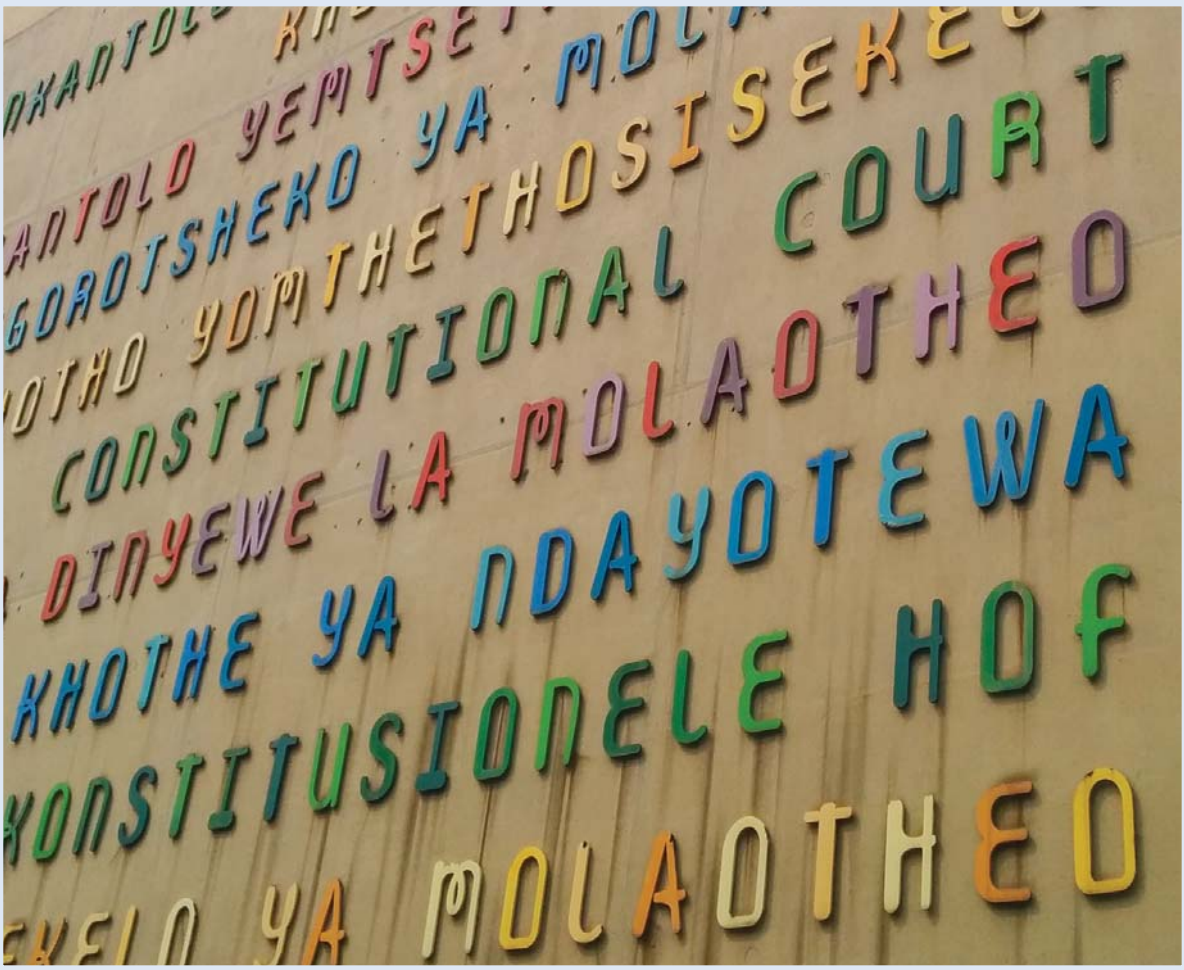
Assessing the Performance of the South African Constitution



Assessing the Performance of the South African Constitution

Assessing the Performance of the South African Constitution

Contributing authors
David Bilchitz
Daryl Glaser
Andrew Konstant
Linette Du Toit
Khomotso Moshikaro
Merle Werbeloff

International IDEA resources on constitution-building processes

International IDEA
Strömsborg
SE-103 34, STOCKHOLM
SWEDEN
Tel: +46 8 698 37 00, fax: +46 8 20 24 22
Email: info@idea.int
Website: www.idea.int

Graphic design: Turbo Design
Cover image: The entrance to South Africa's Constitutional Court (Flickr/ Africa Deluxe Tours)
ISBN: 978-91-7671-053-1

Contents

Acknowledgements

This report was prepared for International IDEA by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a Centre of the University of Johannesburg. A project such as this could not take place without the efforts of several individuals who have often gone beyond the call of duty. Andrew Konstant, Linette Du Toit, and Khomotso Moshikaro were the key researchers at SAIFAC during 2015 responsible for much of the detailed research and writing. Rita Ozoemena, a post-doctoral fellow at SAIFAC, conducted some preliminary research. Raisa Cachalia joined SAIFAC in 2016 and has helped immensely with the finalization and technical finishing of the report. Professor Daryl Glaser, a consultant to the project, has added a valuable political science perspective to the team and been involved in research and writing. Professor David Bilchitz was the team leader involved in some of the written content and research and the review of all the chapters of the longer report. Catalyst Consulting was contracted to conduct the survey. We thank the team from Catalyst, consisting of Mike Charnas, Lynette Benjamin and Merle Werbeloff, who authored the statistical report. We would also like to thank Sumit Bisarya from International IDEA and Tom Ginsburg from the University of Chicago, who provided oversight of the project, reviewed the documents and provided important critical comments that have helped to improve the report.

Abbreviations

ANC	African National Congress
CCMA	Commission for Conciliation, Mediation and Arbitration
CODESA	Congress for a Democratic South Africa
CP	Constitutional Principles
IFP	Inkatha Freedom Party
JSC	Judicial Services Commission
NCOP	National Council of the Provinces
NPA	National Prosecuting Authority
PAC	Pan Africanist Congress
PR	Proportional representation
SAIFAC	South African Institute for Advanced Constitutional, Public, Human Rights and International Law
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front

Executive Summary

This report assesses the performance of the South African Constitution over the past 20 years. The idea that the performance of a constitution can be evaluated is a relatively recent one. With the growth and development of constitution making over the past three decades, an understanding of what constitutions seek to achieve and how they achieve has become increasingly important. Are there better or worse ways of drafting constitutions for the purposes of achieving desired outcomes? How are we to understand the interaction between particular provisions or elements of a constitution and the concrete realities that unfold after the moment of constitution drafting?

This report—like the full-length study on which it is based—focuses on key tensions and stress points that have arisen in the past 20 years within the South African political community as a method of analysing some of the key goals of the Constitution and whether they have been met. It draws on case law, reports by the government and non-governmental organizations, and other empirical data.

As part of the project, an empirical survey was undertaken to provide an understanding of the attitudes of members of the public in the most populous province of South Africa, Gauteng, to a number of key dimensions of the Constitution. The survey provided empirical data that enabled the assessment to take place.

Methodology: evaluating internal and external goals

This report pilots a guiding methodology for assessing constitutional performance. The methodology outlines two perspectives from which the performance of a constitution can be engaged: an 'internal' one that seeks to evaluate the performance of the constitution against its own self-declared goals; and an 'external' one that evaluates the constitution against a set of

general standards and normative criteria about what any good constitution should seek to achieve.

The project team identified two broad internal goals that the Constitution seeks to achieve. The first involves understanding the Constitution as a peace treaty that was designed to avert a civil war and enable a unified South African polity to be established. The second concerns the fundamental transformation of South African society, seeking to redress the key harms of the past and develop the society into a future founded on social justice. We divided this transformative goal into four sub-goals:

1. the change was designed to take place through legal processes and to develop legal doctrines so as to enhance accountability and reason-giving;

2. the entire political system was to be overhauled so as to establish a functioning, democratic system of government responsive to all individuals in the polity;

3. a unified state was designed to be established across the whole territory of South Africa whilst recognizing, and indeed, celebrating the diversity of its peoples; and

4. an ambitious vision was outlined to achieve social justice and, in particular, to advance the economic well-being of all who live within South Africa's borders.

The second perspective is 'external' and evaluates the Constitution against a set of general standards and normative criteria about what any good constitution 'should' seek to achieve. Ginsburg and Huq propose four external criteria against which to evaluate the performance of a constitution which are utilized in this report:

1. Constitutions are sources of legitimacy. One of key criteria in determining the performance of a constitution is whether or not it succeeds in creating legitimate structures and institutions.

2. Constitutions ought to succeed in channelling the inevitable conflict within a society between competing forces and ideologies into formal political institutions.

3. Constitutions ought to ensure that institutions and representatives act on behalf of the people and not in a self-serving manner, thereby limiting agency costs.

4. Constitutional structures are required in order to address the provision of public goods which cannot be provided by citizens alone.

The methodology initially proposed sought to begin with an internal evaluation of a constitution against its own goals and thereafter to consider its performance against external criteria. In the South African context, this approach creates difficulty as the internal criteria themselves are extremely ambitious and often include some of the external criteria. The project team consequently adapted the proposed methodology and adopted a five-step approach towards evaluating the performance of the South African Constitution:

1. analysing the Constitution and the particular aspects of the constitutional architecture under consideration in order to determine its internal goals;

2. engaging in an analysis of the relationship between internal and external goals;

3. considering possible design flaws in the constitutional architecture itself, whereby institutions and provisions were not well-suited to achieve their ends;

4. evaluating the extent to which the goals of the Constitution have been achieved in particular areas; and

5. making recommendations in cases when a different institutional design could potentially have made a difference in areas of constitutional underperformance.

The full report engages in detail with six key facets of South Africa's constitutional design: (a) fundamental rights; (b) democratic governance, including the legislature and the executive; (c) the judiciary; (d) independent Chapter 9 institutions that support democracy; (e) multi-level governance; and (f) the security services.[1] This report provides a summary of the analysis in relation to performance in these six areas as well as a number of recommendations as to how to improve performance. It is important to recognize at the outset that the methodology at various levels requires a number of interpretive judgements to be made. Where such judgements are made, there has been a justification provided which it is hoped can at least be recognized as being plausible by all members of the political community even if they disagree with the ultimate conclusion.

[1] The full report is available on ConstitutionNet: <http://www.constitutionnet.org/vl/item/report-assessment-south-africa>.

Key findings

Thin compliance

One of the key findings of the research is that there has largely been 'thin' compliance with the requirements of the South African Constitution. The African National Congress (ANC), as the dominant party, was able to push for the constitution it desired. It was constrained by the Constitutional Principles proposed but unanimously supported the adoption of the Constitution. Most of the opposition parties supported it too. As a result, there was strong political backing for the final constitutional text and, hence, it is not surprising that laws and policies have been passed which are consonant with its tenets. It should be recognized that the change in the legislative and policy architecture of the new South Africa is highly significant. A number of key pieces of legislation were passed to give effect to the constitutional ethos. All the institutions envisaged in the Constitution have been established and that, in itself, is noteworthy. While their operation is variable, at least some of them have played an important constitutional role in helping to advance the goals of the new order.

Thick compliance

In terms of compliance with the goals of the Constitution in a fuller sense, the picture is more mixed. On the positive side, South Africa has a democratic system of government and elections are generally regarded as free and fair. Greater political competition has arisen over time and there is a general acceptance of opposition. The judiciary is generally regarded as independent and frequently strikes down actions of the legislature and executive. Usually, these orders are complied with and respected. There are Chapter 9 institutions which have achieved remarkable success, although to some extent this has been contingent on the personalities who hold positions in them. The various tiers of government have been developed and function to a lesser or greater extent across the country.

On the negative side, it appears that the institutions have often not fully achieved the objectives of the new order. The one-party dominance of the ANC has led to a worrying capture of democratic institutions by the ruling party and the constitution has not been able to insulate many institutions from heavily political appointments. There is an increasing sense of disaffection from politics by all South Africans. There is widespread corruption or a perception of widespread corruption around many institutions of the state including the police. Political interference has been rife with the National Prosecuting Authority. The entitlements guaranteed by the constitution in

areas such as housing, health care and education are still a long way from being realized and the government's ability to provide public goods is in doubt, generating massive service delivery protests.

The difficulty of the task set by the Constitution should not be underestimated. It involved fundamentally changing a society that was undemocratic and based on a racial caste system, to one that is fully democratic and substantively equal. It was unlikely to fully achieve its aims in 20 years. The Constitution is also a legal instrument that seeks to bring about deep social change. The Constitution can attempt to change behaviour and thus attempt to shift people's attitudes but the very limits of the reach of the state mean that it is impossible to force a change in social attitudes. Some of the malaise in constitutional performance may well be linked to the dominance of the ANC. Without an effective electoral threat, which has only become real more recently, the party has lacked the usual democratic constraints on its operation. It has been able to push through appointments in key institutions and to provide cover for individuals who failed to perform in their jobs, which, in turn, was a recipe for corruption.

Performance in relation to abstract internal goals

Peace treaty

The South African Constitution succeeded in addressing one of the key dramas of the time in the 1990s in finding a way to avert a civil war and create a new social compact. That compact has largely held and balanced the interests of diverse groups over the past 20 years. As South Africa faces more difficult economic conditions and the discontent with the current ruling party grows, there are signs that the compact may not hold in its entirety. The worry is that if key features of the constitutional compact unravel, it may lead to serious instability.

Transformation

A key feature of the South African Constitution is its commitment to fundamental change from the old order to the new. That change had both backward-looking and forward-looking aspects. We divided our treatment of this important topic into a number of sub-goals.

Law-governed change and accountability

Formally, South Africa has set up a society governed by law and a requirement for reasoned decisions provided by public authorities. Substantively, there is often an obstructive approach exhibited by the key institutions of law enforcement and an attempt at political control over decisions that should be independent. While the law may exist, in reality it is often not complied with or an obstructive attitude is taken towards compliance with it. One of the difficult conclusions we have reached concerns the fact that many good laws might exist on paper, but their effect on behaviour is not always clear.

Democracy

South Africa has succeeded in establishing a democratic system of governance. The participatory aspects of the democracy could be improved and there is a perception that it is difficult for citizens to connect with democratic structures, which may eventually undermine them. Elections are perceived as free and fair but single party dominance has undermined some of the key checks in the democratic system.

A united state that is diverse

South Africa has by and large succeeded in establishing a unified state. The Constitution has provided unifying symbols such as a flag and a new national anthem. The South African model also recognizes the diversity of those within the state: heterogeneity is celebrated and a large measure of freedom is accorded to individuals, but some of these measures have been difficult to implement and make meaningful.

Achieving social justice

There is no doubt that South African society has changed significantly since the advent of the Constitution. Steps have been taken to redress and reform, such as the establishment of a Truth and Reconciliation Commission, the adoption of a property clause that expressly recognizes land reform and the taking of positive measures to promote equality and to make unfair discrimination more costly. Forward-looking steps were taken through the recognition of socio-economic rights and these have to some extent been attended to. At the same time, however, progress has been patchy and inadequate. The Constitution has not eradicated prejudice, many South Africans still suffer absolute poverty and relative inequality has grown since the advent of constitutional democracy. South Africa remains in a state of flux and the need for more speedy progress is likely to become urgent.

Performance in relation to external goals

Legitimacy

The democratic system in South Africa has been accepted by most people in the society as reflecting the will of the populace. Court orders are generally accepted by other branches of government and the people. The spectre of minority rule has disappeared, which is a huge achievement. At the same time, the results of our survey explain much of the discontent and alienation often expressed in South African society at present and suggest that the legitimacy of many institutions is increasingly being questioned. Particularly worrying is the fact that individuals experience such difficulty in participating in constitutional institutions.

Channelling of conflict

The constitutional order was successful in channelling the central tension that existed at the time of drafting into legal structures. Constitutional structures have been set up and used in other social conflicts. Nonetheless, there is an increasing sense that individuals need to go outside these structures to make political gains. The protest laws have not helped to create a culture of non-violent protest.

Agency costs

The failure to include an independent anti-corruption authority in the constitution is a clear flaw in the document. There have been subsequent attempts at political interference in the security services dealing with corruption. The federal structure has created a vast bureaucracy and increased opportunities for corrupt practices. The capture of democratic institutions by a dominant party has increased the opportunity for agency costs. Some of the structures set up by the Constitution have helped to plug some of these gaps but they have not been able to prevent many of the agency costs attendant on corruption.

Public goods

The government has instituted numerous programmes to provide the public goods that flow from its constitutional commitments. These commitments have also been used to correct policy failures and prevent reductions in the provision of certain public goods. At the same time, government implementation of policies on public goods has been uneven and often failed to deliver, resulting in discontent. In particular, there is an increasing unhappiness with the manner in which the economy is being run.

1. Introduction

1. Introduction

David Bilchitz

About this project

In February 2014 the International Institute for Democracy and Electoral Assistance (International IDEA) commissioned the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a Centre of the University of Johannesburg, to write a report on the performance of the South African Constitution over the past 20 years, and to pilot a proposed guiding methodology for assessing constitutional performance, including providing feedback and suggesting modifications.

The resulting report was large and ambitious, covering the main aspects of the South African constitutional architecture to achieve an overall picture of constitutional performance. Even so, it was only possible to address some topics in a cursory manner, while attempting to focus on particular areas in more detail.

Structure of this report

The structure of this report is as follows. Chapter 1 continues by outlining the methodology employed in the assessment. Chapter 2 discusses the determining of the key internal goals of the South African Constitution. Chapter 3 evaluates the performance of the Constitution against the internal goals identified as well as four external goals in a broad over-arching manner that takes account of the more detailed discussion in the full report. Chapter 4 presents conclusions and key recommendations on areas of under-performance and on improving constitutional performance. The Annex contains a summary of the results of a survey that was commissioned by SAIFAC to understand the attitudes of individuals living in the most populous province of South Africa, Gauteng, towards the Constitution.

The full report engages in detail with six key facets of South Africa's constitutional design: (a) fundamental rights; (b) democratic governance, including the legislature and the executive; (c) the judiciary; (d) independent Chapter 9 institutions that support democracy; (e) multi-level governance; and (f) the security services.[2]

Methodology: the performance of a constitution

The notion of the performance of a constitution is itself contested: What does it mean for a constitution to perform? How can this be evaluated? These are some of the difficult questions that this project seeks to engage. This project sought to avoid becoming mired in theoretical controversies alone, however, and aimed to establish a type of 'reflective equilibrium' between a theoretical understanding of performance and a practical engagement with the particular South African constitutional context (Rawls 1971) so that each aspect might illuminate the other.

The idea that the performance of a constitution can be evaluated is a relatively recent one. With the growth and development of constitution making over the past three decades, an understanding of what constitutions seek to achieve and how they achieve has become increasingly important. Are there better or worse ways of drafting constitutions for the purposes of achieving desired outcomes? How are we to understand the interaction between particular provisions or elements of a constitution and the concrete realities that unfold after the moment of constitution drafting?

In order to engage with these questions in the South African context, International IDEA provided a methodology, 'Evaluating Constitutional Implementation', drafted by Professor Tom Ginsburg, which drew on his work with Professor Aziz Huq to outline two perspectives from which the performance of a constitution can be considered. The first perspective is an 'internal' one that seeks to evaluate the performance of a constitution against its own self-declared goals. Constitutions contain various provisions and requirements. This perspective involves evaluating whether these requirements have been complied with. The problem is that, assessed from this perspective alone, a constitution might perform well on its own terms and yet be severely flawed when considered against normative criteria concerning what constitutes a good political community.

In recognition of this fact, the second perspective, which is an 'external' one,

[2] The full report is available on ConstitutionNet: <http://www.constitutionnet.org/vl/item/report-assessment-south-africa>.

evaluates constitutions against a set of general objective standards about what constitutions should do. Of course, the difficulty here is in determining what external standards should be used to evaluate a constitution. Professor Yash Ghai identifies 10 criteria against which to evaluate successful constitutions (Ghai 2010). For instance, has a particular constitution established clear criteria for membership of a political community? Has it created a state monopoly on the legitimate use of force? Has it provided for the participation of citizens in the affairs of the state? Clearly, any external standard must be justified in terms of a particular set of normative assumptions about the purpose of constitutions, whether that be to create social stability, maintain a system of democracy or achieve fundamental rights (Huq 2015: 3).

Ginsburg proposes four external criteria against which to evaluate the performance of a constitution:

1. *Legitimacy*: a successful state requires a level of legitimacy from the general public in order to function effectively. Since constitutions can be important sources of such legitimacy, one of the key indicators of performance is whether they succeed in creating legitimate structures and institutions.

2. *Channelling political conflict: all* societies contain a large measure of disagreement by virtue of their inclusion of a range of different individuals. The key question is whether constitutions succeed in channelling such disagreement into formal political institutions and avoid, for instance, violent eruptions in the political community. It is also important to evaluate whether the constitutional provisions exacerbate existing political tensions.

3. *Limiting agency costs*: a key goal of constitutionalism, according to Ginsburg, is to ensure that institutions and representatives act on behalf of the people and in a manner that is not self-serving. Ginsburg refers to the notion of agency costs, when government officials act on their own behalf or do not work at all, which raises questions about whether officials respect the independence of government agencies where such independence threatens their personal self-interest. One such example is corruption, which involves officials acting in their own interests rather than for the benefit of the wider political community.

4. *Creating public goods*: One of the functions of the government is to provide that which cannot be provided by citizens alone. Goods such as national security, economic development, large-scale infrastructure

projects and environmental protection all fall within this category. The relationship between the constitutional structure and the provision of these public goods warrants investigation.

Ginsburg proposes the use of a combination of internal and external criteria to evaluate the performance of a constitution, beginning with the internal and then moving on to an external evaluation. In the South African context, there are difficulties with this approach, since the internal criteria are extremely ambitious and often include external criteria as well. After engaging with the Ginsburg approach, and its relevance to the peculiar South African context, members of the consulting team adopted the methodology set out in steps 1–5 below. It also incorporates some of the most recent thinking on the topic of constitutional performance presented at a workshop at the University of Chicago in April 2015.

Step 1: Analysing internal goals and thematic clusters

The first step involves a detailed analysis of the Constitution of the Republic of South Africa and the internal goals it seeks to achieve. It is important to recognize at the outset that this is not a value-neutral project but rather one that requires acts of interpretation of the values and purposes of the Constitution (Nussbaum 2015). Moreover, one of the difficulties in this area is that constitutions operate at multiple levels: there are many abstract provisions expressing a commitment to certain values as well as concrete ones, providing, for instance, that 'the National Assembly comprises no fewer than 350 and no more than 400 women and men' (section 46(1)). It would be impossible, therefore, for this report to engage in a detailed analysis of the goal of every specific provision in the Constitution.

The analysis in Chapter 2 seeks to capture, at a high level, some of the key goals of the Constitution in the light of South Africa's history. The Constitution can be seen as a peace treaty that enabled a unified South African polity to be established. It also sets up a basic legal structure and establishes the contours of democratic government, and has major 'transformative goals', such as bringing about fundamental changes in the racial structure of South African society and providing a clear framework within which to improve the economic position of those who were previously disadvantaged (Klare 1998). In this Chapter, we also consider particular provisions and how they connect with these abstract goals. For instance, provisions on citizenship, the flag and the anthem aim to create a common national identity in South Africa—a difficult task given the historical divisions that have existed for so long. The Constitution also speaks to a particular notion of how that national

identity will be conceptualized: it does not seek to create homogeneity but celebrates the full diversity of the country by, for instance, recognizing 11 official languages. We also engage with how other provisions connect with the goal of establishing a common national identity while also celebrating diversity.

