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in session



REFLECTIONS ON THE DEMOCRATIC CONSTITUTION

Parliament celebrates





Editor's Note

This year South Africa's democracy is 30 years old. The Constitution – the supreme law of the country – is in its 28th year since it was adopted in 1996. Marking these historic milestones on South Africa's democratic calendar, InSession has republished some of the reflections penned earlier by those at the forefront of drafting the Constitution. These reflections were published in separate books as part of Parliament's celebration of the 20th anniversary of the adoption of the Constitution.

Among these reflections are those of President Cyril Ramaphosa at the time the Chairperson of the Constitution Assembly responsible for drafting this important legislative blueprint for our democracy and development as a nation. He referred to the Constitution as the country's birth certificate. Mr Enver Surty who was a member of the Constitutional Assembly's Management Committee at the time, reflects on the Wednesday in March 1996 when an informal discussion with the late Dullah Omar and Cyril Ramaphosa, paved the way for including human dignity as the pre-eminent value in the 1996 Constitution.

The then-National Party's chief negotiator, Mr Roelf Meyer, in his reflections shared some thoughts on what future Parliaments and generations can do to strengthen democracy. "The one thing that helped us to overcome the challenges and difficulties that we experienced prior to the transition, from the time Madiba was released right through to his retirement from the Presidency, was the fact that we had a strong centre in this country," writes Mr Meyer.

Ms Brigitte Mabandla, former Minister of Justice and Constitutional Development in her article explains how the constitutional processes and the entrenchment of women's rights in the Constitution resulted from the dynamic advocacy and activism in society within the negotiation chambers and Parliament.





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OUR IDEALS
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Professor Cathy Albertyn, a Professor of Law at the University of the Witwatersrand – also an activist for women's rights – was one of the technical advisors for the Constitutional Assembly. Prof Albertyn and her team had to find ways on how institutions such as the Public Protector and the Human Rights Commission could be retained in the Constitution of 1996. In her reflections of that process, she writes that the Chapter 9 Institutions (Institutions Supporting Democracy) was a product of a unique South African process. Prof Albertyn was later also instrumental in other law reforms such as the country's first Choice of Termination of Pregnancy Act.

Hailing the 1996 Constitution as, "the best achievable" that "provided shelter for citizens and institutions in two tumultuous decades since it was inked", former leader of the Democratic Alliance, Mr Tony Leon, wrote in his article that he is fairly certain that the final achievement of the Constitutional Assembly "was easier to achieve in 1996 than it would be if we were to recommence the exercise today".

Revisiting these reflections is a poignant reminder of the country's journey towards democracy, human rights and state-building and the people who made that start possible.



Constitutional Assembly chair, Cyril Ramaphosa: The Constitution is the crown of our Freedom

On 8 May 1996 when the Constitution was adopted, President Cyril Ramaphosa, who was then the chairperson of the Constitutional Assembly, delivered this speech:

Deputy Chairperson of the Constitutional Assembly, Comrade President, Deputy Presidents Thabo Mbeki and F W de Klerk, leaders of all political parties represented here, your majesties, your excellencies, Speaker of the National Assembly, Deputy Speaker, President of the Senate, Deputy President of the Senate, members of the National Assembly and the Senate,

I would like to welcome you all as the Deputy Chairperson of the Constitutional Assembly has. I would also like to say today is a day of joy. It is a day of celebration.

They have just brought me some water here, and I would like to do what the Honourable President often does as he addresses us because it is a day to say cheers! It is indeed a historic day.

It is the birthday of the South African rainbow nation. This is the day when South Africa is truly born.

As we begin this joyous and solemn occasion, I would like to reveal a part

of myself and to dedicate my address to three great South Africans who would have been here with us today if time and tide had been kinder: Oliver Reginald Tambo, Chris Hani and Joe Slovo.

There are many others one could have cited, but these are the three leaders whom I personally sorely missed during the process of constitution-making. I missed them, because I related to all of them in different ways. All of them were there when we started the negotiation process, and they contributed a great deal to me personally, in enabling me and many others to negotiate the transition process and emerge with an interim Constitution.

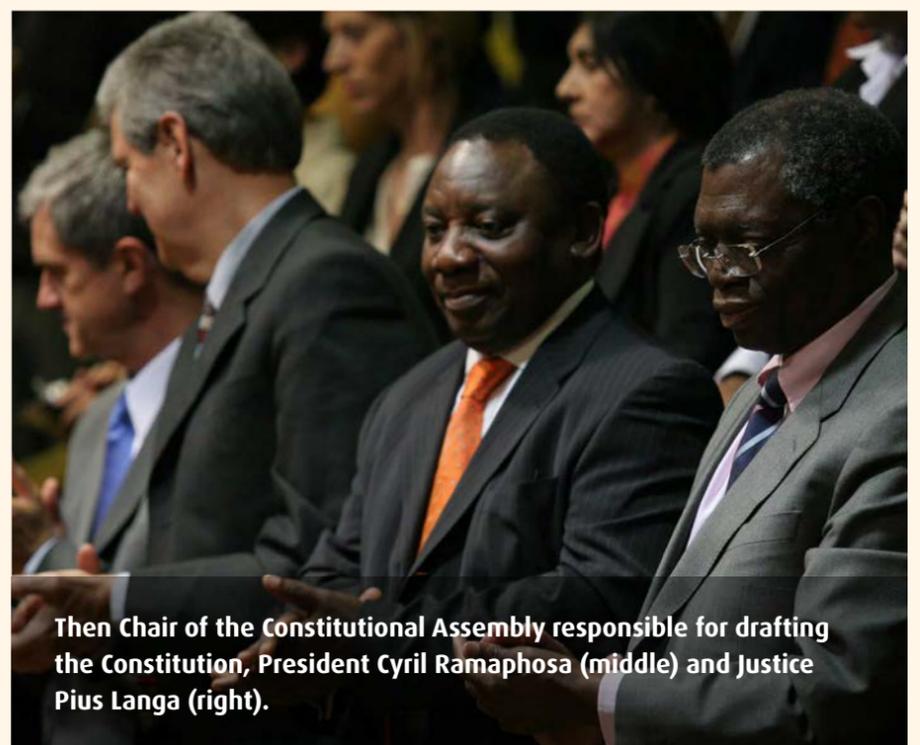
I do wish they were here. I am grieved that they cannot be with us to share this occasion, an occasion that they worked for and died to make possible. May their memory live long in our minds.

Today we are gathered here to make history. We South Africans have adapted so easily to our role

as initiators and witnesses to events which number among the most significant of this century.

We often forget or lose sight of just how historic and profound some of these events are. When we vote today to adopt the Constitution

In truth, the constitution-making process began long before that. It began when the people of this country, deprived of their birthright, dreamt of a country in which all would be free. Indeed, we can say that through this Constitution we confirm that we are a free people. Over the years, this



Then Chair of the Constitutional Assembly responsible for drafting the Constitution, President Cyril Ramaphosa (middle) and Justice Pius Langa (right).

before us, we will indeed be giving life to a new nation, a nation of free and equal people. Our country, our people, will indeed have come of age when we vote for this onstitution. Today is the culmination of a process of consultation, discussion and negotiation which began almost two years ago in this very Assembly.

dream has been articulated by many South Africans. The call for freedom resonated across the length and the breadth of the country and around the world.

South Africans, in their millions, have fought for this freedom, the freedom which we are crowning on this historic

day. Hundreds of thousands died, were tortured, detained, jailed, banned, silenced and exiled in order to write this Constitution. Today we are here to celebrate the culmination of that struggle.

The Constitution before us today is a product of a collective effort by many people. Since we embarked on the

and I met Deputy President F W De Klerk, he always spared a moment to encourage us. The insistence, on the part of Deputy President Mbeki, that we do everything possible to meet the deadline strengthened our resolve.

I recall that one evening when we had doubts, as a management committee, that we would meet the deadline, I shared my doubts with him; there

whenever they were able to join us – there were a few of them who joined us from time to time – they added a great deal of value and wisdom to our discussions, and I thank them all.

I wish to thank the leaders of all political parties. As the president of the ANC, our President, is not a member of this Assembly and cannot vote – fortunately – I extend my deep gratitude once again to Deputy

members of the Assembly for the commitment and hard work, patience and good humour that all of us have demonstrated throughout this process. I would especially like to thank members of the theme committees, who have become constitutional experts of the first order.

We would never have finished our work without the active support of



Former Minister of Finance, Mr Trevor Manuel (left) and President Cyril Ramaphosa who chaired the Constitutional Assembly.

formal constitution-making process 24 months ago, South Africans from across the country have embraced the process as their own. It is no exaggeration

when we say that a team of 43 million people worked on this Constitution.

In that team there are a number of people who deserve special mention, and one is the team leader, the one and only team leader, President Nelson Rolihlahla Mandela whose guidance, inspiration and leadership strengthened our endeavours over the past two years. We have had to draft the Constitution in many forms, and it was always a joy for me to take the big-print version to the President. When we gave them the small-print version he said: "I am not going to read this. I want the big print, because I want to make sure that there are no small-print bits in which you might be making mistakes."

The support that the Constitutional Assembly received from the Deputy Presidents added to the impetus of our work. Whenever Leon Wessels

were just the two of us. I said that we might have to go to November. He gave me the most steely-eyed look I have ever seen him give anyone.

He said: "Chief, that is not possible, that is not doable, that will not happen." That, in a way, had a bonding effect between me and him and I knew then that we had to meet the deadline.

Two days thereafter I said to him: "You were right. Once again, you were right." I would like to thank you for your insistence, Deputy President T M Mbeki. Members of the Cabinet had to try to do the impossible by attending to matters of governance and Constitution-making. Their attention to Constitution-making added to the wisdom we heeded in the Assembly. We missed them sorely when they were not here. There was an occasion when one of the members of the Assembly said: "Where are they?"

We all knew that they were working on matters of government. However,

President Mbeki for the leadership he provided to the ANC and the ANC negotiators during this two-year period. Deputy President De Klerk also provided leadership to members of the NP. I wish to thank Gen Viljoen too.

He participated in meetings of the Constitutional Assembly and management committee, and I thank him too for providing leadership to members of his party. I wish to thank Mr Tony Leon. I thank Mr Leon.

We had many differences. Some of the differences were played out in the meetings of the Constitutional Committee, and they added spice to the proceedings of the Constitutional Committee.

I wish to thank Mr Clarence Makwetu for providing leadership to the PAC members who participated on an ongoing basis in the proceedings of the Constitutional Assembly. I wish to thank Rev Meshoe as well. More importantly, I wish to thank all the

the Presiding Officers of the National Assembly and the Senate, as well as the Whips. I give special thanks to the Speaker of the National Assembly, Dr Frene Ginwala, and the Deputy Speaker, Dr Ranchod, the President of the Senate, Mr Coetsee, and the Deputy President of the Senate, Mr Govan Mbeki. I also thank the Leader of the House – the former Leader of the House, our Minister of Finance, and the present leader of the House, Mr Steve Tshwete – for all the support that they gave us throughout this process.

They went out of their way to give us time and accommodate us. We do thank them most sincerely.

Behind the scenes, the technical advisers, the panel of experts and the law advisers have all worked flawlessly to ensure that the large and the small cogs of this Constitution are in place. I thank them, all of them – the panel of experts, the advisers and the technical experts. We would not have this type of document if they had not worked the many hours that they did.

Special thanks have to go to the staff of the Constitutional Assembly ... and in this regard I would like to single out four people, Hassan Ebrahim, Louisa Zondo, Peter Lilienfeld and Marion Sparg. They deserve the highest of medals in recognition. They started an administration from scratch and did everything excellently, efficiently, cost-effectively and with a great sense of passion. I thank them from the depth of my heart. We would not have done this without them.

I also thank members of the Constitutional Committee and to members of the management committee I extend my thanks

each other that from time to time we would visit each other, have a cup of tea and talk about this Constitution.

Mr Deputy Chairperson, there are a number of other people and institutions that I need to thank. I am thinking, of course, of the numerous governments, international organisations and institutions which have provided generous support to the Constitutional Assembly and our public-participation programme. I would like to note, in particular, the governments of the United Kingdom, France, Norway, Denmark, Sweden, Germany, and Switzerland. Special mention should also be made of

those who sent us petitions and who attended our public meetings and sectoral hearings. We say: Thank you all for the effort that you put in to ensure that we have a Constitution. People will ask what can be said about this Constitution.

This Constitution, with its Bill of Rights, is the mirror of South African society. It reflects both the history from which we have emerged, and the values we now cherish – human dignity, equality and freedom. It proclaims to the world that we are a society committed to democracy, to the rule of law and the protection of human rights. It proclaims to all South Africans, the

for investors, and it is also good for the rand. Co-operation, accountability, responsiveness, and openness are entrenched as the principles of government at all levels in South Africa. To deepen the culture of democracy and human rights in South Africa, the Constitution establishes a number of important institutions such as the Public Protector, the Human Rights Commission, the Commission for Gender Equality and also, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. These bodies are charged with the vital task of ensuring that the government remains committed to the values of this Constitution.



This Constitution is the subject of a rather fortunate paradox. It is no one's constitution, and yet it is everyone's Constitution. Just as no one party sees its constitutional proposals reproduced in their entirety in this Bill, so no one person can claim exclusive ownership of this Constitution. It belongs to everyone in the Constitutional Assembly, and it is a reflection of our collective will for a new, united and democratic nation. This Constitution belongs to South Africans.

The Constitution contained in the Bill before us is the product of negotiation and compromise. Yet the central tenets of a democratic, just and equitable society remain uncompromised, because freedom is non-negotiable. The achievements of this Assembly are, therefore, remarkable.

The provisions of this Constitution are sound. The expectations of our nation are great. The other thing which our Constitution does for us is to make our country the new mecca of constitution-makers. Constitution-makers from all over the world will come to this country to study how we drafted our Constitution and to study the Constitution itself.

We welcome them all. We invite them to South Africa to come and study how democracy really functions. Today we will vote on this Constitution. We will be exercising an awesome responsibility. It is my duty as Chairperson to urge all of us in this Assembly, even those who may have some reservations, to vote today for a democratic and free South Africa. 🙏

and gratitude too. Members of the Constitutional Committee argued, differed and fought, but I also saw them embracing. I saw them embracing at 03:00 when they reached an agreement on a matter which most of us thought we would never reach agreement on. I saw tears in their eyes, and I know that they were a group of people who would indeed deliver a Constitution to this country. I thank them most sincerely.

I wish to say a special thank you to Roelf Meyer. I thank him for being a negotiating partner, and for negotiating not only the transitional or interim Constitution but also this Constitution. I extend my deep-felt gratitude to him. Leon Wessels and I still have to have a bilateral, the two of us. At that bilateral we are going to speak at a very personal level. We have worked very well over the past two years, and a friendship has emerged between us. Unfortunately we both leave this Assembly to go to other careers, but we have promised

the Danish Centre for Human Rights, USAID, the Commonwealth Secretariat, and the European Union.

I am thinking also of all the sponsors in the private sector who decided that the future of this nation was a sound investment and that it would pay substantial dividends for the entire nation. I want to mention, in particular, the support we received from Liberty Life, Sappi, Mondi, IBM, Appleton, Stellenbosch Farmers' Winery, Telkom, HNR Computers, Sony and BMD Textiles.

It is to these people that South Africa owes a debt of gratitude.

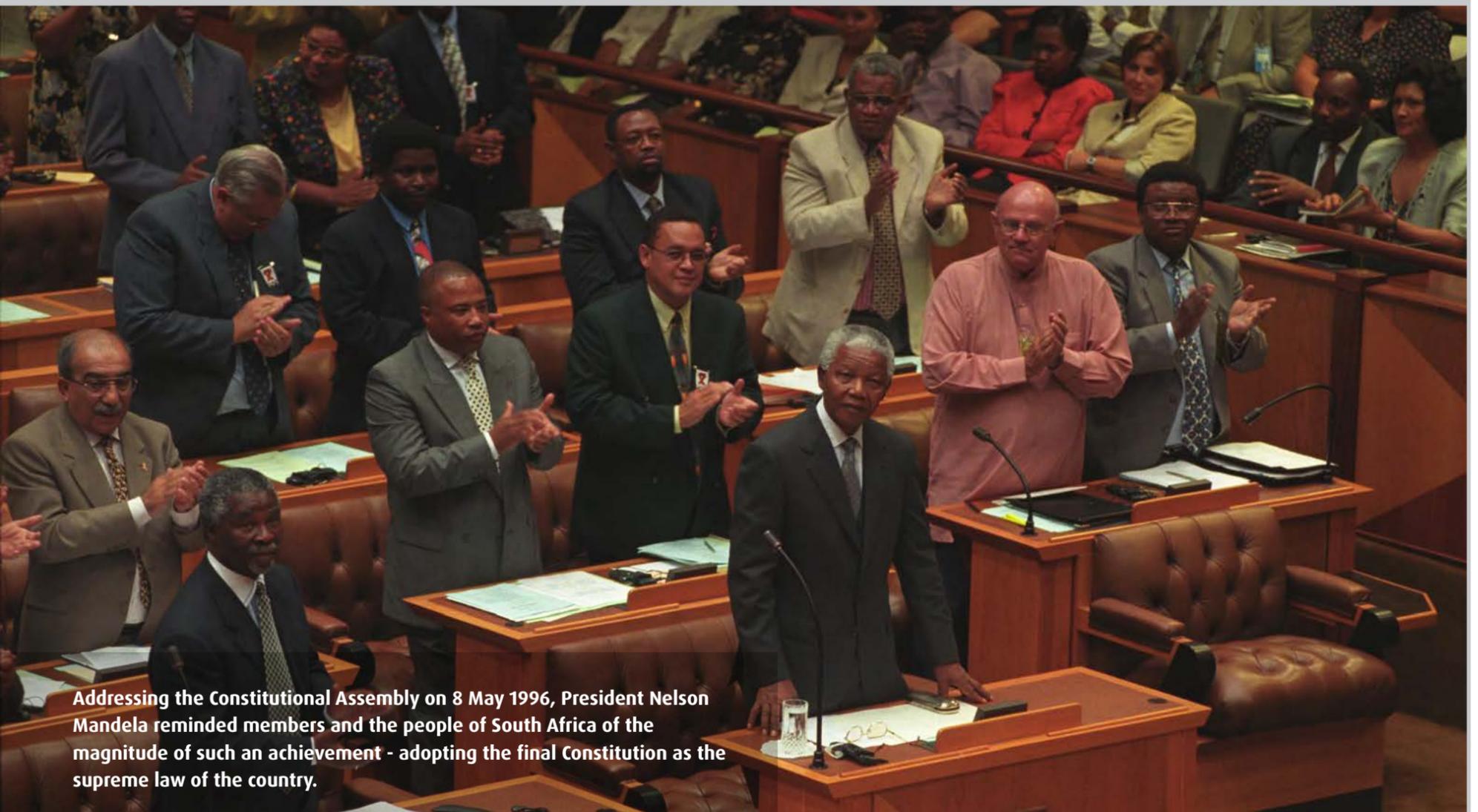
Through their support and hard work, we have been able to achieve so much.

I would also like to thank all the people of our country who participated in this process, all those people who gave us submissions by post, by fax, by telephone and by e-mail,

landless, the homeless, the women, the workers, and the children of this country, that their basic needs and aspirations matter enough to be included in the country's Constitution.

It celebrates the richness of the diversity of cultures, religions and beliefs of South Africans, and affirms that all belong as equals in our one nation. It commits the state to respecting, protecting, promoting, and to fulfilling the rights in the Bill of Rights and acknowledges that it is not enough for the government simply to refrain from violating people's rights. It is also necessary for the government to take positive measures to ensure the full and equal enjoyment of human rights by all South Africans. Through this Constitution, we hope to transform our society from one that is based on injustice and strife to one based on justice and peace.

This Constitution also creates a framework for sound and effective government in South Africa. It is good



Addressing the Constitutional Assembly on 8 May 1996, President Nelson Mandela reminded members and the people of South Africa of the magnitude of such an achievement - adopting the final Constitution as the supreme law of the country.

President Mandela – our new Constitution obliges us to improve the quality of people's lives

The brief seconds when the majority of Honourable Members quietly assented to the new basic law of the land have captured, in a fleeting moment, the centuries of history that the South African people have endured in search of a better future.

As one, you the representatives of the overwhelming majority of South Africans, have given voice to the yearning of millions.

And so it has come to pass, that South Africa today undergoes her rebirth, cleansed of a horrible past, matured from a tentative beginning, and reaching out to the future with confidence.

The nation teetered on a knife edge over the past few days, with reports of intractable deadlocks and an abyss in waiting. This was to be expected,

given the difficult issues we were dealing with, and given the tight negotiating deadlines. But aren't South Africans a wonderful people, to whom the words "deadlock" and "miracle" have come to nestle in comfortable proximity and alternately, to grip the national imagination like the plague!

Be that as it may, we dare not, in the midst of the excitement of last-minute solutions, forget the magnitude of the achievement we celebrate today. For, beyond these issues, lies a fundamental sea-change in South Africa's body politic that this historic moment symbolises.

Honourable Deputy Chairperson Long before the gruelling sessions of the final moments, it had been agreed that once and for all, South Africa will have a democratic Constitution based on that universal principle of democratic majority rule. Today, we formalise this consensus. As such, our nation takes the historic step beyond the transitory arrangements which obliged its representatives, by dint of law, to work together across the racial and political divide.

Now it is universally acknowledged

that unity and reconciliation are written in the hearts of millions of South Africans. They are an indelible principle of our founding pledge. They are the glowing fire of our new patriotism. They shall remain the condition for reconstruction and development, in as much as

reconstruction and development will depend on unity and reconciliation. Our consensus speaks of the maturing of our young democracy, It speaks of the trust that has grown in the blast furnace of practical work, as we, together, rolled up our sleeves to tackle the real problems. Today we



celebrate that coming of age. Long before the intense moments of the last few days, you, the representatives of the people, had decided that open and accountable government will be reinforced by co-operative governance among all tiers. And thus, we strike out along a new road in which the preoccupation of elected representatives, at all levels of government, will be how to co-operate in the service of the people rather than competing for power which otherwise belongs not to us, but to the people.

We were therefore able, in the national interest, to locate governing powers at the level where they appropriately belong and to ensure the national Parliament is not an exclusive preserve of an imaginary national politician, but the workplace in which representatives from all levels can pursue their mandate.

Through the Council of Provinces, the improvement of the status of local government, and the style of

poverty, illiteracy, homelessness, and disease. It obliges us, too, to promote the development of independent civil society structures.

While in the past, diversity was seen by the powers-that-be as a basis for division and domination; while in earlier negotiations, reference to such diversity was looked at with suspicion; today we affirm in no uncertain terms that we are mature enough to derive strength, trust and unity from the tapestry of language, religious and cultural attributes that make up our nation.

