ALTERNATE HORIZONS PLATFORM

Which South Africa was better during apartheid?

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Introduction

In post-apartheid South Africa, it is not uncommon to hear the phrase, "things were better under apartheid." Especially closer to an election cycle, uttered from the perspective of an older South African citizen (of any race) who no longer believes in the promises a democratic South Africa holds for its citizens in the preamble of the South African Constitution (Dlamini 2010:5). As if the claim made by an individual who lived through both eras of South African history can go without criticism. This sentiment is held by a small but noticeable contingency of white and black South Africans alike, and it would be disingenuous to construe the only possible meaning in these words to be a cry to return to an oppressive system of racial discrimination and parliamentary sovereignty. The consequence that the narrative has on our civil and social responsibilities is that it asks South Africans to re-examine what a post-apartheid South Africa looks like, by re-evaluating the way South Africans looked at the problem during apartheid. A good faith engagement with this sentiment would require one to acknowledge that such a phrase encompasses two broad ideas that will be discussed further below.

A strange take - 'Things were better during apartheid'.

First, the idea that the pre-democratic legal order of South Africa was 'good', tends to suggest that—barring the legal segregation and oppression—there was a sense of law and order within all sectors of society (Dlamini 2010:13). In responding to this sentiment a

capita selecta of the two legal systems' constitutional schemes will be set against one another to assess the veracity of that claim in plain terms. Second, this phrase carries with it a presumption that, in the broader scheme of things, the living standards of all South Africans have deteriorated further under the democratic dispensation (Dlamini 2010: 13). This perspective carries with it a representative set of assumptions that are clear from the outset. However, an improved understanding of this perspective is that South African inequality has increased under the democracy, being that democracy is oligarchical and imposes *neo-apartheid* (Madlingozi 2017: 131). In addressing this more comprehensive perspective this paper suggests a different outlook. This critique of the current constitutional dispensation is misplaced by gearing it towards the democratic model that the South African constitution proposes. Instead, such criticism should be directed at liberation discourses and the historical reality of the liberation movements in the aftermath of apartheid.

The 'law and order' of post-apartheid South Africa - 'An entirely different paradigm, definitely for the better'

In assessing the law and order of the current South Africa compared to apartheid, it is clear from the text of the two formative constitutions of South African history that the present legal order is primarily focused on improving the lives of all South African citizens, while the previous constitution was concerned with granting authority to elected representatives to decide the trajectory of South Africa for all citizens. As it currently stands, the South African legal order is that of a constitutional democracy, where the constitution is the supreme law of the land and any law or conduct that is inconsistent with the constitution is invalid and the obligations imposed by the constitution must be fulfilled (The Constitution of the Republic of South Africa 1996, section 2). The primary aim of the constitution currently is to heal the divisions of the past and create a society founded on establishing a society based on democratic values, social justice and fundamental human rights; improving the obligations of the lives of South Africans and free the potential of each person; lay the foundations that will create a government based on the will of the people where every citizen is protected by the law (The Constitution of the Republic of South Africa 1996 preamble). This means that parliament cannot pass any laws that are not consistent with the constitution—the executive cannot administer the affairs of the state in an unjust manner (The Constitution of the Republic of South Africa 1996 section 33). Nor can the many guarantees in the Bill of Rights be limited in a manner that is not justifiable in an open and democratic society and the judiciary has an obligation to develop the law to fit the constitutional mission (The Constitution of the Republic of South Africa

1996 section 36, section 39[2]). Therefore, while carrying out the mandate set out above, the constitution also prescribes powers to the three branches of government (the executive, parliament, and the judiciary) with the sole purpose of achieving these goals. However, this was not the case prior to the adoption of the current constitution.

South Africa has had four constitutions prior to the most recent version (described above) (Segal and Cort 2012:12). The only one relevant to the discussions is the Republic of South Africa Act 1961 (the 1961 Constitution). In terms of the 1961 Constitution, the sovereignty of the republic was under that of the authority of an 'Almighty God' (The Constitution of the Republic of South Africa Act 1961 section 2). This sovereignty obviously can be described as ordained by God but exercised by parliament who made the rules and the executive government that carried out the implementation of those rules. In other words, South Africa, at the time, was governed under a system of parliamentary sovereignty (Bekink 2016: 244). The practical implications of this come to the fore in the fact that when parliament passes an act (makes rules), those rules are no longer solely to the discretion of those elected into the legislature and the constitution is the primary source in assessing the validity not just of conduct, but even the laws passed by the legislature (Bekink 2016: 244): meaning that they could pass any laws they wished. Unlike the current constitution, the 1961 Constitution limited parliamentary representation to the white demographic of South Africa who could only be elected by other white South Africans (The Constitution of the Republic of South Africa Act 1961 section 34). The logical consequence of this constitutional paradigm is that the lawmakers of the time needed to keep the minority white population satisfied to hold onto power, and they could exercise that power however they wished, with the caveat that common law rights were really the only line of defence that citizens had against the will of the state.

One crucial comparison to be made between the two constitutional schemes is that the 1961 Constitution lacks the Bill of Rights, while the current constitution includes the Bill of Rights. The significance of this bill lies in the fact that even where laws are inconsistent with the the Bill of Rights they too are invalid and therefore have no force under the current constitution. The practical implications of this is that elected representatives must represent all South Africans, regardless of their political and ideological mandates or adapt their political and ideological mandates to the desires of the constitution. They must do this not only to stay in charge through the votes of their electorates, but to exercise any of their powers considering the current constitutional vision for South Africa. Thus, through the comparison of the above, we observe that the constitutional paradigm that the South

African reality shaped by an exclusionary past, must adapt.

