



Assessing the Performance of South Africa's Constitution

Executive Summary

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This is an unedited extract from a report for International IDEA by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, a Centre of the University of Johannesburg.

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<<http://www.idea.int/resources/analysis/assessing-the-performance-of-the-south-african-constitution.cfm>>.

Executive Summary

The project

This report was commissioned by the International Institute for Democracy and Electoral Assistance (International IDEA) to evaluate the performance of the South African Constitution over the past twenty years. The notion of the performance of a constitution is itself contested: What does it in fact mean for a constitution to perform? How can this be evaluated?

Methodology

A methodology, developed by Professor Tom Ginsburg and Professor Aziz Huq, was utilized in the process of conducting the research into assessing the performance of the South African Constitution. The methodology outlines two perspectives from which the performance of a constitution can be engaged. The first perspective is an ‘internal’ one that seeks to evaluate the performance of the constitution against its own self-declared goals. 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. 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 SAIFAC team consequently adapted the proposed methodology and has adopted a five-step approach towards evaluating the performance of the South African constitution.

- The first step involves analysing the Constitution in order to determine its internal goals.
- The second step was to engage in an analysis of the relationship between internal and external goals.
- The third step will be to consider possible design flaws in the constitutional architecture itself whereby institutions and provision were not well-suited to achieving their ends
- The fourth step involves evaluating the actual extent to which the goals of the Constitution have been achieved in particular areas and in an overarching manner
- The last step involves recommendations where we believe a different institutional design could have made a difference in areas where we found clear underperformance of the constitution.

We now elaborate briefly on the manner in which we have approached each of these steps and the broad goals that we have utilised in evaluating performance.

Internal goals

It is important to recognize at the outset that, determining internal goals, is not a value-neutral project but rather one that requires acts of interpretation as to the values and purposes underlying the Constitution. 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 such as equality or the rule of the law) as well as concrete ones (providing, for instance, that ‘the National Assembly comprises no few than 350 and no more than 400 women and men’). 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 approach we adopted was as follows. The SAIFAC team first identified the underpinning themes and abstract goals of the constitution in light of South Africa’s history. These are captured in Chapter two of the report. We identified two overarching goals.

1. 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.

2. 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. The transformative goal we divided into four sub-goals:
 - a. first, the change was designed to take place through legal processes and to develop legal doctrines so as to enhance accountability and reason-giving;
 - b. secondly, 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;
 - c. thirdly, 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
 - d. fourthly, 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.

These rather abstract goals are dependent on the particular norms, institutions, processes and rights established by the Constitution to enable them to be achieved. Indeed, particular provisions in the Constitution can also be said to have their own purposes and histories. The first step thus identifying key areas of focus for the evaluation and providing more specificity to the goals of Constitution in these areas. The report focuses on the following specific areas of constitutional design: fundamental rights (Chapter 3); democratic governance including the legislature, and the executive (Chapter 4); the judiciary (Chapter 5); independent Chapter 9 institutions that support democracy (Chapter 6); multi-level governance (Chapter 7); and the security services (Chapter 8).

External goals and the relationship with internal goals

Ginsburg and Huq propose four external criteria against which to evaluate the performance of a constitution:

1. First, 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. Secondly, constitutions ought to succeed in **channelling the inevitable conflict** within a society between competing forces and ideologies into formal political institutions.
3. Thirdly, 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. The last criterion concerns the need for constitutional structures to address the **provision of public goods** which cannot be provided by citizens alone.

As mentioned, since South Africa has such an expansive constitution with detailed provisions, there is a large measure of overlap between the external and internal criteria. In some cases, it is not possible to separate steps one and two into separate sections though the relationship between internal and external criteria are considered in each chapter.

Design flaws

The next two steps involve analysing the performance of key elements of the Constitutional design against the goals identified in the last two steps. In the third step - which is often in the report connected intimately with the fourth step – we attempt to assess conflicts between the goals that may lead to problems in institutional design (and thus performance) as well as whether the institutional structures set up to achieve the goals were well-designed to do so. We furthermore sought to consider omissions from the constitution which have had an impact.

Not all chapters contain this step where there are no clear design flaws.

Actual performance

The fourth step involves evaluating the actual, empirically- determined performance of the various features of the Constitution that are analysed against the goals the Constitution seeks to achieve in these areas. In doing so,

we consider how the South African Constitution has helped to address some of the 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 are met. We focused on goals where it is reasonable to expect that the constitution can itself make a difference in a particular sphere.

We also split our analysis of actual performance in two parts. The first involves **compliance in a 'thin' sense** which involves considering whether or not branches of government have responded to an express mandate in the Constitution to pass legislation, make policy or perform a specific action. Thus, for instance, this enquiry involves considering whether the government has passed access to information legislation in conformity with the requirements of section 32 of the Constitution; or whether national elections have been held every five years in conformity with section 49 of the Constitution. This enquiry is factual and quantitative in nature.

We then turn to consider whether the constitution has **performed in a thick sense** which necessitates a much more qualitative assessment. Questions here include for example: has the Constitution created a stable system of legitimate government?; has the Constitution created greater equality between people of different races, genders, sexual orientations?; and has the Constitution achieved its socio-economic goals? To address these questions, we consider case law, reports by the government themselves, non-governmental organization reports and other empirical data. We also commissioned, as part of this project, 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 provided us with some empirical data which enabled this assessment to take place. A summary of the data is contained in Appendix A to this report as well and a full statistical report of the data is contained in Appendix B.

