INTRODUCTION

Governing the Public Sphere:
Civil Society Regulation in Africa

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This is the first volume in a series that considers the public sphere and how it is regulated in post-colonial Africa. The series reflects a greater concern over the accelerated levels at which the public space for citizens and their formations is shrinking. In many ways this book is a contribution to the growing literature on the regulation of associational life, both in Africa and globally. The Open Society Institute for Southern Africa (OSISA), for example, recently released a report, the *Civil Society Regulatory Framework*, that focused on the freedom of assembly and freedom of association. Other groups such as the World Movement for Democracy (WMD), the International Center for Non-Profit Law (ICNPL) and CIVICUS, among others, have recently produced literature that should be read in conjunction with this book. There has also been a rise in the enactment of other laws that infringe on the rights of certain groups, particularly the minorities. As this book was going to press, anti-gay and lesbian laws and attitudes had sprung up in countries such as Malawi, Uganda, Kenya and Zimbabwe. This is just but a reflection of the deeper homophobic malaise across the continent. Rather ironically, South Africa-a country that in many ways has developed a progressive constitution and its environment is to a larger degree still enabling was at the verge of enacting a Protection of Information Bill which read restrictive and retrogressive. Further the African National Congress was pushing for a Media Appeals Tribunal-a body that many viewed as partisan. It seemed as if South Africa was going the same route as countries that have enacted restrictive regulatory mechanisms.

This book is about the public sphere in Africa and how it is governed, enabled or disenabled. In its simplest definition, the public sphere is that space in society where citizens congregate freely and discuss issues of common interest. It is a space that is institutionalised to regulate the state by influencing political, social and economic life. Yet the tables seem to have turned regarding the sphere of public authority (the state) across Africa and indeed in some parts of the world, where states are enacting stringent regulatory instruments that include laws and extra-legal tactics. As Elone

(2010) observes, this 'increasing regulation indicates a return to autocratic practices and a backlash against democratisation'. Yet amid all this, there are countries that have put in place enabling frameworks that in many ways acknowledge the role that is played by the private sphere (civil society in its various modes and formations). Even so, the tendency in these countries is to adopt heavy-handed tactics against those who attempt to exercise their rights to assembly, association and expression, an indication of what could happen if there were no checks and balances in place. Indeed the complexity regarding such matters is that things appear to be moving yet they are not changing position – as the philosopher Parmenides argued, 'all is one'. Is motion in this case an illusion? Indeed this is the question regarding Africa's progress in the last five decades or so. As Africa celebrates fifty years of independence, it is an opportune time to step back and ask: 'Has Africa made any movement or it has been in motion only'? Economic growth rates have been improving steadily over the last decades, recording an average of above 5% annually until the 2008 financial crisis. In 2010, the African Economic Outlook noted that;

> *Africa continued to register marked improvement in its regulatory environment in 2009. Several countries have introduced new laws or have reformed existing laws, which makes it easier to do business. According to the World Bank Report 2010, 67 regulatory reforms were registered in 29 of the 49 sub-Saharan African countries. The report further noted that for the first time an African country – Rwanda – has been ranked as the world's top reformer. Mauritius also continued to perform well with a ranking of 17 of the 183 countries for the overall ease of doing business.* [1]

Yet these levels of growth did not change the economic conditions of many of Africa's citizens. Many still live below the poverty line. Many still do not own land, capital or the means of production. In many ways this has been a case of motion without movement.

In the political realm, it has been five decades since seventeen of Africa's countries attained independence, from France 'offloading fourteen of its colonies', to two British colonies (Nigeria and Somalia) becoming independent, and the Belgian Congo becoming Zaire. To be sure, in these last decades, Africa has in some instances made positive leaps towards political stability, multi-party politics, pluralism, democratic governance and, more importantly the protection and promotion of human rights. Hence the African Economic Outlook view that;

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[1] http://www.africaneconomicoutlook.org/en/outlook/political-and-economic-governance/economic-governance/ accessed 06/09/2010.

Long-term political stabilisation in Africa regained momentum in 2009, following some disturbance in 2008. Several countries successfully undertook fair democratic elections, and government accountability increased. While setbacks are still common, improvements in checks-and-balances mechanisms bode well for future institutional consolidation on the continent. [2]

Yet despite these achievements, which are not captured adequately here, Africa's Achilles heel seems to be how it can translate gains into substantive freedoms for its people. This failure finds expression in how governance is practiced in all spheres of life. In many ways it has been argued distinctively that Africa suffers from a 'governance crises. Many countries are yet to make substantive democratic progress as opposed to the cosmetic changes that are currently in place. Today Africa, and indeed other parts of the world, increasingly experiences many instances where democratic gains already achieved are being eroded. As we argued elsewhere;

The term 'democratic deficit' is probably too bland and euphemistic a term to describe the acute, systemic failures of (party-based) politics on the continent. Accompanying this state of affairs is a purposeful shrinking of the public sphere for citizens and their formations, with increasing limits to their engagement in public affairs and debates. Necessary information is withheld. Journalists are threatened, or worse. Open debate is curtailed. Criticism is too readily treated as insurrection (Moyo and Fowler, 2010).

