



Assessing the Performance of South Africa's Constitution

Chapter 4. The Constitution and democratic performance

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4.1. Introduction

This chapter examines the performance of South African democracy, as a contribution to a larger discussion about whether the South African Constitution and constitutional order satisfy a range of internal and external criteria. It looks at the historical democratic deficits being remedied by democratic constitutional design, at the internal goals stated or implicit in the constitution, at the institutions designed to realise these goals and at the establishment of the institutions (thin compliance). Subsequent sections are taken up with an evaluation of how the institutions have performed – in terms of criteria of representation, participation, equality, pluralism and deliberation, and in terms of particular institutions. There is an extended evaluation of the central controversies and challenges associated with democratic practice in South Africa. The chapter concludes with a consideration of how the findings of the chapter speak to the criteria developed for assessing performance, of the difference that the constitution makes, and of recommendations. The overall picture provided is of a functioning democracy with considerable strengths but facing serious challenges.

South Africa's 1996 Constitution prescribes a democratic system for the governance of the country. This chapter evaluates the success or otherwise of the constitutional order in meeting the Constitution's own stated democratic goals, as well as goals posited by external or universal democratic theory. This assessment is then used as one lens through which to assess the constitutional order's compliance with Ginsburg criteria.

At the heart of the democracy envisaged by the South African Constitution lies legislative assemblies elected by universal franchise and indirectly elected executives. Legislatures and executives of this kind are located at national, provincial and local levels of government. Executive and legislative bodies make and, in the case of the executive, administer laws, subject to constitutional oversight exercised by an independent judiciary and chapter 9 bodies.

This chapter focuses on democracy as it plays out at central or national level, giving particular attention to the central or national legislative and executive. Other elective branches – those at provincial and local level – are discussed in chapter 7. Non-elective institutions that are relevant for democracy are discussed in chapters 5-7 (the judiciary, chapter 9 institutions and traditional authority). Democracy is though clearly a multi-level phenomenon in South Africa, operating on scales ranging from local ward committees to national legislatures, and so a chapter devoted to democracy will have to comment on aspects of its operation on sub-national scales as well (with consequential overlaps into other chapters).

The chapter also examines political rights supportive of democracy, and these are relevant to all scales of democratic operation. In commenting on these rights and their realisation, and on democracy generally, some attention must be given to the voluntary public sphere. Though unofficial or voluntary, 'civil society' is constitutionally protected and vital to democracy.

4.2 The historical context

The relevance of context

In order to assess the Constitution's larger successes and failures, we need to know something of the context in which it was set up. This applies also to the organs that give expression to democracy and to the political rights and freedoms supporting democracy. Context helps to clarify the historical *deficits* and wrongs that the Constitution was intended to address. A general historical background to the 1996 Constitution was given in chapter 2 and this chapter engages this context and its implications for the particular sphere of democratic governance. Some repetition thus may be unavoidable.

Leaving aside the Interim Constitution of 1993, the 1996 Constitution represents the third major constitutional innovation since the founding of South Africa as a British dominion in 1910. Between 1910 and 1983, South Africa operated under a Westminster parliamentary system of government, one shaped by the British colonial

overlord that established the Union out of four colonies after the South African War (1899-1902). Until 1961, when South Africa became a Republic, the head of state was the British monarch (represented by a Governor-General). After 1961 the head of state was a South African state president elected by parliament. The legislature was bicameral, with a strong lower house elected through a single-member constituency plurality system (first past the post) and a weak indirectly elected Senate.

The union government amounted to a system of parliamentary sovereignty, under a prime minister and cabinet accountable to parliament and a largely ceremonial head of state, with the independent judiciary enjoying only relatively weak powers of review. The saga relating to the removal of coloured people from the voter's role resulted in the whites-only legislature asserting its power and sovereignty. Despite brave initial attempts by the judiciary to place procedural limits on this power, eventually there was an acquiescence to the legislative branch particularly after the court was packed with executive-minded judges. In 1983, South Africa adopted a tricameral parliamentary system. Following this constitutional change, the President, though chosen by parliament, doubled up as head of government and state, giving the system a more presidential slant.

These arrangements were largely discredited by the time constitutional negotiations got underway in 1990. There would prove to be some intriguing continuities between the antecedent and new orders, such as an executive president that was chosen by parliament. There were, however, specific historical democratic deficits widely perceived to be in need of remedy.

The historical democratic deficits to be remedied

The first historical democratic deficit in need of remedy was a franchise largely and/or effectively confined to the white minority population. Whites voted for the national lower house of parliament and for local and provincial councilors. White women obtained the vote in 1930, and all remaining property qualifications were removed for white electors in 1931.

The qualifiers 'largely' and 'effectively' are designed to account for three anomalous types of black participation in voting pre-'94. First, the system inherited by the Cape Province was one of qualified non-racial franchise, involving both property and literacy qualifications. Given economic and educational inequalities and the way communal tenure was discounted for property-qualification purposes, this ensured massive white domination of the electorate even in the Cape. It did, however, give coloureds and Africans electoral leverage in certain contested constituencies, mainly to the benefit of white Anglophone candidates. It was for this reason that white Afrikaner-dominated governments sought to phase out the qualified franchise, and they did so for Africans in the 1936 and coloureds in 1956.

The second anomaly was that under the tricameral parliamentary system introduced in 1984, coloureds and indians were enfranchised, albeit on separate voters' rolls and for separate parliamentary chambers. No provision was made for any direct representation of black people. This system still left the white chamber dominant, because the chambers were weighted by population and in the 1980s whites outnumbered coloureds and indians together (today coloureds equal or exceed whites in number). The state president was white and the executive white-dominated.

The third exception/anomaly concerns the shifting array of black elective institutions that were designed to give effect to the idea of racially 'separate development'. In order to legitimate white rule and reduce the costs of governing a black majority, the white-minority regime created institutions of supposed self-government for blacks located on various spatial scales.

Black Africans, whose ownership rights were increasingly restricted in the rest of South Africa, retained access to land in ethnically-based rural reserves. In keeping with the inherited colonial system, Africans in these reserves were governed indirectly via 'traditional' kings, chiefs and headmen on the basis of a separate system of codified customary law. The ultimate (never-realised) aspiration of white segregationists was to confine Africans to these reserves, allowing them into 'white' South Africa only as temporary labourers. White governments tried to legitimate political partition via a number of ideological and policy moves: by expanding and consolidating where possible these small and discontinuous reserves; by encouraging white-owned businesses to invest near and in the reserves; and by setting the reserves on a path to political self-government and ultimately independence. Four of these so-called 'homelands' or (colloquially) 'Bantustans' eventually accepted independent statehood on Pretoria's terms (which were never recognized by the international community). Within these reserves, black africans could vote for representatives who sat alongside chiefs in homeland legislatures. They were also subject

to the local authority of hereditary and appointed kings, chiefs and headmen, a structure still operative in South Africa (see chapter 7).

In addition to the reserves, blacks enjoyed representation in various advisory councils (notably the Native Representative Council) and (indirectly via white representatives) in the House of Assembly and Senate. These channels were designed to compensate for the loss of the Cape franchise. They were mostly abolished in stages, in line with the logic that africans should find representation in self-governing reserve areas. Coloureds too lost their parliamentary representation, but retained separate advisory bodies that eventually gave way to a coloured chamber in the tricameral legislature. In the 1970s and 1980s, the government began to grant urbanized African representation via self-governing township bodies (community councils, later Black Local Authorities).

Despite these organs of black 'separate development', political power lay effectively and overwhelmingly with the whites. The 'homelands' were underdeveloped dependencies confined to 13% of the land surface, black self-governing urban bodies lacked legitimacy or adequate revenue bases and, as indicated, coloureds and indians were outweighed by whites in Tricameral voting power.

The first historical democratic deficit that had to be remedied in the 1990s was therefore white minority rule. The remedy was an inclusive system of universal franchise based on a common voters' roll. All South African citizens 18 years of age or older are now eligible to vote for constitutionally prescribed legislative bodies at national, provincial and local level.

The related, second historical democratic deficit needing to be remedied was the racial and ethnic fragmentation of the country, long associated by anti-apartheid forces with the tactic of divide and rule and the separate-but-unequal treatment of black people. Despite allowance made for federal and (in the interim constitution) consociational power-sharing, there was by 1992 agreement among all the major parties to South Africa's transitional negotiations that the new state would offer equal and uniform rights for all citizens irrespective of race.

The universalisation of the franchise and the reuniting of South Africa are both consonant with the constitutional goal of creating an inclusive and civic conception of nationhood – a South Africa that, according to the Constitution's preamble, 'belongs to all who live in it, united in our diversity'. The Constitution allows for legislation that promotes restitution or affirmative action in favour of historically disadvantaged groups, but in the name of fairness and substantive equality; no group is granted privileged status. It recognises linguistic and cultural difference, but in the name of diversity and not in order to divide people or entrench old or new hierarchies. Even so, the precise character of the South African 'people' remains contested in the real world of politics – with discourses of 'rainbowism', non-racialism, multi-culturalism, multi-racialism, black consciousness and africanism (both racial and pan-continental) offering rival accounts of the demos – of who the country and continent belong to, of who is or is not indigenous, of who can claim the mantle of being oppressed and to what degree. The civic constitutional 'citizen' as an egalitarian and relatively abstract idea is thus at times at odds with the particularised perceptions and politics of South Africans.

The third historical democratic deficit in need of remedy was the absence of a constitutional system of entrenched rights. Apartheid and its abuses had been a product not just of minority rule but also of untrammelled white parliamentary sovereignty. The familiar litany of abuses enabled by this white-minority majoritarianism included coercive controls over black settlement and movement, racially discriminatory public provision, racial segregation and a host of repressive measures against critics and opponents. Not only did blacks want to see an end to such hated abuses, but whites feared that under majority rule they might themselves be subjected to abuse. The upshot was that all major parties agreed to a Bill of Rights enforced by a judiciary to protect both individual and indirectly and implicitly certain minority rights.

Initially the ruling white National Party (NP) hoped to secure formal protection for minority group rights. The African National Congress (ANC) resisted. For many whites, minority-protective measures were necessary to limit black majoritarianism; in the eyes of blacks, minority protections would entrench whites' privilege and disproportionate power. Ultimately, the NP was largely outmaneuvered in this struggle, and accepted a unified state system based on the protection of individual rights, without formal recognition of racial and ethnic groups.

Nevertheless the Interim Constitution did contain 'consociational' elements favoured by minorities, including the right to a Deputy Presidency for parties securing 20% of the national vote and provision for a Government of National Unity. The delimitation of significant powers for provinces and municipalities (with their *de facto*

varying racial and ethnic mixes) also offered minorities of various kinds a buffer against majoritarianism. The Deputy Presidency positions for opposition parties disappeared in the Final Constitution, which also gave more emphasis to the idea of 'cooperative governance' alongside the scheme of provinces and local government. Other arguably consociational elements survived into the Final Constitution, including the adoption of a highly proportional electoral system that guaranteed parliamentary representation to minorities (however defined). The Constitution also provides a chapter 9 institution to look after the interests of cultural and ethnic minorities.

It was not only the racial minorities that feared centralised unitary government. So did some leaders of ethnic groups like the Zulus, and african traditional leaders more generally. The Constitution recognised certain, albeit vaguely specified, advisory and local government powers for traditional authorities operating on the basis of traditional customary law. Whether recognition of these authorities entrenched an evil of the preceding period (by endorsing ethnically fragmented government and denial of full civic rights to rural blacks) or remedied it (by recognising authentically african governance forms commanding considerable local legitimacy) remains controversial.

Rights-protection would, however, be mainly individual-based, in accordance with global liberal-democratic norms. It would protect individuals singly and severally against abuse by the state and society, whether these abuses were race-based or not. Some elements that go beyond classical liberal-democratic constitutional protections, including provisions for affirmative action and socio-economic rights, are discussed in other chapters (see especially chapter 3). Of relevance from the point of view of democracy is that these rights limited majority powers – in effect, *limited* the power of the people. Some of these limitations could be defended as being themselves necessary to guaranteeing democratic government – such an argument can be made most forcefully in relation to political rights dealing with voting and standing in elections, exercising political speech and freely associating politically. Others limited democratic majoritarianism in the name of other values, including civil and socio-economic rights, though these could also be argued to be necessary preconditions for substantive notions of democratic government too.¹

4.3. The architecture of South African democracy

Against this backdrop, the Constitution outlines a particular democratic architecture for South Africa which has already been outlined in chapter 2. The following is a brief recapitulation and, in some cases, elaboration which is necessary for purposes of analyzing performance later in this chapter.

The 1996 Constitution declares from the outset that it seeks to establish a 'democratic state'² and a 'democratic and open society'.³ This democratic state/society will be 'based on the will of the people'⁴ and founded on 'democratic values'.⁵ Later the Constitution specifies that the purpose of democratic organs is to secure 'accountability, responsiveness and openness'.⁶ The democratic state will include – and be democratic by virtue of having – the following *institutional features*: adult suffrage; a national common voter roll; regular elections and; a multi-party system of government.⁷

The Constitution establishes a representative democracy at national level based on a bicameral parliament. The National Assembly is directly elected by proportional representation. While the Constitution requires proportionality, subsequent legislation confirmed the Interim Constitution's model of party-list proportional representation, detailed in chapter 2.

The National Council of Provinces (NCOP), which represents the nine new provinces, is elected by provincial legislatures, and therefore only indirectly by citizens. The President is chosen by, and formally accountable to, the national legislature, particularly but not only the National Assembly.⁸ The President chooses cabinet ministers

¹ Bilchitz 2015: 86-111.

² Section 1 of the Constitution.

³ Preamble of the Constitution.

⁴ Preamble of the Constitution.

⁵ Preamble of the Constitution.

⁶ Section 1(d) of the Constitution.

⁷ Section 1(d) of the Constitution.

⁸ See RSA 2009: 41-3. The National Assembly alone is tasked by the Constitution with general oversight functions. The NCOP carries out oversight over executive measures affecting relations between governments located on different spatial scales (or 'spheres of government', in constitutional parlance). However there are cases in which the NCOP is expected to exercise oversight functions

from the National Assembly. In a peculiar South African hybrid, a President elected by and accountable to parliament doubles up as head of state.

