

# **CIVIL, OR UNCIVIL SOCIETY?: THE INTERNAL GOVERNANCE AND EXTERNAL REGULATION OF CIVIL SOCIETY AND THE IMPACT OF CONSTITUTIONALISM ON CIVIC SPACE IN SOUTH AFRICA**

Sally Hurt

---

## **1. INTRODUCTION**

Using the theme of the regulation and internal governance of civil society as a lens, this paper discusses civil society in South Africa and the effect of constitutionalism on civil society and civic space. It does this by outlining what civil society and civic space looked like prior to 1994 and then comparing this to civil society after 1994. The key mechanisms for this analysis are the way in which civil society was regulated and governed prior to and after 1994.

It is arguable that while the implementation of a democratic dispensation in South Africa brought about more access and greater freedoms to civil society, this space is far from the democratic space that it ought to be. Civil society in South Africa is still in need of a greater degree of transparency, internal regulation and governance.

In discussing the changing nature and substance of civil society between the apartheid regime and over the course of twenty years of constitutionalism in South Africa, this paper seeks to problematise the regulation and internal governance structures of South African civil society. The key arguments of this paper are that pre-1994 civil society was necessarily less open given government regulations and the political circumstances of the time. In general, donors were understanding of this given the social and political milieu of the time. After 1994 supposedly enabling legislation was enacted. However, this legislation has been poorly implemented in terms of the requirements regarding embracing and enabling civil society. Examples of this include difficulty in registering civil society organisations, as well as sudden decisions on the governments part which have resulted in deregistration of many organisations without notice. At present, there is also a new framework, which, if implemented, is potentially dangerous and would serve to undermine civil society, particularly smaller organisations. A further subsidiary issues that this paper touches upon, is that of

perceived dominance within the NGO sector of some larger organisations to the disadvantage of others. The central ramifications of this dominance are twofold. Firstly, there is issue of funding, particularly for smaller or less media-savvy organisations. Secondly, there is the issue of space and voice-accountability – larger NGOs need to lead the way in ensuring accountability and transparency within the sector. This relates to all aspects of their work, including transparency in funding, transparency in hiring and employment practices, transparency in who is working on particular issues and where they get their information from (while also protecting individual informants where necessary), and transparency with regard to their faults.

Part 1 introduces the topic and frames the discussion. Part 2 presents a working understanding of civic space and civil society, and the limitations of this study. Part 3 is divided into two parts offering an analysis of civil society before and after 1994. Part 4 presents some criticisms and critiques of the regulation and governance of civil society in South Africa post-1994, as well as outlining possible solutions. Finally, part 5 concludes with a brief summary of the key points presented, as well as recommendations.

## **2. WHAT IS CIVIC SPACE AND CIVIL SOCIETY? CONCEPTS, DEFINITIONS AND LITERATURE**

Often when we speak of civil society, the image that comes to mind is that of non-governmental organisations (NGOs) and other civil society organisations (CSOs). This view of civil society is predominantly what is used in this paper. However, it should be noted that this organisational formulation of civil society is too narrow.<sup>1</sup> There is a much broader context to civil society. It is made up of associations, networks, and, importantly, social capital. The value of interconnectedness and solidarity is important. In a broad sense, civil society refers to a population of formed groups for collective purposes. These groups come together outside of the state and outside of the marketplace in an arena where ideological hegemony is challenged.<sup>2</sup> This understanding of civil society as

---

<sup>1</sup> Powercube, 'Gramsci and Hegemony' available at <http://www.powercube.net/other-forms-of-power/gramsci-and-hegemony> accessed on 01/09/2014.

<sup>2</sup> Buttigieg, J. A. 'Gramsci on Civil Society' in *Boundary 2* Vol. 22, No. 3 (Autumn, 1995), 1–32 Chapel Hill: Duke University Press.

a space in which ideology can be challenged illustrates that an important aspect of civil society is mobilisation from below and this mobilisation can encompass many sorts of actors – ones far wider than the formal world of nongovernmental organisations.<sup>3</sup> Thus, what is important in terms of civil society is an understanding that in order to contest power one needs to have a critical mass of associations and nation-builders willing to critique formal and informal structures of regulation and governance.

With regard to the relationship between civil society and the state, Scholte argues that civil society can be understood as a political space where voluntary associations seek to shape the rules that govern aspects of social life.<sup>4</sup> These voluntary associations can be NGOs, trade unions, or even sports and social clubs. Some scholars argue that civil society should regulate the state rather than the state regulating civil society.<sup>5</sup> However, others have argued that the self-organised groups of civil society need to be balanced and organised by the state or otherwise self-interest takes over.<sup>6</sup> However, this regulation needs to be through the provision of an enabling environment rather than a restrictive one. There are valid arguments on both sides with regard to the form that the regulation of civil society takes. What is clear though is that without some form of regulation, or perhaps a balance of the two, civil society runs the risk of becoming distorted in its aims.

Within the African context, civil society has to be problematised.<sup>7</sup> During colonial times, there were many groups aligned to the colonial state. These included groups like farmers unions, and women's groups, for example. However, there were also a number of organisations that tried to mobilise people and empower them from a grassroots level. Examples of these can be

---

<sup>3</sup> Scholte, J. A. 'Global Civil Society: Changing the World?' *CSGR Working Paper No. 31/99* May 1999.

