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Experiences of transformation and alienation in constitutional South Africa

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**Sites of Fracture:
Experiences of transformation and
alienation in constitutional South
Africa**

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Professor Tony Prosser
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A dissertation submitted to the University of Bristol in accordance with the requirements for award of the degree of Doctor of Philosophy in the Faculty of Social Sciences and Law, School of Law, August 2022.

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Abstract

Sites of fracture: Experiences of transformation and alienation in constitutional South Africa

South Africa's constitutional project has been, for many, the manifestation of the promise inherent in transformative constitutionalism. However, nearly 30 years after its introduction, there may be cause to doubt the impact of transformative constitutionalism on the lives of people in the country. Significant fractures continue to define South African society, many of which appear to follow the divides of the colonial- and apartheid- era states. Whether through a failure of implementation or a failure of design, the transformative ideas underpinning the 'rainbow nation' may live more in the rhetoric espoused by influential sectors of society than it does in the lives of individuals and communities in the country.

This project considers the impact that transformative constitutionalism is intended to have on societies, beyond their legal and institutional impact – an impact that includes an intention to shape and re-found the culture of a nation. The intended constitutional culture of a transformative constitution, which emanates from official institutions and from influential individuals and role-players, might not be reflected in the understandings of the state found amongst the broader population. For many people in a population, their understanding and experience of the constitutional culture of the state will be shaped by a range of factors beyond the constitutional culture from 'above,' forming both a perception of the constitutional culture of the state, and a constitutional culture that governs their day-to-day lives, two distinct constitutional cultures from 'below.' Using and adapting Hertogh's 'legal alienation', the fractures that might exist between constitutional cultures from 'above' and from 'below', may contribute to a sense of alienation and exclusion. In the South African context, any alienation present as a result of the rupture between the constitutional cultures present in the country may contribute to the endurance or exacerbation of existing fractures, rooted in the colonial- and apartheid-era states, and the emergence of new fractures, rooted in the constitutional era. Together, these may threaten the legitimacy and prospects of the constitutional project.

This research project sheds light on the constitutional cultures present in the lives of people in three different communities in South Africa. Qualitative empirical work conducted in these communities provides first-hand accounts of some of the constitutional cultures present in South Africa, of the fractures between the interviewees and the state, and of the fractures between communities in the democratic South Africa. These sites of fracture and competing sites of alignment allow this research project to consider the current state of South Africa's constitutional project and its future prospects.

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This journey would not have been possible without the help, assistance and (where applicable!) love of so many people.

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It is unquestionable that a whole network of friends helped me carry this (gleefully accepted) burden – in Bristol, in London, in Joburg, in Cape Town and beyond. There are too many to thank, it's far too risky that I will accidentally leave someone important out. But the lack of specific mentions does not equate to a lack of gratitude and love. A special thanks to Yvonne, whose encouragement as she read my chapters was hugely reassuring– thanks Irv!

My family – Vaunda, Graham, thank you, for everything. Ben and Chris – I love you guys. Theo and Jeanette, thank you for being so supportive, generous and fun. And to all of my family in the UK – in Streatham, in Wales and in Malpas. It has been a highlight spending time with you.

Teenah. First, last and in-between. With you, I am home.

Author's declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

Signed:**Date:** 24 August 2022

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The Constitution whose adoption we celebrate constitutes an unequivocal statement that we refuse to accept that our Africanness shall be defined by our race, colour, gender or historical origins. It is a firm assertion made by ourselves that South Africa belongs to all who live in it, Black and white.... It recognises the fact that the dignity of the individual is both an objective which society must pursue, and is a goal which cannot be separated from the material well-being of that individual... It aims to open the doors so that those who were disadvantaged can assume their place in society as equals with their fellow human beings without regard to colour, race, gender, age or geographic dispersal.

- Deputy President Thabo Mbeki, 1996¹

On 20 January 2014 Michael Komape...who was at the time just five years of age, suffered the most appalling and undignified death when he fell into a pit latrine at his school in Limpopo, and drowned in sludge and filth...Michael attended the Mahlodumela Lower Primary School, in a rural area of the Limpopo province. The toilets provided for learners at the school were in an appalling and disgusting condition. For years complaints on behalf of the school had been addressed to the provincial education authorities who had been requested to improve the pit latrines. There had been no response...It seems that on 20 January 2014, when Michael went unattended to the toilets to relieve himself, the seat collapsed and pitched him into the pit. When, later, he could not be found, enquiries were made to his home to ascertain if he was there. His mother, Mrs Komape, learning that the school authorities were looking for him, rushed to the school in panic. She was there when, eventually, Michael's body was found in the pit below the toilet, the seat of which had collapsed. He had drowned, and was lying in the filth in the pit with hand outstretched as if seeking help. The school staff would not let Mrs Komape remove him, despite her belief that he could still be saved. His body was left in the pit for hours, covered in muck and human faeces until, eventually, it was removed.

- *Komape v Minister of Basic Education*, 2019²

Our interest is to find out why there are racial tensions... Racism is what most people complain about in this country. Every year, it shows that most complaints are about racial tension.

- South African Human Rights Commission manager Lloyd Lotz, 2021³

¹ Thabo Mbeki, 'I Am an African', (Speech at the Constitutional Assembly upon the Adoption of the Republic of South Africa Constitution Bill, 8 May 1996) <<https://www.gov.za/about-government/tm-mbeki-adoption-rsa-constitution-bill>> accessed 11 July 2022.

² *Komape v Minister of Basic Education* (2019) ZASCA 192 [1,9,11].

³ South African Human Rights Commission, 'Human Rights Commission to Investigate Unrests in Phoenix Following 20 Deaths' (*South African Human Rights Commission*, 2021) <<https://www.sahrc.org.za/index.php/sahrc-media/news/item/2745-human-rights-commission-to-investigate-unrests-in-phoenix-following-20-deaths>> accessed 11 July 2022.

Chapter 1: Investigating constitutional dreams and constitutional realities

1.1 Introduction

Nations create stories about themselves, about their values, and about their origins. But understandings of a country that are advanced by institutions and representatives of state may not be shared by the broader populace, whose understandings of the state in which they live will be shaped by their context, by their interactions with the state, and by their everyday experiences.¹ Whether different ideas and experiences of a state can co-exist without friction, or whether they lead to fractures in the constitutional fabric of a particular state, between that state and its inhabitants and between the inhabitants themselves, is a question with ramifications for constitutionalism and its aims.

South Africa's founding story is, in many respects, told by the country's first democratic constitutions,² the introduction of which is understood to be a seminal moment in the country's history. South Africa is a country that has been defined by fracture and by separation throughout its modern history. During the transition to majority rule and to democracy, a time regarded by some as a time of dizzying triumph, the foundation for a new and different future was put forward, a vision which was enshrined in the Constitution. As then Deputy President Thabo Mbeki made clear in a famous 1996 speech, the Constitution both confirmed the call to transform the country and spoke of the shape and nature of the transformation, of the country to come.³ This was to be a unified country, in which the dignity and equality of everyone in the country would be respected and enhanced, where the state placed accountability and transparency at its heart and where it assumed a set of positive obligations, owed to each of its inhabitants, and aimed at ensuring that everyone had the ability to access the fundamental elements required for life. This country would be populated

¹ Aziz Z Huq, 'Constitutionalism, Legitimacy, and Public Order: A South African Case Study' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018).

² The interim Constitution came into effect on the day of the first open and democratic election, 27th April 1994, and the 'final' Constitution was signed into law in December 1996.

³ Thabo Mbeki, 'I Am an African', (Speech at the Constitutional Assembly upon the Adoption of the Republic of South Africa Constitution Bill, 8 May 1996) <<https://www.gov.za/about-government/tm-mbeki-adoption-rsa-constitution-bill>> accessed 11 July 2022.

by a 'constitutional person', brought into being by, and able to rely upon, a series of enforceable rights and freedoms, and a 'constitutional people', united by their values and in their efforts to realise the vision of the country to come. These commitments, intentionally absent in the past, would underpin a new future.⁴

To some, South Africa's approach to its constitutional era marked the global high-water mark of modern constitutionalism,⁵ an example to other jurisdictions, expanding the bounds of what constitutionalism could achieve – little less than the redefinition of a country.⁶ For societies committed to upholding the obligations embedded in their constitution, constitutions are intended to have significant ramifications for the functioning of a state and for its inhabitants,⁷ intended to 'organize politics and society in particular ways.'⁸ They do this through a series of commitments,⁹ both explicit and implicit,¹⁰ that bind not just the generation that is involved in the drafting of a constitution, but future generations too.¹¹ Often positioned as the supreme law that 'defines the organization of government',¹² constitutions contain ideological and practical commitments about values that a country

⁴ The various commitments of South Africa's transformative Constitution can be found, explicitly or implicitly, in the Preamble and in Chapters 1 (Founding Provisions) and 2 (the Bill of Rights) of the Constitution.

⁵ Cass R Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2001) 261.

⁶ David S Law and Mila Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 *New York University Law Review* 762, 826–7.

⁷ David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863, 865–6; Ran Hirschl, 'The Strategic Foundations of Constitutions' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

⁸ Russell Hardin, 'Why a Constitution?' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 52.

⁹ Rosalind Dixon and Adrienne Stone, 'Constitutional Amendment and Political Constitutionalism' in David Dyzenhaus and Malcom Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).

¹⁰ Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60, 62–3; Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul, 'Introduction' in Ellen Frankel Paul, Miller Fred D Jr and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

¹¹ Catherine O'Regan, 'Mission in Progress: Toward an Assessment of South Africa's Constitution at Twenty' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018).

¹² John David Lewis, 'Constitution and Fundamental Law: The Lesson of Classical Athens' in Ellen Frankel Paul, Fred D Jr Miller and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

holds dear,¹³ managing and directing public power,¹⁴ forming and governing state organs,¹⁵ and shaping the relationships between the state and a population.¹⁶ The South African Constitution, in its commitment to constitutionalism and to transformative constitutionalism, sought to perform these tasks, transforming the shape of the country and the lives of those within it, reflecting the hopes of the democratic generation.¹⁷

Nearly thirty years later, the extent to which these hopes have come to fruition can be questioned. It might be argued that elements of the constitutional vision have been realised, at least partially, and representatives of the state can – and do – boast of a range of achievements, amongst which are the provision of basic services to a wide swathe of the population,¹⁸ the provision of houses to people in need of shelter,¹⁹ a record of free, fair and inclusive elections,²⁰ and a number of internationally recognised, progressive court decisions that protect and expand the human rights of people in the country.²¹ Although these achievements are notable, it is unclear that they have had the effect of transforming the lives of the bulk of South Africans.²² Perhaps damningly, it is particularly unclear that the Constitution and the democratic state have substantially impacted the lives of those it most sought to impact – the lives of South Africans of colour who bore the brunt of repression

¹³ Arcioni and Stone (n 10) 62.

¹⁴ Evan Fox-Decent, 'Constitutional Legitimacy Unbound' in David Dyzenhaus and Malcom Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).

¹⁵ David Dyzenhaus, 'The Idea of a Constitution' in David Dyzenhaus and Malcom Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).

¹⁶ Jeff King, 'Constitutions as Mission Statements' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

¹⁷ Yvonne Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 PER 16, 22.

¹⁸ See, for example, the contributions of President Cyril Ramaphosa and Ministers Jackson Mthembu and Nkosazana Dlamini Zuma to Department of Planning Monitoring and Evaluation, *Towards a 25 Year Review: 1994-2019* (Department of Planning, Monitoring and Evaluation 2019).

¹⁹ *ibid* 140.

²⁰ *ibid* 233. See also various oversight reports by the Electoral Institute for Sustainable Democracy in Africa (EISA), which has delivered Electoral Observer Mission reports on the majority of South Africa's local, provincial and national elections. These reports commence in 1999, and can be found at EISA's website - Electoral Institute for Sustainable Democracy in Africa, 'South Africa: Election Observation Reports and Statements' (*Electoral Institute for Sustainable Democracy in Africa*) <<https://www.eisa.org/epp-south-africa.php>> accessed 11 July 2022.

²¹ Mashele Rapatsa, 'South Africa's Transformative Constitution: From Civil and Political Rights Doctrines to Socio-Economic Rights Promises' (2015) 5 *Juridical Tribune* 208, 212.

²² More than 50% of South Africans live under the upper bound poverty line, a measure of poverty that indicates that the majority of South Africans struggle to obtain a combination of basic food and non-food items defined as necessary by Statistics South Africa, discussed in International Bank for Reconstruction and Development/The World Bank, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (World Bank Publications 2018) 8.

under the pre-democratic regimes. Support for this claim is found, amongst other indicators, in the racialised poverty that remains widespread, with the persistence of colonial- and apartheid-era patterns of privilege and deprivation evident in the data;²³ in significant concerns about the ability of the state to guarantee the delivery of quality essential services;²⁴ and in the persistence of racism²⁵ and ongoing racial tension between different racial groups within the nation.²⁶ In light of these shortcomings, it is reasonable to question the extent to which present-day South African society reflects the transformative vision ostensibly contained within the Constitution, and to consider the implications of this for the state and its inhabitants.

It is possible that the shortfalls of the democratic era could lead to fractures in the constitutional fabric of South African society, with ramifications for the legitimacy of constitutionalism in the country. ‘Fractures’, in terms of this project, are areas of life where there is dissonance between different perspectives and experiences of constitutionalism and the realities of life in the constitutional state. Such fractures might be found in the gap between official perspectives on the promises of the Constitution, taken together with the ongoing laudatory rhetoric that surrounds the Constitution, on the one hand, and the lived experiences of many inhabitants of South Africa, on the other. They might also be found in the lack of alignment between the values and perspectives that influential positions in society

²³ More than 50% of Black South Africans indicate that their total monthly income is insufficient to meet what they feel to be their household’s needs, according to Statistics South Africa, *Subjective Poverty in South Africa: Findings from the General Household Survey 2019* (Statistics South Africa 2021) 9.

²⁴ Tyanai Masiya, Yul D Davids and Mary S Mangai, ‘Assessing Service Delivery: Public Perception of Municipal Service Delivery in South Africa’ (2019) 14 *Theoretical and Empirical Researches in Urban Management* 20, 37–8.

²⁵ 60% of equality-related complaints lodged with the South African Human Rights Commission between April 2020 and March 2021 related to race-based violations - South African Human Rights Commission, *2020-2021 Annual Trends Analysis Report* (South African Human Rights Commission 2022) 54.

²⁶ See, for example, coverage in local and international press of specific incidents and general friction, including Zukiswa Pikoli, ‘Inequality Is Fuelling Racism in South Africa, Says Human Rights Commission’ *Daily Maverick* (22 June 2021) <<https://www.dailymaverick.co.za/article/2021-06-22-inequality-is-fuelling-racism-in-south-africa-says-human-rights-commission/>>; Lwandile Bhengu, ‘Hoërskool Jan Viljoen: About 50 Pupils, Mostly White, Removed from School by Parents’ *News24* (14 March 2022) <<https://www.news24.com/news24/southafrica/news/hoerskool-jan-viljoen-about-50-pupils-mostly-white-removed-from-school-by-parents-20220314>> accessed 14 July 2022; Justice Malala, ‘Why Are South African Cities Still so Segregated 25 Years after Apartheid?’ *The Guardian* (21 October 2019) <<https://www.theguardian.com/cities/2019/oct/21/why-are-south-african-cities-still-segregated-after-apartheid>> accessed 15 July 2022; John Eligon and Zanele Mji, ‘Indian vs. Black: Vigilante Killings Upend a South African Town’ *New York Times* (19 October 2021) <<https://www.nytimes.com/2021/09/04/world/africa/South-Africa-Phoenix-riots-deaths.html>> accessed 18 July 2022.

have held out as epitomising the democratic South Africa or that are perceived to be at the heart of the state and those values and perspectives held by the broader population. They may be present in any discrepancy between the hopes that individuals and communities might have had for the democratic state and the reality of their daily lives, or to a broken body politic, to rifts within 'the people' who the constitutional era ostensibly represents. There may – indeed, likely are – a range of other fractures within the constitutional state. While the nature of these fractures might vary, any significant disjuncture between perspectives, expectations and realities would be notable. The potential existence of multiple fractures within South Africa's constitutional fabric was a partial inspiration for this project. There appeared to be merit in undertaking an empirical investigation of some of the different perspectives present in South African society, perspectives that might underlie a constitutional fracture, and in considering the ramifications of the perspectives and fractures identified for the lives of people in South Africa and for the legitimacy of South Africa's democratic project.

Additional, but linked, inspiration for this project came from a more personal perspective. As a citizen of South Africa, as someone who has been invested in a range of constitutionally linked projects, personally and professionally, I have understood the Constitution to be a tool that could assist people in claiming their human rights, as a way for the lives of people in South Africa to be improved, and as a moral compass for the nation. These assumptions have been challenged, through practical failures and a growing theoretical critique of the Constitution, and it became evident that it was possible, even likely, that, perhaps, the Constitution does not resonate with many others as it did in my own life or in the lives of others in similar positions of privilege. Perhaps it could be the case that the Constitution, talk of which infused my formative years, the values of which I regarded as fundamentally correct, and which shaped my understanding of the country and my career, was almost an affront to others, a reminder that, despite the fall of the apartheid regime, they remained unable to access the resources required to improve their lives and the lives of their children. To others, perhaps, the Constitution was a symbol of what had been lost, of lost privilege. It could be the case that some held a perception that instead of helping improve the country, the Constitution, with its progressive approach to rights, would be perceived as playing a role in undermining the safety and the integrity of people in broader society. Or perhaps there was

a question about whether the Constitution actually had any presence, explicit or implicit, in the lives of the bulk of South Africa's inhabitants. Exploring these concerns, this research project seeks to move beyond explicit constitutional literacy, recognising that every person in the country has ideas about how the country runs, and about their place in it, regardless of their understanding of the dynamics of constitutionalism. These ideas and perceptions will be formed by experiences and engagements with the state and with other people, will shape their engagements in the future, and should thus be taken seriously. My research posits that these experiences and engagements, the perceptions of the broader populace, are sufficiently important that, taken cumulatively, there are ramifications for the legitimacy of the South African state. Reflecting this, this project seeks to gain insight into how different people and communities in the country experience and perceive constitutionalism in South Africa, and to consider the ramifications of this for South Africa's constitutional project.

To investigate the disjuncture, and to engage with both the 'intended' and the actual impact of the Constitution on broader South African society, this project has developed the notion of constitutional culture. Building on work by a range of theorists, constitutional culture, in terms of this project, identifies an approach to a constitution 'from above' and 'from below'.²⁷ Constitutional culture 'from above' explores how official organs of state and people in influential roles in society, the 'custodians of constitutional culture',²⁸ position the role of a constitution in a country, and explores the promises made on behalf of a constitution. Constitutional culture 'from below' explores two different perspectives – firstly, exploring the understanding that people in the broader population have of the constitutional state and, secondly, identifying the foundational principles that guide the day-to-day lives of people in the broader population. Approaches to constitutional culture are explored in more detail in Chapter 2.

²⁷ The dual concept of constitutional culture used in this project is explored in more depth in Chapter 2, building on the work of Andrew M Siegel, 'Constitutional Theory, Constitutional Culture' (2016) 18 University of Pennsylvania Journal of Constitutional Law 1067; Jason Mazzone, 'The Creation of a Constitutional Culture' (2004) 40 Tulsa Law Review 671; David Schneiderman, 'Banging Constitutional Bibles: Observing Constitutional Culture in Transition' (2005) 55 University of Toronto Law Journal 833; Robert Post, 'Law and Cultural Conflict' (2003) 78 Chicago-Kent Law Review 485; Reva B Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA' (2006) 94 California Law Review 1323; Marc Hertogh, *Nobody's Law* (Palgrave Macmillan 2018).

²⁸ Schneiderman (n 27) 837.

The approaches to constitutional culture will be used to assess the empirical data collected through research conducted in three distinct South African communities. Each of the communities investigated in this project has a distinct socio-economic, spatial and historical context, explained in more detail in Chapter 4. Through the perspectives provided by people in these communities, this project seeks to understand whether the transformative ideals of the Constitution resonate with different groups of people within the country, whether these ideals ever resonated, or whether the reality of day-to-day life is at odds with the constitutional vision, and to explore the fractures that might arise in response.

By placing individual and community perspectives at the heart of an investigation into constitutionalism, this project offers an insight into transformative constitutionalism that has been underexplored. And, in exploring these perspectives, this project is able to provide insight into fractures between the communities and the state, fractures that have a range of different dimensions across the communities, but which, in different ways, contribute to perceptions and experiences of alienation from the Constitution and the constitutional state. In the process, this project offers empirical insights into how constitutional norms are communicated, and how these norms (perceived or real), combine with pre-existing perspectives on the world, informed by context, including by deprivation and privilege. Significant questions regarding the success of the transformational project arise from the findings of this project.

1.2 Central research questions and aims

In light of the apparent disjuncture between the promises of the constitutional era and the realities of life in South Africa, the central research question that this project seeks to answer is:

Does South Africa's transformative constitutional culture enjoy widespread support amongst people in the country, or do the perceptions and experiences of those in the country cause fractures in their relationship with the state?

This central question does not necessarily seek to assess the merits of the ideological underpinnings of South Africa's constitutional order, or even to interrogate the measurable advances that might have occurred in South Africa over the democratic era. Instead, this project is focused upon exploring the extent to which the transformative aims of the Constitution and the constitutional state align with the perceptions that individuals and communities have of the transformative Constitution and the constitutional state, and with the realities of their day-to-day lives. A secondary, closely linked question arises from the central research question, one that explores the understanding and perceptions of the Constitution and the constitutional state in the absence of the fundamental tenets of transformative constitutionalism:

Do people in South Africa perceive the Constitution to have transformed their lives and their country, and if the Constitution is not understood to be transforming lives, what are the perceptions that individuals and communities have of the Constitution, and what are the implications of this for the relationship between people in South Africa and the constitutional state?

If the Constitution is not perceived to have transformed society and the lives of individuals and communities, claims that lie at the heart of transformative constitutionalism, or to be playing a role in such a transformation, then one of the fundamental elements of nationhood, designed to unite South Africans and place them on a common journey, is absent. In its stead would be an understanding of the Constitution that moves people to a particular understanding of the state and their role in it.

Whether holding an understanding of the transformative constitution or not, the perceptions that individuals and communities have of the constitutional state will shape choices and decisions, leading individuals and communities to generate a series of foundational rules and principles that guide their day-to-day lives. These localised rules and principles will have implications for the relationship that individuals and communities have with the constitutional state, and are an important consideration in any attempt to understand the trajectory of constitutionalism in South Africa. Thus, underlying the central question, and alluded to in this discussion, are several additional elements:

Are there other foundational rules or principles that shape how people in different communities in South Africa lead their lives and, if there are, what do these rules or principles indicate about the state of constitutionalism in South Africa?

Taken together, these questions will assist in providing an empirically founded insight into the legitimacy of South Africa's Constitution amongst broader South African society. This project aims to identify and describe how people are aligned with the Constitution, and, alternatively, to identify inconsistencies that might contribute to ruptures in the South African constitutional fabric, to fractures between the society portrayed to be at the heart of the constitutional vision, and which is often present in the rhetoric that surrounds constitutional South Africa, and the reality of the society that is the South Africa of today, as understood by individuals through the lens of South Africa's history and their experiences of it. In addition to an assessment of the state of transformative constitutionalism in South Africa's present, this project, through the identification of any such fractures, and the interrogation thereof, provides the basis for a consideration of the prospects for transformative constitutionalism in South Africa in the future.

1.3 The approach adopted in the thesis

Accessing first-hand accounts of life in constitutional South Africa, foregrounding experiences and perceptions of the constitutional state, places qualitative methods at the heart of this research. This project is committed to taking the accounts that people provide about their lives seriously, and this requires a methodologically rigorous and ethically sound approach to all elements of the research process, from the manner in which the interviews were designed and conducted, through to the analysis of the content of the interviews and subsequent reflections.

1.3.1 Approaching different perspectives on constitutionalism

Explicit constitutional knowledge is shallow in South Africa.²⁹ Engaging with the ideas that the interviewees had about their explicit understanding of the Constitution and the values contained within it might have served only to reinforce findings about constitutional literacy in the country. This project takes the position that, regardless of explicit constitutional knowledge, every person in South Africa has a perception of the values of the state, and of the ‘nature’ of the country in which they live. To access this ‘nature’, the concept of constitutional culture was explored, and understandings of the concept from the literature developed to formulate two distinct approaches: constitutional culture ‘from above’, which explores the understanding of a country that the state and people in influential positions put forward; and constitutional culture ‘from below’, which seeks to understand the perspectives and experiences of individuals. Constitutional culture ‘from below’ recognises that individuals will have a perspective on the constitutional culture of the state and will also experience a form of constitutional culture that defines their own day-to-day existence, arising from the interactions in their immediate environment.

Using the approaches of constitutional culture ‘from above’ and ‘from below’ allows for the disjuncture between the vision of South Africa found amongst ‘constitutional champions’, which might include state institutions, representatives of the state, and people in influential positions, and the experience of South Africa’s transformative constitutionalism found elsewhere in the country.

1.3.2 Capturing the range: Selecting communities

The range of subjective identities and contexts found in South Africa is substantial, as it would be in almost every country. It is beyond the bounds of this research project to make a claim to represent all of the subjectivities present in modern-day democratic South Africa – in fact,

²⁹ Recent research indicates that only slightly more than 50% of South Africans can identify even one right, let alone the Bill of Rights or the Constitution – Foundation for Human Rights, *Socio-Economic Justice for All: Baseline Survey Report* (Foundation for Human Rights 2018) 38.

such a project would be impossible. Instead, what this research project seeks to provide is an indication of the range of perceptions and experiences that are present in South Africa, using three communities, with a range of distinct characteristics. Through these three communities, this project aims to provide an insight into the range of understandings of the Constitution and the constitutional state present in the country.

Perhaps the primary identifying and distinguishing characteristics of communities in South Africa are their socio-economic and racial profiles. Race and socio-economic status have a strong correlation in South Africa, and the socio-economic structure of society remains highly racialised, for a range of reasons, contemporary and historical. As a result, there is reason to believe that race and socio-economic status will have a significant impact upon the perceptions of the state that the interviewees and the communities have, and upon their day-to-day experiences of the world.

With this in mind, the three communities explored through this project³⁰ reflect a range of different socio-economic and racial characteristics:³¹ a relatively poor, Black African community, a working class, Coloured community, and a relatively wealthy, relatively racially integrated community. While the precise locations of these communities will be withheld, in accordance with the undertakings provided to the interviewees,³² each of the communities is located in or proximate to an urban centre. The final selection of the communities was based on these factors and the researcher's connections within various communities that could have been suitable.

It should be noted that it is not the intention of this project to engage the communities comparatively. This project seeks to explore broad themes of fracture, alienation and legitimacy in constitutional South Africa. The research has not been designed for a rigorous comparison of perspectives, for a like-against-like comparison. Instead, this project attempts to engage with first person accounts of life in constitutional South Africa and to consider the

³⁰ The community accounts are found at Chapters 5, 6 and 7.

³¹ The racial groupings described in this project follow generally accepted racial classifications in South Africa, with a basis in law in the Employment Equity Act 55 of 1998, amongst others, with more details of the particulars of each community at Chapter 4.

³² The consent form is included at Annex 3.

extent to which fractures exist in the constitutional fabric of South Africa. The themes and perspectives in the communities will be engaged on a community-level, and, while common themes and fractures identifiable across the communities will be considered in Chapter 8, this will not be comparative but, will rather constitute a consideration of the possible implications of the findings of the research for transformative constitutionalism in South Africa.

1.3.3 Data collection

The interviews were conducted in the interviewees' communities, and frequently in the interviewees' homes, for their comfort and for their convenience. A semi-structured interview template was used to begin the interview, allowing a combination of structure and the ability to explore particular elements of the interviewees' responses. Where required, a translator was available for the interviewees, although, as it turned out, was seldom used. The process of data collection and the methodology underpinning the research decisions is discussed in more detail in Chapter 4.

1.3.4 Data analysis

The analysis of the empirical data collected through the interviews relies upon an adaptation of Hertogh's legal alienation.³³ As a variant of legal consciousness, an approach that, amongst other elements, sees the law as a social force that foregrounds subjectivity and seeks to explore the meanings of the law outside the institutions of the state, legal alienation sees the law as both shaping and shaped by the social forces, and as a force that can diminish people's identification with the state. While legal consciousness, a theoretical approach from which legal alienation takes its lead, seeks to interrogate the enduring hegemony of the law, interrogating how law maintains its dominance and legitimacy despite its own failings, Hertogh's legal alienation, by contrast, explores the consequences of law failing to maintain its hegemony, departing from the observation that the law and the legal system have, in fact, lost their legitimacy. Through several corrections to the earlier approaches found in literature on legal consciousness, Hertogh outlines an approach that interrogates both what people

³³ Hertogh (n 27).

experience as *the* law, and what people experience as *their* law, seeing values in understanding both how people experience the official law, and what kind of law, formal or informal, governs their daily lives. Legal alienation, which will be developed into a constitutionally focussed tool in Chapter 4, has tremendous utility to this project.

Legal alienation asks two questions, one exploring what people perceive to be the law, and the other exploring what people experience as the law in their lives. The constitutional adaption that this project will make adapts these questions into the following:

- 1) What do people in society experience and perceive be the constitutional culture of their country?; and
- 2) What do people experience as the constitutional culture that governs their lives?

Answers to these questions will indicate whether the interviewees, as representatives of their communities, are aware of a constitutional culture of the state, and the extent to which they identify with the constitutional culture that they perceive to be present. These perspectives and experiences can be considered alongside the idea of the constitutional culture ‘from above’ to identify fractures present in the communities under investigation.³⁴

1.4 Thesis structure

The theoretical framework that informs this analysis is outlined in Chapter 2. As noted above, this will involve identifying the different conceptualisations of constitutional culture, and ultimately formulating two different approaches to understanding constitutional culture, based on approaches found in the literature: constitutional culture ‘from above’ and constitutional culture ‘from below.’ These approaches allow for an investigation of an ‘idealised’ constitutional culture, propagated by the state and a range of constitutional champions, the constitutional culture ‘from above’, and an investigation of two approaches to constitutional culture found amongst the broader populace, the constitutional culture ‘from below,’ an approach that explores what people in the country perceive to be the

³⁴ This analysis takes place in the chapters discussing the communities (Chapters 5, 6 and 7) and in an overarching analysis of common themes, found at Chapter 8.

constitutional culture *of their country*, as well as what people perceive to be the constitutional culture/s that inform *their own lives*. In formulating and expanding these concepts, this chapter creates the conceptual foundation for identifying constitutional fractures, and for considering any implications of such fractures.

Having established the working definitions of constitutional culture, South Africa's constitutional culture 'from above' is examined in Chapter 3, exploring the way that transformative constitutionalism has been placed at the heart of the post-apartheid state. Placing transformative constitutionalism in an historical context, the chapter considers five promises that transformative constitutionalism has made in the South African context, and examines how the culture 'from above' has attempted to communicate these concepts. The chapter will also consider some of the reasons that the constitutional culture 'from above' may not be reflected in present day South Africa, considering why this idealised approach to constitutionalism might not have embedded the constitutional culture that it sought to, and so may not have realised its aims. These criticisms involve the idea that the ideals, values and instruments were, contrary to their positioning by constitutional champions, the result of elite bargains, that the transformative constitution understated the challenges that the constitutional state faced and, finally, but most far-reaching, a critique that fundamentally challenges the Constitution, seeing it as a tool used to maintain existing structures of privilege and power, rather than as a tool for liberation.

The following chapter, Chapter 4, describes the theoretical and methodological approach used to access the perspectives 'from below.' Recognising that the understanding of the constitutional cultures that individuals and communities perceive to be present and experienced in their daily lives may be shaped by factors beyond the law and beyond the Constitution itself, the methodology adopted in this chapter recognises that law is a social concept, emerging from multiple sources. This approach adopts a study of legal consciousness, an approach to the law which sees law as social and subjective, which focuses on the margins and which adopts a pluralistic approach to law, seeing law as emerging from multiple sources. As discussed above, a variant of legal consciousness, legal alienation, is used, allowing an interrogation of the both the perception of the constitutional state and of

the rules and principles that guide people's lives. Chapter 4 also explains how the empirical research was implemented and the ethical concerns that this research project raised.

Chapters 5, 6 and 7 contain accounts and analysis of the first-hand experience and perceptions of the constitutional cultures on the part of people in three different South African communities, which, as discussed above, vary on a range of grounds, but, perhaps most pertinently, on racial and socio-economic grounds. The chapters explore the interviewees' perception of the constitutional culture of the state, and the constitutional culture that regulates their day-to-day lives. Each chapter attempts to place the voices of the interviewees at its core, basing the analysis around the narrative accounts of their lives that arose from the research.

Finally, Chapter 8 contains an analysis of some of the overarching themes and fractures that emerge from the empirical research. While taking care not to examine the communities comparatively, and not seeking an explicit contrast between the communities, this chapter explores the themes and trends that emerge from the empirical research and considers the implications for transformative constitutionalism in South Africa

Chapter 2: Defining and understanding constitutional cultures ‘from above’ and ‘from below’

2.1 Introduction

Constitutions play a number of different roles in the life of a country. While their role as ‘the fundamental law of the land, supreme as a legal matter over any other nonconstitutional law’¹ is clear, many see constitutions as making claims and playing roles beyond this.² An extended understanding of the role of constitutions sees them as engaged in communicating the norms and values of a country, a role that can be played explicitly and implicitly.³ Through this, constitutions contribute to an understanding of the nature of the country concerned, to the shape and the culture of that society.⁴ Frequently, these contributions are underpinned by claims that a constitution is a reflection of the values and desires of a populace, a reflection of the society to be brought into being, adopted by an identifiable body politic, a ‘people’ who constitute the ‘We, the People,’ a phrase common to many constitutions,⁵ who have dedicated themselves to the realization of the values contained within the document. ‘The people’ are portrayed as capable of acting together, indeed, as having acted together to adopt the constitution in question, through participation or through consent,⁶ and, through this, to have embedded a culture, an ethos, upon which the country is founded, ‘preserving’ or ‘transforming’ the norms of that society.⁷ Attempts to embed this culture might be observed

¹ Larry Alexander, ‘What Are Constitutions, and What Should (and Can) They Do?’ in Ellen Frankel Paul, Fred D Jr Miller and Paul Jeffrey (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

² Xavier de Vanssay and ZA Spindler, ‘Freedom and Growth: Do Constitutions Matter?’ (1994) 78 *Public Choice* 359, 360.

³ Elisa Arcioni and Adrienne Stone, ‘The Small Brown Bird: Values and Aspirations in the Australian Constitution’ (2016) 14 *International Journal of Constitutional Law* 60, 67; Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul, ‘Introduction’ in Ellen Frankel Paul, Miller Fred D Jr and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

⁴ Arcioni and Stone (n 3) 60; Hanna Fenichel Pitkin, ‘The Idea of a Constitution’ (1987) 37 *Journal of Legal Education* 167, 168; Paul, Miller Jr and Paul (n 3); Paul Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 *European Law Journal* 125, 125.

⁵ Sanford Levinson, ‘Do Constitutions Have a Point? Reflections on “Parchment Barriers” and Preambles’ in Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

⁶ Manuel J Cepeda Espinosa, ‘Responsive Constitutionalism’ (2019) 15 *Annual Review of Law and Social Science* 21, 26; Ifeoma Laura Owosuyi, ‘Participatory Constitution-Making and Why It Matters: A Review of the Egyptian Experience’ (2016) 23 *South African Journal of International Affairs* 201, 202; Loren E Lomasky, ‘Contract, Covenant, Constitution’ in Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

⁷ Cass R Sunstein, ‘Social and Economic Rights - Lessons from South Africa’ (1999) 11 *Constitutional Forum* 123, 125.

in the way that a constitution is introduced, communicated, and operationalised. Through this extended role, a constitution will attempt to shape a society, and to unite a populace in a common enterprise. As will be discussed over the course of this project, particular at Chapter 3, many of these intentions can be observed over the course of South Africa's constitutional journey.

The intentions that underpin the introduction of a constitution may, however, obscure the realities of life in a society founded on a constitutional order. The positioning of a constitution as an objective or a unanimously accepted intervention in the trajectory of a country may disregard a range of contextual factors that mediate how constitutions are drafted, implemented and received, or perceived to function. Constitutions, whether written or not, and however they are positioned within a society, as a new step in a nation's journey or as a continuation of a nation's historical legacy, are the result of political processes, and are thus, partially, at the very least, political products.⁸ Those involved in drafting a constitution engage in compromise and strategic considerations throughout the drafting process in order to realise their specific goals,⁹ and may understand the decisions, compromises and negotiations that form part of a constitution-making process differently from other parties involved in the process. Similarly, a diverse population will contain individuals and communities with a range of experiences and priorities that will impact understandings and engagement with a constitution and a constitutional state. Consequently, constitutions are not objective instruments, are not formed and introduced in a vacuum. Context and subjectivity lie at the heart of how constitutions, and the claims and aims that surround them, are communicated and experienced. While official organs of state and other constitutional 'champions' might attempt to shape and communicate a constitution and its values in particular ways, and might attempt to embed an 'official' version of a constitution and the country for which it forms the foundation, experiences of that constitution and its culture will vary, and, in a similar way to

⁸ David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863, 865–6; Ran Hirschl, 'The Strategic Foundations of Constitutions' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013); Pitkin (n 4) 168.

⁹ Sanford Levinson, 'Divided Loyalties: The Problem of Dual Sovereignty and Constitutional Faith' (2013) 29 *Touro Law Review* 241, 259.

the manner in which other official laws of state are received, will be shaped by political concerns and by historical and contextual factors.¹⁰

The beliefs and understandings of those within a country are thus important factors in understanding the culture – or cultures – that form as the result of a constitution,¹¹ as these may frustrate attempts to embed the ‘official’ version of the constitution. Claims a constitution might make to legitimacy, and the roles that the drafters or people who champion a constitution might hope for it to play in a country and in the lives of individuals and communities, may flounder in the face of the realities of attempts at transformation, or in the face of the subjectivities present within a country. The reception of a constitution and its values will be determined by the context in which that individual or community exists – engagements with the state, with formal institutions and organs of the state, and with informal sources of law, may shape ideas about a constitution, of constitutional institutions, and of the state.¹² If this is the case, it may be more accurate to speak of multiple constitutional cultures existing within a nation, each shaped by a combination of the ‘official’ constitution and localised understandings of the nation in question, reflecting the individual and communal experiences of life, with implications for the constitution itself or a constitutional project.

This chapter will explore the idea that constitutions contribute to a constitutional culture. Definitions found in the literature regarding constitutional culture reflect these diverse ideas about the concept, with no clear consensus on its meaning emerging.¹³ These definitions largely fall within two distinct perspectives, varying according to where this culture is deemed to ‘originate.’ Reflecting the discussion to this point, this research project will approach these perspectives in the following way:

¹⁰ Marc Hertogh, ‘What’s in a Handshake? Legal Equality and Legal Consciousness in the Netherlands’ (2009) 18 *Social & Legal Studies* Legal Studies 221, 224; Amy Blackstone, Christopher Uggen and Heather McLaughlin, ‘Legal Consciousness and Responses to Sexual Harassment’ (2009) 43 *Law and Society Review* 631, 632.

¹¹ Robert C Post, ‘Foreword: Fashioning the Legal Constitution - Culture, Courts, and Law’ (2003) 117 *Harvard Law Review* 4, 8.

¹² Hertogh (n 10) 224; Blackstone, Uggen and McLaughlin (n 10) 632.

¹³ David Schneiderman, ‘Banging Constitutional Bibles: Observing Constitutional Culture in Transition’ (2005) 55 *University of Toronto Law Journal* 833, 835; Andrew M Siegel, ‘Constitutional Theory, Constitutional Culture’ (2016) 18 *University of Pennsylvania Journal of Constitutional Law* 1067, 1110.

- 1) The first approach, which I will describe as constitutional culture ‘from above,’ is a top-down, institution-focused approach, where a constitution is positioned as an ‘objective’ intervention into society. In this view, formal institutions of law, such as parliament and the courts, understand and communicate elements of a constitution, its contents and values, and the processes that surround it, in particular ways, propagating a vision and a culture that has a particular shape and clear aims.
- 2) The second approach, which I will describe as constitutional culture ‘from below,’ understands constitutional culture as shaped by subjective forces, and engages the experiences of people outside of the formal structures of the law. This approach engages the interaction of formal and informal sources of law and power in society, and how the nature of the interactions that people have with these sources of law develop. These interactions generate understandings and interpretations of society, of the constitution and of constitutionalism, which together produce a constitutional culture – or, rather, multiple constitutional cultures, reflecting multiple subjectivities. This chapter will explore constitutional culture ‘from below’ in two ways – as a response to how the official constitution is received, and as a system of norms and values that binds a particular community or group, that arises from the norms, values, interactions and relationships present in that community or group, a system that has foundational importance in that community or group. Attempts to access the constitutional cultures ‘from below’ found in South Africa require a distinct methodological approach, involving analysis of the empirical data collected over the course of this project. This approach will be discussed in Chapter 4.

In addressing both these approaches, ‘from above’ and ‘from below’, the contributions of a range of authors will, first, be discussed and, second, developed together to develop a conceptual understanding that will underlie the analytic work of this project.

2.2 Institution-focused constitutional culture: Constitutional culture ‘from above’

Constitutional culture ‘from above’ is an approach to constitutional culture that understands constitutional culture to be passed ‘down’ to a population from influential institutions, and thus sees constitutional culture-forming power as operating vertically, downwards. Approaches in this vein see these institutions and positions of power as focused on

communicating a clear constitutional vision, on communicating a clear idea of the society that a constitution is intended to bring into being. This constitutional culture is communicated through practices, through policies and through rhetoric,¹⁴ communicating a discrete and identifiable set of values and principles,¹⁵ together with a vision of that society, which may be aspirational, that are understood to unite a country.

An institution-focused approach to constitutional culture can be found in the work of several writers, whose understanding and use of constitutional culture differ through in terms of what, specifically, constitutes 'above'.¹⁶ At a high level, two approaches can be identified - a narrow approach, which holds that constitutional culture emanates from particular institutions of state, and a broader approach, which takes into consideration how, in addition to these formal institutions, people and organisations in a range of influential positions may shape the constitutional culture that is passed to wider society.

Andrew M Siegel adopts a narrow approach to constitutional culture, exploring the underlying practices and institutional arrangements of courts, seeing these as moving the written text of a constitution into 'concrete consequences for individuals and for the broader society.'¹⁷ Siegel defines constitutional culture as 'an interlocking system of practices, institutional arrangements, norms, and habits of thought'¹⁸ that shape constitutional decision-making. Constitutional culture, in this conception, simultaneously influences decisions of the courts and emanates from the courts, determining how constitutional law is made.¹⁹ The process and consequences of constitutional culture can be explored by looking at 1) how courts are constituted, from judges to their support staff; 2) how constitutional claims are made in court – the culture of argumentation; 3) how courts reach decisions; and 4) how judicial decisions are communicated to the broader population.²⁰ Constitutional culture, as articulated by Siegel, moves beyond a focus on judicial opinions, and encourages

¹⁴ Siegel, 'Constitutional Theory, Constitutional Culture' (n 13) 1121–2.

¹⁵ Schneiderman (n 13) 836.

¹⁶ Siegel, 'Constitutional Theory, Constitutional Culture' (n 13) 1111; Jason Mazzone, 'The Creation of a Constitutional Culture' (2004) 40 *Tulsa Law Review* 671, 672; Schneiderman (n 13) 835.

¹⁷ Siegel, 'Constitutional Theory, Constitutional Culture' (n 13) 1097.

¹⁸ *ibid* 1107.

¹⁹ *ibid* 1112–3.

²⁰ *ibid*.

the exploration of how practices within, and relating to, courts shape the constitutional culture of a country ‘from above’ – the culture is ‘passed down’ from courts, and the lives of people within the country are shaped by this, whether they are aware of it or, perhaps frequently, not.

Siegel maintains a narrow definition of constitutional culture in order to differentiate his use of the term from two issues that he identifies: Firstly, he seeks to reject approaches to constitutionalism that ‘fetishize the [judicial] opinion,’²¹ that ignore the broader institutional processes of courts that shape how a constitution is transformed into practical impacts on society and on people’s lives;²² and, secondly, he is wary of approaches that engage ‘an undifferentiated zeitgeist or a set of ideas about the Constitution that are insufficiently concrete to be classified as a constitutional argument,’²³ holding that these will obscure the ways that the constitution and the practices that surround it actually impact broader society. Siegel does see a role for broader societal trends, seeing these as shaping the institutional processes that give rise to constitutional decisions²⁴ – he differentiates a ‘living constitutional culture’ from the static text of a written constitution, seeing the culture, and not the text, as responsive to public discourse and mores, and it is this culture that shapes judicial opinion and the judicial development of a constitution.²⁵

Schneiderman posits a conceptualisation of ‘above’ that engages broader elements than those found proposed by Siegel, moving beyond formal institutions,²⁶ extending the understanding of ‘above’ to ‘scholarship, the work of legislatures, media reports, and the work of social movements or non-governmental organisations.’²⁷ For Schneiderman, it is from this multiplicity of sources that the intellectual foundations of a constitutional culture originate, and it is from these sources that the ‘basic norms that both make and maintain a political community’²⁸ are formulated. Constitutional culture plays a role in shaping and

²¹ *ibid* 1122.

²² *ibid* 1110.

²³ *ibid*.

²⁴ *ibid* 1070.

²⁵ *ibid* 1125.

²⁶ Schneiderman (n 13).

²⁷ *ibid* 835–6.

²⁸ *ibid* 837.

maintaining the relationship between those within a state and that state,²⁹ making clear the values and principles which underpin a constitutional order³⁰ and which the 'leading cultural agents'³¹ hold to be the values that define and unite a community.

While Schneiderman's definition moves beyond the courts, constitutional culture remains the product of elite institutions and influential positions in society. It is these 'custodians of constitutional culture'³² who, in conjunction with a range of formal institutions, including the courts, determine the mores of their constitutional community – or, perhaps more accurately, who attempt to determine the mores of their constitutional culture. Schneiderman's conceptualisation of constitutional culture holds that those outside of elite positions are, by and large, recipients of constitutional culture. This is not exclusively the case – Schneiderman holds that, in order to maintain its position and its legitimacy, constitutional culture from above must be in communion with the values of the broader populace, must be able to adapt, to change, in response to 'shifts in constitutional values beyond the formal constitutional system.'³³ In a similar fashion to Siegel, while the culture is, in some part, shaped by the constitutional values and the societal trends found in broader society, this understanding of the values and trends, and their ultimate impact on the constitutional culture, is mediated and interpreted by people in influential positions and organisations. The ultimate power to shape the constitution that is communicated and implemented remains in these institutions, however defined, not in broader society.

Like both Siegel and Schneiderman, Mazzone, in his understanding of constitutional culture, recognises that constitutional culture 'from above' responds to an interaction between elite ideas and broader societal perceptions of a constitution. However, unlike Siegel and Schneiderman, Mazzone places this interaction at the heart of his definition. Constitutional culture is a way for a constitutional order to be embedded, a constitutional order requiring a supporting constitutional culture, an architecture of support, in order to successfully take

²⁹ *ibid* 835.

³⁰ *ibid* 836.

³¹ *ibid* 837.

³² *ibid*.

³³ *ibid* 838.

root.³⁴ This definition holds that, within constitutional elites, there is a recognition that a constitutional order can only succeed if there is a broad acceptance of certain elements, such as constitutional values, formal structures of government, and the idea that the population is a unified entity under the constitution.³⁵ In the context of the United States, Mazzone notes that 'the ratifying generation...understood that it was not enough simply to write and adopt a constitution: if a constitution was going to last and thrive, it was crucial to have in place a constitutional culture.'³⁶ That constitutional culture was something to 'have in place'³⁷ indicates that a constitutional culture is a precursor to the success of a constitutional order, and thus needs to be formed, cultivated and maintained. It is people, positions and organisations of influence that nurture this culture.³⁸ Without this constitutional culture, a constitutional order will fail.³⁹

While Mazzone's constitutional culture engages broader society, a constitutional culture is created to ensure that broader society endorses and commits to a constitution and its values. Constitutional culture comes 'from above', from the constitutional elites, and is the means through which constitutional elements are embedded in a society.⁴⁰ Mazzone's approach seeks to understand how those living under a constitution contribute to the success of that constitutional order,⁴¹ how they come to have knowledge and understanding of a constitution, and to accept the authority of a constitution.⁴² Constitutional culture facilitates engagement, and this engagement and participation is intended to foster a sense of ownership of the constitution amongst the populace, to foster consent to, and investment in the, constitutional governance, and can be entrenched through engagement with constitutional government – 'by do[ing] constitutional government...through hands-on activity.'⁴³

³⁴ Mazzone (n 16) 672.

³⁵ *ibid* 684.

³⁶ *ibid* 672.

³⁷ *ibid*.

³⁸ *ibid*.

³⁹ *ibid* 695.

⁴⁰ *ibid* 672.

⁴¹ *ibid*.

⁴² *ibid* 695.

⁴³ *ibid* 694.

Developing a definition of constitutional culture 'from above'

Having discussed Siegel, Schneiderman and Mazzone's approaches to constitutional culture 'from above',⁴⁴ these approaches will be used to develop a definition that will support the research aims of this project. Understanding a constitutional culture that arises from elite institutions, 'from above', provides an insight into overarching ideas that animate and seek to embed a constitutional order, into the role that the law and understandings of the law might seek to play in determining the shape of a society and its values, and into the way that influential sites in society seek to foster consent to the rule of a constitutional order. For this project, there are significant reasons to consider and utilise Schneiderman's approach, which engages multiple positions of influence as formative of constitutional culture 'from above', while also regarding this form of constitutional culture as relatively independent of the knowledge and perceptions of the broader population.

Siegel's approach, focused on the courts, may indeed serve to avoid the fetishization of the courts⁴⁵ and, by introducing this narrow focus, may contribute to an analytical precision in studies of constitutional culture – a specific aim of Siegel's.⁴⁶ However, for the purposes of this project, which seeks to explore the broader role of constitutions in society, this deliberate focus on the courts and linked institutions may obscure the ramifications that a multiplicity of sources have for the constitutional culture that is experienced in society. Individual subjectivities, as well as broader societal practices and contextual factors may shape the 'concrete consequences' of constitutions that are experienced in society, and it is rarely the institutional functioning of courts alone that shape this culture. Investigations into constitutional culture as understood by Siegel are important, making clearer the way in which constitutional decision-making takes place, moving beyond a focus only on judicial opinion. For this project, however, an approach to constitutional culture that looks beyond the courts and related institutions is required.

⁴⁴ Put forward by Siegel, 'Constitutional Theory, Constitutional Culture' (n 13); Schneiderman (n 13); Mazzone (n 16).

⁴⁵ Siegel, 'Constitutional Theory, Constitutional Culture' (n 13) 1122.

⁴⁶ *ibid* 1110.

The broader approaches found in the work of Schneiderman and Mazzone see constitutional culture as arising from attempts by a range of influential organisations and people in positions of societal power to embed a constitutional order. Drafters of a constitution, and those who champion a constitution and a constitutional order in society, may strive to unite a populace behind a common goal and common values, to cultivate a nature and a direction for the country in question that they deem appropriate and desirable for their society.

Mazzone's perception of constitutional culture focuses on a consciously created constitutional architecture, designed to support a constitutional order. Constitutional culture in this conceptualisation is a tool created to sustain constitutionalism. Mazzone's approach relies on a citizenry not only having an understanding of constitutions and their functioning, which might be explicit or implicit (and understood through practice rather than cognitively), and on this knowledge and understanding of the opportunities accurately reflecting the purpose and understanding intended by those in elevated positions. This rests on the communication and reception of an idealised form of a constitutional order, untainted by sectarian or individual interests that might overwhelm the normative and unifying role that some (including Mazzone) believe a constitution should play.⁴⁷ This perhaps underplays the subjectivities and varied contexts that will be present in a constitutional order. Knowledge alone is not sufficient to generate and embed a shared constitutional culture or constitutional order. While the availability of constitutional activities may engage the broader population, the meaning that they attach to these activities, the validation that this gives to a constitution, may not contribute to a constitutional culture from above. To identify the fractures and alignments between constitutional culture 'from above' and those found below, an approach to the culture 'from above' will need to be focused on a constitutional culture as it is promoted, rather than how this constitutional culture is sustained. Schneiderman provides such an approach.

As will be discussed in Chapter 3, a particular idea of the South African Constitution became dominant in the early years of the democratic era, and numerous influential people and organisations engaged in an effort to embed a particular constitutional culture in the country.

⁴⁷ Mazzone (n 16) 695.

This constitutional culture, firmly originating in elite positions, continues to have ramifications for public life in South Africa today. Engaging a broad range of ‘custodians of the constitution,’⁴⁸ Schneiderman’s approach recognises that there are many people in positions of influence who communicate an idealised understanding of the nature of a constitution to the broader populace.⁴⁹ The lack of specificity about how constitutional culture is shaped is simultaneously useful and problematic – useful because it allows for a contextual assessment of who might be considered a ‘custodian’, but perhaps problematic in the lack of consistency that may be permitted within this assessment. In adopting this approach, careful consideration of why a particular institution or individual would be considered a ‘custodian,’ of why a particular institution or individual should be recognised as someone who shapes the ‘official’ view and the norms of a political community, would be necessary. While the delineation of society into ‘custodians’ and ‘recipients’ is perhaps too neat, it contains within it the fact that ‘custodians’ will, in large part, be responsive to broader societal developments, and will seek to position their constitution as relevant and as legitimate in response to these demands. Schneiderman’s recognition that a relatively clear perspective on a constitution, that a clear constitutional culture, emerges from elite positions and is communicated to the broader population, plays a useful analytical role, particularly when positioned in conjunction with an exploration of constitutional culture ‘from below.’

An institution-focused approach will only provide a partial picture of constitutional culture in a country, but the identification of this ‘formal’ constitutional culture, of an officially sanctioned normative universe and its supporting narratives, provides a point of departure for analysis of the lived experiences of constitutional culture among individuals and communities. The identification and delineation of this culture ‘from above,’ enables an interrogation of how this manifests itself and is understood by the population, and allows for a consideration of the impact and consequences for the state if there is a disjuncture between constitutional cultures ‘above’ and ‘below’. Additionally, the consideration of the constitutional culture from above allows for the interrogation of the ends that this culture

⁴⁸ Schneiderman (n 13) 837.

⁴⁹ *ibid* 835–6.

might serve, to consider the political interests underlying the culture, and to consider why this constitutional culture may, or may not, resonate with the various sectors of a society.

2.3 Constitutional culture and subjectivity: Constitutional culture ‘from below’

Constitutions are not merely a repository of a nation’s commitments to particular processes and rights, but are formed to further specific ends, in a particular political context.⁵⁰ While institution-focused approaches to constitutional culture – approaches that explore constitutional culture ‘from above’ – see particular institutions as the originators of constitutional culture, and see constitutional culture as a set of norms passed down to the populace, formulated with the intention of embedding a particular vision in a nation, this is only a partial picture of the life of a constitution. Politics and the realities and understandings of a state and of day-to-day life can mean that constitutions are not always (or, perhaps, are rarely) experienced as they are intended by their drafters, if such ‘intention’ is even discernible,⁵¹ or by powerful institutions or people within society.

Populations of a country, almost invariably containing people and communities that differ in terms of demographic factors, cultural norms, historical experiences or economic class, amongst other differences, will engage with constitutions differently.⁵² Understandings, engagements and experiences with a constitution and with a nation’s constitutional culture are important, as these will shape the relationship and understanding that people within a constitutional order have of a state, of a constitution, and of the promises contained within a constitution.⁵³ The manner in which individuals understand themselves, and understand themselves in relation to a constitution, to the processes that give rise to a constitution, and to the constitutional state will shape their experience of the law and the constitution, understandings of which may diverge from the text of the constitutions and from the manner

⁵⁰ Craig (n 4) 138; Pitkin (n 4) 168; Nathan J Brown, ‘Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghan and Iraqi Constitutional Experiments’ in Säid Amir Arjomand (ed), *Constitutional Politics in the Middle East* (Hart Publishing 2008).

⁵¹ The intentions and interests of constitutional drafters will likely be as diverse as the interests of the individuals and communities of the society into which the constitution is to be introduced – see, for example, Law and Versteeg (n 8) 881.

⁵² Peter C Caldwell, ‘The Crucifix and German Constitutional Culture’ (1996) 11 *Cultural Anthropology* 259, 263.

⁵³ Alexander (n 1) 2.

in which the formal institutions of law understand the text and normative values of a constitution. Approaches to constitutional culture that centre the experience of the broader population, that attempt to reflect this subjectivity, are found in the literature – for example, the recognition that a constitution will be introduced, enforced and received by a range of people, with divergent subjectivities, with differing historical approaches and understandings, varying aspirations and beliefs, is central to Robert Post and Reva Siegel’s conceptualisations of constitutional culture.⁵⁴

Post and Siegel see constitutional culture as a phenomenon created by the interaction of the beliefs and experiences of the citizenry, often arising as a result of interactions with institutions or representatives of the state.⁵⁵ The focus of Post’s gaze, on exploring how the constitutional culture of non-judicial actors and the constitutional law that emanates from the courts are in a mutually shaping relationship, contextually defined,⁵⁶ is reflected in Reva Siegel’s approach, who sees constitutional culture as emanating from interactions between citizens and officials, seeing constitutional culture as shaping ‘both popular and professional claims about the Constitution and enables the forms of communication and deliberative engagement among citizens and officials that dynamically sustain the Constitution’s democratic authority.’⁵⁷ Siegel sees this responsiveness as integral to the ongoing legitimacy of a constitution,⁵⁸ enabling members of society to shape the meaning of the constitution from the outside, and for a constitution to develop in accordance with the advancing and changing demands and mores of the populace.⁵⁹ While Siegel and Post largely focus on the legitimating potential of constitutional culture, within their definitions is a recognition of the importance of context and subjectivity on the way that members of a population will interact with a constitution and a constitutional state. The constitutional cultures that arise may be rooted in perceptions and interpretations of their context and their interactions with the

⁵⁴ Robert Post, ‘Law and Cultural Conflict’ (2003) 78 *Chicago-Kent Law Review* 485; Reva B Siegel, ‘Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA’ (2006) 94 *California Law Review* 1323; Post ‘Fashioning the Legal Constitution’ (n 11).

⁵⁵ Post ‘Law and Cultural Conflict’ (n 54) 508; Siegel, ‘Constitutional Culture, Social Movement Conflict and Constitutional Change’ (n 54) 1327; Post ‘Fashioning the Legal Constitution’ (n 11) 8–9.

⁵⁶ Post ‘Fashioning the Legal Constitution’ (n 11) 8–9.

⁵⁷ Siegel, ‘Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA’ (n 54) 1325.

⁵⁸ *ibid* 1341.

⁵⁹ *ibid* 1329.

state, rather than in the constitutional culture communicated ‘from above’, and may not be rooted in any ‘accurate’ understanding of the contents of a constitution or of the constitutional culture ‘from above’.⁶⁰

Post and Siegel’s conceptualisations resonate with Robert Cover’s conceptualisation of the *nomos* and narratives that are found within a society,⁶¹ of the law attempting to create a ‘normative universe,⁶² a shared ‘world of right and wrong, of lawful and unlawful, of valid and void.’⁶³ Approaches of this nature place emphasis on how subjectivity impacts attempts to create a unified set of norms and a shared constitutional culture. The process by which particular demands of the law become objectified and accepted is one that is heavily reliant on what Cover calls ‘narrative’, a ‘history and destiny, beginning and end, explanation and purpose.’⁶⁴ The narrative of how – indeed, whether – a law, a norm, becomes a community’s own norm may differ from community to community, from individual to individual, defined by the other commitments and experiences of that community and of that individual.⁶⁵ Cover sees the successful embedding of a *nomos* as reliant on the interaction of two different functions, both engaging the broader populace. Firstly, a *nomos* must create a system of shared meaning that is able to ‘ground predictable behaviour and provide meaning for behaviour that departs from the ordinary.’⁶⁶ Simultaneously, a *nomos* provides a vision of a world that is shared by a population, that promises an ideal future, one that is identified and that can be realised.⁶⁷ If, within a country, across subjectivities and contexts, neither *nomos* nor narratives are shared, then the normative universe that a constitution seeks to bring into being, and the bonds that would result from this universe, may be called into question. The effort to create a *nomos* for a constitutional state may originate in formal institutions of state and amongst ‘custodians of constitutional culture’, but it is in the lives of people within that state that the official *nomos* will take root or founder, competing against non-official accounts of the world and the state that are rooted in communities – against localised versions of a

⁶⁰ Post 'Fashioning the Legal Constitution' (n 11) 8–9.

⁶¹ Robert M Cover, 'The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4.

⁶² *ibid* 4.

⁶³ *ibid*.

⁶⁴ *ibid* 5.

⁶⁵ *ibid* 46.

⁶⁶ *ibid* 14.

⁶⁷ *ibid*.

nomos, which draw the boundaries of the normative universe more tightly than the official version.

Cover makes clear that 'a legal tradition...is part and parcel of a complex normative world.'⁶⁸ This is reflected in the way that Post and Siegel see citizens and the formal apparatus of state in a responsive relationship, creating a constitutional culture. Through Cover, it becomes clear that the boundaries of a normative world may be limited, shared only by those who share a *nomos*. Implicit in this is a recognition that the multiplicity of subjectivities present within a country could result in a multiplicity of constitutional cultures, with ramifications for understandings of a constitution and a constitutional order.

Developing a definition of constitutional culture 'from below'

A constitutional culture 'from above', reflecting an attempt to embed a *nomos*, may not be reflected, in full or, perhaps even at all, in the lives of people living in that society. As noted, and as recognised by Post and Reva Siegel, an officially sanctioned version of constitutional culture, whether drawn narrowly or broadly, as discussed above, may be different from the perspectives about the constitution, about constitutionalism, and about life in a constitutional society in the broader population.⁶⁹ While a constitutional culture determined from above may attempt to draw many diverse parts of a nation into a united whole, it cannot engage with the extent to which subjectivity and subjective experiences determine the perspectives of the individuals and communities living in that constitutional order. This could pose a threat to the legitimacy and prospects of that constitutional culture.

For Siegel, for a constitutional culture to be regarded as legitimate, it must respond to the needs of a populace, must make sense to the life that they are living.⁷⁰ Intrinsic to the notion of constitutional culture 'from below' is the idea that people's understanding of the legal climate, the constitutional culture, in which they live, is shaped by multiple sources and experiences, including perspectives on the constitutional culture that emanates from

⁶⁸ *ibid* 9.

⁶⁹ Alexander (n 1) 2–3.

⁷⁰ Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change' (n 54) 1341.

elevated positions in society, 'from above'. Taken together, Post, Siegel and Cover enable an understanding of constitutional culture that recognises that pre-existing norms, the subjective position of an individual, and the material conditions of life may engage with institutional attempts to introduce new norms and a new constitutional culture, displacing, shaping or reinforcing other cultural norms.⁷¹ While Siegel and Post focus on how a constitutional culture can be a legitimating force for the role of a constitution in society, the possibility of multiple understandings of constitutional culture within a nation is clear in this formulation. This recognition contains the possibility of fractures between the relationship that a population will have with a constitutional state, with a constitution.

Inhabitants of a state need to know and engage with the *nomos* and the narrative that sustains it, and to be able to interpret the actions of the state and its representatives in accordance with that *nomos* and the origins and goals contained within the narrative. Where a state's actions do not create a *nomos*, or are not understood to be creating a normative universe recognised as legitimate, the constitution and constitutional state may lack legitimacy – an individual or a community may recognise that the legal culture 'from above' is at odds with that which shapes the daily reality of their lives, and with the normative universe that is present in their day-to-day existence. The unity that constitutions seek to realise may be rendered illusory by this subjectivity, the legitimacy of the state questioned and its ambitions irrelevant, or even a threat to the ambitions and values of individuals and communities. As Cover notes, the *nomos* and the narrative must make sense to those inhabiting it – a *nomos* found only in the formal institutions of state is no *nomos* at all.⁷² The subjectivities invoked by Post and Siegel's accounts give rise to the idea that an overarching *nomos* or constitutional culture may be foiled by the unique perspectives that different groups carry, in communication with formal institutions of state. Should a sufficiently unifying *nomos* or narrative be absent, inhabitants of a state may have differing understandings of the constitutional culture in which they live. This is not reflected in the institutionally focused accounts of constitutional culture 'from above', or it receives insufficient attention there. Post and Reva Siegel's shift of the focus from a purely institutional one to one that engages the

⁷¹ Post 'Law and Cultural Conflict' (n 54) 489–490.

⁷² Cover (n 61) 4.

inhabitants of a nation is thus important, and when considered together with the greater attention to the disparate subjectivities within a population, implicitly contained within Cover's *nomos* and narrative, provides a useful basis for the development of a concept of constitutional culture 'from below'.

An exploration of constitutional culture 'from below' must engage the manner in which individuals and communities understand the official constitutional culture, and must explore two elements of the constitutional culture 'from below'. First, how individuals and communities understand the attempts by influential sectors of society, whether state or non-state, to embed a *nomos*. Individuals and communities will generate a perspective on the constitutional culture that they deem to be present in their nation, on the constitutional culture that they understand to be imposed 'from above'. This understanding of the constitutional culture may not be rooted in the elements of the constitutional culture 'from above' that influential positions in society have attempted to embed, but will instead be rooted in the perceptions that individuals and communities have of the state, its values and its priorities. If the perceived constitutional culture 'from above' is seen as irrelevant, or is discordant with the values or experiences of an individual and a community, attempts to create a *nomos*, to foster a united populace, may run aground. And within this is the second dimension of constitutional culture 'from below', that arises from localised norms and values and is shaped by everyday interactions and perspectives. Normative universes found 'below', and shaped largely by the norms that govern the lives of individuals and communities, may be untethered from any form of overarching constitutional culture. The exact nature of the two dimensions of constitutional culture 'from below', the forms that these dimensions might take, will likely be shaped by the realities of the day-to-day existence of an individual, or a community.

2.4 Understanding constitutional cultures 'from above' and 'from below'

Explorations into all elements of constitutional culture can contribute to a deeper understanding of the shape of a constitutional order. They may thus be able to provide a more nuanced and substantive understanding of a constitutional culture, or the constitutional cultures, found within a nation, and the ramifications of these cultures, understood together.

Approaching constitutional culture from both 'above' and 'below' captures a constitutional culture that is largely independent of locally defined norms and from the experiences of the broader population and juxtaposes this with two approaches to constitutional culture that are based in the subjective understanding of the broader population: firstly, a constitutional culture that is perceived by people in the populace to be the guiding ethos of the state and, secondly, a constitutional culture that forms the fundamental rules and principles that inform the day-to-day lives of individuals in a population, that might reflect little or nothing of the 'official' constitutional culture that is formed and championed by formal institutions and people and organisations in positions of power.

Understanding the constitutional culture 'from below,' in two dimensions, exploring how individuals experience and understand the official constitutional culture, and the constitutional culture that they see as determinative of the norms and values in their community, and, consequently, of their actions, forms the heart of this project, and will be explored in three different South African communities, at Chapters 5, 6 and 7. This empirical research, and the subsequent analysis, will provide insights into the schisms in society, into the frictions and fractures that characterise the relationship that individuals and communities have with the state and other groups within the state. This allows for a consideration of the constitutional cultures 'from below' that are present in South Africa, with the concomitant intention of exploring the limitations of constitutional culture 'from above'.

Underpinning each of the three approaches to constitutional culture, one from above, and two questions from below, are three distinct questions, which would provide:

- 1) An enquiry into the constitutional culture that emanates from by formal institutions of state and by 'constitutional champions', encapsulated in the question, "Can a constitutional culture created by formal institutions and people occupying influential positions in society be identified?";
- 2) The first dimension of constitutional culture 'from below', which involves an exploration of the manner in which individuals understand the official constitutional culture, examining what they perceive to be the constitutional culture, nation. This explores the perspectives on official constitutional culture that exist in society, and will be shaped by multiple interactions and experiences, and can be captured by the

question “What do people in society experience and perceive be the constitutional culture of their country?”; and

- 3) An examination of the constitutional culture that an individual experiences in their daily life, the second dimension of constitutional culture ‘from below,’ formed by norms and practices in their immediate surrounds, investigated by the question “What do people experience as the constitutional culture that governs their lives?”

