



**GENEVA CENTRE FOR THE DEMOCRATIC  
CONTROL OF ARMED FORCES (DCAF)**

**WORKING PAPER – NO. 130**

## **CIVIL SOCIETY, DEMOCRACY AND THE LAW**

*Ian Leigh*

*Professor of Law and Co-Director of the Human Rights Centre,  
The Department of Law, University of Durham,  
United Kingdom*

Geneva, January 2004

**GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF  
ARMED FORCES (DCAF)**

**WORKING PAPER – NO. 130**

**CIVIL SOCIETY, DEMOCRACY AND THE LAW**

*Ian Leigh*

*Professor of Law and Co-Director of the Human Rights Centre,  
The Department of Law, University of Durham,  
United Kingdom*

Geneva, January 2004

**DCAF Working Papers Series**

*DCAF Working Paper Series* constitutes studies designed to promote reflection and discussion on civil-military relations and issues of democratic control over defence and security sector. These studies are preliminary and subject to further revisions. The publication of these documents is unedited and unreviewed.

The views and opinions expressed are those of the author(s) and do not necessarily reflect those of the Geneva Centre for the Democratic Control of Armed Forces.

*DCAF Working Papers* are not for quotation without permission from the author(s) and the Geneva Centre for the Democratic Control of Armed Forces.

# CIVIL SOCIETY, DEMOCRACY AND THE LAW<sup>1</sup>

*Professor Ian Leigh*

## **Introduction**

This paper first discusses the meaning of civil society and, in particular, its strengths and limitations. The second section considers what civil society can add to the representative democratic process. In the remaining sections, I discuss how civil society interacts with the law in a democratic state. There are two distinct aspects to this. Firstly, there are the legal and constitutional pre-conditions that allow civil society to flourish. These include issues about group autonomy, freedom of the press and of protest, including the place of civil disobedience. Secondly, there are the specific ways in which civil society can use the legal process to further its ends.

## **I. The meaning of 'civil society'**

After decades in which civil society was treated with suspicion by neo-Marxist writers the idea is now enjoying a resurgence in Eastern Europe. As is well known, neo-Marxist theorists such as Gramsci doubted the notion of an autonomous sphere of civil society and saw it instead as the place where social consensus and hegemony were formed<sup>2</sup>. By contrast, in its renaissance, the concept of civil society is appealing to many in contemporary Eastern Europe precisely because of the institutional and ideological pluralism inherent in the idea offers an alternative to decades in which the state claimed both a monopoly of power and of truth.<sup>3</sup>

Civil society is now frequently equated with a distrust of the State, which sits easily with the neo-Conservative legacy of the Reagan-Thatcher era, including so-called 'public choice' theorists. The anti-state theme in writing about civil society is in fact

---

<sup>1</sup> Paper delivered to the Civil Society Building Project in Russia (CSBP) 2003 meeting in Moscow, May 2003. The CSBP is a joint project between the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the Foundation for Political Centrism (FPC).

<sup>2</sup> See J Ehrenberg, *Civil Society: the Critical History of an Idea*, (New York, 1999), 209-10

<sup>3</sup> E. Gellner, *Conditions of Liberty: Civil Society and its Rivals*, (London, 1994), 3.

much older and can be traced back to De Tocqueville's description of pre-revolutionary France.<sup>4</sup>

More accurately, however, civil society refers to groups whose concern is the 'public interest' (rather than commercial gain<sup>5</sup>) but which are distinct from the government or the state. Ehrenberg, for example, defines civil society as:

a sphere that is formally distinct from the body politic and state authority on the one hand, and from immediate pursuit of self-interest and the imperatives of the market on the other.<sup>6</sup>

Stereotypically, civil society groups are seen as being closer to the individual, less bureaucratically self-interested, more local and, hence, more democratic than state institutions.

The range of civil society is wide but it includes particular actors such as: the press, voluntary groups, trade unions, educational organisations, pressure groups and 'think-tanks', and religious groups. They may range from the local to regional, national or international and may engage with authority at any or all of those levels. Commonly civil society groups have a narrow focus of interest (such as the environment, international development or animal welfare) or aim to represent a particular section of the public (for instance, consumers, the disabled, or public transport users). Some groups may have an extremely well developed international profile that enables them to speak on more than equal terms with governments and international organisations, such as the International Committee of the Red Cross, Amnesty International or the International Olympic Committee. At the other end of the scale are local groups of concerned citizens who come together to campaign over a single issue, such as a road-building scheme or the closure of a school.