As detailed in chapter 7, the nine provinces also have legislative bodies which are unicameral; and as at the national level, the chief executive – the Premier in this case – is chosen by the legislature who chooses the executive from legislative ranks and is formally accountable to the legislature. Provincial assemblies, like the National Assembly, are elected by party-list proportional representation. Municipal government, covered in chapter 7, is also subject to its own legislative authority, though here the structure varies between metropolitan and rural areas. Notably for our purpose, local electoral systems employ a form of proportional representation that combines party lists and direct ward representation via single-member constituencies, the only level practicing this combination. Local elective government moreover interacts, in former homeland areas, with partly elected traditional councils.

While provincial and local levels are covered in chapter 7, we can register here a few points about this multi-tier system that impinge on any overall assessment of democratic performance in South Africa. First, as indicated, parliamentary representative democracy operates at all levels, from national to local. Equally, executive power is accountable to legislative bodies at all levels. Second, traditional authority introduces a non-elective element (often based on hereditary succession) into local governance in parts of the country, setting the stage for a complex interaction between elected councils and traditional bodies. National and provincial elective government also interact with traditional bodies, but tensions are less acute on these higher tiers, given the limited advisory roles of Houses of Traditional Leaders at national and provincial level. Finally, the multi-level structure embodies a degree of devolution or decentralization, granting entrenched powers and functions to provincial and local levels. One of the key animating ideas behind this architecture is the decentralisation of power by bringing it closer to people.

The Constitution requires all these levels to operate in a participatory way, including representative assemblies. The local level is the main site envisaged for institutions designed specifically to foster participatory democracy. The actual form these participatory organs have taken – ward committees, participatory planning, elected policing forums and school boards – is specified in legislation. The structures of participatory democracy receive attention below. In discussing them this chapter will, at times, reach beyond central government to comment on local participation. It is otherwise focused on the national-level of representative-democratic government.

While elected representative assemblies give formal expression to rule by the people, the Constitution hems in parliamentary majority rule with measures and bodies that constrain the operation of legislatures at all levels of government. These take the form of entrenched rights, institutional checks and a division of powers within the state. Most of these constraints are covered in other chapters, including courts, socio-economic rights, and chapter 9 institutions. This chapter will, however, have cover specifically *political* rights, those involved in supporting democracy or which constitute elements of democracy. The Bill of Rights affirms the equal individual right to make political choices, vote via secret ballot in free and regular elections for all constitutionally prescribed legislative bodies, stand in elections and hold elective office, and to form and campaign for political parties. It also guarantees freedoms of expression (including specifically of the media), association (including specifically the right to join independent trade unions), assembly, demonstration, picket and petition. Finally it entrenches a right to access information and to ‘receive and impart information or ideas’.

4.4. Criteria for assessing democratic performance

What are the internal goals that this democratic architecture was designed to address? As noted in 3.1, the Constitution seeks to establish a ‘democratic state’⁹ that is ‘based on the will of the people’¹⁰ and founded on ‘democratic values’. Later¹¹ the Constitution specifies that the purpose of democratic organs is to secure ‘accountability, responsiveness and openness’.¹²

conjointly with the National Assembly, for example, in oversight of Security Services and international agreements and in approving states of emergency. The cabinet is moreover responsible to parliament as a whole.

⁹ Section 1 of the Constitution.

¹⁰ Preamble of the Constitution.

¹¹ Preamble of the Constitution.

¹² Section 1(d) of the Constitution.

Three notions are already posited in these declarations: a *democratic state*, denoting the making and implementing of binding laws and decisions via a responsive and accountable system of government under leaders chosen by the people; the protection of *values supportive of democracy*; and a *democratic society*. These statements aid us in determining the internal goals of South African democracy.

First, while envisaging rule by ‘the people’, the constitutional designers clearly understood that popular rule is necessarily mediated. The Constitution thus calls for *representative* democracy, and prescribes elective legislative bodies at national, provincial and local level. Secondly, at the same time, though in a quieter voice, the Constitution calls for various kinds of participatory democracy, including the involvement of citizens and communities in voicing grievances, giving advice and participating in decision-making at the three levels of government.

Instead of treating representative and participatory democracy as two distinctive and contrasting types (whether conceived as rivals or as complementary), we will, taking a cue from more recent democratic theory, treat representation and participation as two dimensions of democracy, with effective representation and effective participation both understood as democratically desirable. In these terms, the opposite of representation is not participation but exclusion or lack of representation;¹³ the opposite of participation is not representation, but elitist government.

In addition to representation and participation, the Constitution also upholds other institutional characteristics valued in democratic theory: political equality and inclusion (sought through universal franchise and equal political rights); pluralism, including fair and peaceful political competition (via free elections, free expression and free association); deliberation (envisaged as being secured through parliamentary debate and the deliberations of lawyers, mediators and chapter 9 commissioners) and transparency. Each of these constitute important internal goals that are required to achieve a thriving democracy in South Africa.

To realise the preceding goals, constitutional crafters prescribed institutions giving effect to popular rule (legislatures), institutions protecting or advancing individual rights (the judiciary and chapter 9 institutions) and institutions to administer the country in accountable ways (indirectly elected executives accountable to elected assemblies). The implementation of this formal scheme constitutes what we have termed ‘thin compliance’. In the next section (section 4.1) we will examine formal implementation specifically in respect of the national legislature and executive, participatory democracy and political rights. Since some of the legislative enactment required for constitutional implementation has been accompanied by controversy, the discussion of thin compliance cannot be fully separated from certain of the controversies that have attended the unfolding of the constitutional order. It is one thing though to implement a formal scheme. Whether this formal scheme and actual democratic practice satisfy the goals of the constitution in a qualitative manner is another matter. In section 4.2 we apply these criteria to unfolding events and practices in South Africa to determine whether there has been ‘thick compliance’. Before engaging in an evaluation of performance, we engage in the next sub-section with the relationship between the internal goals identified and Ginsburg’s external criteria.

Ginsburg’s four ‘external criteria’ of constitutional performance

The aims of democratic government in South Africa are of course not framed in terms of Ginsburg’s external criteria for assessing constitutional performance (that is, legitimacy, conflict channeling, agency costs and public goods). Nevertheless, the designers of South Africa’s ambitious Constitution could be seen to have sought, either implicitly or via a different vocabulary, to achieve objectives captured by the criteria.

First, the democratic organs are important to *conflict channeling* and *legitimacy*. Democracy is in part about creating institutions to channel and address competing interests and values as well as to find methods of making decisions despite the differences that exist within a political community. Successful institutional channeling in turn requires popular acceptance of the rules of the democratic game, or popular legitimacy. It requires that democratic rules be perceived as giving expression to popular rule while protecting vital individual and minority interests. Without faith in the system, individuals lack reasons to channel their interests through democratic organs.

Second, the success of democratic organs can be judged by *agency costs* and *public goods* metrics. Delivery of public goods is relevant to any assessment of democracy. There is an instrumental part of democracy’s popular and moral/political legitimacy that depends on its capacity to deliver goods effectively to the public whose interests

¹³ See, for example, Plotke, 1997.

it is meant to serve. And a failure to punish electorally an underperforming government (or reward a successful one) might indicate a fault in the democratic process. Agency costs directly impede the capacity of the democratic state to deliver public goods. Importantly, they arise as a result of the gap between representatives (and officials) and those they govern: the control of agency costs is thus central to the extent to which those who govern do so in a truly democratic manner, that is, in a manner responsive to popular preferences and interests.

How does South Africa's architecture of democracy seek to address these criteria? Many of the mechanisms designed to meet them are not specifically democratic and will be the focus in other chapters. National-level representative democracy, however, seeks implicitly to satisfy the Ginsburg criteria in its own ways. Effective representation of popular values and interests and the conduct of political competition under impartial rules are keys to both legitimacy and successful conflict channeling. In South Africa's case, the proportional representation system ensures representation of diverse interests in both houses of parliament while allowing for majority rule. Parliament is constitutionally required to operate in deliberative ways and be responsive to public input, thus helping to channel conflict and ensure effective decision-making. Elections are supervised by an impartial body. Citizens are also able to take advantage of political freedoms to give expression to their grievances and concerns via civil-society organisations, thus offering a peaceful outlet for demands that might otherwise lead to physical confrontation.

Public goods of a certain kind are also constitutionally mandated. The mandates bind democratic as well as technocratic organs. The requirement to realise substantive socio-economic rights exemplifies this.

Agency-cost challenges and public goods delivery goals are addressed in other ways. The parliament, especially the national assembly, is meant to give expression to the preferences of the people as well as provide chambers in which public interests can be deliberated upon more 'objectively' and 'expertly'. And part of what the public wants or objectively needs will, naturally, be the efficient delivery of a range of public goods. Citizens can, at least in principle, use elections to punish representatives who do not deliver. Executive accountability to the legislature – with departmental directors-general and ministers both required to account to parliament – is meant to operate as a check on bureaucratic corruption, maladministration and abuse. The same is true of presidential term limits. The NCOP is supposed to ensure that provincial interests are not overlooked. The premise of devolution of functions and powers to provinces and localities is that this enables the government to be more responsive to regional and local interests. An implied intention behind these provisions is to reduce agency costs.

How do the internal goals of the preceding section (representation, participation, pluralism, deliberation, equality) relate to Ginsburg's criteria as just discussed? In terms of the Ginsburg criteria, representation speaks most directly to agency costs and legitimacy though also touches on public goods (successful delivery of which suggests substantive representation). Participation speaks to the same concerns, but is especially important to conflict channeling. Political equality is central to legitimacy, both popular and normative. Pluralism, in its institutionalised sense, is a way of channeling conflict. The presence of deliberative mechanisms may help with conflict channeling, legitimacy and (to the extent that it produces better results) public goods. Transparency is essential to limiting corruption and other agency costs.

A big question for this chapter, then, will be whether the actual operation of national-level representative democracy satisfies the internal goals and – though a discussion of the satisfaction or otherwise of these – many of Ginsburg's criteria. It is to an assessment of the performance of democratic organs that we now turn.

4.5. Evaluating democratic performance

Thin compliance

Institutional set-up

Since 1996 South Africa has established all the bodies required by the Constitution. A bicameral legislature has been set up which includes the establishment of the National Assembly and NCOP. It includes, too, the holding of more or less free and fair elections to these bodies in 1994 (under the Interim Constitution), 1999, 2004, 2009 and 2014. The electoral system was clarified by the Electoral Act¹⁴ and subsequent regulations.¹⁵ The National Assembly has set up offices and committees that are prescribed by the Constitution (for example, the Speaker

¹⁴ Act 73 of 1998.

¹⁵ For a useful discussion of the electoral system and electoral administration, see February, 2009.

and various joint committees within the NCOP) or that it falls within the powers of the National Assembly to establish (for example, portfolio and ad hoc committees). Committees have proliferated in number compared to pre-1994 parliaments, and operate in a more open way. Parliamentary parties are represented proportionately within them. The rules of parliament grant these committees significant powers. In addition to examining departmental reports and conducting oversight visits to assess policy impacts on the ground, committees can summon individuals to give evidence, ask any institution or person to report to them and receive petitions, representations and submissions. Another mechanism in place is parliamentary question time, during which Ministers are expected to respond to questions orally or in writing. Thousands of questions have been directed at the executive since 1994. The powers, immunities and procedures of parliament have been clarified in legislation such as the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act;¹⁶ the Public Audit Act¹⁷ and the Money Bills Amended Procedure and Related Matters Act.¹⁸ The Assembly Rules and Joint Rules have also been important in this regard.

Equally, the executive has been put in place in the manner prescribed. South Africa has been presided over by four successive presidents elected by the National Assembly and by successive cabinets appointed by the president of the day. Term limits have been observed. Successive cabinets have presided over the national and also provincial public services and security forces, determined departmental budgets, shaped macro-economic policy and initiated some 50 items of legislation per year. Ministerial behavior is regulated by a code of ethics established by the executive.

Provincial government has also operated in the prescribed manner. Controversy attended the interference in elections to the position of provincial premier by national-level party politicians under President Thabo Mbeki. However, insofar as premiers exercise their influence via duly elected party-affiliated provincial legislators, no letter of constitutional law was violated in the process. The NCOP has secured a say for provinces in central government, though it has, according to February, 'failed to stamp its authority on the law-making and oversight role and has been hidden by the long shadow of the [National Assembly].'¹⁹ The operation of elective local government has proceeded in accord with legislation that has gradually clarified its structure (see chapter 7).

Beyond the formal statutory bodies, voluntary organisations focused on public matters have been established by citizens or already existed by 1996. These organisations populate a civil society envisaged by the Constitution as forming part of the democratic process and operate in a space of constitutionally guaranteed political and associational freedoms. Voluntary bodies include numerous political parties contesting for legislative seats at national, provincial and local levels; the non-governmental organisation (NGO) sector and numerous community organisations. South Africa has around 100,000 registered NGOs and an estimated further 50,000 unregistered ones. These include both service providers and organisations engaged in 'human rights, advocacy and monitoring'.²⁰ The Constitution provides a legal framework for the operation of some voluntary bodies (for instance, the recognition of political parties) and a facilitating environment (via protected freedoms of expression and association). In formal terms, the state has set up an enabling environment for NGOs, enabling registered organisations to receive financial support (via, for example, the Nonprofit Organisations Act²¹ and the National Lottery). It also enables economic interest groups to bargain with the state through the National Economic Development and Labour Council (NEDLAC) and civil bodies make submissions to parliamentary committees or serve as 'friends of the court' in significant court cases.

Political rights and freedoms

The record thus far is also mostly one of implementation of political rights and freedoms, but with causes for concern that will be explored in section 4.2 under thick compliance.

The political system is a multi-party democracy, and there is reasonably impartial enforcement of requirements for party registration. As indicated, successive more or less free elections have been held.²² Voting rights are enjoyed by adult citizens. Elections have been marred by abuses (for example, areas in which some parties cannot campaign) and irregularities (for instance, discarded ballot boxes), but not on a scale that has caused domestic or

¹⁶ Act 4 of 2004.

¹⁷ Act 25 of 2004.

¹⁸ Act 9 of 2009.

¹⁹ February, 2006:127.

²⁰ Sangonet Pulse, 2013.

²¹ Act 71 of 1997.

