



A NATIONAL ASSESSMENT OF THE ENABLING ENVIRONMENT FOR CIVIL SOCIETY ORGANISATIONS IN SOUTH AFRICA



Johannesburg, July 2015

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All the errors and weaknesses that may be contained in this report remain the sole responsibility of the Human Rights Institute of South Africa (HURISA).

Corlett Letlojane
Executive Director, HURISA
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CHAPTER 1: INTRODUCTION

As a country, South Africa presents a set of interesting contrasts. On the one hand, it has policy and legislation that compares with the best in the world when it comes to creating an environment that can enable civil society to thrive. On the other hand, the practice that should go hand in hand with that enabling policy and legislative regime is often frustrating when the country's massive challenges of unemployment, poverty and inequality come into play. At the same time, state incapacity in critical areas such as in the registration of civil society organisations (CSOs) means that many organisations have had to operate for lengthy periods of time without formal registration thus impacting their ability to raise funds from public sources.

Declining resources from international and local sources, and a national agency initially set up with the noble intention of ensuring that the country has a vibrant, well-funded civil society, but which has been beset by a welter of bureaucratic dis-functionalities and more ominously, accusations of political interference in its funding priorities, has seen CSOs scramble to survive in an increasingly resource scarce environment. A bird's eye view of the CSO environment in South Africa shows a landscape dominated by a few, well established, well-funded and visible organisations, a relatively large number of poor, survivalist organisations and a mass of community based organisations that are strongly attuned to the problems of their communities, but which have neither the resources nor the political muscle to effect meaningful change in the lives of those they represent.

This report covers six mandatory, and one optional dimension. These dimensions, which are specified in the project's research guidelines, are considered essential to understanding the environment in which CSOs in South Africa operate. The mandatory dimensions "are viewed as fundamental to the environment for CSOs in all contexts"¹ while the optional dimension is "important and consequential."² The optional dimension was chosen after discussions and consultations with the Expert Advisory Panel (EAP) set up at the commencement of the project to provide advice and guidance throughout the research. The six mandatory dimensions are: (1) formation of CSOs; (2) operation of CSOs; (3) access to resources; (4) freedom of expression; (5) peaceful assembly; and (6) CSO-government relations. The optional dimension is CSO cooperation and coalition. Three optional dimensions namely; internet freedom, taxation and access to information were excluded as the EAP felt that they would not add further value and insight into the nature of the enabling environment for CSOs in this country.

Except for the second dimension (operation of CSOs) for which the assessment was done purely through the literature review, the remaining six dimensions were ascertained through data obtained from a combination of literature review, key informant interviews and focus group discussions. At the end of the research phase, a National Consultation was held to discuss and validate the findings. Participants in this meeting were divided into four groups to discuss the seven thematic areas, the feedback from the group discussions has been used to enrich this report.

¹ See Part 1, p2 of the document titled: "*Enabling Environment National Assessments (EENAs) Research Guide*" specifically the section headed: "*Introduction to EENAs*" This document is available on request from HURISA/CIVICUS/ICNL.

² Ibid.

A country's policy and legislative regime in so far as it relates to the formation of CSOs is critical to the existence of a strong, independent and thriving civil society sector. In South Africa, legislation has been put in place to facilitate and regulate the formal registration of non-profit entities. Consequently, CSOs may be registered as non-profit organisations under the Non-Profit Organisations Act (71 of 1997), or as non-profit companies under the Companies Act (2008) or even as non-profit trusts under the Trust Property Control Act (1988). They may also be established as voluntary associations in terms of the common law but without necessarily seeking formal registration. The existing legislation is fairly flexible in terms of who may establish a CSO (whether under the NPO Act, Companies Act or Trust Property Control Act), and the reporting requirements are not onerous. The challenge lies in the fact that the Directorate of NPOs- the entity established to register non-profit organisations under the NPO Act- is centralised, lacks the institutional capacity to sufficiently meet its statutory obligations and often takes inordinate amounts of time to process and complete an application for registration. Decentralisation of the activities of the Directorate is an important and urgent area of focus for CSOs.

CSO operations refer to the internal and external functions and relations of an organisation. There are minimal requirements regulating the way in which CSOs should operate in South Africa meaning that they are left more or less to determine their own internal organisational activities. However, registered organisations are required to file annual returns with a central authority which in the case of non-profit organisations is the Directorate of NPOs, in the case of non-profit companies it is the Companies and Intellectual Property Commission (CIPC) and in the case of trusts it is the Master of the High Court. These returns should give a snapshot of the activities of the entity in the preceding year as well as the financial status of such entity. Providing a CSO manages its operations in a reasonable manner, exercises some degree of transparency with its finances and files the annual returns as required, there is no danger at all that such CSO may be de-registered or suffer any punitive consequences from the respective directorate.

For purposes of this study, resources for CSOs have been defined to include human resources (staff, board members/board of directors) human capital (intellectual resources/intellectual capacity), buildings, financial resources and what is normally referred to as overheads or operational resources. Operational resources include rentals, office space, telephone, internet connection, utilities, salaries transport, materials, furniture and general equipment. Without resources, CSOs will not be able to function or they may be forced to scale down their operations so drastically that the impact of their work is at best non-existent. Access to resources has become the single biggest challenge for CSOs in South Africa. Funding has declined from both local and international sources leading to the closure of many once-vibrant organisations. The net result is that South Africa has a few well-resourced organisations which have the financial, administrative and intellectual capacity to carry out their operations. Many organisations and in particular community based ones are survivalist and live from hand to mouth. Declining resources has also seen a division between urban and rural CSOs with the former being better resourced and therefore having a greater ability to function, while the latter are often poor and marginalised. A report from the National NPO Database published in June 2012 on the state of South African registered non-profit organisations attests to this fact.³

Freedom of expression may be defined as "the right to seek, receive and impart information and ideas of all kinds regardless of frontiers."⁴ It is the third dimension investigated in this study. In South Africa, freedom of expression enjoys protection in section 16 of the Constitution but this right is subject to two significant limitations: firstly, the right to express oneself

³ Department of Social Development (2012). State of South African Registered Non-Profit Organisations issued in Terms of the Non-Profit Organisations Act 71 of 1997.

⁴ UN General comment No. 34, Article 19: Freedoms of opinion and expression. Human Rights Committee 102nd session, Geneva, 11-29 July 2011. Available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

does not extend to propaganda for war, incitement of imminent violence or hate speech⁵ and secondly, this right, like any other fundamental right in the Constitution, is subject to the general limitation prescribed by section 36 of the Constitution. As such, it can be limited by “a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”⁶

In theory, every person in South Africa enjoys their right to freedom of expression, in practice however, this is not the case. There are a number of laws (e.g. the National Key Points Act of 1980) which limit the right to freedom of expression in ways that some have argued, are unconstitutional. The constitutionality of this law is yet to be tested in court and so it remains valid. How well one is able to enjoy their right to express themselves also depends on factors such as their class position in the South African society. Those with the means and predominantly the suburban based part of the population can and do enjoy the right to freedom of expression. Those without the means have to battle to express themselves, and in the case of townships and rural areas, local networks of power and privilege often determine who can say what and the way they can say it. Depending on circumstances, CSOs may hold back from expressing themselves on certain issues where they are afraid of jeopardising their chances of funding from public or even private sources.

Peaceful assembly is a right that is closely associated with the right to freedom of expression and like its counterpart, it is also protected in the South African Constitution. This right is given further legislative impetus through the Regulation of Gatherings Act of 1993. While the objective of the Act is to give effect to the right to peaceful assembly and for that reason creates mechanisms to enable individuals to gather and express their views, it has become certain that the state has in many ways converted what is essentially a notification process in the Act, into a permission granting exercise. Both literature and field data analysed during this research have supported the contention that municipalities have been requesting additional documents such as permits so as to use public roads, letters of permission from the local tribal council, and acknowledgement letters from the intended recipients of a memorandum of demand. It is noteworthy that none of these documents are required by the Gatherings Act. At the same time, municipalities have been known to cancel a gathering that has already been ‘permitted’ at the last minute,

while the South African Police Service has routinely declared gatherings ‘illegal’ and dispersed protestors using water cannons, rubber bullets, stun grenades and in a number of cases, live ammunition.

There is no policy or legislation governing government-CSO relations but it is generally assumed that the constitutional injunction of a “democratic and open society”⁷ and that South Africa is a democratic state founded on the values of “human

⁵ Section 16(2) of the Constitution. In terms of section 16(2)(c) hate speech is “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

⁶ The limitation must also take into account all relevant factors including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

⁷ See preamble to the South African Constitution.

dignity, the achievement of equality and the advancement of human rights and freedoms”⁸ provides more than ample space for cooperation between government and civil society organisations. This argument is furthermore given historical legitimacy because of the support that the liberation movement received from civil society during the struggle against apartheid. The immediate post-apartheid period saw a great deal of collaboration between government and CSOs. The latter were often consulted during policy formulation and the law making process but 20 years into the country’s constitutional democracy, things have unravelled a great deal.

Many of the respondents interviewed during this research talked of lost trust, the rise in hostility towards CSOs (as well as against the government by CSOs), mutual tension and the lack of a genuine relationship between the two sides. Some respondents even accused government of using the available public funding mechanism to create ‘insider’ and ‘outsider’ organisations. Roughly, the former correspond to those organisations that are in government’s ‘good books’ and therefore receive state grants or other forms of grants, they are mainly service delivery oriented CSOs. The latter are lobbying and advocacy organisations which routinely engage and criticise government on a range of issues including proposed repressive legislation, corruption and human rights abuses. They hardly receive funding from the state.

The last dimension investigated and analysed in this study was CSO to CSO cooperation and coalition. From an initial period of great collaboration and partnerships on a wide range of issues, today, CSOs in South Africa are more likely to be found collaborating on a narrow range of issues of mutual interest. This situation is underpinned and even compounded by the lack of an umbrella body⁹ that can harness CSOs into a collective voice able to engage government, and also articulate the rights and interests of organised civil society. Competition for scarce resources has culminated in the further division of CSOs as each one tries to access for itself the ever shrinking pool of public and private funds. The rise of an NGO bureaucracy together with what some respondents have dubbed “NGO elitism” have also seen a fracturing of CSOs with many organisations unable to reach out across the civil society spectrum to collaborate on issues of common interest.

In terms of structure, this report is divided into four chapters. Chapter one is the introduction while chapter two deals with the methodology. Chapter three is the detailed part of this report, it covers the seven dimensions investigated and analysed during the study. This chapter is essentially, the report’s findings’ section. Chapter four contains the conclusion as well as suggestions for next steps for CSOs to consider if they are to improve the national enabling environment. A number of documents are also annexed to this report. They are; the key informant questionnaire, the focus group guide, the key informants list and finally, the list of focus group participants.

CHAPTER 2: METHODOLOGY

The methodology used in this study follows the guidelines laid down by CIVICUS and ICNL in its document titled “Research Guide”.¹⁰ Based on these guidelines together with the nature of the questions being investigated, it was felt that the study should adopt a qualitative research methodology. The methodology entailed three key data collection methods:

⁸ See section 1 of the South African Constitution.

⁹ The once-powerful SA NGO Coalition (SANGOCO) collapsed in the early 2000s although remnants of it still exist in provinces such as Limpopo.

¹⁰See part 2, pps 5-8 of the document headed: “Research Methodologies and Conducting the EENAs” This document is available on request from HURISA/CIVICUS/ ICNL. The EENA methodology was jointly developed by CIVICUS and ICNL as part of the Civic Space Initiative, implemented by CIVICUS and International Center for Not-for-Profit Law (ICNL) in partnership with Article 19 and World Movement for Democracy, with support of the Government of Sweden.

(1) Desktop research. The bulk of data that forms the basis of the literature review in this report was collected from online sources. These sources include policy documents, legislation, government statements, research reports, and academic and newspaper articles. A number of research reports such as the very useful USAID publication: *“CSO Sustainability Index for Sub-Saharan Africa”* (2012) and the Charities Aid Foundation Southern Africa et al’s *“Critical Perspectives on the Sustainability of the South African Civil Society Sector (Including an assessment of the National Lotteries Board (NLB) and the National Development Agency (NDA)”* (2012) were also used as they present a fairly comprehensive assessment of the challenges facing the civil society sector in South Africa.

(2) Key informant interviews. These interviews focused on the ways in which the existing laws and regulations are implemented and experienced on the ground. A total of ten key informant interviews were conducted. In identifying and selecting potential key informants, special attention was paid to the need to ensure that there was sufficient diversity in terms of the sectors that the informants came from. The informants interviewed for this study constituted CSO activists and employees, academics, government and quasi-government agencies, politicians and donors. Eight interviews were conducted face to face while two were telephonic.

Interviewers used a semi-structured questionnaire in which respondents were allowed as much leeway as possible to express their views and opinions on the themes of discussion¹¹. Each interview took approximately an hour and a half to complete. The interviews were conducted between April and May 2015. Besides manually capturing informant responses, the interviews were also recorded after prior consent had been obtained from the interviewees. The questionnaire, re-formatted for length, is attached to this report as “Annexure 1” while the list of key informants is attached to the report as “Annexure 2”.

(3) Focus group discussions. These were held as a complement to the key informant interviews and in order to tease out as much in-depth information as possible about the problems, challenges and opportunities that define the environment in which CSOs operate in South Africa. Two focus groups were held; one in Johannesburg, Gauteng Province (18 May 2015) and the other in Msiphani Village, about 50 kilometres outside of Tzaneen, in Limpopo Province (19 May 2015). The Gauteng focus group had four (4) participants while the Limpopo focus group had thirteen (13) participants. Participants were

identified through networks established by HURISA at the national and provincial levels, and included representatives from NGOs, community based organisations (CBOs), community development agencies, councillors, and provincial departments of government. Discussions typically lasted about an hour and a half. A member of the research team facilitated the discussions using a discussion schedule while another member took notes. The discussions were also recorded after prior consent had been obtained from the participants. The discussion guide is attached to this report as “Annexure 3” while the list of focus group participants is attached to the report as “Annexure 4”. Data obtained from the key informant interviews and the focus group discussions was compiled, coded, analysed and thereafter used to provide information on the perceptual aspects of the research themes.

¹¹ These were the seven dimensions discussed in the introduction. It should be noted however that ‘CSO Operations’ which was one of the mandatory dimensions was not covered in the interviews as sufficient information on this theme had already been obtained through the literature review. In any event, there are very minimal legal requirements governing the way CSOs should operate in South Africa.

Lastly, a word needs to be said about the field research instruments i.e. the semi-structured questionnaire and the focus group guide. While the literature review covered factual questions-i.e. questions that could be sufficiently answered by on-line research as well as through an analysis of legal and policy documents, the field research instruments concentrated on 'perception' questions. These are questions such as the capacity of the NPO Directorate (which is responsible for the registration of NPOs) to execute its functions efficiently, the availability of resources, the nature and adequacy of public funding, challenges associated with freedom of expression and peaceful assembly, and the nature, characteristics, challenges and opportunities evident in the relationship between government and CSOs on the one hand, and CSOs and CSOs on the other.

CHAPTER 3: THE SIX DIMENSIONS

3.1. FORMATION OF CIVIL SOCIETY ORGANISATIONS

3.1.1. Overview

Ostensibly, the legal framework surrounding the establishment of civil society organisations (CSOs) in South Africa is conducive to an enabling environment as there are minimal legal restrictions. The establishment of a CSO in South Africa is a regulated process set out under the prescripts of the Non-Profit Organisations Act of 1997 (NPO Act), with the Department of Social Development (DSD) acting as the registrar and custodian of all registered CSOs. In that regard, the formation of CSOs is a transparent and predictable process from a legal point of view, but this is not necessarily the case in practice. From the desktop research it is evident that there exists some issues between civil society and the government, and in particular DSD, in respect of the requirements and the time it takes for an organisation to be registered as a CSO.

Non-profit Organisations can choose the type of registration that is appropriate to their size and intention. There are four main legal types of Non-Profit Organisations (NPOs) each with their own unique requirements and subject to different laws and regulations. To begin with, organisations can apply for registration as non-profit organisations under the NPO Act. They may also be established as trusts in accordance with the Trust Property Control Act of 1988. Additionally, organisations may apply for incorporation as non-profit companies under Schedule One of the new Companies Act of 2008. Finally, sight must not be lost of the fact that CSOs may also be established as voluntary associations without formal registration.¹²

3.1.2. Legislation governing the establishment of CSOs

We now turn to examine the legal parameters relating to the establishment of CSOs.

(i) The Non-Profit Organisations Act, 71 of 1997

The NPO Directorate within the Department of Social Development registers organisations under the Non-Profit Organisations Act. The primary purpose of this Act is to encourage and support organisations in a wide range of the work they do by creating an enabling environment for NPOs to flourish, and setting and maintaining adequate standards of governance, accountability and transparency. The Act provides a voluntary registration facility for NPOs.¹³

This Act came into operation on 1 September 1998. It established a facility for the registration of non-profit organisations by putting in place a process that is simpler and cheaper than the processes associated

¹² Department of Social Development, www.dsd.gov.za/npo/

¹³ The full requirements pertaining to the registration of NPOs are discussed below.

with the registration of a company under section 21 of the old Companies Act¹⁴, or a Trust. In many ways, the NPO Act makes it possible for organisations that are generally constituted in terms of the common law (see above) as voluntary associations, to register with a regulatory body, and to reap the potential benefits of entering a more formalised sector. The Act also repealed much of the Fundraising Act, 107 of 1978, which had been used by the government to constrain the activities of NPOs opposed to apartheid.

As the Legal Resources Centre states, "the Act adopts a 'carrot' rather than a 'stick' approach to public accountability in that the improved standard of governance and increased accountability and transparency which voluntary registration is intended to promote, will both increase public and donor confidence in NPOs and encourage organisations to register." Experience is yet to prove whether voluntary registration is an appropriate strategy for achieving the objectives of the Act."¹⁵

(ii) Trust Property Control Act, 57 of 1988

The Trust Property Control Act makes it possible for individuals to register trusts with the Master's Office in their district. The Master's Office is an administrative structure established by the Department of Justice at the seat of every division of the High Court. The Master, who is appointed by the Minister of Justice in terms of section 2 of the Administration of Estates Act, 66 of 1965, is in charge of the administration of deceased estates, insolvent estates, property of minors and persons under curatorship.

This Trust Property Control Act places no limit on the amount of trustees in the organisation. Although highly unusual, a registered company can become a trustee in an organisation, in other words, members do not necessarily have to be 'natural persons'. Contrary to a voluntary association or a non-profit company, a trust is not an independent legal entity, in other words, it is not a legal person (except for purposes of the Income Tax Act, 58 of 1962), and therefore it cannot sue or be sued in its own name. If there is litigation against or by the trust, the trustees themselves are sued, or they have to sue in their capacity as trustees (not in their personal capacity or affecting their personal estates), whereas in the case of a voluntary association or non-profit company, the organisation itself can sue or be sued in its own name. But as in the case of companies, the trustees cannot sue or be sued in their personal capacity. It is only in exceptional circumstances that trustees, directors or governing board members may be sued in their personal capacity.

A trust's founding document (incidentally, not all trusts are non-profit organisations) is a trust deed. The trust deed along with the Trust Property Control Act and the common law lay down the rules for the operations of trusts. There is supervision over the appointment of trustees, but not really over their activities, in other words, the Master requires to be notified of changes in the structure of the organisation, but not of much else. Rules over trading and dissolution of the organisation are specified in the trust deed, but generally they follow a particular format such as that the property of the trust may not be distributed amongst the trustees upon the dissolution of the trust.

¹⁴ Before the enactment of the new Companies Act of 2008, entities could be incorporated as non-profit companies under section 21 of the old Companies Act, 61 of 1973.

³ Honey, M. Guide to the Non-Profit Organisations (NPO) Act. www.etu.org.za. Accessed 17 February 2015.

