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**SPEECH BY FW DE KLERK
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THE CONSTITUTION, STATE CAPTURE AND THE WAY FORWARD

Twenty-two years ago elected representatives of all the people of South Africa, gathered in Parliament, sitting as a Constituent Assembly, adopted a new Constitution as the supreme law of South Africa.

It is important for us to remind ourselves of their objectives in so-doing. They were:

- to heal the divisions of the past and to build a society based on democratic values, social justice and fundamental human rights;
- to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- to improve the quality of life of all citizens and free the potential of each person; and
- to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

The drafters were fully aware of the need for safeguards to ensure that future governments would abide by the provisions of the Constitution and respect the rights and freedoms that it would enshrine.

- They based the Constitution on the principle that it and the Rule of Law would be supreme and that any law or conduct inconsistent with the Constitution would be invalid.
- They established strong and independent courts to uphold and interpret the Constitution. The courts would be independent and subject only to the Constitution, which they would have to apply impartially without fear, favour or prejudice.
- No person or organ of state would be permitted to interfere with the functioning of the courts.
- They also created special institutions to support the Constitution. These included a Public Protector, the South African Human Rights Commission, a Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities; a Commission for Gender Equality; an Auditor-General; an Electoral Commission and an Independent Authority to Regulate Broadcasting.
- These institutions would be independent and subject only to the Constitution and the Rule of Law. Like the Courts they would be required to be impartial and would have to exercise their powers and perform their functions without fear, favour or prejudice.



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The Constitution required public administration to maintain and promote a high standard of professionalism and to provide services fairly, equitably and without bias - on the basis of the efficient, economic and effective use of resources.

- When any organ of state contracted for goods and services, it would have to do so in accordance with a system that would be fair, equitable, transparent, competitive and cost-effective.
- The Security Services - including the Defence Force, the Police and the intelligence services - would be required to act in accordance with the Constitution and would be prohibited from prejudicing or furthering any political interest.
- There would be a National Prosecuting Authority with the power to institute criminal proceedings on behalf of the state which would exercise its functions without fear, favour or prejudice.
- Finally, the executive power would be carried out by a President with extensive powers who would be required to swear in his oath of office to obey, observe, uphold and maintain the Constitution and all other law of the Republic.

Aye, there's the rub.

The Constitution and all the rights and freedoms that it ensures depend to great extent on the integrity of the President and his willingness to abide by his oath of office.

The viability of the entire constitutional scheme rests on the integrity and ability of the people that the President appoints to the cabinet and to the many other key posts in the state sector that he is empowered by the Constitution to fill. In particular, it rests on their willingness and determination to carry out their functions with integrity, in accordance with the law; and in a manner that is without fear, favour or prejudice.

These posts included the heads of all the Chapter 9 institutions that were intended to support the Constitution. They also included the heads of the Defence Force, the Police and the Intelligence Service - and crucially, the head of the National Prosecuting Authority.

The fact that these enormous powers of appointment can - and have been abused - is the topic of our conference today.

On the one hand, it is acceptable and general practice for the head of any government to appoint to key posts political supporters and associates in whom she or he has confidence.

After 1994 the African National Congress proclaimed, in its *Strategy and Tactics* documents, its intention to strengthen *"the hold of the democratic movement (i.e. the ANC) over state power, and to transform the state machinery to serve the cause of social transformation"*.



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According to the ANC *“the levers of state power include the legislatures, the executives, the public service, the security forces, the judiciary, parastatals, the public broadcaster, and so on”*.

So there is nothing new about state capture: however, the ANC’s idea was always that the captured state should serve public altruistic purposes - and not private self-enrichment.

As the ANC put it: *“Control by democratic forces”* meant *“that these institutions should operate on the basis of the precepts of the Constitution; they should be guided by new doctrines; they should reflect in their composition the demographics of the country; and they should owe allegiance to the new order.”*

The idea was not that the levers of state power should be abused for the purposes of amassing immense hordes of private wealth.

But, as other speakers will not doubt point out at this conference, this is exactly what has happened. I will not go into the roots of state corruption, or the sordid and, by now broadly exposed details, of the industrial scale looting of the state that has occurred.

The question that I would like to address is how we as a country are going to re-establish a system of governance that is characterised by integrity - with key institutions that operate in the public interest effectively, professionally, efficiently and without fear, favour or prejudice.

Some observers call for changes to the Constitution - or even for the drafting of a new Constitution.

Critics on both the left and the right now charge that it is the Constitution that has failed - and not those who hold power in our system. On the left, radicals charge that the Constitution is an unacceptable impediment to radical economic transformation. On the right, reactionaries are angry that the Constitution has failed to protect the language, cultural, educational and property rights that their representatives negotiated so arduously into the national accord of 1994.

