

*Civil Society in Africa*

## **TOWARD AN AUTONOMOUS CIVIL SOCIETY: RETHINKING STATE-CIVIL SOCIETY RELATIONS IN ZAMBIA**

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*It has been said that the postcolonial state in much of Africa has failed to emancipate its people from mass suffering while the markets have not ensured that economic benefits trickle down to the poor. Due to the limitation of these two actors, civil society has become a sine-qua-non to development by mediating the failures of the state and the market. Ironically, though, the effectiveness of civil society in much of Africa is dependent on its relations with the state.*

*This article looks at state-civil society relations in Zambia. While there is a plethora of issues, the article analyzes the relations using a legal lens to understand the environment within which civil society operates as well as the other cultural and political issues that impede civil society organizations (CSOs) from being independent and effective in Zambia. The study shows that the current relations between the two development actors hamper the effectiveness of CSOs. As such, civil society in Zambia lacks a sustained engagement with the government; instead it takes a reactionary approach to issues.*

*The policy goal of this study is that the government, civil society organizations and other stakeholders will take action to improve state-civil society relations on the basis of the findings and recommendations. One way would be to reform the legislative framework for civil society and thus provide a basis for enhancing people's participation in decision-making at all levels.*

### **Introduction**

Zambia has been making strides to develop in order to improve the living standards of its people and lift the poor out of poverty. The government has endeavored to improve the basic conditions of living through various infrastructure and social service delivery projects. However, development in its multidimensional sense goes beyond physical infrastructure and the delivery

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of social services to include the opening up of society to plurality of views in order to enhance development outcomes (Mutesa, 2010). At present, the vicious cycle of poverty threatens citizens' participation, leading to unequal development and distribution of wealth and thereby reinforcing a lack of platforms to facilitate participation. This paves the way for the emergence of authoritarian populists who threaten to reverse the strides made in the country's young democracy.

This situation shows the need for an effective civil society to play a complementary role to the state in the development process. However, it remains to be seen whether the nature of interaction between the state and civil society promotes the growth of a vibrant civil society and enhances development.

The first section of the article provides a brief overview of the concept of civil society and the importance of this sector in development. It then gives an analysis of current state-civil society relations, including a discussion of the NGO Act and how it compares to international instruments on freedom of expression, association, and assembly, as well as international principles that govern CSOs. Next, the article discusses the cultural and political factors that shape state-civil society relations and the challenges that hinder the robust participation of CSOs. This is followed by action points for civil society to reform the current legal framework. The final section offers recommendations and identifies new directions for research and analysis.

### **The Concept of Civil Society**

To begin with, it is imperative to understand that civil society is a highly contested concept that is open to a myriad of definitions. Some scholars define it in terms of values and norms, as a collective noun, a space for action, and an antidote to the state. Despite these divergences, a common thread in the definitions is that civil society constitutes a dimension of society different from and sometimes antagonistic to the state. Most definitions also recognize the voluntary nature of civil society and its importance as a forum for independent public expression. Bratton (1994: 2) perceives the concept of civil society as a theoretical concept rather than an empirical one, in the sense that it is a "synthetic conceptual construct" that is not necessarily embodied in a single, identifiable structure. However, he distinguishes civil society from the family, the state, the market, and the political society. The distinction from political society implies that civil society does not include groups interested in acquiring political power, such as political parties. In other words, it is seen as presenting a critical path toward Aristotle's "good society" aimed at thwarting the hegemonic advances of the state from a Habermas point of view or thwarting unfettered market forces from Polanyi's perspective (Mitlin et al., 2007). The two views represent the theoretical or ideological considerations of civil society within development studies which lean toward either the post-Marxist approach or the neo-liberal school of thought.

At a conceptual level, civil society is said to be a historically bound concept that varies from one society to another. As used in development circles, civil society encompasses a larger population beyond relief NGOs, including groups such as social movement agents, human rights organizations and advocacy groups (Van Rooy, 2008).

