions. Russia – again – has refused to recognise the legal personality of the Moscow branch of the Salvation Army. The dissolution of an association by administrative means is also a crucial issue. In a judgment on 11 October 2011, the ECHR reiterated that the proportionality of the restrictions constituted an essential assessment.<sup>2</sup>

The Rhino Association (accused by the Swiss government of squatting buildings to illegally house vulnerable people) at least had right of appeal to challenge the authorities’ decision. In Africa, on the other hand, this same right is being eroded, with a wave of withdrawals by certain States (Rwanda, Benin, Côte d’Ivoire) from the African Court on Human and Peoples’ Rights. Even Tanzania, which is home to the institution, is no longer a member of it.

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<sup>2</sup> Rhino Association and others against Switzerland, § 62, 11 October 2011, <https://www.doctrine.fr/d/CEDH/HFJUD/CHAMBER/2011/CEDH001-106892>

## **The resilience of freedom of association**

Faced with these dangers, associations must adapt. To do this, endogenous and exogenous initiatives are developing.

### **Initiatives within associations**

Violations of freedom of association can occur in several ways. Depending on their degree, associations may adapt and remain resilient. A first technique is for a local association in a given country to expand to the national level.

In Côte d'Ivoire, the United States – the main foreign donor for Ivorian NGOs in the health field – decided to reserve the funding granted under the PEPFAR programme to NGOs present in different parts of the country.<sup>3</sup> In response, nonprofit EGPAF became a national NGO.<sup>4</sup> To address the lack of national legislation, associations in Somalia decided to establish their own regulatory framework in August 2003.

Another option is the creation of clusters which bring together various associations. This method is increasingly used in many countries.

### **Initiatives by States or international organisations**

We must be careful, however, not to oversimplify things. Many States are not in favour of this multiplication of restrictions. On the contrary, in some countries there is an increase in immunities and in some cases in privileges (including quasi-diplomatic ones).

This double trend sometimes plays out in a contradictory way. The case of a democratic country like Switzerland is emblematic. In contrast to the restrictions previously mentioned in domestic law, the -Canton and the Federal Government – with a view to strengthening “International -Geneva”<sup>5</sup> – agreed to grant NGOs original “legitimation cards”, a type of authorisation to work equivalent to a visa, issued by the Federal Department of Foreign Affairs.

International organisations are not inactive either. The European Convention on the Recognition of the Legal -Personality of International Non--Governmental -Organisations (a series of European treaties – no. 124 of 24 April 1986) is an example of this, although it is taking a long time to take effect. It avoids new registration in the host state. Another example is the initiative of the European Commission for Democracy through Law (the Venice Commission), which has established joint guidelines on freedom of association.

Nevertheless, the defence of freedom of association is and will remain a major challenge throughout the world over the coming years.

***Translated from the French by Juliet Powys***

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<sup>3</sup> President's Emergency Plan for AIDS Relief: an emergency foreign AIDS assistance plan launched by U.S. President George W. Bush in 2003.

<sup>4</sup> Elizabeth Glaser Pediatric AIDS Foundation.

<sup>5</sup> The nickname given to the ecosystem composed of various inter-governmental organisations (UN agencies in particular) and NGOs whose European headquarters or offices are in Geneva. The City, the Canton and the Federal State strive to facilitate its development as much as possible, since it is a source of diplomatic influence as well as substantial financial revenue.

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### Biography

**Kouassi Aimé Malanhoua** • With a PhD in Public Law from the University of Nantes (France), Kouassi Aimé Malanhoua is a lecturer-researcher and international consultant. A member of the Société française de droit international, he is the current chief education officer of Université Henry Dunant in Côte d'Ivoire, a subsidiary of the *Unité de solidarité internationale de Genève*. His research focuses on associations, foundations and humanitarian action in general. He also contributed to the mapping of Ivorian society in view of the reform of the law on the legal framework of associations and NGOs. He is working on a vast development project for an international network of NGOs called Humanitarian Action Vitasta.

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