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TO THE FW DE KLERK FOUNDATION CONFERENCE
ON THE NEED FOR REAL TRANSFORMATION,
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THE CONSTITUTIONAL TRANSFORMATION OF SOUTH AFRICA

Transformation entails radical change, i.e. a change at the roots and from one condition or form to another. The word is wonderfully flexible – a favourite in the vocabulary of policy makers and propagandists. In politics and law transformation is a peculiarly South African concept. The most prominent use of the term is patently political. Secondly some prominent and respected South African legal academics have in recent years philosophised and theorised extensively about the meaning and place of transformation in our constitutional order. Much of this work has been published in impressive, mostly liberal, academic literature, in a few instances also under the feather of prominent judges. What is remarkable of both the political and the academic variations, is that their exponents are unable to rely on any reference in the Constitution to the word "transformation" or to other concepts that are closely associated with it, such as "affirmative action" or "Black economic empowerment." Transformation depends on interpretation.

There is however another meaning that should be attributed to transformation based on the ideal to establish a South African constitutional state as it is envisioned in the texts of the 1993 and 1996 Constitutions. Probably due mostly to ideological pressures, this more accurate and promising meaning of transformation seems to be losing traction. I understand my task this morning to be to draw your attention to the merits of what I shall call transformation to constitutionalism.

CONSTITUTIONALISM

Constitutionalism is a concept used widely, essentially to indicate a *desired* state of affairs prevailing in a democratic state. The concept is also inferred in the notion of the "constitutional state."

The first constitutionally regulated major transformative step to South African constitutionalism occurred on 27 April 1994 when the 1993 Constitution came into operation. In the first paragraph of the preamble a sincere desire to achieve constitutionalism was expressed, namely the "need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic *constitutional state* in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms."

Constitutionalism gives expression to a complex of structural, substantive and doctrinal elements that are desirable in a state. I have collated these elements from the international literature on the subject. This is represented in the graphic on the screen, to which I will refer briefly later on.



To fully grasp the meaning of the profound constitutional transformation that this country underwent 20 years ago, we need to compare the changed condition to the previous one. This was done with much hyperbole by Justice (later Chief Justice) Mahomed in 1995 in the seminal death sentence decision of the Constitutional Court. This *dictum* justifies extensive (though abbreviated) quotation here. He said:

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. . . . The South African Constitution . . . retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. . . . [T]he preamble, section 8 and the postamble seek to articulate an ethos which . . . unmistakably recognizes the clear justification for the reversal of the accumulated legacy of such discrimination. . . . What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting "future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".

If one filters out the emotional language, the substance of this early judicial vocalisation of the impact of the introduction of constitutionalism on law and society was that the intended radical change was primarily in the nature of constitutionalism. One, but by far not the only, feature of this transformation is identified as being the reversal of the legacy of discrimination. It is this "reversal" that makes the transition to constitutionalism peculiarly South African, the selective over-emphasis of which characterizes the political and some academic and judicial versions of transformation.

TRANSFORMATION TO CONSTITUTIONALISM

To measure the degree of success of our constitutional transformation from sub-constitutional, racially defined parliamentary sovereignty to modern constitutionalism, one should imagine an ideally transformed South Africa as was hoped for by rational people when the constitutions of 1993 and 1996 were written. These ideals were most compactly expressed in the 34 Constitutional Principles that were negotiated in the 1993 MPNP that bound the Constitutional Assembly in its work on the 1996 Constitution. These Principles were understood to be a record of agreements based on the assumption that all sides will honour them as a "solemn pact". Let us consider, with reference to the elements of constitutionalism, some of the Constitutional Principles that held out the expectations of constitutionalism. You may find it informative, as we do so, to weigh the degree of success that we have achieved over the past two decades towards the establishment of a stable constitutional state with reference to the graphic, beginning with the left column.



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Principle IV required the Constitution to be the supreme law of the land, binding on all organs of state at all levels of government.

Principle VII stated that the "judiciary shall be appropriately qualified, independent and impartial"

Principle XXX demanded the establishment of "an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner"

Principle XXXI stated that "[e]very member of the security forces (police, military and intelligence) . . . shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest."

Principle XXIX: "The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service."

Principle IX: "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government."

Principle III: "The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity."

Section 35(1) of the 1993 Constitution required courts to interpret the fundamental rights chapter in a manner promoting "the values which underlie an open and democratic society based on freedom and equality." Perhaps the most significant enhancement to the new constitutional order that was brought about by the 1996 Constitution, was the elevation of freedom and equality to the level of foundational constitutional values. Interestingly, however, what was superimposed, was human dignity as the over-arching constitutional value underpinning the interpretation of the Constitution and the Bill of Rights and serving as a guide to the lawful limitation of fundamental rights.

When the Constitutional Court confirmed at the end of 1996, in accordance with the requirements of the 1993 Constitution, that the new Constitution conformed to the requirements of the 34 Principles, South Africa had formally completed the first stage of transformation that was initiated by State President de Klerk in Parliament on 2 February 1990. This was the transformation of a state in danger of collapse under world-wide economic and political pressure, to aspirational constitutionalism embodied in a globally admired Constitution.