Civil society has been referred to as "our last best hope" and a "key to good governance" by some scholars.<sup>2</sup> It has a unique role of expanding and promoting civic space by bringing

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<sup>2</sup> See Michael Edwards's keynote address at his book launch of *Civil Society* (London: Polity).

citizens into the political sphere and mobilizing a range of popular voices to address the government on issues of interest. However, this role can be achieved only when civil society is given the space to act. State-civil society relations are central in defining the role CSOs can play in national development, because it is governments that must give civil society the space and autonomy to organize through the law (Desai, 2008).

### **State-Civil Society Relations in Zambia**

Despite the general stability associated with Zambia, the space for civil society has been shrinking. As in much of Africa, there has been a backlash against civil society and democracy as a result of the postcolonial state's retention of excessive power, which in some cases has been used to silence opposing voices (Elone, 2009). The state has been known to use underhanded methods to reconquer the political arena and criminalize dissent, as if control of a country's government was a birthright for the ruling elites.<sup>3</sup>

While a wave of democracy has swept Zambia over the years (evidenced by the smooth transition of power through multiparty elections), the nature of this democracy still does not allow for the emergence of a vibrant civil society (Mutesa, 2009). CSOs remain sidelined and undermined. They do not enjoy the freedom and space to act freely and independently. It has been observed through history that Zambian CSOs have had to constantly negotiate for civic space whenever there has been a change in government<sup>4</sup> (the presidency, to be precise). In this view, Diamond (1996) distinguishes between electoral democracy and liberal democracy. The former is concerned with electoral competition and calls for minimal levels of civic freedom, while the latter provides for a wide range of political and civic pluralism as well as individual and group freedoms. Political freedom of speech, free and independent media, and freedom of association are clearly being undermined in Zambia through the laws. This then casts Zambia's democracy within the "electoral democracy" tradition. Ironically, it takes an independent and effective civil society to transition the country's democracy from its current "electoral" status into a liberal democracy.

According to some CSOs interviewed, the relationship between the Zambian government and civil society organizations is laden "with suspicion, hostility and conflict."<sup>5</sup> The government views CSOs involved in service provision as partners, whereas it finds those involved in advocacy and governance work to be unsettling and somewhat provocative. In like manner, CSOs involved in service provision get positive public media coverage, while the CSOs dealing with governance issues that may be critical of the government are rarely covered by the state media.<sup>6</sup>

The suspicious relationship between the two actors could be attributed to the fact that most CSOs are tied to their funders ideologically and financially, which poses a threat of external influence on state operations (Mweshi, 2009). As such, these groups are considered to be in a hurry to access political power while advancing foreign interests rather than the interest of the societies they purport to serve. It can also be argued that since the country exhibits electoral

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<sup>3</sup> See "Public Sphere Under Threat in Zambia as Press Freedom Violations Mount," Freedom House, June 2, 2014, [https://www.ifex.org/zambia/2014/06/02/public\\_sphere/](https://www.ifex.org/zambia/2014/06/02/public_sphere/).

<sup>4</sup> See historical analysis of civil society in Mutesa (2009).

<sup>5</sup> Transcribed verbatim from respondent.

<sup>6</sup> See CSO sustainability index, USAID.

democracy tendencies, the state lacks a strong sense of legitimacy and is therefore threatened by civic organizations. Liberal democracy governments welcome pluralistic views from different advocacy groups in society as these are seen to enhance their democratic societies. Nonetheless, the state has a vital role of shaping the relations between the two actors and devising effective rules of engagement so that they work as partners and not as adversaries.

### **State-Civil Society Relations Through the Legal Framework Lens**

State-civil society relations in Zambia can be observed through the laws that the government makes to govern civil society and generally through the interactions of the two parties on a daily basis. The framework of laws and regulations governing the formation and operation of civic organizations often indicates whether the state and civil society have a positive relationship. An ideal framework is one that is fully enabling while encouraging some discipline. Governments around the world have justified the adoption of restrictive laws against civil society as necessary to defend national sovereignty against foreign influences in domestic affairs, citing cases where CSOs have been used as conduits of foreign influences; and even to protect citizens against terrorism and unscrupulous individuals masquerading as NGO leaders. However, these justifications should not undermine the fundamental human rights enshrined in national and international instruments (Clark, 2008).

