State-Civil Society Relations: Fundamental Rights in South Africa

July 2016

Research Report
Acknowledgements

This report was made possible through funding from Ministry of Foreign Affairs, The Netherlands. APPRO wishes to express its gratitude to Dr. Sarah Pugh, the lead researcher and author of this paper.

About This Paper
This paper presents contemporary South Africa as a case study of the ways in which state and civil society actors engage with each other toward the protection and advancement of fundamental rights. The paper was commissioned by APPRO to draw potential comparative lessons for the context of Afghanistan, and for other emerging democracies.

About the Author
Sarah Pugh is an independent consultant based in Cape Town, South Africa. She holds a PhD in International Development Studies and Political Science. Sarah would like to gratefully acknowledge the participation and insightful contributions of all those interviewed for this research. She would also like to thank Dr. Saeed Parto, of APPRO, for his comments, edits, and contributions to this work.

About Afghanistan Rights Monitor
Afghanistan Rights Monitor (ARM) was designed to meet the following objectives:
1. Regular monitoring of the current conditions of fundamental rights in Afghanistan using a set of indicators based on internationally recognized standards for monitoring Civic, Social and Economic rights.
2. Informed, pragmatic, and constructive advocacy messaging on fundamental rights needs, based on empirical data, and delivered by civil society actors.
3. Increased capacity and responsiveness of public institutions to fundamental rights needs of Afghan citizens.

For more information on ARM, see: www.nac-pp.net

About APPRO
Afghanistan Public Policy Research Organization (APPRO) is an independent social research organization with a mandate to promote social and policy learning to benefit development and reconstruction efforts in Afghanistan and other less developed countries through conducting social scientific research, monitoring and evaluation, and training and mentoring. APPRO is registered with the Ministry of Economy in Afghanistan as a non-profit non-government organization and headquartered in Kabul, Afghanistan with offices in Mazar-e Sharif (north), Herat (west), Kandahar (south), Jalalabad (east), and Bamyan (center). APPRO is a founding member of APPRO-Europe, registered in Belgium.

For more information, see: www.appro.org.af and www.appro-europe.net
Contact: mail@appro.org.af

Cover Photo: Hex River Valley, South Africa. Sarah Pugh

The Author and APPRO take full responsibility for all omissions and errors.

© 2016. Afghanistan Public Policy Research Organization. Some rights reserved. This publication may be stored in a retrieval system or transmitted only for non-commercial purposes and with written credit to the author and APPRO and links to APPRO’s website at www.appro.org.af. Any other use of this publication requires prior written permission, which may be obtained by writing to: mail@appro.org.af
### List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANC</td>
<td>African National Congress</td>
</tr>
<tr>
<td>APPRO</td>
<td>Afghanistan Public Policy Research Organization</td>
</tr>
<tr>
<td>APRM</td>
<td>African Peer Review Mechanism</td>
</tr>
<tr>
<td>ARM</td>
<td>Afghanistan Rights Monitor</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>CCR</td>
<td>Centre for Constitutional Rights</td>
</tr>
<tr>
<td>CGE</td>
<td>Commission for Gender Equality</td>
</tr>
<tr>
<td>COSATU</td>
<td>Congress of South African Trade Unions</td>
</tr>
<tr>
<td>DHA</td>
<td>Department of Home Affairs</td>
</tr>
<tr>
<td>DPSA</td>
<td>Department of Public Services and Administration</td>
</tr>
<tr>
<td>EELC</td>
<td>Equal Education Law Centre</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>GEAR</td>
<td>Growth, Employment and Redistribution Strategy</td>
</tr>
<tr>
<td>LGBTI</td>
<td>Lesbian, Gay, Bi-Sexual, Transgender/Transexual and Intersexed</td>
</tr>
<tr>
<td>LHR</td>
<td>Lawyers for Human Rights</td>
</tr>
<tr>
<td>LRC</td>
<td>Legal Resources Centre</td>
</tr>
<tr>
<td>NACF</td>
<td>National Anti-Corruption Forum</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-governmental Organisation</td>
</tr>
<tr>
<td>PAIA</td>
<td>Protection of Access to Information Act</td>
</tr>
<tr>
<td>RDP</td>
<td>Reconstruction and Development Programme</td>
</tr>
<tr>
<td>SACP</td>
<td>South African Communist Party</td>
</tr>
<tr>
<td>SAHRC</td>
<td>South African Human Rights Commission</td>
</tr>
<tr>
<td>SALC</td>
<td>Southern African Litigation Centre</td>
</tr>
<tr>
<td>SJC</td>
<td>Social Justice Coalition</td>
</tr>
<tr>
<td>UDF</td>
<td>United Democratic Front</td>
</tr>
<tr>
<td>UPR</td>
<td>Universal Periodic Review</td>
</tr>
</tbody>
</table>
# Table of Contents

Introduction ........................................................................................................................... 5

Objectives and Methodology .................................................................................................. 6

Analysis .................................................................................................................................. 7
  State-Civil Society Relations and Good Governance ............................................................ 7
  State-Civil Society Relations in South Africa: An Historical Overview ............................... 8
  Cooperative and Collaborative Approaches ........................................................................ 11
  Realm of Protest And Direct Action ..................................................................................... 18
  Litigation as a Strategy for Change ....................................................................................... 22

Key Findings ......................................................................................................................... 28
  Importance of Institutions ..................................................................................................... 28
  Litigation ............................................................................................................................... 29
  Legacies of Conflict ............................................................................................................. 30
  Strategies for Engagement .................................................................................................... 30

Conclusion ............................................................................................................................ 31
  Recommendations ................................................................................................................ 33

Appendix 1: Areas, Actors, and Factors ................................................................................. 34

Appendix 2: Interview Codes and Descriptions .................................................................... 38

Appendix 3: Interview Guide for Civil Society Informants .................................................... 39

Appendix 4: Interview Guide for State Actor Informants ....................................................... 40
Introduction

With the formal end of apartheid in 1994, South Africa entered into an intense period of post-conflict transition. The role of civil society in this transition has been, and continues to be, of considerable significance in terms of its efforts to shape the new democratic dispensation, and in its work to advance and protect the long-neglected rights of the majority of the country’s citizens. New constitutional and legislative protections, combined with new national commitments to a range of human rights instruments at the international level, have paved the way for new forms of human rights-based discourse and advocacy in the country. However, these new commitments, legislation and policies have not always translated consistently into changed practices or policy outcomes, creating space for a plurality of engagements between various elements of civil society and the post-apartheid state. In working towards its various goals, post-apartheid civil society in South Africa employs a mixture of approaches to its interactions with the state, including collaborative, cooperative and, increasingly, contentious engagements. As will be explored in this report, these civil society efforts have met with mixed successes across a wide range of social, political, economic and cultural issues.

This research was undertaken as part of the Afghanistan Rights Monitor (ARM) project, funded by the Dutch Ministry of Foreign Affairs and implemented by Afghanistan Public Policy Research Organization (APPRO). ARM is designed to monitor the impact of instability and conflict on fundamental rights in Afghanistan and facilitate state/civil society dialogue on how best to protect and promote fundamental rights based, in part, on learning from other contexts such as South Africa where actual or potential conflict has a significant bearing on citizens’ fundamental rights.

The Government of South Africa, like the Government of Afghanistan, is signatory to numerous human rights treaties, but has had slow and uneven progress toward meeting the obligations associated with these treaties. While the histories and the current states of these two countries are dramatically different, both face daunting negative social, economic and political legacies that are built upon centuries of various forms of oppression and conflict. Both continue to face deep-rooted and complex societal challenges such as violence, political exclusion, lack of social cohesion, and widespread poverty. Both have legislative frameworks which, to various degrees, are insufficient on their own for the task of upholding and promoting basic human rights. Both countries also host an active, engaged and diverse civil society working to address the gaps between policies and practice through different strategies, tools and approaches.

Despite some similarities, there are also very important differences between the ways in which civil society actors in these two countries engage with, and are able to engage with, their respective governments. This report, with a focus on the South African context, explores the ways in which civil society actors and the government interact in their attempts to protect and uphold basic human rights, with the aim of eliciting comparative lessons with potential practical relevance for the context of Afghanistan and other emerging democracies. To this end, the report explores state-civil society interactions across the four key areas of education, health, corruption, and the rights of migrants, refugees and asylum seekers.

This report is organized thematically across three quite different (though not necessarily mutually exclusive) forms of state-civil society engagements and interactions. The first theme explores the realm of civil society as cooperative and implementing partners, working in conjunction with the government
of South Africa and international institutions toward explicit, shared goals. The second theme turns to a discussion of civil society as a realm of protest, in which a more contentious relationship with the government by civil society is meant to elicit material or ideational change around a given issue. The third theme highlights litigation as an important tool for civil society in engaging with, or challenging, the government around its human rights obligations. Taken together, these three very different approaches by civil society in their engagements with the state speak to some profound successes in the advancement of basic human rights in the country, but they also highlight some critical challenges and obstacles that continue to impede progress toward the protection and advancement of human rights.

**Objectives and Methodology**

The objectives of this paper are to:

- Explore the ways in which civil society actors and the South African government interact in their attempts to protect and uphold basic human rights, through a focus on education, health, corruption, and the rights of migrants, refugees and asylum seekers
- Identify the tools and mechanisms through which civil society actors work to uphold, protect and advance basic human rights in South Africa, and to hold the Government of South Africa accountable to its national and international human rights obligations, and
- Elicit comparative lessons regarding the role of civil society actors in the institutionalization of basic human rights, with potential practical relevance for the context of Afghanistan and other emerging democracies.

This research focuses on four key areas in which there is significant interaction between state and civil society. These are education, health, corruption, and the rights of migrants, including refugees and asylum seekers. While there are numerous other areas in which human rights outcomes do not meet national and international obligations (*inter alia*, housing, food security, unemployment, and gender-based violence), the four areas were selected for their potential capacity to illustrate a diversity of state-civil society forms of engagement including cooperative and co-implementing, protest-based, and litigious. The selection of these four areas was also based on the presence of a range of vibrant civil society voices within them at local, national and sometimes international levels. Further, all four of these areas have been volatile and prominent in social and political discourse in South Africa in recent months, providing fertile ground for contemporary research. Finally, these areas were selected for their relevance to the context of Afghanistan, to enable the extraction of informative, comparative, and applicable lessons for Afghanistan. The following tasks were carried out for this research:

- A literature review encompassing data from secondary sources, including research reports, legislation and policies, media reports, journal articles, and books
- Semi-structured key informant interviews with state and civil society actors working within the four key areas of education, health, corruption and migration (see Appendices 1 and 2 for a list of actors, key factors, institutional associations, and coding, and Appendices 3-4 for the guiding questions used for data collection), and
- Qualitative analysis of both primary and secondary data.
Analysis

State-Civil Society Relations and Good Governance

The concept of “civil society” has long been debated and contested, as has the relationship between civil society and democracy. This debate stems in part from the sheer difficulty of determining the boundaries that demarcate who, and who does not, belong under the banner of civil society, particularly in an increasingly globalized, neo-liberal context where lines between public and private spheres have become increasingly blurred. It also stems from different perspectives regarding the project of liberal democracy, and debates about the normative role of civil society organizations in either upholding or contesting the status quo. Further, the very notion of civil society has been critiqued by some scholars as primarily a Western notion, having little salience in some contexts particularly where the relationship between civil society and the state is enmeshed through clientelistic or neo-patrimonial relations.