With confidence, we are asserting that the individual rights and national self-determination of the South African people shall not be inhibited, but reinforced by the collective rights of communities. Through the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, we have found an innovative way of addressing an issue which, when swept under the

who have for far too long suffered too many privations merely because of their gender. Yet it is in actual practice that our ideals and intentions will be tested.

And we have not shied away from acknowledging that we are a democracy with many other realities bequeathed by history. Not least among these realities is the role of traditional leaders, which is not only acknowledged, but is to be further elaborated upon, with their participation, in national and provincial legislation.

Indeed, Honourable Members, we can go on and on, demonstrating the new and higher level of national consensus that today's ceremony represents. What all this reflects is that we are at last maturing to become a normal society, founded on mutual trust, bonded by mutual aspirations, and shaped by the reality of our existence rather than the fulmination of a warped imagination. In our racial, language, religious and sectoral

independence, the new constitution reaffirms our commitment to the rights of citizens and the need to build genuine equality across the board.

The welcome transformation that we are affirming today, will mean that we have to redefine the role of some of the representatives in this Chamber. With the setting up of the National Council of Provinces, many Honourable Senators will enjoy the privilege of being re-deployed closer to the people.

Needless to say, this creative approach derives in part from the seriousness with which the Senate had approached its work – all the time searching for the correct solution to the question of their mandate and their relation to provincial government. For this, we congratulate them, and thank them profoundly for the enormous contribution that they have made to the beginnings of our social transformation.



governance based on transparency, participation and consultation, we shall ensure that democracy indeed constitutes government by the people, for the people.

Honourable Deputy Chairperson
The new Constitution obliges us to strive to improve the quality of life of the people. In this sense, our national consensus recognises that there is nothing else that can justify the existence of government but to redress the centuries of unspeakable privations, by striving to eliminate

carpet, comes back in ugly forms to haunt the architects of artificial unity.

We are extremely proud, that the new Constitution asserts equality among South Africa's languages; and that, for the first time, the languages particularly of the Khoi, Nama and San being trampled upon in the most humiliating and degrading manner.

Many new provisions on gender issues reflect the progress that we are making as a nation towards securing equality for our women compatriots

diversity, as the weak and the mighty, we are one people with one destiny.

Today, we can proudly report to the nation that the interim mandate has essentially been fulfilled. Among others, critical institutions such as the Constitutional Court, the Human Rights Commission and others have started doing their work in the most splendid manner, conscious of the fact that their first port of call is the people rather than government on high.

In reiterating their integrity and

We say with confidence that the interim mandate has been fulfilled, thanks also to the critical role that our security forces have played in protecting our young democracy like the apple of their eye. The new Constitution recognises their importance to society. And we can say without any shadow of doubt, that it creates even better conditions for them and other public servants, to serve with pride and with dignity, in the full knowledge that their rights as citizens and as employees of the state, are protected.



Honourable Deputy Chairperson
In the final analysis, the praise that we are apt to heap upon ourselves appears misplaced against the backdrop of the active participation of the people in the drafting of the new.

The determination of this Assembly to ensure that the people play their rightful role, and the meticulous planning and execution that this entailed, broke new ground in ways of engaging society in the process of legislation.

Reaching out through the media; opening the process to inputs from across society; and going out across the length and breadth of the country for face-to-face interactions with communities; the Constitutional Assembly reinvigorated civil society in a manner that no other process in recent times has done.

Present today in the public gallery are representatives of almost every organised sector of civil society which made their inputs into the process: the legal fraternity, women, local communities, traditional structures, and leaders of sectors dealing with business, labour, land issues, the media, arts and culture, youth, the disabled, children's rights, and many more. Beyond those present are the millions who wrote letters and who took part in public forums: from the policeman in a charge office in the furthest corner of the Northern Province, to prisoners getting together to discuss clauses, and to residents of Peddie in the Eastern Cape who

continued with their meeting in pouring rain to debate the role of traditional leaders...

To all of them, we say, thank you for taking your destiny into your own hands. And we congratulate the Chairperson of the Assembly, the Deputy Chairperson, the Management Committee in which all the parties were represented, and the staff, for their dedication and drive to ensure that we attain this historic moment.

Among us are representatives of the international community who have honoured us by sharing in this, our moment of joy.

Yet the boundaries that might separate our countries cannot subtract from your own labours in ensuring that South Africa achieves her freedom, and that we emerge with a Constitution of which, we hope, humanity shall be proud.

Directly and indirectly, your contributions and your force of example, provided the fountain from which we drank with relish.

This Constitution is our own humble contribution to democracy and the culture human rights worldwide; and it is our pledge to humanity that nothing will steer us from this cause.

Honourable Members

Ultimately, the lodestar governing our movement into the future is the unstoppable force of democracy. You have accomplished what you have,

to the extent that you represented the aspirations of the people and the abiding values of our nation.

In this way, you were paying tribute to the shining example of those, like John Mafukuzela Dube, Olive Schreiner, Reverend Calata, Dr Naicker, Dr Abduraman and others who, long years ago, called for equality and democracy.

You were acknowledging the suffering of the many witnesses who are appearing before the Truth and Reconciliation Commission, and many more citizens, dehumanised, maimed and deprived, but unbowed and unshaken in their confidence in our young democracy. You were recognising the indelible role of pioneers of the negotiations process such as Oliver Tambo and visionaries within the apartheid establishment who were able to sense the momentum of history.

Indeed, you were paying homage to Chris Hani, Johan Heyns and other martyrs whose love for their country and belief in change inspired more than their immediate supporters.

In tribute to them, we stand today before our people and humanity to present this our new basic law of the land, whose founding principles of human dignity, non-racialism and non-sexism, and whose commitment to universal adult suffrage, regular elections and multi-party democracy are immutable.

This is our national soul, our compact with one another as citizens, underpinned by our highest aspirations and our deepest apprehensions. 🙏

“ Our pledge is: Never and never again shall the laws of our land rend our people apart or legalise their oppression and repression. Together, we shall march, hand-in-hand, to a brighter future.”

I am an African - Former President Thabo Mbeki's address to the National Assembly



On 8 May 1996, then Deputy President Thabo Mbeki delivered his speech, "I am an African", when the Constitution of 1996 was passed.

Chairperson, Esteemed President of the democratic Republic, Honourable Members of the Constitutional Assembly, Our distinguished domestic and foreign guests, Friends: On an occasion such as this, we should, perhaps, start from the beginning. So, let me begin.

I am an African.

I owe my being to the hills and the

valleys, the mountains and the glades, the rivers, the deserts, the trees, the flowers, the seas and the ever-changing seasons that define the face of our native land.

My body has frozen in our frosts and in our latter-day snows. It has thawed in the warmth of our sunshine and melted in the heat of the midday sun. The crack and the rumble of the summer thunders, lashed by startling lightening, have been a cause both of trembling and of hope.

The fragrances of nature have been as pleasant to us as the sight of the wild blooms of the citizens of the veld.

The dramatic shapes of the Drakensberg, the soil-coloured waters of the Lekoa, iGqili no Thukela,

and the sands of the Kgalagadi, have all been panels of the set on the natural stage on which we act out the foolish deeds of the theatre of our day.

At times, and in fear, I have wondered whether I should concede equal citizenship of our country to the leopard and the lion, the elephant and the springbok, the hyena, the black mamba and the pestilential mosquito.

A human presence among all these, a feature on the face of our native land thus defined, I know that none dare challenge me when I say - I am an African!

I owe my being to the Khoi and the San whose desolate souls haunt the great expanses of the beautiful Cape - they who fell victim to the most

merciless genocide our native land has ever seen, they who were the first to lose their lives in the struggle to defend our freedom and dependence and they who, as a people, perished in the result.

Today, as a country, we keep an audible silence about these ancestors of the generations that live, fearful to admit the horror of a former deed, seeking to obliterate from our memories a cruel occurrence which, in its remembering, should teach us not and never to be inhuman again.

I am formed of the migrants who left Europe to find a new home on our native land. Whatever their own actions, they remain still, part of me.

In my veins courses the blood of the Malay slaves who came from the East. Their proud dignity informs my bearing, their culture a part of my essence. The stripes they bore on their bodies from the lash of the slave master are a reminders embossed on my consciousness of what should not be done.

I am the grandchild of the warrior men and women that Hintsia and Sekhukhune led, the patriots that Cetshwayo and Mphephu took to battle, the soldiers Moshoeshoe and Ngungunyane taught never to dishonour the cause of freedom. My mind and my knowledge of myself is formed by the victories that are

"I am born of a people who would not tolerate oppression. I am of a nation that would not allow that fear of death, torture, imprisonment, exile or persecution should result in the perpetuation of injustice."

the jewels in our African crown, the victories we earned from Isandhlwana to Khartoum, as Ethiopians and as the Ashanti of Ghana, as the Berbers of the desert.

I am the grandchild who lays fresh flowers on the Boer graves at St Helena and the Bahamas, who sees in the mind's eye and suffers the suffering of a simple peasant folk, death, concentration camps, destroyed homesteads, a dream in ruins. I am the child of Nongqause. I am he who made it possible to trade in the world markets in diamonds, in gold, in the same food for which my stomach yearns.

I come of those who were transported from India and China, whose being resided in the fact, solely, that they were able to provide physical labour, who taught me that we could both be at home and be foreign, who

another, when the stronger appropriate to themselves the prerogative even to annul the injunction that God created all men and women in His image. I know that it signifies when race and colour are used to determine who is human and who, subhuman.

I have seen the destruction of all sense of self-esteem, the consequent striving to be what one is not, simply to acquire some of the benefits which those who had imposed themselves as masters had ensured that they enjoy.

I have experience of the situation in which race and colour is used to enrich some and impoverish the rest.

I have seen the corruption of minds and souls as a result of the pursuit of an ignoble effort to perpetrate a veritable crime against humanity. I have seen concrete expression of the denial of the dignity of a human

And so, like pawns in the service of demented souls, they kill in furtherance of the political violence in KwaZulu-Natal. They murder the innocent in the taxi wars.

They kill slowly or quickly in order to make profits from the illegal trade in narcotics. They are available for hire when husband wants to murder wife and wife, husband.

Among us prowl the products of our immoral and amoral past - killers who have no sense of the worth of human life, rapists who have absolute disdain for the women of our country, animals who would seek to benefit from the vulnerability of the children, the disabled and the old, the rapacious who brook no obstacle in their quest for self-enrichment.

All this I know and know to be true

tomorrow, the sun shines. Whatever the circumstances they have lived through and because of that experience, they are determined to define for themselves who they are and who they should be. We are assembled here today to mark their victory in acquiring and exercising their right to formulate their own definition of what it means to be African.

The constitution whose adoption we celebrate constitutes an unequivocal statement that we refuse to accept that our Africanness shall be defined by our race, colour, gender or historical origins. It is a firm assertion made by ourselves that South Africa belongs to all who live in it, black and white. It gives concrete expression to the sentiment we share as Africans, and will defend to the death, that the people shall govern. It recognises the fact that the dignity of the individual is both an objective which society must pursue, and is a goal which cannot be



taught me that human existence itself demanded that freedom was a necessary condition for that human existence.

Being part of all these people, and in the knowledge that none dare contest that assertion, I shall claim that - I am an African!

I have seen our country torn asunder as these, all of whom are my people, engaged one another in a titanic battle, the one to redress a wrong that had been caused by one to another and the other, to defend the indefensible.

I have seen what happens when one person has superiority of force over

being emanating from the conscious, systemic and systematic oppressive and repressive activities of other human beings.

There the victims parade with no mask to hide the brutish reality - the beggars, the prostitutes, the street children, those who seek solace in substance abuse, those who have to steal to assuage hunger, those who have to lose their sanity because to be sane is to invite pain.

Perhaps the worst among these, who are my people, are those who have learnt to kill for a wage. To these the extent of death is directly proportional to their personal welfare.

because I am an African! Because of that, I am also able to state this fundamental truth that I am born of a people who are heroes and heroines. I am born of a people who would not tolerate oppression. I am of a nation that would not allow that fear of death, torture, imprisonment, exile or persecution should result in the perpetuation of injustice. The great masses who are our mother and father will not permit that the behaviour of the few results in the description of our country and people as barbaric. Patient because history is on their side, these masses do not despair because today the weather is bad.

Nor do they turn triumphalist when,

separated from the material well-being of that individual.

It seeks to create the situation in which all our people shall be free from fear, including the fear of the oppression of one national group by another, the fear of the disempowerment of one social echelon by another, the fear of the use of state power to deny anybody their fundamental human rights and the fear of tyranny.

It aims to open the doors so that those who were disadvantaged can assume their place in society as equals with their fellow human beings without regard to colour, race, gender, age or geographic dispersal.



It provides the opportunity to enable each one and all to state their views, promote them, strive for their implementation in the process of governance without fear that a contrary view will be met with repression. It creates a law-governed society which shall be inimical to arbitrary rule.

It enables the resolution of conflicts by peaceful means rather than resort to force. It rejoices in the diversity of our people and creates the space for all of us voluntarily to define ourselves as one people.

As an African, this is an achievement of which I am proud, proud without reservation and proud without any feeling of conceit. Our sense of elevation at this moment also derives from the fact that this magnificent product is the unique creation of African hands and African minds. But it also constitutes a tribute to our loss of vanity that we could, despite the temptation to treat ourselves as an exceptional fragment of humanity, draw on the accumulated experience and wisdom of all humankind, to define for ourselves what we want to be.

Together with the best in the world, we too are prone to

pettiness, petulance, selfishness and shortsightedness.

But it seems to have happened that we looked at ourselves and said the time had come that we make a super-human effort to be other than human, to respond to the call to create for ourselves a glorious future, to remind ourselves of the Latin saying: Gloria est consequenda - Glory must be sought after! Today it feels good to be an African.

It feels good that I can stand here as a South African and as a foot soldier of a titanic African army, the African National Congress, to say to all the parties represented here, to the millions who made an input into the processes we are concluding, to our outstanding compatriots who have presided over the birth of our founding document, to the negotiators who pitted their wits one against the

other, to the unseen stars who shone unseen as the management and administration of the Constitution Assembly, the advisers, experts and publicists, to the mass communication media, to our friends across the globe - congratulations and well done!

I am an African. I am born of the peoples of the continent of Africa.

The pain of the violent conflict that the peoples of Liberia, Somalia, the Sudan, Burundi and Algeria is a pain I also bear. The dismal shame of poverty, suffering and human degradation of my continent is a blight that we share.

The blight on our happiness that derives from this and from our drift to the periphery of the ordering of human affairs leaves us in a persistent shadow of despair.

This is a savage road to which nobody

should be condemned. This thing that we have done today, in this small corner of a great continent that has contributed so decisively to the evolution of humanity says that Africa reaffirms that she is continuing her rise from the ashes.

Whatever the setback of the moment, nothing can stop us now! Whatever the difficulties, Africa shall be at peace! However, improbable it may sound to the sceptics, Africa will prosper! Whoever we may be, whatever our immediate interest, however, much we carry baggage from our past, however, much we have been caught by the fashion of cynicism and loss of faith in the capacity of the people, let us err today and say - nothing can stop us now! Thank you. 🙏

“Whatever the setback of the moment, nothing can stop us now! Whatever the difficulties, Africa shall be at peace!”

Mr Valli Moosa – a perspective & argument for a unitary state



I was involved with the Constitution long before the 1994 elections. I was elected to the National Executive Committee of the ANC in 1991 at the first conference of the ANC held after its unbanning. In fact, it was the first conference of the ANC after the 1950s and I was elected to the National Executive Committee and from there I was elected to the National Working Committee and my portfolio was the negotiations.

I was involved in the negotiations with the apartheid regime, the settlement talks and the drafting of the Constitution. That was my portfolio.

From 1991 to 1994, I worked full-time on constitutional issues. I headed up what was called the ANC Negotiations Commission. It was my full-time responsibility as secretary of that commission to conduct the negotiations. I had an involvement in

almost every step and every stage of the Constitution – the entire process. From 1994 to 1999, I was elected as a Member of Parliament and a member of the Constitutional Assembly. I served as Minister of Constitutional Development in President Mandela's Cabinet.

Thus, for the five years that followed, I was deeply involved in the constitution-making process. Initially, I was Deputy Minister in 1994 and 1995 and then I was appointed as the Minister thereafter. So for about nine years of my life, I had been involved on a full-time basis with the Constitution.

During the time of the drafting of the Constitution between 1994 and 1996 in the Constitutional Assembly, I led the ANC team. Remember that, at that time, the Secretary-General of the ANC, Cyril Ramaphosa, was the Chairperson of the Constitutional Assembly, which was made up of different parties.

The biggest party was the ANC with about 64% of representation. My job in the ANC was to lead the negotiations. Of course, we were able to draft in some very talented members of Parliament from the ANC and other parties to be involved in the constitution-making process.

When I was appointed in 1994, I was only 37 years old. When I finished

my nine years of the constitution-making process, I was 42 years old. Then I decided that it was never my intention to be a politician as such and I thought, what do I do?

I was persuaded to run for elections again. Fortunately, President Mbeki, like President Mandela, appointed me to Cabinet as the Minister of Environmental Affairs because other than the Constitution, I have a passion for the environment. I served for five years as the Minister for Environmental Affairs and then I retired from politics at age 47.

The Unitary versus Federal state debate

The attitude of the ANC right from the beginning was that we are drafting a Constitution for the people of South Africa, for the current generation and, more importantly, for future generations.

We always reminded the ANC negotiators and the people involved in the Constitution-making process of that noble objective – that we were not drafting the Constitution to give us short-term advantages over opposition parties. We were drafting a Constitution that had to be durable and had to reflect the interests of the nation, not party-political interests. That was very important.

I must say in all fairness it was not always everybody that was able to do

that – this was especially the case with some of the smaller opposition parties. They were not able to maintain a national and long-term perspective, which significantly influenced the debate on Federalism and a Unitary State.

What was important was that the liberation struggle was fought for a united, democratic, non-racist, non-sexist South Africa. The word 'united' became more important because part of the apartheid regime's central strategy was the dismembering and the balkanisation of South Africa along tribal and ethnic lines. That was a very important part of the strategy to divide the people and the country. Thus, the establishment of a united South Africa was crucially important for the ANC in the constitutional negotiations.

I did not expect political parties to simply agree with our point of view on everything. However, the working relationship which we had with other political parties was not a particularly difficult one. Apart from that, the ANC had 64% of the votes. We only needed 67% of the votes to pass a Constitution. I must say that there were political parties that fought for little narrow interests.

Parties had different views on the unitary state versus federalism debate. The IFP argued for "Zuluness", the Afrikaners argued for some sort of a Volkstaat region whereas the DA

(which was the DP at the time) argued for an ill-defined form of federalism.

One of the key reasons forwarded by the proponents of federalism was that in cases where they control a province, they wanted to be able to run it independently. They wanted a kind of an autonomy from the rest of the Republic.

Unfortunately, the media at the time, which was largely a white media, as well as the business community, all supported federalism. But for us, federalism was, in some sense, the re-enactment of the Bantustan system.

The Problem with Federalism

The biggest problem with federalism was that its proponents could not understand that South Africa could only function as a country if it had one economy and not a fragmented economy: one system of taxation, one national revenue fund, one fiscus and one budget. By decentralising monetary and fiscal policy, we would not be able to effectively run this country because the bulk of the country's GDP was generated in Gauteng. The unequal apartheid and colonial social and economic development patterns would be frozen into perpetuity. The economy simply would not hold together.

These were the arguments put forward by the ANC negotiators that the opposition parties were not receptive to. The biggest problem though, intellectually speaking, is that federalism only exists in the world, where independent, sovereign countries or independent sovereign entities decide to come together and merge. What actually happens is that when two countries decide to become one, they retain certain powers and functions for themselves. Europe, for example, is a political entity but each of the national states belonging to the European Union (EU) has given some of its autonomy to Brussels, but not all of it.

That, however, was not the case

in South Africa. We were already a unitary state at the time when the negotiations started, although the Democratic Party (DP), and at the time the National Party (NP), argued that the unitary state be broken up. They were joined by the Inkatha Freedom Party (IFP), which also argued for the break-up of the nation state. Yet, there is not sufficient historical evidence to support the argument for the break-up of the unitary state. They lost that argument even before the formation of the Constitutional Assembly.

Reasons for maintaining a Unitary State

We are a unitary state for several reasons. One, South Africa was already one country. I mean, for what good reason would you divide a historically united country? The direction of progress, globally, was away from disunity towards unity. If you look at the United States, it was the creation of the United States of America; and in Europe, it was the creation of the European Union (EU). Globally therefore, people are moving in the direction of unity and not disunity. It would be a very strange thing to campaign for disunity. The second reason is that if we do not maintain the unity of the country, we could have very poor provinces with little or no basic services because most of the Gross Domestic Product (GDP) of the country would be in a rich province like Gauteng. How would you pay for a school in the Eastern Cape, or in the Free State, or in the North West province for that matter? Given the state of affairs in South Africa at the time of the transition to democracy, the only logical way to ensure infrastructure and service delivery throughout the length and breadth of the country, was to have one economy and a central collection of taxes. This was one of the most important reasons put forward in favour of a unitary state.

In a unitary state such as South Africa, we can ensure that government services will reach everybody equally,



regardless of where they are situated in the country, and that you would not have somebody in a richer province having a higher old age grant than somebody in a poorer province. A further reason for wanting a unitary state was that those who were in favour of a federal state were arguing along ethnic lines. Needless to say, a federal state based on ethnic and separatist lines, runs the risk of conflict, similar to what is currently being experienced in Spain. Why would you want to do that? It soon became clear to the ANC negotiators that those who argued for a federal state did so from the point of view of ethnicity and tribalism and ultimately, to create and preserve tribalism or white privilege.

Arguing for a federal state along these lines went against the fundamental reason why we were drafting the Constitution, which was to create a decent, progressive and enlightened democracy.

Constitutional compromises

Where did we make compromises that we should not have included in the Constitution? We do not have any aspect of federalism in South Africa at all. The provinces actually do not have

any powers and they are essentially administrative entities. That is the reason why the provincial legislatures actually do not do much work. They hardly meet and they do not have much legislative responsibilities because we are not a federal state. Thus, we have a very united, unitary type of system of government. What was apparent during the time of the negotiations was that on the opposition side, there were individuals with intellectual depth, integrity and rigour but as a whole, they could not sustain the federal state argument for too long and once they gave in to our demands they themselves forgot what their original arguments were. We needed to convince them at the end of the day that the unitary state was the appropriate route to follow.

Interestingly, the very people who argued for a federal state at the time are now defending the Constitution more vociferously than ANC members. They have become the biggest defenders of the Constitution, a document that they initially argued against during the negotiations process. In a sense, that is a wonderful thing, but it also shows that their demands and arguments at the time were not from a principled position but from a narrow immediate interest and when the narrow immediate moment passed, they forgot about those demands and arguments. The issue of compromises, however, is quite interesting because some people would say 'oh well, the ANC compromised during the negotiations and during the drafting of the Constitution. Thus, the Constitution is the result of compromises.' These people would even argue that when something is a product of compromise,



it is less than perfect. However, I can quite confidently state that if you were to ask anyone how he or she would have drafted the Constitution differently, they would struggle to provide an answer.