In the case of Zambia, the legal framework governing the operations of CSOs is the controversial<sup>7</sup> NGO Act of 2009. According to the ministry in charge of NGO registration, the Act came about to address the multiplicity of legislation for NGOs. Previously, five distinct pieces of legislation dealt with registration, organization, and regulations of NGO activities: the Companies Act (Cap. 388); the Lands and Deeds Registry Act (Cap. 185); the Trustee Act, 1898 of the United Kingdom; the Societies Act (Cap. 119); and the Adoptions Act (Cap. 54).

To put this discussion into context, it is important to understand that the NGO Act was first presented as a draft bill in 2007, when the Movement for Multi-party Democracy (MMD) was in power, but it was withdrawn following criticism. The bill was finally presented in 2009 and enacted by Parliament as NGO Act No. 16 of 2009 on August 28, 2009. At that time, it was reported in private media that the MMD was using the Act to hold onto the reins of power,<sup>8</sup> due to its provisions seen as limiting civic space. Since presidential elections were looming two years from enactment of this Act, the then-opposition political party Patriotic Front (PF) assured NGOs that once it was voted into government, the NGO Act would be repealed, and the government and CSOs together would come up with a framework acceptable to all stakeholders. The PF had it enshrined in their manifesto that the relationship between

Civil society organisations and the State is essentially fraught with suspicion, antagonism and conflict due to lack of appreciation by the MMD government of the role of the civil society as a partner in national development. Consequently the civil society has found it difficult to play its meaningful role in the area of social justice, good governance and national development.

In order to enhance the role of the civil society and its relationship with the State the PF government shall:

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<sup>7</sup> I call it controversial due to the conflict that has emerged around it between some CSOs and the Government.

<sup>8</sup> See *The Post*, November 10, 2009, [http://www.postzambia.com/post-read\\_article.php?articleId=1646](http://www.postzambia.com/post-read_article.php?articleId=1646).

- Recognize the State and civil society as mutually interdependent and complementary partners in national development;
- Guarantee the active participation of civil society in matters of social justice and good governance;
- Promote constant dialogue between the State and the civil society;
- Review the Non-Governmental Organizations Act of 2009 so as to promote the above

After the 2011 general elections ushered the PF into government, civil society organizations were expectant. Despite its enactment in 2009, the NGO Act had never been implemented under the MMD regime. A clause within the Act states that it would come into effect on the day the minister in charge of NGOs deemed fit. It was not until July 15, 2013, that NGOs were called upon to register under the Act, during the reign of the Patriotic Front, which had not yet reviewed the Act as promised during the campaign. The PF government argued that it was just acting on laws put in place by the previous regime. However, this may also be construed as a case of finding “convenient laws” in place, making it difficult to keep their campaign promises to civil society.

A significant number of CSOs have declined to register under the new Act and have been issuing statements and petitions which, among other issues, remind the PF government to deliver on its campaign and manifesto promises. The current impasse surrounding this piece of legislation signals the need for a regulatory framework that is acceptable not only to the state but to all stakeholders.

This Act is fraught not just by its practical implications for NGOs, as discussed above, but also by the process in which it came to be. There was a lack of proper consultation with primary stakeholders, the NGOs themselves. In fact, submissions by NGOs when the bill was presented to Parliament were ignored (Mzyece, 2009). Among the contentious issues within the Act is the call for compulsory or mandatory registration of NGOs within 30 days of their formation or adoption of their constitutions, and the subsequent re-registration every five years, contained in sections 11 to 14. The concern here from organizations spoken to is that the law does not specify the time of processing the application, which can keep organizations in a state of uncertainty regarding their legal status even though they are allowed to operate until a decision is communicated to them. Further, the Act states that organizations can be denied registration on “public interest” grounds; however, the Act is not clear about what constitutes public interest, leaving it to the interpretation of the government officials responsible for reviewing applications. Further, calling for NGOs to re-register every five years is a potentially threat to NGOs critical of government policies, and it gives the state an opportunity to harass such organizations. This has further implications in limiting the extent to which an organization can be independent and act freely. For the government, it also imposes a great administrative workload on an already burdened Administration.