Most commonly, however, civil society is envisaged as an arena of voluntary public association which exists outside of the market, state, and private sphere. It is a realm that is often credited with enhancing democratic participation and accountability, promoting social capital, and providing critical checks and balances against the potentially authoritarian powers of the state. The ideal of civil society as a realm that is autonomous from the state is a hallmark of many attempts to define the concept, particularly in a Western context. It is this autonomy that imbues civil society with its capacity to stand in opposition or lend support to the state, as necessary, to strengthen pluralistic, democratic engagement and civic culture, and to act as a watchdog in the protection of democratic institutions and values. However, while this autonomy is a central and defining feature of civil society, it is never complete. Rather, it exists within the confines of the boundaries that are “drawn and maintained by tradition, laws and the constitution.” In other words, the laws and practices of the state play a pivotal role in creating and shaping the spaces within which civil society can operate and engage.

For the purposes of this report civil society is conceptualized broadly, leaving room for a range of possible relationships with the state, and for a plurality of agendas in relation to processes of democratization and liberalization. Given the diversity of civil society in terms of composition, ambitions and strategies, these relationships and agendas will necessarily also be diverse, and at times may even be contradictory. Notwithstanding the theoretical debates, this report begins with the premise that civil society constitutes an important sphere in processes of governance, and that it holds significant potential to contribute to “good governance,” understood as governance that is equitable, inclusive, and respectful of the rule of law and the basic rights of all citizens. Good governance is characterized by attributes such as accountability, transparency, legitimacy, and responsiveness, with civil society contributing in critical ways to the building, fostering and protecting of such attributes in governance.

1 For Gramscian theorists, civil society is a subject of critique, both for a perceived complicity in maintaining existing relations of power, as well as for a perceived lack of representativeness.
State-Civil Society Relations in South Africa: An Historical Overview

South Africa has a lengthy and well-documented history of civil society engagement with highly contentious socio-economic and political issues. Civil society activism against apartheid involved churches, trade unions, civics, formal non-governmental organizations and myriad others. Such activism played an increasingly important role in building anti-apartheid momentum, particularly through the 1980s. Despite some reforms throughout the 1980s, the apartheid state remained violently oppressive in many respects, with the heavy-handed crackdown on oppositional civil society as a regular feature of the political landscape. During this time, the apartheid state was subject to international sanctions and intense moral pressures, while international donors channeled significant funding through civil society organizations in support of the anti-apartheid movement.

The end of apartheid, formally marked by the country’s first non-racial democratic elections of April 1994, brought with it significant changes in the roles and configurations of civil society in South Africa. With the coming to power of the African National Congress (ANC), under the leadership of President Nelson Mandela, the raison d’être of many organizations largely vanished. Antagonism largely dissipated, and was replaced with widespread optimism and expectations that the new government would be representative, co-operative, and progressive, working towards the same goals that had driven much of civil society through its decades of anti-apartheid activism. As Lars Buur has noted, the new government now faced a formidable challenge in attempting to “undo and capture” the robust, often radical, and difficult-to-control civil society that played such an important part in ousting the apartheid state.

As the new ANC government worked to establish itself in power, many key civil society actors were formally incorporated into institutions of the state at multiple levels, and the government began a process of attempting to formally regularize the non-profit sector. By 1997, the South African NGO Coalition (Sangoco) estimated that more than 60 percent of senior NGO staff had moved into either government or the private sector since 1990. To survive financially in the face of decreased funding opportunities, many (though certainly not all) NGOs “increased their levels of professionalization in order to compete with private agencies for government tenders.” The shaping of these NGO activities to meet the requirements of tenders meant that their aims became increasingly subsumed by the various agendas of government departments, a process that for many meant stretching far beyond their original missions statements.

---

7 “Civics” emerged in the late 1970s in South Africa as a means of organizing local residents around both local material and broader political goals. They were, “local associations campaigning for improved living conditions in black townships and opposing municipal authorities foisted on townships by the white minority state.” (Glaser, D. [1997]. “South Africa and the Limits of Civil Society.” Journal of Southern African Studies, 23(1), p.6.)
At the same time, within the new government there were mixed perspectives regarding the role of civil society in the new democracy. In the first few years of the post-apartheid state civil society was largely viewed by the new ruling party as partners in the transition to democracy and the envisioned program of subsequent development. However, this perspective became increasingly ambiguous in subsequent years, particularly with the embrace by the ANC in 1996 of a new Washington-Consensus style macro-economic policy, the Growth, Employment and Redistribution Program (GEAR). GEAR replaced the ANC’s previous Reconstruction and Development Programme (RDP), a much more redistributive and transformative socio-economic platform that had been launched in 1994 in consultation with the ANC’s key partners in the Tripartite Alliance, the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP).14 The adoption of GEAR sowed important divisions, both within the Tripartite Alliance and between some elements of civil society and the post-apartheid state, illustrating the challenges faced by the ANC in transitioning into its new role as the ruling state party, no longer a liberation movement outside the corridors of state power.

By the time the 1990s drew to a close, a number of voices highly critical of the new ANC-led government had begun to emerge in civil society. Civil society actors and new social movements began to vociferously challenge the government on a number of issues such as access to health care and treatment, the provision of housing and utilities, unemployment, and education. Bentley described this as the end of the “honeymoon” period between civil society and the post-apartheid state, in which civil society now “frequently acts against government to hold it to its obligations under the Constitution.”15 The Treatment Action Campaign, for example, emerged in 1998 as a powerful, community-driven NGO pushing for the improved treatment, care and support of people living with HIV. It soon became internationally recognized for its strong human rights-based advocacy positions, public challenges of the government, and its recourse to (and success in) the courts regarding the government’s slow and deeply insufficient response to the crises of HIV/AIDS.

Movements and organizations such as the Anti-Privatisation Forum, the Landless People’s Movement, and the “shack-dwellers” movement Abahlali BaseMjondolo also emerged with adversarial positions against state policies or practices at multiple levels of governance. These and other organizations often deploy the language of rights, particularly with reference to country’s new Constitution of 1996 and its associated Bill of Rights. Since the end of apartheid, the South African state has also become signatory to a range of international human rights instruments, providing further weight and substance to domestic rights-claims. For some organizations, the courts became a new battleground to contest the actions (or inactions) of government in areas such as health, education, and refugee and migrants’ rights.

The emergence of these more adversarial and sometimes litigious elements of civil society has created new strains and pressures in post-apartheid state-civil society relations, stemming from what has been referred to as “a new dilemma arising from the diversity of civil societies and their relation with the state.”16 The ANC was forced to revisit its conceptualization of civil society as largely supportive and implementing partners in a shared agenda of development to one of autonomous actors with their own,

14 The “Tripartite Alliance” is a strategic political alliance consisting of the African National Congress, the South African Communist Party, and the Congress of South African Trade Unions.
potentially oppositional, agendas that needed to be confronted. For some within the ANC, the emergent “watch dog” approach of some elements within civil society did not sit well. In his 1997 speech at the 50\textsuperscript{th} ANC Conference in Mafikeng, for example, President Mandela derided NGOs which had emerged as critical voices in the post-apartheid period, accusing some NGOs of being instruments of foreign governments with little popular legitimacy.\textsuperscript{17} A similar perspective was expressed by President Mbeki, during general strikes organized in 2001 and 2002 by labor unions and social movements, in opposition to privatization agendas. Here, Mbeki responded by arguing that such protests ran counter to the democratic mandate of the ANC, and that those positioning themselves in opposition to the ANC were acting against “our movement.”\textsuperscript{18}

In this interpretation of appropriate state-civil society relations, the ANC under both Presidents Mandela and Mbeki continued to identify itself primarily as a “movement,” rather than a governing political party. Those in opposition to the ANC, or even aspects of the ANC’s agenda for transformation, were cast as opponents of the very movement to which the ANC was referring.\textsuperscript{19} This framing of NGOs certainly compromises the space for civil society actors to express dissent around policy decisions, directions, actions or inactions. More recently, during his Department’s budget vote speech in April 2016, South Africa’s Minister of State Security, David Mahlobo expressed the opinion that some South Africans and NGOs were collaborating with foreign agents to destabilize the country, saying “Not everybody is our friend. The forces that are opposed to us are hard at work. Our NGOs play an important part in South Africa, but there are those who work to destabilize the state.”\textsuperscript{20} One Member of Parliament interviewed for this work felt that there was currently a great deal of mistrust of NGOs from within government in terms of their funding, mandates, and how their money was being spent.\textsuperscript{21} To what extent such a perspective is indeed prevalent within the state is unknown, but it is, nonetheless, illustrative of the ambiguous relationship that continues to characterize the relationship between some within the state and some components of civil society.

While civil society, including NGOs, continues to flourish and contribute in myriad ways toward the improvement of lives across South Africa, it is manifestly clear that there is no single “civil society” in South Africa, nor is there a uniform and consistent relationship between civil society actors and various elements or interests within the state. The following sections explore the diversity of some of the state-civil society interactions towards advancing or upholding basic rights in South Africa, by looking at some cooperative, collaborative models of state-civil society engagement, the realm of protests and direct action by civil society, and litigious approaches by civil society to advancing or protecting rights.


\textsuperscript{19} A similar dynamic has played out in other countries as well, in which governments that have newly come to power in part through the substantial assistance and support of the grassroots (such as Egypt in the 1950s, or Iran in the 1980s) have faced significant challenges in negotiating subsequent state-civil society relations. Once a shared goal of regime change has been achieved, the actual imperatives of governing do not always align with the broader ambitions of a diverse civil society, and tensions may quickly arise regarding differing perceptions of the “appropriate” role of civil society.


\textsuperscript{21} Interview, Member of Parliament, Cape Town, May 2016.
Cooperative and Collaborative Approaches

Cooperative or collaborative approaches are forms of state-civil society engagement that use available formal, non-confrontational mechanisms and institutions to monitor or advance human rights or development agendas, or approaches that result in direct partnerships between the state and civil society actors for the delivery of specific services. This section focuses on some of the formal institutions and mechanisms for state-civil society engagement and explores some contemporary examples of civil society activity in the monitoring of human rights across multiple levels of governance. The section concludes with a discussion of state-civil society cooperation around the direct delivery of services.

With the coming to power of the African National Congress, there were substantial expectations on behalf of the new government that civil society would shed its more confrontational tactics of the past in favor of a new, more collaborative relationship with the state. Civil society was largely envisioned as an implementing partner, working towards shared agendas of economic and social development. In many ways, collaborative relationships between some civil society actors and state actors have, indeed, yielded important results in the advancement of rights in the new democracy, and continue to do so across a range of issues.

