



The Midpoint Paper Series N° 6/2021
September 2021



25 years of the South African Constitution:

Reflections and Realisations

Dr Klaus Kotzé

1) Contents

25 years of the South African Constitution: Reflections and Realisations.....	1
Introduction.....	3
Background.....	3
The Constitution as foundation and blueprint.....	4
First, recognition.....	5
Embodying the transformed state	6
Challenges to the Constitutional path	8
Repudiating the Constitution: Towards 25 more years.....	13

“The Constitution itself cannot save South Africa...What can save us is the Constitution in combination with a proud, deeply sceptical population” – Edwin Cameron, former Constitutional Court Justice

Introduction

This year marks the 25th anniversary of the South African Constitution. This paper details how the Constitution serves as a framework towards a peaceful and just society for all. The aim here is not to be triumphal in commemoration, nor simply be conservative in observation. Instead, the paper affirms that the Constitution is only valid and powerful when its ideals are practiced. It looks at how the guiding values and principles of the Constitution are used and abused. Herein language matters. It is our use of language that offers the clearest measure of Constitutionalism. It is through language that we put ideals into motion. It is also through language that our value system is repudiated, and our Constitutional order is impaired.

Commemorating 25 years, this paper recalls the democratic vision and purpose pursuant of the Constitution. To illustrate its promise towards dignified transformation, and the stability required to undergird this. Following a brief background, the paper is set out in two broad sections. The first section returns to the foundations of the Constitution, exploring its ideals and accordant application. The second explores challenges and remedies to Constitutional consolidation.

Background

Constitutional orders are not arbitrarily achieved. As captured by the iconic tree in the logo of the Constitutional court, the Constitution is a living system that is disputed and cultivated by a country's people over time. According to Justice Albie Sachs, ***“the tree protects the people, and they look after the tree”***¹. The tree and those who tend it co-exist dynamically. It is the responsibility of all South Africans to nurture and mature this order. Without the popular application of the Constitutional principles in word and deed, our precarious state faces disintegration.

The building or for that matter the breaking down of a nation is a deliberate act. The recent looting and acts of sabotage are attempts to replace order with disorder. We are increasingly seeing the reconciliatory national project coming under attack. Its foundations and aims of overcoming, of forgiveness and unity are being replaced by polarizing and vengeful missives that seek to undo the truly democratic gains that have been achieved. These narratives are supplanting the development of a holistic appreciation that South Africa's reality is complex and traumatized. These are populist and fatalistic narratives are attractive because they are simplistic. They reject the essence of our state and must therefore be challenged. The best way of doing so is to actively make a case for our Constitution and its principles. In doing so we give expression to its foundations; we embolden its ideas and repudiate the new force which pushes us apart.

On the 20th anniversary of the Constitution, then deputy President Ramaphosa called on all citizens to realise their Constitutional responsibility: ***“As South Africans we ought to say: does the Constitution still serve the current situation we are in... (this) should be a debate we engage in”***².

This discussion paper takes on his appeal. At this time of mounting headwinds, it reflects upon the Constitution and calls upon its expeditious activation and realization.

The Constitution as foundation and blueprint

The South African Constitution is a great artefact of humanity. It **“stands as a monument in the world...The magnitude of its vision and ambition is unprecedented”**³. The interim Constitution appropriately came into effect on the first occasion of Freedom Day, on 27 April 1994. It was the day when, together, South African voices legitimized a previously illegitimate state. In expressing their first-ever collective statement of will, South Africans elected a democratic government. For many years prior, an ongoing struggle existed over what would and what would not be included in the future Constitution. The interim and final Constitutions cohere different views into a unified programme that advances core ideals.

It is not insignificant that South Africa’s democratic Constitution was birthed through a robust democratic process. A process whereby different groups, in pursuing their respective ends, recognized each other in committed negotiation; achieving a deliberative democracy through deliberation. Through measured languages protracted consultation and eventual mutual understanding were made possible.

In a moment of celebration, the South African nation was born. Before 1994 the unitary state was a fiction. Whereas before a multitude of peoples existed in one territory, apart, now the first real union of South Africa was born. It was therefore appropriate that (now) President Ramaphosa has often referred to the Constitution as the national birth certificate of the nation. It was the trust placed in a unified project, incorporating legitimate divergent leadership delegations together in a manner which under apartheid was impossible, that ended the prenatal phase and delivered a foundational programme for all South Africans. In a marked departure from the past, the Constitution, said Ramaphosa, would belong **“to all of us, not just the ruling party, or one section of South Africa. We all wrote this collectively with our blood, some with their lives, with our tears and with our sweat. We claim it as ours, it enshrines the rights that make us live as South Africans, and we will protect it because it belongs to us”**⁴.

In belonging to everyone, the Constitution explicitly transcends the differentiated apartheid political order which imposed direct political power through Parliamentary sovereignty (rule by law). Now, following the Constitution’s provisions, the rule of law placed checks and controls on the power of the lawmaking authority. The new South Africa would not be dependent upon the manifest dictates of individuals but would belong to and be ruled over by the realm of ideas.

True power would reside in intangible principles and values, including human dignity, non-racialism, and the achievement of equality. Power is not imposed but is internalized and expressed by individuals who are empowered to engage values and make judgements on the range of possibilities provided to them. Such a value-based system provides for an indirect administration. According to Foucault’s governmentality concept, **“the exercise of power consists in guiding the possibility of conduct and putting in order the possible outcome”**⁵. “Citizens are enabled and not ruled as is the case under government where they are limited by a clear set of prescribed directions”⁶. As such it would be incumbent upon citizens, through their actions and words, to either admit to or reject these ideals.