Most of this has happened on the pretext of counter-terrorism and anti-corruption. Michael Edwards, in a lecture delivered in Dakar for TrustAfrica, argued that;

Attempts to restrict or close down the space for independent citizen action have risen as governments from Russia to Brazil, Egypt to Cambodia and Uganda to the United States have formulated tighter laws, regulations and registration requirements for NGOs and other civic groups. Many of these attempts have been justified by reference to the 'war on terror' and the need to clamp down on support for organisations deemed to be conduits for terrorist funding, but very few cases of such leakage have been successfully prosecuted, and these moves seem motivated by more basic, pre-existing suspicions of civil society's rising influence (Edwards 2009:2).

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[2] ibid

The other area that has provided an opportunity for the critics of civil society to further curtail its activities has been the accountability question. This has long been a source of concern by civil society itself as Edwards (2009) notes, but has now been taken up by critics as an entry point for a broader questioning of civil society's voice, role and legitimacy. Recent examples of this are seen in the Gambia, Ethiopia, Uganda and Zimbabwe, amongst others.

The intrusion of the public sphere is not just from the state, as there are many other forces such as the market, donors and some elements within civil society itself. The economic arena, for example, is an area that threatens civil society in different ways. As Edwards observed, the 2008 financial crisis, for example, negatively impacted on the budgets and endowments of most organisations. In addition, a new trend has emerged in which the business sector and the market have encroached into 'areas traditionally viewed as the domain and preserve of civil society, a phenomenon called philanthro-capitalism, with a mania for business metrics, commercial revenue generation and induced competition between civil society groups, supposedly designed to deliver better results' (Edwards, 2009:2).

Do the threats from the sphere of public authority and the economic arena reflect an inability to establish trusted forms of governance that correspond to deep issues of identity and political culture? Might these be stemming from a legacy of colonial models that are worse than inappropriate because they provide a vehicle which inhibits creation of 'home-grown' political dispensations that satisfy polities' effective control over those who govern? Does this signal the relevance of citizenship and civic agency as meaningful drivers for democratic reform?

These and many more queries are needed to understand the place of civil society in the African political malaise. As Edwards (2009:1) remarked;

> This is a time when the high levels of support for civil society that we saw in the early 2000s have begun to decline. That's partly because the idea of civil society has been used and misused for so many different and conflicting purposes.

States, Civil Societies and Governance

In the majority of African countries, political liberation was supported extensively by spontaneous people's movements, faith-based formations and various constellations of civil society. A close link existed between civil society – understood in that era as people whose civic rights were denied, self-organising for political ends – and what was to emerge as an indigenous political society. From North to South, West to East, civil societies – be they legally recognised or informal – played critical roles in the dismantling of colonialism, apartheid and other forms of domination. This force for political reform was not only true of Africa; it was also true of other parts of the world. In Eastern and Central Europe, for example, an unaided civil society played a major role in the fall of communist states and the subsequent waves of democratisation that followed.

In Africa, this was spurred on by a liberal market ideology and its economic instruments, disillusionment with post-independence one-party nation-building and the 'developmental state' that gradually set in. Consequently, inspired by the changes that were brought about by people's power elsewhere, a number of donors, including some governments, invested heavily in civil society as an alternative agent of change. The associated theory and logic were linear – strong civil societies 'produce' better governance. In some quarters civil society was even considered as a 'magic bullet' in solving Africa's problem of 'under-development'.

Civil society's role was not limited to the arena of political and civil liberties. It was also seen as instrumental in promoting well-being, influencing public policy, reducing poverty and administering humanitarian aid. Civil society, in particular non-governmental organisations (NGOs) associated with foreign aid, assumed significant roles and became major forces in development.

In this book, civil society refers to both international and local groups whether they are development or advocacy oriented. Therefore it is conceptually important that a distinction is made between aided and unaided, local and international organisations. Also it must be noted that civil society varies in terms of its activities, focus areas and nature. Some groups are service delivery oriented; others focus on research and some are advocacy focused. In its many formations and configurations, civil society has developed multiple relations with the post-colonial state in Africa. This chapter is concerned with civil society in general and human rights or governance related or aided formations in particular due to the nature of relations they have developed with the state.

However, many African regimes still equate civil society with NGOs, obscuring an important analytical distinction between aided and un-aided formations of civil society.

Given the foregoing impetus and expectations, over the past decade, investment in multi-country studies has attempted to map the forms and quantify the value of civil society, typically understood as the economic domain of non-profit organisations or a third sector (Salamon, 2003). Results of this work show a highly varied, but generally substantial contribution of the third sector as a proportion of a country's gross domestic product, including in Africa. A paradox, therefore, is that the substantive role of the third sector has been overshadowed by the dominance of state and market narratives of how societies change. With no place, for example, in official statistics, the realm and scope of civic agency remained on the sidelines. However, infusions of foreign aid and calls for 'people's participation' have brought civil society out of the shadows, but not in the way that original theory suggests. There is increasing evidence of a complex, non-linear relationship between states, civil society and governance on the continent. For example, the evolution of civil society may be challenging the status quo, but not necessarily for the public good. Civic agency has also had, in some instances, an un-civic face of intolerance, exclusion and resolution of differences through the use of violence that must also be recognised for its socio-political effects and state responses to them.