Thomas Jefferson, one of the principal authors of the United States constitution, insisted that each successive generation should draw up a new constitution to meet the requirements of changing times and circumstances. He calculated a generation at 19 years.

According to a study led by Prof Tom Ginsburg of the University of Chicago, there have been more than 900 constitutions throughout the world since 1789. Their average duration is only 17 years - two years shorter than the period prescribed by Jefferson - and five years shorter than the life span of our own Constitution. Constitutions last, on average 32 years in Europe, 12.4 years in Latin America and 10.2 years in Africa.



The French have had 17 constitutions since the 1789 Revolution - so many that according to one joke the latest constitution was not available at French libraries - because they did not stock periodicals. The oldest, most resilient and most successful constitution is that of the United States - which has survived since 1788.

Ginsberg and his colleagues found that the factors that tended to increase the longevity of constitutions included strong enforcement mechanisms; the ease with which they could be amended; the specificity with which they deal with rights and institutions; and their inclusivity.

The South African Constitution meets these requirements.

- It can be amended with relative ease - by a two-thirds majority for most of its provisions and by a 75% majority for its founding values.
- It spells out with great specificity the rights and freedoms that citizens must enjoy - as well as the legislative, executive and judicial institutions required for successful constitutional governance; and
- It is inclusive - making provision for language, cultural and religious rights of citizens from all South Africa's communities.

More than most constitutions, it defines the new nation that it has helped to create. Its founding provisions represent common values and aspirations to which all South Africans of goodwill can subscribe. It contains the recipe according to which South Africa's historically divided peoples came together to create a new society.

In my opinion, we should not interfere too lightly with a document that was negotiated with such consummate care 22 years ago. Once one opens the Pandora's Box of constitutional amendment, it might easily happen that much of the good might be excised with the bits that some people now dislike.

The exception would perhaps be to implement the electoral reform recommendations of the Van Zyl Slabbert Commission.

This is a step that would not require any constitutional amendment - since it was always part of the constitutional scheme that there should be a more accountable electoral system.

The present electoral system has proved to be corrosive of core elements in the constitutional scheme - including the requirements that:

- there should be a meaningful separation of powers between the Legislature and the Executive; and that
- the National Assembly should exercise effective oversight over the activities of the executive.



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South Africa's slide into state capture and corruption can be ascribed in part to the lack of proper separation between the Executive and the Legislature, and the absence until quite recently of effective oversight.

It is self-evident that the members of the National Assembly cannot carry out their oversight functions and their duty to hold the Executive accountable if they themselves are *de facto* accountable, not to the electorate, but to those who in effect comprise the Executive.

The political party to which they belong can decide whether - and in what position - they will be included in future electoral lists; whether they will be redeployed to higher office in the state or elsewhere, and, in terms of section 47(3)(c), can effectively dismiss them from Parliament.

Effective oversight - and Government by the people - require a relationship between elected representatives and voters in which representatives are more directly accountable to the people who elected them.

So, in my view, we should not lightly interfere with our present hard-won Constitution.

John Adams, the United States' second President, was close to the mark regarding the requirements for successful constitutions when he observed that the survival of constitutional governance depends directly on the integrity of those who hold power. As he put it in a letter to his son in 1776:

"Statesmen, my dear Sir, may plan and speculate for Liberty, but it is Religion and Morality alone, which can establish the Principles upon which Freedom can securely stand. The only foundation of a free Constitution is pure Virtue, and if this cannot be inspired into our People in a greater Measure than they have it now, They may change their Rulers and the forms of Government, but they will not obtain a lasting Liberty. They will only exchange Tyrants and Tyrannies."

I agree with Adams. We may amend our present Constitution or replace it with a new one. However, success will depend on the genuine commitment of those who hold power to uphold the values, the vision and foundational values on which constitutions should be based.

Advocates of constitutional change betray their ignorance of what constitutions can - and cannot - achieve - when they criticise those who drafted the Constitution for deviations from the vision and values that it proclaimed.

Constitutions may include a perfect recipe for the ideal society - but ultimately it is the chefs who determine how the dinner will turn out. In our constitutional democracy the chefs are those who hold power - and they include:

- the electorate;



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- the ruling party;
- opposition parties;
- the government;
- the courts; and
- the institutions of state.

The government of the day has the fullest right and duty to implement the policies that the majority of voters support in free and regular elections. However, it should have neither the power, nor the right, nor the intention to interfere with the institutions that have been created to support the Constitution - including the courts, the Chapter 9 institutions; the security forces and the National Prosecuting Authority.

Those who support constitutional government breathed a huge sigh of relief when Cyril Ramaphosa was elected as the new President of the ANC last December. There was a general perception that a win by his opponent would have further entrenched the system of state capture and corruption that has characterised the presidency of Jacob Zuma.