Summaries on performance and recommendations

Having assessed performance, we attempt to consider whether a different institutional design could have made a difference in areas where we found clear underperformance of the constitution. It is not clear at the outset that constitutional design can itself mitigate or address all political and sociological deficits of the South African environment. Where we concluded that a better architecture could have improved performance, we make recommendations as to how the constitution could itself be improved. Ascertaining where there have been weaknesses in the South African constitutional design could also be of importance to other constitutional processes in different countries and contexts.

Key findings on performance of the constitution overall and abstract goals

Thin compliance

One of the key findings of this report is that, largely, there has been thin compliance with the requirements of the Constitution. Given the more patchy performance in relation to thick compliance, this calls for explanation. We suggest that, at least in relation to the final constitution, the ANC was the dominant party, able to push for its conception of a constitution it desired. It was constrained by the Constitutional Principles yet 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 recognised 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), 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. Whilst 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. There is greater political competition that has arisen over time and 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 nine institutions which have achieved remarkable success though to some extent that has been contingent on the personalities who hold positions therein. The various tiers of the 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 and 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 realised and the government ability to provide public goods is in doubt, generating massive service delivery protests.

What then are some of the explanations for the mixed findings on thick compliance?

First, we believe that the difficulty of the task set by the constitution should not be underestimated which involved fundamentally changing a society that was undemocratic, and based on a racial caste system to one that is fully democratic and substantively equal. That task is monumental, highly ambitious and requires massive social change and engineering, along with institutional transformation. In 20 years, it was unlikely fully to succeed. The fact that the constitution requires so much positive state-building and programmes of development means that it will in all likelihood not fully succeed in any short to medium term period. The Constitution may be understood to include both a **roadmap with a sense of where the society wishes to head together with a series of processes** to reach this destination. As such, a failure of complete thick compliance is to be expected: as long as the society is headed in the direction of the road-map, and sufficient compliance is achieved with its requirements, there is no need for alarm. This understanding of the Constitution should not though promote inaction or satisfaction with the status quo.

Secondly, the Constitution is also a legal instrument that seeks to bring about deep social change. The likelihood of the complete success of such a project is debatable. It is possible to provide laws against actions that discriminate against people on the basis of race and gender but can one legislate the eradication of prejudice? 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 means that it is impossible to force a change in social attitudes.

Thirdly, some of the malaise in constitutional performance may well be linked to the one-party dominance of the ANC. Without an effective electoral threat (which is only becoming 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. That, in turn, was also a recipe for corruption in that a lack of accountability allowed for abusive practices to take place without a requirement to explain this behaviour in the political space. The fact that senior members of the ANC have been alleged to be implicated in corrupt practices (including in Parliament and in relation to the President) does not help to create a culture of accountability and trust in the government.

Having briefly looked at some of the factors which may explain problems in thick compliance, we look now at a more macro-level at both internal and external goals of the constitutional order as a whole (drawn from the analysis thereof that we undertake in chapter two of the report) and compliance in that regard taking a broad overview of the conclusion reached.

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 in the past 20 years. As South Africa faces more difficult economic conditions and the discontent with the current ruling party grows, there are some signals 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 in the country (though the fears of civil war seem to have abated).

Transformation

One of the key features of the South African constitution was its commitment to a fundamental change from the old order to the new. That change had both backward-looking aspects and forward-looking ones. As is discussed in chapter 2, there are various facets and conceptions of what transformation involves. We divide 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 reasons in decisions provided by public authorities. Substantively, often there is an obstructive approach exhibited by the key institutions of law enforcement and an attempt at political control over decisions that should be independent. Whilst the law may often exist on paper, 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 may exist 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 the perception is that it is difficult for citizens to connect with democratic structures which may eventually undermine them. Elections are perceived as free and fair but one 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. Whilst the Afrikaners at the time of the negotiation were calling for a state of their own (a 'Volkstaat'), there are hardly any voices anymore pushing for that. The other main grouping – the Zulus – who were in favour of self-rule, have seemed to accept the federal structure of the state. The constitution itself has provided for unifying symbols such as a flag and a new national anthem. The South African model is one of also recognizing the diversity of those within the state: this heterogeneity is celebrated through the recognition of 11 official languages, African customary law and religious personal law and the large measure of freedom accorded to individuals. Some of these measures have been difficult to implement and render meaningful such as giving equal recognition to all 11 languages.

Achieving social justice

There is no doubt that South African society has changed significantly since the advent of the constitution. There have been steps taken towards redress and the new society that is envisaged in the document. Backward-looking steps have been taken through the establishment of a Truth and Reconciliation Commission, the adoption of a property clause which expressly recognises land reform and the taking of positive measures to promote equality and to render unfair discrimination more costly. Forward-looking steps have been taken through the inclusion of socio-economic rights and attending to the realisation of these to a certain extent. At the same time, on both counts, the progress has been patchy and inadequate. The constitution has not eradicated prejudicial attitudes. Absolute socio-economic poverty is suffered by many South Africans and relative inequality has grown since the advent of Constitutional democracy. South Africa remains in a state of flux and it is likely to become urgent that some of the key elements of the constitutional compact be realised more speedily.

Performance in relation to external goals

Legitimacy

The democratic system of 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 an important achievement in itself. At the same time, statistics from our survey explain much of the discontent and alienation often being expressed in South African society at present and suggest that the legitimacy of many institutions are increasingly being questioned. Particularly worrying is the fact that individuals experience such difficulty in participating in constitutional institutions.

