The Democratic Opportunity

Does South Africa need electoral reform?

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TRANSPARENCY

Marikana

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GUPTAGATE

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Preface

Since President Jacob Zuma's victory in 2007 at the ANC's elective conference in Polokwane, the realisation that the country needs quality leadership has risen to prominence. Notably, the Congress of the People (COPE) was formed in response to the outcry against the ousting of President Thabo Mbeki who was (and still is) believed by some to be more qualified for the high office of President than his successor.

There has been much criticism of President Jacob Zuma's leadership. The country's opposition and some within the tripartite alliance (ANC, COSATU and SACP) have, among other things, questioned and challenged his credibility, judgement and competence. High profile individuals in business have also joined the fray. In particular, Dr Reuel Khoza, Non-Executive Chairman of the Nedbank Group, in the company's 2011 annual report, expressed the following criticisms of South Africa's political leadership in his chairman's report:

"SA is widely recognised for its liberal and enlightened constitution, yet we observe the emergence of a strange breed of leaders who are determined to undermine the rule of law and override the constitution. Our political leadership's moral quotient is degenerating and we are fast losing the checks and balances that are necessary to prevent a recurrence of the past. This is not the accountable democracy for which generations suffered and fought…We have a duty to build and develop this nation and to call to book the putative leaders who, due to sheer incapacity to deal with the complexity of the 21st Century governance and leadership, cannot lead. We have a duty to insist on strict adherence to the institutional forms that underpin our young democracy." (1)

Dr Khoza's remarks were viewed as a direct affront towards President Jacob Zuma, his government and the collective leadership of the ANC.

Under President Jacob Zuma's administration a brighter spotlight has been cast on the country's major challenges including unemployment, inequality, poverty, and government inefficiency. Concerns about the state of the public service which is perceived to be in decline; government's diminishing responsiveness to citizens' needs and demands; and collapsing governance across government departments at local, provincial and national levels have also come to the fore.

Community protests across the country have been on the increase. Unrest in the mining sector has taken longer than expected to dissipate, much to the consternation of politicians, business and civil society alike. These developments have posed a great challenge to law enforcement agencies. Police responses have attracted censure following the killing of 34 miners at Marikana and other instances of the use of lethal force on unarmed protesters. Seemingly President Jacob Zuma's administration appears to have elicited misgivings across the broad spectrum of society. And that is what has earned them the label of "a strange breed of leaders".

Notwithstanding the evidence produced to disparage his government, President Jacob Zuma did not originate these political and systemic challenges currently besetting the country. To deny that the signs of deterioration in governance and leadership were not present during President Thabo Mbeki's tenure would amount to selectiveness in observation.

So why make a fuss about leadership, the political and socioeconomic trajectory of the nation, and the allegedly declining state of the ruling party, now?

It is precisely because of the apparently glaring difference between the calibre of those that led in the past and those that are leading in the present. It was easier to look aslant at the failings of government and weaknesses of our political system when these were

shrouded in the respectability, nobility and admirable standing of the leaders of yester-year. However the glory days of the Nelson Mandela presidency with its optimism and euphoria about a brighter future for a united South Africa, has given way to forebodings of political instability, greater fissures in social cohesion, and economic decline.

The contrast between the magnanimous, awe inspiring character of the country's first democratic president and of the incumbent head of state – who came to power under a cloud of speculation about his moral uprightness and questions about his standing before the law, having been acquitted of rape and rescued from corruption charges – have left many people perturbed about the nation's present and future.

The ANC has an overarching role in South African politics. The nature, health, performance, history and conduct of the ANC, its leaders, affiliates and members are often central to all political discourse. Its successes and failures, actions and omissions, competence and incompetence, integrity and perceived and real corruptness, are the reference points in discussions related to the political and socioeconomic trajectory of the country. This is not unusual.

In the past five years there has been a growing preoccupation with the concept of accountability. Opposition and civil society alike have found its utility in their criticism of the conduct of the ruling party's leaders and of the failures of government. The assertion is that leaders are becoming a law unto themselves.

Assessing the discourse concerning the state of governance in the country, it would seem that the consensus is that the growing instability is symptomatic of a floundering leadership, as underscored by Dr Khoza. So what will remedy this state of affairs?

In 2012 the Economist magazine suggested that the country consider replacing its closed list (PR) Proportional Representation electoral system with a constituency-based system.(2) The Democratic Alliance (DA) and most recently the newly formed Agang

SA, headed by former UCT Vice Chancellor and World Bank Executive, Dr. Mamphela Ramphele, echoed this call in 2013.

The assumption is that if we change the system by which politicians come to be elected into legislatures it will invariably improve the quality – moral, educational, experience – of individuals that will be elected. If our aim is to install a responsive, accountable and credible government that respects the will of the people, we need to ask whether the institutions we currently have in place, to borrow from Karl Popper, are "well designed and organized to serve these aims". (3)

Could different institutional arrangements and specifically a different electoral system ensure that a more responsive, accountable and credible government is installed in future? Would it lead to improved governance?

Will electoral reform solve service delivery challenges? Will it lead to a decrease in the levels of corruption? Will it make civil servants more conscientious about their duty towards the tax-paying citizenry?

I would be one of the foremost supporters of electoral reform if it could indeed guarantee that our country makes greater progress towards good governance. I, like many South Africans, have had my fair share of bad experiences whilst trying to access the services that I am entitled to as a citizen of this country. What is most unsettling is that civil servants who are supposed to be dedicated to the public good are the ones who perpetrate these undesirable encounters. It is at the coalface of service delivery that citizens directly feel the consequences of bad governance.

* * *

On 3 June 2013 I visited the Department of Labour Pretoria Provincial Office. Like many other South Africans, I had been retrenched a few months prior and was there to apply for my unemployment insurance fund UIF benefits. The application process involves the usual bureaucratic procedures akin to all government departments. I stood

in the enquiries queue where a delightful middle-aged lady checked my documents. She then directed me to a room on the first floor.

This one big room is configured into cubicles on the left and right, with seating places for clients running through the middle and towards the end of the room on one side.

I entered and sat in the section marked document collection. About an hour passed as the queue snaked along and I edged closer to the document-dispensing consultant – I had arrived at about 11 am.

When my turn came up around 1 pm, the consultant, a gentleman who had come in about an hour earlier, was seemingly lackadaisical in his mannerisms, dragged his feet and complained about his tired state. He looked around uninspired and ranted about how there were too many clients.

He looked at my documents and checked my details on the system and advised me that I had a document missing. Everything else was in order. Before I got up, he handed me an application form. This was an application I had to complete in order to be included on the job seekers database. I could not proceed with the claim until and unless I submitted this document and presented a receipt as proof.

The job seekers database is a noteworthy initiative. It is the department's way of encouraging and assisting unemployed people to keep looking for opportunities.

With my documents checked and my job seekers form in hand, I stepped out to retrieve the missing document, and to register on the database. At around 2 pm I was back at the first floor sitting in another snaky queue waiting to submit my UIF claim as well as my supporting documents.

The service was generally acceptable albeit slow. Having now queued for about an hour (since 2 pm), it came to my attention that although it was only 3 pm the consult-

ants' posturing was that of people preparing to leave. The office hours are from 8 am to 4 pm. A sense of consternation began to build up in the queue.

At around 3:15 pm the consultants began hinting that we'd have to come back the following day. The informal announcement went something like this: "I hope you all realise that this office closes at 4 pm… at 4 pm we will be going home… you might have to consider coming back tomorrow."

Subsequently the lady sitting at my right, who had arrived while I was out sorting out my missing document, told me that this is how things worked around here. She had been at the same office some days before and after waiting for hours she and others who remained in the queue by 4 pm were simply dismissed.

Another lady sitting at my left concurred. She had had the same experience. I was taken aback! I had been there for practically the whole day and I was not alone. "How can these civil servants treat us, tax-payers, so deplorably?" I thought. I contested the remarks and attitude of the consultants together with some of the other clients: "Even the banks don't kick clients out if they arrived prior to closing time, why should it be different with this office?"

As if our contentions were a muted song, sounds of "Goodbye… See you tomorrow!" rang between the cubicles. All this while a queue of clients most of whom had arrived hours before the closing time sat patiently waiting to be served.

When the clock struck 4 pm the remaining consultants promptly shut off their computers and announced that we should come back the following day. At this stage there were about seven clients left to be served. Only two consultants were willing to remain for an extra 10 minutes to finish serving the clients who were already at their cubicles.

I continued my protest, "This is not what Batho Pele (putting the people first) is about". One Harold Raseroka, a consultant responded, "This is how things work around here. If you want to challenge it you'll have to speak to the people at the top… You can go

ahead and take it up", he said this as he cleared his desk and switched off his computer together with his colleagues. And just like that they left, with no remorse, sympathy, or understanding they just left us there. As I walked to the car I thought about the deficit of accountability, poor service delivery and bad governance.

If what I experienced that day is what Batho Pele is about then we are in trouble. For how long will civil servants and government take its citizens for granted?

A great percentage of people who were at that office with me that day – and on many other days – had to take leave to go there. Others took a day out of their job seeking activities, and who knows, that day could have resulted in a big break. That their time is wasted is not only a loss to them, but it is also a loss of productivity and thus a loss to the economy. In how many government offices does this same scenario replicate itself on a daily basis? Do these civil servants not see how their lack of conscientiousness is detrimental to the progress and development of our country?

This is just one albeit infinitesimal experience of poor service delivery and consequence of inefficient governance. Even so, it should not be acceptable. Government and all its employees should primarily be interested in delivering service for the public good rather than doting over their own narrow interests. There is an urgent need to entrench the principles of good governance within all institutions and machinery of the state.

* * *

I have written this book in the hope of contributing to efforts towards change and the promotion of good governance in our country. I thought it important to explore the relationship between electoral systems and good governance since respectable leaders and publications have suggested electoral reform to be the remedy for South Africa's governance challenges.

My investigation of the relationship between electoral reform and good governance is less about outlining the merits of one electoral system over others as it is about understanding the implications of electoral system choice on governance outcomes.

The Opportunity

Democracy does not guarantee success, it guarantees opportunity.
Reverend Jesse Jackson, Mail & Guardian, 2013

God gives opportunities; success depends upon the use made of them.
Ellen G. White, Patriarchs and Prophets, 1890

In the lifespan of a human being, the first two decades are considered the years of assimilation in preparation for later life. During this stage bonds are formed, beliefs are entrenched, the brain together with the body develop to maturity and identity is established.

The knowledge, experience and development garnered during childhood and adolescent years are evidenced through adulthood when the individual establishes his place and makes his contribution - constructive or destructive - to society.

Unfortunately, the same does not follow in the world of politics. From day one, newly democratic governments are expected to assimilate and apply in tandem. Government experiments have real time impacts and establish the course for future ascendancy or decline.

Governing in the 21st century is especially difficult as globalisation, the expansion and advancement of information and communication technologies mean that government has the pressure to deliver locally at international standards.

There is additional pressure on South Africa as one of the youngest democracies on the African continent to learn from the mistakes of its counterparts and to leapfrog them in its own democratic experience. The pertinent question is what use is South Africa making of its democratic opportunity?

The foundations of South Africa's democracy

South Africa's transition from a long history of racism and apartheid to democracy has been said to be a miracle. However, the peaceful transfer of power that was realised through the 1994 general election was not merely a product of an inexplicable supernatural phenomenon. The very decision by the nationalist government and the liberation movement to trade the battlefield for a roundtable was key and the outcomes of those negotiations were the ingredients for and the foundation upon which a democratic South Africa was built.

Because of the decisiveness of leaders on both spectrums of the race and political divide, South Africa escaped the fate of many countries the world over, whose transitions to democracy were realised through civil war. But this was only the beginning. There was much still to be done to transform South African society.

The engines of the newly democratic government ran at high velocity from day one. The large work of reconfiguring a legal system that was premised on institutionalised racial segregation was the first thing on the agenda. Parliament was up for the challenge. After the elections on 27 April 1994, the National Assembly and the Senate formed the Constitutional Assembly, which wrote a new Constitution and subjected it

to two years of public consultation and debate. In 1996 the new Constitution was adopted. The work of the first democratically elected Parliament was so impeccable that the Constitution is esteemed highly as the most progressive Constitution in the world.

This Constitution is the foundation of the country's democracy. In it are contained the values of the nation such as: "human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." (4)

Chapter nine of the Constitution provides for the creation of institutions supporting constitutional democracy. These include the Public Protector, the South African Human Rights Commission, and the Commission for the Promotion and Protection of the Rights of Cultural and Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General and the Electoral Commission.

These institutions are independent and subject only to the Constitution and the law. They exist to safeguard the values, rights and principles enshrined in the Constitution and to ensure that all citizens comply, whether they be in the highest echelons of political office, commercial entities or ordinary citizens.

The democratic government has succeeded in making the state more accessible to all its citizens. It has broadened participation, firstly through supporting the Electoral Commission to deliver credible elections in which all eligible citizens can participate. It has deepened transparency by enjoining government departments to publish annual reports, and by passing the Promotion of Access to Information Act (PAIA) of 2000 that creates a framework for citizens to access information primarily in the possession of the state.

Potholes in the democratic path

Despite the progress that has been made in the country's democratic development, challenges remain. Community protests have escalated – popularly known as 'service delivery protests'. These protests generally have as their theme as discontent and frustration with the level and quality of delivery by government.

However, some have a political undertone as they are spill overs of factional battles within council structures and municipalities that are dogged by political wrangling the root of which lays in the cadre deployment and the blurring of lines between party structures and municipal authority.

Adding to the malaise is spiking public sector corruption. Together with the concerning rise of corruption is the evidence of poor capacity of government departments, at all levels, to manage budgets and implementation of policy. World bodies, including the International Monetary Fund (IMF) and the World Economic Forum, have highlighted government failings that have contributed to the serious economic challenges, including unemployment and slow growth that the country is facing.

Credit ratings agency Moody's downgraded South Africa's bond rating on 27 September 2012 sighting concerns about political instability and labour unrest, given the spate of unprotected strikes in the mining industry from August 2012, which continue intermittently. Moody's observed the following in substantiating the downgrade:

"Moody's reassessment of a decline in the government's institutional strength amidst increased socio-economic stresses and the resulting diminished capacity to manage the growth and competitiveness risks. Shrinking headroom for counter-cyclical policy actions, given the deterioration in the government's debt metrics since 2008, the uncertain revenue prospects and the already-low level of interest rates. The challenges posed by a negative investment climate in

Moody's has attributed rising instability to government's institutional weakness and declining capacity to manage risks. This substantiates forebodings about the declining state of governance.

Indeed government's own assessments concur with Moody's. The results of the management performance assessments for the 2012/2013 financial year, released by the Department of Performance Monitoring and Evaluation, which is located in the presidency, presents evidence of weaknesses in governance.

These assessments were conducted using the MPAT (Management Performance Assessment Tool) that assesses the quality of management practices. MPAT is based on the theory that the quality of management practices has a significant bearing on the quality of services delivered to society.

Shortcomings in service delivery suggest a lowering quality in management practices in government. And the report reveals that the cause of poor service delivery in all government departments is weak administration. Government cannot deliver on its mandate unless it has "an efficient, effective and accountable public service" (6) which is currently not the reality.

The Basic Education Department's failure to deliver textbooks in provinces like Limpopo and the Eastern Cape, intermittent shortages of anti-retrovirals (ARVs) in hospitals across the provinces, government departments failure to pay small businesses within 30 days, failure to enforce social labour plans in the mining sector and lapses in policing leading to incidents of police brutality, among others, are all consequences of bad administration.

The current state of governance necessitates reflection. To overcome the contemporary challenges assailing the country, leaders together with citizens have to be as inten-

tional as those individuals who presided over the country's transition from apartheid to democracy were. South Africans cannot sit and wait for a miracle; the miracle has to be deliberately concocted.

Summary of MPAT Results

The results indicate that in certain areas of management, weaknesses are evident across the public service. In 9 out of 29 management areas assessed, the majority of departments are not yet compliant, let alone working smartly.

With regard to the standards related to Governance and Accountability:

a) 80% of departments are non-compliant in service delivery improvement requirements (service charters, service standards and submission of service delivery improvement plans to the DPSA). This situation is an anomaly, given that improving service delivery is a priority of government.

b) 76% of departments are non-compliant with ensuring that they had policies and systems in place for promoting professional ethics, which includes submission of financial disclosures to the PSC. In addition, 64% of departments are non-compliant with the legal/regulatory requirements for fraud prevention. This is of concern given Government's commitment to combating corruption.

With regard to the standards related to Human Resources Management:

a) 74% of departments were assessed as non-compliant with the DPSA directive that their approved organisational structure reflects funded posts only.

b) 88% of departments were assessed as non-compliant with human resource planning requirements, which include submission of human resource plans and progress reports to the DPSA. Sound human resource planning is critical for service delivery and for budgeting.

With regard to Financial Management:

a) 52% of departments were assessed as non-compliant with the requirements for demand management. Sound demand management is a prerequisite for good financial management and supply chain management as it requires departments to develop procurement plans informed by needs assessments and accurate specifications of the goods and services to be procured.

b) 60% of departments were assessed as non-compliant with the requirement to have processes in place for detecting and preventing unauthorised expenditure, addressing audit findings and communicating findings to responsible officials.