In light of this formulation, constitutional culture ‘from above’ and in the two dimensions of constitutional culture ‘from below’ can be illustrated as follows:

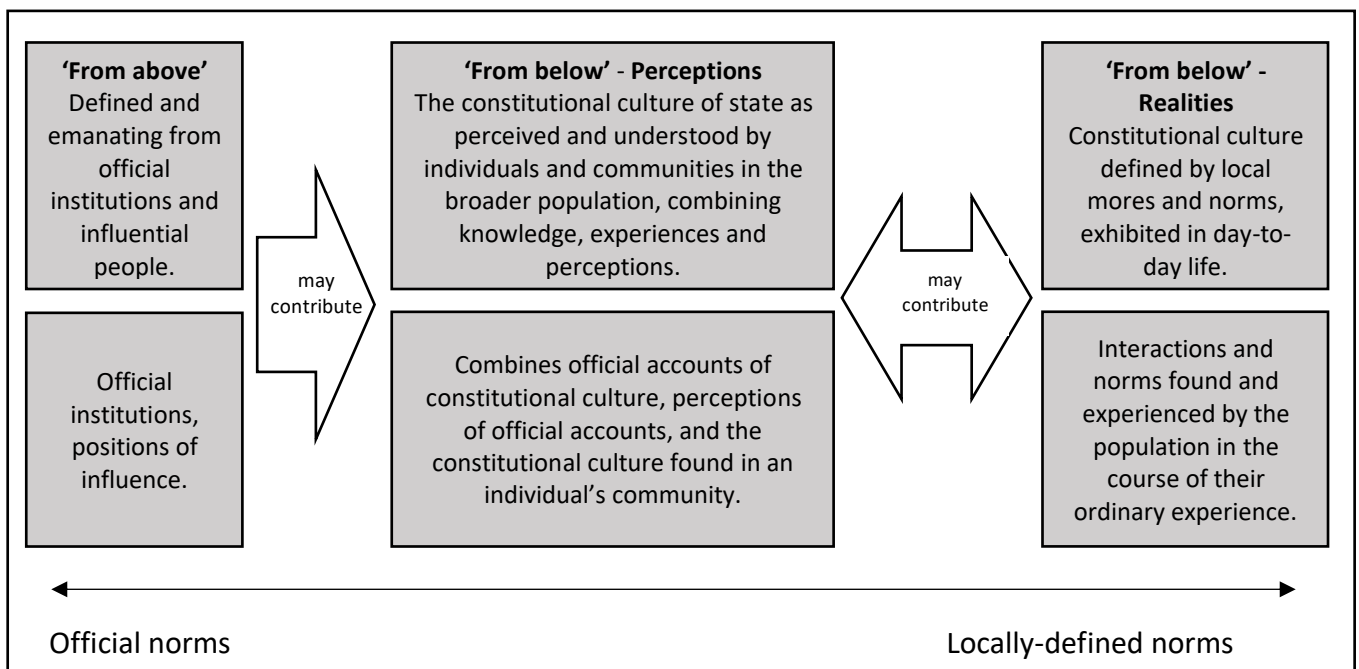


Figure 1: Approaches to constitutional culture

2.5 Constitutional fractures in light of constitutional cultures ‘above’ and ‘below’

Constitutions are intended to form the bedrock of the state and the political community in which they are found. Should ‘the people’ who ostensibly adopted the constitution struggle to locate themselves and their values in what they perceive to be the constitution of their country, or should they struggle to see the application of what they perceive to be the constitution in their lives, the legitimacy of the constitution may be questioned. Instead of being their constitution, the constitution may become a threat or an irrelevance – it may be

the case that, in such cases, people turn away from the constitution, or from what they perceive to be the constitution.⁷³

Approaching constitutional culture ‘from above’ and ‘from below’ provides a clear perspective on where alignment and fractures may be present in a constitutional society. In a society where a *nomos* is formed, where a constitutional vision has been realised, the constitutional culture ‘from above’ will be, in large part, the same as the constitutional cultures found ‘below’. Where this happens, the understanding of the state emanating ‘from above’ will map to the perception of the country ‘from below’, and will be experienced in the reality of day-to-day life for people in that society. No fractures would exist in such cases. In reality, bearing in mind the subjective nature of perspectives ‘from below’ and the impact of context, it is perhaps unlikely for a society to be aligned in this way. Where the constitution is perceived to have failed, to be irrelevant or wrong-headed, or is invisible to individuals, local norms and principles may – will – become determinant of behavioural and cognitive responses to the state.⁷⁴ In such cases, the constitutional fabric of a nation may be fractured. The nature of these fractures may vary extensively, depending on the perceptions that individuals and communities have of the constitutional state in which they live.

If the perceptions of the constitutional order are broadly aligned to the constitutional culture ‘from above’, then there may be a fracture between these elements of constitutional culture and the constitutional culture that informs the day-to-day lives of individuals.

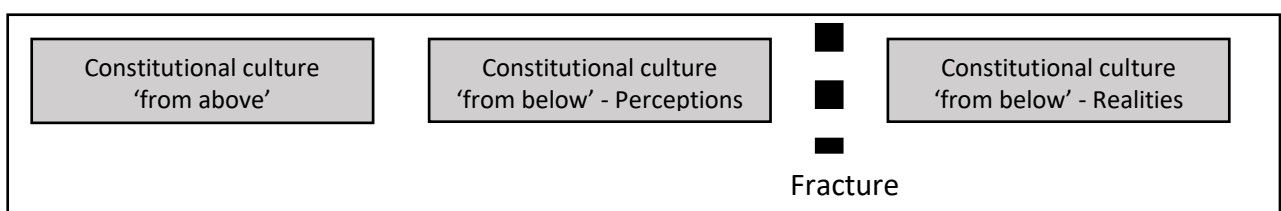


Figure 2: Potential site of fracture 1

Alternatively, where the perspective on the constitutional culture is more closely aligned with the conditions of an individual or communities day-to-day life, on how an individual or a

⁷³ Marc Hertogh, *Nobody's Law* (Palgrave Macmillan 2018).

⁷⁴ *ibid* 180.

community understands the social world in which they live, a fracture may exist between the constitutional culture ‘from above’ and the constitutional cultures found below.

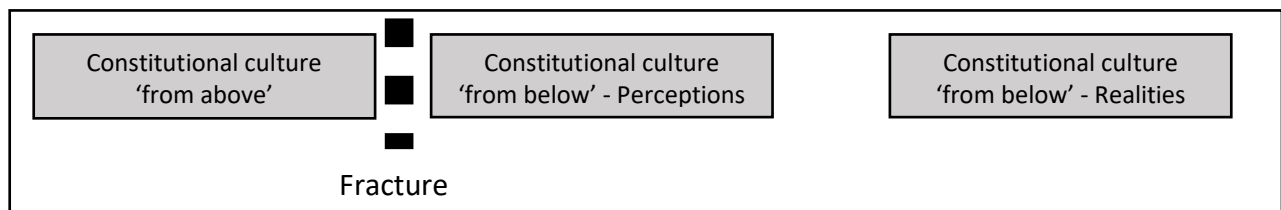


Figure 3: Potential site of fracture 2

A range of other fractures may be possible. This could include the possibility, or likelihood, that individuals and communities rotate through a range of orientations towards the constitutional state and the constitutional culture, may simultaneously be elements of alignment and fracture within an individual. This project seeks to uncover both the overarching orientation of several South African communities towards the constitutional state, while uncovering the nuances of alignment and fracture within these communities.

The fractures in the constitutional cultures of a state are important because of the aims of constitutionalism, and of transformative constitutionalism in particular, amongst which are the creation of a unified population and the entrenchment of a set of values. If these aims are absent from a population, serious questions about the status of South Africa’s transformative constitutional order could arise.

2.6 Moving towards analysis

Constitutional culture, in its various forms, speaks to the fundamental values that are positioned at, or perceived to be, at the heart of a nation, or at the heart of the day-to-day existence of an individual or a community. However, multiple perceptions of constitutional culture exist in a nation. While the constitutional culture that a state seeks to embed might speak to an aspirational version of the state, it might be that this constitutional culture, ‘from above,’ is limited in impact. Instead, perceptions of the constitution will be informed by cultural norms held by individuals and communities,⁷⁵ and by experiences and interactions with institutions of state. These perceptions may be divorced from the content of a

⁷⁵ Hans Vorländer, ‘Constitutions as Symbolic Orders’ in Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017).

constitution,⁷⁶ and from the constitutional culture ‘from above’. Delineating constitutional culture into understandings ‘from above’ and ‘from below’ allows for an interrogation of the state and, possibly, the health of a constitutional project within communities under examination. This project will do so through three different enquiries, discussed above.

As this research proceeds, the importance of contextual location, of historical positioning and of the experiences of officialdom that individuals and communities have will be marked. An individual’s understanding of the constitution of their country, and of the symbolic and practical implications of this, will shape their understanding of their society and of their place in it, with significant consequences for action, for how they structure their lives, for their future engagement with the state in which they and for the legitimacy of that state. Should the actions of the state not align with their expectations, or should the perceived values of the state conflict with the *nomos* that exists in a community, a fracture develops, casting doubt upon the legitimacy of the state.

The approaches into constitutional culture ‘from above’ and ‘from below’ interrogate ‘the law’ as a social concept, shaped by social forces. This, with the importance of context and individual perspectives, roots this research in sociolegal research methods, rejecting the idea of the law as an ideology-free set of normative values and ideas,⁷⁷ and exploring why the aims of formal institutions of law might be (and frequently are) frustrated.⁷⁸ Constitutional culture ‘from above’ requires an examination of a range of materials, and the identification of influential organisations and positions, from which an official version of a constitutional order’s constitutional culture can be understood to emanate. Constitutional culture ‘from below’ requires engagement with those living in a constitutional order – subjective experience is at the heart of these investigations, requiring research methods rooted in qualitative approaches. It is these sociolegal methods that will be used for the detailed empirical work that this project undertakes at Chapters 5, 6 and 7, as well as the consideration of the ramifications of this empirical work, found at Chapter 8. Prior to this, however, the

⁷⁶ Post 'Fashioning the Legal Constitution (n 11) 8–9.

⁷⁷ Joanne Conaghan, 'Labour Law and Feminist Method' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 93, 95.

⁷⁸ Lynette J Chua and David M Engel, 'Legal Consciousness Reconsidered' (2019) 15 Annual Review of Law and Social Science 335, 336.

following chapter will explore South Africa's constitutional culture 'from above', exploring the context of the 1994 democratic transition, and the implications of the centring of transformative constitutionalism for the understanding of South Africa that emanated from positions of power in the democratic era. This will provide the foundation from which to consider the constitutional cultures 'from below' and to attempt to identify sites of constitutional fracture and of constitutional alignment between the various constitutional cultures present in modern day South Africa.

Chapter 3: Apartheid, South Africa's 1994 project and the role of transformative constitutionalism 'from above'

3.1 Introduction

This chapter will seek to explore the nature of South Africa's approach to transformative constitutionalism, conducting a review of existing literature and seeking to make clear what was positioned as the legal foundation of the democratic state, and how this was communicated as such by influential organs of state and influential people. In essence, this chapter seeks to explore how South Africa's constitutional culture 'from above' was formed.

South Africa's history is synonymous with repression, with discrimination and with violations of dignity.¹ The democratic era sought to position itself as categorically separate, as foundationally different to the apartheid and colonial regimes which had governed South Africa, and undermined rights, since the 17th century.² The demise of minority rule, symbolised by the first election in which all races could participate, equally, and the election to power of a representative government, spoke of a society undergoing substantial change. The Constitution was positioned as a central element of this structural change, providing a new foundation for the country, founding a new legal order, and to some influential people, representing the true end of the centuries-long repression that had been inflicted upon people of colour.³ The Constitutional Court spoke of this centrality, noting that

...the Constitution, its founding values and this Court's jurisprudence have all emphasised that our venture in constitutionalism and democracy commits us to transforming our society from an oppressive past to a non-racial, just and united nation.⁴

¹ Apartheid was recognised as a crime against humanity, but the racialised repression found in the territory can be dated back to the arrival of Europeans in the Cape, was present throughout the colonial eras, in the governance of the Union of South Africa prior to the adoption of the formal policy of apartheid.

² The first European settlement in the territory that now constitutes South Africa was established in 1652 at the Cape of Good Hope.

³ Cyril Ramaphosa, 'Speech by the Chairman of the Constitutional Assembly', (Speech at the Constitutional Assembly upon the Adoption of the Republic of South Africa Constitution Bill, 8 May 1996) <<https://www.justice.gov.za/legislation/constitution/history/MEDIA/CYRIL.PDF>> accessed 12 July 2022.

⁴ *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) [74].

The transformational constitution that has been positioned as being at the heart of democratic South Africa indicates that a process is undertaken, 'from' something 'towards' something else. It thus requires a point of departure, a point of origin, from which transformation takes place. It is the repressive regimes of South Africa's past that provide the context for the 1994 project and so for the constitutional cultures 'above' and 'below' in the democratic South Africa. Accordingly, this chapter will commence with a discussion of particular elements of South Africa before 1994, before introducing the constitutional culture that was positioned as an intrinsic part of the 1994 project. In order to understand the constitutional world of 1994, this chapter will review some of the central elements of transformative constitutionalism that are of particular resonance to South Africa, drawing on insights from the literature on transformative constitutionalism as it relates to transformative constitutionalism in South Africa and beyond. Finally, this chapter will the extent to which the constitutional culture 'from above' may have disregarded certain elements of both the transition and of the lives of people who live in South Africa, with potential ramifications for the embedding of this culture 'from above', and for the constitutional cultures found in South Africa 'below'.

3.2 South Africa before 1994

South Africa prior to 1994 was a nation epitomised by repression and separation, which manifested in almost every area of life for those within the country. The apartheid system enshrined and served a clear set of values, with significant ramifications for the day-to-day lives of individuals and communities. To those suffering under racist rule, the state lacked legitimacy and credibility, and public trust was, understandably, absent.⁵ For many within the white population, however, the legitimacy of the apartheid state may not have been absent.⁶

⁵ Pierre De Vos, 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' in Danwood Chirwa and Lia Nijzink (eds), *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (United Nations University Press 2012).

⁶ Although not definitive of the extent of the support of apartheid amongst the white population, explicit or tacit, even at the time of formal apartheid's ultimate decline, when urged by the National Party, the champion of apartheid, to vote to end white rule, more than 30% of white South Africans voted against any reform in the 1992 whites only referendum – see, for example, Annette Strauss, 'The 1992 Referendum in South Africa' (1993) 31 *The Journal of Modern African Studies* 339, 339, 350–351.

Certainly, no one could claim that any shared normative universe existed. Legally and materially, people of colour and the white population lived in separate worlds. It was into this milieu that the Constitution was introduced, with the aim of transforming and unifying the nation.

The legacy of the past has resonance for the constitutional culture that was introduced to South Africa ‘from above’ in the democratic era, for the shape of this culture, for the attempts to embed it, and ultimately, for how the culture ‘from above’ has been understood and received by the population. This section will highlight some of these elements, specifically addressing the centrality of the law to people’s lives during the apartheid era, the enforcement of white supremacy as the guiding value of state, the simultaneous absence and presence of the state in people’s lives, and the lack of accountability fostered by the apartheid system. These elements created a distinct constitutional culture ‘from above’ in South Africa, relevant for the decisions made in the transition from apartheid to the democratic era, to subsequent transformational efforts.

3.2.1 The centrality of the law

The apartheid regime shrouded its policies and practices in a veneer of legality and due process, attempting to obscure the human rights abuses that were contained within its rule. While the apartheid regime was the zenith of *legalised* discrimination in South Africa, racial injustice and repression had been authorised by law since the early days of colonisation.⁷ Injustice and repression were authorised by the legal system – in fact, law was ‘an – if not *the* – oppressive tool of the apartheid regime’⁸ and, frequently that of its precursors too. The law invaded every aspect of life in pre-democratic South Africa – although significant, and terrible,

⁷ Heinz Klug, ‘Towards a Sociology of Constitutional Transformation: Understanding South Africa’s Post-Apartheid Constitutional Order’ in Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017).

⁸ Tim Fish Hodgson, ‘Bridging the Gap between People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy’ [2015] *Acta Juridica* 189, 195.

extra-legal abuses took place,⁹ human rights abuses were permitted in the apartheid-era legal system.¹⁰ Such abuses were, in fact, at the core of this legal system.¹¹

These abuses ranged from the legitimization of state-caused death, such as the state's investigation of the 1961 Sharpeville massacre, which allotted no blame to the police officers who shot and killed 69 people,¹² and the investigation into Steve Biko's death in custody, which cleared anyone of blame for the death, to the constant, all-pervasive trespass of the law into the lives of people in the country, from the mundane and every day, such as decisions involving transport, entrances to buildings, toilets, benches and beaches,¹³ to the most intimate and fundamental elements of life, which controlled where people could live and work,¹⁴ whom they could marry,¹⁵ whom they could engage in sexual relationships with.¹⁶ Unable to exist outside these abysmal, all-intrusive, legal encroachments, the law came to occupy a central place in the lives and minds of South Africans.

3.2.2 White domination and white supremacy as the guiding values of state

The apartheid-era legal system and the policies and actions that supported it made clear the values of the apartheid state – in the words of then-Prime Minister Hendrick Verwoerd, 'to make South Africa white...[and] [k]eeping it white can only mean one thing, namely, white

⁹ See, for example, the torture and extra-judicial killings discussed in Truth and Reconciliation Commission, 'Truth and Reconciliation Commission of South Africa Report, Volume 2' (1998) 187–289.

¹⁰ Edwin Cameron, 'Nepal's New Constitution and Fundamental Rights of Minorities - Lessons of the South African Experience' (2007) 23 South African Journal on Human Rights 195, 199; Dikgang Moseneke, 'Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa' (2013) 101 Georgetown Law Journal 749, 752.

¹¹ Cameron (n 10) 199; Moseneke (n 10) 752.

¹² After police opened fire on protestors protesting against pass laws in Sharpeville, near Johannesburg, on 21st March 1960, killing 69 and injuring hundreds more, an official enquiry found that, although many of wounded or killed were shot in the back, no blame could be placed on the police force, individually or collectively (see Commission Appointed to Investigate and Report on the Occurrences in the Districts of Vereeniging (namely at Sharpeville location and Evaton) and Vanderbijlpark province of the Transvaal on 21st March 1960, 'Report of the Commission Appointed to Investigate and Report on the Occurrences in the Districts of Vereeniging (Namely at Sharpeville Location and Evaton) and Vanderbijlpark, Province of the Transvaal, on 21st March 1960' (1960).

¹³ The Reservation of Separate Amenities Act, 49 of 1953.

¹⁴ The Group Areas Act, 41 of 1950.

¹⁵ The Prohibition of Mixed Marriages Act, 55 of 1949.

¹⁶ The Immorality Amendment Act, 21 of 1950.

domination, not leadership, not guidance, but control, supremacy'¹⁷ where state policy was designed to ensure the 'reproduction and maintenance of white supremacy and white privilege'.¹⁸ The state's desperate desire to elevate and protect white domination informed apartheid policies, and government action, shaping all elements of life in apartheid South Africa. Simply put, the state served, and explicitly sought to serve, only a sliver of the population, at the expense of everyone else, providing the rest of the population only the very minimum required to survive. This structural violence was inflicted upon much of the population, subjecting people of colour to dire circumstances, creating what was, by some measures, the most unequal society in the world.¹⁹

Policies and political choices attempted, largely successfully, to reduce people of colour to subservient roles in society, to roles that entrenched white supremacy, in both political and economic realms, resulting in people of colour being largely excluded from engaging in any meaningful fashion in the economy,²⁰ unable to access to decent education²¹ or basic services,²² and forced to remain on the spatial margins of the country – whether in townships on the outskirts of urban centres, or in rural areas.²³ A consequence – or a specific, desired result – of the values that the apartheid state sought to realise was endemic poverty, which co-existed with the comfortable life lived by the population of white South Africa. Whether

¹⁷ Verwoerd's 1963 speech cited in 'Partners in Apartheid: US Policy on South Africa' (1964) 11 *Africa Today* 2, 2.

¹⁸ Joel M Modiri, 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405, 406.

¹⁹ David Francis and Edward Webster, 'Poverty and Inequality in South Africa: Critical Reflections' (2019) 36 *Development Southern Africa* 788, 789–90.

²⁰ Verwoerd made this clear when, as the Minister of 'Bantu Affairs', he stated that "[i]f the native of South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake...There is no place for him in the European community above the level of certain forms of labour. Within his own community, however, all doors are open," cited in Hannah Tomlin, 'Contesting Ideologies and the Struggle for Equality: Reconsidering the Politics of Education in South Africa' (2016) 14 *Policy Futures in Education* 846, 848.

²¹ See Verwoerd's statement cited in footnote 20, above.

²² Department of Planning Monitoring and Evaluation, 'Twenty Year Review, South Africa, 1994-2014: Income, Poverty and Inequality' (2014) 11.

²³ Monitoring and Evaluation Department of Planning, 'Twenty Year Review, South Africa, 1994-2014: Regional and Spatial Development' (2014) 11.

examining education rates,²⁴ unemployment,²⁵ health outcomes,²⁶ or ability to access services,²⁷ it was clear that, at the dawn of the democratic era, the law had been a significant contributor to the formation of very different worlds, and, as a result, different groups within the population led distinctly contrasting lives.

3.2.3 State presence and absence

The apartheid state was simultaneously absent and overwhelmingly present in the lives of people in South Africa – and particularly in the lives of people of colour. The state was absent from many areas of life in South Africa, and did little to provide resources or services to people of colour, underinvesting in all manner of services. However, simultaneously, the apartheid state had a very real presence in the lives of the population, infringing upon the autonomy of individuals, preventing them making decisions relating to where they lived, whom they married, and where they ate or shopped, amongst many other invasions.

Policing provided an example of this dichotomous presence and absence. Policing in apartheid South Africa was characterised by repression and brutality, but was simultaneously marked by absence, particularly in areas reserved for Black African South Africans.²⁸ Whilst this was true throughout the apartheid era, it was perhaps particularly marked during the

²⁴ Less than 50% of Black learners graduated from high school, while white South Africans graduated at nearly double the rate of Black South Africans - Enrico G Pedro, 'South African Matriculation Results: Comparison Across Racial Lines' (1996) 3 Race, Gender & Class 39, 40. Pedro also noted that a significant contributor to these matriculation rate was the racialised nature of government spending on education, with R5 403 spent on each white learner, and R1 699 on each black learner - even this was a radical reduction in the disparities of earlier periods in South Africa's history (at page 43).

²⁵ Unemployment rates were nearly nine times higher for Black African South Africans than for white South Africans, according to Stephan Klasen, 'Poverty, Inequality and Deprivation in South Africa: An Analysis of the 1993 SALDRU Survey' (1997) 41 Social Indicators Research 51, 71.

²⁶ Black African children were four times less likely to reach their fifth birthday - Department of Health, 'South Africa Demographic and Health Survey 1998' (1999). Black African women had a maternal mortality rate nearly 10 times higher than white women (Michel Garenne, Robert McCaa and Kourtooum Nacro, 'Maternal Mortality in South Africa in 2001: From Demographic Census to Epidemiological Investigation' (2008) 6 Population Health Metrics 1, 8.)

²⁷ Indicative of a broader inability to access services, the 1994 Household Survey indicated that only 27% of Black African households had taps inside their dwellings, compared to 98% of white households - Ros Hirschowitz and Mark Orkin, 'Inequality in South Africa: Findings from the 1994 October Household Survey' (1997) 41 Social Science Indicators 119, 124.

²⁸ J Hornberger, 'We Need a Complicit Police! Political Policing Then and Now' (2014) 48 South African Crime Quarterly 17, 20.

states of emergencies declared in the country throughout the late 1980s. A constant police or military presence could be found in many urban townships, restricting movement, allowing state representatives free rein to interfere with the lives of residents. However, this presence was focused on preventing anti-apartheid resistance – very little, if any, attention was focused on preventing crime in these townships, or on assisting residents with the challenges that they faced in their day-to-day lives.

3.2.4 Accountability and its absence

The apartheid state acted with impunity, abusing rights, ignoring or oppressing large swathes of the population, with the entire system of governance serving to ensure that the apartheid era legal system lacked accountability, by design – in fact, the inability to hold the state to account was a hallmark of the system. While the disenfranchisement of people of colour epitomised the lack of accountability,²⁹ the government evaded accountability for all nature of actions and abuses – no one was held to account for massacres, such as the Sharpeville massacre,³⁰ for deaths in custody, people being held without trial or for extra-judicial killings. Censorship of the press was common, and in the late 1980s, the states of emergency served to further remove the Executive from accountability for its actions, able to rule by decree, with additional powers to quell political resistance.³¹ On the few occasions that courts did attempt to hold the government to account, Parliament side-stepped the strictures.³²

²⁹ A limited franchise for property owning men of colour – the Cape Qualified Franchise – existed in the latter half of the 19th Century, but the number of men eligible to vote gradually whittled away before being removed entirely under the Separate Representation of Voters Act, 46 of 1951, and the Separate Representation of Voters Amendment Act, 30 of 1956.

³⁰ See footnote 12 above.

³¹ The states of Emergency were declared under the Public Safety Act, 3 of 1953, amended throughout the apartheid era.

³² Observed when, after the Appellate Division blocked the Separate Representation of Voters Act, Parliament attempted to pass the High Court of Parliament Act, 35 of 1952, which would have provided Parliament with the power to review and overturn any decision of the High Court. When this Act was blocked by the Appellate Division, in *Harris v Minister of the Interior* 1952 (4) SA 769 (A), the government increased the number of members of Parliament, ensuring that the National Party would have enough members of the Senate to pass the legislation that they desired (in this case, stripping those few remaining men of colour who could vote of their franchise).

3.2.5 Conclusion

In many ways, the positioning of modern-day democratic South Africa places South Africa's past and its future in close connection, the harms of the past used to justify the vision of the future that was placed at the heart of the democratic state. The Constitution represented a route between these two, made explicit in the language of the interim Constitution, which situated the Constitution as an

...historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.³³

Reflecting on this language, Etienne Mureinik famously referred to the Constitution as bridge to a 'culture of justification',³⁴ enabling the country to move beyond a 'culture of authority' where an unaccountable parliament took actions without justification, where '[o]bedience spilled over from law into practice',³⁵ to 'a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes.'³⁶ The focus on the transformation of the legal foundation and culture of South Africa, with the Constitution at the heart of this, is understandable when considered in light of the multifaceted ways in which the colonial and apartheid legal systems shaped the lives of those within South Africa. This transformation was not limited to the legal system, but went beyond this, forming the heart of the vision of the country that South Africa was to become, of the constitutional culture that was envisioned for the nation.

³³ Postamble to the interim Constitution of South Africa, Act 200 of 1993.

³⁴ Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31, 32.

³⁵ *ibid.*

³⁶ Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146, 150.

3.3 The constitutional world of 1994

A clear narrative – a ‘grand narrative’ – accompanied both the interim and the 1996 Constitutions, foregrounding a particular understanding of the fundamental changes in the nature of South Africa and its culture that the Constitution intended to realise.³⁷ It is this grand narrative that constitutes democratic South Africa’s constitutional culture ‘from above.’

This constitutional culture ‘from above’ sees the Constitution as a central strut in efforts to overcome the legacy of apartheid, as a tool for justice. The Constitution in this approach has been understood to be transformative,³⁸ intended to facilitate or to bring about a transformation of the purpose and structure of the state,³⁹ of the relationship between the state and individuals, of the relationships between individuals within the country, and of the nation’s legal culture. In light of the centrality of the law to the apartheid and colonial eras, discussed above at section 3.2.1, the positioning of the Constitution at the heart of South Africa’s transition to democracy and attempts to build a new society was unsurprising, the rationale clear. While not uncontested,⁴⁰ various elements of this grand narrative, of this constitutional culture ‘from above,’ which includes the idea of what the Constitution is, of the role that the Constitution should play, of the values of the Constitution and what the shape of the constitutional state should be, have been omnipresent in discourse surrounding democratic South Africa.⁴¹ The rhetorical advancement of this constitutional culture, from various positions of power, may have created a clear idea of the constitutional culture that was to be embedded in South Africa, positioning the Constitution as having an intrinsic purpose focused on transforming the country, on improving the lives of those in South Africa,

³⁷ Cathi Albertyn and Beth Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *South African Journal on Human Rights* 248, 272; Pierre de Vos, ‘A Bridge Too Far? History as Context in the Interpretation of the South African Constitution’ (2001) 17 *South African Journal on Human Rights* 1, 8–9.

³⁸ Mureinik (n 34) 32.

³⁹ Rosalind Dixon and Theunis Roux, ‘Introduction’ in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution’s Local and International Influence* (Cambridge University Press 2018).

⁴⁰ See discussion below, at section 3.3.3.iii: *Limiting the future: Decolonisation and its demands*.

⁴¹ De Vos ‘A Bridge Too Far?’ (n 37) 8–9.

particularly the lives of the most vulnerable,⁴² and on overcoming the divisions of the past. The prevalence of the constitutional culture ‘from above’, and the apparent clarity and morality of its vision, may have made a substantial contribution to the perception that this approach lies at the heart of South Africa’s new era.

The acclaim and the importance of the Constitution and the transformative culture that it sought to embed within the country have been emphasised by powerful people and institutions, domestically and internationally.⁴³ The Constitution was heralded as the true end of the centuries-long repression that had been inflicted upon people of colour, the true ‘birthday of the South African rainbow nation...the day when South Africa [was] truly born’⁴⁴ by future President Cyril Ramaphosa, who, at the time, was the Chairman of the Constitutional Assembly, responsible for overseeing the drafting of the document. This was despite the first all-inclusive elections having taken place more than two years prior, in 1994.

The principles advanced by the Constitution combined with many other legislative and policy advancements, with influential figures providing many other ‘moments’ that communicated the nature of the new era and the unity that it entailed, including Nelson Mandela’s appearance at the 1995 Rugby World Cup final, wearing the once-loathed jersey of the South African rugby team, and in the then-Deputy President (and future President) Thabo Mbeki’s ‘I am an African’ speech, which stated that the

...Constitution whose adoption we celebrate constitutes an unequivocal statement that we refuse to accept that our Africanness shall be defined by our race, colour, gender or historical origins. It is a firm assertion made by ourselves that South Africa belongs to all who live in.⁴⁵

⁴² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) [24].

⁴³ Klug (n 7).

⁴⁴ Ramaphosa (n 3).

⁴⁵ Thabo Mbeki, ‘I Am an African’, (Speech at the Constitutional Assembly upon the Adoption of the Republic of South Africa Constitution Bill, 8th May 1996) <<https://www.gov.za/about-government/tm-mbeki-adoption-rsa-constitution-bill>> accessed 11 July 2022.

The promises of transformative constitutional culture can be found beyond the formal institutions of state, and remain prominent in political and societal discourse, reflected in frequent public education campaigns, funded by influential and well-resourced organisations such as ‘Our Struggle, Our Freedom, Our Constitution’, which proclaims that ‘People across South Africa breathe life into the Constitution every day through challenging injustice...in our courts or by taking their cause to the streets’,⁴⁶ and in the words of high profile, influential, activists, who share their understandings of transformative constitutional culture by ‘[holding] up a copy of the Constitution’, and stating that ‘[t]he Constitution of South Africa is the most important weapon we have. It is more powerful than Jacob Zuma, but it will only give you power if you organise around the Constitution, if you organise around its rights’.⁴⁷

These, and many other ‘moments,’ sought to tell the South African population about the constitutional milieu in which they lived. Despite these attempts, it should be noted that explicit knowledge of the Constitution and its contents remains shallow in South Africa.⁴⁸ Instead of direct knowledge, it may be the case that South Africa’s constitutional culture ‘from above’ is, as Huq notes, mediated by context and by exposure to “the dispersed and hard-to-supervise decisions of a vast cadre of public officials at the front lines of contact with the public.”⁴⁹

The remainder of this section will explore different elements of transformative constitutional culture in South Africa, exploring how this culture has conveyed the notion of a ‘new era’ in South Africa, the values conveyed by the culture, the emphasis placed on state obligations and accountability, and how the transformative constitutional culture has recreated the notion of the South African people, collectively, and the person, on an individual basis.

⁴⁶ *Our Struggle, Our Freedom, Our Constitution*, a public awareness campaign hosted by the Constitution Hill Trust, an organisation that is closely linked to the Constitutional Court, <https://ourconstitution.constitutionhill.org.za/>, last accessed 21st March 2022.

⁴⁷ Mandy De Waal, ‘Marikana: The Strike Might Be Over, but the Struggle Continues’ *Daily Maverick* (19 September 2012) <<https://www.dailymaverick.co.za/article/2012-09-19-marikana-the-strike-might-be-over-but-the-struggle-continues/>> accessed 15 July 2022.

⁴⁸ Foundation for Human Rights, *Socio-Economic Justice for All: Baseline Survey Report* (Foundation for Human Rights 2018) 38.

⁴⁹ Aziz Z Huq, ‘Constitutionalism, Legitimacy, and Public Order: A South African Case Study’ in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution’s Local and International Influence* (Cambridge University Press 2018).

3.3.1 Constitutional culture and transformative constitutionalism

The role that a constitution might be intended to play in a country will be determined by context, and will differ across different societies. Some constitutions may be introduced to preserve the existing order, while others may be introduced to transform a society.⁵⁰ ‘Transformative constitutionalism’ has been understood to be at the heart of constitutionalism in South Africa, foregrounding the need for change.⁵¹ The concept sheds light on the power that constitutions are understood to have, able to shape a nation, to determine the way that it functions and the way that it is understood.⁵²

Transformative constitutionalism has been understood to be ‘a long-term project of constitutional enactment, interpretation and enforcement committed...to transforming a country’s political and social institutions and power relationships’.⁵³ While the creation of a constitutional culture may be important in every constitutional state, and thus an integral part of every constitutionalism, it may be particularly important in aspirational constitutional projects, such as transformational projects, where official organs of state consciously and deliberately attempt to re-establish the foundations of that state, and where consent and legitimacy are vital. For many constitutional democracies, the adoption of a new constitution is intended to have some form of transformative effect, to break with the past, and herald a new era.⁵⁴ This ‘break’ may be accompanied by the introduction of a new range of state values, a new way of understanding the state, its obligations and its people, as well as by a new operational structure for the state.⁵⁵ In terms of this understanding, constitutions

⁵⁰ Bruce Ackerman, ‘Three Paths to Constitutionalism - and the Crisis of the European Union’ (2015) 45 *British Journal of Political Science* 705, 706–7; Michaela Hailbronner, ‘Transformative Constitutionalism: Not Only in the Global South’ (2017) 65 *American Journal of Comparative Law* 527, 533; Cass R Sunstein, ‘Social and Economic Rights - Lessons from South Africa’ (1999) 11 *Constitutional Forum* 123, 125.

⁵¹ Mureinik (n 34) 32; Pius Langa, ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351, 352.

⁵² Hailbronner (n 50) 528–9.

⁵³ Klare (n 36) 149.

⁵⁴ Cass R Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2001) 6; John David Lewis, ‘Constitution and Fundamental Law: The Lesson of Classical Athens’ in Ellen Frankel Paul, Fred D Jr Miller and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

⁵⁵ Dennis Davis, ‘Democracy - Its Influence upon the Process of Constitutional Interpretation’ (1994) 10 *South African Journal on Human Rights* 103, 104.

provide the framework and make possible a fundamental re-positioning of a state,⁵⁶ making explicit the far-reaching impact that champions of constitutionalism believe that constitutions can have on the nature of a state. In many ways, South Africa's constitutional democracy has been understood as the apex point of the potential of constitutionalism to form or to reform a society.

Transformative constitutions may be positioned as moral interventions in the vision and direction of a state. This positioning might obscure, or attempt to obscure, the vested interests present in transformative constitutionalism, and its political dimensions. In such processes, the individuals and organisations involved will hold a range of motivations and aspirations, and these will underpin decisions about the shape of a constitution.⁵⁷ Amongst these varying interests might be an orientation towards the nature of change at hand and towards the process by which a nation has arrived at constitutionalism. The political nature of constitutions and constitution-drafting is clear in the literature – for example, Ackerman identifies three potential paths to constitutionalism, each of which reflects the manner in which power shapes constitution-forming processes.⁵⁸ One path sees revolutionary change, through development by 'revolutionary outsiders', who have resisted and overcome an existing government, and founded a new regime;⁵⁹ another path involves 'pragmatic insiders', who see the need to grant concessions to specific outsider groups in order to splinter opposition forces and retain power;⁶⁰ the third is that of 'elitist constitutionalism', where 'the general population stays on the sidelines in relative passivity' while 'previously excluded political and social elites...serve as the principal force in the creation of a new constitutional order'.⁶¹ Regardless of the particular path to constitutionalism that a country might follow, the formation of a constitution is a political act, the contents and the vision of a particular constitution containing a range of interests. Any new constitutional era will carry with it the

⁵⁶ Ackerman (n 50) 706–7; Hailbronner (n 50) 528.

⁵⁷ Nathan J Brown, 'Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghan and Iraqi Constitutional Experiments' in Säid Amir Arjomand (ed), *Constitutional Politics in the Middle East* (Hart Publishing 2008); Hanna Fenichel Pitkin, 'The Idea of a Constitution' (1987) 37 *Journal of Legal Education* 167, 168; David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863, 881.

⁵⁸ Ackerman (n 50).

⁵⁹ *ibid* 706.

⁶⁰ *ibid*.

⁶¹ *ibid* 707.

imprint of these politics,⁶² even if the politics are hidden from view by a grander, inclusive narrative.

Ackerman identifies these archetypes, the actual paths to constitutionalism that countries take, but it might be argued that the path to constitutionalism as it is perceived by the populace is as important as the actual path. The ‘perceived path’ impacts the legitimacy of the constitution and the government. For example, if the remnants of an immoral regime are seen to shape the future of a ‘free’ constitutional nation, it is possible that the legitimacy of that constitutional state may be contested by some within that state. A second example might be where a constitution is perceived to have failed to engage with the values that an individual or a community hold to be important. These perceptions, and many potential others, would have ramifications for the reception of a constitution – the path to constitutionalism, and constitutionalism itself, will be understood by the population through a range of subjective experiences, and may be mediated through a range of intermediaries.

A transformative constitutional order will likely be birthed to the accompaniment of diverse perceptions of that transformed constitutional order, of that new legal, and societal, regime. Transformative constitutionalism, and constitutionalism generally, also makes clear that the successful embedding of a constitution will be shaped by the idiosyncrasies of the country in question,⁶³ its history and its cultural influences.⁶⁴ From Cover’s conception of a *nomos*, and the role that narrative plays in embedding the newly developed norms, it appears clear that the success of any transformational project will rest on the way in which the constitutional culture, the new normative universe, is understood and received by individuals and communities. This may differ across communities, shaped by the material realities and competing value systems that might be present in a population.⁶⁵ Perceptions of a legal regime with a transformative vision at its heart may not be congruent with the official

⁶² Ester Cross and Jason Sorens, ‘Arab Spring Constitution-Making: Polarization, Exclusion, and Constraints’ (2016) 23 *Democratization* 1292, 1293–4; Brown (n 57).

⁶³ David Dyzenhaus, ‘The Idea of a Constitution’ in David Dyzenhaus and Malcom Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).

⁶⁴ Rett R Ludwikowski, ‘Constitutional Culture of the New East-Central European Democracies’ (2000) 29 *Georgia Journal of International and Comparative Law* 1, 3–4; Hans Vorländer, ‘Constitutions as Symbolic Orders’ in Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017).

⁶⁵ Robert M Cover, ‘The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4, 46.

approach to a constitution – the ‘official version’ of a constitutional culture and the constitutional culture experienced by people within a country may diverge, with ramifications for the legitimacy of the constitution and constitutional culture, and for the unity of a nation.

The centrality of transformative constitutionalism to South Africa’s 1994 project provides a way to view the constitutional culture ‘from above’ and, a lens through which to interrogate the constitutional cultures present in the country ‘from below’. Amongst the many elements of transformative constitutionalism present in South Africa are a number of elements which would reflect on South Africa’s history, which have been foregrounded in South Africa’s present constitutional culture ‘from above’, and which may have a presence in the constitutional cultures present ‘from below’. The following section will explore some of these central elements of transformative constitutionalism.

3.3.2 Central promises of transformative constitutionalism

It is difficult, if not impossible, to delineate the multiple ways in which transformative constitutions and constitutionalism impact a country and its inhabitants as they ‘transform,’ as they enter a new era. This section will explore some of the intentions that can form part of the underlying motivations for the introduction of a transformative constitution, and the role that the document might play in the life of a country. It is these intentions that underlie the elements of the constitutional culture ‘from above’ in a country. In an attempt to identify the constitutional culture ‘from above’ in South Africa, the manner in which the promises of transformative constitutionalism were understood in the South African context will be discussed at section 3.3.3. Specifically, this discussion will explore:

- a) The manner in which a transformative constitution heralds a new era;
- b) How a new set of values are entrenched as the values of state;
- c) The centrality of accountability and transparency;
- d) How a state assumes obligations to its people; and
- e) The way that a constitution creates a ‘constitutional people’ and a ‘constitutional person’

3.3.2.1 A transformative constitution claims to instil a new, united era

As noted above, a transformative constitution indicates that a journey is underway, or has been taken, symbolises a move ‘from’ something, ‘towards’ something new. The introduction of a new constitution that embraces transformative goals often signposts some form of ‘new era’ in the life of a nation,⁶⁶ and will contain provisions that are shaped by the past, frequently drawn up to prevent the replication of issues that characterised the past. It is at the moment of formation or transformation that new possibilities arise – constitutions can represent a break from the past and hopes for the future.⁶⁷ ‘New eras’ of this nature can take a range of different forms: They may be the independence or formation of a nation, observed in the adoption of constitutions in the United States of America in 1789, in post-revolution Haiti in 1805, post-colonial states in Africa and Asia, in the post-World War II era, and modern states, such as Kosovo (2008) and South Sudan (2011); they may herald some form of reorientation of the nature of an existing state, a moment when a state strikes a new course,⁶⁸ such as when the 2011 Kenyan Constitution was adopted, which included arrangements designed to share the power to govern amongst ethnic groups,⁶⁹ and the 2005 Iraqi Constitution, which sought to establish a post-Ba’athist foundation for the country.⁷⁰

A ‘new era’ can have a profound impact on individuals within a transformed state (or within a state that, through its constitution, has adopted a transformative agenda), introducing new ways of understanding themselves, their relationship with a state and with others within that state.⁷¹ However, transformative goals may be received differently by different sectors of a

⁶⁶ Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 41; 5 Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Johns Hopkins University Press 2009).

⁶⁷ Loren E Lomasky, ‘Contract, Covenant, Constitution’ in Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011).

⁶⁸ Denis J Galligan and Mila Versteeg, ‘Theoretical Perspectives on the Social and Political Foundations of Constitutions’ in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

⁶⁹ Chapter 11 of the 2010 Constitution of Kenya, titled ‘Devolved Government’, is dedicated to matters of devolved government, an attempt to better balance resources amongst different ethnic groups – see Steve O Odero, ‘Devolved Government’ in PLO Lumumba, MK Mbonyeni and Steve O Odero (eds), *The Constitution of Kenya: Contemporary Readings* (LawAfrica 2011).

⁷⁰ Edward Chaplin, ‘Iraq’s New Constitution: Recipe for Stability or Chaos?’ (2006) 19 *Cambridge Review of International Affairs* 271, 279–80.

⁷¹ De Vos ‘A Bridge Too Far?’ (n 37) 21.

population – some might see themselves as having gained from the reorientation of the state, others might understand themselves to have lost.⁷² Reflecting the varying orientations that might exist towards a constitution, a constitution and a constitutional era may be imbued with particular characteristics by an individual by dint of that individual's orientation to the 'new era'.⁷³ How individuals understand themselves in the 'new era', an understanding which may be informed by a complicated system of 'gains' and 'losses,' and by the extent to which a particular individual views themselves as affirmed or undermined by the 'new era', will have implications for their experience of the 'official' constitutional culture, for whether a *nomos* has been formed, or whether multiple normative universes come into being.

3.3.2.2 A new set of values are entrenched as the values of state

A new era may be an attempt to distance itself from the previous status quo. To entrench this distance and emphasise the new era, particular values may be elevated.⁷⁴ This can constitute an attempt to unite that state behind a set of principles that communicate the type of state that a nation intends to become, expressing shared standards, that the population should share or mutually aspire to.⁷⁵ This can take the form of enshrining discrete rights, such as equality, by dividing power amongst various arms of government, or by limiting government in firm and specific ways,⁷⁶ amongst other approaches. Often contained in a preamble, these values shape the contents of the constitution and the manner in which a constitution is understood, within and beyond the formal institutions of law.⁷⁷ These values are intended to ensure that constitutions impact the political, legal, social and economic affairs of the state,⁷⁸

⁷² Pitkin (n 57) 168.

⁷³ Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge 2009) 223.

⁷⁴ Galligan and Versteeg (n 68).

⁷⁵ Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford University Press 1999); Joseph Raz, 'On the Nature of Law' (1996) 82 *Archiv für Rechts- und Sozialphilosophie* 1; Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60.

⁷⁶ Ran Hirschl, 'The Strategic Foundations of Constitutions' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

⁷⁷ Galligan and Versteeg (n 68).

⁷⁸ Andreas Auer, 'The Constitutional Scheme of Federalism' (2005) 12 *Journal of European Public Policy* 419, 427; Xavier de Vanssay and ZA Spindler, 'Freedom and Growth: Do Constitutions Matter?' (1994) 78 *Public Choice* 359, 366; Davide Ticchi and Andrea Vindigni, 'Endogenous Constitutions' (2010) 120 *The Economic Journal* 1, 32.

and should, but may not always, be reflected in the conduct expected of government and of state actors.

The values contained within a constitution may be explicit or implicit. Examples of explicit values include commitments to specific ideas and principles,⁷⁹ such as those found in the incorporation of ‘liberté, égalité, fraternité’ into the 20th century constitutions of France (after a contested history),⁸⁰ the focus on individual liberty found in the Constitution of the United States,⁸¹ and in the Zambian Constitution’s alignment of the values of the nation with Christianity.⁸² The Australian Constitution is an example of a constitution that implicitly establishes the values of a state, refraining from identifying specific values as ‘national’ values, but delineating approaches to “matters of value.”⁸³ In so doing, the Australian Constitution makes clear a perspective: the democratic process underpins the Australian state, containing an emphasis on the importance of the democratic process over substantive values.⁸⁴ It should be noted that the inclusion of a particular set of values in a constitution, whether explicit or implicit, is no guarantee that the state or state actors will, in fact, uphold these values.⁸⁵

Values can play an instrumental role in legitimising the state, in entrenching the new era, and in uniting the populace behind a new common vision.⁸⁶ This could include emphasising common values that appear to be shared by people within a nation, or values which they might agree are desirable.⁸⁷ The power contained within the drafting process is clear – the

⁷⁹ Sanford Levinson, ‘Do Constitutions Have a Point? Reflections on “Parchment Barriers” and Preambles’ in Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul (eds), *What Should Constitutions Do?* (Cambridge University Press 2011); Peter C Caldwell, ‘The Crucifix and German Constitutional Culture’ (1996) 11 *Cultural Anthropology* 259, 266.

⁸⁰ See, for example, the Constitution of the Fifth Republic, adopted in 1958, which entrenches, at Article 2, liberty, equality and fraternity as the “maxim of the Republic.”

⁸¹ Found in the Preamble, and elsewhere, in the Constitution of the United States.

⁸² The Preamble to the Zambian Constitution notes “supremacy of God Almighty” while “declar[ing] the Republic a Christian Nation.”

⁸³ Arcioni and Stone (n 75) 63, 65.

⁸⁴ *ibid* 60–61.

⁸⁵ See, for example, a discussion of regimes not committed to the values and contents of their constitution in Law and Versteeg (n 57).

⁸⁶ Jeff King, ‘Constitutions as Mission Statements’ in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

⁸⁷ Robert Post, ‘Democratic Constitutionalism and Cultural Heterogeneity’ (2000) 25 *Australian Journal of Legal Philosophy* 185, 186.

values which ultimately form the values of the constitution will likely be the result of the political process of contestation and compromise that takes place between drafters.⁸⁸ By enshrining selected values in a constitution, drafters are able to elevate, to prioritise, these values, entrenching an aspirational vision of their country,⁸⁹ one that is presented apolitically, obscuring the political underpinnings of these values.

Politics underlies the adoption of values, and the positioning of these values as commonly held by members of a population represents a choice, informed by politics. The extent to which a common ideology is actually common may be questioned as, even in the most homogenous of societies, conflicting values, or conflicting understandings of ostensibly common values, may be held by individuals and communities within the state.⁹⁰ Schisms in society, including those which gave rise to the need for a 'new era,' and which underlay the drafting of a constitution, may not have disappeared during the process of transition, regardless of any uniting rhetoric that surrounds it.⁹¹ That constitutional values might not align with values held by individuals and communities within a state is not inherently problematic. To believe that societal values cannot change or develop in accordance with aspirational values, and to limit the constitutional imagination to values that are understood to pre-exist a new constitution, or to values that are perceived as indigenous, 'inaccurately imagines that a society's culture is stable, coherent and singular.'⁹² However, should an individual or community find themselves to be consistently at odds with state values, or should an individual have some reason to question the values of the state, the legitimacy of the constitution, of the government or the state may be called into question. It is within this lack of alignment, within the endurance of a lack of alignment, that fractures might form and deepen.

⁸⁸ Brown (n 57); Cross and Sorens (n 62) 1294.

⁸⁹ See, for example, the importance that was placed on communitarian living by the 1926 Lebanese Constitution, included in the constitution at the insistence of French delegates at earlier peace conferences, discussed by John J Donahue, 'Changing the Lebanese Constitution: A Postmodern History' (2008) 30 *Cardozo Law Review* 2509, 2510.

⁹⁰ Caldwell (n 79) 269; Rosenfeld (n 73) 225.

⁹¹ Ludwikowski (n 64) 11–2.

⁹² Robert Post, 'Law and Cultural Conflict' (2003) 78 *Chicago-Kent Law Review* 485, 487.

Whether people within the country understand the values at the heart of the state involves a complex interaction of knowledge, context and experience. For many, their understanding of the values of a state will be limited to their interactions with representatives of a state – an important factor in considering the subjective experiences that individuals will have of a constitution.⁹³ The empirical work conducted in this project certainly indicates that there is reason to believe that this is the case – and, where representatives of the state are perceived to be acting against the interests of an individual or a community, whether on behalf of some other community or in their own interests (and whether this perception is accurate or inaccurate), the legitimacy of the entire state is brought into question. This may also result in individuals or communities perceiving particular values to be at the heart of the state, a perception that may govern the perception of the state, and an individual’s relationship with the state.

Where the values of an individual or a community are at odds with those of the state, whether perceived or accurate, the individual or community may feel themselves to have been relegated to the position of ‘outsider,’ to be resident within a state that does not represent them, exacerbating feelings that their country does not belong to them – perhaps because they feel that it never has. If this were to be the case, then a fracture in the relationship that an individual, a community or a group has with the state may be evident. For example, the Constitution of the United States, which declares ‘all men are created equal,’ had to reorient itself to include Black people within the ambit of this statement,⁹⁴ a reorientation – frequently accompanied by violent assertions and violent resistance – that remains a work in progress.

3.3.2.3 Enhancing accountability and transparency

Constitutions frequently detail a series of commitments that are centred around the demands of accountability – one of the central tenets of liberal democracy.⁹⁵ Where a country’s history is defined by the lack of accountability, the introduction of commitments, mechanisms and

⁹³ Huq (n 49).

⁹⁴ Rosenfeld (n 73) 25.

⁹⁵ Ran Hirschl, ‘The Political Origins of the New Constitutionalism’ (2004) 11 *Indiana Journal of Global Legal Studies* 71, 72; Shannon Roesler, ‘Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority’ (2007) 32 *Law & Social Inquiry* 545, 547.

institutions that promote accountability may be transformative. Creating these institutions, and an operational structure for the state that incorporates responsiveness and accountability, distributing power, and placing limits on the functions of the various organs of state is a seminal part of many constitutions.⁹⁶ For constitutions in the liberal democratic tradition, the manner in which a constitution enshrines and constrains the operation of power speaks to underlying commitments,⁹⁷ in particular to a commitment to the rule of law.⁹⁸ Accountability mechanisms, be they judicial review or additional independent organs of state, such as human rights commissions, offices of the ombudsman, or independent auditor-generals accentuate this commitment to legality and to the delivery of constitutional obligations, and should be understood together with the responsiveness and accountability that is assumed to underpin the elective process in democracies.

The commitments undertaken by, or imposed upon, the state in a transformative constitution accentuate the role of accountability in a constitutional order, entrenching the notion that office-bearers must be responsive to the broader populace. Transformative constitutionalism highlights this accountability, particularly in contexts where accountability has been absent. The ability to hold powerful individuals and organisations to account for their actions empowers the citizenry, emphasising the dawning of a 'new era.'⁹⁹

For many, if not the majority, of people, the primary experience of the constitution will be through encounters with institutions of state, represented by low-level functionaries. Although these interactions may not be explicitly understood by an individual as constitutional interactions,¹⁰⁰ such interactions may play a role in conveying to the population an idea of the nature of the state, and, to the extent that an individual or a community is able to hold office-bearers to account, of the extent to which accountability and responsiveness are present in the 'new era'. Courts and official enforcement mechanisms may remain outside the experience of much of a population, as it is lower level representatives of the state who

⁹⁶ Kim Lane Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism' (2019) 20 *German Law Journal* 314, 315; Ludwikowski (n 64) 2; Lewis (n 54).

⁹⁷ Arcioni and Stone (n 75) 60.

⁹⁸ Levinson (n 79); Arcioni and Stone (n 75) 65; Ludwikowski (n 64) 2–3.

⁹⁹ Huq (n 49).

¹⁰⁰ *ibid.*

will be the primary avenue through which the values of state, the representation of a ‘new era,’ is conveyed to the broader population. It is at these levels that accountability and responsiveness must be demonstrated in order for them to be understood as the values of state.

3.3.2.4 Positive obligations owed by the state to its citizens

The idea that citizens have rights in a country is, obviously, not new. Rights have traditionally been seen as restricting state action, as protecting individuals from overbearing state interventions.¹⁰¹ In recent years, there has been considerable development in the acceptance that rights need not be limited to this negative obligation, but might, instead, impose positive obligations on a state, requiring the state to fulfil a range of roles in the lives of its inhabitants.¹⁰² In part, this reflects the recognition of the role that states can play in realising societies that better reflect justice and equity and, in the context of transformative constitutions, of the potential for a state to lead in ‘transforming a country’s political and social institutions and power relations in a democratic, participatory and egalitarian direction’.¹⁰³ Additionally, the protection of a broader range of positive obligations recognises the intimate connection between the full realisation of civil and political rights and the protection and realisation of positive rights generally, and socioeconomic rights in particular.¹⁰⁴ And beyond this, the acceptance of positive rights by a state, or the imposition of such rights on the state, is an indication of commitment by the state to serve its people, a recognition that their demands for basic necessities are valid.¹⁰⁵

In truth, rights have always made demands of the state – civil and political rights, which some might argue are more established than social rights, require action from the state to, for

¹⁰¹ DM Davis, ‘The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 *South African Journal on Human Rights* 475, 475.

¹⁰² Vicki C Jackson, ‘Positive Obligations, Positive Rights, and Constitutional Amendment’ in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press 2016).

¹⁰³ Klare (n 36) 150.

¹⁰⁴ Pius Langa, ‘The Role of the Constitution in the Struggle against Poverty’ (2011) 22 *Stellenbosch Law Review* 446, 447.

¹⁰⁵ Dikgang Moseneke, ‘The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication’ (2002) 18 *South African Journal on Human Rights* 309, 314.

example, ensure free and fair elections, or to ensure unbiased courts.¹⁰⁶ Accordingly, it may be the case that, in some respects, the extension of a state's role through the imposition of positive obligations is, perhaps, not as big a leap as some might claim. In other respects, however, it is significant, and is frequently transformative. For example, positive rights may make additional demands of the state, in terms of its infrastructure and its resources and, perhaps more challengingly, for justiciable rights, in terms of its legal mechanisms, where courts may need to be institutionally empowered to intervene in the administrative decisions of state, to intervene in decisions where discretion may previously have been permissible.¹⁰⁷ 'Empowered' in this sense may relate to institutional arrangements but, perhaps more importantly, to a transformation of judicial mindsets, to the willingness of the judiciary to embrace a new, more active role.¹⁰⁸

The demands underlying the call for more emphasis on positive obligations are perhaps particularly sharp in the contexts in which transformative constitutions are introduced, where, for a range of reasons, the demands, and the actions required to meet these demands, may be substantial. Positive rights contained within them making clear the 'emancipatory' commitments of transformative constitutions,¹⁰⁹ to the intention of using 'the law to steer state action and drive social change toward a more just and equal society.'¹¹⁰ In transformative constitutions, the acceptance by the state of positive obligations, and, in particular, of justiciable socio-economic rights,¹¹¹ is both a signifier, an indication that the nature of the state has fundamentally changed, and a fundamental part of the new era, of a government that, perhaps for the first time, will act in the interests of all its people. In relation to socio-economic rights, it might be claimed that the willingness of a state to accept, and to meet, its obligations, is 'critical to democracy, development and stability of [the] constitutional state'.¹¹²

¹⁰⁶ Jackson (n 102).

¹⁰⁷ Colm O'Connell, 'Legal Accountability and Social Justice' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013).

¹⁰⁸ Dennis Davis, 'Transformation: The Constitutional Promise and Reality' (2010) 26 *South African Journal on Human Rights* 85, 101.

¹⁰⁹ Hailbronner (n 50) 528.

¹¹⁰ *ibid* 529.

¹¹¹ Dikgang Moseneke, 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 3, 12; Jackson (n 102).

¹¹² Langa (n 104) 446.

The move beyond the ‘traditional’ approach to rights, if more than rhetorical,¹¹³ is an important one for transformative constitutions, offering the potential for significant social change. However, the potential contained in moving beyond the traditional bounds of rights is accompanied with peril for governments, and for their legitimacy. Should a state fail to fulfil its obligations, should it fail to deliver, for example, socio-economic rights promised to the population, its legitimacy may be undermined, the broader transformation of the country threatened.¹¹⁴ On the other hand, it might be argued that a state that fails to assume the responsibility for radical change in the lives and prospects of its populace (in the transformative context) is one that lacks legitimacy from the outset¹¹⁵ – and it was this argument, in the context of South Africa’s transformative constitution, the argument that won out. Globally, obligations of this nature have become increasingly common in the constitutional commitments of states, although enforcement remains a contested point, often a site of contention between courts and other organs of state.¹¹⁶

3.3.2.5 Creating a ‘constitutional people’ and a ‘constitutional person’

Authorities within a new constitutional state may attempt to engage and unify the population within a constitutional culture, attempting to impose a range of unifying principles upon the populace,¹¹⁷ creating a shared normative universe ‘from above’ that attempts to anchor the new era beyond the fragmented subjective identities found within the country, as noted above. It may also go further through introducing a new, overarching and inclusive identity that may not have been available in the earlier era – encouraging individuals and communities

¹¹³ Frequently, commitments to the realisation of positive obligations, such as socio-economic rights, are little more than rhetorical, and lack urgency in their implementation – see, for example, Colm O’Cinneide, ‘Giving Substance to the Social Minimum’ in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle against Poverty* (Hart Publishing 2019).

¹¹⁴ Davis, ‘The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights’ (n 101) 484–5.

¹¹⁵ Matthew Evans, ‘Structural Violence, Socioeconomic Rights and Transformative Justice’ (2016) 15 *Journal of Human Rights* 1, 14.

¹¹⁶ O’Cinneide, ‘Giving Substance to the Social Minimum’ (n 113).

¹¹⁷ Post, ‘Democratic Constitutionalism and Cultural Heterogeneity’ (n 87) 186.

within a state to understand themselves as part of the 'people' in the 'we the people'¹¹⁸ who adopted the constitution.¹¹⁹

This results in the adoption of a constitution creating 'constitutional people' in at least two ways, collectively and individually.¹²⁰ Collectively, it draws each individual into an overarching constitutional body, each a person constituting the 'people' that have adopted the constitution of their nation.¹²¹ Secondly, and concurrently, a constitution, particularly if it incorporates a bill of rights, can create, or re-create, the meaning of what it means to be an individual within a constitutional order, establishing the rights of personhood and the limitations on actions that a state can take against an individual.¹²²

The idea of a constitutional collective, of a people united is a 'political construction'¹²³, a fiction, that serves several ends. It seeks to engender a cohesiveness in the constitutional society, to enable a common identity to be shared by the diverse communities and individuals within a constitutional state, and for a set of common goals to be pursued.¹²⁴ It allows for the assertion of sovereignty by citizens, that they are ruled by a set of foundational principles that they adopted 'themselves', a constitution is 'theirs',¹²⁵ that they are part of a new era that they helped to author.

The 'individual' constitutional person is created by the rights and freedoms which accrue to each individual through the constitution. Whilst these rights and freedoms will vary from nation to nation, they provide the basis for a validation of each individual, and for a range of intersectional identities that are permitted within the constitutional dispensation, which may vary along the lines of ethnicity, gender, of sexual orientation, of religion, amongst others,

¹¹⁸ 'We the people', a phrase with a long history, has become an increasingly popular phrase in constitutions drafted in the post-World War II era - Tom Ginsburg, Nick Foti and Daniel Rockmore, "'We the Peoples': The Global Origins of Constitutional Preambles' (2014) 46 *George Washington International Law Review* 101, 105.

¹¹⁹ Pitkin (n 57) 168.

¹²⁰ Rosenfeld (n 73) 212.

¹²¹ Denis J Galligan, 'The People, the Constitution, and the Idea of Representation' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

¹²² Nikolai Wenzel, 'From Contract to Mental Model: Constitutional Culture as a Fact of the Social Sciences' (2010) 23 *Review of Austrian Economics* 55, 56.

¹²³ Post, 'Democratic Constitutionalism and Cultural Heterogeneity' (n 87) 185.

¹²⁴ Rosenfeld (n 73) 212.

¹²⁵ Galligan (n 121).

and which may form the basis for a range of further claims. These claims may be rooted in historic maltreatment and discrimination, and vindication of these claims, whether, through government action or successful legal process, would provide evidence of the salience of the 'individual'.¹²⁶

The two forms of constitutional personhood, collective and individual, contain the potential to conflict: where there is no conflict between identities, or where the assertion of individual or a collective identity aligns with the constitution, there is no reason for conflict, no reason for individuals to question their position or the legitimacy of the constitution - the two identities may co-exist. However, should particular individual or group identities become salient, for any number of reasons, and be perceived by the individual or the community at hand to be at odds with norms and values of the constitution, with the collective identity, the two forms of constitutional personhood may clash, forcing the individual or group to confront the inconsistency, undermining assertions of unity, with ramifications for their identification with the state. Thus, as individuals assert their rights, as individuals or as part of a discrete group defined by a particular characteristic (for example, race, religion or ethnicity), they may come to be in conflict with the idea of the collective identity that is ostensibly shared by all members of the constitutional nation.¹²⁷ Where such inconsistencies arise, fractures may emerge, fractures between the state and particular individuals or communities and, possibly, fractures between communities who do not perceive themselves to be united. Where these fractures are evident, trust in the constitution and the constitutional state, and the ongoing legitimacy of these entities, may be threatened, with additional ramifications for the idea of a united people.

3.3.2.6 Conclusion

This project seeks to explore whether there are sites of fracture in present day South Africa, looking at whether there is a lack of alignment between constitutional culture propounded by influential sectors of society and the constitutional culture understood and lived by the

¹²⁶ Colm O’Cinneide, ‘The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication’ in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Hart Publishing 2020).

¹²⁷ Rosenfeld (n 73) 21.

inhabitants of South Africa, who engage with South Africa's constitutional project from their subjective position, engaging a range of sources of law.

Transformative constitutionalism ostensibly plays a definitive role in the life and the shape of a nation, engaging a range of mechanisms and approaches in an attempt to remake some element of the state – or to fundamentally alter the nature of a state. The potential within transformative constitutionalism was engaged in South Africa's democratic transition, the promises of constitutionalism foregrounded in move from the oppressive past to an inclusive future. How these were understood in the constitutional culture 'from above' will be discussed in the following section.

This discussion has, amongst other elements, made clear that the idealised notion that the direction for a nation can be set 'from above' faces the potential for contestation – the understanding of transformative constitutionalism propounded by the state and by influential actors, the constitutional culture 'from above', might not be reflected amongst the wider populace. Perceptions of the constitution will be informed by cultural norms held by individuals and communities,¹²⁸ and by experiences and interactions with institutions of state. These perceptions may be divorced from the actual content of a constitution,¹²⁹ informed as they may be by the realities, by an individual's or a community's contextual location, historical positioning and experiences of officialdom. Perceptions of a constitutional culture will shape understandings of society and of an individual's place in it, with significant consequences for action, for how they structure their lives, for their future engagement with the state in which they live, and for the legitimacy of that state. Should the actions of the state not align with their expectations, or should the perceived values of the state conflict with the *nomos* that exists in a community, a fracture develops, casting doubt upon the legitimacy of the state. This project will contribute to the understanding of these sites of fracture, establishing how the 'official' version of constitutionalism has been understood, and undertaking an empirical examination of individuals and communities in South Africa to determine how their

¹²⁸ Vorländer (n 64).

¹²⁹ Robert C Post, 'Foreword: Fashioning the Legal Constitution - Culture, Courts, and Law' (2003) 117 Harvard Law Review 4, 9.

understanding of the constitution and the constitutional state engages with the official version, and how this shapes their approach to the state.

3.3.3 South Africa's constitutional culture 'from above': The centrality of transformative constitutionalism

The identification of a constitutional culture 'from above' is the point of departure for the analysis of this research project, creating a position from which to consider and contrast the constitutional cultures that individuals within the country perceive and experience. This section will explore the constitutional culture that appeared to emanate 'from above' in South Africa, considering how this culture was shaped in terms of some of the fundamental elements of transformative constitutionalism, discussed above. Objections to the constitutional culture 'from above', counter-perspectives to the identified narrative, will be considered, with an initial consideration of the implications of these objections and counter-perspectives for the constitutional cultures found 'below'. First, however, this section will make clear the methodological underpinnings of the approach adopted to the constitutional culture 'from above' in post-1994 South Africa.

3.3.3.1 Locating constitutional culture 'from above'

Schneiderman's approach to constitutional culture, discussed in Chapter 2, which explores the role of a broad range of influential institutions, organisations and people – the custodians of constitutional culture – in forming the culture in which ordinary people reside, without engaging the views of the inhabitants themselves, offers much to the project. This approach holds that the elements beyond the law, beyond constitutional documents and the work and processes of courts, including 'scholarship, the work of legislatures, media reports, and the work of social movements or non-governmental organisations'¹³⁰ give rise to a constitutional culture. By adopting this broad approach, this project will seek to gain an understanding of how influential structures and individuals understand, and have positioned, transformative

¹³⁰ David Schneiderman, 'Banging Constitutional Bibles: Observing Constitutional Culture in Transition' (2005) 55 *University of Toronto Law Journal* 833, 835–836.

constitutional culture in South Africa, and can explore some of the reasons, stated or otherwise, for this culture. This approach to identifying constitutional culture allows for an interrogation of multiple sources, seeking to understand their contribution to the embedding of a constitutional culture in South Africa.

Through the careful interrogation of policy, actions and rhetoric it will be possible to gain an understanding of the “basic norms that both make and maintain [the] political community”¹³¹ that many sources have attempted to embed in democratic South Africa. This approach contains within it several challenges. These include identifying and justifying which elements of a constitutional culture should be considered to be of integral importance and who should be considered to be a ‘custodian of constitutional culture’. Moreover, a further challenge is to determine what objections to the constitutional culture, and which counter-perspectives, should be considered to have sufficient influence to shape a narrative that is contrary to the constitutional culture ‘from above’. These challenges must be met contextually, exploring the role that constitutionalism and constitutional culture sought to play in South Africa.

3.3.3.2 South Africa ‘from above’

‘Transformative constitutionalism’ has been understood to be at the heart of constitutionalism in South Africa, foregrounding the need for change.¹³² Elements of transformative constitutionalism, such as those discussed in section 3.3.2 above, have been reflected in state policies, in the rhetoric that has surrounded the democratic era, and in court judgments, as well as in other places in society. This section will consider how these elements of transformative constitutionalism were positioned in South African society, how they were to contribute towards the creation of a shared normative universe for all in South Africa.

¹³¹ *ibid* 837.

¹³² *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) [8].

3.3.3.2.i The marking of a new era

While South Africa's pre-democratic system of governance literally provided a name for a crime against humanity,¹³³ the Constitution was positioned as part – a central part – of a new era for the country, an era that promised to “liberate all our people from the continuing bondage of poverty, deprivation, suffering, gender and other discrimination.”¹³⁴ In light of all that the law epitomised in the past, of the importance of the law to apartheid South Africa, and its encroachment into the lives of ordinary South Africans, discussed above, the power that was attributed to Constitution, to change the nature of the country, is perhaps unsurprising – the remedy for the problems stemming from South Africa's past was of the same genus as the malady.