Having outlined these broad abstract goals, it is important to provide some specificity as to the goals of the Constitution in key areas. The research examines in detail key features of the South African constitutional design: rights, democracy, the judiciary, the independent institutions in chapter nine of the Constitution, the multi-level governance structures and the security services. Each feature is considered in the context of the historical background and the internal goals particular to that area. While there may be some overlap, this approach attempts to facilitate linkages between the broad abstract goals of the constitutional order and the more specific goals identified.

Step 2: Analysing the relationship between internal and external goals

We then analysed the relationship between the internal constitutional goals identified in Chapter 2 and the external goals contained in the Ginsburg methodology. Although many of the external goals are reflected in the internal goals of the Constitution, by specifically highlighting Ginsburg's four goals, we hope to facilitate a deeper process of 'thinking through' how the Constitution envisages the achievement of these goals.

Step 3: Identifying design flaws

Having gained an idea of the goals against which performance can be assessed, it was necessary to assess the performance of the Constitution against these goals. Step 3, which is intimately connected to Step 4, involves considering possible design flaws in the constitutional architecture itself, whereby institutions and provisions were never well-suited to achieving their ends.

First, we engaged in an evaluation of the goals and their coherence. In some cases, the need to delve deeply into this question was limited. However, where we identified a clear tension between a centralizing, control-based developmental agenda and the federal elements of the South African Constitution, engaging with this inherent tension provided some understanding of the reasons for the under-performance of certain of South Africa's governmental institutions.

Second, it was necessary to evaluate the institutional structures set up by the Constitution against the goals that it seeks to achieve. At times, the benefits of 20 years of experience might show that the institutional structures were not suited to the goals for which they were created: this would be a clear design flaw and inevitably lead to under-performance. Again, this stage was only applicable in relation to some areas of analysis.

Third, omissions from the constitutional design might well have had an impact and could have better helped to achieve the internal and external goals. This is difficult to determine, and will rest on a judgement of plausible alternative structures that may have helped address some of the problems in performance that we identify.

Step 4: Evaluating performance

This step was performed together with Step 3 and involves understanding the actual, empirically determined performance of facets of the Constitution against the goals they are meant to achieve. The evaluative dimension of the project is set out in more detail in Chapter 3 of this report.

Several important issues in this area relate to the question of whether we focus on rather minimalist expectations of a constitution or ones that are much more expansive. Aziz Huq, for instance, proposes a minimal definition of constitutional performance whereby 'a constitution succeeds qua constitution so long as, and to the extent that, its design does not contain elements that are likely to conduce unintentionally to the breakdown or dissolution of effective state functioning that it aims to enable' (2015: 16). Much more ambitious understandings of constitutional performance are possible and relate, for instance, to the overall enhancement of the welfare of an entire population.

In this regard, we use a continuum in assessing whether the Constitution has performed. We commence our analysis with an assessment of 'thin' compliance: have the institutions that are envisaged been created? Have the laws the Constitution requires to be promulgated been passed? We then move to a 'thicker', more expansive understanding of performance: has the Constitution established peace in general between people? Has the Constitution created a stable system of legitimate government? Has the Constitution created greater equality between people of differences races, genders, sexual orientations? Has the Constitution achieved its socio-economic goals? The 'thin' level of compliance largely involves the passing and establishment of formal mechanisms of governance and rights realization; the 'thick' level is much more qualitative and involves assessing whether in

substance those very institutions, laws and policies have met the goals of the Constitution itself. The question as to whether a constitution can do more than the minimal is a live one which we see as an interesting outcome for discussion from this analysis.

It will also be important to evaluate the relationship between what a constitution does at a particular point in time and whether it 'performs' across time (Melton et al. 2015). This, again, involves determining whether the goals against which the Constitution is evaluated are 'thinner' or 'thicker' in nature.

To assess performance in a qualitative manner, we commissioned an empirical survey to provide us with an understanding of the attitudes of members of the public in the most populous province of South Africa, Gauteng, towards a number of key dimensions of the Constitution. This survey provides some empirical data required for the assessment to take place. We recognize that the survey is limited to a single region of South Africa (due to cost) and that the conclusions we draw are therefore also limited. Nevertheless, it is worth highlighting the fact that Gauteng is the economic engine of the country and includes all segments and sectors of South African society. We also utilize key constitutional (and other) cases as data in this assessment.

We endeavour to be transparent about the reasons for any assessment we seek to make and use the goals of the Constitution itself to analyse its performance. We have not sought in any way to be overtly political, although some of our conclusions touch on political matters. When this occurs, our aim is to make arguments that can be justified to others in the political community—who would, we hope, at least recognize their plausibility.

It is important to recognize that it is not practically possible to address all goals, provide a detailed analysis of all the empirical data available and work out constitutional performance against each goal. It will therefore be necessary to make choices as to what features of the Constitution to examine. Robert Gargarella proposes that a 'proper Constitution is the one that recognizes what the main (political, or social, or economic) needs or dramas (my terms) of the time are: and then selects adequate means for overcoming those dramas or achieving those goals. A proper Constitution helps society to solve those fundamental problems or achieve those necessary goals' (2015: 3).

Following from this, we consider the South African Constitution against the backdrop of the problems it was designed to solve. This approach is modified by considering how the Constitution has helped address some of the key tensions and moments of crisis that have arisen in the past 20 years

within the South African political community. In doing so we consider key points of stress in the life of this community and use these as indicators for understanding the extent to which the goals of the Constitution have been met. Examples include the constitutional court's complaint against a High Court Judge, John Hlophe, for trying to influence it and the failure to settle this complaint seven years after the fact. We also address the irrational HIV/AIDS policy adopted by the administration of President Thabo Mbeki, the ensuing litigation and the resulting effects of the court orders; the police entering the halls of parliament and the resulting fall-out; as well as attempts by the South African leadership to limit the independence of anti-corruption agencies and the subsequent intervention of the constitutional court.

These and other concrete and important moments in South Africa's constitutional history do not form the sole focal point of the analysis but enable an evaluation of whether the Constitution has assisted in addressing the problems they highlight, including the parliamentary–executive nexus and the establishment, and subsequent consequences, of judicial review. In this report, our focus is on goals that the Constitution can reasonably be expected to affect in a particular sphere rather than on those where the power of the Constitution is limited.

We recognize that it is not clear at the outset whether constitutional design can itself mitigate or address all political and sociological deficits in South Africa. For instance, it may be possible that certain institutions are well-designed but do not function optimally in circumstances where one party dominates for a substantial period of time. At the same time, the political and sociological conditions that lead to a single party dominating may not be easily addressed through constitutional design. Nevertheless, there may well be some aspects of constitutional design which could better address these conditions. Our analysis attempts to highlight where deficiencies arise through constitutional design or for other reasons.

Step 5: Providing recommendations and an overall assessment

Where we have found clear areas of non-performance of the Constitution, we consider whether a different institutional design could have made a difference. This is, of course, a difficult judgement to make: it emerges from the recognition that certain gaps or provisions have caused certain problems and will involve considering the likelihood that an alternative architecture could have helped solve these problems. Where we conclude that this is likely, we make recommendations on how the Constitution could be improved.

Ascertaining where there have been weaknesses in the South African constitutional design could be of importance to other constitutional processes in different countries and contexts. Furthermore, it would be important to understand whether there are similarities in the political and sociological structures that would require rethinking the suitability of any particular design for a particular society.

2. Determining the internal goals of South Africa's Constitution

2. Determining the internal goals of South Africa's Constitution

David Bilchitz, Daryl Glaser and Andrew Konstant

This chapter provides an understanding of the historical and political circumstances under which the South African Constitution was formed. It also considers the process of constitution-making. These two historical elements will provide the basis for determining the abstract internal goals of the constitutional order. A broad account of the constitutional scheme is offered to provide an understanding of the manner in which these internal goals have been instantiated in concrete values and institutions.

What are the internal purposes and goals of the South African Constitution? This question cannot be answered without an understanding of the historical and political circumstances in which the Constitution was formed. The chapter provides a brief overview of a number of key features of South African history that have a bearing on the constitutional order and briefly addresses the negotiating process that led to the final Constitution. The final part of the chapter examines the question of the internal goals of the Constitution. We start by capturing a number of broad goals that can be discerned from its relation to the historical circumstances in which it was formed, some of which are articulated in the preamble. We then provide an overview of some of the key features of the Constitution and the goals that these seek to achieve.

Background to the Constitution

A useful beginning for any discussion of a constitution is the historical context that gave rise to it. Many of the objectives of the Constitution of South Africa can, in part, be explained by the country's history. Our objective in these sections is not to provide an exhaustive history of the country but to provide some of the background to understand the context in which the Final Constitution was drafted in 1996. This context can in turn help us to understand some of the key internal goals of the document.

That history begins with an understanding of how the people who make up South Africa today came to inhabit the land. The history of the region dates to the earliest history of humanity—the area around Johannesburg is known as the 'cradle of humankind'. Modern humans emerged in East and Southern Africa, and San hunter-gatherers may have descended in situ from some of the earliest humans. The remainder of the population—the vast majority—are products of waves of migration and labour importation. Khoi herders and farmers from other ethnic groups migrated southwards into the region some 2000 years ago. European settlers arrived in the Cape in 1652 under the patronage of the Dutch East India Company. Predominantly Dutch, their ranks included a minority of German ancestry. In the 1680s they were joined by French Huguenots, who arrived in South Africa to escape persecution in Europe. These early European settlers were joined in the 19th and 20th centuries by British settlers, and later by East and Southern Europeans. White settlers began to import slaves into the Cape colony from the lands bordering the Indian Ocean, including Mozambique, Madagascar and the Indonesian archipelago, in 1658. In the 1860s the British Natal colony imported indentured Indian labourers, mainly Hindus, to work on the sugar fields. They were accompanied by primarily Gujarati Muslim 'passenger' Indians who arrived as traders. What is today South Africa thus came to be inhabited by a diverse range of sub-Saharan, European and Asian people, a diversity reflected in today's 11 official languages and the elevated status of Khoisan languages. Descendants of the immigrants from various parts of Africa apart from the Khoi peoples ('black Africans') today constitute around 80 per cent of South Africa's population, whites 8 per cent, coloureds (descended mainly from Europeans, slaves and Khoisan) another 8 per cent, and Indians/Asians about 3 per cent.[3]

European settlement in Central and Southern Africa had major repercussions, still deeply felt, for the entire region. Khoisan societies were decimated by European expansion and diseases. East-coast trading and slave-trading helped set in motion a series of wars among African groups, and these caused major dispersals of population and the consolidation of new centralized kingdoms, such as the Zulu and Basotho. A long period of European expansion, accompanied by periodic frontier wars, brought South Africa's black African population under direct or indirect white dominion in stages between 1779 and the late-19th century. European powers and their settler progeny also fought wars among themselves. In 1806, the British took over the Cape

[3] In this report the use of the terms 'black African', 'coloured', 'Indian/Asian' and 'white' reflect the population group categories used by the South African census agency, Statistics South Africa. See e.g. 'Census 2011 Statistical Release', 30 October 2012, <http://www.statssa.gov.za/publications/P03014/P030142011.pdf>.

from the Dutch, triggering a flight to the interior by Dutch-speaking 'Boers' in the 1830s. Britain fought two wars against independent Boer states in the Free State and Transvaal. The second war, which became known as the South African War (1899–1902), concluded in a costly British victory that brought the whole of South Africa under British control. The importance of the interior to the British and other outsiders was hugely enhanced by the discovery of diamonds in 1867 and gold in 1886. These discoveries initiated the transformation of South Africa from a purely agrarian economy into a mining economy. In the 20th century, South Africa also became an industrial economy. The exploitation of minerals initiated internal migrations, with mines and towns attracting Africans increasingly drawn into the commercial economy by colonial taxes, cattle disease, land loss and opportunities to earn cash.

The British decided to form a union of four provinces and, to this end, constituted the South African National Convention, which involved negotiations between the two British colonies and the two Afrikaner republics. The first constitution of a unified South Africa was agreed on and encapsulated in the South Africa Act of 1909, which was a product of the British Parliament. Drawing on the Westminster model, primacy was granted to parliament, including the executive in parliament. The British Parliament granted self-government to South Africa's white settler minority in 1910, although significant formal limits remained on this power until the passage of the Statute of Westminster in 1931. The only condition imposed by the British was that the property- and education-qualified franchise in the Cape Colony, which permitted some black Africans and coloureds to vote, should be preserved in the new Cape Province. The South African Native National Congress—the forerunner of the current ruling party, the African National Congress (ANC)—was formed in 1912 in response to the exclusion of black Africans from the franchise, in protest against racial discrimination and to advocate for equal treatment before the law.

South African self-government coupled with black African disenfranchisement facilitated the extension of domination by local whites. Among other things, it enabled whites to formally exclude black African people from property ownership across the bulk of South Africa's land surface. For example, under the terms of the 1913 Land Act, black African property ownership was confined to only 7 per cent of the land. In 1936 this was increased to 13 per cent of the land, which could only be held in special 'reserves' assigned separately to each major black African ethno-linguistic group or 'tribe'. Black Africans were expected to work and, where unavoidable, to live in 'white' areas only as labourers, feeding the white-owned economy's hunger for

cheap labour. Black Africans were denied access to skilled mining jobs, and the state favoured whites in civil service employment. As part of a series of segregationist measures, black Africans were stripped of voting rights in the Cape in 1936.

Until the 1960s, the split between Afrikaans-speaking and English-speaking whites was a central axis of contention in South African politics. Increasingly, however, white politics came to be dominated by the fear of the black African majority—of black urbanization, cultural and sexual miscegenation, black nationalism and Communism. Political forces mobilizing Afrikaans-speaking whites were determined not only to wrest political control from the economically dominant anglophones, but also to ensure that black Africans were more rigidly separated from and subordinated to whites—and, not incidentally, forced to become labourers on predominantly Afrikaner-owned farms.

The electoral victory of the Afrikaner-nationalist National Party in 1948 initiated the era of apartheid. Apartheid amounted to a tightening and formalization of longstanding practices of white minority rule and racial segregation, pre-empting and reversing any pragmatic accommodation of the black population in the aftermath of World War II. Measures were taken to separate black Africans and whites at all levels, from urban amenities and residential separation in cities ('petty apartheid') to the partition of the country between 'white' South Africa and designated black African 'homelands' or Bantustans ('grand apartheid'). Job reservation for whites was extended, while black Africans received inferior per capita spending on education, health care, pensions and other state goods and services. Apartheid even sought to regulate the bedroom, as sexual relations between black Africans and whites were outlawed. Dissent was treated increasingly harshly, beginning with the 1950 Suppression of Communism Act.

Apartheid was both a product of parliamentary elections and underpinned by a strong notion of parliamentary sovereignty: the doctrine that the laws passed by parliament were valid and could only be challenged on procedural grounds. The National Party came to power in elections initially on the basis of a minority of the largely white electorate, assisted by districting that favoured Afrikaner voters in rural areas. Over time, however, it consolidated its support on the back of a majority-Afrikaner electorate and, later, the support of whites across language lines against an outside world increasingly hostile to South African racial policies. Parliamentary primacy was affirmed in the 1950s in the course of a controversy initiated by government efforts to exclude coloured people from the Cape franchise. The attempt to remove coloured voters from the common voters roll led to a constitutional crisis in which the courts struck down, on two occasions, the laws of the parliament

for failure to meet the procedural requirements of the existing constitution. The removal required a special majority in terms of the South Africa Act, which the Nationalist Party did not have (*Harris v Minister of the Interior* 1952; *Minister of the Interior v Harris* 1952). Parliament reacted by enlarging the Senate (the upper house of parliament) and increasing the number of judges on the Appellate Division from 5 to 11. The latter move interfered with judicial independence. Unsurprisingly, the removal of coloureds from the electoral roll was then approved by a majority of the packed court (*Collins v Minister of the Interior* 1957). These moves served to entrench the apartheid structure and immunize it against judicial interference.

In the face of these measures and despite the attempt to silence protest, the oppressed population of black Africans, coloureds and Indians/Asians began to battle the apartheid regime. There were massive protests in the 1950s, known as the Defiance campaign, and using passive resistance against apartheid. An important moment occurred on 26 June 1955 when the Freedom Charter was passed at the Congress of the People. The Congress was made up of representatives from the four main racial groups in South Africa and provided a blueprint for the future, some of which is now contained in the Constitution.

Unfortunately, despite this positive development, state repression deepened. The National Party attempted to imprison senior leaders of the opposition in a sham treason trial in the late 1950s. A peaceful gathering against the pass laws in 1960s became the site of what became known as the Sharpeville massacre, when 69 people were killed and 180 injured. In the face of large-scale repression and being banned by the Government, the ANC and the Pan Africanist Congress (PAC) adopted a policy of armed resistance. Much of the senior leadership was imprisoned, most notably in the Rivonia treason trial which saw Nelson Mandela condemned to life imprisonment. The international community condemned South Africa, which became increasingly isolated.

In 1973, a strike among black African workers in Natal signalled the possibility that the action of large numbers of people could shake the apartheid government. Another major turning point occurred in 1976, when black African school students began a massive protest against the imposition of Afrikaans as the language of instruction in schools. While the initial protest was peaceful, police opened fire on the students using live ammunition. Eventually, over 500 students were killed in police action. The Black Consciousness movement, which led the protests, was subject to severe repression in 1977, culminating in the murder in detention of the activist leader Steve Biko.

Alongside its repression, the National Party began introducing tentative measures to 'reform' apartheid in an effort to assuage global and domestic critics. These included the granting of urban self-government and trade union rights to black Africans, and eventually led to the abolition of the pass laws and job reservation. The Tricameral Constitution of 1984 granted parliamentary representation to coloureds and Indians/Asians in separate chambers, but no provision was made for the representation of black Africans who were supposed to be catered for by the homeland governments. Neither repression nor reform could pacify the population. Indeed, the United Democratic Front (UDF) brought together hundreds of civic, youth and other organizations in order to oppose reform measures. UDF-affiliated organizations spearheaded a nationwide uprising that began in 1984 and ebbed and flowed through the dying days of apartheid. At the height of the protests, opposition organizations succeeded in making many townships 'ungovernable'. The apartheid government had to take ever more draconian measures to remain in power and declared a state of emergency in 1985, allowing the President virtually unlimited powers. Thousands died in battles between protesters and security forces, and in violence among rival black African groups that was often stoked by the apartheid security forces.

The constitutional negotiation process

The situation in South Africa deteriorated rapidly. Economically, it faced sanctions from many countries in the international community. Repressive measures, including the banning of the UDF and the detention of thousands of activists, were unable to bring the unrest to a conclusive end. South Africa was drawn into conflicts with neighbouring states, particularly Angola and Mozambique, even as the domestic economy deteriorated. Whites were shrinking as a proportion of the total population. With the rise of Mikhail Gorbachev in the Soviet Union and the subsequent introduction of perestroika and glasnost, Western support for South Africa as an anti-communist bastion began to fade, while the ANC could no longer depend on indefinite support for its armed struggle from the Soviet bloc. With Marxist–Leninist socialism thoroughly discredited, whites themselves had less to fear from communism, and radicals in the ANC had more reason to accept pragmatic solutions. The ANC in exile began to contemplate a constitutional democracy incorporating a bill of rights. The collapse of communism in 1989–91, and the wave of global liberal democratization that accompanied it, were an important backdrop to the parallel processes already under way in Southern Africa by the late 1980s.

In the mid-1980s, informal government contacts began with Nelson Mandela, who was in prison, concerning a peaceful transfer of power. With the ascent to power of a new leader of the National Party, F. W. De Klerk, change began to happen in earnest. The National Party realized it could not continue to rule by force. De Klerk unbanned the ANC and released political prisoners, including Nelson Mandela. The ANC recognized it could not defeat the apartheid regime by force and that there would have to be a negotiated settlement.

Following the unbanning of liberation movements and the release of political prisoners, it was imperative to bring all the interested parties to the negotiating table and sketch the path to universal suffrage. The first effort to accomplish this was made with the establishment of the Congress for a Democratic South Africa (CODESA) in 1991. Unfortunately, CODESA failed due to an inability of the parties to agree on the process for the ratification of the Final Constitution. Despite this setback and their conflicting goals, the parties remained committed to the negotiations.

Each party had its own distinctive goals on entering the negotiations. The ANC's primary goal was the establishment of a constitution that would create a government of majority rule capable of effecting decisive change. The National Party insisted on an interim government and a power-sharing arrangement that would prevail during the transition to democratic rule, offering a role for the National Party and protection for racial minorities. The Inkatha Freedom Party (IFP) advocated a form of federal government that would afford provinces a great degree of autonomy, a position that would serve its interests as the party's constituency was the majority of the Kwazulu-Natal province.

A period of political instability ensued, as did a low-grade civil war between the IFP and the ANC in Kwazulu-Natal. Members of the security forces sought to destabilize the transition. On 17 June 1992, mysterious armed assailants attacked innocent people in the township of Boipatong, killing 45 people. On 10 April 1993 Chris Hani, a senior anti-apartheid hero who held positions as head of the South African Communist Party and Chief of Staff of Umkhonto we Sizwe (the armed wing of the ANC), was assassinated by right-wing extremists. Nelson Mandela called for calm in a situation which could have led to civil war, but insisted on a firm date for the new constitutional order to take effect. A Multi-Party Negotiating Forum was set up, and an interim constitution agreed by the ANC and the National Party. The two parties agreed to the setting up of a five-year, democratically elected interim government charged with writing the Final Constitution, which provided for some level of power-sharing. In order to guide the process of constitution

drafting and to create a standard against which the Final Constitution must be measured, the parties also agreed to a set of 34 Constitutional Principles (CPs) with which the new constitution would have to conform. These CPs would be included in an Interim Constitution that would be in force until the Final Constitution came into effect. This structure enabled democratic elections to take place and the parties in power to negotiate on the basis of their electoral strength, but it also entrenched certain principles that a majority party could not abrogate.

The Interim Constitution established the basis for the first democratic elections on 27 April 1994, as well as the newly democratic government. Just weeks before the elections, representatives of right-wing Afrikaners and a large segment of the Zulus joined the process. Among the many organs of state established by the Interim Constitution, a representative parliament was created which, in addition to its ordinary legislative duties, was to act as the Constitutional Assembly. The Constitutional Assembly was responsible for the drafting of the Final Constitution in line with the 34 CPs set out in the Interim Constitution. Furthermore, a constitutional court was established with unfettered authority to test the Final Constitution against the CPs. The drafting process involved around 40 politicians in six theme committees. Deadlock was often broken by the chair of the Constitutional Assembly, Cyril Ramaphosa, working with the chief negotiators of the National Party in private meetings. The Final Constitution was completed on 8 May 1996.