---

<sup>4</sup> A. De Tocqueville, *The Old Regime and the French Revolution*, (New York, 1995) quoted in J. Hall, *Civil Society: History, Theory, Comparison*, (1995, Cambridge), 9.

<sup>5</sup> Generally speaking: the press and broadcast media may be motivated ultimately by private profit and competition.

<sup>6</sup> Ehrenberg, 235

Although non-governmental, such organisations and bodies play an important part in a flourishing democracy. They act as ‘mediating institutions’<sup>7</sup> between the individual and the family on the one hand and the state and business on the other. As such they provide ways for individuals to participate in public and social life beyond the periodic opportunity to vote and to influence the market beyond small-scale consumer choices.

As a note in Harvard Law Review puts it, private associations allow citizen participation, act as a counterweight to the power of the state and are ‘one of the principal building blocks of social diversity and pluralism’.<sup>8</sup> Writing of England, Roger Scruton goes so far as to claim:

English society was the creation of amateur initiatives; its most valuable institutions were the result either of private patronage. ... or of people making common cause and clubbing together.<sup>9</sup>

Moreover, the right of freedom of association is an important recognition that the state should not interfere too closely with the affairs of private associations. In his classic *Democracy in America*, De Tocqueville remarked that freedom of association is ‘by nature almost as inalienable as individual liberty’.<sup>10</sup>

Civil society does not function merely at the national level, however. The increasing interest in civil society in the past decade or so has led to conscious attempts to engage it at the international level.<sup>11</sup> This was especially the case at the United Nations Conference on Environment and Development at Rio de Janeiro in 1992 and the Earth Summit at Johannesburg in 2002 and the 4<sup>th</sup> World Conference on Women at Beijing in 1995). Rather than merely acting in responsive mode, however, an alliance of NGOs (Non-Governmental Organizations) also successively promoted an

---

<sup>7</sup> On religious groups as mediating or intermediate institutions: Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, (New York, 1993).

<sup>8</sup> Note, “State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations”, (1991) 104 *Harvard LR* 103, 1838-9.

<sup>9</sup> R. Scruton, *England :an Elegy*, (Pimlico, London, 2001), 57-8.

<sup>10</sup> A. de Tocqueville, *Democracy in America*, (J. Mayer and M. Lerner, eds., 1966), 178.

<sup>11</sup> H. Cullen and K. Morrow, ‘International Civil Society in International Law: The Growth of NGO Participation’, (2001) 1 *Non-State Actors and International Law* 7-39.

international treaty on the use of landmines- the Ottawa Convention- which has now been signed by more than 150 states.

At the national level, a prominent feature of so-called 'Third Way' politics in the UK has been the increasing partnership arrangements between the voluntary sector and the state; many public services formerly provided by public authorities are now delivered by voluntary agencies under state supervision.<sup>12</sup> This trend effectively reverses the colonisation of those functions by the state in late nineteenth and early twentieth centuries. Similar developments have taken place in welfare services in the US and Australia.

At a time when there is declining faith in representative democracy in liberal states owing to diminishing electoral turnout, consulting civil society offers the prospect to those in power of re-engaging with the public. Young people in particular often show their disdain of ballots by not voting, but associate more readily with political, social and environmental causes by volunteering and activism. The limitation of civil society is, however, precisely that it lacks the legitimacy of elected bodies and the discipline of accountability that accompanies the need of politicians to seek periodic electoral approval. Thus, while civil society can never replace representative democracy, it may, nevertheless, be complimentary to the democratic process by enabling politicians to reach sections of the public whose views might otherwise be excluded. In a democracy, a variety of methods can be used to gauge public opinion. Citizens are not solely voters, then, they are also taxpayers, users of public services, the residents of a particular area, members of religious communities and other sectional groups and so on. Each of these sectional groups have a right to be heard.

Closely connected is another attribute of civil society which adds to its legitimacy. Such bodies and groups are untainted by party politics and often have public credibility since they are seen to be independent of government. Some larger NGOs dealing with single issues have achieved public recognition because of their acknowledged national or international expertise. This expertise is a valuable resource in the policy-making process since it gives policy-makers and legislators access to information that is credible but independent.

---

<sup>12</sup> A.Dunn (ed.), *The Voluntary Sector, the State and the Law*, (Oxford, Hart Publishing, 2000).