Source: State of management practices in the Public Service: Results of management performance assessments for the 2012/13 financial year (22 July 2013) p. 3.

Democracy is about institution building

Institutions are important because they influence and shape the behaviour, decision-making and actions of the individuals and societies operating within them.

Naill Ferguson expounds, "Institutions are, of course, in some sense the products of culture. But, because they formalise a set of norms, institutions are often the things that keep a culture honest, determining how far it is conducive to good behaviour rather than bad." (7)

Francis Fukuyama weighs in on the matter iterating that "institutions reflect the cultural values of the societies in which they are established." (8)

Ferguson and Fukuyama agree that a society's culture and values inform the nature of institu-tions that it creates. However Ferguson goes further to suggest that institutions can be created to redirect, recreate or reform a country's culture from what it is to what is more desirable.

In other words, it may be that a country's culture and values may have been such that it produced and tolerated institutions that support authoritarian forms of government possibly characterised by Big Man rule and patrimonialism (nepotism and favouring of friends and associates in the distribution of state resources).

But in the event that the country embraces democracy, democratic institutions may be established to reform the authoritarian practices of former years.

Therefore in order to develop a democratic culture of politics and governance, a country must establish institutions that promote the formation and maintenance of such a democratic political culture.

This sounds like a straightforward proposition. However, when one considers the amount of time and upheaval it took for what are today the worlds' most developed democracies to establish their complex political institutions, it is unrealistic to expect that countries that have only recently made the transition to democracy could do the same in a matter of a decade or two. Even so, that is what is expected of young democracies like South Africa. Although it seems unfair to place such a burden on contemporary transitional states, it is not.

These consolidating democracies such as South Africa have the advantage of examples to model themselves after, and the privilege of hindsight which enables them to draw lessons from the histories and experiences of those nations that travelled this road before them. The older democracies of the West did not have that luxury.

History had a huge bearing on the development of the state, the rule of law and accountable government in the West. Developed countries combined these three facets to create what are today considered stable democratic governments. As Fukuyama puts it "If we could understand how these basic institutions came into being, we could then perhaps better understand the distance between Afghanistan or Somalia from contemporary Denmark." (9)

Since institution building is shaped by historical context, it is not a once off exercise. It is a continuous process. Institutions like the societies within which they exist are subject to growth and improvement, as well as to decay if they are not periodically reviewed and at other times overhauled. Fukuyama observes:

"Political institutions develop, often slowly and painfully, over time, as human societies strive to organize themselves in order to master their environments. But political decay occurs when political systems fail to adjust to changing circumstances. There is something like a law of the conservation of institutions. Human beings are rule-following animals by nature; they are born to conform to the social norms they see around them, and they entrench those rules with often transcendent meaning and value. When the surrounding environment changes and new challenges arise, there is often a disjunction between existing institutions and present needs. Those institutions are supported by legions of entrenched stakeholders who oppose any fundamental change." (10)

South Africa has engaged in an intense exercise of institution building since 1994 and has been working to entrench democratic political practice in both government and the broader society. However, the ructions that are pervading the country's politics and challenging its stability are to an extent an indication of political decay.

The call for electoral reform

Some within and outside the country, including political analysts and opposition parties think that altering the electoral system is the place to start. South Africa currently uses a closed list Proportional Representation system. The recommendation is that PR format be replaced with a constituency-based system. It is argued that this may be the catalyst to restore good governance in the public sector.

The call for electoral reform locates the root of political decay within the processes and procedures used to elect public representatives. It takes issue with how certain individuals or political parties attain to high office.

Critically, the call for electoral reform problematizes the constancy of the balance of political power that has characterised the country's democracy since its inception which sees the African National Congress (ANC), a liberation movement, in a com-manding position. The ANC has consolidated its dominance in the country's political landscape.

The ANC is an enduring institution of the liberation struggle and now of the new democratic order. Despite the evidence of decay within its own structures – growing factionalism, patrimonial tendencies, corruption, maladministration – the ANC, does not seem to be significantly losing its share of power. Its continuing dominance is not commensurate with the evidence of decay within the party.

There is no neutrality or altruism in politics. Electoral reform is seen as a means to immunise the state from the rot that has formed in the ruling party.

The logic is that if we replace the mechanism through which the ANC has attained its dominance with an al-ternative system, no sooner will the ANC see electoral demise. The ANC's demise would then open up space for other, more worthy parties and candidates – namely op-position parties - to carry on the job of governing.

That said, it is not advisable that the aim of institutional reform should merely be to change the balance of political power. Political parties should be able to affect the bal-ance of power by carrying out their duty of campaigning and making a case for their own policies.

Nonetheless, in the case of South Africa, the state of the governing party and the insta-bility within it tends to spill over into government, thus impacting on governance and service delivery. Similarly, the spill over is also evident in communities, which are some-times used as pawns in factional battles.

Thus the recommendation of institutional reform is not disqualified by its likely misap-propriation by opposition parties. The country's current political and socioeconomic trajectory calls for such an institutional review and may even require institutional over-haul.

But none should think that achieving such a reform – if warranted – would be accom-plished with minimal resistance. There are many stakeholders, interests and beneficiar-ies of the status quo who will oppose any fundamental change. The theoretical exercise of exploring the veracity of the idea of electoral reform is a more pleasant and less con-suming work than actually implementing the change.

Since electoral reform has come out as the one grand recommendation from intelligent folk, it is important to ask: What is it about electoral systems that gives the impression that electoral reform holds the key to turning around South Africa's governance mal-aise?

Electoral systems as institutions of democracy

Electoral systems are one of the many institutions of democracy. As an institution, an electoral system anticipates and encourages certain types of behaviours, decisions and actions from the electorate and potential leaders within a country's political system, whilst discouraging others. Therefore the type of electoral system a country adopts determines the values and principles that will be emphasised in that political system e.g. fairness, representation, accountability, proportionality etc.

What is certain is that there is no such thing as the 'best' electoral system. Each system has its pros and cons. Electoral systems do not function in a vacuum but are influenced by the broader institutional framework and political culture of a country. It is therefore probable that one electoral system applied in two different countries could have varying implications for governance in each country.

What to expect

This book explores the implications that electoral systems have for governance in three African countries: South Africa, Kenya and Zimbabwe. South Africa uses the closed list Proportional Representation system whilst Kenya and Zimbabwe use the constituency-based first-past-the-post system. Using the comparative method I attempt to verify whether or not reforming South Africa's electoral system to a constituency-based system would result in improved governance.

In setting out to understand how electoral systems contribute to good governance it is important to at least know what good governance is. There are many variations to the definition and application of the concept but I limit myself to three broad themes in my discussion: 1) rule of law, 2) participation, and 3) accountability.

After establishing the often-ambivalent concept of good governance, I set out to delineate the significance of elections in governance. What do elections have to do with good governance? After all elections take place every four of five years in most countries, governance takes place in between. So to what extent can a country's elections determine a country's governance outcomes and are elections more influential than other institutionalised processes when it comes to guaranteeing good governance?

South Africa uses closed-list proportional representation (PR) to conduct its national and provincial elections and a mixed system, a combination of PR and constituency-based system, for municipal elections. How has PR impacted how the political system is organised? What effect has it had on relations between the various groups in society (South Africa has a long history of racial and ethnic divisions? Has it had a positive or a negative influence of the country's political culture? Has it contributed to the establishment of good governance?

In contrast Kenya and Zimbabwe use first-past-the-post system for Parliamentary elections. The President in each country is elected directly by citizens using a run-off system. Do the accounts of their political history give evidence that their use of first-past-the-post sets them apart as beacons of good governance on the continent? What does their experience tell us about the superiority of first-past-the-post over PR – if anything – that would result in South Africa being better governed?

The chapters that follow set out to give answers to these questions and to determine whether South Africa should indeed pursue electoral reform.

Making Acquaintance with Good Governance

Governance is a neutral term. Any government, whether democratic or authoritarian can govern. Governance encompasses "the state's institutional arrangements; the processes for formulating policy, decision-making and implementation; information flow within government; and the overall relationship between the citizens and government". (11)

Governance can also be described as "the manner in which power is exercised in the management of a country's economic and social resources for development". (12)

But once you start adding an adjective before the word governance, such as good or bad, it becomes a unit of analysis. Governance then becomes a descriptive term that can be used to determine quality, value and benefit – or lack thereof. The concept good governance lends a normative value to the notion of governance, directing attention to the quality of governance.

Because governance refers to the management of the economic and social resources of a country, it cannot be separated from the political organisation of that country. The politics of a country have massive implications for how the government manages and distributes state resources. Therefore the quality of governance hangs on the elements that constitute its system of government. (13)

Today South Africa is a democratic state. Fundamental to its political identity is the promotion of political and civil rights with a particular emphasis on inclusion and equality. The key facets of its character are non-racialism and non-sexism and the equality of all under the law. It is on this basis that the state is expected to manage and distribute state resources. When government conducts its business in line with these democratic values of openness and respect for the law and human rights it is practicing good governance.

In contrast, why was apartheid South Africa an example of bad governance? The trouble with apartheid South Africa was that government governed in the interest of a few. State resources were used in a discriminatory manner to carry out the systematic underdevelopment of large pockets of the country. Its policies promoted inequality, uplifting the white minority at the expense of the black majority, contrary to the values of democracy.

Whilst whites enjoyed an ever-improving quality of life and political recognition, blacks were relegated to limited access to health services, poor education; limited access to housing, sanitation, infrastructure; as well as perpetual social and political marginalisation and exclusion. Thus whilst pursuing economic policies that created wealth for white communities, the same policies intentionally extended and deepened poverty in black rural and township communities.

That's what made colonial rule in other parts of Africa, including Kenya and Zimbabwe examples of bad governance. Achieving democracy was therefore indispensible for these countries to discard discriminatory policies that were productive of inequality, poverty, and political and social marginalisation, in to install governments that would govern in the interest of all.

What is the link between democracy and good governance?

Democracy is a system of governance characterised by popular participation through regular, competitive, free and fair elections. In addition, democracy is a system that enshrines the rule of law, which includes the guarantee and protection of civil and political rights, as well as checks and balances on executive power through the establishment of democratic institutions to ensure government accountability.

For democracy to thrive, the majority of citizens must accept it as the legitimate form of social order. Its values should be entrenched in the psyche of all groups within society. This will be attested by a willingness to subject all conflicts to "specific laws, procedures, and institutions sanctioned by the new democratic process" (14) for resolution. Democracy in essence elevates the democratic value system making all other organisation or custom subject to it.

The success of democracy by and large hinges on the attitude and behaviour of the individuals that occupy posts in state institutions. The expectation is that they will rule in the interests of the people – minority and majority groups alike -because they owe the privileged positions they hold to the people who lend them their trust. As long as elected officials live up to that trust, they retain legitimacy, no sooner do they betray that trust then they lose credibility in the sight of the people and delegitimise the political order.

In order to retain legitimacy beyond elections, elected representatives must assent to democratic principles and demonstrate these in their conduct. (15) These principles in most cases are embedded in a country's Constitution. That is the case in South Africa, Kenya and Zimbabwe. (However constitutions, laws and rules mean little unless ruling elites and civil servants abide by them. This is made more evident in later chapters).

Since 1994 South Africa has held regular national, provincial and local government elections. All of the country's elections have been declared free and fair by international and domestic standards and the Independent Electoral Commission has been lauded for its professional and efficient running of elections. The Constitution provides for the separation of powers between the executive, the legislature and the judiciary and guarantees basic human and political rights, notably freedom of expression, freedom of the press, and freedom of association. All these are attributes of good governance. Democracy by definition implies more than just governance, but good governance.

Democracy's link to the concept of good governance lays in the understanding that good governance,

> *"…extends beyond the capacity of the public sector to the rules that create a legitimate, effective and efficient framework for the conduct of public policy. It implies managing public affairs in a transparent, accountable, participatory and equitable manner. It entails effective participation in public policy-making, the prevalence of the rule of law and an independent judiciary, institutional checks and balances through horizontal and vertical separation of powers, and effective oversight agencies." (16)*

The apparent synergies between the conceptual formulations of democracy and good governance underline the fact that good governance cannot be aspired to or achieved outside the context of democratic government.

> *"Good governance requires an efficient, executive, a functioning legislature, an independent judiciary and the effective separation and balance of powers, constituent elements of a democratic regime. Consequently, good governance is not sustainable without effective democratic institutions." (17)*

International best practice in the promotion of good governance, spear headed by international financial institutions such as the IMF and World Bank, has identified three main areas that are imperative to good governance: 1) Enhancing the rule of law, 2) Increasing public participation, and 3) Strengthening accountability and promoting transparency.

Components of good governance

Enhancing the Rule of Law

The law encompasses constitutions, legislation, rules and regulations, and is an objective standard that binds all members of society. It creates a sense of predictability in political, economic and social dealings in daily life. Absence of the rule of law creates ambiguity in the understanding of what is permissible and impermissible.

Even so, having a legal framework alone is not enough. The law must be enforceable. This requires effective law enforcement architecture with an independent judiciary that is able to interpret and enforce the law without fear or favour, thus ensuring "the impartial administration of justice". (18)

In addition, government must have the capacity to monitor adherence to rules and regulations in various sectors and where there are breaches of the law, must be in the position to prosecute. It is no use for legislators to promulgate laws that government has no capacity to police.

Increasing public participation

Through elections, citizens exercise their right of participation in public processes by electing their public representatives. Having credible alternative policies to choose from is necessary for meaningful citizen participation in elections.

Voter turnout is important to the credibility of any election. Low voter turnout can put the legitimacy of elected governments to doubt as it may be argued that these do not have the confidence of the majority of citizens. It is also an indication of a citizenry that is apathetic and may signal a broader reluctance or failure of citizens to participate in political processes or lend their voices to issues concerning the wellbeing of de-

mocracy and its institutions. Such a situation produces a context in which executive dominance begins to take hold; it leads to the diminishing power or influence of the legislature relative to the executive.

For public representatives to retain their legitimacy beyond elections, they must constantly seek to get the public's buy in for their plans and programmes. This requires undertaking public consultation and promoting citizen participation in policy formulation, implementation and monitoring.

> *"Participation helps to build coalitions supporting policy reforms while involvement of civil society helps build social capital. Restricting participation in policy-making often weakens the legitimacy, accountability and the quality of decisions made… Effective participation is inextricably linked to the existence of legitimate and representative parliamentary procedures, which are a constituent part of a democratic regime." (19)*

However, government departments must view public consultation as more than just a box ticking exercise for it to be meaningful. Constantly disregarding the citizens' voice invariably leads to alienation and citizens may resort to resistance, non-cooperation, or even violent demonstrations to drive their point home.

Strengthening accountability and promoting transparency

The role of elections is also to enable the electorate to hold public representatives to account. Government must be responsive and answerable to the electorate. This is known as vertical accountability.

Public officials and elected representatives have an obligation to inform and consult the public on matters of policy, law and public finances. As Moncrieff argues, such an obligation means they should provide justification for decisions made, actions taken and failure to deliver on election promises and government programmes. (20)

Furthermore, accounting officers – publicly elected officials in the case of democracies – may be subjected to questioning. They are obliged to answer questions – even uncomfortable questions – that assist in the investigation of their conduct, actions, failures and attainments. This is what oversight and monitoring consists of.

Some officials plead ignorance or speak of loopholes in the system when they are called to justify certain unsavoury activities. But what public officials need to know is that they are not only subject to the rule of law but to logic. "Power should be bound by legal constraints but also by the logic of public reasoning". (21) For instance the promiscuous behaviour of a private citizen is less likely to provoke the ire of society than that of a President or prominent leader – South Africa's current first citizen has had first hand experience.

As in bookkeeping, accounting officers must keep pedantic account of their activities, and as the other meaning of giving an account implies, they must also be able to provide a narrative justification for their acts.

Provision for sanctions and the ability to enforce them is an important element of accountability. Sanctions without enforcement translate to weak accountability. Enforcement strengthens responsiveness and respect for the rule of law and strengthens the citizenry's confidence in democratic governance. (22)

Human beings generally fear consequences and they try to avoid sanction. But where they calculate that they will be able to get away with 'murder' they will be emboldened to break the rules. Impunity is a threat to the rule of law and accountability. It creates demagogues and autocrats who feel they are bigger, better, stronger than anyone else.

Realising political accountability requires a clear separation of powers and strong oversight mechanisms within government. There must be sufficient and effective checks and balances between the different organs of government – the legislature must have the power to keep the executive in check and an independent judiciary must be en-

abled to enforce standards of accountability on the legislature and executive – that is horizontal accountability.

In addition, the public service must be kept separate from politics and opposition parties must be effective in ensuring that the executive does not abuse its powers. (23)

Notwithstanding, exercising accountability is impossible without transparency. As such, government must be transparent in the administration of its duties and the public must be given access to as much information necessary to enable it to evaluate and assess government performance.

There is an overlap between the three components of good governance that I have outlined. This is a strength rather than a weakness because it demonstrates that good governance is also a matter of character and spirit rather than just a matter of cold theoretical exposition.

Legitimacy and good governance

Legitimacy is that quality that makes the authority of governments and leaders valid. When a government is recognised and accepted to be legitimate, citizens are most likely to comply with its rule. A legitimate government or leadership is one based on a relationship of trust between the rulers and the ruled.