On completion of the drafting of the Final Constitution, the Constitutional Court had to consider its compatibility with the 34 principles in the Interim Constitution in what became known as the first Certification Judgement (*Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*). In an extraordinary move, the court found that the initial text did not comply on nine grounds. In so doing, it required the bolstering of a number of the provisions on federalism, made it more difficult to amend the constitution and sought to protect the independence of the Public Protector and the Auditor General. After a series of revisions, the matter was once again brought before the Court, which on 4 December 1997 found that the amended document adequately reflected the goals set by the CPs. The Constitution took effect on 4 February 1997.[4]

[4] This section on the history of South Africa and the constitutional negotiating process has been informed by Woolman and Swanepoel (2008).

The goals of the Constitution

Broad internal objectives

In the light of this history, what can be said about the goals or purposes of the South African Constitution? It is important to recognize in explicating our methodology that the Constitution is a document that requires interpretation (Nussbaum 2015). Our attempt to capture the broad goals of the Constitution or that of any particular provision rests on our own understanding of the history behind the constitution or one of its provisions, an attempt to capture what it entails and what its possible purposes might be. When the Constitution, for instance, recognizes that everyone has the right to life, the question arises as to whether this allows for the imposition of a death penalty on murderers. This question inevitably requires legal interpretation of the right to life and how it is to be understood. Various bodies play a role in this: the South African constitutional order gives the final word to the courts. That does not mean that they are the only interpreters of the Constitution. Parliament and the executive have their own views of its meaning and academic commentary can also influence our understanding of its provisions. Ultimately, in some sense, every South African is tasked with giving meaning to the Constitution and is part of the community of interpreters. In assessing goals, we thus are aware that this is a project that is inherently interpretive and we hope that the way in which we approach the matter is at least plausible to the vast majority of South Africans.

We begin this section by outlining what we take to be defensible abstract goals of the entire constitutional order. (We evaluate the performance of the Constitution overall against these goals below.) We then consider briefly some of the specific provisions and possible goals that flow from them.

Peace Treaty

The key drama that the Constitution addressed was bridging the chasm between the liberation movements and the apartheid regime. In the late 1980s, as noted above, South Africa was dogged by cycles of resistance and repression, and civil war was a real possibility. The far-sighted leadership of Mandela and De Klerk helped to draw South Africa back from the brink. During the transition, right wing Afrikaners and Zulu nationalists also threatened a civil war and KwaZulu-Natal and Gauteng Provinces saw thousands of lives lost in fighting between the IFP and the ANC. Thus, one of the most important goals of the Constitution was essentially to function as a peace treaty between the various contending parties in order to avoid a bloody civil war. The Preamble indicates this by highlighting one of the

goals of the Constitution as being to 'heal the divisions of the past'. In this sense, the Constitution consists of a compromise between several factions with opposing interests. In playing this role, its success can be measured in its having avoided an anticipated civil war, and in the channelling of conflict through peaceful constitutional means. The constitution clearly succeeded in avoiding the former, although the latter is an enduring challenge and its success more difficult to discern. Various features of the Constitution could support this reasoning: such as, for instance, the proportional representation electoral system, which guarantees representation to minority parties; the creation of a Chapter 9 institution to protect cultural diversity; the recognition of 11 official languages; the recognition of African traditional authority; a property clause to protect owners from arbitrary deprivation; the constitutional allowance for self-determining entities within South Africa's territorial borders (section 235 of the Constitution); and the assignment of significant powers and functions to provinces and municipalities. These provisions could be regarded as part of the compromise required to ensure that the transition to democracy remained peaceful.[5]

Transformation

South African academics have made several broad claims regarding the fundamental purpose of the Constitution. The most popular is the narrative of transition and transformation. The Preamble appears to indicate the need for such change by identifying one of the purposes of the Constitution as being to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. This theme has taken on various forms in the constitutional law literature. However, broadly speaking, and as described in the so-called Postamble to the Interim Constitution, 'National Unity and Reconciliation', this narrative could be reduced to the characterization of the Constitution as 'a bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class belief or sex'. This narrative has been expressed in many South African Constitutional Court cases and perhaps most famously by Mahomed J when he stated:

[5] It is interesting to note that the Interim Constitution guaranteed a Deputy Presidency to parties obtaining 20% of the vote, which provided a likely senior role to the National Party in government and rendered an agreement more likely. This provision was not included in the Final Constitution.

> In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.
> (*S v Makwanyane* 1995: para. 262)

Within the narrative of transformation, we can detect two particular themes that are significant for identify. The first is a commitment to redress for the harms of the past: black South Africans were dispossessed of their land, consigned to an economic underclass and deprived of decent education. These effects were far-reaching and could not be undone overnight. Consequently, the Constitution needed to provide methods of redress for these injustices.

At the same time, the Constitution could not only look to the past but also needed to provide some kind of vision of the future society South Africa would become. There are elements of the Constitution which we classify under the heading 'reform' that are not backward looking but seek to provide a blueprint for a future just society: the socio-economic rights in the Constitution, we argue, fall under this heading, although they are also partly justified by the redress component. The Preamble alludes to this when it identifies the goal of aiming to 'improve the quality of life of all citizens and free the potential of every person'.

The idea of transformation itself is indeterminate: the Constitution certainly brought about change but what were the aspects of the past it was reacting to and what kind of future did it envisage? Different theorists have attempted to provide various answers to this problem, which range from a rather thin conception of what the Constitution is meant to do to a much thicker one—each aspect can be seen to identify important aspects of the new constitutional order. We now consider some various conceptions of what such a transformation requires.

Law-governed change and accountability

One of the remarkable features of the South African Constitution is its commitment to the use of law to achieve a range of purposes. One of the founding values of the Constitution is itself the 'supremacy of the Constitution and the rule of law'. The commitment to law admits of differing constructions. Professor Woolman has recently argued in favour of a minimalist construal of the country's founding document. He contends that it merely represents the 'scaffolding' of the new constitutional era. In other words, the Constitution itself only seeks to create the basic institutions and processes necessary for a democratic system and the rule of law to operate. In doing so, of course, it was reacting to a past which lacked such an infrastructure. Yet, the very evolution or progress of South African society is a product of the functioning of those democratic instruments and processes, whether they are transformative or not (Woolman 2015: 6; Woolman 2016). The establishment of a society that functions on the basis of law is itself an important goal for Woolman that sets the necessary conditions for other changes.

One of the central features of the South African compact was thus a commitment to law-governed change. The question, however, arises whether the veneration for law is important instrumentally or for the substantive values that underlie a society governed by law. A more extensive vision of transformation in this regard was famously provided by Etienne Mureinik, who used the metaphor of a bridge in a different manner (Mureinik 1994: 31–32). He argued that the Constitution was reacting against a past that was marked by what he termed 'a culture of authority', and this involved respecting authority for its own sake. Such a culture was embodied by a system of parliamentary sovereignty that allowed parliament to make laws without the requirement to offer any form of justification either to the courts or to the polity. Law here could itself be arbitrary and unjust, as it was under apartheid South Africa, and the commitment to follow the law not something to be admired. In Mureinik's vision, the constitutional revolution means that we need a more substantive vision of what the new law-governed society is seeking to achieve.

We should no longer be satisfied with bare exercises of authority by the various branches of government. Instead, everyone is now entitled to compelling reasons for decisions taken by the executive, legislation passed by parliament and decisions handed down by the courts. With the introduction of the constitutional order, South Africa has ushered in an era of a 'culture of justification'. In other words, the branches of government are under an obligation to justify their decisions to those affected by them. The key instrument for achieving this is the bill of rights, which requires a justification

for any infringement of a right. The virtues of a law-governed society for Mureinik lie in the fact that the law itself is subject to justification and thus respects a range of important substantive values. Mureinik's view has been influential—for example, in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*, the Constitutional Court made it a requirement that all exercises of public power have to be rational (2000: para. 85). Part of Mureinik's vision was to establish a wide-ranging accountability of public institutions and many features of the Constitution embody these ideas.

Democracy

One of the key goals of the new constitution was to set up a functioning democratic system of government. After many years of white minority rule, the new system was to be designed to express the will of all the peoples of South Africa. The Preamble expresses this goal as being to 'lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law'. One central feature of this ideal was to create a representative system of democracy that would reflect the majority but also offer an opportunity for the inclusion of minority voices. South Africa opted for a proportional representation system with a low threshold for entering the National Assembly, which would enable a large number of competing political voices to be heard. Conventional elective representation alone was regarded as insufficient and there was a recognition that the democratic structures, including the representative bodies themselves, needed to be participatory in nature too. The federal elements of the Constitution also were designed to bring government closer to the people.

Constitutional designers understood too that a representative and participatory democracy could not function in the absence of protected political rights and liberties. The Constitution recognizes a right to stand and vote in elections, and to the freedom of expression and association. The parliamentary system is envisaged as operating on a multiparty, pluralistic basis, with a Chapter 9 institution, the Independent Electoral Commission, created to ensure the integrity of election processes.

The Constitution, finally, seeks to ensure that power is not excessively concentrated, and that it is responsive and accountable. The Executive is required to account for itself to the legislature. Independent Chapter 9 institutions and an independent judiciary keep watch on the way power is exercised. The government is expected to give effect to the will of the people, but in a framework constrained by rights and various accountability mechanisms.

A united South African state that is diverse

Part of the historical drama the Constitution needed to respond to was the attempt by the apartheid regime to divide the country along ethnic lines and to create a number of Bantustans. One of the key elements of the new constitutional order was thus the attempt to create a united South African state, a 'South Africa that belongs to all who live in it, united in our diversity' (Preamble to the South African Constitution). The new South Africa thus needed to encompass all the previous Bantustans and administrations, and create a new structure of multi-level governance with a national government, nine provinces and a new system of local governance. All individuals are recognized as having a common citizenship, which applies equally to all. This aim of establishing a unified state sought to celebrate the fact that it was a union of diverse people. Movingly, the new national anthem consisted of two poems and four languages. The national flag represented a confluence of diverse peoples. Section 6 of the Constitution recognizes 11 official languages as well as others that are commonly used by communities in South Africa. One of the key goals of the Constitution was thus to create a united political community that did not impose homogeneity but celebrated the diversity of its peoples. The preamble also recognizes the fact that South Africa had become isolated from the rest of the international community due to its apartheid policy and the setting up of Bantustans. One of the key goals of creating a unified state that catered for all its peoples was to regain international legitimacy and become integrated once again into the 'family of nations'. The preamble thus aims to 'build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.

Achieving social justice

A more extensive vision of the transformative nature of the constitution was outlined by Karl Klare in a famous article. Klare contrasts a constitutional order that is simply designed to preserve the status quo with one that foundationally seeks to transform it. The latter he terms transformative constitutionalism, which entails 'a long term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction' (Klare 1998: 157). Klare outlines several features of the South African constitution which demonstrate its transformative intentions. These include the articulation of social rights and a substantive notion of equality, positive state obligations, the existence of horizontal obligations, the presence of a participatory governance system and an institutionalization of multiculturalism (Klare 1998: 155).

Thus for Klare the success of the constitutional order depends on achieving these goals and elements of the new order. This more extensive vision is supported by the express goal in the Preamble of seeking to 'improve the quality of life of all citizens and free the potential of each person' as well as many of the institutional features and values identified by Klare which support this more extensive vision.[6]

From the abstract to the specific: internal goals

Determining the abstract goals of the constitutional order is one thing. Yet, what is immediately discernable is the dependence of these goals on the norms, institutions, values and processes established by the Constitution to make them a success. The manner in which they are expressed is important. At the same time, particular provisions in the Constitution can be said to have their own purposes and histories. In the sections below, we outline the broad goals and purposes that can be discerned in relation to the architecture and schema of the Constitution.

Founding values and the Bill of Rights

Section 1 of the Constitution plays a unique role in the architecture of the document. It contains the values that underpin the Constitution. It effectively states that South Africa is one sovereign democratic state founded on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism; supremacy of the Constitution and the rule of law; universal suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' It is the only substantive provision in the Constitution that is super-entrenched and may only be amended by a vote of 75 per cent of the members of the National Assembly together with a supporting vote of at least 6 of the 9 provinces represented in the National Council of Provinces. This is an indication of the importance of the role played by this provision in laying out the foundational principles for the rest of the constitutional document. These provisions have an important effect on the interpretation of the rest of the Constitution. For the purposes of this study, section 1, in very broad strokes, sketches the outlines of the country to which the Constitution is meant to be a bridge. Therefore, it is

[6] More controversially, Klare argues that the Constitution requires a move away from the formalistic reasoning that had been characteristic of courts in the apartheid era to a new, transparent form of substantive reasoning which discloses clearly the normative assumptions underlying it. Klare argues that the courts should adopt a 'legal realist' approach to adjudication. This has been strongly criticized by Roux (2009), who argues that the new constitutional order is compatible with other forms of legal reasoning, such as that adopted by Ronald Dworkin.

possible to argue that these are a collection of the Constitution's goals at their highest level of generality. The rest of the Constitution attempts to elucidate the means by which these goals will be achieved.

Along with the outline of the democratic country under construction, the rest of the founding provisions add further substance to these goals. The provisions relating to citizenship, the national anthem and the national flag all attempt to create a unified national identity. Their purpose, as mentioned above, is to create a single polity out of groups that under apartheid where fractured and separate. Thus, the aim is to create unifying symbols around which all South Africans can coalesce and perhaps help forge a common South African identity.

However, given the wide-ranging nature of the people who live in South Africa, such a common identity is not asserted through an attempt at homogeneity. In several provisions relating to languages, religion and culture, the Constitution recognizes and institutionalizes diversity. Section 6 of the Constitution, for instance, in addition to recognizing the 11 official languages mentioned above, creates a Pan-South African language board to promote and ensure respect for a range of languages commonly used by communities in South Africa, such as Greek, Gujarati and Portuguese. This provision clearly recognizes the wide-ranging diversity of South Africa and that this is something to be celebrated. The unity of South Africa itself is to be achieved through celebrating this diversity (Bornman 2006: 383–99). Many other provisions also exist to this effect (see e.g. sections 30 and 31 of the Bill of Rights, which address linguistic, cultural and religious diversity).

Establishing a rights-based democracy

A primary aspect of the democratic revolution in South Africa was the shift away from an oppressive regime to one that adequately protects the human rights of those who inhabit the country. The bill of rights is described as the cornerstone of South African democracy and also acts as a vital reference point for its legal system. This chapter of the Constitution contains 33 provisions, 27 of which are substantive rights. The remaining six are the mechanisms that dictate the manner in which the rights are to be applied. A radical step taken by the drafters of the Constitution was to create justiciable socio-economic rights that can be enforced through the institution of judicial review. This means that the ultimate responsibility for their enforcement was placed in the hands of the courts, which were empowered to strike down acts of parliament and the conduct of the president where these are incompatible with the bill of rights.

While the values of the Constitution are ordinarily located in the Preamble and founding provisions, the bill of rights includes its own internal value system. These values are integrated with the goals of the rest of the document, but they prove especially useful for appreciating the objectives of this portion of the Constitution. They serve as reference points for the interpretation and application of enumerated rights and aid courts and others in understanding the intention behind their inclusion in the Constitution. The components of this value system, located in subsections 7, 36, and 39, are human dignity, equality, freedom, democracy and openness. These principles are seen not only to undergird the governance systems that the Constitution creates, but also to set the standard for societal conduct and direct the transformative project that was undertaken after the fall of apartheid.

The meaning and effect of rights are influenced by their scope, interpretation and mechanisms for limitation. In terms of scope, section 8 of the Constitution is vitally important. While rights, when included in constitutions, are ordinarily seen as imposing obligations on the state, the South African Constitution states that rights articulated in the bill of rights also place obligations on private individuals and corporate entities. This provision provides strong evidence that the constitutional order and the rights-based project was designed to affect all elements of South African society, much of which had been distorted by the apartheid system.

With reference to interpretation, the Constitution clearly envisages that these rights should be justiciable, and that the courts, when interpreting them, should do so from the appropriate perspective. The Constitution even goes so far as to define what this perspective should be. Section 39 of the Constitution mandates that courts interpret the bill of rights in such a way that promotes 'the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law'. The Constitution, in this respect, is also clearly not an insular document but one that seeks to engage understandings of rights developed around the world. The vision of South African identity it encompasses is a magnanimous one that allows the global to inform the local. In addition, courts, when interpreting legislation or developing customary or the common law, must do so in a way that promotes the 'spirit, purport and objects of the Bill of Rights'.

Crucial to the structure of the bill of rights is the general limitations clause contained in section 36 of the Constitution. The clause allows for the rights in the bill of rights to be limited under certain specific conditions: there must be a law of general application that authorizes the limitation, the limitation must be reasonable and justifiable in an open and democratic society based

on human dignity, equality and freedom, and the benefits of the limitation must be proportional to the harm caused to the right. Several factors are outlined to assess this. The limitations clause essentially allows the collective goals of the polity and other rights of individuals to override individual rights on occasion and requires a balancing process to be conducted. It places emphasis on the need for democratic authorization for any limitation (the law of general application requirement) and for a court to review any justification provided. The clause requires substantive reasoning to be exercised and is a major part of the accountability mechanisms in the Constitution.

While all the rights contained in the bill of rights constitute discrete goals set by the Constitution, we have selected a few on which to demonstrate some of these points. In the rights chapter of the full report, we also focus on several rights that are particularly important in the South African constitutional order.

Equality

The right to equality is entrenched in section 9 of the Constitution. The background to this right is crucial to understanding the goals that its inclusion aims to achieve. The apartheid political and legal system was based on inequality and discrimination against black people. It ensured that only the relatively small white population advanced at the expense of the majority of the country's black inhabitants. As a result of the deliberate harms suffered by this population, it was inevitable that much inequality would persist even into the democratic era (*Brink v Kitshoff NO* 1996: para. 40). This background has shaped the form that an equality right should take. A minimal formal view of equality would ensure that similarly situated people were treated in a similar manner. Such a view would have been insufficient to bridge the gap that emerged as a result of decades of discrimination. Instead, the goal of the constitutional right to equality was seen as constituting a form of 'restitutionary equality' (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999: para. 15). As a result, the provision requires a more substantive vision of equality to be realized and, to that end, allows for disparate and special treatment for some groups in the advancement of that agenda.

Political rights

Section 19 of the Constitution affords every South African citizen the freedom to make political choices. This includes the rights to form a political party, to participate in political activity and to have free and fair elections. These freedoms must be understood in the context of South Africa's history

of political oppression, where some political parties were banned and there was a denial of the vote to the majority of its citizens. This history means that political rights form a central part of the normative underpinnings of the new democracy.

Expression

Section 16 of the Constitution protects free expression in general, while also specifically including freedom of the press and other media, freedom to receive and impart ideas, artistic creativity and academic freedom. The provision also mentions specific exclusions to this right, such as propaganda for war, incitement of imminent violence and certain forms of hate speech. There are obvious and well traversed aims of protecting expression. Free speech allows for individuals to express their autonomy, and thus for a multitude of perspectives that enrich all aspects of society. Democracy is only really possible when people and politicians are free to express themselves; academic and artistic endeavours are greatly enhanced when the practitioners of both are afforded the freedom to express ideas.

One can also see the generous nature of the right as a product of the history of South Africa, as a means to make amends for the past. The apartheid government imposed tight restrictions on expression and initiated policies of censorship and coerced acquiescence to government theories (*S v Mamabola* 2001: para. 37). The inclusion of section 16 is an attempt to reverse these trends, but also to help a fledgling democracy to take root (*S v Mamabola* 2001: para. 37).

Religion

In theory, there are two aspects of religious freedom that the right in section 15 of the Constitution incorporates: the freedom to exercise a religious belief and an expression of the degree to which the state may recognize or 'establish' a religion. The former aspect is regarded as a fundamental right in any 'open and democratic' society (*Prince v President, Cape Law Society* 2001). The latter aspect, being the regulation of the state's ability to sanction a particular religion, can be understood in the context of the role of religion in South African history.

Religion had a complicated history under the apartheid regime. The National Party enacted laws that had a profound Christian preference and the objective of protecting Christian doctrines and practices. For example, the Publications Act 42 of 1974 was enacted for the purposes of protecting a Christian view of life. Section 1 of the Act stated that '[i]n the application of this Act the constant endeavour of the population of the Republic of South Africa to

uphold a Christian view of life shall be recognized'. As further indication of the state's adoption of religion, Blake and Litchfield have noted that 'religious instruction in state schools had a Christian bias. … Only Christian oaths were adequate in criminal tribunals' (Blake and Litchfield 1998: 515). A certain version of Christianity was also used to provide support for the policy of apartheid. At the same time, minority religions still enjoyed some freedom in which to operate. There was also much resistance to apartheid that emanated from religion.

The drafters of the Constitution could not remove religion entirely from the public sphere as the institution plays an important role in the lives of many South Africans. The compromise that was reached in section 15 does not prevent the state from recognizing or supporting religion, but does require that when doing so, it must treat religions equally (Bilchitz and Williams 2012: 164–69). Thus, it cannot support only one specific religion and must enable a wide range of religious expression to take place. As such, both the egalitarian aspect of the Constitution and its focus on freedom and diversity are contained in these provisions.

Property

Section 25, the right to property, is perhaps the best demonstration that the Constitution is a product of negotiations that had the aim of ending the apartheid era and preventing conflict, retribution and destruction of what had been developed. The right was structured to ensure that the property of white South Africans would not be directly targeted by the new democratic government, while allowing the ANC to enact legislation in the future which would address the disparities in wealth and redistribute land. Thus, the protection afforded to existing property rights was circumscribed to allow for the restitution policies that the ANC hoped to pursue.

Socio-economic rights

Socio-economic rights could be argued as providing the thrust behind South Africa's attempt to combat poverty. At the time of the Constitution's drafting, the conventional perspective on a bill of rights was that it should comprise only 'first generation' rights such as equality, liberty, property and free speech. These are seen as rights that protect individuals against the state or, in particularly progressive constitutions, other individuals. However, the changing perception globally of the state's obligation in relation to guaranteeing the fundamental conditions of a country's inhabitants, as well as the devastating impact on the living conditions of a majority of South Africans caused by the history of apartheid, led to the inclusion of what are known as 'second generation' rights in the Constitution.

These rights provide guarantees that individuals are entitled to have access to certain basic goods such as education, health care, food, water, land and housing. They place clear obligations on the government to develop programmes to address the entitlements to these goods. The exact implications of including these rights in the Constitution have been the subject of debate, which is addressed in the full report.

Access to information, just administration and access to courts (sections 32, 33 and 34)

Under apartheid, despite the presence of a parliamentary system, the executive was often found to have acted in an autocratic fashion (Corder 1989: 1). On receiving, and in some instances extracting, the requisite authority to act from the legislature, the executive conceived of and executed its policies of segregation and oppression. This revealed a lack of administrative accountability. Administrative law was described as a 'dismal science' due to the inability to hold the executive to account for its decisions (Dean 1986: 164). Courts were found to be highly deferential to the executive and legislature, and only rarely curbed the efforts of either branch to pursue their segregationist ends (Forsyth 1985; Dugard 1978; Davis and Le Roux 2009). In addition to these tendencies, access to courts as instruments of relief was denied to those who needed them most. It is with this background in mind that the rights to access to information, just administrative action and access to the courts should be understood. Access to information is central for individuals to exercise their autonomy and challenge decisions by the legislature and the executive. The right to administrative action enables individuals to require officials to behave according to set standards of lawfulness, reasonableness and procedural fairness, and to provide reasons for the decisions they make. The right of access to courts provides a review mechanism through which the decisions of officials can be challenged. All of these rights form part of the broad goal of creating a culture of justification and accountability in the public sector.

