Resisting the Anti-terrorism Bill: The Role Of Civil Society in Legislative Reform

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Introduction

The South African civil society response to the recently tabled Protection of Constitutional Democracy against Terrorist and Related Activities Bill (2004), known initially as the Anti-Terrorism Bill (ATB), raises a number of critical questions around the effectiveness of public participation in resisting a controversial bill appearing before parliament for consideration. The outcomes of this particular process have implications for how civil society may respond to similarly proposed legislation in future.

This paper attempts to analyse the nature and context of the public's engagement with the ATB, by firstly tracing very briefly, its history, and then examining the levels of resistance to the bill, and the interesting civil society dynamics that emerged from the various national alliances that were formed in an effort to respond to the bill. We will argue that this process was somewhat unprecedented in the post 1994 period, particularly within the context of broader civil society participation in the formation of government policy on an issue of such critical national significance. It was unprecedented because never before has there been such a concerted effort by civil society to reform or reject a particular piece of legislation.

Moreover, this paper will attempt to understand the reasons that people participated in particular ways, honing in on their differences and similarities. In particular we will argue that participation in this process can be broadly divided into two distinct categories. One being primarily faith based, i.e. the Muslim community and the second, a loose coalition of journalists, unionists, NGOs and activists. This distinction does not reflect the view that there was no confluence of engagement between these groupings, rather that submissions on the bill were generally made along specific group interests. The paper will also look broadly at the effectiveness of their participation as an exercise in advancing democracy and civil liberties, as well as the specific group interests alluded to earlier.

It could be argued that the attacks on the United States on September 11, 2001 served as a catalyst for many countries, particularly the US and the United Kingdom, and South Africa at a later stage, to consider introducing additional legislation to deal with terrorism. In the case of SA, the government's argument that the then ATB would bring our country in line with similar international legislation was met with public anger and discontent from time of the introduction of the draft bill in 2002. The resistance stemmed primarily from the fact that draconian powers would be given to our law enforcement agencies to investigate and deal with acts of terror. This in itself recalls the dark days of apartheid where state repression in South Africa resulted in liberation movements being labelled as terrorist groups, and being

persecuted through the various organs of the state. The vague description of 'terrorism' further fanned fears that the ATB would seriously impact on civil liberties such as the freedom of association, expression, assembly and demonstration.

Given also the experiences of the Muslim and other minority communities in the US, in the wake of such legislation being introduced, illustrated the dangers of these laws being effected and the South African public was understandably nervous about having its own civil liberties curtailed yet again, after years of such treatment under apartheid.

These incidences in the US and elsewhere clearly provided sufficient motivation for those groups feeling potentially most affected, to act. As a result, South African Muslims, together with a range of other interest groups such as COSATU, one of the country's largest labour union federations, were propelled to undertake a sustained campaign to challenge and engage the government on this bill. What followed was arguably a rare and intriguing partnership forged between faith-based and other non-governmental interest groups, to tackle an issue, which would inevitably affect them and their activities.

Brief Chronology Of The Bill

In September 2002, the Department of Safety and Security introduced the draft ATB for comment and scrutiny. At this point a number of human rights organisations opposed the bill, arguing that it was fundamentally flawed. What was at issue were the many archaic provisions that would significantly curtail civil liberties guaranteed in our Bill of Rights. The initial demand by some, including the Muslim community, was that the bill be completely shelved, which the government did not deem feasible. The next course of action for detractors was to actively engage around demanding changes to technical aspects of the bill.