The very content of the post-apartheid South Africa’s 1996 Constitution “was influenced immensely by the input of civil society and many of its provisions, including the socioeconomic rights and the establishment of State institutions supporting constitutional democracy, were strongly lobbied for by the NGO sector.” 22 The Constitution offers specific protections for the continued involvement of civil society and members of the public in processes of governance, and legislatures at both the provincial and national level have constitutional obligations to facilitate the involvement of the public in their processes. 23 Access to information and just administrative action are constitutionally protected, and, as Jagwanth highlights, the Constitution “dedicates a chapter to the basic values and principles of public administration in South Africa, including transparency and the right of the public to participate in policy-making.” 24

Some institutions of state have been created with civil society as an explicit component of their structures. For example, South Africa’s National Economic Development and Labour Council, established through the National Economic Development and Labour Council Act of 1994, was envisaged as a “vehicle by which government, labor, business and community organizations will seek to cooperate, though problem-solving and negotiation, on economic, labor and development issues, and related challenges facing the country.” 25 The National Anti-Corruption Forum is another example of a state forum in which civil society comprised a significant partner at the table (see Box 1). Inevitably, however, given the diversity of civil society in terms of its interests, agendas, and ideological approaches, issues of representation in formal structures for state-civil society engagement and interaction can be highly contentious. The director of one civil society organization felt, for example, that the state has a propensity to “cherry-pick” which organizations it chooses to engage with through collaborative forums, arguing that those elements of civil society which may have a more confrontational or adversarial stance

---

23 Ibid. p.11.
24 Ibid. p.11.
on an issue are often side-lined in favor of those that tend to tow the government line. A Member of Parliament had a similar view, believing that the NGOs trusted by the government were those known to be aligned to the ruling party.

**Box 1: The National Anti-Corruption Forum**

| The National Anti-Corruption Forum (NACF) was launched by the South African government in June 2001 as an intersectoral body consisting of 10 representatives each, from government, business and civil society. Based on a model of rotating leadership between each of these three sectors, with its secretariat within the Public Services Commission, the NACF aimed to provide a forum to combat and prevent corruption, and to build integrity and awareness around issues of corruption across all sectors of society. While there was initially significant political support and momentum behind the initiative, some state and civil society actors interviewed for this report noted that the momentum was difficult to maintain for a number of complicated reasons. They noted, for example, challenges in the model of rotating leadership, which resulted in some discontinuities and disorganization, difficulties in scheduling regular meetings given the high-level positions of the political representatives to the Forum, and sustainability challenges, particularly around the expenses associated with supporting some civil society actors whose budgets could not allow for the costs of participating in or co-organizing the Forum.

One civil society actor also recalled that, while the Forum was an important avenue for discussion and engagement, the structure of the Forum made it difficult to engage deeply in the controversial and sensitive issues that needed to be addressed, such as, for example, unresolved questions of apartheid-era grand corruption amongst state and business actors, and how these patterns of corruption may have continued into the new democratic dispensation. Another challenging discussion revolved around questions of accountability and transparency within civil society itself. The NACF was also lacking in any implementation or accountability functions. One respondent spoke about the perception that the NACF enjoyed more political support under President Mbeki than it does under current President Zuma’s administration.

Some civil society actors believe that state processes of consulting civil society are, at times, conducted in bad faith on the part of the government, being little more than window dressing for state decisions that have in fact already been made. Whether or not this is the state’s intention, the perception that it is so undermines such avenues for engagement, and can undermine working relationships between some state and civil society actors. Other civil society actors note that there are institutions of state that do provide meaningful forums for state-civil society engagement and interaction, particularly at a local level. For example, several civil society actors interviewed noted that they often relied on structures such a Community Policing Forums and municipal level Ward Council meetings to advance their issues around sanitation, violence, and safety, for example, using these forums to raise awareness and build momentum around the specific issues at the community level.

The success of collaborative approaches between state and civil society actors also depends upon the buy-in of high-level decision makers within departments or institutions of state. For example, in a recent workshop on Administrative Justice and Corruption in the Asylum System in Cape Town, one civil society actor recounted how her organization had approached a very responsive Deputy Director-General in the Department of Home Affairs around a potential collaboration to combat corruption in the asylum system. That enthusiasm, however, was not matched by the Director-General or the Minister who

---

26 Interview, civil society actor, Cape Town, May 2016.
27 Interview, Member of Parliament, Cape Town, May 2016.
opposed the proposed collaboration insisting that migrants including asylum seekers (rather than the Home Affairs officials) were the protagonists of corrupt transactions. The individual attitudes, personalities and beliefs of key officials within departments can thus play an important role in the potential for developing and undertaking collaborative projects with civil society actors.

In terms of collaborative approaches with the state, there was also some important reflection from civil society actors around their own actions, attitudes and accountability. For example, one civil society actor reflected that it was important, even when tensions were running high, to also highlight and celebrate the successes of the government.\(^{29}\) She felt that there was always an important balance between pressure and collaboration, and that constant critique without recognizing the advances being made could be damaging to relationships.\(^{30}\) This kind of constructive advocacy approach was described in different terms by other civil society actors, who described it as “respectful pressure,” or “advocacy tough-love.”\(^{31}\) Another respondent noted that there was sometimes an unwillingness by civil society to share successes with government, or to allow government to take credit for advances that have been made, particularly when some civil society organizations feel that their exclusive claim to success may increase funding or publicity opportunities.\(^{32}\) Another civil society actor felt that in order to credibly engage in constructive advocacy, civil society organizations must also be open and willing to accept constructive criticism from government actors, as they also needed checks and balances, and could always improve in their work.\(^{33}\)

Another set of state institutions providing important opportunities for state-civil society engagement around upholding and protecting human rights in South Africa are what are known as the “Chapter 9 Institutions,” so named for the specific chapter of the Constitution which establishes them. Among the Chapter 9 institutions are the South African Human Rights Commission (SAHRC), the Public Protector (see Box 2), and the Commission on Gender Equality (CGE). These institutions are independent, subject to only the Constitution and the law, and are accountable to the National Assembly, with a requirement to present a report on their activities and performance of their functions on an annual basis.\(^{34}\) The SAHRC, for example, is tasked with reporting to Parliament on the steps taken by each government department towards the realization of the socio-economic rights laid out in the Bill of Rights, a task through which it engages closely with various civil society actors working on related issues.\(^{35}\) While there are many critiques regarding the efficacy of both SAHRC and the CGE, civil society actors interviewed placed significant value on the Chapter 9 institutions, and particularly the work of the Public Protector in upholding transparency and accountability in governance, and preventing the abuse of state powers.\(^{36}\)

The Office of the Public Protector has, in recent years especially, played a very central role in addressing high-level issues of corruption and state abuse of power including a high-profile investigation into improper benefits accruing to the President through state-funded security upgrades to his home in the province of KwaZulu Natal. While some civil society actors interviewed indicated that they did not

\(^{29}\) Interview, civil society actor, Cape Town, May 2016.

\(^{30}\) Ibid.

\(^{31}\) Civil society actor panelist (June 13, 2016). Dialogue on “Administrative Justice and Corruption in the Asylum Systems and Beyond” hosted by Corruption Watch, the Scalabrini Centre of Cape Town, and the African Centre for Migration & Society. Cape Town.

\(^{32}\) Interview, civil society actor, Cape Town, May 2016.

\(^{33}\) Interview, civil society actor, Cape Town, May 2016.

\(^{34}\) Jagwanth. (2003) p.11.


\(^{36}\) Interview, civil society actor, Cape Town, May 2016.
necessarily engage directly with Chapter 9 institutions, some of their work was nonetheless focused on protecting the integrity of these institutions. The organization Corruption Watch, for example, currently has a campaign called *Bua Mzansi*, which aims to solicit public participation and encourage transparency in the selection process of the next Public Protector, as the non-renewable seven-year term of the current, much-lauded Public Protector and Advocate Thuli Madonsela comes to an end in October 2016.

**Box 2: The Office of the Public Protector**

The Office of the Public Protector formally came into being on October 1, 1995. It is one of the “Chapter 9 Institutions” established in Chapter 9 of South Africa’s post-apartheid Constitution, along with the Commission for Gender Equality, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Auditor General, the Independent Electoral Commission, and as well an Independent Authority to Regulate Broadcasting. The Chapter 9 Institutions were established to support and protect the country’s new constitutional democracy. The Public Protector is appointed by the President on the recommendation of the National Assembly. In a non-renewable seven year term in office, the Public Protector is empowered to investigate any conduct in state affairs, or in the public administration within any sphere or government, that is suspected or alleged to be improper. Importantly, all other organs of state are constitutionally compelled to assist and protect the Office of the Public Protector in order to ensure its impartiality, dignity, effectiveness and independence.

Advocate Thuli Madonsela, the current Public Protector, has been a formidable force in this office, with her most prominent investigation delving into the scandal surrounding state-sponsored upgrades to President Jacob Zuma’s personal home in Nkandla, in KwaZulu Natal province. In her report from this investigation, Madonsela found that the President violated the Executive Ethics Code in failing to protect state resources, and that he benefitted improperly from non-security upgrades. She also recommended that the President pay back a reasonable percentage of these costs. These and other high-profile cases into corruption and maladministration in the state have earned Madonsela a host of international awards and accolades, a place on *Time* Magazine’s 2014 list of the 100 Most Influential People, and the admiration of many South Africans. They have also resulted in animosity and anger from some within the state. Madonsela has been accused by the Deputy Minister of Defence of being a CIA spy, and exposed to an array of both personal and professional attacks. She has been on the receiving ends of threats, most recently receiving a tip-off in May 2016 of a contacted hit being planned against her. With Madonsela’s term of office coming to end in October 2016, there is much speculation, and some concern, about who will fill her shoes in this critically important Office.

Civil society actors are also involved in various forms of human rights monitoring and reporting in South Africa, at multiple levels. The writing of submissions and shadow reports for international human rights monitoring processes (for example, around the ICCPR or the Universal Periodic Review) is common, with some organizations working together to develop joint submissions. Until recently, there was also a strong campaign in South Africa, led by civil society organizations such as the Community Law Centre, the Black Sash, the Socio-Economic Institute of South Africa, and the People’s Health Movement of South Africa (along with others), to pressure the South African government to ratify the International Covenant on Economic, Social and Cultural Rights, which had been signed by the South African government in October 1994, but not ratified until January 12, 2015.

The African Peer Review Mechanism (APRM) represents another monitoring mechanism, founded in 2003 by African Union (AU) member states, as a self-monitoring mechanism toward good governance, though it has faced heavy criticisms around not providing effective opportunities for civil society engagement with its processes. As of May 2016, 35 African countries had joined the APRM, with 17 having undergone their first review. However, as the South African Institute for International Affairs

reports, “in spite of initial enthusiasm about this initiative, between 2012 and 2015 the APRM was increasingly plagued by challenges relating to its internal governance processes, misuse of public funds and failure to progress with its regular operations.” At present, initiatives are underway to revitalize the APRM, and strengthen engagement opportunities for civil society.

At the national level, there are also innovative forms of human rights monitoring taking place within civil society including the Centre for Constitutional Rights’ (CCR) annual “Human Rights Report Card” program, the purpose of which is to monitor annual progression towards the range of rights protected within South Africa’s Constitution, as well as areas in which the Centre believes there has been regression. The CCR distributes the annual report card broadly, through media and civil society networks, but also delivers copies door-to-door to Members of Parliament. They report a mixed reception, with interest from media, civil society, and opposition parties, but a less welcoming reception, unsurprisingly, from the ruling party. While some of this may be related simply to the ruling party being the target of such a report, the CCR is also a unit of the F.W. de Klerk Foundation (F.W. de Klerk being South Africa’s last apartheid-era President), and thus, criticism from within this organization may be particularly politically charged and sensitive.

