

## **CONCEPT NOTE FOR CONFERENCE: ‘HAS THE SOUTH AFRICAN CONSTITUTION PERFORMED IN THE PAST 20 YEARS?’**

The notion of evaluating the performance of a constitution is a relatively recent one. With the growth and development of constitution-making over the past three decades, an understanding of what constitutions seek to achieve and how they achieve it is of increasing importance: Are there better or worse ways of drafting constitutions? Which ways are more or less likely to lead to the desired outcomes? And, how are we to understand the elements of a constitution, the interaction between particular provisions and the concrete realities that unfold after the moment of constitution drafting?

The first draft of the South African Constitution was passed on 8 May 1996 and a revised final version came into operation on 4 February 1997. It is almost 20 years since this document has been in force – whilst a relatively short period in the history of constitutions, it has enough of a track record to ask the question whether it has performed.

In early 2015, the International Institute for Democracy and Electoral Assistance (**International IDEA**) issued a tender for a project that would evaluate the performance of the South African Constitution over the past 20 years. The tender was won by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (**SAIFAC**), a centre of the University of Johannesburg. A conference on the performance of the South African Constitution is being planned to engage with and evaluate the findings of SAIFAC’s report, which will be released at the conference. The conference will be held at the University of Johannesburg on 26 and 27 May 2016.

In this project, International IDEA wished to pilot a particular methodology for assessing the performance of a constitution. Constitutional performance is itself a contested notion: what does it mean for a constitution to perform? And, how should this be measured? This methodology is contained in a document titled ‘Evaluating Constitutional Implementation’, drafted by Prof Tom Ginsburg. It outlines two perspectives from which the performance of a constitution can be engaged. The first perspective is an ‘internal’ one that seeks to evaluate the performance of a constitution against its own self-declared goals. Constitutions also include various provisions requiring, for instance, elections to be held every five years: the internal perspective also involves evaluating whether these requirements have been complied

with. The problem is that, assessed from this perspective alone, a constitution might perform well and yet itself be severely flawed when considered against normative criteria concerning what constitutes a good political community. Flowing from this recognition is the second perspective, which is an ‘external’ one. It involves evaluating a constitution against a set of general standards about what constitutions ‘should’ do. Of course, the difficulty here is in determining what external standards should be used in evaluating a constitution. Ginsburg proposes four external criteria against which to evaluate performance.

First, he identifies ‘legitimacy’: a successful state requires a level of legitimacy from the general public in order to function effectively. Constitutions can be important sources of such legitimacy and one of the key criteria of performance is whether or not they succeed in creating legitimate structures and institutions. Secondly, all societies exist with a large measure of disagreement. The key question is whether a constitution succeeds in channeling such disagreement into formal political institutions and avoids, for instance, violent eruptions in the political community. It is also important here to evaluate whether the constitutional provisions do not exacerbate existing political tensions.

Thirdly, a key goal of constitutionalism, according to Ginsburg, is to ensure that institutions and representatives act on behalf of the people and not in a self-serving manner. Ginsburg refers to the notion of agency costs, which occur when government officials act in pursuit of their own interests. This raises questions whether these officials respect the independence of agencies of government (where independence threatens their personal self-interest). An example is corruption, which involves officials acting in their own interest rather than that of the wider political community.

The last criterion concerns government attempts to address collective-action problems and the provision of public goods since one of the functions of government is to provide that which cannot be provided by citizens alone. Goods such as national security, economic development, large-scale infrastructure and environmental protection all fall within this category. The relationship between the constitutional structure and the provision of these public goods warrants investigation.

This project partly wished to test and develop the methodology of assessing performance. SAIFAC has both applied and developed this methodology. Its findings are of course not

only important for their methodological implications but their substantive ones too. The report begins by outlining the background to the South African Constitution, constitutional negotiations and provides an account of the general internal goals of the constitutional order. It then considers the performance of particular facets of the constitution including rights provisions, democratic institutions, the judiciary, chapter nine institutions, multi-level governance, and the security-services provisions. A survey was also conducted of the attitudes of members of the South African public in Gauteng towards key features of the constitutional order. A concluding chapter attempts to tie together all the findings and draw out themes from the analysis. It also attempts to recommend areas where the Constitution might be amended to improve its performance in the future, though these are relatively limited.

The conference will seek to engage critically with SAIFAC's report and offer perspectives from a wide-range of actors in the constitutional space. These include politicians, academics, judges, NGOs and many others. The conference will also be multi-disciplinary in the sense that it will draw on the expertise of a wide-range of practitioners such as lawyers, political scientists, philosophers as well as those with specific expertise in the area. The conference hopes to provide an opportunity for discussion around the extent to which the Constitution has succeeded in achieving the goals it has set itself as well as those commonly recognised to be important for constitutions around the world.