

Promise Unmet?

Addressing Inequality in Post-Apartheid South Africa

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GLOSSARY OF TERMS AND ACRONYMS

ANC	African National Congress
BEE	Black Economic Empowerment
Court, the	The Constitutional Court of South Africa
DA	Democratic Alliance
GEAR	Growth, Employment and Redistribution
NP	The National Party
JSC	The Judicial Services Commission
President, the	The President of the Republic of South Africa
Parliament, the	The Parliament of the Republic of South Africa
RDP	Reconstruction and Development Program
RRC	Reparations and Rehabilitation Committee
SERs	Socio-Economic Rights
TRC	Truth and Reconciliation Commission
Ubuntu	“Oneness”

CHAPTER 1: OVERVIEW OF THE REPORT AND RECOMMENDATIONS

[T]he coming of peace to South Africa has carried a formidable price tag to set along the record of considerable accomplishment... For the substance of the transition has been recast both in political and socio-economic terms: narrowed from a project of mass political empowerment to one of mere electoralism, and from a prospect of socio-economic transformation to one that has sanctioned the kind of widening inequality inherent in neo-liberal economic policies.¹

The End of Apartheid

South Africa's apartheid regime was one of the most abhorrently racist administrations of the twentieth century. For over 40 years, the White (Afrikaner) minority systematically marginalized and exploited non-Whites, the majority of whom were Black. However, by the early 1980s cracks had begun to appear in the white polity itself as "it was beginning to dawn on the more reflective members of the white elite that the grand plan of apartheid had failed."² Faced with the immanent collapse of apartheid, South Africa's white elite were eager to ensure that the transformation to liberal democracy would not endanger the economic advantages which they had acquired under the racist regime.³ For South Africa's white elite, the big questions pertained to economics rather than ideology. Armed with this sensibility, international and domestic businesses prepared themselves to sever the marriage between the market economy and political oppression that had proved so profitable in the past.⁴

Despite the ruling National Party's (NP) public displeasure, various groups of whites from within South Africa began engaging with the exiled African National Congress (ANC) as early as 1985. These dialogues played an important role in laying the ground for the future constitutional negotiations.⁵ It was clear that any strategy for a peaceful transition would require the support of the ANC.⁶ Although the NP was preoccupied with safeguarding White privilege and the trappings of race; there was increasing pressure on President de Klerk to adopt a "colour-blind capitalism." Here were the makings of a class compromise, a compromise that would blunt the promise of sweeping socio-economic transformation.

In 1992, the NP and the ANC signed a "Record of Understanding" that paved the way for the adoption of the Interim Constitution in 1993. Concerned that the ANC would establish an abusive one-party state, the NP sought to bind the ANC to a constitutionally prescribed protection of both human and property rights.⁷ While the text of the final constitution demonstrates a certain degree of success in this regard, the NP negotiators were denied the more direct guarantees of minority privilege they had hoped for, such as the dominance of property rights protections.

¹ Saul, John. S. (2004) Costs and Benefits of Peacebuilding, South African Style, in *Durable Peace, Challenges for Peacebuilding in Africa*, eds Taisier Ali and Robert Matthews, pp. 187. University of Toronto Press.

² Dowden, Richard (2008) "Africa: Not Just Another Country: South Africa" in *Altered States, Ordinary Miracles*, pp. 395

³ Quoted in *Financial Times*, June 10, 1986.

⁴ Saul, John. S. (2004) Costs and Benefits of Peacebuilding, South African Style, in *Durable Peace, Challenges for Peacebuilding in Africa*, eds Taisier Ali and Robert Matthews, pp. 187. University of Toronto Press.

⁵ Harvey, Robert (2001) "The Fall of Apartheid: The Inside Story from Smuts to Mbeki." London: Palgrave, 2001.

⁶ Saul, John. S. (2004) Costs and Benefits of Peacebuilding, South African Style, in *Durable Peace, Challenges for Peacebuilding in Africa*, eds Taisier Ali and Robert Matthews, pp. 187. University of Toronto Press.

⁷ *Ibid.*, 191.

The *Constitution of the Republic of South Africa, 1996*⁸ (the Constitution) was designed to fragment state power in order to prevent abuse and foster transparent government by institutionalizing checks and balances on the exercise of power.⁹ Moreover, the Constitution is one defined by a justiciable bill of rights that protected individual rights on a non-racial basis.¹⁰ South Africa's negotiated settlement produced one of the most "humanistic constitutions the world had ever seen, guaranteeing personal freedoms, but also protecting minority rights and the weak and the vulnerable."¹¹ South Africa's Whites ceded political power to the ANC. In turn, the ANC accepted that the White-dominated capitalist economy would endure relatively unscathed.¹²

Fifteen Years Later

It was a time of great promise and great hope; but, as the idealism of that time wanes, questions about the transition's concrete results, or lack thereof, are of grave concern. Today, more than 15 years after the Constitution's ratification, poverty and inequality remain South Africa's defining feature. To be sure, progress has been made. Millions more South Africans now have access to clean drinking water, the number of households with electricity has increased from 50 per cent to 80 per cent, the banking system has begun to make credit available to the black underclass, and there is an expanding black middle class.¹³ The economy has also shown progress. Gross National Income (GNI) increased by 50 per cent and Gross Domestic Product (GDP) more than doubled from US \$132.88 billion in 2000 to US \$276.76 billion in 2008.¹⁴ Yes, apartheid is over and, yes, there has been change. But how much, and for whom?

One of the central challenges with respect to the achievement of South Africa's goal of a unified nation is redressing the endemic poverty of South Africa's Black population.¹⁵ In this respect, remarkable progress has been made since 1994. Between 1995 and 2005, the number of individuals living below the poverty line,¹⁶ as well as the depth of poverty, decreased significantly.¹⁷ Despite these gains however, the "inherited" inequality of apartheid continues to cause the Black population to "bare (*sic*) the brunt of unemployment and poverty."¹⁸ While rates of poverty have shown promising changes, the distribution of income remains troubling.

South Africa's net Gini coefficient, relatively stable around 50.0 from 1975-1990, had risen to 71.9 as of 2005.¹⁹ Average life expectancy at birth, 66 and 60 for women and men respectively in 1990 had declined to 52.5 and 49 by 2006.²⁰ Although sources disagree on exact levels and patterns, it is abundantly clear that South African income inequality sits at a higher

⁸ *The Constitution of the Republic of South Africa, 1996*, <http://www.acts.co.za/constitution/index.htm>.

⁹ Heinz Klug, *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction* (New York: Cambridge University Press, 2000), 118-23.

¹⁰ *Ibid.*, 84-5.

¹¹ Commey, Pusch, Mandela, 20 years on in *New African*, March 20, 2010, p. 10.

¹² *The Economist*, Righting the wrongs of apartheid, April 2006, p. 8

¹³ Commey, Pusch, Mandela, "20 years on" in *New African*, March 20, 2010, p. 8.

¹⁴ The World Bank, "World Development Indicators Database, "South Africa"," September 2009, www.worldbank.org/data.

¹⁵ The commonly accepted statistical categorization of racial groups in South Africa is "African" (black); "Coloured" (mixed race); "Asian" (Asian or Indian descent); and, "White" (European descent).

¹⁶ In terms of both the commonly accepted measures, which are R322 (44US\$)/month and R174 (23US\$)/month, adjusted to constant 2000 prices.

¹⁷ Haroon Borhat and Carlene van der Westhuizen, "Economic Growth, Poverty and Inequality in South Africa: The First Decade of Democracy," 2008, 2-3, 15, http://www.thepresidency.gov.za/docs/reports/15year_review/social/economic_growth.pdf.

¹⁸ Irwin Friedman and Lungile Bhengu, *Fifteen Year Review Of Income Poverty Alleviation Programmes In The Social and Related Sectors: Full Final Report* (Durban, South Africa: Health Systems Trust, March 2008), 71.

¹⁹ Frederick Solt, "Standardizing the World Income Inequality Database," *Social Science Quarterly* 90, no. 2, SWIID Version 2.0, July 2009 (2009): 231-242.

²⁰ The World Bank, "World Development Indicators 1972-2006," 2008, www.worldbank.org/data.

level than it did during the apartheid era, both in the aggregate and within each of the four commonly employed racial categories.²¹ With respect to racial equality, contrary to initial assumptions, inter-race income disparity remains a greater determinant of inequality than intra-race differences. In other words, the aggregate difference between White and non-White incomes is the dominant reason for South Africa's extraordinarily high Gini coefficient.²² There is also a structural problem. While the primary source of poverty reduction is increasing social transfers, these increases are significantly outpaced by increases in income of those in the 70th income percentile or higher. Moreover, the increased social transfers tend to significantly impact only those below the 30th percentile. Thus, while the number of people living in poverty is progressively diminishing, the distribution of income continues to grow more and more unequal.²³ In effect, a growing number of South Africans are being lifted out of poverty, but just barely and only by the increasing provision of social transfers.²⁴ Social transfers can only do so much to offset South Africa's incredibly high level of gross income inequality. Without greater non-White engagement with the economy in non-menial ways, there is little hope for true empowerment or independence for the majority of the population.

There are also positive indications of improvement in the overall quality of life for South Africans. In terms of standard World Bank Development Indicators, between 2000 and 2007 infant mortality decreased from 74 to 59,²⁵ and the rate of measles immunization improved from 77 per cent to approximately 83 per cent. In terms of gender equality, the ratio of girls to boys in primary and secondary education has remained static at 1:1, certainly a promising sign in terms of future gender equality.²⁶ There are also indications of an improvement in South Africa's Human Development Index (HDI) score from 2005 onward (2007 being the last year for which data is available), although this trend, at this point at least, is far from definitive.²⁷

The trends, however, are not all positive. Life expectancy at birth went from a gender combined average of 56 in 2000 to 50 in 2007. Most of this change is likely attributable to the marked increase in the prevalence of HIV in the country. It is estimated that 18.1 per cent of the working age population (ages 18-49) are now infected. Less explicable is the decreasing proportion of individuals completing their primary education, down to 84 per cent from 90 per cent in 2000.²⁸ Moreover, in the broader context, South Africa's HDI score trends downwards, albeit slightly, between 2000 and 2007 and is currently equivalent to the 1985 level. And, while it ranks well above the average for sub-Saharan Africa (0.514) at 0.683, it is still barely 70 per

²¹ See appendix for graphical representation. Solt, "Standardizing the World Income Inequality Database"; Friedman and Bhengu, Fifteen Year Review Of Income Poverty Alleviation Programmes In The Social and Related Sectors: Full Final Report, 81-5.

²² Own work; Borat and van der Westhuizen, "Economic Growth, Poverty and Inequality in South Africa: The First Decade of Democracy," 11-15; Friedman and Bhengu, Fifteen Year Review Of Income Poverty Alleviation Programmes In The Social and Related Sectors: Full Final Report, 81-2.

²³ It should, however, be noted that there are indications that this trend may be changing, although the two primary sources of data employed in this study disagree and the discrepancies between the two which indicate the potential for change occur at the extreme range of the plotted data, an inherently unreliable location from which to extrapolate future values. The two primary sources of data for this analysis are: Solt, "Standardizing the World Income Inequality Database"; and, Friedman and Bhengu, Fifteen Year Review Of Income Poverty Alleviation Programmes In The Social and Related Sectors: Full Final Report; With respect to the dangers associated with predicting future performance from extreme data values, see e.g.: Donald T. Campbell and H. Lawrence Ross, "The Connecticut Crackdown on Speeding: Time-Series Data in Quasi-Experimental Analysis," in *Methodology and Epistemology for Social Science: Selected Papers*, ed. E. Samuel Overman (Chicago: University of Chicago Press, 1988), 223-37.

²⁴ Own work Borat and van der Westhuizen, "Economic Growth, Poverty and Inequality in South Africa: The First Decade of Democracy," 31-2; Solt, "Standardizing the World Income Inequality Database."

²⁵ The Infant Mortality being defined as the number of live births per 1,000 that do not survive their fifth birthday. World Bank, "World Development Indicators Database, "South Africa".

²⁶ *Ibid.*

²⁷ See appendix for graphical representation. Human Development Report (United Nations Development Project, 2009), <http://hdrstats.undp.org>.

²⁸ World Bank, "World Development Indicators Database, "South Africa".

cent of the OECD average of 0.932.²⁹ In short, while there are strong indications of positive and progressive change, they are far from conclusive. It appears that promises to redress inequality have been given substance, but only partially, and in the absence of structural change the full realization of an equal opportunity society is unattainable.

With all the major economic pillars of the country firmly in white hands, the Black majority have pinned their hopes on the government to realize their economic aspirations. The Leaders of South Africa were acutely aware of the developmental challenges of transforming their formal democracy to a substantive one.³⁰ What institutional arrangements could address the enormous disparities between Black and White, rural and urban, that the new regime was to inherit? How might the challenges of educating South Africans, and providing them with housing, water, electricity, and health care be addressed? What are the most appropriate mechanisms to redistribute wealth in one of the world's most unequal societies? (It is to the analysis of South Africa's response to these questions that we now turn.) We now turn to an analysis of South Africa's response to these questions.

The Development of Institutions in Post-Apartheid South Africa

Reconciliation and Economic Empowerment

One of the mechanisms employed to foster a smooth transition from apartheid to democratic rule was the Truth and Reconciliation Commission (TRC). South Africa's TRC is celebrated as the "most highly successful truth commission in the world."³¹ The TRC was established by an act of parliament under the 1995 Promotion of National Unity and Reconciliation Act. The act had three separate yet inter-related committees: the Human Rights Violations Committee, the Amnesty Committee, and the Reparations and Rehabilitation Committee.³²

Although many transitional justice scholars concede that the TRC was a success, its terms of reference remain a matter of contention.³³ There are those who have argued that the period under review for the TRC should have started as far back as the first arrival of white settlers in 1652. Others were of the view that at the very least one should look at the period that began with South Africa's first constitution in 1910. Many maintain that the starting point should be 1948 when the National Party came to power.³⁴ South Africa's Parliament recommended March 1960 to December 1993. The first date coincides with the banning of political organizations and severe oppression of any resistance to apartheid. The end date was arbitrarily chosen as the date when the negotiation teams decided on an amnesty provision in the interim constitution.³⁵ The legal basis for the amnesty process of the TRC emerged from the formal political negotiations that were initiated in 1990. The original provisions were recorded in the postscript to the Constitution of the Republic of South Africa Act No. 200 of 1993 (the Interim Constitution). National unity and reconciliation were central to the negotiation process and the terms were explicit. Items such

²⁹ United Nations Development Programme (UNDP), Human Development Reports (United Nations, 2009), <http://hdr.undp.org/en/>.

³⁰ Simeon, Richard and Christina Murray, *Reforming Multi-level Government in South Africa* Richard, p. 4

³¹ Quinn, Joanna R. (2004) "Are Truth Commissions Useful in Promoting Restorative Justice?" in *Crosscurrents*, edited by Mark Charlton, pp. 171. Nelson Canada.

³² See TRC Report at: <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf>

³³ See: "Truth and Reconciliation in South Africa: Did the TRC Deliver?" eds., Audrey Chapman and Hugo Van der Merwe., University of Pennsylvania Press 2008. 347 pages

³⁴ Boaraine, Alex. (2000) "Truth and Reconciliation in South Africa. The Third Way" in *Truth Versus Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, pp. 141-157. Princeton University Press.

³⁵ *Ibid*

as the sunset clauses and amnesties no doubt helped buy space for change as the anxiety levels of politicians and civil servants from the old regime were damped down.³⁶

The Constitution provides an historic 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. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These were addressed on the basis that there was a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* [togetherness] but not for victimisation.³⁷ In its broadest sense, the mandate of the Reparation and Rehabilitation Committee (RRC) was to affirm, acknowledge and consider the impact and consequences of gross violations of human rights on victims, and to make recommendations accordingly. In doing so, the RRC had access to a rich source of information about reparations, drawn from domestic and international law and opinion.³⁸

The obligation to institute reparations is enshrined in South African law. Through the *Promotion of National Unity and Reconciliation Act*, the legislature made clear its intention that ‘reparations’ of some kind or form should be awarded to victims. The case for reparations is established in both the Constitution and the Act. It is also supported and underpinned by a majority judgment of the Constitutional Court. The judgment emphasizes the obligation on the State to meet the “need for reparations.”³⁹ The TRC was empowered to recommend reparations, but not to grant them so it dealt very little with economic injustices. A quick survey of recent South African media indicates that the unfinished business of the TRC is still a recurring theme even after sixteen years of black majority rule. After a five-year delay, the government made a paltry payment of (US \$4000) to victims identified by the TRC.⁴⁰ This presumably signals closure as far as the state is concerned, but community reparations has hardly been addressed.⁴¹ Under the leadership of President Thabo Mbeki, black economic empowerment (BEE) was instituted by an act of parliament. BEE has been criticized for promoting crony capitalism.⁴²

Justiciable Rights and the Constitutional Court of South Africa

Key to South Africa’s transition from apartheid to an inclusive liberal-democracy was the South African constitution, the Bill of Rights contained therein, and the promise of their strong protection by a newly created Constitutional Court of South Africa. In conjunction with the agreement to empanel a Truth and Reconciliation Committee tasked with the investigation of injustice during the apartheid era, the inclusion of explicitly justiciable constitutional rights in the Constitution enabled the transition to occur as peacefully and quickly as it did. By deferring the settlement of restitution to a later date and embedding it within an established legal framework,

³⁶ Saul, John. S. (2004) “Costs and Benefits of Peacebuilding, South African Style, in *Durable Peace, Challenges for Peacebuilding in Africa*, eds Taisier Ali and Robert Matthews, pp. 195.

³⁷ The Legal Basis of the Amnesty Process, retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010

³⁸ The Case for Reparation and Rehabilitation: Domestic and International Law, retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010

³⁹ Amnesty and Reparations: Achieving a Balance. Retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010.

⁴⁰ Cuthbertson, Greg, South Africa’s democracy: from celebration to crisis a School for Graduate Studies, University of South Africa., pp. 300

⁴¹ Ibid

⁴² The Prince of The Mines, <http://www.forbes.com/forbes/2008/0324/088.html>

elite and international economic actors' fears of the wholesale redistribution of land and wealth, and the concomitant macro-economic implications, were alleviated. At the same time, the apartheid system could not plausibly be separated from the persistent social and economic deprivation of the non-white population. This, in turn, led to the inclusion of socio-economic rights (SERs) in the Constitution as a means to overcome that aspect of apartheid's legacy,⁴³ the overarching goal of the Constitution and the negotiated settlement in general.

Thus far, the Constitutional Court has demonstrated a remarkable capacity for balancing the competing interests of legal legitimacy, political reality, and societal norm adherence while at the same time advancing a notion of socio-economic rights which has achieved a reasonably widespread, although certainly not universal, acceptance. Moreover, they have done so in a way that has enabled significant transformation within South African society in an environment in which every decision is closely analyzed by partisans and non-partisans alike. This is truly an impressive achievement. At the same time, the policy capacity of the Constitutional Court is inherently limited relative to the government bureaucracy and the question remains as to its suitability to determine the appropriate calculus of current consumption versus future investment in the crafting of public policy. Moreover, the legitimacy of an unelected judicial branch countermanding the actions of elected representatives, "the counter-majoritarian difficulty",⁴⁴ remains a concern.

Particularly salient in South Africa is the structural disadvantage faced by those of lesser socio-economic means in advocating for and defending their rights. In her evaluation of the enforcement of SERs in South Africa, one of Liebenberg's most disturbing observations is that "many in South Africa experience violations of socio-economic rights, which go unchallenged due to a lack of access to legal services."⁴⁵ Litigation, particularly constitutional litigation, is an expensive, time-consuming, and intimidating endeavour, and those with the lowest level of material security are also the least able to pursue legal action. As Epp notes, bills of rights are not self-activating components of constitutions. In order to function they require a support structure consisting of resources including: organized group support, financing, and legal professionals.⁴⁶ If there is no support structure the resource requirements for successfully litigating at the constitutional level will not be present. While Bills of Rights matter, they require a support structure if they are to be meaningful in any substantive way.

The process by which South African judges are selected is clearly laid out in the Constitution, with the power of appointment vested in the executive and recommendations provided by a Judicial Service Commission (JSC).⁴⁷ Transforming a judiciary takes time, and making it representative without sacrificing the legal capacity and/or legitimacy of the institution requires the development of a qualified pool of applicants. Nonetheless, great strides have been taken in South Africa. As of October 2008, of the 201 permanent members of the South African judiciary, 74 were African, 16 Coloured, and 19 Indian. With respect to gender: 161 were men and 40 women.⁴⁸ While these are not demographically representative numbers, they are a far cry from the almost exclusively White male judiciary of the apartheid era.

⁴³ In particular, the qualified justiciable guarantees of housing, healthcare, food, shelter, water, and children's rights. *The Constitution of the Republic of South Africa*, ss.26-28.

⁴⁴ Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115, no. 6 (2005): 1356-1407.

⁴⁵ Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (New York: Cambridge University Press, 2008), 80.

⁴⁶ Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

⁴⁷ *The Constitution of the Republic of South Africa*, s.178.

⁴⁸ Carole Lewis, "Briefing report: The State of the Judiciary" (Johannesburg, South Africa, October 14, 2008), http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=print_article&news_id=72639&cause_id=2137.

Although supportive of the JSC's activities, Budlender does suggest that the executive is increasingly seeking to micro-manage the activities of judges and the judiciary in general. In particular, he argues that this micro-management may discourage the application of many top-tier candidates for judicial positions. Moreover, concern is also raised about the potential for members of the JSC to manipulate the appointments process in order to produce a "compliant" judiciary.⁴⁹ Similarly, Plaut notes that "[I]t is now routine for senior members of the African National Congress (ANC) or its allies in the Communist Party and the unions to assert in public that the judiciary must be brought to heel."⁵⁰ Perhaps more importantly, however, are the concerns over the undue exertion of executive influence during the most recent round of Constitutional Court appointments, including the ANC's replacement of an opposition member of the National Council of Provinces, making the four-strong delegation to the JSC all ANC members,⁵¹ and the replacement of other long-standing members of the JSC with staunch ANC supporters.⁵² Moreover, the elevation of Justice Ngcobo to Chief Justice, passing over Deputy Chief Justice Moseneke, also raised questions that the President was avoiding the appointment or elevation of Justices to the Court who had been vocally opposed to executive intervention in the judiciary.⁵³ The Court has done an exemplary job over the past decade and a half, but in evaluating the future prospects of South Africa, past performance must not be relied on as a sole predictor of future performance nor can its relative security or influence within the broader institutional context of South Africa be considered constant.

Provincial Capacity Deficit

Another controversial issue that had to be resolved during the constitutional negotiations and the subsequent transition to liberal democracy was the extent to which the new South African constitution would embrace federalism as an organizing principle of governance.⁵⁴ The concept of federalism has had a troubled history in the country. It was used by the apartheid regime as a method of institutionalizing ethnic, racial and tribal differences and promoting the regime's policies of segregation and racism. As a result, federalism enjoys very little credibility in contemporary South Africa, among ordinary citizens and elites.⁵⁵

Throughout the constitutional negotiations during the 1990s, the ANC argued against a robust form of federalism, fearing that strong autonomous provinces would entrench divisive regional and tribal politics, which would hinder the establishment of an egalitarian society throughout South Africa.⁵⁶ Conversely, the NP saw federalism as a way of fragmenting state power and institutionalizing important checks and balances on the power of the central government, which would almost certainly be dominated by the ANC.⁵⁷ Ultimately, an agreement was reached to adopt a centralized and integrated model of federalism. This

⁴⁹ Geoff Budlender, "Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa," *South African Law Journal* 122 (2005): 715.

⁵⁰ Martin Plaut, "Threat to Justice," *The World Today*, October 2008, 25.

⁵¹ Ethene Zinn, "ANC loading JSC to push agenda - DA," *The Star* (South Africa, July 10, 2009).

⁵² Carmel Rickard, "JSC's new faces raise questions on Zuma," July 11, 2009.

⁵³ Dave Chambers, "Opposition says Zuma did not consult on Ngcobo," *Saturday Star* (South Africa, August 8, 2009); Karmina Brown, "Done deal? You be the judge," *The Weekender* (August 8, 2009).

⁵⁴ Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *The Journal of Federalism*, Vol. 31: 4 (Fall 2001), p. 66.

⁵⁵ *Ibid.*, p. 66.

⁵⁶ Joachim Wehner, "Fiscal Federalism in South Africa," *The Journal of Federalism*, Vol 30:3 (Summer 2000), p. 47.

⁵⁷ Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *The Journal of Federalism*, Vol. 31: 4 (Fall 2001), p. 68.

agreement represents an important political compromise that was necessary to secure the adoption of the new constitution.⁵⁸

Although the text of the 1996 Constitution does not formally acknowledge its status as a federal constitution, by most definitions it rightfully belongs in this category.⁵⁹ It contains all of the typical features found in a federal constitution. Section 40 states that government in South Africa is constituted as “national, provincial and local spheres of government which are distinctive, interdependent and interrelated.” Section 43 provides for a division of powers between the three spheres of government. Section 104 guarantees that each level of government is bound only by the constitution. Each level of government is elected independently.⁶⁰ The constitution also outlines a comprehensive set of organizing principles for the conduct of intergovernmental relations between the three levels of government; these principles emphasize the importance of cooperation between governments.⁶¹

Following the German model of ‘integrated federalism,’ the central government dominates most policy fields by virtue of its sweeping jurisdiction under the constitutional division of powers and its virtual monopoly over government revenue. The central government has vast powers to establish comprehensive national framework legislation, which the provinces are typically responsible for implementing and administering in a way that is sensitive to local conditions. The provinces are given a strong voice within the national legislature through their delegations to the National Council of Provinces, the legislature’s upper chamber, to ensure their interests are protected in the formation of national laws.

In general, South Africa’s model of federalism has produced an extraordinarily centralized system of governance. The provinces suffer from a significant capacity deficit, which has rendered them weak, largely ineffective and highly dependent on the central government. They rely heavily on the central government for fiscal resources because they have very little ability to generate their own revenue, either through taxes or natural resource royalties. They also suffer from a significant lack of administrative capacity, as their bureaucracies are intertwined with the central government’s public service.

