



COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

CONSTITUTIONAL CHALLENGES FACING SOUTH AFRICA

A Presentation by:

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SA Constitution

- Great Vision
- Failed/Limited Transition
- Obstacle to liberation Agenda
- Second Transition



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Constitution is a vision for

- Equitable society
- Human dignity, fairness and justice
- Restorative justice that enables redress of the systematic inhumanity and socio-economic marginalisation of the past
- Supremacy of the constitution and Rule of Law
- Independent Judiciary, Separation of power and justiciable Bill of Rights
- Transparent, accountable and participatory democracy



ANC & Government: Conceding moral High Ground to others

- High levels of inequality, unemployment, poverty
- Race/Class: Wealth/Poverty – mirror past
- Improved Social Security
- Social Policy and Programmes poor
 - Public health system
 - Education
 - Housing, sanitation
 - Marginalisation of rural community
- Corruption (Is ANC/govt captured??)
- Inefficient, Ineffective and incompetent state



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ANC & Government: Conceding moral High Ground to others

- ANC leadership crisis.
 - ANC/SACP/COSATU (Alliance)
 - Tradition/history vs. Values and principles
 - Foreign Policy - Africa leadership, developing world, multi-lateral bodies
 - Court Battles (No respect for the law)
- Judiciary, Chapter 9 and Parliament
- Civil society and the people
- Securocratisation of Politics
 - Protection of State Information
 - Redefinition of role of State Security
 - Apartheid style police brutality
- Culture of intolerance
 - Free association
 - Pikoli and others – economic activity



From Subject to Citizen: Let the people govern

www.casac.org.za

- Contribute to important debate that is evolving NDP/Policy Debate
 - Through a constitutional lens
 - Recognition of strong foundation laid to realise vision of our constitution since 1996
 - Encourage candid assessment of our failure in that period to make greater strides
 - Propose additional approaches to complement the recommendations of NDP
 - Does not cover all the themes of the NDP
 - Focus on key levers that could accelerate our transformation agenda and involve citizens – ‘game changers’



Inequality, Unemployment and Poverty: Achilles Heel

“We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both” (Justice Louis Brandeis, United States Supreme Court 1916-1939)

- They have extremely negative impact on society
- Erode public trust and threaten democracy
- Increase anxiety and illness
- Produce worst social outcomes across the board (health, drug abuse, education, crime, social instability, etc.)



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Inequality, Unemployment and Poverty: Achilles Heel

“Where justice is denied, where poverty is enforced, where ignorance prevails and where any one class is made to feel that society is in an organized conspiracy to oppress, rob and degrade them, neither person nor property is safe”

Frederick Douglas, Washington DC, 1886.



Inequality, Unemployment and Poverty: Achilles Heel

- Expropriation of the cause of the poor and marginalised
- Denialism and Reluctance – Culpability
- Scape-goating
 - Colonialism
 - Apartheid
 - Constitution
 - Domestic white and International Capital
 - Dark faceless forces of Counter revolution



Property Rights in Transformation

- Successful redress of inequalities in our society depends on a more progressive interpretation of constitution and application of
 - Sections 25 (2) and (3)
 - Requiring just and equitable (compensation) i.e. equitable balance between public interest (to redistribution) and private interest (fairness) - owners of property
 - The NDP does not address this critical subject in the **politics of economic distribution** (wealth – whites: poverty unemployment – blacks)
 - Constitution points the way towards **transformation friendly property law**
 - It is **government policy** and **weak regulatory** and **enforcement capacity** of the state rather than the constitution that accounts for the failure to reverse the rampant inequalities in our society



LAND REFORM

- Unlike the constitution, the NPC does not adequately emphasise LAND as an instrument of transformation and justice
 - The need for land for black people to live, work it and farm
- Fails to highlight policy, legal and institutional shortcomings that have resulted in the failure of land reform
- Consequently its recommendations are inadequate
- ANC debates centre around amendment of Sec 25 of constitution

Recommendations:

- **Communal Land Rights Act** struck down by CC for replicating apartheid tribal tenure needs urgent replacing to close policy vacuum. 22 million citizens are affected
- Urgently clarify
 - role of **traditional leadership** *vis-à-vis* elected **municipal councils** ¹¹



- Land reform still has to recognise, and progressively regularise, **complex tenure systems** and land rights management arrangements
- **Building the capacity** of the Department of Rural Development and Land Reform
- The NDP should be explicit about **credible criteria by which success of the programme will be evaluated** rather than just the transfer of hectares and the settlement of claims (e.g. productive use of the land) A qualitative rather than a quantitative assessment
- Land reform, rural development, local economic development and integrated development planning have largely developed in parallel with one another since 1994 (There is a **need for coherence**)
- Land reform and rural development has to become the focus of an **“honest national conversation”**



LET THE PEOPLE GOVERN

- “**The People shall Govern**” proclaims the Freedom Charter
- Constitution envisages a **participatory democracy**
- Governance paradigm is anchored on an unsustainable model that encourages dependency on the state for delivery
 - People as subjects of state rule
 - Dependent on government largesse for their development
 - Passive recipients rather than partners in governance
- Active Citizenry Depends
 - **Transparency** and **Accountability** hence PAJA and PAIA
 - Vigilant Chapter 9 Institution
 - AG’s comment
 - SAHRC/PP/CGE
 - Robust and vibrant parliament that plays a principled oversight role
 - Address “Sunset Clause” in constitution and introduce **electoral reform**
 - Directly elected representative (President/Premiers/legislators and proportional representation)
 - Rediscover “**All Power to the People**” not “**All power to the political parties**”



LET THE PEOPLE GOVERN

- Such a shift will help improve the capacity of the state
- A state that recognises **citizens as partners** and **not enemies** or **opponents**

“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.....