(iii) The Companies Act, 71 of 2008

Section 8(1) of the new Companies Act provides that two types of companies may be formed and incorporated under the Act, i.e. profit companies and non-profit companies. Further at section 10, the Act provides that certain aspects relating to profit companies e.g. capitalisation, securities (shares, debentures, etc), company secretaries and audit committees, and public offerings of securities, do not apply to non-profit companies. A non-profit company must have at least three directors (s66(2)(b)).

(iv) Voluntary Associations under the common law

Three or more people can agree to establish a voluntary association either by written or verbal agreement. An unregistered organisation has legal identity in terms of the common law. Generally, a voluntary association is governed by a written constitution very similar to the one used by an organisation that is registered with the Department of Social Development. Basically, the agreement must make provision for the establishment of a separate entity; in other words, the organisation exists in its own right regardless of changes in membership. The assets or liabilities of the organisation are held separately from its members.

Besides the above laws which regulate the formation of CSOs, there are a number of other statutes that impact the CSO sector to a lesser extent. These include:

(v) Friendly Societies Act, 25 of 1956

Friendly societies are non-profit organisations established to provide support during old age, minority, widowhood or illness for members or persons related to members. Unfortunately there is no recent data on the number of friendly societies in South Africa, but by December 2005, there were 194 organisations registered as friendly societies under the Act.¹⁶ Examples of friendly societies include the South African Commercial, Catering and Allied Workers' Union Benevolent Fund (the SACCAWU benevolent fund), the JB Marks Education Trust Fund and the National Mutual Aid Association of Railway, Airways and Harbour Servants (SA).¹⁷

Members of these societies are defined as any person who contributes to the society in order to obtain any benefit from the society, either for himself or for any other person.¹⁸ Friendly societies must register with the Registrar of Friendly Societies and fall under the auspices of the minister of finance. They are regulated and supervised by the Financial Services Board. An association or business cannot be registered if any of its activities falls within the objects of a pension fund organization as set out in paragraph (a)

¹⁶ Forty-third Annual Report of the Registrar of Friendly Societies (2005). Available from <https://www.fsb.co.za/Departments/retirementFund/friendlySocieties/Documents/FSAR2005.pdf>

¹⁷ Ibid.

¹⁸ Ibid.

or (b) of the definition of “pension fund organization” in section one of the Pension Funds Act, 1956;¹⁹ or (c) if in terms of its rules, each member is entitled at all times to withdraw the full amount of his or her contributions, subject to such notice as may be prescribed in its rules; or (d) if the benefits mentioned in subsection (1) are provided exclusively by way of loans which in terms of its rules must be repaid.

(vi) Income Tax Act, 58 of 1962

The purpose of the Income Tax Act is to consolidate the law relating to the taxation of incomes and donations. The section of the Act that is of concern to CSOs is section 18A, which relates to the deduction of taxes for donations to certain public benefit organisations. Under Section 30 of the Act, public benefit organisations are defined as any company formed and incorporated under section 21 of the Companies Act, 61 of 1973²⁰ or a trust or an association of persons, of which the sole object is carrying on one or more public benefit activities as defined under Schedule Nine of the Act. This scheduled lists the following activities:

1. Welfare and humanitarian;
2. Health care;
3. Land and housing;
4. Education and development;
5. Religion, belief or philosophy;
6. Cultural;
7. Conservation, environment and animal welfare;
8. Research and consumer rights;
9. Sport;
10. Providing of funds, assets or other resources; and
11. General.

There is no requirement for CSOs to register separately as public benefit organisations but after registration as a non-profit entity, an organisation may apply to the South African Revenue Service for tax exemption by virtue of its public benefit status.

(vii) Broad-Based Black Economic Empowerment Act, 53 of 2003

¹⁹ A pension fund organization is defined in the Pension Funds Act (24 of 1956) as:

(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependents of such members or former members upon the death of such members or former members; or

(b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons,

²⁰ Non-profit companies are now established under ss 11-22 (chapter 2) of the new Companies Act, 71 of 2008.

In an attempt to more meaningfully redress apartheid's historically created social and economic inequalities in South Africa, the ANC government introduced Black Economic Empowerment (BEE) in the early 2000s. In its simplest form, BEE entails providing preferential access to economic opportunities for Africans, Coloureds, Indians and Chinese (providing they lived in South Africa before 1994) citizens of the country. While the Broad-Based Black Economic Empowerment Act (BBBEE Act) itself does not directly have any implications for CSOs, it is the provisions of the Codes of Good Practice under the Act that are of concern. In particular, the revised codes (released in 2013) cut social development funding scores by 20 points (from 25 points to 5, out of a total of 105 points for the generic scorecard), and businesses which supported non-profit organisations, are now exempted from compliance.

3.1.3. A synopsis of other legal requirements for the formation of CSOs

The NPO Act of 1997 does not make any provision for who may or may not be permitted to serve as a CSO founder, however there are provisions within the Companies Act (2008-specifically sections 69 and 162) that also extend to non-profit companies that stipulate the reasons as to why a person may be ineligible or disqualified from being a director or prescribed officer of a non-profit company. The grounds upon which one can be barred are: i) having been removed from an office of trust, ii) misconduct involving dishonesty, iii) conviction, in South Africa or elsewhere, and imprisonment without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty.

The minimum number of individuals required to establish a CSO varies depending on what type of legal entity the organisation is. For example in the case of non-profit companies set up under the Companies Act, 2008, schedule 1 of the Act states that it is not mandatory for a non-profit company to have members unless its Memorandum of Incorporation provides for the same (s4(1) of Schedule 1). Such provision for members may however not be in conflict with Section 9 of the Constitution of the Republic of South Africa (which deals with unfair discrimination). On the contrary, a non-profit company must have a minimum of three directors. A trust requires only one trustee for its establishment, while there are no legal prescripts for the number of members a voluntary association must have.

To apply for registration as an NPO, an organisation completes a prescribed application form which is downloadable from the internet, and submits it to the Directorate for Non-Profit Organisations (NPO Directorate) with two copies of the organisation's founding document; i.e. a constitution for a volunteer association and copies of identity documents of the national executive committee members. The application document can be submitted to the nearest provincial office of the Department of Social Development.²¹

A written acknowledgement of having received the application is issued to the applicant upon the submission of the complete application documents. There are no minimum capitalisation requirements specified in the NPO Act but an application for registration as a CSO may be rejected if the applicant has failed to comply with the requirements as set out in detail in Section 12 of the NPO Act. This section provides that the constitution of the NPO that applies for registration must inter alia,—

(a) State the organisation's name;

²¹ See 'How to register a non-profit organisation' at <http://www.gov.za/services/register-nonprofit-organisation>

(b) State the organisation's main and ancillary objectives;

(c) State that the organisation's income and property are not distributable to its members or office-bearers, except as reasonable compensation for services rendered; and

(d) Make provision for the organisation to be a body corporate and have an identity and existence distinct from its members or office-bearers.

The director of the NPO Directorate must, in terms of section 13(3) of the Act, send the applicant a written notice, giving reasons for the decision and informing the applicant that it has one month from the date of the notice to comply with those requirements. Although it is necessary for an organisation to state in the application form its main and ancillary objectives, no restrictions have been put in place in respect of the purpose for which a CSO must adhere before its application for registration can be approved. An applicant who feels aggrieved by the decision of the director not to register the organisation as a CSO can lodge an appeal against such refusal by submitting to the Directorate for consideration by an Arbitration Tribunal the following documents:

- The application for registration;
- The notice sent to the applicant by the director in terms of section 13(3);
- Details of the organisation's response to the director's notice; and
- The director's notice and reasons for the decision which is the subject of the appeal.

Registration is valid until the NPO dissolves or voluntarily deregisters. However CSOs must submit annual audited financial statements and a narrative report covering the year's activities, achievements and challenges to the Directorate for NPOs. If they fail to do so, the Department of Social Development can de-register them if they remain non-compliant after having received notice to comply. Once deregistered, an NPO can no longer access funding from government donors, such as the National Development Agency or the National Lottery Board. However, CSOs that are de-registered due to non-compliance often simply continue to operate as if they were registered, as DSD does not inform organizations in a timely manner about their compliance status or the threat of deregistration.

Registration of an NPO is free and, according to the NPO Act, it should take about two months to process the entire registration. Immediately on receipt of the application, an acknowledgement letter is sent to the organisation; thereafter, a registration certificate follows if the application meets the requirements of the NPO Act. However this is not necessarily the case in practice as argued in the CSO Sustainability Index for Sub-Saharan Africa's Country Report on South Africa²², which stated that the registration process is slow and arduous. It often takes a CSO between six and eighteen months to get its registration approved by the relevant government department.²³

In January 2013, the minister of Social Development and the Ministerial Task Team on Non-Profit Organisations issued a joint statement in response to an outcry by the public after the NPO Directorate said it had deregistered thousands of non-compliant CSOs. The statement indicated that as at that time, there were 64 476 organisations registered with the NPO

²² USAID, 2013: The 2012 CSO Sustainability Index for Sub-Saharan Africa, p. 136.

²³ From information supplied by key informants.

Directorate, of which 23 034 had been de-registered for failure to comply with the NPO Act.²⁴ Most of the affected NPOs were registered before 2007 but had never submitted annual reports (financial and narrative) since registration. Further, the statement observed that 29 286 registered NPOs were compliant with the Act, while 35 190 were non-compliant although not de-registered.²⁵

Less than a year before the above outcry, in mid-2012, DSD had issued a discussion document on proposed amendments to the NPO Act setting out a policy framework on non-profit organization law.²⁶ The document considered the formation of non-profit organizations, ways of monitoring compliance, standards of good governance, and self-regulation and accountability. The document also suggested the establishment of a South African Non-Profit Organization Regulatory Authority (SANPORA), a tribunal, and a technical advisory committee to monitor NPO compliance with the law. SANPORA would be mandated to encourage the formation of NPOs, undertake education and raising awareness, disseminate regular information on NPOs and enforce the law. One of the far reaching proposals in respect of SANPORA was that it would have the power to sanction violations peculiar to NPOs. While the document stated that “it is the intention of the review of the current legislation to simplify registration requirements so that ordinary persons can form and register a non-profit organisation”, it also emphasised that “the mandatory provisions within the legislation that organisations should comply with must ... be retained.”²⁷

3.1.4. Incapacity, bureaucratic barriers and frustrations: Respondents’ views

While there is a feeling that the policy and legislation are not necessarily a barrier to the formation of CSOs, the majority of respondents interviewed for this project cited incapacity in the NPO Directorate, bureaucratic inefficiencies and the centralisation of the registration process as the key obstacles CSOs face when they seek to constitute themselves in a formal sense. One respondent termed the Directorate a kind of ‘net’ because one has to register in order to be able to raise funding from public sources. According to the respondent, many CSOs have had a 'survivalist experience' with the Directorate. As he puts it: “*our experience is that the Directorate is a very inefficient structure... it took us a long time to get registered.*” (Key Informant-KI 3)

The question of minimal capacity and resources in the Directorate, the lack of decentralisation of its services and the rural-urban divide came up quite frequently among respondents as key concerns impacting the ability of CSOs to register. For instance the respondent cited above pointed out that his organisation had to physically go to the NPO Directorate in Pretoria to lodge its registration documents despite the fact that the Directorate allows for the on-line submission of these documents. Furthermore, accessibility and responsiveness of the Directorate remains a challenge while for rural CSOs, they have to cope with long delays and inefficiencies as they may lack the resources necessary to make the trip to

²⁴ Joint media statement issued on 31 January 2013 by Minister Bathabile Dlamini and the Ministerial Task Team on Non-Profit Organisations (NPOs). Available at <http://www.ngopulse.org/press-release/joint-media-statement-minister-bathabile-dlamini-and-ministerial-task-team-non-profit->

²⁵ Ibid.

²⁶ Policy Framework on Nonprofit Organisations Law: Proposed Amendments to the Nonprofit Organisations Act, Act 71 of 1997; A Discussion Document. Available at www.pactsa.org.za/

²⁷ P20 of the document.

the Directorate at its head office in Pretoria. Government's failure to decentralise the registration process has added to the barriers that confront CSOs. This, the respondent feels, is evidence that government *"is not interested in supporting CSOs."*

A number of other responses support the foregoing arguments:

"It (Directorate) is definitely not sufficiently capacitated, I don't know if it's funding or staff, but my experience with it is that it's brutally ineffective. The initial registration isn't too bad but the updating of details is a problem. I know they are now provincializing their work, but my point holds- its nightmarish dealing with them." (KI 7)

"The NPO directorate has gone through its ups and downs. Legislation establishing the formation of CSOs has been in flux. Over the years, the directorate has been less efficient. The Directorate wants applicants to send all documents and not go physically to its offices. Documents often get lost, and the website has confusing information. It's much quicker to register a private company than to register an NPO. The information on the website of the Directorate is never updated, for example there are old organisations which have long ceased to exist yet they are still found on the database of the Directorate. In a nut-shell, registration is not easily accessible. Bureaucracy is a major obstacle. There are supposed to be provincial registration departments for the submission of applications but material has still to be sent to Pretoria. These long distances create the space for the loss of documents." (KI 2)

"I don't believe that it is as easily accessible or user friendly as it should be, especially if you look at NPOs in remote places and in poorer communities who do not have the resources or capacity to comply with the registration requirements or seek help if they get stuck. As it stands now, people have to liaise with Pretoria and send off the relevant documents to the NPO Directorate. For a remote NPO and poorer NPO this is prohibitive. The need for NPO assistance is greater in rural areas yet it's harder for them to access the Directorate." (KI 9)

"The registration process is designed, and is easily accessible to urban NGOs. South Africa has many associations that carry out their activities outside of the parameters of state regulation. For small (mainly rural) NGOs, the registration process is clearly not available to them. But does registration really matter? The one thing with this process is that it reinforces the two levels of association-those who register and those who don't." (KI 3)

A major rationale for the passing of legislation to regulate the registration of CSOs was that this would assist with the pursuit of, and accountability for, public funds. One respondent questioned whether this rationale still holds good and pointed out that at the time when the NPO Act was being drafted:

"Government gave some reasons why NPOs needed to be registered in this country. However, these reasons were not convincing. If public resources are given to NPOs, then there is a good reason to require them to register so that expenditure can be tracked otherwise it's problematic to require NPOs to register. The question at the time of the drafting of the NPO Act was about the deductability of tax for NPOs and also for those who donate to NPOs. What happened after that? We need to ask that question." (KI 3)

Perhaps given the nature of his work, one respondent felt that the registration process is easily accessible and not difficult. Whereas there are capacity constraints in the Directorate, as well as in the Department of Social Development generally,

his view was that this has not imposed a barrier on CSOs and that the Directorate has been working hard to decentralise its services to the provincial level. Recently, the Directorate has begun to hold a lot of information and awareness workshops to assist civil society organisations to understand both the registration process and the compliance requirements:

“We don't have adequate capacity in terms of staff because the number of NPOs has increased, especially in the past five years. So decentralising them will speed up the process and make it as efficient as possible. At the moment [at a provincial level] we assist NPOs with the registration process. We have done a lot of workshops to help people in terms of how to comply with our requirements and ran road shows in partnership with the national Department of Social Development. Our aim is to ensure that individuals know how to go about registering an NPO if they so wish, and also how they should remain compliant once registered. We try and provide different types of training to ensure that they comply with all the requirements in order to qualify for funding from the department. We do this capacity building within the department or at times we hire service providers.” (KI 8).

An interesting dimension raised by at least two respondents is the inter-relationship between the process of registering non-profit organisations on the one hand, and that of non-profit companies (NPCs), on the other. NPOs, as discussed above, are registered in terms of the NPO Act (1997), while NPCs are registered (incorporated) under the Companies Act (2008). One respondent observed that *“it's easier to register a non-profit company when compared with an NPO”* (KI 2) while for another respondent, the problem:

“... is a conceptual one. There isn't a clear model that people use when it comes to registering their organisation - i.e. is it registered as an NPO under the NPO Act or registered as a non-profit company under the Companies Act? These have legal implications based on the nature of the organisation.” (KI 7)

The National Consultation held on the 10th of June 2015 confirmed many of the findings discussed in the preceding sections. In addition, the meeting highlighted the following as major areas of frustration for CSOs when it comes to registration:

- Whereas the registration of CSOs is free, DSD tends to work with agents who use the lack of information and knowledge among applicants to exploit them by demanding huge sums of money before registering their organisations.
- Incapacity (including an ineffective filing system) in the NPO Directorate negatively affects the registration process.
- In the event of incomplete applications, organisations are made to re-start the application process all over again thus wasting time, energy and resources.
- The online registration process is dysfunctional which hampers the ability of CSOs to make use of it. When the problem of poor access to, and the lack of adequate knowledge in the use of, the internet among the rural population is added, it becomes even clearer that the online registration process is a hindrance for many CSOs.
- There is a long delay in the issuing of registration certificates. Many organisations have to wait over 5 or 6 months to receive their certificates of registration.
- De-registration of CSOs without prior information to the members is a major challenge. There is no transparency in this process and there are strong suspicions that corruption is involved. For instance officials will inform a CSO that it is being de-registered whereas the reality is that the de-registration is only an attempt to hijack the project or projects proposed by that CSO.
- Funders require CSOs to be registered before they can apply for funding. Given the long delays experienced with the registration process, many aspiring CSOs simply collapse while awaiting their registration certificates.

The meeting came up with the following specific recommendations on ways of improving the registration process:

- Satellite offices should be established to assist communities with the online registration process.

- Application forms for registration, together with the application process itself, should be in all official languages of the country.
- Applications for tax exemption should be integrated into the application process in order to simplify matters.
- Constant capacity building is required to enhance people's understanding of the registration processes.

3.2. OPERATION OF CSOs

3.2.1. Overview

Except for the reporting requirements in the NPO Act, there are no legislative provisions that prescribe the way CSOs registered as non-profit organisations should operate in South Africa. The Act requires all NPOs to submit an annual narrative report, including audited financial statements to the Directorate of NPOs. Otherwise the internal operations of an NPO are guided by what is contained in the constitution of such organisation. At the same time, non-profit companies (NPCs) registered in terms of the Companies Act (2008) file their annual returns with the Companies and Intellectual Property Commission. These essentially constitute a kind of narrative report highlighting the operations of the company in the preceding financial year as well as the audited financial statements. The governance and management operations of the company must comply with what is contained in the company's memorandum of incorporation (MOI). The operations of a non-profit trust are guided by the trust deed issued by the Master of the High Court. The basic requirement is that besides compliance with the provisions of the deed, the trust must also file annual returns with the Master.

In a nut-shell, CSOs have very limited legislative burdens that impact on their operations. They are by and large left to undertake their operations in the manner they deem fit providing such operations are in compliance with what is contained in their founding documents. However a Research Technical Reference Group commissioned by DSD in 2009-2010 came up with a comprehensive report on *Developing Good Governance Practices within the South African NPO Sector* (2010). It is unclear, however, whether the department undertook any national workshops to enlighten CSO about the findings and recommendations of this report.

3.2.2 Nature of operations

CSO operations refer to internal and external functions and relations of the organisation. Internally, CSO are guided by a commonly generated framework of operation, such as strategy, policy, operational plans, and resources. CSO operations vary depending on whether the organisation is small, medium or large. For the purpose of this section, we will focus on formalized CSOs operations. Small CSOs will generally have a different modus operandi from the medium and larger CSOs. The following modes of operation are discernible:

1. **Small Informal Organisations (SIO):** In this range include *Stokvels*²⁸, group savings clubs, faith based/religious, social clubs and funeral/burial societies amongst others. These organisations are not registered and are usually located within

²⁸ A *stokvel* may be defined as '[an informal] group savings scheme providing for mutual financial assistance as well as social and entertainment needs.' *Stokvels* take different forms depending on the purpose for which they are established e.g. there are burial *stokvels*, savings *stokvels*, *grocery stokvels* etc. *Stokvels* developed as an alternative means to the discriminatory and racialised financial and banking system under apartheid. They were and still are very popular amongst black South Africans and especially Africans. For more information, see generally <http://www.africanresponse.co.za/PressReleases/2014LatestStatsStokvelsReleased.aspx>

a place of employment, in rural villages and in townships. SIOs serve a range of civil functions such as economic sustenance activities and livelihood strategies including ceremonial functions, spiritual or ecumenical services. Decision making is on consensus and based on collective input on operations. There is a financial entity in these organisations, managed internally or via financial institutions. The organogram of such organisations usually features a treasurer, a chairperson, secretary and members. These entities could well be placed under voluntary associations which are recognised by common law.