The source of a leader's legitimacy also has implications for how that leader will employ his authority. Max Weber identified three basis for legitimacy: tradition, charisma or legal-rational authority.

For instance, monarchs in yesteryear derived legitimacy from a widely accepted belief that their authority was divinely sanctioned or governed by hereditary right. Kings and queens could thus veil their arbitrary acts under the veneer of tradition. After all they accounted only to themselves or a heavenly deity. Should the monarch order the unjus-

tified execution of a servant who committed a minor infraction such as getting a mathematical calculation wrong or for something as ridiculous as being unable to tell what the monarch dreamt the previous night, on what grounds would one question the monarch's actions?

This type of legitimacy is based on fear and coercion rather than a social contract built on trust.

Charisma refers to personality driven leadership. Leaders of newly independent states drew their legitimacy predominantly from their larger than life personality.

These leaders such as Nkrumah in Ghana, Nyerere in Tanzania, Kenyatta in Kenya were held in reverence by their followers. The citizens of these newly independent states were enthralled by the "power" of these leaders who were credited with the liberation of the nation. There was a kind of mysticism that surrounded these leaders who held sway over the people.

Society is fixated on what the leader or ruler says, on his ideals, ideology and views. He is the "father" of the nation. As the father of the nation he knows what is best for the nation. The people look to him for answers, for hope, for promise, for progress.

It is little wonder that in most instances leaders who rely on charisma to wield authority tend to think of the state as their own personal fiefdom, plunging the state into debt crises and festering corruption.

Legal-rational legitimacy is based on the rule of law. It is founded on the understanding that rulers are accountable to the citizenry. Without impersonal political institutions, legal-rational legitimacy cannot prosper. It connotes a separation of powers, an impartial legal system, an independent judiciary, a strong Parliament and vibrant civil society.

Accordingly, governments understand that they govern at the pleasure of the electorate. Should they disregard the interests of the citizenry, they will lose their authority. As

such leaders ensure that their conduct is in keeping with the rules and laws that govern their office. They separate themselves from their office; they understand that the state does not belong to them. Governing is not a given but a privilege that must be earned.

Failure to build legitimacy on legal-rational principles has led to the weakening of many African states. Good governance cannot prosper in a context where governments rely on fear and coercion or depend on the manipulative conduct of one Big Man.

Good governance is therefore dependent on the nature of and character of those who govern in as much as it is dependent on a country's institutional make-up. If those who govern are not willing to subject themselves to legal-rational principles they can only function to undermine the institutions that are designed to establish, uphold and pre-serve good governance.

Good Governance: What do elections have to do with it?

Is there a relationship between good governance and elections? And if so, how do elections contribute to promoting, establishing, and maintaining good governance?

There is a strong relationship between elections and good governance. Elections incorporate the three fundamental components of good governance: the rule of law, public participation, and accountability.

Because in a democracy they are the only lawful means of ascending to public office, elections promotes adherence to the rule of law. Political parties and candidates vie for public office by participating in elections and thereby acknowledge and affirm the rules of the game.

Elections are the one opportunity where all citizens may at once express their opinion on governance and leadership by voting for those parties and candidates whom they feel should be in office. Voter turnout is therefore important as it indicates what percentage of the electorate participates in elections, and also has something to say about how engaged citizens are in matters concerning the governance of their country. Low voter turnout raises questions about the veracity of the mandate that an individual or party has to drive its agenda.

But most importantly, elections are the primary means by which citizens exercise their power to hold politicians to account. Elections offer citizens the greatest power to sanction public representatives by putting them in or kicking them out of power. Citizen participation in elections thus gives the democratic system legitimacy.

Elections establish the principle and culture of political accountability. When voters vote they make the statement that elected representatives derive their power and authority from the electorate. Constitutional checks and balances, independent oversight institutions and the various legal sanctions available to punish poor performance by government officials buttress the accountability established by the act of voting.

Elections offer voters the opportunity to reflect on government's past performance. Voters may inquire: Did the outgoing government keep its promises? How responsive were government departments to the demands of my community? Did this administration manage the economy well? Where did it fail?

In this way the electorate may make a comparison between the performance of the outgoing government and the policy proposals that various political parties are presenting for the coming dispensation.

In addition to considering the performance of government as a collective, voters also have opportunity to assess the calibre of the individual candidates that are put forward by political parties for specific government posts. (This is more so in constituency-based systems where citizens elect individuals and not parties.)

Through elections, voters reward some political parties and punish others. Elections are therefore a means by which voters may sanction those parties and candidates whom they feel have underperformed or in whom they have no confidence and to reward those who have done well.

Political parties should therefore view elections as an educational process wherein they gain insight into the kinds of policies and type of leadership the electorate deems ac-

ceptable and which they disapprove of. In this way political parties can tweak their approach in order to be more relevant to the communities they are courting. Because elections are the fundamental platform for citizen participation and political accountability, the choice of electoral system is paramount.

Electoral systems are methods through which citizens elect Members of Parliament. The electoral system must enhance the power of citizens to hold public representatives to account and enable the widest participation possible.

Electoral system categories

In reality there are many types of electoral systems in use across the world however these can be grouped into three broad categories: constituency-based systems, proportional systems and mixed systems (the combination of two or more electoral formulas in one election). (24) The distinguishing factor between electoral systems is the method each uses to allocate seats.

Plurality systems, also known as first-past-the-post, are used predominantly in Anglo-Saxon democracies including the US, UK and India. Majority systems are the most used systems in the world and are used in Ghana, Kenya and Zimbabwe. Proportional Representation systems and mixed systems are the second and third most used systems respectively. South Africa uses PR in national and provincial elections and a mixed system at the local government level. (25)

Constituency-based systems

Constituency-based systems are systems wherein voters vote for individual candidates rather than for political parties. In such systems, a country's territory is divided into

units called constituencies and each constituency elects one or more MPs to represent them in Parliament.

The virtue of constituency-based systems lies in their simplicity, their tendency to create a strong link between elected representatives and their constituencies, and their ability to produce clear winners and thus strong governments.

However there are drawbacks too. Constituency-based systems generally result in disproportionality of representation since the number of seats that a political party garners in Parliament, in most cases, is not reflective of the percentage of votes in has received. It is not unusual for the winning party to gain more seats than what its vote percentage would suggest it should have received. Whilst another party may have attained a similar number of votes gets a comparatively lower number of seats.

Constituency-based systems are predisposed to producing a two-party political system, which poses a challenge to multiparty politics. Because constituency-based systems create a distinct division between winners and losers, it is not appropriate to accommodate minorities. In divided societies (divided along ethnic or racial lines) constituency-based systems can foment tensions between the winners and losers because the losing groups are cut out of government. In some societies, the losing groups resort to undemocratic means in the bid to advance their cause.

The first-past-the-post system is the most popular form of constituency-based system. First-past-the-post only requires a candidate to win a plurality of votes to win a seat in Parliament. The second form of constituency-based systems is the majority system known as the two-round or run-off. What distinguishes the run-off from the first-past-the-post system is that rather than gaining a plurality of the votes, the majority system requires that the winning candidate achieve 50 per cent plus one to win.

The run-off is usually reserved for presidential elections in countries where the president is elected directly. It is not popular for legislative elections. In the run-off system

there are two rounds of voting. If no candidate gets the requisite 50 per cent plus one in the first round, a second round of voting is held.

The aim of having two rounds of voting is to increase the probability of one candidate winning with a majority rather than with a mere plurality. For example, the first round of voting may not result in any candidate receiving a majority of votes. This necessitates a second round of voting. To determine which candidates will stand in the second round of voting either a quota system, where only the candidates that have attained votes equal to or above the set quota of votes, or the candidates with the highest and the second highest amount of votes, participate.

Proportional representation systems

Proportional representation (PR) systems aim for proportionality in the distribution of seats in Parliament. In such systems, as in the system used in South Africa today, voters vote for political party lists.

PR systems are premised on the notion that the seats allocated to political parties in Parliament should as far as possible be equal to the number of votes cast in an election. There are various quota systems that are applied to determine the vote percentage value of one seat in Parliament and to distribute seats to parties based on their takings at the polls. In this sense, no political party gets more or less seats than what they deserve.

Countries using PR either adopt closed list or open list PR. Where closed list PR is used, political parties compile their lists of individuals to take up seats in Parliament without any public input. Voters are unable to alter the names on the lists or the order in which those names appear. Open list PR in contrast allows for voter input in compiling party lists. As such, voters may amend the order of names on party lists at the time of voting.

PR systems are lauded for promoting fairness, inclusiveness, and representation in Parliament. Because of their propensity to produce proportional results and to ensure that even political parties with smaller electoral margins gain seats in Parliament, PR systems allow for minority representation. PR systems are premised on the understanding that Parliament should be a microcosm of society.

Even so, the link between MPs and voters is weaker in countries using PR. There are no direct channels of accountability since voters vote for party lists rather than for individual candidates. Thus PR systems emphasise representation and inclusiveness over accountability and efficiency.

Mixed systems

Mixed systems attempt to combine the strengths of constituency-based systems with those of PR. The most well known form of mixed systems is the Mixed Member Proportional (MMP) system.

In a MMP system a percentage of MPs are elected using closed list PR and another percentage using constituency-based single member elections. New Zealand, Germany and Italy are some examples of countries making use of the MMP system. Such a system ensures that constituency representation is maintained whilst the proportionality of the election is enhanced by ensuring that parties get a proportion of seats equal to their list votes, whether they win constituency seats or not.

Choosing an electoral system

Fundamentally, electoral systems are not mere means of aggregating votes -- they have serious implications for the quality of leadership. An electoral system determines the calibre of individuals elected into office, the character of the legislature, the orientation

and implementation of policy and the public's attitude to the political system as a whole.

Since the political context and institutional framework impact on electoral system outcomes, it is unrealistic to expect that a country's electoral system alone can ensure that public office bearers remain accountable to the people. But this fact does not discount the importance of a country's choice of electoral system as a component in establishing good governance and a democratic political culture that upholds the principle of accountability.

A country's choice of electoral system is based more on its political culture – "local political conditions and traditions" (26) – and its history, rather "than upon abstract considerations of electoral justice or good government". (27)

> *"As Rudolf Wildenmann (1965) has stated repeatedly, electoral systems are so important because they confront all the "deeper realities" of the social structure, of a political culture, or of ethnic or ideological divisions, with the channels through which they must move. Voters develop rather good perceptions as to what these channels will let pass and what they will block, and campaign managers adjust their tactics to the options with which they are presented." (28)*

Because countries differ in their socio-political and historical contexts, as well as in their constitutional arrangements and democratic institutional framework, one particular electoral system will not produce the same results in different countries. This will be discussed in later chapters.

Although plurality and majority systems are known to generally limit the proliferation of parties to produce a two-party political system and stable governments, there are exceptions such as Canada and India where these systems have allowed multiparty systems to thrive. Proportional representation (PR) systems are said to produce multiparty systems however in South Africa and Namibia the phenomenon of one dominant party has been the result. (29)

Despite their implications for the political system, electoral systems are seldom changed and are often maintained with successive governments.

There are a number of reasons why electoral systems remain unchanged for long periods. Firstly is the lack of knowledge about alternatives to the existing electoral system and the different outcomes these may produce. The citizenry and elected officials may not have an elaborate understanding of how the existing system works and may therefore not be cognisant of the consequences of changing it. Secondly, changing the electoral system may require amendments to the Constitution, amendments which may require a higher voting threshold in parliament than is necessary for passing ordinary legislation. (30)

Thirdly, the incumbents are already benefitting from the existing electoral system and are therefore unlikely to change it. Fourthly, political parties are often concerned about the impact that changing the electoral system may have on their own political interests and do not want to give a chance to their competitors. Fifthly, incumbents are afraid of losing existing and potential voter support as citizens may not approve of the decision or be suspicious of the motives for the change. Finally, the decision to change the system has the possibility of fomenting political conflict especially if incumbents change the electoral system to strengthen their own position to the disadvantage of other groups. (31)

Therefore, it is important to consider the implications that changing an electoral system will have on the neutrality that the political system can guarantee to participants.

The choice of electoral system is dependent on a country's values and the impact of the institutional effects and consequences of the electoral system on those values. It is important to integrate normative concerns with practical concerns when seeking justification for the selection of an electoral system. (32)

Broadly the process of selecting an electoral system must take into account representation and accountability and determine whether it will prioritise the representation of geographic, ideological or party-political realities of a country. Questions of access, social cohesion (incentives for participants to promote unity rather than division and fragmentation), stability and efficiency of government, institutional and individual accountability in government, the creation of political parties, the role of opposition, and international standards must be interrogated and accommodated in the emerging electoral system choice. (33)

Above all considerations it is important to remember that regardless of the immediate concerns and issues that influence the choice of an electoral system, the rules chosen are likely to persist through transitions in the political system. Therefore: "the golden rule for politicians confronted with choices about electoral systems is to ask: how would I like it if the rules were applied in circumstances unfavourable to me and my party as well as favourable circumstances? This principle of equity is of fundamental importance, for in any system of free elections, politicians who immediately benefit will still be asked to endorse the system, when the rules that once made them winners turn them into losers." (34)

Choosing and changing an electoral system amounts to tampering with the very rules of the political system. Thus changing electoral rules may have the effect of changing the landscape of electoral politics in a country. It is with this realisation of the power of electoral systems to influence political results that the choice thereof must be undertaken circumspectly with the long-term consequences in mind.

Electoral systems determine the functioning of the political system. As Reeve and Ware put it, "electoral systems are key variables in the political process in a democracy, because to a large extent they determine who gets what, when and how". (35)

The party or parties who have control of or greatest influence over the policy agenda due to their electoral performance determine national policy. Therefore electoral sys-

tems necessarily have an impact on whether and when a policy issue will make it onto the national policy agenda.

A country's electoral system has the potential to shape the party system. It influences the number and size of parties; how parties organise, campaign and market themselves; the power relations between parties and candidates for public office. Electoral systems influence the way in which political leaders conduct themselves. The electoral system influences political parties' choice to pursue a politics of accommodation or divisive politics.

As a means of pre-empting and thus preventing political conflicts that could possibly arise between and among political opponents, electoral systems are a tool for conflict management. More so if a country's electoral system is able to assure the possibility of opposition parties dislodging a ruling party without having to resort to undemocratic means.

Electoral systems also have an impact on citizens' attitudes towards voting. Based on the type of electoral system in place, voters may have to strategise to determine how best to maximise the value of their vote (as is the case with plurality or majority systems) so as not to waste their vote on a candidate who is not likely to win. Other systems which attempt to ensure, as far as possible that no votes are wasted are (proportional representation systems) which put less pressure on voters to think critically about their preferred choice. In such systems, it is likely that a party or candidate will get a seat in the legislature even if they only attain the minimum threshold of votes required.

Politics under Closed-list PR

Many in the country take it for granted that closed-list PR was the only electoral system option available to the country in 1994. Others, still, in their criticisms of the system tend to disregard the strong arguments for its efficacy at the point of the transition from apartheid to democracy. So why did South Africa adopt closed-list PR for its inaugural elections in 1994?

Adoption of a closed-list PR by the negotiators of our country's transition as an interim electoral system in 1994 was informed by the need to unify a divided society. For this reason the first-past-the-post system was abandoned.

PR was appealing because of its tendency to promote broad representation, inclusiveness, fairness, and its amenableness to minority interests. It was believed then that this system would be sensitive to and would help to unify the political interests that took shape before 1994. A practical way had to be found to represent both the majority (read black) and the minority (read white) in Parliament.

Because of the more urgent need to achieve reconciliation and engage all of society's efforts in Nation Building, the accountability and efficiency advantages of a constituency-based system that was in use under apartheid was set aside in order to elevate the values emphasised by PR. When the question of adopting a permanent system of elections in 1996, the same year the final Constitution was promulgated, Parliament deferred. PR was therefore used for the 1999 general elections. Not until 2002 did the

system come to be ratified and accepted as the official system for elections (details to follow).

The use of a closed-list PR has had some advantages. The South African Parliament is diverse in its composition. Minority groups and the majority alike enjoy recognition in the National Assembly. Parliament is akin to a mirror upon which every citizen my see a reflection of themselves and of society more generally.

Since political parties determine party lists, this discretion has made it possible for them to prioritise the selection of women and other marginalised groups, such as people with disabilities, as Members of Parliament. To date, South Africa is ranked among the top three nations in the world when it comes to having the largest number of women MPs. The governing ANC has led the charge in this regard.

At the municipal level, the situation is different. There, a mixed-system is applied. Because municipal government is closest to communities than the other spheres of government, the logic is that having an element of a constituency-based system will strengthen the link between councillors and the communities they serve. This is aimed at making local government more accessible, responsive and accountable. But whether the mixed-system has achieved these goals is debatable. The accountability and efficiency benefits that a mixed-system is supposed to bring are diluted by the use of PR for elections at the other levels of government.

The noble intentions of adopting a simple PR system have not prevented South Africa from the disadvantages that are known to accompany this type of system.

First, the major criticism of PR is that it weakens the link between voters and MPs because there are no direct channels of accountability. In this way PR emphasises representation and fairness at the expense of accountability. Second, PR has encouraged fragmentation and the perpetuation of race politics. Third, PR has contributed to the

dominance of one party in the country's electoral politics. And finally the use of closed list PR has contributed to the weakness of opposition parties.