A further matter related to this point is the notion of sunset clauses supposedly in the Constitution. But I am not aware of any sunset clauses in the Constitution. The only possible issue that could be regarded as a sunset clause was the agreement that after the elections, the second

largest party would be allocated the Deputy President position for a period of five years. The position, however, was symbolic rather than substantive as the Deputy President did not have specific powers, and neither did he have a budget. In essence, this was not really a compromise. Rather, it was an attempt to address the diversity issues within the country and to illustrate to South Africans that we must work together for the sake of the country. 🍌

“Looking back and reflecting on the last twenty-odd years, I feel vindicated that we made the correct decision to opt for a unitary rather than a federal state.”



Ms Baleka Mbete was appointed Speaker of the National Assembly in 2004.

Ms Baleka Mbete - On language and diversity

Language injustices in the apartheid South Africa

Not too long ago, South Africa was a theatre of war; it was considered a pariah state, unwanted and isolated by the world for its apartheid system. This aspect of our history is sometimes too easily forgotten by South Africans.

When we began our journey out of apartheid in 1994, part of the Long Walk to Freedom of Nelson Mandela, we did so with the full knowledge that apartheid was a system rooted in our society and the minds of our people.

Our Long Walk to Freedom had to deal with apartheid and the legacy of the colonial system through a programme of transformation to decolonise our society. This programme of decolonisation had to address itself to the fundamental structure of our society which was based on racial discrimination and oppression, to our hearts which were taught to hate, and to our minds which were brainwashed and poisoned.

Our languages remind us of our past. Our history, for many years during the apartheid era, showed that black people were forced to speak the languages of white people, whereas white people were not forced to learn the indigenous languages of the country. There was a time when one could not get a job if one could not speak Afrikaans and English. The truth of the matter is that Afrikaans

and English are languages just like any other South African language. It does not mean that if one cannot speak Afrikaans or English, one is stupid. Surely, one's wisdom or intelligence is not measured by one's fluency in any particular language.

Negotiations on language rights

The ANC started discussions and engagements on language rights in South Africa long before the Convention for a Democratic South Africa (CODESA) and constitutional negotiations. Albie Sachs (before he became a Justice) and I, for example, were amongst the principal speakers who spoke at the conference organised by the ANC in Lusaka, which focused on language rights in a democratic South Africa.

I also spent a number of years in

Tanzania, where I was connected to the University of Dar es Salaam. While in exile in Tanzania, I had an opportunity to observe how the relationship between English and Kiswahili evolved. Justice Albie Sachs best sums up my experience in language issues in Tanzania as follows: “Living in an independent African country, she learnt that language couldn't be looked at simply in purely instrumental or quantitative terms. Language was intensely meaningful to people, to their sense of self. Kiswahili had been developed over centuries as a language of common usage in large portions of the East Coast of Africa, freely spoken by everybody in the region.

English had come later as the language of colonial domination and even later been appropriated by a section of the people in their struggle



for independence. Yet exclusive use of English for official business in independent Tanzania would disempower the great majority of people. Conversely, extensive use of Kiswahili would literally give voice to everyone and make everyone feel part of the national policy. Now the idea of equal esteem for all languages – how do you achieve that? If you make English the dominant language and you subordinate Kiswahili, there is no equal esteem. National unity is not furthered.”

During the CODESA negotiations, Justice Albie Sachs and I represented the ANC on language rights. The negotiations took place in Kempton Park. Albie Sachs and I sat on the one side of the table while the Nationalist Party representatives were seated on the other side. The Nationalist Party was represented by a huge team of professors. It was clear that they feared that Afrikaans would be suppressed under ANC rule. Our approach to both the CODESA and constitutional negotiations was informed by the mandate that emanated from the ANC’s policy on language rights, adopted following the Lusaka conference.

Our position was very clear: “make English an official language in a future democratic South Africa, not the official.

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Our position was very clear: "make English an official language in a future democratic South Africa, not the official language. The ANC, in fact, officially adopted a policy aimed at achieving equal respect for all the languages deeply implanted in the South African society. This did not require reducing the status of Afrikaans and English. Rather, it called for the upgrading of the African languages that had been marginalised first by the British and then under apartheid. Rather than undermining English and Afrikaans, it necessitated freeing the marginalised languages of their subaltern status and facilitating their emergence as a flourishing means of expression and communication enjoying equal recognition in the new democratic society. In other words, the idea was to "achieve equality of the vineyard by upgrading the suppressed languages rather than equality of the graveyard by downgrading the dominant ones" Justice Albie Sachs.

Language and the Constitution

The Freedom Charter, which is the foundation of South Africa's Constitution, espouses that "there shall be equal status in the bodies of state, in the courts and in schools for all national groups and races". It goes on to declare that "all people shall have equal rights to use their own languages, and to develop their own folk culture and customs."

Despite all the challenges and tensions we had to deal with during the constitutional negotiations, a significant achievement was realised in that we managed to get all eleven languages, that are spoken by the people of South Africa, declared official languages of the Republic of South Africa.

This right is guaranteed by Section 6(1) of the Constitution of the Republic of South Africa.

Section 6(2) of the Constitution states that "recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages". Section 6(4) goes on: "the national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably".

To that end, the ANC government passed the Use of South African Languages Act, 12 of 2012. The objectives of this Act are a clear demonstration of the intention of the ANC government to action Section 6(2), namely: to regulate and monitor the use of official languages for government purposes by national



government; to promote parity of esteem and equitable treatment of official languages of the Republic; to facilitate equitable access to services and information of national government; and to promote good language management by national government for efficient public service administration and to meet the needs of the public.

During the constitution-making process, as the ANC we requested that at the end of the Preamble to the Constitution of South Africa, where it states "Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso" – all other official languages should be included. We wanted this captured because in terms of Section 6 of the

Constitution, South Africa has eleven official languages, and government should use all eleven languages to communicate with its citizens. We also demanded that the Constitution be translated into all other languages. Thankfully, we had leaders who understood that we needed to make certain sacrifices in order to secure a better and peaceful future for our people.

Where hundreds of years of colonial rule had created divisions based on race, creating tribes that are hostile to each other, and setting one South African against another, we had to build a nation united in its diversity. We had to see ourselves as one nation, a rainbow nation. A nation built on the recognition of all eleven official languages that are accorded equal status and protection in the Constitution. We did that because we recognised that the unity of a nation is built out of its richness of languages

and cultures.

Recognising that language is a very emotive and emotional issue, the changes we demanded and negotiated for during the constitution-making process were intended to give us a sense of pride in our languages. If we are proud of our languages, it means that we will respect ourselves and each other. I urge South Africans of all races to make an effort to learn the languages spoken in their areas, especially the indigenous languages. Obstacles to development of African languages

While the Constitution has elevated the status of the nine African languages spoken in South Africa

to that of English and Afrikaans, the challenge we are facing now is to develop them to be on par with English and Afrikaans. There are, however, obstacles which we have to deal with as we move towards attaining that goal. The late Dr Neville Alexander, who in 2004 wrote on 'The politics of language planning in post-apartheid South Africa' argued that:

"Most South African students of applied language agree that the most difficult obstacle in the way of the rapid development of the African languages is what Ngugi wa Thiong'o has called 'the colonised mind' – that is to say, the fact that the vast majority of black people simply do not believe that their languages can or should be used for higher-order functions even though they cherish them and are completely committed to maintain them in the primary spheres of the family, the community and the church."

Because we know why and how this situation has come about – Ngugi's famous essay on the matter was the first of a series of analyses that demystified the language issue – the pertinent question is: what is to be done? In attempting to answer this question, we are led into the heart of the politics of the elite, for the immediate answers are abundantly obvious.

It is essential that the African languages acquire market value in the short to medium term and it is clear that they will do so only if there is bold leadership. While it is wrong to suggest that the political and cultural leaders alone have to break the logjam, it is clear after many years of reflection and intervention at many different levels that political will and commitment are going to be the decisive elements if we are to move from the point where the domination of European languages is replaced by a domination of African languages.

It is clear that there is a political will to develop African languages in South Africa. That has been demonstrated not only by the elevation of African languages to official languages' status, but also by the establishment of constitutional institutions to develop and promote cultural, religious and language rights. These institutions are discussed in some detail in the next section.

Institutions established to develop languages in South Africa.

The negotiations also ventured into the type of institutions which needed to be established in order to promote and upgrade languages in South Africa. Albie Sachs captures what transpired during that part of the negotiations as follows:

“During negotiations, we had had strong debates about what sort of body or bodies should be responsible for developing languages, and in particular, for promoting the upgrading of languages that, if I can put it this way, had been made to languish. I had argued strongly against a body that would be composed of representatives of each official language community fighting in its corner for advancing its particular tongue. The argument turned

out to be successful.

So the Pan South African Language Board is provided for with a view to promoting the development of all official languages, as well as languages facing extinction, as well as sign language.”

That is how the establishment of the Pan South African Language Board (PANSALB) was negotiated and agreed upon. In terms of Section 6(5)(a) of the Constitution, PANSALB must promote and create conditions for the development and use of all official languages, the Khoi, Nama and San languages and sign language.

As envisaged by the Freedom Charter,

Sections 30 and 31 of the Constitution guarantee everyone the right to culture, religion and language. So seriously did we take these rights that the Constitution established a Chapter 9 institution, which is not often spoken about: the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The key functions of this commission, among other things, are to promote respect for the rights of cultural, religious and linguistic communities; to promote and develop peace, friendship, humanity, tolerance and national unity amongst cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association; and to recommend

the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

Given our commitment to the parity of esteem of all our languages, we inserted section 6 with five subsections in Chapter One of the Constitution.

Language, the national flag and national anthem are therefore recognised as critical building blocks in promoting our patriotic identity as South Africans. 🇿🇦



Mr Tony Leon was leader of the official Opposition in the National Assembly when the Constitution was adopted.

Mr Tony Leon – Then versus now

Midway through the two-year period when Parliament sat as the Constitutional Assembly, South Africa received a Royal visit from Queen Elizabeth and the Duke of Edinburgh. There was both pomp and poignancy in the event.

President Nelson Mandela relished the warm embrace and deep esteem in which he was held by the Royal Family, and this was – to the extent that Britain’s monarch ever emotes in public – clearly reciprocated. But the poignancy was her note to Parliament in her address, when the Queen reminded us that the last time she had set foot on our Southern soil was in 1947, just a year before the apartheid government of DF Malan’s National Party was first elected.

Mandela’s presidency and the work of constructing a new and democratic

Constitutional order were the two key events, which distinguished the new South Africa which Queen Elizabeth was now sighting for the first time in contrast to the land of division and exclusion, which she had last seen as a twenty-one-year-old Princess some 48 years before. The intensification of apartheid and the struggle against it after 1948 was the political canvas on which a new and more hopeful political order would be sketched.

But it was also Queen Elizabeth II, today the longest reigning monarch

in her country’s history, who once said that “Distance lends enchantment.”

The editors of this volume have requested my reflections and recollections on my perspective of the work of the Constitutional Assembly in crafting a new Constitutional order for our country.

In one sense, the monarch was correct: looking back from today’s vantage point at the clashing issues, heated moments, and intense debates from 24 years ago does admit of a sense of achievement on how we crossed the huge divides, which often separated several key parties whose buy-in for the final compact was both arithmetically necessary and historically essential.

Then there is the frank degrading

of the public and political debate, and very often the raucous scenes from our Parliament in recent years, which could suggest that the first two years of its first session as a fully democratic assembly were something of a golden age. And the very stress-testing of our Constitution over the past five years can certainly allow all MPs, who doubled as members of the Constitutional Assembly, to share the title of US Secretary of State, Dean Acheson’s autobiography “Present at the Creation.” He was immersed in constructing a world order after the shattering events of the Second World War. Our members were involved in writing what Constitutional Assembly Chairman, Cyril Ramaphosa, today President of South Africa, called ‘our country’s birth certificate.’

But if the story is properly told, and history itself is often more disjointed and messy than neat and heroic, then a lot of our work back then and the results finally achieved, bore some resemblance to the caution of another famous statesman, Germany's "Iron Chancellor" Otto von Bismarck, who once cautioned – on the process of legislating – "if you enjoy eating sausages, don't watch them being made!"

Differences and similarities between the Constitutional environment then and now.

The first reflection I offer is that the 1996 Constitution, with its high aspirations and embedded compromises, was the best achievable and has provided a shelter for citizens and institutions in the two tumultuous decades since it was inked.

I am also fairly certain that its final achievement, which often seemed to elude the key negotiators, was easier to achieve in 1996 than it would be if we were to recommence the exercise today. I offer five personal insights in support of my contention: I also had the advantage in the process of being both a co-chair of Theme Committee Four (Fundamental Rights) and a party leader (I was at the time Leader of the Democratic Party) to participate both in the formal sessions and the often more revealing, sometimes brutally frank, engagements with the key interlocutors from different parties behind closed doors.

First, when we met both formally in the Theme Committee in open session and breakaways (formally the retreat in Arniston and informally basically all the time and often deep into the night) we were undistracted by social media and the endless demands and temptations of Twitter, Facebook and 24/7 TV news. It is an incredible but revealing fact that our sessions were not just unencumbered by continuous leaks and fake or real news, but the cell phone had only arrived in South Africa in 1994 and was hardly widespread at the time.

Certainly, all the political players used the media platform to advance often contentious views: but that was a world of difference, in both urgency and false sensationalising, from the newspaper-dominated world of 1994 and the multiple on-demand platforms on offer today.

If every Constitution-writing exercise requires trust-building, then certainly the Constitutional Assembly and its processes occurred in a less frenzied public atmosphere than today. That is a technological observation.

Second, the issue of trust itself is of course deepened by personal relationships and bolstered by mutual experiences of good faith. Here the 1991 to 1993 Kempton Park experience was invaluable. Now history records the CODESA experience started on 21 December 1991 with a misunderstanding between the two principal participants, FW de Klerk, and Nelson Mandela, which morphed quickly into a bitter accusation of bad faith and aspersions of his discomfort with democracy by the latter against the former.

However, notwithstanding violence, walkouts, breakdowns and even an invasion of the premises, key relationships were forged in the pre-Constitutional Assembly phase, which materially and positively affected the outcome of the final negotiations. Precisely because, in the CODESA process, I had spent a great deal of time informally with some of the key negotiators, Mandela, Joe Slovo, Ramaphosa, Valli Moosa, Kader Asmal and Dullah Omar of the ANC and Kobie Coetzee and Sheila Camerer of the National Party – those relationships were easy to re-establish in the next phase.

Indeed, I well remember Valli Moosa arranging an informal dinner at a fraught moment in 1995 for a 'letting the hair down session' between the ANC and Democratic Party. Since there were only seven MPs in my caucus, we could all attend the dinner en bloc while the mighty 240 MP caucus of the ANC meant only their leading lights could participate at reasonable cost! The evening was enlivened by Kader's enjoyment of a good libation, fully shared by most of us, but Dullah's non-alcoholic regime meant he probably was less incautious than the rest of the party that night.

Ironically, the personal relations between DP and ANC leaders were far closer than either enjoyed with the NP leadership, yet both the politics and joint constituency meant the DP and NP were politically more aligned to each other.

Third, the 1994 election had both swept away much wishful thinking by



a lot of the minor parties (including my own which obtained a very modest result back then) and cemented the political authority of the African National Congress as the new party of government. It would be the biggest player in the process, not by brute force, but through democratic legitimation.

And the provinces – a cornerstone of the new order – were divided in terms of control with two of them (KwaZulu-Natal and Western Cape controlled respectively by the Inkatha Freedom Party and the National Party).

But the impressive 62% of the national total achieved by the ANC also meant that it could not write the Constitution on its own or in its own image entirely. To achieve a new Constitution, it required the support of more than the majority party, and in its founding provisions required a majority of 75%.

Finally, every party – both large and small – understood that the final arbiter of the process in which we were engaged was far away in both distance and political detachment from the rough and tumble of

proceedings in Parliament in Cape Town. The Constitutional Court in Johannesburg would have the last word on whether the new compact was on all fours with the Constitutional principles. When our party, along with several others, so petitioned the court, some of our objections were upheld and others dismissed. However, the entire process, it is worth recalling, was bounded by pre-existing agreements and principles. It is also worth recording this process precisely because there is much debate today as to whether the Constitution was a 'sell out' or unnecessarily compromised. But those questions ignore the basis of the political bargain and its limits.

The Constitution contains, for example, key elements of the Freedom Charter but it is not a facsimile of it, and its construction was designed for maximum buy-in, not the exclusion of key minorities. Ex post facto arguments ignore the key lesson offered by an historian: "History is written backward but lived forward. Those who know the end of the story can never know what it was like at the time."

"The first reflection I offer is that the 1996 Constitution, with its high aspirations and embedded compromises, was the best achievable and has provided a shelter for citizens and institutions in the two tumultuous decades since it was inked."

“But when South Africa set about ‘writing its birth certificate’ the hard lessons of governance and misgovernance lay in the future.”

A fourth reason why I think that a Constitution written today would be somewhat different from the 1996 model, is simply because of the events which have confronted us since its adoption. A great deal of our time in our Theme Committee, and much of it was the expression of political aspirations by its members, was spent on discussing and debating rights which proved – ironically – both uncontroversial in their desirability but intensely difficult to operationalise in subsequent practice. The Constitutional Assembly spent an eye-watering amount (approximately R35m in 1995) in an exercise dubbed ‘taking the Constitution to the people.’ But a great deal of the feedback from those sessions across the country was pithily captured by the ANC 1994 election slogan “A better life for all.”

Thus, much of our committee time was spent on debating incontestable public goods, from expanded health services to rights for children. But of course, the enshrining of these so called ‘socio-economic rights’ has not in and of itself led to a material improvement in services or the betterment of the human condition. My own view then has been borne out by the lived reality since then: a Constitution should sketch a broad framework within which Parliament can develop detailed policies and the final adjudication can be determined by the courts.

And to be perfectly frank – some aspects of public feedback were politely shelved: South Africa in 1994-96 was at the height of an intense crime wave. Yet the public pleas to include the death penalty in the document never proceeded, no doubt because it was Constitutionally dubious, but also because it found little favour with a majority of MPs, whatever the public clamour for its retention.

The flipside of this caution is that

we did not know then what we do know now. Quite understandably, the Constitutional Assembly consisted of men and women, many of them gifted and some remarkable. But none of us were clairvoyants or Sangomas who could divine the future.

Our expectations were burdened by our history. Thus, we spent a great deal of time and devoted much attention to matters, which had disfigured South Africa under decades of undemocratic and racially exclusionary rule.

Who could forget, for example, the PW Botha states of emergency, the midnight knock on the door by the security police and the banning of newspapers and organisations and individuals? Indeed, many of the members of our and other Constitutional committees had searing first-hand experiences as victims of such injustices.

Precisely because the immediate past was the prologue to the Constitutional present, nearly half the text of Chapter Two of the Constitution (the Bill of Rights) contains detailed prohibitions or severe limitations on detention

without trial, the rights of detained, arrested and accused persons, and strictures on declarations of a state of emergency and so on.

Of course, these are foundational to any worthwhile Constitution and our Constitution carefully enshrines safeguards against such arbitrary disfigurements and excesses by the state from our immediate past.

But in truth, these have not been the burning and unresolved issues or hangovers since our Constitution was enacted in 1996.

With what Joe Slovo archly defined then as ‘hindsight being the most perfect and irritating of all sciences’ might we have done differently, given the far more recent events through which South Africa and its polity has passed in recent times?

Clearly, the often-unbridled powers of the Presidency in practice, the issue of executive accountability, the interdicting of corruption, perhaps even the Constitution and efficacy of board membership of state companies, would have found more powerful expression, and in cases limitations, were the Constitution-writing exercise to be undertaken afresh.

Indeed, what seemed on the eve of adoption of the Constitution and were, literally the night before its debate, ‘make or break issues’ have not tripped up the country or its community of diversity since. I received, quite painfully, a bash on the nose from protesting members of COSATU outside Parliament, then involved in a national strike to demand the exclusion of the right to lock out in the final document. I had taken (along with the business community) a pretty hardline position

on its inclusion. We did not prevail. And the subsequent two decades have not seen this as a key reason – there are plenty of other explanations outside of the Constitution – for our modest rates of both economic growth and investment.

Then, our midnight agreement on other contentious issues looming large at the time, such as the right to mother-tongue education and state funding for independent schools, has not prevented – despite the final accord on these rights – the deterioration of these promises in practice.

My fifth and final reflection on differences and similarities between the Constitutional environment then and now was an observation, which I offered to the law students whom I taught in the late 1980s at the University of the Witwatersrand, Johannesburg.

I never thought, incidentally, that my theoretical observations in 1989 would land up being my guiding principle when I was actually tasked, just five years later, in helping to draft a real Constitution for a new democracy. But such is the wheel of fate and fortune. I told my students “a Constitution which does not bend will eventually break”.

Reflections on amending the Constitution

Any worthwhile Constitution such as our own must be founded on imperishable principles but it must contain a degree of flexibility. Precisely for this reason, the drafters of our Constitution made provision in Section



74 for its amendment subject to both stringent procedures and super-majorities.

To amend a Constitution is in the end a technical exercise, important though the technicalities are. But to rephrase President Ramaphosa in his role as Constitutional Assembly Chairman – this is not a driving licence, but indeed a ‘birth certificate’. And there is a big difference between the two documents. Thus, the burning issue of our time in terms of the Constitution is now a revisiting of section 25, the property clause. On the eve of the adoption of the Constitution, it was as much a debate and a raucous and contentious issue back in 1996 as it is here and now in 2018.

My Democratic Party colleague, Dene Smuts, MP, who was a key negotiator and sadly passed away two years ago in 2016, gifted to posterity a

very useful memoir on the great Constitutional debates and outcomes from more than two decades ago. In her book “Patriots and Parasites - South Africa and the Struggle to Evade History” she writes: We may have produced the best Constitution in the modern world, but by dusk on 7 May 1996, the day before its adoption, the Bill of Rights contained the worst property clause on earth.

At five o’clock, Cyril Ramaphosa, Dullah Omar and Kader Asmal advised Tony Leon and me that there had been no movement on the clause... (Tony and I) were on a last-ditch attempt to board up the Trojan Horse clause built into the property clause that allowed land reform to be undertaken without regard to the safeguards against arbitrary deprivation and uncompensated or undercompensated expropriation that were the essence of the clause.

Of course, as history and the final Constitution revealed, and in no small measure due to Ramaphosa’s arm-twisting ability – there was “movement on the clause.” Or as Smuts expressed it, “with postures stiffening, softening, sliding and adjusting” a deal was reached.