2. **Medium sized CSOs:** While the human personnel structure might be the same, in formal small civil society organizations, the CSO is registered with a national statutory body such as the National Directorate for Non-Profit Organisations. Activities are mainly localized within communities, municipalities or district outreach levels. The formation of the NPO status is guided by the decisions undertaken through the documented process of a meeting and a constitution.
3. **Medium/Large sized CSOs:** Formal medium-sized and large CSOs will usually have a larger geographic operation and spread from provincial, national, regional and international focus. Operations for medium and large sized CSO's have had an impact on visibility of small and informal CSOs in a manner that operations have subsumed activities of such, are better resourced in social capital, financial resources and physical infrastructure. Medium and large CSOs have the ability to attract funding from a range of sources and stakeholders ranging from government to national and international donors.

NPOs in South Africa have two distinctive characteristics namely: staff members and board members who are also referred to as an advisory board. Staff members are responsible for executing the day to day operations of the CSO while an advisory board might be involved in activities such as resource mobilization, strategic thinking, development of organisational policies, oversight on financial and

human resources, and recruitment processes. Acting in terms of section 6(1)(b)(1) of the NPO Act, the Department of Social Development in 2001 issued "Codes of Good Practice for South African Non-profit Organisations (NPOs)".²⁹ These Codes cover a wide range of matters relating to NPOs including governance, accountability, ethical behaviour and fundraising and resource mobilisation. The Codes provide an over-arching framework of operating principles to guide the work of NPOs including that these organisations must be responsive to the needs and welfare of the people of South Africa, that they must apply people-centred development, and that they need to promote voluntarism at all levels.³⁰

3.2.3. Public benefit status

A CSO may apply to the South African Revenue Service (SARS) to be granted the status of a 'public benefit' organisation. If approved, such organization is entitled to a broad range of fiscal benefits, including a partial income tax exemption, an exemption on donations tax, and an exemption on transfer duty on immovable property. South Africa uses a tiered regulatory approach towards public benefit status:

- The first step is for the organization to register as a non-profit organization in terms of the NPO Act or the Companies Act. It may also register as a non-profit trust in terms of the Trust Property Control Act. In its

²⁹ A copy of this document is obtainable from https://www.westerncape.gov.za/other/2010/4/good_practice.pdf

³⁰ See pps 8-9 of the Codes.

constitution, memorandum of incorporation or trust deed, the organization must state that its income and property are not distributable to its members or office-bearers except as reasonable compensation for services rendered.³¹

- Once registered as an NPO, non-profit company or trust, the organization may apply to SARS in terms of section 30 of the Income Tax Act (58 of 1962) to be granted the status of “public benefit organization”. Thereafter, the organization can apply to SARS in terms of section 18A for donations made to such entity to be exempted from income tax. Among other requirements, the organization's sole purpose must be to undertake one or more public benefit activities, carried out in a non-profit manner and with an altruistic or philanthropic intent. Public benefit organizations are restricted from using their resources directly or indirectly to support, advance, or oppose any political party, but they are not restricted from lobbying. An organization that has been granted a tax exemption is still required to submit its annual returns to SARS.³² In addition, such organization can only give funds to an organization that is also exempted from paying income tax.³³

The National Consultation held on 10 June identified the problem of arbitrary changes to the reporting system as an area that needs attention if CSOs are to operate efficiently. According to participants, there tends to be arbitrary changes in the reporting system and particularly in the format that CSOs need to follow while compiling their annual reports. Many times, organisations are not informed about these changes which merely goes to show that there is poor communication between the Department of Social Development and civil society. Also, when there are changes in the coordinating processes within the department, these tend not to be communicated to CSOs.

3.2.4. Bank accounts, FICA and reporting requirements

Opening a bank account has become a challenge for many non-profit organisations operating in South Africa. Community-based organisations that are established as voluntary associations have to wait for registration in terms of the NPO Act, a process that can take up to six months, before they can open a bank account. Furthermore as participants at the National Consultation pointed out, South African banks charge exorbitant fees for the maintenance and operation of bank accounts which severely limits the ability of many organisations to operate such accounts. With the objective of combating money laundering, the financing of terrorist activities and organised crime, government passed the Financial Intelligence Centre Act, 38 of 2001 (FICA), which requires ‘accountable institutions’ (e.g. banks, estate agents, attorneys, etc) to establish the identity of persons (natural and juristic) with who they enter into financial transactions. These institutions must also keep a record of the business relationships and transactions relating to their clients.

On 1 December 2010, the Financial Intelligence Centre Amendment Act of 2008 came into operation.³⁴ This amendment Act introduced some changes that are of critical importance to non-profit trusts. The new amendments require accountable institutions to, amongst other things, register with the Financial Intelligence Centre (Centre) and notify the Centre of any changes to their registration details. The Centre is empowered to issue directives to ensure monitoring and compliance with FICA. Supervisory bodies which are listed in schedule 2 of the Act include the Financial Services Board, the Estate Agents Board and the Law Society of South Africa. In terms of section 45 of the Act, these bodies are responsible for supervising compliance by accountable institutions with the Act, and they may investigate any matter and take steps within the scope of their powers, that they deem appropriate.

³¹ See e.g. Section 12(2)(c) of the NPO Act.

³² Information obtained from the Income Tax Act (1962), and also from a document titled “Public Benefit Organisations and Income Tax Exemption: Frequently Asked Questions”- issued by SARS.

³³ Ibid.

³⁴ Available at http://www.saflii.org/za/legis/num_act/ficaa2008323.pdf

Accountable institutions that fail to register with or provide information to the Centre are guilty of an offence and may, upon conviction, be liable to a fine of up to R100m (\$13.3m) or a maximum of 15 years' imprisonment. Non-profit trusts, as accountable institutions, were required to register with the Centre as at the end of February 2011. On 1 March 2011, the Centre issued a statement urging institutions that had not yet registered to do so as soon as possible.

3.2.5 Policy and legislative review

In August 2012, in Johannesburg, a historic summit was held involving a wide range of NPOs and the government. This summit, which was attended by leaders of NPOs, provincial ministers of social development, the national minister of social development and, on the second day, the president of South Africa, provided a platform for engagement and for the forging of relations between government and

CSO's. The summit endeavoured to identify opportunities for supporting the non-profit sector to ensure its sustainability, it also sought to identify and explore mechanisms to create an enabling environment for non-profit organisations, and to provide clear directives on the review of the legal framework pertaining to the non-profit organisations' sector. One of the parallel commissions at the summit focused on exploring options for the review of the legal framework which regulates the non-profit sector. This commission made a number of useful recommendations such as that:

- The registration process should be decentralised.
- The registration process should also be shortened.
- The application and reporting forms prescribed in terms of the NPO Act should be made user-friendly.
- The application for registration should be made possible through the use of South Africa's other official languages and not just English.
- Improvements should be made at DSD generally, and in the NPO Directorate in particular so as to minimise the risk of missing documentation.
- There should be more and better communication amongst key institutions dealing with NPOs.
- A self-regulatory Council should be established for NPOs.

The last proposal sparked controversy as some delegates felt that a self-regulatory council, similar to the Charities Commission in the United Kingdom, may not be a suitable option for South Africa. During the summit, DSD circulated a policy discussion document³⁵ expressing its intentions to review the legislative framework governing the non-profit sector. This policy document states that "the objective of the review is to ensure that the new regulatory framework is appropriate to the legal and socio-economic contexts of South Africa as a constitutional democracy and an open society."³⁶

³⁵ Department of Social Development. 2012. Policy Framework on Non-Profit Organisations Law

³⁶ Ibid., Page 6

Interestingly, the document argues that it is imperative “for voluntary associations, nonprofit companies and nonprofit trusts to be subjected to the same rules regarding formation, governance and reporting requirements in order to circumvent any legal loopholes that will undermine the principles of public beneficitation and disclosure. This will further create greater equality within the nonprofit sector and will also promote public confidence in the sector.”³⁷This statement is seemingly in contradiction with a later assertion in the document that “there will therefore be a need for the regulatory framework to differentiate between the different categories of NPOs and to align standards and the regulation regiment accordingly.”³⁸

With reference to international organisations operating in South Africa, the policy document emphasizes that “the regulation of foreign organisations that have established a presence in South Africa requires special consideration. A simple process that allows foreign organisations to be registered and maintained in South Africa must be developed, while providing for recourse in cases of misconduct and winding up, particularly with respect to liabilities for debts, the duties and responsibilities of the foreign office bearers and inter group transactions. Foreign non-profit organisations must equally be subjected to the same requirements and obligations as that of any registered non-profit organisation. However, registration for foreign organisations must be compulsory considering the risk of money laundering and financing of terrorist activities.”³⁹ During March 2014, DSD published an amended version of the draft discussion document. This amended document has removed some of the draconian proposals relating to enforcement, investigation and sanctioning of NPOs.⁴⁰

3.3. ACCESS TO RESOURCES

3.3.1. Overview

Resources include human resources (staff, board members/board of directors) human capital (intellectual resources/intellectual capacity), buildings, financial resources and what is normally referred to as overheads or operational resources. Operational resources include rentals, office space, telephone, internet connection, utilities, salaries transport, materials, furniture and general equipment. Access to resources has become one of the most critical challenges confronting CSOs in South Africa today. The glory days of a well-funded civil society sector involved largely in human rights work in the 1980s and 90s are long gone. By the end of the 90s it was clear that resources-both external and internal-were drying up. The period immediately after the new millennium was the tail end of what had once been a very well-funded sector of South African society. This culminated in the global financial crisis of 2008 which has seen a massive decline in funding from international sources.

Today, CSOs have to compete with one another for a limited pool of funds. Public funds from bodies such as the National Development Agency, National Lotteries Distribution Trust Fund (NLDTF) and the various government agencies are often difficult to come by or are overlain by bureaucratic controls. In any event, most public funding is directed towards service delivery type CSOs and not advocacy organisations. Local private funding is rather minimal while international funding from locally based international funding agencies or directly from international sources requires a range of competencies including networks, fundraising skills and administrative capacity. These are attributes that most small CSOs simply do not have.

³⁷ Ibid.

³⁸ Ibid, Page 12.

³⁹ Ibid.,Page 18.

⁴⁰ See <http://www.dsd.gov.za/npo/>

An analysis of the literature and field data which appears in the following pages shows clearly that CSOs in South Africa are struggling to survive. The question then is how CSOs in the country will remain active in an environment that presents them with seemingly insurmountable obstacles.

3.3.2. Declining financial resources

Access to resources is a determinant to creating an enabling environment for civil society organisations in South Africa. A question that begs to be asked is what kind of resources do CSOs need access to? A research study done by a coalition of civil society organisations led by the Charities Aid Foundation in 2012 revealed that funding has become one of the biggest constraints facing the CSO sector in the

country.⁴¹ Since the demise of apartheid in 1994, all international donor funding has been channelled to the state through government to government cooperation arrangements and civil society has had to access funding via state institutions such as the Department of Health and the Department of Justice and Constitutional Development.

Generally, the law in South Africa does not impose any constraints on the ability of CSOs to seek and secure funding locally, regionally or internationally. On the international stage, there are no special rules put in place for CSOs to receive foreign funding. Locally, CSOs are allowed to apply for funding from any government funding scheme or agent such as the National Development Agency, the National Lottery, the Department of Health and the Department of Social Development. CSOs that are involved in causes that are viewed as unpopular from the government's perspective may ordinarily not attract significant public funding. CSOs are permitted to carry out commercial activities, either directly or through a for-profit subsidiary. They can compete for government funds based on objective criteria. Government departments and development funding agencies have, however, been criticized by CSOs for having negatively impacted the ability of CSOs to secure funding.

3.3.3. The Consumer Protection Act

The Consumer Protection Act, 61 of 2008, which came into operation on the 1st of April 2011 regulates a wide range of activities including direct marketing. Section 1 of the Act defines the term 'direct marketing' as meaning "to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of— (b) requesting the person to make a donation of any kind for any reason." Whereas the Act applies to transactions in goods and services occurring in the Republic of South Africa⁴², it is arguable that an activity in which an individual or organisation seeks a

⁴¹ Charities Aid Foundation, Southern Africa et al, (2102). Critical Perspectives Sustainability of the on South African Civil Society Sector (Including an assessment of the National Lotteries Board (NLB) and the National Development Agency (NDA).

⁴² Section 5 of the Act.

donation for whatever reason, may be construed as one that falls within the ambit of the Act. Legal clarity is therefore needed in this regard.

To protect the consumer's right to privacy, the Act empowers the National Consumer Commission (the Commission) to establish a registry in which any person can register a pre-emptive block (either generally or for specific purposes) against direct marketing communication.⁴³ Regulations have been published by the Minister of Trade and Industry which also prescribe mechanisms to block direct marketing communication. There are a few important implications for CSOs soliciting donations in South Africa once the relevant provisions of the Act and the regulations are implemented.

Firstly, the Act will effectively allow individuals and legal persons to block non-profit organisations from soliciting donations by registering pre-emptive blocks. Secondly, all direct marketers, including non-profit organisations soliciting donations from the public, will have to assume that a comprehensive pre-emptive block has been registered unless confirmed otherwise by the Commission. Thirdly, all direct marketers must register with the Commission (and annually confirm their details) and apply in writing to the Commission to find out if a pre-emptive block has been registered by entities or individuals that they seek donations from. Fourthly, CSOs applying to find out about pre-emptive blocks, will in all probability have to wait some time as the Commission will be required to put in place a screening and validation process in respect of those registering as direct marketers. Pending registration, the direct marketer will not be able to obtain information on pre-emptive blocks.

3.3.4. Is it all about money? Respondents' views

It is now widely accepted, if with a few nuances here and there, that declining resources have hit the CSO sector in South Africa particularly hard. In much of the literature as well as interviews with key informants and focus group participants, the problem of limited resources was highlighted as vital to understanding the difficulties CSOs are now facing in South Africa. Some respondents painted a time-line of declining funding made up of two periods: firstly, from the mid-to-late 90s and secondly, the period immediately after the global financial crisis in 2008. The net result of these changes is that many CSOs, including some that were gigantic institutions during their time, have simply collapsed.⁴⁴ Still, most of the funding comes from international sources which as one respondent puts it, "*constitutes about 90% of all funding we have raised. There is local money available but many local funders don't see the value of the kind of work that we do.*" (KI 4)

We capture and discuss these responses below.

"There have been significant shifts to the CSO funding environment post 1994. Many funders have withdrawn from South Africa. The designation of South Africa as a middle-income country resulted in funders moving away. For instance funding for advocacy work has declined considerably. CSOs outside of welfare type work do not get much funding. While international funding has declined, there has been nothing to replace it. "In the 1990s, there was a lot of international funding. Government attitude was positive towards international funders given the international

⁴³ Section 11 of the Act.

⁴⁴ For instance the Institute for Democracy in South Africa (IDASA) which closed its doors in March 2013. Initially founded as the Institute for a Democratic Alternative in South Africa by former politicians Frederik van Zyl Slabbert and Alex Boraine in 1987, IDASA played a seminal role in facilitating talks between the then banned African National Congress movement in exile and progressive white South African politicians and academics. Post 1994, IDASA became one of the most prominent, high profile and successful NGOs in the country. For more information, please see <http://mg.co.za/article/2013-03-28-00-the-perfect-storm-that-shut-down-idasa>

support against apartheid. Reliance on government funding was not much given the huge amounts of money available from external sources. Things started getting bad as this funding began to dry up.” (KI 2)

“There has been declining international funding but there has been no funding at the national level outside of government.” (KI 4)

“There has been a significant reduction in the availability of funds. This is a consequence of the withdrawal of organisations like DFID and to a lesser extent the diminished involvement of the European Union among others. Atlantic Philanthropies has pulled out as well.” (KI 7)

“It’s got to do with South Africa increasingly being seen as a middle income country therefore we are no longer considered as a priority country for funding.” (Focus Group Participant, Gauteng)

“Most NPOs are in financial distress because international donor funding has dried up. More and more NPOs now rely on [government] as a result.” (KI 8)

“There has been a huge shift in funding in the recent past. Most of this shift has occurred in respect of international funding. The massive pressures that came with the 2008 financial crisis have resulted in a drastic cut in international funding. But while the foundations have probably turned around, governments have probably not. Locally, the South African government has also been affected and now runs a deficit in its budget. This means there is less money to give for CSO-type activities.” (KI 3)

While declining funding has sounded the death knell for many CSOs in the country, for one respondent, this situation has forced CSOs to become ‘innovative’. *“They have had to look at more personalised sources of funding. Also, they have been forced to change the nature of their work.” (KI 1)*. Accessing whatever is available from international sources is a difficult, cumbersome and time-consuming process. One has to be, as one respondent put it *“a big, shiny organisation to get the money”*. (KI 2). Some of the major barriers cited in respect of international funding included: (1) connections-i.e. who you know as an organisation-for instance, is there a personal connection between the organisation/leadership and international funders? (2), the size and capacity of the organisation-better capacitated CSOs have better chances of raising funding, (3) politics and ideology-some donors are more understanding while others shy away from CSOs that are too radical and (4) paternalism – some donors will simply fund what tickles their fancy.

Coming up with a ‘winnable proposal’ requires one to have good project proposal writing skills something that small, poorly resourced organisations do not have. In addition, an organisation needs to have sufficient human and administrative capacity to ensure the proper implementation of projects, financial expenditure and accountability. As a result, and as one respondent observes, the funding landscape is dominated:

“...by a group of few, well-resourced NGOs. There was shock after 2008 because international donors came under significant pressure. Despite this however, there is still substantial CSO activity in SA. The bigger and more organised CSOs have a better chance of accessing resources but the small CSOs have diminished chances. It is notable however that there are CSOs-some of them in rural areas-that will say money is not their main problem. What they need is to be linked up to other organisations.” (KI 3)

“...bigger organisations tend to monopolise the funding environment. They are seen as more desirable because they have the capacity to attract funders and donors and write up reports that smaller organisations would normally struggle with.” (KI 10)

“Donors have their own agenda. CSOs with limited resources can't show the impact of their work. Donor funding is biased towards the better resourced, mainly urban CSOs.” (KI 1)

“It depends on the organisation. Bigger organisations find it easier to access funding. There is also the issue of race. You will find that white led organisations find it easier to access funding from white donors.” (Focus Group Participant, Limpopo)

Two other respondents reinforce the above arguments by pointing out that the requirements attached to funding are oftentimes onerous and, as one respondent also argues, the NGO sector has simply become ‘elitist’.

“The requirements by some funders are prohibitive to NPOs who do not possess the requisite know how to write up proposals. Most of these NPOs are started out of necessity by people within these communities. There is also a lack of knowledge in this regard - they don't know what funders are looking for when it comes to writing up proposals.” (KI 9)

“CSOs, especially the more grass roots based ones, are excluded right from the outset. The requirements that are asked of them in terms of having a bank account, writing up proposals etc, are not appropriate given the contexts that they operate in. So the supposed beneficiaries of funds from sources like the SETAs (Sectoral Education and Training Authority)⁴⁵ don't really have access to them because they are not able to comply with the increasingly stringent demands placed on them. I can understand the importance of professionalism and accountability of CSOs when it comes to accessing funds, but if it doesn't speak to the context and what's happening in these communities then it's inappropriate.” (KI 10)

“Community based organisations are even in a worse position as funding simply does not flow down to their level. Unfortunately there is no 'iterative relationship' between the big NGOs and the CBOs at the community level. Funders have not strategically understood the essence of CBOs and their importance.” (KI 2)

⁴⁵ SETAs are established in terms of section 9 of the Skills Development Act (97 of 1998) to inter alia, develop sector skills plans, implement sector skills plans (by e.g. establishing learning programmes), and promote learning programmes. See the Act at <http://www.labour.gov.za/DOL/legislation/acts/skills-development/skills-development-act-and-amendments>.