Channelling of conflict

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. Nevertheless, increasingly, there has 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

The failure to include an independent corruption authority in the constitution is a clear flaw in the document. There has 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 strong 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 it has not been able to limit adequately many of the agency costs attendant on corruption.

Public goods

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

Key findings in specific areas of performance

This section of the executive summary considers our findings in relation to the performance of the particular key areas of the Constitution we have sought to analyse. We outline the internal goals we have identified in these areas as well as some of the key conclusions relating to the performance of these features of the constitutional design against these goals. For a fuller engagement with each area, please consult the particular full chapter of our report as the summary is not able to capture the full nuances of our findings.

Rights

A justiciable Bill of Rights is a crucial prong of the new constitutional order. The adoption of these rights is seminal to the change which the Constitution is meant to bring about. Indeed, the transformative goals of the Constitution are given expression to most fully in the bill of rights which outlines a vision of the kind of society South Africa aspires to be whilst attempting to address key injustices of the past. The scope of this report does not allow for an in-depth analysis of each of the rights contained in the bill of rights. The focus of our analysis is on the right to equality, the right to property and several socio-economic rights. These rights have been chosen because they are directly related to several key goals of the Constitution: transformation, redress, reconciliation and distributive justice.

The right to equality

The right to equality is the first right in the bill of rights and represents a fundamental statement of the normative shift in the new order from an apartheid government that sought to normalize unequal treatment. There appear to be two main internal goals for the right to equality. Firstly, the right seeks to eliminate unfair discrimination by the state or private persons. Secondly, the right seeks to encourage measures aimed at redressing past disadvantage and aimed at establishing a more equal future.

In the thin sense, the goals of the right to equality have largely been achieved in that legislation has been adopted and structures have been established to promote a greater level of equality in society and to prohibit and address unfair discrimination.

In considering the overall picture of thick compliance with the goals of the right to equality, there are notable successes and failures. The main institution for enforcing the right to equality – the equality courts – is not yet functioning optimally. In terms of class and income, South Africa remains one of the most unequal countries in

the world: the right to equality has nevertheless been instrumental in shifting income distribution across races. The black middle class has grown and affirmative action has played a role in ensuring that this happens.

The focus of the cases surrounding the right to equality has been largely on ensuring a form of status equality for individuals with a wide range of differing characteristics. There is reason to believe that this right has informed some shifts in attitude toward the role and status of women, racial relations and perceptions of gay and lesbian people though this is an on-going process and currently incomplete. The racial cleavages are perhaps most significant for the future of the constitutional order: there is a limit to which these can be addressed by institutional design alone. Nevertheless, there is a need to think through whether supplementary mechanisms and processes are needed to advance the constitutional vision more actively.

The right to property

The internal goals of the property right are two-fold: the first goal involves protecting the right to property against arbitrary infringement; the second involves land reform to address decades, if not centuries, of land dispossession, forced relocation and the denial of property rights to the majority of the population.

In a thin sense, private property is afforded protection from arbitrary interference and the protective goal of section 25 is achieved. Policies and legislation have been adopted in order to give effect to land redistribution, restitution and to enhance the security of tenure of vulnerable individuals. Legislation has not yet been adopted to strengthen communal tenure rights and the Communal Land Tenure Policy which has been adopted seems incapable of achieving security of tenure for communities. Apart from this failure, thin compliance with the goals of the property right has been achieved.

In a thick sense, the protective goal of the property right has been accorded recognition in legislation and case law and has been balanced carefully with the need to achieve land reform. At the same time, the wider context in which property is held cannot be ignored: the high rates of property-related crime in South Africa such as theft and robbery render people insecure in their property holdings. The state has failed to protect individuals and to manage to control the wave of crime. As a result, substantively, individual property holdings remain precarious despite formal legal protections.

In relation to the reform goal, there is only limited performance that has taken place in the reformative goal of the property right in a thick sense. The programme of restitution was often based on economic compensation rather than actually ensuring people have a piece of land. It has been complicated by complex histories of ownership and, in recent times, tied to the ownership of land by traditional authorities. Redistribution has also taken place at a slow pace and the patterns of ownership of land have not changed massively since apartheid.

It must be noted that the constitutional goal of achieving wide-spread land-reform through a law-governed process is extremely ambitious and there are very few success stories across the world where this has taken place. Understood in this context, South Africa has made significant progress though less than the constitution demands.

It is important to recognise that the constitution is itself not an obstacle in the face of land reform (as some political actors have suggested) but rather an enabler thereof to take place in an orderly, systematic, law-governed manner. The alternative – such as has taken place in Zimbabwe – has eroded the rule of law there and largely destroyed the economy and productive capacity of that state. South Africa must therefore persist with the constitutional compact and seek fuller and better realisation thereof. Failure to do so may well push people to demand more radical solutions (that may ultimately be counter-productive) and undermine the legitimacy of the current Constitutional order.

Socio-economic rights

The South African Constitution was one of the first African constitutions to include such rights as fully justiciable and was unusual in the English-speaking world in that regard. The purpose of including these rights in a constitution is itself debated amongst scholars and thus, it is not possible to identify goals that are free of controversy in doing so.

One important internal goal for the inclusion of socio-economic rights was a commitment to reverse the severe effects that apartheid policies had on black people through limiting their access to education and consigning the

vast majority to living in poverty. A second key goal was more universalistic in nature and sought to enshrine certain entitlements which were minimum conditions of distributive justice without which the constitutional order would have lacked legitimacy. The focus of our analysis is on whether the constitutionalisation of these rights has made a difference to law, policy and people's lives. It will be easier to answer this question in relation to law and policy though we will attempt to marshal evidence to provide some understanding of the impact on people's lives as well. In this evaluation, we also focus on three key rights, namely, the right to have access adequate housing, adequate health care and education.