The political dominance of the ANC throughout South Africa, in all spheres of government, has also hindered the capacity development of provincial governments. The ANC’s strong grip on power, coupled with the integration of the party system at the national and provincial levels, has meant that provincial politicians tend to be less talented than their national counterparts, and they are often more loyal to national party elites rather than the voters in their own provinces. Overall, these factors have conspired to produce provincial governments that are largely unassertive and unwilling to carve out their own independent identities and focus on regional problems.

Given the history of widespread and deep inequality in South Africa, a central goal of the new political regime has been the promotion of equality for all citizens. Not only is the Constitution imbued with the principle of equality, it is also an essential characteristic of any stable liberal-democracy. Herein lies an inherent tension: federalism seeks to preserve diversity so that local populations within a political community can pursue alternative policies from a national agenda, while the idea of equality is wrapped up in the logic of a common social citizenship granting each citizen similar access to comparable social programs anywhere in the country. While federalism represents a preference for diversity (at least within certain policy

⁵⁸ Klug, *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction*, 118-23.

⁵⁹ See, e.g.: Ronald Watts, *Comparing Federal Systems*, Institute of Intergovernmental Relations, McGill-Queens University Press (2008), p. 17.

⁶⁰ Constitution of the Republic of South Africa.

⁶¹ *Ibid*, s. 41.

fields), equality requires similar treatment and a uniformity of government services across the country. Some scholars have argued that the adoption of national standards in federations can be one way of reconciling this tension.⁶²

From this perspective, South Africa's model of a highly centralized system of government can help promote socio-economic equality. South Africa has developed a federal system that is institutionally well-designed to respond to the problems of socio-economic inequality because it lends itself well to the development of comprehensive national standards. The 'integrated' federalism model can be an effective method of establishing national framework legislation that ensures similar government programs for all citizens across the country.

However, the weak capacity and limited autonomy of the provinces is problematic for two reasons. First, it limits their ability to operate as a meaningful check on the power of the central government, which is particularly concerning given the overwhelming dominance of the ANC. Secondly, and perhaps more importantly from the perspective of promoting socio-economic equality, provincial governments could be playing a much more meaningful role in monitoring local conditions, filling in legislative gaps overlooked by the national legislature, and defending regional interests. Thus, federalism in South Africa could be improved by instituting reforms designed to strengthen the capacity and autonomy of the provincial governments. This report makes several recommendations designed to incentivize provincial politicians to focus on regional problems, to promote the development of distinct and autonomous provincial politics, and increase the fiscal and administrative capacity of provincial governments.

The Electoral System and One-Party Dominance

During the transition from apartheid to an inclusive liberal democracy, social scientists and constitutional scholars descended upon South Africa with a plethora of recommendations for institutional and political system design. One of the most contentious issues was the type of electoral system to adopt. Scholars such as Horowitz suggested the alternative vote (AV) system as the best means to ensure intergroup accommodation and cooperation and real participation by minorities.⁶³ In light of the expected political hegemony of ANC however, a system of Proportional Representation (PR) was adopted, on the grounds that it would most effectively ensure representation for minor parties and safeguard against one party dominance.⁶⁴

The objective of creating a multi party system has been met. In the general election of 2004 twelve parties won at least one seat.⁶⁵ South Africa's PR system, however, has not been without problems. The closed list variant of PR which was adopted endows the party leadership with the final say on candidate nominations. The ANC leadership in particular has not shied away from punishing "rebellious" or independent minded MPs who do not adhere to the party line.⁶⁶ In order to enhance the individual accountability of MPs to voters and autonomy from party leaders, reformers have argued that some element of constituency representation is necessary.⁶⁷

⁶² See, for example, Jennifer Walner, "Beyond National Standards: Reconciling tension between Federalism and the Welfare State," *The Journal of Federalism*, 2009, pp. 1-26.

⁶³ Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in Divided South Africa*, (Berkeley: University of California Press, 1991).

⁶⁴ David Pottie, "The Electoral System and Opposition Parties in South Africa" in (ed.) Roger Southall, *Opposition and Democracy in South Africa*, (London: Frank Cass, 2001) p.32.

⁶⁵ Christina Murray and Richard Simeon, "Recognition without empowerment: Minorities in a democratic South Africa" in (ed.) Sujit Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation*, (Oxford: Oxford University Press, 2008) p.424.

⁶⁶ Tom Lodge, *Politics in South Africa: From Mandela to Mbeki*, (Bloomington Indiana: Indiana University Press, 2002) p.178.

⁶⁷ South African Electoral System Roundtable Report, <http://www.elections.org.za/papers/27/ETT.pdf>, accessed on April 17, 2010.

One possible solution to the accountability deficit presented by the closed list system is to disentangle provincial political parties from the national party structure. At present, the provinces role in shaping policy is limited. Intergovernmental relations tend to be top down, and provincial politicians often pay more attention to their national policies than to provincial concerns. In all of the large parties selection of provincial and local government candidates is by the national leadership rather than regional and local branches.⁶⁸ Centralization is also accompanied by an insistence on strict party discipline in sub-national legislatures as well as in parliament, largely ensuring that sub-national governments act as mere implementing agents for national government.⁶⁹

Although formally a multiparty democracy, South Africa is characterized by the dominance of a single political party, the ANC. The ANC's dominance derives from its leading role in the liberation struggle in South Africa and its association with respected national leaders such as Nelson Mandela. The ANC has, as a result, won huge majorities in the five elections held so far, winning in each at least 63 per cent of the national popular vote.⁷⁰

In light of the ANC's political hegemony, it is frequently remarked that South Africa has two constitutions; one is the national constitution and the other is the ANC's constitution. The ANC's dominance and the fragmentation of the opposition make a democratic change of government in South Africa unlikely in the foreseeable future. Consequently, government responsiveness, accountability and the opportunity to influence public policy will largely depend on the degree of internal democracy with the ANC.

If recent history is any indicator, however, the prospects for a vibrant and open democratic culture emerging within the ANC do not appear promising. The party has, stemming from its days as a liberation movement in exile, an ideological commitment to centralized control and an explicit commitment to avoiding factionalism. This makes it very difficult to voice opposition against the dictates of the party leadership. In addition, through a number of recent amendments to the party constitution, internal party politics have increasingly become subject to tighter restraints.⁷¹ In particular, policy making has shifted from the most representative organs of the ANC, such as the National Executive Committee (NEC) to government ministries and sub-committees.⁷²

Not everyone, however, is of the opinion that enhancing intra-party democracy is the solution to the problem of one-party dominance. Rather, they argue, political competition is only likely to emerge when factionalism and conflict within the dominant party leads to its break up. Invoking Hirschman's notion of "voice" and "exit", if there are groups who feel that their views and interests are not being represented and that the process by which decisions are being made are illegitimate, they will either join other parties or form a new party.

This does not mean that the only option is to simply wait for the dominant party to descend into internecine conflict. In a recent article, Kenneth Green⁷³ argues that the durability of single party dominance depends upon the ability of the dominant party to politicize public resources. In the case of South Africa, the adoption of neo-liberal economic policies would suggest that the state's fiscal resources are out of the ANC's reach. However, government procurement programs and initiatives such as the Black Economic Empowerment Program are

⁶⁸ Lia Nizjink and Jessica Piombo, "Parliament and the Electoral System: How Are South African's Being Represented" in (eds.) *Electoral Politics in South Africa: Assessing the First Decade*, (New York: Palgrave Macmillan, 2005) p.75.

⁶⁹ *Ibid.* p.77.

⁷⁰ Anthony Butler, "How Democratic is the African National Congress?" *Journal of Southern African Studies* 31(4):719-736 at p.721.

⁷¹ Lodge, *Politics in South Africa*, p.158.

⁷² Butler, *How Democratic is the ANC*, p.722-25.

⁷³ Kenneth Greene, "The Political Economy of Authoritarian Single Party Dominance," *Comparative Political Studies* 43(9):1-27.

often abused in a way so as to secure and reward political supporters. Insisting on greater accountability and transparency in the operation of these would serve to ensure they are not abused for political purposes.

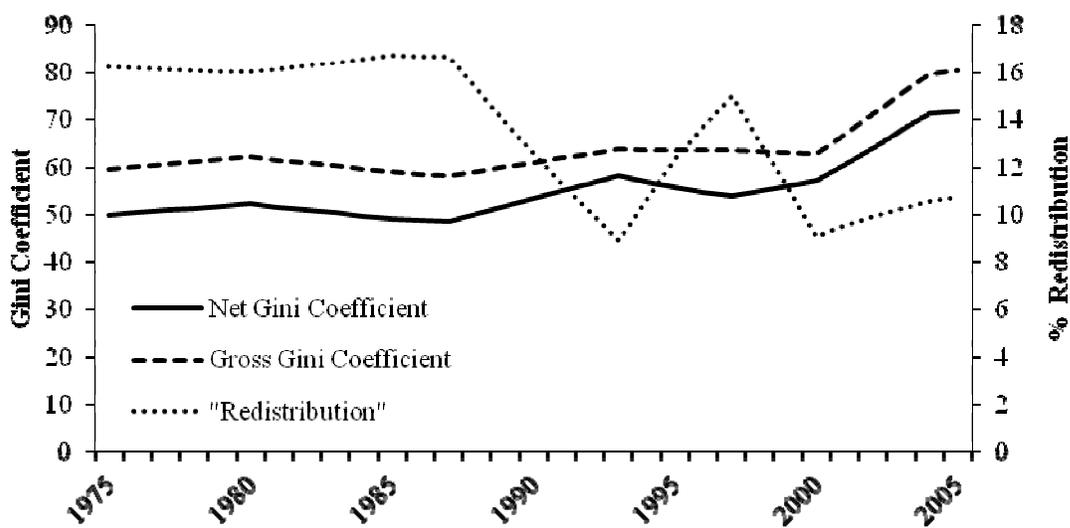
Recommendations

The findings of this report suggest that two interrelated factors have undermined South Africa's successful transition to a substantive liberal democracy. First, the market-oriented policies embraced as part of the negotiated settlement have significantly minimized the State's ability to address socio-economic inequality. Second, the political hegemony of the ANC has stifled the development of serious democratic competition and its ongoing dominance risks devolution into a fully centralized one-party state. In light of these findings, and cognisant of the limitations of institutional design, we offer the following recommendations which we believe will support South Africa's ongoing transformative efforts. The report that follows contains of more detailed discussions of each of these recommendations.

1. Focus on investment in education and skills training as a means to Black empowerment.
2. Reward companies that engage in communities in which they operate with tax incentives.
3. Expand BEE benefits to small businesses through the reformation of preferential procurement policies.
4. Renew the independence and deliberative character of the judicial appointment process by limiting partisan political membership and influence on the Judicial Service Committee.
5. Enhance the transformative capacity of and public confidence in the Constitution by providing merit-based funding for constitutional litigation by civil society organizations.
6. Entrench a legislative override, similar in manner and form to Section 33 of the Canadian Charter of Rights and Freedoms, to reduce the incentive of political actors to influence judicial decisions.
7. Strengthen the fiscal autonomy of provincial governments by increasing their powers of taxation.
8. Develop independent policy capacity of provincial governments by disentangling central and provincial government bureaucracies.
9. Generate regionally focused provincial politicians and legislatures by federalizing the decision-making apparatus of political parties.
10. Augment citizen-representative linkage by adopting a Multi-Member District Proportional electoral system.
11. Facilitate intra-party democracy by expanding the role of local branches of political parties.
12. Increase accountability and transparency of the public procurement process by institutionalizing a multiple-bid requirement.

Appendix: Inequality and Development Indicators

Income Inequality, South Africa



Source: Solt, 2009

Selected World Bank Development Indicators, South Africa

	2000	2005	2007	2008
Population, total (millions)	44.0	46.8	47.8	48.6
Population growth (annual %)	0	9	5	9
GNI per capita, Atlas method (current US\$)	3,05	4,81	5,73	5,82
GNI per capita, PPP (current international \$)	6,47	8,33	9,46	9,78
Life expectancy at birth, total (years)	56	51	50	..
Mortality rate, under-5 (per 1,000)	74	65	59	..
Immunization, measles (% of children ages 12-23 months)	77	84	83	..
Primary completion rate, total (% of relevant age group)	90	92	84	..
Ratio of girls to boys in primary and secondary education (%)	100	100	100	..
Prevalence of HIV, total (% of population ages 15-49)	15.9	18.2	18.1	..

Source: World Development Indicators database, September 2009

CHAPTER 2: RECONCILIATION AND ECONOMIC EMPOWERMENT - KENNEDY JAWOKO

Introduction

The economy is where it all began, and that is where it is likely to end. Since Dutchman Jan Van Riebeck set sail for India and landed on the southern tip of Africa for refreshment in 1652, the theme has not changed. Van Riebeck's desire to set up the Dutch East Indian Company to exploit the country's trade opportunities and resources was followed by political systems that facilitated that economic objective.⁷⁴ Some 350 years later, the issue is still the economy. This year marked 16 years of majority rule in South Africa. Large quantity of ink has been used to extensively "analyze whether political freedom has brought any real measure of economic freedom for the victims, mostly black, of apartheid."⁷⁵ In its transition South Africa produced one of the most "humanistic constitutions the world had ever seen, guaranteeing personal freedoms, but also protecting minority rights and the weak and the vulnerable."⁷⁶ The constitution was a key product of the political settlement brokered by former presidents Mandela and de Klerk. Mandela's vision was one of racial equality and racial reconciliation. It was also "one of social harmony and equal opportunity informed by the appalling living conditions of South African blacks, whose lives and destiny had been sacrificed at the altar of systemic apartheid."⁷⁷ As part of the historic deal struck to ease the way for multi-racial democratic elections, South Africa's whites ceded political power to the African National Congress (ANC). In turn, the ANC accepted that—mainly white-run—capitalism would continue.⁷⁸

The ANC vowed to redress the injustices and inequalities that had developed over 40-odd years of apartheid, not to mention centuries of colonial rule.⁷⁹ Yet 16 years of black rule have still to record a balance sheet that answers the black shanty dwellers' spirit of seeking a better life. To be sure, South Africa has made inroads since the demise of apartheid. Millions of South Africans now have access to clean water. The number of households with electricity has increased from 50 per cent to 80 per cent. The banking system has expanded to embrace the black underclass and there is an expanding black middle class.⁸⁰ Yes the long dark years of apartheid rule are over and, yes, there is change in South Africa, but for whom? The wealth that is created is not circulating among the black majority.⁸¹ With all the major economic pillars of the country firmly in white hands, the black majority has had to rely on the government to realize its economic aspirations. Simeon and Murray have pointed out that ANC leaders were acutely aware of the immense developmental tasks that would face a democratic, non-racial South Africa. Who could address the challenges of educating South Africans, and of providing them with housing, water, electricity, and health care? Who could engineer the redistribution of wealth in one of the world's most unequal societies?⁸²

⁷⁴ Commey, Pusch, "Leaders in Waiting" (Dec 2008) in *African Business*, Dec2008, Issue 337, p16-21, 4p.

⁷⁵ See "A survey on South Africa's Challenge", in *The Economist*, after page 54.

⁷⁶ Commey, Pusch, Mandela, 20 years on: Change, but for Whom? In *New African*, March 20, 2010, pp. 10.

⁷⁷ *Ibid*, pp. 10

⁷⁸ *The Economist*, Righting the wrongs of apartheid, April 2006, pp.8

⁷⁹ *The Economist*, Righting the wrongs of apartheid, April 2006, p. 8

⁸⁰ Commey, Pusch, Mandela, 20 years on: Change, but for Whom? In *New African*, March 20, 2010, p. 8.

⁸¹ *New Africa*, March 20, 2010, p. 8

⁸² Simeon, Richard and Christina Murray, Reforming Multi-level Government in South Africa Richard, p. 4

The skyrocketing unemployment rate, estimated by Statistics South Africa, at 24 per cent in 2009⁸³, has been a hindrance to socio-economic equality advocated for by the ANC. Moreover Cahan and Van Staden have concluded that the very high unemployment rate raises concern about the current economic policies of the ANC. The fiscal and pro-business policies, they argue, have constructed an economy which goes nowhere in terms of improving the conditions of the majority of people.⁸⁴

This paper, therefore, examines Black Economic Empowerment (BEE), a policy promoted by the ANC to mitigate socio-economic inequality. To examine this policy, I have divided this paper in three parts. The first part shall explore the Truth and Reconciliation Commission (TRC) — concentrating on Reparations and Rehabilitation— a central mechanism used to promote a multi-racial democracy in South Africa. The second part shall explore BEE and the third part shall offer recommendations.

Truth and Reconciliation Commission (Reparations and Rehabilitation)

In the aftermath of South Africa's 1948 elections, as the Afrikaner National Party (NP) began enforcing its apartheid policies and the ANC launched the Defiance Campaign in 1952, the two diametrically opposed political cultures confronted each other.⁸⁵ Inspired by religious mythology and legitimated by the Dutch Reformed Churches, Afrikaner nationalism controlled the State.⁸⁶ On the other hand the ANC, a product of four decades of protest politics, was, in comparison, a weaker movement. Nevertheless, the ANC was committed to the liberation of the black majority and to equality before the law for all South Africans. Given that the two political organizations had little in common, Frankel has noted that there was no room for compromise between these two political cultures and no mechanisms for political dialogue.⁸⁷

The ANC is complex movement in which various strains of African nationalism, liberal democracy, and socialism coexist.⁸⁸ These different strains made it possible to find moderate voices to engage in dialogue with the reformers within the ruling apartheid party. Mandela envisioned a colour-blind South Africa. For Mandela, negotiated transition rather than revolutionary transformation was the order of the day— and that negotiated settlement required significant compromises to allay the concerns of the white elite.⁸⁹ The compromises, no doubt, made it possible for both the ANC and the NP to recognize “their mutual interest in an outcome that served their joint concern to place limits on change.”⁹⁰

By 1980, it was beginning to down on the more reflective and moderate members of the white elite that the grand plan of apartheid has failed.⁹¹ Real cracks had begun to appear in the white polity. When faced with the political crisis, the Anglo-American business executive Za de Beer stated in 1986 that “years of apartheid had caused many blacks to reject the economic as well as the political system.”⁹² De Beer argued that “they dare not allow the baby of free

⁸³ Statistics South Africa: Quarterly Labour Force Survey. Retrieved from <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2009.pdf> on March 29, 2010

⁸⁴ Steven F. Cahan, Chris J. van Staden (2009) “Black economic empowerment, legitimacy and the value added statement: evidence from post-apartheid South Africa” in *Accounting and Finance* 49, pp, 43

⁸⁵ Frankel, Phillip (2001) “An Ordinary Atrocity: Sharpeville and its Massacre.” New Haven: Yale University Press

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Friedman, Steven, *South Africa's Reluctant Transition*, 58

⁸⁹ Mandela.

⁹⁰ Saul, John. S. (2004) *Costs and Benefits of Peacebuilding, South African Style*, in *Durable Peace, Challenges for Peacebuilding in Africa*, eds Taisier Ali and Robert Matthews, pp. 187. University of Toronto Press.

⁹¹ Dowden, Richard (2008) “Africa: Not just another country: South Africa” in *Altered States, Ordinary Miracles*, pp. 395

⁹² Saul, John, pp. 187.

enterprise be thrown out with the bathwater of apartheid.”⁹³ For South Africa’s white elite the big questions increasingly concerned economic and demography rather than ideology or ethics. Saul notes that armed with this sensibility, capitalists, both worldwide and in South Africa, prepared themselves to sever the marriage between the structures of capitalist exploitation and of racial oppression that had proved so profitable to it in the past. From mid 1980s they began to develop a counter-revolutionary strategy designed to shape the socio-economic transition that would now parallel the necessary political transition.⁹⁴

One of the mechanisms employed to foster a smooth transition from apartheid to democratic rule was the Truth and Reconciliation Commission (TRC). South Africa’s TRC is celebrated as the “most highly successful truth commission in the world.”⁹⁵ The TRC was established by an act of parliament under the 1995 Promotion of National Unity and Reconciliation Act. The act had three separate yet inter-related committees: the Human Rights Violations Committee, the Amnesty Committee, and the Reparations and Rehabilitation Committee (RRC).⁹⁶ Although many transitional justice scholars concede that the TRC was a success, its terms of reference remain a matter of contention.⁹⁷ There are those who have argued that the period under review for the TRC should have started as far back as the first arrival of white settlers in 1652. Others were of the view that at the very least one should look at the period that began with South Africa’s first constitution in 1910. Many maintain that the starting point should be 1948 when the NP came to power.⁹⁸ South Africa’s parliament recommended March 1960 to December 1993. The first date coincides with the banning of political organizations and severe oppression of any resistance to apartheid. The end date was arbitrarily chosen as the date when the negotiation teams decided on an amnesty provision in the interim constitution.⁹⁹ The legal basis for the amnesty process of the TRC emerged from the formal political negotiations that were initiated in 1990. The original provisions were recorded in the postscript to the Constitution of the Republic of South Africa Act No. 200 of 1993 (the Interim Constitution). National unity and reconciliation were central to the negotiation process and the terms were explicit. Items such as the sunset clauses and amnesties no doubt helped buy space for change as the anxiety levels of politicians and civil servants from the old regime were damped down.¹⁰⁰

The Constitution provides a historic 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. The adoption of the Constitution laid a foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These were addressed on the basis that there was a need for understanding but not for

⁹³ Quoted in *Financial Times*, June 10, 1986.

⁹⁴ Saul, John, pp. 187.

⁹⁵ Quinn, Joanna R. (2004) “Are Truth Commissions Useful in Promoting Restorative Justice?” in *Crosscurrents*, edited by Mark Charlton, pp. 171. Nelson Canada.

⁹⁶ See TRC Report at: <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf>

⁹⁷ See: “Truth and Reconciliation in South Africa: Did the TRC Deliver?” eds., Audrey Chapman and Hugo Van der Merwe., University of Pennsylvania Press 2008. 347 pages

⁹⁸ Boaraine, Alex. (2000) “Truth and Reconciliation in South Africa. The Third Way” in *Truth Versus Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, pp. 141-157. Princeton University Press.

⁹⁹ *Ibid*

¹⁰⁰ Saul, John, pp. 195.

vengeance, a need for reparation but not for retaliation, a need for *ubuntu* (oneness) but not for victimization.¹⁰¹

In its broadest sense, the mandate of the RRC was to affirm, acknowledge and consider the impact and consequences of gross violations of human rights on victims, and to make recommendations accordingly. Thus the RRC had access to a rich source of information about reparations, drawn from domestic and international law, and opinion.¹⁰² The obligation to institute reparations is enshrined in South African law. Through the *Promotion of National Unity and Reconciliation Act*, the legislature made clear its intention that reparations of some kind or form should be awarded to victims. The case for reparations is established in both the Constitution and the Act. It is also supported and underpinned by a majority judgment of the Constitutional Court, which emphasizes the obligation on the State to meet the “need for reparations.”¹⁰³ The TRC was empowered to recommend reparations, but not to grant them, so it dealt very little with economic injustices. A quick survey of recent South African media indicates that the unfinished business of the TRC is still a recurring theme even after sixteen years of black majority rule.¹⁰⁴ According to Cuthbertson, the ANC government has made a paltry payment of an equivalent of US \$4,000 to victims identified by the TRC.¹⁰⁵ This presumably signals closure as far as the state is concerned. Community reparations have hardly been addressed.¹⁰⁶ Although the TRC has been lauded as very successful, it is important to point out that it was an “elite-pact” that involved major compromises. Mandela explains at length some of the compromises that were necessary for a successful transition.¹⁰⁷ Some of the compromises included the need to embrace neo-liberal policies.

Black Economic Empowerment (BEE)

The wave of enthusiasm that followed the 1994 elections did not bring the much needed foreign direct investment. The middle class has grown, but many South Africans do not experience its impact. Depending on how one measures it, estimates of the proportion of the black middle class range from 22 per cent to 40 per cent.¹⁰⁸ However most of the growth has come from public sector jobs, where blacks have been politically more able to get jobs. By contrast, the proportion of blacks in senior jobs in the private sector or the professions has moved up slightly since 1995 to about 25 per cent.¹⁰⁹ The government concluded that the private sector was not doing its bit, and began to implement its economic goals through ambitious economic empowerment mechanisms.¹¹⁰ In his survey, Southall has demonstrated that state-owned enterprises have been useful “instruments for extending black control over the economy, increasing opportunities for an expanding black middle class, and for promoting black empowerment, as they had been in gaining economic power for Afrikaners after 1948. In this

¹⁰¹ The Legal Basis of the Amnesty Process, retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010

¹⁰² The Case for Reparation and Rehabilitation: Domestic and International Law, retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010

¹⁰³ Amnesty and Reparations: Achieving a Balance. Retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010.

¹⁰⁴ Various section of the South African and international media regularly report on the black misgivings about the the TRC.

¹⁰⁵ Cuthbertson, Greg, South Africa's democracy: from celebration to crisis a School for Graduate Studies, University of South Africa., pp. 300

¹⁰⁶ Ibid

¹⁰⁷ Mandela.

