

The South African Constitution: Birth Certificate of a Nation

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Introduction

Although South Africa's Constitution was drafted between May 1994 and October 1996 by the democratically-elected Constitutional Assembly, the ideas contained in it are not new. They are literally as old as South Africa itself. Many of its provisions are the realisation of years of struggle and speak to the very essence and history of who we are as South Africans.

Our constitutional history spans over nine decades between two major milestones - both peace treaties. The first milestone was the Treaty of Vereeniging, which ended the Anglo-Boer War and laid the basis for the adoption of the first constitution, drafted by an unrepresentative convention that expressly excluded the voice of the majority. The second milestone was the 1993 Interim Constitution, which has also been described as a peace treaty. The Interim Constitution essentially signalled the end of a long history of conflict and provided the basis for our new Constitution, drafted by a Constitutional Assembly representative of the majority of people in the country.

The Constitution was the birth certificate of the South African nation, a text adopted by an overwhelming 85 per cent of the Constitutional Assembly. This Constitution is one of the most advanced in the world, establishing a constitutional democracy in which a finely-crafted Bill of Rights enjoys the pride of place. It is the product of negotiations between political parties that were at war with each other. It constitutes a political agreement between the mandated leaders about what the most basic law in the land should be.

In a sense, the Constitution represents a discovery of nationhood because it reflects the soul of the nation.

Understanding Constitutions

New constitutions are generally a product of turmoil, upheavals and even revolutions. They are an expression of radical changes in society. This becomes clear when we look at the history of most constitutional processes over the past hundred years. These have been characterised mainly by struggles against racial domination, colonialism, abuse of human rights and racial, religious and ethnic prejudices. Many of these struggles also revolved around access to land, natural resources and cheap labour. It is hardly surprising, therefore, that the most prominent features of these constitutions have been self-determination, national democracy, universal franchise, the rule of law, separation of powers, regular elections and basic human rights.

Most importantly, a constitution must be a reflection of a people's history, fears, concerns, aspirations, vision, and indeed, the soul of that nation. While a constitution reflects the will of the majority, it must equally take into account the fears and concerns of minorities. It must provide a common framework within which people of diverse or even opposed views, beliefs, and cultures can interact without having to resort to force of arms.

Some historical factors that shaped our Constitution

To understand the essence of our Constitution, one is obliged to journey through history and discover those common values that shaped it. The Constitution also provides the best explanation of who we are as South Africans.

The first clause of our Constitution boldly declares the founding values of our new nation – the recognition of human dignity and the achievement of human rights and freedoms. It also declares a commitment to non-racialism, non-sexism, supremacy of the Constitution as the highest law, the right to vote, and a multi-party system of government in a system that ensures accountability, responsiveness and openness. While this may appear to be common sense and somewhat basic today, the history of our country from 1652 until 1994 suggests differently, in fact so differently that the drafters of our Constitution felt that they had to place this commitment in the very first clause.

Colonialism came to an end with the Anglo-Boer War, when the Boers fought the British for political control over South Africa. The signing of the Peace Treaty of Vereeniging on 31 May 1902 brought an end to this war. This was followed by the eventual adoption of South Africa's first constitution on 31 May 1910. This constitution formally denied the majority of the people political expression. It also set in motion a process through which the black majority were restricted to no more than 13 per cent of the country's land.

The politically-devastating effect of these developments spurred the emergence of the African National Congress (ANC) on 8 January 1912. This saw the rise of African nationalism and resistance to the new political dispensation. Perhaps more importantly, these developments also brought about the first demands for a constitution to be drafted by representatives of all South Africa's peoples. It took nearly one hundred years for this demand to be realised.

This resistance found expression in an alternative vision, a vision of a democracy and in particular a vision of an emerging constitutional dispensation. It is hardly surprising, therefore, that in 1955, at the Congress of the People, the Freedom Charter was adopted. This document was arrived at through popular participation and reflected the vision of South Africa's majority.

On 25 March 1961, the All-in Conference met and called for the negotiation of a democratic dispensation. At this conference, Mandela's call for a national convention of elected representatives to determine a new non-racial democratic constitution for South Africa was adopted. Despite the banning of all organisations representing the majority and a protracted armed struggle, the ANC in 1989 lobbied the Organisation of African Unity (OAU) to adopt the now famous Harare Declaration that set out the basis for the transition of South Africa to democracy. Central to this strategy was the demand that a representative and elected body should be mandated to draft South Africa's constitution.