The simple insertion of the words (in s 25 (8)) “no provision in this section (the right against arbitrary deprivation of property) may impede the state from taking legislative and other measures to achieve land reform in order to redress the results of past racial discrimination...”

This was a “both and” not an “either or” approach. Parliament’s own high-level panel on legislation has concluded – along with our distinguished former Deputy Chief Justice Dikgang Moseneke – that the clause is no bar to redressing the past and its distorted

patterns of discrimination.

Therefore, in my view, an attempt to unravel the carefully wrought compromises of the recent past could have explosive consequences on our future and the hopeful Constitutional compact we agreed on that historic day in Parliament on 8 May 1996.

Of course, the Constitution can be amended, but undermining the good faith displayed on all sides then by tampering with our future now is another matter. Or, as the Indian High Court had ruled in 1970: “The erosion of one right in the Constitution must inevitably erode the whole Constitution.”

We have been warned. 🙏



Nkosi Patekile Holomisa - Negotiating the role of Traditional Leaders

The message conveyed to me by ANC representatives was that I should not run away from becoming a traditional leader when the time came for me to take up that position.

My parents had passed on and my

uncle was acting as regent. They instructed me to join the Transkei Parliament as a member of the ruling party – the Transkei National Independence Party – and to take up any position offered to me.

The military coup led by Major-General Bantu Holomisa, however, overturned the government and dissolved Parliament. Thus, I did not have to take up my position in the Transkei Parliament and went on to pursue my legal training instead. With money

given to me by the ANC I opened a legal practice as an advocate in Mthatha in 1989.

Although I was acting as a traditional leader, I was only formally installed in 1999. The installation process is simply the formalisation of a position. When the ANC was unbanned together with other liberation organisations, I became a member of its interim Executive Committee in the Transkei region. We set up branches in the region and popularised the

organisation among the people.

At the time of its unbanning, a group of professionals and labour activists working in Mthatha formed themselves into what we called the Joint Co-ordinating Committee. Its meetings were held in my chambers in the evenings. That was where we co-ordinated the political activities of the organisations to which we belonged.

We thus became the nucleus around

which the activities relating to the reception of ANC leaders in the Transkei were planned. It was a natural progression, having been active in student politics on campus, to being involved in the programmes of the ANC when it was unbanned, so that when the time came for the ANC to

President, a position that entitles me to attend and participate in all the national leadership structures of the organisation, albeit without voting powers.

Having received several assurances from the ANC that the institution of

We participated in the various committees and thereby made inputs to the development of the Interim Constitution, which was drafted and adopted in the presence of traditional leaders. Because of this involvement in the negotiations, it became clear to us that traditional leadership in

As governors, we not only discuss matters of common interest, we also discuss matters affecting the nation as a whole. Our concern is that at some stage we may have a government that is hostile to traditional leaders and may decide to do away with the



send representatives to Parliament, my name was placed on the party's list. I joined Parliament in 1994 and served on a number of committees, notably, Land and Agriculture, Justice and Constitutional Development, Provincial and Local Government, and even headed the Joint Constitutional Review Committee.

In 2014, President Jacob Zuma informed me that he wanted me to serve as Deputy Minister of Labour. I duly accepted the deployment. Involvement in traditional affairs I became President of Contralesa in 1990 and stepped down from this position in 2013. However, I was subsequently appointed Honorary

traditional leadership would not be abolished in a democratic South Africa, I took up the position as President of Contralesa. However, I soon discovered that the ANC was not keen on giving the institution of traditional leadership the role that it deserved in a Constitutional democracy.

For instance, it was a struggle for traditional leaders to be accepted as part of the Constitutional negotiations. As traditional leaders, we were not part of the negotiations at CODESA 1 and CODESA 2.

Our participation as traditional leaders of the Transkei was indirectly through the formation of a representative body established by the Transkei Military Government, the Military Council, which invited all sectors of society, including traditional leaders, to be part of the discussions.

It was mainly due to pressure from the KwaZulu administration, whose representatives demanded separate delegations from that administration, the Zulu king, the Zulu traditional leaders, and Inkatha Freedom Party, that the ANC and the FW de Klerk government agreed to the participation of traditional leaders in their own right in the Constitutional talks. Thus, it was agreed that there be four delegations of traditional leaders representing the four provinces of the Transvaal, Natal, the Orange Free State and the Cape.

South Africa was being recognised. The Constitutional principles that bound the Constitutional Assembly when it drafted the final Constitution stated specifically that the institution of traditional leadership would be recognised and protected in the final Constitution.

Furthermore, that even though government at national, provincial and local levels would be made up of elected representatives of the people, traditional leadership would still have a role to play in the different levels of government. This would also be extended to the royal courts or traditional courts. During the negotiation process, we called for the Houses of Traditional Leaders to be established and the traditional councils to be transformed in order for them to operate in conformity with the Bill of Rights.

Furthermore, we argued that traditional courts be given requisite resources and due recognition in the Constitution because we dispense justice, irrespective of whether or not we are recognised. The final Constitution, however, watered down all the gains made at the time of the Interim Constitution. Rather than categorically stating that there must be a House of Traditional Leaders at each level of government, the Constitution now states that there may be a House of Traditional Leaders to discuss matters of mutual concern.

Houses of Traditional Leaders as it is not obligatory on government to set up these structures. Areas of conflict between traditional leaders and contemporary local government is that traditional leaders are considered the governors of their territories and people.

The land that my clan occupies, for instance, belongs to the clan and not to government, regardless of the fact that in terms of the law the Minister of Rural Development and Land Affairs is the owner of the tribal land on behalf of the state. The land belongs to the tribe and, therefore, anything that has to be done there has to be done with the consent of the traditional leaders and the community.

Thus, while the local councillors are there to provide services, they ought to acknowledge and respect the institution of traditional leadership by, among other things, informing them about matters relating to the development of the area. They must listen to what the community has to say and what their needs are. They must not act as if they are the owners of the land, and neither should they undermine traditional leaders. In fact, councillors should act as advisors to the traditional leaders, and those councillors who do so are often successful in their work. Those who present themselves as larger than traditional leaders for various reasons, often face challenges and problems within traditional communities.



Nkosi Patekile Holomisa

“However, I soon discovered that the ANC was not keen on giving the institution of traditional leadership the role that it deserved in a Constitutional democracy. For instance, it was a struggle for traditional leaders to be accepted as part of the Constitutional negotiations.”

They tend to create conflict within the community and people do not take kindly to their traditional leader being undermined or insulted by a commoner. It is imperative that in

order to ensure a peaceful coexistence between traditional leaders/authorities and contemporary local government, there must be mutual respect and the elected structures must find ways of

interacting with traditional leaders with regard to the development of the tribal areas. The institution of traditional leadership must be part of the governing committees of those entities.

The need for consultation with traditional leaders on developmental matters

It is often said that traditional leaders should be recognised as the custodians and guardians of democracy in a traditional leadership setting. In a democracy, everyone has the right to have his or her say irrespective of political party affiliation. Thus, traditional leaders must be empowered and capacitated to ensure peaceful political activity within their areas, and to deal with those who violate this principle.

Whenever a development initiative has to be introduced, traditional leaders must be consulted in order for them to explain to the affected people what the development entails and how they stand to benefit from

it. This consultation would go a long way towards preventing conflicts. The matter of social cohesion is very important to traditional communities. In places where traditional leaders are respected, there is a great deal of social cohesion. Certain things are not done because it might offend the traditional leader and people themselves discipline each other.

The institution of traditional leadership is a governance institution. We participate in the traditional setting and in the law-making processes. We participate in the adjudication of cases. As traditional leaders, we should be allowed that space to operate, especially at a local level. However, there should be no impediments preventing us from operating at a national or provincial level. Parliament should reserve seats for traditional leaders, especially in the National Council of Provinces. In this way, we can ensure that perspectives of African traditional leadership and communities are factored into the policies and laws of the country. 🌍

Mr Roelf Meyer - How negotiations shaped the architecture of the state



Mr Roelf Meyer was the chief negotiator for the National Party during the negotiations.

I became a politician in 1979 and in the same year became a Member of Parliament. Prior to that I was involved in student politics. I served on Defence and

Constitutional Affairs Portfolio Committees during the 1980s.

During that period, I also became a Whip in Parliament. I was appointed Deputy Minister of Police in 1986, which was a bad time politically as

political unrest was increasing in the country. As the Deputy Minister of Police, my job was to manage the national state of emergency all over the country.

I had to specifically investigate matters whenever trouble or unrest erupted in the country and had to resolve the problems. This allowed me to gain

access and insights into township life at the time. I was one of the few white politicians at the time to have direct access to the township life and to observe first-hand what was happening there. Those experiences opened my eyes to what was really going on in the country. It then dawned on me that that was possibly the best appointment I could have landed. I also learnt that it was not just about the unrest, but the politics that people were protesting about. The lack of representation for the masses of black people in Parliament was central to the political unrest in the country. My mindset became very strong about what needed to happen in South Africa. I therefore strongly felt that apartheid had to go and that we had to make that happen. Indeed, those were very difficult and challenging times for me because it was not a majority view shared by members of the National Party (NP) and its government.

The calls for political change in the country grew stronger and stronger,



and consequently more and more people within the National Party started to speak out publicly against the apartheid system.

I was part of that process and when I became the Deputy Minister of Constitutional Affairs, I was able to continue doing what I thought needed to be done to usher in a new political dispensation. By the time the change momentum had set in when FW de Klerk took over, first as leader of the National Party and later as the State President in 1989, I was in the right place to help the process along. I became part of the negotiating team for democratic changes that needed to happen, from the beginning until the end. I was part of every decision that needed to be taken, including the release of Madiba from prison and the unbanning of the ANC and other political organisations. I was part of those key decisions right through until we finalised the new Constitution of South Africa in 1996.

Negotiations towards the Interim Constitution and the final Constitution

After the release of Madiba in February 1990, several processes followed fast and simultaneously. We had a few months in which to prepare for formal talks with other political parties and liberation movements. Those who were in exile started to return to the country; and more political prisoners were released.

There were, however, informal talks at different stages. I will never forget the moment when I met Jacob Zuma for the first time. He came into our offices in Pretoria, just a few weeks after Madiba's release. He had just come back from exile, as part of the preparatory team for the returning exiles. It is important to indicate that he was already in talks prior to that with some of the intelligence people outside of the country.

The Groote Schuur talks commenced in early May 1990, which was a big moment as far as the negotiations were concerned.

For the first time we were sitting together around the same table with the enemies, looking at each other across the table, and I am sure they also saw it the same way.

The one thing I will never forget about that day is that after the talks that lasted almost the whole day, we all sat down and had dinner together. The seating arrangement was done in such a way that I found myself sitting opposite the late Joe Modise. By then I knew exactly who he was, and we greeted each other as if we were friends. It was an amazing experience. Ruth Mompati was also seated at the same table. The occasion resembled a reunion for family members who had not seen each other for a long time.

The first round of negotiations in the first two years focused on how to stop the violence taking place in the country and how to persuade the ANC to renounce its armed struggle. However, at the time, there was a great deal of anger and violence, which created big problems. A number of meetings followed which resulted in the Pretoria Minute, the DF Malan Accord and others. In the process, I met and came to know a number of people from the ANC. These included Chris Hani, Joe Modise and others.

There was a lot of contestation surrounding Magnus Malan, who became a Defence Minister after he was an army general. Madiba used to complain about him.

FW de Klerk then made a Cabinet change and replaced Magnus Malan with myself. The ANC could not understand why I was prepared to take up that responsibility, being a civilian with no military background. What was important then was that I was able to convince General Liebenberg to start talking to people like Joe Modise, Chris Hani and others from uMkhonto weSizwe in order to discuss the integration of the armed forces. We simply had to get the armed forces together and that particular experience was very specific for me. I had this exchange as an ongoing project with Hani, Modise and others; and to get the two sides to sit down and talk about this process.

About a year later, my predecessor, the Minister of Constitutional Affairs, Gerrit Viljoen, fell ill and could not proceed with his ministerial responsibilities. De Klerk then moved me back to the Constitutional Affairs Portfolio as a Minister. I became the chief negotiator for the National Party, leading a team of negotiators in the Constitutional Assembly. That is when Cyril Ramaphosa and I started working together. But we knew each other prior to that quite well. We could somehow understand each other very well. Much of the communication took place between the two of us. Soon after I became the chief negotiator, the negotiations broke down following the Boipatong massacre. When the negotiations eventually resumed, we had to start from scratch. We met on a daily basis, working towards finding each other and the way forward. This became known as the channel between Cyril Ramaphosa and I that helped to keep the negotiations going.

“Madiba led us in the process of inclusiveness. He would say: Bring them all to the table, small and big parties.”

After three months, in September 1992, our negotiations eventually led to the signing of the record of understanding by FW de Klerk and Madiba. For me, that was the real settlement in our negotiations in South Africa.

Up to that moment, there was no certainty that we would achieve peace in South Africa. There were ongoing conflicts and people felt that we could still walk away from the negotiations. Then came the record of understanding – a short but very powerful document – that in my view saved the situation. The document outlined what the ANC and the NP wanted for the future; it also described the processes and the main ingredients of the Constitutional settlement in South Africa. It was called the record of understanding because we had eventually come to the same understanding of the type of Constitution we needed for South Africa, informed by the Bill of Rights.

We had to make a distinction between the phase that led to the Interim Constitution and the final Constitution. What I have described so far is what led to the Interim Constitution. Some of the parties never turned up for negotiations, such as the Conservative Party. The Inkatha Freedom Party came to the table but then left and for a long time were not part of the negotiations. The party only rejoined the negotiations before the 1994 elections. The party

suddenly realised that it had to do something, otherwise it would be out of the picture. They could not even participate in the elections. Buthelezi then made a request to Mandela and De Klerk for his party to participate in the elections. They agreed and the party's name was added to the ballot paper, which had already been printed without the IFP's name appearing on it.

I think the IFP did not participate in the negotiations to their own detriment. They could have achieved more, had they been part of the negotiations. We could not stop the negotiations just because some people were not willing to negotiate.

Technical Support

The real drafters of the Constitution were the experts who provided technical support to the theme committees. Cyril and I led political

negotiations and made settlements. The technical experts drafted both the Interim and the final Constitution. We were very fortunate in that we could solicit the assistance of Constitutional lawyers and Constitutional experts from all over South Africa to assist us and give the best possible advice. For instance, the Interim Constitution was largely drafted by Arthur Chaskalson and Francois Venter. The advantage was that each party appointed its own technical advisers to the theme committees. Political parties were given financial resources to appoint their own technical experts. We made the political settlements, and that is reflected as such in the Constitution, but the technical experts from all political parties played a pivotal role in putting the Constitution together. The technical experts greatly benefited the negotiations process that culminated in the finalisation of the Constitution.

The position of the National Party with regard to the Architecture of the State

I think that from the early stages of the negotiations, there was broad agreement about the so-called division of powers. There was agreement that the state should be composed of three arms, namely, the executive, the judiciary and the legislature. There could have been a difference of opinion between the ANC and NP at the time on the exact interpretations and meanings with regard to the three arms of state, but there was agreement on the process.

The decisions reached at the negotiations greatly influenced the way in which the accountability of Parliament is structured and the way the court system or judiciary is organised. There were long debates and discussions, for example, with regard to the principle of the division of power between the three arms of state, to the point where this was captured in the Constitution. The same applied to the nature of the state. The ANC favoured a unitary state and it had very strong views about it. They wanted to retain as much power as possible at the centre for the national government.

On the other hand, as the National Party, and despite not having a real federal history, we strongly argued for a federal state. Our thinking was that a federal state would encourage a better collaboration between the

different elements of government. Thus, certain provinces could have their own Constitutions and a high level of autonomy. That was the sort of argument put forward by the NP. However, this did not mean that there were no arguments within the NP about the reality of that demand. In my view, a federal system with a high level of autonomy can only work if the financial resources are available. In the case of South Africa, the argument has always been that only a province like Gauteng, that has the financial resources, would be able to take care of itself within a federal state. The other provinces, however, will always be dependent on the support from national government. These were some of the arguments put forward during the negotiations. I think that within a federal state, there will always be an argument about the level of devolution of powers from the state to the provinces.

The reality was that we had recognised that South Africa was geographically a vast country, but we had to find a way to accommodate the diversity in the country by means of ensuring geographical authority and power to the provinces.

We started the debate in relation to how much power needed to be devolved; the competencies needed by the provinces; and the type of tax or revenue provisions to be included in the Constitution. In the end, we ended up with a compromise coming from both sides, which resulted in the creation of a state with both unitary and federal concepts. The compromise thus led to the creation of the provincial system with a devolution of powers, although we do not refer to it as a federal system. We did what was

in the best interest of the country at the time and in my view, the system is working.

We had to create new systems of governance for the provinces and mechanisms to guide their interaction with the national government. We had no prior experience in terms of doing this and what helped us greatly was the lessons we learnt from other countries.

The necessity for co-operative governance

My view is that the system of co-operative governance constitutes a fundamental part of the solution to our government system. For instance, when I was the Minister of Constitutional Affairs, we had to work out these new systems of governance. With regard to improving intergovernmental relations, MECs and Ministers would meet jointly to work out what needed to be done and so on. I cannot imagine what the situation would have been like if we did not have such a system of co-operation between national and provincial governments. I think that wisdom propelled us. In my view, the system of co-operative governance, while it might be necessary to improve it in some respects, is working for the country. We must accept that provinces have different requirements. The requirements of the Free State, Gauteng and Eastern Cape provinces are surely different, but through a co-operative structure, we can combine and prioritise their needs and address them accordingly.

The most important question we must ask ourselves is are the provinces sufficiently empowered to execute their responsibilities?



I am asking this question due to the lack of social services in health, education and so forth. I do talk to MECs from time to time and therefore have a sense of what their many constraints and challenges are. This is an area that needs to be looked at further. In the past 20 years much has changed. We have new challenges, especially with regard to the provision of services, more specifically in public health and public education.

Additional disagreements and tensions experienced during the negotiations

With regard to the period leading to the drafting of the Interim Constitution, the biggest tension that we had to address at that stage came about because of the motion brought by the National Party and other parties.

a shift took place, and our revised proposal focused on individual rights for all on an equal basis, without any reference being made to minority or majority rights or race.

Thus, the only rights protected in the Constitution are individual rights as citizens of the country. This is appropriately captured in the Preamble to the Constitution, which says: "... South Africa belongs to all who live in it, united in our diversity." This is how we were able to address the tensions that had developed around this matter.

Specific incidences that stand out from the negotiations

Negotiations with respect to the Interim Constitution were more tense than the negotiations on the final Constitution, as we started from scratch with regard to the former. We

Undoubtedly a key moment that stands out for me was the Boipatong massacre of June 1992 and what followed.

Madiba called off the negotiations after the Boipatong massacre. He argued that they could not continue to negotiate with an untrustworthy and unreliable government, which was responsible for the massacre of so many people. The massacre occurred about two and a half years after the negotiations had started. It was like everything had completely collapsed and the question was: where do we go from here? Eventually we put it together again gradually, until we had the final agreement.

The other key moment that stands out for me was the assassination of Chris Hani, by a white immigrant. This had a major impact on the negotiations.

and in so doing, were able to gain substantial experience in drafting the final Constitution.

That is why we can confidently say that our Constitution is the best in the world because we borrowed from different Constitutions of the world.

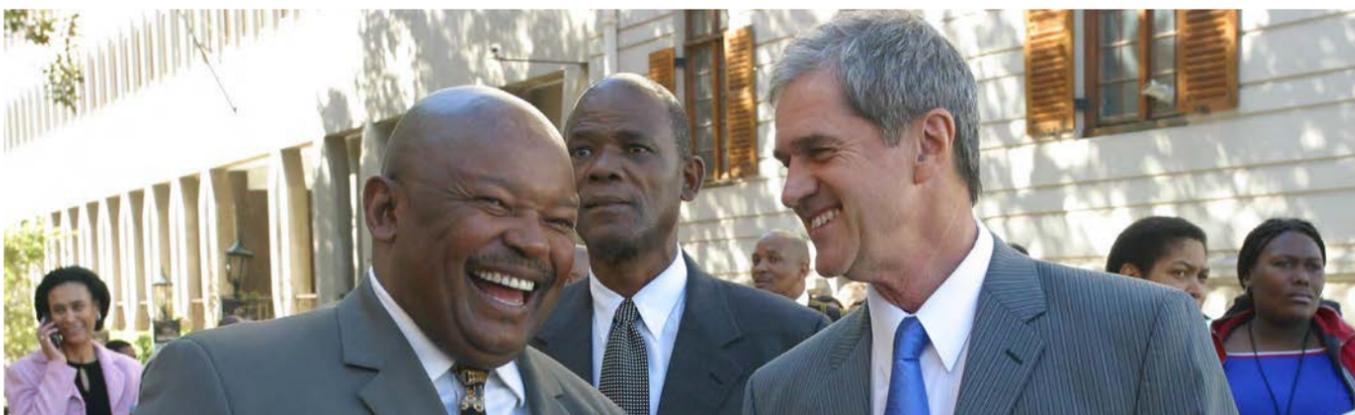
Public engagement in the Constitution-making process

Part of the work of the Constitutional Assembly was to undertake public engagement and consultations. We held rallies every weekend around the country. All the political parties represented in the Constitutional Assembly went out together to conduct these public engagements/hearings. We used these occasions to explain to citizens what the drafting of the Constitution entailed in to ensure that before they made their comments, they understood the process. In addition, the public had opportunities to make written submissions as well. The number of written submissions received could amount to more than two million.

People had an opportunity to make their points of view clear. Thus, there was no need for a referendum on the Constitution at the end of the process. People felt that their points of view were taken into consideration in the drafting process of the Constitution. They also felt that their representatives in the Constitutional Assembly did what was expected from them. I can confidently state that the Constitution-making process allowed for genuine public participation.

Key lessons drawn from the Constitution-making process

In my view, three principles helped us to achieve success in the Constitution-making process. The first one was the inclusive approach, which we had adopted in both the Interim and the final Constitutions. Madiba led us in the process of inclusiveness. He would say: "bring them all to the table, small and big parties." Some political parties, particularly the homeland-based ones, could not even prove their existence, but if they claimed their existence, Madiba would say: "bring them, let them participate in the Constitution-making process." The Constitution-making process was not only inclusive in terms of the number of political parties participating, but we also accommodated people's thinking



We came to the negotiations with a strong group rights or minority rights proposal, which we wanted to be provided for in the Interim Constitution. Many of the proposals that we drafted in the initial phases of the negotiations were all aimed at that. The ANC, however, was strongly in favour of a one-person-one-vote system from the beginning. This created a lot of tension, and we only reached an agreement on this matter through the record of understanding.