¹⁰⁸ The Economist April 8, 2006, Righting the wrongs of Apartheid, p. 8

¹⁰⁹ Ibid., p. 8

¹¹⁰ The Economist April 8, 2006, Righting the wrongs of Apartheid, p. 8

way, the ANC government has recognized the parastatals as occupying strategic sites in the economy.”¹¹¹

As soon as it came to power, the ANC embarked on the endeavour to redress past injustices. In 1994 it launched an ambitious collectivist Reconstruction and Development Programme (RDP), which Mandela said would be “an all encompassing process of transforming society in its totality to ensure a better life for all.”¹¹² It took money from the military and spent it on housing, health and education. The RDP also had a special fund for “presidential projects”, such as free medical care for children and pregnant women, a school feeding programme, electrification of poor homes and public works projects for unemployed youths.¹¹³ However the ANC had to reassure the international financial community and money markets that investments in South Africa were safe and that the government would not institute nationalization programs. Thus the new leadership spent most of its time wondering how to reassure capitalists and whites— which usually amounted to the same thing. In 1996, the government produced the Growth, Employment and Redistribution (GEAR) strategy. GEAR was characterized by fiscal prudence, privatization and liberalized trade. It was the culmination of the ANC leadership’s shift away from the ideals of the Freedom Charter of 1955, which argued that all mines and banks should be nationalized.¹¹⁴ Through GEAR, the ANC elite argued that public expenditure would be reprioritized.¹¹⁵ But after a few years, the ANC conceded that GEAR would neither create enough jobs nor bring in the hoped for investment. Many black South Africans did not recognize themselves in ANC-led government decisions and policies, such as GEAR.¹¹⁶ Unemployment grew and the majority of blacks became poorer.¹¹⁷ As the GEAR strategy missed its targets and reached its end at the turn of the millennium, the government decided to cut interest rates and promote growth. In 1998 the economic growth rate had dropped to 0.5 per cent.¹¹⁸

Whereas Mandela’s aim was national unity and racial reconciliation, President Thabo Mbeki, on the other hand, focused on creating a modern democracy.¹¹⁹ From being a neo-liberal lapdog, based on the adoption of the GEAR strategy as the locomotive to take the country out of poverty, Mbeki shifted towards conceptualizing the country as a developmental state.¹²⁰ However Freund has argued that the “strongest element in South Africa being labelled a developmental state lie in the effort being made to create a new elite, able to navigate the waters of corporate South Africa, but fundamentally loyal to the ruling ANC and tied to its hegemonic political control of the country.”¹²¹ Through a policy of Black Economic Empowerment (BEE), Mbeki and ANC leaders initiated a grandiose process of economic transformation. Interestingly, as Freund, has noted, BEE started from the initiatives, not of the ANC, but of established corporate business where the once Afrikaner insurance giant SANLAM and Anglo-American

¹¹¹ Cuthbertson, pp. 302

¹¹² Dowden, pp. 395

¹¹³ Ibid

¹¹⁴ Ralph Hamann, Sanjeev Khagram, Shannon Rohan South Africa’s Charter Approach to Post-Apartheid Economic Transformation: Collaborative Governance or Hardball Bargaining?” in *Journal of South African Studies*, pp. 20

¹¹⁵ Ibid., 396

¹¹⁶ Darracq, Vincent, “Being a Movement of the People and a Governing Party: Study of the African National Congress Mass Character”, pp. 433. In *Journal Southern African Studies*.

¹¹⁷ The Economist April 8, 2006, Righting the wrongs of Apartheid, p. 4

¹¹⁸ Dowden, Richard, pp. 395

¹¹⁹ Cuthbertson, pp. 301

¹²⁰ Freund, Bill, “South Africa: The End of Apartheid & the Emergence of the ‘BEE Elite.’” In *Review of African Political Economy* No. 114:661-678

¹²¹ Ibid

hived off space specifically designed to cater to a new class of black businessmen and women, but the early form of black corporate empowerment was considered to be unsuccessful.”¹²²

Bridging the socio-economic inequality has been a herculean task for the ANC. Tangri and Southall point out that “for much of the first decade of majority rule, the government turned to white business to generate higher rates of growth. It proposed only modest levels of equity transfer, fearing that a major “deracialization” of business would be detrimental to growth and investment.”¹²³ In 1998, a body known as the Black Business Council was appointed to formulate BEE legislation and the State instituted a BEE Commission to get policies on track. The commission reported in 2001 and in 2003 BEE legislation was promulgated in the form of the Broad-Based Black Economic Empowerment law.¹²⁴ It is important to state that ANC leaders have argued that the BEE policy emerged against the backdrop of increasing frustration regarding the slow pace of socio-economic transformation:¹²⁵

1. *Poverty*: In 1994, an estimated 17 million South Africans were living in poverty, corresponding to between 35 and 40 per cent of the total population. Twenty years later, it is estimated that between 45 and 55 per cent are living in poverty, which represents an increase both in absolute numbers and proportion since 1994.
2. *Unemployment*: At the end of 2009, the official unemployment rate was 24 per cent, but the expanded definition, which includes those of working age who have given up looking for work, was much higher. Furthermore, an estimated one in five workers is employed in the informal sector, which often involves low and haphazard income.
3. *Housing and basic services*: In 1994, there was an estimated backlog of at least three million houses, and about 12 million South Africans lacked access to water and 21 million lacked sanitation services. Despite significant progress, the housing shortage was still between three and four million units in 2005 and 40 per cent of non-urban households still had no access to clean water.
4. *Inequality*: South Africa has one of the most unequal distributions of wealth in the world. In 1994, five per cent of the population – mostly whites – owned 88 per cent of the nation’s wealth. In terms of income inequality, the Gini coefficient in 1996 was estimated at 0.69, in comparison to an average of 0.43 for industrialized countries. Since 1994, inter-racial inequality has diminished, while intra-racial inequality has increased: the Gini coefficient among black South Africans increased from 0.62 in 1994 to 0.66 in 2004. Racial inequality is compounded by significant gender and geographic inequality, with rural women being consistently the worst off according to a range of indicators.
5. *HIV/AIDS*: HIV prevalence among women attending antenatal clinics increased from one per cent in 1990 to 25 per cent in 2001, translating into an estimated infection rate of one in five adults. Here, too, women are disproportionately affected, and there are also significant provincial disparities.

Many of those frustrated about a lack of positive change blamed the government’s macroeconomic policy, such as the GEAR policy. They also blamed it on a shift away from the ANC’s 1994 election manifesto, the RDP, which emphasized a-people-centred development and

¹²² Ibid

¹²³ Tangri, Roger & Southall, Roger, “The Politics of Black Economic Empowerment in South Africa” In *Journal of Southern African Studies*, Volume 34, Number 3, September 2008

¹²⁴ Freund, pp 678

¹²⁵ These points are adapted from M. van Donk and E. Pieterse, ‘Contextual Snapshots: Development Challenges and Responses during the Transition’, in E. Pieterse and F. Meintjies (eds), *Voices of the Transition: The Politics, Poetics and Practices of Social Change in South Africa* (Johannesburg, Heinemann, 2004).

public spending.¹²⁶ The ANC's shift to macro-economic orthodoxy had many contributing factors, but the close relationships between the ANC leadership and big business is likely to have had much to do with it. There was growing frustration within the ANC leadership and an increasingly influential group of black professionals and businesspeople that the South African economy was still primarily in white hands.¹²⁷ Many argued that true transformation is only possible if blacks own and control a greater proportion of the economy.¹²⁸

The ANC government has wrestled with difficult issues such as: “Should BEE involve primarily the transfer of business ownership to blacks, and if so how much ownership? Should the ownership targets entail ultimately majority ownership? Also, what should be the time frame for the transfer of existing assets? Should criteria other than ownership be involved in any assessment of BEE? Should factors such as management and procurement be given due consideration, and if so, what weighting should be given to them?”¹²⁹ The BEE Commission called for deliberate measures by “the State to facilitate the meaningful participation of blacks in the economy because voluntary initiatives by the private sector had not provided adequate results. The Commission argued that left alone, markets tend to reinforce existing distributions of incomes and assets especially in the context of globalization.”¹³⁰ The BEE Act requires companies to implement an affirmative action approach in their labour recruitment and training policies.¹³¹ From the outset, there were concerns — particularly amongst civil society groups and trade unions— that BEE was primarily about the creation of a black elite, without significant benefit to the country's poor. Sensitive to these concerns, the BEE Commission explicitly provided a broader definition of BEE, which includes elements such as rural development, land ownership and access to finance.¹³² BEE provides a set of codes of good practice, which promote partnerships or structured collaboration between government and the private sector for the sustainable achievement of BEE.¹³³ South African law considers compliance requirements for BEE policies. BEE Act set generic rules on BEE standards, as well as more specific codes of conduct for companies operating in different sectors of the local economy. In the last seven years, the volume of recorded transactions has soared between R500 billion– 600 billion, according to Businessmap.¹³⁴ By early 2008, Moody's Investors Service said it expected 52 per cent of South African businesses would experience a change of ownership over the following 10 years. Based on surveys by auditing firm Grant Thornton, this would represent a world high in terms of expected ownership churn.¹³⁵ In the mining sector, arguably the country's most lucrative, for example, BEE laws, mandate that mining companies be at least 26 per cent black-owned in order to get a government mining license.¹³⁶ The CEO of Anglo Gold (South Africa's largest gold producer, now called AngloGold Ashanti) argued:

¹²⁶ Hamann, Sanjeev and Shannon, pp. 20

¹²⁷ Ibid., pp. 26

¹²⁸ Ibid., pp. 26

¹²⁹ Tangri, Roger & Southall, Roger, “The Politics of Black Economic Empowerment in South Africa” In *Journal of Southern African Studies*, Volume 34, Number 3, September 2008

¹³⁰ Black Economic Empowerment Commission Report, p. 6.

¹³¹ Ibid, pp. 20

¹³² Black Economic Empowerment Commission Report, p. 2.

¹³³ DTI (Department of Trade and Industry), South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment (Pretoria, The Department of Trade and Industry, 2004), p. 14.

¹³⁴ Special report Black Economic Empowerment published in *Risk*

¹³⁵ Ibid

¹³⁶ <http://www.forbes.com/forbes/2008/0324/088.html>

“What BEE charter is turning out to be is a test of the social licence. A business will only survive if it benefits all of its stakeholders over time – if people, the community, customers, employees and shareholders are left better off having an association with the company.”¹³⁷

Freund has categorized the new world of top black business figures into four parts, with varying degrees of relationship to the BEE legal framework. *First*, there are “firms established by blacks that are aimed at attracting the attention of anyone wishing to meet the wishes of the State. Often, however, the State and, or, existing business has directly and purposively generated their existence. Sometimes however they do represent extant independent and genuinely entrepreneurial activities.”¹³⁸ *Second* are “firms which represent partnerships between whites and blacks, but are sufficiently black in ownership to qualify as BEE. Firms such as these are certainly desired by the government as partners, but they have not been so easy to structure as pure empowerment firms. Some of the partnerships are due to the limited capacity and experience of companies in the first category. Existing white generated corporations also remain important as parents of black empowerment companies.”¹³⁹ *Third* comes the “BEE-related world of the parastatals, almost all led by black ANC appointees on very large salaries. Parastatals have been partially turned into partnerships. Thus the telecommunications monopoly TELKOM has been partially sold both to foreign investors and to black empowerment owners. The monopoly was breached in 2005, but again the chief beneficiaries will certainly have a big black empowerment stake and this is true very significantly for the owners of the three cell phone companies, an immensely profitable undertaking (which also involves interlocking TELKOM) as well as the State franchised system of gambling casinos, which exist nationwide.”¹⁴⁰ *A fourth* category would be “black managers and executives in the big industrial, commercial and financial companies, some of them nurtured since well before 1990. It is obviously particularly difficult to identify whether or not they are becoming effective generators of policy in economically important activities; some do not have strong ANC backgrounds [but] they would in any event be to some extent intermediaries between white businessmen and the State and BEE world.”¹⁴¹

Critiques of BEE

Proponents of BEE policy argue that it is aimed at nothing scarier than the “normalization of South Africa”, by “de-racializing the capitalist class.”¹⁴² However, this has not been an even undertaking. Cuthbertson attributes this to the ANC’s obsession with “representivity” rather than efficiency in government and he argues that “the ANC opted for a short-term strategy of middle-class replacement through on-the job affirmative action rather than choosing to invest in human capacity over the long term. The outcome has been a low level of administrative performance and the extensive abuse of their powers and positions by many self-serving public servants.”¹⁴³

BEE has split the ruling tripartite alliance, with the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU) saying it should be scrapped because its benefits are not spread widely enough. One of the most controversial

¹³⁷ Ibid

¹³⁸ Freund, pp. 667

¹³⁹ Freund, pp. 667

¹⁴⁰ Ibid

¹⁴¹ Ibid

¹⁴² The Economist April 8, 2006, Righting the wrongs of Apartheid, p. 4

¹⁴³ Cuthbertson, pp. 295

aspects of BEE is the windfall it has provided to well-connected players. Prominent examples include political and business leaders such as Cyril Ramaphosa and Tokyo Sexwale, the founders of Johannesburg-based BEE firms, “Shanduka” and “Mvelaphanda”, respectively.¹⁴⁴ These BEE millionaires have been berated for their extravagant public lifestyles and conspicuous consumption in a sea of poverty. Yet they appear to be shielded from government scrutiny because of their connection to the ANC.¹⁴⁵ Moeletsi Mbeki, brother of former president Thabo Mbeki has referred to BEE as “crony capitalism.”¹⁴⁶ Government ministers have claimed that BEE deals are becoming more broad-based. However it is difficult to ascertain how broad-based these black consortia actually are because there is little detailed public information available on either trade union investment companies or community groupings.¹⁴⁷

To be sure, there have been inroads made in bridging the inequality gap. Since 1994 black South Africans have become more empowered in business.¹⁴⁸ “A survey by Ernst & Young found that at least 1,364 empowerment deals with a total value of R285 billion (2005=US \$40 billion) were concluded between 1995 and 2005. Blacks are in the boardroom and the numbers of blacks in senior management positions has been rising. Yet it has also been observed that the number of black managers in the private sector is still small and black people are hardly in controlling positions in capital.”¹⁴⁹ In an October 2005 report released by the Black Business Executive Circle, “it was recorded that only five of the Johannesburg Securities Exchange (JSE) top 200 companies had black ownership of more than 51 per cent, only 27 companies had more than 25 per cent, and these 32 companies together accounted for less than 2 per cent of the JSE’s market capitalisation.”¹⁵⁰

The lack of enough trained blacks to meet employment equity targets has become a challenge for companies eager to comply with BEE codes. In order to meet their employment equity targets, companies are raiding the public sector, the only place where they can find trained black managers. They are paying top money to lure away the best people, thus exacerbating the skills crises in government.¹⁵¹

Established white business has always feared greater political intrusion to advance the BEE process. To exercise political influence within ruling circles, it has attracted prominent black ex-politicians turned businessmen and women with good political connections. Many white companies have sold their stakes to black businessmen and women who serve in the highest decision-making structures of the ANC, and who can push for policies to the benefit of capital. They have not wanted to risk their value by taking on unknown black partners.¹⁵² In so doing, BEE has amounted mainly to the transfer of shares, which have been acquired disproportionately by a small number of prominent black figures. These leaders have amassed large fortunes from empowerment transactions and accompanying directorships.¹⁵³ While one can certainly find energetic and intelligent black capitalists in South Africa— and firms that are very independent of State links— the extent of corruption, the speed of class creation, makes it imperative to ask to what extent this is a class that is essentially parasitic.¹⁵⁴

¹⁴⁴ Special report Black Economic Empowerment

¹⁴⁵ The African Report, Frontline, BEE: The struggle for black power gets contentious, p. 44

¹⁴⁶ <http://www.forbes.com/forbes/2008/0324/088.html>

¹⁴⁷ Tangri & Southall, pp. 709

¹⁴⁸ Ibid., pp. 700

¹⁴⁹ Ibid., pp. 700

¹⁵⁰ Empowerment and the JSE’, Financial Mail (Johannesburg), 17 March 2006.

¹⁵¹ The Economist April 8, 2006, Righting the wrongs of Apartheid, pp8

¹⁵² Tangri & Southall, pp. 710

¹⁵³ Ibid., pp. 703

¹⁵⁴ Freund, pp. 667

A commentary in *African Business* in October 2006 noted that BEE is also faced with the problem of “fronting”, whereby white-dominated businesses give ownership to bogus black shareholders.¹⁵⁵ In regard to the actual empowerment deals, the government has issued stern warnings, such as to mining firms, that their transactions would be examined ‘microscopically’ in view of the complaints from black empowerment partners of such practices as ‘fronting’.¹⁵⁶ A 2006 commentary in the *Economist* pointed out that BEE policies “discourage blacks to become entrepreneurs.”¹⁵⁷ Why take a risk of starting up their own business when they can name their salary to join a company desperate to meet BEE criteria? The article noted that one business consultant estimates that of the serious new business start-ups in 2003-2004, only 10 per cent were black. Yet a better way to spread BEE would be to make life easier for start-ups and small businesses.¹⁵⁸

While prominent BEE beneficiaries do include Coloureds and Indians, the real BEE world is overwhelmingly a black African one despite what one might expect from the higher educational qualifications and stronger business traditions amongst Coloureds and, especially, Indian South Africans. The signs are that the private sector in South Africa, if it wishes to have a serious engagement with the State, must show a black face, ideally from top to bottom, but especially at the top.¹⁵⁹

In addition to issues relating to land restitution, the TRC and ANC politics – both national and local, the democratic era has highlighted the importance of identity. The retreat into ethnicity has become particularly pronounced, but there has also been a recovery of ‘whiteness’ since 2000 as Afrikaners, for instance, have marshalled themselves against the racial politics of the ANC in its affirmative action and black empowerment agendas. There has also been the reinvestment in identity politics, not least among Coloureds in the Western Cape Province, who now feel they are not black enough to benefit from the policies of economic empowerment.¹⁶⁰

Many BEE deals, for instance, contain a deferred ownership clause whereby black empowerment partners paid for their shares with future earnings and only received shareholder rights at some future date, usually five to ten years later. Yet white companies were counting such transactions for full direct ownership points on the scorecard needed to qualify for licences and State contracts. In 2004, Peter Vundla, president of Black Business Executives, described as smoke-and-mirrors deals those “that promise future ownership down the line without any true economic interest changing hands”.¹⁶¹

The inherent radicalism of democratic struggle in South Africa has been blunted by the market’s energetic support of liberalism, thus undermining the economic aspirations of the vast majority of black South Africans. There is clearly economic prosperity for the middle class, but little material improvement in the conditions of the poor.¹⁶² Hamann *et al* have asserted that “the ANC is playing *realpolitik*, in which the government’s desire to address the poverty and racial imbalances consigned by apartheid is fundamentally constrained by its desire to expand the economy and attract increased investment. Any attempt to exercise power over companies and

¹⁵⁵ African Business Magazine October 2008 Issue No. 56. pp. 45

¹⁵⁶ Tangri & Southall, pp. 707

¹⁵⁷ Economist April 8, 2006, Righting the wrongs of Apartheid, pp. 8

¹⁵⁸ Economist, pp. 8

¹⁵⁹ Freund, pp. 669

¹⁶⁰ Cuthbertson, Greg, pp. 298

¹⁶¹ Tangri & Southall, pp. 708

¹⁶² Cuthbertson, Greg, pp. 294

the interests of capital is thus prevented by the need to operate within the constraint that was worked during the negotiation periods.”¹⁶³

In creating a BEE policy, the government has attempted to satisfy the competing interests of white companies, black entrepreneurs and organised labour. Yet the government itself has been giving conflicting signals on empowerment. For instance, on the one hand it has sought to transform capital, while at other times it has proposed a less stringent empowerment regime—one more conducive to private investment.¹⁶⁴ The government has had competing goals of growth and redistribution, which it has sought to reconcile while implementing BEE.¹⁶⁵ There is no question that a tightly-knit elite of black businessmen, ex-politicians and public servants, bureaucrats and ANC leaders has formed over the past decade in South Africa. The social structure is altering in ways that offer substantial opportunities to various strata in the black population. However, the new elite remain limited in capacity, fragile and very dependent on the ANC remaining in power.¹⁶⁶

Most of the critiques of BEE are essentially moralistic, but the ANC, if it is to have embedded elite, needs something like BEE. The new elite do not inhabit a country with no history of industrialization or predecessor. According to Freund, “with some justification, the ANC considers that it has created a national economic system that is highly business friendly although rewards for this in terms of growth have been slow in coming.”¹⁶⁷ In popular South African discourse, criticism of BEE is not primarily structural but made in class terms. Again and again, the problem with BEE is defined as its narrow base and its tendency to reward (if extremely generously) only a tiny number of select beneficiaries.¹⁶⁸ At present, the spectacular benefits accruing to a few hundred black families at the top largely linked to the ruling party, but unconnected to the broader issues of equality and opportunity in South African society leave BEE as a policy attracting very limited enthusiasm from the bulk of the ANC’s supporters. The heart of the story is that the masses have been left behind while the leaders fatten themselves with new wealth. GEAR, taken as a charter for the policies in which BEE is entwined, is invariably contrasted with the RDP adopted in ANC election manifesto of 1994.¹⁶⁹

Due to limited space, this paper has not explored the controversial issue of land redistribution even though it is central to the South Africa’s transitional justice. It, however, warrants mentioning that South Africa’s land redistribution has been explored extensively by many scholars because, as Cousins accurately notes, “few issues are more important to the future of South African democracy than land. The land issue represents a combination of problems, ranging from urban homelessness and squatting to restitution for historical land dispossession.”¹⁷⁰ Therefore any form of meaningful economic empowerment must incorporate the issue of land.

Recommendations

¹⁶³ Hamann, Khagram and Shannon, pp. 26

¹⁶⁴ Tangri & Southall, pp. 703

¹⁶⁵ *Ibid.*, pp. 703

¹⁶⁶ Freund, pp. 674

¹⁶⁷ *Ibid.*, pp. 670

¹⁶⁸ Freund, Bill, pp. 675

¹⁶⁹ *Ibid.*, pp. 674

¹⁷⁰ Cousins, Ben, ‘Agrarian Reform and the “Two Economies”’: Transforming South Africa’s Countryside’, in Lungisile Ntsebeza and Ruth Hall, eds, *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (Cape Town: HSRC Press, 2007), pp. 220–45, at p. 238.

The race between expectation and the economy is still on. The massive socio-economic inequality that was perfected over centuries of white minority rule, and now being perpetuated by a few black elite, must be address because another generation finding promises unmet may be less patient. In order to mitigate the inequality, and for tangible and lasting inroads to be made, the ANC leaders could adopt the following recommendations:

- Even though ownership is central to BEE, as codified in the BEE codes, whose aim was to make Broad-Based BEE a reality, BEE needs to shift away from a focus on ownership as a measure of empowerment.
- The South Africa Government must invest heavily in education and skills training because developing and training a new workforce is essential for any effective BEE programme.
- Companies that invest back into the community that they operate must be granted tax incentives. For example, India Company, Tata Steel spends 30 per cent of its after-tax profits on community development in areas where it operates.
- Incentivize commercial farmers to train black farm workers. Established an education trust to allow white commercial farmers to train and increase the number of black farmers in the country. This would enable aspiring black farmers to receive hands-on experience, skills transfer, training and mentoring to equip them to operate their own farms in the future.
- While South Africa's economy has suffered many trials and tribulations as a result of the global economic down crisis, the value of its leading companies has recovered strongly.¹⁷¹ Although South African GDP declined by 1.63 per cent last, a late recovery saw the economy grow at an annualized rate of 3.2 per cent in the final quarter of the year.¹⁷² The ANC must aggressively use this improved performance by the country's biggest companies to create new jobs over the next few years.
- Crucial to the development of a society with a system of checks and balances that provide accountability, there needs to be a cleaning up of political party financing. The ANC allegedly received significant amounts of money from successful bidders for arms contract and since the cover up of the deal; it has received money through a series of problematic business transactions, some involving BEE.¹⁷³

Concluding Remarks

Despite dynamism and optimism, the miracle in which South Africa was born has given way to victimhood and the feeling of injustice. In 1994 black South Africans celebrated their freedom while whites were just relieved that the great change had happened without mass violence. Now there is a feeling among majority of blacks that they have not got what they were hoping for and the feeling among whites is that something has unjustly been taken from them. Granted, 16 years is not enough to overturn decades of predatory racism. The ANC leadership correctly argues that despite strides in the areas of housing, water and electricity supply, there has not been sufficient time yet to roll back 350 years of deliberate underdevelopment of the majority; but there is something to be made for South Africa not having delivered all the goods promised in 1994 when blacks came to power. It is imperative for South African leadership to

¹⁷¹ African Business. No.363. April 10, pp. 44

¹⁷² Ibid., pp. 44

¹⁷³ The African Report, No. 11 June-July 2008, pp.53.

have a paradigm shift from *Mandelamania* to the deep-rooted black grievances that have turned the BEE policy into a mere Sunday picnic. At the moment the irony lies in the fact that the historical beneficiaries of colonialism and apartheid, who constitute a national minority, aspire both for genuine national reconciliation and minimal change with regard to their inherited and privileged socio-economic positions. On the other hand, while the transfer of economic power to blacks will, undoubtedly, help to build new consumer markets and expand a black middle class; it is incumbent upon the ANC to craft economic empowerment policies that trickle down to the majority of South Africans and not just to the ANC nomenclature.