From the Constitution, we see the regulation and the management of the possibilities whereby citizens are charged to act. Constitutional freedoms are broad but not endless. Individuals should perceive and know where their freedoms extend to and where they are limited. Its broad

toleration shows the Constitution to be ambitious. It ***“embraces an aspiration and an intention to realise in South Africa a democratic, egalitarian society committed to social justice and self-realisation opportunities for all”***⁷. The values laid down in the Bill of Rights, the cornerstone of democracy, present normative statements of justice. To former Chief Justice Pius Langa, the Constitution ***“provides a blueprint of the type of South Africa we aspire to become...a vision of what we can be”***⁸. Akin to the vision statements that are in vogue in the business world, this vision defines the nation and guides its long-term meaning and purpose. And as vision statements do, the Constitution prompts citizens to activate its promise. Ideas, however, have no meaning when only bound to text; they are impotent when not given life through expression. Citizens are entrusted to adopt ideas and put them into practice. This effectively conciliatory public approach is the target that is set. In so doing, the Constitution provides a framework that inspires social transformation.

While the new Constitution initiated a new legal framework, it did not initiate a new state. Nor did it commence from a blank slate. Instead, it set out to allow the fundamental transformation of an illegitimate state into a legitimate one; ***“the idea of the Bill of Rights was a negation of colonial violence...(representing) shifting uses of law”***⁹. South Africa, accordingly, finds itself in a permanent state of transition. Through its processes, the courts would declare upon actual events of the day, establishing precedent. Replacing the old through declaration. Building a new order on a piecemeal basis, thereby maintaining the imperative of stability while steadily achieving progress. According to Judge Dennis Davis: ***“the early work of the Constitutional Court was designed to purge the South African statute book of the most egregious laws that had been central to the half-century-long repressive regime”***¹⁰. In declaring upon the cases that it heard, the Court injected new meaning into the national order. Meaning-making is, however, not simply a matter for legal processes, which are often slow and limited due to their incremental nature. While the courts set the statutory tone and course, it is up to citizens to observe and instil meaning. It would be the people through their words and deeds that would conceive a just and equal state.

First, recognition

For programmatic documents to have an effect, they must first be recognized. A Constitutional order based on values does not follow statements of fact. Instead, it follows a definitive appreciation of norms and values.

The just and legitimate South African programme of laws and principles can best be perceived in relation to the unjust, immoral system that preceded it. Desmond Tutu’s theological orations during latter-day apartheid exemplify the recognition of this injustice. In Tutu’s oratory, we find the undoing of the government’s programme which manifest South Africa as apart. Tutu’s rejection of apartheid sees him appealing for *koinonia*, a fellowship between different groups. Achieving a united national voice, without losing individual distinctiveness. Doing so would deny the apartheid system its very basis of separateness. Accordingly, Tutu implores South Africans to engage with each other, thereby shutting down apartheid’s strategic principle that denies deliberation. Out of his rejection of an illegitimate state, he put forward his argument for a new South Africa¹¹. Through the platform that his ministry afforded, he spoke the united voice which was otherwise denied. His articulation and demonstration of an undivided people give ideas substance. His claim of a singular South African people is the counterpart to that of apartheid. He does this by building upon the same religious foundation which the then government instrumentalised. His conception of the legitimate therefore stems out of and transcends the illegitimate. The impact lies in commandeering the structure of the old under a more persuasive

and just character. The existence and substance of the new, its legitimate justice, truth, and identity, would rest upon the deliberative rejection and transcendence of the illegitimate past.

This is not only an ethical and legal claim, it forms the basis of a superior political strategy that would relegate its erstwhile political adversaries to the historical dustbin. Notwithstanding the economic spoils of the negotiated transition, the political strategy of building an order upon the rejection of the past ensured that any challenge to legitimate authority would need to advance a similar transformative programme. ***“We, the people of South Africa”, states the first line of the Constitution’s preamble “recognise the injustices of the past”***¹². The very character of the unified, transformative state is couched in the argument that repudiates the past.

Embodying the transformed state

This expression of values and ideas gives shape to the legitimate order. The verbal claims of former President Mandela exemplify the Constitutional values. Through his candidature and then state presidency, Mandela embodied the transcendence of the old. In recognizing the injustices of the past, Mandela’s rhetoric, according to Salazar (2002), presents ***“the first act of reconstruction and development...his speech reconstitutes the nation”***¹³. His claims advance the appeal of the Constitutional preamble: ***“to heal the divisions of the past and establish a society based on democratic values”***¹⁴. Mandela through his word and deed performed the foundation of the democratic society¹⁵. His speech acts, embodying the principles and values of the Constitution, saw him ***“inspiring ordinary men and women with the belief that they can and should make a difference”***¹⁶. Mandela’s praise of the values of Constitutional democracy instilled them as the national ethic. His orations and actions on these values afforded him authority and to the new nation justice and stability. On the first occasion that he *stated the nation*, Mandela realised the present (and made the future possible) by transcending the past. ***“In one gesture, in one voice, the nation finds itself being ‘stated’; mutual confidence is affirmed, and ceremony is performed”***¹⁷.

