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POLICY BRIEF



CAPE TOWN, SOUTH AFRICA



CONSTITUTIONAL DEMOCRACY AND THE RULE OF LAW IN SOUTH AFRICA

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“The rule of law incorporates elements such as a strong constitution; an effective electoral system; a commitment to gender equality; laws for the protection of “minorities” and other vulnerable groups; and a strong civil society”



(FROM LEFT TO RIGHT), MR JOHN JEFFERY, DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT; JUSTICE YVONNE MOKGORO, CHAIRPERSON OF THE CONSTITUTIONALISM FUND; AND JUSTICE ALBIE SACHS, FORMER JUSTICE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA, AT THE PUBLIC DIALOGUE “DEMOCRACY AND THE RULE OF LAW IN SOUTH AFRICA”, HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, IN JUNE 2015.

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Introduction

The Centre for Conflict Resolution (CCR), Cape Town, South Africa, and the Johannesburg-based Foundation for Human Rights (FHR) hosted two public dialogues in Cape Town on 15 June 2015 on “Democracy and the Rule of Law in South Africa”, and on 8 September 2015, on the question: “Is the South African Constitution a Paper Tiger?”

As part of its transition to majority rule, South Africa adopted what some have described as one of the world’s most progressive constitutions in 1996. This marked the end of an era of “rule by law” in which the law was part and parcel of the oppressive system of apartheid. The constitution of democratic South Africa is founded on a set of core values, including: human dignity, equality, non-racialism, non-sexism, supremacy of the constitution, the rule of law, universal adult suffrage, and a multi-party system of democratic government. Accountability, responsiveness, and openness are also important founding principles. Despite notable achievements in the last two decades by the African National Congress (ANC) government since 1994 to address the injustices of the past and entrench constitutionalism, gaps remain which if not urgently addressed, could potentially render the constitution a “paper tiger” that is unable to deliver on the country’s socio-economic transformation aspirations.

1. Constitutional Democracy and the Rule of Law

The rule of law and democracy are related and mutually reinforcing principles. The rule of law is a fundamental concept in advancing democracy, and is defined by the Washington D.C.-based World Justice Project (WJP) as a system in which the following four universal principles are upheld: first, the government and its officials and agents as well as individuals and private entities are accountable under the law; second, the laws are clear, publicised, stable, and just; are applied evenly; and protect fundamental rights; third, the process through which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and fourth, justice is delivered timeously by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the make-up of the communities that they serve.

The rule of law incorporates elements such as a strong constitution; an effective electoral system; a commitment to gender equality; laws for the protection of “minorities” and other vulnerable groups; and a strong civil society. Supported by an independent judiciary, the concept has a crucial function to play in society by ensuring that civil and political rights, civil liberties, and the equality and dignity of all 54 million South African citizens are not at risk. Constitutionalism has been firmly entrenched in South

Africa's democratic history and belief system. Furthermore, the country has implanted strong institutions in its constitution with the aim of establishing constitutional control and judicial review in its young two-decade democracy. The constitutional court is the guardian of the constitution. The significance of the rule of law and its close relationship with the idea of a constitutional democracy cannot be overemphasised. Constitutions do much more than establish government: they also regulate the relationship of leaders with their citizens, as Yvonne Mokgoro, chair of the South Africa-based Constitutionalism Fund and former justice of the Constitutional Court, noted.

In a constitutional democracy, there is an inherent tension between the courts and the other two branches of government – the executive and the legislature – since judges are required to enforce the text of the constitution as part of their duties. The courts also rely on the executive and legislature to enforce orders that go against them. South Africa has to manage the tension between judges who interpret and enforce the constitution, and the elected executive and legislature who are representatives of their constituents. Courts play an important role in upholding and protecting the rights entrenched in the constitution. They are also a potential bulwark against corruption and maladministration.

“A constitution is alive and well if its values and rules are evident in the way in which citizens or those exercising public power conduct themselves”



PARTICIPANTS OF THE CCR PUBLIC DIALOGUE “IS THE SOUTH AFRICAN CONSTITUTION A PAPER TIGER?”, HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, IN SEPTEMBER 2015.

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2. Is the Constitution a Paper Tiger?

According to Kate O'Regan, former justice of South Africa's constitutional court, asking whether the South African constitution is a paper tiger, is akin to asking how South Africans seek to make their constitution work. A constitution is not self-executing, but derives its force and strength from the values and practices of the people, both within and outside government. A constitution's strength and efficacy is thus less a question about the text itself, and more of a political and social question about the citizenry. A constitution is alive and well if its values and rules are evident in the way in which citizens or those exercising public power conduct themselves.