While our initial focus was on safeguarding group/minority rights,

had lots of talks about talks, and then we had talks about negotiations. Once we had made progress, there was a breakdown in the negotiations, and we had to start again. Anyone who says today that it was easy for us to find the solutions to the matters being negotiated, because either the whites gave in or Madiba gave in, have no idea what they are talking about. In fact, I have lost count of the many times we were on the edge of breaking up the talks with the possibility of moving towards a civil war situation in the country.

At the time of his assassination, Hani was probably the most popular person in the country after Madiba. This incident had a devastating effect on the talks but somehow we managed to pick up the pieces and moved forward with the negotiations. These two experiences will remain with me forever.

While working in the Constitutional Assembly, and with many of the tensions behind us, we were able to get down to the real business of writing the Constitution in a profound way. We undertook several overseas visits to learn from other countries,

“The first round of negotiations in the first two years focused on how to stop the violence taking place in the country and how to persuade the ANC to renounce its armed struggle. However, at the time, there was a great deal of anger and violence, which created big problems.”

as well. We allowed for differences in terms of views that were integrated into the process in order to build a real inclusive approach. I think this was one of the key success factors in the Constitution-making process.

The second principle was that we took ownership of the Constitution-making process. My observations and experiences with regard to what is happening in other countries, is that they depend more on outside mediators to help them to resolve their problems.

In our case, we did it ourselves. Even when we had breakdowns in the negotiations, we would look each other in the eye and say: "what do we do now? How do we get out of this?" In the end, Cyril and I developed for ourselves a line that said: these are not problems that we cannot resolve. The power of these words should never be underestimated. We took responsibility for the process and did not rely on someone else to do it for us. Thus, ownership of the problem, ownership of the way in which we were going to resolve it

and even the way we structured the negotiation process, were all part of that ownership agreement. Equally important was that we took ownership of the outcome – the destiny.

The third principle was the development of trust between the negotiating parties. Madiba always said: "you negotiate with your enemy and not your friend because you expect your friend to be on your side." That remains a true statement. How did we develop that trust from the enemy position? We started to trust each other. When you trust somebody, it does not mean that you agree with that person all the time. You might have a difference of opinion, but you trust where it comes from and its intention. Clearly, that element of trust was a key factor between us. It helped us to accept and value each other's integrity and to find solutions in the best interest of the country.

What we should have done differently

I think we should have started the negotiations earlier, at least five years

earlier. Some would say 100 years earlier, which is also true.

Within the context of my own personal experience, I would say that we were ready to start the negotiations process in 1985, producing the required results a bit earlier and in the process saving South Africa a lot of tensions, violence and blood.

If you look at the whole period of apartheid, the worst period was between 1985 and 1990. There was such a high level of divisions that started to grow between black and white people and had we started negotiations earlier, that could have been avoided.

What future Parliaments and generations should do to strengthen and deepen our democracy?

The one thing that helped us to overcome the challenges and difficulties that we experienced prior to the transition, from the time Madiba was released right through to his retirement from the Presidency, was

the fact that we had a strong centre in this country. This strong centre kept things together. We had this strong centre during the negotiations period and beyond.

The individuals who formed part of the strong centre were people who played their roles, be it in civil society, in the church or in business. This strong centre had one thing in common: to make South Africa great, and to make South Africa successful. That is what I desire to have today. The pieces, however, are scattered now. They are all over the place. The centre does not hold any more. Somehow, we have to unify it again. However, that does not mean that we are all in one block. We still have our differences, but we need leadership from all sides again, from civil society, the church, business, politics and elsewhere. We have to come together again and say: we are a strong centre that can take South Africa forward. This is not a one man's task. It was not Madiba alone who formed the centre which we had. There were many other people, and that is what we are lacking at the moment. 🙏

Dr Naledi Pandor - The NCOP as a unique model



Dr Naledi Pandor has served as Member of the National Assembly since 1994.

During the debate of the Constitutional Assembly on the adoption of the final Constitution (11 October 1996) Mr S J De Beer referred to the historic achievements of the Constitutional Assembly as follows: 'When we ask ourselves what has been achieved, we may note the following: South Africa has created a home grown product, which was achieved, in all senses, by the people, for the people?'

His words are most appropriate for this brief reflection on our own home-

grown product of Theme Committee 3, the National Council of Provinces (NCOP). There are many similarities between the founding documents of the United States of America, Canada and South Africa.

This is related to these countries' history of the right for peace and human security, as well as the need to develop legal frameworks that would advance redress of centuries of oppression and inequality for persons who were denied equal rights.

The approach of the ANC to the deliberations of Theme Committee 3 was to pursue the creation of a united South Africa that would be different from the Balkanised, unequal apartheid South Africa.

The section of the Constitution that cogently articulates how the writers of our Constitution imagined our future nation is Chapter 3 of the



Constitution. Chapter 3 cements cooperative

governance as the glue that will hold the nation together. Its essence is reflected in the governance and legislative arrangement of nine provinces and nine legislatures. In advancing the objective of cooperative governance and inclusion in national decision-making, Theme Committee 3 developed the National Council of Provinces (NCOP) as a transformed, radical departure from the old colonial upper House of Parliament, the Senate.

It is important to pause here to recall that the powers that each sphere of government exercises, are set out in schedules or annexures in the Constitution. Schedule 4 sets out powers that are concurrently exercised by national and provincial governments, while Schedule 5 contains exclusive provincial competencies.

These different allocations required truly imaginative institutional models that would enhance co-operation rather than cause conflicts in the exercise of power in governance.

The resultant institution in Parliament

was two chambers with distinct yet complementary mandates, the National Assembly and the NCOP. The NCOP was created by our Constitution drafters with the intention of establishing a House of Parliament that would uniquely bring together public representatives from national, provincial, and local levels of government.

The drafters of the chapter on Parliament were fully alert to the need to think of a totally new way of approaching parliamentary and participatory democracy in South Africa. Departing from the closed, secretive character of the apartheid Parliament, they decided that they would craft a model institution that would strengthen inclusion and open the democratic process to all the people. The NCOP model included participation by all spheres of government and created the basis for lawmaking to be more than a process in Cape Town.

The composition of the NCOP cements the art of inclusive democratic practice. It draws together national, provincial and local government representatives without blurring the distinctiveness of each sphere. Each province has ten delegates. Provincial legislatures each nominate six permanent delegates and four rotating delegates who are



sent to present specific mandates from their provinces. Beyond these unique elements, organised local government can also nominate ten rotating nonpermanent delegates to the House to deliberate on matters that affect local government.

Beyond these features, the institution was allowed to be distinctly unusual in the way decisions are taken. The members of the House are part of a

provincial delegation representing the views of their province and not merely those of their political party. Voting is thus not done solely according to party affiliation. Delegations vote on national legislation as a provincial bloc. Room does exist for party votes, particularly when deciding on legislation that is an exclusively national competence, such as justice or international relations. 🗳️

“The NCOP is the only place in which one sees and hears the full representation of all spheres of governance.”



Mr Enver Surty – Human dignity as pre-emptive value

When the Union of South Africa was constituted and established in 1910, it comprised four provinces, namely the Cape Province, Transvaal, the Orange Free State and Natal.

The Union represented the culmination of Anglo-Boer wars and a political settlement that sought to promote unity and cohesion among the minority white colonisers.

Among the preconditions for creating the Union of South Africa was the division of the legislative, executive and judicial authority among three of the four provinces.

Cape Town (in the former Cape Province) was allocated the seat of Parliament, the legislative arm of government. Bloemfontein (in the former Orange Free State) was the seat of the highest court, the Appeal Court, representing the judicial arm, and Pretoria (in the former Transvaal) was

the executive and administrative seat of the state.

These were decisions made by the minority white colonisers, who had systematically created a state of their own and dispossessed 87% of black people of more than 85% of their land through stealth and forced removals. These and other actions denied black people, as indigenous and native citizens of South Africa, their fundamental right to respect for their human dignity.

In 1994 South Africa became a Constitutional state, committed to creating a non-racial, non-sexist, democratic and united South Africa in which the Constitution became the supreme law of the land. On 10 December 1996, Nelson Mandela promulgated the Constitution of 1996 into law and the Bill of Rights, enshrined in the Constitution, became the cornerstone of the newly created democracy; the executive, legislative and judicial powers were bound by the Bill of Rights in the execution of their respective responsibilities.

The state had to respect, protect, promote and fulfil the rights set out in the Bill of Rights. Prior to 1994, the sovereignty of the State vested in

Parliament where laws were passed to oppress, repress and suppress the vast majority of people. Our sovereignty is now vested in the Constitution as the supreme law of the land. The different arms of government remained unchanged in the new 1996 democratic dispensation, but a Constitutional Court was established and later became the apex court in the country.

Significantly, it was established in Johannesburg on Johannesburg Hill (now called Constitution Hill), in the womb of the prison where political prisoners had been incarcerated, tortured and detained in terms of very repressive security legislation of the eighties.

It was indeed ironic that the seat of judicial power, which would serve as the custodian of the Constitution, including the Bill of Rights, emerged from the dungeons and bowels of despair of incarcerated political prisoners and was transformed into the highest court of the land as guarantor of our human dignity and freedom.

In Cape Town, Parliament is nestled among some old buildings which include an imposing church, all of

which are monuments and heritage sites. It sits at the foot of the majestic Table Mountain, a renowned world heritage site. Within the precincts of Parliament stand three significant buildings, each with a different façade, representing the architectural era or epoch during which they were constructed. The epochs are also represented in the chambers within.

On the southern part of the precinct stood the first legislature in South Africa. After 1994 this became home to the Senate and its successor, the National Council of Provinces. Senators represented both their mandated provincial interests and party political interests in the most interesting way. Its members were elected by their respective provincial legislatures to represent them in the second Chamber of Parliament, the Senate. It housed many committee rooms, among which was a rustic chamber with red leather-bound seats used for plenary sessions.

The Senate, with its tall columns and wide concrete steps cascading down from the balcony, is linked to what was the “Volksraad” or Old Assembly. This was the chamber where the most repressive laws that violated people’s dignity were passed.

Blacks were denied freedom of movement, expression and assembly, and their cultural and linguistic rights were violated, all of which showed a lack of respect for the dignity of black people.

The chamber of the “Volksraad” or National Assembly was very similar to the chambers of the United Kingdom under the Westminster system. The rows of benches on either side of the elevated Speaker’s seat were made up of green, leather-bound wooden benches replicating those in the House of Commons in England. Opponents faced one another, and this layout was an invitation to the kind of vibrant, robust debates that occur in the House of Commons in England. Since 1994 the chamber has been used as a caucus facility of the ruling party.

Near the entrance to the Old Assembly was an open double-volume hall with beautifully crafted ceilings. It served as a reception area for members to socialise and converse during the adjournment of proceedings of the house, now referred to as the Old Assembly.

To its left, tucked in the corner, is a passage which takes one to two offices. Beyond the two offices is a huge office presently known as the office of the Chief Whip. This is a powerful parliamentary office and this member is responsible for the discipline of all members of the ruling party, for the organisation and order of the programme in plenary, and for the well-being of the members of the ruling party.



These offices were once used by the Heads of State of the National Party including BJ Vorster and PW Botha. In a sense it continues to represent

the heartbeat of the ruling party. This large and expansive office had huge windows draped with long flowing floral curtains, approximately five metres in length. The solid oak desk was huge with matching side tables and neatly upholstered, matching antique designer chairs, placed in a gentle arc in front of the table. Opposite the table and between the entrance to the office and the hall, was a huge, glass-encased, solid imbuia bookcase wrapped around the corner from ceiling to floor. The voluminous bookcase was filled with red and green leather-bound Hansards, a record of parliamentary proceedings of more than six decades, and a variety of books relating to Parliament, its history, rules, guides and text books, in Afrikaans and English, among others. In front of and near the huge bookcase stood around wooden table with clawed feet and six comfortable upholstered chairs with arm rests. These were intended for small meetings with the office bearer.

The office had an interleading door to the left of the desk which led to a massive round table conference room. This round table had 20 comfortable high-backed cushioned chairs, draped in soft beige fabric. Each chair had wheels for mobility. On the northern side of the room was a chair with a slightly higher back and arm rests. It was clear that it was designated for the chairperson. The walls had recessed alcoves with wooden frames, two metres high and one metre wide. There were more than 12 such frames. Quite interestingly, when the ANC celebrated its centenary in 2012, the portraits of its 12 presidents fitted neatly into the alcoves.

The room is fully soundproof and, quite understandably, became the meeting place where the most sensitive political discussions or arguments occurred.

The adjoining building, more modern in appearance, with beautiful marbles and a modern entrance hall, is where the National Assembly is located. Imposing and beautiful, it has a huge chamber which accommodates 400 directly elected members of the National Assembly and during joint sittings included the 90 members of the Senate. It is in this chamber that the National Assembly held its plenary sessions and where the Constitutional Assembly held its debates.

The Constitutional Assembly comprised

490 members. Its task was to consider and adopt a Constitution within two years of 27 April 1994. This was agreed on by all political parties. The final Constitution, once adopted in the Constitutional Assembly, had to be certified by the Constitutional Court as having complied with the Constitutional principles set out in the Interim Constitution. Everybody was interested in the work of

“Opponents faced one another, and this layout was an invitation to the kind of vibrant, robust debates that occur in the House of Commons in England.”

the Constitutional Assembly, the Management Committee and the Theme Committee that had been set up.

The Constitutional Assembly was chaired by Cyril Ramaphosa, who was also the Secretary General of the ANC. He cut his political teeth as General Secretary of the National Union of Mineworkers (NUM), the strongest component of COSATU, which represented the vast majority of workers in all sectors – mining, health, education and mines.

Ramaphosa is a qualified lawyer and highly skilled negotiator, skills that he acquired as General Secretary of the NUM, where he had to negotiate with highly paid HR managers of the mining sectors and lawyers bent on protecting the interest of the white monopoly capital of Anglo-American and other mining entities. Extremely eloquent, he spoke in clear, measured tones and without a trace of anger or emotion.

He played a big role as skilled negotiator in the CODESA I and II process, where he, Valli Moosa and Roelf Meyer were regarded as the channel through which contentious issues would be processed, through negotiations with the cadres of other political parties.

He was highly regarded for his integrity, humility and the important

soft skills that were critical and necessary to navigate through the complex phase of negotiating the Interim Constitution.

His values would serve as a beacon for the new Constitutional dispensation. The Interim Constitution served as an important milestone in the roadmap of the new democratic political dispensation on of our country.

Cyril’s attributes of patience, perseverance, self-control, and an analytical mind, and his ability to unpack complex issues and distil the essence of the argument in clear and understandable terms, drew parties closer. He could achieve this because he could identify areas of broad agreement and constantly suggest alternatives to contested or contentious areas.

Yet, in addition, people often forget the importance of having a sense of humour, as it is a critical tool to reduce tension and create a light atmosphere that is conducive to conducting tough negotiations. Cyril frequently used his good sense of humour as an instrument to reduce tension during debate and to provide an easy gateway to resolving disputes.

During the period 1994 to 1996, institutionally the process of negotiations took place at three levels: at the level of Theme Committees, which were inclusive and included all parties, at the second level of the Management Committee, where senior members of political parties would consider and adopt the reports of the Theme Committees, and then the Plenary at the third level, where the Constitutional Assembly would debate, consider and adopt the reports of the Management Committee. The ANC also established a secretariat comprising senior members of the National

Executive Committee (NEC), who were members of Parliament, designated to oversee the Constitution-making process and the negotiations of the ANC from the various

Theme Committees. This mechanism included the key negotiators of the various themes or chapters of the Constitution. I had, over time, been assigned the responsibility to serve in the secretariat on behalf of Theme Committee 4.

The secretariat would meet regularly, usually twice a week, to consider the reports before they went to the Management Committee. It would also consider any amendments that may have been initiated in the Management Committee. The meeting would be held in the Conference Room of the Office of the Chief Whip, occupied at that time by Cyril Ramaphosa. This venue was the locus of political authority among members of the ruling party in Parliament.

As the finalisation of the Constitution was a priority and given its strategic importance and the scope of its

Committee 4, first as observer, then as full member and finally as negotiator. Theme Committee 4 was responsible for the Chapter on Fundamental Rights. The responsibility of drafting the submissions was assigned to me by Naledi Pandor, the chairperson of the ANC study group. I was thus compelled to research widely and be conversant with the International Bill of Rights, the Declaration of the Rights of the Child, the African Charter on Human and Peoples' Rights and Obligations, domestic Constitutions of countries such as Germany, Canada, India, Uganda, the African Claims document and, most importantly, the Freedom Charter. It was an extraordinary learning experience.

It was agreed that we should try to follow language used in the United Nations declaration of Human Rights as closely as possible so that we could make use of the invaluable jurisprudence that had evolved over decades.

The Interim Constitution had provided a useful framework to deal with civil and political rights, but had not incorporated any socio-

that the perspective of the ANC was based on egalitarianism, always seeking rights that included but clearly went beyond the individual. They noted that their approach had a strong social, community and humanitarian dimension which was largely influenced by the African concept of ubuntu in terms of which you acquire your being through others – I am because you are. The NP and the DP, on the other hand promoted and favoured the values of libertarianism that sought to promote individual rights and freedom in a laissez faire environment with minimal interference by the state. Because of this ideological conflict, the values of "equality" and "freedom" were frequently juxtaposed.

We had made significant progress on the rights, except for the labour clause and education clause, both of which remained contentious. We had agreed to attend to the preamble after the adoption by the Constitutional Assembly of all or most of the rights. Discussions on the preamble of the Bill of Rights had already commenced, and broad agreement was reached on the Bill of Rights as the cornerstone of our democracy, its binding effect and the limitation provisions. It was suggested that the values of equality and freedom should be reaffirmed as they were the values that informed the Interim Constitution but we still sought an opportunity to include human dignity as a pre-eminent and overarching value.

On a Wednesday in March 1996 at about 7:30, after a hard day's work, I went to visit Cyril Ramaphosa as we were to discuss progress on the outstanding issues of the Bill of Rights.

Except for his private secretary, Donné Nicol, who always allowed me free and easy access to Mr Ramaphosa, the neighbouring offices were empty. I was told that Ramaphosa was in the company of the Minister of Justice, Dullah Omar, and I could join them.

Dullah Omar wore a grey striped three-piece suit with a red tie. He was sitting three seats away from Cyril Ramaphosa. They appeared to be engaged in informal banter and by their posture it was clear that they were both very relaxed.

I had indicated to them that we were about to conclude the preamble. We had already made the intended change

making the Bill of Rights binding on the executive, the legislature and the judiciary, whereas the Interim Constitution had bound only the executive and the legislature to the Bill of Rights. They were happy with this addition.

When I raised the issue of values, Dullah suggested the possibility of introducing "human dignity" as a value in the Bill of Rights.

Dullah was much older than both of us. He was an astute and disciplined member of the ANC and a very experienced and competent lawyer, who possessed strong analytical skills.

Dullah was a gem to the comrades involved in the political struggle, as he would, without hesitation, religiously defend all comrades who were either detained or charged for political activities. He was principled and to his own financial prejudice, spend time and energy on what sometimes was protracted litigation, frequently without remuneration.

He had assisted many families in their visits to the political prisoners detained on Robben Island, among whom were Nelson Mandela, Ahmed Kathrada and Walter Sisulu. In addition, as a practicing attorney, he had provided articles to scores of aspiring black attorneys, who would otherwise not have been articulated by the many white attorneys in the city.

The apartheid agents tried to poison him, and he was always vulnerable to attack and threats of arrest by them. This notwithstanding, he continues with the struggle for our freedom and liberation, using the law as an instrument to procure the release and acquittal of political prisoners.

In addition to being a human rights lawyer and a founding member of the National Democratic Lawyers Association, he served as a lawyer for the vast community of Blacks, Coloureds and Indians.

As a practicing lawyer, he understood how demeaning it was when people's dignity was violated based on race. He represented scores of clients affected by the Group Areas Act, who were displaced, and clients who were detained incommunicado for expressing their belief in a free, democratic and non-racial society. He



Mr Enver Surty served on several committees during the negotiations as well as the Constitutional Assembly.

application, it was decided that Cyril Ramaphosa would occupy the traditional office of the Chief Whip, as these offices were most centrally located and had all the amenities in their immediate vicinity.

This also made him and his office accessible to all members of the Constitutional Assembly and the personnel of Parliament.

The ANC assigned me to Theme

economic rights. The key values that underpinned the chapter on Fundamental Human Rights in the Interim Constitution were equality and freedom, and in the limitation clause South Africa was described as an open democracy based on "equality" and "freedom".

Respected political analysts such as Halton Cheadle, Firoz Cachalia and Hugh Corder correctly pointed out

understood how black lawyers were discriminated against and were never given the opportunity to represent organs of State. There were very few, if any, white corporates in the private sector willing to give opportunities to black lawyers – this was an affront to their dignity and self-worth. He understood how the denial of access to justice amounted to the denial of the inherent dignity that each person should enjoy. In practice and in life, he had first-hand experience of how the dignity of blacks was trampled in the apartheid state.

Dullah had been involved in CODESA I and II with Cyril and understood the contestation between the ANC's egalitarian ideology and opposition to the libertarian perspective of the NP and DP.

Cyril had also experienced first-hand how thousands of workers were exploited in the mining industry. He knew how their dignity was violated through exploitation and unfair labour practices, where they toiled without compassion deep in the bowels of the earth, in often unsafe and unhealthy environments, without receiving fair or adequate remuneration. He was aware of the plight of the mainly migrant workers, who were compelled to live in unhealthy and overcrowded single quarter hostels, where their families were deprived the privilege of staying with them.

Respect for human dignity or human worth hardly had a place in the mining industry, and monopoly capital placed profit way above respect for human dignity and human life. As a young boy, Ramaphosa also experienced the plight of black farm workers and the poor quality of education offered to the African child and the limited access to institutions of higher learning if you were black – even if you passed with distinction.

Being a facilitator of the negotiations in CODESA I and II, he understood how equality was juxtaposed with freedom, and was aware of the arguments against incorporating socio-economic rights.

He expressed his views succinctly as did Dullah and asked: "Now what do you think, Comrade Enver?"

I was delighted. We had ensured that when we dealt with the final Constitution, we confirmed the right

to respect for human dignity. When we submitted the ANC's proposal regarding the right to respect for human dignity, we ensured that we added the word "inherent" to "dignity", to clearly indicate the self-worth and self-respect imminent in each human being. I had advised that it would best serve as an overarching value over all rights. It would also be included in the limitation clause and the interpretation clause and in so doing permeate all rights.

I also stated that Albert Camus, the philosopher, correctly pointed out in his seminal work, *The Rebel*, that the common element between oppressor



and oppressed, master and servant, is their dignity. The concept became the basis for his existentialist humanism. Jean-Paul Sartre also recognised this in his famous essay "Existentialism is a Humanism". In my opinion, however, none of the philosophers matched Immanuel Kant, who formulated a principle expressing respect for dignity that would echo through the ages, into South Africa's Constitutional Court.