Footnotes:

- ¹ BBBEE Success story. South African Mechanical Engineer. Vol. 59, no. 1, pp. 21-22. Jan. 2009
- ² Commey, Pusch, “Leaders in Waiting” (Dec 2008) in *African Business*, Dec2008, Issue 337, p16-21, 4p.
- ³ See “A survey on South Africa’s Challenge”, in *The Economist*, after page 54.
- ⁴ Commey, Pusch, Mandela, 20 years on: Change, but for Whom? In *New African*, March 20, 2010, pp. 10.
- ⁵ *Ibid*, pp. 10
- ⁶ *The Economist*, Righting the wrongs of apartheid, April 2006, pp.8
- ⁷ *The Economist*, Righting the wrongs of apartheid, April 2006, p. 8
- ⁸ Commey, Pusch, Mandela, 20 years on: Change, but for Whom? In *New African*, March 20, 2010, p. 8.
- ⁹ *New Africa*, March 20, 2010, p. 8
- ¹⁰ Simeon, Richard and Christina Murray, Reforming Multi-level Government in South Africa Richard, p. 4
- ¹¹ Statistics South Africa: Quarterly Labour Force Survey. Retrieved from <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2009.pdf> on March 29, 2010
- ¹² Steven F. Cahan, Chris J. van Staden (2009) “Black economic empowerment, legitimacy and the value added statement: evidence from post-apartheid South Africa” in *Accounting and Finance* 49, pp, 43
- ¹³ Frankel, Phillip (2001) “An Ordinary Atrocity: Sharpeville and its Massacre.” New Haven: Yale University Press
- ¹⁴ *Ibid*
- ¹⁵ *Ibid*
- ¹⁶ Friedman, Steven, South Africa’s Reluctant Transition, 58
- ¹⁷ Mandela.
- ¹⁸ Saul, John. S. (2004) Costs and Benefits of Peacebuilding, South African Style, in *Durable Peace, Challenges for Peacebuilding in Africa*, eds Taisier Ali and Robert Matthews, pp. 187. University of Toronto Press.
- ¹⁹ Dowden, Richard (2008) “Africa: Not just another country: South Africa” in *Altered States, Ordinary Miracles*, pp. 395
- ²⁰ Saul, John, pp. 187.
- ²¹ Quoted in *Financial Times*, June 10, 1986.
- ²² Saul, John, pp. 187.
- ²³ Quinn, Joanna R. (2004) “Are Truth Commissions Useful in Promoting Restorative Justice?” in *Crosscurrents*, edited by Mark Charlton, pp. 171. Nelson Canada.
- ²⁴ See TRC Report at: <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf>
- ²⁵ See: “Truth and Reconciliation in South Africa: Did the TRC Deliver?” eds., Audrey Chapman and Hugo Van der Merwe., University of Pennsylvania Press 2008. 347 pages
- ²⁶ Boaraine, Alex. (2000) “Truth and Reconciliation in South Africa. The Third Way” in *Truth Versus Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, pp. 141-157. Princeton University Press.
- ²⁷ *Ibid*
- ²⁸ Saul, John, pp. 195.
- ²⁹ The Legal Basis of the Amnesty Process, retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010
- ³⁰ The Case for Reparation and Rehabilitation: Domestic and International Law, retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010
- ³¹ Amnesty and Reparations: Achieving a Balance. Retrieved from <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> on April 16, 2010.
- ³² Various section of the South African and international media regularly report on the black misgivings about the the TRC.
- ³³ Cuthbertson, Greg, South Africa’s democracy: from celebration to crisis a School for Graduate Studies, University of South Africa., pp. 300
- ³⁴ *Ibid*
- ³⁵ Mandela.
- ³⁶ *The Economist* April 8, 2006, Righting the wrongs of Apartheid, p. 8
- ³⁷ *Ibid*.
- ³⁸ *Ibid*
- ³⁹ Cuthbertson, pp. 302
- ⁴⁰ Dowden, pp. 395
- ⁴¹ *Ibid*
- ⁴² Ralph Hamann, Sanjeev Khagram, Shannon Rohan South Africa’s Charter Approach to Post-Apartheid Economic Transformation: Collaborative Governance or Hardball Bargaining?” in *Journal of South African Studies*, pp. 20
- ⁴³ *Ibid.*, 396
- ⁴⁴ Darracq, Vincent, “Being a Movement of the People and a Governing Party: Study of the African National Congress Mass Character”, pp. 433. In *Journal Southern African Studies*.
- ⁴⁵ *The Economist* April 8, 2006, Righting the wrongs of Apartheid, p. 4
- ⁴⁶ Dowden, Richard, pp. 395
- ⁴⁷ Cuthbertson, pp. 301
- ⁴⁸ Freund, Bill, “South Africa: The End of Apartheid & the Emergence of the ‘BEE Elite.’” In *Review of African Political Economy* No. 114:661-678
- ⁴⁹ *Ibid*
- ⁵⁰ *Ibid*
- ⁵¹ Tangri, Roger & Southall, Roger, “The Politics of Black Economic Empowerment in South Africa” In *Journal of Southern African Studies*, Volume 34, Number 3, September 2008
- ⁵² Freund, pp 678
- ⁵³ These points are adapted from M. van Donk and E. Pieterse, ‘Contextual Snapshots: Development Challenges and Responses during the Transition’, in E. Pieterse and F. Meintjies (eds), *Voices of the Transition: The Politics, Poetics and Practices of Social Change in South Africa (Johannesburg, Heinemann, 2004)*.
- ⁵⁴ Hamann, Sanjeev and Shannon, pp. 20
- ⁵⁵ *Ibid.*, pp. 26

- ⁵⁶ *Ibid.*, pp. 26
- ⁵⁷ Tangri & Southall.
- ⁵⁸ Black Economic Empowerment Commission Report, p. 6.
- ⁵⁹ *Ibid.*, pp. 20
- ⁶⁰ Black Economic Empowerment Commission Report, p. 2.
- ⁶¹ DTI (Department of Trade and Industry), South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment (Pretoria, The Department of Trade and Industry, 2004), p. 14.
- ⁶² Special report Black Economic Empowerment published in *Risk*
- ⁶³ *Ibid*
- ⁶⁴ <http://www.forbes.com/forbes/2008/0324/088.html>
- ⁶⁵ *Ibid*
- ⁶⁶ Freund, pp. 667
- ⁶⁷ *Ibid.*, pp. 667
- ⁶⁸ *Ibid*
- ⁶⁹ *Ibid*
- ⁷⁰ The Economist April 8, 2006, Righting the wrongs of Apartheid, p. 4
- ⁷¹ Cuthbertson, pp. 295
- ⁷² Special report Black Economic Empowerment
- ⁷³ The African Report, Frontline, BEE: The struggle for black power gets contentious, p. 44
- ⁷⁴ <http://www.forbes.com/forbes/2008/0324/088.html>
- ⁷⁵ Tangri & Southall, pp. 709
- ⁷⁶ *Ibid.*, pp. 700
- ⁷⁷ *Ibid.*, pp. 700
- ⁷⁸ Empowerment and the JSE', Financial Mail (Johannesburg), 17 March 2006.
- ⁷⁹ The Economist April 8, 2006, Righting the wrongs of Apartheid, pp8
- ⁸⁰ Tangri & Southall, pp. 710
- ⁸¹ *Ibid.*, pp. 703
- ⁸² Freund, pp. 667
- ⁸³ African Business Magazine October 2008 Issue No. 56. pp. 45
- ⁸⁴ Tangri & Southall, pp. 707
- ⁸⁵ The Economist April 8, 2006, Righting the wrongs of Apartheid, pp. 8
- ⁸⁶ *Ibid.*, pp. 8
- ⁸⁷ Freund, pp. 669
- ⁸⁸ Cuthbertson, Greg, pp. 298
- ⁸⁹ Tangri & Southall, pp. 708
- ⁹⁰ Cuthbertson, Greg, pp. 294
- ⁹¹ Hamann, Khagram and Shannon, pp. 26
- ⁹² Tangri & Southall, pp. 703
- ⁹³ Tangri & Southall, pp. 703
- ⁹⁴ Freund, pp. 674
- ⁹⁵ *Ibid.*, pp. 670
- ⁹⁶ Freund, Bill, pp. 675
- ⁹⁷ *Ibid.*, pp. 674
- ⁹⁸ Cousins, Ben, 'Agrarian Reform and the "Two Economies": Transforming South Africa's Countryside', in Lungisile Ntsebeza and Ruth Hall, eds, *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (Cape Town: HSRC Press, 2007), pp. 220–45, at p. 238.
- ⁹⁹ African Business. No.363. April 10, pp. 44
- ¹⁰⁰ *Ibid.*, pp. 44
- ¹⁰¹ The African Report, No. 11 June-July 2008, pp.53.

CHAPTER 3: JUSTICIABLE RIGHTS AND THE CONSTITUTIONAL COURT OF SOUTH AFRICA - EVAN ROSEVEAR

The Constitution,¹⁷⁴ the Bill of Rights contained therein,¹⁷⁵ and the promise of their strong protection by a newly created Constitutional Court were key elements of South Africa's transition from apartheid to a formally inclusive liberal-democracy. By deferring the settlement of restitutive matters and embedding their future determination within an established legal framework, fears of dire macro-economic implications arising from the redistribution of land and wealth were alleviated. At the same time, it was generally accepted that the political system of apartheid could not plausibly be separated from the persistent social and economic deprivation of the non-White population.¹⁷⁶ This, in turn, led to the inclusion of socio-economic rights (SERs) in the Constitution as a means to address the social and economic elements of apartheid's legacy,¹⁷⁷ an overarching goal of the negotiated settlement.¹⁷⁸

The qualification that SERs were to be progressively realized represented a realistic understanding of the incremental nature of public policy, created a more stable and predictable private property regime for business interests, both foreign and domestic, mitigating capital flight, and led to a more palatable investment climate than would otherwise have been the case. The decision to balance the interests of transitional justice with the maintenance of economic stability in this way represented a reasoned and pragmatic response to a milieu of competing, often contradictory interests. In addition to its widely hailed social progressivity, the South African Constitution emphasizes liberal values, seeking a single nation of South Africa composed of equal individuals. This juxtaposition between/of individual, "negative," rights and socio-economic, "positive," rights is not without conflict. The Constitution creates a reasonable expectation of the enforcement of property rights and individual liberties and an equally reasonable expectation of the redress of the historical marginalization of non-Whites.

Balancing these competing rights claims, and their relative prioritization in light of the limited fiscal resources of the South African State (the State), is an exercise ripe for divisive political and economic conflict. In South Africa, the adjudication of such matters falls primarily on the superior courts and upon the Constitutional Court (the Court) in particular.¹⁷⁹ As such, the analysis of the transformative efficacy of the bill of rights and SERs in particular are inextricably linked with South Africa's transition to a stable, inclusive liberal-democracy. It is to the analysis and evaluation of the transformative efficacy of the Constitution and the Court that we now turn.

Socio-Economic Rights

The Court is generally thought to have made a credible start on interpreting the South African Constitution in a principled manner, particularly as it was able to hand down several

¹⁷⁴ *The Constitution of the Republic of South Africa*, 1996, <http://www.acts.co.za/constitution/index.htm>.

¹⁷⁵ *Ibid.*, ss. 7-39.

¹⁷⁶ The commonly accepted statistical categorization of racial groups in South Africa are "African" (Black); "Coloured" (mixed race); "Indian" (Asian or Indian descent); and, "White" (European descent). See, e.g. Statistics South Africa, *South Africa: Millennium Development Goals Country Report* (Statistics South Africa, 2005), http://www.statssa.gov.za/news_archive/MDGDraftCountryReportAugust2005.pdf.

¹⁷⁷ In particular, the qualified justiciable guarantees of housing, healthcare, food, shelter, water, and children's rights. *The Constitution of the Republic of South Africa*, ss.26-28; Dennis M. Davis, "Socioeconomic Rights: Do They Deliver the Goods?," *International Journal of Constitutional Law* 6, no. 3/4 (2008): 687-89.

¹⁷⁸ Cass R. Sunstein, "Social and Economic Rights? Lessons From South Africa," *Constitutional Forum* 11, no. 4 (2001): 125; Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Macolm Langford (New York: Cambridge University Press, 2008), 75-6.

¹⁷⁹ *The Constitution of the Republic of South Africa*, ss.165(5), 167(5).

decisions that represent significant policy reversals of the ANC's positions during the early years of its existence.¹⁸⁰ Central to the transformative capacity of the Court's jurisprudence is the broad applicability of the Constitution, particularly its rejection of a strict "State Action" doctrine.¹⁸¹ The Court has determined that not only does the Constitution apply to situations in which one party is an organ of the state, but that it may also apply horizontally; it is possible for "socio-economic rights to apply in legal relations between private parties."¹⁸² But, this possibility does not necessarily translate into application. In fact, the Court has recently asserted that constitutional issues "cannot be expected to arise frequently in cases where the state is not a party."¹⁸³ More frequently, in adjudicating issues involving private parties, the Court has adopted a strong conception of the positive duty of the state to appropriately regulate market interactions such as contracts, thereby compelling state involvement in such matters and avoiding the potential controversy and negative economic implications that would result from directly burdening private actors with the costs of SERs provision.

Through its adjudication, the Court has developed a doctrine of "reasonableness" that facilitates the balancing of the various competing rights claims and public interests which underpin a given case in a broad and inclusive manner. Emerging primarily from *Grootboom* and *Treatment Action Campaign*,¹⁸⁴ the criteria for determining the reasonableness of a State action are, broadly, the comprehensiveness, coherence, and appropriate resourcing of the policy, the balancing of short, medium and long-term interests, and its transparency. However, the Court has asserted that "[w]hat is relevant [to the determination of reasonableness] may vary from case to case depending on the particular facts and circumstances."¹⁸⁵ Additionally, a purely utilitarian notion of progressive realization has been rejected, rhetorically at least, by the Court's assertion that "[t]o be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realize... [I]f the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."¹⁸⁶ However, the degree to which this assertion has been applied, or is practicably justiciable, remains unclear.

SERs also have a negative rights component that is not internally qualified, though is subject to general limitation.¹⁸⁷ For example, the Court has found that evicting individuals may be construed as a negative violation of section 26(1) in that the individual is being deprived of adequate housing, and that this negative duty is not subject to the qualifications in section 26(2) regarding resources constraints and progressive realization.¹⁸⁸ Similarly, in *Joseph v Johannesburg* the Court found that the provision of municipal services was a central mandate of municipal government and that prior to the volitional cessation of such a service, a state organ is "obliged to afford [those who would be affected] procedural fairness before taking a decision which would materially and adversely affect [their receipt of such services]."¹⁸⁹ However, in light of their relatively limited policy capacity, and the issues of democratic legitimacy

¹⁸⁰ Theunis Roux, "Principle and Pragmatism on the Constitutional Court of South Africa," *International Journal of Constitutional Law Advance Access* (November 17, 2008): 2.

¹⁸¹ For a fuller discussion of this concept, see, e.g.: Mark V. Tushnet, *Weak Courts, Strong Rights Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008), 196-8.

¹⁸² Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution," 78-9.

¹⁸³ *Biowatch Trust v. Registrar, Genetic Resources and Others* ZACC 14, para. 27 (CC 2009).

¹⁸⁴ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* ZACC 15 (CC 2002); *Government of the Republic of South Africa and Others v Grootboom and Others* ZACC 19 (CC 2000).

¹⁸⁵ *Khosa and Others v. The Minister of Social Development and Others; Saleta Mahlaule and Another v. The Minister of Social Development and Others* ZACC, para. 44 (CC 2004).

¹⁸⁶ *Grootboom and Others v The Government of the Republic of South Africa and Others* ZACC, para. 44 (CC 2000).

¹⁸⁷ *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* ZACC, paras. 31-35 (CC 2004).

¹⁸⁸ Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution," 91-3.

¹⁸⁹ *Joseph and Others v City of Johannesburg and Others* ZACC 30, para. 47 (CC 2009).

associated with judicially prescribed social welfare policy,¹⁹⁰ the Court's decisions tend to leave policy options open to the government.

Instead, the Court has focused on framing the issues that must be addressed by the State as a result of SERs guarantees and evaluating the State's justification of particular policy choices.¹⁹¹ For example, in *Mazibuko* the Court reiterated that its compulsory powers with respect to s. 27(1)(b), the right to sufficient water, extend only so far as requiring that the state "take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim 'sufficient water' from the state immediately."¹⁹² In general, the Court has approached SERs with the attitude that the State and its various organs may only be compelled to act, or have their decisions reversed, in instances in which there is not room for reasonable debate, particularly when policies directed at the progressive realization of SERs unjustifiably exclude or otherwise marginalize a particular subset of South African society.

Property Rights

Of prime consideration with respect to the relative robustness of application accorded to SERs are the potentially deleterious effects that an unbalanced or overbroad application might have on the market. For example, a broad application of the right to shelter provided for in s.26, and in particular the prohibition of eviction absent a court order set down in s.26(3), would very likely result in a diminished stock of privately constructed housing, as the costs associated with the exponentially more difficult eviction process may cause a redirection of capital to other more profitable endeavours.¹⁹³

The Court's jurisprudence clearly emphasizes the residual nature of SERs. In *Grootboom* the court interpreted the right to housing as requiring the state to first attempt to break down barriers to the accessibility of housing available on the market and, second, to provide housing directly only as a residual measure.¹⁹⁴ Thus, the Court has taken the position, at least insofar as s.26 is concerned, that the SERs provided for in the Constitution apply to South African society writ large, rather than to each individual member.¹⁹⁵ Similarly, the Court has determined that the primary responsibility for children rests with the parents or family that is caring for the child, although there are indications that the idea of children's direct entitlement may be further developed in the future.¹⁹⁶ And, SERs have been useful in defending claims against government policy choices and actions, *inter alia*, those couched in terms of property rights protection.¹⁹⁷

In general, the Court's SERs adjudication is informed more by the liberal notion of equal opportunity in terms of market success than by a radically redistributive conception of social justice. However, the Court has demonstrated that it is willing to reject claims of onerous cost or

¹⁹⁰ Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115, no. 6 (2005): 1356-1407.

¹⁹¹ The Court has also rejected the "minimum core" understanding of SERs developed out of United Nations documents as overly restrictive and not able to effectively address the varied social needs of specific individuals and groups. See, in particular: United Nations, "International Covenant on Economic, Social and Cultural Rights" (United Nations, December 16, 1966), http://www.unhcr.ch/html/menu3/b/a_cescr.htm; additionally, South Africa has not ratified the ICESCR *TAC (II)*; however, the Court has endorsed the UN's view that "retrogressive" policy changes require an additional burden of proof, thus creating a basis for challenging cutbacks to social welfare programs Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution."

¹⁹² See, e.g. *Mazibuko and Others v. City of Johannesburg and Others* ZACC 28, para. 61 (CC 2009).

¹⁹³ Sunstein, "Social and Economic Rights? Lessons From South Africa," 127.

¹⁹⁴ *Government of the Republic of South Africa and Others v Grootboom and Others*, paras. 35-36.

¹⁹⁵ Sunstein, "Social and Economic Rights? Lessons From South Africa," 128-9.

¹⁹⁶ Liebenberg, "South Africa: Adjudicating Social Rights Under a Transformative Constitution," 89.

¹⁹⁷ *Ibid.*, 95-6.

capacity limitations on the part of the Government,¹⁹⁸ clearly indicating that the onus is on the State to demonstrate onerous financial burden. The Court’s jurisprudence also indicates that stricter scrutiny of government’s justifications is applied when a disadvantaged sector of society is deprived of access to essential services or resources, in effect placing the court in an advocacy role.¹⁹⁹ Private property supports democracy, but so too does the provision of minimal protections against starvation, homelessness, and other forms of extreme deprivation.²⁰⁰ Both provide the kind of security and independence required to engage in the meaningful deliberation and reasoned decision-making required of a democratic polity. But, the balancing of these two requirements significantly constrains the transformative capacity of the Court, and of the Constitution in general.

Judicial Independence

The idea of “judicial independence” can be conceptualized in at least three principal ways:

1. independence of judges from the other branches of government or politicians;
2. independence from political ideology or public pressure more broadly defined (including ethnic or sectarian loyalties); and,
3. independence of the individual judge from superiors in the judicial hierarchy, so that a judge can decide each case on his or her own best view of what the law requires²⁰¹

The consideration and relative valuation of each of the interrelated definitions clearly has implications for both judicial decision-making and the judicial appointment process. In the South African context of “co-operative constitutionalism” a balanced approach is necessary. Concisely articulating the need for judicial independence, Langa argues that,

[t]he legislative branch cannot be responsible for the execution of the law it makes, nor may it decide on the disputes such laws may provoke. In this arrangement, the role of the judiciary becomes critical. Without it, proper restraint on the unilateral exercise of governmental authority by the other two branches of government would be difficult indeed.²⁰²

While judicial independence clearly supports the rule of law,²⁰³ an overly autonomous judiciary may lead to a lack of accountability such that the judiciary ceases to function as an appropriately constrained check on political excess.²⁰⁴ In the South African setting, the constitutional ideal is a strong judiciary that reviews and clarifies the work of elected officials and civil servants, rather than ruling over them.

¹⁹⁸ *Khosa*, paras. 58-62 ; see also, Liebenberg, “South Africa: Adjudicating Social Rights Under a Transformative Constitution,” 89.

¹⁹⁹ Liebenberg, “South Africa: Adjudicating Social Rights Under a Transformative Constitution,” 90.

²⁰⁰ Sunstein, “Social and Economic Rights? Lessons From South Africa,” 124.

²⁰¹ United States Institute of Peace, *Judicial Appointments and Judicial Independence* (United States Institute of Peace, January 2009), 1, www.usip.org/files/judicial-appointments-en.pdf.

²⁰² Pius N Langa, “A Delicate Balance’: The Place of the Judiciary in a Constitutional Democracy: The Separation of Powers in the South African Constitution,” *South African Journal on Human Rights* 22 (2006): 4.

²⁰³ For a fuller discussion see Daniel C. Prefontaine and Joanne Lee, “The Rule of Law and the Independence of the Judiciary,” *Revue Quebecoise de Droit International* 11 (1998): especially, 163.

²⁰⁴ Siri Gloppen, Roberto Gargarella, and Elin Skaar, “Introduction: the Accountability Function of the Courts in New Democracies,” *Democratization* 10, no. 4 (2003): 1-6; see also, Francois du Bois, “Judicial Selection in Post-Apartheid South Africa,” in *Appointing Judges in an Age of Judicial Power*, ed. Kate Malleson and Peter H. Russell (Toronto: University of Toronto Press, 2006), 281-312 especially, 283-7; Seth Nthai, “The Relationship Between Judicial Independence and Judicial Accountability: the Package of Draft Laws on the Judiciary,” in *The Judiciary in a Changing Terrain* (Cape Town, South Africa: IDASA, 2005).

Threats to the Court's independence are both direct and indirect. With regard to the former, Roux offers an insightful analysis of the careful balancing of principle and pragmatism undertaken by the Court in its development of South Africa's rights regime. Arguing that this approach does not prohibit principled adjudication but that pragmatism, to a point, is a legitimate means of maintaining the legitimacy and security of a court to "survive to fight another day," Roux contends that is evident in the comparison of three sets of rulings.²⁰⁵ Cases such as *Makwanyane*, *Fourie*, and *TAC* are linked by the ability of the Court to hand down principled decisions which gained them legal and societal legitimacy by exploiting the political context in which they occurred to expand rights protections.²⁰⁶ Conversely, political context forced more pragmatic rulings in, *inter alia*, *New National Party*, *United Democratic Movement*, and *Kuanda* in the face of potential threats to institutional security if those cases were decided on purely principled lines.²⁰⁷ Finally, Roux argues that the Court has exhibited a tendency, even in cases of low political import, to convert issues which might potentially cause the necessity of a compromise between principle and legitimacy, into "multifactor balancing tests,"²⁰⁸ to progressively reduce the tension between the two.²⁰⁹ In effect, he argues that the Court has created instruments for deciding the cases before them in a way that allows the incorporation of pragmatic concerns of institutional security and sociological-popular legitimacy, while retaining legal legitimacy through the principled application of the law.

Public Perception of the Judiciary

*The ultimate power of the courts must... rest on the esteem in which the judiciary is held within the psyche and soul of a nation and in the confidence it enjoys within the hearts and the minds of potential litigants in search of justice. No public figure anywhere, however otherwise popular, could afford to be seen to defy the order of a court which enjoys, within the nation, a perception of independence and integrity.*²¹⁰

The most theoretically sound investigation of public confidence in the Court was conducted by Gibson and Caldeira in 1996 and 1997 and involved the collection of panel survey data with a weighted sample size of 1,285.²¹¹ The researchers found that the Court had yet to develop a strong stock of institutional legitimacy, and that what legitimacy it had was not readily convertible into acquiescence to its decisions.²¹² It is, however, recognized that at the time of the survey the Court was still in its infancy, and would likely require time to build its legitimacy. Although resource constraints preclude precisely replicating this research, a reasonable proxy measure of the perceived institutional legitimacy of the Court, as well as that of political parties

²⁰⁵ Roux, "Principle and Pragmatism on the Constitutional Court of South Africa," especially 12-3.

²⁰⁶ *S v Makwanyane and Another* ZACC 3 (CC 1995); *Fourie and Another v Minister of Home Affairs and Another* ZACC 11 (CC 2003); *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* ZACC 5 (CC 2002).

²⁰⁷ *New National Party v Government of the Republic of South Africa and Others* ZACC 5 (CC 1999); *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) ZACC 21 (CC 2002); *Kaunda and Others v President of the Republic of South Africa* ZACC 5 (CC 2004).

²⁰⁸ Of which "reasonableness" would be the prime example.

²⁰⁹ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* ZACC 33 (CC 2002); *Grootboom*; *TAC (I)*.

²¹⁰ Ismael Mahomed, cited in Martine Barker, "Judiciary 'must be transformed'," *Weekend Argus* (South Africa, January 25, 2009).

²¹¹ James L. Gibson and Gregory A. Caldeira, "Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court," *The Journal of Politics* 65, no. 1 (2003): 8-9.

²¹² *Ibid.*, 22-3.

and Parliament, can be derived from the “Confidence in Institutions” component of the World Values Survey (WVS).²¹³

Changes in public confidence in South Africa’s institutions before and after apartheid are supportive of Gibson and Caldeira’s initial findings. Overall support of the justice system, defined herein as those who indicated “a great deal” or “quite a lot” of confidence, decreased approximately 10%, from 74% to 64%, while confidence in Parliament increased slightly from 66% to 69% over the same time frame. Combined, these changes represent a reversal in the public’s relative confidence in the dominant institutions of government. Political parties fared even worse than the Judiciary during this period, and have thus far failed to rebound, declining steadily from 58% confidence in 1990, to 47% in 1996 and levelling out at approximately 44% since 2001.

The Judiciary, on the other hand, has gained ground. Although no data is available from the 2001 WVS, the 2007 wave indicates that public confidence increased to over 66%. Conversely, confidence in Parliament decreased significantly in 2001. While it did rebound in 2007, it remained slightly lower than its 1990 level. According to the most recently available survey data (2007), public confidence in Parliament and the Judiciary were roughly equivalent, roughly half-again more than confidence in Political Parties (65%, 66%, and 44% respectively). In a comparative context, public confidence in South Africa’s Judiciary was greater than that of Australians, Canadians, American, or Germans in their domestic justice systems (52%, 56%, 57%, and 58% respectively). Clearly, the Court, and the South African justice system in general, were in good company with respect to their public legitimacy. However, it must be noted that several events, discussed in the following section, may have significantly impacted the perceived legitimacy of political parties, the Judiciary, and Parliament since the 2007 WVS.