.....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.....

.....The liberation movement was overwhelmed by a desire to create a society bereft of any form of discrimination and, as a result, made fatal concession.....”

Ngoako Ramatlhodi, Member of NEC of ANC

The Times

1/09/2011¹⁴



A Capable Developmental State

- NDP candid about **dysfunctionality** in some **state institutions**
- Recommends **incremental reforms**; where drastic measures are required
- Public Service Deployment no longer about **advancing demographic** representation BUT more about rewarding allegiance to factions within political parties in power
- **Mediocrity, lack of accountability, secrecy and culture of the old bureaucracy** in the ascendance
 - Protection of information bill
 - Proposed Media Tribunal / Controlling the Public Broadcaster
 - Police force vs. Police services – Police brutality a threat to free expression



A Capable Developmental State

Recommend:

- Posture and Structure of **State to be aligned with the constitution**
- This will require major change in the **level and mix of skills required**
- Paradigm shift from “**Service Delivery**” to and on behalf of passive citizens; to a **governance partnership** that is facilitated by government
- Strengthening of **oversight role of Parliament** (electoral reform) and **Chapter 9** institutions
- Affirmation of the independence of the Judiciary
- Encouragement of a vibrant civil society



END CORRUPTION NOW

- Corruption: Towards a comprehensive societal response (www.casac.org.za)
- The Impact of Corruption on Governance and Socio-Economic Rights (www.casac.org.za)
- **New entrants** in the public service have been **socialised into a culture of corruption, secrecy and lack of accountability** that characterised the **apartheid state**
- NDP proposals on corruption fall short and are inconsistent with our obligations in terms of **international treaties** that we have ratified
- Corruption promotes inequalities, undermines democratic institutions and legitimacy of the state, gnaws away at the ethical fibre of our society, stifles economic growth and distorts deployments of resources



END CORRUPTION NOW

- ANC in Government lack political will to end corruption
 - Resolution ignored
 - Minimalist approach adopted
 - Allies isolated and marginalised
 - Institutions of criminal justice manipulated

Recommendations:

- Establish a **dedicated Independent Anti-Corruption Agency**
- **Educate** public on harms of corruption
- **Investigate, prosecute** and **prevent** corruption
- Ensure **transparency** and **access** to information
- Encourage participation by citizens, media, civil society etc. in the fight against corruption
- Take measures in public and private sectors as well as civil society structures
- Co-operate with other states
- Strengthen **whistle blowing** legislation
- **Regulate party political funding**
- **Party Investment Companies**



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The Judiciary under attack:

Constitutional State:

- Rule of Law
- Credibility of the Courts as independent offices of justice
- Constitutional Court and Final arbiter on Constitutional matters

Constitutional democracy

“People come and people go. Customs, fashions, and preferences change. Yet the web of fundamental rights and justice which a nation proclaims, must not be broken. It is the task of this court (CC) to ensure that the values of freedom and equality which underlie.....our..... Constitution – are nurtured and protected so that they may endure”

(Former President Nelson Mandela)



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The Judiciary under attack:

“South Africa was being transformed into a “one party state” led by unelected courts..... The government derived its mandate from the people, while the courts comprised only a handful of people”

Dr M Motshekga
NEC Member – ANC
Chief Whip - ANC

“Democratically elected Parliament are being undermined by “counter-revolutionary” Judges”

Gwede Mantashe
Secretary General – ANC
Chairperson - SACP
August 2011

Commenting on the

“SCA judgement in the Simelane matter Nzimande there was “no democratic order in some kind of country that is subjected to a judicial dictatorship”

Blade Nzimande
General Secretary – SACP
Cabinet Minister



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Separation of Powers and Institutions established to protect democracy

- Power is circumscribed
- Checks and balances between three arms of the state
- Independent Institutions for protection of Democracy Chapter Nine (C9')

“the legislative, executive and judicial branches of the state..... must co-operate and act independently.....as an integrated, singular unit in the pursuit of the vision set out in the constitution”

Jeff Radebe

Minister of Justice

ANC – NEC Member and Head of Policing



Transformation of the Judiciary

Transformation of Judiciary

- Demographic Representation (Race/Gender etc.)
- Favourable disposition to the values of the constitution
- Evidenced by progressive jurisprudence

Progress since 1994

- Access to justice expensive, difficult for ordinary citizens
- Demographic transformation
 - 2011 – over 60% Black judges
 - 2011 – over 27% Women Judges
 - Similar progress regarding magistrates
- Judgements: few exceptions generally affirm the letter, spirit and progressive thrust of the constitution



Conclusion

- Tremendous strides made to build constitutional democracy

Second transaction must fulfil the following:

- Consolidate and entrench the achievements made
- Renewed energy and innovative ideas required to tackle inequality, poverty and unemployment
- Civil Society must resume rightful role in influencing development of our society