In so doing Mandela gives expression to Ramaphosa’s birth certificate, delivering the nation in space and time. His journey and public conciliation with his former enemy present the embodiment of the national ethos. It afforded him gravitas and set the example for others to follow. Without grandstanding personal attributes, it is valuable to recognise the rhetorical contributions of leaders such as Mandela and Tutu. Their perceptions of the national condition and their strategic oratorical contributions, constructing an environment wherein progress and reconciliation can take place without social calamity speaks volumes of their character and the power of deliberative democracy.

Nevertheless, the accounts of individuals, while inspirational and iconic, are limited. For the state to be transformed the verbal acknowledgement of citizens is central. Attending to beneficiaries of freedom, says Mamdani, ***“would shift focus to a notion of justice as social justice”***¹⁸ - another of the preamble’s appeals. This allows for reconciliation that is not only attributed to individuals but is socially durable¹⁹. Transformation, says Langa, is not simply achieved through equal access. Instead, it is acting upon the endowments of leaders such as Mandela and Tutu. It is “a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which

change is unpredictable but the idea of change is constant²⁰. This is the path of ongoing transformation.

Transformation plays out as the movement from one normative system to the next. The postamble to the 1993 interim Constitution, titled *National Unity and Reconciliation*, proposes a form. It states that the **“Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans”**²¹.

The image of the bridge, linking the authoritative state of direct power, to one of justice and governance, provides an arrangement for transformation. The bridge, following Mureinik (1994) leads from a culture of coercion to one where power must be justified through deliberation²². Direct power gives way to an ongoing, relational process of justification. Here we see the old, while remaining as a reference, being transcended by arguments that conceive of a new reality. The Constitution functions as a portal to realise reconciliation through the act of persuasion. According to Doxtader (2001), **“the path from past to future must be forged through acts of reconciliation that remember and transcend the past simultaneously”**²³. The bridge is only valuable when people willingly make use of it. Individuals must personally assume responsibility, thereby giving the bridge its utility. Put otherwise, in another appropriate metaphor, the constitution, by implication the bridge, is presented as a social contract in the classic sense, between state and civilian. Both, while being symbolic, represent binding structures that are formative. According to Thomas Hobbes, one of its original architects, the social contract forms a constitutional submission of citizens to a central authority²⁴. Such a submission is done to escape a former deprived condition, where there is no arrangement that allows for justice, social or otherwise. The bridge accordingly presents a good metaphor for citizens to collectively leave the past behind and accept a common, shared future. Crossing the same bridge and ‘signing’ the contract ensures the formation of legitimate sovereignty. Together all travelers establish the new. A singular country is birthed and justice becomes possible.

Neither the bridge nor the social contract is self-fulfilling. What they do is provide the potential and space for ideals to be manifest; for different parties to explore engagements and build relationships. The signing of the contract and the crossing of the bridge represent the commencement, though not the achievement, of transformation. The act of democracy entirely depends on the democratic practice being shared. Deliberation requires two or more active agents. It is incumbent upon individuals to take stock of policy, to shape and build the nation. In returning to the postamble, we see that it forms a call to action. **“The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past”**²⁵. Upon this foundation, we are then told **“there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not victimization”**²⁶. The postamble speaks volumes about the necessity for personal responsibility, for restraint. That to give effect to national transformation, South Africans must personally be fair, accept others’ difference and understand principally that they are central in the public process. The **“application of law”**, reminds Scobbie (2014), **“lies not in defining each word, but requires recourse to the values underlying the norms”**²⁷. In stating both what is needed and what is not, the postamble guides popular recourse.

The appeal to ubuntu establishes a powerful ideal upon which the new must be built. Ubuntu allows for reconciliation. It signifies the recognition of mutual humanity and calls upon

magnanimity. This is a matter of strength, not weakness. In pursuing ubuntu, a person grows in their benevolence, surpassing the stage of human development of their counterpart. The victim transcends injustice, dislodges themselves from the deed committed upon them. They do not simply leave the perpetrator behind but through their transcendence afford the other the same opportunity. Ubuntu is powerful. It demonstrates the superior worth of the intangible, of principle. That development depends on the individual; on who you are, not what you have. In doing so, it emphasizes the depravity and illegitimacy of the previous regime and of vengeful individuals. It establishes in its stead a regime of justification. The expression of ubuntu, the declaration of a singular nation, displays the arrival to the new side of the bridge. Ubuntu represents an actual state of affairs, it **“demands that you forgive, because the resentment and anger and desire for revenge undermine(s) harmony”**²⁸. It is important to note that at the time of political transition, there was justifiable fear that the country would be unable to transition peacefully. Before reconstruction, repairs and any form of justice could be initiated. Before the Constitutional order could be inaugurated, the diverse people of the land had to accept that social harmony and not chaotic seizures would form the greatest social good. A comprehensive social compact (we return to this later) was required to achieve the foremost national strategic imperative: securing and maintaining national stability. No democratic consolidation could be realized without national cohesion. Without the people’s trust that the new system would inhere legitimacy. That those who were previously denied would be the state’s foremost beneficiaries.

