UNITING BEHIND THE CONSTITUTION IN SUPPORT OF NON-RACIALISM AND HUMAN DIGNITY
ADDRESS BY PROF FRANS VILJOEN,
DIRECTOR OF THE CENTRE FOR HUMAN RIGHTS
FACULTY OF LAW, UNIVERSITY OF PRETORIA
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As you heard, we are challenged to reflect on how best to achieve the constitutional vision of human rights. Conscious of the impossibility of covering the whole array of contemporary human rights concerns, I focus in my short presentation on three aspects that I think are pertinent to the realisation of human dignity, and they are a culture of justification, social transformation and international scrutiny of our human rights record.

However, before I tackle these more substantive issues I thought perhaps that we should reflect for a few moments about who the 'we' are that should aspire to achieve these constitutional rights visions. As we heard earlier this morning, the first words of our Constitution, the first word, is the word "we". The Preamble of the Constitution starts with the phrase, "We, the people of South Africa" and it elaborates on how we have established this society based on human rights, or this constitutional vision based on those values. However, the same Constitution, the same Preamble, also acknowledges that the actual Constitution-making was entrusted to a much more exclusive group earmarked in the Constitution as our freely elected representatives. Now, this duality permeates the whole of the Constitution.

As much as an expansive 'everyone' is entitled to the rights in the Constitution, it is a more restricted group, the governing elite, if you like, that is primarily responsible to uphold the rights in the Constitution, making them the primary duty bearers. Thus is introduced the fundamental human rights paradox, if you like. It is the very government that is entrusted to uphold human rights that will inevitably violate these rights and has to be held accountable. At the same time the Constitution binds not only the state, but also non-state entities, human beings, and collectives of human beings such as clubs, companies and churches. This feature distinguishes our Constitution from many others and earned the epitaph, 'post liberal'.

The horizontal application of the Constitution, and the Bill of Rights specifically, is most unequivocal when it comes to the right to equality, but it is also potentially foreseeing in respect of all other

rights, depending on who the rights-holder is that needs to comply with an obligation, and depending on the specific right that is being invoked. We should also perhaps recall that as much as the Constitution is created, if you like, by us, presumably the citizens, the people of South Africa, with a history linked to this country, the Bill of Rights grants the protective shield to everyone in South Africa, including non-citizens - non South Africans by birth perhaps and nationality - in respect of many of the rights in the Bill of Rights. At the heart thus of our quest for human rights lies the contested yet interdependent coexistence of the governing 'we' and the governed 'we', and that is what we will explore.

First, with relation to the creation maintenance of a culture of justification. The constitutional entrenchment of human rights brought parliamentary sovereignty to an end, as we well know, and ushered us into an era of constitutional supremacy. The late law professor, Etienne Mureinik, famously described the Constitution as a bridge leading us away from a culture of authority to a culture of justification, because all legislation, all government action can now be tested against the yardstick of constitutional rights. Denial of these rights can not be done at will or be based on coercion or force. While rights may be limited, a limitation is constitutionally acceptable only if the government convincingly articulates a justifiable rationale. Our government is constitutionally obliged to convince us, and ultimately perhaps the Constitutional Court, what the reasons for these limitations may be. Both our constitutional democracy and the culture of justification have been boosted by the numerous findings of the Constitutional Court in which the government's justifications had been found to be wanting, and by the consistency of government compliance with these orders. Although government almost invariably dragged its feet in conforming with this judgement, it has not directly at least contested its obligation to give effect to the Constitutional Court's directives.

In the relatively contentious case of Glenister, for example, the ultimate result was the adoption of the *South African Police Services Amendment Act*. And according to the short title of this Act the aim of the Act is to align the Hawks unit with the Glenister judgement. Even if some, including Hugh Glenister himself, may argue that the amendments to ensure operational and structural independence may not have gone far enough, the drafters seemed at least to have endeavoured to implement the crux of the court's judgement. And pertinent to the point I am trying to make, Hugh Glenister is now returning to the Constitutional Court to contest the constitutional adequacy of the measures adopted to give effect to the court's judgement.

