



A Fifth Estate? The Role and Power of Civil Society

1. Introduction

One of the more remarkable aspects of South Africa's experience of democracy since 1994 is the role played by civil society. Our Constitution encourages and facilitates the involvement of civil society, and the public in general, in political life; and civil society organisations¹ (CSOs) have taken full advantage of this over the years, adding richness and depth to policy discourse, the development of legislation, and the implementation of both.

In our 200th Briefing Paper, published early in 2009, we wrote:

Whatever the outcome of the 2009 general election, South Africa's democracy will continue in a state of relatively good health; far from perfect, but closer to the ideal than in most other African countries and, indeed, in a majority of the world's nations. One reason for this – and for one's confident prediction – is the concerted presence, activity and input of civil society organisations in and around the site of legislative authority and executive oversight, Parliament. The CPLO is grateful to be part of this work, and to represent the Catholic Church in the corridors of political authority.

In that spirit we look forward, and hope that you also do, to the next century of Briefing Papers.

We have now reached that next century of Briefing Papers and, despite all its well-documented failings and weaknesses, South Africa's democracy does indeed remain in fairly

good health. We are witnessing a contest for the leadership of the governing party, and this will be followed, about 18 months from now, by our fifth general election. Already at this early stage, there are murmurings that the main opposition may make significant gains and even that a re-alignment of opposition parties is possible.

The presence, activity and input of CSOs in the fields of public policy and legislation are more important than ever. And so, in this our 300th Briefing Paper, we consider the powerful role played by civil society.

2. The Estates

Conventionally, there were three political 'estates' or 'realms of state' – the First Estate was the clergy (ordained by God); the Second was the nobility (ordained, or at least confirmed in office, by the clergy); and the Third was the common people (some of whom, historically, were elevated to positions of influence by favour of the nobility, especially the monarch). This scheme survives today most clearly in Britain, where the political authority – Parliament – still consists of the 'Lords spiritual' (21 Anglican bishops), the 'Lords temporal' (hereditary and life peers) and the House of Commons.

Towards the end of the 18th century there emerged a 'Fourth Estate' – the press or, as we would term it today, the media. Although newspapers and periodicals had no direct or statutory political power, they wielded enormous influence. As the reading public grew, newspapers became a vital means of conveying news of political and legislative developments,

voicing criticism of politicians, and swaying the opinions of the citizenry. They enabled anyone who could read to follow political debates, to have their say, and to comment on government policy and legislation. The fourth estate, in other words, helped to democratise society, and became a centre of political power outside of the established institutions of government and legislature.

In recent decades organised civil society has emerged as another such centre. Whenever CSOs engage with public policy or legislative issues they provide their members, and the wider public, with an avenue and opportunity to influence these issues that goes well beyond the main institutional means of doing so – the five-yearly vote in a general election. From local civic associations and township street-committees, through large, membership-based bodies such as trade unions and student movements, specialist human rights groups and NGOs working in every imaginable social sector, to global organisations such as Amnesty International and Greenpeace, civil society has never been so strong and so vital to the promotion of democracy. It can surely now be considered the Fifth Estate.

3. Examples of Influence

When it comes to a CSO having had a direct effect in changing government policy for the better, it is hard to think of a more successful one than the **Treatment Action Campaign**. The TAC took on a government HIV/AIDS policy that combined denialism and quackery, and which was cutting short thousands of lives, and adopted a range of tactics to bring about massive change. These tactics included public demonstrations, marches and pickets; intelligent use of the media; thorough research, so that the organisation's arguments and demands could always withstand attack; and a willingness to make use of legal and constitutional remedies. It was perhaps inevitable that the government's obtuse attitude to the problem would change with the departure of President Mbeki, who was stubborn to the end on this issue, but there is no doubt that the work of the TAC made the policy change urgent and irreversible.

An equally effective civil society intervention, though aimed more at a legislative than a policy level, is that of the **Right to Know Campaign** ('R2K'), which has been mobilising against the Protection of State Information Bill. R2K has

shown the effectiveness of networking as it has provided a space for numerous other NGOs and CSOs to band together in opposing this dangerous piece of legislation. It has also demonstrated how civil society activists can work productively with members of the political establishment – in this case, members of the parliamentary committees handling the Bill – to reach shared goals. The fact that the Bill now in the final stages of its journey through Parliament is a vastly less menacing law than the one originally tabled is due in equal measure to the huge pressure that R2K managed to exert on government and to the diligence and persuasive skills of some key MPs on both sides of the house.

Sometimes a significant civil society victory is won by an individual, or a handful of committed citizens, rather than an organisation. For example, when just about everyone else had abandoned the effort to undo the damage caused by the notoriously corrupt arms deal of the late 1990s, the activist **Terry Crawford-Browne** continued hammering away, with the result that there is now a judicial commission of enquiry into the deal. (The fact that the commission has yet to show much enthusiasm for its task does not diminish Crawford-Browne's achievement; and he will no doubt not allow it to get away with a half-hearted enquiry.)

