

WHOSE MESS ARE WE

IN?

Whether we continue to blame the Constitution without exhausting its potency or seize the freedoms it provides is our choice. Many among us did not create the mess we are in, but it is our mess now and, if we do not fix it, it will fix our fate, writes **Thuli Madonsela**

Having become a cantankerous nation that rarely agrees on anything these days, particularly since the Covid-19 black swan pounced on us, it was refreshing to witness the nation agreeing on something in the past week.

This occurred in two meetings: The first event, mostly attended by millennials, was the We, The People civil society event that took place at Constitution Hill on March 21. The other, with participants mostly on the other side of 35, was a multistakeholder constitutional reflections conference convened by the justice and constitutional development department, at Gallagher Estate in Midrand, Johannesburg, from March 22 to 24.

The first event, themed Seize the Power, marked Human Rights Day on March 21, which is commemorated as International Day on the Elimination of Racism in the rest of the world since the UN declared it so as part of rejecting apartheid.

March 21 commemorations spotlight the Sharpeville massacre of 1960, an egregious human rights violation which left dead 69 individuals for protesting against socioeconomically disempowering pass laws.

The organiser was the Constitution Hill's unassuming yet dynamic CEO Vanessa September, mostly underestimated as the spouse of her celebrated husband, retired Constitutional Court Justice Albie Sachs.

The national conference, under the theme Reflections on the Constitution: Rule of Law, Accountability, Social and Economic Justice, succeeded in hauling out some of the Constitution's architects, including Mohammed Valli Moosa, to share a platform with public discourse regulars such as Barney Pityana, Sachs, Mojanku Gumbi, Mark Heywood, Sello Hatang, Phelisa Nkomo and Khaya Dlanga.

At both events, it was agreed that South Africa was not working because our democracy was not working as it should be and that, quite frankly, we were in a mess.

The difference was where each event laid the blame for the mess and what it saw as the critical next steps.

To back their point, both events cited governance dysfunctionalities such as rampant criminality and corruption, including state capture and apparent impunity. Top of the evidence list was the energy security crisis at the core of which is Eskom's dysfunctionality.

The list also included fragile and crumbling coalition governments exacerbating systemic service delivery failures at municipal level, reflected in endemic potholes, filthy towns and endless mayoral votes of no confidence.

Parliament's pointless debates that have done nothing for accountability, while lawfare is increasingly leant on in lieu of political accountability, also featured.

Agreed dysfunctionalities included chronically high levels of unemployment (with youth unemployment imploding at above 60%) coupled with acute inequality reflected in a Gini coefficient of 0.69, making South Africa the most unequal country in the world.

They also included poverty, estimated by Stats SA to be at 55.5% across all groups, racially disaggregated to show 1% among whites, 6% among Indians/Asians, 38% among coloureds and 64.2% among black Africans – a social gradient that mirrors the contours of pre-constitutional racist land dispossession, job reservation, forced removals, and denial of other economic and social freedoms.

It was further noted that, after 25 years of transformative constitutionalism and land reform, land ownership by the African majority remained minuscule, at 4.5%, and that land restitution and redistribution have been bedevilled by systemic corruption and ineptitude amid policy dissonance.

Commencing with the keynote address by President Cyril Ramaphosa, the constitutional commitment to advance social justice was affirmed.

The president and others noted some of the



ON IT Songezo Mabece, Miss SA Ndavi Nokeri, Constitution Hill Trust CEO Vanessa September, Siyavuya Mabece (author of *Enough! Stop Bullying*) and Advocate Thuli Madonsela

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It was unclear how the conclusion was arrived at, considering that outcomes generally depend on the design and execution. An example in this logic was the jump in logic by those arguing that the chronic failures in deracialising land redistribution and ownership of the economy were evidence of constitutional design faults. This was topped with a patently ahistorical narrative which posited that the "liberal Bill of Rights" was the product of beneficiaries of white liberals prevailing within the ANC during the Convention for a Democratic SA talks at Kempton Park and in the Constitutional Assembly.

The truth is that the first Bill of Rights South Africa ever saw was produced by Alfred B Xuma and fellow ANC intellectuals as part of the African's Claims in South Africa, reflecting on the Atlantic Treaty 80 years ago, long before the ANC became a racially integrated organisation.

Essential provisions of the Bill of Rights in chapter 2 of the Constitution have parallels with that 1943 Bill of Rights, though expanded to address additional human rights concerns such as gay rights.

A further truth affirmed by the Constitutional Court

indicators of progress made since the dawn of democracy, including deracialising access to and amounts of social security benefits, while expanding such benefits to include the social relief of distress grant that was introduced to alleviate the impact of Covid-19 containment restrictions on commerce.

All agreed that constitutional democracy bestowed political and legal or de jure freedoms to all.

All agreed that the progress was less than it could be and should be, 25 years since the Constitution had become operational.

It was further agreed that the country lags behind its own Constitution and the world regarding the achievement of de facto or substantive equality on socioeconomic fronts such as land distribution and ownership of the economy.

What was in dispute was whether the Constitution was to blame for the persisting economic and social disparities and other dimensions of the national mess.

The one school of thought at the constitutional conference insisted that the persistence and endemic nature of social challenges were evidence of the fact that the Constitution was to blame.

dictates the advancement of social justice. In *Government of the Republic of SA and Others v Grootboom and Others*, the Constitutional Court said: "The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment."

How then is this mess the fault of the Constitution? For example, why are land redistribution and restitution failures the Constitution's fault when it was government's choice to deviate from the Constitution regarding expropriation with a court-determined price where willing buyer-willing seller fails?

Why is section 25 of the Constitution to blame when it is silent on the right to property, only protecting property owners from arbitrary deprivation of property while dictating in section 5(5) that "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis"?

At both events, I noted that, because of persisting primarily racial and gendered disparities, the Constitution is paradoxically seen as a Potemkin charade by some and a transformative blueprint by others.

I reiterated my opinion that, although they can be a powerful instrument of social change, constitutions are not self-executing devices or magic wands. I opined that the transformative potency of any Constitution lies in both its contents and proper execution, and that there is much more transformative potency in the Constitutions which we are yet to leverage.

Incidentally, this view found resonance among the We, The People group, many of whom are seizing the power given by the Constitution to make a difference for themselves and others.

Two who stuck out were the talented Miss South Africa 2023 Ndavi Nokeri, who is leveraging her power to drive fair play in the education space through eliminating financial and infrastructural barriers; and 10-year-old Siyavuya Mabece, whose response to bullying at school was authoring a book to serve as a playbook on understanding and combating bullying.

As Mandela once said, our future lies in our hands. Whether we continue to blame the blueprint we have without exhausting its potency or seize the freedoms it provides to expand the frontiers of freedom and human fulfilment for ourselves and all is our choice. Granted, many among us did not create the mess we are in, but it is our mess now and, if we do not fix it, it will fix our fate and that of generations to come.

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