The impact of the Constitution on the shape of this new era was captured in the first case heard by the newly established Constitutional Court (itself another symbol of a new era), which emphasised a society made anew in its ruling that the death penalty was unconstitutional. The Court noted that the Constitution, and the democratic South Africa,

...retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.¹³⁵

¹³³ The International Convention on the Suppression and Punishment of the Crime of Apartheid designated apartheid a crime against humanity, as did the later Geneva Convention, Additional Protocol 1, at Article 85.

¹³⁴ Nelson Mandela, 'Statement of the President of the African National Congress, Nelson Mandela, at His Inauguration as President of the Democratic Republic of South Africa, Union Buildings, Pretoria', (1994 Presidential Inauguration, 10 May 1994) <<https://www.gov.za/statement-president-african-national-congress-nelson-mandela-his-inauguration-president-democratic>> accessed 18 July 2022.

¹³⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) [262].

The constitutional culture ‘from above’ saw South Africa under the Constitution as a nation made anew, the interim Constitution describing itself as a ‘a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence’,¹³⁶ where the state was obliged to realise the full potential of every person, and to provide the conditions that would assist in this.¹³⁷

For the first time, people of colour were to be full participants in the nation, ostensibly leaving behind subjugation of the past. It is notable that this new era was an era that South Africans were to enter together, ostensibly united as the ‘rainbow nation’.¹³⁸ The entrenchment of the right to equality,¹³⁹ with an expanded list of listed grounds that could found equality claims, was indicative of the new era. Other provisions emphasised this new era further, including basic protections which had previously been denied to the majority, including the protection of citizenship, a contrast to the homelands policy, which sought to deprive Black South Africans of their citizenship, and a range of mechanisms that would allow for state institutions to be held to account, a marked contrast to the lack of accountability of the past. This drive for accountability included a range of independent institutions,¹⁴⁰ such as an ombudsman,¹⁴¹ a human rights commission,¹⁴² and an independent electoral commission,¹⁴³ amongst others.¹⁴⁴ The strength of this solution was enhanced by the emphasis that was placed on the concept of constitutional supremacy, as a counterpoint to the parliamentary sovereignty that had been used and misused during earlier eras, and how this was understood to be a bulwark against the abuses and violations that the legal system permitted.¹⁴⁵ The idea that the

¹³⁶ Postamble to the interim Constitution.

¹³⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* (n 42) [23].

¹³⁸ A term for the country adopted by Archbishop Desmond Tutu, which became a popular metaphor for the united country (see, for example, usage in Tutu’s foreword in the Truth and Reconciliation Commission, ‘Truth and Reconciliation Commission of South Africa Report, Volume 1’ (1998) 23; Adam Habib, ‘South Africa: The Rainbow Nation and Prospects for Consolidating Democracy’ (1997) 2 *African Journal of Political Science* 15, 15.

¹³⁹ Section 9 of the Constitution.

¹⁴⁰ Chapter 9 of the Constitution, spanning sections 181 to 194, ‘State institutions supporting constitutional democracy.’

¹⁴¹ Sections 182-183.

¹⁴² Section 184.

¹⁴³ Sections 190-191.

¹⁴⁴ Other Chapter 9 institutions include a commission for the protection of cultural and language rights, a commission for gender equality, and an independent auditor general.

¹⁴⁵ Reynaud N Daniels and Jason Brickhill, ‘The Counter-Majoritarian Difficulty and the South African Constitutional Court’ (2006) 25 *Penn State International Law Review* 371, 372–3; Cameron (n 10) 199.

Constitution was a significant part of the new era, of an era in which South Africans could be proud of their nation, was further embedded by the international acclaim that the Constitution received.¹⁴⁶ That South Africa could be considered a progressive role model was, in itself, a mark of a new era, and a commitment to a new future.

The demands of the Constitution consolidated the perception of a nation striking a new course, perhaps most notably through the Truth and Reconciliation Commission ('TRC'), the demand for which was rooted in the interim Constitution.¹⁴⁷ The TRC sought to differentiate past and present, recognising 'that much of the unjust consequences of the past could not ever be fully reversed',¹⁴⁸ but that 'it might be necessary in crucial areas to close the book on that past'.¹⁴⁹ The TRC, consciously and performatively, sought to show that the actions and abuses of the past – authoritarian, punitive, abusive – were markedly different from the transparency, forgiveness and reconciliation which would accompany the new era.¹⁵⁰

3.3.3.2.ii A new set of values: A culture built on justice and fairness

Central to the constitutional culture that emanated from positions of power, and to the new era, was an attempt to unite the people living in South Africa behind a new set of values, contained in the Constitution, to foster a common ideology at the heart of the democratic project, entrenching 'an objective, normative value system'¹⁵¹ that would guide and ground the transformation of the country.¹⁵² The Constitutional Court made clear that 'The values

¹⁴⁶ See, for example, Cass R Sunstein, 'Social and Economic Rights - Lessons from South Africa' (2000) 11 Constitutional Forum 123, Samuel Issacharoff, 'The Democratic Risk to Democratic Transitions' (2013) 5 Constitutional Court Review 1, 1, or Ruth Bader Ginsburg who, when asked about how countries should go about designing their constitutions, stated 'I would not look to the US Constitution, if I were drafting a constitution in the year 2012. I might look at the Constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights and an independent judiciary', cited in Wessel Le Roux, 'The Bader Ginsburg Controversy and the Americanization of Post-Apartheid Legal Culture' (2014) 59 American Studies 519, 519.

¹⁴⁷ The Postamble to the interim Constitution required that, to 'to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.'

¹⁴⁸ *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) [2].

¹⁴⁹ *ibid.*

¹⁵⁰ Nicholas Rush Smith, *Contradictions of Democracy: Vigilantism and Rights in Post-Apartheid South Africa* (Oxford University Press 2019) 65.

¹⁵¹ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [54].

¹⁵² *Albertyn and Goldblatt* (n 37) 248.

urged upon the court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government'.¹⁵³ The Constitution thus represented a commitment to a value system that would ensure a present and a future that would differ dramatically to that of the past, that sought to unite the country within a normative universe based on dignity, freedom and equality, non-sexism, non-racism, a commitment to human rights, constitutional supremacy and the rule of law.¹⁵⁴

The constitutional values enabled 'custodians of the constitution' to carry and communicate a clear perspective about the meaning and potential of democratic South Africa. Chief amongst these was the belief that power should be controlled and directed,¹⁵⁵ used to ensure that every human in South Africa would have the potential to fulfil their potential,¹⁵⁶ to entrench the notion that every person in South Africa had value, a position at odds with the past. The values of the Constitution were thus used to highlight the inclusivity of the new nation, the value system contained within the Constitution intended to enable the country to become 'a rainbow nation at peace with itself and the world'.¹⁵⁷ The Constitutional Court made clear that every action of state would need to be assessed through the prism of the values of the new state,¹⁵⁸ stating, for example, that equality 'permeates and defines the very ethos upon which the Constitution is premised'¹⁵⁹ and is a 'core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance'.¹⁶⁰

The re-founding of the values of the South African state had ramifications for many elements of life in South Africa. The criminal justice system is one notable example. As noted in an early case, 'the transition did have an effect on the country's criminal justice system...superimposing the norms of a rights culture on a system that had evolved under a

¹⁵³ *S v Makwanyane* (n 135) [322].

¹⁵⁴ Section 1 of the Constitution.

¹⁵⁵ *Albertyn and Goldblatt* (n 37) 272.

¹⁵⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* (n 42) [23].

¹⁵⁷ *Mandela* (n 134).

¹⁵⁸ Alfred Cockrell, 'Rainbow Jurisprudence' (1996) 12 *South African Journal on Human Rights* 1, 9.

¹⁵⁹ *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) [20].

¹⁶⁰ *Minister of Finance and Another v van Heerden* 2004 (6) SA 121 (CC) [22].

wholly different regime'.¹⁶¹ The recognition of the need to align the criminal justice system, generally, and the Criminal Procedure Act ('CPA'),¹⁶² in particular, with the requirements of the Constitution led to the South African Law Commission undertaking an extensive report on possibly unconstitutional sections of the CPA,¹⁶³ ultimately issuing recommendations on a range of provisions, including provisions relating to the presumption of innocence, the right to a fair trial, and the right to freedom and security of the person. The abuses of the past informed this process, and informed the work of the Constitutional Court when it considered the criminal justice system, the Court highlighting that while the rights of prisoners existed in the common law prior to the Constitution, the Constitution served to entrench these,¹⁶⁴ reflecting that fact that 'Quite literally...everybody counts.'¹⁶⁵

The rebasing of the criminal justice system bolstered the protections for both those suspected of crimes and those convicted of crimes. Amongst many examples, the value of freedom, a foundational value, and the right to freedom and security of the person were placed at the heart of how the police should act when taking people into custody.¹⁶⁶ This included an extensive understanding of the right to remain silent,¹⁶⁷ particularly important because of the South Africa's history,¹⁶⁸ its 'dim past of torture and intimidation during police custody'.¹⁶⁹ The extent to which constitutional values and rights shaped the democratic understanding of criminal justice and punishment can be noted in *August and Another v Electoral Commission and Others*,¹⁷⁰ which upheld the right of all prisoners to vote in elections because

[u]niversal adult suffrage...is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South

¹⁶¹ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) [2].

¹⁶² Act 51 of 1977.

¹⁶³ South African Law Commission, *Project 101: The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence, and Sentencing* (2001).

¹⁶⁴ *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) [19].

¹⁶⁵ *ibid* [17].

¹⁶⁶ *Mahlangu and Another v Minister of Police* 2021 (7) BCLR 698 (CC) [44]; *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* 2015 (9) BCLR 1026 (CC) [45].

¹⁶⁷ *Osman and Another v Attorney-General for the Transvaal* 1998 (4) SA 1224 (CC) [22].

¹⁶⁸ *ibid* [10].

¹⁶⁹ *Thebus v S* 2003 (6) SA 505 (CC) [55].

¹⁷⁰ *August and Another v Electoral Commission and Others* (n 164).

Africans regardless of race, and for the accomplishment of all embracing nationhood.¹⁷¹

In attempting to undo the harms of the policy and practices of the past, and to instil new values within the country, all manner of public and private institutions and practices needed to be re-founded and rebased, and existent practices reconsidered in light of their adherence to the values of the new state.¹⁷² These values were at the heart of a range of policies, legislative interventions and actions undertaken by the democratic state. One example of this is contained within the public sector's adoption of a series of principles, called the *Batho Pele* ('People First') principles, which sought to transform the manner in which public service was delivered, seeking to ensure the 'effectiveness in delivering services which meet the basic needs of all South African citizens',¹⁷³ attempting to help people understand that the state should have to treat them with respect, that 'Access to decent public services is no longer a privilege to be enjoyed by a few; it is... the rightful expectation of all citizens, especially those previously disadvantaged'.¹⁷⁴ The *Batho Pele* principles give effect to the principles and demands of section 195 of the Constitution,¹⁷⁵ which demands the impartial and equitable provision of resources, placing an emphasis on accountability and an obligation on public servants to demonstrate a high standard of professional ethics. All of these commitments indicate the extent to which the broader values underlying the Constitution were to characterise the interactions, every day or exceptional, that people within the country had with the state.

The values of the constitutional state were not limited to re-founding the relationships between the state and individuals but extended to re-founding the relationships between individuals themselves. The culture of the apartheid state had not only informed the apparatus of state, but had, intentionally, permeated private relationships,¹⁷⁶ as people internalised and enforced the values of white superiority and domination that underpinned

¹⁷¹ *ibid* [17].

¹⁷² *S v Makwanyane* (n 135) [261].

¹⁷³ Department of Public Service and Administration, *White Paper on Transforming Public Service Delivery* (Government Gazette 338:18340, 1997) 9.

¹⁷⁴ *ibid* 5.

¹⁷⁵ Section 195 is entitled 'Basic values and principles governing public administration.'

¹⁷⁶ *Mureinik* (n 34) 32.

the apartheid regime in their private lives,¹⁷⁷ resulting in numerous imbalanced private relationships. The internalisation of discrimination in private relationships highlighted the importance of ensuring that the constitutional values and rights came to infuse all levels of society, including horizontally, reshaping how individuals interacted. The horizontal application of the Bill of Rights, enshrined at section 8, was one way that the Constitution sought to redraw private relationships, to introduce the values and the rights of the Constitution into interpersonal relationships,¹⁷⁸ including into disputes rooted in private law.¹⁷⁹ The injection of the rights and values of the Constitution into private relationships extends the protections of the Bill of Rights, imposing obligations on individuals – for example, the obligation imposed upon the state, to progressively realise the right of access to housing, ‘is not solely on the state...[the right] imports an inhibitory duty not to impede or impair access to housing. This rests not only on public bodies but also on private parties’.¹⁸⁰

The values of the democratic State were emphasised by other areas of society, prominent in the academic literature of the time, and seen as integral to the emerging shape of the new nation.¹⁸¹ This was perhaps most clearly evident in the manner in which socio-economic rights were enshrined in the Constitution, which will be discussed below.¹⁸²

3.3.3.2.iii Enhancing accountability and transparency

The infusion of accountability, one the tenets of liberal democracy, into the South African constitutional order was, in many ways, transformative. Accountability mechanisms were emphasised and held to be a way to ensure that a government that promised to govern for

¹⁷⁷ The enforcement of racialised discrimination beyond the requirements of the apartheid law was a frequent feature of the apartheid era, going beyond the law – meaning that white people often enforced racist practices, not required by the law, in their private relationships. These attitudes persevere today, see Cornel Verwey and Michael Quayle, ‘Whiteness, Racism, and Afrikaner Identity in Post-Apartheid South Africa’ (2012) 111 *African Affairs* 551.

¹⁷⁸ Sections 8(2) and (3) of the Constitution.

¹⁷⁹ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) [8].

¹⁸⁰ *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) [32].

¹⁸¹ See, for example, Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 29; Klare (n 36) 153; Albertyn and Goldblatt (n 37) 248; Hodgson (n 8) 199.

¹⁸² At section 3.3.3.2.iv *Positive obligations owed by the state to its people*.

all actually did so. The new era would orient itself, at least partially, by the difference between it and what came before, marking

a decisive break from the unchecked abuse of State power that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy.¹⁸³

The Constitution made the importance of accountability clear, placing the rule of law as one of the central values of the state and entrenching the supremacy of the Constitution, an answer to the manner in which parliamentary supremacy had been abused over the apartheid years.¹⁸⁴ The introduction, and importance, of accountability was demonstrated in the willingness of the first democratically elected president to submit to the order of a court, to testify and to submit to cross-examination.¹⁸⁵ In democratic South Africa, 'there is nobody, not even the president, who is above the law'.¹⁸⁶

The Constitution contained a range of accountability mechanisms amongst its provisions. These included the constitutional protection for the right of access to information,¹⁸⁷ to freedom of expression,¹⁸⁸ to just and fair administrative action,¹⁸⁹ as well as providing for an empowered judiciary¹⁹⁰ and a range of independent institutions designed to support and protect democracy, such as the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-

¹⁸³ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) [1].

¹⁸⁴ Abuses demonstrated by the extension of the senate and the attempted passing of the High Court of Parliament Act (n 32), all of which attempted to insulate the workings of parliament from judicial scrutiny.

¹⁸⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC).

¹⁸⁶ Nelson Mandela and Mandla Langa, *Dare Not Linger: The Presidential Years* (Farrar, Straus and Giroux 2017) 126.

¹⁸⁷ Section 32 of the Constitution.

¹⁸⁸ Section 16 of the Constitution.

¹⁸⁹ Section 33 of the Constitution.

¹⁹⁰ Section 165 of the Constitution.

General, and the Electoral Commission, amongst others.¹⁹¹ These ‘Chapter 9 institutions’ are designed to be independent, and this independence is intended to contribute to their legitimacy, to their ability to hold power to account.¹⁹²

3.3.3.2.iv Positive obligations owed by the state to its people

The effects and legacy of the past, such as endemic poverty and ongoing exclusion from opportunity, continued to cast a shadow over South African society as it entered the democratic era,¹⁹³ shaping the material reality of the population, with ongoing effects on the dignity of the population and perceptions of justice. A failure to address the material deprivation that so many within South Africa faced would have rendered the values of the State little more than empty rhetoric.¹⁹⁴ Reflecting this, at the heart of the constitutional culture that influential sectors of society sought to embed ‘from above’ was a set of socio-economic rights. The inclusion of these rights and the obligation that they placed on the state stood in stark juxtaposition to the constitutional culture of South Africa prior to democracy, and was a recognition that the material circumstances of the bulk of the population needed to be addressed in order for the Constitution to have any meaning to these groups of people.¹⁹⁵ The inclusion and prominence of these socio-economic rights indicated an understanding present in the country that, to triumph over South Africa’s discriminatory past, it would be necessary to ‘grappl[e] with the economic conditions under which the majority...live’,¹⁹⁶ to address the poverty that stemmed from the colonial- and apartheid-era policies.

These socio-economic rights, whether immediately or progressively realisable,¹⁹⁷ have been understood to require that the ‘basic needs of all in our society be effectively met and the

¹⁹¹ Found at Chapter 9 of the Constitution.

¹⁹² *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) [31].

¹⁹³ Jeremy Sarkin, ‘The Drafting of South Africa’s Final Constitution from a Human-Rights Perspective’ (1999) 47 *American Journal of Comparative Law* 67, 86.

¹⁹⁴ *Soobramoney v Minister of Health* (n 132) [8].

¹⁹⁵ Sandra Liebenberg, ‘The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa’ (2001) 17 *South African Journal on Human Rights* 232, 256–7.

¹⁹⁶ *Langa* (n 104) 447.

¹⁹⁷ Some of the socio-economic rights that demand immediate realisation include rights for children to be able to obtain ‘basic nutrition, shelter, basic health care services, and social services’ (Section 28(1)(c)), the right to

requirement of progressive realisation means that the state must take steps to achieve this goal'.¹⁹⁸ The rights recognise 'that political equality alone is not sufficient; there has, at least, to be some measure of economic equality.'¹⁹⁹

The socio-economic rights marked the dawning of an era where, for the first time, the state served the entire country and the entire population. The realisation of these rights, or the promise of their realisation and protection, was a way for the democratic state to communicate the changes in the nature of the state, Kader Asmal, a senior member of the African National Congress ('ANC'), noting that

The struggle for liberation in South Africa was not only a struggle for the right to vote, to move, to marry, or to love. It has always been a struggle for freedom from hunger, poverty, landlessness and homelessness. Our Bill of Rights must therefore reflect ...the multidimensional and all-encompassing nature of the struggle for liberation.²⁰⁰

The apparatus of state was to be mobilised to 'create a people-centred society of liberty...[pursuing] the goals of freedom from want, freedom from hunger, freedom from deprivation, freedom from ignorance, freedom from suppression and freedom from fear',²⁰¹ recognising that 'These freedoms are fundamental to the guarantee of human dignity'.²⁰²

These socio-economic rights were positioned as integral to, and representative of, the country that South Africa was to become, of the constitutional culture that was to be founded,

basic education (Section 29(1)(a)), and rights for detainees (Section 35(2)(e)) which require that each detainee have "conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment". Amongst the rights that require progressively realisation are access to socio-economic resources, including access to housing (Section 26), health care services (Section 27 (1)(a), and to sufficient food and water (Section 27 (1)(b), amongst others.

¹⁹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* (n 42) [45].

¹⁹⁹ David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 *South African Law Journal* 484, 501.

²⁰⁰ Cited in Eric C Christiansen, 'Adjudicating Non-Justiable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321, 328.

²⁰¹ Nelson Mandela, 'State of the Nation Address 1994' (State of the Nation Address at the Houses of Parliament, 24 May 1994) <<https://www.gov.za/state-nation-address-0>> accessed 20 July 2022.

²⁰² *ibid.*

demonstrating ‘a commitment to...transform[ing] our society into one in which there will be human dignity, freedom and equality.’²⁰³

The promises of the Constitution, of a constitutional culture that sought to assist the entire population, and particularly people in poverty, became entrenched in political rhetoric. The ANC, the governing party after 1994, ran elections on the promise of ‘a better life for all.’²⁰⁴ ‘For all’ – everyone mattered, and everyone would receive the assistance that they required. Policies that were enacted to give effect to the Constitution reinforced the rhetoric of inclusion and of the inclusive state – for example, the Reconstruction and Development Plan placed the revised values of state at the heart of the state-led development programme, seeking to ‘build a democratic, non-racial and non-sexist future’.²⁰⁵ In doing so, the constitutional culture embedded ‘from above’ recognised the fragility of the constitutional state – that without development and the ability to access resources, the Constitution and its values would be stillborn.²⁰⁶

3.3.3.2.v Creating a constitutional people and the constitutional person

The idea that, finally, the South African population had united to form a ‘people’, to act together, is found in one of the opening lines of the Constitution, which states that ‘the people of South Africa...united in our diversity.’²⁰⁷ The Constitution not only reflected the existence of unity, but was positioned as playing a central role in the creation of that unity,

²⁰³ *Soobramoney v Minister of Health* (n 132) [8].

²⁰⁴ “A Better Life for All” is a slogan that has been used repeatedly by the ANC, from the 1994 election manifesto (African National Congress, ‘National Election Manifesto’, <https://www.politicsweb.co.za/documents/the-ancs-1994-election-manifesto>, accessed 10th October 2021) to the 2021 Local Government Elections manifesto (African National Congress, ‘2021 Local Government Elections Manifesto’, <https://www.anc1912.org.za/wp-content/uploads/2021/09/ANC-LGE-2021-Manifesto.pdf>, accessed 10th October 2021).

²⁰⁵ Ministry in the Office of the Presidency, *White Paper on Reconstruction and Development* (Government Gazette 353: 16085, 1994) 7.

²⁰⁶ This inclusion of socio-economic rights marked South Africa’s constitutional era as outstanding, globally. and generated a substantial amount of literature, which I shall not attempt to duplicate here – for further reading, amongst almost countless other examples, see Sandra Liebenberg, ‘The Value of Human Dignity in Interpreting Socio-Economic Rights’ (2005) 21 *South African Journal on Human Rights* 1; Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (n 181); David Bilchitz, ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 *South African Law Journal* 484; Stuart Wilson and Jackie Dugard, ‘Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights’ (2011) 22 *Stellenbosch Law Review* 664.

²⁰⁷ Preamble to the Constitution

the crowning achievement of the fight against repression, hailed as the culmination of ‘a 350-year struggle for national unity.’²⁰⁸

Although many assertions of unity accompanied the democratic era, there was a recognition that this was a process, that the ‘people’ of South Africa both existed as an entity and, simultaneously, was an idea that that required work in order for it to be realised. Various pronouncements noted this dual nature of the united population, the Constitutional Court noting that the Constitution requires transformation to happen, that is an active process, aspirationally contained within the Constitution:

The Preamble to the Constitution, its founding values and this Court’s jurisprudence have all emphasised that our venture in constitutionalism and democracy commits us to transforming our society from an oppressive past to a non-racial, just and united nation.²⁰⁹

While the Constitution contains within it the idea of an already existent people, capable of acting in unison, through the Preamble’s statement ‘We, the people of South Africa...adopt this Constitution...’, the damage of the past could not be undone by mere assertions of unity. However, people in power, while at some points emphasising the difficult steps that would need to be taken to bring about a united population,²¹⁰ frequently relied upon the concept of unity in the country when it was convenient to do so, enlisting the trope of the ‘rainbow people’²¹¹ to encourage people to work together, to view themselves as a whole, to embed the idea that all within South Africa occupied the same normative universe.

The popularized story of the formation of the Constitution drew on the notion of a united nation, a popular narrative highlighting the manner in which the South African population

²⁰⁸ Cyril Ramaphosa, ‘Speech by the Chairperson of the Constitutional Assembly’, (Speech at the Signing of the Constitution of the Republic of South Africa, Sharpeville, 10 December 1996) <<https://www.justice.gov.za/legislation/constitution/history/MEDIA/CACHAIR.PDF>> accessed 12 July 2022.

²⁰⁹ *The Citizen 1978 (Pty) Ltd and Others v McBride* (n 4) [74].

²¹⁰ Desmond Tutu, *No Future Without Forgiveness* (Random House 1999) 21.

²¹¹ Truth and Reconciliation Commission *Volume 1* (n 138) 23.

was drawn into a project of co-creation,²¹² through a much-feted public participation process,²¹³ which adopted the slogan ‘You’ve made your mark, now have your say’.²¹⁴ Through this campaign, millions of submissions were received.²¹⁵ Thus, in popular rhetoric, the Constitution was formed by ‘the people’ – a phrase that conveys the idea of a united entity, a populace acting as one, a ‘team of 43 million people’.²¹⁶ The political process that accompanied the public-participation campaign similarly created the idea of a united nation, as political parties acted together to negotiate, draft and finalise the final document. This process, however, could be understood to be an elite process, a constitution and a constitutional culture ‘from above’, discussed below, at section 3.3.3.

South Africa’s constitutional culture from above did more than create a ‘people’ under the Constitution. It also created constitutional individuals with a clear set of rights that the State and other individuals had to respect.²¹⁷ The focus on the rights that every person had – a reflection of the new era, of values of the constitutional state, and of the obligations that had been imposed on the State – created a clear idea of what it meant to be a person in South Africa. At the heart of this were the dignity, equality and freedom that lay at the core of the Constitution, a sense that everyone mattered, and that each individual had the ability to plot their own course for their lives, with the assistance of the State where basic assistance was required.²¹⁸

3.3.3.3 The deferment of South Africa’s constitutional culture ‘from above’: Problems and obstacles to realisation

Despite the rhetorical presence of a transformed and transforming constitutional culture in South Africa, there are multiple indications that the constitutional culture that was envisioned ‘from above’ has not been successfully embedded throughout South African society.

²¹² Christina Murray, ‘A Constitutional Beginning: Making South Africa’s Final Constitution’ (2001) 23 *University of Arkansas Little Rock Law Review* 809, 822.

²¹³ Ifeoma Laura Owosuyi, ‘Participatory Constitution-Making and Why It Matters: A Review of the Egyptian Experience’ (2016) 23 *South African Journal of International Affairs* 201, 202.

²¹⁴ Murray (n 212) 816.

²¹⁵ *ibid* 817.

²¹⁶ Ramaphosa (n 3).

²¹⁷ Klug (n 7).

²¹⁸ Klare (n 36).

Indications that the values and hopes that were placed at the forefront of the democratic transition, that the unity that the 'rainbow nation' sought to inspire have not resonated in South African society to the extent that the champions of that constitutional culture 'from above' might have hoped, are easily observed in present day South Africa. Numerous examples can be cited to support this claim, including the enduring levels of poverty and inequality patterned on racial grounds,²¹⁹ extremely high levels of gender-based violence,²²⁰ violent xenophobic attacks,²²¹ evidence of large-scale corruption,²²² and ongoing racial tensions,²²³ amongst others. Recognition that the 1994 project has not successfully embedded a constitutional culture in South Africa is widespread, although suggested reasons for this lack of success differ.

This project will explore three ideas: Firstly, that the Constitution was an elite bargain, but positioned as the 'will of the People' out of a desire to claim legitimacy, with little concern for the authentic views of the populace; secondly, that the values that the 'custodians of constitutional culture' sought to embed underestimated the extent of the divisions within the country, and the consequences of these divisions; and, thirdly, that the Constitution was fundamentally flawed from the outset, theoretically and practically, and played a role in limiting the extent of the changes that could take place in South African society. Each of these elements can be linked to particular academic approaches to constitutionalism in South Africa.

In Chapters 5, 6 and 7, this project will interrogate how the constitutional culture of the country is understood by individuals in several communities in the country, exploring, to some

²¹⁹ Statistics South Africa, *Men, Women and Children: Findings of the Living Conditions Survey 2014/15* (Statistics South Africa 2018) 17.

²²⁰ Nobuhle Judy Dlamini, 'Gender-Based Violence, Twin Pandemic to COVID-19' (2021) 47 *Critical Sociology* 583, 588.

²²¹ Widespread outbreaks of violence directed towards foreigners took place in 2008 and 2015, with ongoing tensions – see William Mpofu, 'Xenophobia as Racism: The Colonial Underside of Nationalism in South Africa' (2020) 3 *International Journal of Critical Diversity Studies* 33; Malemela Mamabolo, 'Drivers of Community Xenophobic Attacks in South Africa: Poverty and Unemployment' (2015) 11 *The Journal for Transdisciplinary Research in Southern Africa* 143 for discussions thereof.

²²² See, for example, the findings of the Judicial Commission of Inquiry into Allegations of State Capture, a commission of inquiry into corruption in South Africa, which issued 6 volumes of reports into corruption and fraud in the public sector from January 2022 onwards.

²²³ Sisonke Msimang, 'All Is Not Forgiven: South Africa and the Scars of Apartheid' (2018) 97 *Foreign Affairs* 28, 33–34.

extent, what has shaped this understanding and reception. These perspectives add to the academic approaches to understandings of the journey that constitutionalism has undertaken in South Africa – academic and grounded perspectives, taken together, provide a more complete understanding of the challenges that constitutionalism in South Africa faces.

3.3.3.3.i Elite bargains, global values

For many, the constitutional drafting process, which commenced after the first elections and culminated in the passing of the Constitution into law in 1996, is remembered as an inclusive process. The Constitutional Assembly ostensibly took a number of steps to engage the broader population in the constitution-making process. This included a much-feted public participation and education process,²²⁴ which sought to inform people of the constitution, through radio and print education campaigns, and the invitation to the general public to make submissions about what should be included in the document, an invitation millions took up.²²⁵

The participatory claims of the constitution-making process may overstate the extent to which the thoughts of the broader population were actually considered, notable in a prominent reflection on the work of the Constitutional Assembly, by one of the seven members of the Constitutional Assembly's Panel of Experts, which notes that

'...the Constitutional Assembly received over two million submissions... Even those who read the submissions found repetition rather than inspiration, and, in many painful requests based on deep poverty, they found the legacy of Apartheid rather than a design for the future.'²²⁶

Murray goes further, holding that despite the campaign slogan 'You've made your mark, now have your say... it is unlikely that many people thought that their ideas would find their way directly into the constitution'.²²⁷ On these accounts, the broader public involvement was not

²²⁴ Owosuyi (n 213) 202.

²²⁵ Murray (n 212) 838.

²²⁶ *ibid* 817–822.

²²⁷ *ibid* 822.

taken seriously by the members of Constitutional Assembly, 'even those who read the submissions.'²²⁸ In reality, they claim, the participatory campaign 'was not intended to provide a list of matters that should be included in the constitution'.²²⁹ The participatory campaign sought to legitimate the final document and to educate the population about the role of the constitution in the democratic South Africa.²³⁰

The foregrounding of the participatory campaign that surrounded the drafting of the Constitution may be regarded as a legitimising exercise. Some hold that the 'successful participatory constitution-making process ... conferred legitimacy and broad acceptance of the substantive content.'²³¹ For some of the reasons discussed above, this may be overstating the extent to which the broader population was involved. The involvement of an entire population in the formation of a constitution is clearly impossible. However, the discrepancy between the public messaging that surrounded the public participation campaign and the willingness of negotiators to negotiate behind closed doors is stark.²³² In all likelihood, the process would have faced criticism regardless of the approach adopted. To disregard the role that the apartheid government played in the shape of the 1996 Constitution is disingenuous, as 34 Constitutional Principles agreed during a pre-democratic negotiating process guided the contents of the Constitution,²³³ and had to be adhered to. The principles were intended to address

...the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and insecurities of such constituencies and might therefore subvert the objective negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country...The impasse was resolved by a

²²⁸ *ibid.*

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ Owosuyi (n 213) 202.

²³² Murray (n 212) 824.

²³³ The final Constitution had to accord with 34 Constitutional Principles agreed upon between negotiating parties at the Congress for a Democratic South Africa and through the Multi-Party Negotiating Process, which drew up the interim Constitution.

compromise...[the] text would have to comply with certain guidelines agreed upon in advance by negotiating parties.²³⁴

The existence and influence of the Constitutional Principles, and the fact that important elements of the Constitution were shaped through negotiations is important. This reality may not delegitimise the Constitution to all (although it does to some)²³⁵ but does stand at odds with the idea of a constitution shaped by ‘the people’. The task of those involved in the democratic transition, asked to re-found a society, to engage an autocratic regime that retained the power to do considerable harm, and with trying to address the harms of the past, was undoubtedly difficult, and was perhaps almost impossible. Creating a narrative to unite the country, and, perhaps, to some extent, opting to under-emphasise the compromises that the negotiators deemed necessary in the constitution-making process may have been necessary. These compromises, which may well have been made in good faith, have not come without cost, and the endurance of grave societal ills, including patterns of wealth and poverty that, in the main, continue to track apartheid-era, racialised patterns, may contribute to a perception that particular interests were decisive in determining the contents of the Constitution.

Additionally, the milieu in which the Constitution was introduced is important. It is noticeable that the Constitution contains a vision of a society that should be brought into being. It is aspirational, and did not reflect the society found in South Africa in 1994, did not necessarily mirror the attitudes and values of people within the country. While, for many, the aspirational vision contained within the Constitution is laudable, the fact that the South African Constitution became a progressive icon, enshrining rights that were significantly more progressive than the values of many, perhaps most, South Africans,²³⁶ may be an indication that the Constitution did not align with the mores of broader South African society. That the

²³⁴ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) [12–13].

²³⁵ See, for example, Joel M Modiri, ‘Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence’ (2018) 34 *South African Journal on Human Rights* 300, 313.

²³⁶ In 2016, twenty years after the Constitution was passed into law, only slightly over 50% of South Africans thought that gay people should have the same rights as other people in South Africa, and more than 70% thought homosexual sex was ‘wrong’ (The Other Foundation, *Progressive Prudes* (The Other Foundation 2016) 11, 37); while a 1999 survey by the Institute for Security Studies found that 75% of respondents wanted the death penalty to be reintroduced – Martin Schönreich, ‘Sentencing in South Africa: Public Perception and Judicial Process’ [1999] *Institute for Security Studies Occasional Paper No 43* 2.

views of the public and the values and concerns of the Constitution were not in alignment was explicitly noted in *Makwanyane*, where the Chief Justice, Arthur Chaskalson, stated that he was

...prepared to assume...that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.²³⁷

If there is a widespread sentiment that the Constitution does not reflect broader mores, then it may be the case that this dissatisfaction or unhappiness is contributing to recent debates and concerns about the property clause,²³⁸ to the ongoing, wide-spread disagreement with the abolition of the death penalty,²³⁹ to concerns about how the human rights at the heart of the Constitution undermine the ability of the police to curb crime²⁴⁰ or for parents to discipline their children,²⁴¹ amongst multiple other concerns. In essence, it may be the case that these concerns reflect the disillusionment that people may have when they believe that the Constitution reflects a system of values that is not ‘theirs.’

That the broader population felt ownership of the Constitution was regarded as important during the drafting process, reflected in Cyril Ramaphosa²⁴² recognising the importance of

²³⁷ *S v Makwanyane* (n 135) [87].

²³⁸ Numerous politicians have positioned the property clause in the Constitution as preventing the expropriation of land without the payment of compensation. While many scholars interpret the Constitution as permitting expropriation without compensation, others argue that a constitutional amendment is required. The Expropriation Bill (B4D-2015) currently sits before Parliament, making explicit that expropriation of land without compensation for a public purpose or in the public interest is permitted.

²³⁹ In 2019, nearly 700 000 people signed a petition demanding the reinstatement of the death penalty for crimes against women (<https://www.change.org/p/south-african-government-bring-back-the-death-sentence-in-sa-for-crimes-against-women>, accessed 3rd March 2022), and the issue is frequently found in the mandates and discourses of political parties (for example, the Inkatha Freedom Party (“IFP Wants Talks on Bringing Back the Death Penalty” *eNCA* (5 September 2018) <<https://www.enca.com/news/ifp-wants-talks-bringing-back-death-penalty>> accessed 8 July 2022), and Action SA (Herman Mashaba, ‘Here Is Why I Support the Reinstatement of the Death Penalty’ *Daily Maverick* (27 August 2020) <<https://www.dailymaverick.co.za/opinionista/2020-08-27-here-is-why-i-support-the-reinstatement-of-the-death-penalty/>> accessed 8 July 2022).

²⁴⁰ Heidi Brooks, “‘This Democracy Is Killing Us’: Perceptions of Rights and Democracy in the South African Police Service’ (2020) 58 *Journal of Modern African Studies* 165, 184.

²⁴¹ Pumza Fihlani, ‘South Africans Divided over Smacking Ban’ *BBC News* (30 October 2017) <<https://www.bbc.com/news/world-africa-41754334>> accessed 8 July 2022.

²⁴² Chair of the Constitutional Assembly, and future President of South Africa.

South Africans ‘feel[ing] [the Constitution] belongs to them’,²⁴³ that any constitution be one that they ‘recognised’, that they felt that they had contributed to. However, this may not be the case. Problems of ownership might span the gamut of political opinion, with some believing that the Constitution, which, although transformational, was not revolutionary, failing to adopt the radical opportunities and solutions that (they believed) were promised and that South Africa required.²⁴⁴ Others might reflect on the manner in which the Constitution reflects a particular set of liberal values, many of which reflect global trends of human rights protection.²⁴⁵ In light of the low levels of constitutional knowledge in the country and the apparent lack of success of attempts to embed the Constitution,²⁴⁶ it is reasonable to believe that problems of ownership are present, with consequences for engagement with the constitutional culture that people experience. This alienation from the Constitution, or feeling that the Constitution was foisted upon the populace, may be present in the communities under investigation in this research project, at Chapters 5, 6 and 7. Alternatively, some may feel that the Constitution represents the values that they hold dear, and, if this were to be the case, a strong alignment with the constitutional culture ‘from above’ would be present.

3.3.3.3.ii Understating the challenges: Division, and the absence of a nomos

The divisions present in South Africa at the dawn of the democratic era were stark, with racial divisions that ‘infected every part of South Africa’s national life and its legal culture’.²⁴⁷ The nation continued to bear the wounds of its history, which were (and are) experienced by people in the democratic South Africa on a daily basis,²⁴⁸ consciously and unconsciously, in

²⁴³ Murray (n 212) 822.

²⁴⁴ Heidi Brooks, ‘Merging Radical and Liberal Traditions: The Constitution Committee and the Development of Democratic Thought in the African National Congress, 1986–1990’ (2018) 44 *Journal of Southern African Studies* 167, 181; Dixon and Roux (n 39).

²⁴⁵ Jean Comaroff and John Comaroff, ‘Reflections on Liberalism, Policulturalism, and ID-Ology: Citizenship and Difference in South Africa’ (2003) 9 *Social Identities* 445, 446.

²⁴⁶ Foundation for Human Rights (n 48) 38.

²⁴⁷ Cameron (n 10) 199.

²⁴⁸ Henk Botha, ‘Instituting Public Freedom or Extinguishing Constituent Power? Reflections on South Africa’s Constitution-Making Experiment’ (2010) 26 *South African Journal on Human Rights* 66, 73.

numerous ways, including in the persistence of economic inequality²⁴⁹ in the ongoing racialised ability to access services,²⁵⁰ in the continually racialised nature of land ownership.²⁵¹ The wounds and the divides in South Africa posed an obstacle to attempts to found a common *nomos* – even the most ardent advocates of the ‘rainbow nation’ realised that the divisions of the past could not be cured overnight.²⁵²

As noted in section 3.3.3, the extent of the divisions present in South Africa is recognised in the transformative demands of the constitutional culture ‘from above’ that accompanied the democratic era, that recognised the ongoing impact of apartheid policies,²⁵³ and of the need to fundamentally change the lives of people in South Africa.²⁵⁴ In light of the depth of the ongoing presence of the past, of past abuses and deprivations and past benefits, it is perhaps unclear that the constitutional culture ‘from above’ found in the post-1994 nation took, or was seen to have taken, adequate steps to bridge the divisions, with ramifications for the embedding of a *nomos*. Examples of the milquetoast responses of the state to the scars of the past and to realising an inclusive future can be seen in a range of actions. This section will discuss the TRC and the extent to which socio-economic rights have been realised as examples of these responses.

It is clear that the constitutional culture ‘from above’ that the 1994 Project sought to embed recognised that the chasms of the past needed to be addressed actively in order to be bridged. The TRC was one such step, attempting to address the past in order to contribute to the creation of a unified country.²⁵⁵ The TRC sought to gain ‘as complete a picture as possible

²⁴⁹ Laurie Nathan, ‘Introduction: Mind the Gap! The Constitution as a Blueprint for Security’ in Kristina Bentley, Laurie Nathan and Richard Calland (eds), *Falls the Shadow: Between the promise and reality of the South African Constitution* (UCT Press 2013).

²⁵⁰ *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo* 2010 (2) SA 415 SA [45].

²⁵¹ The extent of the racialized nature of land ownership can be seen in the 2017 Land Audit, the first such study, conducted by the Department of Rural Development and Land Reform, which found that white people owned 49% of registered land and 72% of agricultural land – Department of Rural Development and Land Reform, *Land Audit Report (Phase II: Private Land Ownership by Race, Gender and Nationality)* (Department of Rural Development and Land Reform 2017).

²⁵² Tutu (n 210) 21.

²⁵³ See, for example *Government of the Republic of South Africa and Others v Grootboom and Others* (n 42) [6].

²⁵⁴ See, for example, Mandela (n 134).

²⁵⁵ Truth and Reconciliation Commission *Volume 1* (n 138) 1.

of the causes, nature, and extent of the gross violations of human rights²⁵⁶ committed in the past, one of the ways in which the TRC would ‘promote national unity and reconciliation...which transcends the conflicts and divisions of the past’.²⁵⁷ Although the TRC has been a model for truth commissions internationally,²⁵⁸ it has simultaneously been subjected to substantial criticism, accused of having failed to fulfil its lofty aims.²⁵⁹ The limitations of the TRC are clear from its founding statute, which limits its historical gaze to 1960 onwards,²⁶⁰ the Foreword to the TRC’s Report noting that

Our country is soaked in the blood of her children of all races and of all political persuasions. It is this contemporary history – which began in 1960 when the Sharpeville disaster took place and ended with the wonderful inauguration of Nelson Mandela as the first democratically-elected President of the Republic of South Africa – it is this history with which we have to come to terms. We could not pretend it did not happen.²⁶¹

While the TRC made clear that its limited gaze was not a claim that ‘racism was introduced into South Africa by those who brought apartheid into being’²⁶² and noted that ‘Racism came to South Africa in 1652’,²⁶³ the substantial investment of time and attention on a limited period may have had a signalling effect upon understandings of the constitutional culture aligned to the democratic era, of its shortcomings and possible ineffectiveness. The temporal gaze of the TRC clearly limited its ability to deal with many of the systemic issues in South Africa, as well as countless abuses inflicted on individuals over centuries.

²⁵⁶ Promotion of National Unity and Reconciliation, Act 34 of 1995, at s 3(1)(a).

²⁵⁷ Promotion of National Unity and Reconciliation Act 1995 s 3(1).

²⁵⁸ Renee Jeffery, ‘Truth Commissions and Democratic Transitions: Neither Truth and Reconciliation nor Democratization in Nepal’ (2021) 20 *Journal of Human Rights* 318, 319; Parwez Besmel, ‘The Pathway to Transitional Justice in Afghanistan’ (2020) 37 *Journal of Global South Studies* 240, 246; Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2011) 6; Lydiah Kemunto Bosire, ‘Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa’ (2006) 5 *SUR International Journal on Human Rights* 71, 73.

²⁵⁹ See for example, Mahmood Mamdani, ‘Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)’ (2002) 32 *Diacritics* 33; Bosire (n 258) 90.

²⁶⁰ Promotion of National Unity and Reconciliation, Act 34 of 1995, at s 3(1)(a)

²⁶¹ Truth and Reconciliation Commission *Volume 1* (n 138) 1.

²⁶² *ibid* 16.

²⁶³ *ibid*.

Temporal limitations were not the only shortcoming of the TRC. Amongst other limitations was the narrow focus of the commission, which only looked at harms caused by or inflicted on individuals, further narrowing the scope of the TRC. Although the TRC identified specific victims of abuse,²⁶⁴ it did not engage with the trauma, deprivation and benefits that occurred during apartheid, with the ongoing ramifications for broad groups of people within the country.²⁶⁵ This exemplifies the insufficient steps taken to address the past, to remedy past injustice, and create a better chance of a united future for the country. Identifying specific victims, specific wrongdoers, allowed for competing narratives about South Africa's history,²⁶⁶ allowed for the blame for apartheid to be laid narrowly, the suffering of the broader population to be relegated to a secondary status,²⁶⁷ with ongoing consequences for relationships and perceptions of the constitutional culture 'from above,' and possible ramifications for the prospects of a *nomos* in the democratic nation.

The ineffectiveness of the state's engagement with the ongoing consequences of the past might also be perceived in the limitations imposed upon socio-economic rights, and on the state's attempts to redress land ownership. While on the surface, the inclusion of socio-economic rights at the heart of the South African state was a step towards bridging the socio-economic chasms found in the country, these rights have been understood conservatively by the courts.²⁶⁸ This limited approach has left many of the consequences and structures of apartheid South Africa untouched.²⁶⁹ Resources and services continued to aggregate in areas once allocated to white people.²⁷⁰ Poor people in South Africa remain, overwhelmingly, Black African.²⁷¹ The vast economic disparities present in the country threaten the notion that

²⁶⁴ Aurélien Pradier, Maxine Rubin and Hugo van der Merwe, 'Between Transitional Justice and Politics: Reparations in South Africa' (2018) 25 *South African Journal of International Affairs* 301, 311 note that ultimately 21 769 people were identified as victims of human rights abuse, eligible for reparations – and it is noteworthy that the reparations recommended by the TRC were repeatedly delayed and ultimately reduced in quantum.

²⁶⁵ Mamdani (n 259) 33–4.

²⁶⁶ See, for example, that FW de Klerk, the last apartheid-era president of South Africa, seemed ambivalent, at best, to accepting that apartheid was a crime against humanity, almost until his death, and refused to issue any substantive apology.

²⁶⁷ Mamdani (n 259) 34.

²⁶⁸ Bilchitz (n 199) 484; Wilson and Dugard (n 206) 665; Sandra Liebenberg, 'South Africa's Evolving Jurisprudence on Socio-Economic Rights : An Effective Tool in Challenging Poverty' (2002) 6 *Law, Democracy & Development* 159, 190.

²⁶⁹ Carol Chi Ngang, 'Radical Transformation and a Reading of the Right to Development in the South African Constitutional Order' (2019) 35 *South African Journal on Human Rights* 25, 38–9.

²⁷⁰ *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo* (n 250) [45].

²⁷¹ Statistics South Africa (n 219) 17.

constitutionalism can realise a 'better life for all.'²⁷² While many defend the Constitution, it may be the case that many people associate failures to provide full access to socio-economic rights with an inadequate response to the legacy of the past, a theme which arose during the empirical work undertaken in this study. The persistence of these elements may threaten the ability of the constitutional culture 'from above' to successfully embed itself in South African society.

These examples by no means encompass all of the inadequate responses to the divides and injustices found in South African society. These ongoing issues, and the divides that they maintain, entrench and extend, undermine attempts to claim that South Africa is a united country, that a *nomos* exists in the country. While the absence of a *nomos* may not intrinsically be the fault of the Constitution, it may be fair to critique the Constitution and the constitutional culture 'from above' for failing to adopt a more robust approach to the legacy of the past.

There will always be a range of perspectives on a country trying to transform. This problem may, however, have been exacerbated by a lack of information about the nature of the Constitution that lies at its heart. Recent surveys have indicated that knowledge about the Constitution and its contents is extremely shallow.²⁷³ This has significant ramifications for the embedding of the constitutional culture that has been espoused by people in positions of power. In lieu of actual knowledge about the Constitution, it may be that the primary way that constitutional values and aims are communicated are through the interactions that people have with representatives of the State. Huq notes the danger of this, recognising that '...the Constitution can be undermined as a legitimate instrument of government by the dispersed and only partially controlled actions of its street level agents'.²⁷⁴ Rather than engaging with the contents of the Constitution or the lofty rhetoric that accompanied it, people in South Africa may be obtaining their impressions of the Constitution, may be creating their constitutional culture, through their perception of the treatment that they receive from

²⁷² Lars Burr, 'Democracy and Its Discontents: Vigilantism, Sovereignty and Human Rights in South Africa' (2008) 35 *Review of African Political Economy* 571, 572.

²⁷³ Slightly over 50% of respondents had heard of either the Constitution in a 2018 study, *Foundation for Human Rights* (n 48) 38.

²⁷⁴ Huq (n 49).

the State at the local level. The divides and injustices of the past will form part of these perceptions. It is these experiences and perceptions that will form the content of South Africa's constitutional culture 'from below', explored in this research project at Chapters 5, 6 and 7.

3.3.3.3.iii Limiting the future: Decolonisation and its demands

There is an increasingly prominent strand of constitutional critique that finds a more deep-seated issue in South African's constitutional journey, in constitutionalism and the constitutional culture propounded by the 1994 project. This critique holds that the apparatus of the colonial and apartheid state of South Africa prior to 1994 was focused on the conquest, subjugation and exploitation of indigenous South Africans,²⁷⁵ and that that 'many social and economic structures remain much the same even after the repeal of apartheid laws',²⁷⁶ holding that the Constitution facilitated this continuation, was a way of insulating the exploitation and discrimination of the past. Critiques in this vein hold that the introduction of constitutionalism and the veneration of the Constitution has obscured the fact that much of the apartheid-structured society has been retained by the structure of the state detailed by the Constitution, that the Constitution and the constitutional state intentionally limits the opportunities for justice and dignity for Black South Africans.²⁷⁷ In place of the 'underestimation' concerns discussed in section 3.3.3.3.ii above, this critique sees the Constitution as a continuation of the colonial legacy, as a product of colonialism, intentionally insulating colonial structures of power and wealth from radical change.

The ramifications of this critique are significant. It denudes the constitutional country of its authority, foregrounding the role of the Constitution and the constitutional era in 'the absence of concrete historical justice and the non-realisation of an emancipatory experience of freedom and dignity in the lives of the Black majority.'²⁷⁸ The promises of transformation

²⁷⁵ Ndumiso Dladla, 'The Liberation of History and the End of South Africa: Some Notes towards an Azanian Historiography in Africa, South' (2018) 34 *South African Journal on Human Rights* 415, 421.

²⁷⁶ Lewis Nkosi, 'The Republic of Letters after the Mandela Republic' (2002) 18 *Journal of Literary Studies* 240, 253.

²⁷⁷ Tshepo Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 *Stellenbosch Law Review* 123, 125.

²⁷⁸ Modiri (n 235) 303.

failed to overcome the violence that constituted the foundation of the South African state, as 'problems of inequality, poverty, violence and social exclusion persist stubbornly along racial grounds...suggest[ing] the continuity and durability of the political ontology, political economy and symbolic order created through colonial conquest and white supremacy'.²⁷⁹

Instead of a 'transformed' nation, born afresh, the 1994 project on this view protects pre-existing interests, protects whiteness, and proposes a 'liberation' vitiating the tools of freedom. Madlingozi holds that, in the same way that colonial societies divided humanity into 'beings' and 'non-beings', where 'non-beings' 'suffer unremitting dehumanisation and social invisibility',²⁸⁰ the post-apartheid state effectively divides its population along similar lines, reconstituting the line dividing non-being and being by overlaying race and economic status, thus 'mask[ing] on-going domination and subordination'.²⁸¹ Discourses of democracy and human rights become tools of repression, rhetorical devices that provide the majority of those located outside of power the faint hope that they will emerge into the world of 'being'.²⁸² The TRC and the protection of pre-1994 property rights (while, importantly, limiting land claims to post-1913,²⁸³ eliminating much of the history of colonial dispossession) have been regarded as examples of these tools of ongoing repression, figuring prominently in the critique, allowing for continued injustice, for white supremacy to continue uninterrupted. These interventions could be regarded as a sop, an attempt to show that society had changed or was in the process of change, but intentionally preventing the interventions from having the power to bring about such change. In the process, a wholehearted, consequential critique, moral or materially, is avoided.

This critique fundamentally challenges the constitutional culture propounded 'from above'. Focused on the persistence of a Black impoverished population, on the inability of these people to access the promises of constitutionalism, and the limited ways in which rights can

²⁷⁹ Joel M Modiri, 'Introduction to Special Issue: Conquest, Constitutionalism and Democratic Contestations' (2018) 34 South African Journal on Human Rights 295, 295.

²⁸⁰ Madlingozi (n 277) 124.

²⁸¹ *ibid* 126.

²⁸² Mogobe Bernard Ramose, 'Towards a Post-Conquest South Africa: Beyond the Constitution of 1996' (2018) 34 South African Journal on Human Rights 326, 327.

²⁸³ The Natives Land Act, 27 of 1913 limited land held by Black South Africans to land totalling less than 10% of the total land of South Africa, exclusively within 'Native Reserves'.

be enforced, the critique moves far beyond failures of implementation – the failures of implementation are inherent to the system of ongoing subordination. Experiences of being invisible, of being forgotten or irrelevant to the mechanisms of government, will challenge narratives founded in the constitutional culture ‘from above’. To people relegated to ‘non-being’, the promises of dignity, equality and freedom are illusory at best, or possibly even completely unknown. The bifurcation of society endures through those with access to power being willing to disregard the ‘non-beings’, to offer up those without power, without access to resources, as ‘sacrifices,’ subject to an unknowable, possibly unending, wait for any realisation of their ‘being.’ For those relegated to ‘non-being’, to those whom the constitutional promises, whether known or implicitly recognised, knowledge and juxtaposition of their non-being, the continuation and unbroken nature of their inability to access resources will render the promises of the constitutional culture ‘from above’ irrelevant.

3.4 Conclusion

South Africa’s transformative constitutional culture offered the promise of a better future for all in South Africa. It is fair to question the extent to which this vision has been realised, in light of the enduring inequality and the persistence of racialised patterns of wealth and opportunity, poverty and exclusion. Critiques of transformative constitutionalism should be taken seriously, in light of the delayed realisation of the promises of transformative constitutionalism. The empirical research that was conducted in this project will contribute to these critiques, considering whether the understandings of constitutional culture ‘from below’ might provide evidence for or against these critiques, or, instead, focus attention upon the problems of delivery and administration that can be observed in present day South Africa.

Chapter 4 – Accessing accounts of constitutional culture ‘from below’: Methodology and method

4.1 Introduction

This project is centred around three different explorations into constitutional culture, one of which explores South Africa’s constitutional culture ‘from above’, and two which explore perspectives ‘from below.’¹ In Chapter 3, an exploration of the way that South Africa’s constitutional culture ‘from above’ has been shaped and positioned was undertaken, through an assessment of various texts and discourses. The investigation of constitutional culture ‘from below’ is of a fundamentally different nature. To understand constitutional culture ‘from below’, it is necessary to obtain first-hand, subjective accounts of the constitutional cultures that are informing the lives of individuals and communities, and to analyse these accounts within a theoretical framework that has the capacity to consider the broader ramifications of these constitutional cultures.

Qualitative research provides access to first-hand accounts and experiences – in this case, to accounts of life in constitutional South Africa. The interpretive nature of knowledge that is realised through qualitative method reflects the contextual nature of the knowledge, accepts ‘the limitations and partial character’² of any study in this tradition, while rejecting the idea that research is only useful if it is able to ‘identify universal laws’.³ In light of this, a careful approach to theory and execution, a clear idea about the ‘fundamental beliefs that guide action’,⁴ are a vital part of this study, ensuring the manifestation of a commitment to conclusions supported by evidence and argument.⁵ Establishing research within a theoretical

¹ Chapter 2 of this project provided three questions that would provide insight into constitutional cultures from ‘above’ and ‘below’:

- 1) Can a constitutional culture created by formal institutions and people occupying influential positions in society be identified?;
- 2) What do people in society experience and perceive be the constitutional culture of their country?;
- 3) What do people experience as the constitutional culture that governs their lives?

² Austin Sarat, ‘Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law’ (1990) 15 *Law & Social Inquiry* 155, 166.

³ *ibid.*

⁴ Christopher S Collins and Carrie M Stockton, ‘The Central Role of Theory in Qualitative Research’ (2018) 17 *International Journal of Qualitative Methods* 1, 2.

⁵ Sarat (n 2) 161.

framework provides researchers with access to ‘complex and comprehensive conceptual understandings...different ‘lenses’ through which to look at complicated problems’,⁶ including, amongst other elements, how society functions, and how people understand and engage with the world.

This project will adopt an approach rooted in legal alienation, a recent development within a methodological approach called legal consciousness. This chapter engages central elements of legal consciousness in general, and legal alienation in particular, to illustrate why research rooted in this approach offers the potential for insight into the various constitutional cultures that might be found in South Africa, and allows for the interrogation of these cultures from both dimensions of ‘below.’ In Chapters 5, 6 and 7, perspectives of South Africa’s constitutional culture ‘from below’ will be explored. Before this, however, the methodological underpinnings of the analysis and the methods of data collection will be made explicit. This chapter will provide this basis, exploring legal alienation and its underpinnings, beginning with a discussion of the common elements of legal consciousness, before moving to a discussion of some of the different approaches to legal consciousness found in the literature, with a focus on legal alienation, which will form the methodological lens for this research project. The relevance of the central elements of legal consciousness to this study and the utility of legal consciousness broadly will be made salient, whereafter a discussion of legal alienation will be undertaken, highlighting why this approach to legal consciousness is particularly useful to this project.

4.2 Legal consciousness and its potential for identifying constitutional culture ‘from below’

In order to interrogate the range of constitutional cultures ‘from below’ present in South Africa, it is necessary to engage with the different principles, pressures and interests that might contribute to the way that an individual or community comes to generate a foundational understanding of society, rooted in a range of subjective factors. Legal

⁶ Scott Reeves and others, ‘Why Use Theories in Qualitative Research?’ (2008) 337 *BMJ: British Medical Journal* 631, 631.

consciousness provides a mechanism through which this can be done, providing a method through which to interrogate the ideas that people have about the legal foundation of their lives. Legal consciousness does this by applying an understanding of the law that is social, pluralistic and constitutive.

Studies identifying themselves as legal consciousness studies share the desire to explore the interaction that people have with the law,⁷ to explore the way that individuals ‘experience, understand, and act in relation to’⁸ the presence of the law, whether official or unofficial, in their lives.⁹ Legal consciousness adopts a broad approach to law, breaking away from formalistic conceptualisations, and instead holding that ‘the law’ can be understood as a social concept, formed and shaped by social forces present in the everyday lives of individuals,¹⁰ used by ‘families and neighbourhoods, workplaces...for purposes unintended by formal lawmakers.’¹¹ By developing this social definition of the law, and by removing it from a narrow formal and institution-focused understanding of law,¹² legal consciousness understands law to be inescapable.¹³ Law, in terms of the understanding found in legal consciousness, is an ‘ongoing, dynamic process of constructing one’s understanding of, and relationship to, the social world through the use of legal conventions and discourses.’¹⁴ Ewick and Silbey referred to this conception of law as ‘legality’, differentiated from ‘the law’ that

⁷ Margherita Pieraccini and Emma Cardwell, ‘Divergent Perceptions of New Marine Protected Areas: Comparing Legal Consciousness in Scilly and Barra, UK’ (2016) 119 *Ocean & Coastal Management* 21, 22.

⁸ Lynette J Chua and David M Engel, ‘Legal Consciousness Reconsidered’ (2019) 15 *Annual Review of Law and Social Science* 335, 336.

⁹ Elizabeth A Hoffmann, ‘Legal Consciousness and Dispute Resolution: Different Disputing Behavior at Two Similar Taxicab Companies’ (2003) 28 *Law and Social Inquiry* 691, 693; Amy Blackstone, Christopher Uggen and Heather McLaughlin, ‘Legal Consciousness and Responses to Sexual Harassment’ (2009) 43 *Law and Society Review* 631, 632; Joshua C Wilson, ‘Sustaining the State: Legal Consciousness and the Construction of Legality in Competing Abortion Activists’ Narratives’ (2011) 36 *Law and Social Inquiry* 455, 457; Chua and Engel (n 8) 336.

¹⁰ Chua and Engel (n 8) 336; Pieraccini and Cardwell (n 7) 22.

¹¹ Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 34.

¹² Filip Horák and David Lacko, ‘New Contributions of Multidisciplinary and Empirical Approach to Legal Consciousness’ (2019) 3 *Lawyer Quarterly* 248, 250–1; Simon Halliday, ‘After Hegemony: The Varieties of Legal Consciousness Research’ (2019) 28 *Social & Legal Studies* 859, 860; Marc Hertogh, *Nobody’s Law* (Palgrave Macmillan 2018) 49–50; Ewick and Silbey (n 11) 22–3.

¹³ Ewick and Silbey (n 11) 43–4.

¹⁴ Lynette J Chua and David M Engel, ‘Legal Consciousness in Asia - Editors’ Note to Special Issue’ (2018) 5 *Asian Journal of Law and Society* 1, 1.

emanates from formal institutions,¹⁵ which, in terms of the conceptualisations underpinning this project, can be aligned with perspectives ‘from above’.

The social definition of ‘the law’ in legal consciousness approaches is closely linked to the pluralistic approach adopted to the origins of this law.¹⁶ It is not unusual for legal consciousness research to take place in the shadow of formal instruments of the law,¹⁷ engaging elements of the formal legal system, but seeking to gain insight into the subjective meanings attached by ordinary individuals to these elements, often removed from official law. For legal consciousness researchers, the content of the law is shaped by a range of factors linked to subjectivity and context.¹⁸ Thus, the precise manner in which an individual experiences ‘the law’, and the impact of this, is shaped by a range of factors, which might include historical and geographic factors, and an individuals’ understanding of themselves and their place in the world.¹⁹ This is markedly different to traditional approaches to the study of law which centre upon ‘the law’, understood as an ideology-free set of normative values and ideas emanating only from formal institutions.²⁰ These sources of law should be seen in aggregation and, consequently, approaches routed in legal consciousness see the law as emerging from multiple sources.²¹ These sources might include formal legal systems and instruments (albeit rarely understood as an objective source of law, but mediated by other sources and structures of power),²² relationships and interactions,²³ traditional worldviews and belief systems,²⁴ or objects,²⁵ and will frequently involve several of these categories, and others, simultaneously.

¹⁵ Ewick and Silbey (n 11) 17.

¹⁶ *ibid.*

¹⁷ David M Engel, ‘How Does Law Matter in the Constitution of Legal Consciousness?’ in Bryant G Garth and Austin Sarat (eds), *How does Law Matter* (Northwestern University Press 1998).

¹⁸ Blackstone, Uggen and McLaughlin (n 9) 632.

¹⁹ Erik D Fritsvold, ‘Under the Law: Legal Consciousness and Radical Environmental Activism’ (2009) 34 *Law and Social Inquiry* 799, 803.

²⁰ Joanne Conaghan, ‘Labour Law and Feminist Method’ (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 93, 95.

²¹ Horák and Lacko (n 12) 250–1; Hertogh (n 12); Ewick and Silbey (n 11) 22–3.

²² Marc Hertogh, ‘What’s in a Handshake? Legal Equality and Legal Consciousness in the Netherlands’ (2009) 18 *Social and Legal Studies* 221; Wilson (n 9); Hoffmann (n 9).

²³ Blackstone, Uggen and McLaughlin (n 9).

²⁴ Qian Liu, ‘Legal Consciousness of the Leftover Woman: Law and Qing in Chinese Family Relations’ (2018) 5 *Asian Journal of Law and Society* 7.

²⁵ Dave Cowan, Helen Carr and Alison Wallace, *Ownership, Narrative, Things* (Palgrave Macmillan 2018); Rahela Khorakiwala, ‘Legal Consciousness as Viewed through the Judicial Iconography of the Madras High Court’ (2018) 5 *Asian Journal of Law and Society* 111.

Understood socially and pluralistically, the 'law', in terms of legal consciousness studies, is simultaneously constitutive of and constituted by society – law brings individuals, communities and society into being, and is brought into being by individuals, communities and society, rather than acting upon society.²⁶ Legal consciousness studies interrogate the manner in which interactions and individuals engage in a fluid social world that responds to, and creates, legal norms and practices, creating a legal world that ebbs and flows according to context.

This project takes place in the shadow of the Constitution, but, importantly, it is the subjective understandings of the Constitution, and the implications of this subjective understanding for the identity and action of individuals, that form the project's empirical focus. While an individual or a community may be able to escape formal conceptions of constitutional culture, understood as constitutional culture 'from above', local communities will have understandings of the normative universe, of the norms and values, that inform their community. This project assumes that a constitutional culture, which arises from interactions between individuals, groups and with the state, as well as from perceptions of official sources of law, can be understood in a similar way to the manner in which law has been understood in legal consciousness – inescapable, with multiple points of origin, and capable of shaping behaviour and understandings of the world. From this, the project will develop a concept based on legal consciousness and legal alienation, called 'constitutional alienation.'²⁷ This project holds that constitutional alienation speaks of the relationship between people and the constitutional culture of their state, and provides a tool to identify fractures within the constitutional state.

Before engaging constitutional culture and constitutional alienation, certain additional relevant elements of legal consciousness will be highlighted, specifically focused on what joins legal consciousness approaches.

²⁶ Simon Halliday and Bronwen Morgan, 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination' (2013) 66 *Current Legal Problems* 1, 2–3.

²⁷ Explored at section 4.2.3: *Developing Constitutional Alienation*, below.

4.2.1 Common elements of legal consciousness research

There is a range of different understandings of legal consciousness, underpinned by different ideological positions and theoretical perspectives, given shape by several recent surveys of the field by Chua and Engel, Halliday, and Aidinlis.²⁸ Despite these differences, approaches within the tradition are united by several different elements including 1) the importance of subjectivity; 2) an adoption of qualitative modes of data collection, focused on narrative and storytelling; and 3) a focus on people in the margins of society.

4.2.1.1 The importance of subjectivity

Subjectivity is at the heart of legal consciousness – it is the subjective experience of the law that researchers seek to understand.²⁹ Chua and Engel see legal consciousness scholars as united in exploring subjectivity in three different ways³⁰ – firstly, through exploring an individual’s ‘worldview’, their ‘understanding of their society, their place in it, their positions relative to others, and, accordingly, the manner in which they should perform social interactions’,³¹ secondly, by exploring their ‘perception’, which explores how individuals perceive events,³² and, finally, their ‘decision’, the manner in which they respond to events, informed by their worldview and their perception, which will involve a decision whether or not to use the law.³³ Subjective identity, how individuals view themselves, has implications for the sources of law that a person is subject to, and for their reactions to the law.³⁴ The contextual implications of subjectivity guides the gaze of researchers, often to positions on

²⁸ Chua and Engel ‘Legal Consciousness Reconsidered’ (n 8); Halliday (n 12); Stergios Aidinlis, ‘Defining the “Legal”: Two Conceptions of Legal Consciousness and Legal Alienation in Administrative Justice Research’ (2019) 41 *Journal of Social Welfare and Family Law* 495.

²⁹ Hoffmann (n 9) 692–3; Blackstone, Uggen and McLaughlin (n 9) 632; Wilson (n 9) 457; Chua and Engel ‘Legal Consciousness Reconsidered’ (n 8) 336.

³⁰ Chua and Engel ‘Legal Consciousness Reconsidered’ (n 8) 336–7.

³¹ *ibid.*

³² *ibid* 337.

³³ *ibid.*

³⁴ Leisy J Abrego, ‘Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants’ (2011) 45 *Law & Society Review* 337, 363; Wilson (n 9) 479; Kathryn M Young, ‘Everyone Knows the Game: Legal Consciousness in the Hawaiian Cockfight’ (2014) 48 *Law & Society Review* 499, 522.

the margins of society, as will be discussed below – legal consciousness holds that people most vulnerable to the effects of the law are most aware of the law.³⁵ The focus on subjectivity also has significant ramifications for the methods adopted by legal consciousness researchers, requiring researchers to engage qualitative methods.

Subjectivity lies at the heart of constitutional culture ‘from below’. Chua and Engel’s delineation of the subjective element manifested in three ways, ‘worldview, perception, decision,’ resonates with the manner in which individuals and communities in South Africa will engage with, interpret and understand events and constitutional culture in South Africa. Through the engagement of multiple communities, each occupying very different locations in society (on multiple levels, including physically and materially), differences in the subjective experience of constitutional culture in South Africa will be foregrounded.