Recognition and promises would not be enough. Ubuntu and transformation cannot only remain an attitude. The Constitutional promise must be embodied as to give life and substance to a transformed state. To Tutu there would be no alternative: **“unless there is real material transformation in the lives of those who have been apartheid’s victims, we can kiss reconciliation goodbye. It just won’t happen without some reparation”**²⁹. This task, the task of ensuring reparation, does not lie in judicial texts and legal proclamations. It is not simply the declaratory task of the courts. The regime of justification demands implementation from political classes, the elected officials and the people that elect them. Through policy formulation and implementation, the ideals of the Constitution must be given impetus. Through political action, the regime is either confirmed as legitimate or not.

Challenges to the Constitutional path

When Constitutional ideals remain ethereal and policies fail, distrust sets in. Individuals defy and groups confront the status quo. Demands are made that the ends of the state cannot be achieved through its current modus. New proposals pave alternative paths towards the desired equity and justice. To advance this approach, the current order is first rejected. The greatest challenge to the South African state is accordingly for the Constitutional order to be popularly delegitimized.

Recently there has emerged a significant and dangerous push towards replacing the national order, towards revolution. These claims, alarmingly, reside not among fringe groups but in influential political entities, including the African National Congress (ANC) and the Economic Freedom Fighters (EFF). Both parties are ideologically rooted in and strategically aspire towards revolution. As a whole, the ANC remains guided by its materialist **National Democratic Revolution (NDR)**^{1 30}, which under Jacob Zuma was amplified and expanded towards a radical second

¹ The NDR is the ANC’s “process of struggle that seeks the transfer of power to the people...and changes the manner in which wealth is shared, in order to benefit all the people”; “it means uplifting the quality of life of all South Africans, especially the poor, the majority of whom are African and female” (ANC, 2012).

transition; ***“our first transition was characterised by a framework and a national consensus that may have been appropriate for a political transition, but has proven inadequate and even inappropriate for a social and economic transformation phase”***³¹. Today the ANC, which regards itself and not government as the centre of power in South Africa, is experiencing internal fighting over the required course of action. By extension, not only is it competing to dominate the battle of ideas nationally, it is now entangled in a fight for the direction of the party. The split in the ANC is along a central strategic line. Increasingly the group espousing a radical second transition is turning to violent means and ways to undermine the Constitutionalist group which pursues national transformation based on the national consensus framework; reform and systematic undoing of injustice through social cohesion. The EFF's aspirations align with those of the ***‘second transition’*** faction. Both see systemic revolution as ongoing and necessary. According to the party, ***“the EFF is a radical and militant economic emancipation movement...with the aim of bringing together revolutionary, militant activists”***³².

Revolution is always a violent process that places its fulfilment as the central justifier of any means necessary. The pursuit of revolution therefore legitimizes and indeed relies on the use of violence, foremost violent language. Such language has been principal to the liberation process. It was central to Jacob Zuma becoming the ANC president. His main rhetorical act was his performance of ***Umshini Wami (bring me my machine, by implication machine gun)***, a resistance song from the struggle against apartheid. The ANC justified the use of the song for its legacy and because it regards national liberation as ongoing. To Zuma and his supporters, the song was literally a war cry recharging and redirecting the ANC towards more radical command of the state. These individuals and groups became frustrated with Thabo Mbeki's intellectual pursuit of liberation and wanted a greater materialist approach and accomplishment. The song with its familiar structure of lead (Zuma) and follower (audience) sections, repeats the lead's call for his machine, understood to be him obtaining the authority to lead the party. To take on the enemy head-on. The song peaks when after numerous calls for his machine, the lead claims that ***he and his authority is being held back (Wen'uyang'ibambezele)***.

Zuma has relied on persuasion that has been passionate and forceful. Contrary to Mbeki and even Mandela, his claim was deeply materialist (not idealist) and has been centred on his personal leadership. Only under his lead would the ANC be able to execute its plan. Zuma's pernicious rhetoric subverted the ANC's usual broad-based approach to power. His cult of personality empowered him beyond reproach. His warrior-like performance spurred fellow leaders and supporters to adopt his violent approach. COSATU secretary-general Zwelinzima Vavi and then ANC Youth League leader Julius Malema were both quoted as saying that they would ***“kill for Zuma”***. Today Zuma still discharges his invective despite being the central culprit in the demolition of the ANC's and the national project. He maintains his performance as a national warrior, employing war towards his personal and national struggle. According to Maritz and Van Rooy (2021), ***“Zuma capitalizes on the way in which these metaphors highlight and hide important factors, but he also manipulates overlapping elements by exploiting the grey area between the literal and metaphorical interpretation of his language”***³³. Incredibly, Zuma is still fighting, albeit with waned support and increased desperation. His behaviour should serve as a crucial lesson to South African Constitutionalism. Had his violent message been rejected at the time of his rise to power, we would not be in our current situation. Violent language cannot and should not be condoned.

Zuma's aggression and his recall of anti-apartheid songs have been copied by his strategic acolytes. Julius Malema has cultivated blame and verbal abuse into the culture of the EFF. He has crudely made a name for himself using attention-grabbing invective. When the courts ruled in

2011 that his singing of the banned **Shoot the Boer** song was dehumanizing and illegal it only raised his public profile. This case proves two points. First, while the courts deliver judicial verdicts, they do not settle political affairs. The increased litigation for political ends, while proving the strength and legitimacy of the courts, is pulling the law into the ambit of politics. This may itself be a sustained delegitimation attempt by the politically powerful to contaminate and wear it down.