We had learnt from our successful endeavour to incorporate socio-economic rights that the understanding of the National Party and the Democratic Party, in relation to their perspective of freedom, was parochial and narrow. All three of us present in Ramaphosa's office that day believed human dignity permeates all rights and should serve as an overarching and foundational value in interpreting rights, especially when rights were contested.

I endorsed their views and elaborated

on my philosophical and legal reasons for supporting the proposal. Each of us were lawyers, each of us in varying degrees witnessed and experienced the denigration and dehumanising impact of apartheid on the dignity of blacks. Our life experiences, professional perspective and commitment to social justice ensured that there was absolute convergence. There was no debate, only an endorsement of the proposal.

Armed with this authority of our proposal that human dignity be included in the preamble, the founding provision, limitation and interpretation clauses, we confidently submitted

Nelson Mandela sought to give expression to the centrality of human dignity by demonstrating that, without the freedom from want and hunger, the dignity of the citizens would not be realised. In so doing, he gave content and meaning to the notion of human dignity and ensured that it straddled civil, political and socio-economic rights.

It is something we carried with us as we dealt with the right to equality and other socio-economic rights addressing the real needs of our citizens. We are grateful that we could give expression to this very powerful statement by including human dignity as a pre-

through the structures of the ruling party and then through the Theme Committee, Management Committee and Constitutional Assembly. It would have been difficult for opposition parties to argue against its inclusion, given its centrality in the struggle for our freedom and equality. Given our painful history, it was self-evident that human dignity was a fundamental value that permeates all rights in the interpretation of rights. There may be continued judicial speculation about how, why and when it was included.

The reality is that the Dullah's proposal in an informal conversation that human dignity be included as a value had, for me at least, opened the door for us to embed this pre-eminent value in our Bill of Rights. Cyril has always understood the full scope, nature and impact of its inclusion and authorised it, leaving it to us to push through the political formalities.

In his opening address to Parliament,

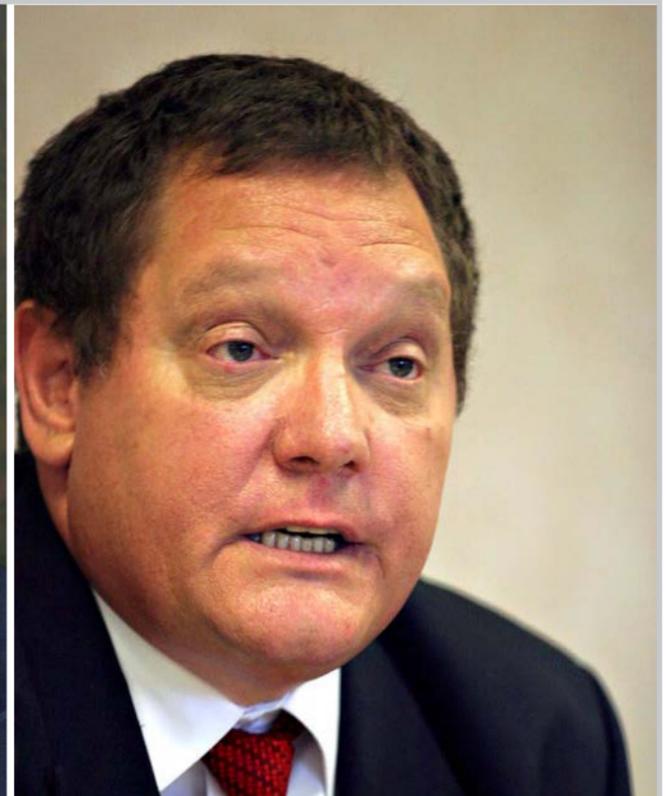
eminent value and right in our 1996 Constitution.

Given Dullah's age, experience, sacrifice and wisdom, we could rightly argue that he was the founding father of the Constitutional value of human dignity, as he had proffered the value to be included in the Bill of Rights at a time when it could easily have been omitted in the race against time to finalise the Constitution within the prescribed two-year period.

In recognising this, the legitimate social, political, economic, philosophical and legal arguments remain valid and support the rational and basis for its inclusion; it may have appeared to be fortuitous but it certainly was not! 🌟



Adv Johannes De Lange was the former Deputy Minister of Justice and Constitutional Development from 2004 until 2009.



Adv Johannes de Lange - transforming the judiciary in a constitutional dispensation

On 4 February 1997, the Constitution of the Republic of South Africa of 1996 (the Constitution or colloquially known as the final Constitution) came into operation. The passing of the Constitution could be regarded as one of the final building blocks arising from what we term our negotiated settlement.

It connotes a peace pact between the forces of oppression and the oppressed, existing prior to 1994 in apartheid South Africa and contains the minimum or maximum compromises, depending on your perspective, upon which both sides were prepared to build a new Constitutional and legal dispensation for our country. It is no exaggeration to say that our Constitution is the most progressive, arguably, ever to be passed in the world, uniquely containing, inter alia, first, second and third generation rights which are justiciable, as well as a Bill of Rights which has vertical and horizontal applicability.

I refrain specifically from referring to our Constitution as a liberal Constitution, as some revisionists do, as it is the antithesis of such a characterisation.

Our progressive Constitution symbolises the birth of the South African democratic, developmental state founded on the supremacy of the Constitution and the rule of law.

But it should never be forgotten that we are building our state from the ruins and depravity of the apartheid Constitutional and legal dispensation, which left our country with a legacy of

unparalleled and devastating divisions, depravity, discrimination, racism, intolerance, inequality and poverty, and causing deeply ingrained, cyclical and structural poverty.

As was observed by former Justice Kate O'Regan: "The deep inequalities that persist are visible reminders of the effects of apartheid and colonialism. Until these scars are healed, the vision of the Constitution will not have been achieved. There is a great burden on government, in particular, to address this historic legacy."

But, as the National Planning Commission also reminds us: "Though divisions of race and class remain, with inequality more often than not reflecting these lines of division, law, government policy and broad social consensus are seeking to remove these inequalities, rather than entrench them as was the case in the apartheid era."

Much has been said and written about our negotiated settlement, which culminated in the passing of our progressive Constitution. However, before proceeding to a discussion of the transformation of the judicial system, I want to deal with one pivotal

aspect, which has gone completely unnoticed and in respect of which nothing or very little has been said or written.

The big compromise

What was the most fundamental or greatest compromise that the liberation movements made during the negotiation process? In my view, it was agreeing to the principle of legal continuity (or legal certainty). As a country transitions from one Constitutional or legal order to a different Constitutional or legal order, broadly speaking, this can take place by way of: a revolutionary seizure of power (usually violently), causing a complete Constitutional or legal break between the old and new dispensations (examples are the French and Russian Revolutions), or by way of a negotiated settlement, which is a seamless, peaceful, Constitutional transition by maintaining legal continuity, as one moves from the old dispensation into the new dispensation.

During our negotiated settlement, we opted for the latter option. This compromise with far-reaching consequences, today still, was

contained in an innocuous clause in the Interim Constitution of 1993 (IC). Clause 229 reads: "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue being in force in such area, subject to any repeal or amendment of such laws by a competent authority." A similarly worded legal continuity clause replaced this clause and was included in Item 2 of Schedule 6 of the Constitution, providing: "2(1) All law that was in force when the new Constitution took effect, continues in force, subject to: (a) any amendment or repeal; and (b) consistency with the new Constitution. (2) Old order legislation that continues in force....."

I am of the view that if the liberation movements did not make this central or pivotal legal continuity compromise, there would never have been a negotiated settlement in our country. The odd thing is that this compromise mostly was an unspoken, underlying assumption of the negotiated settlement. I do not recall any formal public discussions between the negotiating parties on the acceptance of this principle of legal continuity and especially the consequences of

the acceptance of this principle. Yet, it is this legal principle which allowed us to transition, in a legally orderly and seamless fashion, from the old apartheid Constitutional dispensation based on parliamentary sovereignty, to our new Constitutional dispensation based on Constitutional supremacy.

The reason for the lack of formal public discussion seems obvious. From the perspective of the apartheid forces, including the minority white government, they would never have continued with the negotiation process if the liberation movements insisted that all legal actions taken under the apartheid Constitutional and legal dispensation was to be regarded as illegal by the new dispensation.

In any case, logically and practically, it would have been impossible to undo centuries of decisions of our colonialist masters and successive white minority governments. From the perspective of the liberation forces, this was an extremely sensitive matter.

The international community, through the UN, declared by way of a resolution that apartheid was a crime against humanity. The oppressed of South Africa, including the liberation movements, wholeheartedly endorsed this international declaration. If the principle of legal continuity were to be accepted and applied to the South African transitional process, it meant that the oppressed people of South Africa, as a pre-condition for their participation in the negotiation process, had to upfront accept that all actions of the apartheid government, which legally took place within the parameters of the prevailing apartheid Constitutional and legal dispensation, were being accepted to have been performed legally.

So, although apartheid was declared a crime against humanity, the oppressed would negotiate with the apartheid government on the basis that actions performed legally under the apartheid Constitutional and legal dispensation would be regarded as being legal by the new Constitutional and legal dispensation. Thus, although the acceptance of the principle of legal continuity was huge and the pivotal compromise made by the liberation movements, it was neither formally discussed during the negotiation process nor in public. Since then, I am not aware of any writings or



discussions on the matter.

Without going into much detail, one of the consequences of the acceptance of this principle was discussed in the ANC at the highest level, during the passing of the legislation creating the Truth and Reconciliation Commission (TRC). In the process of passing the legislation, it became clear that this compromise of the acceptance of the principle of legal continuity meant that in the context of the TRC Act, cadres of the liberation movement, especially the armed wings, would be treated differently from the apartheid forces, for the exact same event or action. I give an example.

If a detachment of the SAP, inside South Africa, or of the SADF, inside or outside the country, was involved in a "firefight"/armed skirmish, with a detachment of an armed wing of a liberation movement, the legal consequences for the personnel of the two forces involved in the armed conflict, was different. All the actions of the apartheid forces, if legally performed within the parameters of the prevailing apartheid laws, was regarded as legal, whereas all

actions of the liberation forces in this same skirmish would be regarded as illegal, in terms of the apartheid legal dispensation at the time of the skirmish. This meant that South Africans involved in the same skirmish, in terms of the TRC Act, had to respond differently to legally protect themselves. The actions of the liberation forces in this skirmish being regarded as illegal, meant they would always have to apply for amnesty in terms of the TRC Act, whereas the actions of the apartheid forces were regarded as legal, which meant they did not have to apply for amnesty. Only apartheid operatives who acted illegally or outside the apartheid laws, would have to apply for amnesty.

The ANC went ahead and passed the TRC Act, fully realising the irony and incongruity of the situation. They did so, appreciating that this incongruity or unequal treatment did not arise from the wording of the TRC Act, but from the fundamental compromise made at the outset of the negotiation process of accepting the principle of legal continuity. Thereby accepting the apartheid laws at the time when this armed skirmish took place, as being legal, and being projected as legal into

our future Constitutional dispensation.

I trust that this one example alone illustrates just how fundamental and huge this compromise was, and how detrimentally it affected previously oppressed South Africans, whilst the oppressors experienced no negative consequences in this instance. It is because of this compromise that, if you go through the records of the TRC, you will find that all persons within the liberation movements who had transgressed apartheid laws, had to apply for amnesty, whereas it was only personnel of the apartheid forces, who had acted outside of the legality of the apartheid laws, who had to apply for amnesty (like Eugene de Kock), whilst those who were regarded as having acted within the parameters of the apartheid laws did not have to apply for amnesty.

Above, I have only dealt with one example of how our acceptance of the principle of legal continuity, as we transitioned from the odious apartheid Constitutional dispensation into our new Constitutional democracy, has had adverse, unequal and detrimental consequences in and for

the previously oppressed in our new dispensation. There are a myriad other examples possibly in the area of property ownership, expropriation of land, "Bantu education" and so on. Hopefully, others will start analysing and write of the challenges and consequences of the principle of legal continuity in their own fields of endeavour, in an attempt to better and more dispassionately understand the challenges faced during our transition from an oppressive, minority regime to a democracy.

Impact of principle of legal continuity on transformation of the judicial system

Let me finally turn to a discussion of how the principle of legal continuity impacted, or still impacts, on the transformation (or lack thereof in some instances) of some aspects of our judicial system under our new Constitutional dispensation. Chapter 8 of our Constitution defines and institutionalises the judicial system of South Africa in our new Constitutional dispensation. Our judicial system consists of two distinct branches. Firstly, there is our single, hierarchical system of courts, which are presided over by the Judiciary and Magistracy (consisting of judges and magistrates). Secondly, there is our single, national prosecuting authority, with the power to institute criminal proceedings on behalf of the state. I only deal here with the first branch containing our system of courts, as Mohseen Moosa deals with the second branch containing our prosecuting authority elsewhere in this book.

Over and above these generalised Constitutional clauses regulating legal continuity, in the aforementioned clause 229 of the Interim Constitution (IC) and the subsequent Item 2 of Schedule 6 of the Constitution, as we transitioned from apartheid to democracy, a host of other clauses (clauses 230-250 of the IC and subsequent similar items in schedule 6 of the Constitution), provide for specific Constitutional clauses (savings clauses, rationalisation clauses, transitional arrangements) regulating legal continuity in a specific area of governance or government.

In this regard, I turn my attention to items 16 - 18 of Schedule 6 of the Constitution, which specifically regulate legal continuity in the judicial system (in the stead or in place of clauses 241 and 242 in the IC). Item

16(1) specifically provides in respect of our system of courts, that "Every Court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of legislation applicable to that office, subject to (a) any amendment or repeal; and (b) consistency with the new Constitution."

The sum total of these various (general and specific) Constitutional clauses ensuring legal continuity of the apartheid judicial system, through the IC and into our Constitution, is that at the commencement of our new Constitutional dispensation in 1994, it completely and fully preserved the apartheid Constitutional and legal system and apartheid body of laws, and the apartheid court system and the judicial officers who served in it. So, on the 28th of April 1994, the first day of our new Constitutional dispensation, the legal system and body of laws, and the system of courts and the judicial officers serving those courts, were exactly the same as those who served the apartheid dispensation, the previous day.

Judicial officers (and administrative staff) of the apartheid court system remain unchanged

Thus, at the dawn of, and the commencement of our Constitutional democracy, in respect of the racial and gender breakdown of judges, only two recently appointed judges were black, and one judge was a white woman, and all the other judges were white males. In the magistracy, the situation was different, with a larger portion being black, drawn especially from the courts of the previous "Homelands and so-called independent states", but with women being under-represented. One did not have to be a genius, at the time, to realise that it would obviously take decades, in a Constitutionally rational manner within a Constitutional democracy, to phase out the predominantly white male judges from the judiciary and to change the demographics of the judiciary to be racially and gender representative.

This was so specifically considering, inter alia, the following realities and factors:

(1) The appointment of judges under

our new Constitutional dispensation was largely made by the preserve of the Judicial Service Commission (JSC) (made up of 23 individuals from the judiciary, legislative and executive government structures, the legal fraternity and civil society), which recommends the appointment of judges only when a vacancy arises or new posts were or are created. So new judicial appointments were and are still strongly and mainly driven by natural attrition.

(2) The removal procedure for judges being arduous, with multiple role-players and only on the recommendation of the JSC, based on one of three specific grounds of incapacity, gross incompetence, or gross misconduct.

(3) No Constitutional provision was made for white male judges (like civil servants) to take packages and vacate their posts and in this manner to make place for more representative appointments; and

(4) The working conditions and salary packages of judges being relatively

attractive and with section 176(3) of the Constitution providing that the salaries, allowances and benefits of judges may not be reduced.

[After] 23 years [of] democracy, we have a pool of 252 judges, with the racial breakdown looking very different. We have 166 (66%) black judges, 115 (69%) being African, 27 (16%) coloured and 24 (15%) Indian, and 86 (34%) are white judges. So, today, two thirds of our judges are black, of which more than two thirds of those being African.

The gender representivity of judges is less impressive, but shows some improvement, with 91 (36%) or just over one third of judges being women. The transformation of our magistracy from a perspective of representivity, seems even more successful than that of our judiciary, especially in relation to gender. Of the 1 670 Magistrates today, 1 096 (66%) are black with 754 (69%) being African, 164 (15%) coloured and 178 (16%) Indian and 574 (34%) are white. In respect of gender, 921 (55%) are male and 749 (45%) females. These statistics do not include the 176



entry level Magistrates, who were recently appointed, of which 92 (52%) were black females and 69 (39%) black males. Meaning, of the recent entry level appointees, 161 (91%) are black and 15 (9%) being white, and at least 50% are females.

serious questions and challenges with the methodology of appointment of the JSC.

System of courts under apartheid remained unchanged

In 1994, at the dawn of the



The JSC has over the years developed two broad criteria that a judge should comply with before being recommended for appointment. The candidate should, firstly, comply with representivity criteria, especially of race and gender, and secondly, should be imbued with the values of our Constitutional dispensation, as prescribed by the Constitution. It will be fair to say that the criteria of representivity have over the last 23 years played the predominant role in the appointment of judges, arguably rightly so, at the expense of the second criteria. Although it will be near impossible to quantify any unintended consequences, one can only trust that in the future, as our representivity demographic normalises even further, the second criteria play a more balanced and balancing role in the appointment of new judges for our Constitutional dispensation. When eminent and respected senior and experienced lawyers, who were part of the struggle against apartheid and are imbued by the value system of our Constitutional democracy, like Prof Halton Cheadle and Adv Geoff Budlender, S.C., after various attempts, are not appointed as judges, it raises

commencement of our IC, the legal philosophy of supremacy of our Constitution, the upholding of the rule of law and the most comprehensive, progressive Bill of Rights in the world, was introduced for the first time into our Constitutional and legal jurisprudence. Yet, the present system of courts and the judiciary which would be expected to become the interpreters and implementers

of this new Constitutional and legal philosophy, were overwhelmingly (99%) white and male, and mainly steeped, trained, and experienced in the apartheid Constitutional and legal system, which was premised on a model of parliamentary supremacy. Bluntly put, the apartheid judiciary was very unrepresentative of the demographics of our society, especially in respect of race, gender and class; lacked legitimacy as the previous interpreters and implementers of the apartheid legal system were retained; was limited in its capacity to draw on the sense of justice of all communities and marginalised interest groups in our society; was limited in its qualifications, experience, capacity and training to interpret and implement the new Constitutional jurisprudence; and as individuals and lawyers were mostly not imbued with the new value system underpinning the new Constitutional jurisprudence.

On the other hand, the apartheid judiciary could not wholly or partially be removed or be partially removed through a sifting process similar to that undertaken in Germany with judges who served the Nazi or the East German regimes, because of the compromise of acceptance of the principle of legal certainty, which meant that option was off the table. Furthermore, logically, and practically, the removal option wholly or partially was not really feasible, as there in any case was not enough experienced and qualified persons/lawyers outside of the apartheid judiciary to fill all these positions as judicial officers in the new judiciary.

So, what was to be done to solve this conundrum? It was agreed in our

negotiated settlement that a new court should be established, as part of the present apartheid court system, which would be representative of our nation, especially including eminent and competent lawyers who were precluded from being judges or chose not to be judges under apartheid.

The compromise reached was to create a specialist Constitutional Court, in a hybrid continental form, like Germany, as an apex court on all Constitutional matters. The Constitutional Court was clothed with exclusive jurisdiction in some Constitutional matters or with jurisdiction to hear Constitutional matters by way of direct access or on appeal or by referral, with the court having the exclusive power to decide if a matter is Constitutional or not. As part of the compromise, it was decided that the apartheid apex court (the Appellate Division of the Supreme Court) would remain as the apex court in non-Constitutional matters and the Chief Justice of the Appellate Division would remain as the head of the Judiciary as a whole. In later years, the Constitutional Court became the apex court in respect of all matters and the President of the Constitutional Court became the Chief Justice.

The Constitutional Court was established in 1994, as the final arbiter of the interpretation of the Constitution and remains one of the key institutions of our Constitutional democracy. The JSC was tasked with recommending fit and proper persons to become Constitutional Court judges, to the President for appointment, on condition that at least one third of appointees were already judges. The first Constitutional Court bench appointed was a veritable list of eminent and respected lawyers,

“But it should never be forgotten that we are building our state from the ruins and depravity of the apartheid Constitutional and legal dispensation, which left our country with a legacy of unparalleled and devastating divisions, depravity, discrimination, racism, intolerance, inequality and poverty, and causing deeply ingrained, cyclical and structural poverty.”

like, Justices Pius Langa, Dikgang Moseneke, Ismail Mahomed, Albie Sachs, Kate O'Regan, Yvonne Mokgoro, Richard Goldstone, Laurie Ackerman, and others, with Justice Arthur Chaskalson as first President of the Constitutional Court. The Constitutional Court has become an internationally respected court.

Apartheid legal system, body of laws and precedents remained unchanged

On the first day of becoming a democracy, with the adoption of the IC, the body of apartheid law in existence the previous day, became the first body of laws of our new democracy. This apartheid body of

our democracy were still from the apartheid era, infused and imbued their courts and judgments with the normative value system underpinning our Constitutional democracy? The short and over-simplified answer is that results are mixed. The term Constitutionalisation is used to connote the process whereby the courts, since 1995, have evaluated and interpreted the apartheid laws inherited and the new laws passed under our new democratic dispensation through the prism of the normative value system of our progressive Constitution.

Some commentators, like Faiek Davids, observe that although the stifling effect and limitations

reported matters. The chilling effect is that commercial matters and some private law matters have been privatised outside of the reach of the Constitutionalisation through the prism of the normative value system underpinning our Constitution.

This privatisation of cases outside such Constitutionalisation, mostly involving big business and certain private law matters, is done by removing these matters from our courts (and therefore from scrutiny in terms of our Constitutional normative values), through contractual arrangements and arbitration proceedings or other forms of dispute resolution mechanisms, allowing such matters being heard in

equitable legal outcomes are pivotal to the rationale for, and legitimacy of, our negotiated settlement.

Many legal commentators posit that the judiciary's legal positivistic approach pre-1994 has shaped the common law, often to separate the law from morality, equity, equality, and justice, through performing of "mechanical and phonographic" functions.

The result is that the common law, over many decades under apartheid, has developed a systemic insularity and become myopic. Moving our common law, especially in the sphere of commercial and private law, towards



Adv Johannes (Johny) de Lange served on the Constitutional Assembly during negotiations for a new Constitution.

law would remain the law of our new Constitutional democracy until amended or repealed by the relevant legislature or if declared inconsistent with the Constitution by our courts. Although the various legislatures in our country have amended or repealed most of these laws over a period of more than twenty-three years, many of these laws remained on the statute books deep into our democracy, and a few still exist.