A revised bill, with shortened content and a removal of some problematic clauses, was then placed before parliament in March 2003. However, as the excerpt from the Freedom of Expression Institute (FXI) below indicates, the revised version was not without problems:

"The Freedom of Expression Institute in concert with a range of other Human Rights organisations opposes the introduction of this legislation in South Africa. Firstly, the bill itself is fundamentally flawed and the logic behind its motivation curious. Furthermore, the process followed in drafting this legislation is highly questionable as no discussion document was published neither was there proper consultation done by the South African Law Commission with the various stakeholders. Because terrorism is an offence that attracts some of the severest penalties known in law, it would have been thought that the bill would at least attempt to provide a simple, clean and unambiguous definition of the term 'terrorism'. Unfortunately this has not been done and on the contrary the bill presents a vague and incomprehensible definition of what it means by 'terrorist act', which it defines as " … an unlawful act … that is likely to intimidate the public or a segment of the public."[1]

Interestingly, a number of organisations also argued that the State had 22 pieces of existing legislation to cover crimes and activities covered by the ATB.[2] This was one of the more significant arguments raised by the various groups and it effectively informed and shaped the foundation of the objections to the introduction of the bill.

In the latter part of 2003, indications were that the bill would be fast-tracked through parliament. However, COSATU's intervention disrupted the process, arguing that strike action would be seen as "terrorist action" in terms of the construction of the bill. The April 2004 elections halted any progress on the bill, but thereafter it was once again revised, taking into account COSATU's concerns, and reintroduced to parliament. A compromise was reached with COSATU, and the

bill was renamed and unanimously passed in November 2004.

Resisting The Bill: Organising Protest At National Level

It was clear from the outset that the implementation of this bill was going to affect civil society across the board. The South African government's intention to introduce the bill and bring it into effect as soon as possible was read by many as conforming to the US government's agenda in dictating how 'terrorists' were to be dealt with. Groups which would be severely affected by the bill, and civil society as a whole, began to mobilise. Organisations across the country, from the FXI to individuals with legal and political expertise, joined the national coalition to organise the drafting of submissions unpacking serious flaws in the bill.

For example, a secretariat was set up in Durban, which worked together with the administrative networks of other organisations, to synchronise submissions to parliament, as well as issue regular public and press statements. What was intriguing was the way in which groupings that would otherwise, arguably, not have formed alliances, undertook to do so, as part of this broader organised resistance. This included religious bodies, NGOs, trade unions, individuals and professional associations. The constitution of the country became the most powerful tool to engage parliamentarians, with the primary argument being that the bill violated significant rights guaranteed by the constitution.[3]

a) Faith Based Group Intervention: Muslim Resistance to the Bill

The most prominent faith based group in the coalition was the Muslim community. The horror of the experiences of the Muslim community in the US and in other parts of the world, was clearly an indication to South African based Muslims, that they could not allow such legislation to be passed without challenging its proposed draconian measures, which would put them first in line as targets, should the bill be passed in its original form. No doubt the stereotyping of all Muslims who participate in legitimate resistance struggles and campaigns as terrorists has become the single most politically sensitive issue of the day, and challenging this idea remains an ongoing ideological battle.

The extreme measures with which the US based Immigration and Naturalisation Service (INS) authorities dealt with minority individuals after September 11, were daunting. US residents from minority groups, particularly men of Arab, Muslim and South Asian origin were simply detained, without being charged, or allowed access legal counsel. No explanation was given in many instances; many were arrested and refused trial. It was only after sustained protests from the public and human rights groups that the authorities relented, but there are still some individuals incarcerated unjustly, simply because they are Muslim, or of Arab or South Asian descent. If any of these individuals were found to have sent money to the Middle East or Asia, even for charitable causes, they were immediately suspected of channelling money to 'terrorist' organisations.

The South African Muslim initiative drew from a broad spectrum of the Muslim community. A range of Muslim organisations played an active role in making submissions and supporting the national initiative around the bill. These included the following organisations based across the country;

Islamic Medical Association (IMA)
Jamiatul Ulama (KZN)
Muslim Judicial Council
Sunni Jamiatul Ulama (SA)
Muslim Youth Movement (MYM)
Jamaitul Ulama, (Gauteng)
Council of Ulama Eastern Cape
Association of Muslim Accountants and Lawyers
Al Ansaar Foundation
South African National Zakaah Fund (SANZAF)
Islamic Dawah Movement (IDM)

Human Rights Foundation
Institute for Islamic Services
Red Crescent Society of South Africa
Media Review Network (MRN)

A cursory glance at the above list reveals that these are primarily religious organisations, with IMA and AMAL also representing professional interests. It would seem that as faith based groups, the level of public participation by Muslim organisations is located within a predominantly religious framework, the implications of which will be unpacked later on in this paper.