Secondly, it shows that abrasive language is not being deliberately challenged by the mobilization of democratic values. The admiration for and manifestation of democratic principles have waned. Critically, this waning has coincided with a proliferation of digital information platforms where anyone can capture the attention of millions. Malema's vicious rhetoric has infected his supporters who have used **racism, as well as threats of rape and violence against journalists across digital platforms**³⁴. Instead of the deliberative democratic path where values and principles are advanced, Malema spurs division along racial and other lines. His strategy is clearly to break apart, marching towards revolution by coercion. He is a crafty orator who plays with words and manipulates emotions. His comment, **"we are not calling for the slaughtering of white people, at least for now"**, appears to propagate hate and violence among his supporters. While it was found not to amount to hate speech by the South African Human Rights Commission, he centrally employs violent referents such as bloodshed, killing and war in combination with humiliation, loss and defeat. **"Malema's followers and those who are easily misled will act in ways that may not be directed by him, but which stem from the control that he has over what they think"**³⁵.

Here we see that social media has been particularly effective in persuading as well as shutting down, intimidating, and abusing. Social media has seen discerning journalism give way to sensationalism. Twitter, Facebook, and other platforms, which are innately democratic, have fallen prey to the ferocious economy for attention. Instead of cultivating respectful exchange, their structures, and the reward they offer has led to extreme personal aggrandizement and the development of *echo chambers* – environments where a person only encounters more of their own beliefs and opinions.

Respectable argumentation is the greatest casualty of these now mainstream information channels. While before media channels were mediated by professionals that subscribed to or were at least were expected to subscribe to ethical standards, new media has pit personalities against each other in narrow spaces that often turn acerbic, with little recourse. In this space, democratic deliberation, the prerequisite for democratic decision making, is disregarded. Arguments are no longer about advancing a claim through debate. Instead, they have become personal attacks that rely heavily on identification: praising one set of beliefs and blaming another. This ceremonial grandstanding has little to do with consensus-making. It is based on and is directed towards conformity. Essentialised truths are relied upon; new points are not stimulated. The arguments of others are equally refused and fixed into an opposite box, confirming their identification as those of an enemy. The result is the competitive cacophony where statements are exchanged, and ideas are rarely debated.

Social media shows how language can be a form of domination. Freedom of speech, albeit a fundamental freedom, is not limitless. Its abuse must have consequences. Yet, we should avoid running to the courts. While courts may deliver judgements, it is the argumentative process where different groups or individuals recognise and engage each other that democracy is actioned. It is here that the dignity and decency espoused in the Constitution is cultivated. Whereas Twitter and other such platforms have a detached, global architecture, we require local guiding perceptions. This is primarily the responsibility of leadership. We need civic and political leaders that take

responsibility. To demonstrate and give expression to ideas such as social cohesion, showing that people can have different views without behaving like enemies.

This leadership should be central to the ruling party. To avoid popular delegitimation, the government must give expression to Constitutional values. At the core of the government's Constitutional mandate is its task to improve the lives of the public through service delivery. The ANC government introduced its guiding service delivery philosophy in the 1997 *White Paper on Transforming Public Service Delivery*, known under the concept of **batho pele (people first)**. In its foreword, President Mandela suggests that ***“access to decent public services is no longer a privilege to be enjoyed by a few; it is now the rightful expectation of all citizens, especially those previously disadvantaged...That is why I am launching ‘batho pele’. I want to turn words into action”***³⁶. The White Paper proposes a strategy to give effect to Constitutional aspirations through government's structures. In counteracting the racialised delivery programme of the apartheid regime, the state progressively pursues the achievement of human dignity and equality. The White Paper seeks the crossing of the bridge.

White papers give shape to ideas. They are policy tools, ideally affecting transformation. As with the ideas they embody, these tools are susceptible to political influence. At the heart of *batho pele* and comprising one of its eight foundational principles is that service delivery should encompass ***“value for money”***. ***“Batho Pele”***, says Mandela, ***“is the relentless search for increased efficiency and the reduction of wastage within the Public Service. Every Rand wasted...could be invested in improving services”***³⁷. In time new principles have been added to the official list detailed in the White Paper. Foremost is the principle that rewards outstanding employees³⁸. This principle, while seemingly innocuous, effectively contradicts both the principle of *batho pele* and its principle of “value for money”. Instead of ensuring prudent efficiency in the service of the public, we see a yearly Batho Pele gala event, where public servants are awarded for doing their job. Claimed by Public Service and Administration Minister Senzo Mchunu to ***“inculcate and institutionalise a culture of servitude”***³⁹, these deeds reverse the ends of the state, replacing the public with the state employee. This is an illustration of culture, not simply the usage of already limited resources. It shows a clear re-routing of the *people-first* principle. The employees of the state, most of whom are political deployees, have become the real beneficiaries of the state. This is seen in the public sector wage bill becoming the most expensive component of government's spending. The people are not first anymore. The ideals of transformation have been captured in the discharge of the state. Its service has been rerouted from a progressive approach that serves the people at large, to one that serves a select group. In the last year, government has spent more money paying on its public servants than it did on the 18 million South Africans receiving social grants⁴⁰.