Moreover, and ironically, increasing constraints on the public sphere testify to the fact that in Africa ruling regimes see civil society as a (potential) force to be reckoned with. For example, during Africa's civil wars, leaders on both sides of a conflict –for example in Sudan, Ethiopia and the Democratic Republic of the Congo-have always controlled areas where international NGOs operated. For many in power, this experience has been an education in terms of the NGO political economy, feeding into regime suspicion about motives, roles, opportunism and self-serving entrepreneurialism. In many countries, the domain of civic action is viewed with suspicion, despite the fact that many rulers came into power through the support of civil society or were themselves previously part of the civil society formations. It is no surprise; therefore, that legislation constraining civil society organisations, like NGOs, is enacted pre-emptively to counter any potential threat to the regime and its control of the public space. Because civil society is deemed a serious contender for the same space, it is co-opted or treated as an enemy rather than a partner. At the heart of such laws is a broader political strategy to decapitate any opposition, in particular that of a political nature. Even countries with 'friendly' NGO legislation show a tendency to control and repress civic expression and agency, particularly through non-legal structures and tactics.

Perhaps more ironic is the historical and contemporary role that civil society, particularly its expression in aid-related NGO-ism, plays in providing a 'holding ground' for aspiring or rejected or retiring African politicians. It can be argued that, as part of their political repertoire, leaders in Africa often rely on variations of NGO-ism, as well as creating and using civic associations for personal ends. The point is that the connection between civil society, political society and governance in African countries is a complex affair that has yet to be subjected to systematic, critical and comparative scrutiny. In other words, this book is not about civil society in its technical functions, for example, in providing services or mutual support. Rather, it is an exploration of the processes that tie citizens' self-organised formations to the state and vice versa.

State-Civil Society Relations in a Historical Perspective

Using historical, legal and political analysis, the chapters in this book consider the different mutations of the state-civil society relations. The relationship between citizens and the state as well as that between organised formations and their governments has historically varied, and continues to vary from one country to another. Even within a single country, relations are not always the same, changing periodically and contextually. The context, in most cases politics, determines the nature and character of relations. At any given time relations may be cordial and collegial; at another time relations could be conflictual and adversarial. This fluidity is perhaps the strength that ought to be the foundation for arresting countries' recession in their democratic credentials. The diversity of opinions and views as well as expertise and strategies are strengths that states and their people can build on to transform conditions. However, despite the nebulous nature of state-civil society relations, there are some characteristics that are common to the countries that this book examines. Chapters vary in their treatise of these issues but at the heart of them all is the concern with the shrinking levels of the public sphere and how that has occurred historically.

Colonial Spaces and Blurred Boundaries

Civil society was the bedrock for the struggle against colonialism and other forms of oppression. In South Africa, the struggle against apartheid was not won only through liberation movements such as the African National Congress and the Pan African Congress, among others; mass movements such as the United Democratic Front (UDF) and other black consciousness groups played a major role in dismantling apartheid. Organised groups like the Black Sash, the Legal Resources Centre, the South African Civics Organisation (SANCO) and trade unions used different legal and non-legal strategies to isolate the regime, thus placing themselves directly in collision with the state (Moyo, 2009) but in many ways blurring their relationship with the political-liberation movements. However, not all civil society groups collided with the state or worked closely with liberation movements. Some maintained their neutrality while others colluded with the colonial or apartheid state. But in the main, groups fighting for political and civil rights were the basis on which national struggles were waged. This is true of Zimbabwe, the DRC, and many other countries profiled in this book.

In the DRC, for example, as is discussed in chapter fourteen, there was a creation of two publics as a result of colonisation. One was the primordial public which was made up of ethnic groups and community associations. This was to meet the welfare needs of those colonised. The other was the civic public that bore the symbols and institutions of the post-colonial state. In Mauritius, as discussed in Chapter eighteen in this volume, the relationship between the colonial government and citizens was that of the powerful and the powerless, with civil society groups established to address the needs of the colonised. In Angola, civil society activity is traceable to indigenous civic groups as well as cultural associations that were launched to reaffirm the cultural heritage and convene ideas on launching an anti-colonial struggle. In Malawi, during Kamuzu Banda's long tenure, associational life was banned in the same way as political activism.

The point is that for the greater part of the struggle against colonialism, associational life, whether overtly or covertly, played an instrumental role in the twentieth century creation of national liberation movements. Both formal and informal forms of associational life provided the basis and foundations for an anti-colonial struggle. Some of these associations gave rise to national leaders while others transformed themselves into liberation movements, thus blurring the lines again between political society and civil society. It is this historical reality that explains why some political parties that later became ruling parties soon after independence

had strong relations with civil society. In most cases, these relations quickly changed as a result of shifts towards a one-party system by post-independence leaders. How did this happen?

The Post-Independence Era and the Closing of Spaces

The close relations between political movements, later liberation and ruling parties, soon transformed into one of 'the hunter and the hunted' as more countries adopted one-party systems. From Uganda to the DRC, Angola to Zambia, Zimbabwe to Ethiopia, Swaziland to Lesotho, Kenya to Tanzania, Gabon to Cameroon, relations soured between civil society, especially advocacy groups, and their governments. In Angola, for example, with the outbreak of a war in 1975 which destroyed the social fabric and then the attempted coup in 1977, there was a movement by the Mouvement populaire de libération de l'Angola (MPLA) to introduce a one-party state. With this emerged party-created organisations and institutions such as women's organisations (Organizacao das Mulheres Angolanas), the national youth movement (Juventude do MPLA), and trade unions. This would have ramifications for the current state of relations between the state and civil society formations. In Mozambique, the same happened, where the one-party state created mass organisations, co-operatives and state farms. Organisations close to the ruling party dominated the public sphere. These groups were referred to as mass democratic movements. As chapter thirteen on Mozambique discusses, these included women's organisations, organisations of journalists, and national youth associations. An AfriMAP submission to the African Peer Review Mechanism (APRM) Country Review Mission (2009) observed that;