The South African government has put numerous policies and legislative schemes in place and has made large proportions of its budget available for the fulfilment of its duties in respect of socio-economic rights. Yet, there remain major discrepancies between the socio-economic rights guaranteed in the Constitution and the reality faced by large numbers of the South African population who lack access to the goods promised. The socio-economic rights in the Constitution have had an impact, as we have shown, on the demands made by civil society and provided the basis for advances in policy to take place through litigation. As was shown, these rights have effected large-scale changes even where they have not been interpreted by the courts to place an onerous and immediate burden on the state. They have helped bring about important changes to safeguard the right to housing in eviction cases, helped bring about a major change in government policy surrounding the roll-out of anti-retroviral HIV/AIDS drugs and forced the government to act in many cases where the basic necessary conditions for decent basic education have not been in place.

Arguably, a more expansive interpretation of these rights by the Constitutional Court would have encouraged even greater efforts to be expended in reducing absolute poverty and placed a greater focus on ensuring those whose needs are most urgent would have been catered to. Rendering the courts more accessible and the path of litigation easier would have also facilitated more cases and perhaps greater legitimacy for the role of the courts in defending the poor. The manner in which the rights have been framed in the Constitution may have played some role in this weaker approach being adopted towards their enforcement by the courts as well as the overhang of a very traditional and conservative understanding of the separation of powers. Nevertheless, the approach to interpreting these rights cannot be viewed as the primary source of the state's failure to advance further on the project of providing for the basic necessities of all South Africans.

Democracy

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

The Constitution also upholds other institutional characteristics valued in democratic theory: political equality and inclusion (sought through universal franchise and equal political rights); pluralism, including fair and peaceful political competition (via free elections, free expression and free association); deliberation and transparency. Each of these constitute important internal goals that are required to achieve a thriving democracy in South Africa.

In a thin sense, all the democratic institutions required by the constitution have been created and, to a large extent, political rights and freedoms have been implemented. Successive elections have been held which are regarded as basically free and fair and reflective of the popular will.

Considering democratic performance in the thicker sense, the party list system of proportional representation system that was adopted was set up partially to enable smaller parties to have a voice in the parliament. It has succeeded in that goal, but has had the unfortunate effect of increasing the distance between people and members of parliament and strong party control over their representatives. We consider possible reforms to this system in the recommendation section below.

Many opportunities have been created for participation in the democratic sphere. Yet, there remains a sense in which it is difficult to gain access to constitutional institutions and, when this is done, many of these fora are not effective nor are they listened to.

The ruling ANC party has been elected democratically to most levers of government. Whilst there is no doubt that this situation reflects the popular will, the dominance of one party has 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 very little electoral impact. The key threat of losing elections has not been present in general in South Africa though that may be changing as support for the ANC wanes. The continuance of the ANC leadership into five terms has though served as a stabilizing factor on the political scene.

There is a declining electoral turnout and a high level of popular protests in South Africa. The ANC is not generally punished for its failures at elections through a switch to alternative political parties; instead, there are protests against local government officials or abstentions from voting. While dissatisfaction resulting in protests are also driven, in part, by a sense that citizens are not adequately represented by parties and elected leaders, it was also found that much of what is driving the anger is located outside the realm of constitutional design. The policing of protests has to be addressed, specifically ensuring that legal public assembly is permitted under more circumstances and policed less violently.

In South Africa, as in many other democracies, there is a tendency towards executive dominance. The President in South Africa is essentially elected by the majority party and performs the functions of both being head of state and head of the government. The close relationship between the legislative and executive branches has meant that the legislature has not adequately exercised its oversight functions in relation to the executive. In some cases, chairpersons of parliamentary committees have complained of being ignored by the executive.

Moreover, the executive has been dominant in the initiation of legislation. Parliament is too often reactive, hamstrung not only by political loyalties but by insufficient skills and resources. While the Constitution does grant the executive wide legislation-introducing authority, its domination of legislative initiative consigns parliament as a whole – including opposition parties – largely to a debating and ratifying role. Private members' bills may now be introduced as a matter of right but executive dominance over legislation has not been decisively challenged.

In light of considerable national discussion around party funding, it was found that there may be a number of unintended consequences from making it mandatory to disclose the identity of private funders that may impact upon smaller parties disproportionately. Alternative possibilities such as increased public funding and a cap on private election funding should be considered.

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

The judiciary

No feature of the South African state escaped the depredations of apartheid. The judiciary was no exception. With the adoption of the new Constitution it was therefore clear that there needed to be significant changes to the judiciary. The internal goals we identified in this regard are as follows. First, one clear goal of the Constitution is to change the demographic composition of the bench and to create a judiciary that is more diverse and representative of South Africa's population in terms of race and gender. Secondly, the Constitution clearly also articulates independence as a significant goal for the judiciary. Finally, the Constitution envisages the establishment of a judicial system suited to the requirements of the Constitution and the new South Africa.

The Constitution has performed well in respect of the judiciary in the establishment of a JSC and the adoption of a transparent process for the appointment of judicial officers. The change in the composition of the bench in order to reflect racial (and to a more limited extent gender) demographics of the country can also be counted as a success of the Constitution in respect of transforming the judiciary. Another area of positive performance is the creation of a Constitutional Court to serve as the highest court in constitutional matters and the ultimate guardian of the Constitution along with the establishment of a strong judicial review role for the courts within the separation of powers.