The key question, as we enter the second month of 2018, is whether Mr Ramaphosa has the power, the will and the intention to restore integrity to the core of government.

- Much will depend on his ability to consolidate his power within the ANC. The reality is that many members of the leadership and senior ranks of the ANC are deeply compromised by state capture - and are fundamentally dependent on the cascading system of patronage that was established by President Zuma. Many have no other means of livelihood. If they are ejected from the gravy train they face a frightening prospect of very radical economic transformation and poverty.
- Secondly, how will Mr Ramaphosa deal with the very sensitive business of dismantling state capture? How effective will the forthcoming commission of enquiry be and how incisively will it cut to the root of the malaise? We cannot afford another Seriti Commission.

And how will the state deal with those who are found guilty of corruption? Will they be treated “with sensitivity” and let off the hook? And if wrong-doers are not punished, will we not establish a principle of rolling impunity from one administration to the next? On the other hand, what happens to the unity of the ANC if the culprits face the full retribution of the law?

- Finally - and most crucially - what will Mr Ramaphosa do to re-establish the independence of the institutions on which the integrity of governance depends? Will people of unimpeachable character and independence be appointed to head the intelligence services; the police and the Hawks; the Office of the Public Protector; the Human Rights Commission; and the National Prosecuting Authority? Will the government be able to resist the temptation of interfering once again in their activities?



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Dealing successfully with these challenges will require immense political skill; perseverance; courage and integrity.

Mr Ramaphosa has begun well.

In the ANC's 8 January message, he acknowledged that the ANC had become "deeply divided through factionalism, patronage, corruption and competition for resources."

He recognised the impact of state capture on state owned enterprises:

"Many of these enterprises have experienced serious governance lapses and poor delivery of their mandate. These challenges have been exacerbated by state capture, through which billions of rand have been illegally diverted to individuals. Governance of these state-owned enterprises has been severely weakened and confidence in the public sector generally has been undermined." He said that government would "act urgently and decisively to improve governance, financial management and performance in all SOEs and protect them from improper interference."

He welcomed the announcement of the establishment of a commission of inquiry in line with the findings of the Public Protector's report on state capture.

Importantly, he called for the restoration of the integrity and legitimacy of the state and for strong and efficient law-enforcement agencies to fight against corruption and crime. He said that the ANC was of the firm view that "the country's intelligence services, the police and prosecutorial authorities should be strengthened and fortified to act with professionalism, and without fear, favour or prejudice".

So, Mr Ramaphosa has been making the right statements about corruption.

But then, so does virtually every new leader in the emerging world. In the first speeches that they make they all promise to root out corruption. Even President Zuma speaks voluminously on the need to combat corruption and recounts the good work that the ANC has been doing in this regard.

The test will lie in Mr Ramaphosa's actions - and not in his words. Again, he has started well with the reconstitution of the ESKOM board and the appointment of the widely respected Jabu Mabuza as its Chairman.

Now we shall have to watch carefully how he deals with other key institutions.

The Hawks and the National Prosecuting Authority seem, at last, to be serious about investing and prosecuting those responsible for state capture. The noose is tightening around the worst offenders.



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Some commentators believe that state capture can best be combatted by the establishment of an integrity committee or by a limitation of the power of the President to make key appointments to head constitutionally-independent institutions.

Experience has, however, taught us that the fault most often lies - not in the institutions of governance - but in the character, integrity and intentions of those who hold power.

My own view is that the best guarantee for the future lies in implementing our present Constitution with diligence and integrity.

- We need voters and political parties that refuse to elect known scoundrels to public office;
- We need a President who abides strictly by his oath of office;
- We need a National Assembly - strengthened by the implementation of the Van Zyl Slabbert electoral recommendations - that rigorously carries out its oversight functions;
- We need professional security forces that carry out their duty to protect and defend the public efficiently and impartially;
- We need courts that will continue to assure that legislation and executive action comply with the Constitution - and that act with scrupulous impartiality;
- We need Chapter 9 institutions and a National Prosecuting Authority that carry out their duties without fear, favour or prejudice.

Without integrity among the chefs, it does not matter how well the constitutional recipe is written,

- the first course of good governance will be ruined;
- the second course of national unity will be burned to a cinder; and
- the dessert cake of economic prosperity will end up in the dustbin.

I am confident that the present Constitution will serve South Africa well deep into the future and that it will far surpass the lifespan of constitutions elsewhere in our continent and in the world.

At the end of the day, I agree with John Adams: if I can paraphrase his views -

“The only foundation of a free Constitution is integrity, and if those who hold power cannot be inspired to show greater integrity than they do now, they may change their president and the forms of government, but they will not secure lasting freedom. They will only exchange one set of corrupt leaders and corruption for another.”