“It depends on how one defines a CSO. Smaller CSOs such as CBOs find it extremely difficult to access funding. They are not seen as professional. When they do access resources the funding is usually given to larger NGOs. The professionalisation of NGOs is inherently elitist and exclusionary.”

The inability or failure to form coalitions among CSOs was cited by one respondent as one of the reasons why many non-governmental organisations in South Africa have collapsed. Many organisations prefer, as he says, *“to go alone when looking for funding and they become unsuccessful.”* (KI 1) Race was also cited as a barrier to accessing international funding. As the respondent put it:

“...racism also plays a major role in being able to access international funding. White involvement is critical for international donors to accept you. There is a very strong race dimension internationally.” (KI 5)

Government funding, or more appropriately the lack of it, came in for particularly harsh criticism by the majority of key informants who felt that it is in-determinate, erratic and has increasingly been politicised. We capture these responses at some length below.

“Distribution of government funding is completely unpredictable and un-transparent. It is also unaccountable.” (KI 4)

“Government does not accept CSOs operating at the grass roots level as legitimate actors. That's the reality. We need to work from that reality and need to stop pretending that we inhabit the world as it is laid out in the law and the Constitution because that's not the world we live in. Everyone knows that it's not transparent. One doesn't even have to be involved in the sector to know that. Especially with the national lottery. Everyone knows that it's usually problematic. Decisions appear to be arbitrary. Organisations don't know when they will receive funds and often it comes late. Clearly the government is increasingly hostile to independent organisations. Not just at the grass roots but at the elite public sphere too, but that doesn't mean that they are not supporting organisations. They moved away from a democratic conception of civil society to one that is about getting control of the political spectrum. It doesn't mean that money is absent, the question is on what basis it is allocated. In sum, funds are given on the basis of patronage.” (KI 6)

“Most of the advocacy work of NPOs has not been supported by government. Government mainly supports services, such as crèches and early childhood development centres. I don't think that the distribution of funding is predictable. In fact, the framework needs to be reviewed in terms of what they do fund, for example they don't fund salaries but they will fund meals for children, but how is that sustainable?” (KI 9)

“The distribution of government funds is not predictable or transparent. It's erratic and there is no consistency. It's about patronage and increasingly about votes at the local level and political allegiances. This is very prevalent.”

Government funding has decreased in the last decade. At the same time, government is very wary of an independent civil society that can hold it to account. That is why you will not see government supporting the various struggles and needs on the ground.” (KI 10)

“Government funding for CSOs has either decreased or remained static, it has not increased over the last decade or so. Over the last 20 years, government has consistently narrowed down the base for funding. Its funding is also intermittent. It has created an insider and outsider bias. We have seen government develop an attitude of intolerance. To get government funding, it depends on where you are, e.g. if you are a service delivery CSO, you would obviously have a different perspective. Government wants to and treats CSOs as service providers. It is deliberately selective. What is clear is that there has been politicisation of government funding.” (KI 1)

“Government is not funding policy work. From its perspective, CSOs should be an extension of the state, CSOs are simply too unpatriotic hence the little support to CSOs through public funds. Government looks at civil society as 'un-civil' and as a sector which refuses to amplify its (government's) agenda. Available funding covers only a narrow range of activities. The question we should ask is why there is no funding partnership model between government and civil society. The narrow view adopted by government is that it was the ANC that liberated South Africa.” (KI 2)

“We have seen a rise in government hostility towards social change NGOs and a desire to control and dominate those it subcontracts to provide services on its behalf. I don't think there is a policy framework that seeks to encourage a vibrant and dynamic civil society. So mobilisation of resources for CSOs is the last thing on their (government's) mind.” (KI 7)

A focus group participant suggested that some CSOs may refuse to accept funding from government as they do not want to lose their independence and credibility. They thus resort to international donors:

“There are a lot of social change organisations that are emerging in this country. At the same time, you have organisations that are there to encourage change within government who cannot seek funding from government because they are afraid of losing their credibility and independence. As a result, such social change organisations will find it difficult to access funding internally and the challenge then becomes that they must conform to needs of international organisations.” (Gauteng)

There needs to be a great degree of introspection by CSOs about their nature, role, and objectives in South Africa. At least this is the view of one respondent who felt that the CSO sector is strongly segmented between the well-off NGOs and the poor, often black-led and overwhelmingly black-membership based CBOs. He argued that mainstream NGOs have become professionalised institutions managed by the middle class. They lack democratic legitimacy:

“Grass roots organisations do not benefit. They are often not accepted as legitimate actors. Funding is massively biased to elite actors and middle class actors, and people from grass roots organisations tend to only get support when they are under some sort of control of middle class NGOs. There's a complicity there with that sort of exclusion and it's really very important that we don't do that. In ordinary discourse, when people talk about civil society they are talking about professionalised organisations managed by the middle class. Until people acknowledge that the term 'civil society' includes everyone, we are complicit in this highly exclusionary concept of what is legitimate in our political sphere. (KI 6)

There were mixed reactions to the question whether South Africa's legal and policy framework is an enabler or an obstacle to accessing resources by CSOs. For one respondent (KI 2), the country's legal and policy framework is much better compared to other countries like Zimbabwe and Ethiopia. Policy and legislation are therefore not the obstacle, it is their implementation that is a problem. Unfortunately

for CSOs, funding of CSOs is not a priority for government. This is the reason why so many organisations are struggling for money. For another respondent (KI 9), the legal framework is especially 'convoluted'. The NPO Act has not really benefited NPOs in terms of how they deal with the government at large and there is still a lot of uncertainty for NPOs when it comes to accessing funding from the state.

While the policy and legislative framework has good intentions, it has been, in the words of one respondent "*particularly ineffective in mobilising resources for local CSOs.*" The respondent goes on to argue that the funding model for CSOs as established by the National Development Agency (NDA) (which focuses on non-profit status, registration and compliance with registration requirements among other things) creates potential for dependency. The far more powerful and better mechanism would have been to change the tax regime as this would have enabled more individuals to give funding and also more CSOs to enjoy tax exemptions. A more critical perspective is provided by another respondent (KI 1) who feels that the current policy and legal framework is designed to serve a political purpose. "*It is not designed to serve civil society*", he observes, "*it is politicised and it fosters political patriarchy. It is designed to ensure that CSOs are service delivery agents. The service becomes de-linked from the reality.*"

Respondents were also asked to express their views on South Africa's philanthropic tradition, whether it exists and if it does, how effective it is as a source of funding for CSOs. Unsurprisingly, there was a mixed response to this question, but also criticism that there is no proper philanthropy as understood and seen in the western world. For some respondents, South Africa has a fairly well-developed philanthropic tradition, the set back is that this tradition is not supported by the existing policy and legal framework. One respondent termed South Africa's philanthropy 'the philanthropy of liberal guilt', while another one felt that the philanthropic tradition is new although it has potential for growth.

For another respondent, philanthropy is all about a good image, corporate social responsibility type of giving that has everything to do with the 'giver' and nothing to do with the 'recipient'.

We consider these responses below.

There is a strong philanthropic tradition in this country. The Nedbank Giving Report points out that people put their money into animals, children, and the aged, but they aren't too interested in putting their money into other sectors. It's very selective and people are afraid to put their money into things that are riskier and innovative. But it certainly isn't encouraged by a regulatory and legislative framework that seeks to promote that sort of thing." KI 7

"There has been a philanthropic tradition in South Africa for a long time. The struggle against apartheid also sparked much of the philanthropic tradition as those with money and were opposed to apartheid were able to find an avenue to fight the regime by giving to CSOs involved in human rights and other work. If we are to encourage philanthropy, we need to reform our taxation regime. Individual donations are not a common thing and it's very unusual anywhere

for an individual to give funding. The majority of philanthropists in South Africa are business people but the sad truth is that funding is not their core thing. There is considerable funding in the form of Corporate Social Investment. Corporate funding is however an uneven source of funds.” (KI 3)

“Philanthropy in South Africa is a sort of new concept. Our attitude towards philanthropy is limited to family type set-ups. Our kind of philanthropy is different to the philanthropy in the northern hemisphere. While there is a philanthropic tradition in South Africa, it is different from the one in the North. What is needed is support for the kind of philanthropy that can promote/support the CBO layer. Growth of philanthropy is something that can be done. Recently, we have seen an emerging tradition of young (largely white) philanthropists such as the Raith and Bertha foundations. We need to see more of these organisations and also black philanthropists e.g. the Motsepe Foundation. What discourages philanthropy in SA is that it is still seen as a limited tradition. There is need to support philanthropy as a social responsibility with a social value.” (KI 2)

“Philanthropy in South Africa is not worse than elsewhere. The vast majority of people with means don't give a damn. South Africa's rich class generally doesn't care. There is no systematic setting up of foundations of philanthropy. The philanthropic tradition is minimal. It is very much the philanthropy of liberal guilt. Philanthropy in SA is discouraged by a number of traditions: (1) the historic division in class, race, etc. there is no political organisation that has attempted to bring the organisations together (2) Most philanthropy in other countries (as opposed to SA) comes from wealthy individuals and socially sensitised politics. Individual donations are not widespread. Whatever is there comes from individuals themselves-and there is not much money that comes from this source. Corporations do regularly donate to philanthropy but they do that as part of their corporate social investments, to make them look good. It's self-serving. Since Marikana, mining companies in particular are being forced to give money for social activities.” (KI 1)

“There is no real philanthropic tradition in South Africa. What we have is only a few maverick individuals.” (KI 4)

“I don't think there is a philanthropic tradition in this country. If there is, it is very minimal, and is mostly done by people who want to build their names. At the same time, I would say that corruption discourages philanthropy.” (KI 5)

“There exists no philanthropic impulse in the country and the reason for it has to do with the overall framework that I have been trying to get other groups to come to grips with, and that is that we're are living in an environment that encourages individualism and competitiveness that sees development in terms of the whole trickle model which has failed.” (KI 10)

“The problem with corporate social responsibility (CSI) is that it does not really support the full range of activities because often, CSI is just an extension of business' marketing campaigns that tend to promote the image of a particular company. Similarly, you don't have the kind of foundations of philanthropies that would support progressive organisations. You have a sort of kind of 'charity work'. There's no push. In terms of the policy framework and in terms of the

taxation, there's no encouragement beyond corporate social responsibility. There's no urgency or will to encourage people to help fund CSOs. (Ditto)

Civil society organisations remain locked in what the National Consultation on 10 June characterised as “*an unhealthy mutual competition for the limited or scarce resources within the country – especially with the drastic reduction in overseas funding for CSOs.*” As the participants at this consultation argued, it is imperative for CSOs to find better ways of marketing themselves independently of government, and also of financing their initiatives and programmes. One such mechanism is to lobby government to impose a special tax on mineral resources and the revenue collected from this tax should then be distributed to CSOs. At an operational level, CSOs should be given training to capacitate them in the areas of proposal writing, bookkeeping, administration and good governance.

Similarly, there is an urgent need for CSOs to lobby and mobilise for the simplification of public and private funding application processes. For instance the funding criteria used by DSD is uncertain leading many service-oriented CSOs to not know how to go about applying for funding. The same could be said of many other government departments. Still, there is a problem in the way government drives the funding agenda as in most instances, it is government alone that decides, without consultation with civil society, which areas of work it wants to fund. Such areas may not necessarily be the most important, or useful, or the neediest for communities. Consequently, organisations that seek to get funded must streamline their focus to the goals set by government in order to secure funding.

3.4. FREEDOM OF EXPRESSION

3.4.1. Overview

Freedom of expression is guaranteed in the Bill of Rights under Section 16 (1) of the South African Constitution. This right extends to:

- a) Freedom of the press and other media;
- b) Freedom to receive or impart information or ideas;
- c) Freedom of artistic creativity; and
- d) Academic freedom and freedom of scientific research.

However, under section 16(2) of the Constitution, the right to freedom of expression does not extend to:

- a) Propaganda for war;
- b) Incitement of imminent violence; or
- c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Besides section 16, section 32 of the Constitution provides that everyone has the right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights in order to foster a culture of transparency and accountability in public and private bodies. In 2000, parliament passed the Promotion of Access to Information Act, (2 of 2000) to give effect to section 32 of the Constitution.

The challenge for South African CSOs relates to the practical application of the right to freedom of expression, rather than the policy and legislative framework that exists in the country. It needs to be mentioned however that there are a number of laws, mostly a hangover from the apartheid period, still in the country's statute book which negatively affect the right to

freedom of expression. These include the National Key Points Act (1980) and certain sections of the Criminal Procedure Act (1977). Legislation such as the Promotion of Equality and Prohibition of Unfair Discrimination Act (2000) contains sections that impermissibly limit the broad reach of section 16 of the Constitution, but this limitation is yet to be tested in court and as such remains valid. Lastly, proposed legislation such as the Protection of State Information Bill ("Secrecy Bill") stands to undo many of the gains on freedom of expression in the post-apartheid period, and which civil society has been vehemently opposed it. It remains disconcerting that government has refused to shelve this proposed legislation despite stringent opposition by CSOs, opposition political parties, the labour movement and the religious sector.

Analysis of data collected during the field interviews reveals interesting dynamics including the fact that while the Constitution and the law are broadly supportive of each individual's right and freedom to express themselves, the manifestation of this right in practice depends on a whole range of factors including, as one respondent has put it, 'the class position of a person'. This respondent goes on to talk about "the two South Africas", the South Africa of the suburbs and the South Africa of the townships. In the former, there are no barriers except self-imposed ones while in the latter, the right to freedom of expression hardly exists.

3.4.2. International treaties ratified by SA on the right to freedom of expression

South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR)⁴⁶ which commits parties to respect the civil and political rights of individuals, including the right to freedom of expression. South Africa has also ratified the African Charter on Human and People's Rights⁴⁷, where Article 9 deals specifically with freedom of information and expression. South Africa is also a state party to the Southern African Development Community (SADC) Protocol on Culture, Information and Sport which entered into force in 2006.⁴⁸

Section 2 of the Protocol deals specifically with the promotion of access to information by encouraging cooperation within the region to facilitate the free flow of information. This Protocol seeks to accomplish its objectives by encouraging the harmonisation of information policies, increasing information availability, strengthening media freedom, establishing a media code of ethics and developing information infrastructure. Concerns have however been expressed by organisations such as the Media Institute of Southern Africa (MISA) and the Freedom of Expression Institute (FXI) around section 22 of the Protocol which calls for the establishment of an accreditation system for media practitioners in the region. The two institutions have cautioned that such a proposal, if adopted, would lead to the control by the state of media practitioners and hence impact severely on media freedom and freedom of expression.⁴⁹

3.4.3. Limitations on the right to freedom of expression

Limitations to freedom of expression are provided for in section 16(2) of the Constitution and have been discussed above. Despite the fact however that freedom of expression is constitutionally protected, there is still contentious legislation that,

⁴⁶ Adopted by General Assembly through resolution 2200A (XXI) on 16 December 1966. It entered into force about 10 years later on 23 March 1976. Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁴⁷ Adopted on 27 June 1981 in Banjul, Gambia, and entered into force on 21 October 1986. Available at <http://www.achpr.org/instruments/achpr/>

⁴⁸ Available at <http://www.sadc.int/about-sadc/overview/sa-protocols/>

⁴⁹ See information on the websites of the FXI and MISA- www.fxioa.org.za; www.misa.org.

in practice, may be inconsistent with section 16 of the Constitution. Some of the most notable pieces of legislation in this regard include the National Key Points Act, (1980), the Criminal Procedure Act (1977), the Defence Act (2002), the Protection of State Information Bill (2010) and the Promotion of Equality and Prohibition of Unfair Discrimination Act, (2000). We discuss these statutes below.

(i) National Key Points Act, 102 of 1980

Under section 10 of the National Key Points Act, it is a criminal offence for any person to divulge information about an area designated as a national key point that may compromise the security of such point. However, the Act itself does not make provisions for the minister of defence to classify which areas have been designated as national key points. Persons found guilty of contravening the Act could be fined R10 000 or be imprisoned for up to three years, or both such fine and such imprisonment. The list of all 204 national key points in South Africa was published in January 2015 after the South African History Archive (SAHA), joined by the Right2Know Campaign, brought an application in terms of the Promotion of Access to Information Act (3 of 2000) for the state to be compelled to disclose all national key points in the country in the public interest.

(ii) Criminal Procedure Act, 51 of 1997

Section 205 of the Criminal Procedure Act stipulates that a person may, upon the request of a Director of Public Prosecutions or a public prosecutor authorized in writing by the Director of Public Prosecutions, be required to appear before a judge, regional court magistrate or magistrate to give evidence about an alleged offence. Failure or refusal to give evidence, unless the person so summoned has a 'just excuse', renders such person liable to imprisonment for a period of up to two years in terms of Section 189 (1) of the Act. Media practitioners and freedom of expression defenders have argued that section 205 imposes a 'chilling effect' on journalists as they may be summoned and compelled to disclose their confidential sources of information. Thus, Brand argues, that "faced with a Section 205 subpoena, a journalist has a choice of either honouring the obligation to keep a source confidential, and going to jail, or acting unethically and identifying the source."⁵⁰

(iii) Defence Act, 42 of 2002

Under section 104 (7) of the Defence Act, it is an offence for any person to disclose or publish any information that has been classified in terms of the Act. Any person guilty of such an offence is liable on conviction to a fine or imprisonment for a period not exceeding five years. The only saving grace is that this section is subject to the provisions of the Promotion of Access to Information Act.

(iv) Promotion of Equality and Prohibition of Unfair Discrimination Act, 4 of 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was enacted to give effect to section 9 of the Constitution which prohibits unfair discrimination. It was also aimed at protecting individuals from abuse and discrimination based on race, sex, sexual orientation, religion, disability and a variety of other characteristics. However, it has been argued in some quarters that section 10(1)(a) of the Act, is in fact inconsistent with Section 16 of the Constitution

⁵⁰ Brand, R. Between privilege and subpoena: The protection of journalists' confidential sources. *Ecquid Novi African Media Studies* 2006 27 (2): 111 – 134.

(right to freedom of expression) as its definition of hate speech is impermissibly broad.⁵¹ Interestingly, section 10 of PEPUDA does not provide an explicit definition of hate speech, what it states instead is that “no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to (a) be hurtful, (b) be harmful or to incite harm or (c) promote or propagate hatred.”⁵²

Generally, there are no time, place and manner restrictions placed on the right to freedom of expression. Providing a particular form of expression does not constitute propaganda for war, incitement of imminent violence or hate speech (advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm) then such expression will be constitutionally protected. This notwithstanding, we need to bear in mind that in terms of section 36 of the Constitution, any right in the Bill of Rights may be limited providing such limitation is done by way of a law of general application, and the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation must also take into account a number of factors such as the nature of the right set to be limited, the importance and purpose of the limitation and less restrictive means to achieve the same purpose. It is on the basis of section 36 that for instance the Constitutional court has found the common law of defamation⁵³, which is a law of general application, not to be unconstitutional.⁵⁴

Much more recently, CSOs and the public at large have expressed grave concerns about the proposed Protection of State Information Bill.⁵⁵ The Bill lists a range of objectives including the regulation of the manner in which state information may be protected, the promotion of transparency and accountability in governance while recognising that state information may be protected from disclosure in order to safeguard the national security of South Africa, and the criminalisation of espionage and activities hostile to the country.⁵⁶ One of the most contentious aspects of the Bill is its broad definition of “national security” which includes threats of force or use of force against the Republic of South Africa, terrorism, espionage, exposure of economic, scientific or technological secrets vital to the Republic, and exposure of state security matters with the intention of undermining the constitutional order of the Republic.⁵⁷

After a year of debate, this contentious Bill was passed by the National Assembly in April 2013. The then State Security Minister Siyabonga Cwele told parliament that the Bill was aimed at protecting sensitive state information and the information of ordinary people, such as marriage certificates, birth certificates and business registrations. The Bill gives the minister control over the classification of all information. The government insists that whistle-blowers would be protected and no one will be able to use the Bill to hide corruption. Opponents of the Bill including human rights and legal experts, opposition parties and civil society activities say that the Bill preferences state interests over transparency and freedom of expression.⁵⁸

⁵¹ De Vos, P, 2010. Why the hate speech provisions may be unconstitutional. www.constitutionallyspeaking.co.za, accessed 23 February 2015.