²² February, 2009.

international observers to cast doubt on whether elections are basically free and fair and reflect popular will (provincial elections in KwaZulu-Natal in 1994, conducted under the Interim Constitution, may be an exception here).

South Africans generally enjoy freedom of political expression, as required by section 16 of the Constitution. Civil society organisations and the media are able to operate in general in a free manner, despite threats and limits that will be considered under thick compliance. Legislation to regulate public protests and marches – the Regulation of Political Gatherings Act²³ – was already passed in the period of the Interim Constitution, though only came into effect in late 1996.

South Africa has no political prisoners. There have been countless arrests for public-order offences allegedly committed in the course of protest activity, including during recent student protests (this acquires a more disturbing significance in light of alleged police intolerance of peaceful protest). South Africa has faced allegations that it participated in the United States Central Intelligence Agency renditions and in the ‘rendition’ of a suspect to Pakistan in the context of the ‘War on Terror’. Some of these claims have not, however, been verified.²⁴

It is highly debatable whether the government has fully satisfied the requirements of thin compliance when it comes to transparency and freedom of information. The Promotion of Access to Information Act²⁵ was designed to give statutory force to the right to have access to information contained in section 32 of the Constitution, but compliance has been limited. More seriously its provisions are potentially contradicted by the proposed Protection of State Information Bill,²⁶ passed by the National Assembly in 2011 and 2013, and the NCOP in 2012. In an unexpected positive move, the President withheld assent and returned the Bill to parliament for redrafting. The process is currently stalled. The government has also made use of apartheid-era policies like the Minimum Information Security Standards²⁷ and an apartheid-era law, the National Key Points Act,²⁸ to restrict public access to information about the President’s Nkandla homestead. Lack of access to information about party financing is also a problem, at least arguably (a matter we discuss further below).

Controversies attending thin compliance

It is not easy to separate out the controversies attending thin from those attending thick compliance. There follows here a discussion of some that seem to affect the basic Constitution of the democratic order: the rules governing electoral representation, the definition of the electorate, the running of parliament and the executive’s adherence to basic constitutional requirements. Since the lines between thin ‘nuts and bolts’ requirements and more expansive ones blur, some of these themes will be reprised in the discussion of thick compliance, especially in the assessment of legislative and executive performance.

In the case of the legislature, the introduction of provision for *floor crossing* in 2003 generated public controversy. A constitutional amendment and legislation enabled national, provincial and municipal representatives to switch party mid-term, defecting from the party under whose banner they were elected, to another or new party, without forfeiting their seats. Two opposition parties, the Democratic Party (now the Democratic Alliance (DA)) and the New National Party (NNP), sought floor crossing as a way of enabling their merger; another party, the United Democratic Movement, opposed it from the outset and approached the Constitutional Court which refused to ban the practice. Subsequently, it was mainly the ANC, with patronage to deploy, that attracted defectors from smaller parties, reinforcing its dominance. The spectacle of individuals elected as a member of one party joining other parties or forming new splinter groups, and without consulting the electorate, generated a public outcry against so-called ‘crosstitutes’. Eventually the ANC itself, supported by opposition parties, decided to abolish floor crossing by law. Its abolition came into effect in 2009. The rescinding of floor crossing was not without

²³ Act 205 of 1993.

²⁴ Open Society Justice Initiative 2013 *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, 2013 available at <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>) [accessed on 21 March 2016].

²⁵ Act 2 of 2000.

²⁶ B6-2010.

²⁷ Approved by cabinet on 4 December 1996 as national information security policy available at <http://www.kzneducation.gov.za/LinkClick.aspx?fileticket=aDNwzVuiANQ%3D&id=> (accessed on 22 March 2016).

²⁸ Act 102 of 1980.

costs, though, and helped weaken of the leverage of individual members of parliament (MPs) vis-à-vis party leaders.

Since the election of the Economic Freedom Front (EFF) to parliament in 2014, a number of constitutionally significant controversies have attended the EFF's disruptive tactics in National Assembly debate. In attempting to maintain control the Speaker, Baleka Mbete, has been accused of pro-ANC partisanship. During a sitting in February 2015, the ANC parliamentary leadership jammed cell phone coverage in anticipation of a parliamentary showdown, a measure quickly reversed in the face of opposition party pressure; it also interrupted live television coverage of the fracas. Outside security services have controversially been called in to remove disruptive EFF members, and internal security forces have more recently been deployed against EFF leader Julius Malema on grounds of an offence (refusing, in defiance of the Speaker, to withdraw an accusation of murder against the Deputy President) deemed by many not to warrant such drastic action. A Western Cape High Court ruled that the removal or arrest of MPs from parliament for things they say violated MPs' constitutional privilege sec terms of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act.²⁹ The court's ruling was subsequently confirmed by the Constitutional Court.³⁰ However, a case against the Speaker over her attempts to limit broadcasting from parliament was dismissed by the High Court.³¹ Controversy has similarly surrounded the long delay of a presidential response to a parliamentary summons. All of these events occurred in the course of the unfolding controversy over irregular expenditure on the President's private home at Nkandla in KwaZulu-Natal. The Nkandla scandal and the election of EFF candidates to parliament have thus combined to place the ordinary operation of parliamentary democracy under unprecedented pressure.

Lesser controversies have been sparked by the issue of the definition of the electorate. The 1999 *August* case led to a ruling by the Constitutional Court establishing the right of prisoners to vote, absent any explicit legal restriction on that right.³² A subsequent ruling, in the *NICRO* case, struck down a law introduced prior to the 2004 general election denying voting rights to prisoners.³³ In 2009, in the *Richter* case, the Constitutional Court determined that South Africans living abroad should be allowed to vote in the upcoming general election³⁴ (following electoral legislation passed in 2004, the vote abroad had been limited to government employees). The effect of both moves was to expand the demos, affirming the principle of universal adult suffrage upon which the new democratic order is based. There do, however, remain probably millions of disenfranchised residents of the country, namely documented and undocumented non-citizen immigrants.³⁵ Since the Constitution only prescribes that citizens have the right to vote, these people lack a constitutional basis to challenge their exclusion from participating in the demos.

The powers of the executive have also been marked by constitutionally relevant controversy. As discussed elsewhere in this report, executive appointments to various posts (the National Prosecuting Authority (NPA) and the Constitutional Court) have attracted judicial intervention and opposition. So has the matter of the independence or otherwise of the Hawks – a corruption investigation unit – from the Police Minister. The Constitutional Court twice intervened to require stronger provision for the independence of the Hawks from political interference.³⁶ A controversy flared in 2015 when the executive appeared blatantly to ignore South Africa's obligations under an international treaty, as well as a domestic court order, to arrest visiting Sudanese

²⁹ *Democratic Alliance v Speaker of the National Assembly and Others* (2792/2015) [2015] ZAWCHC 60; 2015 (4) SA 351 (WCC). According to paragraph 48(2), 'Section 11 of the Powers and Privileges and Immunities of Parliament and Provincial Legislatures Act, No. 4 of 2004, is declared inconsistent with the Constitution and invalid ... to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution'.

³⁰ *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 8.

³¹ *Primedia Broadcasting, A Division of Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others* [2015] ZAWCHC 72; 2015 (4) SA 525 (WCC); [2015] 3 All SA 340 (WCC); 2015 (7) BCLR 835 (WCC).

³² *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) (August),

³³ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (NICRO).

³⁴ *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with AfriForum and Another as Amici Curiae)* [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (Richter).

³⁵ *In one case, New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 the Constitutional Court adjudicated in a way that some interpreted as franchise-restricting: namely that it was not unconstitutional to require citizens to possess new bar-coded identity documents in order to qualify to vote. According to the appellants and others, the requirement would disenfranchise many voters, given the incapacity of the state to issue bar-coded documents to all applicants in time for the then impending general election of 1999. The Court rejected this argument.

³⁶ See Rabkin, 2014.

Present Omar al-Bashir. Many legal experts and commentators have adjudged this the most brazen and worrying instance of executive defiance of the judiciary, and of constitutional sovereignty, to date.

The recall of Mbeki from the Presidency in 2009 was an important executive-related controversy and test for the new order. It was controversial insofar as Mbeki could have been interpreted to have a mandate to see out his term, and because his recall was engineered within the ruling party and alliance in a way that left most citizens, and certainly non-ANC members, without a say. The recall was contentious enough to prompt a split in the ANC, birthing the Congress of the People (COPE). Even so, no constitutional rules were violated in the changeover of presidential leadership (and of course South African presidents do not carry direct mandates). The recall of Prime Ministers prior to subsequent elections is certainly familiar to citizens of parliamentary orders like Britain and Australia, albeit that it carries legitimacy costs even in those cases, and these costs might be more difficult to afford in a new and fragile democracy. On the plus side, as a number of commentators recognised the recall of Mbeki was a sign of democratic life inside the ruling party which was willing to act against a sitting President. This action also presented a counterpoint to the problem of leaders in post-independence Africa clinging to power for long periods, often decades. Indeed the prior defeat of Mbeki at the ANC's Polokwane elective conference of December 2007, which deprived him of a hoped-for third term as leader of the ANC, thwarted a worrying attempt to extend Mbeki's behind-the-scenes authority in government beyond the maximum of two terms as executive president prescribed by the Constitution.

These controversies involve thin compliance, as they concern the basic definition of legislative and executive powers. The parliamentary controversies affect the National Assembly's basic operation including, for example, compliance with the orders of the Speaker and hence the capacity of the Assembly to perform ordinary deliberation functions. An evaluation of parliamentary and executive performance in respect of democracy more generally – those aspects pertaining to thick compliance – will be offered below.

4.6. Assessing thick compliance

The dimension of democratic performance

Representation

It is a familiar point that popular rule in its pure form is a near-impossibility, both because of the heterogeneity of the 'people' and because government is necessarily mediated – especially but not only in large political units. South Africa's elective institutions do a fairly good job of representing the country's diversity. Parliamentary representatives are chosen by universal franchise in largely free multiparty elections. Thanks to proportional representation, a relatively large number of parties gain entry into the legislatures and, with them, a diverse set of interests, values and preferences. There is an element of representation by authorisation (channeled via parties and party mandates) as well as descriptive representation, with political parties using voluntary quotas and the party-list mechanism to ensure a relatively high level of representation for women (39.5% of the National Assembly after the 2014 election). Africans predominate, while racial minorities are well represented too.

Representation also occurs through participatory inputs into legislatures by citizens groups, and via more directly participatory processes themselves. Voluntary organisations in civil society make 'representative claims'³⁷ more or less convincingly, validating these claims through large paid-up memberships, marches or strikes as well as through internal organizational democracy. Organised economic interests find representation through the corporatist NEDLAC group.

Representation does not always operate effectively, however, or is not always perceived to do so. Voters cannot vote for local constituency representatives. Much of politics happens inside the ANC, which non-ANC voters feel they cannot influence. As a result of secrecy around party funding, voters do not always know which interests are behind given candidates, slates or party lists. Government sometimes make decisions that voters do not support, and sometimes citizens have to turn to non-elective bodies (notably courts) for relief from government action. Civil society representation has also raised questions about representivity: for example, about whether trade unions effectively represent less skilled workers or workers outside the public sector; whether better-resourced civil-society organisations are disproportionately well represented; and whether professionalized NGOs have become elitist and out of touch with the 'grassroots'.³⁸ In recent student protests there were

³⁷ Saward, 2009: 1-22.

³⁸ See for example Sangonet Pulse, 2013.

questions about whether students were properly represented by elective student councils or by militant student opposition groups lacking elective mandate.

In any event, persistent and widespread local unrest attests to the fact that many citizens feel inadequately represented; one reason they burn tires and public property is to garner the attention of those who supposedly represent them.³⁹ Surveys also reveal a public that does not feel fully represented. Our own Gauteng survey shows only 38% of the province's residents agreeing that parliament represents them; under half (48%) feel that there are politicians who represent them.⁴⁰ National surveys show a less alarming picture, but a concerning one nevertheless.⁴¹

*Participation*⁴²

The Constitution's commitment to political participation has been affirmed by the Constitutional Court. In the *Doctors for Life* judgement, the Court found that 'the general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation'.⁴³ Elsewhere it adds that '[t]he participation by the public on a continuous basis provides vitality to the functioning of representative democracy'.⁴⁴ It also contributes to the legitimacy of democracy and its laws, act as a 'counterweight to secret lobbying and influence peddling' and is of 'special importance to those who are relatively disempowered'.⁴⁵

There are various ways in which citizens participate in South African politics. Voting in elections is one such mechanism. Participating in 'invited spaces of participation'⁴⁶ is a second. These include (as we noted earlier) public hearings, access to portfolio committees, legislative outreach, ward committees, Integrated Development Plan meetings, and Community Policing Forums. A third form of participation is via voluntary associations: parties, NGOs, community organisations, unions, professional and business associations, civic associations and so on. The second and third forms of participation often interface, with citizens achieving supposedly 'direct' involvement in state affairs through their membership of, or support for, voluntary organisations that participate in state-provided spaces.

³⁹ Booysen, 2011 and Kirsten, 2011.

⁴⁰ Catalyst, Survey for SAIFAC/University of Johannesburg, 2015. Dissatisfaction amongst Gauteng residents with government and governance, and 'deep dissatisfaction with the local sphere in particular', is confirmed by the GCRO Quality of Life Survey 2014. See Everatt and Culwick, 2014.

⁴¹ In 2014 around 55% of the public expressed confidence in executive or legislative institutions or trust in parliament, according to Wale/IJR 2014, p. 20. Disapproval of the performance of elected leaders is high and rising, according to Afrobarometer, 2015 survey. The survey shows disapproval of the performance of the President (62% disapproving), their local councilors (61%), their member of parliament (54%) and their provincial Premier (36%). See Afrobarometer, 2015a.

⁴² Good summaries of government initiatives to promote direct popular participation can be found in Booysen, 2011:chapter 5 and Buccus and Hicks, 2011.

⁴³ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (*Doctors for Life*) para105.

⁴⁴ *Doctors for Life* para 115.

⁴⁵ *Doctors for Life* para 115.

⁴⁶ MirafTAB,2004:1-7.