This history profoundly influenced the new constitution in several ways. It formed the basis of the argument that no government or constitution could justly claim the authority of all its people unless it was based on the express will of all. Accordingly, representivity and not just majority rule has become a hallmark of our Constitution. In a

large measure this has been influenced by the recognition that South Africa is a rich tapestry of diverse cultures and peoples – all of whom need to be respected. A good example of this is the Constitution’s recognition of eleven national languages of equal standing. Another example is our national anthem.

Our Constitution seeks to find a delicate balance between addressing the fears of minorities and the aspirations of the majority. Hence, there is a deliberate attempt to ensure that minorities are comforted that their interests will not wantonly be disregarded, be this in language, culture or religion.

The pursuit of representivity does not end here. Our Constitution takes the continuous representation of the people’s views much further. As a result of our experiences as a people, we have developed a unique fetish for consultations. There is a requirement in several aspects of decision making, to ensure that proper consultations be carried out with all interested parties – be they individuals or structures of civil society. Public participation in decision-making processes is continuously encouraged. This is also evident in the constitutional requirements for the passing of legislation by Parliament.

Negotiation of our Constitution

The general election in April 1994 was the product of a negotiated package of agreements to bring an end to a conflict. This election also ushered in a new process of negotiation – the negotiation of the final constitution. When the population of South Africa voted in this election, they voted to provide the newly-elected leaders with two separate and distinct mandates. These were to govern the new democratic society and to draft the final constitution. This election produced 490 political leaders at the national level, 400 in the National Assembly and 90 in the Senate. In terms of Section 68(1) of the Interim Constitution, a joint sitting of these bodies formed the Constitutional Assembly.

The most apt description of our Constitution can be found in the post-amble of the Interim Constitution. It describes this document as:

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 and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

Our Constitution is a celebration of the creativity of the South African people. Few countries have been as successful as we in negotiating a political settlement and producing a constitution. This is especially true when one considers the fact that it was a negotiation between parties that held diametrically-opposed ideological views.

This negotiation went on to produce a constitutional framework within which previously warring parties could co-exist to form a vibrant democracy. From the smouldering ashes of a divided society, the basis of a new South Africa was produced, which is why this Constitution is referred to as the birth certificate of a nation.

The experience revealed the determination of South Africans not to succumb in times of adversity. When political violence and civil strife most threatened the prospect of peace and democracy, parties were able to strike agreements that proved wrong the prophets of doom so that, despite the adversity, it was possible to finalise one of the most advanced constitutions in the world with the greatest possible public participation. Fundamental to the success of the process of negotiation was its inclusiveness, which clothed the Constitution with the legitimacy it needed as supreme law. The process was designed to give parties the confidence that they could achieve their objectives through negotiation, and that their success was not entirely dependent on their voting strength.

To produce a 'win-win' formula, it was important to recognise and respect the diversity of the interests involved. While not all parties supported each of the provisions, the rejection of certain unacceptable provisions was not sufficient to warrant the reject of the entire Constitution. Hence, the Freedom Front chose to abstain from voting rather than to oppose its adoption. Differences that were previously responsible for blood-letting became an asset, and differing political, social, cultural, and religious interests were allowed to co-exist. This diversity makes the Constitution the vibrant document it is, for it bears the imprint of all parties and the interest of the constituencies they represented.

Reflecting the soul of our nation

The Constitution is the birth certificate of a new South African nation, yet the issues it deals with are not new. It is the single most important document in the lives of South Africa's people, yet it is not perfect or free of controversy. It is a triumph over adversity, yet it cautions us not to be boastful and repeat the mistakes of the past. Indeed, our Constitution does represent the growing soul of a new nation. The Constitution was negotiated mainly by seven political parties, but it also represents the interests of the majority of South Africans.

Evidence of the fears and aspirations of various sectors in society abound in the Constitution. Some of these relate to the different form of discrimination people experienced in the past, the need for affirmative action, the importance of equality, the desire for self-determination, the importance of effective checks and balances, the need to ensure political control over the security forces, and the need for accountability, transparency and respect for cultural diversity.

Of particular significance is the recognition of the role of civil society and the protection granted to individuals and cultural and religious communities. An entire chapter of the Constitution has been dedicated to institutions supporting constitutional democracy. These institutions include the Human Rights Commission and Gender Equality Commission, the Public Protector, the Auditor General, and the Commission for the Promotion and Protection of Cultural and Religious Communities. A strong Constitutional Court protects the interests of the individual and communities.