The introduction of constitutionalism entailed the establishment of a vast range of institutions that either did not exist before 27 April 1994, or that underwent a substantial metamorphosis. Among the new ones were the Electoral Commission, the Constitutional Court, the Financial and Fiscal Commission, the Human Rights Commission and seven (out of nine) new provinces.



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Some of the previously known institutions that emerged in a new guise included the President and Cabinet, Parliament, the SAPS and SANDF, local governments, the public service and the Auditor-General. These institutions underwent varying degrees of structural change, although elements of the pre-constitutional models of each are still clearly recognizable.

Although there are those that consider the judiciary to be a weak component of the state, incapable of ensuring obedience to its judgments, there can be little doubt that the work of especially of the first highly talented bench of our Constitutional Court, has been the most effective agent of transformation in the direction of constitutionalism. The introduction of constitutional supremacy over all law created the scope for the Constitutional Court to take the lead in thoroughly transforming the South African legal system as a whole. It goes without saying that much of the judgments of the Court is open to criticism and in some instances even severe criticism, but that is par for the course for any independent modern court that has to deal with political issues in its interpretation and application of a supreme constitution.

CONSTITUTIONAL PROVISION FOR SOCIAL RENEWAL

While the transformation to constitutionalism was, and continues to be the primary goal of our Constitution, it would be unrealistically one-sided not to acknowledge the negotiated consensus that an urgent socio-economic need existed to confront the inequalities brought about by our history of cultural and racial alienation over centuries. In 1994 the newly consolidated citizenry of South Africa accepted a common responsibility to put an end to the institutionalization of inequality and of working towards the achievement of equality. This intention was recorded in various provisions of both Constitutions. Unbiased consideration of these provisions is required for a proper understanding of this aspect of transformation.

In addition to the already mentioned desire for equality expressed in the preamble to the 1993 Constitution, section 8 prohibited discrimination comprehensively, but subsection (3) added the qualification that the prohibition would not preclude measures designed to advance the previously disadvantaged, and also prepared the ground for land restitution.

Section 212(2) required the new rationalised and restructured public service to be non-partisan, career-orientated, to function according to fair and equitable principles, to promote an efficient public administration *broadly representative* of the South African community and to serve all members of the public in an unbiased and impartial manner.

Sub-sections (3) and (4) required employment in the public service to be accessible to all South African citizens who comply with the normal statutory requirements, and that the qualifications, level of training, merit, efficiency and suitability of the persons concerned were to be taken into account.

All these substantive provisions of the 1993 Constitution pointed primarily to the establishment of a *constitutional state* in which reasonable provision is made for balanced steps to prevent the continuation of unconscionable inequities.

The famous "postamble" was however cast in more dramatic language, often quoted to justify more drastic steps towards restitutionary action. Significantly however, the heading



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was "National Unity and Reconciliation" and the wording was primarily conciliatory, with assurances that there was no intention of dividing South Africans into acquiring victors and sacrificing losers.

The tone of the preamble to the current Constitution similarly reflects the negotiated understanding of reconciliation by recognizing the injustices of our past, expressing the belief that "South Africa belongs to all who live in it, united in our diversity", identifying the adoption of the Constitution as a means to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." The intention of founding a "democratic and open society," and to "improve the quality of life of *all* citizens and free the potential of *each* person" is also expressed.

None of these sentiments hints at a justification of indefinite and exclusive privileging of any section of the population. Nor do the founding constitutional values of human dignity, the achievement of equality, the advancement of human rights and freedoms and non-racialism that were entrenched in section 1 in 1996.

When it comes to the equality and property clauses of the Bill of Rights, the apologists for affirmative action and Black economic empowerment usually choose to skip over the core provisions to emphasize the qualifications on the core. Thus section 9(1) *emphatically* states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." This is followed in sub-section (2) *allowing* "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination" to "promote the achievement of equality."

Similarly the core protection of property is to be found in the very explicit section 25(1) which provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." This is then followed by the expropriation clauses (2) and (3) and the land reform clauses (4)-(9). An objective reading and just application of these provisions should not raise concern for any owner of property, since arbitrary deprivation and inequitable expropriation are explicitly prohibited by the Constitution.

The essential point I wish to make here, is the following: *the kind of social transformation actually foreseen in the Constitution depends in fact on full transformation to constitutionalism*. This is so because only in a balanced constitutional state, society will be capable of sustainably realizing the material and moral support required for the promotion of the achievement of equality. Transformation in the form of creating a culture of consumption of the available economic fruits while it lasts, is obviously not sustainable.