It would be difficult to argue that a constitution where the lawmakers had very little mechanisms to hold them accountable to a broader citizenry could be better than what the current constitution proposes. Under the 1961 Constitution, the Group Areas Act was permissible so long as the minority remained privileged at the expense of the majority. Atrocities like the destruction of Sophiatown and forced evictions could never be addressed and were legally sanctioned; things that the constitutional mandate would find abhorrent and invalid. Considering this, why would someone argue that there was 'law and order' previously in South Africa in what would be described as 'tyrannical and unlawful' under the present dispensation?

A comprehensive answer to this question would be better left to another discussion entirely. Briefly, these assertions regarding the legal regime would be a manifestation of 'present anxieties through the lens of the past' (Dlamini 2010: 16). The previous perspective would make sense when one understands how this conversation usually emerges: 'While things were not the best under the previous regime, I never had to worry about "x" or "y" the way I do now.' This would largely be in reference to unequal access to social services, something the current constitution prioritises in Section 27, which deals with fundamental socioeconomic rights (rights such as: the right to water, access to healthcare, and so forth). The unequal access to health services in South Africa serves as an example. Under apartheid, the black majority had limited access to healthcare that came at a great cost to their primary health needs (Roth 1979: 2). Even under post-apartheid South Africa, this inequality persists, albeit through wealth inequality as demonstrated in *Soobramoney v Minister of Health* (1998). Mr Soobramoney was an unemployed South African man who required dialysis treatment and was refused access to state resources for dialysis due to their limited supply (Jacobs et al. 1997: 16). The Court found that the state was reasonable in determining its margins for how it would distribute the resources as it would be in their responsibility to deal with such matters (Jacobs et al. 1997: 16). In light of a case like this, many would be sceptical of the seriousness with which the state approaches the constitutional mandate, as it seems that the court deferred its discretion in Mr Soobramoney's matter and this reality once reserved for the non-white masses, now applies to every South African who cannot afford private healthcare. The above leads us into the next part of this discussion.

The consequences of oversimplifying marginalisation during apartheid - 'Misplaced critique, a constitutional apologist's primary defence of the Constitution of the Republic of South Africa.'

Whenever the sentiment that 'things are worse now than under apartheid' is discussed, it is usually distilled into discussions surrounding statistics and discussions concerning the state of the economy. There is a more interesting approach to this discussion that recognises the interaction that the legal-political order has with the economic reality of South Africa. One issue that will be addressed argues that the constitution works, and the promises contained therein are merely rhetorical because it is designed to maintain that inequality. The most cogent variation of that argument requires a pan-Africanist critique of the Constitution itself, which sees it as a document that justifies conquest, imperialism, and creates a state of neo-apartheid (Madlingozi 2017: 125). The term 'neo-apartheid' suggests that South Africa still maintains an economy that relies heavily on cheap, unskilled black labour that does not treat the black population as humans, and that the constitution did abolish this system of discrimination but rather opened the door for non-whites to join the upper classes of South Africa, once reserved exclusively for whites (Madlingozi 2017: 127–129). In this framework, the constitution is an enabler of the political order to maintain the inequalities of settler colonialism in the form of the dispossession of land, that recognition of equality before the law does address the wealth inequality that apartheid created, and maintains a bifurcated (meaning forked or divided) society (Madlingozi 2017: 134).

This critique reflects a reality of the liberation movements of the time as opposed to a reflection of the transformative potential that the constitution proposes. The best way to explain this would be to grapple with one of the most prominent liberation movements of the time, the Black Consciousness Movement (BCM). Black consciousness challenged notions of race, citizenship, and nationalism by broadening what it means to be black: to mean all oppressed groups in South Africa (Macqueen 2018: 4–5). Even at the time, critiques against black consciousness have been charged with being rudimentary and homogenised black struggled, which bleeds into government initiatives into post-apartheid South Africa which reduces inequality in South Africa to transformation objectives and sees a version of apartheid South Africa as affecting all blacks the same way (Dlamini 2010: 21). Even though Black children were segregated from White children, there also existed inequality among black South Africans as the child with shoes and the child without shoes would attend the same school (Dlamini 2010: 78). The children of skilled Black labourers were often more privileged than that of the unskilled Black labourer; many of the student

activists of the time were tertiary graduates or still in tertiary institutions (like Steve Biko) (Dlamini 2010: 82). The consequence of homogenising the oppression of black South Africans during apartheid is that the descendants of Africans who are the product of economic inequality, and black South Africans *during* apartheid, are measured on the same scale. Therefore, government reports about Black graduates that neglect this fact are always going to have a skewed perspective on the success of transformation objectives and thus failing to transform South African society.

Conclusion - How does it affect our civil and social responsibilities as South Africans?

To say, 'things were better in Apartheid', is loaded and the civil and social responsibility today would be to engage with the constitutional system. South Africa currently sees a decreasing voter turnout with a youth voter turnout of 19% in the most recent national election cycle (South African Institute of International Affairs 2021: 7). A variety of reasons are given: political parties are not engaging with the youth, politicians do not take up issues that respond directly to the problems of young people and that the youth are seen as a voting bloc and not a part of the citizenry (South African Institute of International Affairs 2021: 7). It is not a shot in the dark to assume that perhaps the message does not reach the youth because the political parties are not even aware of which young South African they are speaking to.

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