Institutions

The Constitution sought to usher in an age of democratic governance and accountability in South Africa. In order to accomplish this, it created institutions rooted in these ideals. As the primary pillars of this democratic system, the Constitution establishes parliament, the executive and the judiciary. As supportive institutions, Chapter 9 of the Constitution establishes *sui generis* entities that have come to be known as Chapter 9 institutions.

Parliament

While South Africa abandoned the Westminster-style parliamentary system by adopting a Constitution that sits at the apex of the legal hierarchy and establishing an executive head of state, the Constitution nonetheless retains important aspects of a parliamentary system of governance. Thus, in theory, parliament holds the popular mandate and enjoys a foundational place in the basic democratic structure. Parliament consists of the National Assembly and the National Council of Provinces (NCOP). The purpose of the National Assembly is to represent the country as a unified whole. This is balanced by the presence of the NCOP, which aims to give provinces and local governments a voice in the national political process. The National Assembly consists of 350–400 members (in practice 400) elected by voters through party lists, the NCOP is composed of a delegation of ten members from each of the nine provinces, chosen on a proportional basis linked to party representation in provincial legislatures. On some matters, the delegation votes as a bloc, while on others the members vote individually. Both bodies are elected for concurrent terms of five years.

The National Assembly is 'elected to represent the people and ensure government by the people' (section 42(3)). It performs this function by choosing the President, providing a forum for national deliberation, making laws and 'scrutinizing and overseeing' the executive (section 42(3)). The National Assembly can consider, pass, amend or reject any legislation before the Assembly; and initiate legislation, except for money bills (section 55(1)). The National Assembly also receives petitions and submissions and has the power to summon any person before it to give evidence under oath (section 56). Like the National Assembly, the NCOP may consider, pass, amend or reject any legislation before it. Its power to initiate legislation is however limited to particular functional areas (section 68).

The electoral system undergirds the legislature. The 1999 election was the first to be governed by the 1996 Constitution. For this election, the proportional-list system, with large constituencies and low thresholds, that was used for the 1994 elections was maintained (section 6(3)(a) of Schedule 6). However, the Constitution does not prescribe any precise rules for elections. Instead, the authority to structure the electoral system has been passed to parliament to regulate through legislation (section 46(2)). Although the broad requirement is that such legislation provide for proportional representation

in the legislature, parliament is able to determine the details of such a system in relation to threshold requirements and constituency size for that system.[7]

The Constitution grants the legislature vast powers but also goes a long way to limiting the use of those powers. These limitations could be categorized as structural, substantive and procedural. In terms of structural limitations, the Constitution introduces two houses of parliament, the National Assembly and the National Council of Provinces, with the latter providing a check on the power of the former.

Substantive limitations include provisions that limit the type of legislation that the National Assembly or NCOP is permitted to initiate in parliament and the voting procedures applicable for each form of legislation. Here the Constitution attempts to reserve legislative authority for the institutions best equipped to exercise it. The responsibility for the crafting and initiating of bills regarding the appropriation of money, and imposition of or exemption from taxes, for instance, is left in the hands of the cabinet member responsible for national financial matters.

Procedural limitations include the voting procedures that must be followed when parliament attempts to pass a bill. Among these are the requirements of public participation. Certain bills require that parliament consult with other institutions or arms of government before they are passed. This can be traced to several overarching principles such as cooperative government and the separation of powers.

Interestingly, and much like the bill of rights, certain provisions of the Constitution that deal with the internal processes of parliament come with their own normative requirements. Therefore, in addition to extrapolating the goals of the Constitution in establishing the legislative branch from the entire document, it is possible to glean specific goals from within this set of provisions. For example, section 57 requires that the National Assembly operate in a manner conducive to the principles of representative and participatory democracy, accountability, transparency and public involvement.

---

[7] The electoral system is established by the Electoral Act No 3 of 1998, Schedule 1A and subsequent amendments. The Act prescribes that a maximum of half the assembly is drawn from national party lists submitted by registered parties. Parties also submit provincial party lists from which between a minimum of half and a maximum of all of their candidates are drawn. The provinces function as, in effect, nine multi-member constituencies for the national parliament. The electoral system is thus a hybrid of two forms of party-list proportional representation, the assembly drawing on both provincial and national party lists in variable ratios depending on whether parties want to put up national-to-national lists plus provincial-to-national lists or provincial-to-national lists only. It is also a combination of a multi-member constituency system (but with only nine very large constituencies) and a system based on a single national constituency. The net result is an assembly that pretty exactly reflects national voter preferences with respect to the contending parties.

The principle of deliberative democracy should be added to this list. This perhaps goes further than mere participation and focuses on instances of moral disagreement between interest groups. The idea is that such conflicts will be resolved through deliberation and reason. Examples of mechanisms that the Constitution introduces to achieve this aim would be the Mediation Committee introduced in section 78, which is tasked with resolving disputes between the National Assembly and the NCOP during the passage of a bill. Such reconciliatory mechanisms could be seen as playing the role of furthering national unity, enhancing stability as well as aiding the adequate functioning of the federal system of government.

Representative and participatory democracy

The Constitution creates a legislative institution that aims to represent the will of the people of South Africa. At the same time, however, the legislature is mandated with the task of involving the public in the legislative process. The National Assembly thus also receives petitions and submissions. The National Assembly must give due regard to 'representative and participatory democracy, accountability, transparency and public involvement' (section 57). Like the National Assembly, the NCOP must facilitate public involvement in its proceedings. In fulfilment of the value of participation, the Presidency would also later (from 2000) initiate a rolling programme of Presidential *izimbizos*, essentially providing opportunities for community interaction with the President.

On the face of it, these two objectives appear contradictory. Representative democracy entails the public choosing their representatives who will act in their interests. On the other hand, participatory democracy allows the public to actively participate and exert a certain degree of control over the specific decisions of those representatives. These two aims could be reconciled by arguing that the point of representation is to give effect to the interests of the public. Participation aids this process by ensuring that representatives understand the interests of those they represent and are kept accountable to them. Indeed it could be argued that representative mediation is an inescapable feature of democracy, and that the aim of democracy should be to enhance the quality of representation. Representation and participation can be seen as separate dimensions of democracy rather than rival democratic forms, and participation as a means of enhancing representation.

Even so, some mechanisms are set up with a specific brief to maximize performance along the participatory dimension. The constitution appears to envisage the local as the primary site for such mechanisms. Municipalities are expected to provide 'democratic and accountable government for

local communities' (section 152 (1)(a)). This should include encouraging the involvement of communities and community organizations in local government. Subsequent laws would make provision for Ward Committees at the municipal level, involving public representatives (the Municipal Structures Act 117 of 1998); Community Policing Forums (South African Police Service Act 68 of 1995); School Governing Bodies (South African Schools Act 84 of 1996); and public involvement in the Integrated Development Plan (the Municipal Systems Act 32 of 2000). The government also appointed Community Development Workers as 'participatory change agents', enabling the government to maintain direct contact with communities.[8]

Accountability and transparency

Accountability and transparency work hand in hand. Accountability is to a certain degree dependent on transparency. These values require the public to have access to the workings of the National Assembly. Section 59 of the Constitution mandates that the National Assembly must facilitate public involvement in the legislative process and take reasonable measure to regulate public access. These provisions include the requirement that the media be given access to the sitting of committees in parliament unless it is reasonable and justifiable to deny them such right in an 'open and democratic society' (section 59 (2)).

Separation of powers and the legislative branch

While the Constitution does not make any specific reference to the principle of the separation of powers, it certainly was a goal expressed in the Constitutional Principles enshrined in the Interim Constitution. Furthermore, the structure of the governance system established by the Constitution to determine is deeply imbued with this principle. What that principle means in practice, however, is less clear. Certainly, the Constitution's notion of the separation of powers is not a strict separation but rather the allocation of distinct functions between branches of government with interlocking checks and balances. In other words, there are strong oversight imperatives that stretch across each arm of government. The Court has highlighted the ambiguity in the meaning of the principle by stating that '[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another' (*Certification*

[8] Good summaries of government initiatives to promote direct popular participation can be found in Booysen (2011) and Buccus and Hicks (2011).

of the Constitution of the RSA 1996). This picture emerges most clearly from section 55, which mandates that the National Assembly to develop oversight mechanisms for the executive and its agencies. This clearly envisages that the executive is accountable to the national legislature.

The President and National Executive

The President, elected by the National Assembly, is Head of State and head of the national executive. The President exercises his/her own prerogatives as Head of State though, but even those are regulated by the principle that he must behave lawfully and rationally (*Democratic Alliance v President of South Africa and Others* 2012). The President has the power to appoint and dismiss members of his/her cabinet. Together with the appointed cabinet, the President exercises the country's executive authority. His powers in this regard consist of implementing national legislation, performing executive functions, preparing legislation for passage through parliament, and coordinating and developing policy.

The executive branch combines features of a Presidential and Westminster-Style parliamentary system, although academic observers adjudge it to be more akin to a Westminster-type executive than a hybrid (Venter and Mtimkulu 2006: 47). As in presidential systems, the President combines the roles of head of state and head of government. Parliamentary terms are fixed, and the President does not enjoy the power that British Prime Ministers did until 2011, to summon and dissolve parliaments at will (Venter and Mtimkulu 2006: 44). Like the US President, the South African President is limited to two terms (of five years each, in South Africa's case). Head of state functions include unifying the nation, issuing pardons, conferring honours and receiving foreign diplomats. The President can also refuse to assent to a parliamentary bill, but only in cases where its constitutionality is in doubt, and only for purposes of ensuring its reconsideration by parliament. Should the President remain unhappy after further deliberation by parliament, the President can refer the bill to the Constitutional Court to request its judgement on the matter.

On the other hand, the President is elected by parliament; and the President, Vice-President and almost all cabinet members (apart from two) must be drawn from the National Assembly—although in the case of the President, on election to the office of the presidency, he/she must resign from the National Assembly (section 87). Both the President and the executive are dependent on

parliamentary confidence.[9] The executive's responsibilities to parliament are detailed in section 92, in which the cabinet members are under an obligation to provide parliament with 'full and regular reports concerning matters under their control'.

Even though, under a parliamentary model, the executive is accountable to parliament, the Constitution insists that proclamations, regulations and other instruments of subordinate legislation by the executive must be made known to the public. Broader goals set by the Constitution include the requirement that the executive, through the public administration, operate ethically, efficiently, in a developmentally oriented manner, fairly, transparently and responsively (section 195).

Courts and the administration of justice

The judiciary is the cornerstone of the basic legal structure. It is an unelected branch of government. The sections in the Constitution that establish the judicial branch create a structure with various facets. Perhaps the most important new institution created was the Constitutional Court. At the time of its creation, the Court was to be apex court in relation to constitutional matters. The court that would hold final jurisdiction over non-constitutional matters would be the Supreme Court of Appeal, which had been the apex court under apartheid (renamed). The creation of a Constitutional Court was thought to be an imperative as the existing judges could not be given the power to adjudicate on the laws passed by parliament and the conduct of the executive in a new system, to which their allegiance could not be guaranteed.

A foundational principle of the judicial arm is independence. Courts are meant to adjudicate on matters before them without 'fear, favour or prejudice'. The Judicial Services Commission (JSC) was designed to develop an appointments procedure to support this goal, and tasked with the selection of potential judges. The selection of nominees by the Commission is presented to the

[9] The reasons why South Africa chose this almost unique arrangement, involving a parliamentary executive head of state, are unclear. The tricameral constitutional scheme may have influenced deliberations, since clearly the new arrangement resembled the one established by the 1984 constitution. The German model of 'Chancellor government', in which 'parliament gives its imprimatur to the leader of the Executive' (Venter 1998: 66), may also have exerted influence, although Germany retains a separate ceremonial president. According to Doreen Atkinson, the decision in favour of a parliamentary executive president was the outcome of a deliberation process within a technical committee on constitutional issues established in May 1993. The then Democratic Party 'initially argued for direct election, because this would mean a stricter separation of powers. The technical committee felt that direct election might exacerbate party conflicts and undermine the spirit of the government of national unity. The council agreed unanimously, with the DP adding that it was concurring as an interim measure only and would press for direct election at the constituent assembly' (Atkinson 1994: 110).

President who makes the final decision on appointments. The members of the JSC represent various interest groups: the judiciary, cabinet, legal profession, legal academia, legislature and executive constitute. The independence of the judiciary is bolstered by the tenured positions of the judges. Judges may only be removed due to incapacity, gross incompetence or gross misconduct, or through an act of parliament passed by a two-thirds majority (section 177(1)). Finally, the Constitution prohibits the reduction of the salary of judges (section 176(3)).

The Constitution equips all courts from the High Court upwards with a powerful form of judicial review. It also stipulates a single reference point for the courts when adjudicating: the Constitution. Therefore, in performing their tasks, there may arise a degree of tension between the notion of the primacy of the Constitution and that of the democratically held views of South Africans. This tension is commonly referred to as the counter-majoritarian dilemma. There was initially perhaps some uncertainty regarding how this situation should be resolved. In *S v Makwanyane*, the Constitutional Court clearly held that the Constitution represented deeper values to which South Africans had agreed and thus that the allegiance of the courts was not to public opinion but the Constitution (*S v Makwanyane* paras 87–89).

Chapter 9 institutions

In chapter 9 of the Constitution, the drafters created a series of *sui generis* institutions: the Public Protector, tasked with investigating the conduct of state affairs and public administration; the South African Human Rights Commission, tasked with promoting respect for and a culture of human rights and monitoring the observance of human rights; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, tasked with the encouragement of peace and harmony among distinct groups of people and promoting respect for the rights of cultural, religions and linguistic communities; the Commission for Gender Equality, tasked with promoting respect for and the attainment of gender equality; the Auditor General, tasked with auditing and reporting on the financial circumstances of public institutions; the Electoral Commission, tasked with managing national, provincial and local elections and ensuring they are free and fair; and the Independent Broadcasting Authority, tasked with regulating broadcasting in the public interest and ensuring fairness and a diversity of views in broadcast media.

These institutions do not fall within the definition of the legislative, executive or judicial branches. Appointments to these institutions are made by parliament, to which they are loosely accountable. The purpose of these

institutions is to support the core aims of the Constitution. Collectively, they help to establish a democratic system based on a foundation of human rights. They are meant to ensure the efficient, fair and transparent workings of government. The means by which they ensure greater efficiency is through the enhancement of accountability. While the executive and the government departments over which it presides are accountable to parliament, independent 'watch-dog' bodies help provide even greater accountability. Finally, Chapter 9 institutions play a role in establishing national unity.

Multi-level governance and cooperative government

Multi-level governance

A central aim of the Constitution was to create a democratic system of governance at all levels of the state. The aim was brought about as a result of a political compromise between the parties involved in the negotiation of the transition to a democratic state. The adoption of a 'multi-level' government involved the establishment of a national level of executive and legislative authority, as well as similar institutions at the provincial and local levels.

Such a multi-level government is often understood to be a form of federalism. The definition of federalism is a complex and contested one. The most commonly referred to version of the definition is that 'a constitution is federal if: (1) two levels of government rule the same land and people; (2) each level has at least one area of action in which it is autonomous; and (3) there is some guarantee (even though only a statement in the constitution) of the autonomy of each government in its own sphere' (Riker 1964: 11).

The Constitution appears to meet the terms of this definition. It explicitly divides government responsibility between the national, provincial and local levels of government. Importantly, schedules 4 and 5 delimit the areas of authority that are reserved exclusively for the national legislature and those that are shared between the national and provincial legislatures. The underlying principle of a federal structure of government is that governing power is decentralized to enable the branch of government to make decisions that it is best-situated to make.

At the local level, the legislative and executive functions are placed in Municipal Councils. The purpose of local government is to provide democratic and accountable government for local communities and to ensure that services are provided in a sustainable manner. While the Constitution mandates that the specifics of the electoral system for the election of members of the Municipal Councils are left to national legislation, any system that is established must allow for proportional representation.

The Constitution is attempting to achieve several goals with this division of power. First, the establishment of local government better reflects the preferences of local communities. Understanding these preferences improves responsiveness and allows mobile citizens to relocate to areas that may be more receptive to their preferences than others. Second, creating small communities leads to greater cohesion among the members of those communities. With greater cohesion comes greater understanding and compassion for the circumstances and needs of other people. Developing closer community ties helps to advance the interests of those in need who may not possess much political power on their own. Finally, local governments may understand the needs of their communities better and thus initiate nuanced policies with a better chance of success (Halberstam 2014).

The converse, of course, is the benefits that centralized power may bring. Primarily, a national government is best placed to govern on issues that provincial or local government may lack the capacity to govern, or where the issues are of a nature that require harmony across all jurisdictions. Moreover, decentralized governance requires a large number of skilled persons in public administration, which South Africa has lacked. It also increases the opportunities for a high level of agency costs. Through the allocation of exclusive and concurrent jurisdictions of national and provincial legislatures in schedules 4 and 5, as well as the prerogative of the national executive to intervene in the governance of provincial and local areas, the Constitution attempts to strike an appropriate balance between centralization and decentralization. In this way, the aim is to extract all the benefits possible from a multi-level system of government.

Cooperative government

As part of the reconfiguration of the democratic structure in South Africa, the Cooperative Government section of the Constitution is the first occasion on which the Constitution refers to a division in the government structure. It is somewhat unclear what the actual division is that is contemplated in this regard and how extensively the principles of cooperative governance are meant to apply. The provision introduces the notion of 'spheres of government' and refers to these as consisting of national, provincial and local. It thus seems to contemplate operating in relation to the federal (and vertical) features of the Constitution. Section 41 of the Constitution requires all spheres of government and all 'organs of state' within each sphere to operate according to certain principles of cooperative governance. That would seem to widen the application of these provisions to the horizontal division of powers between the legislature, the executive and the judiciary.

The purpose of cooperative government is to limit conflict and unify, to an extent, the operation of the government as a whole. It hopes to do so through listing a number of principles that should guide the operation of a 'cooperative government'. However, depending on how spheres of government are interpreted, several mechanisms could be drawn into the broader understanding of cooperative governance, such as the Mediation Committees that exist in parliament to serve the similar purpose of limiting conflict. Additional mechanisms of cooperative governance include section 146, which mediates conflicts between national and provincial legislation.

The notion of limiting conflict between arms of government or levels of government could be critiqued on several grounds. Part of the reason for the separation of powers is to include an inherent tension between branches of the state that can help ensure adequate checks and balances in the exercise of public power. Disaggregating tasks can also in some cases aid in improving efficiency. On the other hand, some tasks are best carried out by centralized government for the sake of efficiency. Cooperative governance may not seek to undermine the separation of powers but rather suggest an ethos of cooperation on the terms on which it is to operate.

Traditional leadership

Multi-level governance must also consider traditional leadership. The Constitution effectively allows traditional authorities to exercise power alongside other branches of government, particularly local government. Constitutional recognition of traditional leadership could be explained by the need to reach a 'peace-treaty' that would end all conflict in the country and satisfy the claims of all significant groups. Such an agreement would ensure a peaceful transition to democratic governance. It can also be explained by the desire to include a particularly African element in the Constitution and to recognize traditional African systems of governance. Given that many people live and agree to be bound by such systems, it was necessary to find a way to recognize them in the Constitution. The dispersal of some governance authority to traditional leaders of course creates tensions and overlaps with other facets of the state. It also represents a further complex layer of devolution whose exact interaction with other constitutional structures is not entirely clear.

The security services

Governing principles

Apartheid was marked by the brutal use of the security forces against the majority of the population. As such, it might be expected that the institutions in question would receive a great deal of attention in the Constitution. In order to mark a clear break with the past, the Constitution specifically states that the operation of the national security institutions must reflect a range of important values and the fact that South Africans have chosen 'to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life' (section 198 (a)).

It is quite clear that this provision is an attempt to reflect a rejection of the apartheid era security agencies and the manner in which they operated. This view is bolstered by section 12(1), which enshrines the right to freedom and security of the person and includes the right to be free of all forms of violence from either public or private sources. The Constitution places extensive obligations on the security services that they must act, teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements (section 199(5)).

Of course, security services must always strike a balance between liberty and security. The question then becomes whether the policies and practices of the South African security services meet the objectives of the institutions as set out in the Constitution. Broadly, the Constitution attempts to transform these institutions to exercise their powers in a manner consonant with constitutional democracy, to create legal and political accountability for these institutions, as well as a high-level of transparency (to the degree possible for each institution). Specifically, with regard to the police services, the Constitution adopts a transformed community-orientated model of policing. With respect to the defence forces, the relevant constitutional provisions aim to ensure the protection of the existence and sovereignty of South Africa. The goal was also to unite the old South African Defence Force with the military wings of the liberation movements to create a unified army. The intelligence services are directed by the Constitution to ensure national security with strict checks and balances. Finally, the Constitution hopes to guarantee the existence of an independent prosecuting authority to institute criminal proceedings on behalf of the State.[10]

This chapter has provided a brief account of South African history, which led to the need for constitutional negotiations in 1990. It outlined the process

[10] For further exploration, see chapter 8 of this report.

of negotiations which involved two stages, leading ultimately to the Final Constitution which is the subject of this study. Against this backdrop, we attempted to identify some of the internal goals that the Constitution can be said to seek to realize. We first identified two abstract goals of the whole constitutional scheme and four sub-goals. Having done so, we set out the architecture of the Constitution itself and a brief account of the goals of the various broad features of the constitutional order. It is against these broad abstract goals, together with the external criteria identified by Ginsburg, that the following chapter seeks to provide a global evaluation of the performance of the Constitution.

3. Assessing the performance of South Africa's Constitution

3. Assessing the performance of South Africa's Constitution

David Bilchitz

The purpose of this Chapter is to consider the conclusions that can be drawn concerning the overall performance of the South African Constitution. We reflect on the methodology, consider the overarching themes that have emerged from the research, and end with a summary of some key recommendations for constitutional law reform that might improve overall performance.

Piloting the methodology

Internal and external goals

As has been mentioned, one of the key questions raised by this study concerns what is meant by the 'performance' of the South African Constitution. We have modified the particular methodology outlined by Professor Tom Ginsburg, which distinguishes between the internal and external goals of the Constitution. Having conducted this study, we have a number of reflections on the determination of these goals and the distinction between them.

First, the determination of internal goals in a constitution is not a simple matter that can be read directly off the page. To be interesting and not simply to repeat the text of the constitution, a determination of internal goals requires an examination of the underpinning themes behind the provisions. This process is a fundamentally interpretive matter (Nussbaum 2015). It requires an examination of what the goals may have been of including particular provisions. Determining this, however, is tied up with a number of facets of the constitution itself. On the one hand, there is the immediate drama to which a provision may respond. The inclusion of wider federal aspects of the South African Constitution, for instance, arose from the need for a compromise between the ANC and parties such as the National Party, the Democratic Party (now the Democratic Alliance) and the IFP. That, in turn, highlights a wider goal of the constitutional order, which is to ensure a stable system of democratic governance that brings together competing forces in a

joint polity. While the actual motivation for the federal provisions involved attempting to bring these wider parties into the new order, there is a difficult interaction between this wider goal for the whole political community and the specific provisions around federalism. To what extent does the drafting history and circumstances continue to provide an understanding of the purpose of including specific structures? Indeed, the circumstances of South Africa have changed and these parties are now all part of the wider political space. A residue of the prior goal may nevertheless remain in that federalism can assist in encouraging the possibility that different parties may rule different areas and so increase the possibility for democratic competition.

