

OPENING SPACES

Engagements between the State, Civil Society and Citizens

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Introduction

Twenty-two years into democracy, the Constitutional Court rules that the President violated the Constitution. A State Capture Report implicates members of the executive and a government that is constantly dragged to court. This raises the question of whether the Constitution was written as the perfect document for the perfect person. Today, its openness is the last hope for a society trying to interpret the perfect document for a very imperfect situation.

There can be no doubt that South Africa has come a long way. From trade unions that shook the hearts of citizens, to the rapid rise of a black middle-class, all seemed well in a country marred by social injustices and a discriminatory past. However the “honeymoon” didn’t last long - celebrating patriots soon became discontented citizens and rightly so, with just a select few rising from the shackles of poverty. The trade union movement slowly started to collapse with in-fighting breaking out in the Congress of South African Trade Unions (COSATU). The ruling party has had its own set of issues with breakaway parties taking away votes. Civil society is under attack, from a State that denied the AIDS epidemic to non-governmental organisations (NGOs) being accused of being ‘foreign agents.’ A lot has changed in these 22 years and all is not well; all is not going as planned and certain fundamentals have to give way or we will definitely see our weaknesses take control - that’s if they have not already done so.

This paper analyses the relationship between the State and society by examining civil society’s role in South Africa and the changes it has experienced. It examines the role of traditional NGOs and the non-profitisation of this sector; to community-based organisations (CBOs) with their unique ways of operating and the Fees Must Fall (FMF) movement that is one of a kind with its organic transformation and leadership. The role of the judiciary also comes into question as society increasingly relies on the courts to maintain a just relationship with the State. Finally, the way South Africans respond to the crisis in the country is explored. The paper does not aim

to answer questions, but is rather inquisitorial to enable the reader to reach their own conclusions and hopefully come up with possible solutions.

NGOs and CBOs

The dawning of democracy led to the transformation of civil and civic movements. Once firmly in the corner of the African National Congress (ANC), some ANC leaders now claim that it stands in opposition to the ruling party or is even working for foreign agencies.¹ Whether this is true or not is debatable but civil society has certainly become the vanguard of our Constitutional democracy. We thus have the interesting situation where this grouping is challenging the comrades with whom they sat and crafted the democratic dispensation.

With democracy secured in South Africa, international donor funding was diverted to NGOs tackling pressing issues in other parts of Africa such as Zimbabwe and to fund the struggle for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) rights in countries like Ghana and Botswana.² This resulted in many South African NGOs closing shop. However, while apartheid ended, its legacy lives on, and the sector has a crucial role to play in tackling injustice.

All was not doom and gloom, as funding did come in and the larger NGOs continued to thrive and, indeed, some new organisations emerged.³ Larger NGOs offered support to help them grow. The question arises as to how this was possible in a harsh economic climate. Some argue that one reason was the fact that prominent individuals were at the core of these organisations; their contacts ensured the survival and even growth of these NGOs. Some argued that their narrative was dominated by those already in power within the sector. It can be said that the contacts of those established individuals became the driving force behind these organisations and the organisations flourished based on who they knew and had access to at the start. Of course they had great ideas and were going to do great work, as they continue to do today, but could they have done it had they had been a group of rural people with the same idea, trying to be their own liberators just with a different face of a very different colour?

¹ Stated by Minister of State Security, David Mahlabo in Parliament during the 2016 Department of State Security Budget Vote accessed on <http://www.timeslive.co.za/politics/2016/04/27/Spy-minister-sees-enemies-everywhere>.

² R Toal '20 Foundations and Trusts that fund LGBTI Programmes' 15 May 2014 available at <https://www.fundsforngos.org/foundation-funds-for-ngos/20-foundations-trusts-fund-lgbt-programs/>

³ These organisations are not listed as this might cast doubt on their credibility.

The nonprofitisation or corporatisation of the sector, explored by authors such as Dean Spade and Dylan Rodriguez, became a problem as the sector dealt with more grass-roots issues.⁴ Spade notes that this arose due to overreliance on corporates or foundations for funding, while Rodriguez observes that the agendas of radical grassroots liberation movements in the USA in the 1960s and 1970s were compromised by reliance on such funding.⁵

I once had an argument with a director of a well-known South African NGO who said that clients should come to their offices as it was not their duty to go to clients. Although I did not win that argument that day, I did understand a new dynamic in the way some NGOs function, especially those involved in legal work. I later discovered how the narrative of a relatively poor and resource-constrained community was being told by a well-funded and prominent NGO. Interviews were held outside the courtroom on the day of trial by well-groomed lawyers and advocates that were far-removed from the realities of their clients. Does this explain why some State functionaries and others maintain that the large NGOs have hidden agendas? While there is no doubt that legal NGOs do sterling work in enabling ordinary people to access justice, there seems to be a lack of self-empowerment. Is access to justice in this fashion not just *at all*, as the simplest actor cannot access a fundamental protection? Consideration should be given to other models of access to justice such as citizens having direct access to the court as in Colombia.