<sup>4</sup> *Ibid.*

<sup>5</sup> Stillman, P. G. 'Hegel's Civil Society: A Locus of Freedom' in *Polity* Vol. 12, No. 4 (Summer, 1980), 622–646 New York: Palgrave Macmillan Journals.

<sup>6</sup> Elone, J 'Backlash Against Democracy: The Regulation of Civil Society in Africa' in *Democracy & Society* Vol. 7, Issue 2 Georgetown University: The Centre for Democracy and Civil Society 2010.

<sup>7</sup> Appiagyei-Attua, Kwadwo 'Civil Society, Human Rights and Development in Africa: A Critical Analysis' available at [www.bradford.ac.uk/ssis/peace-conflict-and-development/issue-2/CivilSocietyAfrica.pdf](http://www.bradford.ac.uk/ssis/peace-conflict-and-development/issue-2/CivilSocietyAfrica.pdf) accessed on 15/09/2014; and Lewis, David 'Civil Society in African Contexts: Reflections on the Usefulness of a Concept' in *Development and Change* 33(4): 569–586 (2002) Oxford: Blackwell Publishers.

seen in the use of stokvels in South Africa, as well as in many groups that were used to contest colonial power. Some of these groups were religious,<sup>8</sup> some were intellectual,<sup>9</sup> and others were overtly political and even militaristic, while others were trade unions or labour related groups.<sup>10</sup> These types of organisations allowed people to respond to some colonial (or apartheid) pressures and practices through community groups.

In short, civil society is much broader than just non-governmental organisations. The term encompasses a range of actors from all sectors of society. These actors can be formally organised, but do not have to be. In pre-1994 South Africa, there were diverse groups and organisations that made up civil society and used whatever social space available in order to rally against the system. In democratic South Africa, many of these groupings still exist, but the ones that focus on holding government to account and keeping a check on state power tend to be NGOs and civil society organisations specifically formed for that purpose. This brings us to the concept of civic space.

Civic space is the space that civil society occupies – a space for public authority.<sup>11</sup> It also refers to legal and non-legal factors which impact on the conceptual space in which civil society organisations exist. An enabling legal environment, for example, is one factor which helps to create a free, democratic and open civic space where civil society can operate unencumbered and more effectively. An example of a non-legal factor, which impacts upon civic space, is that of access to social capital. Ideally, access to social networks of power and influence should not be a prerequisite for a civil society actor, or for someone

---

<sup>8</sup> See for example: Truth and Reconciliation Commission Final Report, Vol 4, Chapter 3, which states that while many major Christian groups in South Africa either tacitly or explicitly supported the apartheid system, there were also many religious communities which fought against apartheid at great detriment: 'Religious communities also suffered under apartheid, their activities were disrupted, their leaders persecuted, their land taken away. Churches, mosques, synagogues and temples – often divided amongst themselves – spawned many of apartheid's strongest foes, motivated by values and norms coming from their particular faith traditions.' Also see 'Tutu Risks Treason Charge in Urging S.Africa Sanctions' available at [http://articles.latimes.com/1986-04-02/news/mn-2301\\_1\\_south-africa](http://articles.latimes.com/1986-04-02/news/mn-2301_1_south-africa) accessed on 24/09/2014.

<sup>9</sup> For example the Black Consciousness Movement, which began in the 1970s.

<sup>10</sup> Parks, M 'S.Africa Issues Sweeping Political Ban on 18 Groups' 25 Feb 1988 *LA Times* available at [http://articles.latimes.com/1988-02-25/news/mn-45214\\_1\\_south-africa](http://articles.latimes.com/1988-02-25/news/mn-45214_1_south-africa) accessed on 24/09/2014.

<sup>11</sup> CIVICUS, State of Civil Society Report 2014, available at <http://civicus.org/index.php/en/socs2014> accessed on 24/09/2014.

wanting to enter the civil society sector. However, it does factor in when one needs to find a space where one has voice and can be heard.

Many initiatives and regulatory frameworks focussing on civic space tend to focus on the legal barriers.<sup>12</sup> This is because there are international instruments and human rights norms, which can be used to foster civic space, and create an enabling environment for civil society both domestically and internationally.<sup>13</sup> In South Africa, both before and after the Constitution was enacted, there were legal frameworks in place, which sought, and seek, to regulate civil society.

The key objective of this paper is to compare and contrast the regulation and governance of civil society in South Africa through a comparison of civil society before and after 1994. The paper will explore how constitutionalism changed civil society in South Africa, and whether civil society in South Africa is as transparent and democratic as it can be, and if not, what factors might be hindering transparency within this sector. This paper takes into account both legal and non-legal obstacles that might encumber the effective operation of South Africa's civil society sector.

Three limitations associated with this research are time, capacity, and the broadness of the term civil society. These limitations mean that only part of this topic can be covered in the depth. The methodology used was predominantly desktop research, but also included informal questionnaires sent to civil society actors in South Africa. This was done in order to gather first-hand experience and knowledge from those in the NGO sector in South Africa.<sup>14</sup> Thirdly, as

---

<sup>12</sup> Civic Space Initiative, 'Civic Space Initiative: Civil Society Under Threat' available at <http://blogs.worldbank.org/publicsphere/civic-space-initiative-civil-society-under-threat> accessed on 23/09/2014.