Weak link between voters and public representatives

The trouble with South Africa's closed-list PR is that voters are disempowered. Their votes do not determine the representatives in any direct sense because voters do not have the power to determine party lists, but instead have to vote for political parties regardless of their dislike of certain individuals on the parties' lists.

The underlying assumption made by the designers of the system was that if the government was representative of the country's demographic make-up, it would necessarily be accountable. In other words a woman MP will necessarily be attuned to the desires of women as a constituency because she is a woman. Or an MP of a specific origin would naturally have an affinity to his or race, ethnic, linguistic or residential constituency.

But this has not been the case. The PR system delinks parliamentarians from constituencies. It makes it hard for citizens to know which Member of Parliament to approach with grievances or proposals. Even when citizens are able to identify the relevant MPs, it is not guaranteed that the views and demands of the citizenry will gain traction -- especially if they are contrary to party opinions and policies.

Closed-list PR has handed political parties, especially those who run them, disproportionate power and influence over the electoral process. Because party bosses often have the final say in the upward mobility of party members, the culture of pandering to party leadership is very strong. The strict enforcement of party discipline also means that potential MPs are most likely to put the interests and priorities of the party ahead

of those of the people whenever these are in conflict. Thus MPs are first and foremost geared to serving their parties before the people.

However, MPs may go against their party at their own risk. The cases of Ben Turok and Gloria Borman in 2012 are good examples of this. Their decision to abstain from voting for the Protection of State Information Bill was viewed as a punishable offence by the ANC. The Bill has faced great opposition as was reflected in public submissions made by various interest groups within civil society. These two MPs reserved the right to exercise their right to exercise their conscientious discretion – a right they do not have under a system of strict party discipline.

Whether a closed-list PR is appropriate for a South Africa beyond transition has been a subject of debate especially since its use in 1994 was an interim measure.

In the interest of assisting Parliament to make an informed decision about the electoral system, the Honourable Dr. Mangosuthu Buthelezi, the then Minister of Home Affairs, in 2002 appointed an Electoral Task Team (ETT), headed by Dr Frederick Van Zyl Slabbert, to explore the question of electoral reform. One paper presented to the ETT at a brainstorming conference argued that the lack of "direct personal accountability" of MPs could lead to certain communities feeling "disengaged from the political system" and marginalised, which could possibly lead to "disaffection, rebellion and violence". (36)

Andrew Reynolds, an emphatic proponent of PR himself argues that although PR is suitable for divided societies, "simple parliamentary-PR system, however, is not enough: these fragile democracies are better served by a PR that maximises geographic representativeness of MPs, as well as their accountability to the voters". (37)

The ANC itself recognised the negative implications of a growing distance between MPs and the electorate. Following the 1994 elections the ANC allocated MPs to geographic constituencies. However the initiative was undermined by the fact that MPs

did not originate from the regions to which they were allocated thus creating legitimacy and credibility challenges.

To expect that an MP that has been resident in Cape Town for some decades when posted in Nelspruit would have insight into the nature of the people in that locality and the issues that most affect them would be unrealistic to say the least. Such an arrangement makes the entire system of representation somewhat imaginary as MPs are compelled to rely on their imaginations as opposed to their experience.

In contrast to the situation at national and provincial levels, at the local government level a mixed electoral system is utilised. This mixed system combines the strengths of proportional representation with the strengths of a constituency system.

Voting in local government elections works in the following manner: a voter can vote for a DA candidate in a regional council and, at the same time, vote for an ANC ward councillor in the same region. It can thus be said that local government elections satisfy the dual demand for representativeness and accountability in the political system. When community members are disgruntled, or when they have suggestions, they know who to approach. They thus know who to hold personally accountable for matters relating to where they live.

Even so, the mixed system at local government level is incompatible with the closed-list PR at play at the provincial and national levels – where the real decision-making powers in government really lays. Ward councillors who can be singled out by their constituencies do not have overarching powers and are at best beholden to the provincial and national party structures. If these set priorities or give orders that do not harmonise with their constituencies' mandates, they are powerless to overrule the senior structures. This makes their direct accountability to communities void. Communities in various municipalities across the country have expressed their dissatisfaction with local government performance through multiple protest actions. This fact illustrates that having a constituency-based system at the local government only does

not guarantee a more responsive government. Thus accountability and responsiveness should be stressed at all levels of government.

If citizens had the privilege to vote directly for an MP, it would be possible for them to exercise that same right to remove underperforming representatives. Under current arrangements, MPs fear members of the executive more than the will of the people. Ministers are more powerful than voters.

Sadly the gap between public representatives and citizens has continued to grow. South Africa has had hundreds of community protests – many deemed to be illegal protest actions. August to December 2012 witnessed labourers in the mining sector rejecting union leadership and repudiating their public representatives in the form of MPs and Cabinet Ministers.

Fragmentation and perpetuation of race politics

Although the aim of proportional representation is to represent all existing opinions or groupings in society in the parliamentary landscape, it may have the unintended consequence of fragmentation, which is not only limited to the proliferation of political parties but is also characteristic of South Africa's political system.

Closed-list PR has had the tendency to encourage political parties to hold on to and perpetuate divisive or extreme views and policies to win the support of a socioeconomic, ideological, race or other interest group in society.

A key feature of South Africa's political system is the resilience of race politics. The majority black ruling party and minority parties alike have deployed the race card. The

now defunct National Party used it in 1994 to unite whites under its banner as their defender against the "swart gevaar" -- the threat of a black majority government.

Former president Thabo Mbeki regularly labelled detractors and critics as "anti-African". He evaded questions of accountability by painting these as attempts to undermine black people – i.e. the notion that blacks cannot govern.

Former ANC Youth League President, and now Commander in Chief of the Economic Freedom Fighters (EFF), Julius Malema has instrumentalised race by pointing to white people as the chief obstacle to the advancement of black people in present-day South Africa. His singing of the struggle song "Shoot the Boer" and his call for the nationalisation of mines and the expropriation of land without compensation has exacerbated the fears and concerns of a section of the white minority. AfriForum, a predominantly Afrikaner based organisation, has found currency as the defender of Afrikaner identity and the rights of the white minority.

The Freedom Front Plus leader, Dr Pieter Mulder, has been emboldened to misrepresent the facts of South Africa's history to elevate his own and his party's relevance in the minds of his Afrikaner constituencies.

The Democratic Alliance in its quest to shed the perception that it is a "white party" has cast itself as a multiracial political party for which "race does not matter" – however race is still paramount to its identity.

The persistence of this type of fragmentation foments political conflict and frustrates unity and reconciliation in the long term. It distracts from the real issues of good governance.

One dominant political party

Whether South Africa can be labelled a one-party dominant state is a subject of debate. That the ruling African National Congress (ANC) is the one dominant political party in the country is an established fact.

The dominance of the ANC is routinely heaped with negative connotations. However it must be understood that the ANC attained its position of dominance through legitimate electoral contestation. Election results show that the majority of voters prefer the ANC above all other parties.

The ANC has won every general election since the country's first democratic elections. In the 1994 election the ANC took 62.65 per cent of the vote and entered into a government of national unity with the former ruling National Party (NP), which won the 2nd highest number of votes, 20.4 per cent. The NP was followed by Inkatha Freedom Party (IFP) that drew its mandate from predominantly Zulu communities in KwaZulu Natal with 10.5 per cent, the Freedom Front (FF) representing Afrikaner communities with 2.2 per cent and the Democratic Party (DP) with a largely white-liberal support base gaining 1.7 per cent of the votes.

The ANC increased its electoral majority by nearly 4 per cent in 1999. Its gains may be attributed to the fragmentation of the opposition vote in which the New National Party (NNP), formerly the NP, lost its position as official opposition earning only 6.9 per cent, a 13 per cent drop from 1994. DP overtook the NNP to come second with 9.6 per cent. The IFP followed with 8.6 per cent. The United Democratic Movement (UDM), created out of a breakaway faction of the ANC garnered 3.4 per cent, whilst the African Christian Democratic Party (ACDP) overtook FF gaining 1.4 per cent to FF's 0.8 per cent.

There was no marked difference in the 2004 and 2009 elections. The ANC maintained its electoral dominance winning by 69.7 per cent and 65.9 per cent respectively.

The law of the country no longer permits defections by MPs. Floor crossing (process of defecting) was not a feature of the 1993 interim constitution or the final constitution of 1996. However floor-crossing was legalised briefly from 2003 to 2009.

Before I discuss the impact of floor crossing on the country, a brief background is useful.

Floor-crossing legislation was first proposed by the now defunct NNP and DP who wanted to merge after a poor showing at the polls. Because the South African Constitution did not allow for defections the two parties could not merge and take their seats in the National Assembly and provincial legislatures over to the new party. Thus in 2000 the DP and NNP proposed floor crossing legislation to allow MPs to move to other parties and yet retain their seats. The ANC was initially opposed to the suggestion.

Although the two parties (NNP and DP) drove the legislation with a merger in view, the deal did not materialise. The ANC saw an opportunity to absorb the NNP, which was fast sinking into political oblivion. The NNP opted out of a marriage with the DP to merge with the ANC instead. The ANC pushed through floor crossing legislation in 2002 against the protestation of a majority of the opposition parties in Parliament.

Floor crossing was legalised following the passage of the Constitutional Amendment Act of 2003. Under the floor crossing Act MPs could defect from their parties to an existing party or a new one without forfeiting their seats as long as they adhered to the following conditions:

An MP could only defect from his/her party if the number of defections in his/her party was equal to 10 per cent of the party membership.

MPs could only defect in two designated time windows in a single electoral term, in the second and fourth years, between 1 and 15 September in those years.

These conditions benefited larger parties at the expense of the smaller parties. With its large numbers in Parliament, it was less probable that the number of possible defectors

from the ANC would meet the 10 per cent threshold. The result was that the ANC gained the most seats from defections than any other party. "Through floor-crossing events in between the election period of 2004 to 2009, the ANC had increased its level of parliamentary representation from 69.69 per cent to 74.25 per cent." (38)

The challenge of weak opposition

The weakness of the opposition and its failure to make significant inroads with the electorate means that the ruling party operates in an environment where there is no credible threat to its dominance. This poses a challenge for accountability. A strong opposition acts as a deterrent because the ruling party would have to keep in mind that their non-responsiveness and governance failures can be punished with a loss of power to credible opposition parties that are standing in line to take over.

This fact begs the question: Why are South Africa's opposition parties ineffective?

One of the suggestions that have been made is that the ANC benefits from South Africans who predominantly vote along racial lines. Since blacks are in the majority, the ANC, which represents the majority, receives votes commensurate with these statistics. This thesis is popularly known as the racial census. Although it sounds plausible, various studies have shown that it is a simplistic argument.

Idasa's Afrobarometer surveys of 1994 and 1999 revealed that members and supporters of various parties viewed their political party as inclusive, a party for all South Africans. Party supporters do not see their parties as exclusively for one group or race. Therefore voters do not vote for their preferred party because they perceive a benefit for their particular race group.

Even so, voting statistics reflect racial polarisation in the way the electorate votes. The racial polarisation cannot be accounted for by differences in policy priorities between

races, or by differences in political parties, as there is very little distinction between the policy positions of the different parties.

Studies have shown that the economic imperative has been stronger than racial identity in informing voter preference. (39) The distribution of economic goods, which sees whites mostly falling into the category of the wealthy and blacks mostly into the category of the poor is a function of apartheid policies that systematically marginalised blacks and favoured whites.

The 2004 SABC Markinor survey, which surveyed 3500 people, revealed that "the ANC's support base is stronger among South Africans with lower education profiles and those with lower incomes. 94 % of the party's supporters are black, and three quarters are not employed. In contrast, the profile of DA supporters is quite different. The DA draws its support from those with jobs… more than two-thirds of DA supporters are white, and support is stronger among higher income groups." (40)

A link exists between class and voting patterns, and because class lines were historically stratified by race, there is a correlation between class polarisation and race polarisation. The argument therefore goes that because the majority of South Africans are poor and black and have a preference for the ANC, the ANC dominates electorally.

But there is a further nuance to explaining the racial polarisation of voting patterns in the country. Supporters of different parties may see their own parties as inclusive but they view other political parties as exclusively for certain groups.

"First, white South Africans and black South Africans have very different views of the racial exclusivity or inclusivity of South Africa's three main parties. While whites see the DP and NP as representing all South Africans, Africans are more inclined to see them as white.

For the ANC, the opposite story holds: for Africans, it is an inclusive party, but for whites, it is an African one. And for all of these parties, coloureds and Indians tend to

be somewhere between whites and Africans, with far less uniform views of the racial credentials of parties. Thus, while policy preferences are not polarized by race in South Africa, the racial credentials of parties do appear to be. Secondly, it seems that racial credentials work according to a negative logic instead of a positive one: it is about exclusion, not representation, i.e., who is excluded from a party, not who is represented by it." (41)

Thus voters do not support parties other than their preferred one because they perceive other parties to be racially exclusive. If blacks view opposition parties, which are predominantly styled as representing minority interests, as exclusive to other races it is unlikely that they will vote for them – this similarly applies to whites. Because it is the opposition that is disadvantaged by the racial polarisation of voting patterns it is in the opposition's interest to appeal more broadly to the black majority.

A narrow focus on attracting the support of voters from particular ethnic, religious, race and minority group has seen the electoral margins of opposition parties remain static or shrunk, as is the case with the IFP. The DA has benefitted from an effort to garner support among black voters and has increased its electoral gains to 25 per cent to date.

The oppositions' fixation with identity politics has contributed to the sentiment that there is no alternative to the ANC. The opposition has been failing to capitalise on the policy convergence among all voters who are all concerned about the economy, human security, and human development in general.

Campaigning consistently to popularise their own policies rather than continuously attempting to gain the votes of those voters who are disillusioned with the ANC would serve the oppositions' electoral prospects better. Opposition parties must make an effort to alter their image to appeal to all South Africans; it is up to them to de-racialise voting patterns in the country.

How has Closed-list PR impacted governance?

South Africa has arguably one of the best constitutions in the world. How did it achieve this? Perhaps the country's lawmakers considered what other countries had already produced and, picking the best practice from each, were able to compile a masterpiece.

Having done so, it should follow that South Africa fares well in good governance on account of the democratic institutions and governance framework created by the country's Constitution and expounded on by legislation.

However having the most progressive Constitution in the world has not rescued the country from the pitfalls that have beset other newly independent states of yesteryear including limited capacity, maladministration, corruption, and lack of responsiveness.

PR, an electoral system that does not prioritise accountability and that tends to increase the distance between the governed and the governors, means that the state is more likely to suffer incapacity and weakness arising from the politicisation of government responsibilities. Limited pressure is brought to bear on public officials, including the President, Ministers, MPs and party deployments because retention of their positions does not necessarily depend on their performance but on their popularity within party ranks. It is difficult for citizens to vote on the basis of the merit of different leaders because these are shielded by party constructed closed-party lists. Thus, ailing government departments continue in their dire state, compromising service delivery and

wasting taxpayers' money, until party bosses see it fit to remove this or that minister, department head, or junior cadre who was misplaced in the first instance. This tends to undermine the country's Constitutional status and its democratic and governance credentials.

Notwithstanding, South Africa has some of the best institutions on the African continent, and is ranked highly in the world for its legal framework including protection of property rights (26th) and intellectual property (20th), as is measured by the World Economic Forum in the 2012-2013 Global Competitiveness Report that ranked 144 countries. (42)

Institutional strengths and weaknesses

Although the crime rate has reportedly been on the decline in recent years, South Africa still has one of the highest crime rates in the world and is infamous for violent crime. This is an indication of a weakness in law enforcement and threatens the country's development prospects.

Despite the obvious challenges in the criminal justice system, it is important to note that the performance of the institutions that comprise the system (the judiciary, National Prosecuting Authority (NPA), and South African Police Service (SAPS)) vary. There is room for both complements and criticism.

The judiciary is highly independent (amongst the most independent in the world). (43) According to the doctrine of the separation of powers, government is divided into three arms – legislative, executive and judicial. Each arm acts as a check and balance on the other. This is to prevent concentration of power into a single institution in a democracy.

An independent judiciary is paramount as it assesses the actions of the legislature and executive to determine whether these comply with the Constitution, legislation and statutes that seek to protect citizens from abuse of power by the state. "To allow courts to carry out their functions and fairly determine the legality of governmental action, courts must be free from any actual or perceived interference by other branches of government". (44) That is judicial independence.

The constitution includes a justiciable bill of rights that judges may use as a benchmark for their decision-making in ensuring that statutes, institutions and individuals respect the rights of all citizens. That the Constitution is the supreme law of the land allows the judiciary the powers to invalidate any law or action contrary to provisions of the Constitution.

Judges are appointed through a public process, which builds public confidence in the independence and impartiality of individuals selected to be judges. Given South Africa's history of minority white government, the Judicial Services Commission, which presides over judicial selections, has prioritized the transformation of the judiciary. This includes making the South African judiciary reflective of the racial and gender demographics of the country in order to restore legitimacy to the judiciary. However the JSC has been criticised for moving too slowly in ensuring that the composition of the judiciary reflects national demographics. Because of the slow pace in achieving this objective, the judiciary is open to being labelled as partisan to minority interests even in a democratic South Africa.