Because a culture of justification will remain superficial if it is only coaxed through occasional judicial prodding, we should also assess the extent to which the culture has permeated our society. And regrettably there are clear erosive tendencies. Government's actual inaction is all too often deflected by issues that avoid debate, for example, through name-calling - "traitor", "racist" - invoking majoritarian positions, "our people posited against counter-revolutionary forces", and placing reliance on history, "apartheid did it". Similarly, Polokwane and Mangaung resolutions are invoked, not as starting points for debate, but as clinching an argument. This reaction is a remnant of the ANC's uneasy transition from liberation movement to political party and government of the day.

As liberation movement it inculcated the logic of democratic centralism and grassroots-driven mandates. However, in an open democracy centralism easily becomes elitist, and grassroots involvement soon appears to be more apparent than real, leaving many of those outside the inner party circle with a lingering suspicion that secrecy, pro forma consultation and exclusion trump substantive argument. However, the process towards the adoption of the *Protection of State Information Bill*, I think, illustrates the lingering importance and the remaining possibilities of a culture of justification. At the time when this Bill was introduced, little rationale was provided for the approach adopted. Even if we agree that such a new law was necessary to replace the 1982 law, the question was why such a law should grant the powers to classify information to the heads of all organs of state, without allowing for a public defence override. What was the mischief, as a lawyer we would ask, that informs the specific legal choices made? The mischief we saw, and see around us, - corruption and rumours of corruption, mismanagement of funds, etcetera - seem infinitely more real to us than the rather fanciful fear of espionage by some foreign destabilising potentate. It is a testament, however, to the continuous engagement and deliberate deliberation by the Right2Know Campaign, and many others, that the proposed Bill changed over time.

While it may still have its defects, the category of those entitled to classify information as secret has, in the most recent drafts, been limited to security services and a limited public interest exception has been inserted. The proponents of the Bill had no option but to engage more elaborately on the rationale of particular legal provisions, to embark on public consultation, and to compromise. Invoking the spectre of constitutional challenge may have meant the legalisation of politics, but it also brought the prospect and the need for justification into plain sight. In pursuit of our constitutional vision we, the rights holders, should actively participate in fostering a culture of justification, of open deliberation, and it remains important to challenge the government's

rationalisations relentlessly in public fora, or, more modestly, in private and informal spaces. Part of permeating society with such a culture would be to insist on educational systems framing the curricula in whatever school, whatever educational plan, not only as including the Constitution and the constitutional values, but these, the importance of open discussion, the cultivation of differences of views and of deliberation.

I move to the transformation towards social justice. The most celebrated aspect perhaps of our Bill of Rights is its promise of social transformation. It envisages social change through non-violent political processes grounded in law. As poverty and equality - as we heard at length this morning - are the most salient features of our societal fabric today, it means that this process towards social justice has to speak to poverty mitigation and eradication.

This vision finds expression in the constitutional inclusion of enforceable rights. There is a long list, as we know: housing, health care, food, water, social assistance, education. This list has to be read together with other rights in the Constitution, for example, the right to equality, which is understood not as a procedural, but ultimately as a substance based, outcomes based provision. And, together with the values underlying the Constitution, again equality and also human dignity.

Earlier this morning Sipho Pityana referred to indicators that should convince us about the dire state of inequality and social deprivation, economically in particular, in our society. Each of us can choose the framework or the indicator that is most convincing. There are the National Planning Commission statistics, for example, that half of all South Africans still live under the paltry poverty line of R524 per month. There are the UNDP's Human Rights Indexes, the Gini coefficient that has been referred to, and there are the obvious voices being heard, and actions of citizens who bear the brunt of a non-existing and failing service delivery.

What I think is more useful to focus on, is what should and can be done to realise the constitutional promise of social justice in the face of these realities. And I suggest four avenues. The first avenue has been suggested already, and that is perhaps the convenient target of the Constitution, the Bill of Rights itself. Those who suggest that the core of the problem is textual contend that the Constitution is a tainted compromise, it is tilted in favour of a pre-94 status quo, and is designed to inculcate a new liberal market economy approach. There may be some merit in this contention. The textual basis of socio-economic rights could certainly have been stronger.

All the rights in the Constitution - socio-economic rights - are qualified by the phrase "access to" and they all come - that is, except the right to basic education - and they all come with the proviso of progressive realisation. However, a more in-depth analysis and holistic contextual view should see these flaws as counter-balanced by the centrality of equality and the values informing, for example, the limitation analysis. A radical reconfiguring of our constitutional vision would require the redrafting of the constitutional text. Political exigencies dictate that recreating the conditions of a Constitution drafting moment is very unlikely. Critics of the original compact are therefore not likely to suggest that the Constitution should be renegotiated, rather the re-crafting would come through constitutional amendments - if the dominant party would be able to assemble the required two-thirds majority to change the Bill of Rights.