A submission made by the above organisations to President Mbeki in November 2003, noted that;

"There is no place for such legislation in the new, democratic South Africa. Our government should be the first to OPPOSE a bill of this type because it goes against everything that the freedom struggle stood for. If the liberation movements, during the apartheid days, were judged today under this bill all would be condemned as terrorist organizations. If the ATB is passed here, no South African will be able to support in ANY way ANY of the liberation struggles presently being waged in many parts of the world. This is hugely ironical because virtually the entire world supported the South African freedom struggle. We are told that the ATB is needed here in order to deal with groups like Pagad and the Boeremag. Both these groups have been apprehended without the bill. It took good police work, not new laws to achieve this. However, we must emphasize that if measures are contemplated to tighten up domestic security we will certainly be supportive of such moves provided they don't infringe on civil liberties."[4]

The letter clearly indicates the concerns felt by the Muslim community and others that supporting genuine liberation struggles globally would be severely hampered by such a bill, as would the undertaking of local protests, which had effectively been the hallmark of the anti-apartheid movement.

b) Intervention by Broader Civil Society

A number of progressive interest groups undertook to resist the bill. While some of the resistance involved public meetings and protests to a limited extent, oral and written submissions to the relevant parliamentary portfolio committee were the more notable forms of resistance.

In its submission, the Institute for Democracy in South Africa (IDASA) supported the "intention of the bill" and acknowledged the need for legislation to deal with terrorism in South Africa and internationally, but was concerned that "in an attempt to address the problems of terrorism, there is potential to make provisions which may be in contravention with the provisions of the constitution."[5]

IDASA explained that the 2002 draft ATB defined a terrorist act as "acts which intentionally intimidate the public, cause death or serious bodily harm or endanger a person's life." The amended (2003) version defined terrorist act to mean, "An unlawful act committed inside or outside the Republic." The latter definition, IDASA argued, is extremely broad and does not give clarity as to what acts would constitute terrorism. IDASA also expressed concern that the bill might contravene human rights enshrined in the Bill of Rights. In wrapping up its submission, IDASA said,

" Successful anti-terrorism legislation must endeavour to build strong international norms and institutions on human rights and not provide a new rationale for avoiding and undermining them. The legislation should maintain a balance between combating the threat of national and international terrorism while maintaining the hard won rights as enshrined in the constitution. We should be mindful of our repressive history which, at the time, passed

legislation which was intended to "protect" the country against organisations such as the ANC and the PAC which were considered to be terrorist organisations."[6]

The Law Society of the Cape of Good Hope (LSCGH) also voiced resistance to the bill, arguing in its submission that existing legislation was more than adequate in dealing with the threat of terrorism and that the proposed bill's provisions were unconstitutional. Vincent Saldana, who presented for the LSCGH, described the bill as a "stark reminder of old security measures." The LSCGH went further to warn that the bill failed to deal adequately with the complex relationships underpinning some communities.[7]

The South African Human Rights Commission (SAHRC) was also not convinced of the need for the bill. In its submission, the SAHRC proposed a number of technical changes to the bill and expressed concern at limitations on the right to silence. The SAHRC did, however, explain that it understood that the international environment was difficult and South Africa had obligations to meet. However, it made it clear that the manner in which each country incorporates international instruments depends on the country's circumstances, and that there was no need to go against the constitution.