Judicial Selection

A less direct consideration with respect to the independence of the Court, and of the judiciary in general, is judicial selection. The process by which South African judges are selected is broadly defined in the Constitution, with the power of appointment vested in the executive and recommendations provided by a Judicial Service Commission (JSC).²¹⁴ The JSC is a fairly straightforward example of the “judicial council” appointment system.²¹⁵ Its members are drawn from the judiciary, the legal profession, the executive, and both the regional and national legislatures.²¹⁶ The influence of the JSC varies according to the position in question. In the case

²¹³ World Values Survey Association, *World Values Survey 1981-2008 Official Aggregate* (Madrid: Aggregate File Producer: ASEP/JDS, 2009), www.worldvaluessurvey.org. However, two methodological issues problematize this proxy measure. First, Gibson and Caldeira’s analysis is based on the evaluation of the “attentive public,” which excludes individuals who indicated that they were unaware of the existence of the Court, an operation which cannot be exactly reproduced with the WVS data. Second, the survey questions related directly to the attitudes of the respondents toward the Court in particular, whereas the data available via the WVS relates to the justice system in general. While cognizant of these discrepancies, it is held that at least insofar as the purposes of this analysis are concerned, meaningful results are still to be had. This is thought to be particularly so in light of the significant degree of public visibility that the Court has had in passing judgment on several hundred cases, many of which received significant media coverage, and the high degree of public accessibility and lay-level information on the Court’s decisions.

²¹⁴ *The Constitution of the Republic of South Africa*, s.178.

²¹⁵ There are four basic configurations of judicial appointment: by political institutions; by the judiciary itself; by a judicial council composed of either judges, political appointees, or, more commonly, both; and, by election. United States Institute of Peace, *Judicial Appointments and Judicial Independence*, 2.

²¹⁶ Kate Malleson, “Assessing the Performance of the Judicial Service Commission,” *South African Law Journal* 116 (1999): 38; see also: *The Constitution of the Republic of South Africa*, 178(1). Specifically, the JSC consists of: the chief justice, the president of the Supreme Court of Appeal, a senior judge president, the justice minister, two advocates nominated by the profession, two attorneys nominated by the profession, one university law teacher, and four presidential appointees. In addition to the core group of 13 are 10 “political appointees” (Members of Parliament). Six are designated by the National Assembly, at least three of whom must be from opposition parties; and four are delegates from the National Council of Provinces. Shameela Seedat, *Judicial Service Commission and the Upcoming Elections in South Africa: Term of Office and*

of Constitutional Court judges, the JSC provides the President a shortlist of four nominees per vacant position. Should the president decline to appoint any of the four recommendations, the JSC reconvenes to provide a second shortlist, from which the President must appoint. With respect to the selection of the Chief and Deputy Chief Justices, however, the JSC is only one of a number of groups consulted.²¹⁷

Early evaluations of the JSC found that it had made reasonable progress in developing a transparent, representative, and independent judicial selection process, and that early fears of politicization had not manifested themselves.²¹⁸ Although there was some concern about a preliminary “sifting” process by the responsible minister and the heads of the courts unduly biasing candidate selection.²¹⁹ Malleon also noted distinctive evidence of meaningful deliberation within the commission, a practice certainly worth noting in light of the Constitution’s cooperative ideals.²²⁰

The goal of a representative judiciary is supported by both concerns of equity and constitutional mandate. However, judges serve a critical role in the development and administration of the rule of law. Their capabilities matter, and the appointment of under-qualified judges is a serious threat to the justness of the legal order as well as public confidence in the rule of law. Apartheid’s legacy of systemic marginalization of non-Whites, in terms of access to education and professions, coupled with a masculine culture of the legal system has created an extremely homogenous pool of qualified judicial candidates.²²¹ This presents a serious barrier to the goal of representativeness. That said, the JSC’s expansion of judicial selection criteria to include candidates from a non-standard judicial career path, has generally been met with approval as a means to balance these concerns, as has the explicit rejection of quotas.²²²

In contrast, Andrews notes that “[a]lthough the JSC has succeeded, though not without some controversy, in appointing a significant number of black male judges, its appointment of female judges, both black and white, has been somewhat lacking.”²²³ Similarly, du Bois argues that while the approach taken by the JSC has done some good, very few points of contention have been resolved and that public confidence in the courts has yet to be sufficiently cultivated.²²⁴ The Democratic Alliance Party has also voiced dissatisfaction, contending that the JSC has recently jettisoned its specially devised guidelines for judicial selection, instead “[e]mbracing a narrow definition of ‘racial representivity’ as the key defining feature for appointment to the bench.”²²⁵

Transforming a judiciary takes time, and making it representative without sacrificing the capacity of the institution requires the development of a qualified pool of applicants. Nonetheless, great strides have been taken in South Africa. As of October 2008, of the 201 permanent members of the South African judiciary, 74 were African, 16 Coloured, and 19 Indian. With respect to gender: 161 were men and 40 women.²²⁶ While these are not

Composition, Political Information and Monitoring Service (Pretoria, South Africa: IDASA, n.d), www.chapter2.org.za/gbOutputFiles.asp?WriteContent=Y&RID=2521.

²¹⁷ Carmel Rickard, “The South African Judicial Service Commission,” in *Judicial Reform: Function, Appointment and Structure* (Centre for Public Law, University of Cambridge, 2003).

²¹⁸ Malleon, “Assessing the Performance of the Judicial Service Commission.”

²¹⁹ du Bois, “Judicial Selection in Post-Apartheid South Africa,” 288-9.

²²⁰ Malleon, “Assessing the Performance of the Judicial Service Commission,” 39.

²²¹ Penelope Andrews, “The South African Judicial Appointments Process,” *Osgoode Hall Law Journal* 44, no. 3 (2006): 568-72.

²²² Malleon, “Assessing the Performance of the Judicial Service Commission,” 47-9.

²²³ Andrews, “The South African Judicial Appointments Process,” 570.

²²⁴ du Bois, “Judicial Selection in Post-Apartheid South Africa,” 299-301.

²²⁵ *The DA’s Judicial Review: Threats to Judicial Independence in South Africa* (South Africa: The Democratic Alliance, 2005), 21.

²²⁶ Carole Lewis, “Briefing Report: The State of the Judiciary” (Johannesburg, South Africa, October 14, 2008), http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=print_article&news_id=72639&cause_id=2137.

demographically representative numbers, they are a far cry from the almost exclusively White male judiciary of the apartheid era. Thus, in terms of progress toward a judiciary that “reflect[s] broadly the racial and gender composition of South Africa,”²²⁷ it is difficult find fault with the JSC in general. However, recent activities surrounding the JSC’s composition, and their impact on both judicial independence and public confidence in the judiciary are troubling to say the least.

Although supportive of the JSC’s activities, Budlender has warned that the Executive is increasingly seeking to micro-manage the activities of judges, and the Judiciary in general. In particular, he argues that this micro-management may discourage the application of many top-tier candidates for judicial positions to the detriment of judicial capacity. Moreover, serious concerns have been raised about the potential for members of the JSC to manipulate the appointments process in order to produce a “compliant” judiciary.²²⁸ Along these lines, the Democratic Alliance party has been heavily critical of the ANC, accusing them of

undermining judicial independence by...advancing an ideologically partisan view of transformation... using charges of real or imagined racism to intimidate the judiciary and create a more executive-minded bench... [and] attempting to exert even greater political control over the judiciary with new legislative proposals²²⁹

Similarly, Plaut notes that “[i]t is now routine for senior members of the [ANC] or its allies in the Communist Party and the unions to assert in public that the judiciary must be brought to heel.”²³⁰ Carole Lewis, Justice of the Supreme Court of Appeal also outlined a number of concerns during a speech in late 2008.

The judiciary and its independence are under threat at present. It is difficult and demoralising for judges to work in such circumstances. Three things are needed, in my view, for judges to be able to work effectively, efficiently and without fear of political interference. First, appointments to the bench must be made by having regard primarily to merit – skill and experience. Political loyalty and race must cease to be the criteria for appointment by the JSC. Second, politicians should take lessons in constitutionalism and realize that they are not above the law. And third, the provisions in proposed legislation that in any way detract from judicial independence should be consigned to oblivion.²³¹

Justice Lewis’ concerns are far from anomalous. There have been several expressions of serious concern by senior members of the judiciary and the media regarding the potentially delegitimizing effect of the political rhetoric directed at the courts.²³²

Underscoring these concerns are the accusations of undue Executive influence on the most recent Constitutional Court appointments. A number of actions taken by the ANC leading up to the appointments have been cited as evidence of this, including the ANC’s replacement of an opposition member of the National Council of Provinces, making the four-strong delegation to the JSC all ANC members with one of their own,²³³ and the replacement of other long-standing members of the JSC with staunch ANC supporters.²³⁴ Moreover, the elevation of

²²⁷ *The Constitution of the Republic of South Africa*, sec. 174(2).

²²⁸ Geoff Budlender, “Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa,” *South African Law Journal* 122 (2005): 715.

²²⁹ *The DA’s Judicial Review: Threats to Judicial Independence in South Africa*.

²³⁰ Martin Plaut, “Threat to Justice,” *The World Today*, October 2008, 25.

²³¹ Lewis, “Briefing Report: The State of the Judiciary.”

²³² Plaut, “Threat to Justice,” 26.

²³³ Ethene Zinn, “ANC loading JSC to push agenda - DA,” *The Star* (South Africa, July 10, 2009).

²³⁴ Carmel Rickard, “JSC’s new faces raise questions on Zuma,” July 11, 2009.

Justice Ngcobo to Chief Justice, passing over Deputy Chief Justice Moseneke, also raised questions that the President was avoiding the appointment or elevation of justices who had been vocally opposed to Executive intervention in the judiciary.²³⁵ These actions clearly have the appearance of being antithetical to judicial independence.

The Transformative Potential of the Constitution

Measuring the efficacy of a constitution and the social transformation it does or does not bring about are matters as contentious as they are important. While certainly more than “just words,” constitutions are not the only significant determinant of societal organization and resource allocation. Indeed, a critical understanding of “the state,” conceptualizes it primarily as a means by which capital’s interests are implemented.²³⁶ On the other hand, while constitutions may not be able to directly create a polity that has internalized the “logic of democracy” they have the potential to alter the context in which decisions are made, thereby incenting the desired type of behaviour.²³⁷ A complement to this is that a constitution, and the institutions created therein, can create a set of norms which can serve as a touchstone for those seeking to advance claims based on “right” or “justice”.²³⁸ However, it is generally accepted that institutions have some ability, to a greater or lesser degree, to constrain behaviour, and to make certain choices and actions more likely to be chosen, or at least possible.²³⁹ To reject this proposition is to reject the most viable means of improving the material conditions and, in time, overall quality of citizens and democracy.

The capacity to administer justice evenly plays a significant role in promoting the efficacy of constitutionally guaranteed rights, especially SERs. Particularly salient in South Africa is the structural disadvantage faced by those of lesser socio-economic means in advocating for and defending their rights. In her evaluation of the enforcement of SERs in South Africa, one of Liebenberg’s most disturbing observations is that “many in South Africa experience violations of socio-economic rights, which go unchallenged due to a lack of access to legal services.”²⁴⁰ Litigation, particularly constitutional litigation, is an expensive, time-consuming, and intimidating endeavour, and those with the lowest level of material security, who are often those most in need of rights protections, are also the least able to pursue legal action. As Epp notes, bills of rights are not self-activating components of constitutions. In order to function they require a support structure consisting of organized group support, financing, and legal professionals.²⁴¹ If there is no support structure, the rights of those who most need their protection cannot be successfully defended.

²³⁵ Dave Chambers, “Opposition says Zuma did not consult on Ngcobo,” *Saturday Star* (South Africa, August 8, 2009); Karmina Brown, “Done deal? You be the judge,” *The Weekender* (South Africa, August 8, 2009).

²³⁶ Charles E. Lindblom, *Politics and Markets: The World’s Political Economic Systems* (New York: Basic Books, 1977) especially 171-86.

²³⁷ Donald L. Horowitz, “Making Moderation Pay,” in *Conflict and Peace Making in Multiethnic Societies*, ed. Joseph V. Montville (New York, NY: Lexington Books, 1990), 450-475; see also, Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard Economic Studies CXXIV (Cambridge, Mass.: Harvard University Press, 1971).

²³⁸ Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991); for a more critical analysis of the transformative capacity of courts, see: Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed. (Chicago: University of Chicago Press, 2008).

²³⁹ Theda Skocpol and Margaret Somers, “The Uses of Comparative History in Macrosocial Inquiry,” *Comparative Studies in Society and History* 22, no. 2 (1980): 174-197; Kathleen Thelen, “Historical Institutionalism in Comparative Politics,” *Annual Review of Political Science* 2 (1999): 369-404.

²⁴⁰ Liebenberg, “South Africa: Adjudicating Social Rights Under a Transformative Constitution,” 80.

²⁴¹ Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

In spite of the clearly recognized role of civil society organizations in constitutionally litigating in defence of the rights of South Africa's marginalized,²⁴² very little seems to have occurred in the way of directly incenting such behaviour on the part of either the Court or the government more generally. Non-profit organizations such as the Legal Resources Centre and the Women's Legal Centre have been integral to the broad definition and enforcement of SERs in South Africa, yet no significant government program exists to support such litigation. The Court has, to a limited degree, addressed the issue of the potential "chilling effect" of the significant cost burdens imposed by constitutional litigation.²⁴³ However, the primary focus of this decision concerns the awarding of costs *post hoc* and does not deal directly with the initial barrier to rights litigation presented by its uncertain and potentially onerous fiscal burdens. The approach taken by the Court with respect to this initial barrier to the litigation of rights claims appears to be a strong reliance on civil society organizations.²⁴⁴ While this approach is understandable in terms of resource and capacity constraints, this overreliance on the goodwill of civil society and legal professionals is not in line with South Africa's commitment to constitutionalism.

Conceptualizing the Constitutional Court

In liberal-democracies at least, constitutions and the legal systems that both inform and emerge from them must be perceived as essentially principled and equitable if they are to carry any weight with those whom they are supposed to govern. At the same time, if legal norms do not map onto the lived conditions of the polity they risk their legitimacy, and thus the efficacy of the constitutional order itself. As such, a judicial body tasked with interpreting the constitution must act within the constraints of at least three sets of norms if it is to maintain its legitimacy and, in turn, remain efficacious: those of the broader legal culture in which it exists; those of the society in which it exists; and, those of the political environment in which it operates.²⁴⁵

The multi-factor proportionality "reasonableness" approach to the adjudication of SERs taken by the Court is a principled means of balancing competing positive entitlements, property rights, resource constraints, and institutional-political realities. To properly understand this, it must be recognized that many of the cases which the Court must pass judgment on pertain more or less directly to the nature of the South African polis. In particular, the degree to which the State does or does not ensure the provision of the basic necessities of life has a direct impact on the ability of its citizens to meaningfully participate in the democratic process. As such, these decisions are intricately linked with framing of the basic constitutive issues and the relative support for the various alternatives by which the state may respond to them. Even accepting the subjectivity of judicial decision-making, the judiciary has a vital role to play in the transformation of South Africa. Through its exposition and analysis of matters of public interest a stable system of democracy that is underpinned by clear discussion of the guiding norms and principles that inform public policy and in which all citizens have voice, is facilitated.²⁴⁶

As with liberal democracies in general, the nature of party politics coupled with the information deficit of its citizens and the complexity of the policy issues involved makes "public

²⁴² *Biowatch Trust*, para. 19.

²⁴³ *Ibid.*, para. 23.

²⁴⁴ Although the logic is not unassailable, there is a clear argument to be made that this "if you build it, they will come" approach to constitutional litigation on the part of the judiciary will ensure that those issues that are most pressing to the society as a whole will be addressed first, by virtue of their respective saliences as rallying points for civil society actors.

²⁴⁵ Roux, "Principle and Pragmatism on the Constitutional Court of South Africa."

²⁴⁶ A similar concept is advanced in Davis, "Socioeconomic Rights: Do They Deliver the Goods?."

judgment” a rare occurrence in South Africa.²⁴⁷ One may draw causal arrows from innumerable sources, the decline of civic associations, the structural misrepresentation of reality, or the increasing pressures of a global economic order coupled with internal fiscal capacity deficits which threaten the material security of individual citizens.²⁴⁸ Regardless of the cause, however, the essential function that the Court serves in this respect is that of a check on rash policy choices and overly politicized decisions designed to advance partisan power rather than the public interest. Placing the debate over certain foundational issues within the purview of the Judiciary can minimize the impact of electoral-political considerations on the formation of public policy. In effect it allows decisions to be made in a more principled fashion by removing from the calculus concerns of re-election and public opinion, as opposed to public judgment, that so frequently guide the actions of political actors and organizations.

By embedding the contestation of such issues in a forum which emphasizes rational argumentation over rhetorical ability, these matters are considered in a value-neutral manner, at least relative to the realm of partisan politics. And, the provision of such a forum is one of the key functions of any democratic institution.²⁴⁹ As such, the rationale(s) underlying particular policy decisions are more fully considered. Indeed, the Court has embraced this role, asserting that,

[a] reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy... If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.

Moreover, the justifications offered by the State for a particular action or inaction is juxtaposed with competing lines of reasoning which refute or reframe some or all components of the arguments underpinning the State’s policy choices. In so doing, complex issues are more fully explored, in a way which makes the motivations of the State more clearly articulated and publicly accessible than would otherwise be the case.

Concluding Comments

As the primary adjudicator of constitutionality, the Court has been given a particularly difficult task. Compounding this is the Court’s lack of recourse to a “political question” doctrine that would allow them to carve particularly contentious issues out of their jurisdiction. Indeed, with the exception of direct applications of leave to appeal, the Court has relatively little control

²⁴⁷ Public judgment, according to Yankelovich, is a particular form of public opinion that exhibits both thoughtfulness – the weighing of alternatives, genuine engagement with an issue, and the consideration of issues within the broader context – and more emphasis on the normative, valuing, ethical side of questions than on the factual informational side. Moreover, it is his position that, “[t]o say that public judgment has been reached on an issue does not imply that people comprehend all of the relevant facts or that they agree with the views of elites. It does imply that people have struggled with the issue, thought about it in their own terms, and formed a judgment that they are willing to stand by. Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World* (Syracuse, N.Y.: Syracuse University Press, 1991), especially 39-42.

²⁴⁸ See (respectively), e.g. Robert D. Putnam, “Civic Disengagement in Contemporary America,” *Government and Opposition* 36, no. 2 (2001): 135-56; Edward S. Herman and Noam Chomsky, *Manufacturing Consent: the Political Economy of the Mass Media* (New York: Pantheon Books, 1988); Duane Swank, *Global Capital, Political Institutions, and Policy Change in Developed Welfare States* (Cambridge: Cambridge University Press, 2002).

²⁴⁹ Paul C. Weiler, “Rights and Judges in a Democracy: A New Canadian Version,” *Michigan Journal of Law Reform* 18, no. 1 (1984): 51-92.

over its docket.²⁵⁰ This inability to avoid political “hot potatoes” has placed the Court in awkward situations that forced it to balance between competing pressures in the attempt to maintain its legitimacy and institutional security in ways which unduly limited the transformative efficacy of its decisions.

Thus far the Court has demonstrated a remarkable capacity for balancing the competing interests of legal legitimacy, political reality, and societal norm adherence while at the same time advancing a notion of SERs, and constitutional rights in general, that has achieved a reasonably widespread, although certainly not universal, acceptance.²⁵¹ Moreover they have done so in a way that has enabled significant transformation within South Africa. This is truly an impressive achievement. At the same time, the policy capacity of the Constitutional Court is inherently limited relative to the government bureaucracy and the question remains as to its suitability to determine the appropriate calculus of current consumption versus future investment in the crafting of public policy. Moreover, the legitimacy of an unelected judicial branch countermanding the actions of elected representatives, “the counter-majoritarian difficulty,”²⁵² remains a concern.

The Court has done an exemplary job over the past decade and a half, but in evaluating the future prospects of South Africa, we must not rely too heavily on past performance as a predictor of future ability. Experience shows that the institutions and arrangements which bring about the vital sea changes necessary for constitutional transformation are not necessarily the same as those which are best able to administer the transformed or transforming society.²⁵³ As such, at the risk of institutional hubris, three broad recommendations in aid of the transformation and harmonious administration of South Africa are advanced below.

Recommendations

1. *Renew the independence and deliberative character of the judicial appointment process by limiting partisan political membership and influence on the Judicial Service Committee.*

At present, the JSC consists of: the Chief Justice of the Constitutional Court, the President of the Supreme Court of Appeal, a senior Judge President, the justice minister, two advocates nominated by the profession, two attorneys nominated by the profession, one university law teacher, and four presidential appointees. In addition to the core group of 13 are 10 “political appointees”, six are designated by the National Assembly, at least three of whom must be from opposition parties, and four are delegates from the National Council of Provinces.²⁵⁴ In light of recent concern surrounding the politicization of judicial appointments, particularly to the Constitutional Court, the influence of individual political parties on judicial appointments should be limited, if only to reinforce public confidence in the judicial system. It is therefore recommended that:

- a. *the number of Presidential appointees to the JSC be reduced from four to two;*
or,

²⁵⁰ Roux, “Principle and Pragmatism on the Constitutional Court of South Africa,” 12-13.

²⁵¹ Marius Pieterse, “Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited,” *Human Rights Quarterly* 29, no. 3 (2007): 796-824.

²⁵² Waldron, “The Core of the Case Against Judicial Review.”

²⁵³ See, e.g. Guillermo O'Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule* (Baltimore: Johns Hopkins University Press, 1986), especially 63-6.

²⁵⁴ Seedat, *Judicial Service Commission and the Upcoming Elections in South Africa: Term of Office and Composition*.

- b. *the number of members appointed by the National Assembly be reduced to four, the requirement of three opposition party members be retained, and the qualification that no two members be representatives of the same political party be added; or,*
- c. *the delegation of the National Council of Provinces be required to consist of at least three members of political parties in opposition to the Government of the day, with the qualification that no two members of the delegation may be members of the same political party; or,*
- d. *some combination of the above be adopted*

The primary purpose of such measures is to limit particular partisan political influence on the JSC in order to create an environment in which multiple perspectives are represented, and in which deliberation is more readily possible, in order to facilitate the selection and appointment of a capable and non-partisan judiciary.

2. *Enhance the transformative capacity of and public confidence in the Constitution by providing merit-based funding for constitutional litigation by civil society organizations.*

Civil society organizations, their volunteers, and their donors play a vital role in the development and maintenance of South Africa's constitutional order. Through the efforts of organizations such as the Legal Resources Centre and the Women's Legal Centre, not to mention Treatment Action Campaign, the Constitution has been made meaningful for the ill, disadvantaged, and impoverished in South Africa. Indeed, the Court has explicitly recognized the vital role of civil society organizations in both developing and defending the Constitution.²⁵⁵ Moreover, the Court and various levels of government have consistently relied on civil society actors and organizations to facilitate engagement with citizens in, for example, matters pertaining to eviction, relocation, and access to basic municipal services.²⁵⁶

While all citizens surely have an obligation to aid in the development and maintenance of the new South Africa, the combination of engagement, commitment, and professional skills required to effectively litigate constitutional issues do not come without commendable personal sacrifice. Nor do these sacrifices eliminate the need for material resources to achieve these ends. Therefore, the annual provision of a modest sum by the State,²⁵⁷ to be dispersed by a non-partisan professional organization competent to evaluate the merits of such litigation,²⁵⁸ to assist organizations pursuing constitutional litigation that serves the public interest is strongly recommended. The provision of these funds and their suitable distribution would not only serve as a formal recognition of the importance of civic engagement, but also facilitate the development of the Court's jurisprudence, further entrench legitimacy of the new legal order, and demonstrate the commitment of the State to further realizing the promise of post-apartheid South Africa.

²⁵⁵ *Biowatch Trust*, para. 19.

²⁵⁶ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* ZACC 1, paras. 19-21 (CC 2008).

²⁵⁷ While the determination of an exact amount would require further investigation, the author believes 45M Rand annually would not be unreasonable, as this would approximate inflation adjusted parity with the similar Canadian "Court Challenges" program. As a point of reference, this amount represents approximately 1% of the 2010/11 South African public Expenditure Estimates for court administration. *Estimates of Public Expenditure* (Pretoria, South Africa: National Treasury, Republic of South Africa, 2009), <http://www.treasury.gov.za/documents/Estimates%20of%20Public%20Expenditure/2009/default.aspx>.

²⁵⁸ For example, the South African Law Reform Commission or the South African Bar Association.

3. *Entrench a legislative override, similar in manner and form to Section 33 of the Canadian Charter of Rights and Freedoms, to reduce the incentive of political actors to influence judicial decisions.*

The Constitutional Court's mandatory treatment of all issues of constitutionality requires it to render decisions that conform to legal principles, societal norms, and political realities in order to maintain its legitimacy. This position is a difficult one at best, and is potentially untenable as there is no guarantee that a decision space that conforms to each of these requirements exists. Thus far they have done an admirable job striking an appropriate balance between principle and pragmatism. However, the absence of a "safety valve" that would allow them to adhere to legal principles in the face of changing political realities is a threat to the Court's institutional efficacy and the perceived legitimacy of the constitutional regime, in particular the progressive realization of SERs, the cornerstone of the new South Africa.

The significance of the Court's decisions has been made abundantly clear and the controversy surrounding the most recent appointments to the Court highlight the possibility that the importance and supremacy of those decisions may lead to the politicization of the Court to the detriment of its efficacy and legitimacy. It is therefore appropriate to attempt to minimize both the ability and incentive of partisan political actors to influence judicial decision-making either directly or through involvement in the appointments process. The simplest and most effective way to achieve this goal would be to amend the Constitution to limit judicial supremacy and enable legislative-judicial dialogue.²⁵⁹ Specifically, the Constitution should be amended to include a legislative override clause that would enable a two-thirds majority in Parliament to set aside a decision of the Court should they deem it in the service of the public interest. However, legislation enacted "notwithstanding" a decision of the Court should also require the reaffirmation of the Parliament within one year of each general election, again by a two-thirds majority. In the absence of such a reaffirmation, such legislation should be automatically considered to have no force or effect. Adopting such a procedure would serve as a "safety valve" to preserve the institutional and legal legitimacy of the Court by reducing the incentive to covertly influence judicial decision-making or appointments, while ensuring that important constitutional matters are brought to the attention of the public via the media and legislative debate necessary to set aside a ruling.