Something similar was accomplished by businessman **Hugh Glenister**, who would not accept that the government's decision to disband the relatively independent Directorate of Special Operations (the Scorpions) and replace it with the Hawks, a unit reporting directly to the police commissioner, was constitutional. Glenister made a number of submissions to the relevant parliamentary committees, and argued his case in the media, before taking the matter to law, where he was ultimately successful in the Constitutional Court.

Numerous other instances come to mind: earlier this year the **South African Litigation Centre** won a High Court judgment forcing the SA Police Service to investigate allegations of torture committed in Zimbabwe, in terms of the Rome Statute of the International Criminal Court. Likewise, **Freedom Under Law** successfully argued that the appointment of Richard Mdluli as head of crime intelligence was invalid.

These few examples are enough to show the power of civil society to bring about change; to challenge the decisions and policies of

government; and to ensure that constitutional principles and the rule of law are not violated with impunity.

But it is not only the high-profile cases that count. Every march to a municipal office to protest service-delivery; every meeting of a Community Police Forum; every submission delivered to a parliamentary portfolio committee; indeed, every initiative carried out by an NGO in such diverse fields as education, health, welfare, development, environment, the arts, human rights – the list is endless – constitutes an exercise of civil society's power. For our purposes, though, it is worth saying a word or two more about two specific areas of civil society activity.

3.1. Influencing legislation

We are fortunate to have one of the world's most open parliaments. Since 1994, a culture has developed that encourages public involvement in the crafting of laws, and CSOs have been diligent in responding to this openness. Hardly a law goes through the legislature without having been influenced to some degree by the comments and criticisms of civil society. Almost always, this leads to an improved piece of legislation, as the combined wisdom and experience of civil society is applied to the Bill in question. As importantly, the process results in a more credible law; when people and organisations have had the opportunity to contribute to the debate they are far more likely to accept the legitimacy of the final product, even if it is not perfectly to their liking.

The routine involvement of civil society in the formulation of legislation, and even its mere physical presence in parliamentary committee rooms, also has a salutary effect on MPs. It reminds those who may have forgotten that their first duty is to the electorate, the public whose representatives they are, rather than to their party bosses. The submissions of CSOs can also assist MPs in their own arguments for or against a Bill, and indeed these submissions often contain insights and expertise that would not otherwise be available to the relevant committee.

3.2. Taking the legal route

It is not always appreciated that the courts can neither initiate litigation nor adjudicate on abstract points. Someone needs to bring a real dispute before a court before the matter can be argued and pronounced upon.

There is nothing to stop opposition parties from fulfilling this role as, for example, the DA recently did in connection with the invalid appointment of Menzi Simelane as head of the National Prosecuting Authority. But political parties cannot spend all their time and resources doing this. Neither can most private citizens manage the costs and risks associated with litigation of this kind.

Accordingly, it is largely civil society groups that have 'made the Constitution work' by bringing a range of administrative, human-rights and rule-of-law disputes to court. Scores, if not hundreds, of successful court actions and applications by CSOs have focused on legislative and policy issues, while many more have dealt with failures of implementation. All of this has not only made a direct difference to the lives of millions of people, it has also helped to build up the huge body of constitutional jurisprudence that will continue to serve our interests long into the future.

4. Non-partisanship

It may seem that CSOs inevitably end up playing some sort of oppositional role *vis-à-vis* government, but this is not the case; or at least, it should not be so. The most effective CSOs are those which carefully avoid being identified with one or other political party or ideology. Indeed, as soon as a CSO aligns itself with a party it forfeits its independence and, to a greater or lesser degree, its credibility. Thus, there was a rather hollow ring to COSATU's recent refusal to invite the DA to march with it against the Gauteng toll-roads on the basis that it wanted the march to be a 'civil society' effort. As long as COSATU remains in formal alliance with the ANC it cannot claim CSO status. Any organisation that entered into a similar relationship with the DA or any other party would find itself in an equally conflicted position.

It is also worth noting that, in the only province and metropolitan municipality not governed by the ANC, CSOs have been just as active as elsewhere in the country. When the City of Cape Town refused to release an internal report on the notorious Makhaza toilet saga in 2010, the Social Justice Coalition picketed, and had to make a formal application in terms of the Promotion of Access to Information Act, before officials capitulated. More recently, a number of CSOs campaigned against the Western Cape Education Department's plans to close 27 schools in the

province. As a result, in part at least, of these protests, seven of these schools have been reprieved.