Another notable submission was that made by the Unemployed and Social Activists Committee (USAC) who rejected the bill as "unconstitutional and a tool of imperialist oppression." The USAC contended that the bill was more repressive than apartheid itself. They went on to argue that the bill was defending "imperialist globalisation and the bourgeoisie of South Africa."[8]

In a number of statements, the Freedom of Expression Institute (FXI) argued that the bill would seriously impact on individual civil and political liberties. Moreover, the FXI was also concerned about the impact the bill would have on progressive formations in the country, particularly the social movements. A widely circulated press statement said, "What is worrying is the way the bill interfaces with the terrain of radical political protest in South Africa. One can easily surmise that the activities of social movements such as the Anti-Privatisation Forum (APF), the Landless Peoples' Movement (LPM) and the Treatment Action Campaign (TAC) will soon come under the attention of this legislation."

Journalists were also among those who resisted the introduction of the ATB. The South African National Editors Forum (SANEF) called for the withdrawal of the ATB saying it was " a serious threat to media freedom because the legislation could be used against journalists."[9] Kimani Ndungu of FXI commented "it violates the rights of the media to operate freely, and will compel journalists to provide information and hand over material to the State."

The intervention made by the Congress of South African Trade Unions (COSATU) had arguably been the most effective. During the drafting stages of the ATB in 2002, COSATU realised that legitimate strike action could be criminalized as 'terrorist action', and flexed its political muscle, resulting in the bill being stalled. In its submission, COSATU argued that the definition of 'terrorism' was far too broad and vague. It went on to say that;

"This would have the effect of expanding the scope of the bill to include activities, which though unlawful, in no way should be construed as an act of terrorism. This understandably has raised concerns about the potential that this has to be used to suppress political dissent. Considering the broad definition of a terrorist act upon which this provision is dependent, it is understandable that this provision has raised concern about it being used against organisations perceived to be left of government. Further, it is unclear how legitimate liberation movements may be distinguished in respect of acts endangering the security and territorial integrity of other countries."[10]

As a result of the various submissions made by some

of the above interest groups, with COSATU having exerted the most notable influence, the bill was revised, and renamed the Protection of Constitutional Democracy against Terrorist and Related Activities Bill. A compromise was reached primarily with the trade union movement, with the significant change being that the bill now stipulated, "a struggle waged by peoples… in furtherance of their legitimate right to national liberation, self-determination and against colonialism shall not be considered as terrorist activity."

Effective Public Participation: Dynamics of Addressing Legislative Reform

a) Strategic Alliances and National Engagement

Clearly, a number of diverse organisations were involved in resisting the bill. It can be argued that the participation of some organisations was more effective than that of others, for a wide range of reasons. De Villiers reminds us that, "Public participation is about access to power and decision makers. In most systems, certain people or interests have greater access to power and decision makers than others."[11]

We have attempted to unpack the levels of participation by broader civil society by examining briefly the role played by a diverse range of actors. There were essentially two categories, as identified in the introduction; one was primarily a religious based interest group, and the second a loose configuration of human rights groupings, trade unionists, journalists, NGOs and activists. While there are overlaps between the two categories, there are also arguably some significant differences.

The submissions made by the Muslim community were primarily informed by the kinds of harassment and unfair victimisation that Muslims face at a global level, in a post 9/ 11 context. Other groupings were not subjected to this kind of treatment, and hence their participation was located within the context of the potential compromise of certain rights guaranteed by the South African constitution.

The crux of the 'Muslim concern' was the possibility of being identified as "terrorists" because of their historical support for global issues such as the liberation struggles of the Palestinians, Chechnyans, Kashmiris, and more recently, the Iraqis. Moreover the fear was that their financial contributions to organisations supporting the struggles in the above countries would be severely constrained. In addition the threat of arrest, detention without trial, and such drastic measures should, for example, individuals be found to be in possession of materials promoting certain causes, was also seen as compromising essential rights to freedom of expression and association.