Some modern writers are more sceptical, however, about the claim that civil society is a fully autonomous sphere. Ehrenberg argues, that both the power of the State, through use of law, and the market invariably impact upon civil society:

The character of the legal system, national tax policy, administrative procedures, interference with membership practices that discriminate against women or racial minorities - all this, and good deal more, has palpable impact on the habits, norms and organizations that stand between political institutions and the logic of the market. And state involvement in civil society goes considerably further than a series of intersections with an already - existing intermediate sphere. States often use civil society to further their own interests- whether to institutionalise the Hitler Youth, encourage the foundation of veterans' organizations, establish a network of soccer leagues, or to covertly assist a favoured organization. *Any* civil society can be created, supported, manipulated, or repressed by *any* State, and it is profoundly misleading to try to conceptualise it apart from political powers<sup>13</sup>

However, the same writer concedes that protest groups, student movements and human rights groups have frequently been responsible for bringing about political change by checking and monitoring the actions of the state.

Nor can civil society be treated as wholly autonomous of the market- Ehrenberg quotes Sara Riner's findings of the impact of recession and unemployment on volunteering in the United States.<sup>14</sup> Likewise, a 'private sphere' that treats voluntary groups and multi-national companies as part of a common 'non-state' category, is unrealistic. To quote Ehrenberg again:

The economy is not just another sphere of association like a book club, bowling league, or block association. It is an extraordinarily powerful set of social relations whose imperatives are penetrating and organizing ever-wider areas of public and private life. No conceivable

---

<sup>13</sup> Ehrenberg, 238

<sup>14</sup> Ehrenberg, 246



combination of PTA's, soup kitchens, choral societies or Girl Scout troops can resist it. It is no longer possible to theorize civil society as a site of democratic activity and to counterpoise it to an inherently coercive state without considering how capitalism's structural inequalities constitute every day life<sup>15</sup>.

The extent to which particular groups within civil society are autonomous and representative must therefore be considered. Politicians and others who consult groups in civil society are entitled also to take account of the extent to which the sectional group or body follows practices that make it genuinely representative of or accountable to the section of the public on whose behalf it claims to speak. Are the officers of an NGO, for example, chosen by a ballot of its membership? Do they consult their members before speaking on their behalf and report back? Portions of civil society that are beholden to particular market forces (such as commercial broadcasters) or to a small number of donors (whether private or governmental) are particularly suspect since they run the risk of 'donor capture', whereby they simply become the mouthpiece of whoever provides the grant-funding or donations.

## **II. How can civil society contribute to the democratic process?**

Bearing in mind these attributes, positive and negative, what are the means by which civil society may contribute to the democratic process?

Civil society can contribute to policy-making, provided it has access to the decision-makers at a sufficiently early point. Indeed, many suggestions for policy change may emanate from independent think tanks or the campaigns of single issue NGOs in the first place. Once proposals for policy reform have been devised by governments, they can also be tested by consulting civil society.

However, it is important that the consultative process itself is open and even-handed. Otherwise there is the risk that powerful, well-connected or well-funded groups can have disproportionate influence or that governments may engage in consultation as a token exercise. A good discipline is if the representations of all bodies consulted in policy-making are publicly available so that the press (itself part

---

<sup>15</sup> Ehrenberg, 248

of civil society) can trace the influences that shaped policy changes. This also acts as something of a check on the private lobbying of powerful groups or individuals - these groups may be restrained to some degree if there is a realistic prospect that attempts to change policy or law to their own advantage – which may be publicly exposed .

Once proposals reach the legislative stage NGOs may lobby parliamentarians involved in debating, amending and approving draft laws. It is here that the expertise of these groups is particularly useful- an individual legislator is unlikely to be expert in more than a small number of topics, but NGOs can provide expert assistance and help with evidence of the effect of proposed changes. The democratic process is enriched when different groups are involved to equip legislators with competing policy arguments. For example, a proposal to regulate tobacco advertising may attract expert comment from cancer relief and research charities and medical experts on the hand and groups representing smokers and tobacco companies on the other. Care must be taken, however, to ensure that well-funded groups or industries are not simply able to ‘buy’ influence among legislators. Where there is a range of such views reflected in debates the parliamentary process is considerably strengthened, beyond the capacities of the political parties. Such expertise may be available by formal evidence to legislative or other parliamentary committees, where the procedural rules permit this, or by briefing individual legislators. Public campaigns may coincide with the process in an attempt to mobilise a wider range of public opinion and attract the interest of the press, so as bring additional pressure to bear on parliamentarians.