All this amounts to a considerable range of opportunities, and many citizens report participation in public meetings, protests and so on.⁴⁷ Voting turnout has, however, been declining⁴⁸, 'invited' participatory spaces are generally perceived to lack clout and citizens perceive the state as inaccessible.⁴⁹ Critics have claimed that participatory bodies suffer from ANC-domination; control by insiders, the organised and educated; low levels of public education; inadequate resources; lack of authority; alienating or distant policy making processes; and other assorted design flaws.⁵⁰ They are also perceived as playing a largely co-optive role rather than as facilitating genuine popular self-governance.⁵¹ Civil society mobilisation is often more effective, with tactics ranging from militant protest to court intervention via public interest litigation firms paying off to various degrees in influencing government moves. Despite its demonstrated potential for securing progressive gains, civil society mobilisation suffers its own maladies: it disproportionately empowers activists carrying debatable mandates and leads to the prioritisation of those who are organised over those who are not. Initiatives from below can also serve dubious interests, including, for example, those of local residents and businesspeople keen to chase out foreigners.

Equality and inclusion

All citizens are equal under the law and in having formal political rights, though no one doubts that there exist powerful, in some cases, entrenched informal political elites. The ANC dominates nationally and in eight of the nine provinces, and its internal leadership forms an evolving ruling group shaped and reshaped by factional struggles and interpenetrated with state administration. Moneyed interests close to this group are able to secure disproportionate influence in politics, a phenomenon highlighted by controversies around the role of the Gupta family which have erupted sporadically. Recently, a deputy Minister has claimed in a live interview that he was offered the job of Finance Minister by the Gupta family, which suggests an extraordinary level of influence.

While black elites dominate the state, a disproportionately white and transnational business class exercises much informal economic power. The ANC has chosen a development path that relies on attracting foreign investors and stimulating local investment, conferring leverage on holders of capital. In a recent demonstration of capital's reserve power, Zuma was forced largely by negative market reaction to reverse his December 2015 appointment of Des van Rooyen as Finance Minister. The media landscape is dominated by the state broadcaster and a small number of private players.⁵² These include both critical and government-sympathetic media houses, though some (notably on the left) complain of under-representation. Media concentration is partly offset in South Africa as elsewhere by the diverse voices and information conveyed by the Internet (to which South African citizens enjoy unrestricted if not especially high-speed access). Tax-paying middle class citizens do not always feel heard, but can to a degree opt out of dependence on the state for services (especially in relation to health, education and security). There are some signs of an incipient tax revolt in this group, most vividly in the case of the rebellion against electronic highway tolling in Gauteng. Others have less choice but to use state services they cannot always

⁴⁷ In our survey, significant proportions of Gauteng residents report participating in ward committee meetings (50%), Integrated Development Plan forums (26%) and meetings at which local councilors (48%), members of the provincial parliament (23%) or members of the national parliament (21%) were present. Some of these findings seem implausible: it is not possible for such a high proportion to have participated in ward committee meetings given the limited membership of these committees. Respondents may have been thinking of meetings summoned or attended by ward councilors. Our survey also reveals limited knowledge on institutional workings, so they may not all have distinguished the various forums available. The finding *can* be taken to indicate fairly high levels of participation in local participatory bodies and events. The survey also attests to fairly high levels of unofficial participation, including in strikes (32%) and protest marches or demonstrations (27%). See Catalyst, Survey for SAIFAC/University of Johannesburg 2015. High attendance of community meetings is supported by Afrobarometer's national survey: 54% of citizens 35 years old and under, 63% of citizens 36 years and older, reported attending community meetings in the previous year. Large numbers also joined others to raise issues (39% and 48%). Afrobarometer reports much lower participation in demonstrations and protest marches: around 10%. Membership of a community groups is also low: 10% for youth, 15% for those 36 and over. See Afrobarometer, 2015b.

⁴⁸ Turnout as a percentage of South Africa's voting-age population has declined from 86% in 1994 to 57% in 2014. The ANC's share of the voting-age population has declined from 54% to 35%. See Schulz-Herzenberg, 2014: 2-4. Of course the distribution of seats in the National Assembly is proportional to votes actually cast; the ANC won 62% of votes cast in the 2014 election, hence has 62% of seats. Clearly, though, electoral results can give an exaggerated impression of how much active support parties enjoy in the country as a whole.

⁴⁹ According to our survey, only 44% of Gauteng residents believe they can influence government policy. Respondents also report finding it difficult to contact members of the national parliament (64%), provincial parliament (60%) and (notwithstanding the ward system) local councilors (49%). Catalyst, Survey for SAIFAC/University of Johannesburg 2015.

⁵⁰ Booysen, 2011: chapter 5 and Buccus and Hicks, 2011.

⁵¹ Booysen, 2011: chapter 5 and Buccus and Hicks, 2011.

⁵² De Wet, 2013.

effectively influence. Unsurprisingly, in light of all this, not all citizens feel that they are equal in their democratic rights and powers.

Citizens sometimes cast claims about inclusion and exclusion in racial or ethnic terms. Whites feel themselves to be outside the political power structure, and their level of active political participation is low (as our survey confirms).⁵³ Coloureds sometimes claim to be politically marginalized now by Africans as they were before by whites.⁵⁴ Africans perceive whites as exercising economic power; in our survey 62% of black South Africans felt that whites still held the economic power in South Africa. Radical black intellectuals claim that whites also enjoy unreflective privileges in a society dominated by western-imposed forms of knowledge and culture.⁵⁵ In African ethnic terms, Zulus (and KwaZulu-Natal) have been perceived as politically dominant under Zuma, as Xhosas (and the Eastern Cape) were perceived to be under Mbeki and Mandela. Both Nguni groups are viewed in turn by some non-Ngunis as parceling out power between themselves at the expense of Sotho-Tswana groups.⁵⁶

How much objective weight should be attached to these common perceptions and stereotypes is something that can be debated. Most contain grains of truth (as stereotypes often do). Happily racial and ethnic resentments rarely assume violent proportions.⁵⁷ While race and xenophobic tensions simmer, South Africa has been notable in post-independence Africa for limiting organisation and conflict around ethno-regional 'tribal' differences. The ANC's unifying role has been important on this count.

An important issue is raised by the position of documented and undocumented non-citizens, of which there are likely millions in South Africa. 'Foreigners' play an important role in the economy – as cheap labour and informal sector entrepreneurs – but lack voting rights. Immigrants from sub-Saharan Africa and South Asia are all too often victims of xenophobic resentment and violent attacks, primarily because they are perceived to compete for jobs, consumers, houses and women, and to be perpetrators of crime.⁵⁸ Immigrant advocates contest these perceptions. Fortunately, no significant party has exploited what surveys show to be widespread anti-foreigner animosity by campaigning on an anti-immigrant platform.

Pluralism

It should already be clear that the South African political system is pluralistic rather than monopolistic. A diversity of vigorously competing parties is present in parliament (thirteen in the current parliament, elected in 2014); diverse organisations populate civil society. The country is politically, intellectually and culturally lively. Even so, the dominance of the ANC on the political scene must qualify this picture of pluralistic diversity. So must the fact that, at least until the recent rise of EFF, the ideological range represented by party leaders and programmes has been fairly narrow, with racial, ethnic and regional identities seeming to trump ideological ones. This narrowness may be stabilising but also result in some feeling less than fully enfranchised. This situation has been

⁵³ Catalyst (2015). In all the questions around participation, the participation of whites was usually the lowest: for instance, 58% of black South Africans have participated in a meeting where a local councillor is present whereas only 8% of white South Africans had.

⁵⁴ See for example Adhikari, 2005:175-87 on the familiar refrain is that 'before we were not white enough, now we are not black enough'.

⁵⁵ See for example, Pilane, 2015.

⁵⁶ 'Tribal' sentiments are rarely analysed systematically and are mainly expressed in a subterranean way; evidence for them is therefore largely anecdotal. For an earlier discussion of alleged Xhosa domination, see Horowitz, 1991: 55-60. Under Zuma talk of Xhosa dominance has been replaced with talk of Zulu dominance of the ANC. See for example Modjadji, 2015.

⁵⁷ For a recent discussion of racial perceptions among South Africans, see Hofmeyr and Govender, 2015. While some of the authors' findings are worrying, they paint a less alarming picture than recent public discourse on race might lead one to expect. On the downside, 67.3% of respondents of all race groups have little or no trust in members of other racial groups and 61.4% believe that race relations have stagnated or deteriorated since 1994. Fully 61.4% of all respondents agree that full reconciliation is impossible until black material poverty is overcome. Nevertheless 75.5% of respondents value their South African identity and 71% consider it important to strive for a united South African nation; 59.2% believe that there has been progress towards reconciliation since the end of apartheid. There is little hard evidence for the generation gap in racial perceptions claimed to exist by young activists and intellectuals disillusioned with post-1994 policies of reconciliation. Findings of a recent public opinion survey by the Institute of Race Relations are more positive than those of the IJR. According to SAIRR, a majority of black Africans (59.7%) consider race relations to have improved since 1994, though only around a third of whites, coloureds and Indians share this view. Large majorities of Africans (78.5%), whites (75.3%) and coloureds (81.2%) claim to have experienced no racism in their daily lives. A majority of black Africans (58.3%) and plurality of coloureds (49.4%) disagree with the proposition that South Africa is a 'country ... for black Africans, and white people must learn to take second place'. Majorities of all race groups – including 58.8% of black Africans – agree that '[a]ll this talk of racism and colonialism is an attempt by politicians to find excuses for their own failures'. See Cronjé, 2016.

⁵⁸ See for example HSRC, 2008.

a problem especially for the left, whose disagreements with a dominant paradigm perceived as 'neoliberal' have had to be voiced from within the ruling alliance or at the political margins. Left-leaning media activists complain about a broader 'hegemony' of neoliberal ideas that allegedly encompasses both the ANC leadership and the mainstream media.⁵⁹

Freedom of expression is guaranteed and exercised, ensuring a plurality of voices in the public sphere. Political debate is lively and played out across various media. Even so, some balk at what they perceive as a 'political correctness' that sets bounds to the range of permissible thoughts, especially on race and transformation; though this does not stop others from expressing vitriolic racist sentiments, notably on social media. At the beginning of 2016, a crudely racist Facebook remark by a previously obscure white estate agent, Penny Sparrow, set off a national firestorm of debate about free speech and its limits. Two other public figures who made remarks with racial connotations were subsequently caught up in what seemed to some a bout of public hysteria and to others an opportunity to set down a marker against white racial arrogance. Both white racists and black nationalists have contributed to this climate of polarisation, the latter evidenced by, for example, a black university student wearing a T-shirt emblazoned with the call to 'Kill all Whites'. Social media controversies have prompted talk of fresh legislation against hate speech.

In general, there may be said to be a tension between the goals of diversity and equality, the latter entailing a more majoritarian and homogenising logic given overwhelming African numerical superiority. But, so far, majoritarianism has been balanced by pluralism, one sustained in part by the otherwise problematic fact of disproportionate minority influence in business, media, the professions and other spheres. These are, like all spheres in SA, earmarked for 'transformation' in a more racially egalitarian direction. In some of these spheres, at least, diversification and greater equality work in the same direction, given drastic under-representation of black Africans in particular.

Deliberation

An important value for democratic theory since the 1990s has been that of deliberation. This value involves encouraging diverse groups of individuals to engage each other in face-to-face, respectful, reason-giving and public-spirited exchange. It is sometimes contrasted with aggregative and competitive political processes, sometimes with the politics of affect. Legislatures, courts, negotiating forums, mediation and arbitration bodies – all of these are mandated, encouraged or permitted by the constitution; some have been established through subsequent statute. The civil sphere plays its role too, setting up countless discussion and debating forums on radio and television.

Clearly, however, discursive democracy is fraying in South African practice. Violent strikes and protests (often met by police counter-violence) are the most obvious evidence of this. Even in the hallowed chambers of the National Assembly, we now see regular disruption by EFF MPs, followed by their forcible removal. A group of student protesters was recently pushed off the parliamentary precinct with stun grenades. Many formal structures have become less effective at mediation, whether unions or student representative councils. Some argue that the ANC's own appointed parliamentary speaker, who is meant to be impartial but has been alleged to favour the ANC, is responsible for some of this malaise.

In short, the politics of affect is still very much alive in South Africa, often energised by the creative use of militant song, chanting, hand-made posters, live video and Twitter feeds. While this mix of ratiocinate and affective politics might be democratically healthy, the decline of the deliberative element of this mix may be ominous in a country prone to outright physical violence.

South Africans seeking to restabilise and re-legitimise the political order are liable to invoke the ideal of a social compact or agreement.⁶⁰ This notion involves something more like bargaining than deliberation (and indeed horse-trading represents a third point of contrast with deliberation). But South Africans have acquired a strong track record in bargaining, whether in the labour sphere or in the negotiated transition itself. The spirit of bargaining is reflected in organisations like NEDLAC and the Commission for Conciliation, Mediation and Arbitration (which deals with labour disputes) – organisations that do not underplay pre-existing interests in a

⁵⁹ See for example, Duncan, 2014.

⁶⁰ For a recent exposition, see Habib, 2013.

way that deliberative democracy aspires to do; in that sense their mode of conflict channeling is more realistic. But like deliberation, bargained agreement has become more difficult to attain in an increasingly polarised climate.

Performance of particular institutions

We now look more closely at the performance of two specific democratic organs relevant to this section of the report: the executive and parliament.

The executive⁶¹

This section does not look at the general performance of the executive, which would be akin to a general assessment of South African government as a whole, including its administrative acuity and policy record. Comments are confined here to the nexus of executive and democracy. Does the executive branch at national level embody and respect democracy?

The executive's democratic legitimacy derives from several sources. The President is elected by parliament and is required to enjoy parliament's confidence; and ministers are drawn from parliament. In addition, ministers and directors-general are expected to account to parliament, providing regular reports and answering questions. Finally, the executive attempts to communicate directly with the public through functions like presidential *imbizos* and a presidential hotline. The executive also consults outside experts, recruited into, notably, the National Planning Commission. The executive is also subject to checks from non-elected constitutional bodies like the courts and chapter 9 bodies. In recent years, the higher courts and the Public Protector have been especially notable in their efforts to constrain presidential excess.

In South Africa, as in many other democracies, there is a tendency towards executive dominance. South Africa's executive presides over a vast public service and security apparatus and exercises considerable discretion in running it. The wide discretion sometimes granted to the executive by parliamentary legislation came under Constitutional Court criticism in the *Dawood* case.⁶² The court there held that the constitution requires the legislature to provide sufficient clarity as to the basis for the exercise of any executive discretion. It is doubtful though that legislative refinement alone can deal with the problem.