The lived and well-documented failure of service delivery in South Africa illustrates the failure to translate Constitutional ideals into corresponding action. Today grand corruption is practised in the name of *batho pele*. Prosecution alone will not be an effective remedy. To deal effectively with state capture, all sectors of society, all individuals, must re-capture the meaning of Constitutional values. Before recapping these tasks, let us look at where Constitutional disregard by the state and the individual converge. Here, again, we find Jacob Zuma. Unlike the previous ANC presidents who became state president, Zuma made it clear that the NDR, not the national Constitution, would be the loadstar of his leadership. Zuma would lead the state by leading the party; ***“the national project would be subordinated to the leadership goals of the ANC, not to the precepts of the national Constitution”***⁴¹. Zuma's subjugation of the state to the party is evidenced at his re-election as ANC president, in 2012, when he advanced the radical second transition. ***“The time has come to do something more drastic to accelerate change towards economic transformation***

and freedom”⁴². In addressing the National Assembly in 2014, as head of state, he pledged that **“the country will enter a new radical phase”**⁴³. Herein, Zuma captured the state and subjugated the ideational Constitutional order to the revolutionary materialist aspirations of the NDR. By espousing a second transition, Zuma effectively claimed the Constitutional order is variable. That it can be transcended when subjugated to political will.

Zuma’s political campaign undermines Constitutional supremacy as manifest in the separation of powers. He has sought to subjugate the ends of the state to that of politics. Zuma’s has delegitimized the sovereign project through sustained lawfare campaigns; the usurping and instrumentalization of law. In doing so he has elevated his personal experience as supreme to the declarations of the courts. Zuma’s rhetoric at the Commission of Inquiry into Allegations of State Capture presents his explicit delegitimation strategy.

First is his direct challenge to the validity of the Commission led by Deputy Chief Justice Raymond Zondo. In a public letter, he alleges that the terms of the Commission are illicit. He says that it **“recommended that the chairperson of the inquiry be appointed by the Chief Justice and not the president as is the normal and correct legal procedure”**⁴⁴. Zuma claims that the Commission chaired by Zondo is legally invalid and that he, therefore, cannot conscientiously engage it. Only if Zondo recuses himself, as demanded by Zuma⁴⁵, would the Commission not be illegal. Astutely, this is not a way of ensuring legality, only one to prove the inverse. Based on its terms, the Commission would fall apart if Zondo is removed. Its tasks have been tied to his chairship. Zuma’s charge of the Commission is at core a technical claim of illegitimacy.

Next is Zuma’s charge that likens the behaviour of the Commission to that of the apartheid regime. As mentioned previously, the legitimacy of the new is based on the illegitimacy of the old. Zuma knows this very well. By referring to the behaviour of the Commission as **“exactly like the apartheid government”**⁴⁶ and by alleging that there is an **“a judicial dictatorship in South Africa...like the injustice of apartheid”**⁴⁷, Zuma equates the democratic and the apartheid states. Delegitimizing the state, in turn, legitimizes any action against it – as was the case in the campaign against apartheid. **“I am left with no other alternative but to be defiant against injustice as I did against the apartheid government”**⁴⁸. His claim is, therefore, that if he goes to jail it will (again) be as a conscientious objector, a victim of an illegitimate state. To examine this stratagem from another, albeit outlandish, angle, one observes that if it is true that he acted unlawfully, the guilt of the president confers impropriety not upon his person but upon the state itself. This argument is thus, as an individual no longer occupying the presidency, that the system ruling over his person is an illegitimate one. That the presidency which established the State Capture Inquisition is tainted and that, as such, the Inquisition itself is spurious.

A third example, among others, of Zuma’s delegitimation is his claim that the Commission’s actions against his person are invalid. That he has been treated exceptionally. Knowing that he is key to the Commission, that it would likely provide him certain privileges, this consideration is a low-hanging fruit. In a statement compelling Zuma to appear before the Commission, the Constitutional Court adjudged that Zuma was indeed afforded special treatment. He was invited, not summoned as other witnesses were. It also judged that **“no reason was furnished for this favourable treatment to the former president. The commission was alive to the fact that the Constitution requires the equal treatment of witnesses under the law”**⁴⁹. Zuma’s delegitimation tactics extend further to undermining the competency and impartiality of courts and advancing spurious plots against his person. He deftly interprets reality through metaphor, using linguistic claims, not evidence, to advance his ends. These examples suggest an inverse to that of Mandela

who defended himself in court by declaring his admiration for the supremacy of the law and the invalid application thereof by the apartheid regime⁵⁰. The latter praised the law and authoritatively stated the nation, in word and deed. The former is loathsome of Constitutional supremacy. His actions have captured and subjugated Constitutional aspirations to his own political ends.

Repudiating the Constitution: Towards 25 more years

With delegitimation serving as the greatest threat to the national order, it is incumbent upon all people to embrace Constitutional values. Thereby tangibly crossing the bridge and giving effect to a legitimate order. Citizenry does not simply entail voting. It also eclipses legal obligations to include the active establishment of social justice. When the citizenry sees no duty beyond their self-interest, they risk the total failure of the Constitutional project. By seeing government as singularly responsible for Constitutional effect, the transformative social contract remains unfulfilled. The open and critical debate between citizens is foremost in this realization. The Constitutional project is a deliberative one. Simply, ***“a democracy without the means to argue is bound to fail...a duty of deliberation, placed on both governed and government, is fundamental to the exercise of citizenship***⁵¹.