Outside the parliamentary arena, the influence of NGOs may extend to using litigation to test the legality of official action, to change the law in the direction advocated by a pressure group, or, failing that, to publicly highlight the shortcomings of the law as a prelude to reform.<sup>16</sup> The use of representative legal challenges to bring about wider changes has a long history. In English law, one of the earliest examples was the decision in 1772 of the Chief Justice, Lord Mansfield, which is widely regarded as effecting the abolition of slavery in England.<sup>17</sup> Public interest litigation of this kind is a well-recognised feature of the broader political process in the US and increasingly in the UK. It is encouraged where (as in the US) the courts

---

<sup>16</sup> C. Harlow and R. Rawlings, *Pressure Through Law* (London 1992).

<sup>17</sup> *Somerset v Steward* (1771) 21 State Trials 1; see further C. Harlow and R. Rawlings, op. cit., 12ff

have the power of constitutional review, so that litigation can directly affect the policy process by striking down unsatisfactory laws, rather than waiting for the legislature to act (as usually the case in the UK).

Finally, civil society can contribute not just to policy and law-making, but also to implementation. The press and NGOs may in effect audit and monitor the performance of government policies.<sup>18</sup> By reason of their direct contact with particular sections of society, such as disabled or disadvantaged groups, they will have available evidence of the effect of government policies and legislation. In some cases, they may even be directly responsible for delivering the policy in question to a section of the public through joint-working or government partnership government (this is especially the case in the field of welfare services and education).

### **III. Constitutional Rights, Democracy and Civil Society**

The constitutional context is obviously important - civil society requires at minimum constitutional rights of freedom of association and freedom of expression such as those recognised in Articles 29 and 30 of the 1993 Constitution of the Russian Federation<sup>19</sup>:

---

<sup>18</sup> L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy*, (Oxford: OUP, 1994). See Chapter Ten on the constitutional role of the press in the security realm.

<sup>19</sup> See also Articles 10 and 11 of the European Convention on Human Rights.

#### **Article 9 – Freedom of thought, conscience and religion**

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

#### **Article 10 – Freedom of expression**

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation

#### Article 29

1. Everyone shall have the right to freedom of thought and speech.
2. Propaganda or campaigning inciting social, racial, national or religious hatred and strife is impermissible. The propaganda of social, racial, national, religious or language superiority is forbidden.
3. No one may be coerced into expressing one's views and convictions or into renouncing them.
4. Everyone shall have the right to seek, receive, transfer, produce and disseminate information by any lawful means. The list of information constituting the state secret shall be established by the federal law.
5. The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.

#### Article 30.

1. Everyone shall have the right to association, including the right to create trade unions in order to protect one's interests. The freedom of public associations activities shall be guaranteed.
2. No one may be coerced into joining any association or into membership thereof.

A system of free elections is assumed. Some groups, such as trade unions or churches may require more specific rights, for example, to take industrial action or right of freedom of religion. One example is Article 28 of the Constitution of the Russian Federation, which refers to the right of freedom of religion being exercised *collectively*:

Everyone shall be guaranteed the right to freedom of conscience, to freedom of religious worship, including the right to profess, individually or jointly with others, any religion, or to profess no religion, to freely choose, possess and disseminate religious or other beliefs, and to act in conformity with them.

---

or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

To function effectively, groups within civil society also require a degree of access to government-held information. Of course, this is sensitive and difficult, especially in the realm of military and security affairs. Nevertheless, the legal framework of freedom of information laws, the scope of any relevant exceptions, the appeal and enforcement processes and the rights of standing to utilise these provisions are, therefore, all significant.

#### **IV. The Role of the Press**

The press (i.e., the print and broadcasting media) have a key role as part of civil society. Where they are genuinely free to operate and disseminate news without interference they are the main means by which the population is informed about the actions of government.

At the simplest level, the press enables the electorate to be informed thereby making politicians accountable. Moreover, in liberal democratic states, politicians frequently initiate policy changes in anticipation of the effect of negative publicity on public opinion. This, then, is a major contributor to the formation of public opinion and a direct partner to democratic institutions and processes.

However, there are also the more specific related aspects of the role of a healthy independent press. Investigative journalism, through detailed research and the use of informed sources, is particularly significant in the security realm. Military and security information may either be technical and thus impenetrable to the average member of the public (for example, data concerning armaments procurement), or, it may be highly inaccessible (secret intelligence). In informing the public about such matters, the press educates public opinion in a way that would be beyond the capabilities of most citizens, even those with the time or inclination to undertake the necessary research.

The exposure of corruption, malpractice and illegality is another important function of the press: 'Sunlight is the best disinfectant'. For the press to be able to operate effectively, there needs to be some restrictions of the civil rights of politicians, officials and other public figures. Over-broad protection of individual privacy for people in public life risks shielding malpractice from exposure.