It would be incorrect to answer the question of whether the constitution is a paper tiger by looking only at the document, although South Africa's constitution is a good, solid, well-drafted text that provides a firm foundation for government and institutions. The country's bill of rights of 1996 is a fine example of its type, admired the world over. It is comprehensive and includes political, economic, social, and cultural rights. These rights bind not only the state, but also private individuals and corporations “where applicable”. The preamble and Section One of the constitution provide a strong foundation and guidance for the interpretation of the rest of the document. These founding values are profoundly important in determining the meaning of other provisions of the constitution.

“The controversial Protection of State Information Bill – commonly known as the Secrecy Bill – passed by the South African parliament in April 2013 ostensibly seeks to establish a system to regulate state information”



JUSTICE KATE O'REGAN, FORMER JUSTICE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA, AT THE "IS THE SOUTH AFRICAN CONSTITUTION A PAPER TIGER?" PUBLIC DIALOGUE IN CAPE TOWN IN SEPTEMBER 2015.

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The South African constitution is further rooted in the political struggles of the past. Albie Sachs, a former judge of South Africa's Constitutional Court, noted that the document was the culmination of the struggle against colonialism and apartheid. It reflects long-standing demands for equality, freedom, and human dignity. Constitution-making in the country started in earnest in the 1990s, but its roots run deeper. Thus, in many ways, the constitution represents South Africa's "conversation with its own history". The bill of rights is therefore a fundamentally anti-apartheid document.

Throughout the country, South Africans from all walks of life seek to work with the constitution to fulfill its promise. The project of constitutional democracy is alive and well. Cases before the constitutional court do not accurately present the full depth and richness of civic engagement and the struggles to achieve the constitutional vision that are taking place all over the country. Nevertheless, they do illustrate just how many individuals and organisations see the document as providing guidance and protection for them. They make clear that the constitution is a living document, and that it is a rallying point for civil society in all walks of South African life. Litigation is one tool for civic engagement, but there are many others.

The text provides a good basis for the constitutional project, reflecting and building on a long history of civic struggle for social justice and democracy in South Africa. Citizens have a deep-rooted tradition of civic activism in communities across the country. While these factors suggest that the constitution is not a "paper tiger", the success of the project of constitutional democracy is never assured. The challenge, therefore, is how to give effect to the provisions in the constitution, and how to use the mechanisms provided by the document to bring about the desired socio-economic transformation of South Africa, which still remains among the most unequal societies in the world.

Critics have noted that the constitution has no concrete meaning to the lives of poor people, thus potentially eroding its legitimacy. They have further observed that the socio-economic rights contained in the document are utopian because the reality for many poor South Africans is that they do not have access to housing. The August 2012 Marikana massacre in which members of the South African Police Service (SAPS) killed 41 striking miners and injured at least 78 mineworkers who were protesting against low wages and poor living conditions, was raised to make the point that the constitution appears to offer little protection to those whom the document is meant to protect. The Marikana example was also mentioned to illustrate how some South Africans struggle to make sense of the constitution when the police force – which is established by the supreme law to prevent crime, protect citizens, maintain order, and uphold the law – instead uses lethal force against citizens with impunity. Furthermore, there were concerns that the document seems to cater only for a certain group of people, suggesting that there is one constitution for the rich and another for the poor. Related to this was the perception that the constitution does not provide justice for the poor, as some court decisions seem to favour the

ruling class and the rich who can therefore escape conviction or sentencing for crimes committed as a result of their status in society. There were also fears that, although non-racialism is one of the values in the constitution, there is still widespread racism in South African society.

3. Threats to the Rule of Law in South Africa

South Africa is faced with a number of issues which impact adversely on a culture of democracy, human rights, and the rule of law. At the same time, Arthur Chaskalson, the first president of the country's constitutional court, referred in May 2012, to a growing culture of intolerance in which abusive responses are made to those who criticise the government or its leaders. The controversial Protection of State Information Bill – commonly known as the Secrecy Bill – passed by the South African parliament in April 2013 ostensibly seeks to establish a system to regulate state information. However, the bill has been criticised for mirroring the alleged growing intolerance by the ruling ANC towards diverse views. After much criticism from civil society, president Jacob Zuma declined to sign the constitutionally questionable bill into law, and referred it back to parliament for review.

South Africa also struggles with persistent corruption. Corruption threatens the constitutional order by undermining police services and other institutions that have been created to protect and uphold the constitution. It can also destroy the trust of citizens in public institutions. In a 2013 Transparency International survey, 83 percent of South Africans rated the police as the country's most corrupt public institution. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and socio-economic development. Decisions of South Africa's courts upholding the constitutional values of accountability and transparency, the Office of the Public Protector (established by the constitution), and provisions of the supreme law entrenching rights of access to information and just administrative action, can all provide avenues for exposing and addressing corruption.