Determining internal goals can be difficult as a result of the range of differing values underlying any particular institution or structure. Sometimes, too, there are values and structures which are included that are in tension with one another, such as provisions that tend towards centralization of powers and those that promote the diffusion thereof; and a range of different rights. To address some of the disagreements at the time of drafting, one of the traditional mechanisms used was to resort to vagueness, which requires later institutions to work out the meaning of the constitutional provisions in their context. Sunstein famously defended the role of constitutions as 'incompletely theorised agreements' (Sunstein 2001): people often agree about abstractions (e.g. the right to life) but differ about the implications of this recognition (e.g. whether it requires the abolition of the death penalty). They also sometimes agree about specific institutions such as the separation of powers without agreeing about the deeper reasons that lie behind it. These reflections do not, we believe, count against the ability to determine certain internal goals. They do, however, highlight the interpretive nature of the enterprise and the fact that the constitutional text does not automatically admit of only one set of purposes.

A related problem is the level of abstraction at which internal goals are stated. If they are too abstract—for instance, the attainment of a stable political order—they offer limited explanation for particular features of the political order and can explain virtually every feature. There is an important question as to where such general goals fit into such a study and how they are to be ascertained. The other side of the coin would be to specify the internal goals in a way that is so closely tied to a particular provision that they fail to have any wider explanatory power. For instance, in relation to section 6(1), we could simply state that the goal is to recognize 11 official languages in South Africa. That in turn would prevent the establishment of overarching themes against which the constitutional order as a whole can be assessed and render the scope of conducting a project such as this virtually unmanageable. This

more narrow understanding of internal goals may be of use to some extent as an assessment of thin compliance and seeing whether particular legislation or policies have been enacted to give effect to a particular provision.

When addressing this point, it is important to recognize that there are textual provisions which point more directly to particular underlying goals. Thus, for instance, the principles underlying national security expressly recognize that 'national security is subject to the authority of parliament and the national executive' (section 198 (d)). These textual provisions thus clearly support our identification of a goal of political accountability for the armed forces which is a theme that flows through that section. There are, on the other hand, provisions where the underlying goals are less clear-cut and require a greater act of construction. Once again, the reasons for the creation of the federal structure of the South African state together with the notion of cooperative governance are not necessarily easy to determine from the text itself. As has been mentioned, it is not clear that we can determine the goals solely against their drafting history and circumstances. Thus, we are drawn to supplement our understanding of the textual context, and drafting history with general theoretical understandings for the inclusion of particular provisions. We have engaged with the literature, for instance, around the benefits of federal structures, which seem to be relevant at least to why a technical team would have recommended their inclusion. Internal goals are in this way constructed from the text.

This raises some interesting questions concerning the deeper structures of the constitution and whether there could be said to be a certain 'unwritten' sub-structure to the provisions of a written constitution. The manner in which the broader goals of the constitution are understood may well be required to understand the purpose of particular constitutional provisions and thus have a particular role to play in the constitutional order.

The reference to broad, overarching reasons for the inclusion of certain constitutional structures such as federalism also raises questions about the relationship between internal and external goals. In some sense, these broad ideas are external to the immediate context of the constitution itself and thus represent certain external criteria for evaluating the success of the constitutional order. At the same time, the existence in the text of these particular structures cannot necessarily be divorced from more general reasons for their creation. Thus, what appear to be external sources and criteria may well help to construct what the internal goals of the constitution are.

An ambitious constitution like that of South Africa raises particular problems in distinguishing between internal and external goals. The internal goals of

the Constitution can be said to be very expansive and include within their domain many of the external goals identified by Ginsburg. At the same time, we have found that there is some use in keeping in focus certain general features of constitutional orders that the external goals identify. Considering the extent to which particular provisions help achieve these goals provides a fixed point against which many sections of the constitution can be analysed. Constitutional drafters rarely specify some of the external goals, such as the idea of channelling conflict in policing. In some sense, these goals come from different disciplines and may not have been expressly before the minds of drafters. We do not think, however, that this fact necessarily means that the notion of conflict channelling is not an important goal of the constitutional order. This highlights the fact that legal analysis alone may be too narrow in constructing the goals of a constitutional order and reference to other disciplines may be necessary. At the same time, where the constitution does not expressly reference a goal, once again there is difficulty in ascertaining the basis for using it to evaluate performance. The Ginsburg criteria raise the question of whether there is some kind of unwritten understanding relating to what a constitution is meant to do.

The universal and the particular

There is a difficulty that arises from a tension inherent in constitutionalism: between the universal and the particular. On the one hand, it may be asserted that constitutions are meant to perform certain universal tasks across the world: the Ginsburg criteria identify these. On the other hand, a constitution is meant in some sense to be reflective of the particular national character. As Choudhry explains, 'Constitutions are an integral component of national identity, and reflect one way in which those nations view themselves as different from others' (Choudry 1999: 826). Jurgen Habermas also famously stated that constitutions help citizens to: 'clarify the way they want to understand themselves as citizens of a specific republic, as inhabitants of a specific region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, [and] how they want to deal with their history' (Habermas 1994: 125).

Imposing one set of goals on a constitutional order may well elide the unique elements thereof as well as different histories and traditions. On the other hand, there are continuities and common functions performed by constitutional systems and, increasingly, much similarity between constitutions across the world. The tension here is clearly not unresolvable: it may well be that there are universal goals that are expressed in the South African Constitution along with a number of particular ones that are specific to South African society.

The recognition of a particular model of traditional leadership and customary law may fall into the latter category.

There is even more complexity here in that one could argue that we need to distinguish between, on the one hand, more abstract goals that are shared and concrete provisions and institutions which may not be. Thus, even the example of traditional leadership is not unique to South Africa: constitutions across the world have traditions around monarchs that are embodied in the constitutional order. The exact instantiations may differ: as far as we know, the provisions in South Africa around traditional authorities are relatively unique and fail to establish any particular monarchy but recognize a wide range of monarchies; the goals, however, of recognizing particular identities around leadership may not be. Thus, for wider comparative work, it will be necessary to think through the relationship between universal goals of constitutions (which the external criteria purport to be) and then whether there are particular ones too as well as peculiarities of the methods of instantiating the universal. It is also likely we believe that the external criteria in order to be universal will be relatively thin in nature whereas the internal goals offer the opportunity for more expansive considerations to be addressed given they are internal to a particular order (Dixon and Landau forthcoming).

The inclusion of both internal and external goals is important for another reason. The internal goals represent a modality of internal critique: we identify the very goals underlying the constitutional order and then critique existing practices against those goals. This is often most effective if those in society buy into these goals. External goals lay out the possibility of critique from an external perspective, which may of course be more controversial in some contexts. It may be the case that the formation of South Africa's Constitution had a particularly animating set of dramas, and so has a very strong set of internal goals.

One interesting question raised concerns about what happens if there are conflicts between internal and external goals in engaging in a project such as this. For instance, let us accept that the constitution instantiates a goal of multiculturalism underlying many provisions, which requires affording respect to the different cultures and traditions in South Africa. Yet, the recognition of these cultures creates an opportunity for conflict between them. In such an instance, the success or otherwise of the constitutional order relates to whether it creates mechanisms or structures to address the potential conflicts that may arise. For instance, the Constitution clearly recognizes African traditional structures provided they conform to the normative requirements of the Constitution. The Constitution also creates an independent institution that addresses cultural, linguistic and religious

minorities and offers the opportunity for conflict resolution through the courts. It thus creates structures for addressing some of these tensions and the question around performance will be whether it has succeeded in addressing these conflicts.

Thin and thick compliance

The distinction between thin and thick compliance is one that is made throughout the full report. We have attempted under thin compliance to focus simply on whether branches of government have responded to an express mandate in the constitution to pass legislation, make policy or perform a specific action. In some sense, this enquiry is rather factual and quantitative in nature. Thick compliance, on the other hand, involves a wider enquiry concerning whether the identified goals have been achieved in a fuller sense. The enquiry is more qualitative and involves a selection of evidence—whether from court cases or empirical sources—to make a determination concerning performance.

Thick compliance obviously raises a number of difficult methodological issues, such as which sources of evidence are relevant? It potentially involves a massive enquiry that is wide-ranging. This is indeed one of the problems we found with a study of this nature: how do we maintain it within a manageable scope? The performance of the Constitution has the potential to involve a wider evaluation of the entire state. The external goal concerning the achievement of public goods, for instance, is very wide and allows an analysis of virtually every feature of a state. Making a study such as this feasible and within a manageable scope requires a number of limiting conditions. In addressing thick compliance, we have not attempted to exhaust every possible avenue but to focus on a number of stress points in South African society to consider how the Constitution has performed under circumstances where its provisions are under pressure. At the same time, a measure of the success of a constitutional order may well also be the fact that there are limited stress points and that daily life continues without disruption in most circumstances. We have attempted to capture both the disruptions that arise and some empirical statistics about ordinary life. Our survey has helped us also to capture the perceptions of South Africans in the most populous province about the success of the constitutional order and their involvement in it.

Overarching themes from the report

Thin compliance

One of the key findings of this report is that, on the whole, there has been thin compliance with the requirements of the Constitution. Given the more patchy performance in relation to thick compliance, this calls for an explanation. We suggest that, at least in relation to the final constitution, the ANC as the dominant party was able to push for its conception of the constitution it desired. It was constrained by the Constitutional Principles but unanimously supported the adoption of the Constitution. Most of the opposition parties supported it too. As a result, there was strong political backing for the final constitution and, hence, it is not surprising that laws and policies have been passed which are consonant with its tenets. It should be recognized that the change in the legislative and policy architecture of the new South Africa is highly significant. A number of key pieces of legislation were passed to give effect to the constitutional ethos: the Promotion of Access to Information Act (in relation to section 32 of the Constitution), the Promotion of Administrative Justice Act (in relation to section 33 of the Constitution) and the Promotion of Equality and Prevention of Unfair Discrimination Act (to give effect to section 9 of the Constitution) are three of the most significant. All the institutions envisaged in the constitution have been established. That in itself is of noteworthy. While their operation is variable, at least some of them have played an important constitutional role in helping to advance the goals of the new order.

Thick compliance

The story is less sanguine in relation to thick compliance, which involves a more qualitative assessment of government performance. As has been mentioned, there is a difficulty in making this enquiry manageable. Moreover, we also need to be realistic and not entirely utopian: it would not be fair to expect utter perfection or complete performance in relation to the highly ambitious goals set by the South African Constitution. In some ways, it is necessary in any evaluation to consider where there are difficulties that were faced which led to tolerable areas of under-performance; and those which effectively reflect a complete lack of performance.

There is also the question of whether it is possible to achieve an overarching assessment of performance or whether we should simply be content with the detailed considerations offered in each of the chapters of the full report in relation to the specific areas in focus. Much of the interest and recommendations may well lie in the detail of particular institutions and

their functioning. At the same time, however, we think that some overarching explanations are called for by the general picture. We thus attempt in this section to evaluate at a higher, more abstract level the performance of the constitutional order against both the internal criteria identified above and Ginsburg's external criteria.

We start off by recognizing that the picture of thick compliance is a mixed one and supports neither an entirely positive nor an entirely negative assessment of constitutional performance. On the positive side, South Africa has a democratic system of government and elections are generally regarded as free and fair. Greater political competition has arisen over time and there is a general acceptance of opposition. Our survey bears this out with 82 per cent of the sample recognizing that South Africa needs opposition parties and 80 per cent willing to accept the result of an election even if their party does not win. The judiciary is generally regarded as independent and frequently strikes down actions of the legislature and executive. Usually, these orders are complied with and respected. The Chapter 9 institutions have been recognized as champions of the people (and, in particular, the current Public Protector), although to some extent this has been contingent on the personalities who hold the positions. The various tiers of the government have been developed and function to a lesser or greater extent across the country; and the police have attempted to adopt a community policing approach that has encouraged a deeper sense of its legitimacy.

On the negative side, it appears that the institutions have often not fully achieved the objectives of the new order. The one-party dominance of the ANC has led to a worrying capture of democratic institutions by the ruling party, and the Constitution has not been able to insulate many institutions from heavily political appointments. There is an increasing sense of disaffection from politics by all South Africans. Our survey shows this varies with race but, even among black people who are the most politically active, there is a lack of faith in the system.[11] There is widespread corruption and a perception of widespread corruption about many institutions of the state including the police (73 per cent of people in our survey believe the police to be amenable to bribery). Political interference has been rife with the National Prosecuting Authority. The entitlements guaranteed by the constitution in areas such as housing, health-care and education are still a long way from being realized and the government ability to provide public goods is in doubt, generating

[11] Only 46% of people overall and 51% of black Africans in particular view politicians as sticking to the rules of the Constitution. A mere 45% of people (and 50% of black Africans and 17% of whites) feel that they are able to influence government policy. A total of 8% of whites, 42% of Indians/Asians, 55% of coloureds and 45% of black Africans feel that Parliament represents them. Neither white (23%) nor black (54%) South Africans feel adequately represented by politicians.

massive service delivery protests.[12] These conditions increasingly have led to calls for constitutional reform though it is unclear how such reform would address some of these conditions.

Explaining the mixed findings on thick compliance

First, we believe that the difficulty of the task set by the Constitution, which involves fundamentally changing a society that was undemocratic, and based on a racial caste system to one that is fully democratic and substantively equal, should not be underestimated. The task was monumental, highly ambitious and required massive social change and engineering, along with institutional transformation. In 20 years, it was unlikely to be successful. The fact that the constitution requires so much positive state-building and so many programmes of development means that it in all likelihood it could not fully succeed in the short to medium term. If the Constitution had simply required the government not to lock up political dissidents and to avoid totalitarianism, then we may have found more extensive performance. In the other words, the less ambitious the targets we evaluate the constitution against, the more likely it is to be found to have met them; the more ambitious we are, the less we find it has met the aims. A transformative constitution like that of South Africa is thus likely to have certain problem with thick compliance. In a sense, this results from the fact that it was not envisaged that the problems of South Africa would be solved overnight. The Constitution may be understood to include a roadmap with a sense of where society wishes to go together with a series of processes to reach that destination. As such, a failure of complete thick compliance is to be expected: as long as society is headed in the direction of the road-map, and sufficient compliance is achieved with its requirements, there is no need for alarm.

The Constitution is also a legal instrument, and one of the central features of the South African new order has been the attempt through legal means to bring about deep social change. This is a difficult project and its possibility of success has been debated.[13] It is possible to provide laws against actions that discriminate against people on the basis of race and gender, but can the eradication of prejudice be legislated for? The Constitution can attempt to change behaviour and thus attempt to shift people's attitudes, but the limits

[12] The failure of delivery is not alone the sole explanation for service delivery protests. Indeed, it can be argued that they result from an increase in delivery which raises people's expectations of even further delivery. Relative levels of deprivation and a perception of large-scale corruption also provide some of the background reasons for these protests.

[13] Some such as Rosenberg (2008) argue that law itself cannot bring about widespread social change. The South African constitutional ethos and much of the academic writing is based on the opposite view—most famously, Klare (1998: 157).

of the reach of the state mean that it is impossible to force a change in social attitudes. Our survey finds that there is still much racial polarization around a range of topics in the constitutional order, although there is increasingly a more wide-ranging set of determinants of attitudes.

The ANC came into power as a liberation movement that assumed responsibility for the governance of society. Its leaders, although often academically trained due to the far-sightedness of its leader in exile, Oliver Tambo, had never held the levers of power. They took over at a time of great political and economic change in the world with the collapse of the Soviet Union and the whole communist model of social organization. The supposed global consensus on an unrestrained free market approach to economic development forced the ANC to abandon some of its more social democratic policies, which may have been better suited to the new order and the requirements of the Constitution. The ANC was also faced with a number of factors not of its own making, such as the HIV/AIDS crisis which was an external shock that it had not anticipated. Unfortunately, its response in that regard was left wanting, but the democratic constitutional space and the role of the courts were critical in leading to a turnaround in its approach and the development of an extensive ARV treatment programme. Global economics was not on the side of South Africa, but the failure to provide a consistent and clear economic policy has not aided economic growth.

Some of the malaise in constitutional performance may well be linked to the dominance of the ANC. Without an effective electoral threat, (which has only become real more recently, the party has lacked the usual democratic constraints on its operation. As such, it was able to push through appointments in key institutions and to provide cover for individuals who failed to perform in their jobs (Twala, 2014; Southall 2013: 135–58; Naidoo 2014; Booysen 2011 373–78). This, in turn, has also been a recipe for corruption in that a lack of accountability allowed abusive practices to take place without a requirement to explain such behaviour in the political space. The fact that senior members of the ANC are alleged to be implicated in corrupt practices, including in parliament and in relation to the President, has not helped to create a culture of accountability and trust in the government. For example, in the 2006 'Travelgate' scandal several members of parliament pleaded guilty and were convicted of abusing parliamentary travel vouchers (Maclennan 2006). More recently, in *Democratic Alliance v Acting National Director of Public Prosecutions and Others* (2016), the High Court found that the decision to discontinue the prosecution against President Jacob Zuma for corruption was irrational and unlawful, paving the way for the prosecution process to proceed.

The move from liberation party to governing party as part of the political fray has often been difficult in new democracies. Ruling parties have remained in power for long periods and evidenced similar forms of malaise. Many African nations have exhibited similar trajectories as well as, for instance, Mexico and India (Southall 2013).[14] This problem has beset South Africa and the ANC has had to embark on an internal transformation. It was structured much like a Marxist-Leninist Party, with rhetoric to match and but was signed up to a social democratic constitutional order. A question arises over whether it has entirely internalized the new constitutional order. A great test of this will come if it faces electoral defeat. It has nonetheless been a pragmatic party and having signed up to the constitution, has broadly sought to observe it.

Having briefly looked at some of the factors that might explain problems with thick compliance, we look now at a more macro-level at compliance with regard to the internal and external goals of the constitutional order as a whole.

Internal goals

Peace Treaty

South Africa suffered from oppression and violent protests in the 1980s, and arrived almost at the brink of civil war. There was serious armed conflict in KwaZulu-Natal and certain events, such as the Boipatong massacre and Chris Hani's assassination, threatened to take South Africa over the brink. After the latter two events, wise leadership, particularly from Nelson Mandela, helped keep South Africa from descending into civil war. Mandela effectively pushed for a clear deadline to the constitutional negotiations, and the advent of a new order based on a constitution was critical to averting disaster. One of the key features of the new order was to establish a type of 'peace treaty' between the key protagonists in society and set the stage for a stable polity.

There is an important question here as to how much can be attributed to the Constitution and how much to wise political leadership. It is clear that without the latter, the South African transition might not have succeeded. Yet, the inclusive multiparty negotiations and the focus on producing a social contract between South Africans embodied in the Constitution in

[14] Compare further Butler's (2014) argument that dominant parties can be more or less successful (there is nothing inevitable about either trajectory) with Reddy's (2014) argument that dominant parties are prone to factionalism, with reference to the Indian National Congress and the ANC in South Africa. Greene and Ibarra-Rueda (2014) emphasize the capacity of the PRI (the Mexican Institutional Revolutionary Party) to adapt after losing power, while confirming that it practiced an authoritarian corporatism prior to losing power.

a sense held the different sides together. The split into a two-stage process of constitution-making was also important: the first stage allowed for a compromise agreement to lead to democratic elections; the second stage was based on the outcomes of those elections (within certain constraints of the constitutional principles). The process itself may have played a significant role in the eventual outcome and a question regarding how much can be attributed to the document and how much to the process itself. At the same time, the document was the outcome of the process and has largely held the consensus of the community for the past 20 years.

One important feature of the peace treaty was the Truth and Reconciliation Commission (TRC). This was not expressly part of the final Constitution, although was referenced in the Interim Constitution. The possibility of an amnesty from civil or criminal prosecution was key to ensuring the support of the security services of the old order. The compromise was that in return for an amnesty, the perpetrators of gross human rights violations during apartheid had to come forward and explain the truth of what they had done in a public setting. The process was itself a searing one that exposed many terrible crimes committed by the apartheid government, but also led to an amnesty for those who committed those crimes. It represented an acknowledgement of the pain of many black South Africans, uncovered the truth of the apartheid regime for many white South Africans who might genuinely not have known the extent of the crimes committed, and provided a strong indication that the terms of the constitutional settlement would hold. Some further reflections on the TRC process are offered below.

In the main, we regard the peace treaty aspects of the South African Constitution as having been a success. The security services were faced with the difficult task of integrating the ANC's armed wing (Umkhonto we Sizwe) and the previous defence force. In the main, this integration has been successful and a new, legitimate armed force has been created. The federal aspects of the Constitution can also be seen as a compromise: the ANC would have preferred a much more centralized system of government and remains unclear about its support for the provinces (Humphries 1994; Bezdiek 1998). However, the IFP would have refused to come into the constitutional settlement without compromise in this respect and its involvement helped to end the low-grade civil war in KwaZulu-Natal. As noted above, the provinces have been formed and a federal structure largely exists. Unfortunately, the efficiency of the provinces and their ability to deliver have been patchy and this has led to calls for their abolition.

The party list system of proportional representation (PR) adopted could also be seen to be part of this compromise as it allowed smaller parties a voice in

parliament. It has also led to a growing sense of distance between people and parliament, however, as well as to too much party control over MPs. Strong calls are currently being made in the society for a change to the electoral system.

Several aspects of the bill of rights represented a compromise and allowed a political solution. In particular, the property clause in section 25 was strongly contested by the ANC, which wished to have the power to undo centuries of dispossession of black South Africans, while the National Party wished to ensure protection for the property holdings of white South Africans. The clause offers weak protection for property rights while enabling land reform and attempts to achieve a balance. The clause has not been used to its full potential to address land reform. The issue of the lack of land redistribution is currently a key point of contention in the political arena and often leads to calls for an amendment to the property clause, although it is not clear why such programmes cannot occur without such an amendment.

The right in section 23 of the constitution dealing with labour relations also represented a compromise. It represented a right of everyone to fair labour practices and protected the right of workers to strike as well as the right of employers to bargain collectively. Finding a balance in the relationship between employers and workers was a key point of contention. The Labour Relations Act, which is effectively required to be passed by the Constitution, has been recognized by all sides as a legitimate framework in which to conduct collective bargaining. In the difficult economic conditions in which South African finds itself, problems of labour instability remain and there are both pushes to reduce protections for workers in an attempt to help boost employment and efforts to extend them by unions.

