

The south african constitution politics essay



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The Apartheid system, characterized by racism and segregation of black people, began in 1948 when the National Party came to power.

According to the Constitutional court(hereinafter CC) the Apartheid system in South Africa reflected ' a deeply divided society characterized by strife, conflict, untold suffering and injustice which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'.[3]In talking about the evils of the Apartheid system, the CC held that:

...Our history is of particular relevance to the concept of equality. The policy of Apartheid, in law or in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as ' white', which constituted nearly ninety percent of the landmass of South Africa; senior jobs and access to schools and universities were denied to them; civic amenities including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.[4]

In 1910 the very first constitution of South Africa which gave all government power to white people was enacted. As a result of the discrimination against black people in South Africa, the African National Congress (Hereinafter the ANC) was established in January 1 in view of the struggle for freedom of the oppressed black South Africans.[5]

In 1950s and 1960s the History of South Africa was dominated by protest by the ANC and the Pan African Congress.[6] In March 1961 a conference was held in Orlando, Soweto by a group of African leaders about a national convention inviting all South Africans to be represented.[7]

In March 1961 a conference was held that required a national meeting of representatives of all South African society to draft “ a non-racial democratic constitution”. Nelson Mandela after attending the conference wrote to the prime minister “ it was the earnest opinion of the conference that this dangerous situation could be averted only by the calling of a sovereign national convention representative of all South Africans, to draw up a new non-racial and democratic constitution”.[8]

In response to the aggravated struggle for freedom a new constitution was enacted in 1983. The new constitution did not however cure the flaws of the apartheid system since the African majorities were not represented in the tri-cameral parliament established for white, Indian and colored people.[9]

After long years of struggle for change, different political parties, the ANC and the government came together to negotiate in view of a democratic South Africa in 1993. This led to the enactment of the 1993 democratic and non-racial interim constitution of South Africa which resulted from a long process of consultation and wide public participation of the South African society.[10] The Constitution included 34 principles for democratic governance in South Africa.[11]

In 1994 the democratic government of South Africa took office and assigned a group of five members on open democracy. In 1995 a draft bill was enacted to the final constitution.[12]

The concept of open and democratic society in South Africa dates back to 1973 where it was mentioned for the first time by an author named Patrick Laurence in his book titled Towards an Open Plural Society. Although the publication didn't give a specific definition to the concept of open society, it described that contrary to divided plural societies where power is concentrated among a few members of the society, power is equally shared widely among all groups of society in case of open societies.[13]

The next South African publication that dealt with open and democratic society was ANC document which was published in 1991 as a result of a conference about ' A Bill of Rights for a Democratic South Africa'.[14]The document cited the term open and democratic society in relation to the right to privacy, rights of association, religion, language and culture as well as limitations.[15]

The draft declaration of intent for Convention for a Democratic South Africa (Codesa) prepared by the ANC dealt with the need to create " a free and open society based on democratic values where the dignity, worth and rights of every South African man and woman is protected by the law."[16]

The 1993 interim constitution of South Africa also mentioned the term open and democratic society in different articles. However, the Constitution did not define the concept of open and democratic society.[17]

The final constitution of South Africa enacted in 1996 gives an important place to the concept of open and democratic society more than all previous South African constitutions as discussed under the next section.

2. 2 The concept of ‘ open and democratic society’ under the South African Constitution

The term open and democratic society is mentioned in different sections of the 1996 South African Constitution. The commitment of the Constitution to advance open and democratic society can be seen starting from the preamble of the Constitution which confirms that the Constitution was adopted to ‘ lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.’[18]

Section 7 of the Constitution further affirms the commitment of the Constitution to democratic society by stating that “ The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”[19]

The limitation clause of the Constitution as enshrined under section 36 confirms the need to ensure a limitation of a right in the Bill is justifiable in an open and democratic society based on dignity, equality and freedom.”[20] Thus, in an open and democratic society rights in the Bill can not be limited arbitrarily.

The obligation of courts to interpret the Bill of Rights in a way that promotes the values of an open and democratic society based on human dignity, equality and freedom is stated under section 39 of the Bill of Rights.[21]

Section 59(2), in dealing with public access to the National Assembly, states that “ the National Assembly may not exclude the Public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”[22]

Generally, the values that underlie an open and democratic society based on human dignity, equality and freedom as enshrined under different sections of the Final Constitution appear to be ‘ the essential founding values of the Constitution.’[23]

Although the Final Constitution mentioned the term ‘ open and democratic society’ in many sections it didn’t give definition to the Concept. Different scholars gave different definitions to the concept of ‘ open and democratic society which will be discussed under the next section of this paper.

2. 3 Definitions of an open and democratic society

The concept of open and democratic society is defined differently by different scholars. However, the definition given to open society by many scholars revolves around the views of an Austrian philosopher named Karl Popper. Inspired by Hitler’s invasion of Austria he wrote a famous book titled The Open Society and Its Enemies.[24]

Although popper didn’t directly define the concept of open society in his book, he described what open society constitutes. He stated that the open

society is “ the society in which individuals are confronted with personal decisions.”[25]He also suggested that for open society to exist a system of institutional checks and balance is necessary to limit the power of the government.