Given that judges were predominantly white and male during the apartheid dispensation, the attempt is to appoint more black people and women to the bench. This quest for demographic representativeness is important because non-white, non-male judges will be in the position to add diversity to the courts' interpretation of the law and understanding of the socio-political and economic circumstances that the various peoples

of the country have been exposed to in the past and have to deal with in contemporary South Africa.

Even so, judges are appointed on the basis of merit – based on their qualifications and experience. "Depending on the vacancy, the JSC researches and interviews candidates writes a list of nominees and gives advice about appointments. A diverse body made up of legal and non-legal governmental and non-governmental members and required to include representatives from opposition parties, the JSC is supposed to provide protection against appointments of the sort seen during apartheid — politically motivated appointments made behind closed doors without any participation by the public or legal profession. According to the Constitutional Court, "as an institution it [the JSC] provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments." (45)

Judges have security of tenure and their remuneration is prescribed under law and cannot be arbitrarily altered by the executive arm of government. Section 177 of the Constitution sets out that judges may only be removed for reasons of incapacity, gross incompetence or gross misconduct. The decision to impeach a judge must be recommended by the JSC and confirmed by a two-thirds majority of the National Assembly.

Court rules for all courts, save the Constitutional Court, are determined by the Rules Board. (46) Judges have control over the functioning of and administration within their courtrooms under the guidance of legislation (see Section 171 and 173 of the Constitution).

There are challenges regarding inefficiencies within the court system. The wheels of justice turn slowly and this often results in further injustice. Courts have had to deal with major backlogs over the years and the country's jails are filled with a large number of inmates who are awaiting trial, some of whom do qualify for bail but lack the funds to pay. The length of time it takes for cases to go to trial means that inmates serve un-

fairly long terms in prison before being tried, which is a greater injustice to those prisoners who are in for petty crimes.

The judiciary has recognised this challenge. In 2011 the Chief Justice introduced a case flow management coordinating committee that works across the criminal justice system in order to harmonise the activities of police, prosecutors and the judiciary. The Department of Justice and Constitutional Development also set up backlog courts to deal with the situation. According to Minister Jeff Radebe, these backlog courts disposed of over 46 000 cases between November 2006 and March 2011. (47)

The Cabinet's Justice Crime Prevention Safety and Security (JCPS) cluster reported the following progress for 2012:

"Regarding the backlog interventions I wish to express appreciation for the work these additional courts are doing. The country-wide situation regarding both the outstanding and the backlog cases (per court level) in the lower courts has improved significantly in quarter 3 with the total backlog case numbers for all courts now below 30 000 cases (namely, 29 604). At the end of March 2012, 34 926 cases were backlog cases representing 17.4% of all cases on the outstanding roll of 200 532 cases. At the end of December 2012, this was reduced to 29 604 backlog cases, representing 16.2% of the outstanding roll of 194 725 cases. This reduction means that the Regional and District backlog courts have removed 17 425 cases from the court rolls since the 1st of April 2012 until the end of December 2012." (48)

According to the reported progress, the improvements in case flow management are yielding fruit. This puts the country on a positive trajectory towards the efficient delivery of justice and thereby strengthening the rule of law.

Regarding the judiciary's powers to review legislation and actions of the executive, the outcome of litigation has tended in some important cases to go against the state. The decisions of the courts have had great implications on policy making. The Constitutional Court's rulings on cases to do with socioeconomic rights have been far reaching. The state has been compelled to provide alternative shelter when it seeks to evict people who are found to be squatting illegally on government land or in unsafe buildings,

to provide free water to the poor, and to extend HIV treatment to expectant mothers in order to prevent mother-to-child transmission. (49)

The judiciary has drawn criticism from the executive and from the governing ANC and its alliance partners in recent years. This criticism has intensified following the Constitutional Court rulings on some of the President's appointments.

In July 2011, President Jacob Zuma purported to extend the term of office of the Chief Justice Sandile Ncgobo whose term ended on 14 August 2011. However the Constitutional Court handed down judgement in three urgent applications finding that such an extension would be unconstitutional. (50)

In 2012 the Constitutional Court upheld a 2011 Supreme Court of Appeal (SCA) decision invalidating President Jacob Zuma's appointment of Mr Menzi Simelane as head of the NPA. (51)

Reacting to the SCA decision on Mr Menzi Simelane in December 2011 Minister of Higher Education Dr. Blade Nzimande made reference to a "judicial dictatorship" when criticising the court's decision. (52)

In the same vain, President Jacob Zuma in 2012 expressed his views on the need to review the powers of the Constitutional Court in relation to the powers of the executive in matters of policy. President Zuma qualified his view by stating that not all the judges of the Constitutional Court agreed with some of the decisions handed down. In February 2012 Minister Jeff Radebe announced a review of the judiciary to among others assess the ""transformative impact" of the decisions of the Constitutional Court and the Supreme Court of Appeal". However the review was subsequently cancelled later in the year. (53)

These details reflect an uncomfortable relationship between the country's leadership and the judiciary. The criticism of judicial decisions and the suggestions about reviewing and assessing the judiciary's powers tends to tarnish the judiciary's credibility and

legitimacy in the eyes of the citizenry. There are legislative provisions around the review of the powers and functioning of the judiciary, which would require National Assembly deliberation. This is the correct avenue to address any warranted concern over the functioning of the judiciary not through executive orders and commissions. Such utterances and actions from the executive tend to undermine the rule of law.

The NPA, which prosecutes criminal cases before the country's courts, provides witness protection and removes the proceeds of crime from the perpetrators of crime had a conviction rate of 88 per cent in the High Courts, 74.8 per cent in Regional Courts, and 91.8 per cent in District Courts in 2012. (54)

This is an impressive feat, however this does not translate into a percentage of all cases recorded, but only to those that make it to the trial stage. In order to prosecute crimes, the NPA relies on the South African Police Services (SAPS) to refer cases for prosecution. The quality of the cases and the evidence presented in court thus relies heavily on the investigative work done by the SAPS.

The NPA has participated in the reduction of court backlogs. In the period 2011-2012, the NPA disposed of 930 932 cases; 897 842 of those cases were new cases 33 090 were cases already on court rolls. (55)

The JCPS cluster also reported that there has been an increase in the number of cases finalised above the target set for the period 2012/2013. In quarter three of this period 78 584 criminal cases were finalised, 1927 more cases than the target of 76 657. (56)

A useful innovation in the form of the Alternative Dispute Resolution Mechanisms (ADRM) has also contributed to lessening the burden on the courts. For the 2011/2012 Financial year, until December 2012, 33 526 cases were finalised through the ADRM above the target of 32 810 set for the quarter. (57) These statistics present a positive picture regarding the performance of the NPA.

Even so, there has been instability in the leadership of the NPA since 2007. In 2007 Former President Thabo Mbeki suspended the then National Director of Public Prosecutions (NDPP), Mr Vusi Pikoli, due to an alleged breakdown of relations between him and then Justice Minister Bridget Mabandla. It later emerged that Mr Pikoli was engaged in a probe into Mr Jackie Selebi, then Police Commissioner and head of Interpol, who was convicted of corruption and sentenced to 15 years in prison in 2010.

Advocate Mokotedi Mpshe replaced Mr Pikoli as acting NDPP and during his short stint he presided over the controversial dropping of corruption charges against President Jacob Zuma. President Zuma was implicated during the trial of Mr Shabir Shaik, his ex-financial advisor, leading to his sacking as Deputy President of the country in 2005. The perception was that President Thabo Mbeki allegedly sought to use the NPA to bury his political rival in the lead up to the 2007 ANC Polokwane elective conference. The charges against Zuma were dropped shortly after the Polokwane conference.

Following the ANC's election victory in 2009, President Zuma appointed Advocate Menzi Simelane NDPP in November of the same year. This decision caused much consternation among the opposition and within the legal fraternity. Following the SCA's invalidation of Advocate Simelane's appointment, President Zuma placed him on special leave in 2011 pending the outcome of his appeal to the Constitutional Court. The Constitutional Court invalidated Simelane's appointment on the basis that his integrity and credibility was under question.

Justice Yacoob noted that the Ginwala Commission, which was tasked with determining the fitness of Mr Pikoli to hold office, described Advocate Simelane's evidence before the inquiry as "contradictory and without basis in fact or law". (58) Having highlighted these facts the court declared that Simelane's appointment was invalid and unconstitutional because President Zuma failed to apply his mind when making the deci-

sion. Advocate Nomgcobo Jiba has been acting NDPP since Advocate Simelane was suspended in 2011.

These developments within the NPA have created the perception of instability and political interference in the running of the institution and the security sector in general. This view is further exacerbated by instability in the leadership of the SAPS, Special Investigating Unit and Crime Intelligence, as well as a high turnover in the leadership of the State Security Agency. (59)

In respect of crime, South Africa is infamous as one of the crime capitals of the world. However the SAPS have registered some improvements in the combat against crime. Rates of detection have increased and crime rates in general, including serious crimes, are reportedly on the decrease.

During 2010/2011 the crime rate was reported to have decreased by 6.5 per cent and by 3.1 per cent in 2011/2012. According to the Police Minister Nathi Mthethwa, reporting in 2012, the murder rate had decreased by 27 per cent in the last eight years and contact crimes by 35 per cent in the same period. (60)

In 2011/2012 attempted murder fell by 5.2 per cent, assault with intent to do grievous bodily harm by 4.2 per cent and common assault by 3.4 per cent. In the case of organised crime, car hijackings decreased by 11.9 per cent, cash-in-transit heists by 37.5 per cent, bank robberies by 10.3 per cent and ATM bombings by 35 per cent. Although house robbers showed a slight decrease (2 per cent) business robberies rose by 7.5 per cent. (61)

Despite these successes, the country continues to have one of the highest rates of crime in the world. What are most concerning are the prevalence of sexual violence and the alarmingly high levels of rape. Police have been making arrests in this regard, however more needs to be done to increase the level of reporting and convictions.

Escape incidents have increased by 65.5 per cent in 2011/2012, from 478 in 2010/2011 to 810. Most escape incidents took place at Community Service Centres (163) and police station holding cells (128).Such incidents contribute to creating the perception that criminals are able to outwit the police. The SAPS needs to tighten security at police stations that seem most vulnerable to escapes.

Another worrying trend is the killing of SAPS members. Criminals target police officers on and off duty. This reflects a disregard of and contempt for the authority and skill of the SAPS. In 2011/2012 81 officers were killed (38 on duty and 43 off duty). Although this represents a 12 per cent drop from the previous financial year it remains a cause for alarm. (63)

The SAPS' image as an institution of integrity, committed to fighting crime and securing the South African society has been tainted by developments at the top echelons of the organisation. In 2008 the NPA charged the then Police Commissioner Jackie Selebi with corruption and defeating the ends of justice. President Thabo Mbeki put him on extended leave and Selebi resigned as head of Interpol. He was convicted and sentenced to 15 years in prison in 2010.

In 2009 President Zuma appointed Mr Bheki Cele as Police Commissioner. Like his predecessor, he was suspended in October 2011 following allegations of corruption. Following a commission of inquiry into his fitness to hold public office, Cele was found wanting, and the commission recommended his dismissal. President Zuma subsequently dismissed him.

Shortly after her appointment replacing Mr Bheki Cele, Ms Riah Phiyega presided over the massacre of 34 mineworkers by police in Marikana in the North West Province. The massacre followed weeks of protracted strike action by rock drill operators at the Lonmin Platinum Mine in which two police officers were hacked to death and 8 other persons, including two security guards, were killed. The massacre is currently the

subject of a commission of inquiry headed by Judge Ian Farlam, retired judge of the Supreme Court of Appeal (SCA).

In October 2013 Police Commissioner Riah Phiyega was subjected to an internal probe by the Independent Police Investigative Directorate (IPID) for allegedly tipping of Western Cape Provincial Police Commissioner Lieutenant General Arno Lamoer about investigations against him. This follows Commissioner Phiyega's decision to suspend acting Head of the Crime Intelligence Unit, Major General Chris Ncgobo, for alleged irregularities in his qualifications as declared by himself.

The Commissioner has labelled this as a smear campaign against her because she has set out to clean out the SAPS. This assertion by the Commissioner is unsettling and only seems to confirm what many analysts have pointed to as the politicisation of the SAPS. These developments at the upper echelons of the crime fighting body are a blow to the promotion and entrenching of the rule of law as it creates the perception of instability, which could embolden criminal elements and disempower law-abiding citizens.

Growing voter apathy: reality of fantasy?

Despite the ups and downs in the country's law enforcement environment, though much has been declared on radio shows and other media about the apathy of South African voters, South Africa has enjoyed a healthy voter turnout since the country began collecting statistics in 1999.

Voter turnout in the 1999 general election was 89 per cent; it fell to 76.7 per cent in 2004 and increased slightly to 77.3 per cent in 2009. Despite the steady decline in voter participation since 1999 South Africa compares well with older democracies such as

the US (64 per cent in the 2008 presidential election) and UK (65.1 per cent in the 2010 general election). This is a positive sign.

Based on these figures, it is safe to conclude that the South African electorate remains engaged in the political process. The figures reflect the keenness of voters to have their voices heard. However to focus solely on voter turnout would be myopic. It is important to inquire about public participation between elections.

The Constitution (see Sections 57(b), 59 (1) and (2), 70(b), 72 (1) and (2), 154 (2), and 160 (4)(b)) provides that government at all levels should engage in public consultations in the adoption of legislation and government programmes. To this end, citizens are often invited to furnish the various legislatures with public submissions.

Interest groups, communities, and enterprises make use of these opportunities. There are numerous gatherings called by national, provincial and local government that all seek to get citizen input for government initiatives and programmes. Even so, there are indications that citizens feel that elected representatives do not hear nor respect their voice.

Today in many parts of the country, communities and civil society resort to protest (sometimes violent), court action and withholding of rates in order to compel government to be responsive to basic service delivery demands. Indeed South Africa has become the protest capital of the world. According to the SAPS' 2011/2012 Annual Report,

> *"The growing number of unrest-related incidents which required specialised police interventions and redirection of large-scale resources is a case in point. During 2011/12, 1 194 unrest- related incidents (as opposed to 971 in 2010/11) were policed. These incidents include labour disputes and dissatisfaction with service delivery during which violence erupted. The SAPS specialised units managed to fundamentally stabilise all incidents. In the light of this, in 2011, the Minister of Police had introduced a new Public Order Policing Policy which provided further direction in dealing with public order matters and currently all directives in this regard have had to be revised to give effect to this policy." (64)*

That the bulk of these over 1000 protests were service delivery related suggests that there is a growing distance between government and citizens. Questions need to be asked about the openness of South Africa's democratic space.

What is of greater concern is the SAPS' alleged heavy-handedness in dealing with protestors in some instances, including the death of a community member, Mr Andries Tatane during a protest in Fiksburg in 2011; the shooting and killing of 34 mineworkers in Marikana; shooting of farm workers during a farm strike in De Doorns in the Western Cape; and other less prominent incidents of alleged police brutality including unsolicited violence against protesters.

Communities complain of aloof local councillors. Although Parliament has a constituency system in which all MPs have constituency offices, most citizens do not know which MP is assigned to their region.

Moreover, the battle over e-tolling in Gauteng between various civil society groups, including the Confederation of South African Trade Unions (Cosatu), has highlighted the ineffectiveness of government's consultation processes.

However the fault cannot be put solely at government's doorstep. The majority of citizens do not participate in public consultation processes initiated by the various levels of government. Citizens seem to rely on a handful of organisations or interest groups to take up issues on their behalf. This creates a conundrum for government when it implements policies which citizens then claim to not have been consulted about.

On another level, Parliament which is the voice and representative of the people does not seem to be effective in ensuring that government is responsive to the demands and needs of the citizenry. Failures of government delivery have persisted despite the Parliamentary oversight over the executive. Section 55 (2)(a) of the Constitution states that the "National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it". (65)

Oversight role of Parliament

In order to operationalize its mandate to hold executive organs accountable to it, Parliament has an oversight and accountability framework.

Parliament exercises oversight and accountability primarily through its committees. The committees are mandated by Parliament to scrutinise legislation, to oversee government activities and relationships with external parties and they mediate between civil society and government.

> *"In addition, the work of committees include study visits that entail physical inspections, conversing with people, assessing the impact of delivery and developing reports for adoption by committees which contain recommendations for the Houses to consider. In exercising oversight, committees often obtain first-hand knowledge from people engaged in the direct implementation of specific programmes and/or who are directly responsible for service delivery. In order to evaluate the work of government from a broader perspective, committees may invite experts from outside government to provide background knowledge and analysis on relevant issues." (66)*

Committees conduct their oversight duties on behalf of Parliament. As such, they are enjoined to report to Parliament on matters referred to it for consideration or any other relevant matters. These activities of committees, which include "departmental briefing sessions, annual and departmental budget analyses, and calls for submissions and petitions from the public, the consideration of strategic plans and annual reports, and public hearings" (67) inform the resolutions of Parliament and its recommendations to the executive.