CBOs and self-empowerment

Given the fact that a relatively small group of legal and social specialists represent the masses on a continuous basis, making NGOs a conduit between the State and society, is the lack of self-empowerment a barrier between the State and society? Are the roles played by civil society organisations eroding the relationship between citizens and the State⁶, or has the state reached the point where it is no longer able to communicate with citizens *directly*, making the NGO a necessity? The greater question is whether removing civil society activism, or at least limiting it, would solve the problem or exacerbate it, making South Africa, like many countries in Africa, a country where there is a complete disconnect between the State and its citizens.⁷

Community organisations are often formed by and involve people from within the community. These are often the poorest of the poor that lack formal training or education. Such

⁴ D Spade 'Normal Life' Administrative Violence, Critical Trans Politics, and the Limits of Law, 106, Duke University, 2015.

⁵ D Spade 'Normal Life' Administrative Violence, Critical Trans Politics, and the Limits of Law, 106, Duke University, 2015.

⁶ PARI 'Confrontational, Complementary, Co-operatives or Co-opted? Social Justice Organisations working with the State.'

⁷ M Bratton 'Democracy at Large' Vol 1 No 3, 2005.

organisations lack funding and resources because they do not know how and where to access support, nor are they able to sustain their projects. They also find it increasingly difficult to communicate and comply with the various processes set up by the State for citizens to air their grievances - especially given the separate jurisdictions of the different spheres of government. The only real power they have is voting every five years. It could be argued that this erodes the social contract itself as those elected to power rule for a long period with very few control mechanisms in place for the people. What happens when Parliament acts against the best interests of the people? Is there a peaceful way to revolt in such a democratic model or is violence the only answer where we have to take the State back to its core and start all over again as suggested by the 'fallist' movements?

This situation calls for organisations that have developed infrastructure and skills to assist CBOs that have not. There is lack of transfer of skills from established NGOs to those in the informal sector. This is of concern, especially given that government is apprehensive about working with NGOs. The demands of those on the ground often exceed the power of legal reform that society still believes is the answer to the many problems it faces.⁸ Is the non-profitisation of the NGO sector and its goals preventing it from empowering grassroots organisations and precluding them from becoming self-sufficient? Is there not an onus on the State to also build CBOs in order to ensure that substantive checks and balances are in place between those in power and the people on the ground? Unfortunately the State has not demonstrated any will to build this sector. This is problematic in itself as a government should never fear the people it serves and should always want them to be active citizens.

Funding issues within the Civil Society sector

The issue of funding affects big and small organisations alike and is becoming a more exclusive realm as time goes on. I was once told by a funder that they would only fund us through another organisation as they had a long history with that organisation. This perpetuates the cycle of dependency and puts the smaller organisation at the mercy of the larger one. However, larger organisations also often battle to comply with the stringent accountability standards set by funders and to cope with lengthy funding applications. It is, of course, understandable that funders would set such standards. Problems arise when the niche that the funder is looking to invest in can only be identified by a few NGOs that are then able to get a substantial piece of the proverbial pie. Without any guidance or second chances, smaller organisations battle to compete with the well-established grant units within larger organisations, and larger organisations battle to deal with the different requirements set by various funders. This

⁸ D Spade 'Normal Life' *Administrative Violence, Critical Trans Politics, and the Limits of Law*, 106, Duke University, 2015.

negatively impacts the sustainability of the sector as a whole and further perpetuates exclusivity.

Citizen desperation

The service delivery protests that led to the death of Andries Tatane together with the burning of schools in Vuwani⁹ shows the pure desperation South Africans are in. Although some may term the burning as criminal, others may note it as a solid form of resistance by attacking state owned resources directly. The fact that people are prepared to go to such extreme lengths and put their lives on the line to demand what the social contract would ordinarily allow them to access with ease, shows the state of emergency we are in and underlines the need for the State to listen and to not only act when the damage has already been done.

Fees Must Fall

The answer to how we build our society might not lie in a systematic approach or in constructed means of engagement. FMF and the various other Fallist movements are a clear example. The amount of power that a relatively unfunded and “leaderless” movement such as FMF has is truly remarkable.¹⁰ They are prepared to shut the gates of tertiary institutions and shout at heavily armed police to leave THEIR institution, as was seen at Wits. Could this be the new generation of activists we have been waiting for? The most remarkable aspect of FMF is that anyone can be a leader at any time. Some say that this leads to a turf war, and others maintain that no leadership leads to chaos. But this has been dealt with by the students themselves; people from different backgrounds, races, sexualities and political backgrounds all claim this struggle to be their own. This erodes any sense of exclusivity. Anyone is able to be a leader, *provided they support the cause*. This has empowered people who ordinarily would not have been given an opportunity to rise to the occasion. While a few have come forward as prominent leaders, they can be replaced, making no leader indispensable. The movement has also been forced to consider the role of women and queer bodies, and although difficult to raise at the start at institutions such as UCT, the presence of queer bodies taking charge made this an intersectionally-backed issue. The intersectionality of the movement is noteworthy - with various other issues coming to the forefront of a movement primarily concerned with free higher education.