4.2.1.2 The foregrounding of narrative and storytelling

Legal consciousness, with its focus on the subjective experiences of individuals, foregrounds the voices of the particular set of people. Underpinning legal consciousness methods is first person narrative, the biographical stories that people tell, which can be used to convey an individual’s experience of legality.³⁶ The emphasis on narrative has obvious implications for the methods that a project adopts. Beyond this, though, is a methodological recognition that people are participants ‘through words and deeds – in the construction of legal meanings, actions, practices and institutions’.³⁷ The contextually-driven nature of narrative provides insight into the understanding an individual holds of the way in which legality shapes their lives, their decisions about their lives, and their understanding of their place in society.³⁸ Methodologically, this recognises the agency of individuals, and, while their positioning may be subjected to analysis, the use of narrative recognises that people are, to some extent, able to author the world in which they exist.

³⁵ See section 4.2.1.3: *A focus on people in the margins of society*.

³⁶ Cowan, Carr and Wallace (n 25) 21; Ewick and Silbey (n 11) 247.

³⁷ Ewick and Silbey (n 11) 247.

³⁸ *ibid* 244; Wilson (n 9) 458; Blackstone, Uggen and McLaughlin (n 9) 632.

4.2.1.3 A focus on people in the margins of society

Many legal consciousness researchers focus their research upon groups who occupy positions devoid of societal power, upon those who have, in some way, been marginalised by society.³⁹ This approach holds that it is those who view themselves as most powerless before the law who are most aware of its failures, shortcomings and contradictions⁴⁰ – ‘When people fail to see their experiences and needs reflected in law, or find legal remedies unavailable, unhelpful, unreliable, they are more likely to turn to other means such as...acts of resistance’.⁴¹ Marginalisation is often contextual, and may be subjective – there need not be an objective standard to be met, but the experience of marginalisation impacts the experience of the law.

The notion of ‘marginality’ can (and has) been understood in numerous ways. It has been understood broadly, to encompass people outside the legal profession,⁴² or, more specifically, and more typically, to refer to particular groups who experience themselves as relegated to the margins of society because of some aspect of their identity, including, but not limited to ethnicity,⁴³ legal status,⁴⁴ sexual orientation,⁴⁵ and body shape/size.⁴⁶ Marginalisation can be subjective - people might understand themselves to be marginalised, to be powerless, in ways that other people do not agree with. These subjective perceptions will always have ramifications for how people view the world. The focus on the margins is not universal amongst legal consciousness scholars. To some researchers, the focus on the margins betrays legal consciousness’ desire to access the perspectives of ordinary people, painting the parameters of ‘ordinary’ too narrowly and, in fact, capturing only the extraordinary.⁴⁷

³⁹ Halliday (n 12) 865.

⁴⁰ Ewick and Silbey (n 11) 235–7.

⁴¹ *ibid* 238.

⁴² *ibid* 246.

⁴³ Young (n 34).

⁴⁴ Abrego (n 34).

⁴⁵ Kathleen E Hull, ‘Legal Consciousness in Marginalized Groups: The Case of LGBT People’ (2016) 41 *Law & Social Inquiry* 551.

⁴⁶ Anna Kirkland, ‘Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement’ (2008) 42 *Law and Society Review* 397.

⁴⁷ Hertogh ‘What’s in a Handshake?’ (n 22) 225.

Marginalisation has important implications for this project. Whether someone views themselves as in the 'margins' or as 'ordinary' may be rooted in an individual's understanding of themselves and their community. This project seeks to engage people who are, in many ways, fairly typical of particular communities in South Africa. They are not exceptional, they are not extraordinary. Nonetheless, for different reasons, the participants might perceive themselves to be marginalised, for them to see the constitutional culture as something that is 'unavailable, unhelpful, unreliable'.⁴⁸ And should the individuals concerned not see themselves as marginalised, this may be just as instructive.

4.2.2 Approaches

In light of the breadth of the subjects and geographies in which legal consciousness research has been conducted, it is perhaps unsurprising that a number of different approaches to legal consciousness can be identified. Early approaches saw legal consciousness as intrinsically located within the critical school, designed to understand how the hegemony of the law sustains itself, despite its manifest failings.⁴⁹ This approach informed many of the early works of legal consciousness. However, this critical edge began to wane, to the concern of some of the pioneers of the field – Silbey, an early pioneer in the field, advocated vehemently against any unmooring of legal consciousness from the critical school, from critiques of power.⁵⁰ Despite Silbey's objections a broad approach to research in legal consciousness continues to be found,⁵¹ and legal consciousness studies that do not heed the call to adhere to the critical origins of the methodology, and that reflect a range of theoretical aims and perspectives held by the broad range of legal consciousness scholars continue to make a significant contribution to the understanding of how law functions in society.⁵²

⁴⁸ Ewick and Silbey (n 11) 238.

⁴⁹ *ibid* 248.

⁵⁰ Susan S Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323.

⁵¹ Halliday (n 12) 859.

⁵² Halliday (n 12); Aidinlis (n 28); Chua and Engel 'Legal Consciousness Reconsidered' (n 8).

Chua and Engel, Halliday and Aidlinis have provided recent surveys of legal consciousness research and approaches⁵³ and, through these surveys, have given shape to the field, capturing both the breadth of the field and the range of theoretical traditions using legal consciousness approaches. Although the surveys identify a range of approaches, this discussion will focus on the most deeply entrenched approach to legal consciousness, rooted in the critical school, and on legal alienation, Hertogh's recent contribution to the field. While this study will adopt a methodology rooted in legal alienation, an understanding of the critical school will help to provide an appreciation of the development that legal alienation offers.

4.2.2.1 Critical approaches

Early work in legal consciousness focused on a critical interrogation of the enduring hegemony of the law, holding legal consciousness as being designed to explain 'how the different experiences of law become synthesized into a set of circulating, often taken-for-granted understandings and habits'.⁵⁴ In terms of this approach, law is frequently invisible but virtually inescapable.⁵⁵ In studies of this nature, legality/law is sought to be understood,⁵⁶ is 'the dependent variable, one that is explained by virtue of the relationship between other independent variables',⁵⁷ which might include collective understandings and practices, as well as formal institutions of law.⁵⁸

In one of the foundational, and most enduring, theoretical contributions to legal consciousness, Ewick and Silbey explored how interactions and choices made by people in their ordinary lives reproduce and reinforce the hegemonic power of the law. This allowed for an explanation of how law maintained its power despite its manifest shortcomings,⁵⁹ and despite people holding contradictory notions of the law.⁶⁰ Ewick and Silbey's study found the

⁵³ Chua and Engel 'Legal Consciousness Reconsidered' (n 8); Halliday (n 12); Aidinlis (n 28).

⁵⁴ Silbey (n 50) 324.

⁵⁵ Chua and Engel 'Legal Consciousness in Asia' (n 14) 2.

⁵⁶ Chua and Engel 'Legal Consciousness Reconsidered' (n 8) 339.

⁵⁷ Aidinlis (n 28) 503.

⁵⁸ Ewick and Silbey (n 11) 247–8.

⁵⁹ *ibid* 248.

⁶⁰ *ibid* 51.

law to be inescapable, but able to retain its legitimacy by offering individuals a range of orientations, or 'schemas,' towards legality, offering a perception of agency:

- 1) 'Before the Law,' which views the law as impartial and fixed, a 'serious and hallowed space';
- 2) 'With the Law,' which sees the law as being a tool that can be manipulated for advantage; and
- 3) 'Against the Law,' which allows the law to be evaded or resisted in some way, for a range of reasons.⁶¹

These schemas are adopted in the face of the power of the law, are contextually defined, and allow individuals to cycle between contradictory positions to the law.⁶² By being able to engage these contradictory positions, and to (consciously or unconsciously) activate the approach that is most 'beneficial' to them,⁶³ the power and legitimacy of the law is maintained. In creating the perception of agency, that individuals can accept, use or even resist 'the law' at any point,⁶⁴ law appropriates resistance, channelling it to modest avenues of resistance that do not threaten the hegemony of the law.⁶⁵

Ewick and Silbey's schemas have been extended by Fritsvold, whose examination of radical environmentalists identified an experience of the law that goes beyond 'Against the Law', which was the main site of resistance in the original conceptualisation. Rather than seeing the law as an entity to be avoided, per 'Against the Law', Fritsvold identifies an orientation that regards the law as an active agent of repression, something to be fought against, and this underpins a fourth schema, 'Under the Law'.⁶⁶ This schema represents a 'flamboyant challenge to the status quo',⁶⁷ and does not appear to contribute to the enduring hegemony of the law. It requires people to adopt drastic steps in order to occupy it, and will only ever be available to people outside the ordinary. This may, in fact, reinforce Ewick and Silbey's 'ordinary' schemas, available to people outside of radical groups, creating a radical

⁶¹ *ibid* 47–8.

⁶² *ibid* 226.

⁶³ *ibid* 49.

⁶⁴ *ibid* 48.

⁶⁵ Fritsvold (n 19).

⁶⁶ *ibid* 806.

⁶⁷ *ibid*.

positionality that 'ordinary' people might view as radical, might reject, and this, in turn might act to reinforce the power of the law in their own lives.

The schemas identified by Ewick and Silbey, added to by Fritsvold, have been applied in the South African context. Masiangoako used the schemas to interrogate the impact of arrest and detention on the legal consciousness of various activists, exploring how the law retained its authority despite perceived and experienced injustice.⁶⁸ The gap between the South Africa's constitutional protections for those arrested and detained and the participants' experiences of arrest and detention is juxtaposed with the activism in which the participants were involved, work which 'assumes belief in rights and entitlements' and 'implicitly imagines the possibility of achieving some form of relief through legal means'.⁶⁹ That the participants were able to contextually rotate through Ewick and Silbey's schemas provides insight into how the hegemony of the law upheld, despite the apparently contradictory orientations that the participants occupied.⁷⁰

4.2.2.2 Legal alienation

Legal alienation is a recent contribution to the field, positioned as a corrective to the critical approach to legal consciousness, which focuses on exploring how law maintains its power, despite its failures, and which Hertogh views as an empirical error.⁷¹ He argues that rather than maintaining its power, the law has lost legitimacy in the eyes of the broader population,⁷² the explosion of legal regulation of recent years, found in many countries, being viewed as having rendered their voice and their values absent.⁷³ This could have the consequence of alienating many within the populace. From this starting point, Hertogh proposes a series of corrections aimed at stripping legal consciousness of its critical element,

⁶⁸ Thato Masiangoako, 'Rationalizing Injustice: The Reinforcement of Legal Hegemony in South Africa' (2018) 66 *South African Crime Quarterly* 7, 8.

⁶⁹ *ibid* 13.

⁷⁰ *ibid* 16.

⁷¹ Hertogh *Nobody's Law* (n 12) 8–9.

⁷² *ibid* 179–182.

⁷³ *ibid* 179.

rendering it 'an objective lens for empirical research'.⁷⁴ Hertogh labels his approach 'secular'.⁷⁵

Hertogh foregrounds legal pluralism in his secular approach to legal consciousness, claiming that the critical approach, on which his critique of legal consciousness is founded, continues to focus on formal systems of law, failing to consider the many different forces experienced as law.⁷⁶ He sees conventional legal consciousness as defined by 'a) more emphasis on the role of law in society; b) more emphasis on the role of ordinary people; c) the advancement of 'critical empiricism'; and d) a shift in focus from measurable behaviour to the use of ethnographic methods.'⁷⁷ Hertogh suggests a series of corrections to legal consciousness, an attempt to remedy its failings, and suggests the three corrections:

- 1) *Interrogating the law as both a dependent and an independent variable*: Legal consciousness, in Hertogh's understanding of it, fails to adequately interrogate the role of non-state law in people's lives, holding that 'conventional' legal consciousness is overly focused on formal law.⁷⁸ Hertogh holds that, in spite of the introduction of 'legality', scholars such as Ewick and Silbey have failed to conceptually free themselves from state law.⁷⁹ Hertogh differentiates an 'internal,' non-state, law from the 'external,' system of law, state law,⁸⁰ holding that the two may be at odds with each other. He argues that this disconnect '*decreases* the importance of state law but *increases* the importance of non-state law in people's everyday lives'.⁸¹

Hertogh argues that the failure to properly interrogate these plural systems of law, leads to legal consciousness failing to understand how the law is experienced by ordinary individuals.⁸² To ensure that both systems of law, state and non-state, are properly reflected in research, Hertogh proposes considering law as both an

⁷⁴ *ibid* 12.

⁷⁵ *ibid*.

⁷⁶ *ibid* 11.

⁷⁷ *ibid* 66.

⁷⁸ *ibid* 11.

⁷⁹ *ibid*.

⁸⁰ *ibid* 14.

⁸¹ *ibid* 179.

⁸² *ibid* 11.

independent and dependent variable,⁸³ a factor that both shapes and is shaped by other variables in society. To do this, a researcher would need to ask two questions – what he views as the normal question in legal consciousness research, ‘How do people experience (official) law?’, a question that explores the law as an independent variable, and an additional question, which explores law as a dependent variable, ‘What do people experience as the law?’⁸⁴ Answers to these questions would vary according to the subjective experiences of the individuals concerned, and these questions could realise answers that vary substantially across contexts and subjectivities. This dual approach to the law is fundamental to constitutional alienation, the approach that this project develops and uses;⁸⁵

- 2) *Moving beyond the margins*: While much of legal consciousness research is focused on ‘marginalised’ groups, defined differently in different studies, Hertogh advocates for legal consciousness to take a broader approach, engaging with people who might be considered, or who might not consider themselves to be, marginalised by the legal system;⁸⁶
- 3) *Prioritising participants’ voices*: Critical approaches to legal consciousness interrogate the contributions – the first-hand accounts – of participants to uncover the hidden role of power in their lives, seeking hidden meanings that allude to power. Hertogh sees this as undermining the agency of participants, arguing instead that seeking to understand their conscious thoughts, and the specific way in which they articulate their engagement with the law, is an approach that recognizes the dignity of the participants. Such an approach would recognise them as creators of their own meaning, restoring agency and power to participants, rather than positioning them as victims of hegemonic power.⁸⁷

These corrections have led to Hertogh developing legal alienation as a concept to understand dissatisfaction with the formal legal system.⁸⁸ Legal alienation arises when people are unable

⁸³ *ibid* 71.

⁸⁴ *ibid* 69.

⁸⁵ Explored at section 4.2.3: *Developing Constitutional Alienation*, below.

⁸⁶ Hertogh *Nobody’s Law* (n 12) 72.

⁸⁷ *ibid* 74–5.

⁸⁸ *ibid* 15.

to identify with the law. In his conception, there are four different kinds of alienation that an individual might experience, and they may experience some of these elements simultaneously: legal meaningfulness, where people are unable to predict the law; legal powerlessness, when they feel unable to impact the outcome of legal processes; legal cynicism, where law is seen as irrelevant and legal value-isolation, where people perceive a 'gap between the values of the law and one's personal values'.⁸⁹

When analysing the position of an individual or a community, the four forms of alienation combine with two additional dimensions, specifically, the extent to which an individual is aware of the formal law, a 'cognitive' dimension, and the extent to which an individual identifies with the formal law, a 'normative' dimension, to form four subject positions. Hertogh labels these positions 'normative profiles',⁹⁰ and these describe a person's orientation to the law: 'legalist' (aware and identifies), 'loyalist' (unaware, but identifies), 'cynic' (aware, but does not identify) or 'outsider' (unaware and does not identify), represent positions available to ordinary people in their interactions with the state law.⁹¹ Hertogh's corrections run through the forms of alienation and through the normative profiles: Recognising that the law shapes and is shaped by an individual's context; recognising that all members of a society will be subjected to the law and will provide insight into the workings of a legal system, whether formal or informal; and seeking to understand an individual's engagement with the legal system, cognitively and normatively, on their own words.

Hertogh plots the two dimensions and four normative profiles on a matrix,⁹² which could be used to plot the position of an individual and a community, of their orientation towards the formal law, where law is considered as an independent variable, acting upon the individual, the community, the populace. This position, and the qualitative data that underpin the position, would be considered together with an exploration of the position of law as a dependent variable, an exploration of the law that governs the world of that individual, leaning on an understanding of law that extends beyond the formal.

⁸⁹ *ibid* 56.

⁹⁰ *ibid* 57.

⁹¹ *ibid* 57–59.

⁹² *ibid* 58.

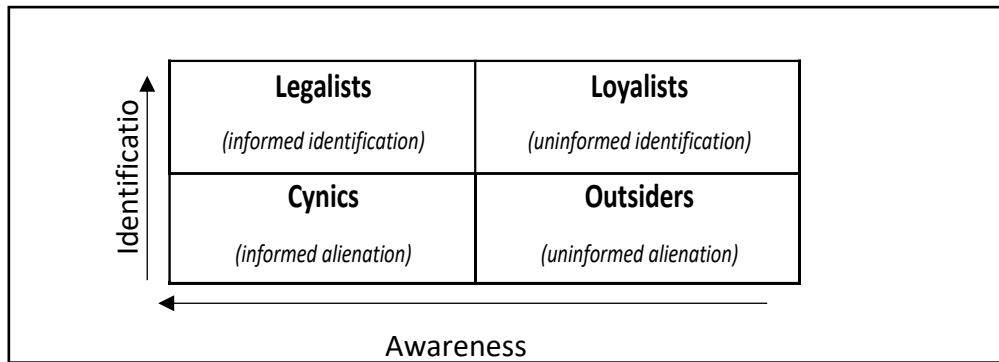


Figure 4: Legal alienation's normative profiles ⁹³

Hertogh sees the various forms of alienation as underlying these normative profiles, with alienation particular present amongst Cynics and Outsiders.

Hertogh applies legal alienation in three different contexts in the Netherlands, analysing the gap between what people experience as the law and what they think the law should be, between the 'awareness' and 'identification' axes of his approach. In studies, one of which looks at equality and non-discrimination in a school, another at antitrust laws regulating the construction industry, with the final study one looking at front-line state officials, legal alienation is present.⁹⁴ Hertogh's findings through the application of legal alienation indicate the difference that the application of legal alienation can make. While the critical school focuses on underlying power structures, Hertogh is more interested in interrogating 'what' people experience as the law, and what they think the law should be, paying comparatively less attention to 'why.' This is not necessarily a failure of analysis – the descriptive nature of Hertogh's findings allows for a consideration of the role of the law in society, and a deliberation of the consequences of alienation. These strengths can be observed in Hertogh's analysis of his case studies, which provide insight into people's experiences of formal and informal law and into the impact of any discrepancy between the formal and informal forms of law. These findings allow for an interrogation of the underpinnings of legal alienation in context, as, generally, rather than a dramatic event, 'everyday legal alienation is a gradual and mundane process'⁹⁵ but one with significant repercussions for individual's relationship with the state and for the legitimacy of the state.

⁹³ *ibid.*

⁹⁴ *ibid* 150.

⁹⁵ *ibid.*

Hertogh's claim that studies within legal consciousness have been either unwilling or unable to engage with the 'internal' conception of the law that people might hold, and that practitioners have been overly focused on the formal legal system⁹⁶ does not accord completely with the work that has been undertaken in the field. As discussed, the recognition of multiple legal forces, both formal and informal, is found throughout the field, across approaches to legal consciousness. Indeed, it appears that Chua and Engel, Aidinlis and Halliday see studies in the critical tradition as generally positioning law/legality as the dependent variable,⁹⁷ rather than as the independent variable, as claimed by Hertogh. Regardless of his analysis of the established approach to legal consciousness, the manner in which Hertogh has refashioned legal consciousness into a tool for analysis, and his approach to the multiple concurrent experiences of the law that many will have offers much to this project and the desire to explore constitutional culture 'from below'.

4.2.3 Developing constitutional alienation

The exploration of constitutional culture undertaken at Chapter 2 of this project provided three questions that would provide insight into the constitutional cultures 'above' and 'below':

- 3) Can a constitutional culture created by formal institutions and people occupying influential positions in society be identified?;
- 4) What do people in society experience and perceive to be the constitutional culture of their country?; and
- 5) What do people experience as the constitutional culture that governs their lives?

While the first of these questions was explored in Chapter 3, the potential utility of legal alienation to the latter questions is striking. Questions 2 and 3 explore different elements of constitutional culture 'from below': the first of these questions explores the perceptions that an interview subject would have of the 'official' version of the law; the second explores the range of influences that shape the day-to-day lives of that subject, which may involve official

⁹⁶ *ibid* 14.

⁹⁷ Chua and Engel 'Legal Consciousness Reconsidered' (n 8) 339; Aidinlis (n 28) 502; Halliday (n 12) 862.

law, but will also engage a wider range of influences. The questions that lie at the heart of the empirical investigation of this project are influenced by the questions that underlie legal alienation: ‘How do people experience (official) law?’, a question that explores the law as an independent variable, and ‘What do people experience as the law?’, which explores law as a dependent variable.⁹⁸

Hertogh’s questions are an invaluable empirical tool. Considering the first-person answers to the questions that are at the heart of this research project through the prism of Hertogh’s conceptualisation of legal alienation and in accordance with his matrix provides the potential for the interrogation of the way that various systems of law engage with the subjective experiences of individuals, and makes explicit awareness of, and identification with, the law – vital elements in the enduring legitimacy of a legal system. The clarity of the framework, and the analytic potential contained within it, imbue the approach with promise. Legal alienation may be able to shed light onto the fracture between the law that people experience and what they think the law should be, providing greater understanding of how they position themselves, as well as for the consequences of these fractures and orientations for their relationship with the state. Applied to a constitutional regime, this could have implications for identity, for mobilization, for state legitimacy and for the prospects of rule of law.

While Hertogh focuses on particular elements of the law in his study, be it equality legislation, anti-trust, or the legal regime regulating the content of front-line officials, this project seeks to interrogate the foundational understandings that individuals and communities have of the state in which they live. While Hertogh’s studies may be reflective of a deeper alienation that the participants in his study feel towards the state and may signpost the lack of legitimacy of the state’s legal regime, this research project’s focus on the central legal regime of a state, on how this is perceived amongst the broader population, and in attempting to understand the localised principles and rules that actually inform and govern their day-to-day lives, explicitly addresses foundational aspects of life in a constitutional state. This allows the claim to be made that alienation, if identified through this project, is an alienation from the entire legal

⁹⁸ Hertogh *Nobody’s Law* (n 12) 69.

and moral project of the state – it is alienation from the constitutional culture of the state. It is constitutional in nature.

While the constitutional implications of the first leg of the questions that constitute legal alienation is perhaps obvious, it may be necessary to make explicit the constitutional dimensions of the second leg of the questions that underpin constitutional alienation, which sees the law as a dependent variable.⁹⁹ This inquiry is constitutional in at least two ways: first, it engages with the foundational principles that shape the lives of individuals and communities – in this project, one such example became clear in the second community, discussed in Chapter 6, namely, the impact that religion has on the day-to-day lives of the interviewees, which fundamentally shapes their engagement with the world; second, the day-to-day lives of individuals are shaped by their needs, desires and demands, many of which are explicitly linked to the transformative constitution, which includes concerns such as safety, the provision of social services, and the ability to hold state representatives to account. The way that individuals lead their day-to-day lives is shaped by their ability to rely on the state for the provision of these elements, and by their efforts to step into the breach created by the state's failure (perceived or actual) to fulfil its obligations.

Constitutional alienation would rely on the normative profiles that Hertogh has devised, adapted for the constitutional development. Accordingly, the analytic framework of constitutional alienation should be understood as follows:

- Where people are unable to identify with the constitutional culture of their country, constitutional alienation arises.
- This manifests in four possible ways, based on Hertogh's approach to legal alienation:
 - Constitutional meaninglessness, where people do not know what the constitution of a state is, or know its requirements;
 - Constitutional powerlessness, when people are unable to shape the constitutional culture of their state;

⁹⁹ The second leg of the 'from below' investigation is 'What do people experience as the constitutional culture that governs their lives?'

- Constitutional cynicism, where the constitution or the constitutional culture is seen as irrelevant; and
- Constitutional value-isolation, where there is a gap between the values of the constitutional culture and the personal values of an individual.
- Underlying these positions are two dimensions – a cognitive dimension, which explores the extent to which people know of the constitution and the constitutional culture of a state, and a normative dimension, which explores the extent to which the values and content of the constitutional culture align with the values of an individual or a community. These dimensions are subjective, as alienation will be based on the perceptions of the people in question, regardless of the accuracy of these perceptions.
- The four elements of constitutional alienation will form four normative profiles:
 - Constitutionalists, who are aware of the constitution and identify with it;
 - Constitutional loyalists, who profess adherence to the values of the country without specific awareness of the role of the constitution in these;
 - Constitutional cynics, who are aware of the constitution, but who do not identify with it; and
 - Constitutional outsiders, who neither know nor identify with the constitution.
- These positions can be plotted on a matrix:

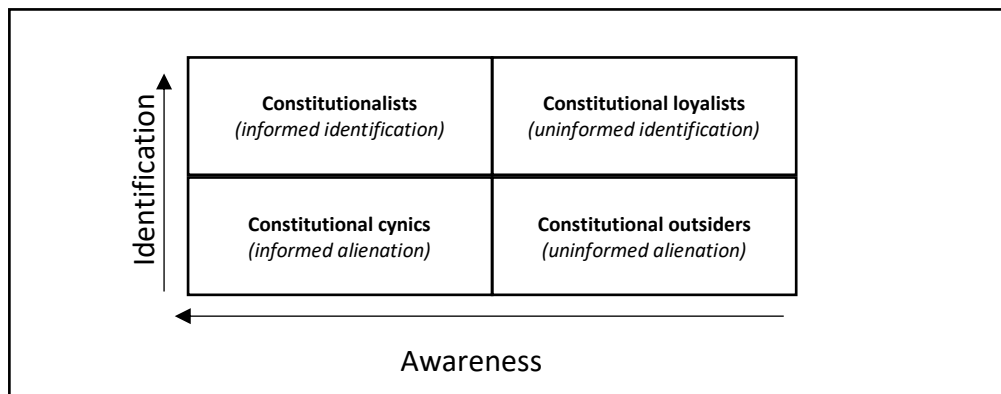


Figure 5: Constitutional alienation's normative profiles, based on Hertogh's normative profiles under legal alienation¹⁰⁰

Hertogh's additional corrections also resonate with this project: Engaging all manner of groups and communities, marginalised or not, would provide a fundamentally broader insight into the constitutional cultures present in South Africa, into the extent to which fractures

¹⁰⁰ Hertogh *Nobody's Law* (n 12) 58.

between the constitutional cultures ‘above’ and ‘below’ are present in the constitutional fabric, the extent to which different communities, whether marginalised or not, identify with the constitutional culture that they perceive to be present, and to consider how this maps to their day-to-day lives. The different communities in this project will likely understand their position in the state differently – for example, the third community in this research project is a community that is relatively wealthy, and which has access to resources. It may be the case that this community does not see itself as marginalised. The perspective of this community, given its relative power, will provide an interesting perspective into constitutional culture/s in South Africa, regardless of whether it perceives itself to be marginalised. Juxtaposed to communities that might be willing to identify as marginalised, the importance of moving beyond the margins becomes clear.

Finally, Hertogh’s call for researchers to prioritise the voices of participants accords with this project’s methods – although, it must be stated that analysing contributions made by participants for unconscious meanings and perspectives, and in the process interrogating the role of power is a valid, and important, methodological approach. While not centered in this project, future work in the field of constitutional culture may find some utility in an approach to narratives provided by interviewees that subjects their narratives to a critique rooted in the critical school.

4.2.4 Legal consciousness and legal alienation in South Africa: A note

Legal consciousness has yet to make a significant contribution to the constitutional experience in South Africa. Indeed, very little legal consciousness work has been conducted in South Africa, at all – Masiangoako’s study aside.¹⁰¹ However, legal consciousness studies have been undertaken in a range of countries beyond the methodology’s Anglo-American

¹⁰¹ Masiangoako (n 68).

roots,¹⁰² including in India,¹⁰³ Myanmar,¹⁰⁴ China,¹⁰⁵ Thailand,¹⁰⁶ Egypt,¹⁰⁷ Nigeria,¹⁰⁸ the Netherlands,¹⁰⁹ and Bulgaria.¹¹⁰

That the methodology has been utilised in a wide range of contexts does not mean that the methodology is intrinsically fit for purpose, for application in the South African context. This may be particularly true in relation to legal alienation, as a recent addition to the field, and to this attempt to develop the concept to a specifically constitutional approach. However, in light of the central position of the Constitution in South Africa, and in light of the attempts to rebase societal culture to reflect the values of the Constitution, as was discussed previously in Chapter 3, to bring the constitutional culture ‘from above’ into being, understanding both how people in the broader population perceive the South African Constitution and its accompanying culture is important. Understanding and exploring where there are fractures between this perceived constitutional culture and the constitutional culture that they actually experience, that binds their community and group, that forms a *nomos* that informs their lives, will provide insight into the health of constitutional South Africa, into its prospects for the future.

¹⁰² See, as a further example, the specially dedicated edition of the Asian Journal of Law and Society 5 (2018), dedicated to ‘Legal Consciousness in Asia’ edited by Chua and Engel (n 14) 1; Halliday (n 12) 859.

¹⁰³ Khorakiwala (n 25).

¹⁰⁴ Arm Tungnirun, ‘Practising on the Moon: Globalization and Legal Consciousness of Foreign Corporate Lawyers in Myanmar’ (2018) 5 Asian Journal of Law and Society 49.

¹⁰⁵ Mary E Gallagher, ‘Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness’ (2006) 40 Law & Society Review 783; Margaret L Boittin, ‘New Perspectives from the Oldest Profession: Abuse and the Legal Consciousness of Sex Workers in China’ (2013) 47 Law & Society Review 245; Liu (n 24).

¹⁰⁶ David M Engel, ‘Vertical and Horizontal Perspectives on Rights Consciousness’ (2012) 19 Indiana Journal of Global Legal Studies 423; Kitpatchara Somanawat, ‘Constructing the Identity of the Thai Judge: Virtue, Status, and Power’ (2018) 5 Asian Journal of Law and Society 91.

¹⁰⁷ Friso Kulk and Betty De Hart, ‘Mixed Couples and Islamic Family Law in Egypt: Legal Consciousness in Transnational Social Space’ (2013) 3 Oñati Socio-Legal Series 1057.

¹⁰⁸ Daniel E Agbibo, ‘The Rights Consciousness of Urban Resistance: Legalism from below in an African Unofficial Sector’ (2017) 49 Journal of Legal Pluralism and Unofficial Law 183.

¹⁰⁹ Hertogh ‘What’s in a Handshake?’ (n 22).

¹¹⁰ Marc Hertogh and Marina Kurkchiyan, “‘When Politics Comes into Play, Law Is No Longer Law’: Images of Collective Legal Consciousness in the UK, Poland and Bulgaria’ (2016) 12 International Journal of Law in Context 404.

4.2.5 Conclusion

Constitutional alienation offers a lens through which to explore the constitutional cultures present in South Africa 'from below', and a way to consider the ramifications for South Africa's constitutional future. Constitutional alienation has the potential to identify fractures in the fabric of South Africa's constitutional society, with ramifications for the legitimacy of South Africa's constitutional, and democratic, project.

Having established a methodological framework for exploring constitutional culture 'from below', questions of execution arise. The subjective focus of both constitutional culture 'from below' and of legal alienation places first-person accounts in the foreground of its analytical approach. Accordingly, to generate the empirical data that will support the analysis of South Africa's constitutional culture 'from below', a carefully considered and carefully executed method needs to be adopted.

4.3. Method – implementation and ethics

Seeking to answer the two questions that provide insight into the constitutional cultures 'from below',¹¹¹ entails accessing the subjective experiences of individuals to understand how people both perceive and experience the constitutional culture of the society in which they live. As noted, the constitutional alienation framework that sits at the centre of the analysis that will be conducted aligns closely with legal alienation. Qualitative methods are a fundamental part of this approach.

The following discussion will 1) discuss particular elements of the qualitative methods applied in this project, including a delineation of the research design, including explanations of how central decisions relating to the application of qualitative methods were made, and ultimately, how these decisions were implemented; 2) engage with the importance of reflexivity to both the qualitative processes undertaken in obtaining the perspectives and

¹¹¹ These questions being: 1) What do people in society experience and perceive to be the constitutional culture of their country?; and 2) What do people experience as the constitutional culture that governs their lives?

experiences that underpin constitutional culture ‘from below’, and to the analyses undertaken subsequent to the data gathering process, and 3) make clear some of the ethical issues that arise in relation to the adopted methods.

4.3.1 Research design and execution

Careful research design is of fundamental importance to all empirical studies. This section will highlight some of the considerations bearing on the design of the empirical research this project undertook, discussing the demands of qualitative research design, and how decisions about the interview style and community selection were made and executed.

4.3.1.1 Accessing first person accounts: The centrality of qualitative methods

First-hand accounts of life in constitutional South African are the foundation of this project. In order for the data collection methods to be effective, and in order for a clear decision-making process to be developed while planning and executing the data collection, certain understandings of qualitative research had to be centred.

Qualitative methods are ‘ubiquitous and fairly well-respected’¹¹² across academic disciplines, seeking to collect contextual data about the ‘objects, identities, experiences or events’¹¹³ that individuals deem to be important and impactful upon their lives. They are able to generate insights that would likely have remained obscured by quantitative methods, are ‘a set of interpretive, material practices that make the world visible’.¹¹⁴ Through this, the lived experience of people can be considered and analysed.¹¹⁵ In coming to an understanding of these experiences, the role of the researcher is vital, as, in qualitative research, first-hand accounts are mediated by the researcher – the manner in which data is collected, and the way in which these accounts are considered and analysed by a researcher, are, in many ways,

¹¹² Kum-Kum Bhavnani, Peter Chua and Dana Collins, ‘Critical Approaches to Qualitative Research’ in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (2nd edn, Oxford University Press 2020).

¹¹³ Helen Malson, ‘Qualitative Methods from Psychology’ in Ivy Bourgeault, Robert Dingwall and Raymond De Vries (eds), *The SAGE Handbook of Qualitative Methods in Health Research* (SAGE 2010).

¹¹⁴ Norman K Denzin and Yvonna S Lincoln, ‘Introduction: The Discipline and Practice of Qualitative Research’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (4th edn, 2011).

¹¹⁵ Uwe Flick, *An Introduction To Qualitative Research* (6th edn, SAGE 2018) 45.

shaped by the identity of the researcher and by the decisions that that researcher makes in the process of collecting and analysing the data.¹¹⁶ Qualitative methods thus engage the identity and position of both the ‘subjects’ of a research project and the researcher,¹¹⁷ and the impact of this on the research must be considered.

The subjective dimensions of qualitative research are important to acknowledge but should not be overstated. Theoretically, there is no reason to believe that the foregrounding of context and of the subjective elements of qualitative analysis should undermine the integrity or the importance of research. Instead, the adoption of an explicit ideological approach and the foregrounding of subjective elements of the research can strengthen both the outputs and the academic integrity of the work,¹¹⁸ enabling researchers to be cognisant of the power dynamics inherent to data collection and analysis. In the process, it is possible for a project to articulate a more accurate reflection of the choices underpinning every research process than approaches that claim objectivity.¹¹⁹ In order for this potential to be realised, however, research needs to be conducted in a way that is ethically sound, with a clear theoretical description of how data will be considered and processed.¹²⁰

Accepting and foregrounding the subjective and ideological bent of a research project, and understanding the highly contextual nature of qualitative research and gaining ‘an awareness of the limitations and partial character’¹²¹ of the data and of the analysis, should not dilute the careful design and execution of the methods, nor should it impact a commitment to ‘accuracy’ in analysis. Accuracy can be understood to mean a commitment to conclusions supported by evidence and argument,¹²² which contain the possibility of replication.¹²³

¹¹⁶ Denzin and Lincoln (n 114).

¹¹⁷ Linda McKie, ‘Engagement and Evaluation in Qualitative Inquiry’ in Tim May (ed), *Qualitative Research in Action* (SAGE 2002).

¹¹⁸ *ibid.*

¹¹⁹ Svend Brinkmann, Michael Hviid Jacobsen and Søren Kristiansen, ‘Historical Overview of Qualitative Research in the Social Sciences’ in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (2nd edn, Oxford University Press 2020).

¹²⁰ Collins and Stockton (n 4) 2.

¹²¹ Sarat (n 2) 164.

¹²² *ibid* 161.

¹²³ Rik Peels, ‘Replicability and Replication in the Humanities’ (2019) 4 *Research Integrity and Peer Review*.

In light of these priorities, careful description of the research design and the methods adopted, consideration of the role of reflexivity and the analytic framework applied by the researcher is of fundamental importance to any qualitative study. The remainder of this section will address the research design and reflexivity.

4.3.1.2 Research design

It bears repeating that the aim of this project is not to engage in comparative research between communities, nor is it to engage in the rigorous comparison of the perspectives and experiences present in different communities. Instead, this project attempts to engage with first person accounts of life in constitutional South Africa and to consider the extent to which fractures exist in the constitutional fabric of South Africa. In the process, this project will explore whether there are identifiable themes present within particular communities in relation to their perceptions of the constitutional culture of South Africa and the constitutional culture that they experience in their day-to-day lives, and will consider the implications of these themes across communities. Relying on constitutional alienation, narrative accounts by individuals are the primary data source, enabling a bottom-up perspective of the law, highlighting how the law emanates from numerous sources, formal and informal, all of which act on, and are interpreted by, individuals.

The way that these narratives were obtained, and where they were obtained from, are perhaps the most important factors shaping the data underpinning this project. A range of methods are available to researchers, including systematic interviews¹²⁴ and forms of ethnographic research,¹²⁵ amongst others. The desire to engage multiple communities in the course of this research project, and to allow people to provide their accounts of their engagement with the law, provided a strong impetus for the use of interviews, which could be carried out with relative speed, and prioritised the voice of the interviewees. Through these choices, interview design, together with community selection assume great importance.

¹²⁴ Ewick and Silbey (n 11).

¹²⁵ Young (n 34); Liu (n 24).

4.3.1.2.i Interview design

Interviews require planning, and integral to this is determining the appropriate sort of interview,¹²⁶ selecting from techniques that range from structured interviews, aligned with the neopositivist tradition, which are highly fact-focused, to unstructured interviews, focused only on meaning.¹²⁷ Between these poles are semi-structured interviews.¹²⁸ The semi-structured interview, rather than seeing the interview purely as an instrument for the transmission of knowledge, sees interviews as productive of meaning, in and of themselves – the processes and context of the interview worthy of consideration, and contributing to nature and content of the data.¹²⁹ So, not only does a semi-structured interview allow the research themes to be understood through questions that are flexible enough to reflect the experiences of the individual, the approach also allows for the consideration of various contextual factors that may have influenced the data generated – which could include the power dynamics inherent in the interview.

Semi-structured interviews offered an appealing combination of structure, which would ensure that certain elements were canvassed across interviewees, and freedom, allowing for particular areas of interest raised by each interviewee to be explored. The ability to engage more deeply on particular topics, away from the interview guide, was an invaluable part of the research process, often uncovering particular elements of the interviewees' lives that may otherwise have remained occluded. The interaction with the interviewees that underpins this relatively free approach to structure requires the interviewee be cognisant of the subjectivities present in the interview space. Reflexivity will be discussed discretely in Section 4.3.2, below, and the specific reflexive considerations that arose in each community will be discussed at points in Chapters 5, 6 and 7.

¹²⁶ Sandy Q Qu and John Dumay, 'The Qualitative Research Interview' (2011) 8 *Qualitative Research in Accounting & Management* 238, 239.

¹²⁷ *ibid.*

¹²⁸ *ibid* 246.

¹²⁹ *ibid* 247.

In designing the semi-structured interview template for this project, an initial template, based on the research agenda, South Africa's social and constitutional history, and existing legal consciousness literature, was developed. The template was refined and developed throughout the research process, and tailored to suit the range of targeted communities (initial template attached at Annex 1).

4.3.1.2.ii Community selection

The focus of this project is the manner in which different individuals and communities experience constitutional culture in South Africa, engaging with the idea that the range of sites of power, often competing, that an individual or a community might experience will impact an individual's perception and experience.

South Africa is a society epitomised, to a large extent, by economic inequality. For historical reasons, socio-economic status, in the South African context, largely, although not completely, coincides with race.¹³⁰ This project sought to identify communities that varied on a range of different indicators, including income and race. It was believed that historical factors, the ability to access resources, and the proximity to sources of relative power in the world, would shape an individual's, and a community's, engagement with the state and South Africa's constitutional culture. Thus, in order to gauge the extent to which different perceptions and experiences of constitutional culture are present in South Africa, the selection of communities was extremely important. A range of different communities were approached, with a focus on ensuring that the communities differed on socioeconomic grounds which, as noted, largely coincides with race in South Africa.

It is important to note that constitutional cultures 'from below' are highly contextual. While prioritising considerations of race and income in the selection of the communities, there is no expectation that the findings will be completely replicable. Within racial groupings, within

¹³⁰ It should be noted that, in South Africa, socioeconomic status and race remain strongly linked, an enduring legacy of the colonial and Apartheid regimes (see Statistics South Africa, *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (Statistics South Africa 2017) 58).

income groupings, certain themes may repeat – but they may not. That the findings of this project are highly contextual should not be regarded as a limitation. Instead, the findings can be regarded as a first step into a deeper, broader understanding of how South Africans understand and exist in South Africa’s much-vaunted constitutional democracy.

While the interviewees and subsequent analysis will provide insight into the positions and perspectives in each community, this insight should be understood as a snapshot, a glimpse, into the range of perspectives that might be present across different communities in South Africa. While the interviews will also provide a limited insight into the range of perspectives and experiences present in the particular community under analysis, the interview data will be assessed for underlying themes within a community, and, if clear themes emerge, it is reasonable to assume that these may be more widely prominent in the community in question.

With these considerations in mind, three distinct communities were identified, varying on dimensions of race and socio-economic status, both of which continue to be informed by the historical structuring of South African cities.¹³¹ Three archetypes – ideal communities:

- 1) An historically Black African community, predominantly consisting in the present day of Black African South Africans, proximate to, or in, a large urban area. While significant numbers of Black South Africans have prospered financially, the bulk of Black South Africans live in low-income areas known in South Africa as townships,¹³² many of which were established during the apartheid era. Demographic data pays testament to the legacy of apartheid, and it would be expected that the people residing in this area would be in the lower bounds of South Africa’s socio-economic range,¹³³

¹³¹ With particular reference to the Group Areas Act, an apartheid-era law which reserved particular areas for particular race groups. These patterns of residence often endure today.

¹³² See Li Pernegger and Susanna Godehart, ‘Townships in the South African Geographic Landscape – Physical and Social Legacies and Challenges’, *Training for Township Renewal Initiative* (2007) for economic and demographic detail on townships in South Africa.

¹³³ Statistics South Africa, *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (Statistics South Africa 2019) 27.

- 2) An historically Coloured community, predominantly consisting in the present day of Coloured South Africans,¹³⁴ proximate to, or in, a large urban area. This area would have been designated “Coloured” during apartheid, and will likely remain somewhat homogenous. While there is a significant range in socio-economic status amongst Coloured South Africans, it would, broadly, be expected that average incomes in this community would be substantially more than those of Black South African communities, but substantially below historically white communities;¹³⁵
- 3) An historically white community, consisting of a range of races in the present day, occupation largely related to income, proximate to, or in, a large urban area. While the community may no longer be exclusively white, may be racially integrated to some extent, the socio-economic status of the community would place in the upper echelons of South African society.

Identifying community archetypes enabled the researcher to develop a shortlist of possible communities that could be targeted. Final selection of the communities was based on the ability of the researcher to access individuals within the communities, through contact people that were identified through several different mechanisms. Full descriptions of each of the three communities in which interviews were conducted can be found at the start of the discussions of the themes that emerged from these communities, in Chapters 5, 6 and 7.

4.3.1.2.iii Execution

Semi-structured interviews were conducted in the three identified communities between June and September 2019, after having obtained ethical approval from the Law Research Ethics Committee at the University of Bristol (‘LREC’), and after having drafted the participant

¹³⁴ ‘Coloured,’ as a descriptor of a racial group in South Africa, has a distinct meaning, incorporating people with a range of genetic backgrounds, and, although initially imposed by the Apartheid government, has been adopted as a specific identifier by many people who see themselves as part of this grouping – for more information, see Mohamed Adhikari, *Not White Enough, Not Black Enough: Racial Identity in the South African Coloured Community* (Double Storey Books 2005); Grant Farred, *Midfielder’s Moment: Coloured Literature and Culture in Contemporary South Africa* (Routledge 2019); Zoë Wicomb, ‘Shame and Identity: The Case of the Coloured in South Africa’ in Derek Atteridge and Rosemary Jolly (eds), *Writing South Africa: Literature, Apartheid, and Democracy, 1970-1995* (Atteridge, Cambridge University Press 1998).

¹³⁵ Statistics South Africa, *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (n 133) 27.

information sheet ('PIS') (attached at Annex 2) and the consent form (a blank consent form is attached at Annex 3).

These interviews were conducted after consultation with contact people in each of the communities. The contact people were appraised of the research aims and foci, and asked to assist without any pecuniary compensation being offered. Extensive preliminary conversations with the contact person in each community contributed to the contextual understanding of the community, and to practical considerations, which included establishing where the interviews should take place and, in Community 1, the language in which the interviews were to be conducted, together with a discussion about whether an interpreter might be required.

Contact people were asked to make introductions to the leaders of community groups in the various areas.¹³⁶ A range of community groups were approached in each community order, in an attempt to ensure that the participants represented a cross-section of the community, rather than only a particular section of the community. These community groups varied across communities, from religious institutions to sports clubs to neighbourhood watch groups. Meetings took place between the researcher and various people linked to these community groups, outlining the aim of the project and asking for assistance in identifying members of the community groups who could potentially participate in the project. Once the interviews commenced, snowball sampling was used, to gain access to people at something of a remove from the various community groups.

Upon the contact people's recommendations, in all three of the communities the interviews were conducted in the interviewees' homes where it was possible to do so, to minimise travel and other administrative burdens for the interviewees. Prior to commencing, the PIS was distributed and discussed, at length, which included a discussion of the aims of the research were outlined to the potential participant, and the consent form was discussed and signed. In Community 1, a translator fluent in isiZulu and Sesotho was present at each interview.¹³⁷

¹³⁶ 'Community groups' is a vague term intentionally used by the researcher. Each community will have a range of groups in it – ranging from religious groups, to youth groups, to community safety groups.

¹³⁷ The predominant languages in Community 1 are isiZulu and Sesotho.

The services of this translator were engaged upon the recommendation of the community group leaders. Interestingly, although the translator was on hand for the interview, without fail the participants opted to be interviewed in English. Although the interviewees opted to continue in English, the translator was invaluable in clarifying any issues relating to the participant's rights, working with the researcher to resolve any concerns that the participant had. The translator signed a non-disclosure agreement ('NDA'), and was present for all interviews in Community 1 (copy of the unsigned NDA attached at Annex 4).

Interviews began with a strict adherence to the semi-structured interview template. The semi-structured nature of the interviews allowed for engagement on particular issues that arose in each interview. It should be noted that during the interviews, participants provided demographic information (including their employment status). Elements of this data may have implications for the analysis of constitutional culture in the community.

4.3.2 Reflexivity

As noted, this research project embraces the contextual and subjective nature of qualitative research. In doing so, the identity and perspective of the researcher plays a significant role in both the collection and analysis phases of the research.¹³⁸ Each encounter between a researcher and another individual, who becomes the subject of analysis,¹³⁹ requires a number of 'negotiations, calculations, and interpretations',¹⁴⁰ and is mediated by a range of factors – including language issues, pre-existing relationships, identity-related issues and historical factors, and the location of the interview, amongst others. These factors place a considerable emphasis on the need to be reflective to recognise the impact that subjectivities and circumstances can have on the data and on the analysis.

¹³⁸ John Smyth and Geoffrey Shacklock, 'Behind the 'Cleansing' of Socially Critical Research Accounts' in Geoffrey Shacklock and John Smyth (eds), *Being Reflexive in Critical Educational and Social Research* (RoutledgeFalmer 1998).

¹³⁹ John Schostak, *Interviewing and Representation in Qualitative Research Projects* (Open University Press 2006) 15.

¹⁴⁰ *ibid.*

While the implications of these factors will vary from community to community, it should be noted that the researcher is a white, English-speaking, upper class man. Each of these attributes is imbued with particular meaning in the South African context (as they are beyond South Africa's borders). This, together with the nature of the engagements that took place with all involved in the interviewing process, from the initial community contacts, to the community leaders, the translator and, of course, the participants, will shape the data.

In each of the communities, it was necessary to reflect on the dynamics of the interview process, of the power relationships present, and to consider how these may shape the data generated, and how the data is analysed. This reflective process recognises that it is impossible to eliminate the impact of a researcher's identity on these elements, and thus it is necessary for the researcher to be conscious of the various factors, including biases and ideological perspectives, that are brought into the research process.¹⁴¹ To this end, a reflection will be included in each of the community analysis chapters of this research project, reflecting on the context and the identities involved, and considering what mitigatory measures were engaged. The issues raised by the subjectivities involved and the context in which the interviews were conducted will vary from community to community, and individual to individual; it may be necessary to address such factors as socioeconomic inequalities, language, and demographic factors, and pre-existing ideological perspectives that the researcher may hold that could shape the interviews. Recognising and interrogating these perspectives is vital.

4.3.3 Ethical considerations

A range of ethical concerns arises in any research project. When a research project involves human participants, there are heightened ethical considerations. This section will consider some of the ethical concerns that arose during this project, considering specific concerns that were raised by the LREC, relating largely to confidentiality, interviewee safety, and to the

¹⁴¹ Ilja Maso, 'Necessary Subjectivity: Exploiting Researchers' Motives, Passions and Prejudices in Pursuit of Answering "True" Questions' in Linda Finlay and Brendan Gough (eds), *Reflexivity: A Practical Guide for Researchers in Health and Social Sciences* (John Wiley & Sons 2003) 48; Banu Ozkazanc-Pan, 'Postcolonial Feminist Research: Challenges and Complexities' (2012) 31 *Equality, Diversity and Inclusion: An International Journal* 573, 584.

positioning of the researcher in the communities, and broader ethical concerns invoked after reflection on the British Socio-Legal Studies Association's Statement of Principles of Ethical Research ('Statement of Principles').¹⁴²

4.3.3.1 Ethical approval

Ethical approval was sought from the LREC in early 2019, and was granted on 1st July 2019. Particular ethical issues raised during the LREC process related to the process of engaging translators and transcribers, the collection and storage of data, and the PIS and consent form.

The LREC asked the researcher to engage with the University of Bristol's central contracts team, who assisted in the drawing up of the NDAs. Through the assistance of the contracts team, an NDA that satisfied the LREC was ultimately drafted, and then signed by the translator and the transcriber. The transcription process raised additional concerns for the LREC, particularly in relation to the manner in which data would be transferred. Through a password-secure process of transmission and the password-secured storage of the data, the LREC ultimately signed off on the process.

LREC had two concerns about the PIS, namely 1) whether the existence of the form would increase any risks that the participants were exposed to; and 2) the manner in which the researcher positioned himself in relation to participants, as an 'outsider' (a foreign researcher) or a relative 'insider' (a local researcher). After consultation with community contacts and leaders, the researcher was satisfied that no significant risk to the participants would arise from the distribution of the PIS, addressing the first concern about the PIS. In relation to concerns about the positioning of the researcher, the wording on the PIS was kept deliberately vague, allowing the researcher to determine his positioning whilst on the ground, in conjunction with community contacts. Questions were raised about whether a written consent form was optimal, in light of the low levels of literacy that could have been found amongst some participants. It was decided to proceed with handing out the written consent

¹⁴² Socio-Legal Studies Association, 'Statement of Principles of Ethical Research Practice' (2009) <https://www.slsa.ac.uk/images/2019summer/SLSA_Ethics_Statement_-_September_2021.pdf > accessed 1 March 2022..

form to every participant, with the translator talking through the form in each participant's mother tongue.

4.3.3.2 Broader ethical concerns

Ethical concerns are heightened when research projects engage people who might be vulnerable, a measure that can be understood in a range of ways, including, but not limited to, economically, politically or legally. In conducting the qualitative research that underpins this project, a range of concerns needs to be addressed, relating to obligations owed to the interviewees, to the academic community, and to broader society. This discussion and the fieldwork are informed by the principles contained within the Statement of Principles.

4.3.3.2.i Obligations to the interviewees

The interviewees in this project placed themselves in the researcher's hands, trusting that the promises made in the process of consent will be upheld, trusting that the data provided will be interpreted in good faith. In many ways, by placing this trust in the researcher, interviewees concede power to the researcher, place themselves, and their community, in a position of vulnerability. This vulnerability may have been enhanced by disparities amongst other matrices, including the societal power that whiteness and maleness, and the combination of these, have been imbued with. To obviate these factors, and to assist the interviewees in feeling comfortable, issues of consent, of confidentiality, and of academic integrity need to be addressed.

Principles 6, 7 and 8 of the Statement of Principles address the obligations that a researcher owes to participants in a research study. Principle 6 relates to the importance of trust and the recognition of the power that researchers assume in the course of the engagement with participants. Principle 7 relates to consent, and Principle 8 relates to confidentiality.

A research project will not be able to succeed without a degree of trust existing between the participants and the researcher. For a range of reasons many of the participants may withhold their trust from the researcher. In the South African context, racial, economic and historical

factors all combine to place many of the interviewees and the researcher in different positions of power. Recognising this, and the threat to trust that this represents, is important. Gatekeepers in the community were a vital bridge over these threats to trust.

The gatekeepers, consisting of people with whom the researcher had pre-existing relationships, who are trusted in the community, made initial introductions. It is important to note that a trust-based relationship between these gatekeepers and the researcher was vital to the successful accessing of participants. This was secured through an extended engagement process and by relying on relationships that pre-existed the research project. These gatekeepers were not privy to the interviews themselves, nor was any aspect of the content of the interviewees shared with them.

The role of gatekeepers was carefully managed to ensure that the free and full consent for participation by the interviewees was not vitiated through pressure applied by the gatekeepers. Although gatekeepers were vital to successfully gaining access to participants, and to having an initial level of trust, it was important for the participants to understand that the gatekeepers would not have access to the interview content. This is a protection for the participants, and an additional protection for the integrity of the project.

The possibility that the participants had had limited experience with providing consent was a weighty consideration. The researcher repeatedly emphasised that participants had the right to decline to participate, of the consequences of their choice to participate, and of their post-interview ability to withdraw. An informed consent form was developed and assessed by the community gatekeepers, who were asked to flag problematic elements of the form, and to consider whether the form should be translated into local languages. The gatekeepers considered this unnecessary, due to the presence of the translator and the fact that most members of the community had the ability to read in English.

Confidentiality is an important element of this project, not only in relation to the identity of the interviewees themselves, but also in relation to their community. It was important to both the gatekeepers and to the interviewees that their community was not identified by name and, further, would not be able to be clearly identifiable through the description of its

characteristics provided in the project. This presents certain obstacles, but these obstacles should not be considered to be fundamental. For the purposes of this project, the identity of the specific communities themselves is not of fundamental importance – instead, certain central characteristics, relating to the communities broadly, and, specifically, their historical racial demographics and current socio-economic characteristics, are more important. This is because the existence of particular understandings of South Africa’s constitutional culture, and the experiences of constitutional culture that the interviewees speak of, may be commonly shared by a range of people and communities within the archetypes identified, regardless of the specific identities of the communities. Thus, anonymisation extended to the names and specific details of the communities under investigation. Identifying characteristics of the individual participants and the communities in which data collection took place has been generalised prior to the submission of any publications. This anonymisation took place prior to transmission to the transcriber.

Finally, the researcher took seriously the impact of research on the various communities, recognising that particular communities and particular individuals are often the focus of researchers’ gazes, that particular individuals are often relegated to ‘objects’ of study. This project sought to address this in several ways, by spending time in the communities, building relationships of trust with people in the communities, by engaging a broad cross-section of society, focusing the research gaze across society, across elements of socioeconomic status, race and gender, and, where appropriate, by seeking to mitigate the extractive nature of the research process.

4.3.3.2.ii Obligations to the academic and wider communities

Researchers should report their findings accurately and truthfully. In light of the methodological approach selected, and the centrality of the data that the interviewees would provide, the choice was made to conduct the interviews in a language other than English (the researcher’s home language). This may give rise to questions regarding the integrity of the

interviews, due to the researcher's limited knowledge of indigenous South African languages and resulting inability to verify answers during the interview process.¹⁴³

Prior to entering the field, a process to ensure accuracy of translation was put in place, with the adoption of a double translation approach – during the interview, as noted, a translator assisted the researcher, translating directly from the language selected by the interviewee. The transcription of this 'on the spot' translation was to provide a first level of data for analysis. A duplicate audio recording was produced, reflecting only the interactions that took place in the language selected for the interview by the participant. This audio file was translated and transcribed by a second translator/transcriber, providing a second level of transcribed data for analysis. Where there were inconsistencies in the translation, a third translator would have been asked to opine as to a correct translation and, where necessary, to assist with contextual understanding of the context, connotations and denotations of a particular word or phrase. Despite these plans, no such conflict arose.

The close attention to accurate translation was a way to protect the integrity of the research project, and to avoid data tainting during the first 'on the spot' translation.¹⁴⁴ To base a project on discourse, and to not pay close attention to the manner in which the participants use language, would be problematic. This formulation was rendered obsolete by the choices made by the participants. Despite having a translator available to them, every member of Community 1 opted to be interviewed in English, a choice that, frequently, seemed to be the result of my presence, and my inability to speak the interviewees' home languages.. This choice raised different questions of ethics, requiring the researcher to engage in a reflexive process regarding their own role in shaping the data generated through the interviews, discussed above, at section 4.3.2, and in Chapter 5.

¹⁴³ Allison Squires, 'Language Barriers and Qualitative Nursing Research: Methodological Considerations' (2008) 55 *International Nursing Review* 265.

¹⁴⁴ The project recognises that translators will be active participants in the data gathering process and will impact the manner of data collected.

4.4 Conclusion

Focused on the lived experiences of individuals living under the constitutional state and the understanding of the law that these individuals generate from their engagement with the state, this project seeks to explore how they understand the relationships between themselves, the government, and the South African Constitution., and the extent to which fractures might be found in the country. Through the methodological tools presented by legal alienation, and through the careful execution of methods that enable access to first person accounts of the constitutional cultures 'from below' present in democratic South Africa, this research project will be able to assess how the transformational goals of the 1994 project are understood and reflected in the lives of people in South Africa.

It is expected that significant levels of alienation will be present, and the discrepancy between the constitutional culture 'from above', perceptions of the constitutional culture, and the constitutional culture that informs the day-to-day lives of individuals and communities will enable the identification of sites of fracture, sites where alienation is noticeable. With this framing and hypothesis, this project will move towards the analysis of the constitutional cultures 'from below' found in three distinct South African communities.

Chapter 5 – Community 1: The absent state, the absent constitution

5.1 Approaching accounts from the ground

5.1.1 Applying constitutional cultures and constitutional alienation

An analysis of three different communities in South Africa will form the heart of this research project. This analysis will be shaped around two questions, which provide different perspectives on constitutional culture ‘from below’:

- 1) A question which explores the interviewees’ perceptions of the South African state, of the nature of the country in which they live; and
- 2) A second which explores the constitutional culture that determines their day-to-day lives.

Earlier, in Chapter 2, the theoretical framework underpinning these questions was visualised as follows:

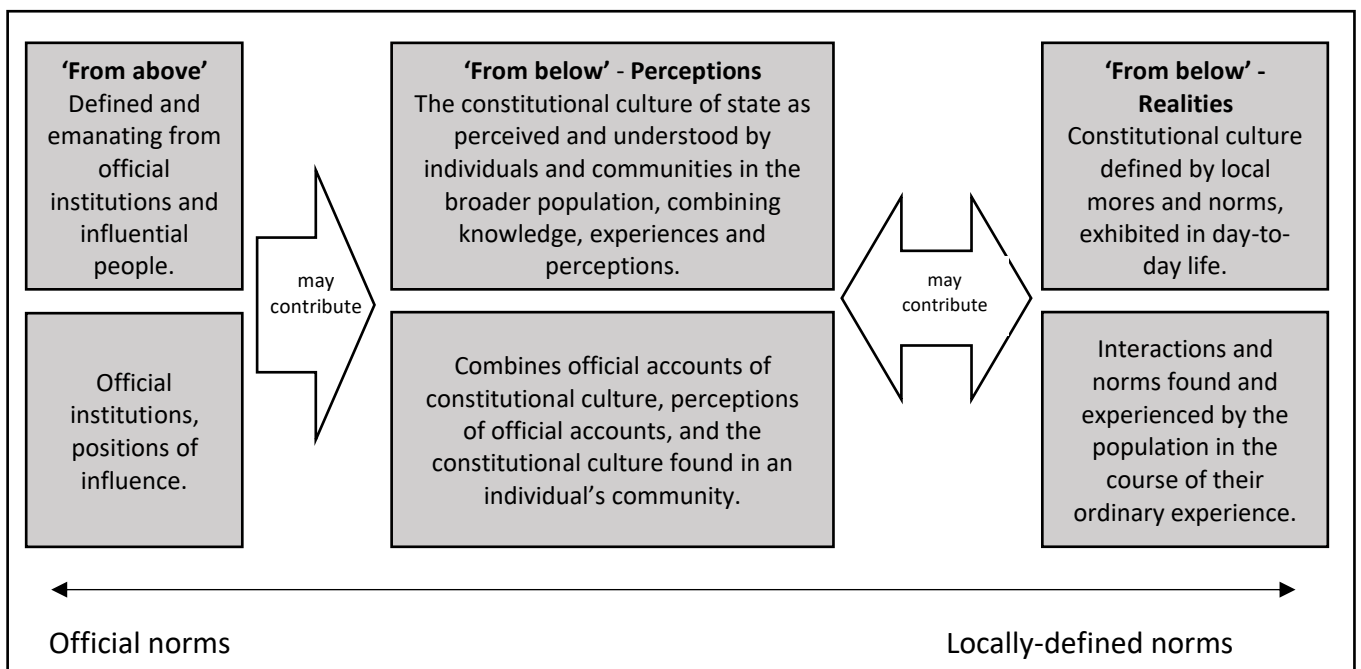


Figure 6: Approaches to constitutional culture

Exploring the interviewees’ answers to these questions will provide insight into the extent to which the constitutional cultures ‘from above’ is known and experienced or will explore the locations and nature of fractures in South Africa’s constitutional society.

As discussed in Chapter 3, South Africa’s constitutional culture ‘from above’ has placed transformational constitutionalism at the heart of the democratic nation. The juxtaposition of how the central tenets of transformative constitutionalism have been positioned by influential institutions and members of society and the extent to which these tenets manifest in the narratives of the interviewees will provide an indication of fracture and fragmentation in South Africa – if any. This assessment will take place utilising legal alienation.

Legal alienation explores the extent to which a legal system has lost legitimacy in the eyes of the population. When used in conjunction with an exploration of constitutional culture, legal alienation enables an assessment of the extent to which a constitutional culture has legitimacy amongst a population. Hertogh’s approach utilises similar questions to those that explore constitutional culture ‘from below’, allowing the identification of four different elements: legal meaninglessness, legal powerlessness, legal cynicism, and legal value isolation. These elements contribute to the formulation of normative profiles, which speak to the extent to which legal alienation is present in a cohort – and tells of the shape of this alienation.

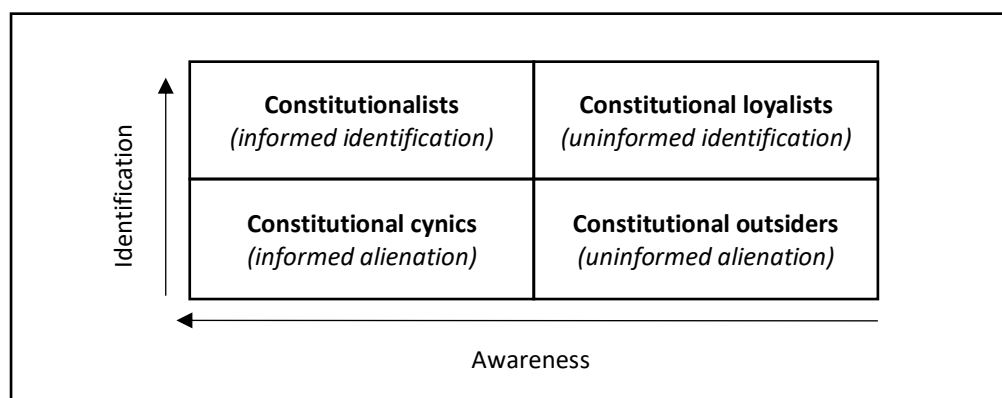


Figure 7: Constitutional alienation’s normative profiles

5.1.2 Structure of the community analyses

The analysis in each of the communities will follow the same structure. This is not to allow a comparison of the communities – the methods adopted do not allow for a comparison of the perspectives and experiences found in the communities. No rigorous control was engaged to ensure that the interviewees across the communities were comparable in every sense – in

light of the project aims, limiting the scope of the project to a particular demographic or comparable group would have added little. Instead, the community analyses allow for a consideration of a 'moment' in the life of the communities, of how different communities exist within post-apartheid South Africa. Applying the same structure allows a better view of the position in each community, and a consideration of common themes across the communities.

Each of the community analysis chapters begins with a description of the community, and a reflexive piece, considering the engagement between the researcher and the community in question. This chapter begins with a composite narrative, comprising quotations from a number of the interviewees, to provide an overarching insight into the content of the interviews conducted in Community 1, before exploring the level of constitutional awareness demonstrated by the interviewees.

The analysis will move to consider how the central tenets of transformative constitutionalism, understood in the South African context in particular ways, are understood by the interviewees. This will constitute the answer to the first question, an answer to a question about how law is experienced as an independent variable. The analysis in this section may or may not reflect the contents of the constitutional culture as espoused 'from above,' and will be shaped by the understanding that the individuals have of the state in which they live. The analysis in each community will then address the second question, exploring what constitutes constitutional culture for the interviewees in their day-to-day lives.

While the community analyses seek to interrogate the words of the interviewees and to understand the perspectives on the constitutional culture, which might be implicit rather than explicit, this project recognises the weight of the words of the interviewees. To reflect this, the community analyses integrates words of the interviewees, and is interlaced with quotations from them. These quotes will be lightly edited for clarity, if necessary, but wherever possible editing will be avoided.

The various elements of the explorations into constitutional culture as an independent and dependent variable will be mapped to the constitutional alienation framework, and a normative profile for the community will be identified.

5.2 Community description and reflexive considerations

For those involved in formulating the transformative vision underpinning narratives of democratic South Africa, communities like Community 1 likely featured prominently. Inhabited by Black African South Africans, marked by unemployment and poverty, and poorly served by the State, Community 1 bears the scars of the generations of discrimination imposed upon Black South Africans.

Clear themes emerge from the interviews, indicating how exclusion from opportunity and the interviewees' inability to obtain basic necessities of life inform the manner in which the Community 1 interviewees understand the nature of the democratic South African state. Succinctly put, the interviewees view themselves and their community as beyond the gaze of the consideration of the state. This feeling of exclusion provides an understanding of both the perception of the constitutional culture in the country and the constitutional culture that shapes their day-to-day lives, and elements of legal powerlessness, legal cynicism and legal value isolation were clearly evident in the empirical data. These elements combine to render the interviewees 'outsiders,' displaying significant levels of alienation, with ramifications for the legitimacy of the democratic state.

5.2.1 Community 1 description¹

Community 1 is a residential area that was formed in the late 1980s, on the far reaches of a large urban centre. Since its founding, it has largely been inhabited by Black African people, in a mixture of freestanding houses and informal houses. Today, the area is populated by just under 80 000 people, more than 99% of whom are Black African.

¹ In recognition of confidentiality guarantees made to the interviewees, which included that the community would not be identified or identified, the community description contained here operates to provide a general idea of relevant characteristics of the community – references are intentionally excluded, to avoid identification.

Nearly one in five households in the area have no income, while three quarters of the households earn less than R38 000 per annum, placing households in the area in the 37th percentile or lower. With an average household size of approximately 4, this means that 74% of households live on less than R890 per person per month, the lower-bound marker of poverty.² 20% of the population in the area over the age of 20 have school leaving certificates, awarded upon the successful completion of the final year of school. Between 2018 and 2021, average sale prices for residences in the area varied between R100 000 and R160 000, a fraction of the average house price for a house in South Africa (R993 000 in 2021).³

5.2.2 Interviewees

All of the interviewees were Black African South Africans, with an age range of 22 to 52. Two of the interviewees were aged between 20 and 30, 10 between 30 and 40, four between 40 and 50, and one over the age of 50.