Executive ascendancy is a combined function of the size and complexity of the modern state and the desire of top politicians to extend their power and authority. Thabo Mbeki, both as Deputy President and then as President, built up a strong Presidency. His technocratic and unilateral style alienated many in the Tripartite Alliance. Despite his populist persona and rhetorical deference to the party, Jacob Zuma has consolidated executive power. In recent years the executive has also exhibited a strong desire to shroud more of its activity in secrecy, pitting a proposed but now stalled Protection of State Information Bill against constitutional and statutory requirements for freedom of information.⁶³

In addition to serving as a power apparatus, the executive has become an over-sized patronage pool. Zuma began his first term by establishing a sprawling government of 34 ministers to accommodate divergent interests and factions, even as he himself (unlike Mbeki) shows little interest in policy – a recipe for cronyism, factionalism and policy uncertainty, with attendant agency costs. Efforts to subject the government to internal discipline and the presidency to the ministrations of technocratic Planning Commissioners have so far failed to instill a sense of competence.⁶⁴

Zuma's time at the executive apex has been characterized by numerous corruption allegations as his family has appeared to amass wealth through political influence, sometimes at state expense. In recent years Zuma has been especially dogged by controversy around massive irregular state spending on his personal country home. The Public Prosecutor required him to repay some of this money, but he lined up key executive politicians and parliamentarians in support of his defiance of this recommendation. Eventually, in early 2016, in the face of a Constitutional Court case, Zuma acceded to public demands to 'pay back the money', or at least a reasonable portion of it. Zuma's leadership has also become noteworthy for arbitrary and seemingly irrational decisions

⁶¹ On executive accountability see, for example, Hoffman, 2011.

⁶² *Dawood and Another v Minister of Home Affairs and Others; Sbalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8 (*Dawood*).

⁶³ On the state and secrecy, see McKinley, 2014.

⁶⁴ See Southall, 2013: chapter 11.

made with little consultation. These include disbanding the popular Scorpions investigative unit (albeit this was giving effect to an ANC collective decision), Zuma's choices for top officials and the President's unexplained December 2015 sacking of a respected Finance Minister.

Sometimes the executive has responded to active civil society and parliamentary opposition to policy choices, notably to its efforts to introduce legislation to regulate the media, criminalise access to state information and further empower traditional leaders. Zuma's withdrawal of his chosen successor to the ousted finance minister, and his turnabout on Nkandla repayment, may attest to increasingly effective public pushback (boosted, however, by severe market reactions in the former case that devalued the currency). But the executive has shown a particular reluctance to conform to demands for a more independent investigation of allegedly corrupt high officials – including Zuma himself – or to answer corruption allegations in parliament. In evading efforts to investigate his record, Zuma has benefited from having established a considerable control over state prosecution, policing and intelligences services, as well as from a relatively a secure base of support in KwaZulu-Natal.⁶⁵

In institutional terms there is, as we discuss in chapter 8, ambiguity around the position of the NPA, as well of independent component investigative units like the Scorpions and its successor the Hawks. These organs are obliged to prosecute corruption and other crimes impartially, yet remain ultimately accountable to the executive. Their independence has been defended by the Constitutional Court on more than one occasion,⁶⁶ but their status remains sufficiently constitutionally uncertain to provide the executive with room for maneuver. The President's power to appoint the National Director of Public Prosecutions is a particularly valuable source of leverage, one whose exercise in the form of a string of dubious choices has ignited repeated controversy.⁶⁷ Perhaps the most spectacular of these followed the decision of NPA interim head Mokathedi Mpshe to withdraw corruption charges against Zuma.⁶⁸

The interaction between the ANC-controlled executive and the ANC at large is of interest here. They could be seen as two rival sources of authority. Personal hierarchies of authority in the ANC sometimes conflict with formal state hierarchies, creating confusion about lines of command and accountability. Branches of the executive and bureaucracy become entangled in intra-ANC feuds, leading to alleged abuses of authority (notably the use of state intelligence resources to spy upon or smear factional opponents). And the ANC in power practices 'deployment' of 'cadres' to all parts of the state, in a fashion that involves a tension with ideals of decentralisation, impartiality and competence. The ANC tends to celebrate its own collectivism and to downplay the independent role of its leader (and hence the country's president). In practice, the balance of power between Luthuli House (the ANC headquarters) and the Union Buildings has tended to favour the state executive.⁶⁹ Thabo Mbeki notoriously imposed the 'neo-liberal' GEAR policy on his backbenchers in 1996 and interfered as President in the selection of provincial Premiers and mayors. These actions caused the ANC membership to seek a reassertion of its authority, and Mbeki's successor Zuma appeared set to defer to party dictates. But he has now established a power base in the party that gives him considerable freedom of action. Still, a repeat of the intra-party discontent that culminated in Mbeki's eviction cannot be ruled out.

*Parliament*⁷⁰

Parliament is the embodiment of the idea of democratic representation at a national level. It consists of freely elected representatives who have a final say over laws. It is also charged with acting as a site of national deliberation and as a mechanism for holding the executive branch to account.

Rhetorically at least, parliament has taken these functions seriously, portraying itself as a 'people's parliament' engaged with the citizenry and 'scrutinising and overseeing executive action'.⁷¹ Legislators have been provided with resources unavailable to MPs prior to 1994, and parliament has set up commissions and committees to advise it how to operate more effectively.⁷² Parliament has scored some successes in persuading the executive to

⁶⁵ Southall, 2013: 318.

⁶⁶ These stress-points are outlined in chapter 8.

⁶⁷ These are also outlined also in chapter 8.

⁶⁸ For a good summary of controversies attending the relationship between the NPA and the executive, see February and Pienaar, 2014: 36-39.

⁶⁹ Booyesen, 2011: 404-418.

⁷⁰ See, for example, Calland, 1999, 2006; Mathisen and Tjonneland, 2001; Murray and Nijzink, 2002; Barkan, 2005; February, 2006; Misra-Dexter and February, 2010; Nijzink and Piombo, 2005; De Vos, 2011.

⁷¹ Cited in February, 2006: 124.

⁷² See notably Parliament of the Republic of South Africa 2009.

change course, notably in respect of antiterrorism legislation and (in the case of the NCOP) the Traditional Courts Bill – albeit that in such cases the back-up of civil society opposition has been crucial.⁷³ Parliament has witnessed many vigorous debates, more recently, and worryingly, spilling into physical altercation. The Official Opposition plays a conventionally Westminster-style adversarial role, making for sometimes effective but often for ritualised opposition. The EFF, in parliament since 2014, has in some respects eclipsed the Official Opposition (currently the DA) in the doggedness of its opposition to the ANC government – disproving the mantra that small opposition parties are necessarily ineffective.

On the downside, the ANC's absolute majority and internal whip ensure that most ANC MPs – the majority in parliament – give the ANC a fairly easy ride (and the party list system reinforces the Whip's clout). Matters have gotten worse with the sidelining and resignation of some of the ANC's more principled and effective MPs (for instance, Pregs Govender, and Andrew Feinstein). Independent-minded MPs, like former Defence Committee Chair Thandi Modise and former Speaker Frene Ginwala, were punished respectively by 'redeployment' and sacking.⁷⁴ Some have talked of a 'juniorisation' of MPs as veterans retired.⁷⁵ Parliamentary committees have operated unevenly – their success or otherwise dependent notably on who chairs them. Chairpersons of committees have complained of being ignored by the executive.⁷⁶ The capacity of committees to exercise oversight received a major blow with the hobbling of the highly regarded committee on public accounts, Scopa, during investigations of the arms deal.⁷⁷ The recent rallying of ANC MPs behind the President over the Nkandla issue – defending his record against the findings of the independent Public Protector – exemplifies what some see as a trend towards deference.⁷⁸ Ministers have often avoided answering parliamentary questions, which initially came mainly from opposition MPs. The ANC leadership moved in 2000 to ensure that opposition MPs would be able to submit questions only in proportion to their parliamentary representation.

The verdict of most parliamentary observers is that too many ANC MPs are pliant or apathetic. Ineffective ANC MPs matter for executive accountability because internal ANC opposition and scrutiny has the potential to serve as a more effective check on executive power than do the efforts of small and largely powerless minority parties. Indeed, the increasingly rowdy opposition of the EFF could be viewed as a consequence of the unwillingness of ANC MPs themselves to hold their leader to higher standards of integrity and openness.

Second, the executive has been dominant in the initiation of legislation. Parliament is too often reactive, hamstrung not only by political loyalties but by insufficient skills and resources. While the Constitution does grant the executive wide legislation-introducing authority, its domination of legislative initiative consigns parliament as a whole – including opposition parties – largely to a debating and ratifying role. The Constitutional Court has more recently insisted that private members' bills should not have to depend on the permission of the Speaker, which the Speaker had previously been reluctant to give. The result has been an increase in legislative proposals from ordinary parliamentarians.⁷⁹ Executive dominance in lawmaking has not, however, been decisively challenged.

Third, there have been, as indicated, questions about the impartiality of the current Speaker of parliament, who is also a senior ANC official. Alleged attempts by the ANC parliamentary leadership to advantage ANC speakers, the brief shutting down of cell-phone communication with the outside during a showdown with the EFF, and the use of strong arm tactics – including by non-parliamentary security services – in dealing with obstruction by the EFF, have all contributed to an impression of partisan and increasingly repressive control over the country's premier organ of democratic representation.

Fourth, MPs who are meant to expose executive corruption, have been implicated in corrupt activities themselves. The most notorious instance of this was the mass cross-party abuse by MPs of travel allowances, a

⁷³ February, 2006: 131-133.

⁷⁴ February, 2006: 131.

⁷⁵ Booyesen, 2011: 483.

⁷⁶ Parliament of the Republic of South Africa 2009: 39-40.

⁷⁷ In accord with a Commonwealth tradition, Scopa is chaired by a member of the Opposition. The ruling party has weight through its committee majority, however. It defanged Scopa during the arms deal by removing the head of the ANC study group within Scopa, Andrew Feinstein. See February, 2006: 134-5.

⁷⁸ For an earlier example of parliament's failure vigorously to exercise its oversight function, see February, 2006:125-6 on its handling of the so-called 'Oilgate' scandal.

⁷⁹ February and Pienaar, 2014: 28. The relevant Constitutional Court case is *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27.

scandal dubbed 'Travelgate' that broke in 2005.⁸⁰ There is a wide perception that perpetrators were never brought fully to account. The implication of MPs in corruption themselves makes it likely to be less dogged in holding an often-corrupt executive to account.

Finally, it is not clear that parliament has done enough to maintain contact with the public it represents. Since MPs are elected on national and provincial party lists, voters cannot hold them individually accountable or gain easy access to them. Parties do assign their individual MPs responsibility for particular designated geographical constituencies and parliament provides the MPs with resources and allotted times to maintain constituency offices. This dispensation is part of a conscious effort to offset the limits of list-based representation and to improve public access and parliamentary responsiveness.⁸¹ However funding of constituency offices is inadequate (especially for small parties), the operation of the system is poorly monitored, information about constituency offices is hard to come by and public knowledge of this facility is extremely limited.⁸² Perhaps more importantly, parliament does conduct hearings and receive public submissions, to some effect. However it is mainly representatives of a small number of better-resourced civil society organisations that are able to take advantage of this opportunity.⁸³ The public's relatively low estimation of parliament and their representatives (attested to in the Survey we conducted) may be one upshot of these defects and limitations.

Political rights

Under thin compliance, we mentioned that political rights are generally observed, backed by legislation. Here, under thick compliance, we delve a little deeper into the complexities, including limitations, controversies and prospects. We begin with media freedom, a subject of ongoing and sometimes unsettling discussion arising from persistent government-media tensions.

South Africa enjoys a vigorous private media that lampoons government and exposes corruption on a regular basis. The Bill of Rights itself places limitations on free speech (it prohibits propaganda for war, incitement of imminent violence and hate speech on grounds of race, gender, ethnicity or religion that constitutes imminent incitement to harm). Citizens who believe they have been subject to hate speech can take their complaints to the South African Human Rights Commission. In the event that the SAHRC considers judicial deliberation necessary, it can hand cases on to Equality Courts, established under the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality) of 2000. The constitution also mandates broadcast media regulation in order, amongst other things, to encourage diversity of expression. The telecommunications and broadcasting sectors are regulated by the Independent Communications Authority of South Africa (ICASA), established in 2000 by the ICASA Act in fulfillment of a constitutional mandate outlined in chapter 9. Citizens can also seek remedies from a Press Council in the case of print and digital media and a Broadcasting Complaints Commission in the case of broadcasters.

The judiciary, when called upon, has until a controversial recent case interpreted constitutional restrictions on free speech in a narrow way that is protective of free expression. This assertion is evidenced by the *Islamic Unity* case⁸⁴ where the Constitutional Court declared a speech-restrictive reading of a statutory broadcasting code unconstitutional; and another case, *Ramesh*⁸⁵ where the Durban and Coastal Local Division of the High Court refused to extend an interdict restricting the publication and marketing of a song that denigrated Indians. The court insisted that while the song was racist, it did not constitute incitement to imminent harm. In 2005, the Constitutional Court upheld the right of an organization called Laugh it Off to sell T-shirts displaying politically-charged visual satire incorporating the trade mark of another company, Carling Black Label.⁸⁶

⁸⁰ For a summary of this scandal and its upshot, see February 2006: 124-5.

⁸¹ For information on the mechanics of the constituency system, see <http://www.pa.org.za/info/constituency-offices>.

⁸² *City Press*, 2014.

⁸³ February, 2006: 136.

⁸⁴ *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (*Islamic Unity*)

⁸⁵ *Ramesh Dharamsbee Jetbhalal versus Mbongeni Ngema and Universal Musi* Case No. 3524/2002 heard by the Durban and Coast Local Division and handed down on 28 June 2002 (unreported) (*Ramesh*).

⁸⁶ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC).