Overall Assessment: The South African Constitution succeeded in addressing one of the key dramas of the time in the 1990s in finding a way to avert a civil war and create a new social compact. That compact has largely held and balanced the interests of diverse groups over the past 20 years. As South Africa faces more difficult economic conditions and the discontent with the current ruling party grows (see e.g. Lekalake 2016), there are some signals that the compact may not hold in its entirety.15 The worry is that, if key features of the constitutional compact unravel, it may lead to serious instability in the country, although the fears of civil war seem to have abated.

[15] Examples of recent events demonstrating discontent are the #feesmustfall student movement; the strong call across civil society and even among former struggle leaders for President Zuma to leave office; the government's inability to bring an end to a six-month strike involving Johannesburg's waste-management agency, Pikitup; and the burning of schools in Limpopo province. On the latter see e.g. Ndlovu (2016).

Transformation

One of the key features of the South African Constitution is its commitment to a fundamental change from the old order to the new. That change had both backward-looking aspects and forward-looking ones. There were various facets and conceptions of what transformation involved. We divide our treatment of this important topic into a number of the sub-goals identified above.

Law-governed change and accountability

One of the key facets of the South African Constitution is a commitment to change that is governed by law. Essentially, in the process leading up to 1994, South Africa faced the possibility of revolutionary change, but the negotiators focused on a process of change that essentially took place through the law. The rule of law thus became crucial to the new order.

The security apparatus of the state is one area where a real shift was needed, as it had become virtually a law unto itself. The Constitution envisaged a wholesale restructuring and forced a high degree of legal and political accountability on these services. Clearly, there has been some success in integrating Umkhonto we Sizwe and the old Defence Force, and the army has effectively been placed under civilian control. Legislation and policies around the police require legal and political accountability, but unfortunately high levels of wrongful arrest and police brutality still exist. There have also been worrying attempts to pass a draconian law on state secrecy, but civil society action led to a much better legal framework. The National Prosecuting Authority, which is a central prong of the criminal justice system, has been undermined on several occasions through attempts at political interference in the appointment of its head. For example, the judgement of *Democratic Alliance v President of South Africa and Others* (2013) found that President Zuma's decision to appoint Menzi Simelane as head of the National Prosecuting Authority was flawed and irrational, given earlier findings by the Ginwala Commission impugning his integrity and credibility and ultimately his fitness to hold office. The full saga dealing with the continued interference in the appointment of the head of the NPA is dealt with in the security services chapter of the full report.

The lack of an independent corruption authority in the Constitution was a major omission. When the ruling party sought to undermine the independence of an anti-corruption investigative unit, the Constitutional Court used a number of provisions in the Constitution to find a constitutional requirement that there be an independent corruption investigatory unit. In a sense, this shows that the constitutional system is working, in that courts are able to plug major gaps in the constitutional scheme.

The rule of law has not been understood in South Africa in a purely formal manner. In fact, it has been given significant substantive content and all exercises of public power are subject to review in what has been termed the principle of legality (*Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000: para. 20). Legality itself embraces a number of elements, and includes what is termed 'rationality review' requiring all exercise of public power at least to have some justification.

A number of features of the Constitution extend the idea that the exercise of power must be capable of being justified by reasons and thus bear out the notion outlined by Etienne Mureinik that the new order intends to create a 'culture of justification'. The right to administrative justice and its concomitant legislation—the Promotion of Administrative Justice Act—create procedures for the review of decisions by government officials.

Individuals have the right to ask for reasons for any decision within a specified amount of time. The rights in the bill of rights place a duty on the government to justify any interference with them. Specific rights such as socio-economic rights also require the government to have a reasonable justification for the programmes it institutes in order to realize these rights. The creation of an independent judiciary is an essential prong in this scheme as it is capable of evaluating the reasons offered by the government in these areas. Chapter 9 institutions also bolster this architecture and are able to engage with the government in a more proactive manner. The government is still often resistant to providing reasons and has sought to obstruct the functioning of some of these mechanisms. For instance, the Promotion of Access to Information Act enables individuals as a matter of right to request information from the government, which it may only refuse to provide on very restricted grounds. Nonetheless, it is often extremely difficult to gain access to government information and the government creates all kinds of excuses to avoid providing it.[16] In general, the government has followed court orders. Unfortunately, recently, and most notably in a case concerning a High court order not to allow the Sudanese President to leave South African soil, the government flagrantly disobeyed the courts with limited consequences.

[16] The South African Human Rights Commission has found that the government tends to be reluctant to respond to the public's requests for information (SAHRC 2012).

Overall assessment: Formally, South Africa has set up a society governed by law and a requirement for reasons for decisions to be provided by public authorities. Substantively, there is often an obstructive approach by the institutions of law enforcement and an attempt at political control over decisions that should be independent. A law may often exist on paper, but in reality it is often not complied with or an obstructive attitude is taken towards compliance with it. One of the difficult conclusions we have reached concerns the fact that many good laws exist but their effect on behaviour is not always clear.

Democracy

One of the key goals of the Constitution was to set up a democratic system of governance. Prior to 1994, black people were unable to vote in the country for the leaders who would effectively govern them. Of course, this goal is not simple and has its own character. A system was set up for people to vote for representatives, but one that also has significant participatory aspects between elections.

The party list system of PR was adopted partially to enable smaller parties to have a voice in parliament. As we have shown in the democracy chapter of the full report, it has succeeded in that goal, but with a number of drawbacks such as the increasing distance between people and MPs and strong party control over representatives. Ensuring credible elections in South Africa is a difficult task but has, in general, been performed well by the Independent Electoral Commission. Elections are regarded as free and fair and changes in political preferences are starting to occur.

The federal structures of the Constitution in some ways also seek to contribute to the democratic ethos. Decision-making is rendered closer to the people through provincial and local government structures, and people have an opportunity to engage with some of their representatives.

The dominance of one party has unfortunately undermined some of the key checks in the system of democracy. The fact that the ANC can rely on electoral victory has reduced its need to be responsive to citizens. It has also often resisted accountability and transparency with few electoral consequences. The key threat of losing elections has not been present in general in South Africa, although this may be changing as support for the ANC wanes. It is difficult to see whether this state of affairs is a matter that impacts on the performance of the Constitution or whether it is simply part of the political landscape given the existing structure of preferences in the political community.

While the constitution and much legislation provides for structures that are meant to facilitate participatory democracy, there is often only limited participation in democratic governance. The survey we conducted bears out a concern that large numbers of people (over 60 per cent for most features of the constitutional design) see participation in various democratic structures as difficult. This will need to be addressed if participatory democratic ideals are to be realized.

Overall Assessment: South Africa has succeeded in establishing a vibrant democratic system of governance. The participatory aspects of the democracy could be improved and the perception is that it is difficult for citizens to connect with democratic structures, and this may eventually undermine them.

A unitary state that is diverse

Apartheid had sought to divide people into categories and also place black people in self-governing administrative units, which the apartheid government called states. One of the key features of the new order was to try to bring all people within one unified state and create a cohesive social order. Given the diversity of South Africa this was a difficult task. At the same time, part of the goal of the new South Africa was to recognize the diversity of its peoples. Thus, there was an attempt to create a unitary state that recognized the wide-ranging diversity of those within it and included all in the political community.

The Constitution outlines some of the symbols of South African governance: a flag and a new national anthem. The flag represents the diversity of all coming together in a unitary state. The anthem has four of the official national languages and two very different elements—two stanzas from a song of liberation and two stanzas from an Afrikaans poem that was the national anthem under apartheid. The South African flag has been embraced by most South Africans. The anthem still elicits some discomfort but has been widely embraced. Our survey shows that 74 per cent of South Africans are proud to be South African and so, in some sense, the goal of a unitary state has been achieved. At the same time, that may be under threat as a recent survey by Afrobarometer shows growing distrust between the races in South Africa.[17]

[17] Overall, 67.3% of South Africans do not trust people of racial groups other than their own. Distrust is highest among black South Africans (68.9%) and lowest among white South Africans, at a still-high 58.6% (Institute for Justice and Reconciliation 2015).

The idea of a unitary state has gone along with a recognition of diversity in a truly multicultural ideal. Thus, section 6 of the Constitution recognizes 11 official languages as well as a number of other languages that are commonly used in South Africa. While the recognition of 11 official languages may be seen to be part of the compromises made to bring everyone together, in effect English has become the lingua franca in the country and is used in most official documents and ceremonies. There are concrete claims that can be made for the other official languages, but de facto the state has essentially focused on the one common language, English. As such, full commitment to the diversity required by the Constitution can be questioned, although full recognition of such a large number of official languages might be impractical.

The Constitution is also committed to the recognition of traditional leadership and officially recognizes African customary law. Religious personal law systems are also recognized. As such, the unitary state is seen to be compatible with laws that particular communities hold dear. The Constitution includes a general trump: laws inconsistent with the bill of rights will not be recognized. That trump has been used on several occasions by the Constitutional Court, in particular with reference to African customary law.[18]

The Constitution also established a special Chapter 9 institution: the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities. This Commission evidenced an intention to take the wide-ranging diversity of South Africa seriously and to promote it, but it has unfortunately had a low profile in the South African political community and failed to chart a course of glory for itself. This could also reflect a lack of demand for what it was intended to offer.

Overall assessment: South Africa has by and large succeeded in establishing a unitary state. While the Afrikaners at the time of the negotiation were calling for a state of their own (volkstaat), there are hardly any voices pushing for that today. The other main grouping in favour of self-rule—the Zulus—seem to have accepted the federal structure of the state. The South African model is one of also recognizing the diversity of those within the state: individuals have a large measure of freedom, but some forms of diversity such as linguistic difference have been harder to implement.

[18] See e.g. *Bhe and Others v Khayelitsha Magistrate and Others; Shibi v Sithole and Others* 2005 (1) SA 580 (CC), where the court effectively replaced the customary rule of succession that only the first born male would inherit.

Achieving social justice

Chapter 2 identified the fact that transformation can involve a more extensive idea that has two key elements: 'redress', the backward-looking aspects and moving beyond the legacy of the past; and 'reform', the future-orientated aspects that seek to achieve a particular vision of society.

Redress

The Constitution could not begin with a clean slate after the high levels of historical injustice that had taken place in South African society. There was a need to acknowledge the past and provide some form of redress. The constitutional settlement involved the establishment of the TRC. Part of its function was to acknowledge the pain and hear the stories of victims of gross human rights violations under apartheid. A further element of the TRC was that there would be some reparations paid to these victims. The reparations element of the transition was never really implemented and a tax that could have been levied for this purpose on the wealthier classes, who at the time were mainly white, was not instituted. This is a great pity as it may have helped to provide resources for those who were severely harmed by apartheid and shown a willingness on the part of white South Africans to recognize the injustices they either perpetrated or benefited from. Despite these failings, a recent survey has found fairly high levels of support for the TRC, with 57 per cent of South Africans agreeing that the TRC provided a good foundation for reconciliation (Institute for Justice and Reconciliation 2015: 8).

The property clause, as noted above, is a compromise but expressly recognizes the need for land reform. Significant pieces of legislation have been passed to give effect to the need for tenure security, restitution and redistribution of land. The programme of restitution, however, was often based on economic compensation rather than ensuring that people have a piece of land. It has also been complicated by complex histories of ownership and, unfortunately, in recent times, tied to the ownership of land by traditional authorities. Redistribution has also taken place at a slow pace with the government concerned not to affect agricultural productivity and food security. Consequently, the patterns of ownership of land have not changed much since the end of apartheid.

The equality clause was of course also central to the commitment in the Constitution to address the legacy of past racial discrimination. Section 9(2) expressly allows for positive measures to be taken to address the unfair discrimination of the past and promote equality. The government has instituted programmes of affirmative action and black economic empowerment, and

these have no doubt contributed to greater racial representativeness in the workplace, particularly in the public sector. The constitutional scheme has not eradicated prejudicial attitudes, which would be a rather unlikely goal to have achieved in 20 years. At the same time, however, it has made discriminatory behaviour more costly and provided remedies in the form of Equality Courts where it does take place. There has also been a fundamental change in the racial demographics of the judiciary, which has shifted from the skewed racial composition of the past.

Reform

The Constitution not only seeks to redress the injustices of the past but also hopes to achieve a certain kind of society in the future. There is obviously a link between the two as the past to some extent conditions the kind of future that can emerge. The socio-economic rights provisions in the Constitution can be said to have a justification to redress the socio-economic disadvantages forced on black South Africans by the apartheid system. At the same time, they apply to everyone in society regardless of racial group or residency status. Their justification cannot be completely backward-looking and their inclusion can only adequately be explained by a vision that the future society will be one where everyone is guaranteed a minimum basic set of entitlements to concrete resources. The Constitution is thus not entirely agnostic about the economic direction of South Africa: while space is left for different policies to realize these goals, the rights themselves require that individuals be placed in a position of having an adequate amount of housing, food and water.

In terms of performance, the Government of South Africa has, in part, sought to fulfil its duties in relation to social and economic rights. It has put in place numerous legislative schemes and policies and devoted large amounts of its budget to them. At the same time, it has made a number of shocking mistakes, including a refusal to roll out HIV/AIDS drugs to the general population in the midst of a crisis. It has also often failed to find a way to tackle destitution, and the rate at which it realizes these entitlements is very slow. The constitutional rights have been interpreted in a rather weak way, comparative to South America, for example, and their performance could be regarded as being in some senses undermined by the judiciary, as the interpretations provided have softened the requirements imposed by these rights which may have reduced their impact. At the same time, even weak interpretations have had significant results, and thousands of lives have been saved, for instance in the Treatment Action Campaign case. The courts must also be given credit for ensuring that evictions only take place where individuals are provided with alternative accommodation. It has also insisted that the government engage meaningfully with individuals, and sought in

many of its judgements to ensure that the political branches do not ignore the interests of the poor.

The Constitution also places obligations on local government to deliver basic services that are often connected to socio-economic rights. This mandate of local government has led to various processes and targets, which in many cases have extended important services such as water, electricity and sanitation to millions of people across the country. At the same time, local government has faced a severe crisis in its ability to meet its mandate due to the lack of human capacity. Service delivery protests have erupted across South Africa as a result of discontent with the performance of local government. These protests might be seen as healthy, but they are often accompanied by violence which undermines the constitutional compact.

In relation to the police, the Constitution envisages the promotion of 'good relations between the police and the community', in a vision of the reconstruction of a relationship that had been destroyed by apartheid. Legislation and policy have led to the idea of community policing, which establishes greater trust between the police and the community. Unfortunately, examples of police brutality and corruption have undermined these noble aims and our survey bears out the fact that there is very little trust in the police.[19]

Overall assessment: there is no doubt that South African society has changed significantly since the advent of the Constitution. There have been steps taken to redress and put in place the new society envisaged in the document. At the same time, progress has been patchy and inadequate on both counts. South Africa remains in a state of flux and some of the key elements of the constitutional compact need to be realized as a matter of some urgency.

External goals

Legitimacy

To what extent has the Constitution succeeded in creating a sense of legitimacy for the new order? On the positive side, it is important to recognize that people have accepted the results of every election. The Independent Electoral

[19] According to our survey, only 48% of people have confidence in the police to fulfil their function; 57% of people agree that the police use too much force against ordinary people. Strikingly, this view is held by 65% of black Africans but only 16% of whites; 73% of people across all race groups feel that the police are amenable to bribery.

Commission has developed credibility and there is a sense that the results reflect the wishes of the South African people. Court orders are generally respected by other branches of government and by the general public.

At the same time, there is a high level of protest, which often turns violent. There is a sense of frustration that such measures are necessary to ensure that the government will take any notice of citizens. The popular legitimacy of the constitutional order is thus fraying at the edges.

The survey we conducted bears out many of these points and provides an important understanding of popular attitudes towards the legitimacy of the new constitutional order among the residents of Gauteng province. While people have problems with the functioning of many institutions, it seems that they have accepted their legitimacy. This is particularly striking in the case of black people, who were previously excluded but within 20 years appear to have accepted the constitutional institutions: 87 per cent of black South Africans have voted in the general election and 60 per cent attended a meeting of their local ward committees. Furthermore, 81 per cent of black South Africans believe that the President must obey court orders.

Unfortunately, despite the acceptance of these institutions, they are often not regarded as functioning according to their true purposes. Only 40 per cent of the sample felt that parliament represented them: less than half of black Africans (45 per cent) and a tiny percentage of whites (8 per cent) felt that to be the case. Given the fact that there is a high participation rate in elections (82 per cent of those sampled had voted), there is a clear sense in which people do not feel well represented by the democratic organs.

The approval rating of the President is a low 34 per cent: only 40 per cent of black South Africans and 3 per cent of white South Africans think that he is performing.[20] While there is a clear racial disparity here, it is significant that less than half of black South African are satisfied with his performance.

Worrying results flow from the questions around participation and the ease of doing certain activities. Large percentages of participants found it difficult to utilize the institutions of democracy: 71 per cent found it difficult to contact a member of parliament and 68 per cent felt it would be difficult to lodge a complaint with the Human Rights Commission.

There is some evidence from the survey that individuals find participation in local government easier, but 54 per cent still found it difficult. That is a high

[20] These figures seem consistent with those emerging from more advanced democracies but are perhaps disappointing in a relatively new political community with relatively high levels of political mobilization, particularly among black South Africans.

figure but bears out the notion underpinning different tiers of government—that the closer government is to the people, the more they can participate. Similarly, only 48 per cent of the sample felt that provincial parliaments were a waste of taxpayers' money. In general, the statistics on participation suggest an alienation of ordinary citizens away from the institutions created by the Constitution, which is worrying and remedies need to be found.

In relation to the security apparatus, the survey indicates high levels of distrust and a lack of legitimacy. Only 48 per cent of respondents have confidence in the police to arrest criminals and just 51 per cent have confidence that criminals will be prosecuted. As noted above, 57 per cent of individuals think that the police use too much force against ordinary people, and the percentage varies strongly with race. Black and Indian people display a very strong lack of faith in the police. Almost three-quarters of the sample think that the police are willing to take bribes. These statistics attest to the fact that the police service is seen as neither effective nor trustworthy, which may mark a failure to fully overcome the legacies of the past. Given the political interference in the National Prosecuting Authority (NPA), the low confidence levels are perhaps not surprising, or that 81 per cent of the sample believes that the head of the NPA receives instructions about who to prosecute.

There is a mixed bag of results in relation to the courts. Only 55 per cent of the sample seemed to be aware of the Constitutional Court. Of those who had any understanding at all, many had only a weak understanding of its role in the polity. Nonetheless, 70 per cent felt that a decision by the Constitutional Court must be obeyed. This seemed to be the case even in where the participants disagreed with the Court: 65 per cent of the sample felt that the death penalty should be brought back but 70 per cent responded that the Constitutional Court should be followed even where they disagreed with the result; 83 per cent of respondents felt that the President must comply with the orders of court and 59 per cent accepted that courts can go against the will of the majority to protect vulnerable minorities.

At the same time, there is a lack of confidence in the administration of justice in South Africa. Only 53 per cent held the view that judges do well in achieving justice in South Africa, and only 53 per cent expressed confidence that judges will act fairly. A high number of respondents (68 per cent) felt that government officials sometimes influence the court's decisions. There is a striking contrast between the view that court decisions must be obeyed and the sense that they are not truly just.

Overall Assessment: The democratic system in South Africa has been accepted by most people in the society as reflecting the will of the populace. The spectre of minority rule has disappeared, which is an achievement in itself. At the same time, the statistics from the survey explain much of the discontent and alienation often expressed in South African society and suggest that the legitimacy of the institutions is increasingly being questioned. Particularly worrying is the fact that individuals experience such difficulty in participating in constitutional institutions.

Channelling conflict

How has the South African Constitution performed in channelling conflict into formal political institutions? In relation to the major drama that precipitated the new constitutional order—the system of apartheid and the resistance to white domination as well as use of security forces to crush the resistance—it has been a major success. There was no civil war in South Africa and the violence between the IFP and the ANC reduced significantly in the first few years of the new constitutional order. There was no armed Afrikaans rebellion and right wing Afrikaners found a voice in the new system through the Freedom Front Plus. As such, the constitutional settlement fundamentally succeeded in bringing the disparate parties together into a structure of governance.

A number of institutions were created to help address social conflict. The Public Protector receives large numbers of complaints and its legitimacy has grown with the current incumbent. Large numbers of labour disputes are dealt with through the Commission for Conciliation, Mediation and Arbitration (CCMA) established by the Labour Relations Act. The Equality Courts have been used to some extent to address issues of discrimination. The Constitutional Court has also been the site of struggle for many social movements, such as the Treatment Action Campaign in relation to the famous mother-to-child HIV transmission case and Abahlali Base'Mjondolo, which has used the courts to prevent widespread evictions. The Court recently achieved huge attention in relation to its hearing on the status of the report of the Public Protector into upgrades made to the personal home of the President (*Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016; *Democratic Alliance v Speaker of the National Assembly and Others* 2016).

At the same time, one academic has called South Africa the 'protest capital of the world' (Alexander 2012). This is not in itself a problem as protest can be a sign of a vibrant democracy. The worrying element is that protest is often accompanied by a risk of violence or damage to property. The police have reported on protests and identified those that are peaceful and those that have 'unrest' associated with them. There were 3000 participants involved in protests that involved unrest in 2007–08 and 4000 participants in 2008–09. The police also report on the number of arrests made in connection with protests involving unrest: 4883 in 2009–10, 4680 in 2010–11 and 2967 in 2011–12 (Alexander 2012). These protests were generally associated with service delivery. Our survey shows that most South Africans do not agree with breaking the law for the purpose of protest.

Nonetheless, a sizeable minority of 20 per cent of the sample—particularly of black and coloured South Africans—believe it to be justified to burn government property as a way of forcing politicians to listen. A confirmatory result is achieved in the 18 per cent of the population being prepared to break the law to advance their point of view. At the end of 2015 and early in 2016, a protest by university students around the country was successful in having fee increases frozen and obtaining a number of other goals, such as the insourcing of workers. The protests were initially peaceful but became increasingly violent, which has marred and split the underlying movement.

Part of the problem may lie in the law that regulates protest, known as the Regulation of Gatherings Act 205 of 1993. The Act essentially requires notice of any protest to be given to the police and local authorities. It also enables meetings and negotiations to take place prior to protests and various conditions to be placed on such protests; and allows for a refusal to grant permission for a protest. The Act has generally been understood to make protest difficult and thus hinders the realization of the constitutional right to freedom of assembly. Since it is hard for people to obtain permission to protest, they often continue with illegal protests which result in confrontations with the authorities. Arguably, South Africa needs to return to its constitutional provisions on protest and a new law should be passed that attempts to cultivate a different culture. The first aspect of this culture would be to create a strong presumption in favour of allowing protests. The second aspect would be to provide stringent measures against violent protest. Finally, it would need to provide some duty on the targets of the protest to engage and listen to the protestors: otherwise, violence would inevitably ensue.

Another major problem with the constitutional scheme for channelling conflict is raised by the survey results on participation. The fact that over 60 per cent of the sample consistently finds it difficult to use constitutional

structures means that these institutions cannot perform the function of channelling conflict. Attention must be paid to increasing the ease with which constitutional structures function and are able to engage with members of the public.

Overall Assessment: the constitutional order has been successful in channelling the central tension that existed at the time of drafting into a legal structure. Constitutional structures have been set up and used in other social conflicts. Nonetheless, there has increasingly been a sense in which individuals need to go outside these structures to make political gains. The protest laws have not helped to create a culture of non-violent protest.