5.2.3 Conducting research in Community 1: Reflexive considerations

The influence of the subjective identities that researchers and the 'subjects' of research bring to the research process is significant, shaping both the data-gathering and data-analysis phases of the research.⁴ In Community 1, a range of elements would need to be considered, and their potential impact on the research process accounted for. Amongst these factors would be race and socio-economic status, elements that, perhaps more than any other, marked me as an outsider to the community. The language in which the interviews were conducted is also worthy of note.

² Statistics South Africa, *National Poverty Lines (2021)* (Statistics South Africa 2021) 11, which defines the lower-bound poverty line as 'households whose total expenditure is close to the food poverty line...and therefore sacrifice some basic food-needs in order to meet their non-food requirements'.

³ 'South Africa: Property Trends and Statistics' (*Property24*, 2021) <<https://www.property24.com/property-trends>> accessed 21 July 2022.

⁴ John Smyth and Geoffrey Shacklock, 'Behind the 'Cleansing' of Socially Critical Research Accounts' in Geoffrey Shacklock and John Smyth (eds), *Being Reflexive in Critical Educational and Social Research* (RoutledgeFalmer 1998).

Power dynamics are an intrinsic part of both the research process and of interviews. As a white man entering the community under the auspices of an academic project, the contrast between the opportunities available to me and those that had been offered to them was stark, for all. The mere fact that I was able to drive into the community would have emphasised this fact. Whiteness, in South Africa, remains a position of power, one that creates safety and security, the ability to access resources, and the ability to avoid the indignities that poverty inflicts upon people. For people familiar with the struggles that are faced in their communities, the ability to be elsewhere is a boon. And, while wealthy Black people may be elsewhere too, to be white is to be 'elsewhere' – during my time in Community 1, spanning several weeks, I saw few, if any white people. The divides in the country were emphasised.

The fact that I was almost literally the only white person in the area may also have served to render my presence there interesting, if perhaps odd, and people appeared keen to share their perspectives. It was clear, however, that I was from outside, that I brought experiences to the area that were from a different life. My experiences of life, of challenges, and the interviewees' lives were, in many ways, almost unknowable. To enter this space, as an outsider, as a person of means and privilege, was to ask for unearned trust.

It was important to realise that power dynamics operate in numerous different ways. Coming into the community, as an outsider, I occupied particular positions of power in society, but I was also locked out of the dynamics of the community, my experiences able to offer only limited insight into the dynamics that sustain the interviewees' lives. Although the interviewees' lives were affected by poverty, it was important to take care not to reduce the lives of the interviewees to their poverty, not to impose assumptions about the implications of both historical and present patterns of deprivation on their identities or on the way that they understood their lives.

Language also represents a site of power, one that had the potential to contribute to the comfort of the interviewees. The interviewees were all able to speak multiple languages, but languages spoken by white people in South Africa, English and Afrikaans, maintain positions of power as they are frequently necessary for work. Although efforts were made to conduct

the interviewees in the home language of each interviewee, the interviewees themselves chose to answer in English. In some senses, this gave the interviewees agency, enabled them to assert their abilities – their multilingual abilities, on which I commented at the outset of the interviews. Nonetheless, the use of English in the interviews, the prioritisation of English as a language in which ‘work’ takes place, is something to consider – their preference perhaps emphasising sites of power in society.

It is not possible to gauge the extent to which the interviewees’ answers could have been shaped by my whiteness and accompanying privilege. Although the interviewees discussed race, and the ongoing privileges and wealth of South Africa’s white population, the extent to which this shaped the interviewees’ consciousness may have been understated, as the interviewees may have been self-censoring.

As an interviewer, I sought to provide the interviewees with an opportunity to talk about the day-to-day of their lives, to share the victories and frustrations that they face on a daily basis. In this way, I sought to bear testimony to the interviewees, to recognise that their lives, while hard, were not without agency. This included the affirmation of the value and importance of their ability to speak multiple languages. Several additional steps were undertaken to try to ensure that the interviewees felt comfortable, and that the research process was not merely an extractive exercise. The location of the interviews, in Community 1 and frequently in the houses of the interviewees, were designed to facilitate comfort. After each interview, significant time was set aside for general conversation, about their lives, about the country, all of which was unrecorded. Although these conversations contribute to a wider understanding of their thoughts, engaging ‘off the record’ had value, communicating a desire to hear their views, broadly stated. Often these informal sessions were accompanied by shared food and drink, some provided by me, some by the interviewees. Through the informal discussions, and the interviews themselves, an attempt was made to mitigate the extractive nature of the interview process, to move the conversation beyond the formal, meagre as this may have been. Finally, several weeks after the completion of the interviews, I provided a constitutional rights workshop in the area, for the general community, which was advertised

through a range of networks.⁵ This was attended by nearly 50 people, including several of the interviewees (their participation in the research project was not made public though), and was intended to provide an introduction to the Bill of Rights and the Constitution – an additional effort to reduce the extractive nature of the data collection process.

5.3 Community voices

*This vignette is a snapshot of the participants' responses. It is a composite - whilst it relies on the actual words of the interviewees, it draws on all of the interviews, attempting to provide an overall picture and insight into the themes and approach of the interviewees, in their own words.*⁶

I've been here since '93, I started my primary and high school here. I'm not working at the moment. I've worked, it was three years back, I had a job as a research assistant, it was a two month contract. Since then, I've been looking, but here in [Community 1], we don't get opportunities. The problem is government is not creating jobs or is not making some jobs. Many people don't have jobs, the economy is falling apart. Like now, I am just sitting at home, I have nothing to do. They say, "Education is for free", but on our side it is not, you have to pay about 100 bucks or around 50 bucks.

It is very hard for us. The transformation, it hasn't happened. It was meant to change but it didn't. There is too much corruption, for starters. Corrupted cops, corrupted mayors, corrupted councillors, let me say corrupted government. The government doesn't not think about us, it doesn't have the understanding of being poor, what does it take, what does it mean, what does a black person think about when they wake up. The government, they have certain communities that they listen to, and then there are certain communities that don't matter, whatever they are demanding is not taken into consideration. They don't know what happens in the locations. There was one incident, just here next to me, the construction was doing road works, and they dug a trench and then left it like that for a period of time, and

⁵ This workshop was based on a freely available constitutional literacy curriculum that I designed prior to commencing my PhD.

⁶ A fully referenced version of this vignette can be found at Annex 5, identifying the source of each quotation.

then the rain came and there was water. Two kids fell down there, and they died. The police came, but no police got into that trench – it was only the community.

I think I am lost about the term ‘constitution.’ The Constitution, its, its, it could be a paper, it could be a building, where human rights live. I think it came just before this new state of not having apartheid, I think it was made mainly for people to feel the redemption of freedom, you know, the acceptance of things changing for everyone in South Africa, so that South Africans can live a better life. People, they should have rights. The Bill of Rights is where my rights are, my rights as a citizen of South Africa. They are specifically made to make us acknowledge what we are allowed to do, the responsibility of what we are doing and the consequences. The Constitution has helped in getting a roof over my head, in giving us homes. I have the rights to say “no,” I have the right to report you, I have a right to talk, I have a right to approach you. But the Constitution matters more for others, for people who have money, people who have everything, because, for us, we don’t even know what the Constitution is.

When it comes to children, I can say that the government is not supposed to interfere, to put more laws, because these children are ours. Now the government, they have made rights for our children, now, they say if you maybe spank your child, you are wrong, you are become arrested. But whose child is this? Nowadays, when you discipline your child, it is called child abuse. The children get to do whatever they want.

We don’t have much things, we don’t even have roads, we don’t even have water, we are crying about electricity, it’s going on, its going off. The school is overcrowded, it has more than 1000, I think was 2000 to 3000 pupils, there is gangsterism, and I don’t think at that stage there can be any teaching or learning. I wish the government can change that, but, you know, in South Africa, if you want something, you must toyi-toyi,⁷ I think if we toyi-toyi strong, they can change it.

The police are not trustworthy, at least not according to the eyes of the community. There is a police station, but they are not helping. In the morning, I think at 3:30, you will hear the

⁷ A form of dance associated with protest

vuvuzelas, they are calling, then you know the neighbourhood watches are out, to go to different spots to escort people who are going to work. When there is something happening around, they blow a whistle, to let people know that there is something wrong. When you hear a whistle, you have to go out. We go out, then we go to the corner there. The main thing, the first thing, you should be armed, knobkerrie,⁸ shambok,⁹ you name it, go outside and see what is happening, if a neighbour need assistance. The police, they arrest you, and then the judge will sentence you, and then it is not a sentence suitable for that person. The community will beat you up, if you murder someone, the community can decide to murder you as well. In my world, it is okay. Justice from the community is quite stronger than any other justice. Each and every house has got that whistle, then if you blow that whistle everyone should come out.

5.4 Constitutional awareness

The Community 1 interviewees evidenced little knowledge about the existence of the Constitution, let alone its contents or the manner in which it functions in South African society. Questioned about whether they knew something about the Constitution, interviewees provided responses that varied from a complete lack of knowledge,

I think I am lost about the term 'constitution',¹⁰

to some connection between the Constitution and the law,

I don't know the Constitution, like, but, I know of some the things, ya...okay, a tavern should be closed at 2 o'clock...they got some racial speech, abuse, you know, people getting sentenced, you know, things like that,¹¹

to a vague and indistinct link between the Constitution to the idea of human rights,

⁸ A traditional weapon, a type of club.

⁹ A whip.

¹⁰ Interview 2.

¹¹ Interview 15.

The Constitution, it's...it's... it could be a paper, it could be a building, where human rights live.¹²

The interviewees have little knowledge of the rights themselves, and even less knowledge about how to enforce them, reflected in the vague way in which rights talk in the community takes place,

[People in the community] just boast, not frequently, they [talk about rights] when they boast that they apply, 'I've got rights, I've got rights.' It's just a saying, 'I've got rights.' When they buy in the shop there, 'I've got a right to buy,' at the counter, I always hear them at the counter, 'I've got rights.'¹³

Although the bulk of the interviewees could identify some link between the law and its associated institutions and mechanisms, this was tenuous, without any connection to a vision for South African society,

...I think that the government doesn't really know what South Africa should be like, they are just trying to address this and that, this and that, here and there, here and there. But there is no clear vision...¹⁴

The interviewees ascribed their lack of knowledge about the Constitution to its perceived irrelevance to their lives.

The Constitution, if I remember, was a booklet that were given to the people, that says the constitutional rights. But not everyone has access to that...People don't have time to be reading the constitutional rights, booklets, and stuff like that. They are concerns, like how to alleviate poverty, how do we get out of this poverty. Reading constitutional rights, booklets, it doesn't help them.¹⁵

¹² Interview 1.

¹³ Interview 13.

¹⁴ Interview 10.

¹⁵ Interview 7.

Instead of being understood to be useful to people in Community 1, and communities like it around the country, the Constitution is perceived to be a document that helps those with privilege maintain their position in society,

I might say the Constitution...it serves certain people, and doesn't serve certain people...it seems like the poor get poorer and the rich get richer.¹⁶

Implications

It may have been expected that the interviewees, living in an area with widespread poverty, many of whom are personally in highly straitened circumstances, would have been focused on the promises of South Africa's transformative Constitution. This does not appear to be the case – instead, the Constitution appears to exist only in the periphery of the interviewees' minds, an abstract notion, relegated to the margins of consciousness, with little apparent use for the interviewees or for others in their community.

The perceived irrelevance of the Constitution has consequences for the interviewees, who have no clear awareness of their entitlements or the mechanisms which they can use to demand these entitlements from the government. However, the lack of attention paid to the specifics of the rights contained in the Constitution reflects the difficulty that the interviewees may have in accessing the rights. Instead, the interviewees see the battles that they face on a daily basis as existing outside the realm of the Constitution, even for those interviewees who demonstrated greater understanding of the Constitution.

5.5 What do people in Community 1 experience and perceive to be the constitutional culture of South Africa?

Constitutional culture 'from below' consists of two questions, the first of which explores perceptions of the state, of the nature of the country in which a person lives. These perspectives will be informed by engagement with a range of formal and informal

¹⁶ Interview 7.

representatives of the state and custodians of a constitution, and by the experiences that an individual has in the course of their day-to-day lives.

Although explicit constitutional knowledge appears to be largely absent from the understandings that many of the Community 1 interviewees have of present day South Africa, the absence of explicit constitutional knowledge does not mean that the interviewees do not have perspectives about the nature of the South African state, about its constitutional culture, but instead means that their understanding of the state is gained from their interpretation of the world, which will include their engagement with representatives of the state.

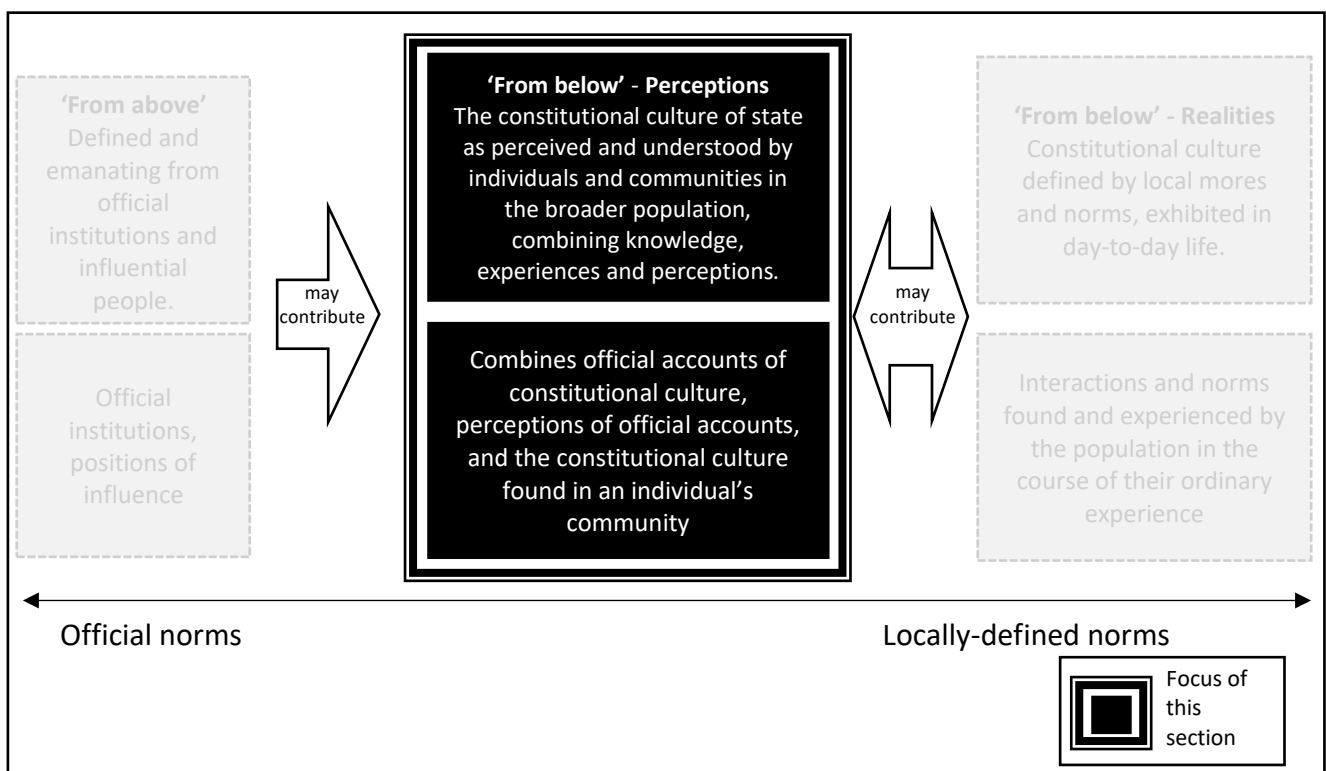


Figure 8: Approaches to constitutional culture, highlighting the role of 'perceptions'

5.5.1 Constitutional culture through the prism of the elements of South Africa's transformative constitutionalism

This section will seek to understand the Community 1 interviewees' perspectives on present day South Africa, interpreted through the prism of the central elements of transformative constitutionalism, discussed in Chapter 3. The use of the elements of the transformative state is a framing mechanism, a way to understand the alignment in the positioning 'from above' and the perceptions 'from below'. Through this, it will be possible to understand the extent to which the interviewees' experience of the country matches with, or fragments from, the constitutional culture that the State and influential people sought to embed 'from above,' and to gain a perspective on the legitimacy of the constitutional state in the eyes of the Community 1 interviewees.

5.5.1.1 The commencement of a 'new era'

The 'rainbow nation,' epitomising the new democratic era, with all that it was to entail,¹⁷ may have held the most promise for people in positions similar to those of the interviewees in Community 1. The interviewees appear to balance the idea of a new era that something should have changed, that their lives should not still be shaped by the legacy of centuries of discrimination against Black people, with their perception that the 'new' constitutional era appears to be a continuation of the past,

I don't see any change...I still now see, still the same, still the same, nothing has changed, nothing has changed [since 1994].¹⁸

Or, perhaps more damningly, some interviewees went beyond this, claiming that the economic situation during apartheid was better for Black South Africans,

¹⁷ See Chapter 3, above.

¹⁸ Interview 13.

[During apartheid], things were straightforward...there were many jobs in South Africa...today...the government can't manage, and...many people don't have jobs today.¹⁹

Rather than heralding the past, this critique can be seen as an indictment of the present, of a reflection of the circumstances that the interviewees find themselves in. The interviewees' assessment of the situation is shaped around race – race retains its salience in the democratic era, shaping the possibilities for life,

The government does not think about us...doesn't have an understanding of being poor, what does it take, what does that mean, what does a Black person think when he wakes up.²⁰

The focus of the state has not changed. Whiteness equates to influence, whiteness captures the attention of the state, and Black people, whether under the apartheid or the democratic states, continue to be disregarded,

[The government]...it does [care more about white people]. It was meant to change, but it didn't. We are treated the same [as during apartheid], even now.²¹

5.5.1.2 A new set of values entrenched at the heart of the state

The Community 1 interviewees have a clear sense of the values that underpin the constitutional culture of the democratic state. At the heart of this constitutional culture the interviewees see problematic ideas about human rights, hindering the ability of the authorities and individuals to protect themselves. The vulnerability of the interviewees is enhanced by the extent to which they see themselves as invisible to the state, rendered so by their Blackness, by their poverty. These two ideas will be explored in more detail in this section.

¹⁹ Interview 6.

²⁰ Interview 9.

²¹ Interview 12.

5.5.1.2.i Rights are more important than doing right

As discussed above, the transformative constitutional order sought to define the values of state.²² Dignity, freedom and equality, non-sexism, non-racism, and a commitment to human rights, were intended to be amongst the most visible elements of the nature of South African society.²³ The interviewees recognise that rights are an important part of the democratic nation, creating a freedom that was not previously present,

Our rights is the right to do anything you want to do...who decides what the limits are?...I decide.²⁴

The bulk of the interviewees quickly align rights with responsibilities,

Human rights are human rights, but they are specifically to make us acknowledge what we are allowed to do, the responsibility of what we are doing and the consequences of what we would be facing if we don't live by that.²⁵

To many of the interviewees, there has been a problematic decoupling of rights and responsibilities, the emphasis on rights ultimately causing problems in the country, the state overstepping its role, and creating a situation with potentially negative ramifications,

It's nice to have rights, but responsibilities as well needs to be emphasised a lot, because I feel like people are emphasising on rights more instead of responsibilities...you forget to tell us we also have responsibilities as well...There is a right to go everywhere, anywhere you want. A responsibility is, you can't go where it's not safe.²⁶

²² Discussed at Chapter 3, above.

²³ Section 1 of the Constitution.

²⁴ Interview 8.

²⁵ Interview 14.

²⁶ Interview 3.

The government is failing because of the rights they created...the worst things are happening now with crime and how people handle themselves because of rights.²⁷

In fact, the focus on rights is indicative of a state not willing to hold people responsible for their actions, not willing to make people face the consequences of their actions,

I can say children have too many rights, there is no more corporal punishment, even my own, my own child, I can go, I can be put in jail for reprimanding or even just spanking to say “No, you cannot do this...They are not going to school...they do this they do that because of their rights...so I think it’s too many rights, because in my own house, I can’t even do what I am supposed to do as a parent.²⁸

The perceived leniency of the state in its dealings with suspected wrongdoers is a reflection of the idea that the state’s response to wrongdoing is weakness, that the state is willing to sacrifice law-abiding citizens on the alter of rights,

I think that the justice system protects criminals more than it does its people.²⁹

This apparent permissiveness leads the interviewees to seeing rights and their centrality in present day South Africa as problematic. And the willingness of the State to interfere with their freedoms, including their freedom to parent as they deem fit, sits uncomfortably with another element that they see at the heart of the state – its perceived disregard for poor Black people, and focus on white people and other people with access to influence and resources.

5.5.1.2.ii Poverty means invisibility

The interviewees have the distinct perception that differential treatment is a defining value in South Africa, that their poverty renders them and their needs invisible to the state,

²⁷ Interview 3.

²⁸ Interview 7.

²⁹ Interview 14.

It comes down to money...they [the government] don't have respect for people who don't have money, for people who don't have anything, so we are treated differently than people who have money, not only whites.³⁰

Underlying the focus on access to resources and money is an ongoing belief that South Africa continues to be defined by inequality. For the interviewees, at the heart of modern South Africa is the fact that people with money are listened to and protected. It is wealth, the ability to access money, that is valued in present day South Africa,

If you have money, it looks like you have more rights...you can have the police on your payroll, you can have lawyers, judges and stuff, do you favours...people...put money first, yah, like, it's always about money.³¹

Although the interviewees feel that they should be treated equally, they are not, an inequality that they feel in their ability to access decent education and schooling, for themselves or their children,

[I am not happy with the school]...first of all, the school is overcrowded, it has more than 1000, I think it was 2000 to 3000 pupils, there is gangsterism, and I don't think at that stage there can be any teaching and learning that is conducive for the pupils and even for the teachers. I think in poor communities, it might be something that is similar.³²

The interviewees perceive themselves and their children to be irrelevant to the state, which does not care about whether they are able to access essential services, able to secure the things that they might need to improve their lives. This inequality manifests in their inability to access electricity, proper sanitation, and other infrastructural services,

No, we don't even have roads, we don't even have water, we crying about electricity, it's going off, it's going on...there has none...no impact...we don't have much things, we don't have resources...most of the things are far away.³³

³⁰ Interview 12.

³¹ Interview 15.

³² Interview 10.

³³ Interview 9.

To be poor is to be invisible. It is wealth that creates visibility, and the Constitution is little more than a tool used to maintain or exacerbate the ability of people with money to obtain what they want,

[The Constitution is important]..for others...people who have money, people who have everything...we don't have any knowledge about that. They buy the world.³⁴

That the interviewees' needs and opinions are disregarded is a continuation of their invisibility to the state, reinforcing the idea that the democratic era is little more than a continuation of the past. They continue to see the State as representative of a normative universe that fails to recognise any value in the lives of the interviewees or the people in their community. The interviewees speak of the disregard and marginalisation that epitomises their interactions with the State, a disregard that can be fatal,

Ministers and department officials are failing to even help the community. There was one incident just here, next to me...The road works, the construction that was doing the road works, they were putting pipes in, these big pipes, down in the ground, and they had to dig a trench. They left it ...the rain rained, and there was water. Two kids fell down there, and they died. The police came, but no police got into that trench, it was only the community.... The people threatened the police, to beat them, because they are not helping...Why are they there?³⁵

5.5.1.3 An emphasis on accountability and transparency

The accountability of the state to the entire population, and the enriching effect that this has on the dignity of the inhabitants of the country, is ostensibly a cornerstone of South Africa's democratic dispensation.³⁶ In contrast to this promise, the engagement that the interviewees have with the state and its agents is marked by an absence of accountability. This is, in part, perceived to be because of the incompetence or lack of interest of officials,

³⁴ Interview 12.

³⁵ Interview 10.

³⁶ Discussed at Chapter 3, above.

...are doing nothing – about solving crimes, about solving poverty, and all of that.³⁷

More commonly, however, the lack of accountability arises because significant swathes of the public service, including elected officials, are seen to be engaged in corrupt activities, misusing the money meant to improve the community,

There is too much corruption...corrupted cops, corrupted mayors, corrupted councillors – let me say, corrupted government.³⁸

The interviewees understand the impact of this corruption on Community 1 to be significant, impacting the infrastructure, the provision of basic necessities, and the opportunities available to community members. That the state does not move to prevent this corruption, to remedy the lack of delivery, is understood to be an indication that the state is designed to serve those in power.

The perceived failure of public officials to account for their actions and for the failures to deliver upon their promises and the promises of state undermines the interviewees', the community's, dignity further. Public officials are brazen in their attempts to avoid public accountability, an imperviousness which highlights their power, which reinforces the powerlessness of the community and its members,

We had a meeting some time back with our councillor, so I was called, because I am a chatterbox, I will tell you about what I need to tell you... When it's usually community meetings, people will be talking...councillor is there, everyone is dead quiet. I'm like, you know what, I want to roast this man, and then he called me outside and was like, 'Come here, let's talk quickly, because now you are asking me all this questions next to the community, and some are very difficult to answer, some, well, some I can't even answer, so can we talk privately.'³⁹

³⁷ Interview 12.

³⁸ Interview 5.

³⁹ Interview 14.

The failure of officials to practice accountability has ramifications for the value of accountability through the ballot box, for representative democracy,

I give you my votes, I ask for what I am asking for, but there is nothing. You don't even come to my place and tell me...'Your street is are going to be fixed this month,' or 'Your access to water are gonna be fixed' ...There is no communication with government.⁴⁰

The lack of accountability that the interviewees find to be ubiquitous in their interactions with the police in their community is indicative of the problems of accountability with the State more broadly. Perceived as unwilling to help,

[The police] used to play a different role...they used to play a pivotal role, a very important role, but now it's more of that they are benefitting. So in the evening, you would hear a van passing by...you hear they are coming...And then we would know that we are safe, you would randomly bump into the police, just standing around...And now, you barely even find, even if you go to the street and you bump into a police van...and you say 'Please come quickly', they are like 'Hey, we are not coming, just call the police station first, they will send someone.'⁴¹

the police are seen to be both incompetent and corrupt, and pay no price for their shortcomings,

I'm thinking they should take all the police and ...train them well, because they are fat like me, they don't know how to run. They eat, they take bribes, they don't have any training.⁴²

This is a reflection on state officials generally, who, in the opinion of the interviewees, have provided nothing to the interviewees or their community, but instead have used the opportunities given to them to benefit themselves. The interests of the interviewees form no part of this. The extent of this powerlessness, contrasted to the ability of those in power to secure benefits for themselves, is understood to part of how modern-day South Africa operates.

⁴⁰ Interview 9.

⁴¹ Interview 14.

⁴² Interview 12.

5.5.1.4 Positive obligations owed by the state

The provision of justiciable socio-economic was central to the vision of a South Africa where the dignity of every member of society is protected.⁴³ The interviewees indicate that they have some understanding that the constitutional culture of South Africa includes the protection and the provision of socio-economic rights,

Everyone who is in the country, I think we have rights...for instance, like children, they know they had the right to education, they have a right of food, they have a right to be loved.⁴⁴

This knowledge is not specifically about, or located in, the Constitution or Bill of Rights. Instead, the socio-economic resources that the interviewees claim are rooted in the experience of the interviewees, in their recognition of what they need to be able to lead a meaningful life, and their belief that they should be able to access these, and that they should be able to claim these from the state,

We have protests...they are unhappy with the conditions that they are living in, their daily lives...these are not conditions we are supposed to live, so for them to get what's right, is to go into the streets, so that the government can hear them...It's unhappiness.⁴⁵

Many of the interviewees rely on the state for the provision of important resources in their lives, or see the state as the major source of provision for these essentials – housing, social grants, free education. There is an alignment between their perception of what should happen, and of what the state should be doing, and what they see in their community,

My grandmother, she is still having her [social grant], and most of the kids...around here, they do have grants...I believe they still, they have that security.⁴⁶

⁴³ Discussed at Chapter 3, above.

⁴⁴ Interview 8.

⁴⁵ Interview 7.

⁴⁶ Interview 1.

I would say that the government do give them, RDP⁴⁷ houses, but there are so much people, the government cannot give them all at the same time, they should just wait and be patient, and if they qualify, they do eventually get the house, even though it is after so many years.⁴⁸

As a result of this alignment, to some extent, there is a belief that the state can provide, and a strong belief that it should so. Despite this positive intervention of the state, the enduring sentiment held the interviewees relates to the absence of the state and the inability of the state to provide what it should, to provide sufficient resources and support for the interviewees to have their prospects altered. Although some recognise that the state faces significant constraints on its ability to provide, the difficulties that the Community 1 interviewees face in securing the basics of life is an ongoing threat to their dignity, an ongoing reminder that their race and the legacy of racialised discrimination in the past continue to have ramifications for their lives, and of the fact that they feel that their community exists outside the gaze or the concern of the state,

The government does not think about us...doesn't have an understanding of being poor, what does it take, what does that mean, what does a Black person think when wakes up.⁴⁹

5.5.1.5 The making of a 'constitutional people' and the 'constitutional person'

The claims to unity that underlay the 'rainbow nation' rhetoric so prominent in the post 1994 era, and which continues to be found in South African society today, although perhaps less frequently, does not marry with the experience of the Community 1 interviewees. There is no sense of unity, of the people of South Africa being "united in...diversity."⁵⁰ As discussed above, the interviewees see South Africa as fundamentally divided between the 'haves' and the 'have-nots', where people without poverty are ignored, are rendered invisible,

⁴⁷ The Reconstruction and Development Programme (RDP) was a state programme adopted in the first years of the democratic era to 'direct the progress of the transformation strategy' needed in post-apartheid South Africa, and was outlined in Ministry in the Office of the Presidency, *White Paper on Reconstruction and Development* (Government Gazette 353: 16085, 1994).

⁴⁸ Interview 8.

⁴⁹ Interview 9.

⁵⁰ Preamble to the Constitution.

The government does not think about us...doesn't have an understanding of being poor, what does it take, what does that mean, what does a black person think when wakes up.⁵¹

The interviewees see the divisions in South Africa as racial, spatial, and class-based, with these elements intersecting to leave them as an underclass, generally irrelevant to those in power,

No, we don't even have roads, we don't even have water, we crying about electricity, it's going off, it's going on...there has none...no impact...we don't have much things, we don't have resources...most of the things are far away.⁵²

Whiteness was clearly linked to relative wealth, to access to resources and to influence, while the interviewees saw Black people, under both the apartheid and the democratic states, as second-class citizens,

[The government]...it does [care more about white people]. It was meant to change, but it didn't. We are treated the same [as during apartheid], even now.⁵³

In addition to the perception that society is fundamentally divided, the interviewees do not experience themselves to be holders of rights that they can enforce, that every individual is entitled to, regardless of their station in life. Instead, the interviewees see themselves as on their own, and see poverty-stricken people in similar situations similarly abandoned,

There are poor people, poor communities, where you find that, a typical example is the electricity thing. When the electricity goes in the suburbs, especially during that time of load shedding, people knew when the electricity would go out. But in the poor community, they have no...medium that the poor community are using or have access to, so even if they publish it on their website, people have no access to the internet...the poor community will only see by the electricity going out.⁵⁴

⁵¹ Interview 9.

⁵² Interview 9.

⁵³ Interview 12.

⁵⁴ Interview 10.

The interviewees' poverty, together with the lack of state support, also means that they are unable to access basic resources that would enable them to obtain a foothold in society, and they receive no help in doing so,

I did try, at the Department of Education, I did a course there, then they wanted money from me...they said I must pay 450, then the rest they will pay. I failed to get that 450, because I wasn't working and then at home there was no money for me to go and register.⁵⁵

The interviewees' perception that they have been left to their own resources undermines any claim to a united body politic within the democratic state. Their ongoing sense of marginalization, their sense that they are second-class citizens is a rejection of the notion that South Africa 'belongs to all who live in it'.⁵⁶

5.5.2 Perceptions of constitutional culture in Community 1: Themes and patterns

The Community 1 interviewees may have been expected to be the biggest beneficiaries of the progressive elements of the Constitution, of the Constitution's attempt to transform the society that was created by generations of discriminatory laws, policies and practices. These promises, when seen together with the persistence of inequality and poverty, might render the manner in which the interviewees implicitly engage with the central tenets of transformative constitutionalism unsurprising – the disillusionment, sense of abandonment and anger are clear. Across their engagement with the transformative tenets, three strong themes are present, which shape the interviewees' perceptions of the constitutional culture of the state: firstly, the sense that the present is a continuation of the past, secondly, that the constitutional culture benefits some within the country, and is indifferent to others, and that the constitutional culture undermines personal responsibility. These themes are related, but they will be discussed separately.

⁵⁵ Interview 13.

⁵⁶ Preamble to the Constitution.

5.5.2.1 The constitutional culture ‘from above’ is the same as that of the past

While perhaps naïve to expect to find the damage of the past to have been eradicated in the less than the three decades that the South African state has had to date, the extent to which the interviewees see the present as a continuation of the past is striking. They continue to be unable to access resources that would help them improve their lives and the lives of their families – the danger that they face in their community, the challenges that they face in obtaining employment, the perception that their children are receiving an inferior education are amongst the multiple factors which lead them to make comparisons with the past. In a manner reminiscent of the past, the state fails to provide the services that they need and is not held to account for this failure. In a country which has embraced substantive equality, and is ostensibly geared towards helping the most vulnerable, it is members of this very sector of society that feel that their present circumstances are a continuation of the past, that no real effort has been made to elevate their prospects. A clear perspective exists among the interviewees – the constitutional culture of the state bears no real difference to that of the past.

5.5.2.2 The constitutional culture ‘from above’ renders people in Community 1 invisible

The interviewees demonstrate a sense that their community is disregarded by the authorities, that the constitutional culture of the country is one that prioritises the interests, needs and desires of other communities, particularly those who are white and wealthy. This is, in some sense, a continuation of the past – the interviewees view themselves, people like them, as having always been outside of the concerns of the state – but, in other ways, is somewhat different. Their relegation to the margins of society, which once spoke of the racial discrimination of apartheid, is now enforced by elements of both race and class – they hold that, to be worthy of note, in the government’s eyes, one needs to be white or one needs to be rich. The interviewees are neither ‘white’ enough to be intrinsically worthy of consideration, nor are they rich enough to ‘buy’ consideration. They are on their own, despite their attempts and pleas for assistance.

5.5.2.3 The constitutional culture ‘from above’ is focused on the wrong things and undermines responsibility

The interviewees perceive a constitutional culture that is not invested in enforcing personal responsibility or accountability, fostering a society that is in decline and that undermines the rights and freedoms of the interviewees and their community. This perception of the constitutional culture manifests in three different ways in the interviews.

Firstly, the constitutional culture of the state, as the interviewees perceive it, undermines accountability and responsibility, enabling the state and its office bearers to avoid responsibility for failures and corrupt practices. State representatives are not invested in improving the community or in working for the people, seeking only to benefit themselves, and to avoid accounting for their actions and decisions. It is difficult or impossible for the interviewees to hold these people to account – be they police officers, councillors, or government ministers.

Secondly, recognising that the State is not invested in taking proactive steps to help them, the interviewees profess a commitment to taking responsibility for their own lives, to ensuring that they have the agency to make decisions that will improve the situation for their families and for themselves. The interviewees recognise that they need assistance in doing this, that they need training and access to resources. While the state should be assisting them in their efforts to improve their situation, to improve the conditions in their community, this has not happened, and the interviewees do not see anything in the constitutional culture that compels the state to take action. This failure undermines the interviewees and undermines their ability to take responsibility for their community.

Finally, the introduction and emphasis on human rights is concerning to the interviewees, who see these rights as unmoored from personal responsibility. To the interviewees, it is the rights included in the constitutional culture that contribute to such social issues as the crime that threatens their personal safety and to their inability to discipline their children. While supportive of rights, generally, they believe that rights should be accompanied by a focus on

responsibilities that are perceived to accompany them. The state’s focus on rights rewards those who have not fulfilled their responsibilities. By prohibiting parents from striking their children, by failing to take appropriate harsh steps towards suspected wrongdoers, and by allowing what are perceived to be ‘good’ conditions in prisons, the State is failing to impose any sense of personal responsibility and undermines the attempts of those in the community to imbue society with a sense of responsibility, personal and towards others.

Overarchingly, these elements combine to form the perception amongst the interviewees that the constitutional culture of the state is permissive and undermines responsibility – no one is held responsible for their actions, and this is a significant cause of some of the issues that their community faces and is a significant cause of a perceived decline in society, with increased crime and more poorly behaved children.

5.6 What do people in Community 1 experience as their constitution?

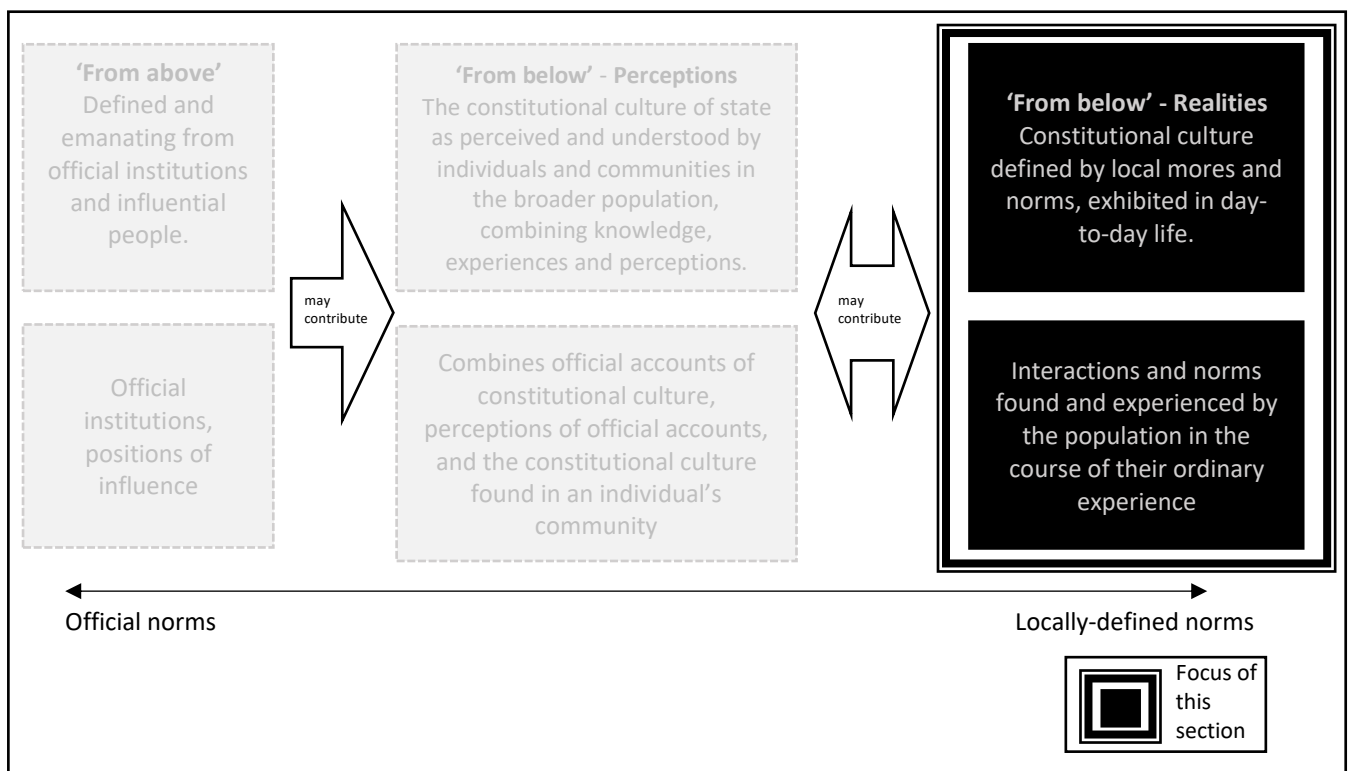


Figure 9: Approaches to constitutional culture, highlighting the role of day-to-day experiences

The second approach to constitutional culture from above explores the principles and rules that the interviewees see as shaping their day-to-day lives. These principles or rules may be

intimately linked to the perceptions of the constitutional culture of the state, or may be independent, shaped by localised demands.

In the face of a constitutional culture that is perceived to have little regard for or positive impact on the Community 1 interviewees' lives, the interviewees and their community understand themselves to have to undertake actions of their own in order to secure some sort of foothold on society. State absence and inaction give rise to a normative universe with two distinct elements – direct action and mutual responsibility. These elements form some of the day-to-day constitutional rules and principles that form the lives of the Community 1 interviewees, determining, to a certain extent, the social world in which the interviewees exist. These elements are foundational in the community, constitutive of and constituted by the manner in which the individuals understand their relationships with the state and with each other.

5.6.1 Direct action

Whilst the South African state entrenches rights for all members of society, the perceived absence of the state from Community 1, when allied with the dearth of constitutional knowledge in the community, appears to render these rights ineffectual. The interviewees have a clear perception that if anything positive is to take place in their community, it will take place in response to actions that originate in the community, a lesson learnt through the hopes they have placed in state representatives being repeatedly unfulfilled,

They are the ones that are doing nothing – about solving crimes, about solving poverty, and all of that...Maybe the money is coming, but we don't see the money, because the money goes to certain people, tenders, they eat it...they eat it.⁵⁷

The resort to direct action may, in some senses, be regarded as a reclamation of agency by the interviewees and the community. However, it is clear from the interviews that the paucity of options and resources available to the interviewees means that this agency is cloaked in

⁵⁷ Interview 12.

desperation, is a response to the ongoing assault on the dignity of the interviewees – the dignity that the state is required to protect but fails to do so. This claim to agency takes two forms, one in which the community members find a way to solve their problems and the other, closely linked, where they pressurise the state to fulfil a demand.

5.6.1.1 Finding solutions

The attempt to generate solutions from within the community is a reflection of the loss of faith in the ability or the willingness of the state to deliver. The community's first, and likely more effective solution, is to generate a solution that does not rely on the formal elements of the state, which has, to the minds of the interviewees, failed too many times,

We want a tar road, we want a clinic, we want this...we want...and they will be having a community meeting, with councillors. We will be telling the councillor, like this... but it has been more than 20 years, nothing has happened.⁵⁸

This might involve workarounds, which could include bribes, the community willing to band together to resolve the issue that they face,

There are times when they, when we haven't had electricity for about a week, then they would, you know, call Eskom.⁵⁹ Eskom would be like, 'I'm coming, but I am going to need a R1 000.' [Each community member] will come, and take out, each other would take out probably, R10 , R20, yes. And then you know it is fraudulent, because they are supposed to do that for free. But because we want to speed up the process, we'll take out the 1000, you know.⁶⁰

Or it might involve sourcing basic necessities from other places, like non-governmental organisations in the community,

⁵⁸ Interview 12.

⁵⁹ Eskom is the state-owned power company, which has, until recently, been the sole supplier of energy to South Africans.

⁶⁰ Interview 14.

We have a Muslim organisation, and the one that is a social development organisation...and they help, really, they give away groceries to the poor, the poorest, and they give kids everyday food, Monday to Friday. It is only on Saturday and Sunday that they don't get fed, and they give to grannies and to people who aren't working.⁶¹

Perhaps the clearest example of community-generated solutions is in the way that the community attempts to secure its safety. Although the form that the solution takes varies street by street, it is clear that at the heart of this solution is a belief that the state will not take the safety of the community seriously. This belief arises from in both the perceived absence of the police from the community,

The problem about the police is they are not on the ground...they are not visible here. An incident can occur, it will take 4 to 5 hours for them to be here, yet the police station is right down the road...But what I have noticed is that if the man from that house is fighting with his wife, it doesn't take hours to come...Maybe they fear for their lives, that's what I am thinking.⁶²

And in the way in which the police and other institutions of state, when they do become involved, are understood to treat wrongdoers, either allowing them to escape censure through corrupt processes,

You stole a cell phone and then the next morning I saw you walking as if, you pretending nothing happened. And then somebody rape someone, and then after 2 months you see that person has no evidence...because of money, bribery,⁶³

or treating them with a level of dignity and respect that is denied to the members of Community 1,

⁶¹ Interview 12.

⁶² Interview 13.

⁶³ Interview 2.

Outside, you have to hustle, we have to work to get the things...prisoners have so many rights, because they just stay there and are given everything, where else on the outside, we all have to work.⁶⁴

In order to address the neglect of the state, individuals within the community form street committees or neighbourhood watches, which offer protection,

So, in the morning, I think at 3.30, you will hear the vuvuzelas,⁶⁵ they are calling. That's when you know all the neighbourhood watches are out, to go to different spots to escort people who are going to work...at that time it's very active so people are safe.⁶⁶

and administer 'appropriate' punishments to people suspected of wrongdoing, a punishment that will, in the minds of the people inflicting the punishment, better protect the community,

...they would beat you, they would bend you here, they would call the community and beat you, and tell the community that this person has done this and this and this...and the would whip you with a sjambok⁶⁷...then you have your punishment and no one will ever do anything that is not right.⁶⁸

The self-help activities that the interviewees speak of, whether they are attempting to obtain essential services, vital resources, or to secure the safety of individuals, families and the broader community, are not activities that the interviewees particularly want to undertake. The interviewees recognise the shortcomings of the solution, and the limited ability of their solutions to solve their problems. In the absence of the state, in the perceived absence of a constitutional culture that would enable them to claim assistance and protection, the importance of the community working together to find a solution is essential, and participation in these solutions is expected. The limits of self-help are reflected in the second

⁶⁴ Interview 8.

⁶⁵ A vuvuzela is a trumpet-like instrument found throughout South Africa. Closely associated with soccer, it was made famous/infamous during the 2010 World Cup.

⁶⁶ Interview 14.

⁶⁷ A whip.

⁶⁸ Interview 13.

form of direct action, in which the interviewees speak of how the community attempts to force the state to deliver.

5.6.1.2 Creating pressure

The interviewees recognise that there are problems of necessities and resources for which they cannot generate solutions themselves, either on grounds of practicality or on grounds of costs, recognising that the mechanisms of state need to be engaged

...matters of tar roads, water, rates, and service deliveries that are not happening, how we are going to move forward, and finally we call up the councillor as well.⁶⁹

However, engaging individual councillors, asking them to take action, seems to be a tactic of limited impact, particularly in light of the idea, held by multiple interviewees, that councillors are not overly committed to improving the lot of the community,

We don't see our councillors...and our councillors are not crying for us...so it is very hard for us.⁷⁰

In light of this, faced with situations where self-help is impossible, the community takes to the streets,

[demanding things from the government doesn't work] until they are out on the street and toyi-toyi, and then the government start to listen. People are toyi-toying for basic services most of the time. It's just taking out their frustrations, its, you know, people think that the government doesn't understand any other way of demanding certain things...if you don't toyi-toyi, the government won't listen to you.⁷¹

Street protest is a way to elevate the demands and the needs of the community, a way to capture the attention of the government.

⁶⁹ Interview 7.

⁷⁰ Interview 9.

⁷¹ Interview 10.

It's [the government's] job to like, provide us with those things, so if they are not providing us with those things...we will say, it's our rights to go and do toyi-toyi, as much as I don't like burning tyres in the street...they demand houses, jobs, a councillor to go down, we have no electricity for 3 weeks, 3 months or 4 months now, no water, you know.⁷²

The poverty of the community in which the interviewees live means that many of the services that the interviewees and the community demand are basic in nature, are essential to a dignified life. Corruption is seen as a significant obstacle to the realisation of these rights, protest a way of elevating concerns beyond possibly corrupt local officials, who may be subverting the intentions of the wider state,

Maybe the money is coming, but we don't see the money, because the money goes to certain people, tenders, they eat it...they eat it.⁷³

Public protests have a long history in South Africa and have been frequent throughout the apartheid and the democratic eras.⁷⁴ The interviewees are sceptical of the potential of such protests to succeed – in fact, to some interviewees, the democratic government is perceived to be even less responsive than the apartheid government.

Before [1994] when they protested for the toilets that they wanted, we got them, now, if you protest or you don't protest, it is the same.⁷⁵

5.6.2 Mutual responsibility

The onus that is placed upon direct action places a responsibility upon the members of the community. For the interviewees, in order to receive the benefits that accrue from direct action, from solutions that arise within the community or from presenting a united front to put pressure on the authorities, it is necessary to recognise that the individuals within the

⁷² Interview 15.

⁷³ Interview 12.

⁷⁴ Martin Bekker, 'Language of the Unheard: Police-Recorded Protests in South Africa, 1997–2013' (2022) 49 *Review of African Political Economy* 226, 228.

⁷⁵ Interview 8.

community carry a responsibility towards each other. In large part, this responsibility is the result of a paucity of other options – unable to rely on the state, unable to access private services, it is only through the actions of a community working together that solutions to the challenges of living in Community 1 can be found. This holds for safety,

[The whistle] happens everyday...the whistle is in each and every house, so that when we have a problem you blow the whistle, and we gonna come out...I have to go out, I have kids, I have a wife. If I don't go out, what if that thing that is happening at the house happens at my house while I'm not there? So I have to go out, in order people know that ...that house we need to guard.⁷⁶

and for the solutions that the community might generate to problems like an electricity cut, where the community members might pool their money,

Eskom would be like, 'I'm coming, but I am going to need a R1 000.' [Each community member] will come, and take out, each other would take out probably, R10 , R20... we'll take out the 1000.⁷⁷

The protection of the community, the acceptance of responsibility, is a simultaneous assertion of the community's needs and norms, and a rejection of the absent state. The emphasis that is placed on fulfilling one's personal responsibilities to the community, to working together, is highlighted by an issue that several of interviewees raised, involving the restrictions that the constitutional state has placed on the physical chastisement of children. To many of the interviewees, failing to beat your child when they have done wrong is an abdication of your responsibilities as a parent, abdicating your responsibility to the child and to the community,

I can say that children have too many rights. Remember, there is no more corporal punishment, even my own, my own child, I can go, I can be put in jail for reprimanding or even just spanking to say 'No, you can't do this!' But you can no longer spank the kids. So, I think

⁷⁶ Interview 13.

⁷⁷ Interview 14.

they given so many rights to an extent that to see them now, they are roaming the streets, they are not going to school.⁷⁸

The state is interfering with the responsibilities that the interviewees have accepted, and, in doing so, the interviewees view the state as undermining the wellbeing of the community. Failing to fulfil the obligations of parenthood, which includes physical punishment, has the potential to undermine the collective, as undisciplined children can become undisciplined adults. Both of these are a threat. Similarly, the community's resort to self-defence, to violence, can be understood as a form of civic responsibility – by violently 'teaching' the wrongdoer, the community is protected,

The main thing, the first thing, you should be armed, knobkerrie,⁷⁹ shambok,⁸⁰ you name it, go outside, see what's happening. If your neighbour needs assistance, to chop off his hand or to do whatever the beating...I think it's the only way of teaching that person, if you come back again, this, this is little. I'm going to do worse to you tomorrow.⁸¹

5.7 Constitutional alienation and fracture in Community 1

In many ways, the lives of the Community 1 interviewees are defined by a sense of abandonment, a sense of living beyond the reaches of the state and the law.⁸² The constitutional culture that they experience as the constitutional culture of the state serves to undermine their dignity, to render them invisible.⁸³ The interviewees resist this, resist the fact the constitutional culture that they feel has been imposed upon them,⁸⁴ adopting local norms that are of fundamental importance and allow the interviewees and their community to claim

⁷⁸ Interview 7.

⁷⁹ A traditional weapon, a type of club.

⁸⁰ A whip.

⁸¹ Interview 5.

⁸² See sections 5.5.1.1: *The commencement of a 'new era'*, 5.5.1.2.ii: *Poverty means invisibility*, 5.5.1.4: *Positive obligations owed by the state*, 5.5.1.5: *The making of a 'constitutional people' and the 'constitutional person'* and 5.5.2.2: *The constitutional culture 'from above' renders people in Community 1 invisible*.

⁸³ See sections 5.5.1.2.ii: *Poverty means invisibility*, and 5.5.1.5: *The making of a 'constitutional people' and the 'constitutional person'*.

⁸⁴ See sections 5.5.1.2.i: *Rights are more important than doing right*, and 5.5.2.3: *The constitutional culture 'from above' is focused on the wrong things and undermines responsibility*.

agency,⁸⁵ to assert their right to be seen and to have their rights and their dignity respected.⁸⁶ Constitutional alienation, based on Hertogh's legal alienation,⁸⁷ identifies constitutional outsiders as people with elements of 'constitutional cynicism', 'constitutional powerlessness' and 'constitutional value isolation.' These elements are present in Community 1, and the interviewees can be identified as 'constitutional outsiders,' with limited awareness of the law, and not identifying with those aspects of the constitutional culture that they perceive to be present.

5.7.1 Constitutional alienation

5.7.1.1 Constitutional cynicism

Legal cynicism is found when people believe that law does not matter,⁸⁸ and, similarly, constitutional cynicism is found where the Constitution and the constitutional culture are deemed to be irrelevant. The interviewees see the constitutional culture that they perceive to present from above as irrelevant to their lives, as irrelevant to the actions that they deem necessary to create opportunity and to protect themselves, their families and their community. Understanding the constitutional culture of the state to have abandoned them, to have rendered them unworthy of attention or assistance, formal structures of state become irrelevant unless there is no alternative, and the interviewees find their own solutions. It is only through this that they can assert the safety of their community, the need to promote accountability, and the need to assert justice,

The community don't have the rights to take the law into their own hands when we've got the police and even though the police is not working straight, you don't have the right to take the law into your hands....But maybe if...we take that person maybe to the police we know that person is going to be here again, swearing at us.⁸⁹

⁸⁵ See sections 5.6.1: *Direct action* and 5.6.2: *Mutual responsibility*.

⁸⁶ *ibid.*

⁸⁷ Marc Hertogh, *Nobody's Law* (Palgrave Macmillan 2018) 60.

⁸⁸ *ibid* 56.

⁸⁹ Interview 6.

The failure of the police to take responsibility for apprehending wrongdoers in the community is seen to be the fault of rights, an integral part of the new constitutional order, and of the general lack of interest of the police in helping them. The authority of the police to intervene in situations where the community was imposing its justice was rejected,

The police, they are not involved...They try to involve themselves, but...we just stare at them and then we will tell them straight 'We are not in your business, stay out of our business', because if they ever wanted to help us, they should not even be there, they should have been out looking the perpetrators.⁹⁰

The antipathy towards the constitutional culture and its representatives goes beyond anger at the failure of the officials to fulfil their duties. Put simply, the interviewees believe that the state is unwilling or incapable of dealing with the problems that the community faces, whether in relation to crime,

I will tell you this much, mob justice has worked, much more than the cops have,⁹¹

or to joblessness and poverty,

...if the Constitution was working the way it was supposed to be working, I don't think I would be sitting here, not working.⁹²

5.7.1.2 Constitutional powerlessness

Legal powerlessness 'refers to the sensed ability to control the outcomes of legal processes'.⁹³ Constitutional powerlessness arises when people are unable to shape the constitutional culture of their state. The perceived lack of access to public officials, the inability to raise their issues, and the lack of accountability amongst public officials has disempowered the

⁹⁰ Interview 1.

⁹¹ Interview 14.

⁹² Interview 13.

⁹³ Hertogh (n 87) 55.

interviewees, creating a constitutional culture that is not responsive to their needs, that does not understand what is required for people in Community 1 to prosper

...have to feed their family...they need a job but the job they are not getting it, because the problem is the government is not creating jobs or is not making something jobs.⁹⁴

The interviewees believe that the community is ignored by the state because of its poverty, that it has been unable to contribute to the shape of the country because they, and people like them do not matter. A constitutional culture has been put in place that answers other peoples' needs, and there is little that the interviewees can do to make themselves 'worthy'. Their engagements with the formal structures of power strip them of agency and of dignity, rendering them powerless.

5.7.1.3 Constitutional value isolation

Constitutional value isolation is the final type of legal alienation identified by Hertogh.⁹⁵ Constitutional value isolation occurs when there is 'a perceived gap between the values of the law and one's personal values,' when what is perceived to be society's constitutional culture is regarded by an individual or a community as being unimportant and of low value.⁹⁶ Constitutional value isolation is on display by the interviewees in Community 1, who believe that the government does not care about them, despite their own belief in their intrinsic value,

The government does not think about us...doesn't have an understanding of being poor, what does it take, what does that mean, what does a black person think when wakes up.⁹⁷

The values and laws of the state are deemed irrelevant to the heightened situation of poverty and vulnerability in which the interviewees find themselves. In fact, to the interviewees, it

⁹⁴ Interview 9.

⁹⁵ Hertogh (n 87) 56.

⁹⁶ *ibid.*

⁹⁷ Interview 9.

appears that the police have prioritised wrongdoers, protecting the wrongdoers at the expense of the community, creating a value system that the interviewees do not recognise,

The government is failing because of the rights they created...the worst things are happening now with crime and how people handle themselves because of rights.⁹⁸

The extent of this disconnect is made clear in several interviewees expressing a yearning for the apartheid era, for a punitive state that is explicit in its use of force against people who are in the wrong. This is contrasted with the approach of the democratic state, whose values prioritise the wrong people,

I think that the justice system protects criminals more than it does its people.⁹⁹

If we catch the perpetrator, the perpetrator will be beaten before the police come. And this is whether the other thing puzzles, because that person, who steal, he can formally lay a charge against the community and in the court.¹⁰⁰

To the interviewees, the constitutional culture, as they understand it, makes no account for the choices that individuals have made, and diminishes personal responsibility. The interviewees see community justice as a necessary response to these choices – a reaction designed to put right the issues within the constitutional state. To the interviewees, people involved in wrongdoing do not necessarily lose their rights, but need to be taught, and these lessons are best administered physically – these lessons are intended to uphold the values and the safety of the community. A failure to impart them is a threat to the community and all within it. The approach of the community towards wrongdoers is both punitive and corrective,

Beatings are good and bad at the same time. On the good side is that the person will never do it again...On the bad side, is when the police come, the people that were doing the beating, they get arrested.¹⁰¹

⁹⁸ Interview 3.

⁹⁹ Interview 14.

¹⁰⁰ Interview 5.

¹⁰¹ Interview 3.

The corrective bent of the community punishment closely correlates to the approach that many of the interviewees adopt towards children. In the same way that the interviewees see the state as favouring the wrongdoers and failing to hold them to account due to prioritising their rights, the interviewees see the government elevating the rights of the child. Although this state action seeks to protect the bodily integrity of the child/wrongdoers, the government is ultimately short-sighted, not invested in the long-term success of either the child/wrongdoers or the community,

You spank the children...some parents spank the children because they love them, they want to teach them the right way.¹⁰²

Failing to teach people to be accountable will ultimately place them in more harm. The constitutional culture of the state is perceived to fail to recognise this. Additionally, the state oversteps its role, and tries to insert itself into the relationship between parents and children, which the interviewees believe to be inappropriate,

...the government was not supposed to interfere, to put more laws, because these children are ours, we stay with them, we know them...now they say if you spank your child, you are wrong, you will become arrested...whose child is that, who stays with that child?...Now everything is out of our control.¹⁰³

This overreach is an example of the state misunderstanding its role, of the constitutional culture not understanding that it is parents who have the best interests of their children at heart, who need the authority to do what they must. The values of the constitutional culture are wrongheaded and at odds with the values of the community.

5.7.1.4 Normative profile

Constitutional alienation focuses on two questions, one of which explores awareness of the constitutional culture, the other exploring the extent to which people identify with the

¹⁰² Interview 5.

¹⁰³ Interview 11.

constitutional culture. These questions can be plotted together on a grid,¹⁰⁴ providing a normative profile for an individual, group or community. High identification with the law will reduce alienation, low identification, whether accompanied by knowledge of the law or now, will result in alienation, and a threat to the legitimacy of the legal order in question.

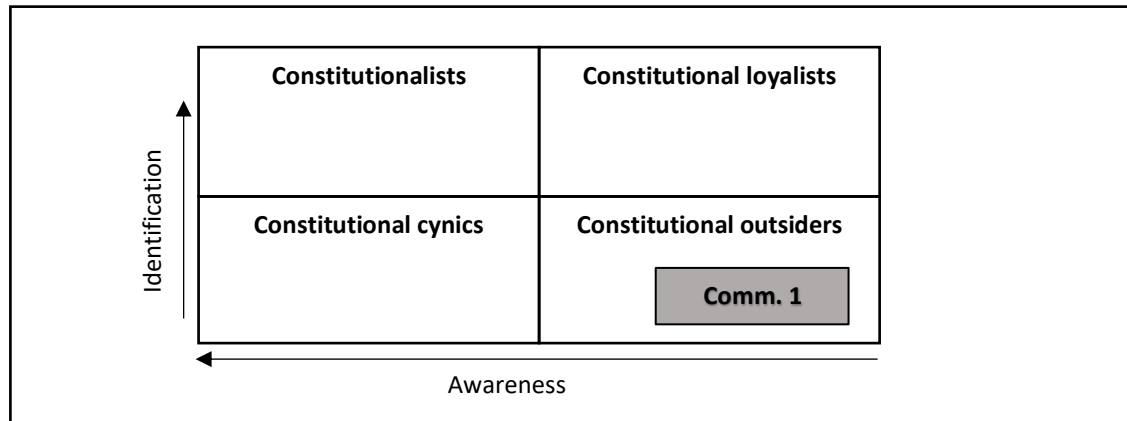


Figure 10: Constitutional alienation in Community 1

The interviewees in Community 1 are clearly positioned as constitutional outsiders. They neither identify with the constitutional culture of the state, as they perceive it, nor have a particular strong awareness of this culture.

5.7.2 Constitutional alienation and fracture in Community 1

The extent of the alienation that the Community 1 interviewees feel and experience is substantial, and as ‘constitutional outsiders’, they, as far as possible, seek no answers from the constitutional state, have no expectation that the constitutional culture of the state will provide assistance to them. They are beyond its gaze.

The fractures in this community can be depicted as follows:

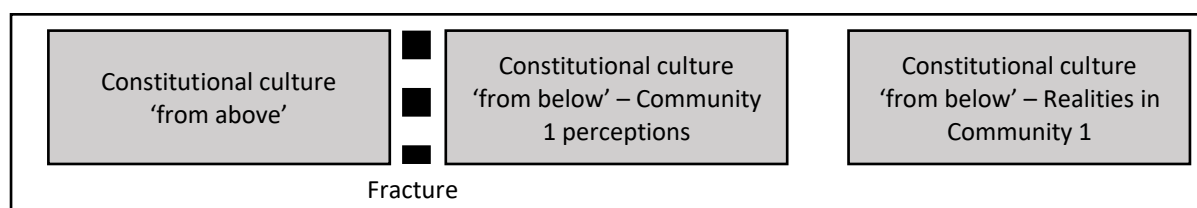


Figure 11: Fracture in Community 1

¹⁰⁴ See Chapter 4, above.

There is a clear fracture between the constitutional culture ‘from above’ and the interviewees’ perception of the constitutional culture of the state. There are virtually no vestiges of the constitutional culture ‘from above’ in the perspectives that the Community 1 interviewees have of South Africa’s constitutional culture. This is significant. The constitutional culture ‘from above’ was ostensibly designed to transform the country, to address the injustices of the past and to help people of colour in South Africa achieve dignified and prosperous lives, and is armed with a range of mechanisms that are intended to realise this. The constitutional state is, according to the constitutional culture ‘from above’, a state that is meant to be particularly protective of the most vulnerable members of society. That the Community 1 interviewees can be regarded as ‘constitutional outsiders’ is deeply worrying for the prospects of constitutionalism in South Africa.

Hertogh notes that “outsiders’ have turned their backs on the law.”¹⁰⁵ As constitutional outsiders, the Community 1 interviewees have a perception of the constitutional culture of the state that leads them to turn their backs, as far as possible, on the constitutional culture of the state, as they perceive it. They reject its central tenets, as they understand them. In some part, this is a result of their perception that the constitutional culture has, in essence, rejected them.

The Constitution, the constitutional culture ‘from above’, which positions itself as an intervention intended to transform South African society, is absent or regarded as a threat to the health and safety and to the prospects for the future, of the entire community. In the face of this absence and the perception of a range of values that they do not identify with, the community members have been forced to adopt their own standards and enforcement behaviours. That people who have little, virtually nothing, continually have to resort to self-help is a damning indictment of a vision that has failed to be realised. Whatever assistance the interviewees have received from the state – and many of them have received financial assistance, as well as assistance in other forms, it simply does not register as being part of the constitutional culture, or is deemed insufficient, inconsequential.

¹⁰⁵ Hertogh (n 87) 59.

The experiences and perceptions of the Community 1 interviewees seem to have implications for the critique of the Constitution put forward by decolonial theorists.¹⁰⁶ Justice for past discrimination, the opportunity to create their own lives, is denied to the interviewees and their community. As they understand their position, they are invisible to the state, reminiscent of Madlingozi's 'non-beings', 'suffering unremitting dehumanisation and social invisibility'.¹⁰⁷ It is difficult, perhaps impossible and likely disingenuous, to argue that the subjugation of the Community 1 interviewees has ever been interrupted, let alone ended. The community stands alone, and it has little hope or expectation of any change.

5.8 Conclusion

It is clear from the interviews conducted in Community 1 that the constitutional culture that the interviewees perceive to be present in post-apartheid South Africa is a constitutional culture that has little regard for people like them, for poor Black African people. This perception serves to alienate the interviewees from the state, to render the constitutional culture 'from above' completely irrelevant to them. As 'constitutional outsiders,' they have been forced to establish a constitutional culture that enables them to gain the best possible access to the basic resources that they require to live, and to ensure the safety of those in their community. The interviewees see themselves as oppressed, the modern state a continuation of the past. This resonates with critiques of transformative constitutionalism in South Africa that see a continuation of colonial subjugation within South Africa's transformative constitutional culture.

¹⁰⁶ Discussed in Chapter 3, above.

¹⁰⁷ Tshepo Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 Stellenbosch Law Review 123, 124.

Chapter 6 – Community 2: Re-experiencing exclusion

6.1 Introduction, community description and reflexive considerations

Community 2, a community of Coloured South Africans,¹ had reason for hope at the dawn of the democratic era. The promises that would accompany this era meant that, for the first time, their voices would be heard, their presence felt in the shaping of the new nation, a ‘rainbow nation.’ Nearly 30 years on, the interviews conducted in Community 2 indicate the extent to which the hopes of the interviewees have not been realised. Instead, the interviewees, who continue to see race as the primary ordering factor of society, see the discrimination that they faced in the past from the white apartheid government as being replicated by the democratic government, a government that they understand to only be concerned with Black South Africans.

Religion is important to the interviewees, and the freedom of religion that the Constitution protects is well known by the interviewees, and much valued. While this protection was regarded as important, it could not overwhelm the ongoing sense of exclusion and the absence of hope that things will improve that permeated the interviewees conducted in Community 2. The sense that the country did not belong to them contributed to the presence of constitutional alienation, to the presence of legal meaninglessness, legal cynicism and legal value isolation in the community, creating a normative profile for the community that can be understood as bridging Hertogh’s ‘cynic’ and ‘outsider’ profiles.² This chapter will consider these findings and their ramifications in more detail.

6.1.1 Community description³

Community 2 is an historically Coloured area located within 5 kilometres of an urban centre, consisting largely of freestanding houses. In the middle of the twentieth century, the area, on

¹ See footnote 134 in Chapter 4, above.

² Marc Hertogh, *Nobody’s Law* (Palgrave Macmillan 2018) 59.

³ In recognition of confidentiality guarantees made to the interviewees, which included a guarantee that the community would not be identified or identified, the community description contained here operates to provide

the outskirts of the urban centre, was populated by families forcibly removed from more central areas in the urban centre. Today, the area, consisting of just over 2000 people, continues to have a large presence of Coloured people (54% of the area's population is Coloured, and 41% Black African). A significant proportion of the Coloured population is Muslim. There is a significant divide between the Coloured community, with its recent historical links to the area, and the more recently arrived Black African population, with a significant income disparity between the communities.

Between 2018 and 2021, average sale prices for residences in the area varied between R283 000 and R520 000, substantially below the average house price for a house in South Africa (R993 000 in 2021).⁴

6.1.2 Interviewees

All of the interviewees were Coloured South Africans, with an age range of 24 to 61. One of the interviewees was aged between 20 and 30, three between 30 and 40, two between 40 and 50, and four over the age of 50.

6.1.3 Conducting research in Community 2: Reflexive considerations

Entering into Community 2, I thought that two elements of the subjective identities of the interviewees and of my own identity would come to bear on the data collected and the subsequent analysis: religion, shared by all of the interviewees, but not by me, and race, underpinned by the fact that the interviewees and I were of different races. These elements, together with the power inherent in data collection and data analysis, would play a role in the manner in which the interviews were conducted, and the contributions made by the interviewees.

a general idea of relevant characteristics of the community – references are intentionally excluded, to avoid identification.