Uneven and poor provision of public services by local governments across South Africa, which are meant to be at the forefront of service delivery, has led to widespread and often violent protests. Deeply structural poverty and extreme and persistent inequality in a society in which there are great disparities of wealth and increasing evidence of corruption, inevitably lead to dissent in impoverished areas. In 2014, South Africa experienced a sharp rise in “service delivery” protests, thus reversing the declining trends after 2009. Peaceful protests are accepted as a form of public participation and a democratic exercise of the freedoms of expression and association. However, when they turn violent, these protests often have an adverse impact on the rule of law. According to South Africa's deputy minister of justice and constitutional development, John Jeffery, in the 2014/2015 financial year, police resources were committed to dealing with 14,740 protest incidents of which 12,451 were peaceful and 2,289 resulted in violence.

“South Africa's bill of rights should protect everybody living in South Africa. In an effort to build an inclusive society, the preamble of the Constitution states that “South Africa belongs to all who live in it, united in our diversity”



MR JOHN JEFFERY, DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, AT CCR'S "DEMOCRACY AND THE RULE OF LAW IN SOUTH AFRICA" PUBLIC DIALOGUE IN JUNE 2015.

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South Africa also witnessed a spate of xenophobic attacks on foreign nationals in April 2015. At least eight people were killed, and thousands displaced in and around Durban and Johannesburg. These attacks followed similar acts in May 2008 in which 62 people were killed, and about 100,000 displaced. Between 2008 and 2015, about 350 people have been killed in xenophobic violence. These attacks are at odds with South Africa's bill of rights, a cornerstone of the country's democracy. The document should protect everybody living in South Africa. In an effort to build an inclusive society, the preamble of the Constitution states that "South Africa belongs to all who live in it, united in our diversity".

The Zuma administration has also been accused by its critics of departing from the provisions of the constitution, subverting the rule of law, and threatening the principle of the separation of powers. The constitutionality of some government decisions and procedures for the appointment of persons to high state offices has further been questioned. An example is president Jacob Zuma's appointment of the head of the National Prosecuting Authority, Shaun Abrahams, in June 2015. Allegations of defying court orders have also been levelled against the government by its critics. Most recently, it was accused of violating a court ruling in June 2015 ordering the arrest of Sudanese president, Omar al-Bashir, while he was in Johannesburg attending an African Union (AU) summit. The government argued that it had granted the Sudanese president diplomatic immunity as a head of state attending the meeting, but was later denied leave to appeal the ruling. The ANC National General Council (NGC) called for South Africa to withdraw from the Hague-based International Criminal Court (ICC) in October 2015.

There have been calls from within the ruling ANC to amend sections of the constitution which are viewed as an obstacle to the country's socio-economic transformation.



A PARTICIPANT AT THE CCR PUBLIC DIALOGUE "DEMOCRACY AND THE RULE OF LAW IN SOUTH AFRICA", HELD AT THE CENTRE FOR THE BOOK, CAPE TOWN, IN JUNE 2015.

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4. Amending the Constitution

The South African constitution can be amended by a two thirds majority for all provisions except for Section One which requires a 75 percent parliamentary majority. Seventeen amendments have been made to the document since 1996. Most of these were to correct technical and structural issues, and were adopted without dissent. There have been calls from within the ruling ANC to amend sections of the constitution which are viewed as an obstacle to the country's socio-economic transformation. Some observers worry that such calls may undermine respect for the document as a fundamental social contract and set of basic rights. Pierre de Vos, a professor at the University of Cape Town (UCT), has cautioned against amending the constitution to suit a specific moment or to respond to an immediate political problem. Amendments of substance, however, are different and may be warranted. Justice Arthur Chaskalson did not foresee any amendments in the foreseeable future that would undermine the constitution's core values, and argued that the danger to the document lay elsewhere. He focused instead on the government's failure to deal with the poverty, inequality, and unemployment in South African society, and the corruption, poor education, failing public health system, poor service delivery, crime, and social divisions within South African society as greater threats to the constitution.

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Policy Recommendations

The following seven key policy recommendations emerged from the two public dialogues:

1. Political parties should avoid judicialising matters that are political in nature, as this places judges under pressure to make decisions that should better be resolved through political struggle and the legislature.
2. South Africa's government and its philanthropists should create a fund to cover legal costs for those who are unable to access justice through the courts.
3. All South Africans must take responsibility for the constitutional project in order for it to succeed. South Africans must create a society in which people feel that they have a stake, and that it is worth investing in the constitutional project.
4. Local government should respond better to the developmental needs of communities across the country in order to minimise violent protests. To deliver public services more effectively, local government capacity and leadership also need to be urgently strengthened.
5. South Africa's Inter-Ministerial Committee on Migration – established in April 2015 – must ensure that the human rights of foreign nationals living in South Africa are protected, as required by the constitution.
6. All three branches of government – the executive, legislature, and judiciary – need to play their part in ensuring that South Africa's democracy continues to be guided by the constitution. They must uphold the supremacy of the constitution, and respect the independence of all three branches of government.
7. Civil society should continue to play its watchdog role in keeping constitutionalism alive in South Africa through advocacy, litigation, and public debate.

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