Under-performance has taken place in that procedures and mechanisms to deal with judicial discipline were established belatedly and the JSC has not exhibited a willingness to hold judges to account. While a transparent appointment process for judicial officers has been adopted, this process is not independent from overt political

bias. In particular, the appointment process for the Chief Justice is not perceived to be adequately independent, fair, and transparent. A system of governance for the judiciary by the judiciary which does not place too much power in the hands of the Chief Justice has not yet been established. Moreover, it is unacceptable that acting judicial appointments are made by the executive without oversight. Access to courts as well as legal representation in civil cases remains a problem for those who lack means.

Chapter 9 institutions

The Constitution mandated in Chapter 9 the creation of a range of independent *sui generis* institutions that were designed to support democracy. These institutions are diverse and include the Public Protector; the South African Human Rights Commission (SAHRC); the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (CRL Commission); the Gender Commission; the Auditor-General; and the Independent Electoral Commission (IEC). The mission and tasks of these institutions differs, each possessing a constitutional mandate that relates to a specific substantive field or section of society. The broad goals of these institutions is to contribute to creating an accountable government through monitoring and investigation of government action; and to contribute to the transformation of South Africa into a country in which freedom, dignity and equality prevail. We focus in this chapter is on the Public Protector, the SAHRC and the IEC.

In a thin sense, all these institutions have been set up and acts of parliament passed to give effect to their mandates. A major area of concern relates to the recent admission by the IEC that it has not adequately guaranteed the integrity of local government election processes.

In relation to thick compliance, worries have arisen around the funding of institutions such as the SAHRC, Gender Commission and the Public Protector are located within the budget appropriations of the national government departments. This feature of the financial arrangements reduces the level of independence these institutions have from the national executive and exposes them to the possibility of undue influence. The silence of the Constitution on issues of financial independence could therefore be considered a concerning shortcoming.

Moreover, there are overlaps in the jurisdiction of the SAHRC, the Commission on Gender Equality and the CRL Commission which impacts on the effectiveness of these institutions. It ought to be considered whether these bodies should be merged into a single institution. The SAHRC has often met its duties to collect information but failed timeously and predictably to release reports on the extent to which fundamental rights it is tasked with investigating have been realised.

Ultimately, the manner in which the appointment process is currently structured for these institutions renders it susceptible to political influence. It is in the best interests of political representatives and appointees who may be embarrassed by the findings of these institutions to ensure that individuals are appointed that do not wholeheartedly pursue the goals set out in the Constitution. Adequate safeguards therefore need to be instituted in this regard.

There is also a lack of general public awareness of these institutions. 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 through approaching them. Without doing so, they cannot effectively fully achieve their goals.

It is also important to ensure processes are in place to allow for expeditious, independent and transparent investigation, as well as adequate disciplinary mechanisms which include sanctions that do not necessarily entail the removal of an office-bearer.

The Constitution did not clarify the effect of the remedial actions taken by an institution such as the Public Protector. Courts have had to step into this breach and both the SCA and the CC have now recognised that the Public Protector may issue binding orders which can only be overturned by a court of law.

Multi-level governance

The Constitution of South Africa provides for three spheres of government – national, provincial and local – that operate in a cooperative, interdependent and interrelated manner. It also recognized the institution, status and role of African traditional leadership and allowed national legislation to provide a role for African traditional leaders in governance affecting local communities. The relationship between traditional leadership and the other tiers of government is not clearly delineated in the Constitution.

The internal goals that we identified of this multi-level governance system are firstly to create a check on centralised power in the form of greater autonomy for the provinces; the creation of greater efficiency and effectiveness in governance; increasing the level of political responsiveness and representation in governance; reducing the level of corruption in government and ensuring decisions are taken by those institutions in a position that would best achieve the intended objective.

The fact that different political parties have and continue to govern one or two of the provinces means that there has been a limited success in introducing competition into the electoral system. Furthermore, there have been instances where provincial Premiers have taken different policy approaches from the national government, even where the premier is a member of the same political party: that indicates that there is some autonomy exercised by the provinces and that federalist norms of some kind have taken root. Provinces are able, in such instances, to plug some of the gaps of the poor policy decisions of national government as was the case with the response to the HIV/AIDS crisis.

As to local government, it is important to recognise the mammoth re-design of these institutions that took place in the new South Africa. A whole new set of structures have been created that have, at least, sought to give effect to some of the goals for which they were created. The creation of an independent Municipal Demarcation Board has been important to prevent the boundaries of municipalities being drawn according to political allegiance.

Parliament has acted on the constitutional provisions around traditional authority and passed legislation to regulate traditional leadership as well as creating structures for their interaction with other branches of government. This helps to legitimise the post-apartheid state, increasing the likelihood of acceptance of the constitutional regime by traditional communities. The Constitution has also provided recognition to customary law and the interaction between the two has led the court to affirm the power of traditional communities to develop their own law. It has also resulted in important changes to customary law that may advance other key constitutional values such as gender equality.

One of the major problems affecting the multi-level governance structure of the Constitution has been the areas of overlap in powers. We highlighted the fact that there is a lack of clarity of how to proceed in relation to the wide range of concurrent areas of governance included in Schedule 4 of the Constitution with no clear authority established in any sphere of the state. In some sense, this harms the federal structure of the constitution, bolsters the centralisation of power in the national government and creates gridlock on key policy issues. The lack of clear definition of who is responsible often also has an effect on service delivery.