Even if one-party dominance would from time to time allow this to happen, in my view this approach is to be avoided. It would in the first instance be a slap in the face of history. It would undermine the legitimacy of our founding constitutional moment. It would be divisive, destabilising and inimical to non-dominant interests.

The second avenue to get to social justice is the obvious: legislative and executive means. Let us be reminded, as we were earlier, that social justice should in the first place come about politically. The Constitution should be the blueprint, or the starting point, in that it provides the values that need to be transposed into legislative and policy principles. And much has been done, and many socio-economic rights are guaranteed in law, policy and practice.

But the problem, I think, is two-fold. On the one hand, law policy and even court judgements are often not effectively implemented. On the other hand, legislation and policy do not sufficiently deal with that one core group in our society, which is the group of able-bodied adults who are not formally employed, people between the ages of 19 and 59, in that social assistance is in place for those younger and older than this particular age group. In my view, the possibilities have not seriously been explored and the reality of this group has not been prioritised. Whether one takes the promise of the Constitution seriously where it says that everyone shall have access to social assistance, whether the means of job seeking grants, new subsidies grants are explored, there needs to be much deeper and serious reflection in the light also, and still informed by the culture of justification.

Job creation mentioned earlier, obviously a crucial peg to secure growth in a developmental state, is

unlikely to have any effect on this group, those aged 19 to 59 and unemployed. While the prospect of employment is real in many other developmental states - perhaps the Asian Tigers - this is a faint and diminishing possibility to similarly situated South Africans, leaving it to the market economy in a developmental state. Making more promises about public work programmes, in the absence of the infrastructural commitment thereto, is not likely to alleviate the situation of this particular group here, now, or in the foreseeable future.

An ethical society, and in my argument a constitutional state based on social justice, cannot close its eyes to the immediacy of the plight of those most at risk: those most likely to go to sleep hungry and those most likely to participate in the slide towards social unrest and violent action, informed by the lack of basic means of survival and of a life of indignity and dire need.

A third possibility to get to social justice is through the courts, through litigation. On this basis it is pointed out that the Constitutional Court in particular should contribute, but has failed the poor in its interpretation of the Bill of Rights. The main criticism is that when interpreting these rights the court has not engaged in a quest to find the content and meaning of these rights, but instead finds tailor-made solutions that would suit its view of its own institutional role, informed by judicial modesty and deference to the other branches of government.

Although there may be some merits in these criticisms, there is consensus, I think, that the court more or less steered a cautious course between advancing socio-economic justice and not exceeding its institutional powers. It would be unwise for our courts to adopt a jurisprudence of exasperation by pushing the boundaries through taking decisions that would easily be targeted as extravagant and overly intrusive into the domain of other branches of government. By disregarding the dictates of the possible, the courts may well invite confrontation and ultimately threaten their own institutional legitimacy.

The fourth avenue is a more engaged role for civil society. We heard earlier about the resurgent spirit within civil society, and they have contributed to the social justice realisation, especially through the courts. Criticism about the civil society is that it does not really extend to cover rural constituencies and that there is a perception that constitutional litigation is only for an elite club - organisations and lawyers. It must also be stated that it should be a cause of regret that despite the work that has eventually been done around the right to education, that these kinds of cases were ready and ripe for adjudication, and for being taken to the Constitutional Court and other courts,

much earlier than it in fact happened. Against this background it should be clear that there is very little justification for the government's recently reappearing intention to have the courts reviewed for their contribution to the transformation of our society. Such a review has dubious constitutional roots.

It is not clear what the end of the proposed review would be. More pertinent is the review outcome. If the review outcome should reflect unfavourably on the judiciary, what action would be taken? It is difficult not to read some intent to intimidate into the proposed process. In any event, it seems a negative result of such a study is most unlikely. The South African judiciary and its role in social transformation is one of the most studied topics in South Africa and abroad. Although the outcomes of these studies are not uncritical, there is general appreciation of what the courts have accomplished. These studies, and the Constitution itself, underline that the main responsibility to achieve social justice lies with the legislature and the executive. What is needed, above all, is the effective implementation of existing policies and laws, the elaboration of further legislation and policies and the diligent and full compliance with court judgements.

