
Strengthening South Africa's Constitution for Social Transformation

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Introduction

The following document provides a summary of a meeting, held at Chatham House on 3 November 2015, on the topic of recent challenges to South Africa's constitution.

Lawson Naidoo, executive secretary of the Council for the Advancement of South Africa's Constitution (CASAC), spoke about the potential for constitutional crisis in South Africa, as the result of the degradation of the country's constitutional system and its independent institutions by members of the government. He argued that the government is moving towards majoritarianism at the expense of principled constitutionalism, and in doing so is stepping away from the values that underlined the struggle against apartheid. He examined the weakened institutions of governance, and commented on how the escalation of mass protests could lead to a new form of politics in South Africa.

This meeting was held on the record. This document is intended to serve as an aide-memoire for those who took part, and to provide a general summary of discussions for those who did not.

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CASAC was established in 2010 as a response to the changing political dynamics within South Africa. Members of the government have increasingly undermined aspects of the constitution, such as the rule of law and independence of the judiciary. CASAC views the constitution as a platform for the engagement of democratic politics in South Africa, and believes it to provide a framework to create a stronger democracy and deal with the socio-economic legacy of apartheid. CASAC aims to restore the ethos of the national liberation movement. Its mandate covers the entire constitution, and the ways in which the document can be protected and advanced.

South Africa is moving towards a constitutional crisis as the ruling party increasingly asserts the counter-majoritarian argument, seeking to undermine the notion of the supremacy of the constitution and revert instead to parliamentary sovereignty. This was seen in the response to upgrades to the president's private residence at Nkandla, during which the Office of the Public Protector came under attack. It was also demonstrated in the flagrant disregard of a court order in the matter of Sudan's President al-Bashir's visit to South Africa, and the general increase in government criticism of the judiciary. The African National Congress (ANC) originally championed the rejection of the system of parliamentary sovereignty, as it was a system of government that failed to protect black people from the abuses of apartheid. The ANC instead chose to establish a constitution that enshrined checks and balances on the executive power. These included the introduction of a range of independent institutions supporting constitutional democracy, such as the Public Protector and the Human Rights Commission. Recent events in South Africa suggest that the executive and parliament no longer respect the constitutional independence and authority of these institutions. There is a slide towards majoritarianism at the expense of principled constitutionalism, with a deliberate undermining of the notion of the constitutional state.

This shift is partly due to the ANC's weakened position following the 2014 general election. In addition, contestation within the party over who will be the next ANC leader could serve to further polarize politics through renewed anti-constitutional radicalism and populism. The ANC is likely to lose further support in the 2016 municipal elections, especially in some key metropolitan cities such as Port Elizabeth, Johannesburg and Pretoria. Furthermore, former president Kgalema Motlanthe has reported that the

tripartite alliance between the ANC, the Congress of South African Trade Unions (COSATU) and the South African Communist Party is now lacking in substance – a situation that will have a significant impact on electoral outcomes. The ANC's electoral weakening could lead to the further degradation of institutions, and will undermine respect for the rule of law and due process. The notions of accountability and frameworks within the constitution placing limitations on government are seen by some ANC rulers as an obstacle to the sovereignty of the majority.

Tension exists between the judiciary and the legislative and executive powers. Political parties are increasingly going to the courts to bring cases on constitutional issues and the rules of parliament. This is due to the ANC's use of its majority position in parliament to avoid debate on key issues. The need for these matters to be taken to the courts highlights failings in parts of the political process. Tensions with the executive were clear in the al-Bashir case, following President al-Bashir's visit to South Africa in June 2015. President Zuma deliberately flouted the South African High Court's ruling on the matter, which required the detention of President al-Bashir until the full merits of the International Criminal Court (ICC) subpoena could be heard. Resulting government accusations regarding the independence of the judiciary led the Chief Justice of South Africa to request a meeting between the judiciary and the government. This incident served to strengthen the judiciary's independence, as the judges were united in their response to the government.

There has also been degradation of the institutions of governance in South Africa. Parliament is weak and is failing to hold the government to account. Debates on key issues are not held, or they take place very late. There is also a disconnect between events affecting constituencies and the complacency and unresponsive behaviour of politicians. The Office of the Public Protector has been hampered, and issues have arisen regarding the report on upgrades to the president's residence at Nkandla. A systematic weakening of institutions of the criminal justice sector has also taken place. The National Prosecuting Authority suffers from high levels of political interference, and has weak directors who are appointed to protect the government. The police service suffers from instability, and little action has been taken following the inquiry into the Marikana killings. Although the national police commissioner was suspended, no time frame has been set for an inquiry into the commissioner's fitness to hold office. Additionally, none of the police officers responsible for the deaths of the miners at Marikana has been charged, and the recommendations of the Marikana report have not been implemented.

The new head of South Africa's Directorate for Priority Crime Investigation (known as the Hawks) was recently found to have committed perjury in the High Court, and the head of the Independent Police Investigative Directorate has been suspended.