But, how and to what extent has our new judiciary, who deep into

clause 229 of the IC (and later Items 2(1) and 16(1) of Schedule 6 of the Constitution) may have had an impact on the development of the Constitutionalisation of certain aspects of the apartheid legal system, especially parts of the area of private law and the challenges to the horizontal application of the Bill of Rights, it is difficult to quantify, and difficult to argue it has not happened. A study of our reported judgments, since the advent of democracy, of commercial matters and certain private law matters, seemingly show that there are no or few such

foreign jurisdictions or if heard locally, it takes place outside of our court system.

I make a few tentative remarks relating to the potential limits and challenges in respect of some of our judges and lawyers to think outside an inherited, apartheid, positivistic, common law paradigm, in certain areas of our body of laws. Considering our legacy of an oppressive and authoritarian, white minority, apartheid regime, coupled with the reality of huge socio-economic disparities and inequalities based on racial lines, ensuring consistent, sustainable,

a "self-consciously South African law", which is "purified of its purifications" that serves an emergent nation, is crucially dependent on a judiciary that can appreciate that our common law was profoundly shaped and tainted by judges interpreting the law mostly through a particular apartheid prism/modality. This has caused some commentators to opine that at the time of our negotiated settlement it may not have fully dawned on the people's representatives that a political dividend unused is not recoverable or that our courts are not as well suited

for the Constitutionalisation of our common law as some proponents then proclaimed.

Commentators point to ample legal precedent indicating our new judiciary's insensitivity to understand the socio-economic context of our transitional jurisprudence, being testimony of our judiciary's "bittersweet heritage" and questionable "ideological neutrality", as one commentator puts it. As commentators, like Faiek Davids, point out, our sphere of private law is replete with examples of our judiciary favouring legal consistency, applying, or preferring libertarian private law constructs over, or instead of, normative values, like "human dignity, achievement of equality and advancement of human rights and freedoms" and the advancement and achievement of "non-racialism and non-sexism", underpinning our Constitutional democracy. This approach is incongruent with our Constitutional normative value framework.

The prevailing view is that legal positivism cannot sustain "a substantive vision of the law." Transitional jurisprudence, fully embracing and applying the progressive normative values of our Constitutional democracy, in all areas of our body of laws, provide a broader set of considerations that allow the adjudicator to look backwards/ into the past, but also forward/into the future.

South Africa, for many decades now, has been identified as one of the countries with the biggest gap between the rich and the poor. Since the advent of democracy, despite numerous opportunities opening up for the previously disadvantaged and marginalised, and with the creation of a rapidly increasing and substantial black middle and lower middle class, this gap between the rich and poor has remained constant, perhaps even increasing. In this South African context, of the existence of huge socio-economic inequalities and disparities, the failure by the judiciary to apply new judicial tools based on the normative values underpinning our Constitution, to curb unfairness and injustice and promote equality and equity, by balancing competing interests through the prism of the normative values of our new Constitution, will continue to entrench and deepen inequality in our society.

The Constitution permits the horizontal application of our Bill of Rights and obliges the development of the common law in line with our Constitutional normative value system. The Constitutional obligation for the judiciary to develop the common law is not discretionary and is part of a general obligation to assess its deficiencies and develop it in accordance with the letter and spirit of the Bill of Rights and the normative value system of our Constitution.

Our transition to a society governed by the rule of law and a progressive Bill of Rights, and by promoting and applying the normative values of "human dignity, achievement of equality and advancement of human rights and freedoms" and the advancement and achievement of "non-racialism and non-sexism" (section 1(a) of Constitution), requires that all laws are interpreted through the prism of the Bill of Rights and our Constitutional normative values. At times, even in established democracies like Britain, judges have been charged with applying narrow judicial ideologies, for example, by favouring market individualism over consumer welfare.

Our present judiciary may at this historic juncture be facing the same or similar charge and challenge. Considering our South African apartheid common law heritage and concomitant judicial mindset, the Constitutionalisation of all our sources of law and all spheres of our body of laws requires renewed and greater energy and urgency, "to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights and freedoms."

Conclusion

In conclusion, within the limitations and challenges of our transition from apartheid to democracy, especially the transformation of the judicial system, including our system of courts, judicial officers which serve it and the body of laws, as outlined above, it is fair to say has met with mixed success. The structures of our courts have remained very similar as under the previous apartheid dispensation, except for the very important innovation of creating the Constitutional Court as our apex court, to establish interpretations and precedents which are binding on and a guide to all our courts. Notwithstanding the huge strides made in the last 23 years, with the

achievement of a more transformed judiciary and magistracy from the perspective of racial representivity, although less so in respect of gender representivity, it does appear that the Constitutionalisation of the apartheid commercial law and aspects of private law have been muted at best and are facing challenges and limitations.

So, since the advent of democracy, a large body of law and precedent has been developed by our courts through Constitutionalisation in the area of public law; whereas certain areas of commercial and private law remain mainly untouched from similar Constitutionalisation, by privatising such matters outside the court system or, possibly, by being limited or stifled by the narrow, positivistic, common law training and experiences of our lawyers and judges.

The approach of our courts within a Constitutional state is teleological and value-driven and fundamentally differ from the approach of the apartheid courts. We arguably then need a new breed of progressive lawyers and judges to serve our Constitutional and developmental State. Judges (and lawyers) who are first and foremost imbued by the value system underpinning our Constitutional democracy; who are independent minded; who do not get caught up in the populist mood of the moment and seemingly taking sides in political battles raging in society; and who truly can act without fear, favour, prejudice or bias, as enjoined by the Constitution, no matter who the parties are appearing before them.

We need to vigorously engage with

our law schools and associations of lawyers, to ensure that we produce this new breed of progressive lawyers, which our Constitutional democracy needs, and which creates the pool from which our judges and magistrates are drawn. As a society, we also need to devise new and innovative ways to ensure that lawyers, who have the potential to become this new breed of progressive judges or magistrates, are exposed to the kind of work and experience that would equip them for this task. In turn, the legal education of our judges and magistrates by the Judicial Education Institute needs to be deepened, intensified and accelerated, to allow judges and magistrates to play this progressive and empowering role in our Constitutional democracy, imbued by the normative value system underpinning our progressive Constitution. Lastly, we need to find new and innovative tools to reverse this process of privatisation of certain areas of our private law outside the Constitutionalisation process through the prism of our Constitutional normative value system.

Much has been achieved with the transformation of our judicial system in the last 23 years, but much more needs to be done before our judicial system is truly and fully reflective of the Constitutional normative values of "human dignity, achievement of (substantive) equality and the advancement (and achievement of three generations) of human rights and freedoms" and the advancement and achievement of "non-racialism and non-sexism", which form the cornerstone of our new Constitutional dispensation. 🌱

"Much has been achieved with the transformation of our judicial system in the last 23 years, but much more needs to be done before our judicial system is truly and fully reflective of the Constitutional..."



Ms Sheila Camerer - Section 178 of the Constitution and the Judicial Services Commission

Pre-democracy, South Africa's judges were appointed by the President on the advice of the Justice Minister in the proverbial smoke-filled rooms and behind closed doors.

Once the Constitutional negotiations started, all political parties agreed that the need for an independent judiciary and a transparent and credible process for appointing judges was of paramount importance. Thus, our Judicial Service Commission (JSC) was first crafted at CODESA, and the multi-party talks at the so-called World Trade Centre in Kempton Park. Here are some earlier reflections on this process by Sheila Camerer.

On a recent visit to Cape Town, Jeff Minear, currently Counsel to the Chief Justice of the United States Supreme Court, John Roberts, in discussion with Professor Penny Andrews, Dean of UCT's Law School, opined that the process of appointing judges in the United Kingdom and South Africa through an independent Judicial Commission was perhaps preferable and more independent than the highly politicised system which prevails in the United States.

I felt compelled to point out to him that South Africa got there way ahead of the Brits. Pre-democracy, South

Africa's judges were appointed by the President on the advice of the Justice Minister in the proverbial smoke-filled rooms and behind closed doors. Once the Constitutional negotiations started, all political parties agreed that the need for an independent judiciary and a transparent and credible process for appointing judges was of paramount importance. Thus, our Judicial Service Commission (JSC) was first crafted at CODESA, and the multi-party talks at the so-called World Trade Centre in Kempton Park and reflected in section 105 of the Interim Constitution of 1993, fleshed out in the Judicial Service Commission Act No 9 of 1994 – one of the first pieces of legislation worked on by the Justice Portfolio Committee of the new democratically elected Parliament – and then further refined in section 178 of the final Constitution of 1996.

While I was Deputy Minister of Justice in 1993 and in the Government of National Unity of President Nelson Mandela in 1996, and served in between while on the Justice Portfolio Committee in the new democratic Parliament, I was very involved

with the drafting of the provisions governing the Judiciary and the appointment of judges throughout this long process.

Unlike ours, the British body, which is modelled on our own but does not have quite the same degree of transparency of its processes, was established more than 10 years later in 2005/6 as part of PM Tony Blair's law reform initiative. Our Commission owes quite a bit to the Canadian model, but it is home-grown on the whole.

As I recall, there were no major disputes between the political party representatives negotiating Chapter 7 of the Interim Constitution of 1993, and particularly section 105 thereof, or Chapter 8 of the Constitution, 1996 (section 178). As both Sections make clear, the intention was to have a mix of representation: from the legal profession (two attorneys appointed by the side bar, two advocates appointed by the Bar); a legal academic; judges, including the Chief Justice, the President of the Supreme Court of Appeal, a representative of the Judges President of the Provinces, as well as politicians. These include the Minister of Justice, six members of the National Assembly of whom at least half must come from the ranks of the Opposition, and four from the National Council of Provinces (NCOP), who command

the support of at least six of the nine provinces. Before the era of President Zuma, the NCOP always elected two out of the four from opposition ranks in the spirit of inclusivity on this august body, but sadly this is no longer the case. In addition, the President can nominate four people with the necessary qualifications. It is probably true that this provision was included with President Nelson Mandela in



mind. His outstanding nominations have included the likes of Adv George Bizos SC and Adv Kgomo Mokoena SC. Sadly, Madiba is gone, and former President Zuma's current appointees do not command the same respect.

While drafting other parts of both the Interim and final Constitutions

was a fraught process, the provisions governing the Judiciary and their appointment had a fairly smooth passage. Part of the reason was that the opposition parties felt they would be properly represented as they were given an out-of-proportion number of delegates from Parliament on the JSC.

The importance and interest of these sections in our Constitution on our Judiciary and their manner of appointment, is not so much how they came into being, but how magnificently they have been implemented and the extraordinarily successful result: which is that South Africa's Judiciary is respected nationally and internationally as impeccably

to the Interim Constitution would be carried over and embedded in the final Constitution, there was an urgency to have it established. For this reason, the Judicial Service Commission Act (No 9 of 1994) was one of the first pieces of legislation passed in the new democratic era.

I am proud to have served on the JSC as one of three members of opposition parties of the National Assembly's delegation of six, for 10 years from 1999 to 2009, when I left Parliament to become South Africa's Ambassador in Bulgaria. While there is sniping from the opposition and generally some criticism of the JSC and its processes from time to time, it is my view that

appointments, where the President only has the option to appoint or reject the candidate put forward by the JSC.

In this case, President Zuma appointed the most junior candidate of the four on the list offered by the JSC, Judge Mogoeng Mogoeng, who had undergone a three-hour grilling during his public interview by the JSC. Controversially, he overlooked the Deputy Chief Justice, Dikgang Moseneke, about which there was much criticism. However, Judge Mogoeng Mogoeng has proved all his critics wrong and is roundly applauded for his stances and judgments, particularly by his colleagues on the Constitutional Court.

Of all the various legal personalities on the JSC, it is the late Arthur Chaskalson, the first President of the Constitutional Court (from 1994 to 2001) and Chief Justice (from 2001 to 2005), and who served on the JSC during all that time; who casted the longest shadow.

(It should be noted that the Interim Constitution provided for a Chief Justice as well as a President of the Constitutional Court, but the final Constitution combined the roles, providing that the Chief Justice presides over both the Constitutional Court and the JSC.)

To address the complete imbalance on the bench, which in 1994 was dominated by white men, Arthur Chaskalson helped the JSC to develop informal guidelines for appointments.

This was of course also Constitutionally mandated in terms of section 174 (2) of the final Constitution which enjoined the JSC as follows: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed".

The guidelines were roughly along the following lines: If all things are equal between candidates, then the person of colour should be appointed and similarly, if all things are equal between a male and a female candidate, the latter should be appointed regardless of colour. During my 10 years on the JSC great strides were made in ensuring that the bench became more reflective of the South African Nation. However, the female gender component still lags behind. This is not only the fault of the JSC, but also that of the legal profession as a whole, as proportionately fewer

female candidates are nominated for appointment. This is perhaps the only area where the JSC has not excelled.

Arthur Chaskalson steered the development and establishment of the standards, the climate and the culture that have operated on the JSC and in terms of which the JSC has judged the candidates before it. In that role alone he has left an indelible footprint and an inestimable legacy. In this he was wonderfully assisted by the likes of Advocates Bizos and Moroka and Judge Bernard Ngoepe, who for many years represented the Judges President on the JSC.

Having seen it in action and been part of it for 10 years, in my view South Africa's Constitutional system of a transparent and independent process for the appointment of judges is a world leader. It has justifiably been held up internationally as an example to be emulated. A public interview, which quite often turns into an interrogation, by 23 skilled and motivated questioners is a great leveller. Big egos are quickly pricked; those less than frank in their responses in the questionnaire which each candidate has to complete prior to the interview, or in their replies to questions during the interview itself, are quickly found out and it very soon becomes apparent which candidates are "fit and proper" and which should be preferred.

Some NGOs have agitated that deliberations in the JSC after the interviews, to decide on successful candidates, which take place in camera, away from public scrutiny, should be recorded and made public. I am not convinced. Politicians like to grandstand, and there are plenty of them from a range of political parties on the JSC. In my experience the frank discussions between Commissioners behind closed doors very often prevented unsuitable people from being appointed.

Like the Bill of Rights (Chapter 2 of our Constitution), South Africa's Constitutional provisions regarding the appointment of judges (in Chapter 8), are rightly regarded as highlights in our internationally respected Constitution. Unlike the Bill of Rights, where exercising the rights on paper has not always proven easy or even possible, implementation of that portion of Chapter 8 providing for the appointment of our Judiciary has been an extraordinary success. 🍀



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independent. They are regarded as a shining light in our Constitutional firmament.

For instance, of late it has become apparent that our Constitutional Court and, to a high degree, the Supreme Court of Appeal and the High Courts, are all that have stood between the citizens of our country and the chaos that a rogue state could inflict on them.

Because the Constitutional Court had an immediate role vis-à-vis the new democratic Parliament sitting as a Constitutional Assembly, in that it was to oversee and ensure that the 34 Constitutional principles attached

the Commission and its methods for appointing judges have held up brilliantly for the first 23 years of democracy.

The JSC has almost always proved its critics wrong. A case in point is the current Chief Justice. When it comes to the Chief Justice and the Judges of the Constitutional Court, the candidates for appointment have to appear like all other candidates for their interviews before the JSC in open forum, with the public and the media able to attend. The interviews may be recorded and filmed by the media. In the case of these appointments, the President must be offered four candidates to choose from, unlike for other judicial

Prof Cathy Albertyn - Chapter Nine institutions as product of a uniquely South African process and Constitution



Prof Cathy Albertyn is a Professor of Law at the University of the Witwatersrand

In late 1994, I was invited to participate in the Constitutional Assembly as a Technical Expert to Theme Committee 6, subcommittee 3, dealing with what were then 'Chapter 8 institutions': The Public Protector, the Human Rights Commission and the Commission on Gender Equality.

As all three institutions were established by the Interim Constitution, our broad mandate was to investigate whether to retain them in the final Constitution and, if so, in what form (in broad or detailed terms), what their core functions should be, and how we could avoid overlap in their roles and functions.

As Technical Experts, we were supposed to provide comparative research on similar institutions in other countries, to summarise political party and public submissions, to assist with public hearings and generally to provide technical/legal advice to the Theme Committee. Although the political decisions were taken elsewhere, the work of the Technical Experts and Theme Committees was crucial in identifying the core issues and points of agreement, or disagreement, and in providing the space for discussion to build consensus across parties. Mindful of the Constitutional Assembly's commitment

to public participation, the Theme Committees also prepared detailed questions for public engagement and actively sought the views of civil society organisations. Public Hearings for our subcommittee were held in April 1995.

Of course, we all wore many hats in those days. Apart from work on the subcommittee, I was actively involved in lobbying for women's rights and gender equality in the 1996 Constitution more broadly, as well as engaging early law reform processes in Parliament, such as the Choice on Termination of Pregnancy Act.

I was also pregnant with my first child, and only able to make the weekly trip from Johannesburg to Cape Town until mid-June, after which I was technically not allowed to fly. Happily, the Constitutional Assembly ran a tight ship, and we were finished by that time.

The Human Rights Commission and the Public Protector

The Interim Constitution had made fairly detailed provision for the Public Protector (PP) and the Human Rights Commission (HRC).

In both instances, the new Parliament had wasted little time in developing legislation to get both institutions up and running as soon as possible. Indeed, the Human Rights Commission Act of 1994, and the Public Protector Act of 1994, were completed and signed by President Mandela in November 1994.

This meant that the structure, powers and functions of each institution had been subject to considerable debate within Parliament and by civil society, prior to the start of the Constitutional Assembly. This made our work in the subcommittee much easier.

There was no dispute among political parties and civil society organisations that the PP and the HRC should remain in the final Constitution as important institutions of our fledgling democracy. The questions, rather, were how much detail should be included in the Constitution, particularly in terms of their powers and functions, and how could we ensure that there was no overlap between the respective roles of the PP, the HRC and the Commission on Gender Equality (CGE). In rereading the files of documents for the subcommittee, only a few points of debate arise. Some of these are worth mentioning as they reflect the aspirational nature of the Constitutional deliberations, and how we sought to

develop a Constitution that could form the basis for transforming our society.

It was generally agreed that the HRC should be an independent Constitutional body, accountable to Parliament, with only its essential features captured in the Constitution. Legislation would deal with the rest and as noted above, it already had. One significant area of debate was the role that the HRC might play in relation to socio-economic rights. Remember that these rights were not included in the Interim Constitution and there was, at that stage, no consensus about their justiciability and their place in the Final Constitution.

Many of us wanted to see them in the Constitution as a means of ensuring that socio-economic transformation was prioritised. Apart from questions of justiciability by courts, it had been suggested that the HRC should monitor the implementation of socio-economic rights. In the end, socio-economic rights were included as justiciable rights in the final Bill of Rights and section 184(3) of the Constitution specifically mandates the HRC to monitor government progress 'towards the realisation of the rights concerning housing, healthcare, food, water, social security, education, and the environment'.

A second suggestion worth noting

is the idea that the HRC address systemic problems of inequality and human rights violations, over and above the resolution of individual complaints of rights violations. This reflects the dominant view at the time that not much would change in South Africa without addressing the structural underpinnings of apartheid and inequality. This was not explicitly written into the Constitution, but it was believed that the range of powers available to the HRC would always enable such an approach.

The inclusion of the PP in the Constitution was also uncontested. True to the spirit of the Constitutional Assembly, there were fairly detailed discussions about the PP, although no material disagreement emerged. One interesting debate concerned the name: 'Public Protector'. Some submissions suggested that we revert to the more well-known term 'Ombudsman', while others decried the sexist language that this entailed. In the end, the term 'Public Protector', a uniquely South African name for a fairly generic globally recognised institution, remained in place.

One of the overriding concerns of the subcommittee was the relationship between the three institutions. One debate that might be of contemporary interest concerned the role of the HRC and PP in relation to the private sector. It was clear that the PP would address the relationship between the individual and the state, but questions were raised about whether it should have any role in relation to maladministration (and perhaps corruption) in the private sector. It was decided the role of the PP should be limited to the state, and that misconduct and rights violations in the private sector would be left to the HRC, the CGE and the courts. This helped draw a clear line between the PP and other structures.

The Commission on Gender Equality

In contrast to the HRC and PP, there was very little detail on the Commission on Gender Equality (CGE) in the Interim Constitution, beyond the establishment of the Commission in section 119 'to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women'. The paucity of detail on the CGE reflected its rather hasty origins in the Interim Constitution, as part

of a last-minute deal in seeking to resolve the conflict between women and traditional leaders over the application of equality to customary law. This was perhaps also the reason why legislation on the CGE was only discussed and passed in Parliament in 1996, with the Commission on Gender Equality Act of 1996, signed by the President in July 1996.

Despite the mode of its appearance in the Interim Constitution, there had been significant debate within women's movements about the kind of gender structures that might be



necessary in the new democracy. A Gender Commission was certainly part of that debate. For this reason, the discussions in the subcommittee provided an opportunity for women to reclaim the CGE as their own, and to debate its place and role in the wider national machinery.

National machinery – in this sense – meant a co-ordinated set of structures, policies, strategies and programmes, which aim to augment the status of women and promote gender equality. Initial debates about the CGE indicate uncertainty about whether it should be integrated into policy development, strategic planning and monitoring (thus linking up directly with structures in the executive and public administration) or whether it should be more independent (fully 'outside' the state) and only play a role in enforcing rights and monitoring government progress. Remember at this stage – in 1995 – there was no consensus on the shape and form of national machinery in South Africa, and we were seeking to craft a set of structures that would suit our own particular needs. In the end, the Constitution envisages the latter option: emphasising the CGE's powers to 'monitor, investigate,

research, educate, lobby, advise and report on issues concerning gender equality' in section 187(2) of the Constitution.

A second discussion looked at whether the CGE needed to be in the Constitution at all: could it not just be established by legislation? In the end, there was strong support for including the CGE in the Constitution. It was felt that this was an important symbolic commitment to gender equality, and that its entrenchment in the Constitution meant that it would enjoy greater protection and would not be

subject to the political will of the day.

A particularly important debate concerned the relationship between the HRC and CGE. How could we avoid overlap? At the time, it was felt that while some overlap might be inevitable, a specialised CGE could investigate and address the complex and systemic ways in which gender inequality and discrimination manifest themselves, whilst the HRC could take on women's rights violations within their programmes. However, there would be consultation on how this could be achieved in practice.

Chapter Nine institutions: The product of a uniquely South African process and Constitution

There was probably never any doubt that the HRC, PP and CGE would be retained in the Final Constitution. In hindsight, what stands out in the processes of our subcommittee was the manner in which these Constitutional institutions were nevertheless subject to detailed scrutiny, debate and consensus-setting. In preparatory workshops, Theme Committee Meetings and

Public Hearings, each institution was dissected and put back together again. It is in these processes of political party and public engagement that the legitimacy of these institutions, and the Constitution as a whole, was built.