⁴ 'South Africa: Property Trends and Statistics' (*Property24*, 2021) <<https://www.property24.com/property-trends>> accessed 21 July 2022.

The manner in which I gained access to the community, through mutual connections, trusted by both the interviewees and by me, created a nexus of trust and reduced scepticism amongst the interviewees. Nonetheless, race and religion continued to play a role. In relation to religion, the centrality of their faith to the interviewees meant that, by not sharing this, there may have been certain levels of meaning and understanding of the world that they were hesitant to share with me, that I would not have understood properly. This may be possible to overstate. For the inquiries underpinning this project, a precise understanding of the specific elements of the interviewees' religion is perhaps not required – instead, allowing the interviewees to speak of how their religion shapes their relationship with the state, in their own words, provided significant opportunity for further interrogation within the interviews, when required, and in the analysis.

The interviewees' race was a significant factor shaping their view of the world. While this was anticipated, the extent to which this was true was perhaps surprising. The difference in race between the interviewees and the researcher might have proven a problem, and, entering the community, this was something that I was distinctly aware of. The direction of the interviews might have been shaped by my whiteness, by an eagerness not to offend, but the content of the interviews perhaps indicates that my race, my whiteness, may not have been the difficult factor it was expected to be. Instead, as will become clear, the legacy of apartheid's racial hierarchy appeared to have an impact, shaping the perception of the modern state – some of the interviewees saw Coloured and white people as united in their exclusion from the concerns of the democratic State, and this perspective may have created a bridge over the anticipated difference.

Finally, entering the community as a researcher linked to a foreign institution introduced a particular dynamic to the relationship with the interviewees, introducing questions of power and foregrounding some of the issues around the extraction of knowledge. In a similar way to the manner in which Community 1 interviewees were approached, the researcher sought to emphasise that the perspectives held by the interviewees had intrinsic value, were worthy of being heard, and would be treated and analysed with the need to maintain and extend the dignity of the individuals concerned. Attempts were made to reduce power imbalances by

holding the interviews in a location of the interviewees' choosing, and, where necessary, repeating the confidentiality undertakings several times over the course of the interviews.

6.2 Community voices

*This vignette is a snapshot of the participants' responses. It is a composite - whilst it relies on the actual words of the interviewees, it draws on all of the interviews, attempting to provide an overall picture and insight into the themes and approach of the interviewees, in their own words.*⁵

I lived here my whole life. I'm working as a teacher. I studied marketing and communication, but due to difficulties or the unemployment rate, I had to do my postgraduate certificate in education.

I've heard about the South African Constitution; I know that it is the highest form of law in South Africa. It was instituted in our new democracy, and our current president was one of the main initiators and writers and part of the developers of that. We celebrated because it represented freedom in our country. As far as my knowledge, as far as the Constitution is concerned, it is one of the best Constitutions in the world. I know it is the highest form of law in South Africa, in order for us to live in a whole new South Africa, where we can create a new environment where our families can gravitate and alleviate poverty, but it is not always followed. It is definitely one of the most progressive constitutions in the world...but I don't think South Africa is a progressive, the people in South Africa, the majority are necessarily progressive. It's because of the human rights lawyers and the groups all over the world.

Everyone must have equal rights, Blacks, Coloureds, whites, Indians, whatever, everybody must have equal rights. But there is no balance. During apartheid, the rules applied where whites had priority, and now, under the new dispensation, which is apartheid in reverse, we have the Blacks wanting to be the ruling party. It is a Black country now. First we weren't white enough, now we are not black enough. I think because the government or certain

⁵ A referenced version of this vignette can be found at Annex 6, identifying the source of each quotation.

people in government feel that maybe they [Indian and Coloured people] didn't play a bigger role in the apartheid struggle, so they feel that they are not Black. It's not merely a matter of government pushing resources to previously Black communities, it is a matter of the people of [Community 2] not going and demanding their rights, we expect someone else to do it...you see, the squeaking wheel gets the most attention. I'm thinking about this tendency, I don't know how true it is, like traffic police, if you stopped and in luck, and its Coloured police, you not going to be fined by a Coloured police, but if it is African police officers, they are not going to fine the Africans, but they are going to fine other races...we are still in the racial turmoil.

We live close to the location, where there is obviously a bit more poverty, they got shanties⁶...there is no water, there is no ablution facilities, nothing, and they just do dirt⁷ wherever. They can't be happy. You know, criminals are coming from that side [the location]. If guys were more involved in doing work, the crime would be less.

There was nothing good about the past, the only thing that had under control was crime, and this is massive. I was more safe then than now, crime is worse now. There was a better policing system in place. Everyone feared them...I don't think they were unfair, they just did their work...they were not hitting [people] so bad...but they know they going to be in the back of the van and going to be locked up. The police are tied up, about this police brutality, all the laws they have to follow. We don't have a neighbourhood watch...the police station is less than a kilometre from where I stay, and when we phone them it might take five hours to come...with the resources that they have, they are doing their best – they don't have enough vehicles, their training is inadequate. [The death penalty] can change the way of thinking, scaring you to change the way of thinking. It will curb [crime]. In many communities, people support [the vigilantes], but sometimes they were very harsh...but people felt more protected.

For all religions, the big thing is freedom of faith, for example, where the Constitution affords abortion on demand and the government will pay for it, this goes against every religion, so

⁶ Informal housing.

⁷ Euphemistic reference to human waste.

on the one hand yes, they say we will look after religion, but then we also have this issue, and then also the other issue is same-sex marriages. I'm not sure it is legal, I know in other parts of the world it is, but I'm not sure in South Africa. We have a clause in our religion that...as long as we keep our core values...the likes of gambling, abortion, I don't know if it is allowed, is it allowed in South Africa, gambling, consumption of alcohol It is not an Islamic constitution, it is not an Islamic country. At school it is a bit difficult, in certain things they focus on one religion...it was very Christian...beards weren't allowed and we had to shave.

6.3 Constitutional awareness

The Community 2 participants were all aware of the existence of the Constitution, associating the Constitution with the democratic, 'new' South Africa,

We celebrated because it, it represented freedom for our country, and the way in which we would be governed would be fair, which we thought would be fair.⁸

The participants made links between the Constitution, the law and rights, recognising the supremacy of the Constitution,

...the Constitution is the supreme document at the apex of the law in South Africa, it governs what is happening in the country, all aspects of life,⁹

and seeing rights as having a significant role within the Constitution.¹⁰ The collaborative vision engendered in the participants a form of pride in the Constitution, in the idea that they would be part of creating a just South Africa. This sense of pride in the Constitution was compounded by the idea that the Constitution had attracted international attention for the protection that it gave South Africans,

⁸ Interview 3.

⁹ Interview 2.

¹⁰ Rights were linked to the Constitution in numerous interviews.

Look as far as my knowledge is, as far as the Constitution is concerned, it is one of the best constitutions in the world... the boundary of the Constitution would be able to give people the rights that are needed.¹¹

For some of the participants, the Constitution is a very real presence in their cognitive understanding of South Africa. For others, the precise role that the Constitution plays in the country is less clear,

I don't know how to explain it, but it deals with all of the things on the legal side.¹²

Regardless of the precise way in which it was (or was not) understood, it is important to note that all of the participants had heard of the Constitution, that the participants could make a direct link between the Constitution, the law, and rights and could draw a clear connection between the introduction of the Constitution to the dawn of the democratic era.

Many of the interviewees in Community 2 were very clear about the fact the Constitution provided protection for their freedom of religion, although precisely how the 'permissiveness' of a secular society aligned with religious protections was, perhaps, slightly unclear,

For all religions, the big thing is freedom of faith, for example, where the Constitution affords abortion on demand and the government will pay for it, this goes against every religion, so on the one hand yes, they say we will look after religion, but then we also have this issue, and then also the other issue is same-sex marriages.¹³

Implications

The awareness that the participants have of the Constitution, that the Constitution has implications for the manner in which the country is governed, allows the participants to engage directly with how they think the Constitution shapes their experience of life.

¹¹ Interview 9.

¹² Interview 6.

¹³ Interview 2.

Consequently, the participants have firm ideas about how the Constitution affects their lives and shapes their community. This is true regardless of the accuracy of the participant's beliefs about the contents of the Constitution, about how it has been put into effect, or about how it functions in South Africa society.

6.4. What do people in Community 2 experience and perceive to be the constitutional culture of South Africa?

This section will address the first question that underlies constitutional culture 'from below', which explores how individuals perceive the constitutional culture of the state in which they live, informed by their context and their subjectivities.

6.4.1 Constitutional culture through the prism of the elements of South Africa's transformative constitutionalism

In all of these matters, the participants' engagement with the Constitution and the constitutional state reflects their conflicted relationship with the Constitution and its implementation. These themes will be considered through the prism of the central elements of South Africa's approach to transformative constitutionalism, discussed in Chapter 3.

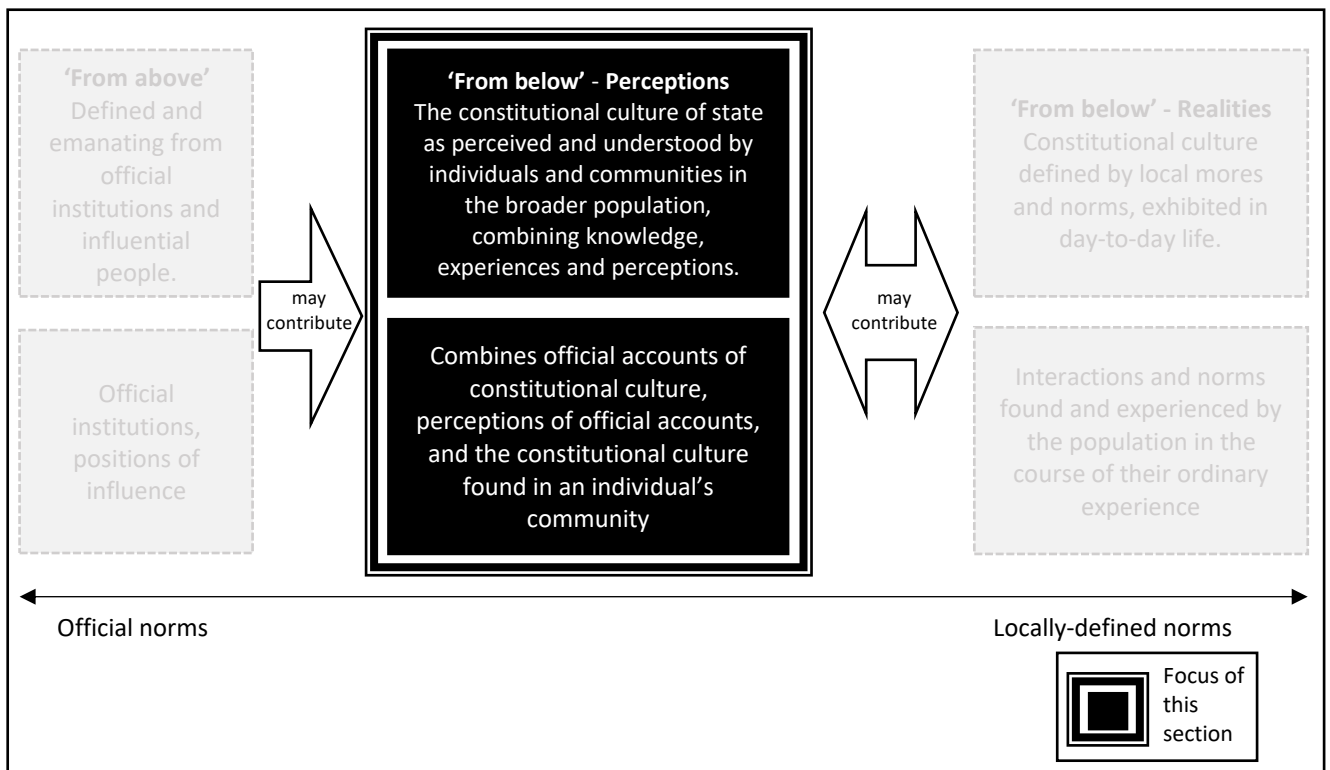


Figure 12: Approaches to constitutional culture, highlighting the role of 'perceptions'

6.4.1.1 The commencement of a 'new era'

That the 1994 transition to democracy is understood as a moment in which change was supposed to take place is clear in the accounts of the Community 2 interviewees, who demonstrate a deep-seated awareness that the constitutional culture of South Africa fundamentally changed in 1994. This is rooted in the removal of the restrictions that were placed on them, restrictions that limited their lives,

...our movement was restricted so we couldn't move wherever we wanted to, there were designated areas...we couldn't associate with people freely...when the new Constitution came those are the issues that were addressed first – South Africa is for all those who live in it.¹⁴

As it was for countless South Africans, being recognised as full members of society was a seminal moment for the Community 2 interviewees. This sense of belonging, of ownership, was notably important to the participants. No longer locked outside of the instruments of

¹⁴ Interview 2.

power, they would be able to shape the country in which they lived, to contribute to the efforts of the country to recreate itself, and, importantly, to create better lives for themselves, for their families,

...for us to live in a whole new South Africa, so we can create a new environment, where our families can thrive and alleviate poverty.¹⁵

The interviewees saw the new era as epitomised by a promise that they would be considered part of the new country, where they would be able to contribute to the path and the nature of the country. The country would be theirs, and the Constitution was considered a part of this ownership. The Community 2 interviewees reflect positively on the aspirations that they perceive to be contained within the Constitution,

...it wanted to represent, if I can say for lack of better words, an ideal country...you never going to get any ideal country anywhere in this world, there is never going to be utopia, the point is here, that we wanted to get close to this kind of life...¹⁶

The new era marked an attempt to undo the harms of the past, the interviewees demonstrating a common understanding that the legacy of previous, racially discriminatory, regimes needed to be addressed, and that the Constitution and the constitutional order would ameliorate inequalities and assist the participants and their community in overcoming the repercussions of past injustice,

The Constitution, in a way...they are making things right.¹⁷

The manner in which the interviewees speak of their expectations of the new era and their understanding of the society that the Constitution was intended to realise is in stark contrast to their understanding of the 'new era' that has been realised. While the interviewees recognise that change has happened, that the present and the past are different, many of the

¹⁵ Interview 10.

¹⁶ Interview 3.

¹⁷ Interview 6.

interviewees see this new era as oppressive, as an era that represents a continuation of the discrimination that they suffered on the grounds of their race, as Coloured South Africans,

We came from an old apartheid system into a democratic system. The rules were applied where white had priority under the apartheid system, and in the new dispensation, it is apartheid in reverse, so we have the Blacks...and they forget about everyone else.¹⁸

In the new era, as in the old era, Coloured people are excluded. To some of the interviewees, this renders the differences promised by the new era illusory, their marginalisation continuing, the discrimination that they experience in modern South Africa mapped to the racial patterns forged in the past,

...the Blacks, most of them, they want to be in charge of everything...it is a Black country now, they have the privileges.¹⁹

6.4.1.2 A new set of values entrenched at the heart of the state

With varying degrees of consciousness, the Community 2 participants recognise the importance of the foundational values of the Constitution to the country, although few are able to identify all of the values explicitly. The knowledge of these values does not appear to have had a strong influence in shaping their understanding of the constitutional state, which they see as entrenching discrimination against everyone who is not Black, that they see as imposing a system of progressive rights and values that do not reflect the views of the population and, in particular, do not reflect their views, undermining their safety and contributing to a perceived decline of infrastructure and societal mores. Simultaneously, however, the interviewees recognise the freedoms that are protected by the constitutional state reflected, most importantly, for them, in the protections for religious freedoms.

¹⁸ Interview 9.

¹⁹ Interview 5.

6.4.1.2.i A failed commitment to equality

A stated commitment to racial equality is at the heart of how the interviewees understand the values of the democratic nation. It is clear that the interviewees do observe a change in the values of state – to their mind, the centrality of white supremacy has been removed. The interviewees see this change as having the potential for realising the promise of

a democratic country, equal opportunities for all, no preferential bias for this group or faction, that group or faction.²⁰

When the participants spoke about equality, about equal opportunity, they generally, although not exclusively, spoke about race, - understandably, perhaps, in light of the centrality of race and racialised discrimination to South Africa's history,

...everyone must have equal rights. Blacks, coloureds, whites, whatever, everybody must have equal rights.²¹

To the interviewees, this professed commitment to equality, of racial equality, is not really an animating value for the state. Instead, the interviewees perceive a new system of racialised discrimination to have been put in place, a system that prioritises and benefits Black people,

We came from an old apartheid system into a democratic system. The rules were applied where white had priority under the apartheid system, and in the new dispensation, it is apartheid in reverse, so we have the Blacks...and they forget about everyone else.²²

It is Black African people that the state cares about helping, who benefit from the interventions of state, from the dismantling of white supremacy and apartheid. The interviewees perceive Coloured people to be facing the same discrimination, the same injustice, they faced in the past, on account of not being the right colour for the state,

²⁰ Interview 10.

²¹ Interview 5.

²² Interview 9.

We were, first, we weren't white enough, now we are not black enough.²³

To the interviewees, one form of racial discrimination was replaced with another. The interviewees view Coloured people as a group that is unable to rely on the state, as a group whose needs and wellbeing are deemed irrelevant. While white people are similarly ignored by the state, they are able to rely on the ongoing benefits that they have been able to secure because of their past preferential treatment, their prior access to capital and privilege, to ensure that they can access the basic necessities of life, without needing to rely on the state,

[White people] can got [money] and they can open their own business, and what I like about them is that they look after their own people – that is the only way they can do it.²⁴

To the interviewees, the disregard with which the democratic state views them, with which it views Coloured people generally, manifests in the decay that they see in their community. They see no investment in their areas, and see themselves as surrounded by failing and decaying infrastructure, as

a forgotten community, and there is a reason for it, if you look at the past 25 years for any development from the government in our community, there was absolutely no development, there were no new roads started, there was no new library built, no community centre, no trees planted on the roadside, no outreach...so the community feel that we are side lined, and the reason for that is because we are Coloured.²⁵

In light of the fact that the participants were so firm in their assertion that Black people have been prioritised in the democratic South Africa, it is interesting to note that many of the participants made reference to the appalling conditions in an informal settlement which had been established on the outskirts of Community 2. This settlement, largely inhabited by Black people, is similar to many informal settlements in South Africa. The participants see the inhabitants of the informal settlement as struggling to obtain basic services, living in temporary structures, and having high rates of unemployment,

²³ Interview 1.

²⁴ Interview 1.

²⁵ Interview 2.

Down the road there they got shanties²⁶...there is no water, there is no ablution facilities, nothing, they just...they can't be happy.²⁷

The conditions in the informal settlement are regarded as another indication of how the government is failing, but these dire conditions do not appear to impact the idea that Coloured people are the ultimate victims of discrimination, that racial discrimination rather than any other form of failure underlies the problems that they face in their lives, that they see in their community. Regardless of the difficulties of the lives that poor Black people lead, and of prevalence of this poverty, the system is perceived by the interviewees to benefit Black people.

6.4.1.2.ii The imposition of progressive values from above

For the Community 2 participants, being recognised as full members of society was a seminal moment, as it was for countless South Africans. The interviewees understand South Africa promised to be a country in which their values were taken into consideration, the foundational values of the country to be a collaborative effort of the entire population (through their representatives). This sense of belonging, of ownership, was notably important to the participants. No longer locked outside of the instruments of power, they would be able to shape the country in which they lived, to contribute to the efforts of the country to recreate itself anew,

...for us to live in a whole new South Africa, so we can create a new environment where our families can thrive and alleviate poverty.²⁸

The perspectives of the interviewees resonate with the way in which the Constitution positions itself, as a collaborative document – ‘We, the people of South Africa...adopt this Constitution’.²⁹ This idea of agency, the sense of ownership engendered by the idea of

²⁶ Informal housing.

²⁷ Interview 1.

²⁸ Interview 10.

²⁹ Preamble to the Constitution.

contributing to the shape of the national project and the ability to influence the values of the state, stands in stark contrast to having had repressive values and ideals imposed upon them, as was the case during the apartheid era. This sense of pride in the Constitution was compounded by the idea that the Constitution had attracted international attention for the protection that it gave South Africans,

Look as far as my knowledge is, as far as the Constitution is concerned, it is one of the best constitutions in the world... the boundary of the Constitution would be able to give people the rights that are needed.³⁰

Despite the general support amongst the participants for a 'new' South Africa, of what they perceived this 'new' nation to be promising, deeper engagement with the participants revealed a sense that the Constitution was not, in fact, 'their' Constitution, or even a Constitution that belonged to the people of South Africa,

...it is definitely one of the most progressive constitutions in the world, but...I don't believe South Africa is a progressive country, that the people in South Africa, the majority are necessary progressive in their mindset.³¹

The interviewees ultimately question the extent to which they can recognise their values within their understanding of the vision for the country. In this light, the international acclaim accorded to the Constitution is seen in a different hue. The participants express concern that the Constitution has been imposed upon them, that the engagement of the populace has been replaced with a prioritisation of the voices of,

...human rights lawyers and groups all over the world. It's meant to be the people who give input, whites, Blacks, everyone, but it doesn't reflect everyone's views³²

The interviewees identify a constitutional culture that is not concerned with the issues affecting their community, with their safety. Instead, the constitutional culture reflects the

³⁰ Interview 9.

³¹ Interview 2.

³² Interview 1.

views of privileged people, able to insulate themselves from the problems found in South Africa,

Ultra-liberals, who have comfortable homes, who think about the rights of people, and are not really involved in or victims of crime. They don't know how it feels to be a victim of murder. It is nice to be able to think about the criminals.³³

To the participants, the origins of many of the social ills that the country faces lie in the divergence of the constitutional culture from their own values and perspectives. Participants articulated unhappiness with the manner in which they perceived the Constitution to dictate the approach that the government was to follow in relation to various elements of the nation, including the approach to the death penalty,

[we do not have the death penalty] because the human rights lawyers and that sort of groups all over the world, they said no...[Protestors] call for [the death penalty] now, with these marches, with the protection of the ladies and children,³⁴ they won't even return it... [The Constitution] it's meant to be the people who give input...but it doesn't reflect everyone's views.³⁵

The values articulated by many of the Community 2 interviewees are informed by their Muslim faith. The interviewees did not expect the Constitution to reflect their faith, acknowledge that South Africa is not a religious state,³⁶ but they see solutions contained within Islam as disregarded, perceive their views to have been disregarded. The progressive standards and values that they perceived to be entrenched in the Constitution gave rise to a range of problematic outcomes in society, in a range of outcomes that they perceive to undermine their own lives, which could be solved if the hegemony of 'ultra liberals'³⁷ was broken,

³³ Interview 2.

³⁴ In September 2019, numerous protests and demonstrations were held around the country, protesting the level of violence against women and children in South Africa.

³⁵ Interview 1.

³⁶ See section 6.5.2: *Religion as a 'shadow grundnorm'*, below, where further discussion about the role of religion in the interviewees' experience of the constitutional culture that they experience on a daily basis.

³⁷ Interview 2.

Certain crimes would be punished by the death penalty; other crimes would be punishable by limbs being removed...that comes from religion... a lot of [other people in South Africa] would welcome this.³⁸

Their perceived ongoing inability to shape the values of the country in which they live is a continual infringement upon their dignity, exacerbated by the betrayal of their expectations of collaboration, their expectation that they would have a level of ownership of the values of the new state.

6.4.1.2.iii Freedom of religion

The interviewees see freedom of religion as a central value in the democratic state, as a fundamental element of the democratic era, the displacement of the Christianity that accompanied the apartheid regime as central to the post-1994 state,

South Africa decided to be a secular State that in fact broke away from the...Christianity that was given preference because it was a Christian State...it put all religion on the same footing.³⁹

Placing all religions on an equal footing within a secular state has allowed the participants to experience an element of freedom and recognition that they were previously denied, and they see this freedom to be at the heart of the post-apartheid order. The participants acknowledge that treating religions equitably, and having a secular state, is the only way to have an equal society, in light of the diversity of South African society,

There are values [in South Africa]. Freedom of religion is one of the main core ones, because we are a diverse population.⁴⁰

This freedom is a freedom that they have been able to access, that the state deems sufficiently important to ensure that the freedom is asserted, that past limitations are removed. While there are threats to the interviewees' ability to freely practice their religion,

³⁸ Interview 10.

³⁹ Interview 2.

⁴⁰ Interview 10.

the interviewees are able to resist these threats, and to assert their right to practice their religion, even in spaces where this freedom was previously restricted,

The Constitution is quite clear about freedom of religion...but we find that in schools in particular, in our area, Muslim children are forced to shave their beard, or girls are not allowed to wear the head scarf and to cover their legs. The argument is that this is our school, this is our code of conduct...So we have dealt with the Department of Education in regard to this issue.⁴¹

The religious values of the participants may differ from what they understand to be the values of the country, but the participants do not necessarily experience these differences as religious oppression. Instead, where possible, the participants elevate the demands of their religion above the demands of the secular law, the two systems operating on different planes,

We seem to have a clause in our religion that [a country can have different rules to the religion] as long as we keep our core values...South Africa, it is not an Islamic constitution, it is not an Islamic country.⁴²

Maintaining this divide, the participants experience freedom, able to regulate their own lives, and affairs, to hold themselves to a different standard, without undue interference from the state. This does not mean, however, that they support values and practices that they perceive to have been incorporated into the fabric of the nation, but that clash with their own values, and worry about the ramifications of these practices,

To influence [crime], certain crimes would be punished by the death penalty, other crimes would be punishable by limbs being removed, certain limbs being removed...this comes from religion.⁴³

I don't know, if we had a woman President, if things would get done...or we would be too soft on other countries, or be trampled upon...There is the different status of men and women in sight of Allah, in the sight of God...Not in a defaming way, not in a criticising way.⁴⁴

⁴¹ Interview 2.

⁴² Interview 10.

⁴³ Interview 10.

⁴⁴ Interview 6.

There is a tension inherent in the freedom of religion and the progressive values of the Constitution. On one hand, the freedom of religion allows for the interviewees to practice their religion, and to bring their religion into public spaces that it was previously locked out of, like schools,

I think the government now has...given certain religious rights, I know at school it is a bit different, where...they did not focus on one religion at certain schools....at the time of the new government, at that time beards wasn't allowed, we had to shave...then I think they had a meeting the next year, and certain guys could wear beards.⁴⁵

On the other, the constitutional culture, and all that it permits, causes the interviewees to withdraw to a community where their values are shared and, to the extent possible, manifest. This has ramifications for the constitutional culture that ultimately shapes their day-to-day lives.⁴⁶

6.4.1.3 An emphasis on accountability and transparency

The absent, unresponsive state of the apartheid era was supposedly consigned to the past, the 1994 election a symbolic representation of a government of the people, responsive to the needs of the people.⁴⁷ No trace of this responsive, accountable state is present in the accounts of the Community 2 interviewees. A lack of transparency and an ongoing suspicion of corruption serve to undermine the belief that officials can be held to account – present in the electoral system itself. Voting is transactional, the politicians seeking votes, failing to deliver on their promises and failing to be held to account at the ballot box

So, the ANC government says, yah, we gonna build you houses, and all...vote for me. Then...everyone from that poor community sees it and they like 'Yoh, the next time, I'm going to get too.' Because he promises to all of the them...then tomorrow he's gone.⁴⁸

⁴⁵ Interview 10.

⁴⁶ Explored in section 6.5.2: *Religion as a 'shadow grundnorm'*.

⁴⁷ Discussed above at Chapter 3, above.

⁴⁸ Interview 4.

Politicians, public office-bearers, are self-interested and self-serving, engaged in opaque and self-enriching practices,

I think most [politicians] just toe the line and look after their jobs...It comes from the top...of the government and the ANC... it makes me so furious... and yet they can sit there and talk about corruption, I mean, even Ramaphosa, how did he become a millionaire?... At the same time, he is the best we got.⁴⁹

The inability to hold public officials to account and the extent of the corruption in the country, go beyond politicians, and extend to the police force. Although the police are regarded as incompetent and corrupt, the interviewees have no way to hold the officers to account,

One of the major issues in South Africa is corruption, and the South African Police Service is not immune to corruption. So we find that among the criminals are the police themselves... Police are taking bribes, so instead of arresting the person, they take money, dockets getting missing, so you cannot stand trial...but also police being perpetrators of crime.⁵⁰

So deeply entrenched is this lack of accountability that it is understood to be the *de facto* way in which they state works, the state understood to be designed in such a way that those who wish to secure unearned benefits can do so without repercussions.

The lack of accountability for any form of wrongdoing is entrenched in the constitutional culture of the democratic state. The interviewees see the rights-based constitutional culture as protecting wrongdoers, as failing to impose accountability on people committing crimes,

You would also want to change the Constitution so...that the police can do what they need to do...because what happens now, if someone was to jump over here and then wants to come in, and even if I find him here, and I shoot him dead, I'm in, I will be in big trouble, but it is either your life or theirs.⁵¹

⁴⁹ Interview 1.

⁵⁰ Interview 2.

⁵¹ Interview 1.

Rights have allowed people to become entitled, to demand things from the state, rather than to accept the responsibilities that are placed on them by society. Permissiveness, that people can escape punishment for misbehaviour, is an integral part of the nature of the democratic State,

...discipline is gone in South Africa...they had to adhere to it in the previous regime, now they see the freedom and relax, now see all the systems and pick what they want to do. Freedom come with rights and responsibilities, pros and cons.⁵²

The participants understood that rights for people of colour, for Coloured people, like them, were an integral and necessary part of the new democratic regime. However, there appears to be a concern that the South African population has focused on entitlements at the expense of personal responsibility,

I have heard many people say that maybe the apartheid was better in some ways. Not the oppression, but the fact that there was discipline and order...there is too much freedom.... a person who is disciplined will use [rights] in the right way...For a person who is not, he feels that he can do, you know, whatever he likes.⁵³

The lack of accountability, fostered by the State's focus on human rights and unwillingness to hold people to account, has contributed to the surge in crime, as people are not properly punished, with significant ramifications for the lives of the interviewees and their community, for their safety,

Crime has just become worse everywhere... [Community 2] was safe, you know, and you can't say that anymore.... I think there is just a whole lot of lawlessness...people are becoming more daring.⁵⁴

The interviewees see the absence of accountability as the way in which the democratic state functions. The various accountability mechanisms found in the design of the state are deemed

⁵² Interview 10.

⁵³ Interview 8.

⁵⁴ Interview 3.

toothless, indeed perceived to be intentionally toothless. For the interviewees, no assistance in holding state officials or anyone else in South Africa to account will be found by relying on the state.

6.4.1.4 Positive obligations owed by the state

The interviewees see the state as failing to provide for the people within their community, and understand this failure to be underpinned by race, leading to Coloured people understanding themselves as

a forgotten community, and there is a reason for it, if you look at the past 25 years for any development from the government in our community, there was absolutely no development, there were no new roads started, there was no new library built, no community centre, no trees planted on the roadside, no outreach...so the community feel that we are side-lined, and the reason for that is because we are Coloured.⁵⁵

Within this is a firm perception that the state should be engaged in the provision of services. To some of the interviewees, the state has been given an impossible task, the obligations imposed by the Constitution stretching resources beyond breaking point, making promises that could never have been kept,

If you want to call it now the apartheid time...I think there were police, there was a better policing system in place...it was certain people that were protected more than others...first your whites...but even to a certain extent...to say maybe even a little bit for Coloureds as well...because this population was small they could do it...which they cannot do it now because now we must take everyone into consideration...so that has become a problem...we made it like the Constitution with the right to electricity and all those kind, water and all...I would imagine it would impact on everything. It impacts on the roads, it impacts on infrastructure, it impacts on everything in South Africa, because now it is open to ... I want to say it, not meaning racial or whatever, the other 75%.⁵⁶

⁵⁵ Interview 2.

⁵⁶ Interview 3.

Within this is a perception of the promises that the constitutional era had for everyone, of the promises of resources, of access to the basic necessities. This promise is juxtaposed with the fact that the state is unable to provide, and that everyone struggles to obtain services from the state. Despite the belief that Black South Africans have been prioritised in the democratic era, the interviewees belied that the state has been unable to provide for almost anyone, with an understanding that the Black African population is also underserved, that a significant percentage of the poor Black population exists with little, are deeply affected by poverty, and appear to receive little from the State,

Down the road there they got shanties...there is no water, there is no ablution facilities, nothing, they just...they can't be happy.⁵⁷

The interviewees believe that positive obligations are a fundamental part of the new era, but that the state is not able to deliver these. Despite the promises of the democratic era, which the interviewees understand as a promise that the state would help everyone lead a dignified life, the state has not been able to deliver this. The promises of the constitutional era mean little in this regard, do, in fact, reinforce the idea of a state unable to deliver on its promises and its obligations.

6.4.1.5 The making of a 'constitutional people' and the 'constitutional person'

To the interviewees, the idea of a united population, of a single people united under the Constitution in the democratic era, is very clearly inaccurate. To them, the South African population is defined by its race, is segmented into racial groups, and defined by concern for Black African South Africans, at the expense of the rest of the population,

...the Blacks, most of them, they want to be in charge of everything...it is a Black country now, they have the privileges.⁵⁸

⁵⁷ Interview 1.

⁵⁸ Interview 5.

Racial 'in group' support spans the population, racial groups regarded as providing support to others within their racial group, emphasising the fragmentation of the populace,

[White people] can got [money] and they can open their own business, and what I like about them is that they look after their own people – that is the only way they can do it.⁵⁹

The differential treatment that is accorded to different racial groups has ramifications for the idea that a 'constitutional person' was created by the 1994 project, that each individual is accorded an equal range of rights that will be respected. Instead, there are people who are prioritised and people who are ignored, for a range of reasons, including historical reasons. These historical reasons inform current entitlements,

...the government or certain people in the government feel that maybe [Coloured and Indian people] didn't play a bigger role in apartheid or the struggle...they weren't part of those who were in the 80s and 90s, the struggle.⁶⁰

6.4.2 Perceptions of constitutional culture in Community 2: Themes and patterns

Across the Community 2 interviewees, a clear perspective on the constitutional culture of the state can be observed. To the interviewees, this constitutional culture is in marked contrast to the promises that accompanied the democratic era, promises that, for the first time, they, as Coloured people, would be able to participate fully in the life of the country. In place of this promised constitutional culture 'from above', the constitutional culture that the interviewees experience is marked by three themes: firstly, a consideration for Black South Africans at the expense of everyone else; secondly, the prioritisation of 'progressive' values at the expense of values actually held by South Africans; and, finally, a recognition that the new constitutional culture does provide some benefit, allowing them to practise their religion and to assert this freedom in spaces previously hostile to Islam.

⁵⁹ Interview 1.

⁶⁰ Interview 6.

6.4.2.1 The constitutional culture ‘from above’ prioritises Black African South Africans, is discrimination in reverse

While the interviewees recognised that rhetoric involving equality and diversity, the rhetoric of the ‘rainbow nation’, surrounded the post-apartheid era, they expressed a clear belief that these are not the values that actually define the country. Instead, the interviewees see a continuation of discrimination, a discrimination that differs from the discrimination of the past, but that continues to shape their lives. It is the change from a system that favoured white people to a system that favours Black South Africans that is at the heart of the 1994 project. The interviewees understand this discrimination and favouritism as informing every element of their lives, as informing the nature of the transformation that the nation undertook. It is because of this discrimination that they, that Coloured people, struggle to get the contracts that they want, struggle to get well-paying jobs, and cannot obtain the resources that they need to ensure that the infrastructure in their community is maintained or improved.

6.4.2.2 The constitutional culture ‘from above’ does not reflect what ordinary South Africans think should happen in the country

The constitutional culture of South Africa is one which the interviewees are simultaneously proud of and concerned about. The idea of South Africa being a leader in the protection of human rights is appealing, especially in light of the fact that they and their community suffered under a system that was a crime against humanity. However, these same rights represent a threat to the interviewees, who see many of the issues in modern South Africa as located in a permissive idea of society that is willing to sacrifice the safety of its citizens in order to follow a set of progressive norms imposed by an influential coterie of rights-focused individuals who are divorced from the realities of life in the country and who ignores the actual values of the broader population.

The interviewees recognise that their religion is a minority religion in the country, but see members of other religions as sharing many of the moral positions that they deem to be a consequence of their Islamic faith. These common values are undermined by a set of

progressive and liberal values forced on a conservative population. The adoption of these values tells the interviewees that the 'people' are not the primary authors of the principles that define their country. While welcoming some elements of the rights culture that they see as at the heart of the constitutional culture,⁶¹ the progressive rights at the heart of South Africa undermine individual accountability, prevent the state from taking appropriate action against wrongdoers, and also undermine the fabric of the nation in other less direct ways – several of the interviewees expressed concern about homosexual rights and about the roles of men and women in society. The extension of rights to the LGBTQI+ community and the ability of women to be active in society, is seen as an unwelcome imposition of progressive principles onto people in South Africa, who are intrinsically more conservative, and who would resent such developments. Accordingly, the nature of the values of the constitutional culture 'from above' ignores the will of the majority and exacerbates the interviewees' feeling that the state disregards them.

6.4.2.3 The constitutional culture 'from above' creates some space for diversity

Islam is at the core of many of the interviewees' existences, and the ability to practice freely and manifest their faith, is understood by the interviewees to indicate that there has been a transformation in the nature of the country. The fact that the country allows this diversity reduces the sense of 'otherness' that was experienced under the Christian apartheid state, or was understood to be the experience of those living in that era. The interviewees' sense of belonging is enhanced by the willingness of the constitutional culture to make space for their religion, a sense that is aided by the State institutions that support the interviewees when they feel their religious freedom has been undermined. The existence of this space and support is significant for the interviewees' understanding of and identification with the constitutional culture 'from above'.

Interestingly, the sense of belonging and ownership of the new state created by the freedom of religion, by the interviewees' freedom to practice their religion, coexists with a sense amongst that the interviewees that they are a community apart, that their religious values

⁶¹ Most notably freedom of religion.

are, by and large, are not integrated into the fabric of the constitutional culture. Instead, as will be discussed in Section 6.5.2 below, the interviewees hold themselves to a set of values that do not necessarily concur with the constitutional values that they understand to be at the heart of the constitutional state.

6.5 What do people in Community 2 experience as their constitution?

The perceived nature of the South African state is an important factor in shaping how the interviewees in all of the communities live their lives, localised norms and principles often arising in response to the perceptions of the official constitutional culture, of its shortcomings and its successes. The nature of the perceived constitutional culture ‘from above’ held by the Community 2 interviewees is reflected in two fundamental principles that inform the day-to-day lives of those in the community. The first of these demands reflects the interviewees’ understanding of a racialised state, and demands that the interviewees use whatever relationships or leverage they have to realise tangible gains, while the other is rooted in their religion, which helps them to cognitively insulate themselves from the injustices and unfairness of that they perceive to be present in the constitutional culture ‘from above.’

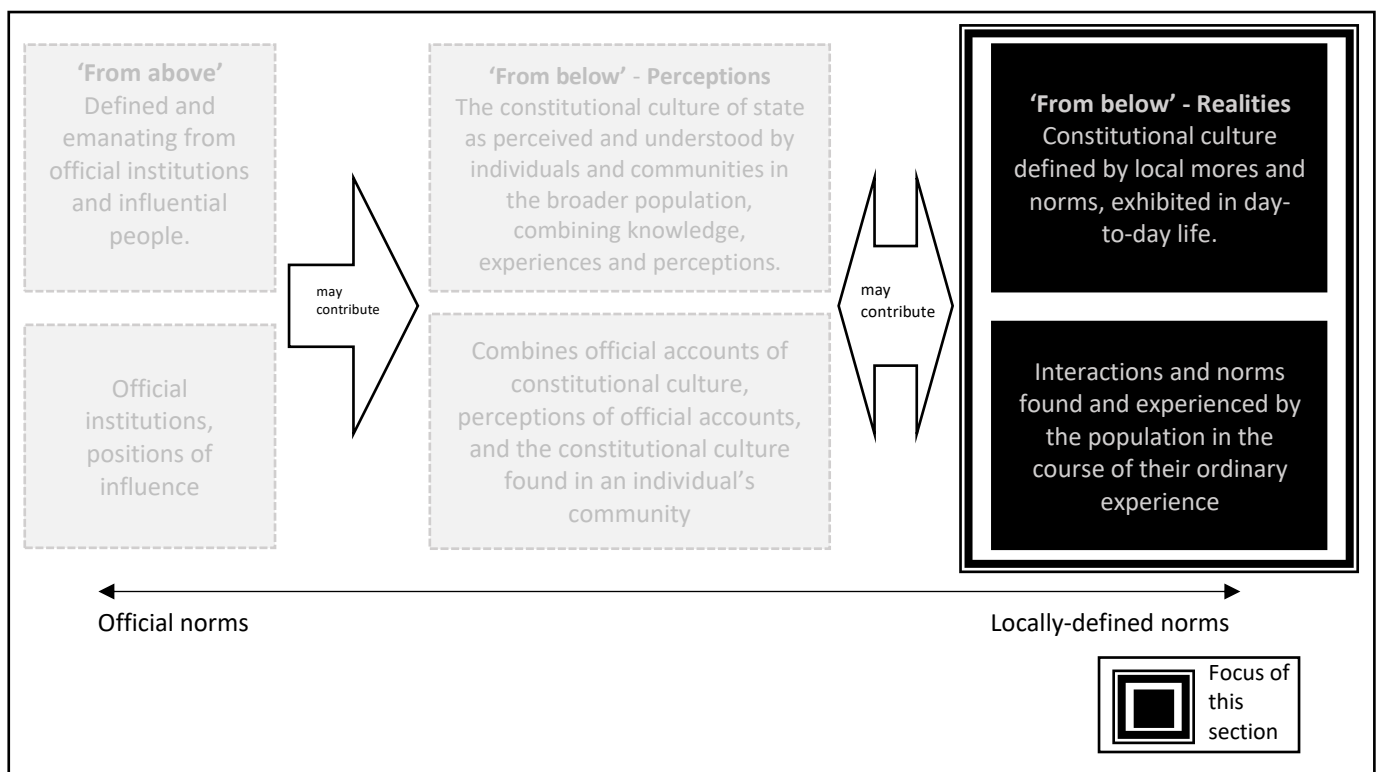


Figure 13: Approaches to constitutional culture, highlighting the role of day-to-day experiences

6.5.1 Leverage amidst competition for resources

While the Constitution makes clear that the democratic South African is a society in which people can make demands of the state and can expect the state to act in an even-handed manner, the Community 2 participants experience the Constitution and the constitutional state very differently, as discussed above. Where once resources trickled into Community 2, as a result of the apartheid government's relative 'prioritisation' of Coloured people over Black people, the interviewees see the equality of the democratic era as having reduced Coloured people's ability to access resources. In the post-apartheid state, the same resources have to be divided amongst many more people – the interviewees view individuals and communities within the country as competing for a share of the finite resources and opportunities available in South Africa. In order to be able to secure this share, for themselves and for their community, the interviewees see leverage as essential.

The interviewees identify a range of different ways through which they enhance their ability to obtain resources, including relying on connections, on historical factors, or on using active methods of protest to pressure the government to intervene in a community, to invest in infrastructure. However, on all of these fronts, the interviewees see themselves as at a comparative disadvantage, viewing themselves as lacking leverage when compared to other groups. Race plays an important role in exerting leverage, continuing to undermine their ability to locate resources. They are not able to enjoy what they perceive to be the advantages of being Black African, a group that the participants view as prioritised by the democratic government, nor able to access what are perceived to be the advantages of being white, which the participants view as accompanied by the accoutrements of privilege, wealth and connections,

...the community feel side-lined and the reason for that is we are Coloured.⁶²

perhaps exacerbated by a lack of commitment by Coloured people to the struggle against apartheid,

⁶² Interview 2.

...the government or certain people in the government feel that maybe [Coloured and Indian people] didn't play a bigger role in apartheid or the struggle...they weren't part of those who were in the 80s and 90s, the struggle.⁶³

The participants see themselves as marginalised through an absence of strong connections in government, undermining the participants' ability to access financial opportunity. The participants speak of wishing to use personal connections to gain access to financially rewarding contracts, and talk about how their leverage may be insufficient to result in such contracts, in the face of stronger connections,

My father was heavily in the struggle...we used to tell what they were saying and what they were doing with us, at first we were so excited, we already got the amount of the money, then we have to deliver [textbooks] to the schools...Only what was left was this other...stupid guy to sign...they said 'no, no.' They took it away from us and gave it to his friends in Joburg. My daddy wrote letters to the Premier, to the Education Department, to everyone. They just don't care.⁶⁴

Race is, again, at the heart of this insufficient leverage. The participants see themselves as best able to exert leverage when engaging with other Coloured people in government,

This tendency...if you are lucky and it's Coloured police, you not going to be fined by a Coloured police, but it is African police officers they not going to fine the Africans, but they going to fine other races.⁶⁵

Race is not the only tool that the interviewees can use to generate leverage to force the government into action. Leverage can be generated through a commitment to forcing government action, a commitment that some participants see Community 2 as lacking,

⁶³ Interview 6.

⁶⁴ Interview 1.

⁶⁵ Interview 10.

It is a matter of people in [Community 2] not going and demanding their rights, we expect someone else to do it. And where the government is concerned, you see, the squeaking wheel gets the most attention. So, if we don't squeak, there is no attention.⁶⁶

In contrast to the perceived silence of Community 2, neighbouring poor Black communities attempt to create leverage through protest, creating an urgent situation that the state has to address,

Every weekend, they are burning stuff, they can't be happy, but the problem is they burn the road and things there and we can't go to town... [they want] service delivery.⁶⁷

The consequence of the participants' belief that they lack or have failed to create leverage is what the participants view as the decline of their community, a decline manifest in failing infrastructure and decreased safety,

...like the roads, they didn't have a hole in, there wasn't always a bad smell, maybe the sewage comes here, water wasn't cut like now, there was...electricity.⁶⁸

This decline can be dated to the dawn of the democratic era,

Before [1994] ...we lived a better life, actually...There is a Constitution now, but things have changed...I was more safe than now, I mean school, everything, was better than now.⁶⁹

The constitutional culture that the interviewees see as prevalent in South Africa is one in which one needs to fight for one's share and, wherever possible, find a way to gain access to the resources that they need to prosper as individuals and as a community. That their community is struggling is an example of the lack of leverage that those in Community 2 perceive themselves to have, that they perceive Coloured people generally to have as a relatively small, relatively poor section of South African society. In the minds of the interviewees, this bodes ill for their future.

⁶⁶ Interview 2.

⁶⁷ Interview 1.

⁶⁸ Interview 6.

⁶⁹ Interview 5.

6.5.2 Religion as a 'shadow grundnorm'

In light of the importance that the interviewees place upon their religion and their religious identities, it is perhaps not entirely unsurprising that Islam and its values are prominent in shaping elements of how the interviewees understand the world, and informs how they conduct their day-to day lives. Perhaps most importantly, Islam represents a way for the interviewees to address what they understand to be wrong about the constitutional culture that they perceive to be present in the country, a corrective to the permissive constitutional culture that has accompanied the 1994 project,

I'm not sure [homosexual marriage] is legal. I know in other parts of the world it is, but I am not sure about South Africa... Our religion doesn't agree with that kind of thing [referring to abortion]. No, it isn't legal in South Africa, is it? Okay, I am sure it's wrong.⁷⁰

While they cannot put all of these beliefs into practice, it is the guidance of Islam, not the Constitution or the constitutional culture, that they understand to be binding. The interviewees hold themselves to this standard, and see this as something that they are able to enact immediately,

Obviously [I would prefer an Islamic constitution]...but for those who are practicing Islam, for now should adhere to Islamic teaching and ruling already.⁷¹

There is a conflicted approach to the freedoms that characterise the constitutional culture in South Africa. While their ability to manifest their faith has been facilitated by the freedom of religion that they understand to be part of the constitutional culture of the state,

There are challenges, not only from a Muslim...from all religions, the big thing is freedom of faith, for example, where the Constitution affords abortion on demand and the government will pay for it, this goes against every religion. So, on the one hand, they say that we look after the religion...we also have this issue...same sex marriage...but there is a provision gain that

⁷⁰ Interview 8.

⁷¹ Interview 10.

the marriage officer can refuse to participate based on their conscience, but as well as abortion, the physician can...refuse to participate.⁷²

This coexists with an overly progressive set of values that are perceived to be at heart of the constitutional culture of the state. In response to the dissonance between their personal values and the values they perceive to be entrenched in the Constitution, the participants appear to withdraw from the public realm, to devise a parallel system that guides their own lives, with ramifications for the constitutional culture that ultimately shapes their day-to-day lives. Although the participants have a clear stance on particular issues, such as abortion, same-sex marriage, gender equality or gambling, ultimately, whether these are permitted in South Africa is an irrelevance to their lives, their norms informed by standards outside of the Constitution,

We have a clause in our religion, as long as we keep our core values, the likes of gambling, abortion, I don't know if it is allowed. Is it allowed or isn't it, in South Africa? It's not allowed, gambling, the consumption of alcohol...it's just the law.⁷³

However, the resignation that accompanies the acceptance of these 'ultra-liberal' practices is replaced by anger when the actions of the state and its permissive constitutional culture threatens them. This is particularly clear when discussing the criminal justice system,

Looking at the stats of crime in countries where [the death penalty] is implemented...it should be introduced...and...from my religious conviction I believe in a life for a life, so if a person commits a homicide or a premeditated murder, he should be killed, but there are a group of people who don't want [the death penalty] because of rights issues.⁷⁴

With no way to put this system into place, with no way for the norms of their religion, as they understand them, to be put in place in broader society, the public realm becomes a site to be avoided, representing a threat to their morals, to their ability to practice the full demands of their faith. Their religion has answers to South Africa's problems, but the interviewees have

⁷² Interview 2.

⁷³ Interview 10.

⁷⁴ Interview 2.

no expectation that South Africa will follow the dictates of the religion, and are instead resigned to the progressive dogma that they perceive to be at the heart of the constitutional culture, and that marginalises their community.

6.6 Constitutional alienation and fracture in Community 2

The Community 2 interviewees exhibit a basic understanding of the role that the Constitution was meant to play in the life of democratic South Africa.⁷⁵ Their perception of the constitutional culture of the state has aspects of the constitutional culture ‘from above’, of the constitutional culture as it was positioned by the state and people of influence. To a greater degree, however, their perception of the constitutional culture of the state is shaped by their enduring feelings of marginalisation, of a perception that the law is designed to benefit others in the country, at the expense of those in Community 2.⁷⁶ This is exacerbated by the role that religion plays in the lives of the interviewees. While the freedom of religion that the constitutional culture protects is welcomed,⁷⁷ the drastic difference between the interviewees’ values and the values that they perceive to be present in the constitutional culture ‘from above’ serves to enhance the sense of marginalisation that the interviewees and their community feel.⁷⁸ A sense of alienation is clearly observable, a palpable sense that the interviewees view themselves and their community as ‘outsiders’ to the constitutional culture of South Africa.⁷⁹

Analysing the interviewees in terms of the dimensions of constitutional alienation and the normative profiles, it is possible to observe strong feelings of ‘legal powerlessness’ and ‘legal

⁷⁵ See section 6.3: *Constitutional awareness*.

⁷⁶ See sections 6.4.1.2.i: *A failed commitment to equality*, 6.4.1.2.ii: *The imposition of progressive values from above*, 6.4.2.1: *The constitutional culture ‘from above’ prioritises black South African, is discrimination in reverse* and 6.5.1: *Leverage amidst competition for resources*.

⁷⁷ See sections 6.4.1.2.iii: *Freedom of religion* and 6.4.2.3: *The constitutional culture ‘from above’ creates some space for diversity*.

⁷⁸ See sections 6.4.1.2.ii: *The imposition of progressive values from above*, 6.4.2.2: *The constitutional culture ‘from above’ does not reflect what ordinary South Africans think should happen in the country* and 6.5.2: *Religion as a ‘shadow grundnorm’*.

⁷⁹ See sections 6.4.1.2.i: *A failed commitment to equality*, 6.4.1.2.ii: *The imposition of progressive values from above*, and 6.4.2.1: *The constitutional culture ‘from above’ prioritises black South African, is discrimination in reverse*.

value isolation', with elements of 'legal cynicism' also present.⁸⁰ Almost uniformly, the Community 2 interviewees exhibit a low level of identification with Constitution and the constitutional state.⁸¹ A variation in knowledge means that some of the interviewees might be viewed as 'constitutional cynics', while others would be viewed as 'constitutional outsiders', demonstrating strong feelings of constitutional powerlessness and constitutional value isolation, and somewhat weaker feelings of legal meaningless and legal cynicism. These findings indicate the presence of a fracture in the constitutional fabric of the state, a fracture that causes the legitimacy of the constitutional state to be called into question.

6.6.1 Constitutional alienation

6.6.1.1 Constitutional meaningfulness

Legal meaningfulness, the 'sensed inability to understand the law and to predict the outcome of legal processes',⁸² can be understood to relate to constitutional processes in constitutional alienation. This dimension of alienation is not a dominant feature of the Community 2 interviewees' engagement with the Constitution. Although some of the interviewees profess ignorance about the role of the Constitution, and indicate that they are relatively unfamiliar with the contents of the Constitution, they are aware of its operation, and have a relatively clear idea of its contents,

I don't know much, or how to explain it, but it deals with all the things that is on the legal side, your rights and so on...Rights is probably what, are what people...let's say the basic needs of people...the right to live, to education, right to work, right to, I would say, water, shelter, food.⁸³

And, while a majority of the interviewees find fault with the Constitution, with its contents and with how the constitutional state functions,

⁸⁰ Based on the normative profiles that underlie legal alienation, per Hertogh (n 2) 57.

⁸¹ See sections 6.4.1.2.i: *A failed commitment to equality*, 6.4.1.2.ii: *The imposition of progressive values from above*, 6.4.2.1: *The constitutional culture 'from above' prioritises black South African, is discrimination in reverse*, 6.4.2.2: *The constitutional culture 'from above' does not reflect what ordinary South Africans think should happen in the country*, 6.5.1: *Leverage amidst competition for resources*, and 6.5.2: *Religion as a 'shadow grundnorm'*.

⁸² Hertogh (n 2) 55.

⁸³ Interview 6.

Life is changed now, since this, the new government, take over, everything really went down, I think maybe the education system also, it is down, I mean we had all those privileges [during apartheid] ...even if we couldn't go to the white places and stuff like that, but we were looked after...now everybody cares for themselves,⁸⁴

they are able to predict its outcomes. The Constitution, as they perceive it, has meaning – it is this perceived meaning and the outcomes that the interviewees perceive to result from the demands of the Constitution that causes the interviewees disillusionment and alienation, rather than its lack of meaning.

6.6.1.2 Constitutional cynicism

Constitutional cynicism manifests when the Constitution and the constitutional culture are deemed to be irrelevant. To some extent, the normative power of the constitutional culture 'from above' is neither fully embraced nor fully rejected by the interviewees. This is reflected in the tension between the assertion of the freedom of religion that the interviewees claim, and that they are aware is protected by the Constitution, and their lack of faith in the progressive nature of the constitutional culture, sufficiently dissonant with their own values to render the contents of the constitutional culture irrelevant to how they lead their own lives.

The ambivalence towards the constitutional is also present in the interviewees' approach to vigilante groups active in nearby communities. When considering how to combat crime, the interviewees express significant unhappiness about the manner in which the state punishes wrongdoer. They recognise, and speak approvingly of the actions taken by vigilante groups active in a nearby township, approving of the effectiveness of the punitive actions taken by the group,

I would support those boys, anytime of the day, they get the job done, them being...a bunch of people that has come together within the community and says we have had enough as far as crime

⁸⁴ Interview 5.

in our area is concerned. They were effective... As jy nie hoer, dan sal jy voel [if you don't hear, then you will feel]...the judge, the jury and the executioner...⁸⁵

The interviewees see the actions of the group as necessary because the police are not willing to uphold the law, and it is two elements of the constitutional culture that underpin the lack of police engagement in their community – firstly, the impact of the human rights focus, which prevents the police from undertaking the kind of punitive action that the interviewees claim to welcome and, secondly, that the interviewees perceive the constitutional culture of the state to regard them as irrelevant. The community needs to take action in order to protect itself. Where the police's protection and the interviewees rights to safety and security have become irrelevant, the constitutional principles that underpin the due process rights of the suspects are regarded as similarly irrelevant, as ideas that are inappropriate and unwelcome in light of the reality of the way that the interviewees perceive their lives and the risks that they face. However, the interviewees appear to support these violations in the abstract – none are involved, and only one of the participants expressed an interest in becoming involved in such groups. The risk of falling foul of the police prevents them engaging, indicating that the rule of law restrains their behaviour,

They are violating the rights of others. If you suspect someone is a house breaker, and do something, without due process, you will be punished, and this I can understand.⁸⁶

Ambivalence towards the constitutional culture can also be noted in the interviewees' belief that the Constitution and its principles may, in fact, be irrelevant to how democratic South Africa functions. Instead, nepotism and cronyism determine the manner in which government functions, including in designating how contracts are distributed,

They took [the contract] away from us and they have it to his friends in Joburg...We had very little, and then Zuma got Indians from Durban and gave them the tender, which we didn't even see.⁸⁷

⁸⁵ Interview 9.

⁸⁶ Interview 2.

⁸⁷ Interview 1.

The interviewees firmly believe that corruption is endemic in South Africa, particularly in the public sector. In the face of this corruption, the Constitution and its promises become irrelevant,

...until the people see [the Constitution] being done by the people who are supposed to be ruling, they won't, or they don't understand.⁸⁸

Race, and the interviewees' perception of their marginalisation on the grounds of race, reinforces the interviewees' perception that the Constitution is irrelevant. The frequency of race differentiation and discrimination undermine the equality that the interviewees view to be at the centre of the Constitution. They, as members of the Coloured population, continue to suffer on racial grounds, negating the promises of the Constitution. The promised values of equality and dignity are an illusion, with no basis in reality,

I think that there is still a limit range for life, how can I say, Coloureds and Indians [Black and white people] are on the same level, maybe more blacks than white people.⁸⁹

Observing what they perceive to be ongoing and uninterrupted inequality, the interviewees cease to believe that there the Constitution and the constitutional values are relevant.

6.6.1.3 Constitutional powerlessness

The Community 2 interviewees exhibit an inability to 'control the outcomes of legal processes'.⁹⁰ In a constitutional context, constitutional powerlessness relates to the inability to shape the constitutional culture of the state to bring. This dimension of constitutional alienation manifests in multiple ways, including the process which put the Constitution into being, the manner in which constitutional values are put into effect, and the manner in which the constitutional state functions.

⁸⁸ Interview 4.

⁸⁹ Interview 6.

⁹⁰ Hertogh (n 2) 55.

The process by which the Constitution came into effect is one that many of the interviewees view as either opaque,

I'm not sure of how [it came into being], I won't lie to you, I don't know the research. I just know it was decided on by the Supreme Court, changed there and adopted, that's about it,⁹¹

or as one in which the interviewees had little input, the public participation process being little more than performative,

The drawing up of the Constitution, I think after CODESA 2, we had a committee of members of the legal fraternity, they had public participation, and so the broader community of South Africa was also interviewed on issues before it was enacted and adopted...although the level of participation is not what we always want...it was useless.⁹²

The exclusion from the process has a range of consequences, not least of which is the perception present amongst the interviewees that they have felt unable to influence the shape or content of what the participants uniformly identify as 'the highest law,' its operation and outcomes, sustaining feelings of marginalisation. The inability to shape the process means that the interviewees have not been able to infuse the constitutional culture with their own values, that the values enshrined in the constitution of those of influential others,

Ultra-liberals, who have comfortable homes, who think about the rights of people, and are not really involved in or victims of crime. They don't know how it feels to be a victim of murder. It is nice to be able to think about the criminals.⁹³

Constitutional powerlessness is also evident in the inability of the interviewees to bring about the changes that they think are necessary in the constitutional order, perhaps particularly evident in the state's approach to the death penalty,

[we do not have the death penalty] because the human rights lawyers and that sort of groups all over the world, they said no...[Protestors] call for [the death penalty] now, with these

⁹¹ Interview 4.

⁹² Interview 2.

⁹³ Interview 2.

marches, with the protection of the ladies and children⁹⁴ they won't even return it... [The Constitution] it's meant to be the people who give input...but it doesn't reflect everyone's views.⁹⁵

6.6.1.4 Constitutional value isolation

Constitutional value isolation, the extent to which there is a gap between the values of the perceived to underlie the constitutional culture and the values held by the Community 2 interviewees, is clearly present. At the heart of this gap is the interviewees' view of the Constitution as a progressive document, foisted upon them by an international elite, reflecting the values of this class, rather than reflecting the indigenous, more conservative, values of the South African populace. The interviewees do not see themselves reflected in South Africa's Constitution. Although there are multiple ways in which this value gap manifests, it is particularly noticeable in two related concepts – in issues of 'morality' and understandings of key constitutional concepts.

For the interviewees, the morality of the state and the moral standards of their religion are at odds with each other. The values of the Constitution, which allow for abortion and same-sex marriage, which place women in public roles, and which protect the rights of people who have committed crimes, cause varying degrees of unease amongst the participants. Although the interviewees recognise that their freedom of religion is protected by the Constitution, and also that their religion allows for Muslims to live in a secular state, as long as they maintain their 'core values,'⁹⁶ the disparity causes the participants to withdraw, weakening their engagement with the constitutional state.

Constitutional value isolation is also evident by the gap between the interviewees' understanding of how the values of the constitutional state should be executed and the way that they perceive the state to be executing these values. This gap speaks of different, possibly irreconcilable, underlying values. The interviewees' critiques of equality and human rights

⁹⁴ In September 2019, numerous protests and demonstrations were held around the country, protesting the level of violence against women and children in South Africa.

⁹⁵ Interview 1.

⁹⁶ Interview 10.

demonstrates the extent of this gap, and the consequences on the interviewees' relationship with the constitutional state.

While the interviewees welcome the idea of equality, they believe that equality should equate to the eradication of unequal treatment, that all within South Africa should be treated equally, an idea that seems to equate with the idea of formal equality. Anything other than this would, in the interviewees' view, constitute discrimination. Their experience of the manner in which the constitutional culture operates, however, is of one that elevates and favours Black people in the country, at the expense of other races, particularly of Coloured people. The difference between the manner in which the participants understand equality and the importance that they place on formal equality distances them from the state and undermines their faith in the constitutional democracy, which, in effect, does not treat people equally.

The interviewees have firm ideas about human rights, particularly in relation to crime. Physical punishment is seen as the best way to protect the community from crime, and to discipline wrongdoers, whether convicted or not. The fact that the Constitution prohibits these punishments indicates that it is insufficiently committed to protecting the participants and law-abiding people like them. The state's protection for wrongdoers is at odds with the religious requirements of the participants, which posits physical punishments,

Certain crimes would be punished by the death penalty; other crimes would be punishable by limbs being removed...that comes from religion... a lot of [other people in South Africa] would welcome this.⁹⁷

The Constitution's protection for wrongdoers also indicates that it is focused on the wrong values, on protecting the wrong people. In a country where so many are struggling, providing wrongdoers with protection and, upon imprisonment, with comfort, is an indication that the Constitution and the constitutional state are focused on the wrong people. The participants and their community are isolated, and cannot put their values, values that they believe would protect them and their community, into effect.

⁹⁷ Interview 10.

6.6.1.5 Normative profile, consequences

The extent to which the participants feel unable to shape the values of South Africa, or to have input into the constitutional values that ostensibly shape life in South Africa, is striking. The participants are aware that the Constitution heralded a new era, one of freedom and equality, one that would allow them to become the authors of their own lives. However, the participants' perception that their living conditions have declined since the end of the apartheid era, while other people have benefitted, often due to unfair favouritism, and the idea that their own solutions for crime, which they perceive as having spun out of control, are disregarded, undermines the value that they attach to the constitutional culture 'from above' found in South Africa. The constitutional culture underpins a system that undermines them, and their inability to exert leverage exacerbates this.

The clear presence of constitutional powerlessness, constitutional cynicism and constitutional value isolation indicates a low level of identification with the constitutional culture of the state, as they perceive it. As discussed earlier, Hertogh's conceptualisation of the normative profiles underlying legal alienation has two dimensions, and this will be applied in the context of constitutional alienation – and while there is a clear, and shared, lack of identification with the perceived constitutional culture 'from above', there are varying levels of knowledge about the contents of this constitutional culture. Ultimately, the Community 2 participants can be located in position between cynic and outsider, their basic knowledge of the Constitution and low levels of support for the law providing a picture of a community that feels isolated and cut adrift from power in South Africa.

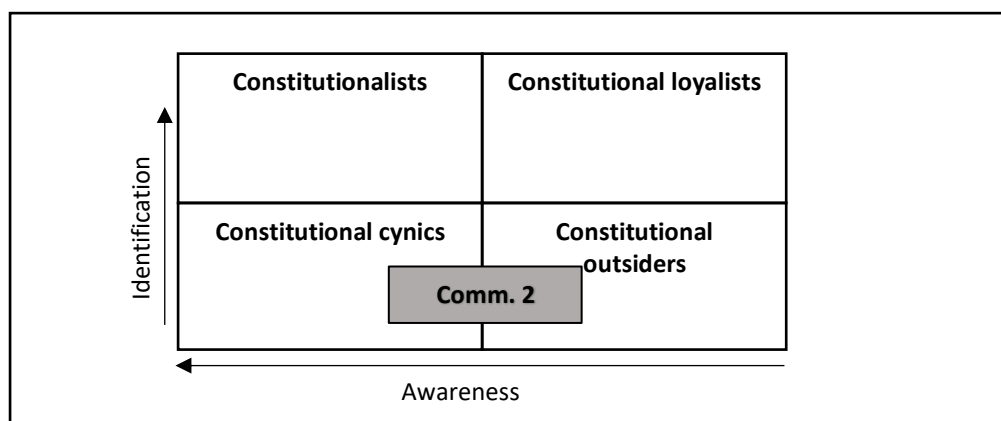


Figure 14: Constitutional alienation in Community 2

6.6.2 Fracture and alienation in Community 2

The Community 2 interviewees perceive themselves to be living in a country whose constitutional culture is, at best, indifferent to them and to their community. Their alienation from the constitutional culture of the state is profound. The expectation that the prospects for them as Coloured people, would improve after the demise of apartheid is perceived to have been misplaced. They perceive themselves to be the victims of discrimination, they perceive themselves to lack the agency to change their position or to impact the decisions that are made in the country.

The constitutional culture of the state that the interviewees perceive to be present in the state is one that bears little resemblance to the constitutional culture that emanates 'from above.' A distinct fracture is observable between these two dimensions of constitutional culture.

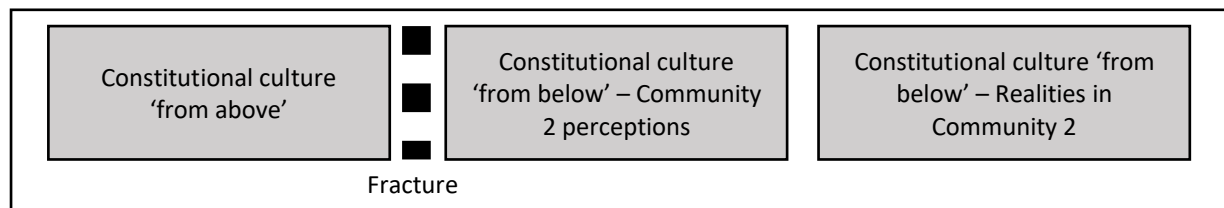


Figure 15: Fracture in Community 2

The interviewees day-to-day experience of the constitutional culture of the state is responsive to the shape of the perceived constitutional culture of the state. Where the constitutional culture as they perceive it ignores them, and renders them powerless, the interviewees seek to leverage whatever advantage to gain the essentials that they need, which include contracts for work and services for the community.

An additional critique of the constitutional culture 'from above' lies within the perceptions of the Community 2 interviewees. It is apparent that race remains the primary lens through which the interviewees view the country, through which they understand the constitutional culture 'from above.' The argument that the transformative constitutional culture that accompanied the 1994 project was required to do the virtually impossible, was required to surmount virtually insurmountable divides within society, seems relevant. The racialised

nature of poverty in present day South Africa, the fact that the vast majority of the Black African population remains in poverty, both registers with the interviewees, and is rendered irrelevant by the narrative that emerges from the interviews, a narrative which posits Black African South Africans as the 'winners' in the democratic era, as favoured by the constitutional culture from above, regardless of any counter-indications.

