

ANC's fatal concessions

Ngoako Ramatlhodi, The Times, 1 September 2011

We have a Constitution celebrated as the best in the world. Some would say it is the most progressive, while others would call it the most liberal.

A brief analysis of the conditions and forces that gave birth to our Constitution seems to be in order.

In case we do not remember, the collapse of the then Soviet Union provided the most immediate catalyst to the process of negotiations for a new and democratic South Africa.

In apartheid South Africa in the late 1980s, the regime could only keep a modicum of law and order through a state of emergency.

The masses were no longer willing to be ruled in the same old way.

An orderly retreat for the regime meant giving up elements of political power to the black majority, while immigrating substantial power away from the legislature and the executive and vesting it in the judiciary, Chapter 9 institutions and civil society movements.

Interestingly, and perhaps reflecting the balance of forces at the time, the movement was willing to make this fundamental and substantive concession. However, the concessions described cannot be explained only as a reflection or result of a balance of forces at the time.

In this regard, one ventures to suggest that the negative experience of the apartheid government by the oppressed might explain the ease with which the liberation movement embraced what one calls the emptying of the state.

Apartheid forces sought to and succeeded in retaining white domination under a black government. This they achieved by emptying the legislature and executive of real political power.

On the other hand, the liberation movement was overwhelmed by a desire to create a society bereft of any form of discrimination and, as a result, made fatal concessions.

We thus have a Constitution that reflects the great compromise, a compromise tilted heavily in favour of forces against change.

However, there is a strong body of thought arguing the view that our Constitution is transformative.

In this regard, a point needs to be made that a constitution can either be progressive or reactionary, depending on the balance of forces in the society it governs.

In our case, the black majority enjoys empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society.

The old order has built a fortified front line in the mentioned forums. Given massive resources deriving from ownership of the economy, forces against change are able to finance their programmes and projects aimed at defending the status quo. As a result, formal political rights conferred on blacks can be exercised only within the parameters of the old apartheid economic relations.

This imbalance is reflected across the length and breadth of the country in economic, social and even political terms to some extent.

The objective of protecting white economic interests, having been achieved with the adoption of the new Constitution, a grand and total strategy to entrench it for all times, was rolled out. In this regard, power was systematically taken out of the legislature and the executive to curtail efforts and initiatives aimed at inducing fundamental changes. In this way, elections would be regular rituals handing empty victories to the ruling party.

Regarding the judiciary, a two-pronged strategy is evident. The first and foremost is to frustrate the transformation agenda by downplaying requirements of gender and colour representation.

Many obstacles, such as comments from white-dominated law societies, have to be taken into account when final decisions are made by the Judicial Service Commission.

The subtext of this is to ensure that in the inevitable event of these appointments being made, the new appointees are expropriated by the system in place. This is done through the application of an unwritten plethora of rules during the initiation of new appointees.

The other tactic is to challenge as many policy positions as possible in the courts, where the forces against change still hold relative hegemony. The legislature itself has not escaped the encroaching tendency of the judiciary, with debatable decisions taken by majority views, in some instances. Decisions of the Judicial Services Commission have equally been systematically subjected to judicial reviews. The process of delegitimising the commission and its decisions has been initiated through the instrument of "public opinion".

At an ideological level, the public sector under the control of the black majority is posited as inefficient, corrupt and not worthy of any trust. This manifests itself in the form of vulgar and at times subtle racism. This means that, in our country, capital also has colour, as was the case under colonialism of a special type.

It is, therefore, not surprising that any black person doing business with government exposes himself or herself to extraordinary scrutiny. This way the government is compelled to retain contracts with established white business. When the government employs black people in senior positions, it is seen as cadre deployment. When whites

are employed in the private sector and public areas controlled by the opposition, it is lauded as wise skill deployment.

In the view of the dominant but seriously contested ideology, the private sector is promoted as the ultimate panacea for all societal ills. Public opinion, which in fact is the opinion of the private sector, is deployed to propagate this world view. In this context, any different opinion is immediately discredited as pro-government and therefore unreliable propaganda to be dismissed. In this regard, it is interesting to note that even the public broadcaster has been compelled to succumb to the power of hegemonic forces. To remain credible it has to be seen to be critical of the government of the day, except in areas controlled by the opposition.

To criticise the private sector is to enter taboo land and to commit an unforgivable sin.

Seventeen years later, a moment has arrived for an honest collective reflection of the state of the nation and the common future we are duty-bound to build, as failure to do so would lead to colossal destruction of the country. One is initiating this reflection in the context of the foregoing analysis. In the 17 years, we have witnessed sustained and relentless efforts to immigrate the little power left with the executive and the legislature to civil society and the judiciary.

The main drivers in this process are the opposition and civil society, who feel relatively strong in those fronts, given the mainly still untransformed judiciary. The opposition to the judiciary itself and the bashing of the Judicial Service Commission should be understood in this context.

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