Agency costs

To what extent has the Constitution managed to limit agency costs in South Africa? The Constitution is clear that public officials are required to work for the public benefit and not personal enrichment. At the same time, there was a failure to set up an institution in the Constitution that could function as an independent authority to curb corruption. As a result of reports of widespread corruption, the Constitutional Court had to step in to plug this gap and to ensure that the security apparatus contained an institution with sufficient independence to investigate corruption. Such a move is supported by popular opinion, and our survey shows that over 70 per cent of each racial group is in favour of the bodies who fight corruption being independent and free of political influence.

Nonetheless, on an individual level, a sizeable minority of individuals are prepared to bribe the police (25 per cent). It is also worrying that 20 per cent of the sample felt it acceptable for taxpayers' money to be used by government officials to help their friends and family. There appears to be a lack of clarity about what constitutes corruption. The pervasiveness of corruption seems to have led some to regard it as acceptable.

The federal structure also creates problems in relation to agency costs. In theory, it is meant to minimize them through people voting directly for people at multiple levels, thus making them more accountable. In practice, however, it has created a vast bureaucracy and increased opportunities for corrupt practices. The appointment policy of the ANC has seen government positions provided as a reward for party loyalty, and thus discouraged a breaking of ranks where an official's livelihood depends on not falling foul of the higher

echelons of the party (Twala 2014; Southall 2013: 135–58; Naidoo 2014; Booysen 2011 373–78). The capture of democratic institutions by a dominant party also increases the opportunity for agency costs in that representatives feel less accountable to the people who elect them. The PR system in some ways exacerbates this effect. It is thus not that surprising that less than 50 per cent of the electorate feel that politicians represent them. The fact that senior members of the ruling party have been implicated in corrupt practices has, in all likelihood, led to less faith in politicians.

In terms of other indications of agency costs, term limits have thus far been respected. Importantly, Nelson Mandela stepped down after his first term and Thabo Mbeki did not see out his second term. There have been some mutterings about enabling Jacob Zuma to serve a third term, but there seems to be limited support for this and his low approval ratings suggest it would be unwise for the ANC to pursue it. There has been, as yet, no change in government since the advent of democracy, and failure to perform does not lead to electoral defeat, which increases agency costs. This trend seems to be changing, however, as alternative political party formations strengthen.

Overall Assessment: the failure to set up an independent corruption authority was a clear constitutional flaw. This has led to attempts at political interference in the security services dealing with corruption. The Constitution has helped to plug some of these gaps but this has not been adequate to limit the agency costs of corruption.

Public goods

How has the Constitution facilitated the provision of public goods? The South African Constitution is ambitious in this regard and provides for numerous affirmative duties on the part of the state. The socio-economic rights provisions require the government to adopt reasonable legislative and other measures to achieve the progressive realization of access to adequate housing, health care, food and water. The government must take similar measures to protect the environment and ensure education is provided to all. Local government has a specific developmental mandate to give priority to the basic needs of the community and to promote social and economic development. Public administration too must be development-orientated and respond to people's needs.

The governmental response to its constitutional obligations has been substantial and significant extensions of basic services, such as water and sanitation, have occurred across the country. An extensive housing programme has been carried out and a range of legislation and policies put in place to realize its mandate in this regard. There have also been severe failures of policy, most notably on HIV/AIDS. Constitutional institutions such as the Constitutional Court have helped to address these failures, albeit perhaps not quickly enough. The implementation of government policies pursuant to the Constitution has unfortunately often been lacking, and resulted in the large number of service delivery protests mentioned above. These protests also highlight the fact that South Africans recognize that they are entitled to the provision of certain public goods, and that they are not prepared to accept anything less. This form of active citizenship bodes well for encouraging greater provision of these goods.

South African's waning economic position has in some sense affected the provision of these goods. The growth rate has reduced to below 1 per cent and South African debt has been downgraded by Fitch to a rank just above 'junk' status (Fitch Ratings 2015). Our survey bears out the worrying economic situation South Africa currently finds itself in. Only 47 per cent of South Africans are happy with the manner in which the government has managed the economy since 1994, and 60 per cent have experienced job losses in their company or business. The standard of living questions indicate that a large number of South Africans are feeling a high level of economic pressure. These statistics suggest that there is increasing unhappiness with the manner in which the economy is being run, which is of great importance to the provision of socio-economic rights and public goods.

Overall Assessment: The government has instituted numerous programmes to provide the public goods that flow from its constitutional commitments. These commitments have also been used to correct for policy failures and prevent reductions in the provision of certain public goods. At the same time, the government's implementation of policies on public goods has been uneven and often failed to deliver, resulting in discontent.

4. Conclusions and recommendations

4. Conclusions and recommendations

Conclusions

We suggest below a number of changes to the Constitution that could help to address some of the shortcomings in performance noted above. Yet, it is notable that, after this detailed and extensive study, we are making only a small number of recommendations. This suggests that the Constitution is a well-designed document that has, for the most part, been fit for the purposes it was meant to achieve. It simply does not require much amendment.

This conclusion raises a wider question about the value of a project such as this, in attempting to evaluate the performance of a constitution as a whole. After this extensive engagement with the South African Constitution, the team that wrote the report believes it to have been a valuable process for a number of reasons. First, it required some detailed thinking about the internal goals of the constitutional order as a whole as well as the specific features of its constitutional design. These goals are sometimes engaged with by the courts tasked with interpreting specific provisions, but are often not explicitly articulated in the wider political space.

Second, understanding these goals also often requires a move to a more holistic perspective that is somewhat removed from the cut and thrust of ordinary politics. It may also have implications for particular political positions that are adopted: recognition of the Constitution's peace treaty function and the need to heal divisions in society may well have an impact on politically divisive agendas and the extent to which they are allowed political and legal space within the society.

Third, the external goals provide a particular universal set of fixed points that are useful as a means for evaluating the constitutional institutions that have been created and their performance. These external goals also require a useful shift in perspective. Fourth, a project such as this can highlight flaws in institutional design and show how these flaws have had real concrete effects in particular contexts. It can also stimulate creativity as to how to address these difficulties.

Fifth, such a project can serve to highlight how far a society has come in achieving constitutional goals and how much it still has to achieve. This involves a taking stock of the legislation and policies adopted by the government and their empirical impact. It allows for an engagement with the functioning of the courts and their interpretive procedures. The methodology adopted, while requiring a fairly extensive report, focuses on key areas of the constitutional dispensation and engages with them in some depth in relation to the goals that were identified. This allows not only for broad, overarching conclusions but also engagement with the specific institutional design of a particular constitutional order. If the Constitution is to be understood as a road map to a better future, stopping and understanding where we are is a vital step in achieving progress.

Sixth, a project such as this can result in particular recommendations on possible constitutional amendments and changes to the constitutional architecture. This can have certain salutary effects by providing a strong case for change that will help to address areas of underperformance.

Finally, this project highlights features of constitutions and the manner in which they are designed to achieve particular goals. It also demonstrates whether those features have achieved their goals. Such an analysis is useful for those undergoing a process of constitution-making or constitutional revision. By developing an understanding of the goals underlying particular constructions and the extent to which they have been achieved, mistakes can be avoided and new opportunities identified to better achieve these aims.

Many of the areas of underperformance we have identified involve social and political forces that hinder the achievement of the noble ideals the Constitution sets for South African society. They also reflect a lack of ability, willingness or commitment to achieve these goals, which cannot be remedied by constitutional design changes alone. The vision the Constitution articulates and we have attempted to give expression to through an analysis of internal goals is we believe still an intoxicating one that holds out the promise of a decent, just and democratic society in which everyone who lives in the South African polity can achieve fulfilment and flourish. After 20 years of the Final Constitution, it is perhaps time to call for a recommitment to the original vision and a rededication to efforts to achieve its goals.

Recommendations

We have emphasized throughout that there is a limit to what constitutional design can achieve. South Africa has also faced particular political conditions—such as single party dominance—which may change in the foreseeable future. One of the key questions will be the resilience of constitutional structures in the face of changing circumstances. We have sought to test performance against particular 'stress points' in the political community and have seen certain difficulties arising from these test cases. While constitutional design is not a remedy for all the problems facing South Africa, it is possible that some elements of the design could be changed and thus help to alleviate some of the difficulties we have highlighted. This would also ensure the goals of the Constitution are realized more thoroughly.

In this final section, we summarize some of the key findings and recommendations for amendments to the Constitution. We also highlight some measures that will help to achieve the goals of the Constitution. We do so while recognizing that such an enterprise is risky: if the Constitution is subject to significant amendment, this may open up fault lines in society and affect the still shaky foundations of the détente reached in the 1990s. The peace treaty function of the Constitution should not be underestimated and, if opening it up for wholesale revision would do so, we believe that it would be inadvisable. We believe that the fundamental rights sections of the Constitution should not be modified, given that they represent a broad societal agreement on central values, and thus include no recommendations in this regard. This does not mean these provisions are being given effect to optimally: judges and other actors should look to some of our findings about how to improve their performance in relation to rights. At the same time, we have identified a number of areas where the design of institutions could be improved and that might help alleviate future crises. We thus detail some of our findings concerning lack of performance or underperformance below and make key recommendations on where amending the constitutional design should be considered.

Democracy

There is significant dissatisfaction concerning the operation of democracy and the sense in which elected representatives are not connected closely enough to people. We have considered whether reform of the electoral system might be a solution. We have indicated that the answer to this is not simple and would probably require a modified version of the current party-list PR system, which would increase the sense of connection between the public and their representatives. A proposal worth considering is the combination

of a multi-member constituency system (large constituencies each with several representatives) topped up by a party-list system. While this could be done without a constitutional amendment, it has important constitutional implications and might help strengthen the architecture of South African democracy.

- Information should be more widely disseminated about the constituencies of MPs and more accountability introduced for the money spent on constituency work.
- A review should be conducted of how to enhance the functioning of parliament and a clear process identified for giving effect to its recommendations.
- Executive accountability to parliament needs to be strengthened through such measures as giving more teeth to parliamentary committees, including the power to impose penalties on members of the executive who fail to respect summonses.
- Firmer rules need to be developed around Speaker impartiality, an entrenched right to broadcast commentary from parliamentary chambers, which security forces can intervene when, how close protesters can approach and the security measures in place to protect parliamentary premises.
- There is a serious worry for democracy in the failure to cap private donations to political parties or have any transparency on funding. We suggest that there are competing values in this regard but that there should probably be a cap on party funding from private sources and greater state funding of political parties.
- Given the big effect political parties have on people's political rights in South Africa, the internal functioning of parties is a matter of constitutional importance. We suggest that a possible constitutional amendment might be warranted akin to a provision in the Kenyan Constitution that places certain requirements on the internal functioning of parties.
- The Constitution includes participatory democratic elements but these are more weakly expressed than the representative democratic elements. An amendment could help to strengthen the clear guidance on enhancing the participatory aspects of South African democracy. Detailed thinking needs to be devoted to how to make the structures of government more accessible to individuals. We would hesitate to

recommend that a 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

- We do not express a firm preference but have raised questions around the functioning and role of the National Council of Provinces. Whether it is worth retaining a geographically focused second house may be worth debating, although the structure also bolsters certain federal aspects of the Constitution.

- Individuals have a right to protest in terms of their rights to freedom of association and assembly, but the current statutory structure based on the Regulation of Gatherings Act 205 of 1993 is flawed and often results in the right to protest being denied. While it is difficult to see that an amendment to the Constitution will help, we believe this is a matter of great constitutional importance for the democratic space, and the relevant laws around protest need to be amended to facilitate this right within the reasonable bounds set by the Constitution.

- 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 too 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.

- The state should not intervene further in the regulation of the media. The independence and impartiality of the South African Broadcasting Corporation should be safeguarded, a matter that possibly requires constitutional attention given the failure to adequately respect its independence.

The judiciary

- The Constitution has failed to ensure the creation of a process for the appointment of judges that is fully independent and credible in the eyes of the public. We recommend that section 178 be amended to decrease the size of the JSC and to reduce the number of political appointees to create a better balance between professional and political members. The subsection that deals with the National Council of Provinces should require opposition leaders to be represented on the JSC.

- A possibility for debate is whether section 174(2) should be amended to read that when making judicial appointments, the judiciary must reflect broadly not only gender and race, but also other aspects of diversity.

- There is a perception of bias in the appointment of judges and the appointment of the Chief Justice in particular. Section 174(3) should be amended to provide for an appointment procedure of the Chief Justice that is similar to the appointment of the other Constitutional Court justices. The JSC could call for nominations from the President as well as the leaders of the parties represented in the National Assembly and institutions identified in its procedure. After short-listing and interviews by the JSC, a list of all candidates could be submitted to the President and a process of consultation, which should be clearly defined in the constitutional amendment, between the President and the leaders of parties should begin.

- Section 175 deals with the appointment of acting judges and ought to be reconsidered in the light of independence and separation of powers concerns. If acting judges are to remain, then the JSC should be involved in their selection and the decision should not be made solely by the Executive. This is particularly important in the case of acting appointments to the Constitutional Court.

- The Constitution should be amended to add a requirement that a system of governance should be established over the judiciary by the judiciary.

- The Constitution should be amended to provide for a mechanism to deal with judicial discipline short of removal and to require a Code of Judicial Ethics to be developed.

- The Constitution should be amended explicitly to provide for legal representation at state expense to parties to civil matters who are unable to afford such representation.

Chapter 9 institutions

- One of the problems for the functioning and independence of Chapter 9 institutions is the fact that there is no constitutional provision or guarantee that their mandate will be adequately funded. We therefore recommend a constitutional provision that ensures the adequate funding of Chapter 9 institutions.

- In so doing, we believe it is imperative that there be a requirement that funding for chapter 9 institutions be subject to independent appropriation processes and not be included in the budget of government departments, where there remains a discretion on the part of such departments to disperse the funds to chapter 9 institutions.
- We also would recommend the inclusion of a public participatory and vetting element in the appointment process of chapter 9 commissioners and the Public Protector.
- Stronger safeguards need to be introduced so that individuals committed to advancing the mandate of each of these institutions are appointed and to reduce the influence of narrow political agendas in this regard. These could take the form of increasing the percentage of votes required for approval of any appointment to force cross-party agreement.
- While we make no firm recommendations, we believe that it is worth considering the amalgamation of the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- Greater efforts need to be expended by the chapter 9 institutions to make the public aware of what they do and the recourse they can seek by approaching them.
- Where there are allegations of unbecoming conduct on the part of a high-level office-bearer of a chapter 9 institution, it is important that processes are in place to allow for expeditious, independent and transparent investigation, as well as adequate disciplinary mechanisms that include sanctions that do not necessarily entail the removal of an office-bearer.
- The Constitution does not clarify the effect of the remedial actions required by an institution such as the Public Protector. A judgement of the Constitutional Court recently held that the Public Protector has the power to make binding orders; such a holding could be the subject of a constitutional amendment which also clarifies whether any other Chapter 9 institutions have such binding powers.
- The South African Human Rights Commission is required to gather information concerning the activities of state organs in relation to a range of socio-economic rights. There is no provision requiring

a report to be compiled or published on these activities at regular intervals. The imposition of such an obligation should be considered and perhaps extended beyond the realm of socio-economic rights.

- The constitutional provisions on the Independent Electoral Commission are minimal and, given its importance to the health of South African democracy, should perhaps be extended to constitutionalize protection of its independence and functioning in all respects.

Multi-level governance

- The development of multi-level government emerged from concrete historical circumstances and interests. Experts in constitutional design around the world recognize numerous benefits derived from devolved government, but there needs to be a more principled political commitment to make the federal structures work. This means attending to the reasons why they are important in the first place and trying to give effect to those reasons.

- There should be an investigation into areas where a lack of clarity about constitutional competences, or excess overlap, hampers governance. We believe it may be time to revisit Schedules 4 and 5 of the Constitution in order to ensure clearer loci of responsibility.

- There should be a clearer delineation of the responsibilities of traditional authorities and local governments in areas of service delivery, and mechanisms established akin to those in other branches for addressing conflicts.

- There should be an investigation into whether the local government structures of South Africa cannot be simplified. In particular, the creation of a fourth tier of government where district and local municipalities exist may well be unnecessary, and removing one of these layers (probably the district layer) could help to enhance efficiency and service delivery.

- Investigations should be considered into how to enhance participatory democracy in local government and comparative models, such as participatory budgeting, considered.

- Greater options for provincial revenue raising should be considered, which could enhance provincial autonomy.

- Programmes should be put in place for training and up-skilling those at all levels of government in order to ensure they achieve their mandates. Different levels of government need to be considered separately to ensure that each is properly staffed with those who have gained expertise in relation to that particular level.

The security services

- A clearer definition is needed of what constitutes lawful arrest or detention. This is a matter that could be attended to short of constitutional amendment.
- The requirements around lethal force in recently amended legislation need to be made stricter and clearer to ensure that the requirements outlined by the Constitutional Court are met.
- Stronger steps need to be taken to separate decisions around policing from political interference and to ensure the police force is not used for political ends.
- Data-gathering practices around crime statistics need to be improved so that greater transparency is achieved in this regard.
- A significant number of states require some legislative approval for the deployment of their Defence Forces. Including such a provision in the Constitution might make for more sober and considered decision-making.
- The lack of clarity about parliament's role in the dismissal of the Intelligence Inspector General may lead to the possibility of presidential interference with the Inspector-General's work. Thus, the constitutional text should include a provision on parliamentary oversight of the dismissal of an Inspector-General.
- A general public interest defence should be made available to whistle-blowers who release protected state information in order to expose any matters related to criminal activity or corruption about which there is a pressing public interest.
- The institutional independence of the National Prosecuting Authority should be guaranteed by the Constitution. The current provisions do not adequately safeguard its independence and there is a lack of specificity concerning the relative roles of the executive and the NPA. A more expansive provision providing stronger protection for the independence of the NPA would be desirable. A note of caution

should be sounded here, however, given the current penchant for weakening institutions rather than strengthening them.

- We have identified a serious omission in the Constitution involving the failure of the document to include constitutional protection for an independent anti-corruption agency, especially for a country that has South Africa's history of endemic corruption. This has led indirectly to the courts having to fashion such constitutional protection. It would be preferable to include the need and contours for this independent ant-corruption agency in the Constitution's text, although current attempts to weaken institutions for political gain caution against tampering too much with court-led developments.

References

Alexander, P., 'A Massive Rebellion of the Poor, *Mail & Guardian*, 13 April 2012, <http://mg.co.za/article/2012-04-13-a-massive-rebellion-of-the-poor>, accessed 19 April 2016

Al-Ali, Z., 'The Arab Spring Constitutions: For Whose Benefit', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

Atkinson, D. (1994), 'Principle Born of Pragmatism? Central Government in the Constitution', in S Friedman and D Atkinson (eds), *The Small Miracle: South Africa's Negotiated Settlement* (Johannesburg: Raven Press, 1994)

Bilchitz, D. and Williams, A., 'Religion and the public sphere: towards a model that positively recognises diversity', *South African Journal on Human Rights*, 28 (2012), p. 146

Blake, R. and Litchfield, L., 'Religious freedom in Southern Africa: The developing jurisprudence', *Brigham Young University Law Review,* 515/2 (1998), p. 515

Bezdiek, D., 'Provincial Government' in A. Venter (ed.), *Government & Politics in the New South Africa*, 2nd edn (Pretoria: Van Schaik Publishers, 1998)

Booysen, S., *The African National Congress and the Regeneration of Political Power* (Johannesburg: Wits University Press, 2011)

Bornman, E., 'National symbols and nation building in the post-apartheid South Africa', *International Journal of Intercultural Relations*, 30 (2006), p. 383

Buccus, I. and Hicks, J., 'Civil Society and Participatory Policy Making in South Africa: Gaps and Opportunities', in J. Daniel et al. (eds), *New Paths, Old Compromises?* (Johannesburg: Wits University Press, 2011)

A. Butler (ed.), *Remaking the ANC: Party Change in South Africa and the Global South* (Johannesburg: Jacana, 2014)

Choudhry, S., 'Globalisation in search of justification: towards a theory of comparative constitutional interpretation', *Indian Law Journal*, 74 (1999), p. 826

Corder, H., 'Crowbars and cobwebs: Executive autocracy and the law in South Africa', *South African Journal on Human Rights*, 5/1 (1989)

J. Daniel et al. (eds), *New Paths, Old Compromises?* (Johannesburg: Wits University Press, 2011)

Davis, D. and Le Roux, M., *Precedent and Possibility: The (Ab)use of Law in South Africa* (Cape Town: Double Storey, 2009)

Dean, W., 'Our administrative law: a dismal science?', *South African Journal on Human Rights*, 2 (1986), p. 164

Dixon, R. and Landau, D., 'Constitutional Endurance and Performance: Judging Constitutional Performance', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

Dugard, J., *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978)

Farlam, P., 'Freedom of Religion, Belief and Opinion' in S. Woolman et al. (eds), *Constitutional Law of South Africa*, 2nd ed. (Cape Town: Juta, 2008)

Fitch Ratings, 'Fitch Ratings in South Africa', [n.d.], <https://www.fitchratings.com/site/fitch-home/pressrelease?id=995794>, accessed 11 December 2015

Forsyth, C., *In Danger of their Talents: A Study of the Appellate Division of the Supreme Court of South Africa 1950–1980* (Cape Town: Juta, 1985)

S. Friedman and D. Atkinson (eds), *The Small Miracle: South Africa's Negotiated Settlement* (Johannesburg: Ravan Press, 1994)

Gargarella, R., 'When is a Constitution doing well? The Alberdian Test in the Americas', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

Gathii, J. T., 'Assessing the Constitution of Kenya 2010 Five Years Later', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

Ghai, Y., 'Chimera of Constitutionalism: State, Economy and Society in Africa' in S. Deva (ed.), *Law and Inequalities: Contemporary Perspectives* (Delhi: Eastern Book Company, 2010), p. 313

Ginsburg, T., 'Evaluating Constitutional Implementation', International IDEA (2015, unpublished)

Ginsburg, T. and Huq, A., 'Evaluating Constitutional Implementation', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

—, 'What can constitutions do? Lessons from Afghanistan's experience', *Journal of Democracy*, 24 (2014), pp. 116–30

Greene, K., and Ibarra-Rueda, H., 'Mexico's Institutional Revolutionary Party: Reform and Resurgence' in A. Butler (ed.), *Remaking the ANC: Party Change in South Africa and the Global South* (Johannesburg: Jacana, 2014)

Habermas, J., 'Struggles for Recognition in the Democratic Constitutional State' in A. Guttman et al. (eds), *Multiculturalism: Examining the Politics of Recognition*, 2nd edn (Princeton: Princeton University Press, 1994) pp. 107, 125

Halberstam, D., 'Federalism: Theory, Policy, Law', in M. Rosenfeld and A. Sajo (eds), *The Oxford Handbook on Comparative Constitutional Law* (Oxford: Oxford University Press, 2014)

Hofmeyer, J. and Govender, R., Institute for Justice and Reconciliation, *SA Reconciliation Barometer 2015: National Reconciliation, Race Relations and Social Inclusion* (South Africa Reconciliation Barometer Briefing Paper no. 8, December 2015)