> *Under the one party state, civil society participation was limited by various constraints inherent in the political system itself. Spaces for discussion, through the FRELIMO party branches and committees, or the network of People's Assemblies, were hierarchically structured and clearly subordinate to the political guidance of the party. Below the official party structures and the People's Assemblies, there were the so-called Mass Democratic Organisations… The few autonomous organisations that existed, even when they had objectives different from those of the state and the ruling party, were subject to their control. The private sector operated in a context of strong state intervention, and there were no adequate mechanisms for its interaction with the government which dictated almost unilaterally all the rules of the game.*

In the second Republic of DRC (1965-1990) a coup in 1965 led to a de facto one-party state, resulting in multi-party politics being outlawed and social activism curtailed. This led to the unification of the labour movements forming one union aligned to the ruling party. Cultural associations were also outlawed, as was the independent media. The single-party system replaced all forms of association, sounding a death knell to civil society, or at least its public face, as most groups went underground. As the chapter on the DRC discusses, the church, in particular the Roman Catholic Church, as in most countries, remained active in such areas as education and health. In Uganda, as Larok states in chapter nine, a five-year guerrilla warfare that led to the National Resistance Movement (NRM) regime set the stage for the current relations between the state and civil society groups. As Larok (2009) explains;

> *A young and fragile NRM regime was concerned about security threats to its power base. As a result, the regime was suspicious of groups that claimed to be independent.*

One of the ironies of the democratisation project is that the stability it brings results in the emergence of many groups, but the more groups that emerge, the more controlling governments become. This has happened everywhere, perhaps with greater intensity in countries like Uganda and Zimbabwe. The mushrooming of NGOs in Uganda, for example, led to the NRM regime introducing measures of control that were informed mainly by security and administrative concerns (Larok, 2009).

It is important to note that in all these countries even though associational life, particularly groups such as human rights advocates and the independent media, were outlawed or curtailed, they continued to operate outside the confines of the law. Most of them went underground until the introduction of the multi-party system, but even then the space to operate was not necessarily provided for.

Democratic Transitions, Open Societies and Complex Relations

Although all the eighteen countries in this volume embraced multi-party systems and held periodic elections, developed constitutions that enshrined civil and political rights for their citizens, and formed part of the democratisation wave, their suspicion of civil society continued. In many ways the democratic dispensation and its inherent contradictions and ironies opened up the public space for popular participation but at the same time invited the scrutiny and at times wrath of the state. As a result, different relations emerged dependent on contexts and the characters

involved. In some countries, three types of relations developed between the state and civil society due to the different configurations of civil society and the character of that state. The first was collegial and collaborative, especially among service delivery groups that were mainly NGOs. The second was adversarial, particularly for human rights monitors and advocacy-based groups. The third was that of survivalist groups like community-based organisations that did not develop a particular relationship with the state.

Most governments responded swiftly to governance and human rights advocacy organisations. In the main their motivation for regulating this type of civil society emanated from the fact that they viewed these groups as instruments of foreign (former colonial) powers to influence the political direction of their countries. Governments have been asking the question; whose agenda are these groups implementing? The view of most governments is that these groups are powerful agents representing imported agendas that need to be constrained. Are governments justified in holding this view? This is an open challenge to civil society organisations of an advocacy nature-given that aided civil society groups involved in service delivery have not attracted the same wrath from governments.

Another issue that has in many ways incensed governments in Africa is liberalisation or neo-liberalisation and how it has affected development and policy making. Many African governments have resisted forcefully the liberalisation agenda. Perhaps rightly, they have seen many aided NGOs (including service delivery ones) as instruments of foreign promoters of liberalisation to ensure the shrinking of state machinery in Africa while at the same time expanding the space for private service providers (NGOs) through the governance decentralisation agenda. In many ways, this has been viewed by states as weakening their power and shrinking their control over resources-thereby shrinking the political control of the country's development path and rendering governments ineffective. Related to this of course is the whole question of who is providing the money? As is discussed in some chapters in the book, some governments have been wary about the West, particularly regarding funding from bilateral donors and have responded by capping the amounts coming from outside for NGOs. Yet the funding landscape is changing. Funding is more diversified now than before with the entrance of new bilateral donors from the historical South and new funding mechanisms and channels such as global funds, private mega-philanthropies and African sources of aid. The terrain is fast changing and the old assumptions for regulating the space for civil society based on their sources of funding might not apply anymore.

Different countries illustrate different forms of relations and how these relations have developed. In South Africa, for example, all three kinds (collaborative,

adversarial and survivalist) developed based on the contexts and the actors involved. The country's constitution, for example, enshrines all kinds of freedoms. As chapter two discusses, the political context in South Africa has allowed for the vibrancy of civil society. However, the same civil society has fragmented over the years as more of its leaders joined the democratic state as well as the private sector especially after the 1994 dispensation. The development challenges of the country such as HIV and AIDS, land reform and the general poverty levels has meant that at times civil society has had to engage the state in confrontational ways. Groups that have done so, such as the Treatment Action Campaign (TAC), social movements and other interest-based groups, have had different relations with the state ranging from confrontational to collegial, depending on the context. It is this fluidity in relations that has contributed to some form of constitutional democracy in South Africa.