Further, sections 5 to 7 of the NGO Act provide for the establishment of three tiers of bureaucracy, with the NGO board at the top, followed by an NGO council comprised of NGO representatives voted in by the NGOs themselves, and finally an NGO congress. There are three issues of controversy here. First, the composition of the board is seen to be more government-dominated. The members need to be approved by the minister of community development. In

addition, only seven out of 15 members of the board are to be elected by the NGO congress subject to the minister's approval, with the other seven appointed by the minister—which could have serious negative implications for the independence of NGO sector. Only one member is an independent member of the board. The minister is also given the power to appoint the chairperson and vice chairperson from among the board members. Given such a composition of the board, its functions then become challenging in the following ways:

- 1) **Approving the area of work of NGOs:** This function gives the government-dominated board the power to determine NGOs' thematic and geographic areas of operation and in a way control their activities, which goes against the fundamental principles of freedom of expression, association, and assembly.
- 2) **The power to provide policy guidelines to harmonize the activities of NGOs with the national development plan:** This aspect co-opts NGOs into assisting in the fulfillment of the political priorities of the government reflected in the plan. It has the potential to impact upon the independence of the civil society sector. It also goes against the right of CSOs to operate free from unwarranted state interference.
- 3) **The power to advise on strategies for efficient planning and coordination of activities of NGOs:** This aspect treats NGOs as government subsidiaries, as opposed to independent entities free to formulate and execute action plans in line with identified priorities.

Furthermore, the Act in a way imposes regulations on NGOs by compelling them to draw up a code of conduct, requiring approval by the government-dominated NGO board and monitoring by a 12-member NGO council. Although members of the council are to be elected by NGOs themselves, its overstretched mandate could have serious repercussions on the autonomy of individual NGOs, which may not subscribe to the majority position adopted by the council.

Overall, the implementation of this Act not only interferes with and hampers the work of NGOs but also violates fundamental rights guaranteed in the Constitution of Zambia as well as some of Zambia's legal obligations under binding human rights instruments.

Despite all the weaknesses and problems posed by the Act, the PF government has maintained that the Act is intended to bring internal democracy and accountability to CSOs. They have argued that the democracy, transparency, and accountability that CSOs usually expect from other entities (government and private sector) should in fact begin with CSOs and that CSOs should operate in accordance with the values and principles they espouse.<sup>9</sup> The government has called on organizations to register, but due to widespread defiance they have had to keep extending the deadline. In a bid to force organizations to register, the Ministry of Community Development is reported to have written to diplomatic missions and aid agencies in June 2014, cautioning them to work with only those NGOs registered under the NGO Act; however, the letter did not state the consequences for donors who did not comply. On the other hand, the "big" civil society organizations argue that they are willing to dialogue without the condition to "register first then discuss."<sup>10</sup>

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<sup>9</sup> See comments from former Justice Minister Wynter Kabimba, [http://www.postzambia.com/post-read\\_article.php?articleId=35586](http://www.postzambia.com/post-read_article.php?articleId=35586).

<sup>10</sup> This is according to one of the CSOs that has yet to register.

## **Effective Civil Society Engagement with State**

While having a good legal framework for civil society is important, there are other cultural and political issues that interfere with maintaining positive state-civil society relations and ensuring that CSOs are independent and effective in Zambia. One such issue is the political orientation of the country, which is such that government can clamp down on their “enemies” using state apparatus. To start with, no clear or distinct political ideologies inform the different political parties in the country, so it is common to see politicians moving from one political party to another (usually the direction of these defections is towards the ruling party) in the name of “exercising one’s democratic right.” As a result, when a party gets into power, it is at liberty to change its course or adopt policies that differ from what was stated in the earlier manifesto that ushered it into power. When this happens, no one can hold government accountable and pressure them to deliver on their promises. This could explain why the PF government (which is currently a transition government following the demise of President Sata) was not in a hurry to deliver on its campaign promise of repealing the NGO Act when they ascended into power.