However, the vibrancy of different interests and ideas can best be seen in the Bill of Rights. The interests of the ANC, the PAC and their constituencies in the reconstruction and transformation of society are clearly reflected in the catalogue of socio-economic rights. The Democratic Party's traditional stance on individual rights such as freedom of expression is also present. The PAC's principled positions on fundamental rights and the

rights of those detained and arrested also have a special place. The interests of the National Party were secured by tempering the clauses on property, labour relations, education and culture. As mentioned above, the influence exerted by civil society, especially religious, human rights, business, labour and women's groupings, is clear in the drafting of the various clauses.

A vision for a better future

The constitution of a country is a very important document, for it represents the values and aspirations of the nation. The South African Constitution represents the end of an era and the dawn of a better future. Until 1994, South Africa's Parliament was sovereign, which meant that it was entitled to pass virtually any law it wished. This changed only when the new dispensation became a constitutional democracy.

The Constitution is the supreme law of the land, the yardstick by which all other laws are judged and tested. It sets out the rules by which government is obliged to function and how it will be accountable to the ordinary people who elect it. Any citizen who is aggrieved by any law or any other aspect of the conduct of government is entitled to seek the assistance of one of several institutions, including the Constitutional Court, that have been established specifically to safeguard their interests.

Our Constitution is one of the most advanced in the world, with a Bill of Rights second to none. As such, it enables South Africans to create and enjoy one of the most vibrant democracies in the world. However, like any other law, the Constitution is only as good as its citizens allow it to be. The Constitution does no more than set out rights, the rules by which government is run, the structures of government, and the parameters within which laws can be made and government conducted. No matter how dynamic any law may be, unless the government is able to implement and enforce the law it will lose its value. Similarly, no matter how wonderful the Constitution may be, unless it is respected by all – government and citizens alike – it will not be of much value. Laws do not make a better society; people do. Laws can only be of assistance in empowering people to achieve their aspirations.

While a law depends primarily on government to implement and enforce it, the Constitution requires everyone's undivided respect. Democracy thrives on the existence of different ideological, religious or cultural values. No matter what these differences may be, it is critical that the people of South Africa unite around a common respect for the Constitution. This does not in the least suggest that the Constitution is perfect, for it is not, and the assumption that it could be is naïve. There may well arise a need for improvement and a need to incorporate new values and new rights. The Constitution makes provision for a regular review, and its continuous improvement must be encouraged.

Despite the wonder of our Constitution, it would be foolhardy to become complacent. Like any other organism, the Constitution requires constant nourishment, which can only come from the respect of every one of its citizens. It is vital that we always be vigilant, to ensure that the values contained the Constitution are upheld. In this regard, the roles of the judiciary, civil society, and the electorate are pivotal, for unless they carry out their responsibilities scrupulously, the very essence of democracy will be eroded. This need imposes an added obligation on both government and civil society to

ensure the continuous education of the public. Ordinary citizens need to be empowered to understand what their rights are and how to access the institutions capable of providing redress to legitimate grievances.

Conclusion

In the few years since the promulgation of the Constitution, a large number of important challenges have been brought before the Constitutional Court. Hardly a day goes by without the media publishing an article referring to the Constitution. While it is still early to pass judgement on the vibrancy of the Constitution, there is little doubt that it has become part of our daily diet of public debates and discussion. What is perhaps more exciting is the fact that despite these vigorous debates, there has been little argument – if any – related to the legitimacy of the Constitution itself.

These successes, however, provide little cause for complacency. The South African public, and particularly civil society, have come to understand the essence and value of a participatory democracy and are beginning to demand just that. South African democracy is young and the process of transformation it has embarked upon is both arduous and difficult. We are thus confronted with exciting challenges for both government and civil society. While there is much ground that needs to be covered to ensure greater interaction between departments of government and the public, civil society, too, is required to perform a much more exacting function in the transformation of our society.

For government, it is a question of how it prioritises its resources to realise a true and lasting participatory democracy. At the same time, civil society needs to ensure that it actively mobilises the public around matters that defend the gains made and that nurture democracy. In the final analysis, it is the ordinary citizen's respect for democracy and the country's Constitution that provides the best defence we can possibly have.