The Social Justice Coalition (SJC), a broad-based civil society organization based in Khayelitsha, a partially informal township 25 kilometers outside of Cape Town, engages in a more localized and specific form of monitoring in the area of socio-economic rights, called “social auditing.” The SJC’s social audits represent a localized attempt to hold the state accountable for the delivery of services within the communities in which SJC works and in which most of its members live. One such social audit revolved around the issue of chemical blue toilets – a sanitation service meant to be provided at a municipal level of governance. SJC members first applied through a Protection of Access to Information Act (PAIA) request to obtain the contracts involved in this service, which were being managed by the City of Cape Town. Following this, they trained themselves and their membership around the specifics of this contract and the ensuing obligations of both service provision and oversight by the City. Once this was done, SJC members conducted “physical verifications” of the toilets, checking to ensure that what is required by the contract was, in fact, happening, and that there was adequate oversight as contractually required. After compiling a report of their findings, the SJC held a public meeting to deliver the results to both members of the public and invited officials. While the results of social audits are not necessarily well received by officials, the SJC believes this is a crucial and potentially transferable process to encourage active, empowered citizenship as well as state accountability. To date, the SJC has conducted four social audits, is developing a social audit network with other civil society organizations, and has created a guidebook to conducting social audits.

Finally, another important means of cooperative or collaborative state-civil society interactions in South Africa is through a more direct service delivery function by civil society actors, particularly in areas such as health, or the provision of support services for asylum seekers and refugees. In the health sector, particularly, civil society organizations have been a critical conduit of direct services to many hard-to-reach communities in the context of South Africa’s HIV/AIDS pandemic, and devastating rates of tuberculosis (TB). For example, South Africa’s community care worker programs, funded by the state but managed and administered by a wide network of NGOs, play an important role in HIV/AIDS and TB care,

38 http://www.saiia.org.za/events/reviveaprm
39 Interview, civil society actor, Cape Town, May 2016.
40 For more information on the social audit as a strategy, and for the associated guidebook, see: http://socialaudits.org.za
treatment and support processes across the country, and increasingly in terms of other health issues as well. NGOs or other civil society actors working in the area of service provision can fill crucial gaps in the state’s own capacity to adequately reach its diverse populations. However, this approach may also render NGOs dependent on state funding, limiting the potential for other critical or advocacy functions, unless there is a clear mandate that such funding is not contingent upon a non-critical stance. There are also important questions around whether filling such gaps in the provision of services that ought to be state-provided creates a disincentive for the state to improve the scope and delivery of its direct programs.

The diversity of civil society organizations working in South Africa towards advancing or upholding human rights is reflected in the diversity of approaches taken by these organizations, particularly in terms of the ways in which they engage and interact with the state. For most, there is not one, single approach that is more effective than the others, but rather civil society actors speak about the importance of being able to draw on a repertoire of diverse and often complementary strategies, depending on the specific context of the issue at hand. In South Africa, as reflected in this section, there are many opportunities for civil society actors to engage effectively with the state to advance or uphold rights through formal state structures and institutions, various human rights monitoring strategies at multiple levels of governance, and even through collaboration with the state for the direct delivery of services. The next section turns to more contentious forms of civil society engagement and activism, expressed through protest and direct action.
### Summary: Cooperative and Collaborative Mode of State-Civil Society Interface

<table>
<thead>
<tr>
<th>Role of CSO</th>
<th>Ongoing Challenges</th>
<th>Potential Lessons</th>
</tr>
</thead>
</table>
| Chapter 9 Institutions (e.g. SAHRC and Public Protector’s Office) | • Adequate resourcing  
• Guarding against potential political interference | • Institutions established under the Constitution  
• Public Protector as an important resource for upholding transparency and accountability in government  
• SAHRC as a dedicated state institution for protecting/advancing human rights |
| NGOs as service providers (e.g. managing community based care programs) | • Possible dependency on government funding  
• Decreasing international funding  
• May limit NGOs’ capacity for critical engagement with the state  
• May be disincentive for state to meet those functions itself | • NGOs with stable funding from government can fill important gaps in the delivery of services  
• NGO service delivery functions should complement, not replace, state efforts to provide adequate services for all |
| Participation in governance and human rights monitoring mechanisms (e.g. UPR, ICCPR, APRM) | • May be difficult to see immediate impact or results  
• APRM currently suffering from internal governance and resourcing issues | • An important mechanism for bringing domestic human rights issues to the international stage  
• Potential of regional peer-review processes like APRM, if properly resourced and managed, as a tool for governance and rights-monitoring |
| Stakeholder workshops/formal policy submissions | • Can be strained if state-civil society relationships are difficult  
• Some concerns from civil society that stakeholder workshops and formal policy submission requests are window dressing, with decisions already made by the state authorities | • Constitutional protection of civil society in policy processes  
• Some civil society policy submissions have impact |
| Social Audits (e.g. SJC’s sanitation audits) | • State actors may refute results of locally-conducted social audits  
• Requires access to information (e.g. contracts between state and service providers) | • Engages with local community members to train them in social auditing activities to help hold government accountable for service delivery around basic rights  
• Draws public attention to relevant issues  
• May provide direct impetus for state to improve services |
Realm of Protest And Direct Action

This section explores protest and direct action as forms of ideational and material challenges in contemporary South Africa. After situating the tactics of protest and direct action within the historical context of South Africa’s struggles against apartheid, this section synthesizes some of the ways in which protests and direct action feature in contemporary civil society and social movement activism, along with some of the key factors that either support or inhibit the effectiveness of these strategies. This section also explores the propensity of some protests to spill over into violence in South Africa. This recourse to violence occurs with regularity, either through the destruction of property, interpersonal violence, or a combination of both. Such violence has important direct and indirect implications for both state and civil society actors as they work towards the advancement of rights in South Africa.

Protest and direct action as a means for civil society to engage with the state have a long and rich history in South Africa, particularly in terms of challenging and undermining the apartheid regime. Such strategies, in various forms, continue to play an important role in contemporary activism and civil society politics. Apartheid-era protests in South Africa formed a pivotal component of resistance to the oppression and inequities that characterized the apartheid state, though they were often met with heavy-handed and violent police responses, fostering legacies of public mistrust of the police. The famous Sharpeville massacre, for example, in which the South African police shot dead 69 unarmed protesters on March 21, 1960, helped to foment anti-apartheid sentiments and actions across the country, as well as internationally. Intensive, mass labor action, such as the 1973 Durban strikes, also led to a renewal of black labor organizing, which the apartheid state was unable to quell. Student uprisings were most famously expressed in the Soweto Uprising in 1976, in which police opened fire on students, killing more than 60 people. During the 1980s the ANC in exile called on South Africans to make South Africa ungovernable, as a means of undermining the authority of the apartheid state and its institutions. Many of the state’s administrative systems, particularly at local levels, broke down and a heavy police presence resulted in ongoing violence, conflict and oppression in many communities. At the same time, massive peaceful marches and protests also took place at a grand scale, particularly through the 1980s. The United Democratic Front (UDF), an ANC-aligned umbrella of more than 600 anti-apartheid organizations, was launched in 1983 and was instrumental in organizing these protests and building civic momentum in the struggle against apartheid.

In the post-apartheid democratic era, protests in various forms continue to be a prominent strategy of activism and public expression. Some protests erupt locally, within communities, while other marches or rallies take place outside key institutions of political power, such as Provincial legislatures or Parliament. Since 2004, especially, there has also been a distinct rise in the number and intensity of what have become widely known as “service delivery” protests across communities in South Africa, where, despite some advances, post-apartheid promises of housing, employment, access to health, and sanitation remain unmet for many. However, whether or not this term adequately captures the nature of these protests and gatherings remains a point of debate, given the diversity and local contextual dynamics of these protests, and also given that the term “service delivery” may gloss over some of the deeper social and political dynamics, in favor of a more material interpretation. These protests appear to be locally organized to “place demands on people who hold or benefit from political power (which includes, but is

---

not limited to, local politicians)." Alexander (2011). p.26. These protests arise from within poorer neighborhoods, rather than suburbs, suggesting that the protests may be best characterized as a local political phenomenon:

The form of these actions relates to the kind of people involved and the issues they have raised. They have included mass meetings, drafting of memoranda, petitions, toyi-toying, processions, stay-aways, election boycotts, blockading of roads, construction of barricades, burning of tyres, looting, destruction of buildings, chasing unpopular individuals out of townships, confrontations with the police, and forced resignations of elected officials. Alexander (2011). p.26.

While these features echo those that characterized many protests of the anti-apartheid movement, South Africans also engage in many contemporary peaceful protests around a wide range of social, economic and political issues, such as health, corruption, education.

The civil society actors interviewed for this research generally continue to regard strategies such as protests or sit-ins as important tools of engagement, with the potential to contribute towards the achievement of end goals. However, they were also quick to note that protests undertaken in isolation from other forms of engagement, activism and social mobilization, would likely not meet with much success. The civil society actors also recognized the importance of building broad public support for their work, with one respondent, for example, explaining that the strength and success of their own work stems from the amount of time and effort they spend as an organization ensuring that complex political or policy issues are made accessible, understandable and relevant to the lives of their members and supporters in communities. For this organization, it is important that anyone attending a protest be able to speak to the issues, and to understand why it is they are there and what they hope to achieve. This respondent explained that in their own work one important means of reaching people is local radio and media, in conjunction the use of national and more mainstream media.

The reception of protests by civil society from within the state appears to be varied. According to an interview with one state actor, there were some people within the state that believed protest action by civil society was tantamount to the behavior of “a naughty child,” and that rather than criticizing the government from the sidelines, civil society was taken much more seriously when it attempted to engage concretely and cooperatively with the state. From this perspective, the memoranda, petitions, or media attention that might accompany a protest could be easily dismissed by state officials, who assumed that the protest would blow over, would lack broad support, or that organizers would be

43 The toyi-toyi is a collective protest dance widely used in South African protests. It featured strongly in anti-apartheid protests, and continues to play an important part in contemporary protests.
45 Interview, civil society actor, Cape Town, May 2016.
46 Ibid.
47 Ibid.
48 Ibid.
49 Interview, state actor, Cape Town, May 2016.
unable to sustain momentum. However, in other cases, protests certainly can have impacts. One civil society respondent, for example, noted that after a sustained and high profile campaign against the South African government’s proposed Protection of State Information Bill (dubbed “the Secrecy Bill” by civil society and the media) from 2011-2013, the government was subsequently more responsive to them in terms of consultations and meetings around related policies and legislation.

South Africa’s democratic transition has opened new, much safer spaces for protest, and the majority of protest action in the country is indeed peaceful and without incident. Yet, protests in the country can and regularly do easily spill over into violence or the destruction of property. Societal mistrust of state power, including the police, has not entirely dissipated since the end of apartheid, and has even been reinforced in some dramatic ways in recent years. The Marikana massacre of August 2012, for example, saw police open fire on striking miners in the country’s platinum belt, killing 34 people, with little state accountability. Service delivery protests, as noted above, regularly result in looting, burning of tires, police confrontations and property destruction. Recently, arson and property destruction related to student protests across the country in the tertiary education sector have resulted in more than US$19 million in damage to schools, while the burning of 24 schools in Limpopo province by community members in an electoral demarcation dispute in May 2016 resulted in over US $45 million in damages. Service delivery protests in some communities have, at times, also morphed into the expression of anti-foreigner sentiments or violence, with looting of shops or destruction of property owned by foreign nationals, or direct violence against foreign nationals. Amongst state and civil society actors interviewed for this research, most believe that this kind of violence has long and complicated roots in apartheid, ongoing marginalization, and the frustrations of the slow pace of change in the post-apartheid era. One Member of Parliament interviewed for this report believed the propensity for violence and property destruction in protests may also be the result of criminals attaching themselves to protests in pursuit of potential material gain. Another Member of Parliament reflected that perhaps violence and destruction are sometimes the tactics of “the forgotten people” – those who feel socially and politically marginalized, without hope, and without voice.