There have been more worrying developments, however, for advocates of free expression. The media have been subject to interdicts that have delayed the publication of material, and to civil defamation lawsuits, including from the President, that are potentially chilling in effect.⁸⁷ (On the plus side, the state has recently committed itself to abolishing criminal defamation.) The extended definition given to hate speech in the Equality Act is considered by some more restrictive than the Bill of Rights allows (a proposition yet untested in the Constitutional Court). A South Gauteng High Court ruling that the song ‘Shoot the Boer!’ constituted hate speech has alarmed free speech activists, primarily because it relied on the broader definition of hate speech in the Equality Act, rather than on the constitutional clause banning incitement to imminent harm.⁸⁸ A ruling by the BCC that a caller to a radio show was defamatory in alleging that the Cabinet is ‘entirely corrupt’ was widely viewed as threatening a popular medium of public expression.⁸⁹ On more than one occasion free-expression activists have challenged the editorial independence and impartiality of the public broadcaster, the South African Broadcasting Corporation (SABC) – with particular controversy surrounding an SABC ‘blacklist’ of critics in the Mbeki years and political interference in appointments under Zuma.⁹⁰ Looking to the future, there are fears around censorship or prosecution of journalists that may result from proposed legislation, including a Protection of State Information Bill, proposed amendments to the Film and Publications Act⁹¹ and a threatened Media Appeals Tribunal.

Serious questions have been raised by police use of violence against strikers and protesters, most dramatically by the massacre of striking miners at Marikana in the North West Province in 2012. On the one hand, there is a high propensity to violence in industrial and political protest in South Africa, including, notably, killing of ‘scabs’. On the other hand, the state has been argued by some close observers⁹² to be unnecessarily restrictive in granting permission to protest and too quick to resort to the violent enforcement of restrictions. The recent rough police handling of student protesters at the National Assembly building has raised this issue anew.

The challenges facing South African democracy

South African democracy faces significant challenges. Those most directly pertaining to the operation of democracy include the government impunity and centralization enabled by *de facto* one-party dominance (with symptoms including corruption, cronyism and maladministration); the prominence of identity politics in voting behavior; unintended effects of the electoral system that reinforce ruling-party dominance under certain conditions; the character of the ANC, especially its self-understanding as a vanguard party of national liberation; rising public disappointment with democracy and the constitutional settlement; declining public participation in formal institutions, and, most importantly, in voting; and politically-related violence. A more detailed discussion of some of these themes follows.

This section seeks to identify the central issues and controversies marking the operation of democracy in South Africa overall, and allows us, in particular, an opportunity to consider the important role of a single dominant political party – the ANC. Constitutions, including the South African Constitution, do not always have much to say about parties, or for that matter the operation of party systems, but South Africa’s case illustrates why they are central to the way constitutional orders unfold.

One-party dominance⁹³

The ANC has won five successive absolute majorities in national-level legislative elections since 1994. This electoral outcome has provided a certain amount of political stability and continuity. The ANC has generally been a pragmatic party committed, for the most part, to inclusive nation building. It commands support across all linguistically-based ethnic groups in the black African population. It also commands substantial support among middle-class indians and coloureds. While only enjoying a fraction of white support, the ANC periodically makes inclusive gestures towards whites. The ANC can be viewed as a centre that holds amidst racial tensions, populist demands and social unrest. The ANC’s dominance is a product of freely exercised voter choice, and some of the vote for the ANC may be rationally rewarding its successes in delivering certain desirable things to

⁸⁷ See for example Zuma’s lawsuits against the satirical cartoonist Zapiro, launched in 2010 and dropped in 2012.

⁸⁸ Freedom of Expression Institute, 2013.

⁸⁹ De Wet 2014. In the run-up to 2016 local elections, the SABC banned call-in shows altogether, allegedly for fear that they would be manipulated by party-affiliated callers for electioneering purposes.

⁹⁰ De Waal, 2011; Freedom of Expression Institute, 2014

⁹¹ Act 55 of 1996.

⁹² See, for example, Duncan and Royeppen, 2013.

⁹³ On one-party dominance, see Giliomee and Simkins, 1999; Butler, 2009; Suttner, 2009 and Butler, 2014a.

black people of all social classes – exactly what elections would be expected to reward in a black majority country facing issues of racialised inequality and demands for redress.⁹⁴

Even so, the one-party dominance of the ANC carries democratic costs. ANC behavior and performance has been a ‘mixed bag’. Its rule has been characterised by successes (in maintaining political and economic stability, delivering water, electricity and housing to the poor, weaving an incomplete safety net of social grants, expanding the black middle class), but also by important performance and policy failures (notably in energy provision, improving education, generating employment, controlling crime, ensuring road safety and, during the Mbeki years, in addressing an HIV/AIDS pandemic that gravely increased infant mortality and reduced life expectancy). Many ANC politicians and associates have been mired in corruption (private appropriation of public moneys, bribes, tender favouritism, appointment of cronies, participation in criminal activities) and have acted in ways that appear designed solely to protect top people from prosecution, at a considerable cost to the integrity of public institutions (see, for example, the abolition of the Scorpions and the NPA’s dropping of charges against Zuma, issues covered in chapter 8). Corruption and maladministration have generated enormous waste, siphoning funds designed to assist the poor or boost development.⁹⁵ The political elite often appears out of touch, and is given to arrogance and insensitive displays of material wealth. A functional democratic system might be expected to punish such failings more often than South Africa’s democratic system does – if only to keep the ruling party ‘on its toes’.

Moreover, one-party dominance has arguably facilitated a centralization of power in the ruling party (both as party and government) that carries obvious dangers for future democratic processes as well as for state performance. The ANC commands vast amounts of patronage in the form of tenders and appointments. It deliberately deploys its members to as many sites of state power as possible, threatening the separation of party and state and the independence of courts, regulatory bodies and chapter 9 institutions. The ANC is so imbricated in the state that ANC internal factional squabbles sometimes take the form of disputes between branches of the state, with faction leaders using state resources (notably spy services) to undermine party rivals. Mismatches between the ranking of persons in party and state bureaucracies leads to confusion about lines of authority and accountability, as well as to episodes of rivalry between party and state leaderships. An ANC-majority legislature holds the executive to less vigorous account than it arguably should, notwithstanding vigorous opposition parties. Moreover, state largesse becomes identified in the public mind with party largesse, an association encouraged by the ANC and used to good effect at election times according to some authors.⁹⁶

The ANC leadership does not go unchallenged. Factional squabbles in the ruling party, industrial and civic unrest, challenges from the media, opposition parties and civil activists, and international pressures all help to keep ANC leaders in some degree of check. These pressures may indeed account for the way the ANC often ‘pulls back from the brink’ of problematic policy choices in the face of sustained political opposition (as it has done, recently, to the proposed Media Appeals Tribunal, the Traditional Courts Bill and the Protection of State Information Bill). It has also reversed serious policy errors under sustained pressure (on HIV/AIDS and, recently, tourist visa requirements). Clearly, one-party dominance has its serious maladies, and leaves too much of the fate of South African democracy in the hands of a single party.

*The character of the ANC as a dominant party*⁹⁷

Given that the ANC controls the fate of SA democracy to a considerable degree, and that it occupies so much political space, its character as a party matters. The ANC is South Africa’s oldest political party, formed in 1912 to challenge the British handover of power to the white settler minority in South Africa. It commands widespread admiration, both domestically and internationally, for having played a leading role (perhaps *the* leading role) in challenging racial segregation and apartheid, often at great personal cost to its leaders and members; and for

⁹⁴ The idea that the ANC is rewarded for success in delivery remains a matter of debate. A counterintuitive case to the contrary – that the ANC has least support where it delivers most – has been made recently by de Kadt and Lieberman, 2015.

⁹⁵ This fact is widely acknowledged, including by the ANC’s own politicians and documents (see, for example, Booysen, 2011: 485), and is demonstrated annually by the Auditor-General among others. South Africa ranked as 67th least corrupt country in the Transparency International *Global Corruption Perceptions Index 2014*.

⁹⁶ The evidence on whether state provision of social grants influences voters in favour of the ANC is contradictory. Certainly some ANC politicians have encouraged this association. See Ensor, 2014.

⁹⁷ For excellent accounts of the ANC and the nature of its power, see Booysen, 2011 and Southall, 2013. See also Hamill and Hoffman, 2011 and Butler, 2014b.

helping to shepherd South Africa into a constitutional democracy, avoiding racial civil war in the process. As indicated, it is a pragmatic party and an ethnically unifying one.

Still, several features of the ANC render it an awkward fit with constitutional liberal democracy. It is the heir to authoritarian ideologies like radical developmental nationalism and Marxism-Leninism. These were ascendant during the decades from the 1950s through to the 1980s, reinforced by the ANC's alliance with the South African Communist Party (SACP) and the Soviet Bloc. Although these ideologies lost influence with the end of the Cold War and the 'Third Wave' of democratisation, they are perceived by many commentators to remain embedded in the culture of the ANC and ruling party allies like the SACP and Cosatu (and are certainly reflected in its language).⁹⁸ Relatedly, the ANC remains an open practitioner of the so-called National Democratic Revolution. This Marxist-inspired concept, honed by the SACP for the South African case, envisaged South Africa undergoing a two-stage revolution, the first of which would replace 'colonial' domination with democratic majority rule and begin a process of social and economic transformation, the second of which would take South Africa to a socialist future. In this scheme of establishing a people's and subsequently a proletarian dictatorship, there is little room for liberal constitutional democracy except perhaps as a strategic instrument for realising the first stage. Third, and related again, the ANC has tended to view itself as a liberation movement carrying out a transcendent historical mission rather than as an ordinary political party competing in elections.

The upshot of this lineage is a tendency on the part of the ANC to regard opposition and pluralism with suspicion, as unaffordable luxuries given developmental priorities or even as instruments of counter-revolution. The ANC's revolutionary mindset also fosters a hegemonistic will to take control of all levers of power, and to forestall supposedly reactionary opposition. Much authoritarian ANC rhetoric, action and threatened action becomes intelligible when viewed in this context: verbal attacks on the media, judiciary and civil society; threatened curbs on the media; state secrecy legislation; and the whole apparatus of 'cadre deployment', involving the insertion of ANC members and supporters in state and statutory bodies, including (some allege) in bodies meant to operate impartially or independently. Efforts to set up a professional civil service have come to naught, despite occasional ANC lip service to this concept and the manifest need for it given widespread corruption, cronyism and maladministration.

There is thus a paradox, that a party still attached to ideologies whose adherents once espoused one-party dictatorship signed up in the 1990s to an essentially liberal-democratic constitution. Moreover, despite controversies and possible breaches, it has generally observed the letter of constitutional democracy. This paradox is partly explained by reference to the ANC's pragmatism, its recognition of the domestic and international balance of forces post-Cold War and a sincere desire to maintain cohesion in a society characterized by plural values and interests. Moreover, the ANC has attracted to itself lawyers and NGOs supportive of global thinking about human rights. Some of its own internal 'wing' – notably trade unions and civics – were in any case reluctant to cede all independence to ANC leaders returning from exile. The ANC's statements of its foundational programme – most notably the Freedom Charter (1955) – are ambiguous enough to be interpreted as supporting constitutional democracy (and indeed documents and slogans of the 'national democratic' stage are meant to be attractive to wide coalitions).

The ANC's own emphasis on collectivism and grassroots mobilization leads it to distrust one-person leadership and to insist on the primacy of party branches. While its ally the SACP may view itself as an elite vanguard party, the ANC has celebrated its role as a party that actively involves the masses of people in party and public affairs (as in the campaign of soliciting popular opinion that preceded the adoption of the Freedom Charter). The ANC in exile ran a tightly disciplined, hierarchical and occasionally militarized machine, but reasserted its democratic credentials upon return – albeit under the banner of 'democratic centralism'.

Even post-return, however, the reality is one of centralization of power in ANC leaders. Exiles and long-term prisoners were accused of garnering power at the expense of active internal grassroots campaigners. Cases in point are Mbeki at the height of his dominance and more recently in Zuma (a factor that has in turn underpinned executive dominance in the state). Zuma's insistence that he is merely a cipher of the ANC's collective will is not credible.

⁹⁸ For example in references to comrades, vanguards, counter-revolutionaries, the patriotic bourgeoisie, working class leadership, class alliances, motive forces, imperialism and neo-colonialism. The SACP still has a central committee, a politbureau and the hammer and sickle as its emblem.

On the other hand, Mbeki's centralisation of power eventually produced a backlash in the party, a good deal of it emanating from party branches. This uprising finally denied him a third term of party leadership at the Polokwane elective conference in 2007. There was speculation that Zuma might suffer a similar fate as opposition mounted to him prior to the Mangaung elective conference of 2012. In fact, Zuma survived, and his grip on his party appears tight, despite the President's rising unpopularity. The uprising against Mbeki *has* though left a lasting legacy: since roughly 2005, the ANC has been highly prone to internal factionalism, some of it ideological and some centered on the battle for resources. In addition, two significant rival parties have emerged from splits in the ANC since Mbeki's overthrow. While this disputation might be read as evidence of democratic vitality, critics claim that branches are subject to manipulation, often being activated only for special occasions by local 'power mongers'.⁹⁹ Factionalism has been accompanied by low-level violence and allegations of electoral fiddling, notably in the process of accrediting branches and delegates to vote in internal party processes. The Constitutional Court was itself called upon to intervene in ANC internal affairs prior to Mangaung, and declared invalid the election to the party's Free State Provincial Executive Committee. The Court suggested that the conduct of the election had violated the ANC's own constitution as well as the constitutional right to participate in party activity.¹⁰⁰ This judgment was a notable assertion that the constitution required certain standards to be met for intra-party democracy. The Constitution itself, unfortunately, provides very little guidance in this regard and the Constitutional Court has valiantly sought to carve out a role for itself in this essential facet of democracy. There is little evidence that it has done much though to still internal party shenanigans, although the real test will be the run-up to the next electoral conference in 2017.

Both the authoritarian tendencies of the ANC and its conflict-laden internal processes must be counted as risks for constitutional democracy in South Africa. An important part of the test facing the constitutional order is whether it can keep the authoritarian tendencies in the ANC in check.