There are certain pre-requisites, both legal and practical, which must be satisfied before the press can perform in these ways. Most obvious is the absence of state control, or censorship, of political content.

However, the risk of threat to independence comes not only from state control but also commercial interests, which own media outlets. Here the best safeguard against the political bias of individual newspapers or media outlets is competition. It is unrealistic to expect that each media outlet or individual journalist is politically unbiased. However, where there are a *variety* of different news outlets in competition with each other the public has a better opportunity of discovering the truth. For this reason, a legal regime that prevents the over-concentration of ownership of the media (or cross-media ownership, for example, TV and newspapers) is of some importance.

Globalisation is a potent factor at work here: with the advent of satellite broadcasting and the internet it is becoming more difficult for governments to conceal news from their populations. However, the dominance of US broadcasters (CNN especially) means that the news heard by much of the world's population emanates from a few commercial sources.

The reporting of war and terrorist incidents demonstrates a number of points about the importance of the press. The live television coverage, beamed from the field of operations around the world, of September 11 and of the second Gulf War plainly did much more than merely to make the 'facts' available. Public opinion was decisively shaped by the news coverage. Politicians and military leaders were acutely aware of the near instantaneous public dimension of their actions, so much so that their behaviour was, undoubtedly, changed or influenced as a consequence. An obvious example is the propaganda battle concerning civilian casualties from US-British bombing in Iraq. In order to function effectively in this context, the press requires access to the field. However, detailed access to events is insufficient without balance and a contextual understanding of how events on the ground fit into a longer picture of the overall conflict. Obviously, the price of privileged press access - whether it be journalists 'embedded' within active military units or those escorted to selected sites by government officials - is the risk of distortion or of being used for propaganda purposes. At the same time, most people would accept that absolute free speech is

unrealistic in a war zone - some restrictions to protect military personnel by disclosure of the exact locations or military capabilities are obviously acceptable. The press themselves need to be acutely aware of when truth becomes the 'first casualty' of war and to constantly remind their audience of that danger.

What are the legal pre-requisites that will allow the press to play the role of constitutional watchdog? The eighteenth century English writer Blackstone was surely right to draw attention to the phrase 'prior restraint' later adopted in the First Amendment jurisprudence of the United States. The absence of 'prior restraints' on press freedom is vital. The press should not be beyond the law, but any legal remedies should come *after* the event. Even the *risk* of legal prohibition before print or broadcast is stifling since news is a perishable commodity - it will not stay fresh while a lengthy court battle ensues.

Furthermore, to go a stage further back, access to information is vital. Freedom of information laws therefore with tightly drawn exceptions are important. Freedom of information laws cannot be absolute: legitimate state interests over matters such as defence or national security deserve some appropriate legal exception to the principle of public access. However, some system of independent review of claims that material should be withheld is a vital safeguard against abuse and capable of fostering public confidence in the robustness of the system. Few private citizens will make freedom of information requests. However, experience suggests that journalists and pressure groups often make greater use of these legal regimes and become experts at accessing information in this way.

Equally important, however, is the security realm is protection for journalistic sources - for example legal protection for 'whistleblowers' (the insiders with knowledge of malpractice or wrong-doing) and rules preventing journalists from being forced to reveal their sources of information. Without protection of this kind, little 'inside' information will reach journalist in the first place or, ultimately, the public.

## **V. Freedom of Association, Protest and Civil Society**

That the effective functioning of civil society depends on group or collective rights is too easily overlooked. While the recognition of individual human rights is obviously a

vital aspect of a democratic society, so too is the opportunity to join with others to advance a common cause. Much political and other action is only effective when it is collaborative. Collective action of this kind takes many forms, from the foundation of political parties and trade unions, to single issue groups (for example, environmental or animal rights or peace groups) to loose associations brought together for a single event, such as groupings of anti-capitalist bodies formed to protest at the recent G8 summit or the 'Stop the War Coalition' in the UK.

Until recently, it might have been thought that the Golden Age of mass protest had passed, only to be replaced by other means of popular expression; through the ballot box (in elections or referendums), or, through the broadcasting media. It is clear, however, that popular protest is alive and effective, as the toppling of regimes across Eastern Europe by mass dissent in the late 1980's illustrated. Equally, Western countries where street protests were largely a memory of the 1960s have witnessed a recent resurgence in the practice. In the UK alone, mass demonstrations in 2002-3 involving several hundred thousand people have taken place in protest of both the government's anti-hunting legislation (by the Countryside Alliance) and the recent Gulf War. A sense of alienation from mainstream political parties seems to have given rise to this new wave of people's protest. Moreover, the communications revolution, especially the internet, seems to have produced a kind of popular democratic empowerment by making it easier for isolated individuals to attach to a cause and then to organise joint action.