In Mozambique, the Constitution of 1990 established for the first time the freedoms of expression and association (Articles 51 and 52). The proliferation of laws such as the Press Law (Law No. 18/91) also guaranteed various freedoms such as those of association and assembly. The 1990s thus saw the opening up of public spaces for associations and the reconfiguration of state-civil society relations. Indeed, there was a move towards more consultation and co-operative mechanisms between government, business and civil society. As a result, civil society in Mozambique has;

> …*gradually increased its ability to influence government planning and policies, while the government has been increasing its channels for interaction with civil society (AfriMAP, 2009).*

There are concerns in Mozambique, however, as argued in chapter thirteen, that even though relations are cordial and collaborative the independence of civil society could still be compromised.

In Angola, relations between the state and civil society are still viewed from the perspective of a history that tended to close the space for civil society. The advent of many groups has helped in the democratisation of the public space. At least these groups can use the Bicesse Accord which, among other things, recognises the rights of political parties, freedom of assembly and association.

In Botswana, though not included in this volume, although the state recognises the value and contributions of NGOs, the state's definition of civil society is very narrowly limited to NGOs. As in many other instances, this has

the danger of excluding many other formations from government funding and other opportunities.

Among the islands, particularly Seychelles, Madagascar and Mauritius, relations between civil society and the state are forged very much in line with the history of the state. In Seychelles, for example, although the government has strong control over the media, there is widespread acceptance that recent changes in government have facilitated a move towards creating opportunities for civil society in contributing to the country's needs. Government is viewed as being facilitative. Yet this might just be a reflection of the fact that civil society institutions are still nascent and could change as more complex issues develop.

In Mauritius, there also seems to be a greater degree of openness. Civil society has up to now been engaged in an open dialogue with the state. The general trend is that government views civil society as a partner in development and the relationship is one of mutual respect, especially on social issues. Chapter eighteen concludes in many ways that suspicions abound about the current support from government despite the good relations. Some groups are wary that this might lead to co-option.

In Madagascar, the political climate has had implications for the character of civil society. It is too early to tell what direction civil society will take, but what is clear in politically charged contexts is that civil society too often tends to be polarised along political fault lines. This often results in civil society being questioned around its legitimacy, something that has already begun in Madagascar.

In other countries, there was a very short period between the opening up of the political space and its subsequent closure. In the DRC, for example, in the 1990s, civil society flourished as a result of liberalisation. Human rights organisations were among the first to emerge to address the human rights violations of the state. This led to a breakdown in relations. The state did not want to share the public space and the new groups lacked experience in engaging the regime. As in most countries, liberalisation facilitated the emergence of new political players, some of whom came from civil society. This led to tensions between the state and civil society groups. The National Sovereign Conference (1991-1992) somewhat politicised civil society, leading to many of them playing political roles in the Mobutu regime. Under Laurent Kabila's administration, there was an attempt to control civil society by channelling financial and other forms of aid through government. The regime harassed and arrested activists and put in place cumbersome registration requirements. These relations were not static, however; for example, in 1998, Laurent Kabila adopted a more conciliatory approach to civil society, and when Joseph Kabila took over, some in civil society joined government

and parliament. This was partly because Joseph Kabila adopted a conciliatory approach by unbanning political parties and encouraging civil society and other formations to take part in formulating the laws of the country. As a result, civil society played key roles in the Inter-Congolese Dialogue.

The political contexts in Zimbabwe, Uganda, Ethiopia, Kenya and Swaziland are worth noting in terms of their current relations with civil society. In Zimbabwe, cracks started developing in the mid-1990s when students from the University of Zimbabwe demonstrated against rising food prices and the general state of the country. Trade unions soon followed suit leading to the formation of the Movement for Democratic Change (MDC) in 1999. This was the moment when relations strained between the state and many civil society formations. Since 2000, the state has viewed civil society, in particular advocacy and human rights groups, as an extension of the opposition. Just as the government has consistently argued that the MDC is a 'puppet of the West', civil society groups have heard the same accusations. One of the weaknesses of civil society during this time was to be seen as being synonymous with the opposition. This is the context in which the relations ought to be understood. Even though Zimbabwe has now formed a Unity Government, those strained relations have not changed, as is discussed in chapter one.

In Ethiopia, the strained relations can be traced back to the 2005 Presidential elections where some activists and members of the opposition and journalists were arrested for questioning the credibility of the elections. In Uganda, although the NRM was always sensitive to its security, the advocacy work of some NGOs, especially the anti-corruption campaigns and the 'mabira' crusade (a mobilisation of groups against the state's proposal to give away a significant portion of natural tropical rain forest to an investor for sugarcane), and civil society governance reports, among others, could have heightened the speed at which government then controlled the space.

In Malawi, it is worth noting that strained relations resurfaced between the state and civil society due to civil society's campaign against the third term bid by President Bakili Muluzi. The interesting thing is that it was civil society in Malawi that first developed a draft NGO Bill. However, due to political calculations, the state took over the process and left out the areas that civil society groups had wanted addressed in the bill. This is discussed in some detail in chapter six.

What these situations demonstrate is that state-civil society relations are fluid and have been changing historically between pivotal moments in history and between various encounters. In some instances, the relations have moved from co-operation to adversity and back to co-operation. In others, the relations have moved

from supporting each other during the liberation environment to that of suspicion, both under one-party states and in today's multi-party systems. The new trend, however, is for states to revisit old laws-most enacted by colonial regimes-with the view to tightening them so that it is easier to control associational life. Where none exist, new laws are crafted to regulate civil society activities. Larok (2009) cites a highly placed official in the Ministry of Internal Affairs in Uganda commenting that;

> *The mobilisation capacity of civil society took government by surprise and their strength can no longer be taken for granted.*

Given these dynamics it is important to understand the context and locate the discourse on the 'regulatory environment for civil society in particular and the public sphere in general in the wider political and governance context'. The regulatory environment for civil society in these countries is a product of the history of colonial struggles, post-colonial independence and contemporary state formation. It is therefore important to determine the political contexts that shape the regulatory instruments in these countries. Are there practices and trends in civil society that warrant these instruments? Or is the state simply concerned about the narrow conception of security? Given the current global backlash against democracy, could this in fact be a backlash against democracy and not necessarily an attack on civil society?