In a similar vein, there has also been a problem a lack of clarity concerning the relationship between traditional leadership and other branches of government. In particular, the unclear relationship between municipal powers and traditional authorities needs consideration and possible amendments should be considered.

Multi-level governance requires that there be adequate human resources to ensure decent governance at each level. Unfortunately, staffing these various layers has been a problem leading to failures in governance. National government has had to intervene several times with the provinces; and the provinces have often had to intervene in the functioning of municipalities.

The ANC which is the dominant party throughout has been a reluctant federalist and, as such, has not exhibited a strong will to make the federal structures work: in many ways, its deployment policy and approach to appointing Premiers of provinces has reflected its tendencies to centralise control of the state.

High levels of violent service delivery protests suggest a large amount of dissatisfaction which is often directed particularly at local government. Local government has only to a limited extent succeeded in giving expression to the desire for participatory democracy.

Local government has taken on the mandate of providing basic services to varying degrees of success across the country and with many instances of failure adequately to provide for individuals. These problems often arise from a lack of human capacity and, sometimes, financial ability too given the limited pool of residents who can contribute to municipal coffers in many areas of the country.

Some of these problems may have resulted from a design flaw in the Constitution in that it is not clear why it was necessary to create such a complex system of local governance with both local and district municipalities in many areas: too many layers have exacerbated the problem of finding skilled staff to work in these structures and

of utilising these structures to dispense political largesse to those who follow the party line. There are effectively four layers of government where district and local municipalities operate which arguably is too much in a developmental state.

Fiscal Federalism could also have more teeth when applied to provinces. Greater autonomy and local economic experimentation could have been made more effective by granting more powers to provinces to raise their own revenue instead of their heavy reliance on national allocations.

The security services

If the judiciary was Apartheid South Africa's austere and respectable left hand that lent the regime a veneer of legality and neutrality, then the Security Services were Apartheid's firm right fist, ruthlessly enforcing the government's totalitarian and racist ideological objectives.

As a consequence, it is not surprising that the framers of the South African Constitution chose specifically to address some of these serious failures of the past Security Services in the constitutional text, which have in turn shaped the internal goals set by the Constitution. Thus, in evaluating the constitutional performance of the Security Services, we have identified the following general, internal goals that apply across these institutions: transformation, impartiality, legal accountability, political accountability, and transparency. Of course, each institution has its own purposes which are expressly outlined in the Constitution. In this chapter, we consider the police, the defence force, the intelligence services and the national prosecuting authority.

The Police Service's performance on most of its constitutional goals has been tragically sub-optimal. It has established community policing forums, which seek to bring policing closer to the community. It has also voluntarily published crime statistics without any constitutional obligation compelling them to do so though there are some concerns relating to the veracity thereof. There seems though to be little appreciation of the post-Apartheid notion of a transformed, community-centered police service that takes its positive obligations seriously. Even attempts by courts to encourage an inculcation of this goal indirectly by revising delictual liability for police conduct has failed to change police behavior.

Additionally, instances of unlawful arrests, detentions and excessive use of force are rife. The police also woefully fail in many respects to bring perpetrators of crime to justice. The police have also shown themselves incapable of appreciating that political accountability lies with the minister of police and that senior police officials have no business concerning themselves with political factionalism. On transparency, the police service has also failed markedly by demonstrating that they are willing to conceal vital information from the public if such information is potentially embarrassing, as they did during the Marikana Incident.

The Defence Force has broadly achieved the goal of non-offensive defence by reducing general defence spending and participating in peace-keeping missions which engender good continental relations. The Defence Force has also succeeded in creating one united force that brings together soldiers from the old apartheid order with those fighting for the liberation movements which is a major achievement. The Defence Force has though struggled to find the balance between pursuing non-offensive defence and still adequately equipping soldiers for armed conflict. The misguided and poorly planned mission in the Central African Republic demonstrative of this failure. It also highlights a design flaw in the Constitution in that the president is able to take decisions to deploy troops without parliamentary approval which would at least have required a higher level of justification for any such life-threatening mission.

The Intelligence Services are subject to some political accountability by having to report to the President or Minister of Defence. The Constitutional design relating to the Intelligence Services though is also sub-optimal in not requiring some level of parliamentary oversight over its operations. There has also been attempt – albeit highly controversial – to render the law relating to the protection of state information more compliant with the new constitutional order. The new regime relating to state information has failed adequately to offer protection for whistleblowers through the creation of a general public interest defence for disclosure of classified information.

The NPA has also had certain NDPP's, such as Vusi Pikoli and to an extent Bulelani Ngcuka, at the helm who fearlessly instituted proceedings against high profile individuals. Unfortunately, though, it seems that there has generally been a failure to respect the constitutionally mandated decision-making independence of the institution. The fact that no NDPP has served out his full term and that one NDPP had to be dismissed by a court because

of serious doubts as to his integrity and conscientiousness is alarming. There is a categorical failure of protecting the Constitution's goal of prosecutorial independence. That failure may to some extent be laid at the door of the Constitution itself given the very design of the institution – particularly the decision not to grant it 'institutional independence' – as well as a lack of specificity concerning the relative roles of the executive and the NPA.

A concerning area of where the Constitution itself is poorly designed relates to the failure to include constitutional protection for an independent corruption agency, especially for a country that has South Africa's history of endemic corruption. This led to courts having to indirectly fashion such constitutional protection via interpretation of a number of provisions of the Constitution. The independence of the agency still remains in doubt and appointments to it often appear to be either designed to undermine it or to ensure political control of this key institution.