⁹ Different people may argue differently regarding the real reason behind the Vuwani burning. The author submits that citizens burnt in a desperate cry to be heard.

¹⁰ Referring to FMF in 2015.

The second remarkable aspect of FMF is that the movement has little access to funding. Limited resources have been used to build and sustain it. Students have been more innovative than ever in using technology, not through a like or retweet, but through mobilisation that has been largely successful. Two lessons can be learnt here. The first is that students have mastered organic leadership and responding to the situation at hand by dealing with the *now*. The lack of funding has not deterred them in their fight for free higher education. They have allowed those most affected to lead and have even acted on behalf of outsourced workers, but have also capacitated them to fight their own battle. This mutually beneficial understanding that acts as a unifying factor is something that civil society organisations could learn from.

Divided Activism

In our society, the first move is to claim the struggle as yours and yours alone. This is extremely divisive and further compromises the political climate in which we function. While some initiatives have emerged in the past few years that most would support, activists and politicians cannot agree on how and who should claim the struggle. As an activist community, instead of coming together to support the cause, we stay away and pass judgment because white capital is involved; or because certain people's politics don't align with our own; the agenda is neoliberal; or the method is not the one you would have decided on. We need to focus on the end-goal and get off our high horses.¹¹ The fight is bigger than us all, as was apartheid, and no one person was able to win that fight - not even Mandela can claim the sole victory of that struggle. The unity we once had as a nation is fading, and at a time when disciplined unity may be our only hope, civil society should be doing more to bring people together from different walks of life, not just the constituency that one's organisation represents. Is it at all possible for these role players to display political maturity and rise above their differences in order to mobilise the masses to act with confidence?

The new role of the courts and the effects thereof

The ruling party claims that opposition parties have made the courts the battle ground on which most, if not all, political battles will be fought. This is true to a large extent. Many would support the assertion that the Executive and Parliament have failed us and are largely ineffective - especially when the ANC continuously uses its majority in Parliament to squash any attempt to make autonomous decisions and the Executive is constantly dragged to court and is

¹¹ M Heywood 'Of Trust and High Horses' Daily Maverick 3 November 2016 available at <http://www.dailymaverick.co.za/opinionista/2016-11-03-of-trust-and-high-horses/#.WCDyIS197IU>

losing cases, often with costs, costing the tax payer millions.¹² The role of the judiciary has come into question. Should it and could it continue to be used to settle political disputes, or should each arm of the State resolve its own problems? Are the courts the only hope for political parties and citizens alike, when the State is becoming more oblivious to realities on the ground? What implications does this have for activist mobilisation? Have citizens completely surrendered their power and given up on the concept of participatory democracy, leaving their fate in the hands of the courts? Could this be the reason why we see affected groups coming out in support of their legal team on the day of action yet, when there is a call for citizens to march or protest, only a hand full of often the same people take to the streets? Is society's only hope for change now in the hands of the courts and a select few judges, who we hope will always remain the vanguards of justice and the rule of law? How long can the judiciary sustain this reputation? Can we be sure that the judiciary we have today will be a moral judiciary in the future, considering the state of most judiciaries on the continent? Maybe sitting back and waiting for others may not be in our own best interest anymore?

Conclusion

The relationship between any society and the State is never a static one; as society changes, the State needs to change and not the other way round. Power corrupts and absolute power corrupts absolutely; therefore, the arms of the State must be cognisant of the responsibility that comes with power and the purpose for which such power was bestowed. The only way to strengthen a democracy is to build and strengthen our institutions, empowering our people and thereby ensuring an active participatory democracy and creating a vibrant civil society which will hold the State accountable. New models for civil society organisations need to be considered in light of the difficult political climate in South Africa in order for us to avoid George Orwell's *Animal Farm* where "all animals are equal but some animals are more equal than others."

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¹² W James 'Litigation costs health depts R388.7m in 2015' Politicsweb 9 June 2015 available at <http://www.politicsweb.co.za/politics/litigation-costs-health-depts-r3887m-in-2015--wilm>.

¹³ The author of this paper writes in his personal capacity and none of the views expressed in this paper represent that of any organisation he is associated with and may not necessary be his own personal views.