When protests are used in the absence of violence from both protesters and the state, they continue to play an important role in advancing rights in South Africa. They demonstrate that citizens are paying attention to processes and issues of governance. Through the galvanizing of media attention, they can raise the profile of specific issues, and pressure the South African state into upholding its obligations to work toward the progressive realization of the wide array of rights enshrined in its Constitution and related legislation. However, when protests turn violent or destructive, they can quickly impede, rather than advance, the work being done in the country towards the realization of socio-economic rights.

---

50 Ibid.
51 Interview, civil society actor, Cape Town, May 2016.
54 Interview, Member of Parliament, Cape Town, May 2016.
55 Interview, Member of Parliament, Cape Town, May 2016.
### Summary: Protest and Direct Action Mode of State-Civil Society Interface

<table>
<thead>
<tr>
<th>Role of CSO</th>
<th>Ongoing Challenges</th>
<th>Potential Lessons</th>
</tr>
</thead>
</table>
| Service Delivery Protests    | • Many such protests are peaceful, but others entail violence and property destruction  
                                 • Service delivery protests may become violent and result in attacks against foreign nationals in some communities  
                                 • Protests can heighten tensions between South African police and citizens in communities | • Protests draw attention to the continued marginalization and vulnerability of millions of South Africans  
                                                                                       • Protests entailing property destruction or violence are used by many citizens for their perceived, ongoing impact |
| Student Protests             | • 2015-2016 national student protests have resulted in approximately US$19 million in damages  
                                 • Many legitimate student grievances overshadowed by violence and vandalism | • Protests draw attention to the substantial challenges faced by South African youth in terms of access to education, ability to pay for education, and lack of post-apartheid transformation in the tertiary education sector (and, by extension, the primary education sector)  
                                                                                       • Protests also highlight broader discontent, including high unemployment rates for graduates and ongoing inequality |
| Peaceful Demonstrations      | • Mass mobilization for peaceful demonstrations may not be possible for some issues (e.g. refugee rights or LGBTI rights) where public support may be lacking, or underlying social values may be at odds  
                                 • Always a risk of peaceful demonstrations turning into violent confrontations | • Peaceful demonstrations provide an important tool for raising awareness and building support around an issue  
                                                                                       • Peaceful demonstrations can draw positively on the protest methods of the anti-apartheid movement to advance contemporary goals |
Litigation as a Strategy for Change

The pursuit of legal challenges as a form of political engagement has a lengthy history in South Africa, far pre-dating the end of apartheid. Even during the height of apartheid, the courts occasionally returned decisions that were singularly misaligned with the social and political imperatives of the apartheid state. Yet, the crafting of South Africa’s post-apartheid Constitution of 1996, its associated Bill of Rights, and its post-apartheid commitments to a range of international human rights instruments, has opened the door to new opportunities for human rights-driven civil society engagement with the state through litigation.

There was strong awareness amongst those interviewed for this report that the space for litigious action toward the advancement of rights is only possible because of South Africa’s functioning, independent judiciary, and a national and international legal framework that provides for such an approach in the first place. Elements of post-apartheid South African civil society have now become adept at using strategic and public interest litigation to advance human rights agendas around issues such as the protection of refugee, asylum seeker and migrants’ rights, the rights of prisoners, environmental rights, textbook delivery and minimum standards for infrastructure of schools, and access to anti-retroviral treatment for people living with HIV (see Box 3).

Such an approach has yielded important victories for the advancement of rights, and for providing an important check and balance on state power. However, there are also significant obstacles to successfully utilizing this approach, as well as important potential implications for state-civil society relations.

Since the end of apartheid civil society-initiated court challenges have been advanced largely as a means to define or expand the protections afforded to certain populations, work towards ensuring the inclusion and protection of potentially neglected or vulnerable populations, or challenge the contravention of existing laws. An important element of this new legal space has been the capacity to advance claims by way of administrative review, an avenue noted as being almost non-existent prior to 1994, but which is now a visible component of public law in South Africa. The Constitution guarantees just administrative action through the Promotion of Administrative Justice Act of 2000 and public law jurisprudence in the country’s courts. Litigation is central to the work of some civil society organizations such as the Legal Resources Centre (LRC), the Equal Education Law Centre (EELC), the Southern African Litigation Centre (SALC), and Lawyers for Human Rights (LHR). Other organizations may

57 This Bill of Rights draws heavily on a range of international human rights instruments, including the 1948 Universal Declaration of Human Rights, the 1996 ICESCR, and the 1966 ICCPR. The Constitution also contains an important provision in section 39(1)(b) about the role of international law, with regard to the interpretation of the Bill of Rights and statutory interpretation, in that the courts “must consider international law when interpreting the Bill of Rights.” (Hardy, K. [2013]. “Litigating human rights in South Africa: the experience of the Centre for Applied Legal Studies. Law, Democracy & Development, 17. p.448.)
59 http://bhekisisa.org/article/2015-09-30-hiv-infected-south-africans-on-arvs-could-double
59 Ibid. p.25.
resort to litigation occasionally while others, whether for financial, practical or ideological reasons, do not do so at all.

**Box 3: Treatment Action Campaign**

In 2015, Statistics South Africa estimated there were 6.19 million people living with HIV/AIDS. Of these, around 3 million were taking life-saving antiretroviral (ARV) medications. While there is still a long way to go in reaching all those who need access to ARV, this represents remarkable progress, particularly given the earlier days of HIV/AIDS in South Africa throughout the 1990s and into the early 2000s, characterized by stigma and fear, government denialism, and a dearth of care, treatment and support options.

The Treatment Action Campaign (TAC) was launched on International Human Rights Day, December 10 1998, by a small group of activists in South Africa. The TAC represented a critical civil society response to the emergence of a decimating HIV/AIDS epidemic in South Africa, and a less-than-robust response from the government in effectively addressing the care, treatment and support needs of those infected or affected by the virus. As one of the co-founders of the organization writes, “the intention of the founders of TAC was to popularize and enforce what was loosely described as ‘the right of access to treatment’ through a combination of protest, mobilization and legal action.” Explicitly drawing on the language of human rights to frame their calls for access to treatment, TAC mobilized thousands of people in their work. Organizers built a movement from within communities, based on a model of “treatment literacy,” in which those living with HIV/AIDS took part in programs of health education, exploring the science of HIV and the benefits of treatment. They needed to overcome both domestic barriers in the form of government neglect, resistance or denialism, as well as international barriers to access to treatment, entrenched in the structures of the global political economy and the global pharmaceutical industry.

TAC launched ultimately successful campaigns for the development of effective national government programs for the prevention of mother-to-child transmission of HIV, in particular lobbying for the provision of the drug AZT. They subsequently demanded a national ARV plan, as well. In both campaigns, TAC employed a combination of mass mobilization, research, negotiation, and litigation based on the right to health. Amongst other successes, its work has resulted in significant price reductions and dramatic improvements in access to pharmaceuticals, increases in government budgetary allowances for HIV/AIDS, the empowerment of thousands of people living with HIV/AIDS, and the testing of new models of state-civil society engagement in post-apartheid South Africa. More recently, the capacity of TAC to continue in its work has been badly affected by the scaling back of grants to NGOs involved in HIV/AIDS by global donor countries, and the shifting of donor priorities. While donor priorities may be shifting, the work of TAC remains as relevant, and as urgent, as ever, as HIV/AIDS continues to takes its grim toll on the country.

Such an approach has yielded important victories for the advancement of rights, and for providing an important check and balance on state power. However, there are also significant obstacles to successfully utilizing this approach, as well as important potential implications for state-civil society relations.

CSOs that regularly or occasionally engage in litigation indicated that it remained, for them, a tool of last resort for advancing the issue at hand. Others indicated that litigation was one of a range of various tools in the repertoire of civil society, only to be pursued when other means of interaction and engagement with the state, such as letter-writing, meetings, high-level advocacy, attendance at workshops, policy submissions, representations at relevant Parliamentary Portfolio Committee

61 http://bhekisisa.org/article/2015-09-30-hiv-infected-south-africans-on-arvs-could-double
meetings, were perceived to have failed or resulted in intractable differences. Even while litigation was not the preferred course of action, for many CSOs it remains a valued option for responding to being sidelined or ignored in formal attempts to engage with the state. One Member of Parliament indicated that civil society lawsuits can also help to build political awareness around issues that politicians can then build on and take further within the corridors of power.  

However, the risks, or shortcomings, of litigious approaches were also widely acknowledged in interviews for this report. The expense of litigation, along with the often long time frames associated with the processes involved, can be a powerful deterrent for organizations that are considering this option, particularly for smaller civil society organizations that do not have access to the kinds of resources that litigation can consume. The financial costs associated with litigation, however, run both ways, and legal costs for the state can also be substantial. One 2012 report by the African Centre for Migration and Society, for example, documents no less than 90 legal challenges just around illegal detention and deportation practices, brought against the Department of Home Affairs (DHA) by LHR between January 2009 and December 2010. The report noted that in every case that went to court, the judge found the DHA’s actions to be unlawful, with an estimated financial cost to the Department of R4.7million (approximately US$300,000).  

State legal costs are exacerbated across Departments and institutions by the persistent and long, drawn out appeal of court losses in what one law professor at the University of Cape Town has termed “a Stalingrad defense style.”  

Given the particular dynamics of state-civil society relations in post-apartheid South Africa, litigation can also be a particularly sensitive form of state-civil society interaction, with a potential to damage relationships and undermine trust. Several civil society actors interviewed for this report noted that in their work, there have been very mixed reactions to litigation by different officials in different departments, and at different levels of the state. For example, one civil society respondent recalled a state official tacitly supporting a particular court case, because it provided the impetus for that Department to find the resources, momentum and capacity to address the issue at stake. Another state actor believed that litigation could provide an important reminder to state officials that they are accountable to stakeholders outside of the state.  