⁵² See the Act at <http://www.justice.gov.za/legislation/acts/2000-004.pdf>

⁵³ Defamation in South African law is defined as “the wrongful, intentional publication of words or behavior concerning another person which has the effect of injuring his [or her] status, good name or reputation. See Neethling, J., Potgieter, J. & Knobel J. 2010. Neethling-Potgieter-Visser Law of Delict, p331.

⁵⁴ See *Khumalo and Others v Holomisa* 2002 (5) SA 401; 2002 (8) BCLR 771.

⁵⁵ The final version of the Bill as approved by Parliament is available at http://www.r2k.org.za/wp-content/uploads/Protection-of-State-Information-Bill-POSIB_bill06D-2010.pdf

⁵⁶ Section 2 of the Bill.

⁵⁷ Section 1 of the Bill.

⁵⁸ See generally the publications and campaign of the Right2Know. Information available at <http://www.r2k.org.za/secretcy-bill/>

Analysis of the Bill by organisations such as the Right2Know has revealed that despite some concessions by the state, the Bill is still too restrictive in respect of classification and the disclosure of classified information. Dubbed the ‘Secrecy Bill’ by its opponents, the finalised version of the Bill criminalises the public for possessing information that has already been leaked, protects apartheid-era secrets, and still contains broad definitions of national security that will in all likelihood be used to suppress legitimate disclosures in the public interest. In short, the Secrecy Bill remains a clear threat to the right of everyone in South Africa to access information. After its passage by the National Assembly in April 2013, the Bill was submitted to President Jacob Zuma for consent but he instead sent it back to the National Assembly for reconsideration in September of the same year.

3.4.4. Theory vs practice: Respondents’ views

There is near unanimity amongst respondents that freedom of expression is well protected in South Africa’s Constitution and to some extent in the law, and also that most individuals and CSOs are aware of the right to express themselves. The problem, some respondents have pointed out, is that one’s ability to express oneself is mediated by aspects such as the class position of such individual, and the issues that one wants to express an opinion about. As a respondent put it:

“So far the space for free expression has been good. But there are a number of laws and others coming up that threaten this space e.g. the ‘Secrecy Bill’ (Protection of State Information Bill). The major challenge experienced is that while the laws are by and large good, the practices of state agents do a lot to hinder the ability of CSOs to express themselves.” (KI 2)

Sometimes civil society organisations will hold back from saying something as a ‘tactical’ decision, not because there are barriers to free expression. Whether this amounts to self-censorship or not is a matter for debate:

“Individuals and CSOs are indeed aware of their right to freedom of expression and I would not say that there are barriers to free expression. There is nothing that stops organisations from saying what they want to say. Sometimes CSOs will hold back from saying something but this is a tactical decision. One cannot take anything for granted.” (KI 4)

For organisations seeking funding from the state, they may censor themselves as they do not want to jeopardise their chances of getting funds. As such, it depends on what one wants and consequently, how one packages what they want to say:

“We understand the legal framework surrounding freedom of expression because of how we mobilise people. There are no problems surrounding the right to freedom of expression but it depends on how you package what you say.” (KI 5)

One respondent characterised South Africa as a country with two societies; one society in which there are no barriers to free expression and the second society where there are major limitations on what one can say, and how they can say it:

“There are two South Africas; the South Africa of the suburbs where barriers to free speech are non-existent. Whatever barriers that may exist are self-imposed, and the South Africa of the townships where there are major barriers to free speech. There is a whole network of structures that shut you up e.g. local political power brokers. You are subject to a whole set of pressures. Many individuals are of course aware of their right to freedom of

expression. The point is how that right is exercised. The cases of Andries Tatane⁵⁹ and Marikana⁶⁰ demonstrated how this right can be brutally shut up.⁶¹ In essence, we have one set of society that enjoys freedom of expression and another that does not.” (KI 3)

The state, according to one respondent (KI 1), has closed down available spaces for expression and there are a number of laws some of which are a hangover from apartheid (e.g. the National Key Points Act of 1980) and others the product of the democratic parliament (e.g. the Regulation of Interception of Communications Act of 2002) that negatively affect the right and ability of individuals to express themselves. CSO with limited resources are often unable to challenge the state for instance when their ‘applications’ to hold marches are denied as they do not have the means to go to court and call for a review of the decision of say the local municipality. With time, such entities increasingly slide down towards self-censorship. The fear of missing out on funding, unconstitutional practices by state security agencies and the way state entities such as local municipalities interpret the Regulation of Gatherings Act (2003) have all diminished the essence of free expression:

“CSOs fear to express themselves on sensitive issues because of patronage and the fear of missing out on funding. State agents are known to be quite vindictive.⁶² It’s a way of stopping individuals and organisations from freely expressing themselves. Freedom of expression is not just about talking, it’s also about action, and although we have progressive provisions for expression, in practice, this is not the case. There has also been an increase in the securitisation of society. The security services overstep their mandate constantly. Also if you look at the Regulation of Gatherings Act, it specifies that you merely need to notify the relevant metro authorities - not ask for permission. In reality, municipalities put a whole range of obstacles on the way of organisations that want to exercise their right to freedom of expression.” (KI 10)

A focus group participant sees freedom of expression as an adjunct to democratic practice but that the way people sometimes exercise this right is extremely concerning:

⁵⁹ Andries Tatane was shot dead by police during a service delivery protest in the town of Ficksburg in the Free State Province on 13 April 2011. There was a major public outcry following his killing. A number of police officers were charged with his murder but the charges were subsequently withdrawn on the basis that it was not possible to identify the actual police officers who shot him. Some information on Tatane’s death can be obtained from <http://mg.co.za/tag/andries-tatane>

⁶⁰ On 16 August 2012, Police officers shot dead 34 striking mine workers at the Lonmin Mine the small town of Marikana in the North West Province. This caused a serious national and international outcry. South African president Jacob Zuma subsequently established a judicial commission of inquiry chaired by retired Judge Ian Farlam, to investigate this incident. In its report which was handed over to the President on 31 March 2015 (but only released by the President on 25 June 2015), the commission placed the blame on the police, but more importantly, that the conduct of the National Police Commissioner General Rhia Phiyega and some other senior police officers was unsatisfactory as they had not been entirely open with commission. The commission recommended “that steps be taken in terms of section 9 of the SAPS Act to inquire into their [General Phiyega and the North West Provincial Police Commissioner Lieutenant General Zukiswa Mbombo] fitness to remain in their posts and whether they are guilty of misconduct in attempting to mislead the Commission.” See the report at <http://www.gov.za/sites/www.gov.za/files/marikana-report-1.pdf>

⁶¹ The Tatane and Marikana cases have been seen in many quarters as an expression of the heightened increase in state repression against dissent in South Africa. See e.g. http://www.dissentmagazine.org/online_articles/after-the-marikana-massacre-a-luta-continua

⁶² In April 2015, the Right2Know published a booklet titled: “Big Brother Exposed” which details cases of surveillance, intimidation and harassment of activists by South Africa’s intelligence agencies. The booklet can be downloaded at <http://bigbrother.r2k.org.za/wp-content/uploads/Big-Brother-Exposed-R2K-handbook-on-surveillance-web.pdf>.

“Some people do not know how to express themselves, they do it in the wrong way. Yes it [South Africa] is a democracy and we need to express ourselves but we do it wrong sometimes and resort to violence because we want immediate answers.” (Gauteng)

While the constitutional protection of the right to freedom of expression extends to all forms of expression except those specifically excluded by section 16 of the Constitution⁶³, individuals who have strongly expressed their views on matters such as land which the state considers sensitive have sometimes found their right to freedom of expression curtailed (see e.g. the cases of Andries Tatane and the Marikana Massacre which are discussed above). In certain cases, local power politics simply mean there is no space to express critical but sensitive views.

Furthermore, as one of the respondents points out, the way civil society frames the discourse on the right to freedom of expression is problematic as the assumption is that as long as the right is constitutionally protected, then all that remains is for individuals to enforce that right in court:

“There are parts of the country where expressing your opinion can easily get you arrested, beaten, or in some instances like KwaZulu-Natal, killed. We need to be honest and open about this. For a long time we've been pretending that what is written in the laws and the Constitution is the reality, the truth however is that it is not the reality for millions of people. Many of our people do not inhabit a democracy. It's routinely assumed by academics and other actors that when there's a problem amongst ordinary people it's because of their ignorance. For years now civil society has been framing the problem on the constructed ignorance of the people and not dealing with the fact that they are not living in a democratic society.” (KI 6)

At the same time, civil society organisations need to understand that to be genuine representatives of the voice of the poor, they have to be located where the poor are, not in 'air-conditioned offices' in urban areas:

“I think that it's not just the issue but it relates to the organisation and the approach to the issue. If you're talking about land and you're sitting in an air-conditioned office you are not relevant. If however you're on the ground with the people, you become the voice of the people. You need to think about how you will engage the community and embed yourself in it.” (Focus Group Participant, Limpopo)

There is insufficient use of existing legislation to protect the rights of organisations and individuals to freedom of expression. For instance CSOs have not made sufficient use of laws such as the Promotion of Access to Information Act (PAIA-2 of 2000) to demand for information from organs of state (e.g. DSD or even the police). According to participants at the National Consultation, the state has become more belligerent, often viewing CSOs as 'prying eyes':

“There are institutions such as the police departments and a number of other government departments that are quite belligerent to CSO request for information on a number of human rights concerns in the country. These institutions perceive the persistence of CSOs as 'prying' on them. Thus they try as much as possible to stifle civil society's access to pertinent information that will be useful in human rights advocacy campaigns in the country. There is thus an antagonism between government institutions and CSOs in South Africa.”

Culture is another phenomenon that often acts as a constraint on the ability of CSOs to lobby and advocate the fundamental rights and freedoms of individuals. The National Consultation argued that South Africa's patriarchal cultural system limits the ability of many individuals and organisations to express themselves freely. It is worse in the case of women as in many instances, culture perpetuates gender inequality, while structural barriers limit the ability of women to express themselves. The rural-urban divide also entrenches the dualistic system of rights enjoyment with those in the urban areas better able to enjoy their fundamental rights as compared to their counterparts in rural areas.

⁶³ See the discussion above.

3.5. PEACEFUL ASSEMBLY

3.5.1. Overview

Like its counterpart the right to freedom of expression, the right to peaceful assembly is constitutionally guaranteed⁶⁴ and given legislative effect through the Regulation of Gatherings Act (205 of 1993). Again like the right to freedom of expression, the challenge relates not to the law and policy, but to the practical application of this right. More and more people have become frustrated with the government's slow pace of transformation and taken to the streets to express their anger. Sometimes, such frustration has assumed violent turns resulting in the destruction of property and injuries to people. The unfortunate part is that the state-through the local authority- has turned what is merely a notification process as prescribed in the Gatherings Act, into a permission granting procedure.

Both the literature and field data show that local authority functionaries routinely impose all manner of obstacles on the path of those who wish to publicly express their views through gatherings and demonstrations. For instance a march may be prohibited at the eleventh hour on spurious grounds that find no sustenance in the Act⁶⁵ or unbearable conditions may be imposed on those planning to hold a demonstration thus making it impossible for them to proceed legally. Also, it has become evident that

the state has consciously targeted radical organisations (mainly social movements) and used the Gatherings Act as one of the tools to frustrate and curtail their operations.

3.5.2. The practice of peaceful assembly: International conventions, the Constitution and legislation

South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR) which at section 21 commits parties to respect the civil and political rights of individuals, including the freedom of peaceful assembly.⁶⁶ In addition, the country has ratified the African Charter on Human and People's Rights (the Banjul Charter) which also obliges states to respect the right of "every individual ... to assemble freely with others."⁶⁷ At the domestic level, peaceful assembly is guaranteed in section 17 of the Constitution which states that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. To this end, public gatherings are regulated by the Regulation of Gatherings Act, 205 of 1993 (Gatherings Act).

According to the Gatherings Act, a gathering is "any assembly, concourse or procession of more than 15 persons in or on any public road... or any other public place or premises wholly or partly open to the air."⁶⁸ The Act goes on to state that such

⁶⁴ Section 17 of the Constitution.

⁶⁵ For instance that the person or department against whom the march is being organised is not willing to receive a memorandum of demands from the marchers.

⁶⁶ See the ICCPR at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁶⁷ This right in the Charter is however subject to "necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others." It may be argued that such restrictions are a claw back on the right itself and potentially arm the state with a weapon to impermissibly attack the right in practice. See the charter at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

⁶⁸ Section 1(vi) of the Act.

gathering may be for purposes of discussing, attacking, criticising or promoting the principles or policies of any government, political party or political organisation, or for forming a pressure group, or to hand over petitions or to demonstrate in support of any views.⁶⁹ A person wishing to convene a gathering must give notice of his or her intention to do so to a responsible officer⁷⁰ no later than seven days before the gathering is held.⁷¹ The notice must contain certain information including the name, address and telephone and fax numbers of the convener, the name of the organization or branch on whose behalf the gathering is convened, the purpose of the gathering; the time, duration and date of the gathering, the place where the gathering is to be held, and the anticipated number of participants.⁷²

In the event that it is not reasonably possible to give such notice seven days prior to the gathering, the convenor must give notice at the earliest possible opportunity.⁷³ A gathering may be prohibited, by notice to the convenor, if the responsible person is notified of the gathering less than 48 hours prior to its commencement.⁷⁴

3.5.3. Limitations on the right to peaceful assembly

There are a number of limitations imposed on a gathering such as that where credible information on oath is presented to the responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the police and the traffic officers in question will not be able to contain this threat, then the responsible officer may prohibit such gathering.⁷⁵ Furthermore, no person at a gathering may by way of speech or singing incite hatred against other persons or group of persons⁷⁶, or utter words likely to encourage violence.⁷⁷ However, there is no limitation placed on who may or may not assemble based solely on their agenda or political, social, economic or any other form of orientation.

In theory, at least, there are no express limitations imposed on individuals who may want to gather and demonstrate for or against any cause. However, this is not necessarily borne out in practice, as the Act can and has been misused by local authorities in particular, to frustrate the right to individual and collective assembly. There is evidence that municipalities have requested additional documents such as permits to use public roads, letters of permission from the local tribal council,

⁶⁹ Ibid.

⁷⁰ A responsible officer is defined in the Act as "... a person appointed in terms of section 2(4) (a) as responsible officer or deputy responsible officer, and includes any person deemed in terms of section 2(4) (b) to be a responsible officer. In terms of section 2(4)(a) of the Act, "A local authority within whose area of jurisdiction a gathering is to take place or the management or executive committee of such local authority shall appoint a suitable person, and a deputy to such person, to perform the functions, exercise the powers and discharge the duties of a responsible officer in terms of this Act."

⁷¹ Section 3(1) of the Act.

⁷² Section 3(3) of the Act.

⁷³ Section 3(2) of the Act.

⁷⁴ Section 3(2) of the Act.

⁷⁵ Section 5(1) of the Act.

⁷⁶ Section 8(5) of the Act.

⁷⁷ Section 8(6) of the Act.

and acknowledgement letters from the intended recipient of any memorandum of demands⁷⁸. None of these letters are mentioned at all in the Gatherings Act and are therefore illegal requirements. Professor Jane Duncan has stated that what is often not narrated are the great efforts many communities make to have their voices heard before resorting to protests. Furthermore, Professor Duncan notes that what the South African Police Service (SAPS) refers to as “unrest-related protests” are increasing because more municipalities are manipulating the Act, which they administer, to make it more difficult to protest lawfully. In some cases, protests turn violent in response to police violence.⁷⁹

Concerns have also been raised about section 11 of the Act which deals with the liability for damage arising from gatherings and demonstrations.⁸⁰ In terms of section this section, the organisers of the protest march or demonstration could be held vicariously liable for the damage (riot damage) done by the marchers or demonstrators. This means that even if organisers of a protest march or demonstration took steps to prevent the destruction of property, the organisation may nevertheless be sued for the damages that occurred because of a riot that ensues.

In the case of *South African Transport and Allied Workers Union (SATAWU) & Others v Garvis and Others*⁸¹ the Constitutional Court had to decide whether section 11(2)⁸² of the Act, which provides a limited defence to a claim of riot damage, is ‘rational’ and whether it unjustifiably limits the right to peaceful assembly. SATAWU’s argument was that section 11(1) had a ‘chilling effect’ because an organisation was always going to be held liable for damages that occur during a march or demonstration unless it could prove that the riot was not reasonably foreseeable. In addition, the union argued that the defence provided by section 11(2) “is illusory and therefore unattainable.”⁸³ In the event, the Constitutional Court held that section 11 did not constitute an impermissible limitation of the right to peaceful assembly, the limitation was therefore not unconstitutional. The Court concluded that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

⁷⁸ Duncan, J. 2013. Inside Rustenburg’s banned protests. Daily Maverick, 7 March 2013.

⁷⁹ Duncan, J. 2014. The politics of counting protest. Mail & Guardian, 17 April 2014.

⁸⁰ A ‘demonstration’ is defined as including “any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.” One does not need to notify the authorities to hold a demonstration.

⁸¹ Available at <http://www.saflii.org/za/cases/ZACC/2012/13.pdf>.

⁸² This section states as follows: It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves-

(a) That he or it did not permit or connive at the act or omission which caused the damage in question; and
(b) That the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and

(c) That he or it took all reasonable steps within his or its power to prevent the act

or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.

⁸³ *South African Transport and Allied Workers Union (SATAWU) & Others v Garvis and Others*, at para 131.

In the wake of the *Marikana* Massacre⁸⁴, more and more municipalities as well as the local and metro police have been using spurious and illegal means of prohibiting protests. Analysis of the South African Police Service's Incident Registration Information System (IRIS) by Professor Duncan has revealed that in 2011 only 32% of protests were approved while another 39% fell into a category that was not specified. In other words, it was not clear whether such protests had been 'approved' or 'not approved'. In 2012, the number of approved protests remained steady at 33% while those not approved increased dramatically from 29% to 53%. Unspecified protests shrunk to only 14%.⁸⁵

3.5.4. 'The problem is not the law': Respondents' views

Like the right to freedom of expression, the right to peaceful assembly is constitutionally protected.⁸⁶ The problem then, as all the respondents emphasised, lies not in the law, but in the way the right to peaceful assembly is realised in practice. The state, and local authorities in particular were criticised for turning what is merely a 'consultative process' into a 'permission granting exercise' under the Regulation of Gatherings Act. A number of these responses are captured below:

"The Constitution protects the right to freedom of peaceful assembly. What we have seen however is a push back not in law, but in practice by the police and other agencies of the state (e.g. the 'granting' of permission by local authorities for gatherings). We as the [...] are in the middle of a trial of 118 women who were charged with holding an unlawful gathering. These are poor women and all they did was to hold a demonstration to demand better health care. The state is being deliberately punitive to make a point. It's pure hostility." (KI 4)

"...no they are not because they don't submit the necessary documentation and it's not handled appropriately by the regulatory authorities. I think the reason for that is that CSOs don't know what they are supposed to do and there actually isn't an appetite on the part of regulators for peaceful protests." (KI 7)

"It's not a question of ignorance, it's a question of how the state treats people. Rhodes University organised a march against xenophobia that was very peaceful, but it's very difficult for people that are poor and black to exercise this right. A few weeks ago, a group of migrants' organisations tried to organise a protest against xenophobia in Durban. They complied with all the requirements laid down in the law, they also conformed to all the extra requirements imposed by the Durban municipality such as that they provide their refugee and asylum seekers' permits, but they were still beaten up and dispersed." (KI 6)

Generally, individuals are aware of their right to peaceful assembly although once again the ability of a person or an organisation to exercise this right depends on factors such as access to information and resources:

"Individuals and CSOs are aware of their right peaceful assembly but a lot more is needed to create awareness especially around the interpretation of the Bill of Rights. The problem relates to the state and its attempts to limit the extent to which individuals and CSOs can exercise this right. Human rights education should be connected to the lived realities of individuals." (KI 2)

"At the centre of all of this is the question of access to information. Access is so sporadic that not everyone is able to get the information they need. People are aware at a blanket level, however, there is no coordination. The information is there but it is not being distributed." (KI 9)

⁸⁴ More information can be obtained from <http://marikana.mg.co.za/>. Also see the discussion under section 3.4 dealing with freedom of expression.