On the other hand, CSOs in Zambia have been exhibiting more of a reactionary approach to engaging with government. While Zambian CSOs easily mobilize into coalitions and social movements in times of crisis and always play a role at the defining moments of the country’s political history,<sup>11</sup> there is lack of a long-term engagement with the government. However, the level of engagement with the government has been characterized as reactive or crisis-mode rather than rigorous and sustained. For instance, after the transition from one-party state to multiparty politics in 1991, there was an observed decline in the visibility of civil society. The main reason advanced was that, with democracy in place, civil society had achieved their main aim of political mobilization.<sup>12</sup> Civil society was later seen more visibly toward the end of the 10-year rule of President Chiluba, when he wanted to amend the constitution to provide for a third-term clause. Once that battle was won, CSOs again went into hibernation.

With the development agenda of the early 2000s calling for more stakeholder participation in national development plans, the government introduced coordinating committees at the community, district, provincial, and national levels in order to strengthen and institutionalize CSO-government communication and engagement. Government officials, civil society groups, and, in some cases private-sector companies meet every three months to discuss vision, direction, and strategies for development. Other forums for CSO participation are the parliamentary portfolio committees, which examine how government is being run and how it is spending money. Committees working on different thematic areas each invite members of the public, CSOs, and other stakeholders to make submissions. The extent to which these submissions are taken on board is beyond the scope of this paper; however, in terms of effective participation, it has been observed that CSOs are given only short notice to participate in these committee meetings, which results in their either not being able to attend or if they do, lacking adequate preparations to make effective submissions (USAID, 2011).

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<sup>11</sup> See Mutesa (2008).

<sup>12</sup> Mumba (2008), in Mutesa F. (ed.) *State Civil Society and Donor Relations in Zambia*. UNZA Press.

Other factors impede robust participation of local CSOs in the everyday running of government. Key factors highlighted by organizations interviewed as well as scholars in this field<sup>13</sup> include the following:

- Citizens' participation in governance issues is limited to elections and political parties. There is a lack of institutionalized mechanisms for citizens' participation in decision-making, and government administrative structures are highly centralized.
- There is an observed lack of dialogue between the government and CSOs dealing with governance issues.
- According to Mweshi (2009), CSOs are greatly reliant on foreign donors for funding, and to some extent they compete with each other for donors. This has implications for the independence of the organizations' agendas and ideologies, and it places serious constraints on home-grown strategies for development. It is common for NGOs to change their strategies and missions to align with those of their foreign funders, and they promote a rhetoric that validates their existence only by compromising their character. This could also explain why the government wants to be kept abreast of any such changes, as is indicated in the controversial NGO Act.
- CSOs also suffer the effects of lacking representation at grassroots level. It is common to find NGOs at national level without constituencies at local level.
- Another factor that reinforces this reactionary approach is the lack of proper coordination and collaborations among CSOs. It is common to see a duplication of efforts in NGOs' areas of work.
- The Zambian media, which is a vehicle through which citizens can remain informed, has often had clashes with the government, evidenced by the arrest of some private journalists and the blocking of online papers that report negatively about the government.<sup>14</sup> Private online media editors and contributors are forced to work anonymously for their own safety, while private radio stations have faced instances of program interruption by either governmental officials or ruling party cadres with a threat to revoke their operating licenses. Other factors such as literacy levels, poverty, and lack of electricity have affected access to electronic media, too.

In addition, there is no appropriate incentive system in place for Zambian CSOs, due to the high dependence on foreign funding noted above. This strikingly differs from most of their Western Europe and American counterparts, which are mainly founded and funded by people within society; as such, they are compelled to be effective in their own societies, because it matters what the public thinks about them. It then follows that the governments in such societies cannot easily attack CSOs; to do so would be akin to an attack on their its citizens. While the perception of CSOs in Zambia is positive and the public is generally supportive of CSOs' work

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<sup>13</sup> See CIVICUS Civil Society Index Analytical Report for Zambia (2010).

<sup>14</sup> "Zambia Blocks Another Website, Re-arrests Reporter," Committee to Protect Journalists, July 30, 2013, <http://www.cpj.org/2013/07/zambia-blocks-another-website-re-arrests-reporter.php>.

(based on 2011 CSO sustainability index), this does not mean that the public perception of CSOs has a bearing on CSOs' effectiveness comparable to donor perceptions.