Recommendations

Whilst 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 alleviate some of the areas of underperformance we have highlighted above. This will also ensure the goals of the constitution are realised more thoroughly.

Here, we summarize some of our key findings and recommendations for amendments to the Constitution. We also highlight some measures that will help more effectively to achieve the goals of the Constitution. We do so though recognising that such an enterprise is risky: if the constitution is subject again to significant amendment, this may open up fault-lines in the 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 in chapter 3 (and summarized above). 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 below some of our findings concerning the lack of performance (or underperformance) and key recommendations of 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 to people closely enough. We have considered whether the 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 with several representatives each) topped up by a party-list system. Whilst this can be done without a constitutional amendment, it has important constitutional implications and may help strengthen the architecture of South African democracy.
- Information should be more widely disseminated about the constituencies of Member of Parliament and more accountability introduced for the spending of money on constituency work.
- A further review on how to enhance the functioning of parliament should be conducted 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 for 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, clarity about which security forces can intervene when, about how close protesters can approach, and about security measures to protect parliamentary premises
- We have also suggested that there is a serious worry for democracy by a failure to cap private donations to political parties or have any transparency in funding. We have suggested that there are competing values in this regard but that there should probably be a cap on party funding from private sources and larger state funding of political parties.
- Given the large effect parties have on people's political rights in South Africa, the functioning of the parties internally is a matter of constitutional importance. We have suggested that a possible constitutional amendment akin to a provision in the Kenyan constitution might be warranted which places certain requirements on the functioning of parties internally.
- The constitution, as we have seen, includes participatory democratic elements though these are more weakly expressed than the representative democratic elements. A possible amendment could help strengthen the clear guidance to enhance the participatory aspects of South African democracy. We have seen in our survey a sense in which participation is experienced as being difficult and detailed thinking needs to be devoted as to how to render the structures of government more accessible to individuals. We would hesitate, though, to recommend that specific participatory models be constitutionally entrenched, or that participatory bodies be given more authoritative power as a constitutional requirement. Matters such as these are probably best left to democratic experimentation guided by legislation
- 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 though the structure also bolsters certain federal aspects of the Constitution.
- We have seen that individuals have a right to protest in terms of their rights to freedom of association and assembly. Yet, 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. Whilst it is difficult to see that an amendment to the Constitution will help, we believe this is a matter of high 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 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 adequately to 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 should 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 which deals with the National Council of Provinces should require opposition leaders to be represented in the JSC.
- A possibility that should be thought about and debated is whether section 174(2) should be amended to read that when making judicial appointments, it must be considered that the judiciary must reflect broadly, not only gender and race representation in South Africa, but also other aspects of diversity.

- There is also 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 which 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 can be submitted to the President and thereafter the process of consultation (which should be clearly defined in the Constitutional amendment) between the President and the leaders of parties can begin.
- Section 175 deals with the appointment of acting judges and ought to be reconsidered in light of democratic concerns. If acting judges are to remain, the JSC ought to be involved in the selection of acting judges and the decision should not solely be made by the Executive. This is particularly important in the case of acting appointments to the Constitutional Court.
- The Constitution should be amended to add the requirement that there be established a system of governance 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 must 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 representation.

Chapter 9 institutions

- We have identified the fact that one of the problems for the functioning and independence of Chapter nine institutions lies in the fact that there is no constitutional provision or guarantee relating to the fact that their mandate must be adequately funded. We therefore recommend a constitutional provision which 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 department to disperse the funds to chapter 9 institutions.
- We also would recommend the inclusion of a public participatory and vetting element to the appointment process of chapter 9 commissioners and the Public Protector.
- Stronger safeguards need to be introduced such that individuals committed to advance the mandate of each of these institutions are appointed and to reduce the influence of narrow political agendas in this regard
- Whilst we do not make firm recommendations in that regard, 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 through approaching them.
- Where there are allegations of unbecoming conduct on the part of a high-level office-bearer of chapter 9 institutions, it is important that processes are in place to allow for expeditious, independent and transparent investigation, as well as adequate disciplinary mechanisms which include sanctions that do not necessarily entail the removal of an office-bearer.
- The SAHRC is required to gather information concerning the activities of state organs in relation to a range of socio-economic rights. No provision requires a report to be compiled of these activities at

regular intervals which is released publicly. The imposition of such an obligation should be considered and perhaps extended beyond the realm of socio-economic rights.

- The Constitutional provisions around the IEC are minimal and should perhaps be extended to constitutionalise protection of its independence and functioning in all respects given its importance to the health of South African democracy.

Multi-level governance

- The development of multi-layered government emerged from concrete historical circumstances and interests. There are though numerous benefits to devolved government, recognized by experts in constitutional design around the world. We have attempted briefly to canvass some of these in this report. The point we wish to make is that there needs to be a more principled political commitment to make the federal structures work. Doing so requires 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 the lack of clarity in constitutional competences and too much overlap is hampering governance. We believe it may be time to re-visit Schedules 4 and 5 of the Constitution in which these are contained for the purpose of being able to ensure clearer loci of responsibility.
- There should be a clearer delineation of the responsibilities of traditional authorities and local governments in the areas of service delivery and perhaps mechanisms established for addressing conflicts (akin to those with other branches).
- 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 taking away one of these layers (probably the district layer) could help enhance efficiency and service delivery.
- Investigations should be considered into how to enhance participatory democracy within local government and comparative models considered (such as participatory budgeting).
- Greater options for provincial revenue raising should be considered that can enhance provincial autonomy.
- There need to be programmes put in place for training and up-skilling those at all levels of government in order to ensure they achieve their mandates. In doing so, different levels of government need to be considered separately so as to ensure that each is properly staffed with those who gain expertise in relation to that particular level.