An Outline of Laws Targeting Civil Society

The context and the nature of state formation in these countries shape the kinds of laws that have been crafted. As stated earlier, some of these are enabling while others are controlling and restrictive. There seems to be a strong relationship between adversarial relations and repressive legal and non-legal tools on the one hand, and between cordial and enabling environments on the other. It is also instructive that in all these countries their constitutions enshrine the various freedoms (of assembly, association, and expression) and rights (such as political, civil and economic), despite the nature of the regime.

In countries that have enabling laws or where relations between civil society and the state are cordial and mutually respectful (such as Namibia, South Africa and perhaps Mozambique) the laws are embedded in their constitutions. In other words, there is an effort to align the letter and spirit of the constitution with the policies and further legislation on specific issues. In South Africa, for example, the NPO Act No. 71 of 1997 made a clear distinction between creating an enabling environment for civil society and the other objectives regarding

administration and regulation. Furthermore, the Act promoted co-operation and shared responsibility between the state and civil society. The preamble states, for example, that the objectives of the Act are:

- *To provide for an environment in which non-profit organisations can flourish*
- *To establish an administrative and regulatory framework within which non-profit organisations can conduct their affairs.*

In the DRC, in addition to the Constitution, the law that regulates civil society is Law No. 004/2001 which determines the registration process of groups; while in Mauritius, Section 12 of the Constitution guarantees the right to freedom and Section 13 guarantees the right to freedom of assembly and association. Laws specific to civil society include the Civil Code and the Registration of Associations Act (4/465, 1979), the Co-operatives Act, and the Companies Act. Other laws that have an impact on civil society include the Industrial Relations Act, Income Tax Act, Public Collection Act and Public Gatherings Act, among many others.

In Angola, the Constitutional Review Law No. 12/91 is the legal framework for the regulation of civil society. The Law of Association (No. 14/91) was enacted, soon followed by Decree Law No. 5/01 which regulates associations and institutions of public interest. In addition, civil society is also affected by Regulatory Decree Law No. 84/02 that regulates activities of NGOs, their registration, accountability and taxation. In Mozambique, the Law of Association No. 8/91 regulates registration and taxation, among other things. In addition, Decree Law No. 55/98 regulates and defines the legal operational framework for international organisations. Other laws cited earlier, such as those pertaining to the press and media, also impact on civil society operations.

In Zimbabwe, the NGO Bill of 2004 which was not passed was meant to be the principal law that would regulate the activities of civil society. However, various parts of that Bill have resurfaced in other pieces of legislation such as Constitutional Amendment No. 18, and the Electoral Act. Laws such as the Access to Information and Protection of Privacy Act (AIPA) and Public Order Security, amongst others, also have an impact on civil society. In Zimbabwe, the minister responsible for NGOs once issued a memorandum that suspended the operations of civil society. This shows that at times regimes may not need to enact a law to control the activities of civil society.

In Ethiopia, the main law is the Charities and Societies Proclamation (2008). This law mirrors the Ugandan NGO Act and the Zimbabwean NGO Bill.

In Namibia, the Civic Organisations Partnership Policy in many ways guides the relationship between the state and civil society. Voluntary groups can be established under the provisions and parameters of common law while trusts can be set up through the Trust Monies Protection Act (1934). Some organisations are also established through Section 21 of the Companies Act (1973). A similar trend is seen in Swaziland where voluntary organisations can also be established through the common law while other non-profit organisations can be established through Section 21 of the 1912 Companies Act. In addition, groups have to meet the provisions of the Names, Uniforms and Badges Act (1917).

In Zambia, the Societies Act (1958), the Companies Act (1994, 1995, and 2000) and the recently enacted NGO Act (2009) govern the establishment and registration of various forms of associations and groups. Zambia's NGO Bill was shelved for the whole of 2008 and only passed by parliament in August 2009.

In Malawi, groups can be established through the NGO Act (2000), the Trustee Incorporation Act (1952), the Companies Act (1984) and the Penal Code. A similar pattern is followed in Lesotho where the Societies Act (1966), the Societies (Amendment) Act (2001), the Companies Act (1967), the Internal Security Act (1984) and the Public Meetings and Processions Act (1993) establish and govern civil society formations.

In Uganda, the NGO Act (2006) is the main law regulating civil society. However, the NGO Regulations (2008) and the NGO Policy (2009) are other frameworks that impact on the operations of civil society. In Kenya, the NGO Act (1990) and its subsequent Amendment Act (1992) and the Co-operative Societies Act (1968) in the main govern the registration and activities of civil society formations, while in the same region; Tanzania has enacted the NGO Act (2002), the Companies Act (2002), and the Societies Act (2002) among others to govern civil society.