<sup>13</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, U.N.T.S., vol. 999, p. 171, articles 18, 19, 21 and 22; OAU, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), articles 9, 10 and 11; *Nasibova v. Azerbaijan*, European Court of Human Rights, Application no.4307/04, (Judgment of 18 October 2007); *Ramazanova and Others v. Azerbaijan*, European Court of Human Rights, Application no. 44363/02 (Judgment of 1 February 2007); and *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, European Court of Human Rights, application no. 37083/03 (Judgment of 8 October 2009).

<sup>14</sup> A questionnaire was sent out to a selection of participants from a cross-section of civil society-related organisations. Respondents were targeted based on their knowledge of the sector and how it operates, as well as potential knowledge of the sector prior to 1994. Disaggregated information from these questionnaires has been used to inform the findings of this paper.

indicated above, the term 'civil society' is very broad, and so although the questionnaires were sent to as broad and diverse a cross-section of participants as possible, many of the first-hand accounts collected have come from a limited part of civil society – the NGO sector. Further case studies and in-depth interviews from all sectors of civil society would enhance this research and further inform a potential strategy for the strengthening of civil society in South Africa.

### **3. BETWEEN DARKNESS AND LIGHT**

The subsections below give a descriptive account of the regulation and governance of South African civil society during Apartheid, and after the democratic dispensation in 1994.

#### **3.1 DAVID AND GOLIATH: SA CIVIL SOCIETY PRIOR TO 1994**

Prior to 1994 civil society and civic space was highly regulated, heavily restricted, not transparent, and where restrictions were too cumbersome, civil society existed in the margins, or underground. The following paragraphs provide a brief description of the governance and regulatory environment of civil society prior to 1994.

Socially, and in terms of the governance framework, the secrecy and restricted environment in which civil society had to operate prior to 1994 meant that organisations that operated 'underground' were subjected to fewer checks and balances. These organisations were forced to exist as underground organisations because of the objectives of these organisation, which were often related to achieving human rights for all regardless of race. Funding organisations, particularly overseas donors, required less from organisations in terms of accountability for funding. This was because the donors knew that the environment in which civil society operated was one that was not conducive to the normal checks and balances expected from funding recipients.<sup>15</sup> The effect of this was that immediately prior to 1994 South African civil society organisations were not functioning in an open and transparent fashion. Furthermore, in terms of internal governance and management of the sector, civil society was severely lacking in terms of capacity and training. Thus, while the coordinated activities

---

<sup>15</sup> Sparks, A (1990) *The Mind of South Africa*.

and overall functions of civil society organisations were more or less effective in rallying against the apartheid state, there was a skills gap in terms of the internal regulatory environment.

Most Non-Profit Organisations (NPOs) in South Africa were originally set up as voluntary associations. An NPO is different from a CSO as where CSOs focus on civil society in general, and NPO is the legal entity itself. Thus a CSO can be an NPO if registered, whereas an NPO doesn't always strictly entail being a CSO. For the majority of organisations, it was easy enough to set up an organisation, but there was no public directory where you could register, except at the directorate of fundraising which was a government agency. Many organisations did not want to register with this agency because it was a government one. Some implications of this were that registering with a government agency could be perceived to impact upon the organisations independence, some organisations were against the state and so it would have contradicted with their mission to register, some required secrecy and others were outright banned by the state itself. There was also a problem as many were barred from registering. This was because they had to agree to an organisational constitution, and then once they had certain members they were recognised as a legal entity, but some organisations couldn't do this for practical reasons, such as secrecy, or protection of members.<sup>16</sup>

Funding is an issue of central importance in the civil society sector, and particularly with regard to NGOs. During apartheid, funding was one of the key avenues through which the state sought to control and exert pressure on CSOs. In terms of the Tax Act prior to 1994, there were only three types of organisations that got tax benefits and tax exemption status. These were charitable, educational, and religious organisations.<sup>17</sup> The categorisation of individual organisations was at the discretion of an official at the South African Revenue Services (SARS). Thus, the fate of an organisation in terms of its tax status was left at the personal discretion of a government agency and was therefore open to abuse or undue influence.

---

<sup>16</sup> Wyngaard, R.G. 'The South African NPO Crisis – time to join hands' March 2013 available at [www.nonprofitlawyer.co.za](http://www.nonprofitlawyer.co.za) accessed on 20/09/2014.

<sup>17</sup> Fundraising Act 107 of 1978.

Further laws impacting upon the activities of civil society prior to 1994 included laws prohibiting the publication or dissemination of 'documentary information calculated to engender feelings of hostility between the European inhabitants [of South Africa ...] and any other section of the inhabitants of South Africa'.<sup>18</sup> The Industrial Conciliation Act<sup>19</sup> provided for the registration and regulation of trade unions. It also provided for a dispute settlement mechanism to be used during disputes between employers and employees. The regulation of trade unions, while important in an open and democratic society, was subject to abuse by the state during the apartheid regime as some trade unions were seen as a threat.<sup>20</sup> Legislation aimed at curbing the activities of political groups included the Suppression of Communism Act,<sup>21</sup> and the Public Safety Act.<sup>22</sup> These two pieces of legislation gave the police broad and far-reaching powers to raid the homes of individuals, as well as the offices of organisations. The latter also granted the government the authority to set aside certain laws and declare a state of emergency. The Public Safety Act was a specific response to the civil disobedience campaigns organised by the African National Congress around 1950. This legislation was followed by ever-more repressive laws, which curbed free speech, freedom of movement and the ability to attend public gatherings,<sup>23</sup> all of which are rights and freedoms that are essential for the proper functioning of civil society, or a democratic society in general.