> *"When a committee reports its recommendations to the House for formal consideration and the House adopts the Committee report, it gives the recommendations the force of a formal House resolution pursuant to its constitutional function of conducting oversight. The House then also monitors executive compliance with these recommendations." (68)*

Committee reports come in the form of "legislation, study tours, responses to annual reports and financial statements of departments, international agreements, private members' legislative proposals, budget votes, petitions, statutory provisions (for exam-

ple the filling of vacancies in a statutory body), Annual reports of committee activities and performance against their strategic plans, and any matter referred to committees for consideration and reported in terms of National Assembly Rule 137 and the National Council Of Provinces Rule 102." (69)

What is of importance is that Parliament is to oversee that the executive complies with its recommendations based on the oversight functions performed by the committees. This is the test of accountability. In addition to the work of the committees, Parliament has various plenary processes through which it exercises its accountability mandate.

MPs hold the executive to account by posing written or oral questions to the President, Deputy President and Cabinet Ministers. These are collectively and individually accountable to Parliament in the exercise of their powers and administration of their duties (see Section 92 of the Constitution). During question time the executive is given an opportunity to respond to Parliamentary questions. In this way, MPs are able to seek clarity on executive activities and to address questions of policy and service delivery on behalf of their constituencies.

Following the various committees' analyses of departmental budget votes, based on committee reports, Parliament debates the budget votes made by the Minister of Finance and his counterparts in Cabinet.

Notices of motion and motions without notice are used by political parties in Parliament to place issues of political importance on the agenda for debate and/or decision by Parliament. Notices of motion often deal with substantive issues such as legislation, amendments to resolutions and proposal of a draft resolution following the consideration of a committee report. Therefore Parliament needs to be given notice so that MPs may prepare themselves for the discussion.

Moreover, at plenary, MPs are permitted to state their views on any matter under consideration by Parliament. In the same vain, Members of Cabinet may take the opportu-

nity to address Parliament on policy issues, executive actions and on any other information that Parliament should be informed about.

Rule of law, accountability and the public voice undermined

Beyond elections, there is a worrying trend of public office bearers circumventing the rules, regulations and standards of the offices they hold as well as breaking the law. Incidences of corruption in the public sphere have increased and are reported upon on a weekly basis in the nation's media. This reveals a lack of respect for the rule of law among those who are elected to represent the interests of the people and a disregard for the impact that the loss of public resources has on the living conditions of the public they are supposed to be serving.

It is estimated that South Africa loses R30 to R40 billion to public sector corruption every year. The country's ranking in the Corruption Perception Index has decreased, dropping from 54 in 2008 to 69 in 2012 out of 180 and 176 countries surveyed, respectively. These developments have had a negative impact on service delivery and government efficiency.

Government set up an anti-corruption task team in 2010. The Minister of Justice and Constitutional Development, Jeff Radebe, on 25 February 2013 reported that since the task team's inception, 237 people had been arrested. Of that number 32 have been convicted, 2 acquitted and the remaining 203 accused were facing charges before courts.

The Ministry has committed to name and shame perpetrators of corruption in the public sector through posting advertisements in the local media and publishing pamphlets containing names and details of convictions.

The number of convictions when pitted against the number of reported infringements is a mere pittance. Public servants seem to practice corruption with impunity bringing the public service into disrepute and undermining the sanctity of the rule of law.

Although South Africa has an established legal framework, with rules and regulations for the disbursement of finances and management of resources as well as an elaborate legal system, compliance with and enforcement of the law especially in the public administration is weakening. There is a growing concern about the blurring of the line between the state, party and personal interests. The politicisation of the public administration is contributing to the decline in standards of service delivery and is retarding the pace of development.

In the 2010-2011 financial year, the Auditor-General reported that there is a worrying trend of the greater number of government departments and public entities failing to achieve clean audits and noted "the administration as a whole is not making progress towards the desired audit outcomes". (70)

A shortage of accounting officers, weak monitoring of action plans; poor record keeping, asset management, preparation of monthly reports and reconciliations; failure to ensure compliance with laws and regulations and to prepare service delivery reports, were identified as the cause for regression in meeting audit outcomes. This context of lax controls over financial management has lead to "an escalating trend in irregular expenditure." (71)

In the same reporting period the office of the Public Protector made the following observations in its report:

"The majority of complaints handled by the Public Protector during the period under review mainly concerned service failure by the relevant organs of state, particularly municipalities. Systemic administrative deficiencies impact negatively on service delivery and good governance. The failures suggest non-compliance with the constitutional principles regarding governance enshrined in section 195 of the Constitution relating, among other things to professional ethics, efficiency, effectiveness, impartiality and fairness, responsiveness, accountability and transparency. They also

suggest lack of proper policies or the non-implementation thereof, or non-compliance with the relevant statutory frameworks which led to some of the organs of state receiving qualified audits or disclaimers from the Auditor-General of South Africa." (72)

Central to the Public Protector's findings about the causes of maladministration and poor service by government is disregard for the constitutional principles as well as legislation that is in place to promote and entrench good governance. The Public Protector does not fault the existing statutory framework but the non-compliance of organs of state working within that framework.

The Auditor-General's 2012-2013 PFMA consolidated general report recorded limited improvement in internal controls specifically regarding financial and performance management within departments and government entities. This impacts directly on governance and delivery.

At the core of the Republic's service delivery challenges, escalating corruption, endemic mismanagement and maladministration is the paucity of accountability in the public service. The trend is that government at all levels, and at the local level in particular, is unresponsive and unaccountable to the citizenry, lacks transparency, disregards the public voice and is flouting rules, regulations, constitutional principles and legislation.

Governance under Constituency-based Systems in Kenya and Zimbabwe

Kenya

Kenya celebrated 50 years of independence on December 12, 2013. The country has had a colourful political experience since in gained independence in 1963, traversing between a multiparty political system and single party statehood, and finally returning to multiparty democracy in 1992.

In 2010 Kenya adopted a new Constitution. This marked the establishment of the second republic. On 4 March 2013, Kenya held its first elections under the new Constitution. Although highly contested, the election results and the outcome of the court challenge that followed have generated hope for the consolidation of democracy.

After fifty years of independence and experimenting with democracy: Why did Kenya need a new constitution?

The 2010 Constitution is aimed at curing Kenya from the political decay that has resulted from decades of patrimonialism (where the leader is a law unto himself and makes law by edict), clientelism (where the leader makes those weaker than him beneficiaries of his benevolence by distributing state resources – he being patron, they being clients), and centralisation of the state with power residing in the office of the president.

At independence Kenya adopted first-past-the-post elections for Parliamentary elections and a run-off system for Presidential elections. Having received a direct mandate from the people, it would be expected that government would prioritise accountability to the citizenry.

President Jomo Kenyatta, Kenya's first President, and his successor President Daniel Arap Moi, made an art of centralising power in the presidency. Throughout their tenures, they went about dismantling the checks and balances on the executive arm of the state. Central government had a monopoly on political processes. Separation of powers was thrown in the rubbish heap of things to be forgotten. Civil society was slowly suffocated into oblivion. With all contest eliminated, the executive dangerously accumulated power within itself and went about serving its own narrow interests at the expense of the people, more so during President Moi's administration.

President Jomo Kenyatta's experiment with centralisation involved co-opting threatening opposition personalities and deposing more menacing characters from society. He was motivated by the need to create a strong government that could deliver the necessary security and development desperately needed by the nation, with minimal impediment and delays. Ultimately, the Kenya African National Union (KANU) remained as the only active political party, making Kenya a *de facto* one party state.

In a one-party state where the president is more like a paramount ruler and where there is no political competition the rule of law is fictitious – the law is mainly used to

club dissenters and to call citizens into line. Public participation exists only to legitimise the ruling party when it holds sham elections. Accountability is not even spoken of.

President Moi presided over Kenya's transformation into a *de jure* one party state. One could somewhat understand his paranoia since his administration was the victim of a coup attempt in 1982. Table 1 provides a schedule of constitutional amendments made under Presidents Kenyatta and Moi's presidencies.

Manipulation of the constitution for political expedience had dire implications for the rule of law in Kenya. It has meant that the judiciary and by extension the police and prosecutions have been under executive control. Similarly, Parliament's oversight role has been greatly weakened by executive dominance of the political system.Evaluating the executive's relationship with the rule of law Mbote and Akech argue:

> *"One of the tenets of the rule of law ideal is that 'government discretion must be bounded by standards that set effective limits on the exercise of that discretion'. Unfortunately in Kenya's case, the exercise of the immense discretionary powers wielded by the executive, especially the president, has not been fettered by any such standards. As a result, the president, government ministers and senior civil servants often act in any manner they deem fit, and in many cases irrespective of existing statutory requirements. There is thus a culture of executive impunity in Kenya, which owes its origins to the creation of an Imperial Presidency in the first decade of independence. The term 'Imperial Presidency' denotes the concentration of extreme power in the president, including the granting of unfettered constitutional powers to the president. The Imperial Presidency is a legacy of Kenya's colonial experience. In the colonial era, there were no effective mechanisms for regulating the exercise of the immense powers of the governor, which contributed to the development of autocracy.*

> *The culture of executive impunity has manifested itself in various forms throughout the history of the Republic of Kenya, and is a common subject of discussion in national newspapers. In all its forms, what typically happens is that the executive actor in question behaves with total disregard for the existing statutory requirements in the comfortable knowledge that his or her actions will not be subjected to any sanctions, since the established public accountability mechanisms are weak. Executive actors also tend to stretch the boundaries of their statutory powers, so that in practice that which is not expressly outlawed by any statute implicitly becomes – at least in their eyes – permissible. As far as these executive actors are concerned, the law seems to count for little; in many cases they perceive*

law as an inconvenience that must be cast aside when political exigencies demand it. Ironically, they are quick to embrace the law when it suits their fancies." (74)

Mbote and Akech note how Parliament has also been complicit in the undermining of the rule of law. To a certain extent, Parliament has been as brazen as the executive in its misuse of the law for narrow interests.

> *"The legislature has also displayed a lack of respect for the law in significant respects. In particular, the exercise of legislative power has been characterised by: the lack of respect for the legislature's own established procedures, the passage of laws undermining the separation of powers and the deliberate failure to enact amendments to laws declared unconstitutional by the courts.*
>
> *Generally speaking, while parliamentary assertiveness has been instrumental in enhancing the accountability of the executive, Parliament has not always demonstrated respect for the rule of law. Specifically, Parliament has undermined the separation of powers doctrine by passing laws that give MPs executive powers. Even worse perhaps, Parliament has not taken steps to amend such laws even after the courts have ruled that they are unconstitutional.*
>
> *Again, MPs have demonstrated a particular proclivity to enact laws that seem to only secure their parochial interests, and not the interests of the general public. This is especially the case with a series of laws that enhance the salaries and financial benefits of past and present members of parliament." (75)*

The judiciary's weakness and inability to uphold laws and adjudicate for the protection of human rights is directly proportional to the concentration of power in the executive. In an earlier paper I observed that the executive deliberately undermined the independence of the judiciary in order to strengthen its own position against opposition and dissident members of the then ruling KANU.

> *"Following decades of monopolising power and quelling all opposition using varying tactics, in 1988 and 1990 President Moi instituted constitutional amendments that had the effect of reining in the judiciary's authority and independence. These particular amendments had the effect of undermining the security of tenure that judges of the High Court had under sections 61 and 62 of the 1963 Constitution. The tribunals whose function it was to pronounce on the tenure of judges in order to maintain the independence of the judiciary from executive abuse were removed and judges retained or lost their positions at the "pleasure of the President". This surrender of security of tenure to the whims of the executive further compromised the separation of powers in Kenya. (76)*

The legacy of disregard for the rule of law has been evident even after the Moi Presidency.

Corruption in Kenya has been a cancer eating at the fabric of state and society alike. Corrupt practices, including when citizens are asked for kitu kidogo ("a little something" or "cool drink" – a South African euphemism for bribery) "to get a document stamped, a service provided, or an infraction overlooked." (77) Bribery and irregular awarding of contracts has been a popular form of corruption.

Post-colonial Kenya has not been effective in ensuring that those politicians and members of the executive who have at one or other time been implicated in corruption or misconduct are held to account. (Although President Kibaki ran on the ticket of eradicating corruption in the public sector in 2002, his own cabinet contained individuals who had clouds hanging over them.)

In 2013 speaking at the unveiling of new police vans, incumbent President Uhuru Kenyatta declared that the Presidency is the hotbed of corruption in Kenya. He referred explicitly to the culture of classifying information in order to shield senior officials from public and legal scrutiny. It remains to be seen what he will do to end this practice. (78)

There have been a number of infamous cases of corruption, which involved high profile government officials. One such scandal was the Goldenberg scandal, considered one of the country's biggest corruption scandals. That this scandal implicated a number of ministers who retained their powerful positions during the autocratic dispensation into the democratic era demonstrates the deep roots of impunity in Kenya's government.

The use of patronage to garner political support from tribesmen led to the politicisation of ethnicity in Kenya. Under President Kenyatta, members of the Kikuyu tribe dominated the political and economic scene in Kenya since constituting the bulk of his government. (79)

President Moi further entrenched the perception that marginalised ethnic groups could only achieve their developmental goals as well as access economic prowess by capturing the state. After ascending to power, he rewarded members of his tribal community with the perks of state office and easy access to commercial opportunities.

Ethnic polarisation has been a great source of instability in Kenya. For instance, a feeling of resentment towards the dominant Kikuyu tribe among the marginalised ethnic groups was a key factor in the violence and killings in the post-election clashes of 2007/2008. (80)

In the prevailing context of executive dominance of the judiciary and a weak Parliament, corruption in Kenya reached record levels under President Moi. (81) Human rights violations and harassment of opposition and civil society activists also increased. From the late 1980's those activists who sought relief from the Kenyan courts were disappointed because judges complied with executive instructions to override the bill of rights, which had practically been suspended.

A one party system is antithetical to the promotion and broadening of public participation. Removing the right of opposition parties and interest groups to contest the governing party robs the electorate of alternative voices. Having only one recognised political party makes a mockery of elections. It amounts to imposing the ideology, values and programmes of the governing party on society, depriving citizens the opportunity to exercise their own choice.

Prior to the 1969 general election, the KANU government banned the only remaining opposition party, the Kenya People's Union (KPU). The ban came shortly after the assassination of one of Kenya's promising young leaders, Tom Mboya, who happened to be a prominent figure in the KPU. The subsequent 1974 and 1978 general elections were contests of one party, hardly competitive.

Kenya forfeited the accountability and efficiency benefits of first-past-the-post. Elections ceased to be a credible mechanism through which citizens could question and sanction the executive because the Presidency manipulated all institutional safeguards and checks and balances against abuse of power. The absence of rule of law; the frustration of public participation and political competition; the weakening of the judiciary and legislature, all made the use of a constituency-based system for elections null and void.

Under pressure from donors and civil society in 1991, President Moi reinstated the multiparty system through a major constitutional amendment. The adoption of multipartyism did not restore political trust and stability mainly because President Moi and KANU manipulated the system.

Although government, on paper, permitted opposition parties to register to run in the elections, these were frustrated through delays in the application process. The divide and conquer tactic also came in handy because a divided opposition meant split votes and thus minimal challenge to the incumbent.

The KANU government restricted the opposition's ability to campaign by denying permits for rallies. Media freedom was constrained. The freeness and fairness of the election was compromised from the outset given that President Moi nominated all members of the Electoral Commission, the members were beholden to him. Such manoeuvring ensured that the outcome of the 1992 elections went in his favour. During the elections, President Moi dispatched security forces into the various regions to destabilise the electoral process in order to "confirm his prediction that the transition to multiparty politics would lead to disunity and violence." (82)

President Moi won the 1992 elections, defeating a split opposition with 36% of the vote. The 1997 election went the same way as the 1992 polls as President Moi retained power using the same tactics. (83)

The voter turnout of the 1992 election reflected the undemocratic atmosphere within which it was conducted. The turnout for Parliamentary and Presidential elections stood at 58,48 and 66,81 per cent respectively. There was a huge improvement in participation in the following election in 1997 where the turnout was 65,45 and 83,86 per cent in the Parliamentary and Presidential elections respectively. The 1997 elections indicated the public's renewed enthusiasm to participate in and influence government. (84)

A complete constitutional reform that would reinstate fundamental principles of democracy, that is, separation of powers, the rule of law, and the protection of civil liberties and political rights was the only way to accomplish true change in Kenya.

Branch and Cheeseman argue that: "In the Kenyan context, divorcing appointments to the Electoral Commission and the judiciary from executive control would give the opposition greater faith in these institutions." (85) They also state "effective institutional reform is essential to prevent the transition to multi-partyism being self-defeating and forever incomplete." (86)

Although the autocratic system of governance was taking long to capitulate, there were signs of progress. In 2001 Parliament adopted legislation to separate the legislature from the executive and President Moi acceded to it.   Since then, Parliament has asserted its authority and is willing and able to challenge the executive.

The voter turnout in the following general election in 2002 betrayed a sense of disillusionment among the electorate, only registering at 57,18 per cent. However, there was an improvement in turnout in 2007, where it rose to 69,09 per cent.

Former President Mwai Kibaki served as the Minister for Economic Affairs and Planning and Minister of Finance under President Kenyatta. In the lead up to the 2002 elections, Mwai Kibaki and Raila Odinga (former Prime Minister) formed the National Rainbow Coalition (NARC) in the bid to unite Kenya's opposition parties.