Civil society is thus in no way an enemy of government or of the state; on the contrary, it often supports legislation and policy initiatives, and co-operates on the ground in myriad ways with government departments. In addition, one has only to think of the enormous number of CSOs and NGOs active in all spheres of society, often in seemingly 'non-political' areas such as welfare and development, to realise the extent to which civil society lightens the state's burden. It is precisely because of the depth and extent of their engagement that CSOs inevitably identify the gaps and weaknesses in the state's programmes and their execution. That they do so, and then confront the state, should not be construed as an attack; it is rather a legitimate effort to ensure that the state does a better job of carrying out its constitutional duties.

5. In Whose Interests?

Some years ago a prominent cabinet minister posed a rhetorical question to some representatives of civil society: "Who elected you?" He had a valid point. In a democracy the clearest and most fundamental expression of the will of the population occurs through the formal system of elections. For this reason, duly elected parliaments and governments have an authority that can never be usurped or surpassed by other social structures; certainly not by a CSO.

The danger of 'self-appointment' is always present: the temptation of an interest group, or even a handful of individuals, to confer on itself a status equal to that of a duly-elected government. No non-elected body, no matter how many people it may represent, can claim authority on a par with that of a legitimate government. Sometimes, what purports to be a CSO speaking for one or other section of society turns out to be no more than what used to be called 'one person and a fax-machine'; today, one person and a laptop.

But the existence of some spurious CSOs does not detract from the legitimacy of the many. People organise themselves politically in various different ways, the formal structures of parties and elections being only one of them. What is required – and what is very well entrenched in South Africa – is an appropriate balance between

the roles of statutory political structures and the voluntary, spontaneous structures of ordinary people who choose to band together for the achievement of some purpose.

6. A Political Kindergarten

The great majority of South African MPs and professional politicians have a record of civil society involvement prior to their entry into formal electoral politics; trade-unions, civic associations, church organisations, women's groups, etc. It may be that some (too many?) of them appear to have cast aside the classic CSO characteristics of service and self-criticism in favour of a sense of entitlement and self-justification; but this does not negate the fact that involvement in civil society activism is a useful preparation for formal political life.

Likewise, citizens who are active in CSOs are much more likely to take politics seriously, to contribute to vibrant debate, to help mobilise voters, and generally to make the system work. They also play a valuable mediating role, through which political, legislative and policy developments can be analysed and clarified for improved understanding by citizens.

None of this is to say that the primary purpose of civil society is to be merely some sort of adjunct to 'formal' politics. Not at all; civil society pre-exists governments and party politics, and would continue to function even in the absence of such structures. Nevertheless, since it is precisely in the nature of people to band together and co-operate in the pursuit of shared goals and goods, it is also in our nature to take the step from informal to formal political involvement.

7. Conclusion

The most cursory glance at the range of civil society activism reveals that it is a growing phenomenon. In an age of expanding social communication, where people can act together almost instantaneously, and where information flows incessantly, this is to be expected, and to be welcomed. The benefits of an active civil society are self-evident.

However, to end on a worrying note, civil society in South Africa is facing a daunting challenge – it is being starved of the funds it needs to carry out its work. When CPLO started in 1997 it joined a

number of organisations already involved in dedicated parliamentary advocacy: IDASA, the Black Sash, the Human Rights Committee, the SA Council of Churches, the Legal Resources Centre. None of these groups still has a parliamentary office; the Human Rights Committee no longer exists; and many of the others have scaled down their work significantly. Hundreds of other CSOs and NGOs have also closed their doors lately, or have had to reduce staff to a minimum.

The reasons for this are well-known: foreign funding is reducing as donors perceive South Africa to be a middle-income country capable of supporting its own CSO sector; demands from 'needier' countries are being given priority; much of the financial aid previously given by bodies such as the EU to local organisations now goes directly to government; local donors, especially the corporate sector, completely fail to understand – and therefore support – the importance of civil society activism, and advocacy in particular.

In the last few months and weeks a number of high profile voices have been speaking out about

what they perceive as 'drift' and lack of leadership in the nation's affairs: former President Mbeki; Russel Loubser and Reuel Khoza in the business community; the *Economist* and the *Wall Street Journal*; and of course one local political commentator after another. By now it should be absolutely clear that South Africa will not suddenly find direction and leadership from within the governing elite alone. It is going to take a much broader effort, involving all sectors of society; after all, as someone once said, politics is too important to be left to the politicians.

Civil society has shown that it has the commitment and the skills to contribute to a solid, prosperous democratic future for South Africa. The Constitution provides the space for it to do so. All it needs is to be taken more seriously and to be given proper support.

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¹ There is much debate about what exactly is meant by 'civil society' and 'civil society organisation'. Some people exclude quasi-political bodies such as trade unions; others exclude businesses and professional bodies; some include political parties. The key consideration, it seems, is that it is the sphere of society outside of government; and that CSOs are essentially voluntary, non-governmental and non-statutory bodies that express the interests and needs of people. More on this can be found at http://en.wikipedia.org/wiki/Civil_society