The security services

- There is a need for a clearer definition to be developed of what constitutes a lawful arrest or detention. That is a matter that could be attended to short of constitutional amendment.
- The requirements around lethal force in recently amended legislation needs to be rendered stricter and clearer to ensure that the constitutional requirements outlined by the Constitutional Court are met
- Stronger steps need to be taken to separate out decisions around policing from political interference and to ensure the police force is not used for political ends
- Data-gathering practices around crime and 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 Force. Including such a provision in the Constitution may make for more sober and considered decision-making.
- The lack of clarity as to 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 Parliament's oversight in the dismissal of an Inspector-General.
- A general public interest defence should be made available to whistleblowers who release protected state information in order to expose any matters (such as criminal activity or corruption) on 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 is sounded here given the current penchant for weakening institutions rather than strengthening them.
- We have identified a serious omission of the Constitution involves the failure in the document to include constitutional protection for an independent corruption agency, especially for a country that has South Africa's history of endemic corruption. This led to Courts having indirectly to fashion such constitutional protection. It would be preferable to include the need for this independent corruption-busting agency in the Constitution's text though the current attempt to weaken institutions for political gain cautions against tampering too much with court-led developments.

Constitutional legitimacy survey

As part of assessing performance, SAIFAC commissioned a research survey to establish attitudes towards various features of the Constitution amongst the people of Gauteng Province in South Africa. The survey also sought to establish the ease of participation in constitutional institutions and the knowledge of the Constitution itself. We summarize some of the findings of the survey below as well as of a statistical report we compiled in analysing the results. To understand the full results and textured analysis, please see the appendices of the report.

A stratified random sample of 608 adults living in Gauteng was interviewed in October/ November 2015 on their perceptions towards 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.

Responses

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:

Values

These items were designed to understand the values of people in Gauteng, their understanding of their identity and the congruence thereof with the new constitutional order. Most respondents acknowledge as important the values of equality, dignity, freedom, democracy and the rule of law. They ascribe similar high levels of importance to various facets of their identities such as being/feeling a South African, and belonging to their religion and race though less importance to being a member of their tribe. Whilst a large number support a return of the death penalty, a similar number believes in the power of the Constitutional Court to decide the issue. Similarly, most people in Gauteng are liberal than 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 is though willing to take the law into their own hands to achieve their goals. There is strong racial polarisation around affirmative action and land reform and moderate polarisation around such issues as the death penalty, and the rights of foreigners.

Democracy

This section of the questionnaire was meant to examine the attitudes of the people of Gauteng towards aspects of the constitutional architecture relating to democracy. The findings in this section suggest that most people have accepted democratic values and institutions with 80% of people agreeing that they would accept an election result even if the party they voted for lost whilst 82% think that South Africa needs strong opposition parties. The numbers also though suggest that people are not satisfied with the functioning of representative and participatory aspects of democracy: only 40% believe that parliament represents them and less than a half agree that their politicians represent them. There is a strong degree of racial polarisation around whether 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 institutions created by the Constitution. Generally, the various forms of political participation were perceived as being difficult. At least half to two-thirds of the population express difficulty with participating in various activities such as contacting their member of parliament (66% difficulty), challenging a violation of rights in court (61% difficulty), or lodging a complaint at the Human Rights Commission (68%). Only about 20% or fewer respondents perceive 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. The 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 actual levels of political participation by the people of Gauteng. High numbers of people in Gauteng Africa vote, with 82% having participated in national elections and 78% in local government elections. A majority of people, discuss politics regularly with friends (57%) and almost 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 (22%-24%) is present, or participate in a strike (33%). Generally, blacks have the highest levels of political participation, followed by coloureds, and then by Indians. Whites participate 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 express national pride, but only 34% agree that Jacob Zuma has done well in leading the country, and 35% have entertained thoughts about emigration. There are strong differences amongst 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.

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

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

In general, the attitudes of blacks and whites are polarised 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, the most obedient to 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 though 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 process of clustering the respondents. Four distinct clusters of like-minded respondents emerge:

Cluster 1 (22%): the 'constitutionally engaged'

This cluster has the highest knowledge score on the 18-item knowledge test (55% on average compared to the 44%-50%). Compared to the other cluster members, 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 the LSMs 5-7, and 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 4 to 5 people, with 1-2 children and up to 3 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 (for example accepting of 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 though fairly confident in the political leadership of the country. They have a sense of unequal power in the country (for example 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 a third (31%) not having matriculated. The majority of cluster members are black (86%), 4% are coloured and Indian respectively, and 6% are white. Generally, households comprise 3 to 6 people, with 1-2 children and up to 3 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 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 fewer in the other clusters. Membership is 84% black, 2% coloured and Indian, with the most children and the lowest number of earners of all the clusters.

Cluster 4 (24%): the 'constitutionally disempowered'

This cluster has the second highest knowledge score of the constitution, scoring 50% on 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 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 disobedience to the law. They hold the most punitive attitudes to criminal justice. They are the least confident in the political leadership of the country.

This cluster is the most affluent cluster, with a 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 achieved 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 of the cluster members speak English or Afrikaans at home compared to under 20% in the other clusters. They tend to have households with 1-5 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, 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 which could track the views of a population such as Gauteng adults over time.