As with the other qualities of civil society, group protest and 'direct action' is, in part, a reaction to the sense of disengagement from mainstream political affairs that some groups feel. Such protests are a way of gaining publicity for causes that have been marginalized by political parties and unlikely of becoming part of the policy or legislative agenda. While this remains so of some causes in contemporary Britain - for instance pro-life groups - other minority causes have successfully courted or been adopted by political parties, such as constitutional reform, gay rights, environmental or countryside issues.

In a mature democratic state, protest should be seen as a form of alternative political appeal. In this vein, in the *Brokdorf* case<sup>20</sup> the German Constitutional Court argued

---

<sup>20</sup> 69 *BverfGE* 315,343-7 (1985).



that taking part in protest was a type of 'active engagement in the life of the Community'. Recognising the right of individuals to express their view in this way, rather than merely through political parties and the electoral process, is an outworking of autonomy i.e. people are free to choose *how* to make political statements as well *what* to express.

There is a strong connection, between free speech and freedom of association. As Justice Harlan of the US Supreme Court stated in 1958, 'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association'<sup>21</sup>. This is a connection recognised also in the jurisprudence of the European Court of Human Rights, which has linked Article 10 (freedom of expression) with Article 11 (freedom of association).<sup>22</sup> This is a realistic position since most public protest by groups takes the form of 'political speech'- the variety of freedom of expression accorded greatest respect.

Broadcasting has, however, changed the nature of protest. In the West, crowds no longer expect to achieve their objectives by sheer physical presence. Instead, they first hope to attract the TV cameras and then to make their point by an impressive display of numbers. There are alternative methods, however. Much protest is symbolic in nature; it is usually directed at buildings symbolising particular regimes or causes, such as embassies or, in the case of animal rights' groups, scientific laboratories. Demonstrators may interrupt the activities of such sites or engage in theatrical forms of protest in order to publicise their cause.<sup>23</sup> Such actions vary from picketing government buildings or military installations, to heckling or disrupting the speeches of political figures, to street drama or the enactment of ritual. Recent illustrations in Britain include the acts of Friends of the Earth groups' destruction of experimental fields of genetically modified cereals for the benefit of invited cameramen while dressed in white anti-contamination suits.<sup>24</sup> This protest intended to focus public attention on the danger of the spread of genetically modified pollen and seeds to neighbouring areas.

---

<sup>21</sup> *NAACP v Alabama* 357 US 449 (1958), 460.

<sup>22</sup> see e.g. *Socialist Party and Others v Turkey* (1999) 27 EHRR 51, paras 41, 47 and 50.

<sup>23</sup> For a useful discussion of different forms of protest and the law (especially the European Convention on Human Rights): H. Fenwick and G. Phillipson, 'Direct Action, Convention Values and the Human Rights Act', (2001) Vol. 2, No. 4., *Legal Studies*, 535-568.

<sup>24</sup> See e.g. *The Times*, 30 June 2003.

Some symbolic acts may involve law-breaking or disruption of societal activities. In the UK in 2002, protestors against fuel tax levels caused widespread disruption by blockading motorways and fuel distribution depots. Drawing the line between peaceful lawful protest and activities which bring attention to a groups' cause by disrupting communal life is one of the most difficult challenges in a democratic state. Restrictions on freedom of association are inevitable in order to protect the community. Under Article 11(2) of the ECHR, for example, these must be 'prescribed by law' and 'necessary in a democratic society' with the aim of protecting specified legitimate values. These include national security and public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others.

In some respects, protest may shade into civil disobedience or symbolic law-breaking. Legal and political theorists disagree over whether breaking the law as a form of protest is justified in a democratic state. For some, the question of democracy is irrelevant. Thoreau, for example, argued that each individual was bound to follow their own conscience if necessary by breaking the law and the will of the majority made no difference to this duty.<sup>25</sup> Conscience, he argued, could not be subordinated to ballots. For him, civil disobedience was not so much a right as a moral imperative. Thoreau endured imprisonment because of his refusal to pay poll tax to support a war (by the United States against Mexico) that he regarded as immoral.

Among modern theorists, John Rawls stands out as a writer for whom democratic practice necessarily sets limits on civil disobedience.<sup>26</sup> Within his *Theory of Justice*, describing the notional conditions of a 'nearly-just' society, civil disobedience has a limited place, hedged in by conditions and restrictions.