NARC won the 2002 elections following Odinga's endorsement of Kibaki and Kibaki was installed as third President of Kenya.

Although they worked together, President Kibaki and Mr Odinga differed on a number of issues including the creation of the post of Prime Minister, the number of Parliamentary seats to be allocated to each coalition member and the distribution of ministerial posts among the coalition parties. Ultimately President Kibaki populated his cabinet with his Kikuyu tribesmen together with individuals from the Meru and Embu tribes, cousins to the Kikuyu, leaving out other ethnic groups including Odinga's Luo tribe.

Despite the wrangling within the coalition, the socio-economic conditions in Kenya improved under President Kibaki.

> *"Economic growth resumed, reaching 7 percent in 2007. The quality of public administration was substantially restored, as was the performance of state-owned corporations such as Kenya Airways and the marketing boards for coffee and tea. Personal incomes rose for the first time in two decades. Tourism and investment, which had deserted Kenya under Moi, returned." (87)*

The one thing President Kibaki failed to improve upon was the high level of corruption that persisted in his administration. The gains made under President Kibaki were not enough to guarantee long lasting stability in the country. The 2007 polls were highly contested. The bloodshed and chaos led all parties to realise the need for constitutional reform and to overhaul of Kenya's political system.

Following the 2007/8 post-election violence former UN Secretary Kofi Anan brokered a deal between the rival parties, which resulted in a government of national unity. The unity government worked to produce Kenya's new Constitution, which was adopted through a referendum held on 4 August 2010. President Mwai Kibaki ratified the new Constitution on 27 August, that same year.

The 2013 general election, held on 4 March, marked a break with the past. The election was conducted peacefully, dispelling the predictions of some analysts. This election registered a record voter turnout of 85,91 per cent, evidence that the Kenyan public is very much engaged in the political system.

TABLE 1		
YEAR OF AMENDMENT	**DETAILS**	**IMPLICATIONS**
1964	Unified offices of Head of State and Head of government.	Office of president given extensive powers within the executive.
1964 and 1968	The constitutional protection against the redrawing of regional and district boundaries or the creation of new regions or districts removed.	Government could redistrict boundaries at will.
1965	Simple majority for Parliamentary approval of state of emergency rather than special majority (65%)	President could call for a state of emergency without resistance from Parliament.
1966	Removed the time limitations on state of emergencies.	Executive could arbitrarily extend the state of emergency, which suspends the bill of rights and outlaws opposition activities.
1968	Abolition of the Senate.	The Senate represented the interests of the provinces/states. Its abolition meant that the central government dominated and the interests of the regions were not represented.
1968	Gave the President the authority to appoint the twelve nominated Members of Parliament.	The power to nominate MPs gave the President influence over these individuals in Parliament. This diminished the independence of Parliament to some degree.
1975	Allowed the President to waiver the penalty on persons found guilty of an election offence, not to contest elections for five years.	Discretion over electoral offences meant that the President had influence over electoral processes. He could determine who could run based on who he favoured.
1982	Constitutional amendment that made Kenya a de jure one party state.	At this stage Kenya only had one legally recognised political party – KANU.
Source: Kindiki, K. The Emerging Jurisprudence on Kenya's Constitutional (73)		

The high voter turnout could be attributed to the opening up of democratic space since the installation of the new constitution. Citizens have participated in various constitutional reform processes, including the appointment of the Chief Justice and his Deputy and the vetting of the judiciary wherein they were allowed to make submissions.. Civil society has indeed been monitoring that government is implementing constitutional provisions that are aimed at reform.

What was most encouraging is that Mr Raila Odinga, the runner up, turned to the courts rather than to the streets in disputing the election results.

There is evidence of remarkable changes in the judiciary. As prescribed by the Constitution, the Supreme Court gave its ruling within 14 days of the lodging of Mr Odinga's dispute. This is also an improvement on the past where courts took over a year, sometimes two years, to adjudicate election disputes leading to frustration and conflict. There is generally an atmosphere of optimism among Kenyans about the future of the country henceforth.

What institutional changes have Kenya's 2010 constitution introduced that should lead to better governance outcomes?

• Separation of powers is guaranteed

• Power is devolved to 47 local counties

• Bicameral Parliament with Senate and House of Representatives

• Educational, moral and ethical perquisites for all would   be public representatives (Presidential candidates, prospective MP's and members of county assemblies etc.)

• Public participation in Parliamentary processes

• Oversight role of Parliament has been strengthened

• Citizens may recall MPs

The Goldenberg Scandal

The extent of corruption in Kenya was illustrated in one of the country's biggest corruption scandals – the Goldenberg scandal. In sum, Goldenberg International Ltd., headed by businessman Pattni Kamlesh, purported to provide a solution to the Moi government's shortage of foreign reserves. Goldenberg International Ltd. posed as an exporter of gold and diamond jewellery. The company was designed to exploit Kenya's export compensation scheme, which was designed to encourage companies to export more in order to gain Kenya more foreign exchange, by compensating them 20% of the value of their exports.

Goldenberg International Ltd. applied to get the exclusive right to export gold and diamond jewellery against the Monopolies and Price Act, which outlaws monopolies and also requested 35% compensation rather than the 20% stipulated in the Export Compensation Act. Professor George Saitoti, the then Finance Minister, approved this. Goldenberg presented fraudulent compensation claims to the Central Bank of Kenya (CBK) for large sums of exports that did not actually take place. Although the CBK and First American Bank (where Goldenberg did its banking) picked up discrepancies when processing Goldenberg's claims, they did not act. In 1991 the Exchange Controller who monitored the payment of compensation raised alarms about Goldenberg's fraudulent activities. First American Bank, which had a problem with how Goldenberg declared its foreign exchanges, also raised concerns. Even so, Goldenberg International Ltd. was permitted to open an exchange bank under the auspices of the Minister of Finance and the then Governor of the CBK – Eric Kotut.

"The establishment of Exchange Bank was a turning point in the Goldenberg scandal because it meant Goldenberg's transactions were controlled under one umbrella and it was more difficult to subject them to the kind of scrutiny that had been possible when its affairs were reported on by the bankers who previously dealt with Goldenberg accounts. Indeed, this marked the beginning of new money laundering operations that quickly evolved into one of the biggest financial scandals ever seen in Kenya and probably in the whole of the Eastern Africa region."

The scandal was uncovered in 1992 when the Daily Nation, a Kenyan newspaper, first published a story about Goldenberg International Ltd.'s fraudulent diamond and gold jewellery exports. In May 1992 the Controller and Auditor General presented an audit questioning various compensation payments made to Goldenberg. The Minister of Finance persisted to defend Goldenberg and his Ministry's decision to give Goldenberg a monopoly and 35% compensation instead of 20%, and by claiming that Goldenberg's documents were in order. In June 1993 the Central Bureau of Statistics presented an Economic Survey that did not reflect the large amounts of exports in gold and diamond jewellery that Goldenberg claimed to be exporting.

The survey also found that the foreign companies that Goldenberg claimed to be to exporting its goods to, had no dealings with it at all. IMF and World Bank audits in 1993 as well as investigations by Price Waterhouse Coopers 'revealed that Exchange Bank and Goldenberg were at the centre of extensive money laundering activities with the other politically connected banks and the CBK'.

Although the evidence pointing to large-scale corruption and money laundering abounded, government failed to prosecute the masterminds of the scandal:

"Amos Wako, the Attorney General, faced considerable pressure to start prosecution but he always scuttled the matter, saying the police were still investigating and there was insufficient evidence to sustain a prosecution. The Law Society of Kenya (LSK) took up the matter and gave Wako until 31 August 1993 to prosecute those associated with Goldenberg and, when he failed to do so, the society

filed a private prosecution in the Kenyan High Court. However, the Attorney General used his constitutional powers to sabotage the prosecution by taking it over and thereafter terminating it."

The fact that the Office of the Attorney General frustrated the judiciary by interfering in court proceedings is an indication of the serious need for reform in Kenya's justice system and the need to guarantee the independence of the judiciary.

Although Amos Wako had failed to ensure prosecutions in the 1990's, in 2006 following a report by the Goldenberg Commission set up by President Kibaki in February 2003, charges were laid against Mr Pattni, former head of intelligence James Kanyotu, former treasury permanent secretary Wilfred Karuga Koinange, former central bank governor Eric Kotut and his deputy Eliphaz Riungu. However Professor Saitoti was omitted from the list, 'a court order is in force exempting him from prosecution' although the Commission's report recommended that he should also be charged.

Source: N Sibalukhulu, 'The judicial appointment process in Kenya and its implications for judicial independence' (July 2012). p. 39 -41.

Zimbabwe

Akin to Kenya, Zimbabwe's is a tale of power-mongery, patrimonialism, clientelism and constitutional fiddling. Similarly to Kenya, Zimbabwe has adopted a new constitution. On 22 May 2013 President Robert Mugabe promulgated Zimbabwe's second Constitution. The document was adopted through a landslide yes vote in a referendum held earlier in the same year.

Zimbabwe is a quirk of former British colonies. Zimbabwe was the only former colony to adopt PR for its inaugural general election. Even so, contemporary Zimbabwe makes use of first-past-the-post for Parliamentary elections and a run-off system for Presidential elections.

PR was most favoured by the white minority at independence as it would guarantee their representation in the new government. Zimbabwe African National Union (ZANU-PF), headed by Robert Mugabe, and the Zimbabwe African People's Union (PF-ZAPU), headed by Joseph Nkomo, were sceptical of the system. It is little wonder that subsequent to the 1980 election, both parties having garnered enough votes to control Parliament, opted to change from PR to first-past-the-post.

Zimbabwe's PR system consisted of two voter's rolls, a common voter's roll and a voter's roll exclusively for whites. The common voter's roll seats were 80 and the white voter's roll had 20 seats. A threshold of 5% was used for the allocation of seats.

In the common roll, Robert Mugabe's ZANU-PF won 57 seats in the 1980 parliamentary elections, a total of 63%. PF-ZAPU won 20 seats (24%) while UANC won 3 seats (8%). RF won all 20 white roll seats.

Some scholars speculate that the change had to do with Mugabe's desire to establish a one-party state in Zimbabwe. Accordingly, Mugabe perceived that the PR system would perpetuate multipartyism within which minority groupings and opposition

would retain their influence, however small. First-past-the-post on the other hand would dumb down the significance of the minority vote thus allowing ZANU-PF to cement its dominance and implement its programmes unhindered by the objections of opposition parties.

The ZANU-PF government followed up the alteration of the electoral system with the abolishment of the 20 white parliamentary seats in 1987. In the same year, Parliament amended the Constitution to introduce direct presidential elections as from 1990 – thus abolishing the Electoral College. The Senate was also expunged in favour of a single house of Parliament. (88) This was the laying of the foundation for centralisation of the state.

Although voters elected local councils using first-past-the-post, the central government developed a tendency to interfere with the running of the counclils. Even after the people had elected councillors, the national executive could at any stage remove elected councillors and replace them with others. (89)

The Minister of Local Government has legal authority to administer local councils. In order to bolster the influence of the central government, especially at the time where the MDC posed greatest threat as strong parliamentary opposition, the Minister used his powers to frustrate the functioning of local councils through unsolicited suspension of councillors, among others.

Central government's interference in the functioning of local governments for political reasons worked to undercut the will of the people who elected the local representatives. Political expedience was placed before the interests of the people.

Just like KANU in Kenya, ZANU-PF swallowed up opposition parties. In 1987, PF-ZAPU ceased to exist, having amalgamated with the ruling party. By 1995 Zimbabwe was a de facto one-party state. ZANU-PF has maintained its dominance with very little

competition until 2000 when the Movement for Democratic Change (MDC) gained electoral momentum.

ZANU-PF maintained its electoral dominance in part by manipulating state institutions – "especially the Central Intelligence Organization (CIO), police, army, and media (daily newspapers, radio and television)." (90) Its monopoly on public funds, which it has used to reward party loyalists and to fuel its election campaigns, has also stood it in good stead.

Characteristic of the ZANU-PF government has been an intolerance of dissent, the use of repressive measures to pacify opposition parties and any civil society demonstrations including those by workers and students. Muzondidya observes "behind the façade of constitutional democracy lay an authoritarian political system characterised by the proscription of democratic space, and serious violation of basic human rights and the rule of law". (91)

This intolerant political culture is a legacy of the 'commandist' style of leadership adopted during the struggle for liberation in which all opponents were considered enemies. Similarly, post liberation, ZANU-PF has participated in elections as if they were a war, viewing electoral opponents as enemies to be destroyed rather than competitors to be respected. Thus violence has become a key aspect of Zimbabwe's political culture. (92)

Sithole and Makumbe argue that populist politics and charisma have also been ZANU-PF's trump cards. Its appeal to the masses through its leftist leaning and the enrapturing rhetoric of party leader President Mugabe has kept the masses under the ruling party's sway. (93)

However the voter turnout in the early period after independence reveals that most voters were slowly disengaging from the political system. Voter turnout dropped from 90% to 60% in 1985 - largely due to an election boycott led by ZANU-Ndonga (a

break away from ZANU-PF) protesting Mugabe's plans to turn Zimbabwe into a de jure one-party state. At the 1995 elections voter turnout sat at 54%, with turn out averaging at 30% in urban areas. (94)

ZANU-PF's historically good performance in rural areas and the opposition's flourishing in urban areas are largely due to the artificial barriers ZANU has erected to prevent opposition from reaching the rural masses. This it does through its monopoly on the media and armed forces. (95) It is a calculated strategy to keep rural people perpetually ignorant of alternatives to the ruling party through fear mongering and threats of violence against disloyal communities.

Reynolds observes, "ZANU-PF were able to maintain their vice-like grip on Zimbabwean electoral politics through a monopoly of state resources, a legal and social framework stacked against dissent, the general ineffectiveness and fragmentation of opposition movements, plus the reservoir of loyalty held by Mugabe in the North and Nkomo in Matabeleland." (96)

The prevailing ethnic, racial, urban-rural electoral divides in the country are more a function of ZANU-PF's violent election campaign tactics. (97) The development of conciliatory and accommodating politics has not been in ZANU's political interests. Thus the use of the first-past-the-post tends to prop up this divide and conquer strategy because of its underplaying of broader representation.

The greatest challenge to Mugabe's autocratic regime came from the trade unions and civil society organisations (CSOs) in the face of the country's economic meltdown that was evident from the late-1990s. In 1998, responding to the food riots of late 1997, the Zimbabwe Congress of Trade Unions (ZCTU) engaged government on issues of taxation and economic policy demanding a "properly constituted consultative body on economic policy." (98)

The ZCTU's relevance extended beyond economic issues. It began to be a leader in the political struggle, agitating for opening up of democratic space and protection of civil rights and liberties. Together with CSOs the ZCTU whose leadership included Morgan Tvangirai (now leader of MDC and Prime Minister) as Secretary-General, organised mass actions including 'stay-aways' in 1998.

> *"In the face of such intensifying labour militancy the state imposed the Presidential Powers (Temporary Measures) Labour Regulations of 1998 (Statutory Instrument 368A of 1998) in November 1998, and imposed heavy penalties on trade unions and employers who incited or facilitated strikes, stay-aways, and other forms of unlawful collective action." (99)*

Government's repressive response to civil society's mass action led to the formation of the National Constitutional Assembly (NCA) in 1997, with the ZCTU at the forefront. The NCA was concerned with establishing a framework for democracy. The NCA process gave birth to the Movement for Democratic Change (MDC) led by the Morgan Tsvangarai. The MDC took on ZANU-PF in the 2000 election and emerged as the official opposition.

The election was close and the MDC posed a real threat to ZANU-PF's hegemony. However the ZANU-PF government avoided the threat of electoral defeat by giving itself 30 additional seats in parliament. "Otherwise, the MDC inroads had paved the way for a competitive two-party system." (100)

Further to the additional seats advantaging Mugabe's regime, in the lead up to the 2005 parliamentary elections ZANU-PF used propaganda and violence against the opposition in order to evade a two-party system. (101)

The 2005 electoral violence drew the attention of the international community and so in 2007 the South African Development Community (SADC) appointed former South African President Thabo Mbeki to mediate between Mr Tsvangarai and President Mugabe to reach a political consensus. In that year an agreement was reached that signalled conditions conducive to free and fair elections in 2008; the calm was short lived.

MDC won 109 seats in parliament against 97 ZANU-PF's 97 seats in 2008. In the presidential election, neither President Mugabe nor Mr Tsvangarai won a majority thus necessitating a second round of voting.

In the lead up to round to of the vote, President Mugabe's government unleashed a campaign of violence against MDC supporters and sympathisers thereby voiding the progress made in the mediation process and precipitated political instability. Mr Tsvangarai pulled out of the race. President Mugabe was the victor by default.

Changing the electoral system from PR to a plurality system allowed ZANU-PF to use its dominance in government to entrench its control of state institutions, leading to the blurring of lines between state and party. The stifling of opposition, the undermining of separation of powers, and centralisation have resulted in the absence of institutional safeguards against executive abuse of power in the country.

The ruling party has been able to use state resources as patronage to reward party members and to co-opt opponents. It has given ZANU-PF free reign to adopt repressive laws aimed at weakening opposition and to deploy state sponsored violence through the military and police to crush dissent in society.