After 25 years, the Constitutional order cannot sustain further captors. Nor can it withstand the lack of transformation that has coalesced under inequality and incapacity. Energy must be lent to rediscover and build upon previous gains. While great responsibility lies with the government, it is mainly incumbent upon citizens to personally reconcile the Constitutional ethos through active deliberation. A personal stating of the nation. In 1998 then Deputy President Thabo Mbeki stressed that ***“without (nation-building) ... the kind of South Africa visualized in our Constitution will most certainly not come into being”***⁵². Mbeki goes on to suggest that true nation-building entails ***“the construction of the reality and the sense of common nationhood which would result from the abolition of disparities in the quality of life among South Africans”***⁵³. The overarching, transformative concept of nation-building wherein the Constitution is enacted, must be a collective effort. It is expressed and afforded meaning through the language of people. Through the social compacts entered into by citizens who recognise and embody a transformed and legitimate state. Social compacts, unlike the legal application of social contracts, bring people together in the ongoing practice of democracy. Compacting gives expression to ubuntu, to the unity of purpose. While social compacts require sacrificing personal concerns, their benefits are comprehensive. As South Africa grapples with lingering inequities compounded by state capture and the effects of the pandemic, it is wise to note the predominant lesson of COVID-19: no one is safe unless everyone is safe. Herein, we can recall the benefits from the social compact entered at the turn from apartheid. ***“It was the social compact, comprehensively entered into by the diversity of South Africans, when people recognised each other as equals, refusing to be forced apart, that broke down the walls of apartheid”***⁵⁴. Compacting made transformational progress and stability possible.

Much of what is needed for an effective social compact has already been discussed above. It is crucial to note that unless South Africans enter a comprehensive social compact, we may not witness a 50th observation of the Constitution.

Compacts are empty when citizens use violent and undignified language. By engaging in non-violent communication, people transcend trust deficits, and importantly set the example for others to follow. Social compacting is the deliberate recognition and embodiment of ubuntu. Deliberation takes place with an other; conversing affords reciprocal value and dignity. Seeing an other as a person through whom one can advance one's humanity affords dignity to both the self

and the other. Harmony is found when people give respectful expression to the ideals that bind them. Herein, the republic, as the public thing which unites us all, is established. This is not a matter of liberal, socialist or other ideological tendencies.

A just state requires constant justification. In his instructive article, Transformative Constitutionalism (2006), Justice Langa reminds that ***“transformation is a permanent ideal, a way of looking at the world that creates the space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created”***⁵⁵. Achieving these ends depends on the application of Constitutional ideals.

The best way to do this is to use language that builds the nation instead of breaking it down.

¹ The Constitutional Court <https://www.concourt.org.za/index.php/about-us/the-logo>

¹ SABC News. 2016. "SA must review the constitution: Ramaphosa". <https://www.youtube.com/watch?v=eFEp66npus8>.

¹ Tembeka Ngcukaitobi. 2018. *The Land is Ours*. Penguin. Cape Town

¹ Nelson Mandela Foundation. 2012. Conversation on the Constitution. <https://www.nelsonmandela.org/news/entry/conversation-on-the-constitution>

¹ Michel Foucault. 1982. "The Subject and Power." *Critical Inquiry*, 8 (4): 777-795. (p789)

¹ Klaus Kotzé. 2020. "Responding to COVID-19: Emergency Laws and the Return to Government in South Africa". *Javnost – The Public*, 27 (4): 393-406. (p395)

¹ Dennis Davis and Karl Klare. 2010. "Transformative Constitutionalism and the Common and Customary Law". *South African Journal on Human Rights*, 26(3): 403-509.

¹ Pius Langa. 2000. "A New Constitution and a Bill of Rights". *Law, Democracy and Development*, 4(2): 115-120.

¹ Tembeka Ngcukaitobi. 2018. *The Land is Ours*. Penguin. Cape Town

¹ Dennis Davis. 2010. "South African Constitutional Jurisprudence: The First Fifteen Years". *Annual Review of Law and Social Science*, 6: 285-300 (p287)

¹ Philippe-Joseph Salazar, 2002. *An African Athens: Rhetoric and the Shaping of Democracy in South Africa*. Lawrence Erlbaum Associates: London (p2)

¹ The South African Constitution

¹ Ibid 12, p27

¹ Ibid 10

¹ Ibid, p19

¹ Gaye Davis, 1997. "No ordinary Magic". *The Mail & Guardian*, 18 July. <http://archive.niza.nl/uk/press/mandela/mgmandela.html>

¹ Ibid 9

¹ Ibid 8, p359

¹ Ibid

¹ Ibid, p354

¹ Interim South African Constitution, 1993. <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993>

¹ Etienne Mureinik, 1994. "A Bridge to Where? Introducing the Interim Bill of Rights". *South African Journal on Human Rights*, 10(1): 31-48.