The ANC is not the only political party in SA that comes with dubious baggage in respect of democracy. The NP now disbanded but central to constitutional negotiations, was the party of apartheid; the DP/DA is heir to a tradition of conservative liberalism that only belatedly and tentatively adopted universal suffrage; and the Inkatha Freedom Party (IFP) is the product of militaristic Zulu nationalism. Among significant newer players, the EFF carries into opposition perhaps the most authoritarian side of the ANC from which it split; its members wear berets, its leaders have military titles and its commitment to constitutional democracy appears often to be only instrumental to achieving its own goals. Ironically the Constitution's pluralist commitments were a product in part of an attempt to accommodate political forces that were not themselves obviously committed to either pluralism (in the case of the ANC and IFP) or democracy (in the case of the DP/DA and NNP).

For now, the ANC's own authoritarianism remains the biggest threat to constitutional democracy, given its dominance. Burgeoning authoritarian populist forces outside the ANC may, however, come to constitute a larger danger in the future to democracy. An emerging question for the constitutional order is how well it will be able to channel conflicts generated by new populisms and whether it will be able to continue to persuade often (and in many cases increasingly) skeptical political actors to hold true to the constitutional settlement.

One-party dominance and the party system

Why is the ANC not punished in elections for its transgressions and failures? Political scientists have debated this and do not always agree, especially on how to weigh different factors.¹⁰¹ It is easy enough, though, to record the main claims and arguments. The ANC's dominance is partly attributable to its leading role in the struggle for the liberation of population groups – black Africans narrowly, blacks, coloureds and indians more broadly – who constitute an overwhelming majority of the population (black Africans 80%, blacks, coloureds and indians 92% in 2015¹⁰²). The consistency and extent of the ANC's leadership in the overall liberation effort is contested, but various factors combined to secure huge black African support for the ANC by the end of the 1980s and early 1990s. These include the organisation's long history of struggle; success in overcoming serious rivals thanks

⁹⁹ Booyesen, 2011: 485.

¹⁰⁰ *Ramakatsa and Others v Magashule and Others* (CCT 109/12) [2012] ZACC 31.

¹⁰¹ On voting patterns and behavior in South Africa see, for example, Southall, 2001; Habib and Taylor, 2001; Habib and Naidu, 2004. See further Naidu, 2006 and Shulz-Herzenberg, 2007.

¹⁰² South Africa's population was determined to be 51.77-million by the 2011 census. Africans constituted 79.2% of the population, coloureds and whites 8.9% each and the indian/asian population 2.5% of the total (Census 2011).

mainly to international support and internal discipline; the conduct of spectacular acts of sabotage in the 1980s; a panoply of martyrs; a charismatic leadership; and its centrality to the transitional negotiations. The ANC has understandably retained prestige in the eyes of many grateful black Africans.

Success feeds on itself, and the ANC has attracted resources and enjoyed the various advantages of incumbency since 1994. Most obviously, it controls a machinery of patronage (jobs, tenders, connections). It generates money through an investment wing that fares favourably in receiving contracts from the government and friendly businesses. Unknown donors may include foreign governments and parties. The ANC has also provided benefits: to the rising black middle class in the form of state employment, affirmative action and Black Economic Empowerment; to the organized working class in the form of cozy relations with public sector unions and labour market protections; and to the black poor in the shape of benefits in kind and an incomplete social safety net. The precise connection between these benefits and ANC support remains contested, however.

Taken together, these considerations provide support for arguments that emphasise racial identity voting as well as for arguments that suggest blacks vote rationally according to their interests (or at least vote according to a rational reading of where their interests lie). Certainly the correlation between race and voting behavior remains strong, though it is not uncomplicated. It is strong in that blacks vote overwhelmingly for the ANC whilst whites vote overwhelmingly for the opposition DA, which has been disproportionately led by whites. One complication is that identifiably coloured and indian parties have not fared well; both of these racial minorities split their vote between 'black' parties and the supposedly 'white' DA. Roughly speaking, middle classes in these groups are more likely to vote ANC, working classes more likely to vote DA. The identity argument also has its limits as an account of ANC dominance: it does not explain why the ANC has so far predominated so massively over black rivals. The alternative, interest-based argument proceeds from the fact that there is still such a high correlation between race and class, giving the majority of blacks incentives to vote for the ANC (or at least 'black' parties) on both racial-identity grounds and class-interest grounds.

The class-interest point deserves further comment. A famous objection to identity-based voting is that it prevents elections from serving as contests over substantive issues and between alternative programmes. It also reduces elections to population censuses. Viewed in these terms, it cuts across ideological contestation, including on classic left-right grounds. The interest-based voting argument is that blacks, being poorer, are more likely to vote for left parties, while whites, being richer, are more likely to vote for bourgeois parties. In fact, however, most party leaders and election manifestoes in SA cluster around the centre-left of the spectrum. The DA, keen to attract votes from the black majority, is careful not to sound too gung-ho in its espousal of free markets. The ANC hews to the centre, partly because of the lack of confidence still attaching to leftwing policy alternatives in the context of capitalist globalization, and partly because the ANC leadership is in substantial measure middle class itself. The upshot is a lack of clear-cut ideological choice for the electorate, giving more scope to identity voting. At the same time the ANC has a largely poor and working class membership and a leftist lineage; to that extent left-inclined poor and working class voters are not acting irrationally in plumping for the ANC over the DA.

Left-right ideological rivalry is far from absent in SA politics, but has been largely confined to the internal political space of the ANC and the Tripartite Alliance. Cosatu and the SACP have tended to represent the left, although the former is now ideologically and organizationally split while the SACP has drawn itself close to Zuma. The long-anticipated left-right split of the ANC was indeed long forestalled by the gathering of left-leaning forces around Zuma after the eviction of the 'neo-liberal' Mbeki from the presidency. The Zuma coalition is still partly intact, despite the defection of leftwing trade unions from Cosatu and the ruling alliance. This pattern of left-right rivalry internal to the party may now be altering with the emergence, in the EFF, of a credible party to the ANC's left claiming an affinity to the thought of Marx, Fanon and Thomas Sankara. There is also talk of leftist defectors from Cosatu, currently gathered in a so-called United Front, contesting elections at a point in the future. Inter-party ideological contestation may therefore become a factor in elections in future, at least provided the EFF and other leftist cum populist breakaways remain 'pure' and do not succumb to the common South African elite temptation to opt for riches over principles.

How, if at all, does the constitutional set-up itself affect ANC dominance? The key consideration here is the constitutionally prescribed system of proportional representation, (PR), which was introduced in part to assuage white (but also Zulu-nationalist) fears of black majoritarian domination. From the point of view of representing diverse interests, this system is a success: there are low barriers to parliamentary entry and (as noted) there are a large number of parties in parliament, representing (usually only *de facto*, never explicitly) diverse racial, ethnic and

regional interests. PR, we also noted, has also enabled a high level of representation of women (operating here interactively with the ANC's voluntary gender quota).

From another point of view, though, PR has fallen short of the aims of some of those who pushed for it. In many democracies, the effect of PR is to encourage coalition governments, since it prevents the strongest party from translating its plurality of the popular vote into an absolute majority of parliamentary seats. However this effect only operates in fragmented or fairly evenly divided electorates where no one party obtains a majority of popular votes. The ANC's successive absolute popular vote majorities have ensured that it can govern alone nationally (and in most provinces most of the time). In this circumstance, arguably, South Africa's particular form of PR serves to bolster, rather than moderate, ANC dominance. The national and provincial party lists give party leaders high levels of control over parliamentarians, with arguably deleterious results for executive accountability to the legislature. It also gives the leadership leverage in enforcing the ANC's 'democratic centralism' within the party, notwithstanding the power officially vested in – and occasionally exerted by – the branches.

While PR is constitutionally prescribed, the list system is a product of statute, and so can be reformed by statutory means. There has been a lot of public dissatisfaction with the electoral system, primarily based on the perception that it does not link MPs to local constituencies. While popular sentiment appears to favour constituency voting, anything like the 'first past the post' system would give the ANC a crushing advantage, especially in competing for the black African vote. More informed reformers look to other forms of PR involving additional member PR (as practiced, in fact, in SA local government), multi-member constituencies, or both.

The constitution does little to regulate the way parties operate, though it does insist on statutory party funding, the impartiality of the Independent Electoral Commission (IEC) and a role for opposition parties in parliamentary deliberations and committees.¹⁰³ Party funding is buried in secrecy, and the Constitutional Court has failed to remedy this in a recent case.¹⁰⁴ It is widely presumed that the ANC takes advantage of funding secrecy to attract money from those seeking influence or favours, without giving the electorate a chance to assess what interests are influencing ANC policy-making. Funding secrecy is not, however, opposed by the main opposition parties. Opposition parties fear that funding transparency would expose their donors to government retaliation in awarding contracts. In accordance with a constitutional mandate¹⁰⁵, however, there *is* statutory funding for parties. This is provided on a proportional basis to parties represented in national and provincial legislatures under the Public Funding of Represented Political Parties Act.¹⁰⁶ However the funding provided under this legislation is not considered enough to counteract ANC advantage. Expanding state subsidy to parties might serve as a better remedy under current conditions, but any such notion encounters public resistance in South Africa as elsewhere.

The Constitution does insist, as indicated, on the impartiality of public organs like the electoral commission and the public broadcaster. The IEC's impartiality has generally been accepted in the past, although it has now been called into question by a Constitutional Court judgement condemning its handling of by-elections in the city of Tlokwe in 2013.¹⁰⁷ SABC election coverage has sometimes generated controversy and claims of pro-ANC bias, but informed observers judge it fair overall (if rather shallow).¹⁰⁸ Most recently, the SABC have been accused of political partisanship in banning listener call-in shows on radio in the run-up to 2016 local elections.

Participation and legitimacy

While the ANC's hold on power seems secure, there are several indicators of dissatisfaction about the operation of the political system – enough to raise questions about its current and future legitimacy.

One indicator is declining electoral turnout. The ANC has retained its large absolute majority, but (as noted earlier) of a shrinking population of active voters. This suggests possibly a high level of alienation or apathy in the

¹⁰³ In relation to the latter point, see section 57(2) of the Constitution.

¹⁰⁴ *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31. For an understanding of the complexities of the 2015 case, see van der Berg, 2015.

¹⁰⁵ Section 236 of the Constitution.

¹⁰⁶ Act 102 of 1997.

¹⁰⁷ *Kham v Electoral Commission* [2015] ZACC 37.

¹⁰⁸ The ruling party invariably gets a large plurality of SABC coverage in the election run-up, but this is partly a function of its being both the biggest and governing party. The coverage is not invariably positive. The 2014 election campaign saw controversy around the SABC pulling an opposition ad it deemed an incitement to violence against police. See Davis, 2005; Duncan, 2009; Kruger, 2012 and (on the 2014 elections) Moonda, 2014.

electorate and a fall-off in participatory democracy. Another indicator of alienation if not apathy is the very high level of popular protest in South Africa. Two kinds of ‘unrest’ have been particularly prominent. ‘Service delivery protests’ typically involve localised protests over corruption within, or poor service delivery by, municipalities. The other involves strikes by workers, usually but not always unionized, and notably in the state and mining sectors. These two types of protest often degenerate into violence. Protesters block roads, burn tires, vandalise public amenities; some strikes have seen the killing of ‘scabs’. The police sometimes respond to protest with lethal violence, resulting in deaths of protesters and strikers from live ammunition. Just recently a third form of protest, student protest over fees and conditions of university employees, has dominated the headlines. Student protests too have involved violence on both sides, but of a less lethal kind so far.

It makes sense to discuss the declining voter turnout and popular protest together. As identified by Booyesen, Von Holdt and others¹⁰⁹, ANC supporters often direct their anger at municipal and local party officials as a way of gaining small-scale improvements or leveraging factional advantages, but then go on in subsequent elections either to vote ANC or to boycott polls. They do not, in the main, choose to express dissatisfaction by casting votes for opposition parties. They challenge local notables while maintaining loyalty to the ruling party, often appealing over local heads for intervention from the centre. In other words, intense local dissatisfaction has been more likely to result in violence or voter abstention than in voting alternatives to the ANC. As Booyesen notes, the ANC is viewed by many supporters not as a party *in* parliament, but as itself a ‘parallel’ democracy or ‘parliament of the people’: one pursues grievances or power within this parliament, not by going outside it.¹¹⁰ The operation of this effect limits the capacity of the electoral system to punish the incumbent party for governance failures. At the same time it has helped in an odd way to preserve system stability overall. As long as the ANC continues to contain social unrest within itself, the party can serve as a stabilizing factor on the political scene. The ANC has employed various tricks to absorb shocks and release pressures. ANC leaders, including the President, have often visited protest sites to issue reassurances of improvement. Changes in local and national leadership enable the party to regenerate legitimacy, mimicking some of the effects of electoral change.

This shock-absorbing quality may be eroding. Anti-ANC sentiment is heard quite often in protests and not only from far-left activists. The EFF now provides a serious challenge to the ANC from the populist left. It has become a credible repository for the votes of dissatisfied blacks, especially in Gauteng and the northern provinces. In the first national election it contested, in 2014, the EFF gained a respectable but not earth-shaking 6%. But its rise coincides with the growing strength of the DA, now under a credible black African leader. There is a significant chance that the ANC may lose absolute majorities in major metropolitan areas in local elections scheduled for 2016. As of now there is little certainty about how the ANC will respond to significant electoral losses. The ‘nightmare scenario’ is that it will call upon its supporters to destabilise legitimately elected governments; the ‘hopeful scenario’ is that the party has internalised democratic values and will accept its role in opposition as it has done in the Western Cape where it lost power in the provincial parliament. The ANC is also not in control of all local governments and has learnt to function as an opposition in these areas.

Whatever happens in local elections, there is a widespread perception that South African politics is flying into turbulence. If that is so, the constitutional order awaits new tests.

4.7. Concluding comments

Democratic performance and the Ginsburg criteria

We should touch again on the Ginsburg criteria, now that we have provided an overall descriptive and qualitative assessment of the operation of central democratic organs.

The constitution’s legitimacy is far from unquestioned, as our Gauteng-based survey shows.¹¹¹ Politicians themselves, in the ANC and to its left, are wont to cast the constitution as an unfortunate historical compromise

¹⁰⁹ Booyesen, 2011: chapter 4; Von Holdt, 2011.

¹¹⁰ Booyesen, 2011: 5, 486.