First-past-the-post has failed to ensure fairness of the political system. It is because of this that opposition parties and members of civil society have called for the reform of the electoral system to incorporate tenets of PR. (102)

Similar to Kenya, Zimbabwe's new constitution has introduced reforms aimed at addressing the governance deficit:

• For the life of the first two Parliaments after the Constitution comes to force, an additional sixty women members (six from each of Zimbabwe's 10 provinces) are to be elected using the PR system, based on the performance of political parties in the constituency-based general elections

• Separation of powers is guaranteed

• Bicameral Parliament – Senate has been reinstated

• Parliament may pass a vote of no confidence in the President

• Constitutional supremacy has been established

• Government has been devolved to the local level

• President no longer has sole discretion over the election of Provincial governors

• Provincial and local governments are enjoined to ensure good governance by being effective, transparent, accountable and institutionally coherent and to secure the public welfare

• The Zimbabwe Electoral Commission is categorised as an Independent Commission

Standing at a Crossroads

After evaluating all three countries' governance track record with a focus on the rule of law, participation and accountability, one clear difference emerges. South Africa's strong democratic institutional infrastructure sets it apart from Kenya and Zimbabwe.

Good governance rather than being an outcome of electoral processes is more a matter of political culture, democratic institutional design, conscientious and ethical leadership, and constitutionalism.

It is precisely because of its institutional framework, specifically separation of powers buttressed by an independent court system and independent institutions that exist to support and protect the tenets of constitutional democracy (Chapter 9 institutions) that South Africa has avoided the pitfalls of centralisation and constitutional manipulation.

Respect for and protection of political rights and civil liberties – which include freedom of association and expression – and the guarantee of press freedom, are important indicators of freedom. Where these freedoms are not guaranteed and upheld, public participation is not possible and is not substantive. According to Table 2 South Africa is freer than Kenya and Zimbabwe, scores better on press freedom.

South Africa has the greater percentage of women's representation in Parliament. The representation of women in parliament is a strong indication of the inclusiveness of

the political system. Women are usually the most vulnerable and thus most susceptible to marginalisation.

Table 3 and 4 demonstrate that South Africa has the most independent judiciary, the least corrupt public sector, the more efficient legal framework and most reliable police service of the three countries. According to the rankings, therefore, South Africa is leaning more towards good governance than its two counterparts.

Even though South Africa seems to be leading the pack, signs of decline are vividly apparent.

Weaknesses in governance in South Africa have been underscored by the growing challenge of corruption, maladministration, and failures in the delivery of services. One just has to read the Auditor-General and Public Protector's findings to see the trend. Government's own assessment of itself gives clear evidence of the decline.

Despite the setting up of the anti-corruption task team and their recorded successes to date, reports of corruption continue to fill the pages of daily and weekly newspapers and are uncovered by members of the public. The controls in place as well as the punitive measures that are being applied do not seem to be deterring perpetrators. Indeed, controls are overridden and regulations flouted.

The country's robust and sound legal framework and provisions for public participation are undermined. Public consultation platforms appear to be mere formalities since government departments do as they please under Parliament's watch. Failure to apply accountability and transparency mechanisms in government makes a mockery of the trust that citizens' place on elected representatives to guard their interests. Government and civil servants are losing legitimacy in the sight of the citizenry. The social contract between the state and society is being trampled.

Despite the oversight and accountability mechanisms of Parliament, government departments continue to flounder in ensuring the implementation of policy and recommendations on operational issues at all levels of government.

South Africa is not immune from the ills that have spelt the degeneration of the democratisation projects of Kenya's, Zimbabwe's and indeed other African states' independence eras.

President Uhuru Kenyatta aptly highlighted that the root of corruption lays in the arbitrary use of powers to classify documents, used by senior officials in government.

In dealing with allegations of corruption surrounding the security related renovations done at President Jacob Zuma's family home in Nkandla, dubbed Nkandlagate, South Africa's cabinet and security machinery have demonstrated their proclivity to use classification as a means to prevent public scrutiny into executive actions.

Details of the R206 million project have been said to be top secret given that it is directly concerned with the President's security. The Department of Public Works' internal probe of the allegations was also classified top secret in the interest of the President's security. Moreover, security cluster ministers attempted to interdict the release of the Public Protector's provisional report claiming that it would jeopardise the President's security. It could be that Nkadlagate is not only a threat to the President's personal security but perhaps to his political security as well.

In keeping with the theme of classification, Parliament has undertaken the project of compiling the Protection of State Information Bill, which is colloquially termed the Secrecy Bill. The bill gives government powers to classify information in the guise of protecting state security. The bill could have the effect of giving officials authority to cover up state corruption preventing the public from getting wind of unscrupulous behaviour. Moreover, the bill does not protect whistle blowers and would subject journalists

and any member of the public who should get possession of classified information, even for the purposes of exposing corruption, to long jail sentences and large fines.

Patrimonialism and clientelistic politics are also a growing reality in South Africa. Political connectedness is the key to many a business and/or career opportunity. Nepotism, comradeship and friendship have begun to displace any impersonal measure of merit and capacity as the primary criteria for government jobs and tenders. Politicians at local through to national level have tasted the benefits of dangling the carrot of jobs, state contracts, and other state sponsored advantages in order to win the support and secure the votes of communities.

Should South Africa continue on its path of decline, Kenya and Zimbabwe do have a chance at overtaking her. If they learn from their pasts, and remain on track to implementing and cementing the constitutional reforms they have adopted, together with the use of an electoral system that emphasises accountability, their governance trajectory can only be positive.

What lessons have the Kenyan and Zimbabwean experience taught about the relationship between electoral systems and good governance?

Kenya's first-past-the-post system did not prevent the centralisation of power in the executive, the arbitrary application of the law for political expedience and the undermining of the principle of separation of powers.

The executive intermittently tampered with democratic institutions systematically weakening the capacity of Parliament, the judiciary, regional and local government. In line with the centralisation of power, channels of participation and expression of dissent or grievance were systematically closed by the ruling elite.

TABLE 2			
PUBLIC PARTICIPATION INDICATORS	**South Africa**	**Kenya**	**Zimbabwe**
Political rights*	Free (2)	Partly free (4)	Not free (6)
Civil liberties*	Free (2)	Partly free (4)	Not free (6)
Press freedom**	Partly free (34)	Partly free (52)	Not free (80)
Women's representation in Parliament: Lower house	42.3 %	18.6%	15%
Upper house	32.1 %	26.5 %	24.2 %

Source: Political rights, civil liberties and press freedom score taken from Freedom House: Freedom in the World Report and Press Freedom Report; Women representation in Parliament taken from The Guardian Data Blog (104)

*Rating: 1-2 = Free, 3-4 = Partly free, 5-7 = Not free

** Rating from 0(the most free) to 100 (the least free)

TABLE 3			
RULE OF LAW INDICATORS*	**South Africa**	**Kenya**	**Zimbabwe**
Judicial independence	27	85	113
Reliability of police services	90	113	124
Efficiency of legal framework in settling disputes	17	72	82
Efficiency of legal framework in challenging regulations	16	69	134
Organised crime	111	115	36

Source: Rule of law and accountability indicators taken from Global Competitiveness Report 2012-2013 (out of 144 countries) (105)

TABLE 4			
ACCOUNTABILITY INDICATORS*	**South Africa**	**Kenya**	**Zimbabwe**
Transparency of government policy making	35	105	72
Favouritism in decisions of government officials	110	120	117
Diversion of public funds	84	93	92
Public trust in politicians	88	92	130
Irregular payments and bribes	47	125	69
Wastefulness of government spending	62	81	99
Corruption ranking*	69	139	163

Rule of law and accountability indicators taken from Global Competitiveness Report 2012-2013 (out of 144 countries) (106)

*Corruption ranking from Corruption Perceptions Index (out of 176 countries and territories) (107)

The competition promoted by first-past-the-post converged with the already existing ethnic disparities, which encouraged the politicisation of ethnicity. The resulting politicisation of ethnicity meant that electoral rivalry expressed itself in ethnic rivalry. In this context, politicians garnered support by promising patronage to their ethnic groups from which they derived greatest support. The state therefore became the tool for personal advancement rather than an instrument for the public good. This created an environment for corruption and irresponsiveness to thrive.

The Kenyan experience and the reforms prescribed by the 2010 Constitution demonstrate that a constituency based electoral system is not enough to ensure good governance. An electoral system, which is only one of the many institutions necessary for a democratic government, needs to be accompanied by broad institutional reforms.

Kenya has identified these reforms as political party transformation; establishing a truly independent electoral and boundaries commission; setting stringent leadership, moral and educational standard for prospective public representatives; devolving authority and decentralising power from central government to regional county governments; adopting elements of proportional representation; and making provision for the electorate to institute recall proceedings against unsatisfactory MPs.

The biggest challenge to Kenya's new political order is political will. The success of the codified reforms rests heavily on the good faith and integrity of those individuals who have been given the task to implement them. Chapter six of the Constitution outlines the high standards of leadership and integrity that Kenyans expect from those with political ambitions.

In Zimbabwe, accountability to the electorate and responsiveness to its desires has not been the outcome of first-past-the-post. The ruling party has managed to manipulate state apparatus, including the armed forces, to entrench its dominance, contrary to the will of the people – as illustrated in the 2008 parliamentary election. Moreover, first-past-the-post has enabled President Mugabe's government to crush minorities and deny them full political participation.

Given that Zimbabwe is a divided society, divided along race, class and ethnicity, the PR system could have been (and still could be) advantageous to building cohesion in the Zimbabwean society. Even so the first step to reforming Zimbabwe's electoral system should focus on creating a "conducive political environment for free and fair elections". This requires extensive institutional reforms including the devolution of power from the centre to local governments, the reduction of presidential powers, depoliticised police and armed forces, promotion and respect for civil liberties and political freedoms, and strong separation of powers.

Both Kenya's and Zimbabwe's new constitutions have identified the outlined institutional reforms towards strengthening democratic governance in these countries.

Although Kenya and Zimbabwe have a constituency-based system, this has not made them better governed states. Their democratic experience has been undermined and well near eroded by the disregard for the rule of law, the subversion of participation and the overriding of accountability mechanisms.

As Matshiqi puts it "The electoral system is, therefore, but one factor among several that have the potential to enhance the democratic experience…"(108)

Therefore, changing the electoral system may contribute to strengthening the service orientation of public representatives but in no way does it guarantee that those who intend to be corrupt will retract their contemptible designs. This fact illustrates that electoral systems do not operate in a vacuum.

Their power to influence political behaviour is either constrained or assisted by the existing political culture and the constitutional and institutional framework. Whilst mulling over whether to change the electoral system, the question is whether the principles of accountability, transparency, participation and the rule of law are present in the country's broader institutional design.

And indeed these principles are already enshrined in our Constitution. Separation of powers, an independent judiciary, and independent oversight institutions that monitor the actions and performance of government, the requirement for public consultation and publication of policies and financial statements already exist. However there are areas of our political culture that require improving:

Demand for accountability

We need a polity that requires and demands accountability. In order to achieve this we need to establish higher standards of merit and integrity so that prospective politicians and public representatives who do not meet the standard are deterred from the outset.

An enlightened electorate

In order for public representatives to take these standards seriously, we need an educated, well informed, and engaged electorate that demands accountability and uses its power – the vote – to enforce it.

Prospective leaders must be tested

We need to develop the habit of testing and evaluating leaders. Our leaders need to be questioned about their credentials, previous achievements and vision for the future. It is not beyond our reach even under a PR system. Our media could assist by running candidate profiles of those prominent on party lists at election time.

Promote internal party democracy

Political parties themselves must practice democracy if they are to be fit to administer an entire country's democracy. Strengthening internal party democracy will compel greater commitment to good governance at the party level which should spill over into governement. Laws could be instituted to impel political parties to open up the list processes ensuring that the broader party membership have a say in the selection of individuals to be deployed in government.

Transparency of party funding

A transparent and equitable party funding system is also key to accountability, so that we know whose interests political parties could be serving. How else can we be sure that political parties are not putting the private interests of their donors before the public interest?

Parliament participation in and oversight of Cabinet selections

Requiring Parliamentary approval of Cabinet appointments could enhance the oversight role of Parliament further. All Presidential appointments could be made subject to Parliamentary vetting and approval. In this way, the executive's accountability to Parliament would be more strongly impressed.

A stronger and more competitive opposition

Greater electoral competition is vital so as to temper the governing party's complacency. Opposition parties have a responsibility to voters, to present clear and credible policy alternatives so as to increase voter choice.

The way forward for South Africa: A mixed system for good governance?

Adding a constituency element to the current electoral system could be beneficial in improving governance and government responsiveness to the citizenry. However, electoral reform is not a panacea. Although the argument for it is compelling there are possible drawbacks.

Firstly, dividing a country into constituencies is at most times an emotive and politically divisive exercise. In a divided society it can possibly foment conflict between different groups, which have vested interests.

Apartheid policies divided the South African society along racial differences. Because the distribution of resources was determined according to race, class stratification has followed the same racialised patterns.

Ndletyana made the point in 2007: "But the question still remains: Has South Africa reached a point where the initial considerations, which necessitated the adoption of the PR system, no longer hold sway? My answer is a definite no. South African society is still racially polarized. White voters support historically white parties and vice-versa. There still a marked distrust of the other, and the white community especially feels emasculated. A shift towards a majoritarian system, therefore, would be completely inappropriate." (109) His words ring true today.

Secondly, direct accountability does not necessarily mean the weakening of the influence of political parties in governance. It does not guarantee that MPs will be more responsive to communities because they remain answerable to their political parties.

Thirdly, a constituency-based system is likely to result in the exclusion of minorities and smaller parties who will struggle to compete with the larger electoral margins of the bigger parties such as the African National Congress and the Democratic Alliance.

Adopting a full on constituency based system for national elections would neither uphold the values of inclusiveness and representation which the country's democracy still needs in order to foster nation building. Nor would it necessarily lead to the consolidation of the desired good governance principles – rule of law, participation and accountability – without other institutional imperatives as noted above.

What South Africa ultimately needs is a government committed to complying with the already existing governance framework; strengthened capacity within the state to implement and adhere to constitutional norms and administrative rules, regulations and standards; a conscientious civil service that will apply the Batho Pele (people first) principle of service delivery; and the will to deal decisively with corruption at all levels of the government.

The components of good governance are built into South Africa's institutional framework. Although introducing a purely constituency-based system could enhance account-

ability and responsiveness, it could also reverse the gains made in the areas of inclusiveness and representivity of the country's democracy. A mixed system is therefore the most acceptable compromise.

Mixed Member Proportional system (MMP) has been experimented with at the local government level, (see Chapter 2). This system has produced mixed results in terms of good governance outcomes, for example the lack of responsiveness to community needs, unsatisfactory service delivery, poor financial administration, lack of capacity. However, this can largely be attributed to structural arrangements, i.e. the relationship between local, provincial and national government and their powers, rather than the merits of the system itself.

A mixed system would retain the aspiration for representation and inclusiveness whilst incorporating the necessity of accountability, which should together, ultimately, strengthen the imperative towards good governance across all levels of government. To further reinforce MP's responsiveness to communities, a recall provision could be inserted into the constitution, similar to that in Kenya's 2010 Constitution.

In addition to a mixed system for Parliamentary elections, adopting a system of direct elections for the office of President might strengthen the accountability of the executive as well as its commitment to adhere to and uphold the rule of law.

Direct elections would ensure that the President is directly accountable to the people. Even so, it must be understood that direct elections are not an absolute guarantee that the executive will not in any way undermine the citizenry's confidence. But it would go some way to entrenching the perception that the executive derives its power and authority from the electorate and not their political party.

* * *

Good governance is not only a matter of what is written in law; it is a matter of principle. It begins with individual values and character. Rules matter little if they are broken with impunity, controls are insignificant if they are constantly overridden, and policies and regulations are irrelevant if they are perpetually disregarded. Good governance requires a conscientious civil service, a leadership characterised by integrity, and a citizenry that holds its government accountable.

The preceding chapters have highlighted weaknesses in governance across all levels of government in South Africa. It is clear that citizens and government alike must stand ready to perform the necessary political surgery to purge the body politic of those vices and institutionalised practices that are eroding good governance, leaving room for political decay to fester unabated.

As 2014 marks 20 years of democracy South Africans can look back with pride at the work of institution building that has characterised this transitional period. But if this work of institution building is to retain its form and substance South Africans must be diligent to make effective use of their democratic opportunity.

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The Democratic Opportunity: Does South Africa need electoral reform? reviews the democratic progress over the last 20 years. Weakening government capacity, corruption, poor service delivery and instability and violence in communities across the country have become hallmarks. If the problem is bad leaders, will changing the way we elect them make a difference? Nompumelelo Runji argues that in order to restore good governance and ensure accountability from the country's leaders democratic institutions must be defended and respect for them promoted. This requires citizens that demand accountability and that critically evaluate the quality and performance of public officials.

NOMPUMELELO RUNJI is a policy analyst and columnist. She has worked as researcher and political analyst for think tanks and within academia. Through her written work, including articles, commentary and analysis in various media, she has contributed to the national and international discourse on politics, socioeconomic issues and criminal justice with a particular focus on South Africa and Africa. She holds a BA (Hon) in Political Sciences and MPhil in Multidisciplinary Human Rights from the University of Pretoria.