The nuanced qualification of the core constitutional provisions concerning equality, property, land ownership and appointment policy distinguishes our aspirational constitutional state from others. This is most readily demonstrated with reference to different affirmative action approaches: in the United States discrimination in favour of disadvantaged persons is in principle not given preference before other equality demands; in Europe the "equal opportunities" model applies mostly, which requires that all competitors should be placed in an equal starting position; the South African substantive equality model considers measures that counter the *continuation of discrimination* against



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previously disadvantaged persons, *not* to be discriminatory. This however does not amount to a constitutional blank cheque for e.g. reverse discrimination or for racially calculated appointment quotas. The fragile and contestable nature of the arguments for the non-discriminatory nature of affirmative action was recently demonstrated in the conflicting judgments of the Labour Court, the Labour Appeal Court and the Supreme Court of Appeal in the case of Ms Barnard against the SAPS. After all, section 195(1)(i) of the Constitution provides *no more* than that, [and I quote] "[p]ublic administration must be *broadly representative* of the South African people, with employment and personnel management practices based on *ability, objectivity, fairness*, and the need to redress the imbalances of the past to achieve broad representation."

GENETIC DEFECTS OF OUR CONSTITUTION

In our Constitution there are certain unfortunate weaknesses that allow for political abuse. Thus e.g. in the restructuring of the institutions that existed in South Africa before, e.g. the military, the police, the public service and local government, fundamental changes occurred in the form of large-scale purges of personnel in accordance with the ANC's policy of cadre deployment. That this has been the major cause of the collapse of infrastructure and service delivery has been acknowledged openly by the ANC, without however indicating an intention to change their deployment policy - other than urging the decision-makers to intensify their efforts to ensure that control over all levers of power, including the judiciary, are secured.

Regarding the "political" branches, there is one disturbing constant that has survived, and continues to undermine our transformation to constitutionalism. South Africa inherited the British colonial governmental structure of the British Crown being represented by the Governor-General as head of state, with a prime minister in the image of Westminster being head of government. When, under the direction of Mr PW Botha this model was revised in terms of the *RSA Constitution Act*, 110 of 1983, the functions of the symbolic head of state were merged with those of the prime minister, thus creating a state presidency at the pinnacle of both the executive and legislative branches. The State President's position of power was unassailable, except from within, i.e. through internal party political processes. When the 1996 Constitution was written, this arrangement was re-established after the relatively brief existence of the Government of National Unity provided for in 1993. Today the President is both head of state and head of the national executive. As head of government he not only appoints the Deputy President and the Cabinet ministers, but may dismiss any of them at any time. The President as head of the executive also appoints the commander of the defence force, the national commissioner of police and the heads of the intelligence services. This places the leader of the political party that obtains the majority vote in a general election in an immensely powerful position, causing every member of the Executive to be completely dependent for his or her political, executive, administrative and legislative activities on the goodwill and approval of the President. The President's displeasure can be fatal to key political and professional careers and aspirations.

In this respect South Africa failed to undergo transformation to constitutionalism on a significant point: appropriate division of authority among various persons and institutions.



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Seen from the perspective of constitutionalism, this is the weakest element in our Constitution.

Here we encounter another shortcoming in our constitutional transformation. Modern democracy depends on political parties to provide representative channels for the expression of different variations of political opinion in society. In our case it *is* required that those who wish to participate in an election must register a political party. Thus the ANC, among a range of others, is duly registered for election purposes as a political party. However, the ANC essentially does not understand itself to be a political party, and it says so explicitly in its strategy and tactics documents.

This means that the ANC does not see itself as a participant in the democratic process of determining who should govern the country, but its political conduct is to be determined by the thoroughly Marxist notion of the National Democratic Revolution, the main content of which, and I quote from an ANC document of 2009,

remains the liberation of Africans in particular and Blacks in general from political and socio-economic bondage.

Despite these brave words, after 20 years in government the ANC has been unable to transform in any significant way the most debilitating aspect of our society, rampant poverty especially among Black people, except the elite. In fact, the gap between rich and poor, the so-called GINI coefficient, has increased since 1994.

Transformation in the constitutionalist sense of the word does not seem to be on the agenda of the ANC any more. It employs the notion of "transformation" differently and is using the instruments of the power of the state without any scruples to implement a form of transformation not founded on constitutionalism, but on political expediency. The ANC's core transformation policy is intended to benefit only "Africans in particular and Blacks in general". It would appear that the ANC understands the frequent constitutional reference to the benefits of equality and democracy for *all South Africans* to apply only to Black South Africans. Can South Africans born after our constitutional transformation be expected to accept such an attitude to conform to the demands of constitutionalism?

THE NEED TO REFORM TRANSFORMATION

These and various other disturbing indications that the process of establishing constitutionalism is in remission, are well known. This raises the question whether the constitutionalist ideals of 1993 and 1996 can realistically be resurrected? The answer obviously depends on future social and political developments. A return to the establishment of constitutionalism requires the majority in Parliament to produce leaders willing and capable of guiding the country back on a course towards the achievement of constitutionalism provided for in the Constitution.

It is furthermore necessary that the assumption of the correctness of the degraded political meaning to which transformation has been reduced must be removed from our journalistic, academic, judicial and political discourse. The temptation of "political correctness" is destructive of constitutionalism. In order to bring us back on the road towards a real South African constitutional state, South Africans need to focus on *impartially* nurturing the ethics



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of the foundational constitutional values of this Republic, namely human dignity, equality and freedom.