If the subcommittee scrutinised each institution in detail, the Constitutional drafters also worried about their overall place in the Constitution as part and parcel of the core Constitutional machinery established to fulfil the Constitution's mandate. Designated as 'state institutions supporting Constitutional democracy', the HRC,

PP and CGE joined the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Auditor-General; the Electoral Commission and the Independent Authority to Regulate Broadcasting in Chapter 9 of the Constitution. The creation of this multiplicity of independent institutions as a 'fourth branch of government', each with a specific Constitutional mandate to 'respect, protect, promote and fulfil' the rights in the Bill of Rights, is a very South African approach.

They provide multiple avenues for democratic and legal contestation and have binding and effective powers to hold the executive and legislature to account.

Twenty-three years ago, in 1995, we might not have imagined how important their role would be. Today, in the wake of the Public Protector's role in opposing state capture and corruption, we can quietly celebrate the hard work of the Constitutional Assembly in putting together Chapter 9 of the Constitution. 🙏



Ms Brigitte Mabandla was legal advisor to the ANC's legal and constitutional affairs department and was appointed Minister of Justice and Constitutional Affairs in 2004.

Ms Brigitte Mabandla - Equal participation of women & men in decision-making a fundamental right

This paper reflects on the processes towards the Constitutionalisation of women's rights and the current status of women in decision-making.

The Constitutional processes and the entrenchment of women's rights in the Constitution were a result of the dynamic advocacy and activism in society, within the negotiation chambers and Parliament.

Women activists were criss-crossing the country advocating for the cessation of hostilities, promoting peace, and advocating for a democratic and inclusive Constitutional dispensation. The representation of women in decision-making bodies in both the public and private sector is a hard-won right in South Africa. Today, South Africa is a better place for women than it was during the different phases of colonialism and apartheid.

This victory is the result of the tenacious struggle of women from different walks of life, at different historical moments, who came together to agitate and campaign for the promotion and protection of women's human rights. There is a

tome of writings by women on the struggle against apartheid and the status of women during apartheid.

Mindful of the fact that the emancipation of women happens when there is deliberate and purposeful effort to promote women's equality and participation in leadership, the ANC women's section recognised the need to prepare and discuss the situation of women in a post-apartheid South Africa. The 1989 ANC in-house seminar in Lusaka was an important milestone in promoting women's human rights as demonstrated in the following:

"The demand for the protection of women's rights and the promotion of gender equality in a democratic, non-racial and non-sexist South Africa was made unequivocally at an ANC in-house seminar which took place in Lusaka in 1989. The Lusaka seminar formed part of many similar gatherings organised both inside and outside South Africa to discuss Constitutional guidelines."

In January 1990, an important conference on women's advancement was held in Amsterdam, the Malibongwe conference. This seminar and conference would provide the genesis of an intense movement for gender justice. In 1990, the Women's Section of the ANC moved to form a

women's coalition across party lines that would inform the Constitution-making process.

Women and the negotiation process The Period 1991 - 1994

At the onset of negotiations, the ANC challenged the exclusion of women in the process. This resulted in the negotiating parties establishing the Gender Advisory Committee (GAC) in 1992 to ensure that women were fully participant in the CODESA process. The President of the Women's League, Gertrude Shope, reflecting on this matter had the following to say:

"We believe, correctly too, that any government attempting to address the issue of gender oppression, which is deeply entrenched in society and the laws of the country, can succeed only if it addresses the question in consultation with the affected party — especially the victims of triple oppression — African Women.

It is for this reason that we organised a successful protest on the 1 April 1993 at the World Trade Centre in Kempton Park to register our abhorrence at the exclusion of women in the Negotiating Council. As women our task is to penetrate the old domains previously reserved for men by men."

The immediate task of the GAC was to

identify all gender discriminatory laws to be repealed and/or amended. The ANC deployed one of its formidable women, Mavivi Myakayaka Manzini to the GAC. The role of the GAC was also to ensure that all the CODESA working groups include the participation of women in their programmes. For example, the GAC required the CODESA working group on Elections and Political Participation to ensure that women participate freely in political activities. The GAC outlined guidelines in relation to women's access to public facilities and meeting venues; intimidation; freedom of choice with regard to political parties and the opposition; and sexual harassment among others. Notably, the GAC recommended that all CODESA documents must use non-sexist language.

The suggestion did not find favour with many who thought that the question of gender was overstated. Notwithstanding the objection, the GAC recommendation was carried. The influence of the GAC was profound in that it raised awareness and deepened consciousness amongst the negotiators, many of whom would become leaders in the new democratic dispensation.

In their diverse formations women stood together in unity on the matter of women's participation in

the negotiations. Although this was identified as common cause there were disagreements in other policy matters because of ideological differences.

In 1991, the Women's Coalition was formed. An important outcome of the Women's Coalition was the consensus about including women's rights in post-apartheid policy. It was agreed that the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) would be used as a reference document as it would provide a normative basis to enable consensus around Constitutional principles. Article 7 of CEDAW became immediately relevant during the discourse on the inclusion of women in political leadership.

Throughout this period, women's activism was vibrant. Women in their many formations in society were having extensive discussions, which resulted in the development of a Women's Charter. The Charter became an important source in the shaping of Constitutional principles. In addition, the writings of academics and scholars on a gendered approach to Constitution-making, contributed to the framing of both the interim and the final Constitution. Women worked hard in preparing for elections and fielding female candidates for party lists.

The drafting of the Interim Constitution

During the early years of negotiations, South Africa experienced a wave of violence in many parts of the country and in 1992 a well-loved and respected ANC leader, Chris Hani, was assassinated, which resulted in the termination of the first wave of talks and negotiations.

The able and distinguished leader of the ANC, Nelson Rolihlahla Mandela, steered South Africa out of what could have been chaos and more bloodshed by ensuring that ground rules were strengthened for the prevention of violence and the cessation of hostilities. When negotiations resumed there was a determined mood to find consensus on the essential elements of the Constitution. The Negotiating Council was then tasked with delivering the

Interim Constitution within tight timelines. The year 1993 was a busy time for the negotiators.

During the period 5 March to 17 November 1993, key resolutions were adopted to enable the resumption of multi-party negotiations and the drafting of an Interim Constitution. Some of the important resolutions were as follows:

Resolution 2 - 5/6 March 1993 - Resumption of Multi-Party Negotiations

Resolution 8 - 7 May 1993 - Declaration of Intent on the Negotiating Process adopted by the Negotiating Council

Resolution 9 - 18 May 1993 - Intolerance and Assassinations adopted by the Negotiating Council.

These resolutions provided an effective way of building consensus around difficult and complex issues.

During this period consensus was reached for establishing important institutions such as the Independent Electoral Commission and the Demarcation Commission.

In addition, the following priorities were also identified, namely:

- The incorporation of the homelands (TBVC states)
- Establishing mechanisms for the integration of the armed forces

Interim rules for the democratic Parliament and the establishment of the Constitutional Assembly; the drafting of the Constitution was key to the interim arrangements.

Women and the 1994 Elections

Having secured their rightful place in the negotiations, women were buoyant and worked hard to mobilise for women to be included in all the party lists. A seminal conference in this regard was organised by the ANC in Stutterheim in 1993. The conference was attended by representatives of various women's organisations in the country such as the GAC; the Malibongwe Women's National Development Institute, Matla Trust; the Women's National Coalition, COSATU, and the Centre for Applied Legal Studies. There were also participants from outside South Africa.

In her opening speech, the President of the ANC Women's League, Gertrude Shope, had the following to say with regard to women's participation in elections:

"This seminar is a forum to enrich us with skills on election programmes, strategies and mechanisms and how to overcome obstacles that impede participation in these processes and in standing for office. During the next session we will be addressing the

whole elections process. Tomorrow's input on Constitutional options will also help to strengthen our perspectives on this topic".

The conference was privileged to have speakers from Zambia, Uganda, Zimbabwe, Mozambique, Ghana, and Canada who gave inspiring presentations on the role of

women in elections and the Constitution.

As a result of extensive research and political education in preparation for elections,

special mechanisms to include women candidates, such as the application of a quota system, were considered.

The ANC adopted a 30% quota for women representation. The hard work paid off, for the first time in the history of South Africa, a huge number of women graced the benches of Parliament. Four hundred members of Parliament were elected and a hundred and eleven of those were women. The Speaker and Deputy Speaker were women. Female Ministers and Deputy Ministers were appointed.

Women in Parliament

Women in Parliament came to realise that facilities for women in the institution were inadequate, toilets were mainly for men, there were no childcare facilities yet working hours were long. Some women experienced patriarchal chauvinism.

Many women parliamentarians required further education to enable them to be capable lawmakers. Gender education was also important to enable female parliamentarians to advance gender policies for the good of society at large.

The post-election period was an important policy-making time, the final Constitution was to be drafted through the Constitutional Assembly and all elected persons were to participate in the Constitutional Assembly.

Women recognised the need for establishing a platform to deal with gender issues, both immediate (situational) and substantive, that is in connection with policy and laws. Accordingly, a Multi-Party Parliamentary Women's Group was established. The group may not have achieved all its goals because of

"We believe, correctly too, that any government attempting to address the issue of gender oppression, which is deeply entrenched in society and the laws of the country, can succeed only if it addresses the question in consultation with the affected party — especially the victims of triple oppression — African Women."

the dynamics of party politics. It is common practice that a member's loyalty is with the political party to which the member belongs.

There has been consensus around women's empowerment; the campaign for the Women's Charter is one such area. The draft Women's Charter was completed in 1994.

The Constitutional Assembly

The final Constitution was to be drafted by Parliament constituted as the Constitutional Assembly. It must be recalled that over a period of five years to the time of drafting the final Constitution, there had been extensive discussions and research about essential aspects of the Constitution, a



Bill of Rights was one such important area. The question in this regard was whether it should be incorporated in the Constitution and the extension of the rights to be incorporated. It was agreed that Fundamental Rights should include Socio-Economic Rights. Equally important was the challenge of ensuring the definition of 'substantive equality' to be the right that provides de jure equality.

Activist scholars drew attention to American and Canadian jurisprudence in the interpretation of gender-neutral equality clauses of those Constitutions. To avoid the ambiguities experienced in these countries, substantive equality was to be South Africa's choice. The Equality clause in the Bill of Rights is extensive to avoid complications of narrow reading.

The final Constitution came into force in 1996. It is a product of collaboration across party lines, a truly South African product. Restructuring in accordance with the new Constitution and policies had to happen shortly within this period. Transforming the judiciary was one of the immediate tasks of the new government. Apart from the challenge of a fragmented judicial system, the bench was predominantly white males

excluding black women in the main. The lower courts had fewer black males as well and even fewer black women as magistrates.

Transformation of the Judiciary: Inclusivity

The period 1996-2002 was critical in operationalising the Constitution in addressing poverty and inequality, enabling access to justice for the indigent, defining equality, the right to dignity, racism, xenophobia, promotion of equality and enabling access to socio-economic rights.

The first Minister of Justice in 1994, Advocate Dullah Omar, had the unenviable task of rationalising the Department of Justice, and setting norms and standards in accordance with the new dispensation. He discharged his responsibility brilliantly. Dr Maduna, who succeeded him, was to continue the transformation, making the Department more aligned to the letter and spirit of the Constitution. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 and the hosting of the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerances', heightened the

awareness of rights as entrenched in the Constitution. In 2004, there were still fewer black judges in comparison with white justices and there were even fewer women judges. This situation required urgent attention and the Judicial Service Commission was seized with the challenge. Equally, Law Associations had to respond to the challenge. There was some mobilisation required to encourage legal professionals to avail themselves for the bench. With the rationalisation of the courts taking effect and the vacancies opening up in a number of divisions, blacks had to take their place on the bench. The Ministry had to work with the judiciary and the profession to support the drive for inclusivity on the bench. In 2005, the late Chief Justice Pius Langa started a programme for aspirant female judges and, working with the Department, raised awareness about the right of women to serve as judges. Gradually, competent and capable female lawyers availed themselves for the bench.

Today, men and women of distinction lead the judiciary. 🌟

Ms Thandi Modise - Reflections on transforming the armed forces

Thousands of students and young people left South Africa during and after the Soweto student uprising of 1976. I was among those who joined the ANC and uMkhonto weSizwe to fight against the unjust system of apartheid.

Thousands remained and formed the underground structures in the defence of the people and in aid of the freedom fighters who came in and out on operations against the system.

I was born and raised in Vryburg, a small rural town which was in a long-term resistant mode against forced removals and incorporation into the Bantustan called Bophuthatswana. Nearly three days after the killings of students and pupils in Soweto by the police, we as Mafikeng High School students organised a peaceful march to protest. This march was interrupted by police batons and live ammunition. I saw fellow students shot at for simply saying no to Afrikaans as a medium of instruction. We mobilised other students to spread

the protest. I had to go into hiding to evade arrest. I left the country hating to see the continued humiliation of fathers and mothers during the raids. I hated the denigration of African fathers who worked in white women's kitchens simply because they had to earn a living to pay taxes after their land and herds were taken from them. I hated having to make way for whites to pass first in the streets of Vryburg. The killings across the country made me hate apartheid.

I left the country through Botswana and finally arrived in Angola for my military training. I had started in Tanzania, where I was prepared politically to understand the concepts of stability, peace, equality, and democracy. In my stay at the different

military camps of the ANC I went from being a Chief of Supplies, to Section Commander, Medical Officer, and finally a Commander. I had come into the country to do some underground work and was arrested and consequently went on to serve eight years in prison for those activities.

I was among the first members of Parliament after South Africa's first democratic elections in 1994. I was a member of the Portfolio Committee of Defence as well as the joint Standing Committee on Defence, and later became chairperson of both these committees simultaneously.

Nature and Character of the SADF in the Pre-Democratic Era



Ms Thandi Modise was a Member of the National Assembly in 1994 and was appointed as Speaker of the NA in 2019.

The Union Defence Force (UDF) was established in 1912 after the passing of the Defence Act No 13 of 1912. In 1948 the Nationalist Party came into power. The UDF was later renamed the South African Defence Force in 1957 after the 1957 Defence Act No. 44 was passed. The structure of the SADF comprised headquarters and four arms of service namely, the South African Army (SAA); the South African Navy (SAN); the South African Air Force (SAAF); and the South African Medical Services (SAMS). This structure is still in place, except that the South African Medical Services was renamed the South African Medical Health Services (SAMHS) after 1994.

The SADF was white and male-dominated, and it enjoyed a privileged relationship with the Presidency – both in terms of the budget and influence in decision-making. It was not accountable to Parliament and military operations were not open for public scrutiny.

Transformation and Integration

Negotiations preceded the integration processes. Eight different armed forces were integrated into one – the South African National Defence Force (SANDF). These were the SADF which was aligned to the apartheid government, uMkhonto weSizwe (MK) – aligned to the ANC; the Azanian People's Liberation Army (APLA) – aligned to the PAC; the Transkei Defence Force (TDF); the Venda Defence Force; the Bophuthatswana Defence Force; the Ciskei Defence Force, as well as the Inkatha Freedom Party protection units which joined the integration process very late. In essence, this brought together five statutory forces and three non-statutory forces.

The Transitional Executive Council had seven sub-councils, one of which was the sub-council on defence, which established the Joint Military

Co-ordinating Council (JMCC). The JMCC managed all the pre-integration processes and staffing. It was chaired on a rotational basis between General George Meiring (SADF) and General Nyanda (MK) – both chiefs of staff of their forces.

Integration also brought together all the racial and linguistic groups of South Africa for the first time into the military as equal citizens; it brought together different military histories and cultures; cultural and religious beliefs now had to be considered. The MK forces also insisted that their women members not be relegated to health services and communications.

Why was integration necessary?

The country agreed that it needed a defence force. The country had to own this defence force. According to the White Paper on National Defence for RSA, we needed to deliberately bring together former enemies into one national force. This meant that the transformation of the apartheid structures was important because of the history of the forces; the new strategic environment internationally and regionally as well as the new democratic South Africa. We could only build a new country and a unified nation if we deliberately brought all forces under South Africa's new bosses – the People, through Parliament.

Most countries expect their forces to be broadly representative of their population. South Africa was very deliberate to find representivity in terms of race, class, gender, ethnic composition, religion, and even geographic spread. The fact of the matter was that the SADF had had discriminatory policies, including barring women from certain arms of services and mustering. On the other hand, MK women had been trained side-by-side with MK men and therefore could not agree to underrepresentation everywhere in

the defence force or, for that matter, anywhere in any societal position or situation. Transformation was also necessary to bring the defence force under civil supremacy for the first time. If the defence force is not representative of the general population, those not represented may view it as hostile and unfriendly toward them.

In the words of Nelson Mandela in 2003, the transformation of the

The continued use of Afrikaans as a medium of instruction and command and control was intended to disempower many of the non-statutory force members. On realising the danger this placed the country in, the joint standing committee on defence strongly insisted that English be accepted as the operational language of the SANDF. This resulted in an uproar, led mostly by the Old Guard led by General Meiring. The President had



defence force was necessary because we needed “a disciplined defence force, loyal to the Constitution and the new democratic order.” Simply put, we needed to transform and fuse all the different forces into one national defence force; owned, defended, funded and loved by all the people of South Africa.

Challenges Experienced during the Transformation and Integration Processes

Any integration of armed forces of different backgrounds, political affiliations and ideologies, is set to encounter serious challenges, one way or another. Our integration was one of the biggest in Africa (Zimbabwe brought together their three armed forces; Namibia, Mozambique and Zambia all brought together two armed forces).

All integrations have their challenges and South Africa was no exception.

to intervene to calm emotions.

Incidences of racism and arrogance amongst black and white members limited the full participation of the non-statutory forces in the restructuring process, leading to a delay in the integration process as well as the early exit of some. Shootings were also reported in some cases.

It was absorption rather than integration: Many non-statutory force members felt that they were treated as inferior and were expected to just “fall-in” with the old SADF traditions.

Non-statutory forces were forced to undergo training before they could be ranked. The old SADF disciplinary code was used until Parliament insisted on a new code for all members.

Compromises Made Political compromises were made on the size of the SANDF which saw a large number of the non-statutory



force members being demobilised – often with no benefits. Ranks and placements of non-statutory force officers, management and oversight of integration processes during the post-election period, were done with the British Military Armed Forces Advisory and Training Team (BMATT) as arbitrators. Recognition of service for non-statutory forces was not necessarily translated into pension and other benefits.

Successes of the Integration Process

The integration of former statutory and non-statutory forces itself was a huge success for our young democracy. This is echoed by the first Minister of the Department of Defence in a democratic South Africa, Joe Modise: “The



integration of these forces, many of which were once enemies-in-arms, is a powerful and practical demonstration of our country’s commitment to national reconciliation and unity.” The new SANDF was established in line



with the new Constitution’s framework for democratic civil-military relations. According to this framework, the new defence force operates in a non-partisan manner, and it is obliged to perform its functions within the law (see 1996 White Paper on National Defence for South Africa).

Another key success of the transformation and integration of the defence force of South Africa is clearly captured by the 1996 White Paper on National Defence for the Republic of South Africa as follows: “In the new South Africa national security is no longer viewed as a predominantly military and police problem. It has been broadened to incorporate political, economic, social and environmental matters. At the heart of this new approach is a paramount concern with the security of the people of South Africa.”

It is vital to emphasise that the negotiation processes for the transformation and integration of the defence force took place in an atmosphere of relative peace. It was largely for that reason that the armed forces, both statutory and non-statutory were able to resolve their differences and challenges around the negotiating table rather than on the battlefield.

Constitutional changes governing the new Defence Force of South Africa

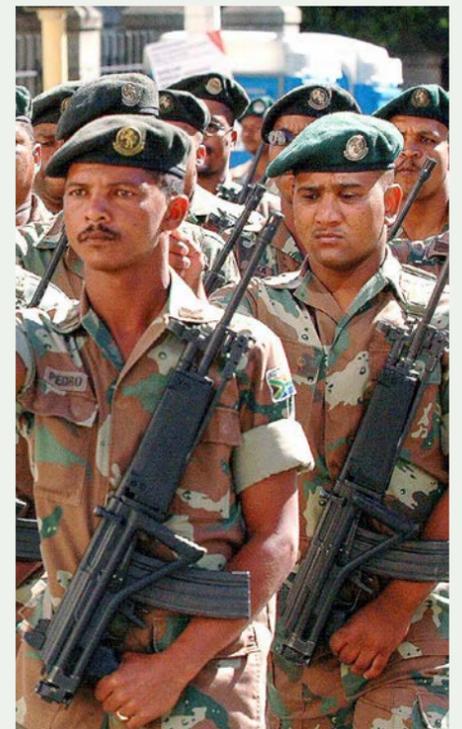
The final Constitution of South Africa made several key changes that sought to govern the work and conduct of the new defence force of South Africa. In terms of Section 198, paragraph (d), “national security is subject to the authority of Parliament and the national executive”. In terms of Section 200, sub-section 1, “the defence force must be structured and managed as a disciplined military force”. Sub-section 2 clarifies the objective of the defence force which is “to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force”.

In terms of Section 201, sub-section 1, “a member of the Cabinet must be responsible for defence”. This simply means that the Minister of Defence is a Cabinet member responsible for defence matters in the country. Section 201, sub-section 1, states very clearly that “the President as head of the national executive is the Commander-in-Chief of the defence force and must appoint the Military Command of the defence force”. Sub-section 2 outlines how such a command should be executed namely: “Command of the defence force must be exercised in accordance with the directions of

the Cabinet member responsible for defence (Minister of Defence), under the authority of the President.”

Some of the key responsibilities of the President are spelt out clearly in the Constitution. In terms of Section 201, sub-section 2 “only the President, as head of the national executive, may authorise the employment of the defence force in co-operation with the police service; in defence of the Republic or in fulfilment of an international obligation”.

Of further importance is Section 201, sub-section 3, which states that the President, when employing the defence force, should inform Parliament promptly and in appropriate detail of such a deployment. This ensures an important oversight role for Parliament and thus adds to a system of checks and balances on executive power. These Constitutional changes are in complete contrast to the lack of accountability that characterised the defence environment during the apartheid era. The integration process and subsequent legislative amendments therefore successfully realigned civil-military relations in a truly democratic context. 🙏



“The new SANDF was established in line with the new Constitution’s framework for democratic civil-military relations.”





OUR SOUTH AFRICA – THE SUN

The sun heals the divisions of the past, improves the quality of life of all South Africans, frees the potential of each person and builds a united and democratic South Africa, taking its rightful place as a sovereign state in the family of nations.



OUR PEOPLE – THE PROTEA LEAVES

Our people, building on the foundation of a democratic and open society, freely elect representatives, acting as a voice of the people and providing a national forum for public consideration of issues.



OUR PARLIAMENT – THE DRUM

The drum calls the people's Parliament, the National Assembly and the National Council of Provinces, to consider national and provincial issues, ensuring government by the people under the Constitution.



OUR CONSTITUTION – THE BOOK

Our Constitution lays the foundation for a democratic and open society based on democratic values, social justice and fundamental human rights. It is the supreme law of our country, and ensures government by the people.