⁸⁵ Duncan, J. 2014. The politics of counting protest. *Mail & Guardian*, 17 April 2014.

⁸⁶ Section 17 of the Constitution of the Republic of South Africa.

“Individuals and CSOs are generally aware of their rights-mainly from practice and also the history of rights in the 1970s and 80s. Even small CSOs can resist attempts by the state to diminish this right. Individuals and CSOs are also able to practice the right to freedom of expression. They can also pro-actively claim this right. The problem is self-censorship which remains a big issue. Some CSOs will back off quickly if the state takes a tough stance.” (KI 1)

Focus group participants in both Gauteng and Limpopo supported the argument that while the law is not a barrier to the enjoyment of the right to peaceful assembly, it is in practice that a divergence emerges between those who have the means, and so are able to enjoy the right, and those who don't. The latter may encounter a slew of obstacles before they can gather to express themselves:

“You can enjoy this right as long as you master the bureaucracy. As a smaller organisation, you might not be able to organise a march unless you have a lawyer. If you're a smaller organisation you have to jump through hoops and just persist.” (Gauteng)

“It is not a big issue for us here in Limpopo but may be if we want to march we will have to go to the local municipality or to the chief's office and tell them we want to do that. But you need to have transport if you are going to march in Tzaneen or Polokwane because it is far from the village.” (Limpopo)

3.6. GOVERNMENT AND CIVIL SOCIETY RELATIONS

3.6.1. Overview

Government and civil society organisations should not work in isolation, instead, they should work collectively in the formulation and implementation of policies.⁸⁷ Civil society organisations have the awareness that for their interventions to be sustainable, they need to involve the government since most CSO programmes are project based and time bound while for government, its policies and programmes are usually long-term. Related to the foregoing is the argument that the delivery of basic services and addressing poverty is, fundamentally, the responsibility of the government and not CSOs. Civil society organisations hence only come in to augment government efforts thus heightening the need for collaboration between the two.

Like much else that defines post-apartheid South Africa, the laws and policies in place have placed a premium on good government-CSO relations, but the practice unfortunately reveals a different reality. Much of the information in this section comes from interviews with key informants and participants in focus group discussions. It shows that government and civil society (in its formal sense) have a relationship that is characterized by mutual distrust and tensions. Words used to describe this relationship include 'hostile', 'conflict-ridden', 'mixed', 'not genuine' 'complicated' and 'it depends on the issue'. If anything, there is an urgent need to look at how this relationship can be changed for the better, not necessarily to one where there is agreement and consensus on all issues, but to one that appreciates the role and necessity of a vibrant, critical and independent civil society in a democracy.

⁸⁷Consultative Dialogue between the Southern Africa Trust and Civil Society Organisations in Madagascar Hilton Hotel, Antananarivo, Madagascar 5 September 2007, sourced from http://www.southernafricatrust.org/events_02.html

3.6.2. CSOs and public participation

Both the policy and legal framework in South Africa are adequately placed to facilitate both government and CSOs relations and as such, there are good parameters for collaboration. The legal framework if implemented adequately tends to make collaboration fairly easy, and eliminates ad hoc and informal relations particularly at the lower level. The issue of CSO-government relations has not been sufficiently studied in South Africa, hence less explored and documented post 1994. The National Development Agency has attempted to profile relations between government and CSOs since its formation in 1998, however less is known about the interfacing points between the two parties.

The South African Constitution is underpinned by principles of good governance, highlighting the importance of public participation as an essential element of successful good local governance. Section 152 of the Constitution confirms a number of citizen rights and more specifically, the right of communities to be involved in local governance. Municipalities are a localised structure of government charged with implementation of social infrastructure such as water, sanitation, healthcare and roads. All these are within the parameters of interest to both government and CSOs.

Municipalities are obliged to encourage the involvement of communities and community organisations in local government. This obligation extends to the entire way in which a municipality operates and functions. The principle behind public participation is that all the stakeholders affected by a public authority's decision or actions have a right to be consulted and contribute to the making of any decision that is likely to affect them.

Municipalities are expected to create other platforms for broad community engagement. This may not be through structures but rather through *ad hoc* and spontaneous invitations to ordinary members to contribute in municipal decision-making. In this regard, municipalities may publish proposed decisions on various issues through mediums such as websites, newspapers, community radios, etc., and invite members of the public to offer their inputs. Structured forums for community involvement in municipal processes can include developers' forums, business forums and municipal sports councils.

3.6.3. A cooperative platform: The NDA and civil society

In 1998, the National Development Agency (NDA)⁸⁸ was established with the aim of promoting an appropriate and sustainable partnership between government and civil society, and to eradicate poverty and its causes. Importantly, section 4 of the NDA Act provides that the NDA must inter alia, "act as a key conduit for funding from the government... foreign governments and other national and international donors for development work to be carried out by civil society organisations."⁸⁹ The NDA must also "contribute towards building the capacity of civil society organisations to enable them

⁸⁸ Established in terms of section 2 of the National Development Agency Act, 108 of 1998.

⁸⁹ Section 4(1)(a) of the Act.

to carry out development work effectively; and create and maintain a database on civil society organisations.”⁹⁰ In addition, the NPO Act requires the National Department of Social Development to create a platform for effective partnerships between government and the non-profit sector.

3.6.4. Lost trust and the ‘insider’- ‘outsider’ paradigm: Respondents’ views

According to the respondents, the relationship between government and civil society in South Africa is ‘hostile’, ‘tense’, ‘conflictual’, ‘mixed’, ‘not genuine’ ‘complicated’ and ‘depends on the issue’. The general thread running through the above sentiments is that the relationship is not healthy, and that it is characterised by mutual suspicion and mistrust. One respondent sees this development as an outcome of ‘nostalgia’ on the part of CSOs coupled with a ‘sense of betrayal’ at the hands of the onetime liberation movement and now ruling party, the African National Congress:

“The relationship is always hostile. Radical organisations are obviously on the receiving end of government’s hostility. But one thing that is clear is that it is fashionable for some CSOs to be very anti-government and for government to be very anti-CSOs. In many respects, it depends on which part of South Africa one belongs-suburban or township. But there is also what one can call

‘the jilted lover syndrome’ There is a sentiment like ‘we used to be on the same side and now you have moved to the other side’. There is a sense of nostalgia.” (KI 3)

Hostility is informed by what a respondent defines as the gradual loss of trust by government against CSOs:

“The relationship between government and CSOs is complicated. Government misunderstands and distrusts CSOs. This loss of trust has occurred over time. It has limited the participation of CSOs in policy and legislation to the level of a mere formality. Government wants CSOs to rubber stamp its decisions. It wants them to speak on its terms.” (KI 2)

Three other respondents argue that since government has consolidated itself and limited the space for participatory democracy, civil society organisations have been pushed from the centre to the margins of decision making. Advocacy CSOs are seen as a threat while service CSOs are considered as allies creating what one respondent calls ‘the insiders’ and ‘the outsiders’:

“The relationship between government and CSOs is characterised by both conflict and paternalism. There are the insiders (soft-mainly state-funded service delivery CSOs) and the outsiders (radical-mainly advocacy CSOs). Even communication between government & CSOs reflects this bifurcation. Government perception of CSOs depends on where the CSO lies. If it’s an insider CSO, it is seen as an ally/partner, if it is an outsider CSO, it is seen as a threat. The truth is that government is arrogant and is unwilling to give content to participatory democracy. In the 90s and early 2000s, the opinions of CSOs used to be taken on board by government. There was a consultation and commenting process. Now, there is no seriousness in this process as reflected by the Secrecy Bill. Government has appropriated the unilateral power to govern. It has created the conditions for antagonism. Many activists have become frustrated over time and are cynical about government.” (KI 1)

“The relationship is always contradictory, which, by the way, is not necessarily a bad thing. I think when there are attempts not to be transparent and use methods that are against the spirit and letter of our democracy, we are in trouble. I think at the moment we are in a more tense situation than ever before. I think that with the movements

⁹⁰ Section 4(1)(c)&(d) of the Act.

on the ground and the fluidity and the divisions in the ruling party, tension is becoming worse and more dangerous. Quite often, CSOs are viewed as challengers of government power. The relationship has worsened with time. Politicians feel insecure as CSOs continue to raise their voices against corruption and maladministration.” (KI 10)

“It’s either super subservient or very hostile. But there is actually very little authentic, collaborative, solutions-orientated, constructive engagement. They [government] only want collaboration on certain issues, and they want it on their terms. The two parties shout at each other. There’s no dialogue.” (KI 7)

“You have a government that is extremely sensitive because you have so many failures with government programmes, and they tend to not to want to own up to that so they try and enlist the help of civil society. If you look at DSD, the whole process about registration and the way they interact with civil society is so fraught with complications because of the lack of capacity and ability. It is a government that is sensitive and aware of its inability to deliver.” (Focus Group Participant, Gauteng)

For one respondent, there is ‘no *genuine relationship...government views NGOs as a necessary irritation.*’ (KI 9) Furthermore, there is a lack of depth in this relationship; *“things are done on a piece-meal basis devoid of substance and meaning and a lot of time any attempts at creating a 'dialogue' are primarily for show.” (Ditto)*

The political location of a CSO will in many ways inform the kind of relationship that government will have with such organisation. This is the view of one of the respondents who feels that for grass roots organisations, they are too weak to change policy but government views them with suspicion if not hostility given their potential to influence public opinion. For ‘middle-class’ organisations, government knows that they are vocal given their access to resources and so it treats them with hostility:

“For grass roots organisations who are independent of the ruling party, it’s very difficult to have any communication at all with government. For middle class NGOs they are seen as a challenge by the state and so the relationship is strained. Government has been mobilising a set of discourses that present the middle class as a proponent of imperialism and a threat to the “national democratic revolution.” (KI 6)

He goes on to observe that when it suits it, government is happy to work with civil society. In a way, government views CSOs from a political as well as a functional prism:

“When it is in its interest, government is quite happy to work with civil society. It’s purely an instrumentalist approach, it’s not about diffusing power or anything like that. The question we should be asking is not whether government has created a favourable climate, but rather, whether the state has a genuinely democratic conception of political power.” (Ditto)

Some respondents view this relationship as ‘mixed’ in the sense that it is neither good nor bad; it is merely cordial and dependent on what government wants from civil society:

“The relationship is not generally antagonistic but civil society does experience hostility from government from time to time. Sometimes civil society is not sure whether it’s better to work with government or not especially when it comes to trying to influence policy. We have also seen government making increasing use of consultants to draft white papers and bills, so by the time legislation is up for discussion with CSOs, it’s really at the final stage of the process.” (Focus Group Participant, Gauteng)

The relationship is somewhat 'mixed'. One cannot characterise it this way or that way. There are different relations between government and CSOs. There are also different relations between CSOs and certain individuals in government. The communication between government and CSOs is fairly mixed. The onus is on government to find ways of communicating more effectively. Most of the consultation/communication is formalistic and technical. Sometimes, the opinions of CSOs are taken into account and sometimes they are not. In the early days of South Africa’s democracy, CSO input was sought by parliament and CSOs participated extensively in the various parliamentary portfolio committees. This is no longer happening, at least not to the extent that it did before”

(KI 4)

“It [the relationship] depends on what sector the CSO is in and what government wants to do. It depends on the issues, sometimes we see eye to eye and sometimes we have a more complicated relationship. At times it’s not good while at other times it’s okay. Again it depends on the issues and the personalities involved. Sometimes government departments only notify us of meetings the day before and do not provide any assistance to attend them [travel expenses etc]. Other times they do not attend meetings they said that they would. There are times when government will see us as partners or allies for instance when it is involved in international events and it wants to include us

in its delegations. One has to understand that this is purely for government’s image and has nothing to do with the reality of the relationship between it and civil society. When however we want to hold them accountable, they [government] take us as a potential threat.” (KI 5)

One respondent at least thought the relationship is okay, in fact it has improved over time but it needs to be made better for the benefit of society:

“We have a dialogue forum where we can raise issues. We may not always agree but there is a dialogue and that's what is important. Of course there is consultation. We ask NPOs what they think of policy. If we want to review policy we ask all the relevant stake-holders what they think. They should be able to provide input and offer insights on how we can implement our programmes. Our relationship has become healthier because there is more dialogue, there is more willingness to engage with one another. The conditions are there, but what could be improved is for us to be clearer on how we can work together and how to create a more coordinated approach in dealing with issues.” (KI 8)

The lack of effective communication between government and CSOs is symptomatic of a much deeper problem which is the lack of trust between the two sides. But as the party wielding power and resources, government was accused by participants at the National Consultation of adopting a unilateral approach in its methods of communication. They pointed out that communication tends to be one way where information is passed down without proper and adequate collaboration to enable the effective implementation of strategies. At the broader level, there is a lack of consultation by government over amendments to, or even new legislation, or budgeting processes. Participants were concerned that government does not inform CSOs about tax exemptions, certificates and other relevant issues to enhance their knowledge of developments and avenues through which their operations can be more effective.

Matters could be improved if DSD introduced a newsletter which can be disseminated in different languages to inform CSOs and different groups of whatever changes that emerge within the department. At the same time, the use of SMSs should be encouraged as it is a much cheaper and more effective way of reaching a far larger number of CSOs. Lastly, DSD should make constant outreach visits to communities and particularly those in the rural areas to enhance the dissemination of information about the activities of, and opportunities available within, the department.

3.7. CIVIL SOCIETY COOPERATION AND COALITION

3.7.1. Overview

South African civil society has a distinguished record of critical engagement with the state, whether the former apartheid state or the current democratic state. This enviable history is owed in part to the strong organisational cooperation that defined the 1980s and 90s civil society in South Africa. Much of that has changed now and cooperation is largely confined to issue based engagements. Still, this cooperation is weak and uncoordinated. The challenge is exacerbated by the absence of a centralised coordinating structure such as the once powerful but now dysfunctional South Africa NGO Coalition (SANGOCO). Respondents described the current climate as one defined by 'more competition and less cooperation'. Organisations compete for resources and even sections of the population. Survivalism has come to define the praxis of many organisations while the fact that CSOs are not democratically elected structures of popular representation has resulted in accusations that organised civil society is illegitimate and representing its own interests. Some respondents talked of the rise of an "NGO elite" that is accountable to no one but itself and funders. The CSO sector has also come under criticism for being disconnected from the lived realities of the majority of those it claims to represent.

3.7.2. The law, cooperation and coalition building

There are no laws that explicitly place restrictions on CSO coalitions, operations, or programmes as the existing legal framework does not concern itself with the operations of CSOs, but rather, it legislates their formation, and how they may legally be funded. While other legislation may indirectly affect the conduct of CSOs, or place limits on what CSO coalitions may say (refer to relevant legislation mentioned in dimensions 4 and 5) these laws still do not prohibit or regulate CSO coalitions.

Legally, domestic CSOs may partner with foreign CSOs, the only legislation that would have a direct impact in that regard would be the Income Tax Act. This Act allows the South African Revenue Service (SARS) to scrutinize the financial transactions of such a coalition for purposes of paying any applicable taxes. The NPO Act does not place any limitations on domestic CSOs partnering with foreign organisations.

3.7.3. Challenges for coalition building

CSO coalitions are quite a common occurrence. However, as is the case with most of the CSOs that constitute such coalitions, the coalitions are also subject to the same burden of limited resources. Owing to the lack of available resources, coalitions are in fact quite common as CSOs band together to utilize resources. Nevertheless, the lack of readily available funding also means that some smaller coalitions receiving grants for projects to sustain themselves end up resembling CSOs in their own right and not a coordinating body of member CSOs. In addition to the issues emanating from a lack of funding, issues of governance also hinder the effectiveness of CSO coalitions, particularly with regard to provincial and national networks.

A lack of proper governance within coalitions has severe implications for the harmonisation of policies which stymie the operations of coalitions as members may not be able to fully exploit the network they are a part of. A report entitled “*A Record of Conversations: Possibilities, Opportunities & Constraints towards Better Coordination*” released by the Western Cape NGO Coalition in collaboration with the National Development Agency, acknowledged that the networks and movements which were built to harness and strengthen democracy have grown weaker.⁹¹ Making use of the experience of the South African NGO Coalition (SANGOCO) (for instance that with South Africa’s transition to democracy, “it has become increasingly difficult for many socially and politically engaged CSOs to redefine their identity and roles within a legitimate, constitutional democracy”⁹²), the report acknowledged that an over-emphasis on the organisations’ national operations meant that provincial NGO Coalition structures

operated on an uneven keel and were unable to maintain basic levels of cooperation within the organisation. This not only had an adverse effect on the presence and impact of NGOs but also weakened democratic practice and government development programmes.⁹³

However, in an attempt to revive the clout of coalitions in the country the National Welfare Forum (NWF) and SANGOCO announced in a press release in April of 2010⁹⁴ a new collaboration to form together the largest collective of civil society organisations in the country intended to build the strength and voice of civil society. Both are also members of the Global Call to Action against Poverty coalition (GCAP-SA).

3.7.4. Self-Regulation

The Department of Social Development requires that NPOs registered with the Directorate must submit a narrative report as well as a financial report, however, the vast majority of NPOs do not comply with these requirements. There are also several CSO driven initiatives such as the SANGOCO Code of Ethics which was developed to build capacity among South African NGOs with a view to assisting in addressing inequities in South African society in the post-apartheid era. Adherence to the Code is required of all SANGOCO members. CSOs can also subscribe to the Independent Code of Governance for Non-Profit Organisations in South Africa⁹⁵ which was first submitted to the King commission in 2009 by Inyathelo: the South

⁹¹ Available at <http://www.nda.org.za/docs/WC%20NGO%20Coalition%20-%20Best%20Practice.pdf>.

⁹² Western Cape NGO Coalition, 2010. *A Record of Conversations: Possibilities, Opportunities & Constraints towards Better Coordination*. P3.

⁹³ Ibid, pp 3-7.

⁹⁴ South Africa’s leading NGOs tie the knot. www.ngopulse.org.za

⁹⁵ Available at <http://governance.org.za/index.php/download-the-code>.

African Institute for Advancement. The Code seeks to ensure adherence to values (such integrity, equality and non-discrimination, democracy and empowerment, etc), exercising leadership, and ensuring fiscal and legal compliance.