---

<sup>18</sup> The Riotous Assemblies Amendment Act 19 of 1930.

<sup>19</sup> Act 36 of 1937; also see the Industrial Conciliation Act 36 of 1937, the Industrial Conciliation (Natives) Bill of 1947, the Natives Labour (Settlement of Disputes) Act of 1953. The Industrial Conciliation Act introduced a colour bar with respect to the joining of and formation of trade unions. These pieces of legislation were periodically amended and made stricter from the 1940s onwards. See for example the Black Labour Relations Regulation Amendment Act 70 of 1973.

<sup>20</sup> For example, in 1988 heavy restrictions were placed on organisations such as the Congress of South African Trade Unions (Cosatu) when the state effectively prohibited the trade union from engaging in any form of political activity. Other organisations affected included the Azapo, the South African youth Congress, and the UDF among others.

<sup>21</sup> Suppression of Communism Act, 44 of 1950.

<sup>22</sup> Public Safety Act of 1953.

<sup>23</sup> See for example the Riotous Assemblies and Suppression of Communism Act 15 of 1954; the Internal Security Act 74 of 1982; Riotous Assemblies Act 17 of 1956; Unlawful Organisations Act 34 of 1960; Indemnity Act 61 of 1961; General Laws Amendment Act (Sabotage Act) 76 of 1962; Terrorism Act 83 of 1962; General Laws Amendment Act 37 of 1963; General Laws Amendment Act 80 of 1964; Criminal Procedure Amendment Act (the 180 Day Detention Law) 96 of 1965; General Laws Amendment Act 62 of 1966; Suppression of Communism Act 24 of 1967; Prohibition of Political Interference Act 51 of 1968; Public Service Amendment Act 86 of 1969; Indemnity Act 13 of 1977; Suppression of Communism Act 2 of 1972; Security Intelligence and State Council Act 64 of 1972; Riotous Assemblies Amendment Act 30 of 1974; Second General Laws Amendment Act 94 of 1974 (as amended periodically between 1974 and 1987); and the Undesirable Organisations Act 9 of 1978.



These Acts specifically limited the ability of civil society actors to effectively challenge the state and state power. It is important to note that more general legislation also had the same effect. This includes legislation limiting the movement and residence of black people in South Africa, as well as legislation limiting who can own property where, and legislation determining who was and was not entitled to vote or exercise any other form of democratic rights. It also includes legislation curtailing freedom of speech and freedom of the press.<sup>24</sup>

Thus, prior to 1994, various mechanisms were used to control civil society. These included legislative measures, which restricted registration, as well as measures restricting funding – particularly external funding from international donors. For example, the Affected Organisations Act restricted certain organisations from receiving foreign funds.<sup>25</sup> However, there were also lower standards expected by funders of the organisations that they funded. This was in response to the highly restrictive environment in which civil society operated, and in response to the secret nature of some of the organisations, members, or activities being performed.<sup>26</sup> It was also a response to the repressive government and repressive laws.

### **3.2 DAWN OF A NEW DAY: CONSTITUTIONALISM IN SA AND ITS IMPACT ON CIVIC SPACE**

Constitutionalism in South Africa brought about many changes in terms of the legislative and regulatory framework in which civil society operates. The following arguments illustrate that while democracy and constitutionalism in South Africa have had a positive impact on civic space, the freedoms won should not be taken for granted.

The legal framework is very important in terms of facilitating an environment within which civil society organisations can operate. The Constitution is the foundational document in terms of the legal framework

---

<sup>24</sup> See for example the Newspaper and Imprint Registration Act 19 of 1977. It is possible that this Act was in direct response to publications such as the Rand Daily Mail, under the editorship of Laurence Owen Vine Gandar, which chose to publish stories that criticised the government.

<sup>25</sup> Affected Organisations Act 31 of 1974.

<sup>26</sup> For example, the ANC and PAC were banned in the 1960s.

regulating civil society in South Africa at present.<sup>27</sup> It enshrines rights pivotal to the functioning of civil society and to ensuring the openness and transparency of civic space. These include the three foundational rights for civic space: freedom of speech, freedom of assembly, and freedom of association.<sup>28</sup> Beyond the rights enshrined in the Constitution and expanded upon where necessary,<sup>29</sup> there is also specific legislation applicable to CSOs in South Africa.

Pre-1994 legislation regulating civil society in South Africa related to far more than just funding. However, much of the legislation regulating civil society in South Africa today relates to funding, or funding mechanisms for non-profit organisations (NPOs) in South Africa. The National Development Agency Act,<sup>30</sup> is aimed at securing money from external funders and channelling these funds to NPOs in South Africa. However, this objective is problematic because it allows for extra state involvement in how funds are dispersed. The main objective of this act never materialised, so though this legislation does play a role in the regulatory environment of NPOs in South Africa, it does not have as big an impact as it could.

The Lotteries Act<sup>31</sup> also provides for mechanisms of funding to some organisations. The Income Tax Act<sup>32</sup> has provisions relating to public benefit organisations, which apply to civil society organisations. These provisions provide more objective criteria for registration of NPOs. However, it is not just NPOs that can apply for PBO status. NPOs have to register with the Department of Social Development, non-profit companies (NPCs) have to register with CIPC, and, Trusts have to register with the Master of the High Court. All three of these entities or types of registration enable an entity to get funding. However, in order to obtain government funding as a service provider the entity has to be registered as an NPO. In general, the variety of registration options is in stark contrast to the system prior to 1994 where the categorisation of an organisation

---

<sup>27</sup> Constitution of the Republic of South Africa, 1997.