In other instances, however, civil society respondents noted that some state officials could become angry or defensive in the face of litigious approaches, with one civil society actor recalling an irate official in one provincial department telling them they must not sue, as they were taking important resources away from the work that needed to be done. Another indicated that in the field of migration, litigation has created highly antagonist relationships between the Department of Home Affairs and litigating components of civil society. This respondent noted that while Department officials used to meet regularly with civil society actors working on issues of migration, these

---

63 Interview, Member of Parliament, Cape Town, May 2016.  
65 University of Cape Town professor of law panelist. (June 13, 2016). Dialogue on “Administrative Justice and Corruption in the Asylum Systems and Beyond” hosted by Corruption Watch, the Scalabrini Centre of Cape Town, and the African Centre for Migration & Society. Cape Town.  
66 Interview, civil society actor, Cape Town, May 2016.  
67 Interview, state actor, Cape Town, May 2016.  
68 Interview, civil society actor, Cape Town, May 2016.  
69 Interview, civil society actor, Cape Town, May 2016.
stakeholder meetings had fallen away as litigation increased, as it was difficult to sit in a collegial meeting one day and be adversaries in court the next.\textsuperscript{70}

Another civil society actor recalled a colleague showing up to a stakeholder meeting with the Department of Home Affairs, and being told by the Department of Home Affairs official that he was not welcome to attend, because his organization was litigious.\textsuperscript{71} One respondent noted that litigation in the migration field has also strained the relationship between the government and UNHCR, which contributes funding to a number of civil society organizations in this sector, some of whom engage in litigation against the state.\textsuperscript{72} Civil society actors also expressed concern that litigation, particularly if overused, could create or exacerbate existing strains between the executive and the judiciary, as state and department officials could experience adverse decisions in cases as impinging on the policy-making and implementation functions of the state, and the judiciary may be hesitant to make decisions that may be interpreted in such a way. Such litigation can sometimes cause strain even within the judiciary, with different judges taking conflicting positions around how to best translate the separation of judicial and executive powers in practice.\textsuperscript{73} Even while agreeing that litigation was sometimes a necessary strategy, as one activist put it, “Bringing courts into political spaces is not ideal.”\textsuperscript{74}

A further issue identified by civil society actors was the sense that litigation might adversely impact state transparency and access to information processes. For example, one civil society director noted that since launching related lawsuits against one provincial department, they had increased difficulty in the attaining relevant information through Protection of Access to Information (PAIA) requests.\textsuperscript{75} Following up on the requests, they learned that the hesitancy to share information was borne out of the fear by mediating state officials that such information would used against the department in court.\textsuperscript{76}

Finally, another important challenge of litigation as a tool for the advancement or upholding of rights is the issue of state non-compliance with court orders. The failure of state departments to comply with court orders was raised consistently in all litigation-related discussions for this report. The director of one civil society organization that regularly engages in litigation indicated that, in her experience, far from being an anomaly, “non-compliance is the norm,” while another noted that litigation, even when successful, does not always result in the hoped for outcomes or impacts.\textsuperscript{77} When the state does not comply with court orders, civil society options can be limited. In some cases, the organization may file for contempt of court which, if successful, may have very personal ramifications for those named in the suit.

Litigation is time-consuming, expensive, and often antagonistic. Where there is significant public awareness and backing of an issue, media and political pressure may be brought to bear on the issue, pushing the government to respond where it otherwise might not, even with successful litigation

\textsuperscript{70} \textit{Ibid.}
\textsuperscript{71} Interview, civil society actor, Cape Town, May 2016.
\textsuperscript{72} Interview, civil society actor, Cape Town, May 2016.
\textsuperscript{73} University of Cape Town professor of law panelist. (June 13, 2016). Dialogue on “Administrative Justice and Corruption in the Asylum Systems and Beyond” hosted by Corruption Watch, the Scalabrini Centre of Cape Town, and the African Centre for Migration & Society. Cape Town.
\textsuperscript{74} Interview, civil society actor, Cape Town, May 2016.
\textsuperscript{75} The appointment process of an “Information Regulator” in South Africa is currently underway in Parliament. Part of this new role will entail ensuring better compliance with Protection of Access to Information requests.
\textsuperscript{76} Interview, civil society actor, Cape Town, May 2016.
\textsuperscript{77} Interview, civil society actor, Cape Town, May 2016.

www.appro.org.af
initiated by civil society organizations. Where there is little public awareness and broad support, however, or where underlying social norms and values may not be aligned with the case at hand, some civil society respondents noted that even successful strategic or public interest litigation may not achieve systemic change, or address the underlying structural issues that give rise to matter of the actual court case.78

It is difficult to ascertain whether the failure of some state institutions to comply with court orders is due to capacity or resource issues or intentional disregard of an order by officials for political reasons. Regardless, noncompliance raises important questions about litigating for the advancement of rights in the context of a state that is, for whatever reason, unwilling or unable to meet the legal obligations that it has set out for itself through domestic and international law. While the use of public interest and strategic litigation by a range of civil society actors across issues such as migration, health, education and corruption have yielded some very important results, litigation remains both a financially and sometimes politically risky strategy in civil society’s repertoire of contention, largely considered to be a tool of last resort. Without addressing the underlying systemic and structural drivers that give rise to the many rights-related issues in the first place, the potential of litigation as a tool for the advancement of rights remains limited. As the director of one civil society organization put it, litigation “can make a ripple, but it cannot change the tide.”79

78 For example, broad social values and attitudes around LGBTI rights, the rights of migrants, and the abolition of the death penalty are often very different in South Africa from related rights or protections in law.
79 Interview, civil society actor, Cape Town, May 2016.
## Summary: Litigation Mode of State-Civil Society Interface

<table>
<thead>
<tr>
<th>Role of CSO</th>
<th>Ongoing Challenges</th>
<th>Potential Lessons</th>
</tr>
</thead>
</table>
| Access to Information       | • Difficulty of obtaining information, even through PAIA requests  
• Sense from some civil society actors that access to information can become more difficult when civil society organizations are litigious | • Litigation requires strong access to information mechanisms  
• “Information Regulator” may be an important office for enforcing access to information requests |
| Litigation and relationships | • Litigation can damage relationships between state and civil society actors  
• Litigation can strain relationship between judiciary and executive  
• Litigation can strain relationship between state and those who fund litigious civil society actors | • Many civil society actors view litigation as the tool of “last resort” and do not enter into litigation lightly |
| Successful Litigation by Civil Society | • Challenges in translating court judgments into structural changes  
• Difficulties in influencing underlying social norms or attitudes  
• Expensive and time-consuming for state and civil society actors  
• Challenges of balancing rights-based litigation with the state’s actual capacity to meet its obligations | • Has resulted in tangible advancement or protection of rights across a number of issues, including health (e.g. access to ARVs), education, and refugee and asylum seeker rights  
• Can provide a critical tool for civil society when all other forms of engagement are perceived to have failed  
• Successful litigation requires a strong, independent and transparent judiciary |
Key Findings

This section groups the key findings from this research on state-civil society interface on basic rights in South Africa under four headings. These are the role of institutions in state-civil society relations, role of litigation in advocacy, role of continuing legacies of conflict, and lessons that could be drawn from the South African experience for Afghanistan.

Importance of Institutions

The capacity of state and civil society actors to work independently or in tandem toward the protection and advancement of rights is closely interconnected with the existence and strength of relevant institutions in South Africa. These institutions provide a legal framework for rights protection and monitoring, forums for cooperative efforts toward advancing or protecting rights, and checks and balances on state power and its potential abuses. Not all institutions function with the same degree of efficacy, however, and many historically rooted and contemporary structural challenges remain as impediments to their effectiveness.

In the discussions and interviews undertaken for this research South Africa’s post-apartheid Constitution of 1996 featured strongly as both a set of guiding principles and as a practical tool for advancing socio-economic rights in the country. The protections afforded by the South African Constitution in imposing a specific obligation on the state to ensure civic involvement in its decisions have to some degree encouraged and protected civil society in its interface with the state even where state-civil society relations have been strained or difficult.

The presence in the country of an independent, generally uncorrupted and well-functioning judiciary was an essential component in civil society strategies of attempting to advance or protect socio-economic rights through strategic or public interest litigation. While using litigation to advance socio-economic rights and advocacy goals can sometimes raise difficult separation of power issues between the institutions of the judiciary and the executive, those interviewed for this report nonetheless consider recourse to the courts to be a critical tool in a wider repertoire of advocacy and contention.

Another clear finding of this research is the importance that both state and civil society actors place on the Chapter 9 Institutions, even though these institutions are also not without their own challenges. The Office of the Public Protector, in particular, was singled out as one of the most effective contemporary institutions in South Africa in terms of combating issues of corruption and abuses of power by and within state institutions. Even where civil society organizations have never directly utilized or interacted with the Office of the Public Protector, the importance of maintaining the integrity of this Office was highlighted throughout the interviews. Part of maintaining this integrity involves ensuring that the position is held by an individual who is not subject to political interference, and is willing and able to withstand the significant political pressures and controversies that the Office inevitably provokes in its work.

Civil society and state actors also offered some interesting reflections regarding the role of inter-sectoral bodies such as the National Anti-Corruption Forum, which have attempted to bring state, business, and civil society actors together to jointly work toward solutions or advancements in specific issue areas. In this regard, there were mixed reflections about the potential advantages and shortcomings of such
bodies. While they were seen by some as providing an important forum for engagement between different sectors, others emphasized that their effectiveness depended largely on strong, sustained leadership, a well-designed governance structure, adequate and sustained resourcing, a clear mandate, and in-built accountability, representation, and enforcement mechanisms.

Finally, this research has also established the importance of understanding the various ways in which contemporary institutional challenges are shaped by the historical context of South Africa. The legacies of South Africa’s history and decades of conflict continue to impact the institutional cultures of government departments and other structures, as well as the capacity of government departments to exercise effective governance. This historical institutionalist perspective can provide further understanding of the often-cited gap between what are, in many ways, the progressive policies of the South African state and ways in which these policies translate into practice, given the historical role and functions of various institutions. It is also important to note that the capacity and effectiveness of state institutions varies significantly across departments, across different levels of the state, and how these different institutions clash or resonate with other institutions with longer history.

Litigation

Public interest and strategic litigation have come to play important roles in state-civil society relations in post-apartheid South Africa. The use of the courts for political ends, whether by civil society or opposition parties, has been referred to as “one of the wonderments of [South African] politics,” and “lawfare.” The emergence of the courts as an important site of contestation between civil society and the state has resulted in some landmark advancements in upholding or expansion of human rights in South Africa, as exemplified in the campaigns for access to ARVs for HIV treatment.

This research finds that there is a dominant perception that while litigation is an important and necessary strategy for protecting and advancing rights, it is nonetheless a strategy of last resort. Civil society actors report that litigation is almost always followed by a break down in communications initiated by the state. Civil society actors also report that litigation is used only after every other option available for engagement with the state authorities has been unsuccessfully exhausted. Civil society actors indicate that the expense of litigation, its time-consuming nature, and the potential tensions it creates between the state and civil society actors, as well as between the state and the judiciary, have to be weighed against the potential positive outcomes of the litigation. Finally, civil society actors who do engage in litigation for the protection or advancement of human rights indicate the importance to their work of leveraging both national laws and international human rights law and protections.

Despite some important successes in the use of litigation, another important theme to emerge through this research is the propensity of the state to engage in appeal after appeal after losing a court case, and a related but even more serious issue of state non-compliance with court orders. State non-compliance with court orders was an issue cited across the various sectors explored in this work, including migration, education and health.

Legacies of Conflict

South Africa’s tumultuous and violent history has various implications for contemporary state-civil society engagement around the protection or advancement of human rights. While the post-apartheid state has made important strides in undoing some of apartheid’s legacies, ongoing unmet socio-economic needs such as housing, adequate sanitation, access to water, inequality in education, and access to employment are at the roots of widespread social discontent across the country. The majority of the protests across the country are peaceful. Yet, all too often protests can spill over into violence, property destruction, or both, echoing some of the protest styles that became entrenched during anti-apartheid struggles in various communities.

This research highlights the extent to which apartheid’s legacies of inequality and injustice, still entrenched in many ways in the structures and institutions of contemporary South Africa, continue to shape and frame the agenda of civil society activism. The country’s vibrant history of civil society activism, in no small part borne out of the struggle against apartheid, is evident in contemporary forms of civil society activism, bolstered by the addition of new, post-1994 opportunities for engagement and influence.