²⁵⁹As Tolley notes, "[w]eak-form judicial review may be less effective in producing immediate results, but national and regional courts seem to understand that in the long run their legitimacy is enhanced by their willingness to work with democratic governments to meet the commitments they have made to fulfill socio-economic rights." Michael C. Tolley, "The Judicial Enforcement of Socio-Economic Rights in Comparative Perspective," in (presented at the American Political Science Association [Annual Meeting], Boston, Mass., 2008), 21; for a fuller discussion of the concept of strong and weak-form judicial review, see Tushnet, *Weak Courts, Strong Rights Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, 21; Peter Hogg, Allison A. Bushell Thornton, and Wade K. Wright, "Charter Dialogue Revisited - or "Much Ado About Metaphors"," *Osgoode Hall Law Journal* 45, no. 1 (2007): 21; Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited," *International Journal of Constitutional Law* 5, no. 3 (2007): 391-418; for a contrasting opinion, see Christopher P. Manfredi, "The Day the Dialogue Died: a Comment on *Sauve v. Canada*," *Osgoode Hall Law Journal* 45, no. 1 (2007): 105-123.

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CHAPTER 4: PROVINCIAL CAPACITY DEFICIT - NATHAN CATO

Introduction

One of the more contentious issues during the constitutional negotiations was the extent to which the new South African constitution would embrace federalism as an organizing principle of governance.²⁶⁰ Ultimately, a federal system of government was chosen, but it has so far proven to be one of the most centralized models in the world. In many respects, South Africa's federal system operates more like a unitary state, with a powerful central government and weak provincial governments that operate more like administrative units rather than independent governments. Nonetheless, South Africa's new Constitution does have many distinctly federal features. It is the intention of this chapter to evaluate how well South Africa's model of federalism is helping to achieve greater socio-economic equality, one of the central goals of the new Constitution and the post-apartheid political regime. Rather than evaluating federalism as an end in itself, as an abstract form of organizing governance, this chapter will focus on how well federalism in South Africa is serving the values and policy objectives of socio-economic equality.

The chapter is divided into four parts. It will begin with a brief discussion of the troubled history of federalism in South Africa, showing why the concept has been and remains so controversial. Secondly, it will describe the institutional design of South Africa's particular model of federalism that was adopted under the 1996 Constitution. The third section will offer an assessment of how well this model is working to address socio-economic inequality. It will argue that South Africa's highly centralized, integrated and cooperative model of federalism is institutionally well-suited to foster greater socio-economic equality, but that it is much less successful at fragmenting state power. Finally, this chapter will close by outlining a few proposals for improving the federal system in South Africa. These proposals are aimed at increasing the capacity and autonomy of the provincial governments.

Federalism's History in South Africa

It is impossible to evaluate political institutions without an appreciation for the historical context in which they operate. The history of federalism in South Africa is critical to understanding both its design and function. Since the *1909 South Africa Act*, the British statute that created the Union of South Africa, federalism has had a contested history in the country.²⁶¹ The 1909 Act created a quasi-federal system, but it was significant only for white citizens given that the black majority was excluded from political participation.²⁶² After 1948, when the full-blown apartheid regime had taken hold, 10 Bantustans (or ethnic 'homelands') were established along tribal and racial lines, and they were justified in part by appeals to federal and confederal values.²⁶³ Thus, during the apartheid era, federalism (or decentralization in general) was used as a method of institutionalizing ethnic and tribal differences; it was a tool used by the apartheid

²⁶⁰ Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *The Journal of Federalism*, Vol. 31: 4 (Fall 2001), pp. 66.

²⁶¹ Janis Van Der Westhuizen, "Republic of South Africa: History and Development of Federalism," *Handbook of Federal Countries*, (2005), pp. 310.

²⁶² *Ibid.*, pp. 310.

²⁶³ Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *The Journal of Federalism*, Vol. 31: 4 (Fall 2001), pp. 64.

regime to promote its agenda of systematic racism and segregation.²⁶⁴ This history has fundamentally delegitimized the concept of federalism in contemporary South Africa, among ordinary citizens and political elites.²⁶⁵ A substantial majority remain either hostile towards or exceedingly sceptical about the idea of federalism.

Throughout the constitutional negotiations in the 1990s, the African National Congress (ANC) feared that a robust form of federalism with strong autonomous provinces would entrench, institutionalize and exacerbate ethnic divisions in the country and form the basis of divisive tribal or regional politics.²⁶⁶ It also feared that federalism would entrench the significant socio-economic disparities between the regions.²⁶⁷ For the ANC, federalism was simply a method of thwarting majority rule and legitimizing the homelands established by the previous apartheid regime.²⁶⁸ Instead, the ANC favoured a strong central state that would be well-suited to establish a non-racist, equalitarian (egalitarian) society.²⁶⁹ Many within the ANC felt that a unitary state would be more effective for reducing socio-economic inequality between the various ethnic groups and the different regions.

The outgoing white minority regime, lead by the National Party (NP), favoured a strong federal regime because it generally feared the wrath of an all-powerful central state dominated by the ANC.²⁷⁰ For them, federalism would help institutionalize a check on the power of the majority by dividing authority among different levels of government. Thus, from the NP's perspective, federalism was seen as "a brake on a strong central government."²⁷¹ The NP did not necessarily see federalism as a method of protecting territorially-based ethnic interests because, with the exception of the provinces of Western Cape and Northern Cape where non-Africans were in the majority, its white support-base was dispersed across the country.²⁷² The NP's support for federalism during the constitutional negotiations further discredited the idea in the eyes of the ANC.²⁷³ The gulf between the two sides over this issue was profound. Yet, despite their significant differences, a compromise agreement was eventually crafted.

Simeon and Murray have noted that an important element in reaching an agreement on the principles of a federal regime was a confidential *Report to the Political Parties* prepared by a group of experts in 1993.²⁷⁴ The report sought to bridge the divide by arguing that the goals of achieving equality for all citizens could be reconciled with regional powers that would provide additional checks and balances on the use of state power.²⁷⁵ The group of experts sought a balanced solution that would accommodate both sides: equality on the one hand and the fragmentation of power on the other. Nico Steytler and Johann Mettler note that the breakthrough in negotiations was not the agreement to devolve a limited degree of power to sub-

²⁶⁴ Mary de Haas and Paulus Zulu, "Ethnicity and Federalism: The Case of Kwazulu/Natal," *Journal of South African Studies*, Vol. 20, No. 3 (1994), pp. 435.

²⁶⁵ *Ibid.*, pp. 68.

²⁶⁶ Joachim Wehner, "Fiscal Federalism in South Africa," *The Journal of Federalism*, Vol. 30: 3 (Summer 2000), p. 47.

²⁶⁷ *Ibid.*, p. 47.

²⁶⁸ Nico Steytler and Johann Mettler, "Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy," *The Journal of Federalism*, Vol 31: 4 (Fall 2001), p. 93.

²⁶⁹ *Ibid.*, p. 94.

²⁷⁰ Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *The Journal of Federalism*, Vol. 31: 4 (Fall 2001), p. 68.

²⁷¹ Nico Steytler and Johann Mettler, "Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy," *The Journal of Federalism*, Vol 31: 4 (Fall 2001), p. 94.

²⁷² *Ibid.*, p. 94.

²⁷³ Janis Van Der Westhuizen, "Republic of South Africa: History and Development of Federalism," *Handbook of Federal Countries*, (2005), pp. 312.

²⁷⁴ Nico Steytler and Johann Mettler, "Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy," *The Journal of Federalism*, Vol 31: 4 (Fall 2001), p. 96.

²⁷⁵ Consultative Business Movement, *Regions in South Africa: Constitutional Options and Their Implications for Good Government and a Sound Economy*, Confidential Report for Discussion with Political Parties (1993), pp. vi-vii.

national provincial governments, but the creation of a government of national unity...the NP placed its faith primarily in a model of shared rule, rather than self-rule.²⁷⁶ The compromise agreement provided for a federal state with a powerful central government and relatively weak, subordinate provincial governments.

In spite of the constitutional agreement to establish a federal system of government, many South Africans remain highly sceptical about the idea of federalism, and some, including many within the ANC, see it as a form of neo-apartheid.²⁷⁷ The concept of federalism enjoys very limited acceptance by both citizens and elites.²⁷⁸ It is clear that the decision to adopt a certain degree of decentralization in the new constitution was an important political compromise that was necessary to secure an agreement for a new constitution. In addition to the bill of rights that is entrenched in the new Constitution, federalism is designed to foster inter-ethnic harmony and prevent the abuse of state power by fragmenting authority between three spheres of government. However, as the next section will demonstrate, South Africa's system of federal government is highly centralized, and its ability to fragment state power is relatively limited.

Federalism After the 1996 Constitution

Given the controversial history of federalism in South Africa, it is perhaps not surprising that the new Constitution avoids formally acknowledging its status as a federal state. By most definitions however,²⁷⁹ South Africa can rightfully be included among those countries that call themselves federations. Indeed, most analysts view the 1996 constitution as “essentially federal”.²⁸⁰ The Constitution establishes a central government and nine provinces. Unlike many other federations, South Africa rejected models of federalism that are designed to empower specific national or ethnic groups with their own institutions and political communities.²⁸¹ The provincial borders are not designed to coincide with racial or tribal boundaries, although this does occur in three provinces, namely KwaZulu-Natal, the Eastern Cape and the North West, where more than two-thirds of the population speak a single language.²⁸² South Africa's federal system does not institutionalize or entrench ethnicity, tribalism or racialism, but it has allowed some white minorities in KwaZulu-Natal and the Western Cape a certain degree of self-government, which has likely helped reconcile them to the new regime. The provinces of KwaZulu-Natal and Gauteng dominate the other provinces in population, as they share approximately 42.6% of the country's total population.²⁸³ The remaining provinces range from 13.9% to 5.9% of the overall population.²⁸⁴

Federal Institutions

²⁷⁶ Nico Steytler and Johann Mettler, “Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy,” *The Journal of Federalism*, Vol 31: 4 (Fall 2001), p. 94.

²⁷⁷ Richard Humphries, et al., “The Shape of the Country: Negotiating Regional Government,” *The Small Miracle: South Africa's Negotiated Settlement*, eds. Steven Friedman and Doreen Atkinson (Johannesburg: Raven Press, 1994), pp. 148-181.

²⁷⁸ Richard Simeon and Christina Murray, “Multi-Sphere Governance in South Africa: An Interim Assessment,” *The Journal of Federalism*, Vol. 31, No. 4, Fall 2001.

²⁷⁹ See Ronald Watts, “Comparing Federal Systems,” Institute of Intergovernmental Relations, McGill-Queens University Press (Kingston: 2008), pp. 17.

²⁸⁰ Janis Van Der Westhuizen, “Republic of South Africa: History and Development of Federalism,” *Handbook of Federal Countries*, (2005), pp. 312.

²⁸¹ Richard Simeon and Christina Murray, “Multi-Sphere Governance in South Africa: An Interim Assessment,” *The Journal of Federalism*, Vol. 31: 4 (Fall 2001), p. 71.

²⁸² *Ibid.*, p. 70 – 71.

²⁸³ Statistics South Africa, “Mid-year population estimates 2009,” Statistical Release P0302, (Summer 2009), p. 6.

²⁸⁴ *Ibid.*, p. 6

The *1996 Constitution of the Republic of South Africa* (‘the Constitution’) contains all of the typical features commonly found in a federal constitution. While describing the country as “one sovereign democratic state” (Section 1), it also states: “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated” (Section 40).²⁸⁵ The Constitution therefore at once calls for the unity of the country and provides for a measure of decentralization. Section 43 specifies the division of legislative authority between the three spheres of government (the full list of legislative powers for each sphere of government is found in Schedules 4 & 5). Section 104 guarantees that each sphere of government is bound only by the constitution, thus enshrining their independence and constitutional status. The three spheres of government are also elected independently. The Constitution designates the Constitutional Court as the final arbiter of disputes between the various spheres of government. Thus, by all accounts, South Africa’s constitution is federal in nature. It provides for a division of authority between three independent spheres of government that find their legitimacy directly in the constitutional text.

South Africa’s federal system closely follows the German model of ‘integrated federalism’, which features a strong national parliament that provides leadership through framework legislation; the provinces are then responsible for implementing and administering the national framework legislation enacted by the national parliament.²⁸⁶ Integrated federalism is characterized by a tight interaction between the central and provincial governments, rather than a more divided, decentralized and competitive model, such as Canada, the United States or Australia. Thus, in South Africa, as in Germany, federalism primarily divides the roles of each level of government rather than their responsibilities. Integrated and cooperative federalism requires the three spheres of government to function as a single, unified and coherent system, collaborating with each other rather than competing.

The constitutional division of powers illustrates a strong commitment to cooperative, integrated federalism. Most of the critical powers are concurrent or shared between the national and provincial spheres of government. For instance, the National Parliament and the provincial legislatures share concurrent powers over education, environment, health care, housing, law enforcement, regional planning and development, transportation and welfare.²⁸⁷ Both spheres of government may legislate in these areas, although national legislation has supremacy in the event of a conflict. The provinces have exclusive legislative authority over a narrow range of policy fields, including ambulance services, libraries, liquor licenses, provincial cultural matters, recreation, sport and veterinary services.²⁸⁸ However, the National Parliament may override any area of exclusive provincial jurisdiction if it threatens national security, economic unity or national standards.²⁸⁹ The National Parliament may also intervene to prevent “unreasonable action taken by a province which is prejudicial to the interests of another province or the country as a whole.”²⁹⁰ The residual power is assigned to the national parliament. A complete list of the enumerated division of powers can be found in Appendix “A”.

Thus, the South African model of federalism gives the National Parliament sweeping legislative authority to set comprehensive national standards in almost any policy area and to override any provincial legislation that threatens national unity or national standards. The

²⁸⁵ *The Constitution of the Republic of South Africa, 1996 (Section 40)*.

²⁸⁶ Janis Van Der Westhuizen, “Republic of South Africa: History and Development of Federalism,” *Handbook of Federal Countries*, (2005), pp. 312.

²⁸⁷ *Ibid*, Section 44 & Schedule 4.

²⁸⁸ *Ibid*, Schedule 5.

²⁸⁹ *Ibid*, Section 44 (2)

²⁹⁰ *Ibid*, Section 44 (2).

provinces are responsible for implementing and administering the national framework legislation in a way that is sensitive to local conditions. However, given the need for tight integration and cooperation between the spheres of government, the provincial governments are given a strong voice within the national legislature to ensure they can play a meaningful role in the formation of national laws. Much like the German *Bundesrat*, South Africa's upper chamber, the National Council of Provinces (NCOP), is designed "to ensure that provincial interests are taken into account in the national sphere of government."²⁹¹ The NCOP "provides a national forum for public consideration of issues affecting the provinces."²⁹² However, although the provinces participate in the formulation of national policy that affects them, the central government generally has the final say.²⁹³

The NCOP is composed of delegations from all the provinces, and they represent the provincial legislatures instead of the provincial executives (which is the case in the German *Bundesrat*). Each delegation includes six permanent delegates chosen by the provincial legislature and three other "special delegates", who may rotate according to the policy issue under discussion.²⁹⁴ The permanent delegates are subject to recall by the provincial legislature.²⁹⁵ They also cannot sit in the provincial legislature after they have been appointed as a delegate to the NCOP.²⁹⁶ The NCOP's powers are determined by the type of legislation being considered by the chamber. If the proposed legislation does not have any direct impact on the provinces, the NCOP delegates vote as individuals. The NCOP can be overridden on such legislation by a simple majority in the National Assembly. If, however, the proposed legislation impacts an area of concurrent jurisdiction or an area of exclusive provincial jurisdiction, each provincial delegation casts a single vote on behalf of the province as per the provincial legislature's instruction. The National Assembly can still overrule the NCOP on such legislation, but this time it requires a two-thirds majority. The NCOP is also the forum through which the provinces participate in constitutional amendment procedures. To be successful, a constitutional amendment requires the support of the National Assembly and six of the nine provinces.

Intergovernmental Relations

One of the more unique aspects of the 1996 Constitution is the direction that it provides for the conduct of intergovernmental relations between the three spheres of government. Unlike most federal constitutions, the new South African Constitution outlines a comprehensive set of organizing principles for the conduct of intergovernmental relations. These principles emphasize the importance of cooperation between governments. For example, Section 41 states that all spheres of government must "preserve the peace, national unity, and the indivisibility of the Republic."²⁹⁷ Moreover, each government must respect "the constitutional status, institutions, powers and functions of government in other spheres," and they must always "cooperate with one another in mutual trust and good faith."²⁹⁸ Section 41 goes on to say that any government involved in an intergovernmental dispute must "make every reasonable effort to settle the

²⁹¹ *Ibid*, Section 42(4).

²⁹² *Ibid*, Section 42(4).

²⁹³ Janis Van Der Westhuizen, "Republic of South Africa: History and Development of Federalism," *Handbook of Federal Countries*, (2005), pp. 312.

²⁹⁴ Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *The Journal of Federalism*, Vol. 31, No. 4, Fall 2001, pp. 75.

²⁹⁵ *Ibid*, pp. 75.

²⁹⁶ *Ibid*, pp. 75.

²⁹⁷ *The Constitution of the Republic of South Africa, 1996, Section 41 (1)*.

²⁹⁸ *Ibid*, Section 41 (1).

dispute” and it must “exhaust all other remedies” before approaching the courts to resolve the dispute.²⁹⁹ This constitutional requirement is in stark contrast to many other federations, including Canada, where competition between governments is the norm. This unique constitutional feature illustrates how the idea of cooperation, rather than competition, is woven into South Africa’s model of federalism.

Fiscal Federalism

Just as the legislative process is highly centralized, so too is fiscal federalism. The central government has incredibly wide powers over the nation’s finances and fiscal arrangements. It has a virtual monopoly on all government revenue-generating capacity. The provinces, meanwhile, have limited fiscal autonomy because they have very little capacity to generate their own revenue. In fact, the local governments have slightly more revenue-raising capacity than the provinces because they can levy property taxes (within the limits imposed by the national parliament). The provinces do not have direct access to any major sources of taxation.³⁰⁰ They also do not own or control natural resources, which further limits their ability to generate revenue independently. The Constitution treats natural resources as an important national heritage that should be used to finance government services equitably for all citizens anywhere in the country, rather than as a regional resource.³⁰¹ Instead of generating their own revenue, the provinces and local governments must rely on transfers from the central government to finance their activities. On average, 94 percent of provincial revenue is derived from transfers from the central government.³⁰²

Fiscal federalism in South Africa has been heavily influenced by the Australian and Indian models, where a formal independent commission is established to make recommendations on the distribution of transfers from the national government to the provinces.³⁰³ Section 213 of the Constitution mandates the creation of a single pool of revenue into which all money owed to the national government is paid.³⁰⁴ However, because the national government has a virtual monopoly over all revenue generation, the constitution protects the provincial and local spheres of government by enshrining their right to an “equitable division of revenues raised nationally.”³⁰⁵ Section 214 requires that the distribution of revenue take into account a number of criteria, including the national interest, the ability of provinces to perform their assigned tasks, and the need to combat economic disparities within and among provinces.³⁰⁶ The national parliament has the final say in determining the “equitable share” between spheres of government, but it is required to consult the Financial and Fiscal Commission (FFC) and consider its recommendations before introducing legislation affecting the division of revenues.³⁰⁷

The FFC is a very important institution for federalism in South Africa. It must make recommendations on the allocation of revenues and transfers between the three spheres of

²⁹⁹ Ibid, Section 41 (3).

³⁰⁰ A complete breakdown of the constitutional division of taxation sources can be found in Appendix “B”.

³⁰¹ Nicholas Haysom and Sean Kane, “Negotiating natural resources for peace: Ownership, control and wealth-sharing,” Briefing Paper, October 2009, pp. 10.

³⁰² Provincial Budgets 2009-2010, Department of Finance, Government of South Africa, online: <<http://www.finance.gov.za/documents/provincial%20budget/2009/Guides%20to%20the%20Budget/Gauteng%20-%20Budget%20Booklet%202009-10.pdf>> (accessed 28 March 2010).

³⁰³ Ronald Watts, “Equalization in Commonwealth Federations,” *Regional and Federal Studies*, 13:4, pp. 121.

³⁰⁴ *The Constitution of the Republic of South Africa, 1996, Section 213 (1)*.

³⁰⁵ Ibid, Section 214 (1).

³⁰⁶ Ibid, Section 214 (1 and 2).

³⁰⁷ Ibid, Section 214 (2).

government.³⁰⁸ The FFC is composed of 22 members that represent all three spheres of government.³⁰⁹ Half of the members are appointed by the provinces (9) and local governments (2); the remaining 11 are chosen by the national government.³¹⁰ The division of appointments between all spheres of government demonstrates respect for the constitutional status of all governments and helps to ensure that the provinces and local governments have a say in determining an equitable division of revenues. This is different from the independent financial commission in Australia, for example, which is appointed entirely by the federal government.

The FFC addresses both vertical and horizontal balance. As Ronald Watts explains, vertical fiscal imbalances occur where the constitutionally assigned revenues assigned to each level of government do not match their constitutionally assigned expenditure responsibilities.³¹¹ Horizontal imbalances between the constituent units of a federation occur as a result of differences in revenue-generating capacity or the costs of carrying out responsibilities.³¹² As mentioned before, there are few differences between the provinces in South Africa in terms of revenue generating capacity; the provinces neither own natural resources nor do they have direct access to major sources of taxation. Thus, horizontal equalization between the provinces involves primarily a formula-driven approach based on the differences in costs rather than revenue. In determining the relative differences in costs, the FFC considers both the demographic and economic profiles of the provinces.³¹³ For example, if a province has more residents than the national average and those residents live in more remote regions, which increase the costs of delivering government services, then that province will generally be entitled to a greater share of revenue.³¹⁴ Vertical fiscal balance is a much larger and more complicated issue because of the tightly integrated model of federalism. In addition to the unconditional equitable division of national revenue, the national government can make conditional transfers to the provinces.

Although the FFC is an independent, constitutionally mandated commission, the national government has been keen to emphasize that it is merely an ‘advisory body,’ and that the national Minister of Finance has the ultimate decision-making power.³¹⁵ This position is constitutionally accurate, although the provinces are not entirely without influence. The Constitution requires that the national government “consult” the FFC and “consider” its recommendations, but the final authority is left with the national government.³¹⁶ The national Minister of Finance is, however, required by law to take explicit account of the FFC’s recommendations in the annual Division of Revenue Bill.³¹⁷ If the national government could unilaterally change the division of revenues at any time, then the autonomy of provincial and local governments would be a myth. The provinces do have influence over all legislation that directly affects their interests, including financial transfers and the allocation of revenues, by virtue of their power in the NCOP. As mentioned before, the National Assembly requires a two-thirds majority to overrule the NCOP on legislation directly affecting the provinces.

³⁰⁸ Murphy Morobe, Chairman, Fiscal and Financial Commission of South Africa, “Federalism and Public Finance: South Africa’s Evolving Intergovernmental Finance Regime,” Presentation to the Forum of Federations, Veracruz, Mexico, 15 November 2001, pp. 1.

³⁰⁹ The Constitution of the Republic of South Africa, 1996, Section 124.

³¹⁰ *Ibid.*, Section 124.

³¹¹ Ronald Watts, “Equalization in Commonwealth Federations,” *Regional and Federal Studies*, 13:4, pp. 112.

³¹² *Ibid.*, pp. 112.

³¹³ *Ibid.*, pp. 124.

³¹⁴ Murphy Morobe, Chairman, Fiscal and Financial Commission of South Africa, “Federalism and Public Finance: South Africa’s Evolving Intergovernmental Finance Regime,” Presentation to the Forum of Federations, Veracruz, Mexico, 15 November 2001, pp. 4.

³¹⁵ *Ibid.*, pp. 124.

³¹⁶ *The Constitution of the Republic of South Africa, 1996*, Section 214 (2).

³¹⁷ Inter-Governmental Fiscal Relations Act (1997), Section 10 (5).

Integrated party system and One-party dominance

In addition to the centralized and integrated constitutional design under the 1996 Constitution, the integrated party system and the political dominance of the ANC are also factors that have impeded the development of strong, autonomous provinces. Provincial legislatures are elected at the same time as the national parliament, and politicians are selected according to the same list system under proportional representation.³¹⁸ As a result, provincial elections are not fought on distinct regional issues with their own distinct regional dynamics. Instead, they are absorbed into the broader national election campaign. The national parties control the electoral lists for both provincial and national elections, which has usually meant that provincial politicians are essentially second-tier politicians who the party elites do not want at the national level. It is therefore difficult for provincial legislatures to attract the kind of talented politicians who might be more willing and able to assert themselves in relations with the national parliament. The closed party lists, which are controlled by party elites at the national level, has also meant that provincial politicians are typically more accountable and responsible to the national party instead of the voters in their own province.³¹⁹ Their loyalties lie above at the national level rather than below with their voters. The tight integration of the national and provincial party systems, coupled with the overwhelming political dominance of the ANC, present a number of significant consequences for the integrity of democracy and the electoral system. Those issues will be dealt with in the following chapter.

Federalism and Socio-Economic Equality

It is clear that the constitutional design chosen by the South Africans has an extraordinarily high degree of centralization. The provinces suffer from a significant capacity deficit which impedes their ability to assert themselves in the federation. The provincial governments have very little legislative, financial or administrative autonomy, and they have struggled to establish their own independent political identities. The highly centralized nature of federalism in South Africa is largely attributable to the suspicion many South Africans continue to hold about the concept. There is very little desire for powerful and independent provincial governments. The ANC has always resisted federalism, and because it has dominated South African politics at the national level and in most provinces since the collapse of the apartheid regime, it is not surprising that provincial governments have largely failed to establish independent identities in the minds of their citizens.

How has South Africa's system of federalism responded to socio-economic inequality? To what extent are federal institutions helping or hindering the promotion of socio-economic equality for all South Africans in the post-apartheid era? Given the widespread and deep inequality throughout South Africa during the apartheid regime, the reduction of socio-economic inequality has been one of the primary goals of the new Constitution and the post-apartheid political regime. Not only is the Constitution imbued with the principle of equality, it is also an essential characteristic of any stable liberal-democracy. It has now been 14 years since the adoption of the new constitution; it is therefore an appropriate time to evaluate how well the new institutional design is helping South Africa achieve this worthy goal.