<sup>28</sup> Constitution of the Republic of South Africa 1997, sections 16, 17 and 18.

<sup>29</sup> See for example the Promotion of Access to Information Act 2 of 2000.

<sup>30</sup> National Development Agency Act 108 of 1998.

<sup>31</sup> Lotteries Act 57 of 1997

<sup>32</sup> Taxation Laws Amendment Act 5 of 2001.

for tax exemption status was left to the discretion of a SARS official. The criteria in the Income Tax Act now stipulates objective criteria for determining whether tax exemption status is granted or not.<sup>33</sup> A concerning trend at present is that, although these regulations were passed in 2001, some organisations that should have tax-exempt status have reported some issues or resistance when applying for tax-exempt status.<sup>34</sup> The unit responsible for granting tax-exempt status at the South African Revenue Service (SARS) now demands certain documents, even when provision of such documents by the applicant is not a requirement by law.<sup>35</sup> This last point was indicated by a number of interviewees who had had trouble registering with SARS for tax-exempt status. It was further confirmed by a legal professional working in the field of NGO law.

With regard to securing funding, legislation governing registration is also important. This is because registration is often a prerequisite for funding. Registration of a CSO into an NPO is covered by the Companies Act.<sup>36</sup> In the Old Companies Act, NPOs were dealt with under section 21, and were thus referred to as 'section 21 companies'.<sup>37</sup> Under the New Companies Act, for-profit and not-for-profit companies are recognised. Despite provisions in the New Companies Act, funders and donor organisations in South Africa tend to rely on more than just NPO/CIPC (Companies and Intellectual Properties Commission) registration before granting an organisation funding. Thus, what funders also rely on is Public Benefit Organisation (PBO) registration via the South African Revenue Service. This is because PBO registration provides for more certainty of the organisation's legitimacy and ability to comply with tax requirements and financial legislation.

The principle legislation governing non-profit and civil society organisations in South Africa is the Non Profit Organisation Act (NPO Act).<sup>38</sup> This Act has some

---

<sup>33</sup> Taxation Laws Amendment Act 5 of 2001.

<sup>34</sup> Wyngaard, R.G. 'The South African NPO Crisis – time to join hands' March 2013 available at [www.nonprofitlawyer.co.za](http://www.nonprofitlawyer.co.za) accessed on 20/09/2014.

<sup>35</sup> Ibid.

<sup>36</sup> Companies Act 71 of 2008.

<sup>37</sup> Old Companies Act, section 21.

<sup>38</sup> Non Profit Organisation Act 71 of 1997.

potentially far-reaching provisions, such as section 3, which outlines the state's responsibility to NPOs. It states,

'within the limits prescribed by law, every organ of state must determine and coordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of non-profit organisations to perform their functions.'<sup>39</sup>

This provision clearly articulates the change between the pre- and post-1994 approach taken by the state towards civil society. It illustrates that there should be symbiosis between the state and civil society, and that the state has a responsibility to 'promote, support, and enhance' the capacity of non-profit organisations. This provision represents the kind of freedom that was fought for in South Africa by civil society prior to 1994.

Apart from section 3, the NPO Act aims at providing a registration facility for small organisations. The Act does not make it compulsory to register. This is because the majority of NPOs are small community organisations and often do not have the capacity (either in terms of human resources or financial capacity). Usually, an organisation wishing to secure funding has to be registered in terms of the NPO Act. Prior to 1994 these organisation could only register with the directorate, whereas now, they have to report annually to the NPO Directorate. This is important because the biggest donor to CSOs in South Africa is the state. Thus, by requiring annual reporting a measure of accountability is achieved.

In 2012, the NPO Directorate reported that it had done a study<sup>40</sup> on the impact of the NPO Act on non-profit organisations and it was decided that the NPO Act in its current formulation was insufficient. Key recommendations from this study include: the registration process should be decentralised to provinces and local municipalities; application forms should be simplified and available in other official languages; and a self-regulatory NPO Council should be established. There was also some focus on international organisations operating in South Africa and the need to be cautious of the influence of these organisations. In 2012 the Department stated that there were over 85,000 organisations

---

<sup>39</sup> NPO Act, section 3.

<sup>40</sup> Impact Assessment Study issued in 2005.

registered on its website,<sup>41</sup> and that a third of these would face de-registration if they did not comply with legislative requirement. No arbitration panel was appointed, and the Department began to deregister organisations from January 2013. This resulted in a large number of organisations not being able to receive funding as their legal existence was directly impacted by this move. Furthermore, it resulted in a decreasing in South Africa's general rating as a country with a conducive operative environment for NGOs.<sup>42</sup>

Wyngaard argues that the NPO sector in South Africa is in crisis, and that there is a need for civil society to collaborate more and work towards enabling smaller organisations to be sustainable, particularly community-based organisations.<sup>43</sup> This 'crisis' points to a further issue within civil society in South Africa, that is, the dominance of some organisations within the sector. While it is conceivable that if an organisation is effective in the work that it does that it will gain recognition for this and that this recognition will translate into further funding opportunities; it is also important that these better endowed organisations are self-aware and cautious of inadvertently taking away the voice of other smaller organisations.