Briefly then to the international scrutiny. Through the embrace in our Constitution of international human rights law, our Constitution announces an end to pre-1994 international isolation. Our Bill of Rights speaks the language of international human rights and affirms the role of international law as an interpretive lodestar. This means that our constitutional vision is premised upon the acceptance of international scrutiny of our domestic human rights affairs.

Briefly, how has South Africa fared in respect of the three major inter-governmental organisations to which it is part of in terms of human rights? As far as SADC is concerned, when the SADC summit in 2012 took the political decision that the legal basis of the SADC Tribunal should be amended to exclude the possibility of individuals taking cases to that tribunal, the possibility of the SADC Tribunal being an effective forum for redress for victims of human rights violations in SADC was eliminated.

While it is understood that South Africa did take some actions, it is clear that our government could have and should have played a much stronger leadership role to prevent the tribunal from falling victim to outdated notions of state sovereignty. As the campaign to ensure a South African as AU chairperson testifies, our foreign policy operators can be very successful in advocating for a position, in building coalitions and exerting pressure when there is political will. The absence of an equivalent political will in respect of the only sub-region human rights body in Southern Africa contributed

significantly to this huge step backwards.

As far as the African Union is concerned, much can be said. Let me just focus on the one judicial institution of the African Union, the African Court on human and people's rights. South Africa has accepted the jurisdiction of this court, but it is not among the five states that have accepted individual complaints to be directed to this court, despite our claim to be the most progressive domestic human rights protector on the continent.

As far as the UN is concerned, I will briefly take us through four layers of state commitment that allow international scrutiny. First of all, the state has to ratify UN treaties and show its commitment. There are nine core UN human rights treaties, and South Africa has ratified only six. The outstanding ones are the International Covenant on Economic, Social and Cultural Rights, and the conventions dealing with the rights of migrant workers and enforced disappearances.

Now, it is true that cabinet has announced its go-ahead to ratify or see to the socio-economic rights convention covenant. This process still has to be concluded and one already hears arguments that this should be done with reservation. So the plea is, this process should be accelerated and that no reservations should be entered.

The second layer of commitment is that the state should not only ratify treaties but also accept the individual complaints mechanisms that make the treaties really effective. Of the six treaties South Africa has in fact ratified, we have accepted these individual mechanisms only in respect of three. The outstanding ones are the conventions dealing with racial discrimination, torture and the rights of the child.

The third layer is that the state should periodically submit reports to these inspection or monitoring bodies of the UN. South Africa has an appalling record, unfortunately. It is up to date in respect of only one treaty dealing with the rights of women, and in respect of perhaps the most important treaty, the covenant on civil and political rights, South Africa is yet to submit a report since 2000.

The fourth layer is the actual implementation of the findings or the concluding observations of UN treaty bodies. South Africa has in recent years been found in violation of the covenant, and civil and political rights, by the UN Human Rights Committee in the McCollum case, and unfortunately South Africa, the government, did not only fail to respond to the allegations of torture, sexual

assault and denial of medical care to prisoners of the St Albans Correctional Centre domestically, but it also failed to respond to the international body's decision *against* South Africa to reply within a set period of six months. There was a much belated reply.

Also, the Committee on the Rights of Women, in congratulating South Africa in 2011 for female representation in parliament, and in public life generally, singled out the judiciary as an aspect of public life that still needs attention, and recommended that South Africa should take measures to accelerate women's full and equal participation in that sphere. Unfortunately this international guidance did not resonate in the recent discussions on the all-male panel to be interviewed for the vacancy in the Constitutional Court. What seems to be lacking is a greater role that civil society may craft for itself or that it is allowed to take in respect of these processes of scrutinising our international obligations and certainly, greater political will, among others, perhaps to create a central or coordinating body within government to ensure that the obligations are being taken seriously.

To conclude, Constitution talk is permeated by metaphors, bridges, dances and trains. I choose the image, in conclusion, of the Bill of Rights, the Constitution, as a seed, carrying in it the potential for growth from a vision to reality. The growth in terms of our human rights vision has been faltering and the end product that we see is fragile. We may disagree about what we see. Some may be disappointed that it is not yet a Baobab or want it to be a Baobab. Others may think it is a weakling and others may see in it some form of a shrub. But, whatever it is, it needs our further cultivation and our loving care. That is for sure.