¹¹¹ Democracy is still held in high esteem among Gauteng residents (72% agree or strongly agree that it is the best system of government for South Africa) but 75% - a majority in all race groups – would favour rewriting the Constitution if it were possible. Only 47% believe that politicians stick to the rules of the Constitution. See Catalyst 2015. See also the discussion of ‘representation’ above and Wale/IJR 2014, p. 20. For an earlier survey of the national-level legitimacy of democracy and state institutions see Daniel, Southall and Dippenaar, 2006.

rather than as a progressive settlement.¹¹² The claim that Mandela was a 'sell-out' is in wide political circulation among radicals. Some argue that the state is on the brink of a legitimacy crisis amid student protests, corruption allegations and economic stagnation.¹¹³ Elements of the new student movement romanticise violence as a cleansing, redemptive force. There is certainly a great deal of conflict in society that is not channeled through peaceful democratic processes – service delivery protests, xenophobic pogroms, strikes, student protests and even opposition party rowdiness in the parliamentary chamber. These conflicts have been contained so far – in the sense of being prevented from magnifying into democracy-threatening civil and political conflict – in large measure by the hegemonic role of the ANC itself, though this situation carries its own serious costs for accountable and effective governance. On the plus side, too, election results have generally been uncontested¹¹⁴, though the legitimacy of the electoral system is under scrutiny.

Clearly agency costs of democratic governance are high, attested to by widespread corruption, maladministration and incompetence. Parliamentary democracy has been able to play only a limited role in curtailing this – its limitations illustrated by sluggish and tendentious responses from the executive to probing around the Nkandla expenditure – and in the case of 'Travelgate', parliament participated in this corruption itself. MPs are seen by many as too acquiescent to the executive and as too apathetic to play a vigorous role in pushing for more effective governance. An upshot of all this is, of course, reduced output of public goods, manifested in numerous policy failures and inefficiencies and in inchoate economic management.

Does the Constitution make a difference?

At one level, the Constitution makes all the difference when it comes to the design and operation of democratic institutions, given that the current architecture thereof follows the blueprint laid down by the constitution. Statutory design innovations must themselves also remain within constitutional parameters.

But beyond initial design, the Constitution can, as it were, reassert its presence through courts, which have been brought into the resolution of a number of controversies around the operation of democratic organs, including controversies around voting qualification, party funding and internal party democracy (a number of these court cases have been referred to above). Courts as well as chapter 9 institutions have played a role in protecting political rights. The judiciary certainly remains in the background as a potential port of call should the government, for example, adopt too restrictive an approach to information access and media regulation. Court interventions sometimes make a decisive difference (in terms, for instance, of who can vote) but some other interventions, in favour of limiting executive discretion or disqualifying rigged elections in the Free State ANC, have had a less demonstrable longer-term impact on how politics is conducted.

The Constitution may also influence democratic politics through the affect that its values have on public attitudes and expectations. Constitutional rights have certainly figured prominently in the discourses of human rights organisations campaigning for changes. They may have some effect on public opinion and values too, a dynamic that has yet to be fully investigated. Our own and other surveys of public constitutional attitudes reveal a mixed picture with respect to public knowledge of and fealty to constitutional values.¹¹⁵

¹¹² See for example the comments of Deputy Minister Ngoako Ramatlhodi (cited in February and Pienaar 2014: 27, 30). Relevant here, too, is government questioning of the independence and powers of the judiciary (February and Pienaar, 2014: 34). It should be noted that an annual review of the constitution is mandated by section 45(1) (c) of the constitution itself. Every year a joint Constitutional Review Committee receives submissions from citizens regarding proposed constitutional amendments. The committee's own minutes suggest that it struggles to process these submissions timeously and to clarify its mandate and powers. Its work has not so far had much apparent impact. See for example Parliament of the RSA: 2014 at <https://pmg.org.za/committee-meeting/17032/>.

¹¹³ Suttner, 2015.

¹¹⁴ Our Gauteng survey has 80% of respondents agreeing that they would accept the result of a free and fair election, even if the party they voted for loses. Catalyst, 2015.

¹¹⁵ Thus in our report, '[t]he responses to only 7 of the 18 knowledge items were generally correct. The differences between the knowledge levels of the race groups are weak to moderate. The overall score for whites (47% correct responses) is slightly lower than for the other race groups (52% for blacks, and 53% for both coloureds and indians)'. SAIFAC/UJ 2016 (Executive Summary).

Conclusions on performance and recommendations

South Africa has a functional representative democracy at national level: in many ways, there has been, in the main, thin compliance with the requirements of the constitution. On the other hand, there are a number of qualitative weaknesses when evaluating thick compliance which is leading to increasing dissatisfaction with the way the democratic order operates. Unrest from streets to parliament suggests that many feel under-represented, and our research on Gauteng underlines this (see Appendix 1).

There is, as they say, no ‘magic bullet’ here. What one does find is a growing consensus around the need for reform to the electoral system. Much of it, at least on the public or popular side, involves idle talk of ‘scrapping PR’. But scrapping proportional representation would be disastrous for democracy, assuming that a competitive party system is important to democratic health. While parties with predominantly white, coloured and indian constituencies would remain competitive, parties competing with the ANC for the black African vote would, with present voting configurations, be crushed on a constituency by constituency basis, boosting the ANC and one-party dominance with its accompanying ills. More informed reform discussions and proposals point to a modified form of PR – an additional member system, a multimember constituency system or a combination of both.¹¹⁶ Although the operation of an additional member system already in local government suggests that a reformed PR system will be no panacea – local politics is embroiled in a crisis of legitimacy itself – it would probably enhance the public’s sense of being directly elected (via geographic constituencies) without sacrificing multi-party diversity. It would also give at least a portion of MPs a separate mandate, affording them more independence from their parties; in the case of the ANC (or future ruling parties or coalitions) this could strengthen the willingness and power of MPs to confront the executive. For these reasons, we recommend a PR system that incorporates an element of direct election of MPs from geographic constituencies. In retrospect, it might have been helpful if the constitution had specified not merely a proportional system but a system that combined a high level of proportionality with a geographic constituency element.

In the meantime, more radical measures could be taken to improve the effectiveness of MP constituency offices and other mechanisms of public contact. Concrete suggestions in this regard were made by the Report of the Independent Panel Assessment of Parliament, 2009. They include improving information available to the public and strengthening the accountability of parties for the way they spend money allocated to constituency work. The evidence is that these recommendations have not been implemented.¹¹⁷

Other measures that might strengthen executive accountability to parliament include giving more teeth to portfolio committees, including powers to impose penalties on executive members who do not respect summonses as well as rules that require chairpersonship of committees by opposition MPs in certain instances going beyond the public accounts committee (perhaps as part of a rotation system of some kind). Parliament has itself periodically drawn up or commissioned investigations into ways of enhancing its functioning, including its capacity for overseeing the executive and limiting its discretionary powers. Large numbers of valuable detailed proposals have emerged from these efforts, but the follow-up has been uneven. We recommend that parliament conduct a fresh review to establish, for example, the extent to which the 2009 Report of the Independent Panel Assessment of Parliament has been attended to during the intervening years.¹¹⁸

Parliament is also going to have to accommodate a more challenging style of opposition in future, including (going by recent precedent), marches by aggrieved citizens onto the parliamentary precinct, disruption of proceedings by opposition MPs and rumbustious protests by parliamentary support staff. Dealing with these challenges will require clarified rules of engagement, including measures to give opposition MPs and media observers a sense that they are being treated fairly and allowed to do their jobs. There will have to be firmer rules around Speaker impartiality, an entrenched right to broadcast commentary from parliamentary chambers, clarity about which security forces can intervene when, about how close protesters can approach, and about security measures to protect parliamentary premises.

¹¹⁶ Van Zyl Slabbert Commission; Selfe, 2013.

¹¹⁷ *City Press*, 2014.

¹¹⁸ This panel recommended (for example) establishing a ‘scrutiny mechanism to oversee delegated legislation’ (33), more conferral between committees to ensure a more coordinated oversight of the executive, reviews of the impact of legislation, enhancement of the skills and capacities of MPs, enactment of outstanding constitutionally required legislation, development of an MP attendance policy, improvement of the quality of on-site inspection reports, monitoring parliamentary responses to recommendations for improvements arising from its reports, improvements in research capacity, clarification of the roles, responsibilities and ethical obligations of MPs, and mechanisms to ‘ensure that the Executive is held effectively to account for unanswered questions’ (52).

Both parliament and the executive must do and be seen to be doing more to curb corruption. A more strongly independent investigative and prosecutorial machinery is recommended in Chapter 8. A perception that both executive members and parliamentarians allow themselves too many perks, and display their authority too brazenly (as in the so-called 'blue-light brigades'), will have to be addressed if the legitimacy of democratic institutions is to be secured. Budget constraints may anyway necessitate a reining in of costs in the near future.

There is considerable national discussion around party funding and whether it should be transparent. It is important to avoid unintended effects here. Mandatory disclosure of funders could benefit parties in power more than opposition parties, since business donors might fear losing out on government largesse if they are seen to be supporting opponents of the government. A better solution would be a beefed up system of state subsidy to parliamentary parties, but this will be a tough case to make in a situation (as is the case currently) of fiscal constraint and public skepticism about political parties. An alternative approach is a cap on election expenditure.

Internal party democracy should itself, arguably, be a matter of constitutional interest. The Constitutional Court has found grounds for intervening in an internal ANC election dispute, while also concerning itself with the ANC's observance of its own constitution's rules. There are dangers in the state becoming involved in the internal matters of a voluntary association, but some such involvement may well be as a response to deficits in popular participation and representation and to factional conflicts which threaten the stability of the wider political system. The party is anyway no ordinary voluntary association and has a special role in the constitutional order; it straddles the state-private divide. The Kenyan constitution may offer useful guidance in this regard. It includes a whole section regulating political parties whose basic requirements include that they should have democratically elected governing bodies and uphold constitutional values. The requirement that they not be organized on ethnic or regional grounds addresses specifically Kenyan concerns and is less urgent in South Africa.¹¹⁹

The weakness of bodies designed specifically to enhance participation might suggest a need for a stronger participatory commitment in the constitution. As indicated, improving participation should be understood as primarily about how to make representative institutions themselves more participatory, irrespective of the scale on which they operate; participatory organs must themselves, in turn, be genuinely representative and not, for example, privilege activists or the better organised. We would hesitate, though, to recommend that specific participatory models be constitutionally entrenched, or that participatory bodies be given more authoritative power as a constitutional requirement. Matters such as these are probably best left to democratic experimentation guided by legislation.

The democratic rationale of the NCOP is rather murky. It is bound up with a view of South Africa as quasi-federal. The system of multi-level cooperative governance may require such an organ at its apex. What is not clear is why geographical interests should have pride of place as the basis of a second house as opposed to other, for example, functional, cultural, community or professional interests. Unlike the United States, there exist few pre-state territorial entities invested in their own autonomy or identity; with the exception of the Free State and KwaZulu-Natal, all were sliced up and amalgamated into new ahistorical functional provinces. There is in any case already an element of provincial representation built into the current list system in the National Assembly. Geography does possess advantages; it resolves issues of inclusion and proportionality of representation and brings simplicity. On the other hand, a democratically ambitious and innovative constitution might have sought incorporation of other interests. We simply flag this for further discussion.

Overall, we would argue that the design of central democratic institutions is pretty sound. There are improvements that can be made, as indicated in preceding paragraphs, but it is unlikely that any of these would fundamentally alter national political equations. Unrest and dissatisfaction is driven in part, to be sure, by a sense that citizens are not adequately represented by parties and elected leaders; but much of what is driving the anger is located outside the realm of constitutional design, including, for example, in slower economic growth, massive unemployment, persistent racialised inequalities, incapacity in service delivery, raised expectations fuelled by populism and promises, and the precariousness of working and middle class incomes due to debt, amongst other factors. These are precisely the circumstances of scarcity and friction that a good democracy should be able to manage. So far the friction is largely being kept within bounds, but probably more because of continuing ANC legitimacy and clout than effective constitutional design. Context remains crucial.

¹¹⁹ Constitution of Kenya 91: Basic Requirements for Political Parties. Available at <http://www.klrc.go.ke/index.php/constitution-of-kenya/172-chapter-seven-representation-of-the-people/part-3-political-parties/258-91-basic-requirements-for-political-parties>.

The state has a role in addressing all the above maladies located in the wider society and economy, but its role here revolves around establishing coherent and effective policy. The National Development Plan is intended to ensure both, but remains contested on the left. The question of appropriate economic and social policy mixes falls outside our purview. Political will is also needed. We do not believe that the current constitutional design itself holds back effective economic and social governance, contrary to some critics, especially on the left (see eg Chapter 3 on the property clause); and certainly the design of central representative-democratic institutions does not do so in any fundamental way. Still, some of the improvements listed above – more stringent scrutiny of the executive, securing more MP independence – might well make a small contribution to securing democracy’s promised policy outputs.

Regarding political rights supportive of democracy, one matter that clearly needs to be addressed is the policing of protests, specifically ensuring that legal public assembly is permitted under more circumstances and policed less violently.

Freedom of information is a big issue for both the state and civil society, and it is crucial that the final form of current legislation to protect state secrets should not be restrictive. Current obstructive approaches by state institutions to complying with requests for access to information should be investigated and measures adopted to address this unacceptable situation.

In our view media self-regulation, though imperfect, operates sufficiently well, and should be strengthened where necessary by media organisations themselves; we strongly oppose the proposed Media Appeals Tribunal, which gives the state a hand in media regulation. Some argue that it would be unconstitutional. The state does have a useful potential role, on the other hand, in ensuring media diversity – for example, enabling support for community papers and preventing excessive concentration of media ownership – but it is crucial that this be handled impartially. The ruling party has been accused of favouring certain publishing houses in terms of advertising and of using connections to establish sympathetic print and broadcast media. If true, such abuses of power must be addressed. This is also a particular problem given the ruling party’s already substantial de facto influence on the public broadcaster, the SABC.

Civil society will continue to be crucial to informed and accountable governance, and any measures to curtail its autonomy would be most worrisome.

All in all, in 20 years, South Africa has made significant progress towards developing a democratic system of government. Many institutions still remain rather fragile and the depth of the commitment to democracy remains to be tested with increasing electoral opposition. Certain features of the institutional design could be reformed hopefully so as better to achieve the very goals that a democratic system of governance aims at.

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