A Draft NPO Policy Framework on the Amendment of the NPO Act was put forward.<sup>44</sup> Proposed amendments include giving the state the power to blacklist organisations, as well as the power to enter the premises of an organisation to check its documents. These proposed amendments will give the state more enforcement powers. This outlines the current legal climate in South Africa, and although these amendments are yet to be accepted, they do represent a worrying trend.

In terms of governance of civil society in South Africa today, Constitutionalism has meant that CSOs can operate freely and openly. This means that whereas before 1994 there were fewer restrictions placed on civil

---

<sup>41</sup> Wyngaard, R.G. 'The South African NPO Crisis – time to join hands' March 2013 available at [www.nonprofitlawyer.co.za](http://www.nonprofitlawyer.co.za) accessed on 20/09/2014: 3.

<sup>42</sup> CIVICUS' 2013 Enabling Environment Index. Also see USAID 2012 Africa CSO Sustainability Report.

<sup>43</sup> Wyngaard (n 41 above).

<sup>44</sup> To access the draft see <http://www.inyathelo.org.za/special-projects/npo-policy-framework.html>.

society organisations by their funders, but more by government, now there are more checks and balances demanded by funders. Not only do funders look at a CSO's NPO registration and tax status, but they also evaluate the transparency of the organisation and its governance structures. This has meant that many CSO actors, who had been accustomed to fewer funder-driven checks and balances prior to 1994, now have to focus on meeting these extra requirements. Larger and more 'businesslike' CSOs have managed to leverage these processes to their advantage and gain more funding, while smaller NGOs with less capacity have not been able to comply with new sets of rules and thus have lost access to possible funding. As previously mentioned, a further issue in civil society in South Africa today is the tendency of some larger, stronger, or louder groupings to take up civic space in order to have their cause heard and, in doing so, they inadvertently silence others. Sometimes this is done simply by the monopolisation of funding. Admittedly the NGO sector has many parallels to the private sector when it comes to funding. That is, competing for funding is one area that necessarily requires NGOs to market themselves and attach their names to causes that will ensure their continued ability to exist financially. Sometimes this competition means that bigger NGOs, or international ones, are better able to access funding. While it is important that these organisations continue to exist and do the work that they are doing, it is equally important for the sector to have a multitude of voices.<sup>45</sup>

Thus, in terms of both governance and regulation, constitutionalism and democracy in South Africa brought about an opening up of civic space, and placed civil society in a powerful position in terms of the social capital it had, as well as in terms of the legislative framework at its disposal. However, civil society in South Africa is now at a crossroads. The freedoms and civic space achieved just after 1994 should not be taken for granted. With those freedoms comes responsibilities, and these should also be taken seriously and carried out in a manner that protects the openness and transparency of civic space and seeks to further the values of democracy. The furthering of these values should,

---

<sup>45</sup> For more on funding and the need for a multitude of voices in the NPO sector in South Africa see O'Riordan, A 'The End of Hope: SA Civil Society's Race to the Bottom' <http://sacsis.org.za/site/article/2171?frommailing=1> accessed on 25 October 2014.

by implication, include the creation of a space that empowers the most vulnerable members of society. This applies not only to individuals, but also to smaller, vulnerable civil society groups or organisations, as often it is these organisations that are doing the footwork and working at a grassroots level, but not necessarily receiving the accolades or recognition they deserve.

#### **4. THEORISING A WAY FORWARD: HOW CIVIL IS CIVIL SOCIETY REALLY?**

Ways forward for a more vibrant civil society sector in South Africa should include the sector adopting the highest standards of governance available to them. This should not simply be 'skin deep governance'; rather, it needs to be governance infused with ethics and constitutionalism, and greater support for smaller organisations. The standards to which civil society wishes to hold government and private power should, by default, apply to civil society as well.

An Organisation for Economic Cooperation and Development (OECD) document entitled 'The Corporate Governance Lessons and the Financial Crisis' is a good starting point in terms of potential governance standards that could be used for civil society.<sup>46</sup> Recommendations from this document include board responsibilities, more training of boards, decisions based on ethical principles taking into account the environment and communities, fair and equitable remuneration of board members, shareholder rights, more auditory courts, and strengthened internal control systems.<sup>47</sup> While focussed on large corporations, these recommendations can be translated to fit civil society – and adjusted according to the size of the organisation in question. The 'shareholders' in civil society are the constituents that the organisation serves. They may not have a financial stake in the success of the work that that particular CSO engages with, but they do have non-financial interests, and in many cases this interest is more far-reaching than a financial stake would be. These should be taken into account in order to ensure that the constituency being served is given maximum input and ownership, and receives the most benefit from an endeavour or cause. In a

---

<sup>46</sup> OECD, 'The Corporate Governance and the Financial Crisis' available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/corporategovernanceandthefinancialcrisis.htm> accessed on 15/09/2014.