The submissions made by the second category, while alluding to some of the concerns expressed by the Muslim coalition, went further to argue that radical and progressive activities entailing criticism of neo-liberal interests could easily be labelled as 'terrorist activity'. Dale McKinley, a well-known social activist argued that; " The ANC government can use its discretion to define 'unlawful' dissent as terrorism". He added that; "it does not take a genius to figure out what this might mean for social movements such as the Anti-Privatisation Forum and the Landless Peoples Movement."[12]

The effectiveness of the resistance offered by COSATU can be attributed to the fact that they are a powerful, well-organised formation. Moreover, the fact that COSATU is a significant part of the national tripartite alliance helps locate its critique as serious and strategic. Bearing in mind the political ramifications, the government could not afford to introduce legislation seriously at odds with a powerful trade union movement, having the support of the vast majority of organised workers in the country.

While the submissions from the Muslim community played a very significant role in resisting the bill in its original state, it soon became clear that the influence of the trade union was going to be more substantial in

shaping the final version of the bill, partly because of their power to paralyse the effective functioning of the country. The fact that COSATU has broad-based support from working masses, no doubt had greater impetus in convincing government to revise technical aspects of the bill.

Conclusion

This paper has essentially attempted to analyse the formation of civil society alliances in order to better effect responses and resistance to a common threat. The fact that the process entailed taking on a piece of legislation that could change the landscape of how civil society functions, is a significant point, as it indicates the effectiveness of organised public participation around critical legislative issues.

Habib argues that " contemporary civil society is distinguished by the fact that it not only reflects the demographic realities of South African society but also transcends the racialised form of the adversarial – collaborative dichotomy that typified civil society relations with the state in earlier epochs." He goes on to say, " Indeed the distinctive feature of this period is not only the longitudinal growth of the sector, but the formal emergence, or at least the surfacing in the political sphere, of a significant part of it, viz black civil society actors who had hitherto either been banned or prevented from operating in the public arena."[13]

The fact that participants in ATB resistance efforts were from a diverse racial and political spectrum, seemingly confirms Habib's assertion. What it perhaps doesn't explain completely is the reality that the process we have outlined above reflects something of a fragmented approach. Essentially the non-faith based groupings engaged with the issue, largely within the context of class interests, whereas the former did not, to any significant degree. However, it should be noted that there were individuals in the faith-based category who were sensitive to the issue of class and did indeed tackle it. Also Habib's reference to the emergence of black civil society actors is significant in view of the role played by COSATU as a representative of majority black, working class interests.

It can thus be argued that the broader South African civil society's response to the ATB has illustrated that it has indeed matured as a collective force in national politics. The fact that it took on this issue with a modicum of success reflects well on the project of democratic consolidation. In so far as this coalition attempted to tackle a piece of national legislation that could impact on the hard fought for democratic rights of South Africans, there can be very little doubt, that the constitution of the nation, ultimately served to advance the interests of citizens and not those of the political elite.

ENDNOTES

1 Press statement issued by FXI, March 24, 2003

2 See Saber Jhazbhay's document and COSATU's submission

3 There were numerous submissions outlining the legal contradictions that the bill raised, which essentially violated the country's constitution. Significant among these were those documents submitted by a human rights lawyer based in Durban, Saber Jhazbhay

4This was part of a letter submitted to President Mbeki, in November 2003, authored by Mr. A. Dawjee, a media personality based in Durban and written on behalf of the listed signatories

5 IDASA's submission on the ATB, June 2003

6 Ibid

7 LSCGH's submission on the ATB, June 2003

8 USAC's submission on the ATB, June 2003

9 Press statement issued by SANEF, January 03, 2004

10 COSATU submission on the ATB- June, 2003

11 de Villiers, S, 2001: *A Peoples Government. The Peoples Voice*, Cape Town: Parliamentary Support Programme, pp 27

12 McKinley, D, South *Africa: Anti-Terrorism Bill to " Terrorise" Lef*t, Green Left Weekly, May 14 2003

13 Habib A (2003): *Relations between civil society and the State.* In J Daniel, A Habib & R Southall (eds.) *The State of the Nation 2003-2004.* Cape Town: HSRC Press.