3.7.5. More competition, less cooperation: Respondents' views

Given the challenges confronting civil society organisations in South Africa, it would be reasonable to assume that there would be a greater degree of cooperation between the various CSOs in order to maximise the potential for raising resources and also influencing change in society. Unfortunately, the sentiments expressed by the respondents paint the picture of a sector in which organisations are often in competition with one another especially when it comes to funding. The lack of cooperation also means that there are many areas of South African society including policy making and legislation where civil society could influence change in a positive way but this is not happening. Furthermore, since the collapse SANGOCO almost a decade ago, nothing else has risen in its place to provide coordination and leadership of the NGO sector. We present and discuss the responses below:

“The biggest thing that I see among CSOs is duplication. There are issues of mistrust because they are competing for funding and just a lack of coordination. Where there has been more collaboration you can see the impact that those initiatives have made. There is minimal cooperation. The problem is that NPOs want to secure the funding for themselves and this preoccupation takes away the focus from the intended beneficiaries.” (KI 9)

“Apart from individual campaigns where CSOs come together, which are few and far between, there isn't this kind of working relationship. I think that while it's understandable because of the different orientations, the whole regime around funding and the need to police your area and terrain to secure additional funding prevents a working relationship. The other issue relates to an organisation's political orientation. A basic understanding of concrete issues will help CSOs work together.” (KI 10)

“CSOs need to find one another. CSOs are currently in competition rather than cooperation with each other. They compete for government funding and for communities. The bottom line is that no individual CSO will survive on its own. There is no sustainability of CSOs at an individual level, they need to collaborate with each other for their long term survival. CSOs have to think more about working together. They have to establish a more constructive and collegial working relationship. Because of this individual approach to working, communities often see CSOs as entities that want to use them (communities) for their own benefit (e.g. to get funding).” (KI 2)

The shifting nature of South Africa's politics together with shifting donor priorities have also been named as reasons for the 'fracturing' of relationships between civil society organisations. According to one respondent, the necessity of a united voice cannot be gainsaid but there has been no 'ridiculous demand' for unity where same is not warranted:

“What seems clear is that there has been a shift in the environment. We do not hear the same kind of talk as we used to hear 10 years ago. And certainly, there has been no 'ridiculous' demand for unity where the same is not justified. Be that as it may, there is an absolute necessity for a united voice especially on the question of taxation exemption for civil society organisations.”

(KI 3)

“One of the most fundamental challenges in the CSO-CSO relationship is the silo mentality. Donors have also in a way forced this outcome because they only want to fund specific activities. We are still very much in a transitional phase.” (KI 1)

A focus group participant suggested that civil society should take seriously government’s criticism that it (civil society) is disconnected and non-cohesive:

“One of the criticisms of government that civil society needs to take into consideration, is that we are disconnected and not as cohesive as we should be. I still question what it means to have a united civil society whether it’s based on certain rights and different allies. I think it would be great to have such a thing. But the problem is that it assumes that we are always going to agree on things.” (Limpopo)

‘NGO elitism’ is a term that has been used by an increasing number of analysts to define the rise of a civil society bureaucracy which exists not to advance the social justice causes it claims to espouse, but the material interests of the leaders and employees of CSOs. According to one respondent, there can be no meaningful cooperation between CSOs because there is a huge chasm between ‘professional donor organisations’ and grass roots organisations:

“The relationship is extremely problematic. The way that professional donor organisations treat grass roots organisations often reproduces the general exclusion that people face. For example, a grass roots organisation I worked with that was involved with the [...] was never included in the planning meetings, and was never included in any kind of decision making when it came to money, strategy or anything like that. There are middle class organisations that have been as hostile to grass roots organisations as the state has been.” (KI 6)

Similarly, mainstream CSOs have been said to represent not the interests of the poor, but of themselves and their donors. They have no mandate to represent the poor since anyway they never consult them on any issues:

“There is a lack of reflection in that space and the idea that because you have a group of people with money they are now representatives of civil society is bogus. They don't represent anyone except the donors and themselves. You represent people when you have a mandate from them and that needs to come out of some kind of democratic process. When that democratic process is in place, then things are possible. When it is not, then you are representing your own interests. Donors determine who represents people and this is a new form of exclusion and marginalisation. It is highly racialised but given legitimacy through the language of civil society, human rights, etc.” (Ditto)

With more competition and less cooperation, it is not surprising that there has been less and less collaboration among CSOs on many of the most pressing issues affecting South Africa today. When cooperation has or does happen, it is on specific issues for instance on the ‘Secrecy Bill’, the right to education and the environment. In essence this is ‘issue-based’ cooperation as captured in the responses below:

“There are issues that create coalitions, such as the securitisation of democracy and the suppression of state information. CSO groups like the Right to Know have managed to bring together various actors to work together. I

think increasingly at the environmental level as well, we are seeing more and more cooperation. Education is another area. I think that if you look at where these alliances and coalitions are working, they tend to be not dogmatic, but they have a particular perspective of the nature of the state and of neoliberalism and its impact. Basically it comes down to a clear perspective of the nature of the state today and its impact on poor people, and hard work and struggle on the ground, not the self-promotion of particular individuals in the leadership of organisations.” (KI 10)

“Cooperation between CSOs depends on the area of work that they are involved in. There has not been much cooperation but more recently, things have begun to change. For instance in housing, we are seeing more cooperation. Also with the right to protest, we have seen a greater coming together of CSOs. The problem remains that we do not see a greater appreciation of the need for strategic inter-sectionality.” (KI 1)

“We have seen more cooperation in certain sectors e.g. there has been growing cooperation on education, also on xenophobia. However the level of cooperation is generally not satisfactory but it is growing. A new area of cooperation is on the right to food. There are a few organisations that are cooperating in this area but their number and size is growing. We should aim to develop a framework for cooperation. Cooperation works best when it is for a clearly defined purpose.” (KI 4)

“It depends on what sectors you are in and what your approach is to the issue. In alliances and coalitions people are united over the issues but the strategies may be what is separating them and that is why most coalitions don't last.” (KI 5)

“It differs from sector to sector. Sometimes it's hostile and sometimes there is genuine collaboration. It really depends on the issue.” (KI 8)

Focus group participants in both Gauteng and Limpopo suggested that there are always opportunities to work together but “*competition for resources*” undermines this possibility. Sometimes when opportunities present themselves for collaborative work, the obstacle becomes whether the leaders or individuals of the concerned CSOs have a personal relationship:

“They are willing to work together to a certain extent but it goes back to the issue of personalities. So it ends up being a coalition of people that know each other. (Focus Group Participant, Limpopo)

4. CONCLUSION

This study has assessed the enabling environment for civil society organisations in South Africa. By using seven dimensions that are considered essential to understanding the environment in which CSOs in South Africa operate, the project has been able to provide a fairly good picture of the challenges that confront organised civil society in this country. The project has also identified the kind of opportunities that CSOs can exploit in order to make their operations more efficient, and the achievement of their objectives more likely.

South Africa's legal and regulatory environment for CSOs can be characterised as very supportive in theory but often difficult to realise in practice. Starting with the formation of CSOs, the country has already passed legislation which provides for the registration of not-for-profit organisations. There are really minimal requirements that an individual or group of individuals need to meet in order to be able to register a non-profit organisation (NPO). The problem is that the legal entity mandated with the responsibility of registering NPOs—the Directorate of NPOs—is compromised by bureaucratic inefficiencies leading to long delays in the registration of organisations. Capacitation of this entity, coupled with education and training for CSOs on the application process could go a long way in addressing the current bottlenecks.

Operation of CSOs should not be problematic given that the existing legislation mostly requires compliance with basic reporting requirements. A key requirement for all registered organisations is the submission of annual reports, which should include a narrative of activities and an audited financial statement, to the registering authority. Voluntary associations established in terms of the common law are left more or less to carry out their operations as they see fit providing they do not engage in unlawful activities.

Access to resources is the one area in which CSOs in South Africa have had severe difficulties. The decline in international funding after the fall of apartheid, and the global financial crisis of 2008 have seen many organisations simply fold up, scale down their operations or venture into new areas of work considered more appealing to international funders. Locally, public funding for CSOs is available through the National Development Agency (NDA), an entity established through the National Development Agency Act of 1998—although it only commenced operations in 2001. Unfortunately, this agency has experienced a significant amount of challenges including corruption and mismanagement leading to many CSOs to not receive funding at all.

The philanthropic tradition in South Africa is not so well developed despite the fact that there is a significant amount of money given out every year for charitable purposes by wealthy individuals. On the other hand, corporate social responsibility is seen by many as a marketing tactic by corporates rather than a true commitment to social justice. If anything, access to resources remains the biggest concern for many CSOs in this country. With international funding unlikely to improve in the near future, South African CSOs need to think more clearly about ways of leveraging funds from local sources, and the role that bodies like the NDA can play in this regard. Changes to legislation to allow for tax breaks for individuals and organisations who give funds for charitable causes can be a significant intervention in encouraging greater philanthropy. CSOs also need to lobby for changes to the way in which the NDA operates including in the criteria that the agency follows when allocating funding. Capacitation in proposal writing, the strengthening of administrative systems and greater collaboration in fundraising efforts are a necessity if CSOs hope to weather the current storm of severely limited funding at both domestic and international levels.

It is often remarked that South Africa has one of the most progressive, if not the most progressive, constitutions in the world. This may be borne out by the fact that the Bill of Rights (Chapter 2 of the Constitution) protects a whole range of

fundamental rights and freedoms including the right to freedom of expression and the right to peaceful assembly. Some limitations are imposed on these two rights but these can be said to be justifiable in the kind of open democracy that the Constitution says South Africa must become. The problem with the two rights lies in their practical enjoyment. For instance many individuals and organisations are not able to express themselves freely because of poverty and social exclusion. Given South Africa's problem of deep inequality, the poor and marginalised also basically lack the avenues to express themselves or where they are able to have such access, to enforce their rights by legal means in the courts. The problem of legislation that impermissibly limits the right to freedom of expression needs to be tackled with a measure of decisiveness. CSOs should as far as possible come together and bring class actions to challenge the constitutionality of laws such as the National Key Points Act. At the same time, CSOs must remain vigilant against attempts by the state to introduce legislation such as the Secrecy Bill which would, if passed, severely curtail the right to freedom of expression in South Africa.

Peaceful assembly which is the most overt expression of the right to collective expression has come under increasing strain in South Africa. While legislation only requires that those wishing to gather and demonstrate merely 'notify' local authorities of their intention to do so, and that there be a consultation process after that in order to ensure the orderly and safe holding of the proposed gathering, the authorities have cynically turned this process into a permission granting exercise. One therefore finds a situation where authorities will refuse to grant 'permission' to CSOs on a range of spurious grounds such as that the person or entity against whom a gathering is being held is not willing to accept a memorandum of demands. CSOs would be well advised to strongly consider pushing for reforms to the Regulation of Gatherings Act. This can be done by lobbying for the introduction of regulations to the Act, which would spell out for instance, the kind of information that individuals and organisations need to provide for purposes of consultation with the local authorities and the SAPS.

Cooperation between government and CSOs requires deeper reflection. Government is a legal entity put in place through a process of elections. In theory, government represents the interest of everyone in the country including those who vote for the opposition. Its activities are only limited by the constitution and the law. Civil society on the other hand is an off-shoot of social engagement. Organised civil society is not an elected body but a grouping of individuals who come together for a common purpose. Its function is to advance and deepen democracy and most often, to hold government to account. Civil society remains an essential embodiment of any democratic society, for this reason, caution must always be taken to ensure that CSO cooperation with government does not amount to co-option. A critical, vociferous and independent civil society is important for a country like South Africa so that the gains of democracy are not whittled away. Thus, CSOs in this country need to consider a more strategic approach in their relationship with the government. Where cooperation is necessary, then that may be entertained but

where clearly this is not warranted, there is no reason to pursue it. A fundamentally hostile approach to the state is unhelpful.

Lastly, cooperation and coalition building among CSOs is something that needs to be encouraged and nurtured. It is a sad reality that in South Africa, the relationship between CSOs is one of competition rather than collaboration. Competition for resources, survivalism and a silo approach to doing things has seen a gradual decline in the once enviable practice of cooperation by CSOs across a range of issues. Similarly, the demise, or decline of the once powerful SANGOCO has resulted in a void and the absence of a centralised voice to articulate issues of interest to both CSOs and society broadly. CSOs should explore the possibility of setting up an umbrella body that can become the coordination point and organised voice of civil society in the country.

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ANNEXURES

ANNEXURE 1: Key Informant Questionnaire

Introduction

The Enabling Environment National Assessment Project (EENA) is a five months' research project which looks at the legal, regulatory and policy environment in which Civil Society Organisations (CSOs) operate in South Africa. The ability of CSOs to register, operate, access resources, and effectively engage in advocacy are all crucial to the ability of civil society as a whole to flourish and be successful. Moreover, the laws and regulations that govern CSOs and the ways in which they are implemented, potentially shape a host of other significant factors as well such as the ability of CSOs to communicate and associate with others, to engage in peaceful assembly, to seek tax exemptions, to engage in philanthropy, and to access information. All of these factors, as well as the relationship between CSOs and their government, help to define the nature of civil society's enabling environment within a particular country. Importantly, these factors, when taken together, significantly affect the public's receptivity, the lifeblood of a well-functioning civil society, to the important work performed by CSOs.

This project has ten research dimensions, six of which are mandatory and four optional. The mandatory dimensions are: (1) Formation of CSOs; (2) Operation of CSOs; (3) Access to Resources; (4) Freedom of Expression; (5) Peaceful Assembly; and (6) CSO-government Relations. The optional dimensions are: (1) Internet Freedom; (2) CSO Cooperation and Coalition; (3) Taxation; and (4) Access to Information. This questionnaire contains five of the six mandatory dimensions, as well as CSO Cooperation and Coalition which is an optional dimension.

You are encouraged to provide as much information as possible in order to ensure that the project succeeds in giving us a fairly comprehensive picture of the environment in which CSOs operate in South Africa.

If you need to clarify any aspects of this project, please feel free to get in touch with the following person:

Kimani Ndungu

Lead Researcher (on behalf of HURISA)

Tel: 011 403 2122

Cell: 083 733 2675

Email: kimani@naledi.org.za

DIMENSION #1: FORMATION OF CSOs

1. Is the entity responsible for registering CSOs sufficiently capacitated (funding and staff)?
2. Is registration easily accessible? (e.g., are there sufficient locations/centers around the country for registering CSOs)?
3. What non-legal and/or non-governmental barriers, such as slow or ineffective bureaucracies, inability to access funds, or difficulty buying/leasing property, affect the formation of CSOs?

DIMENSION #3: ACCESS TO RESOURCES

(a) General questions about the funding environment

1. What barriers hinder access to funding for CSOs?
2. How effectively does the legal and policy framework support the mobilization of local resources for CSOs?
3. Does government and donor funding support the full range of CSO programmes and activities (e.g. core funding, policy development, advocacy, etc)? Why?
4. What type of sources of funding are CSOs most dependent on?
5. Have you seen any major changes in the funding environment at the national level in the recent past? If so, which have been these changes?

(b) Government funding

1. To what extent is the legal framework conducive to government funding of CSOs?
2. Is the distribution of government funds seen as predictable and transparent? Why?
3. Has government support of CSOs decreased or increased in the last ten years? What would you attribute this change to?

(c) International funding

1. What barriers exist for CSOs seeking to raise funds from foreign sources?

(d) Philanthropy

1. Does the legal and regulatory framework encourage philanthropy? Why?
2. Is there a philanthropic tradition in the country? Why do you say this, and what would you attribute it to?
3. What encourages this tradition?
4. What discourages this tradition?
5. Do individuals regularly donate to CSOs? If yes, in what ways? If no, what would you say is the reason for this?
6. Do corporations regularly donate to CSOs? If yes, in what ways? If no, what would you say is the reason for this?
7. Do CSOs have fundraising capacity? Why?

DIMENSION #4: FREEDOM OF EXPRESSION

1. What barriers hinder the ability of CSOs to openly express their opinions?
2. Are individuals and CSOs aware of their right to freedom of expression? Why?

DIMENSION #5: PEACEFUL ASSEMBLY

1. Are individuals and CSOs aware of their right to peaceful assembly? Why?

2. In practice, are individuals and CSOs effectively able to exercise their right to peaceful assembly? Why?

DIMENSION #6: GOVERNMENT TO CSO RELATIONS

1. In general, what is the nature of the relationship between the Government and CSOs?
2. How would one describe communication between CSOs and the Government? Why?
3. Are the opinions of CSOs taken into account when drafting policy or legislation? Why?
4. Does the Government view CSOs as partners/allies, or as potential threats? Why?
5. Have there been any significant changes in relations between civil society and the government in the last ten years? Why?
6. What conditions need to be in place to allow for a good and effective relationship between state and civil society?

DIMENSION #7: CSO COOPERATION AND COALITION

1. What is the nature of the relationship between and among CSOs?
2. Are CSOs able and willing to work cooperatively with one another? Why?
3. Are there certain sectors where cooperation between CSO is more typical (e.g. environment, women, human rights etc) than in others? What would you attribute this to?

Kimani Ndungu

14 March 2015

ANNEXURE 2: Focus Group Guide

MAIN THEMES FOR DISCUSSION

Operation, Access to Resources, Freedom of Expression, Peaceful Assembly, Government-CSO relations and CSO Cooperation and Coalition

A. INTRODUCTION (5 MINS)

Good morning/afternoon/evening. My name is and I would like to welcome you all and thank you for joining us in this discussion. I am from an organisation called HURISA, which stands for the Human Rights Institute of South Africa. HURISA is a human rights research, lobbying and advocacy organization based in Johannesburg.

We have been requested by CIVICUS, which is an international human rights organization dedicated to the support of civil society, to conduct this study with the aim of understanding whether or not South Africa has an enabling environment for civil society organisations. We hope to hear your views about this issue and also some ideas of how this environment can be improved in order to strengthen civil society in the country.

B. ICE-BREAKER (10 MINS)

Before we get into the depth of our discussion today, I would like us to introduce ourselves to one another. Please introduce yourself to the person sitting next to you and ensure that you obtain the following information:

- Are you married, single, living with a partner?
- Do you have children, and how many?
- Are you employed, run your own business, etc?
- What are your interests/hobbies (e.g. sports, television programmes, etc.).
- What particular issue has interested you in the past few days?

After obtaining this information, your neighbour will introduce you to the whole group and you will do the same about him/her. We have about 10 minutes for this activity.

C. SETTING THE GROUND RULES & OBTAINING CONSENT(5 MINS)

Now that we know each other, we need to set some ground rules that we will all be comfortable with and ensure that we have a focused and fruitful discussion.

1. The purpose of this discussion is to get opinions, ideas and feelings from each one of us, and therefore **there will be no right or wrong answers;**
2. Because each one of us thinks independently, it is important that everyone participates and shares his/her opinion;
3. Your opinion is very critical to the success of this project even if it differs from the one raised by another participant. We all have different experiences, so what someone has experienced or thinks might differ totally from what you have.
4. **Only one person should speak at a time.** Otherwise we will not be able to hear you properly when we replay the tapes for transcribing;
5. Please feel free to use the **language** you are most comfortable with;
6. We have only one and a half hours (90 Minutes) for this discussion. We therefore might have to cut the discussion to ensure that we cover all the topics.
7. This discussion is being recorded. This means that some of the words you use here may be quoted in our report, but **your names will not be mentioned.** Please do you give consent for the discussion to be recorded?

1. ACCESS TO RESOURCES (20 MINS)

1. What would you say are the barriers that hinder CSOs from accessing funding?
2. What source/s of funding are you as CSOs most dependent upon?
3. What source/s of funding is/are most reliable for you?
4. Do you receive funding from government?
 - 4.1. How reliable is this funding?
 - 4.2. How effective is this funding?
5. What do you expect to happen in terms of funding from government in the next 10 years?

6. Would you say the current legal and policy framework supports the mobilization of local resources?
7. What barriers hinder you from accessing funding from international sources?
8. Do you fundraise from local public institutions and corporations?
 - 8.1. What is your experience with them?
9. What is your opinion about the capacity of CSOs to raise funding?

2. EXPRESSION (10 MINS)

1. Do you think CSOs are aware of their right to freedom of expression?
2. Would you say CSOs are able to exercise this right freely?
3. Would you say CSOs are able to openly criticize government?

3. PEACEFUL ASSEMBLY (20 MINUTES)

1. Would you say CSOs are able to assemble peacefully in support of, or to criticize any cause?
2. Do you think CSOs are able to openly criticize government?
3. What would you say are the problems that CSOs face when they wish to exercise their right to peaceful assembly?

4. GOVERNMENT-CSO RELATIONS (20 MINUTES)

1. How would you describe the nature of the relationship between the Government and CSOs?
2. Would you say there have been significant changes in relations between civil society and the government in the last ten years?
3. Would you say government views CSOs as partners/allies, or as enemies?
4. What conditions do you feel need to be in place to allow for a good and effective relationship between government and civil society?