In this context (which includes a just electoral system and constitutional rights), civil disobedience is conceived of as being a form of exceptional appeal from the minority to the majority within society. It is regarded as a political act (unlike Thoreau for whom a private, personal, disobedience would qualify). Hence, it is to be used as a last resort after all conventional forms of protest and appeals to legislators have been

---

<sup>25</sup> H D Thoreau, *On the Duty of Civil Disobedience*, (1849).

<sup>26</sup> J Rawls, *A Theory of Justice*, (Oxford, 1971), 363 ff.

exhausted. Civil disobedience must be *public* and non-violent (or it would not qualify as a political appeal).

The need for non-violence was stressed by prominent practitioners of civil disobedience such as Mahatma Ghandi and Martin Luther King, Jr.<sup>27</sup> Both men regarded non-violence as establishing a certain moral superiority against the immorality that was being opposed. It was also a consideration of efficacy: violence distracts attention from the injustice that a protest movement opposes and is likely to produce a violent counter-reaction. Dignified conscientious law-breakers who accept the punishment of the law draw attention to the immorality of law itself. Some have argued, however, that in states where the rulers abuse or suppress the democratic process, violent protest may do less harm in the long run if it succeeds in producing political change.<sup>28</sup> Repressive states may have an infinite capacity to crush non-violent protest.

For others, it is clear that merely because an immoral law has been passed, there is right to disobey it. In a sophisticated modern re-working of Aquinas, John Finnis argues that potential civil 'disobedient' persons are bound to weigh the collateral damage their actions will cause against the rule of law.<sup>29</sup> Since the rule of law is generally intended to protect the common good, only in exceptional cases will the scales tip in favour of disobedience.

From discussion of actions by civil society at the edge of the law, we turn back now to the legal pre-requisites for a healthy engagement with civil society.

## **VI. Legal requirements**

Central to the issue of how civil society groups can use the legal process is the question of their group status. Unless the law recognises *group standing* (i.e. the right to litigate collectively or on behalf of group member), much of civil society will be excluded from using the law.

---

<sup>27</sup> See L. Fischer, *The Life of Mahatma Ghandi*, (London, 1982).

<sup>28</sup> J Raz, *The Authority of Law*, (Oxford, 1979), chapters. 13 and 14.

<sup>29</sup> J.M. Finnis, *Natural Law and Natural Rights* (Oxford, 1980), ch.12

Often individuals will lack the resources, expertise or determination to tackle legal issues that affect a whole class of persons, such as secretive or discriminatory practices by the security or military sector. A representative body or pressure group may be able to do so, however. Without group standing it will be impossible for civil society to mobilise the law as a resource for holding the government accountable.

In these cases, the support of special interest groups in bringing public interest or test litigation is vital. A lone individual may be what Marc Galanter calls a '*one shotter*' in challenging the government in an isolated court case. A pressure group or NGO, on the other hand, has better prospects of facing government on more equal terms as a '*repeat player*'.<sup>30</sup> They have a longer-term interest in changing the climate in which litigation takes place to complement the interests of the authorities. Consequently, they may be willing to advance constitutional arguments or to challenge procedures, such as executive privilege or public interest immunity, which feature prominently in litigation on security affairs. A lone individual challenge of this kind would be a costly and time-consuming diversion.

Group or test litigation has, for example, been crucial in challenging discriminatory practices in the UK military, such as the discharge from the armed forces of practising homosexual and lesbian service personnel<sup>31</sup> or the pension rights of retired members of the Gurkhas. Expressing political demands as legal and constitutional rights invests them with added legitimacy and helps to enlist a wider range of support for campaigns designed to remedy injustice. Even where it is not immediately successful in court, 'test' litigation may form part of a campaign to raise public or political awareness about an issue or lead to legislative reform. The attempts to challenge the legality of the second Gulf War in the UK courts, or, to have declared unlawful the use of nuclear weapons fall into this category. Moreover, the process of litigation, and especially pre-trial access to information held by the defendant ('discovery') may make public evidence that had been previously concealed.

As well as contesting governmental decisions through constitutional or administrative law, group litigation can take other forms. For example, a group may support or initiate a *private prosecution*, where the legal regime does not give a monopoly of

---

<sup>30</sup> M. Galanter, 'Why the Haves Come Out Ahead' (1974) 9 *Law and Society Review* 115.