³¹⁸ Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *The Journal of Federalism*, Vol. 31, No. 4, Fall 2001, pp. 75 – 76.

³¹⁹ *Ibid*, pp 76.

At the intersection of federalism and equality lies an inherent tension. One of the virtues of federalism is that it seeks to preserve diversity so that local populations within a political community can pursue alternative policies from a national agenda. On the other hand, the idea of equality is immersed in the logic of a common social citizenship that grants each citizen similar access to comparable social programs and benefits anywhere in the country. While federalism represents a preference for diversity (at least within certain policy fields), equality requires similar treatment and a certain degree of uniformity in government services and benefits across the country. Some scholars have argued that the adoption of national standards in federations can be one way of reconciling this tension.³²⁰

South Africa's centralized and integrated federal structure certainly lends itself well to the formulation of comprehensive national standards, which can help ensure comparable social programs and benefits for all citizens across the country. As noted above, the central government has sweeping powers to establish national standards in virtually any policy field, and the provinces have had very little desire or capacity to resist. The combination of a powerful central government and largely subordinate provincial governments has created a political situation that is friendly towards the establishment of national standards and uniformity of social programs and benefits across the country, which often helps foster socio-economic equality.

Although South Africa still has a long way to go in order to achieve its goal of socio-economic equality, federalism can hardly be considered a major obstacle. The primary reason that socio-economic inequality continues to persist is the decision by the ANC to embrace neo-liberal economic policies. The ANC was almost forced to impose capitalism to gain the respect of the international community. Thus, global economic trends, as well as the structure of South Africa's economy and its geography are central factors that cannot be ignored when evaluating socio-economic outcomes. There can be no doubt that federalism in South Africa is institutionally well-suited to develop a more egalitarian society, but the push for these kinds of policies must come from the political leadership. In many respects, South Africa's federal system is better positioned than many federations to address problems of socio-economic inequality. The history of federalism in Canada, for example, reveals an ongoing debate about how to reconcile the tension between federalism and the welfare state; national standards have sometimes been attempted, but they are much more difficult to establish in a decentralized and competitive federation like Canada.

Nevertheless, the severe provincial capacity deficit does hinder the goal of increased socio-economic equality. Increased provincial capacity could help improve socio-economic equality because the provincial governments would be able to play a stronger monitoring role, ensuring that national legislation is implemented and administered effectively in their respective region. The provinces could also fill in any legislative gaps that are overlooked by the national legislature with supplementary or complimentary legislation. At least in theory, provincial governments are situated closer to the people, so they should be able to monitor local conditions more effectively than the national government.

Increasing provincial capacity will also help fragment state power, which is a worthy goal in South Africa given the political dominance of the ANC throughout the country. The lack of provincial fiscal, legislative and administrative capacity, along with the integrated party system, has prevented federalism from institutionalizing the checks and balances typically found in federal countries. One-party dominance is not a healthy phenomenon for any democracy,

³²⁰ See, for example, Jennifer Walner, "Beyond National Standards: Reconciling tension between Federalism and the Welfare State," *The Journal of Federalism*, 2009, pp. 1-26.

because it impedes a meaningful contest between at least two opposing political parties. The provinces may prove to be an effective forum to begin dislodging the overwhelming dominance of the ANC.

Proposed Recommendations

This paper proposes three specific recommendations that are designed to strengthen the capacity of provincial governments. At the outset, it is important to acknowledge that institutional design cannot solve every problem in a society, particularly with respect to socio-economic equality. Even the most perfect constitutional framework cannot overcome prevailing economic and societal conditions. It is essential to recognize these limitations. Nevertheless, these proposals, however modest, will help strengthen the capacity of the provincial governments.

1. Strengthen the fiscal autonomy of provincial governments by increasing their powers of taxation.

Reducing the fiscal dependence of the provinces on transfers from the central government is essential to strengthening their autonomy. As long as the distribution of nationally-raised revenues remains a political decision of the central government, the ability of provinces to assert themselves will be constrained. There are two mechanisms to expand provincial powers of taxation that should be considered. First, the constitutional division of taxation sources could be amended to widen the access provincial governments currently have to raise their own revenues through direct taxation. Provinces could, for example, be given direct access to personal, corporate or retail sales taxes. This option is the most desirable because it would constitutionally enshrine the strengthened fiscal autonomy of the provinces. Alternatively, the national parliament could simply pass legislation enabling the provinces to levy a personal income tax surcharge on the national rate. The FFC recommended a provincial surcharge on personal income taxes several years ago, but so far the national government has rejected the proposal. As the FFC noted in its annual report, increased provincial autonomy would “encourage provincial expenditure accountability, responsibility and efficiency.”³²¹

2. Develop independent policy capacity of provincial governments by disentangling central and provincial government bureaucracies.

In addition to strengthening their fiscal independence, provincial governments need to establish their own autonomous bureaucracies that are capable of generating sophisticated and expert policy advice. As it currently operates, the bureaucracy in South Africa is essentially a unitary entity functioning at both levels of government. This situation clearly undermines the ability of provincial governments to seek out advice that is independent from the national government. If provinces are to play a meaningful role in monitoring local conditions, filling in legislative gaps where necessary, and checking the power of the central government, they must have professional bureaucracies with the ability to generate independent policy analysis. Disentangling the bureaucracies must therefore be a priority if provincial governments are to strengthen their independence.

³²¹ Fiscal and Financial Commission of South Africa, “Submission for the Division of Revenue 2005/2006,” (June 2004), online: <<http://www.ffc.co.za/docs/submissions/dor/2005/2005-2006%20Submission%20on%20the%20Division%20of%20Revenue.pdf>> (accessed: 25 April 2010), pp. xiii.

3. *Generate regionally focused provincial politicians and legislatures by federalizing the decision-making apparatus of political parties.*

The third and perhaps most important recommendation is the federalization of political parties that currently operate as a single entity in both the national and provincial spheres of government. This is a significant problem because of the political dominance of the ANC, which controls the national parliament and a majority of the provincial legislatures. It is acceptable to have ANC parties contesting elections at both levels of government, but they cannot be controlled by the same leadership and party apparatus. A truly federalized party system, with separate political parties operating at both levels of government, will help provincial polities carve out their own distinct political identities, thereby focusing attention on regional problems. It will help attract more talented and capable politicians to provincial politics because national party elites will not control access to party lists at the provincial level. Talent will also be attracted to provincial politics because provincial governments will begin playing a more meaningful policy role, as they become more focused on regional issues. Additionally, breaking apart the party system will help institutionalize the checks and balances on state power that is typically found in federations because the same political party will not be able to control multiple levels of government. This will help promote more independence among provincial politicians and help strengthen the accountability between provincial politicians and their voters.

Concluding Comments

As this chapter has shown, federalism in South Africa suffers from a controversial history that has limited its reception by both ordinary citizens and political elites. As a result, South Africa continues to operate one of the most centralized models of federalism in the world. The constitutional design of South Africa's federal institutions is generally well positioned to address the challenge of socio-economic inequality, specifically because it allows for the establishment of robust national standards. Federalism cannot be considered a major obstacle to socio-economic equality in South Africa. However, the severe provincial capacity deficit is preventing provincial governments from playing a meaningful role in the federation. If provinces are going to exist as anything more than simply administrative arms of the central government, they must develop more autonomy, particularly with respect to fiscal and administrative capacity. This paper has proposed three recommendations that, if implemented, would help achieve greater capacity at the provincial level. Stronger provincial governments can help enhance socio-economic equality, but they must be given the capacity to do so.

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Appendix A

Schedule 4 to the Constitution of the Republic of South Africa, 1996

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Administration of indigenous forests

Agriculture

Airports other than international and national airports

Animal control and diseases

Casinos, racing, gambling and wagering, excluding lotteries and sports pools

Consumer protection

Cultural matters

Disaster management

Education at all levels, excluding tertiary education

Environment

Health services

Housing

Indigenous law and customary law, subject to Chapter 12 of the Constitution Industrial promotion

Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence

Media services directly controlled or provided by the provincial government, subject to section 192

Nature conservation, excluding national parks, national botanical gardens and marine resources

Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence

Pollution control

Population development

Property transfer fees

Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5

Public transport

Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law

Regional planning and development Road traffic regulation Soil conservation

Tourism

Trade Traditional leadership, subject to Chapter 12 of the Constitution Urban and rural development

Vehicle licensing

Welfare services

PART B

The following local government matters to the extent set out in section 155 (6) (a) and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Firefighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law

Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Stormwater management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5 to the Constitution of the Republic of South Africa, 1996

FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Abattoirs

Ambulance services

Archives other than national archives

Libraries other than national libraries

Liquor licenses

Museums other than national museums

Provincial planning

Provincial cultural matters

Provincial recreation and amenities

Provincial sport

Provincial roads and traffic

Veterinary services, excluding regulation of the profession

PART B

The following local government matters to the extent set out for provinces in section 155 (6) (a) and (7):

Beaches and amusement facilities

Billboards and the display of advertisements in public places
Cemeteries, funeral parlours and crematoria
Cleansing Control of public nuisances
Control of undertakings that sell liquor to the public
Facilities for the accommodation, care and burial of animals
Fencing and fences
Licensing of dogs
Licensing and control of undertakings that sell food to the public
Local amenities
Local sport facilities
Municipal abattoirs
Municipal parks and recreation
Municipal roads
Noise pollution
Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking

APPENDIX B

Constitutional Revenue Assignment			
Revenue Source	Determination of		Collection and Administration
	Base	Rate	
Customs	N	N	N
Corporate income	N	N	N
Natural resources	N	N	N
VAT	N	N	N
Personal income	N	N, P ^a	N
Retail Sales	N	N	N
Property	N, L	L	L
Fees, user charges	N, P, L	N, P, L	N, P, L
Excises	N	N	N

Source: *Constitution of the Republic of South Africa (1996)*, sections 228 and 229.

Notes: N = national government, P = provincial government, L = local government

Provincial taxation powers require national regulatory legislation according to section 228 (2)(b) of the Constitution to become effective.

CHAPTER 5: THE ELECTORAL SYSTEM AND ONE PARTY DOMINANCE – ZAIN ASAF

Introduction

South Africa's first universal suffrage election in 1994 was widely hailed as a "miracle" marking a non violent transition from racial dictatorship to a condition of non-racial democracy elaborated around one the most liberal democratic constitutions in the world. On the economic front, since the end of apartheid there have been impressive gains in employment opportunities and income for the growing black middle class and poor blacks have seen unprecedented improvements in access to basic necessities. Yet there are important reasons to be concerned about the current state of South Africa's democracy. Citizens display low levels of community and political participation. Economically, macro-economic stability exists along side massive unemployment and rising intra-racial inequality. Politically, an internationally celebrated constitution designed to promote multiparty competition and individual rights is overshadowed by one-party dominance.

The preceding chapters in this report examined how mechanisms of institutional design could be used to create greater socio-economic equality. I will focus instead on how South Africa's political institutions can be redesigned to create a more accountable, responsive and competitive political system. The chapter is divided into five parts. In the first section, I evaluate the current electoral system and highlight its principal deficiencies. Section II considers the consequences of the practice of floor crossing in a one party dominant system like South Africa. The subject of section III is the way in which the legislature's capacity to exercise oversight of the executive can be enhanced. In section IV, I discuss the importance of disentangling the provincial and federal political parties. Finally, section V examines the most appropriate way to increase political competition in a one party dominant system.

I. Electoral System

The Current System

Understandably, the literature on electoral design for divided societies has focused almost exclusively on which type of systems will most likely ensure cooperation and coalition building between ethnic and racial groups. There are, however, other important criteria to consider when evaluating proposals for electoral reform. Namely, how well does the proposed system ensure democratic accountability, strengthen citizen-representative linkages, facilitate governability and encourage political responsiveness.³²²

Prior to 1994, the debate about the electoral system in post apartheid South Africa centered on how best to achieve ethnic and racial accommodation through elections. The adoption of a system of proportional representation was eventually regarded as the best means of encouraging political parties to build cross racial and national appeal, whilst simultaneously facilitating the creation of multiparty politics. Although the ANC initially favoured a constituency based system, once it became clear that adopting a PR system would not significantly harm their electoral fortunes, they were willing to compromise with the other

³²² Pippa Norris, *Electoral Engineering: Voting Rules and Political Behavior*, (Cambridge: Cambridge University Press, 2004), pp. 66-73.

political parties on the choice of electoral system.³²³ Moreover, the decades long ideological commitment of the ANC to non-racialism encouraged it to select PR rather than a constituency based system.³²⁴ After all, against the background of apartheid geography, it would have been almost impossible to draw small non-racial constituencies for a plurality system.

In the current electoral system proportional representation is prescribed for the composition of the main representative bodies, namely, the National Assembly and the Provincial legislatures. The 1996 constitution, like the 1993 (interim) constitution, requires a structure which results “in general, in proportional representation” (RSA 1996: Sec 46(1d)). The specific PR system chosen is a closed list system. Two hundred members of the National Assembly are elected using national party lists, while the remaining 200 are elected on the basis of regional party lists; each region or province is entitled to a proportion of the 200 members in accordance with its relative population size, with the proviso that each shall have a minimum of 30 and a maximum of 80 members. Nine provincial legislatures are elected, the size of each being about double the number of regional representatives a province has in the National Assembly.

The national list system, in which the whole country is one constituency, combined with the absence of a legally imposed threshold, has led one observer to call South Africa the “most proportional electoral system in use in any democracy.”³²⁵ The latter feature ensures the appearance of an array of smaller parties in the legislature; for example, in the general election of 2004, twelve parties won at least one seat, giving full expression to racial, ethnic and political diversity.³²⁶

However, one negative consequence of this electoral system is that the party leadership can command strong loyalty from its members and party hierarchy is extremely powerful. Voters vote for parties instead of individual candidates. As a result, each candidate relies on his or her party for their respective place on the list and, thus, the likelihood that they will be in parliament. Consequently, each representative is strongly inclined to support the party’s mandate and reluctant to question party positions in public, or in the case of government MPs, openly scrutinize decisions. Individual MPs, notably of the ANC, are said be in thrall to their party leadership for fear of being excluded from an electable position on the party list at the next election, or indeed being “redeployed” from parliament.³²⁷

Horowitz and the Alternative Vote (AV)

In light of the deleterious effects that closed list PR system has on the ability of representatives to engage in forms of autonomous political behaviour when it conflicts with the dictates of the party leadership and the attendant lack of constituent-representative accountability that results from voting for a party rather than a candidate, should South Africa not adopt an exclusively majoritarian-plurality voting system in which electoral contests are held in single member districts? Indeed, Donald Horowitz famously recommended an Alternative Vote (AV)

³²³ David Pottie, “The Electoral System and Opposition Parties in South Africa,” in Roger Southall (ed.) *Opposition and Democracy in South Africa*, (London: Frank Cass Publishers, 2001) p.27.

³²⁴ Timothy Sisk, *Democratization in South Africa: The Elusive Social Contract*, (Princeton, NJ: Princeton University Press, 1995) p.154.

³²⁵ Amanda Gouws and Paul Mtsheli, “South Africa: One Party Dominance Despite Perfect Proportionality” in Michael Gallagher and Paul Mitchell (eds.), *The Politics of Electoral Systems*, (Oxford: Oxford University Press), p.361.

³²⁶ Christian Murray and Richard Simeon, “Recognition without empowerment: Minorities in a democratic South Africa” in Sujit Choudhry (ed.) *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2008) p.424.

³²⁷ Richard Calland, *Anatomy of South Africa: Who Holds the Power*, (Cape Town: Zebra Press, 2006), pp.102-103.

electoral system as the centerpiece of an accommodation and moderation inducing structure for post-Apartheid South Africa.³²⁸

There are at least two reasons why such a system would be inappropriate for South Africa. First, while it is true that the current system of PR has not resulted in a coalition government, in fact, even in the 2005 election, when the ANC had its weakest ever electoral showing and won “only” 265 seats, all of the other parties were only able to win a combined 135 seats.³²⁹ However, adopting any form of single member plurality system (SMP) would reduce even further the representation of other parties in the legislature. This is because the support of the main opposition parties – the Democratic Alliance (DA), the Inkatha Freedom Party (IFP) and the Union for Democratic Movement (UDM), is concentrated heavily in a small number of areas.³³⁰ As a result, there would be the phenomenon which frequently occurs in SMP electoral systems of a party racking up huge majorities in a few districts, but winning only a few seats at the national level because all of their support is territorially concentrated.

It is important that minorities represented in parliament feel they are part of the political process and have representatives who can articulate their interests. This is especially true in South Africa where the shift to an SMP system would almost certainly guarantee that for the foreseeable future the ANC would have a two thirds-majority, the size needed to amend the constitution. The ability of one party, which draws the overwhelming majority of its support from one demographic group, to unilaterally amend the constitution would certainly not be a desirable outcome in any divided society.

This leads to the second reason why an SMP electoral system would not have the outcome that its proponents suggest. After the First Past the Post System (FPTP), the two most commonly used variants of SMP are the two round vote and the AV. Both systems, its advocates argue, will force candidates to moderate their behaviour and reach out to as many groups as possible because it is unlikely, they claim, that any candidate will receive an overall majority either in the first round or be ranked as most preferred candidate by more than fifty percent of voters. Yet in South Africa, the continuing persistence of de facto racial residential segregation means that potential electoral districts are such that the ANC candidates would receive an outright majority either in the first round or under an AV system be ranked as the most preferred candidate of more than fifty percent voters, thus negating the need to engage in “vote pooling”.³³¹

To be fair, Horowitz did recognize that due to the correlation of ethnicity, geographical concentration and party preferences in South Africa, constituencies would have to be heterogeneous to allow for the possibility of no single party winning an absolute majority. “To achieve this, the constituencies may have to be large, and they may therefore need to be multi-member constituencies”.³³² Yet Lijphart has convincingly demonstrated that AV operated in multi-member constituencies makes the system even less proportional and more majoritarian. Whereas in PR systems proportionality increases as district magnitudes increase, in majoritarian system the relationship is inverted.³³³ AV’s disproportionality will rise sharply when applied in

³²⁸ Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society*, (Berkeley, CA: California University Press, 1991).

³²⁹ Raenette Taljaard and Albert Venter, “Parliament” in (eds.) Albert Venter and Chris Landsberg, *Government and Politics in the New South Africa*, (Pretoria: Van Schaik Publishers, 2006) p.19.

³³⁰ *Ibid*, p.72.

³³¹ Jeremy Seekings, “The Electoral Implications of Social and Economic Change Since 1994” in Lia Nizjink and Jessica Piombo (eds.) *Electoral Politics in South Africa: Assessing the First Decade*, (New York: Palgrave Macmillan, 2005) p.33.

³³² Horowitz, *A Democratic South Africa*, p.56.

³³³ Arend Lijphart, “Constitutional Choices for New Democracies,” *Journal of Democracy*, 2(1):72-84.

multi-member districts. Indeed, the only empirical cases study we have of AV-MMD - the elections of the Australian Federal Senate between 1919 and 1946 - proves this to be the case.³³⁴

Current Proposals for Reform

Almost all of the most recent reforms which have been proposed for South Africa's electoral system are based on a version of Mixed Member Proportional (MMP)³³⁵ – a system in which a number of seats are filled through plurality/majority geographical constituencies, while the remainder is filled from PR lists which serve to rectify the disproportionality reflected in the allocation of district seats. Within this broad category of consensus, the basic differences between the proposals have been whether parliamentary constituencies should be Single Member Constituencies (SMCs) or Multi Member Constituencies (MMCs). In fact, in recent years a number of scholars have proclaimed the virtues of MMP systems, claiming that it is more likely than any other class of electoral system to simultaneously generate local accountability as well as nationally oriented parties.³³⁶

There is, however, an important reason why an MMP system would be inappropriate for South Africa, and in particular why it would not mitigate the problem of constituent-representative link. For the reasons previously stated regarding plurality systems and geographically concentrated support, it is quite probable that the ANC and at most one or two other parties would dominate all the SMD seats. As Andrew Reynolds points out, this would leave smaller party MPs to be elected only from the “top up” pool of members from regional lists, with a concurrent lack of geographical accountability.³³⁷ This would lead to the creation of two classes of MPs: MPs elected from districts tied to local parties and local voters with constituency case loads; and MPs elected from list, chief accountable to party bosses in national headquarters. Levels of citizen participation and interaction with government in South Africa, as measured by contacting parliamentarians or attending parliamentary hearings, are already amongst the lowest in Southern Africa.³³⁸ This passivity is in large measure because they don't know who their parliamentarians are and MPs have no incentive to reach out to people. For South Africans who do not vote for one of the three or four parties which could conceivably win an electoral district, the adoption of MMP would not remedy this disconnect.

The electoral system which I propose for South Africa is the single transferable vote system of proportional representation (hereinafter STV). In contrast to the list system of proportional representation, under the STV system the electors vote for candidates, not parties. But, as a proportional system, STV operates with a district magnitude of greater than one (thus distinguishing it from SMP). In other words, more than one MP is elected per constituency. Another area of variation between STV and most other electoral systems is the ballot structure, which is ordinal. Voters numerically rank candidates, choosing between parties and within parties.

The STV provides a close constituent representative link. The question then for assessing if it would be an improvement over South Africa's current electoral system is how disproportional would it be and what are its effects on gender representation. There has been

³³⁴ Andrew Reynolds, *Electoral Systems and Democratization in Southern African* (Oxford: Oxford University Press, 1999), p.102.

³³⁵ “The Report of the Electoral Task Team,” at <http://www.pmg.org.za/bills/030311ett1.pdf>. Accessed on April 2, 2010.

³³⁶ Matthew Shugart and Martin Wattenberg (eds), *Mixed-Member Electoral System: The Best of Both Worlds?* (Oxford: Oxford University Press, 2001).

³³⁷ Reynolds, *Electoral Systems and Democratization in Southern Africa*, p.100.

³³⁸ Robert Mattes, “South Africa: Democracy Without the People?” *Journal of Democracy*, 13(1):22-36 at pp.32-33

much debate in the academic literature on how proportional the STV is. Although the percentage differences between votes and seats is not as small as list PR systems, in the jurisdictions where STV is used the evidence suggests that smaller parties are, comparatively speaking, not cheated by the system.³³⁹ Furthermore, it appears that a decisive factor when dealing with the issue of proportionality is constituency size (or district magnitude). In jurisdictions that employ the STV if the size of the constituency is at least five seats disproportionality is minimized.³⁴⁰ This is also a size which is not so large so as to make the voters' job of choosing between candidates impossible.

II. Floor Crossing

Perhaps the most controversial issue in South Africa's legislature is the practice of floor crossing. The 1993 interim constitution entailed an Anti Defection Clause stating that any representative would lose his/her mandate if he or she abandoned the party upon whose list he or she had been elected. However, at the end of 2002, legislation was passed by parliament that allowed "floor crossing" within specified window periods at all three government levels. Floor crossing has significantly affected the political landscape. In 2003, the permission of floor crossing at the national and provincial level gave the ANC two of the three political domains denied to it by the voters in the 1999 elections. It gave the ANC a two thirds majority in the National Assembly, the proportion needed to amend the constitution, and an absolute majority in the Western Cape Provincial Legislature, allowing the ANC to govern the province outright for the first time; an outcome they had been unable to achieve through elections.³⁴¹

Writing soon after the transition to democracy, Jung and Shapiro³⁴² were critical of the provision of the interim constitution which entailed that any MP who ceased to be a member of his or her party would also lose his or her seat (the prohibition on floor crossing). "If party elites," they wrote, "can cause members to be threatened with expulsion from their party, backbenchers will not have leverage of any kind in dealing with their party leadership".³⁴³ While it is true that permitting floor crossing reduces the party leadership's control over MPs, the disadvantages offset the advantages. It should be remembered that in South Africa in order for the floor crossing legislation to apply, the number of members leaving the party must represent at least 10 percent of seats held by that party. This means that it is unlikely that there will be defections from the larger parties to smaller parties since the "rebellious" MPs in a large party, such as the ANC, would be unlikely to gather together the number of colleagues from their party necessary to meet the threshold. Moreover, in a one party dominant system, floor crossing serves the dominant party and fragments the opposition. The incentive to abandon the dominant party is less attractive than it is to defect from the smaller parties. The advantage of the dominant party in terms of rewarding willing defectors is simply much greater than that of smaller (opposition) parties, who almost always have no chance of holding office and access to state patronage.³⁴⁴

³³⁹ David Favell, *Electoral Systems: A Comparative Introduction*, (New York: Palgrave Macmillan, 2001) p.154-56.

³⁴⁰ Rein Taagepera and Matthew S. Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems*, (New Haven, Conn: Yale University Press, 1989).

³⁴¹ Susan Boyesen, "The Will of the Parties Versus the Will of the People?: Defection, Election and Alliances in South Africa" *Party Politics* 12(6):727-46 at p.732.

³⁴² Courtney Jung and Ian Shapiro, "South African's Negotiated Transition: Democracy, Opposition and the New Constitutional Order," *Politics and Society* 23(3):269-309.

³⁴³ *Ibid*, p.277.

³⁴⁴ Boyesen, "The Will of the Parties Versus the Will of the People?: Defection, Election and Alliances in South Africa."