5. CSO-COOPERATION AND COALITION (20 MINUTES)

1. How would you describe the relationship amongst CSOs?
2. Do you think CSOs are able and willing to work with one another?
3. Do you feel that there are there certain sectors (e.g. environment, women, human rights etc.) where CSOs are willing to work with one another, and not in others?

D. WRAP UP & CLOSURE (10 MINS)

Let me thank you very much for your willingness to share your experiences, opinions and ideas about CSOs and the environment in which they operate in South Africa.

1. Are there any issues that you feel we have left out?
2. Is there anything else that you wish to mention?

Once again, thank you very much

Kimani Ndungu

14 March 2015

ANNEXURE 3: Key Informants

Number	Name	Surname	Organisation	Address	Date of interview
CSO Activists & employees					
1.	Makoma	Lekalakala	Earth Life	87 De Korte Street 5th Floor Hereengracht Building Braamfontein Johannesburg	23 April 2015
2.	Dale	McKinley	Right2Know	JHB Office -6th floor, Aspern House 54 De Korte Street Braamfontein	24 April 2015
3.	Sipho	Mthathi	Oxfam South Africa (Executive Director)	129 Fox Street, Johannesburg	29 April 2015
4.	Mark	Haywood	Section 27	5th Floor, Braamfontein Centre, 23 Jorissen Street, Braamfontein Johannesburg	5 May 2015
Academics					
5.	Richard	Pithouse	Rhodes University (Lecturer)	Grahamstown	28 April 2015
6.	Salim	Vally	Centre for Education Rights and Transformation, University of Johannesburg (Director)	House Number 8, Research Village Bunting Road Campus, Auckland Park, Johannesburg	30 April 2015
7.	Steven	Friedman	Centre for the Study of Democracy (UJ) (Director-Professor)	House Number 7, Research Village Bunting Road Campus, Auckland Park, Johannesburg	4 May 2015
Government + quasi government agencies					
8.	Themba	Msimanga	Gauteng Department of Social Development, NPO Directorate (Acting Director)	69 Thusanong Building, Commissioner Street, Johannesburg	29 April 2015

Politicians					
9.	Bridget	Masango	Gauteng Delegate NCOP Social Services Committee		29 April 2015
Funders					
10.	Dugan	Fraser	Raith Foundation (Programme Manager)	Houghton, Johannesburg	28 April 2015

ANNEXURE 4: Focus Group Participants

Gauteng Focus Group:

Date: 18 May 2015

Venue: Civicus House, Johannesburg

No	Name	Surname	Position	Organisation
1	Louisa	Zondo	Chief Executive Officer	Bertha Gxowa Foundation
2	Nonhlanhla	Sibanda	Gender Programme Manager	Centre for the Study of Violence and Reconciliation
3	Karabo	Van Heerden	Intern	Amnesty International
4	Sonny	Pholwane	Field Manager	CBO in Soweto

Limpopo Focus Group:

Date: 19 May 2015

Venue: Xitsavi Centre, Valoyi Trust, Msiphani Village

No	Name	Surname	Position	Organisation
1	Jane	Sambo	Culture Leader	HURESIC
2	Golinky	Shingage	Culture Leader	HUREWIC
3	NC	Baloyi	Youth Coordinator	Mugcedeni
4	G	Mukhari	CDP	Department of Social Development (Limpopo)
5	C	Baloyi	Ward Councillor	Greater Tzaneen Municipality

6	P	Ngobeni	Treasurer	Dyondzani Youth Project
7	T	Mhlongo	Chairperson	Dyondzani Youth Project
8	Abel	Mzondi	Member	RVD
9	Akani	Mashele	Deputy Chairperson	RIYA
10	Dikotla	Joseph	Senior Consultant	Mashao ATT
11	GM	Kubayi	Community Development Worker	Department of Cooperative Governance (Limpopo)
12	Alina	Mhlongo	Programme Manager	Nhlohotelo Development
13	Arteleroy	Mabunda	Secretary	Dyondzani Youth Project

ANNEXURE 5: Assessment Matrix

The Assessment Matrix is part of the EENA Research Guide, and serves as a guidance tool for EENA partners to conduct an assessment of their findings and evaluate the situation, per question and dimension, in terms of a green (enabling), yellow (partially enabling) or red (impeding) flag “ranking”.

Mandatory Dimensions

I. Formation:

Question	Flag
a. Factual questions:	
1. What law(s) currently govern(s) the formation of Civil Society Organizations (CSOs)6?	Green
2. Who is legally permitted to serve as a CSO founder? Who is excluded from serving as a founder?	Green
3. What minimum number of individuals is required to form a CSO? What are the requirements of membership?	Green
4. What procedures are required to register/incorporate a CSO?	Green
5. Is there a minimum capitalization requirement to register a CSO?	Green
6. What are the specific grounds for rejecting a CSO’s application for registration/incorporation? Are such grounds sufficiently detailed?	Green

7. Must CSOs adhere to certain categories of purpose before being allowed to form; or are some CSOs with certain agendas (human rights protection or democracy-promotion, for example) forbidden from forming?	Green
8. Can registration decisions be appealed? If so, how frequently are registration decisions appealed? What are the results?	Green
9. What documentation is required for a CSO's incorporation/registration?	Green
10. Are CSOs required to regularly renew their registration?	Green
11. What registration fees are required?	Green
12. How long does the registration process typically take?	Yellow
13. How many CSOs are currently registered?	Yellow (approx. 64 000 registered NPOs)
14. Are there draft laws or regulations that, if adopted, would restrict or, alternatively, ease the formation of CSOs? If so, please summarize the content of the key provisions and in what stage of the legislative process it currently stands.	Yellow (no pending draft legislation at the moment. A discussion document on proposed amendments to the Non Profit Organisations Act issued in 2012 appears to have been shelved.)
b. Perception questions:	
1. Is the entity responsible for registering CSOs sufficiently funded and staffed?	Yellow
2. Is registration easily accessible? E.g., are there sufficient locations/centers around the state for registering CSOs, or is the process all done electronically?	Yellow
3. What non-legal and non-governmental barriers, such as slow or ineffective bureaucracies, inability to access funds, or difficulty buying/leasing property, affect the formation of CSOs?	Yellow
4. To what extent is there a perception of excessive discretion, favoritism (political, ethnic, religious, etc.), and/or corruption in the registration process?	Green

II. Operation:

Question	Flag
a. Factual questions:	
1. What law(s) directly govern(s) the operation of CSOs? Do any other laws affect or influence the operation of CSOs?	Green

2. Are CSOs required to notify the government of any meetings? If so, of each meeting or only key meetings? Are they required to notify the government of the list of candidates for the board of directors? Of the results of elections?	Green
3. Are CSOs required to submit periodic reports to the government? What kind of reports – e.g. activity or financial reports –and how often?	Green (Annual narrative report together with the audited financial statements)
4. Are CSOs required to periodically report to the government for any other reasons? What reasons and how often?	Green
5. Are CSOs subject to government audits or inspections? How often, and what types?	Green
6. What types of information are CSOs required to publicly disclose?	Green (Financial information)
7. What administrative requirements affect the operation of CSOs?	Green
8. Are CSOs mandated to align their activities with governmental priorities as defined in national development plans?	Green
9. On what grounds is the government legally permitted to terminate or dissolve a CSO? Is there an opportunity to appeal this decision?	Green (the state can deregister an NPO that fails to submit its annual reports. This decision is appealable)
10. On what grounds can a CSO be voluntarily dissolved?	Green
11. Are there draft laws or regulations that, if adopted, would restrict – or, alternatively, ease - the operation of CSOs? If so, please summarize the content of the key provisions and in what stage of the legislative process it currently stands.	Green
b. Perception questions:	
1. What level of oversight does the government have over CSOs? Extensive, moderate, or light?	Green
2. In practice, do the legal and administrative requirements referred to above act as impediments to the productive operation of CSOs? Are they helpful to the daily operation of CSOs?	Green
3. Are there non-legal grounds that, in practice, the government uses or cites to terminate or dissolve a CSO? In practice, how have such terminations been conducted: according to the law or otherwise?	Green
4. Is there a history of state harassment of CSOs for allegedly not adhering to administrative and/or legal requirements? Is there a history of state harassment of CSOs for other reasons or in general?	Green

III. Access to Resources:

a. General questions related to the funding environment

Question	Flag
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Factual questions:	
1. What financial resources do CSOs have legal access to: State funds? Earned income? Donations? Foreign donor funding? Other?	Green
2. What legal barriers hinder access to each of these potential sources of funding?	Green (the problem is not the law but the bureaucracy and practices which impact negatively on many NPOs)
3. Do laws and/or regulations prohibit CSOs from distributing profits or otherwise providing inappropriate private benefit to officers, directors, or other insiders?	Green
4. Upon dissolution or termination, what happens to a CSO's assets? What laws and/or regulations affect distribution of assets upon dissolution?	Green
5. Are there draft laws or regulations that, if adopted, would restrict – or, alternatively, ease – CSOs' access to resources? If so, please summarize the content of the key provisions and in what stage of the legislative process it currently stands.	Green
Perception questions:	
1. What non-legal and non-governmental barriers hinder access to each of the potential sources of funding for a CSO?	Yellow (competition for the limited funding available, public funding very bureaucratic, many NPOs have limited fundraising capacity).
2. How reliable is a CSO's access to legally permissible funds? And how freely available are these funds?	Yellow
3. How much does a CSO's financial sustainability depend on government oversight and approval?	Yellow (in respect of public funding)
4. How effectively does the legal and policy framework support the mobilisation of local resources?	Yellow
5. Does government and donor funding support the full range of CSO programming and activities, including e.g., innovation, policy development and advocacy?	Red
6. What type of source of funding are CSOs most dependent on?	Red
7. What is the perceived reliability of different sources of funding? What source of funding is more reliable for CSOs?	Red
8. Are you seeing any changes in the funding environment at the national level? What are the impacts of any changes on CSOs?	Red
b. Government funding	
Factual questions:	
1. Is government funding currently available for CSOs? If so, is it available for any type of CSO or are there special types of CSOs that are supported by the government?	Yellow

2. In what form and at what levels is government funding available? E.g. are grants, subsidies, institutional (core) support provided at the central level and/or at the local level? Is there a special funding mechanism (e.g. a fund) for CSO support? Are there examples of contracting with the government by CSOs?	Yellow
3. What are the laws, rules and policies currently governing government grants and subsidies of CSOs?	Yellow
Perception questions:	
1. To what extent is the legal framework conducive to government funding of CSOs? What are specific legal and non-legal barriers to increased, more efficient or more transparent government support?	Yellow
2. Is the dispersal of government funds seen as predictable, transparent, easily understandable and impartial?	Red
3. Has government support decreased or increased within the past years? What is expected in the following years?	Red
c. International funding	
Factual questions:	
1. Are there different standards/requirements for accessing foreign sources of funding versus domestic sources of funding?	Green
2. What are legal barriers to accessing and using foreign resources by a CSO, if any? E.g. is there government notification and/or oversight required to acquire foreign funding? Are there additional reporting requirements when using foreign funding?	Green
3. Are there bilateral or multilateral agreements in place that affect foreign donors' ability to donate and establish partnerships with CSOs? If yes, what kind of agreements are they (statement of medium to long-term commitment to a relationship; funding framework, etc.)	Red
Perception questions:	
1. What non-legal barriers to receiving foreign funds exist in practice?	Red
2. Has the overall state of governance and rule of law in the country affected donor's contribution to CSOs? If so, how?	Yellow (SA considered to be an upper middle income, model democracy so funders have shifted their focus elsewhere.)
d. Philanthropy	
Factual questions:	
1. What are the laws and/or regulations specifically addressing philanthropy?	Yellow (The current laws that impact on philanthropy relate to revenue i.e. tax exemption for donations for public benefit causes)
2. Are tax exemptions given to those who engage in philanthropy?	Green (but the process is somewhat cumbersome. A donation can only be exempted if the donation is made to an organisation that

	already has public benefit status conferred to it by the Receiver of Revenue.
3. Are CSOs permitted to be the recipients of both corporate and individual philanthropy?	Green
Perception questions:	
1. Does the legal and regulatory framework encourage philanthropy? If so, how? If not, how?	Yellow (Does not provide sufficient incentives for philanthropy)
2. Is there a philanthropic tradition? What encourages it? What discourages it?	Yellow
3. Do CSOs regularly fundraise from the domestic public or corporations? Do CSOs have fundraising capacity? Or capacity to diversify their funding?	Yellow
4. Do individuals regularly donate to CSOs?	Yellow
5. Do corporations regularly donate to CSOs?	Yellow

IV. Expression:

Question	Flag
a. Factual questions:	
1. What laws affect a CSO's ability to freely express its opinions? What rights are guaranteed under the existing legal framework, including the constitution, with respect to expression, including access to the internet?	Green
2. Which international treaties have been ratified that affect the ability to publicly express oneself? What treaties have been ratified that affect the right to access the Internet?	Green
3. What laws and/or regulations regulate the content of expression? What restrictions are placed on this content (i.e., restrictions for national security, "fighting words", commercial speech, obscenity)?	Green
4. Are there time, place and manner restrictions placed on expression?	Green
5. What legal barriers, if any, hinder a CSO's ability to openly express its opinions, particularly on matters critical of government policies?	Green
6. Are there draft laws or regulations that, if adopted, would restrict – or, alternatively, ease – CSOs' freedom of expression? If so, please summarize the content of the key provisions and in what stage of the legislative process it currently stands.	Red ("Secrecy Bill")
b. Perception questions:	

1. What non-legal barriers hinder a CSO's ability to openly express its opinions?	Yellow (class position and level of education among others)
2. Is open criticism of government policies and practices tolerated? What type of criticism is not tolerated? What, historically, has been the reaction of the government to such open criticism?	Green (Note nevertheless that politically sensitive matters such as land and the economy together with very robust criticism against the government has received strong reaction from the state. This includes unlawful surveillance by state intelligence agencies)
3. Are individuals and CSOs aware of their rights with respect to expression? Does the political culture openly support these rights? Or are they actively suppressed regardless of legal protections?	Green (However, the political culture is not supportive of strong criticism against the government on matters like land, the economy and lack of service delivery)

V. Peaceful Assembly:

Question	Flag
a. Factual questions:	
1. What laws address the rights to peaceful assembly, including domestic legislation/regulations and international treaties to which the country is a signatory?	Green
2. Are there limits placed on who can assemble? Are groups with certain agendas or orientations forbidden from assembling?	Green
3. Are individuals or CSOs planning a strike/protest required to seek permission or notify the government in advance of the strike/protest?	Green
4. Are there limits on the time, place and manner that individuals or groups can assemble, strike, protest or otherwise publicly (and peacefully) express their views?	Yellow (local authorities & the police often impose unreasonable/unlawful conditions on persons and organisations)

	wishing to gather and demonstrate)
5. How are aggressive/violent demonstrators dealt with in the law and in practice?	Red (In many cases, police use disproportionate force to stop demonstrations. Also there is a prevalent use of the criminal justice system (holding/participating in an unlawful gathering) against individuals and organisations)
6. Are there draft laws or regulations that, if adopted, would restrict – or, alternatively, ease – individuals and/or CSOs right to peacefully assemble? If so, please summarize the content of the key provisions and in what stage of the legislative process it currently stands.	Green
b. Perception questions:	
1. Is there a history of government-led violence or aggression against peaceful demonstrators, activists and/or strikers?	Red (There are many cases of police fatally shooting peaceful demonstrators. The most prominent have been the killing of Andries Tatane in the Free State province in April 2011 and the Marikana Massacre in August 2012)
2. In practice, are groups who gather to openly criticize the government through protest, strike or other form of peaceful demonstration tolerated?	Yellow (They are tolerated but there is a lot of intimidation through e.g. surveillance of radical groups and activists. Local authorities and the police also regularly impose unlawful/unreasonable conditions on the way of known radical NPOs when they want to gather and demonstrate)

VI. Government- CSO Relations:

Question	Flag
a. Factual questions:	
1. To what extent are CSOs permitted to engage in the political (electoral) process? E.g., are they permitted to nominate candidates for public office? Support or oppose political parties/candidates? Fundraise for political parties/candidates? If so, under which conditions?	Green
2. To what extent are CSOs allowed to participate in public policy activities? Are they allowed to advocate (campaign) and lobby for legislation? If so, under which conditions?	Green
3. What are legal / institutionalized opportunities for CSOs to participate in the decision-making process? E.g., are there open hearings, consultations, multi-stakeholder working groups?	Green (but the consultative practice has deteriorated with time)
4. To what extent are there compacts, liaison officers, committees, or other similar mechanisms to promote cooperation and communication between government and civil society?	Yellow
5. Are there draft laws or regulations that, if adopted, would inhibit – or, alternatively, ease – government-CSO relations? If so, please summarize the content of the key provisions and in what stage of the legislative process it currently stands.	Green (No pending legislation at the moment)
b. Perception questions:	
1. In general, what is the nature of the relationship between the Government and CSOs? Contentious? Harmonious? Somewhere in the middle?	Yellow (the relationship is contentious)
2. Is there regular communication between CSOs and the Government? How can the quality of the dialogue between the Government and CSOs be characterized?	Yellow
3. Are the opinions of CSOs taken into account when drafting legislation, or more generally, anywhere in the legislative process?	Yellow
4. Are there timely consultations with CSOs in order for them to impact government decisions?	Yellow
5. Is there full transparency and accountability for development priorities, strategies, plans and actions by government?	Yellow
6. Do CSOs have a mechanism to dispute or appeal certain government decisions at the central or local level? Is this mechanism a reliable, genuine and effective way for CSOs to voice their dissent to particular government decisions? In practice, has this mechanism been successfully utilized by CSOs to produce a fairer result?	Yellow
7. Does the Government view CSOs as partners and allies in their own work, or as potential threats to their agenda?	Yellow
8. Are CSOs capable of participating in a broad range of public policy initiatives and activities, or are they restricted to a narrow range of circumscribed activities?	Yellow (CSOs not well organised to participate)

9. Have there been any significant changes in relations between civil society and the government in your country in the last two years? If so, please describe these.	Yellow
10. Have any global events in the past two years affected state-civil society relations at the national level? (i.e. The Aid effectiveness debate, etc.)	Yellow
11. What conditions do you feel need to be in place to allow for a good and effective relationship between state and civil society?	More openness by government about its work and less sensitivity towards CSOs. On the other hand, CSOs need to cooperate more with one another in order to strengthen their work and efforts when engaging with government.

Optional dimensions

VIII. CSO Coalition and Cooperation

Question	Flag
a. Factual questions:	
1. Do(es) the law(s) governing CSO operations similarly regulate coalitions of CSOs working together? Does the law(s) allow or prohibit such groupings? Does it encourage or hinder without outright prohibiting such groups?	Green
2. Are domestic CSOs legally able to partner with foreign CSOs, and vice versa? If not, what are the conditions for cooperation? What level of government oversight/notification is required, if any, for such alliances?	Green
3. Are coalitions, platforms or similar voluntary groups of CSOs, common? Are such coalitions often found working together for a common agenda?	Yellow
4. Have CSOs adopted any means of voluntary self-regulation? If so, please describe this shortly. Here self-regulation generally refers to the Istanbul Principles: http://www.cso-effectiveness.org/istanbul-principles,067 . Please specify any other form of self-regulation that you may include.	Yellow (There is a Code of Good Practice for CSOs issued by the Department of Social Development but it is very doubtful whether CSOs take cognisance of it. CSOs

	themselves have done little to adopt and promote self-regulation mechanisms)
5. Are there draft laws or regulations that, if adopted, would restrict – or, alternatively, ease – CSO cooperation or coalition-building? If so, please summarize the content of the key provisions and in what stage of the legislative process it currently stands.	Green
b. Perception questions:	
6. What is the nature of the relationship between and among CSOs? Are they able and willing to cooperatively work with one another? Are there certain sectors (e.g. environment, women, human rights etc.) where this is more typical than others?	Yellow (the NGO sector is fragmented and there is very little cooperation and coalition building taking place)