<sup>31</sup> *Smith and Grady v UK*, 2000) 29 *EHRR* 493, *European Court of Human Rights*.

criminal law enforcement to the state. In England, this exceptional procedure has proved to be an important means of bringing cases before the courts which state prosecutors are not prepared to support because of the contentious nature of the issue, technical legal obstacles or weaknesses in the evidence. Several high profile cases of this type have been brought before the courts in recent years, notably the alleged racist murders of Stephen Lawrence, where the police investigation was considered highly flawed. Private prosecutions can also be a means by which a campaign group can enforce health and safety or environmental standards against multi-national companies, where regulators or local politicians are reluctant to do so. Environmental groups, such as Greenpeace and Friends of the Earth have been active in monitoring private companies and using the law in this way, either by presenting evidence of violations to regulators or in courts directly.

Equally, to function effectively in the consultation, policy-making and submission processes of expert evidence groups in civil society, legal access to other procedures such as public inquiries, coroner's inquests, and parliamentary committees and other investigations may be required. Some instances from the UK relating to the military sector illustrate this; The 'Bloody Sunday' inquiry into shootings by the British Army in Londonderry has become the focus for the conflicting claims of community groups, relatives of those shot, and the military;<sup>32</sup> Veterans from the first Gulf War dissatisfied with the Ministry of Defence's explanation for their illnesses have mobilised parliamentary support;<sup>33</sup> Relatives of the deceased pilots accused of human error in the notorious military Kintyre Chinook helicopter crash have attempted to use an investigation by a parliamentary committee to clear their name.<sup>34</sup>

These are merely some examples showing how the law can be used a resource by groups in civil society in a way that strengthens the democratic process and forces those in power to give a fuller account of their actions and decisions.

---

<sup>32</sup> A group of soldiers responsible for firing into the crowd has successfully claimed procedural protections from the courts: *R v Lord Saville of Newdigate ex p. A* [2001] 1 WLR 1855.

<sup>33</sup> *Gulf Veterans Illness* 7<sup>th</sup> Report of the Defence Select Committee, 1999-2000.

<sup>34</sup> Mull of Kintyre Chinook helicopter crash; see 4<sup>th</sup> Report of the Defence Select Committee 1997-8.

## Conclusion

We have seen that there is a complex and delicate relationship between civil society, representative democracy and the legal order. Civil society should be understood as the realm of *non*-state actors, but this does not necessarily mean that it is *anti*-state.

Civil society is plural and varied and this variety can enrich parliamentary and legal processes from a variety of perspectives. There are some constitutional and legal pre-conditions for this to occur, however. State toleration of diversity finds expression in constitutional protections for freedom of association and freedom of expression (including a free press). This entails more than the civil and human rights of individual citizens. Civil society is a sphere of collective action.

The capacity for effectively group action depends, among other things, on group legal standing, both against public authorities and, on occasion, against private businesses. Moreover, if groups within civil society are to be effective in lobbying and holding the state to account, the scope of freedom of information laws and procedural rules giving access to the parliamentary process are both significant.

So far as the legal system is concerned, recognition of civil society entails embracing the rule of law in the fullest sense. Apart from the principle that the law binds state entities as well as citizens, there is also the consideration of the autonomy of the law. An autonomous legal system gives spaces and opportunities in which civil society groups can undertake their advocacy and monitoring work. On rare occasions protest may be at the edge of, or, slightly beyond the law. In a healthy democracy, a degree of civil disobedience can be tolerated without calling into question the entire legal and political order.

There is no blueprint or grand design by which civil society can be created. Independence and autonomy are key concepts here. Perhaps, above all, what is needed is self-restraint by the state. Where the state provides a sympathetic framework and allows space for others to operate, civil society groups have a chance to flourish and, in time, democracy may flourish.



## **Geneva Centre for the Democratic Control of Armed Forces (DCAF)**

Established in October 2000 on the initiative of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) encourages and supports States and non-State governed institutions in their efforts to strengthen democratic and civilian control of armed and security forces, and promotes security sector reform conforming to democratic standards.

The Centre collects information and undertakes research in order to identify problems, to gather experience from lessons learned, and to propose best practices in the field of democratic governance of the security sector. The Centre provides its expertise and support, through practical work programmes on the ground, to all interested parties, in particular governments, parliaments, military authorities, international organisations, non-governmental organisations, and academic circles.

Detailed information on DCAF can be found at [www.dcaf.ch](http://www.dcaf.ch)

Geneva Centre for the Democratic Control of Armed Forces (DCAF):

rue de Chantepoulet 11, PO Box 1360, CH-1211 Geneva 1, Switzerland

Tel: ++41 22 741 77 00; fax: ++41 22 741 77 05; e-mail:

[info@dcaf.ch](mailto:info@dcaf.ch);

website: [www.dcaf.ch](http://www.dcaf.ch)