Humphries, R. et al., 'The shape of the country: Negotiating regional government' in S. Friedman and D. Atkinson (eds), *The Small Miracle: South Africa's Negotiated Settlement* (Johannesburg: Ravan Press, 1994)

Huq, A., 'Hippocratic Constitutional Design', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

Institute for Justice and Reconciliation, *SA Reconciliation Barometer 2015: National Reconciliation, Race Relations and Social Inclusion*, 2015, <http://www.ijr.org.za/uploads/IJR_SARB_2015_WEB_002.pdf>, p.15, accessed 11 December 2015

Klare, K., 'Legal Culture and Transformative Constitutionalism', *South African Journal on Human Rights*, 14 (1998), p. 146

Kuper, A., 'Review: Crolyn Hamilton's the Mfecane aftermath: Reconstructive debates in Southern African history', *Current Anthropology* 38 (1997), p. 471

Lekalake, R., 'South Africans committed to unity despite economic pessimism', *Mail & Guardian*, 21 April 2016 <http://mg.co.za/article/2016-04-21-south-africans-committed-to-unity-despite-economic-pessimism>, accessed 6 May 2016

Maclennan, B., 'Travelgate: 14 plead guilty', *Mail & Guardian*, 6 October 2006, <http://mg.co.za/article/2006-10-16-travelgate-14-plead-guilty>, accessed 6 May 2016

Melton, J. et al., 'Time and Constitutional Efficacy', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

Mureinik, E., 'A bridge to where? Introducing the Interim Bill of Rights', *South African Journal on Human Rights*, 10 (1994), p. 31

Naidoo, V., 'Party-state relations in South Africa in a period of transition' in A. Butler (ed.), *Remaking the ANC: Party Change in South Africa and the Global South* (Johannesburg: Jacana, 2014)

Ndlovu, S., 'Motsekga devastated by schools burned in Limpopo', *Sowetan*, 7 May 2016, <http://www.sowetanlive.co.za/news/2016/05/07/motshekga-devastated-by-schools-burnt-in-limpopo>, accessed 9 May 2016

Nussbaum, M., 'Ambedkar's Constitution: Caste, Religious Minorities, Gender, Sexual Orientation', Paper presented at the Chicago Conference on Constitutional Performance, University of Chicago Law School, 24–25 April 2015

Rawls, J., *A Theory of Justice: Revised Edition* (Oxford: Oxford University Press, 1999)

Reddy, T., 'Factional dynamics in the Indian National Congress and the African National Congress' in A. Butler (ed.), *Remaking the ANC: Party Change in South Africa and the Global South* (Johannesburg: Jacana, 2014)

Riker, W., *Federalism: Origin, Operation, Significance* (Boston, MA: Little Brown, 1964)

Rosenberg, G. N., *The Hollow Hope: Can Courts Bring About Lasting Change?,* 2nd edn (Chicago: University of Chicago Press, 2008)

M. Rosenfeld and A. Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012)

Roux, T., 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference', *Stellenbosch Law Review* 20 (2009), p. 258

Twala, C., 'The African National Congress and the Cadre Deployment Policy in the Post-Apartheid South Africa: A Product of Democratic Centralisation or a Recipe for a Constitutional Crisis?', *Social Science Journal*, 41/2 (2014), p. 159

South African Human Rights Commission, *The Promotion of Access to Information Act (PAIA) Annual Report, 2011–12* [n.d.], <http://www.sahrc.org.za/home/21/files/PAIA%20Annual%20Report%20201112.pdf>, accessed 11 December 2015

Southall, R., *Liberation Movements in Power: Party and State In Southern Africa* (Pietermaritzburg: James Currey and University of KwaZulu-Natal Press, 2013)

Sunstein, C., *Designing Democracy* (Oxford: Oxford University Press, 2001)

A. Venter (ed.), *Government & Politics in the New South Africa*, 2nd edn (Pretoria: Van Schaik Publishers, 1998)

—, 'The Executive' in A. Venter (ed.), *Government and Politics in the New South Africa*, 2nd edn (Pretoria: Van Schaik, 1998)

A. Venter and C. Landsberg (eds), *Government and Politics in the New South Africa*, 3rd ed (Pretoria: Van Schaik Publishers, 2006)

Venter, A. and Mtimkulu, P., 'The Executive' in A. Venter and C. Landsberg (eds), *Government & Politics in the New South Africa*, 3rd edn (Pretoria: Van Schaik Publishers, 2006)

Woolman, S., 'Understanding South Africa's Aspirational Constitution as Scaffolding' *New York Law School Law Review* 60 (2015–16), p. 401

—, 'South Africa's aspirational Constitution and our problem of collective action' *South African Journal on Human Rights* 32 (2016)

Woolman, S. and Swanepoel, J., 'Constitutional History' in S. Woolman et al. (eds), *Constitutional Law of South Africa*, 2nd edn (Cape Town: Juta, 2008)

S. Woolman et al. (eds), *Constitutional Law of South Africa*, 2nd edn (Cape Town: Juta, 2008)

Cases

Bhe and Others v Khayelitsha Magistrate and Others; Shibi v Sithole and Others 2005 (1) SA 580 (CC)

Brink v Kitshoff NO 1996 (4) SA 197 (CC)

Certification of the Constitution of the RSA, 1996 1996 10 BCLR 1253

Collins v Minister of the Interior 1957 (1) SA 522

Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC)

Democratic Alliance v Acting National Director of Public Prosecutions and Others [2016] ZAGPPHC 255

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11

Harris v Minister if the Interior 1952 (2) SA 428 (AD)

Minister of the Interior v Harris 1957 (1) SA 769 (AD)

Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA))

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)

Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Other 2000 ZACC 1 674 (CC)

Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

Prince v President, Cape Law Society 2001 (2) BCLR 133 (CC)

S v Makwanyane 1995 ZACC 3 (CC)

S v Mamabola 2001 (3) SA 409 (CC)

Annex. Constitutional legitimacy: a survey of the Gauteng adult population

Annex. Constitutional legitimacy: a survey of the Gauteng adult population

Merle Werbeloff and David Bilchitz

Background

This Annex summarizes the statistical analysis and interpretation of the results of a survey of the Gauteng adult population on constitutional legitimacy in South Africa. The survey was commissioned by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a centre of the University of Johannesburg. The sample comprised 608 respondents from areas within Gauteng. The results obtained from the interviews have been statistically weighted according to AMPS 2015BA to reflect the 9.2 million adult residents of Gauteng. A team of academics and researchers on the SA constitution and related disciplines engaged in a lengthy process of collaboration to devise the questionnaire and ensure that it covered attitudes towards a wide range of features of the constitutional order. The fieldwork was conducted in October and November 2015. The questionnaire was compiled from first principles for the purposes of the research.

Sampling and sample characteristics

This research is based on the responses of a stratified random sample of 608 adults aged 18 years or older, living in Gauteng. The sample comprised 337 blacks, 145 whites, 49 coloureds and 77 Indians.

An attempt was made to draw the sample so that it would reflect the demographics of the 9.2 million adult residents of the Johannesburg, Pretoria, Vaal, East Rand, West Rand and non-urban Gauteng areas. Accordingly, within these areas, the sample was stratified by gender, race and age based

on the population of adults aged 18 years and over from AMPS 2015BA.[21] However, in the case of certain smaller segments, disproportionate sampling was used to ensure a large enough sample base for analysis, resulting in discrepancies between the relative percentages of the sample and population demographics.

Therefore, the AMPS 2015BA weighting factors for the Gauteng population were used to correct these discrepancies, so that the responses of demographic subgroups in the sample would be represented correctly. Correct representations of subgroups are important when the responses of the people interviewed are aggregated into an overall figure (Maletta 2007), for example when computing an overall figure for the percentages of agreement of respondents in different areas of Gauteng on a particular indicator. Correct weightings thus reduce the errors of estimation that would occur if some population groups have more weight than they are eligible for and others have less. Consequently, weighting factors were used in all analyses that involved the aggregation of groups.

The analysis below references the SAARF Living Standards Measure (LSM) which has become the most widely used marketing research tool in South Africa. It divides the population into 10 LSM groups (10 being the highest and 1 the lowest). The LSMs are a wealth measure based on standards of living rather than income.

Summary of the analysis

A stratified random sample of 608 adults living in Gauteng was interviewed in October and November 2015 on their perceptions of various aspects of the constitutional legal order in South Africa. The sample was statistically weighted based on AMPS 2015BA to reflect the demographics of the 9.2 million adult residents of Gauteng. The questionnaire was compiled by experts on the Constitution and related issues. The responses of the Gauteng adults were measured in relation to various facets of the questionnaire, which are described below, with some of the interesting results. The key segments of the questionnaire and some key findings are outlined below. A more detailed and nuanced picture can be obtained from the full survey and statistical report.

[21] The All Media and Product Survey is a national, random probability consumer survey conducted by SAARF's (SA Audience Research Foundation) contractor, Nielsen Media Research. The survey is conducted twice a year with a sample size of 25 000 people aged 15 and over, projected to the adult SA population of 38.2 million. AMPS provides media owners, advertising agencies and marketers with the readership, viewership and listenership of all media types in South Africa. It also contains extensive demographic, geographic, psychographic, product and brand information.

Values

These items were designed to understand the values of people in Gauteng, their understanding of their identity and its congruence with the new constitutional order. Most respondents acknowledged as important the values of equality, dignity, freedom, democracy and the rule of law. They ascribe similarly high levels of importance to various facets of their identities, such as being/feeling South African, and belonging to their religion and race, but less importance to being a member of their tribe. While a large number support a return of the death penalty, a similar number believe in the power of the Constitutional Court to decide the issue. Similarly, most people in Gauteng are liberal in their attitudes towards same-sex sexuality and a large number would follow a ruling of the Constitutional Court not to discriminate against same-sex couples. A small minority, however, is willing to take the law into their own hands to achieve their goals. There is strong racial polarization around affirmative action and land reform, and moderate polarization around such issues as the death penalty and the rights of foreigners.

Democracy

This section of the questionnaire examined the attitudes of the people of Gauteng to aspects of the constitutional architecture relating to democracy. The findings in this section suggest that most people have accepted democratic values and institutions: 80% of people agreed that they would accept an election result even if the party they voted for lost while 82% thought that South Africa needs strong opposition parties. The numbers also suggest that people are dissatisfied with the functioning of representative and participatory aspects of democracy: only 40% believed that parliament represents them and less than half agreed that their politicians represent them. There is a strong degree of racial polarization around whether the police use too much force against ordinary people and whether white people still hold economic power in South Africa.

Accessibility of participation

This section of the questionnaire sought to evaluate the perceptions of individuals concerning the ease with which they can participate in the polity and gain access to the institutions created by the Constitution. Generally, the various forms of political participation were perceived as being difficult. Half to two-thirds of the population expressed difficulty with participating in various activities, such as contacting their member of parliament (71% had difficulty), challenging a violation of rights in court (61% expressed difficulty)

or lodging a complaint at the Human Rights Commission (68%). Only about 20% of respondents perceived any form of participation as easy.

Knowledge of the Constitution

This part of the questionnaire was designed to assess the knowledge the people of Gauteng have of various features of the constitutional scheme. Responses to only 6 of the 18 knowledge items were generally correct. This suggests a general lack of knowledge about the Constitution and the structures it sets up. The differences between the knowledge levels of the race groups are weak to moderate. The overall score for whites (44% correct responses) is slightly lower than for blacks (49%), coloureds (52%) and Indians (50%).

Political participation

This section of the questionnaire sought to evaluate the levels of actual political participation by the people of Gauteng. High numbers of people in Gauteng vote: 82% had participated in national elections and 78% in local government elections. A majority of people discuss politics regularly with friends (57%) and over three-quarters follow the news daily (78%). Fewer members of the polity engage in more demanding political activities such as participating in a meeting where a national or provincial representative is present (22–24%) or participating in a strike (33%) Generally, blacks had the highest levels of political participation, followed by coloureds and then by Indians. Whites participated the least.

Perceptions of South Africa/confidence in political leadership

This section of the questionnaire sought to understand the attitudes of the people of Gauteng towards current problems facing South Africa and its existing leadership. The vast majority (74%) of Gauteng respondents expressed national pride, but only 34% agree that Jacob Zuma has done well in leading the country and 35% have entertained thoughts of emigration. There are strong differences among racial groups concerning the perception of the President's political performance, with 40% of black people believing him to be performing well and only 3% of whites.

Awareness

The participants were asked two open-ended questions on their awareness of two important institutions set up by the Constitution: the Constitutional Court and the South African Human Rights Commission. Just over half (55%) of the sample respondents said that they were aware of the Constitutional

Court and a similar percentage of 57% (not necessarily the same respondents) said they had heard of the Human Rights Commission.

Factor analysis

Using factor analysis, the report sought to move beyond the responses to individual items to understand whether any patterns emerged from the responses. Factor analysis helps to understand whether there are significant underlying dimensions to or factors in the responses. By understanding the correlation (or otherwise) of various responses, we were able to identify the following factors in each part of the questionnaire:

1. *Values*: Support for constitutional values, Group identity, Equality, Extra-legal dissent, Attitudes to sexuality and Attitudes to criminal justice.
2. *Democracy*: Institutional legitimacy, Political impartiality and Unequal power
3. *Accessibility of participation*: Sense of disempowerment
4. *Political participation*: Political participation, Interest in politics, Obedience to the law (anti) and Political engagement
5. *Perception of South African leadership*: Confidence in political leadership

In general, the attitudes of blacks and whites are polarized on these factors. Compared to blacks, and to a lesser extent to the other race groups, whites tend to be more opposed to extra-legal dissent, more punitive in relation to criminal justice and less positive about the legitimacy of democratic institutions. Furthermore, whites tend to perceive less unequal power in society, feel the most disempowered from participating in democratic institutions, participate the least in politics, be the least politically engaged and the most obedient of the law, and have the least confidence in the political leadership of the country. By contrast, blacks express the highest willingness to engage in extra-legal dissent, although they also express the highest sense of institutional legitimacy. Blacks perceive the most unequal power distribution in society, participate the most in politics with the most interest and greatest engagement, feel the least disempowered and are the most confident in the country's political leadership.

Cluster analysis

We then used cluster analysis to identify natural groupings in the factor scores of the participants. It should be noted that the demographic variables were used only to describe the clusters and not used in the process of clustering the respondents. Four distinct clusters of like-minded respondents emerged.

Cluster 1 (22%): The 'Constitutionally Engaged'

This cluster had the highest knowledge score on the 18-item knowledge test (55% on average compared to the 44%-50%). Compared to the other clusters, Cluster 1 members are the most active participants in politics (e.g. participation in the Integrated Development Plan process, trade unions and demonstrations). They have strong confidence in the political leadership of the country. They are supportive of constitutional values (equality, dignity, freedom, democracy and the rule of law), and have the strongest group identity (religion, race). They hold liberal views on equality (equal opportunities across gender and race groups) and sexuality. They feel the most empowered relative to members of the other clusters (e.g. they would approach the Constitutional Court directly or a member of parliament). They do not support extra-legal dissent and are the most strongly supportive of obedience to the law.

Almost three quarters (70%) of the cluster members belong to the LSMs 5–7, and they are mostly (94%) black compared to 86%, 84% and 52% in the other clusters. About half (46%) the members speak Zulu at home, more than the percentage of Zulu home language speakers in the other clusters. Over half (58%) of the cluster members have matriculated, and a further third (34%) have some form of tertiary education. The vast majority (almost 90%) are employed or self-employed, with only 7% looking for work. In general, households comprise four to five people, with one or two children and up to three earners.

Cluster 2 (37%): The 'Constitutionally Disaffected'

This cluster has a relatively poor knowledge of the Constitution, averaging only 44% on the 18-item knowledge test. The cluster members are generally less supportive of constitutional values. Compared to the other cluster members, they are the most supportive of extra-legal dissent (e.g. accepting the burning of government property to force politicians to listen or to force the state to provide services) and, correspondingly, show the least obedience to the law (e.g. they are prepared to pay bribes to the police). They are still fairly confident in the political leadership of the country. They have a sense of unequal power in the country (e.g. that white people still hold the economic

power in South Africa), more so than all the other clusters. They do not participate actively in politics.

This cluster is the second lowest in terms of socio-economic status, with 36% of members in LSMs 1–5, and is similarly ranked second lowest in terms of education, with almost one-third (31%) not having matriculated. The majority of cluster members are black (86%), 4% are coloured and Indian respectively, and 6% white. Generally, households comprise three to six people, with one or two children and up to three earners.

Cluster 3 (17%): The 'Constitutionally Ambivalent'

The knowledge level of this cluster tends to be low, similar to that of Cluster 2, with the same average score of 44% on the 18-item knowledge test. Members of this cluster feel more disempowered than Cluster 2 members, but unlike Cluster 2 members they are not supportive of extra-legal dissent and do not support disobeying the law. They are moderately liberal in their attitudes to sexuality and generally supportive of strong criminal justice responses such as the death penalty for serious crimes. They are ranked second lowest of the clusters in terms of support for the values of the Constitution and for institutional legitimacy, only higher than Cluster 2. They are fairly confident in the political leadership of the country and feel to some extent politically engaged.

This cluster has the lowest socio-economic status with almost half (47%) of members in LSMs 1–5. Members of this cluster have the lowest levels of education, with 58% not having matriculated and only 12% with any form of tertiary education. The cluster members tend to have the largest households and the least number of earners. A quarter (24%) of the cluster members are at least 65-years old and retired, compared to just 5% or less in the other clusters. Membership is 84% black, 2% coloured and Indian, with the most children of all the clusters.

Cluster 4 (24%): The 'Constitutionally Disempowered'

This cluster has the second highest knowledge score on the Constitution, scoring 50% in average on the 18-item knowledge test. The cluster members feel the most disempowered of all the clusters. The cluster members participate the least in politics, are the least politically engaged and have the weakest support for the legitimacy of democratic institutions. However, they show strong support for the values of the constitution and political impartiality. They are the most strongly opposed to extra-legal dissent and are unsupportive of disobeying the law. They hold the most punitive attitudes to criminal

justice but are the least confident in the political leadership of the country.

This cluster is the most affluent cluster, with one-third of cluster members in LSM's 9–10 compared to fewer than 11% in any other cluster. It is also the most educated of the clusters, with half the members having benefited from some tertiary education. This cluster is mostly employed or self-employed (80%). The cluster comprises half black membership, 4% coloureds, 5% Indians and 40% whites. Half the cluster members speak English or Afrikaans at home compared to under 20% in the other clusters. They tend to have households with one to five members, with one or two earners in the household and up to two children.

By studying these clusters and their demographics, we are afforded a much more in-depth understanding of like-minded people in the context of constitutional legitimacy than if we had merely separated out the groups on a single variable such as race. Based on the mixed composition of the four clusters, it is clear that there are respondents from different race groups, and from different education and socio-economic levels, who share similar outlooks. Thus, to compare views based on a variable such as race alone is simplistic and may even be deceptive. From a research design perspective, this study has the potential to function as the baseline stage of longitudinal research that could track the views of a population such as Gauteng adults over time.

About the authors

David Bilchitz is a Professor of Fundamental Rights and Constitutional Law at the University of Johannesburg and Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). He is also Secretary-General of the International Association of Constitutional Law. He was elected to the South African Young Academy of Science in 2015. He is the author of a monograph *Poverty and Fundamental Rights*, published by Oxford University Press, and two co-edited collections, and has published many book chapters and journal articles in the field of fundamental rights. He is also on the editorial board of several journals. He holds a BA (Hons) LLB from the University of the Witwatersrand and an MPhil and PhD from the University of Cambridge.

Daryl Glaser is Associate Professor in the Department of Political Studies at the University of the Witwatersrand. His interests traverse democratic theory, normative political theory and the study of South Africa. He is the author of *Politics and Society in South Africa: A Critical Introduction* (Sage 2001), editor of *Mbeki and After: Reflections on the Legacy of Thabo Mbeki* (Wits University Press 2010) and co-editor of *Twentieth Century Marxism: A Global Introduction* (Routledge 2007). He has published widely in international academic journals.

Andrew Konstant is currently a visiting researcher at Georgetown University Law Centre. Andrew spent a year as a researcher at SAIFAC and before that was an associate at Webber Wentzel. He graduated with an LLB and LLM from the University of the Witwatersrand and an MA from King's College, London.

Linette Du Toit holds an LLM in Human Rights and Democratization from the University of Pretoria's Centre for Human Rights. She has clerked at both the Constitutional Court of South Africa and the Supreme Court of Kenya and is currently working in an organization that defends LGBTI rights in Uganda.

Khomotso Moshikaro completed his LLB at the University of Pretoria in 2012, and a Bachelor in Civil Laws (2014) and an MSc in Contemporary Chinese Studies (2015) at the University of Oxford. He has worked as a law clerk in the Constitutional Court of South Africa and as a researcher at SAIFAC, and is now a lecturer in Public Law at the University of Cape Town. His areas of interest are legal theory, constitutional law, competition and regulation, and civil procedural theory.

Merle Werbeloff is a registered industrial psychologist and lecturer in quantitative research methods at Wits School of Governance. She works in applied statistics, data mining and data modelling. Her research includes analysis of South African human rights databases and other major national databases.

The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) is a centre of the University of Johannesburg and a leading research centre in South Africa producing advanced research in its focus areas. SAIFAC's vision is to be an internationally recognized centre of research excellence in its key focus areas of constitutional, human rights, public and international law. SAIFAC's mission is to produce advanced research in its focus areas, to foster collaboration and engagement between academics and members of the legal community across South Africa and internationally, and to advance constitutionalism, human rights and the rule of law in Southern Africa.

<http://www.uj.ac.za/faculties/law/saifac>

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the fields of elections, constitution-building, political parties, gender in democracy and women's political empowerment, democracy self-assessments, and democracy and development, we undertake our work in three activity areas:

1. providing comparative knowledge derived from practical experience on democracy building processes from diverse contexts around the world;
2. assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
3. influencing democracy building policies through the provision of our comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, it has offices in Africa, the Asia-Pacific, and Latin America and the Caribbean. International IDEA is a Permanent Observer at the United Nations.

<http://www.idea.int>

The idea that the performance of a constitution can be evaluated is a relatively recent one. With the growth and development of constitution making over the past three decades, an understanding of what constitutions seek to achieve and how they achieve has become increasingly important.

Are there better or worse ways of drafting constitutions for the purposes of achieving desired outcomes? How are we to understand the interaction between particular provisions or elements of a constitution and the concrete realities that unfold after the moment of constitution drafting?

This report—like the full-length study on which it is based—focuses on key tensions and stress points that have arisen in the past 20 years within the South African political community as a method of analysing some of the key goals of the Constitution and whether they have been met.

It draws on case law, reports by the government and non-governmental organizations, and other empirical data to assess the performance of the South African Constitution and offers a series of recommendations on potential changes to the Constitution that could help address its shortcomings.

International Institute for Democracy and Electoral Assistance
(International IDEA)
Strömsborg, SE-103 34 Stockholm, Sweden
Tel: +46 8 698 37 00, fax: +46 8 20 24 22
Email: info@idea.int, website: www.idea.int

ISBN: 978-91-7671-053-1