For popper open society is one characterized by not only tolerating different opinions of people but also respecting them.[26]Popper’s idea of democracy involves the kind of government committed to the safety of an open society. [27]It requires the powers of the rulers to be controlled and checked by the ruled. It also entails the idea of dismissing the rulers by a majority vote of the ruled when they find the rulers to be incompetent.[28]

Shearmur in his book titled The Political Thought of Karl Popper defined Popper’s open society as a society in which different institutions are formed for the realization of a specific goal and political initiatives are regulated by ‘ critical feedback from citizens’.[29]

Maggie gave definition to the open society described by Popper as a society characterized by the freedom of its members to investigate problems and offers solutions and a society with a government that welcomes criticism of its acts by any member of the society and changes its policies inline with the criticism.[30]

O’Hear on the other hand defined Popper’s open society as one that welcomes criticism from any member of the society. In such society the government and its institutions are subjected to criticism by all members of society.[31]

According to Soros, another scholar who defined Popper's open society, open society is " a form of social organization that starts with recognition that no claim to the ultimate truth can be validated and therefore no group should be allowed to impose its views on all the rest." [32] Similarly, Boyer defined open society as one that fosters the plurality and creations of different ideas of life. [33]

Bergson on the other hand defined the open society as a society ' which is deemed in principle to embrace all humanity'. [34]

Davis identified the Popperian concept of open society as the liberal or interventionist society in a democratic state. [35]

Similarly, Niiniluoto defined Popper's open society as a democratic, liberal and anti-totalitarian society characterized by peaceful transition of power and belief in the rule of law, equal justice and fundamental rights. [36]

As discussed above different scholars gave different definitions to the concept of open and democratic society. Thus, it can be seen that the term ' open and democratic society' doesn't have a single or universally agreed upon definition. It is rather open to many interpretations.

2. 4 Transformative Constitutionalism and open and democratic society

There is no single universally agreed upon understanding of transformative constitutionalism. According to Klare, transformative constitutionalism means " a long term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social

institutions and power relationships in a democratic, participatory, and egalitarian direction.”[37]

Langa DP correctly stated that the main idea behind transformative constitutionalism is to cure the divisions of the past and direct South African society to an enhanced future.[38]It also includes the idea of acquiring substantive justice in political and economic aspects of the society.[39]

Similarly, Albertyn’s and Goldbatt’s understanding of transformative constitutionalism under the South African context involves reconstruction of society and redistribution of power equally among all members of the society. They argue that the transformative concept of equality requires the eradication of all sorts of material disadvantage based on any ground.[40]

Section 9(2) of the Constitution confirms the views of Albertyn and Goldbatt in that it highly reflects the transformative nature of the South African Constitution by stating that the realization of the right to equality requires legislative and other measures to protect and advance the rights of persons unfairly discriminated against in the past.[41]It recognizes affirmative action and other restitutionary measures which reflect substantive equality.[42]

The epilogue of the 1993 interim constitution of South Africa describes the constitution as providing “ 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 co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.”[43]

From the reading of the preamble of the 1996 constitution as well as the epilogue of the interim constitution it can be understood that the South African constitution aims to transform the South African society from one dominated by racism and inequality into one that reflects open and democratic society based on equality, human dignity and freedom.[44]

It is also possible to note the transformative nature of the Constitution from its deep commitment to substantive equality, restitution and redistribution and socio-economic rights.[45]Klare argued that the inclusion of justiciable social and economic rights indicates that the Constitution “ post liberal” which in turn makes the Constitution transformative.[46]Similarly, Belani suggested that the injustice suffered during the Apartheid system includes economic injustice and the transformation to democracy includes the improvement of social and economic lives of people.[47]

The South African CC also views the South African constitution as a transformative constitution.[48]The relationship between transformative constitutionalism and the concept of open and democratic society is that the Constitution in trying to heal the divisions and suffering of the Apartied system aspires to transform the South African society from inequality, injustice, racism to open and democratic society based on equality, human dignity and freedom. Hence, transformative constitutionalism and the concept of open and democratic society are highly inter-related. The very idea of transformative constitutionalism is to bring an open and democratic society in South Africa.

Although the South African constitution is transformative, its implementation rests on the three arms of government namely the legislature, the Executive and the Judiciary. The CC as the highest court in all constitutional matters has a huge role to play in advancing transformative constitutionalism.

Some scholars suggest that the CC failed to follow a more transformative interpretive approach in its judgments.[49] In cases like *Grootboom*, the Court failed to meet its obligation of advancing transformative constitutionalism by giving a mere declaratory order after finding the state's housing policy unreasonable for not including interim measures for the most poor and vulnerable groups of the society. The fact that the court didn't give a specific time frame for the implementation of its order and its failure to monitor the implementation of its order by giving remedies such as structural interdict resulted in the continued housing problems of the most marginalized groups of society for a long time after the delivery of the *Grootboom* judgment.