- ¹ Erik Doxtader. 2001. "Making rhetorical history in a time of transition: The occasion, constitution, and representation of South African reconciliation". *Rhetoric & Public Affairs*, 4(2): 223-260. (p247)
- ¹ Rachel Adams, 2018. "South Africa's social contract: the Economic Freedom Fighters and the rise of constituent power". *Acta Academica*, 50(3): 102-121.
- ¹ Ibid 21
- ¹ Ibid
- ¹ Iain Scobbie, 2015. "Rhetoric, Persuasion, and Interpretation in International Law", in *Interpretation in International Law*, Andrea Bianchi, Daniel Peat, and Matthew Windsor. Oxford University Press.
- ¹ Desmond Tutu quoted in Patti Waldmeir. 1997. *Anatomy of a Miracle: The End of Apartheid and the Birth of a New South Africa*. W W Norton & Co., New York
- ¹ Desmond Tutu. 2000. *No future without forgiveness*. Penguin: Cape Town.
- ¹ African National Congress. 2012. "Strategy and Tactics of the ANC: Building a National Democratic Society", December. *African National Congress*. https://www.sahistory.org.za/sites/default/files/strategy_and_tacticsof_the_anc_by_anc_december_2012_anc_53rd_conference.pdf
- ¹ African National Congress. 2012. "The Second Transition?", *National Policy Conference*, Version 6.0. <https://static.pmg.org.za/docs/120306ancdoc.pdf>
- ¹ Economic Freedom Fighters. 2021. "Background of the Economic Freedom Fighters". <https://effonline.org/about-us>
- ¹ Ansie Maritz and Bertus van Rooy, 2021. "'Linking the Dots': Metaphors in the Narrative of Self-Justification by Former President Zuma". *Language Matters*, 52(1): 30-49.
- ¹ Daniel Friedman. 2019. "I was threatened with rape and violence following Malema tweet – Karima Brown". *The Citizen*, 6 March. <https://citizen.co.za/news/2096515/i-was-threatened-with-rape-and-violence-following-malema-tweet-karima-brown/>
- ¹ Ismail Lagardien. 2021. "Julius Malema and what we can learn from power of euphemisms in politics and language". *Daily Maverick*, 22 June. <https://www.dailymaverick.co.za/opinionista/2021-06-22-julius-malema-and-what-we-can-learn-from-power-of-euphemisms-in-politics-and-language/>
- ¹ Department of Public Service and Administration. 1997. "Government Gazette", 18340(388).
- ¹ Ibid
- ¹ Kwazulu-Natal Province Health Department. 2014. "Batho Pele: People First" <http://www.kznhealth.gov.za/bathopele.htm>

¹ Department of Public Service and Administration, 2020. "Government to honour hardworking public servants". <http://www.dpsa.gov.za/thepublicservant/2020/10/29/government-to-honour-hardworking-public-servants/>

¹ Ray Mahlaka, 2021. "State tries to curb its spiralling R650-billion wage bill". Online at Daily Maverick, 14 March. <https://www.dailymaverick.co.za/article/2021-03-14-state-tries-to-curb-its-spiralling-r650-billion-wage-bill/>

¹ Klaus Kotzé. 2019. "Cyril Ramaphosa's Strategic Presidency." *Defence Strategic Communications*, 7: 17–48

¹ <https://www.sahistory.org.za/archive/2012-anc-national-policy-conference-opening-address-president-jacob-zuma-midrand-26-june>

¹ South African Government, 2014. "President Jacob Zuma: Reply to the State of the Nation Address". <https://www.gov.za/address-president-jacob-zuma-response-debate-state-nation-address-national-assembly-cape-town-0>

¹ Jacob Zuma, 2021. "I am prepared to go to prison – Jacob Zuma". Online at *Politicsweb*, 1 February. <https://www.politicsweb.co.za/documents/judgment-heralds-constitutional-crisis-in-sa-jaco>

¹ Ibid

¹ Ibid

¹ Jacob Zuma, 2021. "Zuma: Let's rise up against the 'corrupt, judicial dictatorship'. Online at *News24*, 26 March. <https://www.news24.com/citypress/news/zuma-lets-rise-up-against-the-corrupt-judicial-dictatorship-20210326>

¹ Ibid 42

¹ Theto Mahlakoana, 2021. "'Blunders': Concourt says Zondo inquiry to blame for Zuma situation". Online at *EWN*, 28 January. <https://ewn.co.za/2021/01/28/concourt-zondo-inquiry-to-blame-for-situation-it-found-itself-in-with-zuma>

¹ Jacques Derrida, 1986. "Admiration of Nelson Mandela, or The Laws of Reflection". *Law and Literature*, 26(1): 9-30

¹ Philippe-Joseph Salazar, 2010. "Rhetoric as Salvatory", *African Yearbook of Rhetoric*, 1(1): 1-2 (p1)

¹ Department: International Relations and Cooperation, 2004. "Statement of Deputy President Thabo Mbeki at the Opening of the Debate in the National Assembly, 29 May 1998". <http://www.dirco.gov.za/docs/speeches/1998/mbek0529.htm>

¹ Ibid

¹ Klaus Kotzé. 2019. "Cyril Ramaphosa's Strategic Presidency." *Defence Strategic Communications* 7: 17–48.

¹ Pius Langa. 2006. "Transformative Constitutionalism". *Stellenbosch Law Review*, 17(3): 351-360. (p354)

About Us

The MidPoint is a forum of ideas. It provides a political platform for centrist and humanist thinkers. Authors writing in their personal capacity show how a market-orientated economy can achieve human dignity.

Proudly supported by the Konrad-Adenauer-Stiftung.

Contact

info@themidpoint.org

Please find an associated discussion of this paper with the author, Judge Albie Sachs, Ongama Mtimka and Rebecca Sibanda at www.themidpoint.org.za. Recorded 7 September 2021.

*Konrad-Adenauer-Stiftung e.V. Foundation
Office South Africa*

*Postal and visitor address:
60 Hume Road,
2196
Dunkeld / Johannesburg
Republic of South Africa*

*Contact
info.johannesburg@kas.de
+27 11 214 29 00*