The naked political opportunism with which floor crossing has been exploited is demonstrated perhaps most clearly by the shift in the ANC's position to the practice. In 2002, the ANC suddenly dropped its steadfast opposition to legislators crossing the floor. This shift was prompted by a conflict that emerged between the key partners of the main opposition coalition, the Democratic Alliance (DA). As a result, the new National Party (the NNP is the direct heir of the architects of apartheid) decided to exit the coalition and enter into talks with the ANC. The ANC changed its position principally to enable NNP Cape Town city councillors to leave the DA and cross into an alliance with the ANC, thus giving it control of the only city government it did not already dominate.³⁴⁵

III. Parliamentary Oversight

The relationship between parliament and the executive is of crucial relevance to a Westminster based parliamentary system, especially when the dominant party holds a majority, for the government is recruited from the parliament, and the “potential alteration of government, the real (and only) safety valve of the Westminster model is unavailable.” So, how willing and effective has Parliament been in exercising executive oversight? The record is a mixed one. There have been attempts to challenge the executive branch, but overall, when it came to highly controversial decisions, deference to party leadership has won over the constitutional duty to oversee the executive.³⁴⁶ Though ANC MPs insist that caucus meetings feature plenty of debate and represent the key site of backbencher oversight of the executive, ANC backbencher challenges to ministers are rare, and when they occur they tend to arise from “safe” issues that do not raise important question of principle.³⁴⁷ Perhaps the clearest example of the partisanship overriding principle occurred in 2000, when a Parliament Standing Committee on Public Accounts (SCOPA) was convened to investigate allegations of corruption and nepotism in the negotiation of a 1999 Arms deal. ANC members broke off communications with investigators and blocked efforts to obtain further information from the army and government.³⁴⁸

South Africa is in fact fairly unusual in that institutional elements associated with the parliament's task of holding the government accountable, namely, parliamentary questioning (RSA 1996: Sec 55) and the parliamentary committee system (RSA 1996: Sec 56) are enshrined in the constitution itself. Also, somewhat unusually, the right of committees and individual members to initiate legislation is also enshrined in the constitution. Yet a recent internal Report on Parliamentary Oversight and Accountability identified several logistical and resource problems confronting committees that have prevented them from using their extensive powers.³⁴⁹

There are also several institutional features which prevent the opposition parties in the National Assembly from effectively holding the government to account. Time allocated to speakers in parliamentary question time is based on party strength, thus favouring the ruling

³⁴⁵ Mattes, South Africa: Democracy Without The People? pp.25-26

³⁴⁶ Richard Calland and Paul Graham, “Progress and Democracy” in Calland and Graham (eds.), *Democracy in the Time of Mbeki*, (Cape Town: IDASA, 2005) p.33.

³⁴⁷ Lia Nizjink and Jessica Piombo, “Parliament and the Electoral System: How Are South Africans Being Represented?” in (eds.) Jessica Piombo and Lia Nizjink, *Electoral Politics in South Africa: Assessing the First Democratic Decade*, (New York: Palgrave Macmillan, 2005), p.67.

³⁴⁸ Mattes, South Africa: Democracy without the People, p.27.

³⁴⁹ H. Corder, *Report on Parliamentary Oversight and Accountability*, prepared for the Office of the Speaker,

party and committees may not issue separate minority reports in which opposition parties can express their views.³⁵⁰

Proposals for Parliamentary Oversight

To enhance the capacity of the Parliament to make meaningful contributions to policy development and exercise effective oversight and scrutiny, I propose the four following recommendations: First, make it mandatory for the minister or government official who is responsible for a piece of government legislation to attend committee deliberations. Second, change the rules for question time so that they are allocated to parties not according to their relative size in the house but instead on a first come first serve basis. Despite their overwhelming numerical superiority, ANC members make little use of question time, whereas opposition is more active in submitting questions.³⁵¹ This reflects the fact that the ANC sees parliament not as an arena for debate and an opportunity to hold government accountable but primarily as a venue for passing laws initiated by the government and facilitating policy implementation by the executive. Third, increase the funding and size of the support staff for parliamentary committees so that they are more effective in amending legislation, preparing for parliamentary questions and conducting public hearings. Fourth, establish a committee, like the one which exists in Sweden, devoted exclusively to oversight. This committee would be comprised entirely of MPs and civil servants, and it would be empowered to audit the entire chain from policy development in parliament to implementation in state agencies. The audit focuses on the whole system and broad policy questions. A single committee for implementation review would be the best use of scarce resources, because it would concentrate scarce review staff in one committee, rather than spread them thinly over the entire committee system.

IV. Federalism and Political Parties

Citing the example of India, observers of South African politics frequently point to the provincial and local governments as potential counterweights which may eventually mount a challenge to the ANC dominant centre. In India, after all, it was as a consequence of their success at the state level that regional parties broke the Congress Party's national political hegemony. Indeed, there does seem to be some potential for regional bases of opposition. The IFP formed the government of KwaZulu-Natal after the 1994 election, as did the National Party in the Western Cape. Yet, as the previous chapter demonstrated, the provinces powers are highly circumscribed, with few areas of exclusive legislative competence, so even when they are governed by the ANC's opponents there is only occasional evidence of serious differences over policy issues between central and regional government.³⁵² Furthermore, attempts by provinces to make even minor amendments to their constitutions have been opposed by the central government who fear that such a move would undermine the power of the central government.³⁵³

Since the previous chapter dealt extensively with the legislative, administrative and fiscal capacity of the provinces, as well as the issue of intergovernmental relations, I will focus only on

³⁵⁰ Antoinette Handley, Christina Murray and Richard Simeon, "Learning to Lose, learning to win: Government and opposition in South Africa's transition to democracy" in (eds.) Edward Freidman and Joseph Wong, *Political Transitions in Dominant Party Systems: Learning to Loose*, (New York: Routledge, 2008) p.198.

³⁵¹ Nizjink and Piombo, *How Are South Africans Being Represented*, p.70.

³⁵² Handley, Murray and Simeon, *Learning to loose*, p.201.

³⁵³ Christina Murray, 'Provincial Constitutions in South Africa: The (non)Example of the Western Cape' (2001) *Neue Folge Band 49 Jahrbuch des öffentlichen Rechts* 481 – 512.

the ability of the provinces to establish independent political bases. There are a number of institutional factors which have inhibited the provinces from developing distinctive political identities and a capacity for policy making which is autonomous from the central government. For one, provincial legislatures are elected at the same time as the national parliament. National political parties are responsible for preparing the electoral lists for elections at both levels. A consequence of this is that provincial elections are not about regional issues in which regional figures play a prominent role, rather they are part of the national election campaign in which provincial interests are secondary. Consequently, Simeon and Murray conclude, "...there is a common perception that provincial legislators are elected on the coattails of national politicians. Service in a provincial legislature is reserved for distinctively low ranking party figures".³⁵⁴

The ANC practice of "deploying" provincial premiers represents the clearest indication of the political subordination of the provinces. Since 1998, it has become a practice for the ANC National Executive Committee to appoint provincial premiers in the ANC provinces; no longer do ANC provincial chairpersons become premiers.³⁵⁵ The central organs of the ANC have frequently used the tactic of deployment to bring recalcitrant provincial leaders in to line, dissolving the local party executives in provinces and replacing them with more compliant figures.³⁵⁶

Proposals for Enhancing the Political Capacity of Provincial Parties

The highly integrated nature of South Africa's provincial-national party structure has meant that provincial issues are seldom the subject of election campaigns and that regional parties have little autonomy. Disentangling the provincial and national party systems would not only increase the autonomy of provincial governments, it offers the potential of mitigating the effects of the one party dominance which exists at the national level. Therefore, I propose the following recommendations: First, empower the provincial parties to prepare provincial electoral lists. Second, hold provincial elections at a separate time from national elections, so that provincial issues are the focus of discussion. Third, prohibit the ANC practice of deploying premiers and require that the Provincial Premier is elected by the legislature from amongst its members and can only be removed by a no confidence vote by the provincial assembly. Finally, prohibit premiers and provincial members of cabinet from sitting on the bodies of national party organization. In Gauteng, for example, the premier and two members of cabinet (MEC) are part of the National Executive Committee (NEC).³⁵⁷ This inhibits the emergence of an autonomous provincial sphere and increases the ability of national politics to dominate provincial political leadership.

V. One Party Dominance

Such is the degree of political dominance by the ANC that it is often remarked South Africa has in fact two constitutions; one is the national constitution and the other is the party's constitution. Although there is no consensus in the academic literature as to what constitutes one

³⁵⁴ Richard Simeon and Christian Murray, "Multi-Sphere Government in South Africa: An Interim Assessment" *Publius: The Journal of Federalism*, 31(4):65-92 at pp.76.

³⁵⁵ *Ibid*, p.76.

³⁵⁶ Geoffery Hawker, "Political leadership in the ANC: the South African provinces 1994-1999," *The Journal of Modern African Studies*, 38(4):631-658.

³⁵⁷ Simeon and Murray, Multi-Sphere Government in South Africa: An Interim Assessment, p.76.

party dominance, for most scholars who have considered the question the ANC appears to possess the characteristics of a dominant party.³⁵⁸ In his influential study, T.J. Pempel identified three crucial dimensions when dealing with party dominance in a competitive environment. To be considered dominant, a party must: 1) be electorally dominant for an uninterrupted and prolonged period; 2) have the presence of a unifying historical project; 3) have the ability to dominate the policy agenda of the country.³⁵⁹

Evidence advanced for the ANC's dominance has firstly been electoral. In the first three national elections of the democratic era, in 1994, 1999, and 2004, the ANC secured respectively 63.1, 66.4 and 69.7% of the votes cast.³⁶⁰ Second, the ANC possesses a self-conception that fits the dominant party mould in a key way. It conceives of itself as a national liberation movement that represents a project which transcends class, region and race. Third, the ANC institutions, forums and conferences have deliberated over the country's most important post-apartheid policy choices. Furthermore, the ANC's dominance is further aided by the fragmented nature of opposition parties along provincial and ethnic or racial lines. The Inkatha Freedom Party (IFP), with a largely Zulu following, is based predominantly in KwaZulu-Natal, for instance, whilst the United Democratic Movement (UDM) is concentrated in the Eastern Cape, and the DA has a mostly white support base.³⁶¹

Intra-party Democracy

As a consequence of the political hegemony of the ANC and the absence of credible political opposition, it is vital for democratic accountability and good governance that the ANC is committed to transparency, consultation and inclusion in the internal working of the party. Participation in decision making allows for the selection of more capable leaders and the adoption of responsive policies as well as the development of a democratic culture.³⁶² For a governing party, intra-party democracy is particularly important as it makes government responsive to popular demand. Participation by party membership and lower structures in decision making also imposes checks against bad leadership.³⁶³ For this to exist, a culture of tolerance of debate and dissenting opinion by the party leadership is a necessary precondition of internal democracy.

There are at least two dimensions along which to assess intra-party democracy; candidate selection and policy formation.³⁶⁴ The current process for candidate selection is as follows: Each local branch makes nominations and the branch submissions are tallied at regional conferences and the names that have been nominated most frequently are placed at the top of the regional list. The regional lists go in turn to provincial committees. The provincial lists are passed up to a national list conference overseen by a national list committee at which priorities are determined. Finally the list goes to the ANC's National Executive Committee, which adjusts the lists determining the ranking of the candidates.³⁶⁵

³⁵⁸ Herman Giliomee and Charles Simkins, *The Awkward Embrace: One Party Domination and Democracy*, (Cape Town: Tafalberg Publishers, 1999).

³⁵⁹ T.J. Pempel, *Uncommon Democracies: The One Party Dominant Regimes*, (London: Cornell University Press, 1990), p.3-4.

³⁶⁰ See the South African General Elections Report www.saweb.co.za/elections.com. Accessed on 7 April 2010.

³⁶¹ Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Bloomington, Indiana: Indiana University Press), p.157.

³⁶² Susan Scarrow, "Political Parties and Democracy in Theoretical and Practical Perspectives: Implementing Intra Party Democracy", *National Democratic Institute for International Affairs* (2005), p.3.

³⁶³ Alan Ware, *Citizens Parties and the State*, (Cambridge: Polity Press, 1987) p.33.

³⁶⁴ Scarrow, *Political Parties and Democracy in Theoretical and Practical Perspectives: Implementing Intra Party Democracy*.

³⁶⁵ Constitution of the African National Congress, available at http://www.anc.org.za/ancdocs/discussion/2007/constit_ammend.pdf, retrieved on 2 April, 2010.

It is in the realm of policy formation that the ANC's commitment to intra-party democracy is most questionable. Under the ANC constitution, the National Conference, held every five years, decides and determines policies and programs and elects the top leadership and other members of the National Executive Committee (NEC).³⁶⁶ The NEC is comprised of eighty eight national executive members who are elected by branch delegates. Critics note, however, that the election for the NEC and senior officials are very tightly managed, that debate within the NEC is circumscribed and intolerant of leadership criticism, and that a small coterie of leaders can usually dominate the rest of the Party.³⁶⁷

Although the National General Council (NGC) is formally empowered to ratify or rescind any of the decisions taken by any of the ANC bodies, officials of the National Conference and the National General Council do not play any significant role in policy making, other than to endorse leadership positions, which are generally unchallengeable because of the ANC's organizational practices of democratic centralism and party discipline.³⁶⁸ For their inability to play any significant role in policy making, Tom Lodge has termed the ANC National Conferences "a legitimating ritual."³⁶⁹

Though the ANC is obviously no longer an exiled liberation movement, many trace its culture of hierarchy, discipline and democratic centralism to the strategic assistance it received from the Soviet Union in the 1960s and 1970s.³⁷⁰ In more recent years the ANC's internal politics has become subjected to even tighter restraints. At its 1997 national conference, the party amended its constitution in ways which strengthened executive authority. The changes included holding general conferences every five years rather than every three.³⁷¹ All ANC structures, including caucuses in parliament, legislatures and municipalities, were placed under the supervision of the NEC.³⁷² Since 1999, within the parliamentary caucus, office bearers such as the whips and committee chairpersons have been appointed by the National Working Committee. The 1997 conference re-endorsed the principle of democratic centralism, which together with a constitutionally prescribed prohibition on factionalism made it very difficult for any organized mobilization to assert itself against leadership policy.³⁷³ A code of conduct adopted in 1997 insisted that 'ANC structures in parliament' should be subject to the authority of the organizations highest decision making bodies, and that elected ANC members should not use parliamentary procedures to "undermine" party policy.

The most prominent recent example of policy decisions being taken by the ANC leadership with little input or consultation, and indeed deliberately attempting to foreclose debate, was the adoption of the Growth Employment and Redistribution (GEAR) economic policy in 1996. GEAR, South Africa's current macro economic framework, was adopted by the ANC leadership without reference to – indeed with the exclusion of – party members, lower level party structures and even alliance partners such as the South African Communist Party (SACP) and the Congress Of South African Trade Unions (COSATU).³⁷⁴ Focusing on neo-

³⁶⁶ Constitution of the African National Congress, available at http://www.anc.org.za/ancdocs/discussion/2007/constit_ammend.pdf. Accessed on 2 April, 2010.

³⁶⁷ Anthony Butler, "How Democratic is the African National Congress," *Journal of Southern African Studies*, 31(4):719-736, at pp.722-24.

³⁶⁸ Butler, How Democratic is the African National Congress, p.730-32.

³⁶⁹ Lodge, The ANC and the Development of Party Politics in Modern South Africa, p.210.

³⁷⁰ Stephen Ellis and Tsepo Sechaba, *Comrades against Apartheid: The ANC and the South African Communist Party in Exile*, (London: James Currey Ltd, 1992).

³⁷¹ Butler, "How Democratic is the African National Congress?" p.729.

³⁷³ Lodge, *Politics in South Africa*, p.161.

³⁷⁴ Vincent Darracq, "Being a 'Movement of the People' and a Governing Party: Study of the African National Congress Mass Character," *Journal of Southern African Studies*, 34(2):429-449 at pp.437-439

liberal economic reforms, such as cutting public expenditure on social services and the privatization of public enterprises, the lower party structures and general membership were only notified of the new economic policy after its completion and warned by both Mbeki and Mandela that it was “non-negotiable.”³⁷⁵

Whereas the country’s previous official development program - Reconstruction Development Program (RDP), - a mixed economy redistributive agenda - was adopted after a largely consultative process, the drafting of GEAR took place in government departments and the NEC subcommittee on economic transformation, thus bypassing the NEC and NWC, the ANC’s most representative bodies (the NEC did not see the program until after its adoption by the government) and reinforcing executive dominance over the party’s policy determination process.³⁷⁶ Those who disagreed with GEAR within the ANC and its alliance partners were given an ultimatum to either “recant” or face “harsh sanctions” and those who did not recant were subjected to disciplinary hearings and stripped of their positions within the party.³⁷⁷

Proposals for Intra Party Democracy

In light of my proposals for reforming the current electoral system and moving to a STV system it would be, I believe, inappropriate for the ANC to maintain a system for candidate selection which places such significant control in the hands of the party leadership and in particular the National Executive Committee. Instead, I propose moving to a primary system for candidate selection which does not require choices to be approved by party leaders. There are, of course, concerns about moving to such an inclusive selection process. In particular, opening up the candidate selection process so that candidates are chosen directly by voters, it is feared, will weaken the cohesiveness of the party since voters and members views and preferences, it is argued, will become more important than the programmatic profile of the party as whole.³⁷⁸ However, as I will now move on to discuss, the high degree of centralization and hierarchal control over policy which currently exists in the ANC makes it unlikely that this would happen. It is important, however, that there is a waiting period before new members are allowed to participate in candidate selection. ANC membership tends to fluctuate widely between government elections.³⁷⁹ In the absence of a waiting period candidates could sign up members simply to vote in selection process, the consequence of this, according to Katz and Mair, is that activists are becoming less powerful and party elites are strengthened.³⁸⁰

The preceding discussion has shown that when it comes to policy formation the ANC is highly hierarchal, exclusionary and intolerant of dissent. I propose the following institutional changes in order to foster a more democratic culture of party policy making. First, on important and divisive policy issues hold internal plebiscites. Second, enable the National Conference to initiate new policy. The National Conference is the highest decision making body in the ANC and its most representative elected body – 90% of its delegates are elected. Yet, its current powers are limited to confirming and accelerating policies that have already been proposed. Third, re-establish the role of the ANC policy unit. Since the period of the transition from

³⁷⁵ M.W. Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Cape Town, Zebra Press, 2005), p.87.

³⁷⁶ Darracq, Being a ‘Movement of the People’ and a Governing Party: Study of the African National Congress Mass Character, p. 439.

³⁷⁷ Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC*, p.92.

³⁷⁸ Paul Pennings and Rueven Hazan, “Democratizing Candidate Selection: Cause and Consequences,” *Party Politics* 7(3):267-275.

³⁷⁹ Tom Lodge, The ANC and the development of party politics in modern South Africa,” *Journal of Modern African Studies*, 42(2):189-219, at p.191.

³⁸⁰ Richard Katz and Peter Mair, “Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party,” *Party Politics* 1(1):5-28.

Mandela to Mbeki, the ANC policy department has been superseded as a core policy organ, subordinated to the President's office. Fourth, require cabinet ministers, who are the core agents in policy making and implementation, to appear before ANC elected bodies- NWC, NC and NEC and answer questions about the adoption and implementation of policies.

Should We Encourage Intra-Party Democracy?

Not everyone is convinced that instituting greater intra-party democracy within the ANC is the most effective means of enhancing political competitiveness. Instead, it is argued, the prohibition on internal debate and the hierarchal form of decision making will eventually lead to some factions within the party to feeling so marginalized and aggrieved that they will eventually leave the ANC and form a breakaway party. In short, fostering intra-party democracy, it is claimed, is in fact counterproductive as it is only when groups within the party feel they are not being provided with a voice that they will exit.

Until recently it was believed that the most likely source of factional conflict within the ANC would emerge from within the tripartite alliance between the ANC, COSATU and SACP. Numerous commentators have argued that the alliance partners have been rendered subordinate, particularly in the implementation of economic strategy, and that "it is only a matter of time before COSATU joins the SCAP in leaving the Alliance and forming a labour backed mass party of opposition to ANC which is becoming increasingly dominated by a bourgeois right wing."³⁸¹ Evidence of the increasingly conflict ridden nature of the relationship emerges³⁸²

Therefore, it came as somewhat of surprise when Jacob Zuma, who draws much of his popular backing from COSATU and SACP, was able to oust the incumbent leader Thabo Mbeki at the ANC National Conference in Polokwane in December 2007, and in the subsequent months it was those associated with the Mbeki leadership who became marginalized and left the ANC to form a new party, the Congress of the People (COPE). While to a certain degree the party fragmented along class lines and socio-economic interests in Polokwane, the division was not entirely about ideological differences. ANC stalwart Raymond Suttner claims the struggle was "a battle for loot" between those who sought to benefit from continued Mbeki rule as opposed to those who sought to win out under Zuma.³⁸³

Patronage, Clientelism and One Party Dominance

Increasingly, political scientists regard patronage and clientist linkages as one of the crucial variables in explaining why dominant parties persist in spite of meaningful competitive elections. Kenneth Greene points to the way in which dominant parties manipulate the public budget for partisan purposes by diverting funds from the budget of state owned enterprises, doling out patronage jobs and providing state contracts in exchange for campaign contributions.³⁸⁴ Similarly, Ethan Scheiner convincingly demonstrates that the reason for the Liberal Democratic Party (LDP) domination of Japanese politics since 1955 was in large measure due to the party's highly developed clientistic networks, especially with the construction

³⁸¹ Roger Southall, "The State of party politics: Struggles within the Tripartite Alliance and the decline of opposition," in (eds.) John Daniel, Adam Habib and Roger Southall, *State of the Nation: South Africa, 2003-2004*, (Cape Town: HSRC, 2003).

³⁸² Tom Lodge, "Policy Process within the African National Congress and the Tripartite Alliance," *Politikon*, 26(1):5-32.

³⁸³ Raymond Suttner, "What are the alternatives to these harmful voices?" *Business Day* 8 July, 2008.

³⁸⁴ Kenneth Greene, *Why Dominant Parties Lose: Mexico's Democratization in Comparative Perspective*, (Cambridge: Cambridge University Press, 2007).

industry which provided the party with large donations and mobilized voters in exchange for public works contracts.³⁸⁵

The ANC's Black Economic Empowerment (BEE) policies have become one of the key instruments by which the ANC provides patronage to allies, and by rejecting particular BEE deals or excluding individuals from access, punishes opponents. Designed in order to increase black ownership of capital and enhance black access to the marketplace (through education, job training, hiring and promotion), there is increasing evidence of "crony capitalism" and influence pedaling reaching high in the ANC. Specifically, senior party figures have financially benefited from the awarding of contracts, politically connected individuals are the ones who benefit from privatization and the recipients of state contracts, it has later emerged, have often made financial donations to the party.³⁸⁶

It is at the level of municipal politics, however, that the practice of politically preferential tendering has become so ubiquitous that it is an almost accepted convention in ANC controlled local governments. In its "Through the Eye of a Needle" document, the National Working Committee complained of "companies" that "identify members that they can promote in ANC structures so that they can get contracts", suggesting such interests could even sponsor the mass "buying of membership cards to set up branches that are only ANC in name." Recent housing scandals in Gauteng and Limpopo, involving local government councillors and officials using their power to allocated RDP dwelling to kinsfolk and friends, supply an indication of the spread of patron-client relationships within the ANC.³⁸⁷

Proposals for Eradicating Patronage and Clientelism

The South African Constitution dramatically improved the formal framework of transparency and accountability, requiring that all executive organs of state must be accountable to the National Assembly, and directing that mechanisms be established for the Assembly to carry oversight functions. Furthermore, over the last ten years the ANC government has introduced a wide range of legislation and institutions of accountability that have transformed the governance landscape, and which have generally followed international best practices.³⁸⁸ There are, however, certain areas in which government transparency could be enhanced. First, put an end to the practice of political appointments in the upper echelons of the public service. Not only do these appointments provide the ruling party with a source of patronage job opportunities, but a neutral public bureaucracy can help ensure that state resources are not being used for partisan purposes. Second, require political parties to submit a report of their finances to an independent committee. Currently there is no obligation on any political party to account to any oversight agency. This lacuna in the law helped the ANC for years to hide the existence of Chancellor House, an organization which surreptitiously functioned as an in house investment firm to raise funds for the party. Chancellor House was able to take advantage of its connection with the government to secure lucrative contracts, the proceeds of which it donated to the party. For

³⁸⁵ Ethan Scheiner, *Democracy Without Opposition: Opposition Failure in One Party Dominant System*, (Cambridge: Cambridge University Press, 2006).

³⁸⁶ Stefan Anderson, "The African National congress and its critics: 'predatory liberalism', black empowerment and intra alliance tensions in post apartheid South Africa, *Democratization*, 13(2):303-322 at pp.315-17; Roger Southall, "Black Empowerment and corporate capital" in (eds) Sakhela Buhlungu, John Daniel and Roger Southall, *State of the Nation: South Africa, 2007-2008*, (Cape Town: HRSC Press, 2007), pp.455-478.

³⁸⁷ Lodge, *The ANC and the development of party politics in modern South Africa*, p.213-214.

³⁸⁸ Sam Sole, "The state of corruption and accountability" in (ed), John Daniel, *State of the Nation: South Africa, 2004-2005*, (Cape Town: HRSC Press, 2005), pp.94-96.

example, in November 2007 the parastatal electricity supplier Eskom awarded the biggest single contract in its history, for six steam generators worth R20 billion, to a consortium including Hitachi Power. At the time of the award that company was 25% owned by Chancellor House.³⁸⁹

Concluding Remarks

In this paper I have proposed a number of recommendations designed to enhance the responsiveness, accountability and competitiveness of South Africa's political system. It is important, however, to be aware of the limitations of institutional design, especially as a mechanism for achieving greater socio-economic equality. For instance, the ANC leadership's adoption of a neo-liberal economic framework, and the attendant reduction of government spending and restraint on wage increases, was animated by a belief that in order to attract foreign capital investment it would have to adopt the prescriptions of the IMF.³⁹⁰ Similarly, the capacity of institutional design to foster political competitiveness is limited. Race and class continue to be the most salient political cleavages in South Africa. Furthermore, the correlation of race and poverty makes it unsurprising that the ANC - the party of black liberation, which at least ostensibly is committed to social democratic principles - receives the overwhelming support of black South Africans. This does not mean that South Africans simply vote according to ascriptive identities and that elections are simply an "ethnic census". The working class and unemployed are willing to consider other electoral choices but find that the present opposition parties do not advance policies that would advance their interest.³⁹¹ As long as the main opposition party, the Democratic Alliance, fails to broaden its support beyond the white community and continues to be seen as the defenders of apartheid privilege, one party dominance will persist.

³⁸⁹ "The ANC's New Funding Front", *Mail and Guardian*, Nov 10, 2006.

³⁹⁰ Michael MacDonald, *Why Race Matters in South Africa*, (Cambridge Mass: Harvard University Press), p.143.

³⁹¹ Adam Habib and Rupert Taylor, "Political Alliances and Parliamentary Opposition in Post Apartheid South Africa" in (ed.) Roger Southall, *Opposition and Democracy in South Africa*, (London: Frank Cass Publishers, 2001), pp.207-227.