There exists no common understanding of the past, no common understanding of the present. While, for good reasons in South Africa, race continues to matter, and affects policy – affirmative action and active steps to undo the legacy of the past are important, and relevant – there is no understanding of what this means for the present. It appears that the legacy of the 'divide and conquer' tactics of apartheid, the division of the population into distinct racial groups endures, and no *nomos* is identifiable, no mutual understanding of the normative universe of either the present or the past.

6.7 Conclusion

The constitutional culture 'from above' that the Community 2 interviewees perceive to be present in South Africa is one that they understand to continue, and even deepen, their historic marginalisation. The constitutional culture 'from above' has no regard for them, as Coloured people, has no impetus or desire to assist them or to improve their situation. While there are elements of the constitutional culture 'from above' that are welcomed – most notably freedom of religion – their alienation from the constitutional culture 'from above,' which is perceived to care only for Black African South Africans, which is perceived to be beholden to an overly permissive human rights culture, is deeply entrenched. This has significant ramifications for the legitimacy of the constitutional state.

Chapter 7 – Community 3: Defenders of the Constitution

7.1 Community description and reflexive considerations

The hope that so many had in the constitutional era seems to be reflected in the lives that many within Community 3 lead. The interviewees are racially mixed, reflective of a racial mix in the community, have been able to access opportunity, educationally and professionally, and are able to access the basic services that they need to lead dignified lives.

The discussions with the interviewees from this community indicate significant levels of support for the Constitution - something that is perhaps not surprising, in light of the fact that they are able to enjoy the promises contained within it. However, several things are notable – first of all, the relative absence of the state from the interviewees’ lives, secondly, the discrepancy between the lives that the interviewees lead, characterised by relative comfort and security, and the lives of many of the people in the country, a discrepancy that causes the interviewees significant discomfort, and thirdly, the extent to which the interviewees advocate for the Constitution and its values, despite their knowledge that there is a significant discrepancy between the values of the Constitution and those of many within the population. It is these three elements that create the complex interviewees’ understanding of the formal Constitution – the objective law, the law ‘from above.’ But these three elements are also present in how the interviewees understand the law ‘from below’ – their subjective understanding of the law.

Significantly, there is little sign of any constitutional alienation at all. Instead, we find what Hertogh calls Legalists, or, where specific knowledge is absent, Loyalists.¹ The Constitution itself faces few challenges from the Community 3 interviewees, its contents seen as the solution to South Africa’s issues. However, the state, its competence and commitment to the constitutional values, faces questions the Constitution does not.

¹ Marc Hertogh, *Nobody’s Law* (Palgrave Macmillan 2018) 57–9.

7.1.1 Community description²

Community 3 is an historically white, middle upper-class area located within 5 kilometres of an urban centre, consisting largely of apartment blocks. The area was founded in the early decades of the 20th century, and today is populated by just over 5000 people.

80% of the households in the area were in the 77th percentile or higher for household incomes, with incomes of at least R12 000 a month, R144 000 a year, while 56% of households fall in the 92 percentile or higher (incomes of R25 000 a month, R300 000 a year, or higher) Between 2018 and 2021, average sale prices for residences in the area varied between R1 300 000 and R1 600 000, above the average house price for a house in South Africa (R993 000 in 2021).³

Although the area was historically white in terms of apartheid-era legislation, today the area is, by South African standards, relatively mixed, with a population that is 35% Black African, 31% white, and 27% Indian or Asian. It should be noted that the area was never solely populated by white people – during apartheid, people of colour were permitted to occupy servants' dwellings on the properties in the area. These dwellings continue to be where many of the Black African people in the area live today.

7.1.2 Interviewees

Six of the interviewees were white, one was coloured, one mixed race, and one Indian, with an age range of 26 to 53. Two of the interviewees were aged between 20 and 30, six between 30 and 40, and one over 40. Three of the nine interviewees expressly identified as queer.

² In recognition of confidentiality guarantees made to the interviewees, which included a guarantee that the community would not be identified or identified, the community description contained here operates to provide a general idea of relevant characteristics of the community– references are intentionally excluded, to avoid identification.

³ 'South Africa: Property Trends and Statistics' (*Property24*, 2021) <<https://www.property24.com/property-trends>> accessed 21 July 2022.

7.1.3 Conducting research in Community 3: Reflexive considerations

The context in which the Community 3 interviewees lead their lives is one familiar to me, and is one that echoes my own life, in many ways. Able to access resources, whether through the state or through private avenues, employed, many, if not all, having engaged in studies after school, the vulnerability that the interviewees in Communities 1 and 2 felt was absent. My familiarity with the context in which the interviewees exist was, in many ways, a boon, enabling a level of shared meaning, through shared experience and expectations.

At the same time, such close identification with interviewees can pose a challenge, containing the possibility that I might over-identify with the interviewees, and may superimpose my own experiences and interpretations upon the experiences of the interviewees. Alternatively, I might fail to recognise the assumptions that underpin lives such as those that the Community 3 interviewees and I live. This is to be closely guarded against. One such strategy that aids against this transference is through maintaining an intersectional understanding of subjectivity and recognising the multiple ways in which the world is experienced, along racial, gendered and many other lines. Maintaining this perspective placed the disparate experiences and understandings of the world at the forefront of the data gathering process and the subsequent analysis.

7.2 Community voices

This vignette is a snapshot of the participants' responses. It is a composite - whilst it relies on the actual words of the interviewees, it draws on all of the interviews, attempting to provide an overall picture and insight into the themes and approach of the interviewees, in their own words.⁴

I moved to [Community 3] when I started working and have been here for three years. I have a Masters, and I work as a consultant. I always wanted to be here, ever since I came here, I

⁴ A fully referenced version of this vignette can be found at Annex 7, identifying the source of each quotation.

thought, 'I love [Community 3].' [Community 3] is quite a particular place in [urban centre name redacted]. I feel safe, people feel a sense of safety parking in the road, where maybe in other areas they don't...there is a security guard in every building.

I know South Africa has a Constitution, a document that determines how, like, it's like the basic, the most basic and fundamental laws of the country. I always use the phrase, 'South Africa has such a liberal Constitution', but it is not always implemented. But I mean, I love it. It is a very progressive document, I mean, there is so much to say about it. I really love that we came through a whole lot of hardship and we developed this forward-thinking document where everyone's rights are enshrined. It's an excellent thing, for South Africa as a country, it's like a project, that needed an aspirational foundation if it was going to move forward from apartheid in the best way.

I would be immensely troubled if the Constitution didn't align with my conception of ethics. I am very deeply aligned with it, but there is definitely a dis-alignment between the bulk of South African's values and the Constitution...it is progressive, and a lot of people don't think this way. I think South Africa is not necessarily the most open-minded society...there is a conservatism in South Africa...very much linked to the...strong religious roots in the country. I don't think many people care about who drafted the Constitution, it doesn't matter to me. It was written in the 90s by a bunch of judges.

The Constitution has impacted everyone's life, everyone who lives in the country, indirectly, at least. Being gay, the Constitution has definitely affected my life, and there are so many cases in which the Constitution has been used to ensure that people have rights...it protects the rights of all individuals. But I'm in a privileged position and I don't feel like I have to fight for anything...being white, being educated, I think education is a big one, having a disposable income, and living where I live, I think most of those are privileges. I think that I am lucky enough to say that I live in a fairly free society...but, definitely, the majority don't...I think that it is impossible to, to separate whether the ideas of freedom, of openness and justice, to separate them from the material circumstances in which people live...I have access to courts, lawyers, if I want them, right. I also live in areas that are fairly safe. I have access to education, I have access to work opportunities, I have access to health care, these kind of rights, I am not

confronted with instances of frequent physical violence or intimidation... I can express views fairly openly, I can move places, safely...But a lot of South Africans do not. Many of the kind of injustices in South Africa are never personal and collective, often they are observed at a distance, it is about power and who has power and authority in a society. I mean, you know, the ability to assert their right to minimum wage, because they know that they have tenuous rights, tenuous labour rights anyway, and that they may just be fired. Similarly, the people who live in our building won't assert their right to use common areas because they, they don't feel secure in their right to shelter. If they get kicked out of the building, you know, where are they going to go? I also think that the people who are poor and black still aren't really, I mean, their rights are enshrined in the Constitution, but you know, the common acceptance that they have got full humanity isn't really, I mean, we aren't really there yet.

The government isn't addressing crime properly, but it's not like I know what it should do, it's a really, really hard problem. If we think about crime in a simplistic sense, we can say, 'Oh, the government isn't doing enough, because all these murderers aren't in prison', but if you think about crime as being socio-economic, as having a wider socio-economic reality to it, in the sense that I don't think people are criminals for reasons that we can explain, socially and economically, and if you have that view, what the government should do is more complicated. When people suggest the death penalty, I think they are looking for an easy fix, rather than going back and looking at the roots of it, taking the time to rebuild the communities and working with men and working with victims.

I don't often see the police here, you see, we have got private security. If someone was trying to break into my house, I would call private security because I think that their reaction time would be faster, and I think that, considering my previous interactions with the police at our designated police station, I don't even think that there is going to be, like, enough policemen. I think the problem is capacity...you don't see them very often...and I don't think it is because they do nothing, I just think there aren't many of them. It's complicated, they are underpaid, they are poorly educated.

7.3 Constitutional awareness

Without exception, the Community 3 interviewees were aware of the Constitution, and put forward relatively clear perspectives on its place in South Africa's democratic order, with varying levels of specificity, from when it came into force,

it was published in 1996, so, I think post-apartheid, after 1990,⁵

to its impact on South African law and the path of democratic South Africa,

I would define the Constitution as an aspirational document of how we want society to be...it means something that, something that, that society doesn't look like or behave as, but how we want to become.⁶

The Constitution appears to play an important role in the Community 3 interviewees' engagement with constitutional South Africa, creating the context in which they exist,

It's something that allows your life to happen, it allows choices, but it doesn't, you don't notice it...it is a good helpful background.⁷

Despite a firm basic understanding of the Constitution, the interviewees were not always entirely sure about how the Constitution came into being,

I understand the kind of formulation of the Constitution in relation to a much wider set of processes happening in those transition years, which were happening at, you know, a high level, in terms of people with power on both sides trying to rethink how we create a new society...not all ordinary people were invested in that project, so there...was this project of asking people themselves to vision what freedom looks like, what a new society might look like, for them.⁸

⁵ Interview 4.

⁶ Interview 6.

⁷ Interview 3.

⁸ Interview 8.

However, this uncertainty appears to have little impact on the interviewees' faith in the Constitution. Instead, the interviewees highlight what they understand to be the vision contained within the Constitution,

The Constitution is looked at as this great document, globally, and one of the most progressive constitutions, where women have equal rights, queer people have equal rights, people with disabilities have equal rights, despite anything, despite who you are, your religion, your affiliation, everyone has equal rights.⁹

Defined variously as 'progressive' or 'liberal', the perceived nature of the Constitution is deemed to be pivotal in the interviewees' positive inclinations towards it, towards the constitutional state. This is, in large part, because it mirrors the interviewees' own values,

I love it, it is a very progressive document...it is forward thinking, aiming for an equal and just, allows everyone the very basic rights, you know, rights of association or rights to property, but also, government, as well as allowing people to live their lives, government has a duty to provide basic human rights, a right to shelter, rights to education.¹⁰

There is, clearly, an awareness of the constitutional culture that accompanied the democratic era. The perceived alignment between the values of the Constitution and the values of the interviewees creates a bond between the democratic South Africa and the Community 3 interviewees,

I would say that I am very deeply aligned with the large majority of [the constitutional values].¹¹

The interviewees see themselves as invested in the democratic society, and as beneficiaries of the promises of the Constitution. They speak positively of the impact that the Constitution and the culture that surrounds it have had on their own lives,

⁹ Interview 4.

¹⁰ Interview 9.

¹¹ Interview 8.

I mean, it has [impacted my life] in pretty much every way you can think of...on the type of laws we have, on the type of society that we have now, and want to have in the future, in the way that you think about...living in society.¹²

While noting the congruence of their own values with what they perceive to be the constitutional values, the interviewees' knowledge of the Constitution and the constitutional state recognises that the contents and aspirations of the Constitution may not reflect the perspectives of the majority of South Africans,

I think South Africa is a very conservative society in many ways, but we have this, um, very radical Constitution in many ways, and that is a real tension.¹³

This disjuncture is potentially problematic, and the interviewees recognise that it may have ramifications for the constitutional state,

I think that there is a serious worry about the legitimacy of the Constitution in as much as it is part of the social order in which many people feel that they don't have much of a say. People feel like they don't have a voice or influence.¹⁴

Implications

Overall, the Community 3 interviewees are familiar with the general contents and aspirations of the Constitution, but also recognise that the values contained in it, values that, generally, reflect their own values, may be at odds with the values held by many, perhaps the majority, of people in South Africa. The interviewees are also aware that many of the comforts that they enjoy, be they security, health care or having had access to a good education, are a result of their engagement with private services. They are aware that these benefits are often denied to people who rely on the state, that the lives of many South Africans fall short of the promises contained within the Constitution.

¹² Interview 2.

¹³ Interview 8.

¹⁴ Interview 7.

The interviewees are also aware that the society envisaged by the Constitution is one that has yet to come to fruition, that, although many of the promised fruits of the constitutional era can be found in the interviewees' own lives, there is a significant disparity between their own lives, between the resources and opportunities that have been available to them, and the lives of others. In discussing the constitutional culture that they understand to be present in South Africa, the interviewees wrestle with their own privilege, interrogating the extent to which the constitutional culture is inherent or alien to this privilege, with their pride in the Constitution, and with the enduring hardships of the lives of the majority of people in South Africa, with the persistence and entrenchment of inequality.

7.4 What do people in Community 3 experience and perceive to be the constitutional culture of South Africa?

As in Chapters 5 and 6, perceptions of the constitutional culture will form the first part of the analysis of the constitutional cultures found in Community 3.

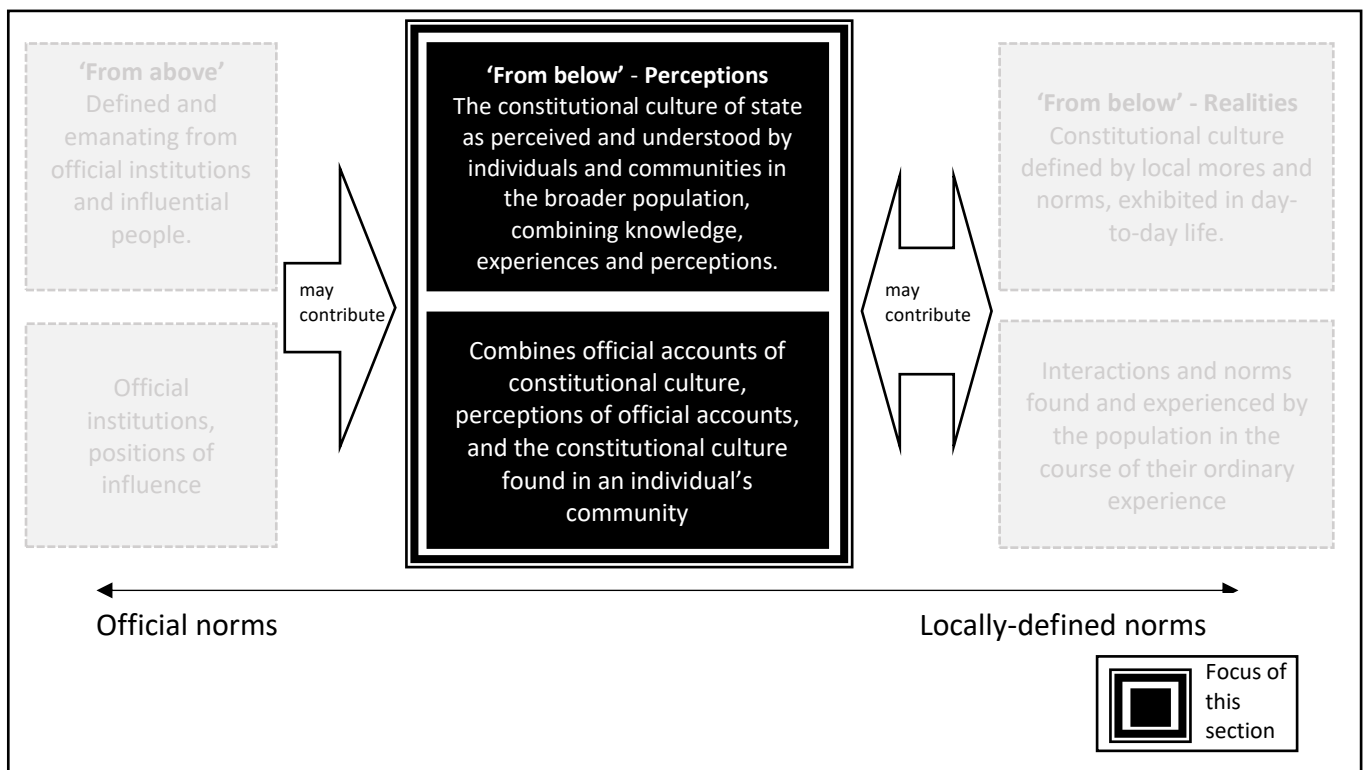


Figure 16: Approaches to constitutional culture, highlighting the role of 'perceptions'

7.4.1 Constitutional culture through the prism of the elements of South Africa's transformative constitutionalism

As in Chapters 5 and 6, the manner in which the interviewees perceive and experience the constitutional culture of South Africa will be interrogated through the central elements of transformative constitutionalism, found at Chapter 3.

7.4.1.1 The commencement of a 'new era'

That the 1994 transition to democracy was understood to mark a new era is manifest in the ideas of the Community 3 interviewees,

I live in a South Africa which is to some degree more open, to some degree less restricted, I mean, I don't live in a South Africa where there are separate entrances based on race...This makes a difference, makes a difference to who you interact with everyday...This is entirely for the better and for the benefit of everyone.¹⁵

In this new era, people are free to manifest their full selves, the Community 3 interviewees understanding the constitutional culture of the democratic South Africa to mark a fundamentally different stage in South Africa's journey, one, where, for the first time, the values of the State allow

...for human beings to fulfil the full extent of their potential.¹⁶

The constitution makes this possible, provides a vision that replaces the oppressive goals of the apartheid regime,

[The Constitution] is an excellent thing, it's absolutely pivotal, because South Africa, as a country, is like a project that needed an aspirational foundation if it was going to move forward from apartheid in the best possible way.¹⁷

¹⁵ Interview 7.

¹⁶ Interview 6.

¹⁷ Interview 2.

The new era that they understand to be present in South Africa marks a change, is the culmination of a journey that enables everyone to thrive, that is the manifestation of the struggles for a fair country,

I love it, it is a very progressive document. I mean there is so much to say about it. I just really love that we came through a whole lot of hardship and we developed something where everyone's rights are enshrined.¹⁸

The new era is epitomised by a series of rights that provides a freedom not present in the country before. Human rights underpin the constitutional culture of the democratic country, and allow people in the country to live lives of their own choosing, to be recognised as full participants in the country, regardless of their characteristics, a drastic departure from the past,

...because my parents are different races...[the Constitution] almost legitimised my family, it meant that we weren't illegal anymore.¹⁹

For me, being gay, it like one of the major things, because I wouldn't have the rights that I do, in South Africa, if it wasn't for the Constitution.²⁰

The interviewees recognise that the freedom that they enjoy, that is protected by the Constitution, is a consequence of their privilege, but willingly embrace the freedom to be able to define themselves, to be able to exhibit the elements of their identity that are protected by the Constitution, but, for a range of reasons, might have been undermined in the past, and to feel as though they belong and have ownership of the democratic country. There is a recognition that this new era might not be experienced across society,

The constitution doesn't discriminate on the basis of race, so in terms of movement, where you could live, they are able to sit on whichever bench they like...but South Africa is still not a

¹⁸ Interview 9.

¹⁹ Interview 9.

²⁰ Interview 6.

perfect society...I think there are still people in need in terms of jobs, health, housing, water, basic rights.²¹

The interviewees recognise that the new era remains a promise to many within the country. This does not undermine the fact of the new era – while the transformed constitutional culture is yet to be fully realised, the vision underpinning this culture is a drastic break from the past, offering promise to all.

7.4.1.2 A new set of values entrenched at the heart of the state

The Community 3 interviewees are able to identify a range of new values and a new constitutional culture in place in South Africa, values that shape their lives, values that they endorse. That the interviewees recognise themselves in what they understand the Constitution to stand for, and that they support the society that the Constitution aspires to realise enhances their dignity – they deem this alignment to be important,

The Constitution definitely agrees with my values, that's why I like it.²²

At the heart of these new values is an aspirational vision of a country where every individual has the right to equality, to dignity and to freedom, a country where everyone matters. The interviewees recognise that for much of the country, this vision has yet to be realised, and this delay factors into the way in which the Community 3 interviewees understand the transformational values of the constitutional culture in South Africa. A second value underpins the interviewees' understanding of the constitutional culture found in the country – a value that speaks of the importance of protecting human rights and promoting inclusion, at the expense of reflecting the values of the broader population.

²¹ Interview 1.

²² Interview 3.

7.4.1.2.i Everyone matters equally (in theory)

To the Community 3 interviewees, the transformed constitutional culture recognises that everyone has value, everyone is worthy of consideration, everyone should be able to access a range of basic rights and services that protect and promote the dignity of individuals,

I think that the kind of anchor value of it all is a combination of equality and equity...I think that equality is kind of, it is more, somewhat more theoretical. It's a principle that everybody should be treated the same...so you have a society where people have basic access to, to material goods, food, healthcare...and the distance between the 'haves' and the 'have-nots' is not so egregious.²³

Equality is a central part of this constitutional culture, the idea that everyone matters, and matters equally,

It guarantees that everyone should be treated equally, which was not the case for any previous constitution, and that everyone should be an equal.²⁴

Although equality is deemed to be central to the constitutional order, the bulk of the interviewees observe South African society to be riven by, almost defined by, inequality, by a comparison between their own lives and the lives of the bulk of South Africa's population. The constitutional culture is designed to realise a vision, designed to provide both the destination and means of arriving there, but this will require patience,

I would define the Constitution as an aspirational document, of how we want society to be...something that society currently doesn't look like, but how we want to become.²⁵

This inclusive, affirming vision of society contained within the constitutional culture does not reflect the society that the interviewees observe in present day South Africa. The interviewees are clearly aware of the implications of the inequality that they observe, of how

²³ Interview 2.

²⁴ Interview 3.

²⁵ Interview 6.

this inequality entrenches past patterns of discrimination, aware that, perhaps, the new era is

...not different. On paper, there are no different laws for different people...they don't have to live in designated areas, can have relationships with people who have a different skin colour...on paper, yes, great, but in reality, we still have partial apartheid.²⁶

While recognising that South Africa's past has left the democratic state with a difficult, near impossible, task, the ongoing vulnerability of many within society raises questions about the extent to which the constitutional culture has been put into effect –

There is nothing being done...to prevent women from being raped and preventing transwomen and gay men and just queer people in general from being hated.²⁷

The interviewees recognise that everyone matters, that everyone should have access to basic services. While they are amongst those in society who are able to obtain the resources required to uphold one's dignity, it is interesting, and telling, that they largely do so through sources other than the state – through private healthcare, through relatively privileged (or private) schools, through the employment of private security companies, amongst others,

No, I don't [obtain many services from the State]. I mean, not healthcare...I went to a private school...so I definitely think, and I definitely acknowledge, that not everyone lives in a world where they can get access to quality healthcare, or a decent education, or shelter, or any of those kind of things.²⁸

The difference between the interviewees and the vulnerable is their ability to access resources, their ability to 'opt out' of relying on the State. This will be discussed in more detail below, at Section 7.5.2. It is sufficient, at this juncture, to note that the State is struggling to put into effect fundamental elements of the constitutional culture introduced in the democratic era.

²⁶ Interview 1.

²⁷ Interview 4.

²⁸ Interview 9.

The interviewees' positioning within the landscape of privilege and deprivation causes them a degree of discomfort. The constitutional culture, the aspirational vision, is supposed to be different, everyone should have benefitted, and the relative comfort of their own lives clash with the deprivation that they observe around them

In one sense, it's not hard to reconcile because the only way to think about [the inequality], you don't like it, but life can still be quite good. At another level, it is bloody hard, how do you reconcile, how to be in this...how to live in this country.²⁹

The interviewees realise that they are not the ones bearing the cost of the delay in realising the constitutional society, are not bearing the cost of living in 'partial apartheid'.³⁰ The interviewees implicitly wrestle with the question of whether these vulnerable groups, the bulk of the population, are actually able to enjoy the promises of the constitutional era. The interviewees view the constitutional society as simultaneously impactful and as having fallen short, the Constitution simultaneously an international benchmark,³¹ while the failure to realise its promises as a symbol of the enduring divide and inequality of society.³²

The values of equality and inclusion that the interviewees perceive to be at the heart of the values of the constitutional culture of democratic South Africa, of a nation that seeks to provide everyone with access to basic resources and rights, is something that the interviewees are proud of, something that they can clearly identify, and that they identify with. The ongoing problems realising this constitutional culture are not seen as failures of the constitutional vision or culture, but are ascribed to the need to be patient, to failures of the state, or to the unwillingness of the privileged sector of the population to embody the values of the democratic state's constitutional culture, the lingering whiff of racism present,

²⁹ Interview 7.

³⁰ Interview 1.

³¹ Interview 7 – 'I guess it is more progressive than many others around the world, in a tradition of constitutions and constitutionalism, because it protects rights here, like socio-economic rights, and also because of a variety of protections that people consider liberal or progressive, like the constitutional provision that allow the courts to rule out the death penalty or rule in favour of civil unions.'

³² Interview 2 – 'Definitely not, the majority don't [live in a free and open society]... I think that it is impossible to separate the...ideas of openness and justice... to separate them from material circumstances in which people live.'

In [Community 3]...there is still contestation. Salaries – to make sure the security guards are paid minimum wage, which should be a very easy and obvious thing, but actually, it is a bit of a battle. And in [Community 3], there is also a battle about how people who live in the servants' quarters are treated. Whether they have, whether they enjoy the same rights of access as people who live in flats...there is definitely a sort of, racial discrimination undertone as well.³³

While the interviewees appear to have invested time and energy (at least in the interviews) towards understanding equality (and inequality) in South Africa, in placing their own privilege and experiences within the experiences of a South African society that has significant levels of deprivation, there are clearly alternative approaches found in the middle/upper-middle economic sectors of South African society, one of which is found in the views of one interviewee in particular,

Even if you listen to literature, Africa didn't like its white citizens, really didn't. There is reverse apartheid now, we are in this reverse apartheid with the this BEE³⁴ empowerment, [white people are] disenfranchised.³⁵

To this interviewee, a white woman, it is white people in South Africa who suffer from an absence of equality, who are discriminated against. This idea was familiar enough to be recognizable to other interviewees – recognizable, but regarded as problematic and inaccurate,

[The Constitution has] more extended the rights that [white people] already have...A lot of people have a weird way to feel discriminated against, it seems to me...there is a darker sentiment underneath that, like they have the automatic like, being in charge...because obviously black people shouldn't be in charge...There is a sense of unrecognised superiority.³⁶

³³ Interview 9.

³⁴ 'BEE' means Black Economic Empowerment.

³⁵ Interview 5.

³⁶ Interview 3.

The understanding of inequality and race exhibited by the interviewee concerned with discrimination against white people offers an interesting avenue for future study. For the purposes of this study, the existence of competing understandings and experiences of equality indicate that many further avenues of exploration are available and would be required for a full picture of constitutionalism in South Africa.

Taking all of the above together, the interviewees draw a divide between what they perceive to be a value underlying the constitutional culture, that everyone matters, and what they observe in practice – that inequality and injustice endure. The inability to realise the aims of the constitutional culture, to realise a society where everyone matters, reinforces the need for the new era, for the constitutional culture that they understand to have been introduced from above. The transformation of South Africa’s constitutional culture must ultimately result in a society in which all members can access opportunity and resources.

7.4.1.2.ii A progressive future, ‘for’ the population not ‘by’ the population

Inclusivity is perceived by the interviewees to be a fundamental element of the new constitutional culture, a contrast to the discrimination and exclusion of the past. The emphasis on inclusion is closely linked to equality, to the need to involve people who have suffered exclusion in the past. There are important socio-economic and political rights elements to this inclusion, as well as elements linked to race, gender and sexuality. This inclusion is a fundamental part of how the interviewees understand the constitutional culture of South Africa,

I guess it is more progressive than many others around the world, in a tradition of constitutions and constitutionalism, because it protects rights here, like socio-economic rights, and also because of a variety of protections that people consider liberal or progressive, like the constitutional provision that allow the courts to rule out the death penalty or rule in favour of civil unions.³⁷

³⁷ Interview 7.

The inclusive constitutional culture that the interviewees understand to be part of the democratic state aligns closely with the interviewees' own values. This alignment is a significant reason for their support,

The Constitution definitely agrees with my values, that's why I like it.³⁸

Yet the interviewees understand these values to be at odds with the values held by many, perhaps most, of the people in South Africa,

Yeah, absolutely [the Constitution is at odds with the values of most South Africans]. I think South Africa is not necessarily the most open-minded society in the world. I feel that there are still deeply entrenched patriarchal norms, and there is a conservatism to South Africa...that I think does very much link to the fact that there are strong religious roots in the country.³⁹

Accordingly, they believe that the constitutional culture in the democratic state represents a desirable outcome, have a belief that the values within the constitutional culture are laudable, in no small part because of the link between these values and the interviewees' own values. The interviewees seem to believe that the constitutional culture of the state will direct the South African population on a journey to a society that is more progressive and inclusive,

The Constitution is an aspirational document of how we want society to be... [this is positive] because if you aspire to something, you don't usually aspire to be worse than you were before. I mean, I think that, in many ways, the Constitution has aspired to things that society doesn't intrinsically want.⁴⁰

The contrast between the importance that the interviewees place on the Constitution reflecting their own values and their willingness to accept that it conflicts with the values of the majority of the South African population is striking. While one interviewee noted that

³⁸ Interview 3.

³⁹ Interview 6.

⁴⁰ Interview 6.

they would feel ‘immensely troubled’ by such a disconnect,⁴¹ many of the interviewees appear to regard the Constitution as a protection against the demands of the majority,

I might be anti-democratic in this respect, like, it seems really important to me, that fundamental rights are not based on their popularity with voters.⁴²

The conflict that this entails is both inevitable and necessary

You were always going to have this kind of situation, where you have society that is moving to a place that you want to be, but because they are not there yet...If they were there, we probably wouldn’t have needed the Constitution.⁴³

Many of the interviewees adopt this approach, recognising that the Constitution is not designed to be a populist document, but a principled one. To the interviewees, it is progressive values that are most appropriate for society, and their perception that it is these values that inform South Africa’s democratic constitutional culture reinforces their support for the constitutional era. Some of the interviewees wrestle with the implications for the legitimacy of the Constitution,

There is a serious worry about the legitimacy of the Constitution, there are ways in which it is contrary to, like the majority, public opinion as polled...I think that there is serious worry about the legitimacy of the Constitution in as much as, um, well, it is part of the social order of which many people feel that they don’t have much of a say.⁴⁴

7.4.1.3 An emphasis on accountability and transparency

Accountability and transparency are not strongly emphasised elements amongst the Community 3 interviewees. However, a number of elements from the interviews are perhaps worthy of consideration. Firstly, the interviewees recognise that there has been a lack of accounting for the past, that patterns of privilege endure,

⁴¹ Interview 2.

⁴² Interview 3.

⁴³ Interview 2.

⁴⁴ Interview 7.

This is entirely for the better and for the benefit of everyone...including, most specifically, for white South Africans, who have the best of both sides of things, the best of the legacy, they haven't had the artificial restrictions.⁴⁵

White South Africa has not only not been called to account, but it has additional benefits in the present era – they maintain the material benefits of the past, and can benefit from the freedoms of the present.

Secondly, the interviewees seem to be somewhat indifferent to the process through which the values that they perceive to underpin South Africa's constitutional culture, values that they support, were imposed upon the country,

[Does it matter to you who drafted the Constitution?] Not really, no...To be honest, I don't think many people care about who drafted, about the process, who drafted the Constitution.⁴⁶

As discussed above, in sections 7.4.1.1 and 7.4.1.2, many of the interviewees recognise that their advocacy of the 'progressive values' that underpin the constitutional culture of the democratic era – of their own values – comes from a position of privilege. They recognise that this reinforces their dignity, but also has the potential to alienate large swathes of the population.⁴⁷ In light of the importance of such values to the interviewees, and the potential conflict that these values have with the values of the broader population, this nonchalance is perhaps interesting, indicating, perhaps, that accountability matters to them only in so far as they approve or disapprove of the result.

Taken together, these two points, and the relative lack of emphasis on accountability from the interviewees may mean that accountability is not a fundamental part of how they see the modern South African state, is not seen as a fundamental part of the constitutional culture.

⁴⁵ Interview 7.

⁴⁶ Interview 2.

⁴⁷ Discussed at section 7.4.1.2.ii: *A progressive future, 'for' the population not 'by' the population*, above.

7.4.1.4 Positive obligations owed by the state

The interviewees see the transformational and progressive nature of South Africa's constitutional culture as epitomised by the positive obligations owed by the State to every member of South African society, a step towards addressing the challenges and vulnerabilities present in South African society,

I think that it is impossible to separate the...ideas of openness and justice... to separate them from material circumstances in which people live.⁴⁸

The inclusion of these obligations sets South Africa apart, emphasises the extent of the inclusive nature of the constitutional culture established in the post-1994 era, and emphasises how exceptional South Africa's constitutional culture is,

I guess it is more progressive than many others around the world, in a tradition of constitutions and constitutionalism, because it protects rights here, like socio-economic rights...⁴⁹

These positive obligations speak of the kind of country that South Africa aims to be, a country where the most vulnerable are taken into consideration, where the State cares for everyone. The inability or unwillingness to put this constitutional culture into effect undermines the constitutional culture – while the protections of the constitutional culture are laudable, they are largely theoretical. Unless they materialise, they might mean very little to people unable to access the basic resources required to lead the lives that the constitutional culture promises, lives defined by dignity,

I just think that so much of that the Constitution means is about people's everyday experiences...and in the context where the majority of people have a state that is dysfunctional in the everyday sense, of a clinic that doesn't have meds, or you know, in the

⁴⁸ Interview 2.

⁴⁹ Interview 7.

sense that you have been trying to find out why your 256 RDP houses only have foundations...I just think that the breakdown happens at a much more practical level.⁵⁰

The fact that there is a continuing range of threats to the dignity of people in South Africa, particularly to people who bear the legacy of past oppression, is recognised by the interviewees. The interviewees implicitly wrestle with the question of whether these vulnerable groups, in essence, the bulk of the population, are actually able to claim their constitutionally protected right to dignity – a question whose answer has ramifications for the actual impact of the Constitution, for the reality of the constitutional society that has been founded in democratic South Africa. In essence, the interviewees recognise that constitutional South Africa continues to manifest a society where some enjoy the protections contained within it, while others do not. Power and privilege remain unevenly distributed in society. Those without power are unable to access or enforce their rights,

It is about power and who has power and authority in society...I think that people who are poor and majority black still aren't really, I mean, their rights are enshrined in the Constitution, but, you know, the common acceptance that they have got full humanity...we aren't really there yet.⁵¹

The interviewees' perception that the positive obligations perceived to be imposed on the State by the constitutional culture are a vital part of rebuilding South Africa and undoing past injustice may be juxtaposed with their perception that these obligations are largely not fulfilled, rendering much of the population vulnerable. This is reinforced by the interviewees' own mechanisms for obtaining the essential elements that they require for a dignified life, for a life in which their potential is realised, which they do by accessing private providers and avoiding the State. Their dignity is preserved by not having to rely on the State, which is deemed an unreliable provider, at best. The strategies that the Community 3 interviewees adopt to avoid engaging the State are a vital part of their day-to-day existence and will be explored in more detail in section 7.5.2, below.

⁵⁰ Interview 8.

⁵¹ Interview 9.

7.4.1.5 The making of a 'constitutional people' and the 'constitutional person'

The Community 3 interviewees see the constitutional culture embedded in South Africa by the 1994 project as having both collective and individual ramifications,

I think it's about being an individual and also being part of the system. Like respecting individual values and all the different people and cultures and backgrounds that make up South Africa in one.⁵²

Collectively, the interviewees speak of a sense of unity that underpins the constitutional culture of the new era, 'a sense of South African-ness',⁵³ that is intended to replace the divided and fragmented culture of the past,

One thing apartheid did really well was to keep people separate.⁵⁴

While this vision of a united country is noted by the interviewees, the interviewees cast doubt upon the extent to which this vision of unity has been realised, as is the case with many other elements of the constitutional vision. Instead, they note the endurance of racial and socio-economic divides common in the country,⁵⁵ the continued fragmentation of the body politic.

Individually, it is clear that the Community 3 interviewees understand the constitutional culture to provide a series of rights and entitlements that constitute what it means to be a person in democratic South Africa,

I think the values of the Constitution are allowing for the...for human beings to fulfil the full extent of their potential.⁵⁶

The constitutional culture's elevation of protections and freedoms shape the way that the interviewees, and other people in South Africa, exist in the world,

⁵² Interview 1.

⁵³ Interview 3.

⁵⁴ Interview 3.

⁵⁵ Interviews 3, 4, 5 9, amongst others.

⁵⁶ Interview 6.

I think that, fundamentally, what the Constitution did is that it abolished apartheid, and the legal structure of apartheid. So, on the one hand, it almost legitimised my family, it meant that we weren't illegal...that I, that I, as a citizen of South Africa, I have certain rights guaranteed to me. And I think that this does affect the way that you go around the world.⁵⁷

This is deemed to be particularly true for groups and individuals that were subjected to discrimination during the pre-democratic era. The ability to manifest their 'full selves,' that they have the right to live freely, is something that the interviewees hold dear, that they believe to be rooted in the constitutional culture of the democratic nation. This was acutely evident for the interviewees of colour and for those interviewees who identified as queer or gay.⁵⁸ The Constitution, the legitimacy and protection that it conferred, validated these individuals, granting them the freedom to be able to move confidently in the world, without the fear that their personal characteristics would attract official sanction, as would have been the case in the past,

I'm a queer woman, and I wouldn't have been able to date a woman...As a queer woman, I don't think I would have been given the same freedoms.⁵⁹

[The Constitution] allows your life to happen, it allows choices, but it doesn't you don't notice it...like, if gay marriage wasn't allowed...the social consequences of me dating a woman...it would be gross or worse, or difficult...the fact that the Constitution is pro-equality, particularly with regards to orientation, it's a good, helpful background.⁶⁰

The interviewees recognise that the freedom that they enjoy, that is protected by the Constitution, is a consequence of their privilege, but willingly embrace the freedom to be able to define themselves and exhibit the elements of their identity that are protected by the Constitution but, for a range of reasons, might have been undermined in the past. Again, the interviewees note that these freedoms might not be enjoyed equally by all throughout the

⁵⁷ Interview 9.

⁵⁸ 3 of the 9 Community 3 interviewees identified as queer or gay.

⁵⁹ Interview 4.

⁶⁰ Interview 3.

country. Threats to these choices were identified, emanating from those who might not be willing to recognise the rights of groups they deemed unworthy, in some way,

My impression is that people welcome rights as they affect their daily lives...where people get a bit iffy is other peoples' rights, particularly groups that they don't really like, like I think that there would be lots of people who don't believe in the rights of gay people, for example...the death penalty...the recent xenophobic attacks.⁶¹

The interviewees were able muscularly to assert their individual freedoms, were able to assert their personal characteristics, but only because of their ability to occupy protected spaces – they were in some ways insulated by their privilege. The restrictions on these freedoms often manifested in unrestricted public spaces,

I would never walk across the highway at night. I ran in Community 3], quite fine. The one thing I hated, which actually stopped me running, is I hate being cat-called, so did not want to run anymore.⁶²

Interestingly, many of the interviewees actually felt their freedom infringed upon during their interactions with the state, which were perceived to render vulnerable a range of different rights,

Dealing with Home Affairs...I go there, and they are like, 'You don't have a number,' they are like, 'Sorry, if you weren't born here, you don't get a card.'... I mean, Home Affairs, in some ways, it's a big equaliser.⁶³

I was filming a protest, and the police were shooting into the crowd...firing with guns, rubber bullets at the crowd, and I was filming this, and then the police weren't happy with this, and they told me to stop filming.⁶⁴

⁶¹ Interview 9.

⁶² Interview 6.

⁶³ Interview 1.

⁶⁴ Interview 1.

They managed to maintain their enjoyment of their rights by avoiding engagement with the state, by retreating to private spaces, leveraging their privilege to enjoy freedom in a way that they understand to be, to a large extent, denied to people who rely on the state,

Definitely not, the majority don't [live in a free and open society] ... I think that it is impossible to separate the...ideas of openness and justice... to separate them from material circumstances in which people live.⁶⁵

The material circumstances of the bulk of South Africans are an infringement of what should be, of the constitutional promise. It is the failures of the state to deliver, to fulfil its obligations that leave the bulk of the population unable to claim their identity as 'constitutional people,' to claim the individual rights that the constitution ostensibly protects for them. The Community 3 interviewees continue to exalt the constitutional culture, but protect their own rights by avoiding engagement with, or reliance, on the state. This, in fact, forms a central element of the constitutional culture that governs their day-to-day lives, discussed in section 7.5.2, below.

Overarchingly, the majority of the interviewees viewed the democratic era as an era in which freedom was enhanced, at least theoretically, and this is particularly true for privileged sectors of the population. However, even this theoretical notion of freedom was not an uncontested value – one interviewee held that the Constitution had placed additional restrictions on white people in South Africa,

...as a white, I don't think you have that many rights, and those rights can be taken from you in a second...⁶⁶

This approach did not find currency amongst the bulk of the interviewees, although this may be a sentiment that resonates with some white people's perception of life in modern day South Africa.

⁶⁵ Interview 2.

⁶⁶ Interview 5.

7.4.2 Perceptions of constitutional culture in Community 3

The Community 3 interviewees find the constitutional culture that they observe in South Africa to be one that resonates with them, to create a vision that they identify with and support. Across the various elements of transformative constitutionalism identified in this project, the interviewees demonstrate a number of themes in their understanding of the constitutional culture present in South Africa.

7.4.2.1 The constitutional culture ‘from above’ offers the vision of a better future for all

The constitutional culture that the Community 3 interviewees see as being at the heart of democratic South Africa is a constitutional culture committed to realising an equitable future where everyone’s human rights are respected and the scars of the past are recognised and addressed. In no small part, these interviewees perceive the constitutional culture that is present in South Africa to be similar or identical to the constitutional culture that has emanated from influential institutions and positions in society during the democratic era, one that seeks to fundamentally rebase South African society.

7.4.2.2 The constitutional culture ‘from above’ is progressive and this is to be welcomed

The interviewees are clear in their perception that the constitutional culture found in South Africa is progressive, markedly so, even by global standards. For these interviewees, the progressive nature of the constitutional culture is welcome, and aligns closely with their own values. It is the progressive nature of the constitutional culture that enables people to make demands of the State, to claim resources and services from the State, and it is the progressive nature of the constitutional culture that protects and advances the rights of women, of gay, lesbian, trans and queer people, amongst others, who are protected by the law. Taken together, the interviewees see the progressive nature of the constitutional culture as indicative of a constitutional culture that manifests high ethical standards, one that tries to ensure that every individual is able to fulfil every element of their potential.

Interestingly, the interviewees care that their own values are reflected in the constitutional culture but are relatively unconcerned about the process by which this happened or about their perception that the progressive nature of the constitutional culture clashes with what they perceive to be the values of the broader population. The interviewees see the constitutional culture as a protection against the conservatism that they perceive to be present in the broader population. They believe that, over time, the broader population will see the merits of the protections extended by the constitutional culture, and South African society, more broadly, will start to manifest progressive values. However, in the short term, the disjuncture between the progressive constitutional culture and the conservatism of the broader populace is one that is unavoidable.

7.4.2.3 The constitutional vision requires patience

The interviewees are aware of the gulf between the lifestyles that they enjoy and the resources that they are able to access, and those available to the bulk of the population, of the gulf between the safety that they enjoy and the vulnerability of so many others in the population. Although the interviewees do not understand the constitutional culture to require absolute equality, to require everyone to have the same access to resources and opportunity, they understand the inequalities found in South Africa to be contrary to the vision of South Africa's constitutional culture. The interviewees also perceive the extent of the challenge that the constitutional state faces and understand the persistence of inequality and the ongoing struggle for the state to meet its obligations as inevitable, and as an anticipated part of the process of building an inclusive and just state. For those seeking to improve their position by relying on the promises of the constitutional culture, it will be necessary to be patient – patience required for the state to deliver, patience required for the state to be equipped with the skills and expertise to deliver, patience while behaviours of state officials that are in conflict with the values of the constitutional culture, whether caused by incompetence, indifference or corruption, are remedied.

7.5 What do people in Community 3 experience as their constitution?

The Community 3 interviewees identify closely with the Constitution and have a perception of it that broadly aligns with the constitutional culture ‘from above.’ The interviewees simultaneously recognise that the constitutional vision is, to a significant extent, unrealised. The Constitution is limited by the failings of state, and this prevents the constitutional vision from materialising. From this, two principles inform the lives of the interviewees – firstly, the interviewees maintain the essential morality of the Constitution, and seek to protect it against any claims of its inadequacy. Secondly, the interviewees seek to avoid the state. The interviewees are able to access the resources that they need through private channels. Having to rely on the state would threaten these. And, in fact, it is their engagements with the state that threaten their ability to have or to enjoy the resources that they have secured.

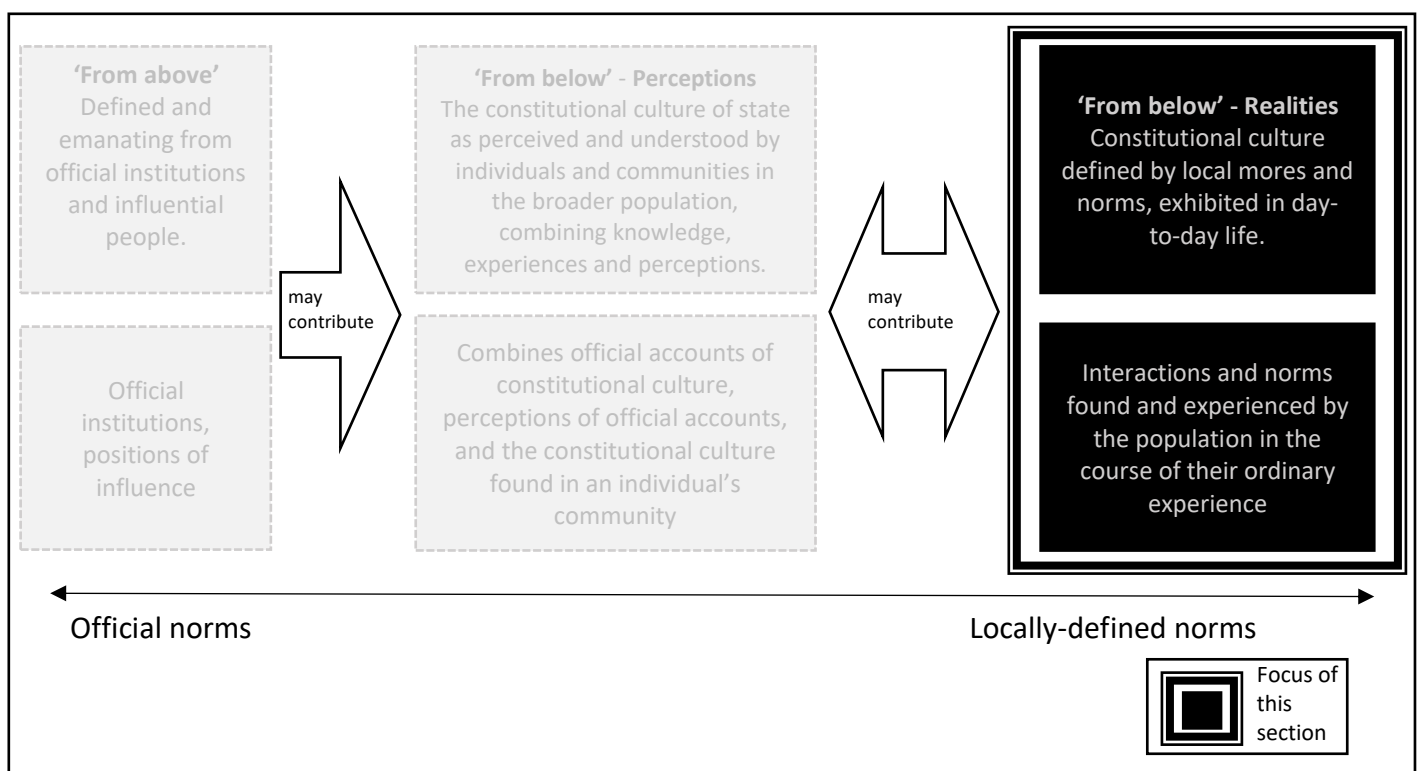


Figure 17: Approaches to constitutional culture, highlighting the role of day-to-day experiences

7.5.1 Support the Constitution, but recognise its limitations

The Community 3 interviewees are, in the main, whole-hearted supporters of South Africa's constitutional project. The aspirations that they perceive to underpin the constitutional culture resonate with them, and they believe that, over time, as these aspirations are realised, they will improve the lives of everyone in South Africa,

...it is forward thinking, aiming for an equal and just, allows everyone the very basic rights, you know, rights of association or rights to property, but also, government, as well as allowing people to live their lives, government has a duty to provide basic human rights – a right to shelter, rights to education.⁶⁷

The commitment that the interviewees have to the constitutional culture of the democratic State appears to originate in the alignment between their values and what they perceive to be values that underpin the constitutional culture. In their own lives, they experience the dignity and the freedom that the constitutional culture envisions, are able to secure the services and protections that they need. But they recognise that their ability to obtain the promises of the constitutional culture places them in a privileged minority,

I have access to courts, lawyers, if I want them, right? I live in areas that are fairly safe. I have access to education, I have access to work opportunities, I have access to health care, these kinds of rights. I am not confronted with instances of frequent physical violence, intimidation, those kinds of stuff...that will make my movements restricted. I can express my views fairly openly; I can move places safely...But a lot of South Africans do not.⁶⁸

These failings are not laid at the door of the Constitution. They perceive the constitutional culture to offer protection to the most vulnerable members of society and see this as important. The challenge that they face, that the country faces, is to make these protections material,

⁶⁷ Interview 9.

⁶⁸ Interview 2.

I think [the Constitution] is a progressive document...but if it's just a progressive document with no policy implementation or radical change, what's the point, really?⁶⁹

They are aware that gross inequality endures in South Africa, that people in South Africa remain vulnerable to grave insults to their dignity, that people's freedoms are infringed upon. To their mind, the Constitution is the answer, and the is only the full realisation of the constitutional culture would resolve these issues. In the minds of many Community 3 interviewees, they are already at this destination, in terms of their personal values, in terms of the lives that they lead.

In short, a foundational constitutional principle for this community is the inherent value and morality of the Constitution. The interviewees see themselves as examples of the lives that the Constitution can realise, see themselves as a constitutional 'vanguard,' brings responsibilities – responsibilities to fight values and practices that contradict the Constitution, and to defend the Constitution itself. Many of the Community 3 interviewees view themselves as activists of some kind and believe that they have a duty to put pressure on the state to provide the rights enshrined in the Constitution – not necessarily for themselves (as their rights are not viewed as under threat), but for other people in the country, for more vulnerable groups and individuals within society. The interviewees recognise that is only through providing more people in society with the fruits of the transformative constitution that constitutionalism will be safe in South Africa. The state is meant to be the shepherd, guiding the population to an understanding of the constitutional culture, and to the constitutional vision becoming material. In many ways, the state has failed this role, and it is up to the Community 3 interviewees to step into the breach and demonstrate the merits of the Constitution.

7.5.2 Avoid the State

It is the reliance on the State to be the shepherd leading the way to a future in which all can enjoy the fruits of South Africa's transformative constitutionalism that poses the biggest

⁶⁹ Interview 4.

threat to the success of constitutionalism, and the interviewees see the need to step into the role of constitutional champions, as members of the group that have benefitted from constitutionalism. It is, however, the state that poses the biggest threat to the interviewees' own enjoyment of the constitutional culture. While the Community 3 interviewees understand themselves to experience the dignity and the freedom that they perceive to be at the heart of the constitutional culture, and are able to secure the services and protections that they need, they largely enjoy these constitutional fruits in the absence of the state.

In a positive respect, the absence of the state is a requirement of the constitutional culture that the interviewees perceive, a manifestation of the negative obligations imposed upon liberal democratic states. In contrast to the past, to the discriminatory and overbearing apartheid state that intervened in the private lives of individuals and groups, the absence of the state facilitates the interviewees' ability to love who they want, to live where they want (or can afford to live), amongst other freedoms. In this way, they enjoy the fruits of the constitutional culture,

For me, being gay, it's like one of the major things, of why...of why the Constitution has been really important, because I wouldn't have the right that I do, in South Africa, if it wasn't for the Constitution...and, I mean, there are so many other cases in which the Constitution has been used to ensure people have rights.⁷⁰

The interviewees believe that the state has a role in facilitating the space for people in South Africa to exercise their rights. In this way, the state not only needs to not intervene in the lives of people in the country, but to ensure others do not. And for the interviewees, relying on the State to create this space, to create safe spaces, is a problem,

Gender-based violence is an issue...it has always been an issue...How many women are, like, coming out with their stories about going to the police station and not being taken seriously...then you realise that the government is not doing enough to curb crime against women or gender-based violence, and specifically violence against like the LGBTQI, LGBT

⁷⁰ Interview 6.

community...where crime is being committed against them...I think that the government needs to do more.⁷¹

The inability of the state to create the space for people to enjoy the freedom that the constitutional culture grants them is a problem, poses a threat to the promises of the constitutional era. The interviewees maintain their safety by withdrawing from the public realm, or by relying on private means for their safety,

If I felt unsafe in [Community 3], I would first speak to the private security company before the police. And if I was raped, I would definitely not go to the police first. I just think that they are not great with victims of crime. They are not sensitive, they aren't even very good at taking statements. I mean, the last time I had to give a statement, I literally had to...give him a pen, I had to make sure that they had spelt all the words correctly.⁷²

Creating safe spaces by withdrawing to privately managed spaces or services is a privilege that the interviewees are aware that most people in the country are not able to enjoy. In fact, in large part, the extent to which the interviewees are able to enjoy the benefits of the constitutional culture is because they are able to avoid the state,

No, I don't [obtain many services from the state]. I mean, not healthcare...I went to a private school...so I definitely think, and I definitely acknowledge, that not everyone lives in a world where they can get access to quality healthcare, or a decent education, or shelter, or any of those kind of things.⁷³

The interviewees are aware that they are in the minority, that their enjoyment of the promises of the Constitution is in large part linked to their ability to access resources beyond the State – is in essence, linked to privilege,

I, being privileged to live in a free society...I have access to courts, lawyers, if I want them, right? I live in areas that are fairly safe. I have access to education, I have access to work opportunities, I have access to health care, these kind of rights. I am not confronted with

⁷¹ Interview 4.

⁷² Interview 9.

⁷³ Interview 9.

instances of frequent physical violence, intimidation, those kinds of stiff...that will make my movements restricted. I can express my views fairly openly, I can move places safely...But a lot of South Africans do not.⁷⁴

By opting for private security, private healthcare, and other private services, the interviewees can reduce their contact with the state to the minimum, can limit this contact to the use of state infrastructure, to unavoidable administrative tasks, or to engagement with the police (usually initiated by the police, except where it is absolutely unavoidable),

Dealing with Home Affairs...I go there, and they are like, 'You don't have a number,' they are like, 'Sorry, if you weren't born here, you don't get a card.'... I mean, Home Affairs, in some ways, it's a big equaliser.⁷⁵

Frequently, these interactions undermine their sense of dignity and their experience of freedom. Ironically, their positive experience of South Africa's constitutional state seems to rely on the absence of the state from their lives. The representatives of the state are ill-equipped to provide in the manner that they expect – or to provide at all. In part, this is a recognition of the extent of the challenges that the constitutional culture seeks to overcome, reflects on the extent of the damage caused by centuries of discrimination,

I have a belief in the existence of very competent people in government departments, doing really good work, but...the challenges that they are facing, being nevertheless too large for their efforts to make any difference. So I don't want to say government is failing, I think people are trying, I think people are trying...My belief is that people, government, is trying, but they are failing.⁷⁶

The constitutional culture and the state operate on different planes, the state failing to meet the requirements of the constitutional culture, threatening the realisation of the constitutional culture, but not threatening the validity of it. That so many are failing to have the opportunity to share in the benefits of the democratic era is not seen as a failure of the

⁷⁴ Interview 2.

⁷⁵ Interview 1.

⁷⁶ Interview 6.

Constitution or the constitutional culture. Instead, it is regarded as a failure of the state, which several interviewees regard as lacking commitment to the realisation of the goals of the Constitution – and this, in turn, represents a threat to the constitutional culture,

I think [the Constitution] is a progressive document...but if it's just a progressive document with no policy implementation or radical change, what's the point, really?⁷⁷

The interviewees are alienated from the state, doubt the state, but not the constitutional culture. They recognise that, ultimately, the constitutional culture of the democratic state will fail without support from the state. In the meantime, the avoidance of the state needs to continue, an almost unconscious guiding principle for the interviewees, often born from necessity – simply put, the state is unable to provide. And it is this absence of the state that, at least in part, enables the interviewees to maintain their commitment to constitutionalism – their ongoing ability to access the basic services that secure these foundational rights is vital - in truth, it is essential to the interviewees' sense of dignity that they remain able to access the accoutrements of a middle/upper middle-class existence that extend beyond the promises of the Constitution, but state absence applies to their ability to access these elements too.

7.6 Constitutional alienation and fracture in Community 3

Constitutional alienation in Community 3 requires substantially less discussion than was required for the other two communities, for the simple reason that constitutional alienation is, by and large, absent. The Community 3 interviewees identify closely with what they perceive to be the constitutional culture of the state.

The Community 3 interviewees have a fairly well-developed idea of the Constitution and its purposes.⁷⁸ There is a clear knowledge of the law which, although incomplete, is both relatively accurate and assumed by the interviewees to be accurate. And the interviewees

⁷⁷ Interview 4.

⁷⁸ See sections 7.3: *Constitutional awareness*, 7.4.1: *Constitutional culture through the prism of the elements of South Africa's transformative constitutionalism* and 7.4.2.1: *The constitutional culture 'from above' offers the vision of a better future for all*.

identify deeply with the Constitution – it represents them and their world views and contains the promise of a society whose values they support. In brief, legal alienation does not exist in this community. The interviewees are reasonably, although not fully, aware of the content of the constitutional culture, and identify fully with it, regardless of the gaps in their knowledge.⁷⁹ In terms of Ewick and Silbey’s conceptualisation, the interviewees are very much ‘before the law’,⁸⁰ seeing the constitutional culture of South Africa as ‘a formally ordered, rational...system of known rules and procedures’.⁸¹ Reflecting this, the Community 3 interviewees can be understood to be constitutionalists, firm supporters of the constitutional culture that they perceive to be present from above.⁸²

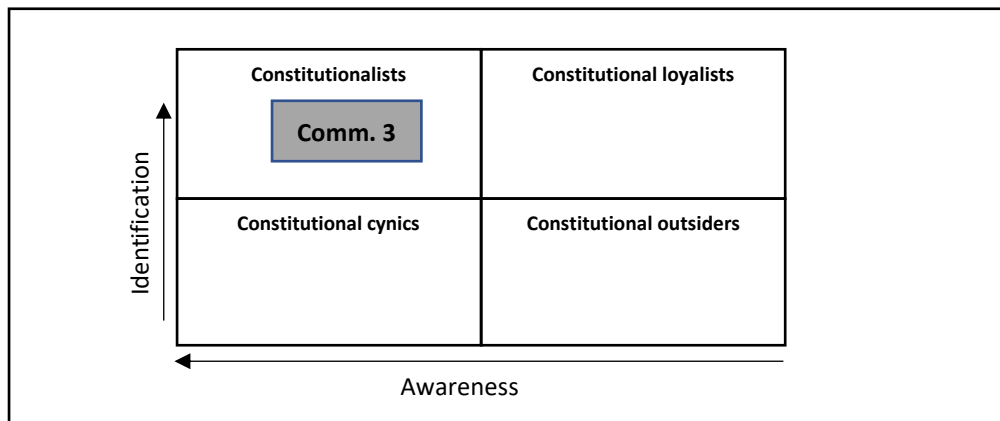


Figure 18: Constitutional alienation in Community 3

Although constitutional alienation does not appear to be present amongst these interviewees, there is a distinct fracture between the constitutional culture that the interviewees perceive to be present in the country and the constitutional principles that inform their day-to-day lives. While they are able to enjoy lives that seem to enable them to enjoy the various protections and freedoms that are found in the Constitution, they are, in the main, able to enjoy these freedoms only because they do not have to rely on the state and, as far as possible, do not have to engage with the state.⁸³

⁷⁹ See section 7.3: *Constitutional awareness*.

⁸⁰ Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 47.

⁸¹ *ibid.*

⁸² See sections 7.4.2: *Perceptions of constitutional culture in Community 3* and 7.5.1: *Support the Constitution but recognise its limitations*.

⁸³ See section 7.5.2: *Avoid the State*.

In a similar vein, the interviewees' 'with the law' orientation coexists with their perception that the injustices of the past continue to manifest in the present, that the promises of the constitutional era continue to be denied to vast swathes of the population, largely along racial lines.⁸⁴ The interviewees do appear to see within the constitutional order the opportunity for substantial reform of society.⁸⁵ It is putting this reform into effect that presents the most significant issue.⁸⁶ Adherence to the demands of the Constitution, from all sectors of the population and the state, would improve the lives of everyone – if only the rest of society and public sector actors would embrace it.⁸⁷ These failures are not deemed to be failures of the constitutional vision or of the constitutional culture, as they understand it. Instead, it is the state that has failed, failing to provide the conditions necessary to overcome the obstacles in South African society. The interviewees may be alienated from the state, but this is distinct from the constitutional culture of the democratic era.⁸⁸

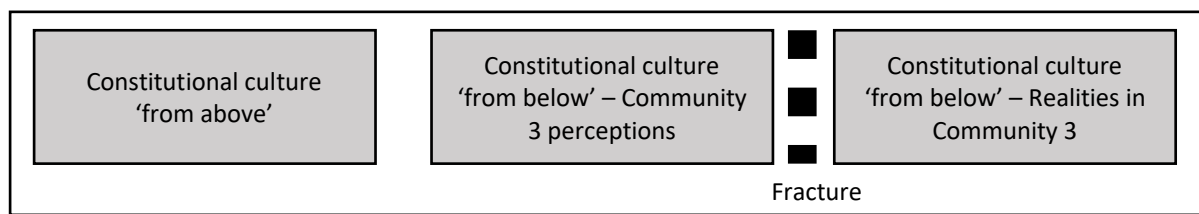


Figure 19: Fracture in Community 3

Thus, the fracture in this community is a fracture between the reality of the interviewees' lives, between the imperatives and principles which guide their day-to-day decision-making, and their view of the constitutional culture of the state, which is largely aligned with the constitutional culture 'from above'. In some sense, this fracture is no threat to the constitutional culture of South Africa, but a reflection upon the state. In another sense, the fact that even strong proponents of the Constitution inhabit a constitutional and normative universe that is beyond that envisaged by the Constitution, which certainly did not envisage people withdrawing from the state and the public sector, threatens the legitimacy of the constitutional vision. If it has such limited implementation that it exists only as a cognitive

⁸⁴ See section 7.4.1.2.i: *Everyone matters equally (at least in theory)*.

⁸⁵ See sections 7.4.2.1: *The constitutional culture 'from above' offers the vision of a better future for all* and 7.4.1.2.ii: *A progressive future, 'for' the population not 'by' the population*.

⁸⁶ See sections 7.5.1: *Support the Constitution, but recognise its limitations* and 7.5.2: *Avoid the State*.

⁸⁷ See section 7.4.1.2.ii: *A progressive future, 'for' the population not 'by' the population*.

⁸⁸ See section 7.5.2: *Avoid the State*.

comfort for wealthy, liberal South Africans, the question might be asked whether it has any real presence in broader South Africa at all.

7.7 Conclusion

For the interviewees from Community 3, whose understanding of the constitutional culture of the state is closely aligned to the constitutional culture ‘from above’, the Constitution represents the hope of a better future for the country. The state represents an obstacle to this realisation, and the apparent inadequacies of the state are viewed as the reason for South Africa’s slow progress towards realising the constitutional vision, and is the reason that they themselves have to seek the services that they need elsewhere, from private providers. Shortcomings and flaws in the constitutional scheme are given little heed, and little interrogation takes place of the cost that the gradual realisation of rights, or of the endurance of apartheid-era patterns of privilege and deprivation, outside of the allocation of blame to the state. It is perhaps questionable whether the Constitution has a presence beyond the intellectual for these interviewees, who swear allegiance to it, but whose lives, in many ways, take place without it.

Chapter 8: Discussion and conclusion

8.1 Introduction

This research project was undertaken out of an interest in an apparent disjuncture between the way that influential institutions and people in a range of prominent positions in South Africa positioned South Africa's Constitution and the way that people in the country understood the Constitution. Believing fractures may lie at the heart of constitutional South Africa, this project sought to explore whether the stated aims and ideals of the constitutional era are reflected in the understandings and experiences that individuals and communities have of the country in which they live, or whether alternative constitutional understandings could be found. If found to exist, such fractures could undermine the transformative vision that many see as the foundation of the post-apartheid state, and result in serious questions of legitimacy for this state.

In order to interrogate the existence of these fractures, the concept of constitutional cultures was engaged and extended, providing a way to consider perspectives on the constitutional state 'from above', from influential positions in society, in contrast with perspectives from people in the general population, generated from their experiences and exposure to the state, from their day-to-day experiences, and from their knowledge of the Constitution. Through the consideration of the perspectives of people in three South African communities, the belief that fractures exist, has, it is argued, been confirmed. These overarching fractures manifest themselves in multiple forms. This chapter will summarise some of the central findings of this research project, making clear the fractures that epitomise life in modern day South Africa, and considering their implications for the legitimacy and the prospects of South Africa's democracy.

8.2 Overview of the findings

This project developed and engaged the concept of 'constitutional culture' from two perspectives – constitutional culture 'from above' and 'from below' – to shed light on the relationship between individuals, communities and the state in which they live.

Constitutional culture ‘from above,’ simply put, is the manner in which the culture of a country is presented to the public, and emanates from official institutions and representatives of the state, as well as from other influential people. In the South African context, this constitutional culture can be identified in the abundant rhetoric surrounding the nature of the constitutional state, rhetoric that communicates the transformational nature of the South African Constitution and the vision that this provides for the nation. This idea has been entrenched by academics, by courts, and by politicians.

Constitutional culture ‘from below’ operates in two different ways – firstly, exploring how individuals understand the constitutional culture of the state in which they live, how they understand the values, aims and vision of that state, and, secondly, exploring the constitutional culture that shapes the day-to-day existence of individuals, rooted in the realities of their daily lives, and exploring the rules and principles that individuals understand to create a normative universe in their community, the rules and principles they understand to be foundational elements of their social lives.