Finally, this research also points to the challenges of negotiating and renegotiating state-civil society relations at the end of a period of intense conflict and political unrest. In South Africa, the African National Congress represented an intensely popular liberation movement, and came to political power with widespread support from across civil society. The transition of the ANC into the role of a ruling party in a new constitutional democracy inevitably involved a significant shift in its relationships with civil society. This research illustrates that these relationships, and interpretations of the “proper” role of civil society in post-apartheid South Africa, remain contested and sensitive, particularly when it comes to civil society attempts to provide checks and balances in terms of government powers and accountability. Within the state, it appears that there are mixed sentiments regarding the trustworthiness of some sectors of civil society, particularly those with contentious or litigious strategies and international funding.

Strategies for Engagement

Throughout this research civil society and state actors reflected on what they felt were some of the pivotal challenges and most promising strategies for interacting toward the protection or advancement of rights. Their insights are rooted in their own particular field of work, yet many of them have potential relevance across sectors and across issues. Civil society actors, for example, stressed the importance of protecting and enhancing access to information mechanisms. From grassroots, community-based NGOs to legal NGOs, access to information represented a key component of their strategies for engagement. Support for the protection or enhancement of state mechanisms for access to information was a point of common ground across many civil society organizations, as a means for upholding and improving the transparency and accountability of the state.

Another finding of this research is the role that regional bodies or regional cooperation can play in advancing rights. One organization, for example, partnered with colleagues in other southern African countries to help build and advance a regional approach to rights. Formal regional institutions such as the African Peer Review Mechanism, though not without significant challenges, may be important forums for advancing human rights in a way that avoids some of the difficult and often emotive politics.
of “developmentalism,” viewed by many as externally driven rights-based or development agendas being imposed largely by developed countries as new forms of colonialism or control.

Linked to this, civil society actors and some state actors point out that civil society activism has been generally most successful when it has had roots in communities, with broad-based public support built around an issue with direct relevance or impact on the daily lives of citizens. Campaigns that entailed NGOs or civil society actors parachuting briefly into communities, and which were built around abstract conceptualizations of rights or other themes of development, are seen as much less likely to have any significant impact in the longer term. The conducting of “social audits” was cited as one example of a potentially effective approach for advancing socio-economic rights at the local level by training citizens in methods of holding governments accountable for the direct delivery of services in impoverished and under-resourced communities.

Another key finding of this research is the emphasis placed, by civil society and state actors, on the importance of protected spaces for civil society to engage with the state using a wide cross-section of complementary strategies. Some civil society actors felt shut out by unresponsive government officials or departments and felt that opportunities for engagement in some areas had become little more than window-dressing. However, this research also reveals that state-civil society relations can vary substantially across departments and across different levels of the government. These relations are also functions of specific personalities of various officials and institutional cultures.

Conclusion

South African civil society is diverse, dedicated and engaged in a wide range of local, national, regional and international issues. While a specific human rights approach does not necessarily inform the work of all organizations, most are working in one way or another on issues with a direct bearing on human conditions such as access to education, housing and services, and employment, environmental protection or poverty reduction. Others work more directly to hold the state accountable and promote good governance through promoting the protection or enhancement of access to information mechanisms, or working to combat corruption and abuses of state power.

State-civil society relations appear to be in a perpetual state of flux, constantly adapting to the quickly shifting social and political landscape of post-apartheid. The end of apartheid brought with it new means and mechanisms for state-civil society engagement on the advancement of human rights, particularly in terms of the new protections afforded by the Constitution of 1996 and the associated Bill of Rights. It also brought new challenges in state-civil society relations, as an active and powerful civil society, previously closely aligned with the interests of the ANC as a liberation movement, was forced to adjust to the new reality of the ANC’s coming to political power as the ruling party of a new constitutional democracy. This shift also required an adjustment in the ANC’s own conceptualizations of the role of civil society, as interests began to diverge and more critical, and at times adversarial, elements of civil society began to emerge.

The strategies and tactics of South African civil society are diverse in responding to new opportunities and political dynamics. On fundamental rights in areas of migration, health, education and corruption, civil society and state actors described a range of approaches to engagement, each with their own particular strengths and challenges. Cooperative, collaborative and institutional approaches in state-civil
society interactions toward the advancement or protection of human rights have met with much success in post-apartheid South Africa, particularly given the human rights-based approach of the Constitution of 1996 and subsequent legislation and the protection afforded to civil society. Civil society can engage collaboratively with the state in multiple forums including participation in policy-making processes through, for example, stakeholder workshops, policy submissions, and lobbying. Chapter 9 Institutions such as the Office of the Public Protector and the South African Human Rights Commission provide additional avenues for civil society to advance its goals, while regional and international bodies such as the African Peer Review Mechanism and the United Nations’ rights-monitoring programs such as the Universal Periodic Review provide further forums for input from civil society. Some civil society actors are also directly involved in service provision through funding attained from the state, such as the Community Care Worker programs in the health sector that reach millions of South Africans in their communities, and are mediated by non-governmental organizations.

This research also explored the role that protests play in raising the profile of rights issues, providing a forum for the venting of public frustrations around specific issues, and building momentum in campaigns. While the majority of protest action in contemporary South Africa is peaceful, violent or destructive protests are also not uncommon, ranging from “service delivery” protests in communities that are characterized in part by the burning of tires and blockading of roads, to student protests that have resulted in arson and vandalism that have cost the country millions of dollars in recent months. This dynamic speaks to the legacies of apartheid, both in terms of the inheritance of a political and protest culture imbued with conflict and violence, and in terms of the mounting frustrations of a nation still reeling from centuries of oppression, injustice and inequalities, entrenched along racial lines.

Litigation is also frequently used against the state as a contemporary tool by civil society in its work to advance or protect human rights. The role of litigation is complex and controversial, garnering significant discernible resentment from some quarters of the state. Litigation has been used to great effect in the areas of health, education, migration and corruption, amongst others. However, in the context of this research, litigation by civil society actors is a tool of last resort in strategies for engaging with the state due to the expense, delays, uncertainty, and the damaged relationships that litigation can evoke. Civil society actors use litigation when all other avenues for cooperative communication and interaction with state authorities have been exhausted or failed. Importantly, civil society actors engaged in litigation spoke about what they viewed as an increasing trend of state non-compliance with court orders. This raises important questions regarding state capacity, or willingness, to be beholden to orders of the court and the utility of litigation as a tool for civil society to hold state authorities accountable. Either scenario has worrisome implications for the ongoing health and consolidation of the country’s constitutional democracy, and represents an important avenue for further research.

For many, twenty-two years after South Africa’s first racially inclusive elections much of the sheen has worn off the new democracy. The demise of apartheid and the coming to power of President Nelson Mandela represented a moment of global optimism and hope for the county. While South Africa’s human rights commitments remain entrenched in the Constitution, Bill of Rights, and through the international human rights conventions to which it is signatory, the capacity of the state to meet these obligations in a meaningful and timely way remains uncertain, at best. While there have been many laudable advances in the intervening years in areas such as health, education, refugee protection, housing, and the provision of social grants, South Africa is still a country characterized by vast inequality, poverty, and unemployment. Millions of South Africans continue to experience a range of interlaced structural and historical vulnerabilities. Millions continue to live in informal and semi-formal housing, with limited opportunities for education, meaningful employment, good health, safety and security.
Despite the depth and scope of these challenges, this research has also revealed the impressive energy, dedication, and creativity of countless individuals within civil society and various institutions of the state in South Africa who are working on a daily basis in multiple ways toward the improvement of citizens’ lives across a wide range of social, economic and political issues. Despite the differences and tensions that may exist in state-civil society interactions toward the advancement of human rights in South Africa, there are nonetheless many shared goals and values, and many continuing opportunities for change and growth.

Recommendations

For the Government of Afghanistan
- Strengthen the role of quasi-state institutions, such as Afghanistan Independent Human Rights Commission (AIHRC), equivalent to South Africa’s Chapter 9 institutions
- Strengthen legislative provisions and protections for civil society’s involvement in policy processes
- Intensify efforts to create and maintain an uncropped and independent judiciary
- Protect and enhance public access to information legally and practically

For Afghan Civil Society Organizations
- Increase efforts to create and maintain an uncropped and independent judiciary
- Explore strategic litigation as a strategy for upholding or advancing socio-economic rights, drawing on national legislation and international human rights law
- Intensify efforts to implement Afghanistan’s nascent Access to Information Law, focusing on the protection of the citizens’ right to utilize the Law, as a means for closer cooperation between state and civil society
- Consider strategic approaches best suited to the issue at hand, ranging from cooperation and collaboration to litigation based on Afghanistan’s Constitution and related legislation
- Look to the region and similar countries, such as South Africa, for precedents, support, and lessons or tools to be used for effective state-civil society engagement
- Consider social audits as a tool for increasing accountability in service delivery and the localized advancement of socio-economic rights
- Build sustained, evidence-based, and popular campaigns at grassroots levels, drawing on real and immediate community needs and issues to inform state strategies and goals

For International Donors
- Provide support for multiple forms and strategies of civil society engagement with the state on advancing and protecting fundamental rights
- Encourage and support strategies for regional approaches to upholding or advancing human rights
- Intensify efforts to increase transparency and accountability of both state and civil society partners through closer state-civil society engagement and documented checks and balances systems for state and non-state partners
- Create opportunities and support for knowledge exchange and collaboration with civil society and state actors in other countries
Appendix 1: Areas, Actors, and Factors

Area: Migration

<table>
<thead>
<tr>
<th>Historical Context</th>
<th>Relevant State and Multilateral Institutions</th>
<th>Examples of Civil Society Actors in this Area</th>
<th>Selected Achievements and Advances</th>
<th>Current Challenges</th>
</tr>
</thead>
</table>
| • Racialized, discretionary, exclusive immigration policies | • Department of Home Affairs  
• South African Police Service  
• United Nations High Commission for Refugees  
• International Organization for Migration  
• Southern African Development Community | • African Centre for Migration and Society  
• Scalabrini Centre of Cape Town  
• Somali Association of Cape Town  
• Consortium for Migrants and Refugees in South Africa  
• Adonis Musati  
• Cape Town Refugee Centre  
• Africa Unite  
• Refugee Rights Law Clinic, University of Cape Town  
• Legal Resources Centre  
• Lawyers for Human Rights | • Development of country’s first Refugee protection legislation  
• New immigration policy, deracialized and aligned with Constitution  
• Asylum seekers and refugees enjoy freedom of movement and working rights  
• Advancements in provision of social protections to refugees and asylum seekers | • Rapid urbanization  
• Rise of anti-foreigner sentiments and violence  
• Overwhelmed asylum system  
• Backlogs in claims and appeals  
• Under-resourced and under-capacitated systems  
• Potential refoulement  
• Lack of clear migration policies  
• Corruption in asylum system  
• Challenges with cessation  
• Challenges with unaccompanied minor migrants  
• High levels of litigation from civil society  
• Undocumented migration |
| • Exploitative regional history of mining labor, emphasis on return to home country at completion of contract | | | | |
| • Asylum seekers and refugees not recognized | | | | |
| • Apartheid pass-laws regulating movement of black South Africans within SA until its repeal in 1986 | | | | |

81 This is not intended to be an exhaustive list of active and relevant civil society organisations working in this field.
## Area: Health