<sup>47</sup> Ibid.

recent article Mark Heywood asked the question ‘shouldn’t civil society also be about seeking lasting change?’<sup>48</sup> The article goes on to comment that despite its sound and fury, civil society in South Africa is not adequately achieving ‘deep structural change and social betterment’. Heywood offers his view on the failures of civil society in South Africa. These include the un-strategic or un-coordinated nature of civil society; the co-opting of civil society without enough critical discernment; the lack of hard managerial skills within the sector; dependence of civil society for funding; and the complicity of civil society to those who have ‘bought’ them.<sup>49</sup> All of these points are pertinent for civil society today, but what needs to be added to this list is lack of democracy within the sector itself. For civil society to succeed it needs to adhere to the highest standards of conduct. Where allegations, or even rumours, of misconduct exist, these should be taken seriously and investigated accordingly.<sup>50</sup> During apartheid there were many reasons for lack of transparency within the NGO sector. Now, there are no valid excuses as to why civil society organisations should not strive for the highest degrees of transparency, accountability, and openness.<sup>51</sup>

Second, as was recommended by the Draft Policy Framework, an NGO council would be both useful and constructive. The structure of this council would need to be tailor-made for the South African situation, but a recent example that could be useful is that of the Public Benefits Organisations Regulatory Authority in Kenya.<sup>52</sup> This Authority was developed by Kenyan NGOs during a time when they were under threat of more restrictive measures from government. It ensures compliance of NPOs in Kenya with the various reporting and administrative obligations required by law. The Kenyan example also has an

---

<sup>48</sup> Heywood, M ‘Quo Vadis Civil Society’ <http://www.dailymaverick.co.za/article/2014-08-18-analysis-quo-vadis-civil-society/#.VFtKsucu40k> accessed on 20/09/2014.

<sup>49</sup> Heywood note 47 above.

<sup>50</sup> This point is taken from some of the questionnaires sent out in doing research for this paper. An alarming number of the respondents indicated knowledge of practices within the sector that have been swept under the carpet. Examples included allegations of unfair labour practices, as well as sexual harassment that is widely known by people in certain organisations, but rather than confront the problem, the victim(s) of the harassment were silenced for fear of the potential ramifications for the organisation(s) in question.

<sup>51</sup> A notable example of an organisation striving for transparency is the Centre for Environmental Rights. The CER strives for greater transparency from the public and private sector. In doing so, it holds itself to the same standards by ensuring accessibility of information and documents pertaining to the CER itself. For more, see <http://cer.org.za>

<sup>52</sup> Churchill, S ‘Self regulation key to success of new NGO law’ available at <http://www.standardmedia.co.ke/?articleID=2000086203> accessed on 15/09/2014.



umbrella body of NGOs, the National Federation of Public Benefits Organisations, which is recognised by law and allows for some self-regulation of the NGO sector.<sup>53</sup> South Africa could take lessons from the Kenyan example in order to ensure more self-regulation and greater transparency and power-sharing in the NPO sector.

A further recommendation is an industry ombud or the use of an institution like the public protector in order to ensure more transparency and accountability in the sector. This would regulate the immense power that some NGOs have built up, and keep the sector as transparent as possible. The accountability should include not only financial and legal accountability, but also voice-accountability. That is, when an organisation speaks on behalf of others, it is vital that it does so in an accurate manner and for the benefit and empowerment of that constituency. It is important that NGOs and civil society organisations in South Africa exercise power with due regard to the causes that they serve, but also the persons that they serve, and to each other.

## **5. *L'HEURE ENTRE CHIEN ET LOUP: THE NEED FOR SELF-REGULATION AND CAPACITY BUILDING IN THE CIVIL SOCIETY SECTOR***

In conclusion, this paper has problematised some issues relating to civil society in post-1994 South Africa. It has done this by first presenting a working definition of civil society and civic space. Then, using that definition as a foundation, a comparison was drawn between the regulation and governance of pre- and post-1994 civil society in South Africa. In the subheading to this paragraph, the French expression '*l'heure entre chien et loup*' has been used. This idiom is used to describe the time of day where the light is such that one cannot distinguish whether a canine shape is that of a dog or a wolf. It is a threshold or cusp between hope and fear. It is used to articulate the point at which South African civil society now finds itself.

---

<sup>53</sup> See the Kenyan Public Benefits Organisations Act 18 of 2013, available at <http://www.ngobureau.or.ke/Docs.aspx> accessed on 14/09/2014.

Twenty years of Constitutionalism has brought with it freedom and breathing. It also allowed civil society to become a space of robust engagement, and a mechanism that has the capacity to temper private power and that of state institutions. However, if civil society is to continue to be a space of dialogue and engagement, those in the sector need to hold themselves to the highest standards of democracy, constitutionalism, and accountability. This paper has suggested that in order to do this, South African civil society needs mechanisms of self-regulation. These should allow for an effective complaints mechanism or industry ombud. This forum needs to handle legal and non-legal issues, such as regulatory issues and issues of power and governance, in a transparent and democratic manner.

The Constitution and an open and democratic society have had a positive impact on civil society, but to be truly transformed, it needs to be a space where the marginalised feel empowered and where accountability on all levels is pivotal.

## **BIBLIOGRAPHY**

### **International Instruments and cases:**

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, U.N.T.S., vol. 999, p. 171, articles 18, 19, 21 and 22.

OAU, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

*Nasibova v. Azerbaijan*, European Court of Human Rights, Application no.4307/04, (Judgment of 18 October 2007).

*Ramazanova and Others v. Azerbaijan*, European Court of Human Rights, Application no. 44363/02 (Judgment of 1 February 2007).

*Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, European Court of Human Rights, application no. 37083/03 (Judgment of 8 October 2009).

### **Domestic Legislation:**

Constitution of the Republic of South Africa, 1997.

In reverse chronological order:

South African Companies Act 71 of 2008.

Taxation Laws Amendment Act 5 of 2001.

National Development Agency Act 108 of 1998.