### **Way Forward: Practical Action Points Based on International Best Practices**

In order to move forward on the NGO Act impasse, CSOs need to be unified and show a united front before questions of legitimacy arise in terms of representation. Already a good number of NGOs are reported to have registered under the Act, according to the Ministry of Community Development, Mother and Child Health. Civil society organizations therefore need to identify or map their pressure points and what can be done to position government officials to use their power effectively. The government and parliamentarians are ultimately responsible for developing and reforming legal frameworks for civil society. Therefore, it is important for advocacy efforts to be directed toward ensuring that the government and Parliament understand and address their concerns in amending legal provisions while accommodating government interests. To do so, CSOs discontented with the current Act should communicate and negotiate effectively with government officials and parliamentarians to develop mutual understanding (ICNL, 2008).

Further, calling on government to repeal the Act is not enough and may take time. To speed up the processes and quickly engage decision makers, civil society organizations need to develop an alternative model or law and use it as a basis for dialogue. This strategy is similar to the one adopted by Kenyan civil society organizations, who drafted a Public Benefit Organisation Bill in 2011 that was shared by the government agency responsible for registering NGOs, the Kenyan Law Reform Commission, and various members of Parliament. The bill was drafted following a consultative process with a number of civic organizations throughout the country. With the draft bill in place, the coalition was able to engage the Law Reform Commission and parliamentarians. Eventually the bill was accepted by a Parliament committee responsible for legal affairs in December 2011 and was submitted to the full Parliament. To date, Zambian civil society has been calling for the current Act to be repealed without providing an alternative. The Minister overseeing the registration of NGOs was quoted in local media saying that civil society organizations are pushing an already open door: "We have already told them [NGOs] to bring fresh amendments to us and we will consider them. For now we cannot operate in a vacuum, something has to be in put in place to guide their operations."<sup>15</sup>

In case there is lack of capacity among organizations to draft an alternative law, CSOs can always seek the help of both national and international experts on civil society law such as Law Association of Zambia (LAZ), International Center for Not for Profit Law (ICNL), American Bar Association, and Freedom House, among others.

Finally, CSOs should avoid politicizing issues related to developing an enabling legal framework. A key observation in the calls for reform of the NGO Act is that they are somewhat politicized. When the current Act was introduced in 2009 under the MMD regime, CSOs tended to seek sympathy from opposition political parties, and it was somehow looked at as an "MMD law." This could have influenced the Patriotic Front to include a clause in their manifesto on reviewing the NGO Act once they came into power, as a way of soliciting support from CSOs.

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<sup>15</sup> See "Government Willing to Make Amendments to the Controversial NGO Act—Katema," *Lusaka Times*, July 31, 2013, <http://www.lusakatimes.com/2013/07/31/government-willing-to-make-amendments-to-the-controversial-ngo-act-katema/>

Now that the Act has come into force under the PF regime, the messages from CSOs are framed with a political inclination. The leader of NGOCC speaking on behalf of 24 other CSOs was quoted in local media saying that “the PF is the most unresponsive government.” Alternatively, CSOs can move away from politicizing their messages to developing a message that speaks to the needs of the entire citizenry or society, showing how changing the legal framework will affect those needs. “An effective message should highlight how the legal framework for CSOs is linked to the development and prosperity of the country. It should include examples of how civil society’s work contributes to the government’s goal of social development and delivery of social services” (ICNL, 2012). This helps prevent the reform initiative from being politicized. An example from Iraq shows that during the advocacy efforts that led to the successful passage of the progressive Law 12 of 2010, civil society groups highlighted how a strong civil society sector could contribute to rebuilding the country and attracting foreign funding to support local development.

## **Conclusion**

A vibrant civil society is a necessary ingredient for economic, social, and political development. It is the duty of every state to protect these civic liberties and promote the growth of an effective civil society. As has been noted, the Zambian NGO Act is fraught with clauses that are subject to discretionary application of the government of the day, leaving CSOs without any legal recourse. The implementation of the Act in its current form risks making CSOs a mere extension of state apparatus rather than effective and independent partners in development. The state-civil society relations are also shaped by the cultural and political issues.

In order to have positive relations, the state and civil society must hold open and honest dialogue, based on the understanding that there is a shared vision while respecting basic differences in approaches. Consultative mechanisms must be put in place to ensure that the state-CSO dialogue is not incidental but is one of strategic mutuality.

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