<table>
<thead>
<tr>
<th>Historical Context</th>
<th>Relevant State and Multilateral Institutions</th>
<th>Examples of Civil Society Actors in this Area</th>
<th>Selected Achievements and Advances</th>
<th>Current Challenges</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Poor apartheid-era health systems and outcomes</td>
<td>- Departments of Health</td>
<td>- Treatment Action Campaign</td>
<td>- Restructuring and deracialization of health systems</td>
<td>- Estimated 6.19 million people living with HIV in 2015^2</td>
</tr>
<tr>
<td>- Racial and gender discrimination in health systems</td>
<td>- Southern African Development Community</td>
<td>- Mothers2Mothers</td>
<td>- Primary health care for all</td>
<td>- TB, MDR TB and XDR TB remain a major public health challenge</td>
</tr>
<tr>
<td>- Negative health impacts of migrant labor system</td>
<td>- * as a cross-cutting issue, health is impacted by many departments and institutions of state</td>
<td>- TB/HIV Care Association</td>
<td>- Free health care for children younger than 6 years and pregnant women</td>
<td>- Health system remains tiered – public and private systems</td>
</tr>
<tr>
<td>- Widespread social, political and economic exclusion (social determinants of health)</td>
<td></td>
<td>- Desmond Tutu HIV Foundation</td>
<td>- Significant progress in the provision of anti-retrovirals for those living with HIV/AIDS</td>
<td>- Challenges of resources and capacity in public sector</td>
</tr>
<tr>
<td>- Rise of HIV/AIDS in SA</td>
<td></td>
<td>- NACOSA</td>
<td>- Significant advances in the Prevention of Mother to Child Transmission</td>
<td>- Inequality, poverty and other social determinants of health still adversely affecting South Africans, largely along racial lines</td>
</tr>
<tr>
<td>- Rise of TB, MDR-TB and XDR-TB</td>
<td></td>
<td>- Kheth’impilo</td>
<td>- Community Care Worker models developed</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Social Justice Coalition</td>
<td>- Work towards development of a National Health Insurance model</td>
<td></td>
</tr>
</tbody>
</table>

---

^2 [https://www.statssa.gov.za/publications/P0302/P03022015.pdf](https://www.statssa.gov.za/publications/P0302/P03022015.pdf)
## Area: Education

<table>
<thead>
<tr>
<th>Historical Context</th>
<th>Relevant State and Multilateral Institutions</th>
<th>Examples of Civil Society Actors in this Area</th>
<th>Selected Achievements and Advances</th>
<th>Current Challenges</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “Bantu Education” system under apartheid (unequal and racialized education outcomes and systemic inequalities in the education system)</td>
<td>• Department of Basic Education</td>
<td>• Equal Education</td>
<td>• Post-1994 restructuring of Universities and Technikons</td>
<td>• High drop-out rates for learners, before finishing high school (matriculation)³³</td>
</tr>
<tr>
<td>• Poor school infrastructure</td>
<td>• Department of Higher Education &amp; Training</td>
<td>• Equal Education Law Centre</td>
<td>• Deracialization of education system</td>
<td>• Human resourcing challenges (teacher numbers and teaching quality, particularly in rural and impoverished areas)</td>
</tr>
<tr>
<td>• Poor quality of teaching for the majority under apartheid</td>
<td>• Provincial Education Departments</td>
<td>• Section 27</td>
<td>• Significant increase in education budget (now 1/5 of national budget)</td>
<td>• Tiered education system</td>
</tr>
<tr>
<td>• Access challenges for poor or marginalized South Africans</td>
<td>• Departments of Social Development</td>
<td>• Centre for Education Rights and Transformation</td>
<td>• Increased access to schools</td>
<td>• Corruption within school systems³⁴</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Fee exemption programs</td>
<td>• Legacies of “Bantu Education”</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Financial support schemes for tertiary level students</td>
<td>• Limited university and tertiary education spaces</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Increased transportation budgets</td>
<td>• University and tertiary education fees remain out of reach for many South African students</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Advances in school infrastructure</td>
<td>• Student discontent regarding lack of transformation and decolonization of universities (protests, vandalism and violence)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Civic education and engagement through after school programs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Higher enrollments in tertiary education</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Deracialized curricula</td>
<td></td>
</tr>
</tbody>
</table>

³³ For example, of the 1,085,570 learners who started grade 2 in 2004, only 532,860 remained to write their matriculation exams in 2014. https://africacheck.org/spot_check/south-africas-matric-pass-rate-obscures-dropout-rate/

³⁴ For example, see “Cash for Jobs” Department of Basic Education, Ministerial report, 2016. Republic of South Africa.
## Area: Corruption

<table>
<thead>
<tr>
<th>Historical Context</th>
<th>Relevant State and Multilateral Institutions</th>
<th>Examples of Civil Society Actors in this Area</th>
<th>Selected Achievements and Advances</th>
<th>Current Challenges</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Entrenched systemic corruption during apartheid</td>
<td>• Public Services Commission (current secretariat for the National Anti-Corruption Forum)</td>
<td>• Corruption Watch (South African chapter of Transparency International)</td>
<td>• Legislation developed around organized crime, whistle-blowing, and combating corruption</td>
<td>• Corruption remains entrenched within many state systems and institutions</td>
</tr>
<tr>
<td>• Much evidence and documentation destroyed during the transition to democracy</td>
<td>• Department of Public Services and Administration</td>
<td>• Open Democracy Advice Centre</td>
<td></td>
<td>• President Zuma found by the Public Protector to have benefited unduly from security upgrades to his home in KwaZulu Natal (Nkandla)</td>
</tr>
<tr>
<td>• International sanctions against apartheid South Africa discouraged proper procurement structures and systems, encouraged secrecy, lack of transparency and lack of accountability</td>
<td>• Department of Justice and Constitutional Development</td>
<td>• Social Justice Coalition</td>
<td></td>
<td>• Still little known about the scale of corruption under apartheid</td>
</tr>
<tr>
<td>• SAPS Public Protector’s Office (Chapter 9 Institution) National Prosecuting Authority</td>
<td></td>
<td>• Right2Know Campaign</td>
<td></td>
<td>• Non-renewable term of the current Public Protector ends in 2016; concern about possible political interference in upcoming selection process</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Institute for Justice and Reconciliation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---


---

www.appro.org.af
## Appendix 2: Interview Codes and Descriptions

<table>
<thead>
<tr>
<th>Code</th>
<th>Organization</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>CS1</td>
<td>Equal Education Law Centre</td>
<td>May 16, 2016</td>
</tr>
<tr>
<td>G1</td>
<td>Civil Servant, Department of Public Services and Administration</td>
<td>May 17, 2016</td>
</tr>
<tr>
<td>CS2</td>
<td>Cape Town Refugee Centre</td>
<td>May 19, 2016</td>
</tr>
<tr>
<td>CS3</td>
<td>Right2Know Campaign</td>
<td>May 19, 2016</td>
</tr>
<tr>
<td>G2</td>
<td>Civil Servant, Public Services Commission</td>
<td>May 19, 2016</td>
</tr>
<tr>
<td>CS4</td>
<td>Southern African Litigation Centre</td>
<td>May 20, 2016</td>
</tr>
<tr>
<td>CS5</td>
<td>Centre for Constitutional Rights</td>
<td>May 20, 2016</td>
</tr>
<tr>
<td>CS6</td>
<td>Congress of South African Trade Unions</td>
<td>May 22, 2016</td>
</tr>
<tr>
<td>CS7</td>
<td>Student Representative Council, University of Cape Town</td>
<td>May 23, 2016</td>
</tr>
<tr>
<td>G3</td>
<td>Member of Parliament/member of Parliamentary Portfolio Committee on Basic Education</td>
<td>May 25, 2016</td>
</tr>
<tr>
<td>CS8</td>
<td>Researcher, Institute for Justice and Reconciliation</td>
<td>May 26, 2016</td>
</tr>
<tr>
<td>CS9</td>
<td>Social Justice Coalition</td>
<td>May 26, 2016</td>
</tr>
<tr>
<td>CS10</td>
<td>Corruption Watch</td>
<td>May 30, 2016</td>
</tr>
<tr>
<td>G4</td>
<td>Member of Parliament/member of Parliamentary Portfolio Committee on Higher Education and Training</td>
<td>May 31, 2016</td>
</tr>
<tr>
<td>G5</td>
<td>Member of Parliament/member of Parliamentary Portfolio Committee on Health</td>
<td>June 1, 2016</td>
</tr>
<tr>
<td>G6</td>
<td>Civil Servant, Western Cape Education Department</td>
<td>June 1, 2016</td>
</tr>
<tr>
<td>CS11</td>
<td>Catholic Parliamentary Liaison Office</td>
<td>June 2, 2016</td>
</tr>
<tr>
<td>CS12</td>
<td>Scalabrini Centre of Cape Town</td>
<td>June 2, 2016</td>
</tr>
<tr>
<td>G7</td>
<td>Civil Servant, Western Cape Education Department</td>
<td>June 3, 2016</td>
</tr>
</tbody>
</table>
Appendix 3: Interview Guide for Civil Society Informants

1. How would you describe your organization’s relationship with the government? Is it different for different levels of government?
2. What kind of relationship do you think civil society ought to have with the government?
3. Should civil society organizations work as implementing partners of government? Why or why not?
4. Should civil society be involved in litigation against the government? Why or why not? And how should the government respond?
5. Does your organization ever participate in protest action? Why or why not?
6. Why do you think protests can turn to violence so quickly in South Africa?
7. In what ways do human rights considerations drive your own agenda and work?
8. In what ways do you attempt to hold government accountable for its human rights obligations? Can you give an example from your own work? How successful do you think you are in these efforts?
9. Does your organization participate in any human rights-monitoring activities? (for example, the UN human rights monitoring processes like the ICCPR review and the Universal Periodic Review, or the African Peer Review Mechanism?)
10. Have you ever, or would you consider, using the Section 9 institutions (for example, the Public Protector’s Office, the South African Human Rights Commission, the Commission for Gender Equality) to advance your own work? Why or why not?
11. What do you see as the role of the media in engaging with your area of work?
12. At present, what do you see as the key challenge in South Africa for state-civil society relations?
13. What lessons or final thoughts would you offer for other new or emerging democracies regarding the relationship between civil society and the state, for the advancement and protection of human rights?
Appendix 4: Interview Guide for State Actor Informants

1. How would you describe your department’s relationship with civil society actors in this sector?
2. What kind of relationship do you think government ought to have with civil society?
3. Do you think civil society organizations should work as implementing partners of government? Why or why not?
4. Should civil society be involved in litigation against the government? Why or why not? And how should the government respond?
5. In your own work, in what ways do human rights considerations drive your agenda?
6. In what ways do you see civil society actors attempting to hold government accountable for its human rights obligations? Can you give an example from your own work or experience? How successful do you think they are in these efforts?
7. Does your department ever participate in any human rights-monitoring activities? (for example, the UN human rights monitoring processes like the ICCPR review and the Universal Periodic Review, or the African Peer Review Mechanism?)
8. How important do you think the Section 9 institutions (for example, the Public Protector’s Office, the South African Human Rights Commission, the Commission for Gender Equality) are in South Africa, in terms of upholding human rights obligations?
9. What do you see as the role of the media in engaging with your area of work?
10. At present, what do you see as the key challenge in South Africa for state-civil society relations?
11. What lessons or final thoughts would you offer for other new or emerging democracies regarding the relationship between civil society and the state, for the advancement and protection of human rights?