Non Profit Organisation Act 71 of 1997.

Lotteries Act 57 of 1997.

Old Companies Act of 1978.

Fundraising Act 107 of 1978.

Internal Security Act 74 of 1982.

Undesirable Organisations Act 9 of 1978.

Newspaper and Imprint Registration Act 19 of 1977.

Indemnity Act 13 of 1977.

Second General Laws Amendment Act 94 of 1974 (as amended periodically between 1974 and 1987).

Affected Organisations Act 31 of 1974.

Riotous Assemblies Amendment Act 30 of 1974.

Suppression of Communism Act 2 of 1972.

Security Intelligence and State Council Act 64 of 1972.

Public Service Amendment Act 86 of 1969.

Prohibition of Political Interference Act 51 of 1968.

Suppression of Communism Act 24 of 1967.

General Laws Amendment Act 62 of 1966.

Criminal Procedure Amendment Act (the 180 Day Detention Law) 96 of 1965.

General Laws Amendment Act 80 of 1964.

General Laws Amendment Act 37 of 1963.

Terrorism Act 83 of 1962.

General Laws Amendment Act (Sabotage Act) 76 of 1962.

Indemnity Act 61 of 1961.

Unlawful Organisations Act 34 of 1960.

Riotous Assemblies Act 17 of 1956.

Riotous Assemblies and Suppression of Communism Act 15 of 1954.

Kenyan Public Benefits Organisations Act 18 of 2013, available at <http://www.ngobureau.or.ke/Docs.aspx> accessed on 14/09/2014.

**Books, Journal Articles and Internet Sources:**

Appiagyei-Attua, Kwadwo 'Civil Society, Human Rights and Development in Africa: A Critical Analysis' available at [www.bradford.ac.uk/ssis/peace-conflict-and-development/issue-2/CivilSocietyAfrica.pdf](http://www.bradford.ac.uk/ssis/peace-conflict-and-development/issue-2/CivilSocietyAfrica.pdf) accessed on 15/09/2014.

Buttigieg, J. A. 'Gramsci on Civil Society' in *Boundary 2* Vol. 22, No. 3 (Autumn, 1995), 1–32 Chapel Hill: Duke University Press.

Churchill, S 'Self regulation key to success of new NGO law' available at <http://www.standardmedia.co.ke/?articleID=2000086203> accessed on 15/09/2014.

Civic Space Initiative, 'Civic Space Initiative: Civil Society Under Threat' available at <http://blogs.worldbank.org/publicsphere/civic-space-initiative-civil-society-under-threat> accessed on 23/09/2014.

CIVICUS, State of Civil Society Report 2014, available at <http://civicus.org/index.php/en/socs2014> accessed on 24/09/2014.

CIVICUS' 2013 Enabling Environment Index.

Draft NPO Policy Framework available at <http://www.inyathelo.org.za/special-projects/npo-policy-framework.html>.

Elone, J 'Backlash Against Democracy: The Regulation of Civil Society in Africa' in *Democracy & Society* Vol. 7, Issue 2 Georgetown University: The Centre for Democracy and Civil Society 2010.

Heywood, M 'Quo Vadis Civil Society' <http://www.dailymaverick.co.za/article/2014-08-18-analysis-quo-vadis-civil-society/#.VFtKsucu40k> accessed on 20/09/2014.

LA Times, 'Tutu Risks Treason Charge in Urging S.Africa Sanctions' available at [http://articles.latimes.com/1986-04-02/news/mn-2301\\_1\\_south-africa](http://articles.latimes.com/1986-04-02/news/mn-2301_1_south-africa) accessed on 24/09/2014.

Lewis, D. 'Civil Society in African Contexts: Reflections on the Usefulness of a Concept' in *Development and Change* 33(4): 569–586 (2002) Oxford: Blackwell Publishers.

OECD, 'The Corporate Governance and the Financial Crisis' available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/corporategovernanceandthefinancialcrisis.htm> accessed on 15/09/2014.

O’Riordan, A ‘The End of Hope: SA Civil Society’s Race to the Bottom’  
<http://sacsis.org.za/site/article/2171?frommailing=1> accessed on 25 October 2014.

Parks, M ‘S.Africa Issues Sweeping Political Ban on 18 Groups’ 25 Feb 1988 *LA Times* available at [http://articles.latimes.com/1988-02-25/news/mn-45214\\_1\\_south-africa](http://articles.latimes.com/1988-02-25/news/mn-45214_1_south-africa) accessed on 24/09/2014.

Powercube, ‘Gramsci and Hegemony’ available at  
<http://www.powercube.net/other-forms-of-power/gramsci-and-hegemony>  
accessed on 01/09/2014.

Scholte, J. A. ‘Global Civil Society: Changing the World?’ *CSGR Working Paper No. 31/99* May 1999.

Sparks, A *The Mind of South Africa*.

Stillman, P. G. ‘Hegel’s Civil Society: A Locus of Freedom’ in *Polity* Vol. 12, No. 4 (Summer, 1980), 622–646 New York: Palgrave Macmillan Journals.

TRC, *Truth and Reconciliation Commission Final Report*, Volume 4.

USAID 2012 Africa CSO Sustainability Report.

Wyngaard, R.G. ‘The South African NPO Crisis – time to join hands’ March 2013  
available at [www.nonprofitlawyer.co.za](http://www.nonprofitlawyer.co.za) accessed on 20/09/2014.