In Cameroon and Gabon, the laws governing civil society are disaggregated according to whether the entity is a trade union, a church, an NGO, etc. Such laws as Decree No. 2001/150, and Law No. 90/053 apply in Cameroon as chapter fifteen discusses. Similar laws apply in Gabon, perhaps due to proximity and the similar colonial experience. In Mauritius, the Civil Code (Amendment 2007), the Associations Act (1982), the Representation of People Act (1958) and the Co-operatives Act (2005), among others, govern associational life.

States have justified their reasons for such laws by mainly couching them in counter-terrorism measures, protecting national security, curbing NGO abuse and ensuring that NGOs are accountable and transparent. At perhaps moderate levels, some states have argued that NGO Policy Frameworks are meant to align NGO work with country priorities. But, in some extreme cases, states have argued that

civil society groups represent foreign interests and pose a risk to national security. In an interview with the BBC's Zeinab Badawi on HardTalk on April 2, 2009, Prime Minister Meles Zenawi of Ethiopia responded to a question that the NGO Law undermined the independence of civil society;

> *It does not undermine the independence of Ethiopian civil society organisations. What it undermines is the funding of civil society organisations in Ethiopia who are involved in political activities from foreign sources. And I believe the practice in all developed countries is that political activities are funded from local sources.[3]*

He went on to say that only those NGOs involved in political activities would be affected, explaining that '… all those NGOs who are involved in economic, social and environmental developmental activities are not required to source their money locally'. But of course, nothing is apolitical in development work.

Consultation versus State-Driven Law-Making Processes

There seems to be a relationship between the type of regime and the nature of approach. In more stable and enabling environments, the approach in crafting these laws was consultative, such as in South Africa. However, in countries that are concerned with security threats to their political power base, the approach was state-driven. Also interesting in these countries is who the responsible authorities for registration, monitoring and general operations of civil society may be. In most of these countries, a board or state agency manages the affairs of civil society. Who is appointed and who appoints them is an interesting area of enquiry.

In Uganda, for example, the process was state-driven even though on a number of occasions civil society groups tried to influence the end product. Larok has documented the response by NGOs as soon as the government decided to amend the 1989 NGO Statute;

> *There was a spontaneous rise of NGO action and campaign in opposition to most aspects of the bill. Several memos, lobby letters and meetings sought to improve the proposed bill to create a more enabling environment for NGOs. […] Despite all the above valid concerns and the spirited effort by NGOs to influence the proposed legislation for the better, including the development, by NGOs, in 2004 of an 'Alternative NGO Bill', the campaign only succeeded in preventing the bill*

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[2] Zenawi tells BBC's HardTalk: 'This would be my last term. You believe him'? http://www.ethiomedia.com/adroit/2171.html, accessed 21 May 2009.

from being passed earlier than when it was eventually done. On April 7th 2006, Parliament passed the Bill into an Act of Parliament with little, if any, of NGO suggestions (Larok, 2009).

In Zimbabwe, the Bill was state-driven even though civil society organisations campaigned hard to stop it from being passed in Parliament. However, as stated earlier, the Minister responsible for NGOs in 2007 unilaterally wrote a letter that halted the activities of NGOs in the country. In Ethiopia, the state drafted the law and presented it for comments. A number of groups made submissions and even requested meetings with the Prime Minister, who met them at least twice to hear their concerns but still maintained that the law did not violate anyone's constitutional rights (Moyo, 2008)[4]. The Zambian Bill was also drafted by government and CSOs made submissions. In Angola, the laws were driven by the state and there is no evidence that civil society was formally consulted.

In other countries, however, the process was consultative. In the South African case, the formulation of the law was a lengthy and rigorous exercise that involved consultations between government, civil society and other development partners. A number of NGOs played leading roles in the formulation of the law, such as the now defunct Development Resources Centre. In Mauritius, generally law-making is consultative. In Malawi, the process was first begun by civil society but later taken over by government.

These chapters point to some interesting trends. Where the relations between the state and civil society are somewhat cordial, the process leading to the formulation of the laws seems to have been consultative. The consultation continues in many forms today. The regulatory environment in those countries is also enabling. However, in countries where the relations are adversarial, the process was state-driven and civil society groups tried frantically to influence the process with minimal success. The environment in those countries is not enabling and tensions still persist.

Except for a few cases, it is also interesting to draw a link between the type of approach, whether consultative or state-driven; the type of existing environment and the relations; and the ministry responsible for the registration and general oversight of NGOs. For example, in environments that are somewhat enabling and where the process was consultative, the relevant ministry is either one responsible for social development like South Africa (Angola is an exception here because the relevant ministry is that of social assistance and reintegration); the Ministry of Foreign Affairs (Mozambique); or the Registrar of Associations (Mauritius).

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[4] Page 10: Personal communications with some Ethiopian CSOs that attended the meeting with the Prime Minister, June 4, 2008.

Zimbabwe is exceptional in this case because it regulates NGOs under the Ministry of Public Service, Labour and Social Welfare, despite the fact that its process was not consultative, and its relations with civil society are strained and the environment remains restrictive.

At the other extreme are those countries that have restrictive environments and their regulatory authorities seem to logically follow. In Uganda, the Ministry of Internal Affairs is responsible for the registration of NGOs and a board appointed by the Minister and dominated by government officials supervises the work of NGOs. In Ethiopia, it is the Ministry of Justice that is responsible for NGOs and a state-dominated agency supervises the work of NGOs. In the DRC, the Ministry of Justice is responsible for NGOs. In Zambia, previously NGOs were governed under the Ministry of Home Affairs. This has changed, however, and NGOs are now under the Ministry of Child Welfare and Development. More detailed discussions of this are provided in the individual chapters.