A recent escalation in public protests across the country highlights growing frustration with the government's under-delivery and failure to protect the freedoms for which people have fought. That the dissatisfaction with the government exemplified by protests is not reflected in election results indicates the weakness of opposition politics in South Africa. It is unclear whether escalating mass protests can help to strengthen the constitutional project. The recent student protests were largely well-disciplined and generated significant public support. They connected the struggles of marginalized and vulnerable groups with more wealthy students, and succeeded in achieving progress on important issues such as outsourcing. The demise of the tripartite alliance is an important factor in this, as it had previously absorbed such pressures within society. A new era of people's power is due to commence, but demands will take place outside of the weakened constitutional institutions.

Summary of Questions and Answers

Comment

Issues such as Nkandla are problems of South Africa's administrative bodies, not the executive. The issue was not caused by the president; instead, organs such as the defence and police are responsible. South Africa's constitution is not sacrosanct, and will be challenged. The government, similarly, will be taken to court when it is not acting correctly. Motlanthe would never say that the tripartite agreement is no longer substantial, so this must have been inflated by the media. South Africa's parliament is also very representative, and there are strong opposition parties.

Question

There are very high levels of violence towards women, refugees and migrant populations in South Africa. How can the constitution protect these vulnerable groups?

Lawson Naidoo

South Africa has a remarkable constitution, which was created through a process of public engagement and a democratically elected constitutional assembly. It has incorporated the values of liberty and human rights that were first articulated in the African Charter, and then in the Freedom Charter. However, the constitution's vision is far removed from the reality for many South Africans. Although the ANC was initially very successful in tackling issues such as housing, sanitation and access to electricity, as policy decisions have become increasingly difficult progress has diminished. The government is either unwilling or unable to implement the necessary policies to address the structural issues in the country's economy.

Nkandla is not an administrative issue. The Public Protector's enquiry was conducted in terms of the Executive Members' Ethics Act, which relates directly to the role of the president. Nkandla is an issue of public accountability for wasteful expenditure. Instead of addressing this, the government has attempted to undermine the independent institution.

Motlanthe's comments on the tripartite agreement can be found in his exclusive interview with *Business Day*.

South Africa does have a representative parliament. CASAC commissioned a study earlier this year to investigate whether changing the electoral system in South Africa would lead to greater public accountability. The study concluded that this alone would not be sufficient, and a shift in the political culture would also be required.

South Africa's constitutional framework is premised on the notion of respect for human dignity and the protection of all people in South Africa. The Bill of Rights applies to all within South Africa, including migrants. However, there are issues with implementation. The police suffer from a lack of capacity and are unable to deal with systemic gender-based violence. Low levels of economic growth and a lack of employment opportunities also lead to attacks on immigrants.

Question

What form will the struggle for the new era of people's power take, given the pre-existence of a consensus-based constitution, and how will victory look?

Lawson Naidoo

A new era of politics is gradually emerging. The recent student protests brought this to the fore due to the high levels of publicity that resulted from the involvement of the middle class. These protests are not about civil rights, but about inequality and socio-economic rights. The government needs to develop mechanisms to support students from disadvantaged backgrounds, and to ensure that the high levels of growth in inclusive tertiary education are maintainable. South Africa has been successful in building a welfare state in 20 years, but the sustainability of this is questionable, with 16 million citizens receiving benefits. The government has to start prioritizing different areas when dealing with the critical issues of education and health.

The ANC may have to form coalitions at the municipal level after the 2016 local elections in order to retain power. This will lead to a new dynamics in politics, in which politicians will have to become more accommodating and responsive.

Question

Would a coalition necessarily signal a change for the better? The Democratic Alliance (DA) gained at the polls in Oudtshoorn in the last by-election and a municipal-level coalition government was formed. However, subsequent governance of the municipality has proven chaotic.

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The chaos in Oudtshoorn is largely due to constant resignations by councillors there, which forces by-elections. Each of these by-elections has been won by a different party. Factional politics in both the DA and ANC is inflating challenges. Similar instability is also observable in other coalition-governed municipalities, as factional and patronage politics are played out on the local level. Coalition governments may not be a panacea, but they will lead to a new form of politics and a realignment of local politics.

Question

How strong are the constitutionalists within the ANC, and could a weakening of the ANC's rule lead to the emboldening of these members?

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Motlanthe's interview is important because it brought together many of the different constitutionalist strands within the ANC. In the interview, he explained how he refused to serve as Zuma's deputy or on the ANC's national executive committee because he would be the sole constitutionalist. This reflects a growing unease among constitutionalists within the ANC. The group is beginning to speak out about the excesses of the ANC, and how the party is losing its way. They fear that the ANC will suffer at the polls because of this. It is premature to comment on the success of the constitutionalist faction, but it is positive that such a debate is taking place within the ANC, as South Africa will be far better served by a healthy ANC than a weak one.