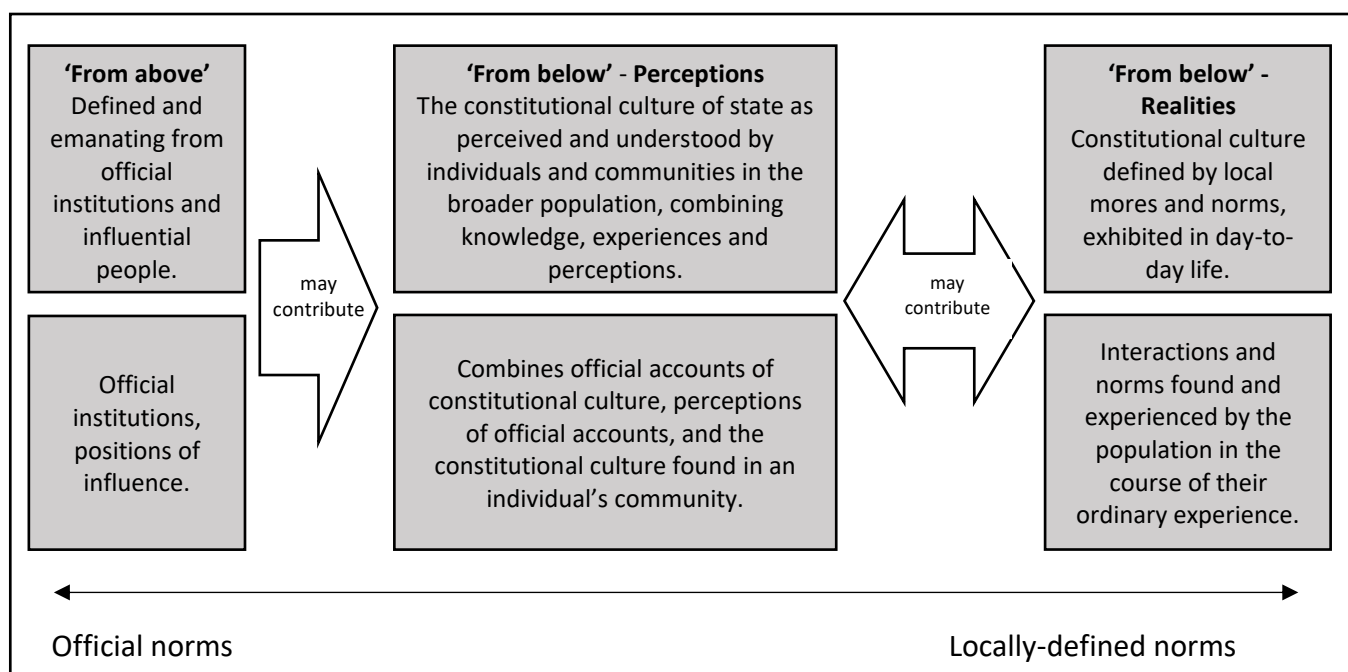


Figure 20: Approaches to constitutional culture

The constitutional culture ‘from above’, that emanates from elite and influential institutions and positions in society, may influence the shape of the perceptions about the constitutional

culture of the state by the bulk of the population, or could be completely irrelevant to large swathes of the population. The extent of the influence, if any, will depend on the depth of constitutional knowledge of an individual or found in a community, and on the origins and sources of this knowledge. For the bulk of the population, it may be the case that instead of direct knowledge of the constitutional culture 'from above', their perception of this culture is shaped through their interactions with organs and representatives of the state. While the constitutional culture 'from above' may be irrelevant to perspectives of constitutional culture, the consideration of this form of constitutional culture in this project plays an important role, providing a counterfoil to the perspectives 'from below', allowing for the identification of constitutional fractures. Through the juxtaposition of perspectives 'from above' with perspectives 'from below', a critique of transformative constitutionalism in South Africa that is grounded in the perspectives of a broad range of people in South Africa becomes possible, possibly providing a check upon the considerable hopes placed in transformative constitutionalism in South Africa.

In exploring the constitutional cultures present in South Africa 'from below', the three communities whose perspectives were engaged provide a 'snapshot', a moment in time, regarding both the perceptions that people in these communities have of the constitutional culture present in South Africa, and of the constitutional culture that guides their day-to-day lives. Several important caveats should be noted regarding these 'snapshots':

- As noted previously, this project does not intend to be a comparative study. The analysis of the interviews and the themes contained therein will not be considered comparatively. Instead, the findings of the community analyses and the ramifications of these findings for South Africa's transformative constitutional project will be considered together;
- This project provides only a glimpse into the range of perspectives and lived realities that constitute constitutional culture in South Africa, intending to provide an indication of the different orientations that might be found more widely. Every community, every individual in the country will have some form of perspective that would add depth to this project. While the bounds of this research project prevented further research in additional communities, engaging with a broader range of communities, particularly exploring different variations of race, socio-economic

status, ethnicity (which is not explored in this project), and geographic location (which, again, is not widely explored in this project, but engaging the urban/rural divide may be a particularly interesting exploration) would provide interesting, and likely new, insights;

- The interviews at the heart of this project took place in 2019. It is impossible to consider the perspectives provided by the interviewees in 2019 without contemplating the impact that the COVID-19 pandemic has had upon the individuals, their communities and the country, more broadly, and the possible implications that this might have for the project, for the data that the interviewees would have shared. It is reasonable to assume that the pandemic would have been raised as an issue by the interviewees in each community. There are reasons to believe that the position of the interviewees, their understanding of the constitutional culture of the state and the constitutional cultures that inform their day-to-day lives, might remain fundamentally unchanged today. Underlying this assertion is the fact that the underlying conditions that have shaped South African society in recent years – inequality, poverty, and a state struggling to deliver services to the broader population – were present before the pandemic, and remain present today, arguably to a heightened extent.

8.2.1 The constitutional culture ‘from above’

Transformative constitutionalism has been placed at the heart of South Africa’s constitutional culture ‘from above’, and rhetoric supporting and reinforcing this positioning can be found throughout South Africa’s democratic era, to the present day. Identifying constitutional culture ‘from above’ is an exercise in identifying the processes that have shaped the nature of the constitutional state, examining rhetoric, policy and processes that have entered the popular realm.

This project identified five fundamental elements of the transformative constitutional culture, each of which was intended to re-found the South African state, to represent a break from the past, and to focus the state upon a new, inclusive vision. Amongst other roles, the Constitution sought to:

- 1) Herald a new era;
- 2) Introduce a new set of values;
- 3) Enhance accountability and transparency;
- 4) Impose a series of positive obligations on the state; and
- 5) Create a new, united, constitutional people and a new constitutional 'person', through the rights contained in the Constitution.

The transformative constitutional culture of South Africa intended to remake a country defined by centuries of racist discrimination and abuse, by dispossession and racialised patterns of wealth, opportunity, exclusion and poverty.

From the commencement of the constitutional era, there have been critiques of the positioning of the Constitution and of its potential to radically alter South African society. These critiques have gained traction in recent years, particularly in light of the endurance of racialised patterns of poverty and inequality.

8.2.2 The constitutional culture 'from below'

Constitutional culture 'from below', in this project, provides two different perspectives on the constitutional cultures that might be found in a state: firstly, it explores the perceptions that individuals might have of the constitutional culture of the state and, secondly, it explores the constitutional cultures that shape the day-to-day lives of individuals, the localised rules and principles that are foundational to the lives that people lead, that shape and guide their actions in their social milieu.

Identifying constitutional culture from below involves engaging directly with people in the broader population, with those who live in the constitutional nation, and in analysing the interviews within an appropriate analytic framework. Hertogh's conceptualisation of legal alienation provides the foundation for the analysis conducted of the interview data, selected for two significant reasons:

- 1) His approach aligns closely with the foundational questions informing constitutional culture ‘from below;’¹ and
- 2) Hertogh’s point of departure, which holds that the law might not retain its power amongst broader society, as a corrective to more traditional legal consciousness approaches, on which legal alienation is based, resonates with this project’s point of departure, that the constitutional culture of South Africa may have lost its legitimacy. Developing Hertogh’s legal alienation into ‘constitutional alienation’ allows for its application to this project, permitting the various findings of the engagement with the interviewees to be assessed in terms of his normative profiles, developed to align with constitutional alienation.

8.2.2.1 Perceptions of the constitutional culture of the state, ‘from below’

Distinct perspectives about the constitutional culture of the South African state could be observed in each of the communities. The central themes identified in each of the communities are outlined in Table 1:

Community 1	Community 2	Community 3
- The constitutional culture ‘from above’ is the same as that of the past	- The constitutional culture ‘from above’ only cares about Black African South Africans	- The constitutional culture ‘from above’ offers the vision of a better future for all
- The constitutional culture ‘from above’ renders people in Community 1 invisible	- The constitutional culture ‘from above’ does not reflect the values of South African people	- The constitutional culture ‘from above’ is progressive and places significant weight on individual rights, discarding the problematic conservatism present in the broader South African population
- The constitutional culture ‘from above’ is focused on the wrong things and undermines responsibility	- The constitutional culture ‘from above’ creates a space for diversity	- The constitutional culture ‘from above’ is difficult to realise and will take time

Table 1: Perceptions of the constitutional culture of the state, across the communities

¹ The two questions exploring constitutional culture ‘from below’:

- 1) What do people in society experience and perceive be the constitutional culture of their country?
- 2) What do people experience as the constitutional culture that governs their lives?

8.2.2.2 The subjective: Constitutional cultures as experienced on a day-to-day basis

In each community, a series of rules and principles shape the day-to-day lives of the interviewees. These rules and principles are foundational elements of the interviewees' lives, are literally *constitutive* of their world. It is these rules that shape their everyday experiences, their decisions and their actions. These rules and principles may be shaped by the individuals' understanding of the state, by their interactions with the state, by interactions within communities, or may be shaped by other factors, determined contextually. Within the three communities, these localised constitutional rules, that inform their actions and their worldviews are:

Community 1	Community 2	Community 3
- Direct action	- The importance of creating leverage	- The broader population will benefit, eventually Inequality and unfairness in society will reduce, through the promises of the Constitution
- Mutual responsibility	- Religion as a 'shadow grundnorm'	- Avoid the state

Table 2: The constitutional culture experienced on a daily basis, across the communities

8.2.3 The communities' normative profiles, in terms of constitutional alienation

Applying constitutional alienation to the interview data, a normative profile was developed for each of the communities (mapped below in Figure 2). Both Communities 1 and 2 demonstrated elements of the 'constitutional outsider' profile, underpinned by constitutional cynicism,² constitutional powerlessness,³ and constitutional value isolation.⁴ Constitutional outsiders do not have knowledge of the constitutional culture of their state, nor do they identify with what they perceive to be present. Their relationship with the constitutional

² Where the constitutional culture of a state is seen as irrelevant – see Chapter 2.

³ Where people view themselves as powerless to impact the constitutional culture of their state– see Chapter 2.

⁴ Constitutional value isolation arises when there is perceived to be a gap between the values of the constitutional culture and the personal values of an individual – see Chapter 2.

culture is fundamentally fractured. The interviewees in Community 2 demonstrated greater knowledge of the constitutional culture of South Africa, to the extent that they demonstrated elements of a ‘constitutional cynic’ profile – their lack of identification with the constitutional culture that they perceive to be present in the state is the enduring factor.

In distinct contrast to the findings of constitutional alienation in Communities 1 and 2 were the Community 3 findings, where a relatively high level of awareness of the constitutional culture was aligned with an extremely strong identification. As ‘constitutionalists’, there was an absence of constitutional alienation, an absence of fracture between the interviewees and their perception of the constitutional state.

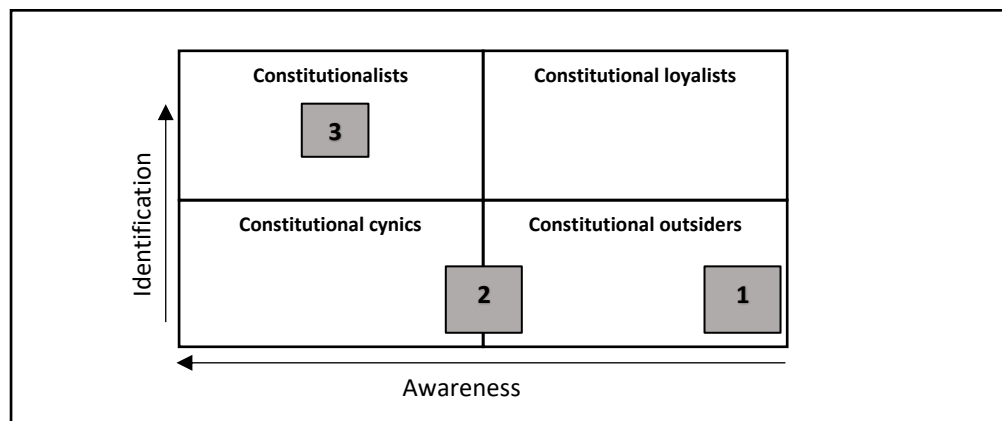


Figure 21: Mapping constitutional alienation in the three communities.

8.3 Observations

This project sought to explore the extent to which fractures were present in the South African constitutional landscape of present-day South Africa, fractures that could be present in the cognitive understandings or the physical experiences of life in the country. As discussed above, the empirical work of this project indicates that fractures can be found – indeed, that fractures may epitomise life in South Africa today. These fractures will be discussed below. Additional observations regarding the implications of these findings for constitutionalism in South Africa, together with links to existing literature, will also be explored.

8.3.1 Fractures

This research project has identified a key fracture lying at the heart of constitutional South Africa, a fracture between the stated aims of the constitutional culture and the perspectives of the constitutional culture held by some communities in the country. A fracture of this nature was located in Communities 1 and 2, and is underpinned by their status as constitutional outsiders, who do not identify with the constitutional culture that they perceive to present in the state. This perception is largely underpinned by the absence of the state from their lives, from their inability to access resources.

In these communities, the constitutional culture of the state that they perceive to be present is intimately linked to the constitutional culture that shapes their daily lives. Their perception of a constitutional culture of the state that is hostile to their interests and desires has required the communities to foster rules and principles that enable them to bridge the shortcomings of the state, as best they can. The fracture in these communities can be depicted graphically:

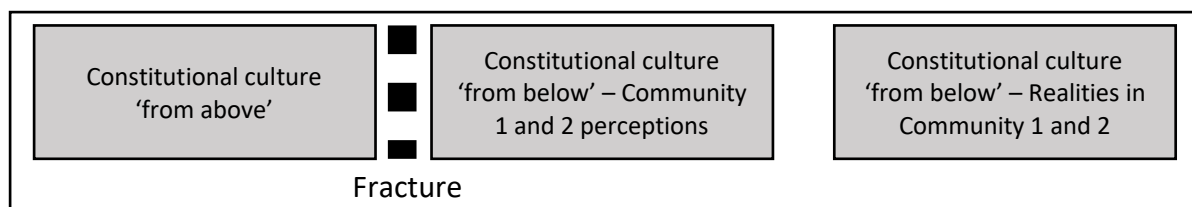


Figure 22: Fracture in Communities 1 & 2

Despite the alignment that the Community 3 interviewees feel with the constitutional culture of the state, a fracture was identified in this community too, of a different nature to the fracture in the other two communities. The Community 3 interviewees, avowed supporters of the Constitution and the official constitutional culture, have a series of rules and principles that shape their day-to-day lives, but which bear little resemblance to the constitutional culture of the state that they perceive to be present, which has their whole-hearted support. This support is rooted in an intellectual understanding of the values of the South African state, rather than in the realities of their lives. To this community, the fact that the constitutional culture has not been actualised is not a failure of the constitutional culture, but of the state. Their perception of the constitutional culture and its inherent value is protected from the

realities of life in South Africa, by their knowledge and alignment with the goals, and by their ability to access the necessities of life from sources outside the state, something not available to the other two communities, due to their constrained resources. This can be depicted as follows:

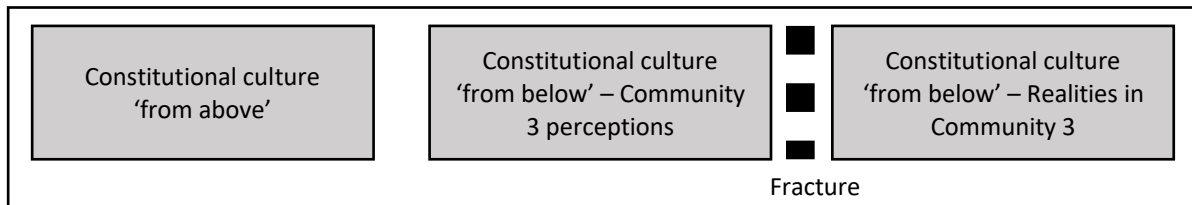


Figure 23: Fracture in Communities 3

These, and additional fractures have been identified, and will be discussed in detail, together with consideration of their implications.

8.3.1.1. Fractures between the communities and the state

8.3.1.1.i Fractures between the constitutional culture 'from above' and the perceptions of the constitutional culture 'from below'

This project anticipated a rejection by sections of the South African population of some elements of the constitutional culture 'from above', of the progressive values of the state. To some extent, this rejection was indeed observed – certainly, Communities 1 and 2 did not believe that, on the whole, the values of the South African state were values that they held themselves. This disjuncture was particularly noticeable in relation to punishment and criminal justice, with a concern that the extension of rights to wrongdoers contributed to increased crime. However, the deepest fractures between the state and the interviewees lay not in this lack of alignment, but in the distance between what has been presented as the constitutional culture of the state and in the perceptions of the constitutional culture of the state that were found amongst Communities 1 and 2, captured in Table 1 above. Although there is some element of misalignment between the progressive values perceived to be at the heart of the constitutional culture 'from above' and the values of the communities, the deeper underlying misalignment lies in the perception that interviewees hold that the constitutional culture of the state fundamentally does not care about them. Accordingly,

there are fundamentally different understandings of the state between the constitutional culture 'from above' on the one hand and the perception of the state 'from below' on the other, with ramifications for the rules and principles that guide the day-to-day lives of the interviewees and people in their communities.

The constitutional culture 'from above' places great rhetorical emphasis on the dignity of each individual, on the importance of equality and freedom, and contains within it the vision of a just and fair society. It might be expected that this vision would have particular resonance for Black South Africans and people of colour, to the people and communities discriminated against by the apartheid state, living with the legacies of centuries of oppression. It was these people, these communities, whose lives were reduced and whose dignity was violated, by the racist laws and practices of the apartheid and colonial states. However, little vestige of the constitutional culture 'from above' is evident in the perception that the interviewees in Communities 1 and 2 have of the constitutional culture of the state. In some senses, the vision has no impact because the 'official' culture is not known – constitutional knowledge is shallow. However, the constitutional vision calls upon the state to embody the vision and the values of the Constitution, which would allow the interviewees to draw inferences about the content of the constitutional culture. This, evidently, is not the case.

All three communities see the state as failing to provide the essential services required for a dignified life, as failing them, and as a threat to their well-being. This is understood differently by the communities, with differing implications for the communities' perceptions of the constitutional culture 'from above'. A complicated knot of class, race and constitutional knowledge may underlie or contribute to these differing perspectives.

The constitutional alienation evident in Communities 1 and 2 interviewees is indicative of the fractures present in these communities. For the interviewees from Communities 1 and 2, this state failure is understood as central to the constitutional culture of the state. It is, in fact, not viewed as a state failure, but as part of the constitutional culture. This constitutional culture is perceived and experienced as one that disregards them, that deems them, their communities and people in similar situations to theirs, to be unworthy of attention or assistance. It appears that the conflation of the actions of the state with the constitutional

culture of the state is tied closely to the lack of constitutional awareness evident in these communities. This could be understood differently, however, if the failure to implement the constitutional culture 'from above,' of a transformative state designed to promote the dignity and prospects of all within it, is seen as an intrinsic failure of this constitutional scheme, as an indictment of a vision not provided with adequate tools to bring about the changes that were ostensibly promised.

The marginalisation that the Community 1 and 2 interviewees experience communicates an impression that South Africa remains a country in which they are relegated to the periphery. This disregard is communicated through the difficult personal circumstances of the interviewees, through the perceived absence of the state, and particularly of the police, from their community, through the limited resources available to their community and substandard services that they are required to access. The interviewees do not align themselves with the official vision of the state, perceiving this vision to see them as irrelevant, at best. Their daily experiences, and the perceived unwillingness of the state to intervene effectively to help them, to disrupt the patterns of marginalisation that they have experienced, creates the impression that the state is vested in the continuation of these patterns. This represents a fundamental fracture.

The Community 3 interviewees stand in contrast to the interviewees from the other communities, and see themselves as closely aligned with the constitutional culture 'from above', with a constitutional culture that is progressive and rights focused, and which will ultimately transform South African society. They are aware, to a far greater extent than the Community 1 and 2 interviewees, of the vision of the constitutional state. This enables them to distinguish between the vision and the promises of the transformative constitutional culture and the actions of the state and its representatives. While they recognise multiple failures of the state, they see this as distinct from the supervening aims of the democratic nation – the failures of the state to be responsive, to deliver the services and resources required by people in South Africa, and to alleviate poverty, are examples the state not living up to the promises of the constitutional culture. The constitutional culture of the state does not equate to the actions, the achievements or the failures of the state, and the failures of the state to deliver do not threaten their approval of what they perceive to be the

constitutional culture 'from above', which continues to be imbued with the potential to deliver an equitable South Africa. This ability to access many of the services and resources that they need to lead dignified lives, without relying on the state, may contribute to the enduring legitimacy of the constitutional vision. Their ability to access resources, their constitutional knowledge and alignment with the transformative vision, regardless of its state of delivery, is reflected in the lack of constitutional alienation observable in the community.

8.3.1.1.ii Fractures within the day-to-day lives of the interviewees

The constitutional cultures that inform the day-to-day lives of the interviewees, the approach to constitutional cultures 'from below' rooted in the realities of their lives, appear to be shaped by the state and its shortcomings. Across the communities, this form of constitutional culture reflects their beliefs that the state is unwilling or unable to serve them, and that their lives need to be shaped in particular ways in response. This manifests itself slightly differently in each of the different communities.

Communities 1 and 3 appear to have resigned themselves to the shortcomings of the state. In recognising this, both communities make alternative arrangements to secure the services that they need. This forms a series of foundational principles for the interviewees and the community members, with deep-seated similarities and differences between the communities. Similarities can be seen in the way that these principles help the interviewees to avoid relying on the state. To rely on the state is to increase the vulnerabilities to which the interviewees are exposed and, for the Community 1 interviewees in particular, is to emphasise the precariousness of their existence. The differences lie in the manner in which this avoidance of the state manifests itself, which is through increased reliance on the community and on increased personal responsibility for Community 1, which might include acting together to pressurise the state to act, or through increasing reliance on the private sector for the provision of services, exhibited in Community 3.

There are, of course, limits to this self-help, particularly for those in Community 1, where resources are more limited and the intervention of the state is, as previously noted, a necessity for their hopes of attaining the essential elements of a dignified life. Those in

Community 3 have less reason to rely on the state but cannot insulate themselves completely. It is when the Community 3 interviewees have to engage with the state that their vulnerability becomes salient.

A further difference lies in the way that the 'self-help' that Communities 1 and 3 engage in is understood. For Community 1, this 'self-help' is because of the constitutional culture, which does not care for them. For Community 3, their 'self-help' is despite the compassionate constitutional culture of the state, with which they align themselves, and which is being failed by the state itself and its representatives. The fractures brought about by this are, as discussed above, different in nature.

Community 2 appears to be caught between the two other communities, neither possessing the resources to reduce their reliance on the state, as Community 3 has done, nor being so desperate as to engage in the radical acts that underpin the self-help of those in Community 1. The interviewees in Community 2 continue to see the state as the answer, at least partially through an inability to see or access any alternative. They continue to seek ways to move the state to action. That the interviewees perceive these needs to be largely unmet emphasises their perception of themselves as 'outsiders' and increases the fracture in their relationship with the state. This fracture is understood by the interviewees in racial terms. The vulnerability that results from this leads to an enhanced focus on the promises of their religion. In understanding their religion to offer better solutions than those put forward by the constitutional culture, but having no expectation that the state will look to these values for a solution, the interviewees are able to withdraw from the body politic, to carve out a space where they can implement their values, in the belief that a better, more moral future will one day be realised, in this life or beyond.

While the interviewees in all three communities perceive that hopes of their needs being met by the state are unlikely to be realised, the straitened circumstances of Communities 1 and 2, their limited (but considerably different) access to resources mean that for many of the essential services of life, reliance on the state is unavoidable. For these communities, their day-to-day constitutional cultures incorporate an element that attempts to move the state to action. Whether through direct action, trying to force the state to act, or through leveraging

existing relationships, the interviewees and their communities try to make themselves and their needs visible to the state. The intrinsic acknowledgement of the need to take action in order for their needs to be considered by the state, in order for them to feel that they are visible to the state at all, is an indication of the marginalisation that these communities feel, an indication of a further fracture in their relationship with the state.

8.3.1.2 Fractures between communities in the population

Each of the communities under investigation in this research project had a distinct perspective on the constitutional culture of the state, and each has developed a particular constitutional culture that enables them to protect their dignity, as best they can. These perspectives were informed by the subjectivities of the interviewees, by their experiences and by their access to resources. The fundamental differences within these constitutional cultures are indicative of fractures within the South African population. That such fractures exist is unsurprising in light of the historical divisions that have epitomised South African society and that, in many respects, continue to the present day. However, that these divisions exist is a further indication of the gap between the constitutional culture ‘from above’ and the present-day realities.

The interviews did not reveal any particular animosity towards other members of the population, although it must be noted that this was not specifically canvassed. Rather than identifying animosity between the communities engaged in the course of this project, or animosity towards any other group within the country, the interviews and subsequent analysis made clear the extent of the segmentation of South African society and the fractures that are present in the South African body politic, emphasising the extent to which the rhetorical concept of the ‘rainbow nation’ has not been manifested in reality. Through the interviews, it became clear that interactions in South Africa between individuals were tightly circumscribed by race, by class, and by location, and by various interactions of these, and other, subjectivities.

Within Communities 1 and 2, there was no common understanding of the challenges that different groups within the country faced, no common understanding of the destination

towards which South Africa was heading, and little reason for the interviewees to believe that they were involved in a collaborative enterprise. In place of a united populace, these interviewees viewed the constitutional culture of South Africa as having identified and benefitted particular people, who could be understood to be the 'winners' of the democratic transition. While the identity of these winners differed across the communities, it was clear that the interviewees saw themselves as particularly vulnerable, as having fared particularly badly in comparison to others – as the 'losers' of the constitutional transition.

Once again, the Community 3 interviewees seem to understand society differently, their vision of a united country, and an apparent pathway to the realisation of this vision, leading the interviewees to believe that they and the other people in South Africa are on a constitutional journey, which will eventually realise a nation in which the dignity of everyone is protected. The interviewees were not ignorant of the travails of the broader population, recognising their own privilege, recognising that the state has struggled to deliver upon its promises. However, the constitutional vision was elevated by the interviewees, providing a way for ongoing injustices and the segmentation of society to be overcome. While the interviewees noted their privileged position in society and their ability to access resources, their alignment with the constitutional culture 'from above' was framed as a belief that this would enable more people in South Africa to thrive, rather than seeing themselves as the ultimate beneficiaries of the transformative regime. Unlike the other communities, the interviewees did not see the reforms of society as a zero-sum game, where some would win at the expense of others. Whether this position can be disentangled from their privilege is a question with implications for the transformative potential of the constitutional culture 'from above'.

Ultimately, the fractures in South African society, the apparently siloed nature of existence of these societies, fractured along multiple lines, is radically misaligned with the constitutional culture 'from above'. The presence of these fractures, however, is unignorable, and speaks of a vision that has, at best, yet to be realised.

8.3.2 Implications of the findings

8.3.2.1 The absent transformative vision

In seeking to assess whether the Constitution, positioned as transformative and progressive,⁵ was the source of a fracture between the state and the populace, it appears that rather than a source of fracture, the transformative constitutional culture, the constitutional culture ‘from above’, is marked by absence. The empirical work of this project has provided indications that many within South Africa have neither abstract knowledge nor any lived experience of the transformative constitutional culture that is meant to define the democratic state, and have no knowledge of a vision intended to include them and to protect their dignity. Instead, the majority of the people interviewed have an understanding of the constitutional culture of South Africa as, at best, indifferent to them or, at worst, actively seeking to repress and undermine their dignity and prospects.⁶ This raises serious questions about the extent to which the lives of people in South Africa have been transformed or, perhaps, the extent to which they understand them to be transformed.

Whatever achievements, whatever steps, have been taken over the course of the past twenty-five years – and representatives of the government are frequently eager to list these – it appears these achievements, such as they are, have not resulted in everyone in South Africa understanding their lives and their prospects to have been transformed and improved. The extreme difficulties that many within South Africa face on a daily basis can be observed in the enduring legacies of colonial- and apartheid-era discrimination that remain a central element for many people in the country. It is not surprising that these experiences inform both their understanding of the country and their interactions with the state. Should this apparent failure to transform society, epitomised by the endurance of poverty, and by

⁵ See section 3.3.3.2: *South Africa ‘from above’*.

⁶ See sections 5.5.2: *Perceptions of constitutional culture in Community 1*, 6.4.2.1: *The constitutional culture ‘from above’ prioritises Black South Africans, is discrimination in reverse* and 6.4.2.2: *The constitutional culture ‘from above’ does not reflect what ordinary South Africans think should happen in the country*.

ongoing harms to dignity, be understood as a failure of the state, or should it be understood as a failure of the Constitution to provide the foundation for a truly revolutionised society?

For those in Community 3, the answer to this question is, resoundingly, a failure of the state.⁷ The Constitution maintains legitimacy, and it is divorced from these failures. For Communities 1 and 2, it might be argued that the question is irrelevant – the state and the constitutional culture are one and the same, the failure of the state understood as a failure of the constitutional culture. These failures appear to have led to fractures, to a lack of trust in, and to alienation from, the post-apartheid state. Absent this trust, the prospects for transformative constitutionalism seem bleak.

Whether the Constitution deserves greater trust is a weighty question. This aim of this project is not to provide an answer to the question of whether the transformative constitutional project has been let down by implementation or whether it was flawed from the start, two of the primary reflections on the state of constitutionalism today.⁸ The project can, however, note that the patterns of exclusion that are observable in the interviewees' perspectives and experiences are resonant of the past. The lack of trust in the Constitution and the constitutional era that is present in Communities 1 and 2 appears to be rooted in an understanding of themselves and their place in the world that is an apparently uninterrupted continuation of the apartheid era – the circumstances of their lives viewed through a prism informed by the past, exclusion understood as primarily racial, albeit with economic dimensions too. This project can thus note that patterns established during the past endure, apparently undisrupted by the Constitution.

The challenge raised by those scholars who see the Constitution as a vehicle for just this continuation, as a vehicle for neo-apartheid,⁹ resonates with the fact that it is the same sector of the population who suffered the greatest indignities under previous eras that also understand themselves to be suffering in present-day South Africa and view themselves as

⁷ See section 7.5.2: *Avoid the State*.

⁸ See section 3.3.3.3: *The deferment of South Africa's constitutional culture 'from above': Problems and obstacles to realisation*.

⁹ See section 3.3.3.3.iii: *Limiting the future: Decolonisation and its demands*.

irrelevant to the state today.¹⁰ Instead of bringing about a fundamental change in the structure of South Africa's social fabric, the transformative constitutional culture has a cognitive presence that is limited to the minds of a group who are, on their own accounts, amongst the most privileged members of society. And part of what sustains this presence is their ability, their privilege, of not having to rely on the state. For transformative constitutionalism to have any prospects of success, it must become present in the lives of the broader population of the country – cognitively and materially. Without this, transformative constitutionalism may be little more than a cognitive comfort blanket for some of those in the most privileged sector of South African society.

8.3.2.2 Creating a presence for the constitutional culture 'from above'

In Communities 1 and 2, where knowledge of the Constitution is shallow or absent, the actions of the state seem to be understood by the interviewees as indicative of the constitutional culture of the country. This closely aligns with ideas of how constitutional culture is communicated – as Huq notes, for many people, the understanding of the state in which individuals live is shaped by their engagement with front-line public officials.¹¹ By contrast, the Community 3 interviewees appear to differentiate the constitutional culture that they understand to be the foundation of the democratic state from the actions of the state and its representatives. In a context where the state is struggling to deliver the promises of the democratic transition, this difference in perception can be considered significant, and could have ramifications for the legitimacy of the constitutional order and the constitutional culture.

The privileged position of the Community 3 interviewees may account for their support for the transformative constitutional culture. However, that they have some familiarity with the goals of the state, that they can see an inclusive vision for the state, may account, to some

¹⁰ See sections 5.5.2.1: *The constitutional culture 'from above' is the same as that of the past*, 5.5.2.2: *The constitutional culture 'from above' renders people in Community 1 invisible* and 6.4.2.1: *The constitutional culture 'from above' prioritises Black South Africans, is discrimination in reverse*.

¹¹ Aziz Z Huq, 'Constitutionalism, Legitimacy, and Public Order: A South African Case Study' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018).

degree, for the manner in which the objective perception of constitutional culture ‘from below’ in this community, which aligns closely with the South African constitutional culture ‘from above’, persists despite the interviewees observing the fundamental failures of the state. While the link between constitutional knowledge and the willingness to disaggregate the actions of the state and its representatives from the constitutional culture may have several contributing factors, champions of the transformative constitutional culture may be advised to consider the impact of the dearth of constitutional knowledge on the prospects of success of South Africa’s transformative constitution.

Engaging people in the transformative project seems a basic requirement, an important imperative, in order to be able to foster the society that was perhaps envisioned in 1994. If people were able to see the prospects of change, perhaps greater trust in the constitutional project would arise. However, the question must be asked whether the passage of time has closed this avenue. A population more familiar with the Constitution, but continuing to endure circumstances that they deem undignified, might not contribute to an enhanced identification with the transformative constitutional culture. It may be the case that the slow pace of change over the past thirty years, and the apparent fact that many people in the country view their position and their prospects as fundamentally unchanged, continuing to view themselves as invisible to the state, as they were in the past, will undermine the legitimacy of the transformative constitutional culture.

A contrary argument might be made. If the transformative constitutional culture has been absent from the consciousness of so many in South Africa, introducing and promoting the understanding of the culture could start to engage the population in a collaborative project. The failure of the transformative constitutional culture to hold the state to account for its lack of delivery would perhaps need to be addressed for this argument to gain traction. While the consequences of increasing knowledge of the Constitution and constitutional culture may be unclear, it appears clear that equipping people with the knowledge to critique the current constitutional culture ‘from above’ could lay the groundwork for the population to contribute to an informed re-envisioning of the constitutional state. This, however, relies on a patience that is may be unrealistic, and unjust, to expect.

It is clear that for any enduring legitimacy, state delivery and accountability would need to be at the heart of any constitutional culture or any potential reorientation of the South African state. Ideology is important, creating the foundation for interventions and change in society. Without delivery, however, any underlying ideology will be delegitimised. The importance of delivery may underpin the disturbing nostalgia for the apartheid era, which, it must be noted, only a few of the interviewees in Communities 1 and 2 displayed,¹² and which was absent from Community 3. These interviewees appear to hold a belief in the effectiveness of that regime's ability to deliver resources and community safety for all communities in South Africa – a belief that most would justifiably argue is fundamentally misplaced. Nonetheless, such statements indicate the secondary nature of ideology for people in the broader population. This, in itself, is a threat to a constitutional democracy. For people who view themselves as marginal and battling to secure the basic necessities required for a dignified existence, delivery of these necessities could trump other considerations. To maintain legitimacy, a constitutional state must be able to create a society in which no one, or in which relatively few people, feel invisible, feel that they fall outside the gaze of the state.

8.3.2.3 Bolstering legitimacy

The constitutional culture 'from above', centred on transformative constitutionalism, can be understood as an attempt to impose a *nomos*, a 'normative universe',¹³ a shared 'world of right and wrong, of lawful and unlawful, of valid and void',¹⁴ on post-apartheid South Africa. This *nomos* was accompanied by what was, in essence, an officially sanctioned narrative, attempting to create a 'history and destiny, beginning and end, explanation and purpose'¹⁵ for the country and its inhabitants, shaping the understanding of the constitutional state's birth and vision. It was the constitutional culture 'from above', the transformative constitution and the vision that it contained, that led to South Africa being seen as a beacon

¹² Noted in sections 5.5.1.1: The commencement of a 'new era', 6.4.1.3: *An emphasis on accountability and transparency* and 6.5.1: *Leverage amidst competition for resources*.

¹³ Robert M Cover, 'The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4. See Chapter 2 for a broader discussion of the applicability of Cover's work to constitutional cultures.

¹⁴ *ibid.*

¹⁵ *ibid.* 5.

of hope, a 'rainbow nation', the transition to democracy and majority rule a high point in constitutionalism.

As Cover notes, the *nomos* and the narrative must make sense to those inhabiting it – a *nomos* found only in the formal institutions of state is no *nomos* at all.¹⁶ A *nomos* imposed 'from above' will have only be able to embed itself if it makes sense to those it attempts to draw into its normative universe. Whether or not this 'officially sanctioned' *nomos*, 'from above', did, in fact, make sense to the South African population has been the subject of some contestation. The transformative constitutional culture has always claimed to represent 'the people'. Through the participatory process leading up to the finalisation of the 1996 Constitution to the preamble, the people are, ostensibly, made central. The findings of this project indicate that to a significant extent, at least some communities within South Africa feel relegated to the margins, feel as though they are in a daily battle to gain some vestige of respect for their dignity. Significant concerns can be found about the extent to which the transformative constitutional culture reflected the desires of the populace, the extent to which it could bridge the deep divides in society, and, more fundamentally perhaps, whether the transformative constitutional culture did, in fact, re-found the country, instead of merely refashioning existing structures of power, in the process leaving in place the patterns of wealth, opportunity, exclusion and poverty.

8.4 Reflections and next steps

This project provides some indications that the transformative constitutional culture positioned at the heart of the democratic state has not entered the public consciousness in South Africa. Not only is explicit knowledge of the transformative ideals at the heart of the state rare, but the apparatus of the state does not appear to reflect the lofty ideals that the Constitution appears to embed.

To a South African who grew up in the 1990s, the Constitution was positioned as the solution to the injustices stemming from South Africa's past, and was a reason why South Africa was

¹⁶ *ibid* 4.

extraordinary. In some respects, the absence of understanding of the constitutional culture is a wake-up call to those who, like me, placed their faith in the document and the culture that it sought to embed. In reality, this wake-up call should not be necessary. The enduring patterns of privilege, the unrelenting poverty that so many in South Africa face must represent a challenge to the transformative ideals of the constitutional era, regardless of orientations towards the constitutional culture of the democratic state. Whether the answer lies in a radical re-imagining of the possibilities in South Africa or in a more robust commitment by the state to ensuring that people can live with dignity, something must change. The passage of time, with the third decade of South Africa's transformative constitutional era coming to an end, and the perceived lack of transformation of society, may mean that the window for transformative constitutionalism to be effective is closing.

This project is a first step in understanding the various constitutional cultures at play in South African life. To gain a deeper understanding of the extent and the shape of constitutional alienation in the country, a wider range of communities would need to be engaged. With every community analysed, a new perspective and a better understanding of the prospects of transformative constitutionalism in South Africa will be realised. Next steps could include the identification of particular archetypes that might represent broad communities in the country. This would traverse rural and urban, class and language divides, and would engage people from across the racial spectrum. Examples of the archetypes that could be explored in the next step of this line of research could include engaging rural communities, as this project focused on the urban, on engaging people aligned with particular political parties, who may be advocates of a more radical change, or of a reversion to an order that has the hallmarks of South Africa's racist past.

The analytic framework developed in the course of this project, of constitutional cultures 'from above' and 'from below' and of constitutional alienation could be relevant to constitutional democracies around the world, although perhaps most obviously to democracies where the constitution has become a fundamental part of the nation. The application of this framework could be used to interrogate the alignment of populations to their constitutional order, and to understand and identify fractures within these states. This would be a useful enterprise. In a time when many countries appear to be divided,

understanding how groups and communities within a society view their country, and the constitutional cultures that define their day-to-day experiences, may help states to better design initiatives and interventions that engage the population, that better enable populations to critique and hold states to account.

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Annexes

Annex 1

Semi-structured interview template

Semi-structured interview template

Constitution/ Rights talk

- * Have you heard anything about South Africa's Constitution?
 - * What have you heard about it?
- * Why is the Constitution important?
- * Does the Constitution impact your life?
 - * Positively or negatively?
- * Do you have any rights?
 - * What are they?
 - * Have they made any difference to your life?
 - * Do they make any difference to your day-to-day life?
- * Do people in your community talk much about rights?
 - * What do they say?
- * Have people managed to claim things from the government?
 - * What have they claimed?
 - * How did the government allow/give these things?
- * Do other people have any rights?
 - * Do other people have rights that you don't think that they should have?
 - * Are there people that shouldn't have rights?

Crime

- * Do you think the government is responding properly to crime in South Africa?
 - * What does the government do that is good?
 - * What other things should be done?
- * What happens to suspected criminals when they are caught?
 - * What should happen?
 - * What does happen?
 - * What rights to suspected criminals have?
- * Do the police behave appropriately when they take suspected criminals into custody?

Values in South Africa

- * Are the laws different in South Africa than they were during apartheid?
 - * Why?
- * Should everyone in South Africa have rights?
 - * Explore what the participants understand and mean with the word 'rights'
- * What do you think the most important values in South Africa should be?
- * Do you think that the values of the government agree with your values?
- * What values do you think the government has?
- * Are these values written down anywhere?
- * Do you think that the values of most people in South Africa are represented in the Constitution?
 - * What do you think will happen if people's values aren't represented in the Constitution?

Annex 2 Participant Information Sheet

School of Law
Jonathan Parsonage
jon.parsonage@bristol.ac.uk
+27 76 607 7772



University of Bristol
School of Law

PhD Research project:

Attitudes to rights of suspects and constitutional values in South Africa

I am a PhD researcher at the University of Bristol, in Bristol, England. I would like to invite you to be interviewed for a research study that I am conducting, which will explore what people in South Africa think of the Constitution and the protections that the Constitution gives to suspected criminals. Below, I will describe the focus of my research, what participation would require of you, and what rights you would have in relation to information that you provide for me.

The research

This research will explore what people in different communities in South Africa think about the rights that the Constitution gives to people suspected of committing crimes. It will also explore the difference between what the Constitution says should happen, what actually happens and what people think should happen affects attitudes to the government. In the long term, this may assist you and your community, enabling the government to be more responsive to your demands, or to communicate better with people in South Africa.

Your involvement

The interview will take approximately 2 to 4 hours and can take place at a location convenient to you. I will conduct it in the language of your choice. This may mean that I will bring a translator with me to assist in conducting the interview. I will record the interview on a digital audio-recorder. There is no obligation on you to take part. If you do take part, and subsequently change your mind about being involved, you are free to contact me and withdraw permission for me to include your interview in my analysis.

What happens to the information you provide

After the interview has been completed, I'll make a written record of the interview. Both this written record and the audio recording I make, will be kept confidential. We will remove all identifying data from these records. Aside from the translator, the transcriber and I, no one will be able identify you, and no one will be able to link your interview to you. The audio file of the interview and the transcription of the interview that we produce will be stored on an encrypted hard drive and on a secure computer system. What you say in interviews may be used in publications, like academic journals, newspapers and websites. It will not be possible to identify you or where you live in these publications – we will remove your name and any information that specifically identifies you.

After the project is completed the records will be stored on a secure system for no longer than 10 years.

Your rights

You have the right to have the personal information you provide in the interview protected. You also have the right to receive a copy of the interview, if you would like to. You have the right to correct anything that you share during the interview, or that you think that I may have incorrectly understood while I was interviewing you.

If you participate in the project, you have the right to withdraw your consent for any reason, and to ask that the interview you provide be removed from the analysis.

If you make this decision, you are welcome to contact me on jon.parsonage@bristol.ac.uk to tell me that you are withdrawing. I will ensure that all data you provided is destroyed. Due to the manner in which the analysis takes place, if you decide to withdraw, you would need to inform me before 28th February 2020.

I would be happy to answer any questions you have about the research. Should you wish to participate, please contact me on 076 607 7772 or by emailing me at jon.parsonage@bristol.ac.uk. Should you have any concerns or complaints to make, before or after participation in the project, you may contact the University of Bristol's Law Research Ethics Committee, which approved this project (law-recchair@bristol.ac.uk), or the University of Bristol's Data Protection Officer (data-protection@bristol.ac.uk)

Annex 3

Participant consent form

School of Law
Jonathan Parsonage
jon.parsonage@bristol.ac.uk
+27 76 607 7772



CONSENT FORM

Attitudes to rights of suspects and constitutional values in South Africa

HAVE YOU:

YES NO

• Been given information explaining about the study?	<input type="checkbox"/>	<input type="checkbox"/>
• Had an opportunity to ask questions and discuss this study?	<input type="checkbox"/>	<input type="checkbox"/>
• Received satisfactory answers to all questions you asked?	<input type="checkbox"/>	<input type="checkbox"/>
• Received enough information about the study for you to make a decision about your participation?	<input type="checkbox"/>	<input type="checkbox"/>

DO YOU UNDERSTAND AND AGREE:

YES NO

• That the interview may involve you providing certain personal information, such as your age, your gender, your race, information about your economic situation, where you live, and your opinions on political matters in South Africa.	<input type="checkbox"/>	<input type="checkbox"/>
• That you are free to withdraw from the study and free to withdraw your data without having to give a reason for your decision to withdraw at any time before 28th February 2020?	<input type="checkbox"/>	<input type="checkbox"/>
• That the interview will be recorded on an encrypted audio-recording device?	<input type="checkbox"/>	<input type="checkbox"/>
• That the interview will be transcribed by a transcriber, and the transcription stored in the University of Bristol archives. All information that can identify you will be removed from the transcript. The transcriber and the translator, if a translator is used, will sign a document agreeing to protect the confidentiality of the information that you will provide.	<input type="checkbox"/>	<input type="checkbox"/>
• That the transcription and the audio recording will be stored securely at all times, on encrypted computers and data storage devices	<input type="checkbox"/>	<input type="checkbox"/>
• That the transcription and the audio recording of the interview will be deleted within 10 years of the interview.	<input type="checkbox"/>	<input type="checkbox"/>
• That the investigation is designed to promote legal knowledge and that the University of Bristol will use the data you have provided for no purpose other than research and deepening knowledge.	<input type="checkbox"/>	<input type="checkbox"/>
• That the information that you provide will be kept confidential. Neither your name nor the name of the community in which you live will be disclosed in any presentation or publication of the research.	<input type="checkbox"/>	<input type="checkbox"/>

I hereby fully and freely consent to my participation in this study

I agree to the University of Bristol keeping and processing the data I have provided during the course of this study. I understand that these data will be used only for the purpose(s) set out in the information sheet, and my consent is conditional upon the University complying with its duties and obligations under the Data Protection Act.

Participant's signature: _____ Date: _____

Name in BLOCK Letters: _____

If you have any concerns related to your participation in this study or to how the information that you provide will be dealt with, please contact the Law Research Ethics Committee, via Asma Vranaki, Research Ethics Co-ordinator (email: asma.vranakis@bristol.ac.uk or law-recchair@bristol.ac.uk) or the University of Bristol Data Protection Officer (data-protection@bristol.ac.uk).

Annex 4
Translator's non-disclosure agreement



Dated the 14th day of June 2019 (the "Effective Date")

(1) **The University of Bristol**

(2) Redacted

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (the "Agreement") is made by and between

- (1) **The University of Bristol**, a corporation incorporated in England and Wales by Royal Charter with registration number RC000648 and an exempt charity whose principal offices are at Beacon House, Queens Road, Bristol, BS8 1QU (hereinafter, "the University"); and
- (2) [Redacted], an individual resident at [Redacted] South Africa (hereinafter "Translator").

WHEREAS:

- A. The University wishes to conduct an interview programme with local residents across multiple townships in South Africa ("the Participants") between June and September 2019 in order to compile research data and information for the PhD study entitled "Attitudes to rights of suspects and constitutional values in South Africa" ("the research project"). A draft of the questions to be asked is attached as Annex 1.
- B. In advance of the interview programme taking place, The Participants will each have been made aware of, and provided consent to, the collection and use of the information provided by them during these interviews. A draft of the participation form is attached as Annex 2.
- B. The Translator is willing to provide on-the-ground translation services to the University in order to facilitate the interviewing of the Participants and in the course of doing so, the Translator will have access to information provided by the Participants (hereinafter severally and collectively referred to as "Confidential Information").
- C. The Translator is willing to disclose to the University such Confidential Information as required for the purpose of providing this translation service ("the Permitted Purpose") and agrees that any and all Confidential Information disclosed by the Participants to them shall be used solely for the Permitted Purpose described above and shall be subject to the terms and conditions of this Agreement.

THE PARTIES HEREBY AGREE AS FOLLOWS:

1. The Translator shall keep all Confidential Information imparted to it by the Participants in confidence confidential and will not, without the Participant's prior written consent, disclose said Confidential Information to any person or entity, except those of the University's officers or employees who require said Confidential Information for carrying out the research project. The Translator shall not be entitled to disclose Confidential Information supplied by the Participants to third parties for any purpose without the prior written approval of the Participants.
2. The Translator shall not use, either directly or indirectly, any Confidential Information imparted in confidence to it hereunder for purposes other than the Permitted Purpose without the Participants prior written consent. Neither party shall issue any press release or any other information containing the other party's name, unless required to do so by law, without the prior written consent of the party named.
3. Confidential Information shall be marked 'Confidential' if in tangible form, or if disclosed verbally by the Participants shall be treated as confidential. The obligations of confidentiality set forth herein shall not apply to any Confidential Information which is:
- 3.1 possessed by the Translator, other than through prior disclosure by the Participant, as evidenced by the Translator's written records and which was not acquired directly or indirectly from the Participants;
 - 3.2 in the public domain at the time of disclosure;
 - 3.3 published or available to the general public after the time of disclosure, otherwise than through a breach of this Agreement;
 - 3.4 obtained by the Translator from a third party with a valid right to disclose such

Confidential Information, provided that said third party is not under a confidentiality obligation to the Participant or any other third party and to the extent that such information would not be regarded as confidential by a reasonable person;

- 3.5 independently developed by the Translator without reference to the Participants' Confidential Information as shown by the Translator's written records; or
 - 3.6 required to be disclosed by order of any court or regulatory authority of competent jurisdiction, or by legal process subject to the provisions of clause 7 below.
4. Any combination of features or disclosures shall not be deemed to fall within the foregoing exclusions merely because individual features are published or available to the general public or in the rightful possession of the Translator unless the combination itself and principle of operation are published or available to the general public or are in the rightful possession of the Translator.
 5. All Confidential Information, without limitation, shall remain the personal and proprietary property of the Participants. The Translator shall not acquire any licence or other intellectual property interest in any Confidential Information disclosed to it by The Participants. Further disclosure of Confidential Information shall not result in any obligation to grant the Translator any right in or to said Confidential Information.
 6. At any time upon request by the University, the Translator shall immediately return to the University all Confidential Information it has received from the Participants, including but not limited to all notes and reports which may have been made regarding said Confidential Information, and all copies thereof.
 7. In the event that the Translator is required by judicial or administrative process (including but not limited to the provisions of the Freedom of Information Act 2000) to disclose any or all of said Confidential Information, the Translator shall promptly notify the Participants, and consult with the Participants concerning such process before disclosing any Confidential Information in accordance with such process.
 8. No agency or partnership relationship between the parties hereto, whether express or implied, shall be created by this Agreement.
 9. This Agreement shall be effective as of the Effective Date and shall terminate one (1) year after the Effective Date. With the express exception of previous confidentiality obligations, this Agreement supersedes all other agreements or understandings, written or oral, between the parties on the same subject matter. This Agreement and the obligations created herein shall be binding upon both parties, and their successors and assigns with respect to each successive disclosure of Confidential Information and, with respect to each disclosure, shall survive termination or expiration of this Agreement for 3 (three) years from termination or expiration, whichever date is later. This Agreement may not be modified except in a writing signed by both parties.
 10. The parties give no warranties in relation to the Confidential Information disclosed hereunder and in particular (but without limiting the foregoing) no warranty or representation, express or implied, is given by the Participants as to the accuracy, efficacy, completeness, capabilities or safety of any materials or information provided under this Agreement.
 11. All notices required to be served pursuant to this Agreement shall be made in writing to the addresses at the head of this Agreement.
 12. This Agreement shall be governed by, interpreted and construed, and all claims and disputes, whether in tort, contract or otherwise be resolved, in accordance with the laws of England and Wales, without reference to any rules of conflict of laws, and this

Agreement shall be subject to the exclusive jurisdiction of the courts of England and Wales.

13. This Agreement does not create any right enforceable by any person who is not a party to it ('Third Party') under the Contracts (Rights of Third Parties) Act 1999, but this clause does not affect any right or remedy of a Third Party which exists or is available apart from that Act.

Agreed by the parties through their authorised signatories:

For and on behalf of:

University of Bristol

Redacted

Signed: _____ Signed: _____

Print Name: _____ Print Name: _____

Position: _____ Position: _____

Date: _____ Date: _____

Annex 5

Referenced vignette: Community 1

This vignette is a snapshot of the participants' responses. It is a composite - whilst it relies on the actual words of the interviewees, it draws on all of the interviews, attempting to provide an overall picture and insight into the themes and approach of the interviewees, in their own words.

I've been here since '93, I started my primary and high school here.⁸⁵¹ I'm not working at the moment.⁸⁵² I've worked, it was three years back,⁸⁵³ I had a job as a research assistant, it was a two month contract.⁸⁵⁴ Since then, I've been looking, but here in [Community 1], we don't get opportunities.⁸⁵⁵ The problem is government is not creating jobs or is not making some jobs.⁸⁵⁶ Many people don't have jobs, the economy is falling apart.⁸⁵⁷ Like now, I am just sitting at home, I have nothing to do.⁸⁵⁸ They say "Education is for free", but on our side it is not, you have to pay about 100 bucks or around 50 bucks.⁸⁵⁹

It is very hard for us.⁸⁶⁰ The transformation, it hasn't happened.⁸⁶¹ It was meant to change but it didn't.⁸⁶² There is too much corruption, for starters.⁸⁶³ Corrupted cops, corrupted mayors, corrupted councillors, let me say corrupted government.⁸⁶⁴ The government doesn't not think about us, it doesn't have the understanding of being poor, what does it take, what does it mean, what does a black person think about when they wake up.⁸⁶⁵ The government, they have certain communities that they listen to, and then there are certain communities that don't matter, whatever they are demanding is not taken into consideration.⁸⁶⁶ They don't

⁸⁵¹ Interview 12.

⁸⁵² Interview 8.

⁸⁵³ Interview 9.

⁸⁵⁴ Interview 13.

⁸⁵⁵ Interview 12.

⁸⁵⁶ Interview 9.

⁸⁵⁷ Interview 6.

⁸⁵⁸ Interview 14.

⁸⁵⁹ Interview 9.

⁸⁶⁰ Interview 9.

⁸⁶¹ Interview 13.

⁸⁶² Interview 12.

⁸⁶³ Interview 5.

⁸⁶⁴ Interview 5.

⁸⁶⁵ Interview 9.

⁸⁶⁶ Interview 10.

know what happens in the locations.⁸⁶⁷ There was one incident, just here next to me, the construction was doing road works, and they dug a trench and then left it like that for a period of time, and then the rain came and there was water. Two kids fell down there, and they died. The police came, but no police got into that trench – it was only the community.⁸⁶⁸

I think I am lost about the term ‘constitution.’⁸⁶⁹ The Constitution, its, its, it could be a paper, it could be a building, where human rights live.⁸⁷⁰ I think it came just before this new state of not having apartheid, I think it was made mainly for people to feel the redemption of freedom, you know, the acceptance of things changing for everyone in South Africa,⁸⁷¹ so that South Africans can live a better life.⁸⁷² People, they should have rights.⁸⁷³ The Bill of Rights is where my rights are, my rights as a citizen of South Africa.⁸⁷⁴ They are specifically made to make us acknowledge what we are allowed to do, the responsibility of what we are doing and the consequences.⁸⁷⁵ The Constitution has helped in getting a roof over my head, in giving us homes.⁸⁷⁶ I have the rights to say “no,” I have the right to report you, I have a right to talk, I have a right to approach you.⁸⁷⁷ But the Constitution matters more for others, for people who have money, people who have everything, because, for us, we don’t even know what the Constitution is.⁸⁷⁸

When it comes to children, I can say that the government is not supposed to interfere, to put more laws, because these children are ours.⁸⁷⁹ Now the government, they have made rights for our children, now, they say if you maybe spank your child, you are wrong, you are become

⁸⁶⁷ Interview 8.

⁸⁶⁸ Interview 10.

⁸⁶⁹ Interview 2.

⁸⁷⁰ Interview 1.

⁸⁷¹ Interview 14.

⁸⁷² Interview 14.

⁸⁷³ Interview 11.

⁸⁷⁴ Interview 12.

⁸⁷⁵ Interview 14.

⁸⁷⁶ Interview 7.

⁸⁷⁷ Interview 2.

⁸⁷⁸ Interview 12.

⁸⁷⁹ Interview 11.

arrested. But whose child is this?⁸⁸⁰ Nowadays, when you discipline your child, it is called child abuse.⁸⁸¹ The children get to do whatever they want.⁸⁸²

We don't have much things, we don't even have roads, we don't even have water, we are crying about electricity, it's going on, its going off.⁸⁸³ The school is overcrowded, it has more than 1000, I think was 2000 to 3000 pupils, there is gangsterism, and I don't think at that stage there can be any teaching or learning.⁸⁸⁴ I wish the government can change that, but, you know, in South Africa, if you want something, you must toyi-toyi,⁸⁸⁵ I think if we toyi-toyi strong, they can change it.⁸⁸⁶

The police are not trustworthy, at least not according to the eyes of the community.⁸⁸⁷ There is a police station, but they are not helping.⁸⁸⁸ In the morning, I think at 3:30, you will hear the vuvuzelas,⁸⁸⁹ they are calling, then you know the neighbourhood watches are out, to go to different spots to escort people who are going to work.⁸⁹⁰ When there is something happening around, they blow a whistle, to let people know that there is something wrong.⁸⁹¹ When you hear a whistle, you have to go out.⁸⁹² We go out, then we go to the corner there.⁸⁹³ The main thing, the first thing, you should be armed, knobkerrie,⁸⁹⁴ shambok,⁸⁹⁵ you name it, go outside and see what is happening, if a neighbour need assistance.⁸⁹⁶ The police, they arrest you, and then the judge will sentence you, and then it is not a sentence suitable for that person.⁸⁹⁷ The community will beat you up, if you murder someone, the community can

⁸⁸⁰ Interview 11.

⁸⁸¹ Interview 5.

⁸⁸² Interview 6.

⁸⁸³ Interview 9.

⁸⁸⁴ Interview 10.

⁸⁸⁵ A form of dance associated with protest

⁸⁸⁶ Interview 2.

⁸⁸⁷ Interview 10.

⁸⁸⁸ Interview 12.

⁸⁸⁹ A plastic trumpet.

⁸⁹⁰ Interview 14.

⁸⁹¹ Interview 3.

⁸⁹² Interview 10.

⁸⁹³ Interview 12.

⁸⁹⁴ A traditional weapon, a type of club.

⁸⁹⁵ A whip.

⁸⁹⁶ Interview 5.

⁸⁹⁷ Interview 3.

decide to murder you as well.⁸⁹⁸ In my world, it is okay.⁸⁹⁹ Justice from the community is quite stronger than any other justice.⁹⁰⁰ Each and every house has got that whistle, then if you blow that whistle everyone should come out.⁹⁰¹

⁸⁹⁸ Interview 3.

⁸⁹⁹ Interview 3.

⁹⁰⁰ Interview 1.

⁹⁰¹ Interview 6.

Annex 6

Referenced vignette: Community 2

This vignette is a snapshot of the participants' responses. It is a composite - whilst it relies on the actual words of the interviewees, it draws on all of the interviews, attempting to provide an overall picture and insight into the themes and approach of the interviewees, in their own words.

I lived here my whole life.¹ I'm working as a teacher.² I studied marketing and communication, but due to difficulties or the unemployment rate, I had to do my postgraduate certificate in education.³

I've heard about the South African Constitution; I know that it is the highest form of law in South Africa.⁴ It was instituted in our new democracy, and our current president was one of the main initiators and writers and part of the developers of that.⁵ We celebrated because it represented freedom in our country.⁶ As far as my knowledge, as far as the Constitution is concerned, it is one of the best Constitutions in the world.⁷ I know it is the highest form of law in South Africa, in order for us to live in a whole new South Africa, where we can create a new environment where our families can gravitate and alleviate poverty,⁸ but it is not always followed.⁹ It is definitely one of the most progressive constitutions in the world...but I don't think South Africa is a progressive, the people in South Africa, the majority are necessarily progressive.¹⁰ It's because of the human rights lawyers and the groups all over the world.¹¹

¹ Interview 1.

² Interview 6.

³ Interview 4.

⁴ Interview 10.

⁵ Interview 3.

⁶ Interview 3.

⁷ Interview 9.

⁸ Interview 10.

⁹ Interview 9.

¹⁰ Interview 2.

¹¹ Interview 1.

Everyone must have equal rights, Blacks, Coloureds, whites, Indians, whatever, everybody must have equal rights.¹² But there is no balance.¹³ During apartheid, the rules applied where whites had priority,¹⁴ and now, under the new dispensation, which is apartheid in reverse, we have the Blacks wanting to be the ruling party.¹⁵ It is a Black country now.¹⁶ First we weren't white enough, now we are not black enough.¹⁷ I think because the government or certain people in government feel that maybe they [Indian and Coloured people] didn't play a bigger role in the apartheid struggle, so they feel that they are not black.¹⁸ It's not merely a matter of government pushing resources to previously Black communities, it is a matter of the people of [Community 2] not going and demanding their rights, we expect someone else to do it...you see, the squeaking wheel gets the most attention.¹⁹ I'm thinking about this tendency, I don't know how true it is, like traffic police, if you stopped and in luck, and it's Coloured police, you not going to be fined by a coloured police, but if it is African police officers, they are not going to fine the Africans, but they are going to fine other races...we are still in the racial turmoil.²⁰

We live close to the location, where there is obviously a bit more poverty, ²¹ they got shanties²²...there is no water, there is no ablution facilities, nothing, and they just do dirt²³ wherever.²⁴ They can't be happy.²⁵ You know, criminals are coming from that side [the location].²⁶ If guys were more involved in doing work, the crime would be less.²⁷

¹² Interview 5.

¹³ Interview 10.

¹⁴ Interview 9

¹⁵ Interview 9

¹⁶ Interview 5.

¹⁷ Interview 1.

¹⁸ Interview 6.

¹⁹ Interview 2.

²⁰ Interview 10.

²¹ Interview 8.

²² Informal housing.

²³ Euphemistic reference to human waste.

²⁴ Interview 1.

²⁵ Interview 1.

²⁶ Interview 8.

²⁷ Interview 6.

There was nothing good about the past, the only thing that had under control was crime, and this is massive.²⁸ I was more safe then than now,²⁹ crime is worse now.³⁰ There was a better policing system in place.³¹ Everyone feared them...I don't think they were unfair, they just did their work...they were not hitting [people] so bad...but they know they going to be in the back of the van and going to be locked up.³² The police are tied up, about this police brutality, all the laws they have to follow.³³ We don't have a neighbourhood watch...the police station is less than a kilometre from where I stay, and when we phone them it might take five hours to come...with the resources that they have, they are doing their best – they don't have enough vehicles, their training is inadequate.³⁴ [The death penalty] can change the way of thinking, scaring you to change the way of thinking.³⁵ It will curb [crime].³⁶ In many communities, people support [the vigilantes], but sometimes they were very harsh...but people felt more protected.³⁷

For all religions, the big thing is freedom of faith, for example, where the Constitution affords abortion on demand and the government will pay for it, this goes against every religion, so on the one hand yes, they say we will look after religion, but then we also have this issue, and then also the other issue is same-sex marriages.³⁸ I'm not sure it it is legal, I know in other parts of the world it is, but I'm not sure in South Africa.³⁹ We have a clause in our religion that...as long as we keep our core values...the likes of gambling, abortion, I don't know if it is allowed, is it allowed in South Africa, gambling, consumption of alcohol.⁴⁰ It is not an Islamic constitution, it is not an Islamic country.⁴¹ At school it is a bit difficult, in certain things they focus on one religion...it was very Christian...beards weren't allowed and we had to shave.⁴²

²⁸ Interview 1.

²⁹ Interview 5.

³⁰ Interview 4.

³¹ Interview 3.

³² Interview 1.

³³ Interview 10.

³⁴ Interview 2.

³⁵ Interview 10.

³⁶ Interview 6.

³⁷ Interview 3.

³⁸ Interview 2.

³⁹ Interview 8.

⁴⁰ Interview 10.

⁴¹ Interview 10.

⁴² Interview 6.

Annex 7

Referenced vignette: Community 3

This vignette is a snapshot of the participants' responses. It is a composite - whilst it relies on the actual words of the participants, it draws on all of the interviews, providing an overall picture and insight into the themes and approach of the participants, in their own words.

I moved to [Community 3] when I started working and have been here for three years. I have a Masters, and I work as a consultant. I always wanted to be here, ever since I came here, I thought, 'I love [Community 3].'¹ [Community 3] is quite a particular place in [urban centre name removed].² I feel safe, people feel a sense of safety parking in the road, where maybe in other areas they don't...there is a security guard in every building.³

I know South Africa has a Constitution, a document that determines how, like, it's like the basic, the most basic and fundamental laws of the country.⁴ I always use the phrase, 'South Africa has such a liberal Constitution', but it is not always implemented.⁵ But I mean, I love it.⁶ It is a very progressive document, I mean, there is so much to say about it.⁷ I really love that we came through a whole lot of hardship and we developed this forward-thinking document where everyone's rights are enshrined.⁸ It's an excellent thing, for South Africa as a country, it's like a project, that needed an aspirational foundation if it was going to move forward from apartheid in the best way.⁹

I would be immensely troubled if the Constitution didn't align with my conception of ethics.¹⁰ I am very deeply aligned with it,¹¹ but there is definitely a dis-alignment between the bulk of South African's values and the Constitution...it is progressive and a lot of people don't think

¹ Interview 1.

² Interview 6.

³ Interview 6.

⁴ Interview 3.

⁵ Interview 1.

⁶ Interview 9.

⁷ Interview 1.

⁸ Interview 1.

⁹ Interview 2.

¹⁰ Interview 2.

¹¹ Interview 8.

this way.¹² I think South Africa is not necessarily the most open-minded society...there is a conservatism in South Africa...very much linked to the...strong religious roots in the country.¹³ I don't think many people care about who drafted the Constitution, it doesn't matter to me.¹⁴ It was written in the 90s by a bunch of judges.¹⁵

The Constitution has impacted everyone's life, everyone who lives in the country, indirectly, at least.¹⁶ Being gay, the Constitution has definitely affected my life, and there are so many cases in which the Constitution has been used to ensure that people have rights...it protects the rights of all individuals.¹⁷ But I'm in a privileged position and I don't feel like I have to fight for anything...being white, being educated, I think education is a big one, having a disposable income, and living where I live, I think most of those are privileges.¹⁸ I think that I am lucky enough to say that I live in a fairly free society...but, definitely, the majority don't...I think that it is impossible to, to separate whether the ideas of freedom, of openness and justice, to separate them from the material circumstances in which people live...I have access to courts, lawyers, if I want them, right.¹⁹ I also live in areas that are fairly safe. I have access to education, I have access to work opportunities, I have access to health care, these kind of rights, I am not confronted with instances of frequent physical violence or intimidation... I can express views fairly openly, I can move places, safely...But a lot of South Africans do not.²⁰ Many of the kind of injustices in South Africa are never personal and collective, often they are observed at a distance,²¹ it is about power and who has power and authority in a society.²² I mean, you know, the ability to assert their right to minimum wage, because they know that they have tenuous rights, tenuous labour rights anyway, and that they may just be fired.²³ Similarly, the people who live in our building won't assert their right to use common areas

¹² Interview 4.

¹³ Interview 6.

¹⁴ Interview 2.

¹⁵ Interview 3.

¹⁶ Interview 7.

¹⁷ Interview 6.

¹⁸ Interview 1.

¹⁹ Interview 2.

²⁰ Interview 2.

²¹ Interview 8.

²² Interview 9.

²³ Interview 9.

because they, they don't feel secure in their right to shelter.²⁴ If they get kicked out of the building, you know, where are they going to go?²⁵ I also think that the people who are poor and black still aren't really, I mean, their rights are enshrined in the Constitution, but you know, the common acceptance that they have got full humanity isn't really, I mean, we aren't really there yet.²⁶

The government isn't addressing crime properly, but it's not like I know what it should do, it's a really, really hard problem.²⁷ If we think about crime in a simplistic sense, we can say, "Oh, the government isn't doing enough, because all these murderers aren't in prison," but if you think about crime as being socio-economic, as having a wider socio-economic reality to it, in the sense that I don't think people are criminals for reasons that we can explain, socially and economically, and if you have that view, what the government should do is more complicated.²⁸ When people suggest the death penalty, I think they are looking for an easy fix, rather than going back and looking at the roots of it, taking the time to rebuild the communities and working with men and working with victims.²⁹

I don't often see the police here, you see, we have got private security.³⁰ If someone was trying to break into my house, I would call private security because I think that their reaction time would be faster, and I think that, considering my previous interactions with the police at our designated police station, I don't even think that there is going to be, like, enough policemen.³¹ I think the problem is capacity...you don't see them very often...and I don't think it is because they do nothing, I just think there aren't many of them.³² It's complicated, they are underpaid, they are poorly educated.³³

²⁴ Interview 9.

²⁵ Interview 9.

²⁶ Interview 9.

²⁷ Interview 3.

²⁸ Interview 8.

²⁹ Interview 1.

³⁰ Interview 7.

³¹ Interview 4.

³² Interview 6.

³³ Interview 5.