The Impact of the Laws on Civil Society

The rise of strong civil society organisations, vibrant and vocal media institutions in Africa was not bestowed by some benevolent leadership. They reflect the will of the people to hold the leadership of their countries accountable. [5]

It is because of this vibrancy and the need to hold governments accountable that most civil society organisations have been targeted by restrictive laws and hostile political environments. The response to these groups varies from country to country depending on the political environment. In somewhat enabling environments like South Africa, civil society is viewed as a partner in development and as such many rights are respected although they face the challenges of funding, fragmentation and the generally shared capacity and leadership problems. Even in those countries, however, there is a tendency to want to reduce the public space. At times this happens outside the legal framework through arrests, harassments, police brutality among others. In many ways this is exactly what the restrictive laws do in direct ways and openly.

Generally, restrictive laws in their negative nature curtail the activities of civil society and in the extreme render citizens' action for the public good a dangerous activity. The World Movement for Democracy has outlined in its report *"Defending Civil Society"* the various methods used to restrict civil liberties, remarking in 2008 that;

[5] Statement made by Vice-President of Ghana,, John Mahama, at the Opening Ceremony of the Pan African Parliament's 11th Session, 18 May 2009.

In less than a year, more than twenty countries globally have introduced restrictive legislation and regulations aimed at undermining civil society and diminishing the space in which they operate. The ongoing backlash against democracy has been characterised by a pronounced shift from outright repression of democracy, human rights and civil society activists and groups to more subtle government efforts to restrict the space in which civil society, especially democracy-oriented groups, operate (WMD, 2008).

The various methods used vary from imprisonment, torture, disappearances and harassment to more sophisticated measures such as legal and administrative obstacles including barriers to entry, bureaucratic paperwork and stringent requirements for registration. Other obstacles include arbitrary dissolution of NGOs, stringent oversight and control by the state, as well as the creation of lookalike government-backed NGOs. The impact differs from country to country but in general the following barriers are created.

• *Narrow Definition of NGOs*

These laws are premised on a very narrow understanding of what civil society is, and more often they equate NGOs with civil society. For example, the Ugandan NGO Law defines an NGO as 'an organisation established to provide voluntary services, including religious, educational, literary, scientific, social or charitable services, to the community or any part of it'. The problem with this definition is that it excludes, or rather it is silent on, governance matters, policy and human rights issues, most of which define the political and civil society landscape in Africa. The danger is that as long as the state enacts a law based on this narrow definition it can when it deems necessary invoke it (the law) to curtail the activities of those groups that operate in the democracy, governance and human rights fields.

• *Cumbersome Registration*

The registration process in most of these countries is stringent and cumbersome. It is also bureaucratic. Registration often takes more than six months in most of the countries profiled here. Renewals also take longer and are very burdensome.

• *State-Centric Board*

In most of these countries the state has put in place a governing board which is dominated by government officials. In some countries, the NGO Registration Board does not provide for adequate representation by NGOs. Rather it has representation from state security officials. Could this be a confirmation that the state views civil society as a security threat? In addition, most of these boards are appointed by the minister responsible for the registration of NGOs. They are granted unfettered discretion on NGO matters and their decisions can only be appealed through the minister in charge and very seldom through courts of law.

• *Lack of Provision for Appeals*

Most of the NGO laws do not provide for an appeal process in the event that an NGO is aggrieved by the decision of the board. Where there is an appeal process, it is made to the minister responsible for NGOs and his or her decision is final. The minister bears authority and arbitrary power over the fate of NGOs. Yet in enabling environments, NGOs can appeal to the courts of law.

• *Barriers to Freedom of Association, Assembly and Expression*

These laws violate the freedom of association that is enshrined in constitutions. This is also in violation of many international and regional agreements such as the International Covenant on Civil and Political Rights (Articles 19, 21 and 22), the United Nations Declaration on Human Rights Defenders (Articles 19 and 20), and the African Charter on Human and People's Rights, amongst others.

• *Barriers to the Right to Fundraise*

Most of these laws have restrictions on fundraising. For example, the Ethiopian law requires that local NGOs working on governance and political areas mobilise not more than 10% of their resources from international sources. If they do so, they cease to be Ethiopian, and yet international organisations are not allowed to work in political and governance questions.

These were but some of the barriers and limitations created by the regulatory framework currently in place in the countries profiled here. The chapters that follow delve deeper into these and other pertinent issues.

About this Book

This book is thus a discussion of the regulatory environment under which civil society, and in particular organised formations, operates in Africa. The book focuses on civil society-state relations; existing NGO laws and NGO policies, including other laws that have an impact on NGOs; and national constitutions, processes and the general political economy of civil society. The chapters in the book are broadly divided into sections that discuss:

- An overview of state-civil society relations. Here chapters track the various relations that have developed over the years between states and civil society depending on the political context and country particularities. In a way this puts into perspective the context in which current laws have emerged, and argues that these regulatory instruments should be understood as resulting from a political process of colonial struggles, post-independence and contemporary state formation visa-vi deliberations within the public sphere.
- An outline of the laws that have been enacted mainly to regulate civil society, in particular NGO laws and policies, including those that are not enacted particularly for NGOs but have a direct or indirect impact on the very existence and functionality of civil society organisations and how the public sphere operates.
- Processes followed in enacting the laws, including the authorities responsible for monitoring and registering civil society formations.
- Provisions of the laws and what they impact on, particularly the right to entry, assembly, association and expression, amongst others.

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