

REMARKS AT THE FW DE KLERK MINI CONFERENCE ON THE SOUTH AFRICAN CONSTITUTION: QUO VADIS?

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Ladies and Gentlemen.

We have just held a 6th election, without allegations of serious irregularities, which has given rise to a widespread analysis that, even though our economy is in a parlous state, our democracy (at least) is stable.

Writer Justice Malala's post on social media captures it: "It is beautiful and right that we celebrate the fact that SA's multi-party democracy has deepened, survived and consolidated itself for 25 years. In the run up to the '94 election many said we wouldn't make it this far. We have proven the skeptics wrong."

This was followed by a great deal of positive comment.

I am afraid history will show that this is a superficial judgement, and today I will attempt to say why. It is a common error that elections are sufficient evidence of a functional democracy.

This is, of course, not so. The world is full of examples where elections are held but democracy has failed. The essence of constitutional democracy is not winning and exercising power. It is the effectiveness of the institutions and conventions that ensure checks and balances on the abuse of power; and the notion that the State defends the rights and serves the people, not the ruling clique of the ruling party.

A fascinating book called *How Democracy Dies* by Ziblatt and Levitsky, warns of the electoral route to authoritarianism, and contains the following insight "the tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy, gradually, subtly, and even legally, to kill it".

I think we can relate to that sentence.

My mandate is to give a South African perspective on the constitutional transformation process, where we are now, and what we need to do to recapture the spirit of reconciliation and mutual co-operation and optimism that characterised the early years of our democracy.

It is also appropriate to pause and consider anew the extraordinary achievement of South Africa's transition. Its clearest visual symbol was the long queue that snaked around every voting station as people waited to cast their ballot on 27 April 1994.

But the substance lay in the fact that it was also the day the Interim Constitution, agreed to the previous year, came into effect to enable the election to happen.

Another crucial milestone was 18 December 1996 when President Mandela promulgated the final Constitution, which came into effect on 4 February 1997.

This finalised our transition from a Parliamentary democracy to a constitutional democracy -- and therein lies the essence of our transformation.

The world recognised it for the momentous achievement it was and aptly conferred the Nobel Peace Prize on the architects of South Africa's unlikely peace process: Presidents De Klerk and Mandela. Far too few young people today, especially the younger generation, recognise the enormity of this achievement, which is part of the reason why constitutionalism is in trouble today.

It is important to begin with the sobering insight that there are more failed transitions to democracy than successes. All the successes are backed by a long history of effort, from a range of individuals and institutions, to achieve a positive outcome, which is never regarded as permanent. Constitutional values have to be reaffirmed and respected, even struggled for anew, in every generation.

Francis Fukuyama, a political scientist from Stanford University, in his exhaustive studies of why some societies succeed in achieving stable democracies with widespread prosperity, and others don't, has influenced my analysis a great deal.

To boil it down, perhaps somewhat simplistically, he says that the transition to a stable, prosperous constitutional democracy requires a society with three distinctive national attributes:

Respect for the Rule of Law
A capable State
And a culture of accountability.

The more I think about it, the more I believe he is right. Let's measure where we are on these yardsticks.

Respect for the Rule of Law: the struggle against apartheid was characterised by a widespread violation of the laws of the time. These breaches of the law carried little stigma, and in many cases were worn as a badge of honour. However, we have learnt that once respect for the law has eroded, it is difficult to regain, even under a new and legitimate constitution.

Today we see how widely the law is violated, not only in our violent crime rate, but in what is presented as the politics of protest -- the burnings of trucks, trains, infrastructure, even people. The erosion of the efficacy of the criminal justice system has made matters substantially worse.

Equally problematic is the often limited understanding of constitutionalism and the Rule of Law among some of our country's leaders. This was most clearly epitomised by President Zuma, who said, directly to me on more than one occasion: "I cannot understand why judges can tell me what to do. I was elected. They weren't".

He understood the role of State institutions as being to serve the ruling party rather than protect the rights of the people (indeed, the ANC has always conflated the concepts of the party and the people). Under Jacob Zuma we learnt how democracy dies in the way Ziblatt and Levitsky describe.

Zuma was re-elected with an over 60% majority even after his corruption and contempt for the Constitution were clearly evident. How is this possible? I am in difficult terrain here -- but I genuinely

believe that as we embarked on our transition, we did not pay sufficient attention to the alignment between constitutionalism -- including the concept of an independent capable State, the Rule of Law, and accountability -- with traditional governance systems in our society.

Which brings me to the subject of Accountability:

I'm afraid I know very little detail about how accountability works in traditional governance systems in Southern Africa. I have been in contact with Professor Peter Delius of Wits University to get as much of the reading as exists on the subject. But when I see how accountability mechanisms and patronage systems work, from being at quite close quarters to the Zuma Presidency, right down to many local ward councillors, I see a system where people are primarily accountable to a leader rather than the other way around. Patronage is a big part of it. In many a ward, one will find a councillor in charge of his fiefdom -- he says who should be employed on projects, in new enterprises, who will take priority on housing waiting lists and who can build their shacks on what piece of ground. Many people refer to the councillor as The Council.

I believe we ignore the disjuncture between traditional accountability systems and those of a constitutional democracy at our peril. We are currently trying to deal with this contradiction through the *Traditional Leaders Bill* which is awaiting President Ramaphosa's signature to become law.

This creates the risk of deepening the misalignment, and excluding large numbers of South Africans from the constitutional checks and balances on power-abuse. We risk creating an enclave constitutional State -- where some parts of the country enjoy constitutional protection, while others do not.

And the lack of accountability extends to the very institutions that are supposed to give expression to it. Just today I was glancing over the AG's report of the North West and there are clearly no consequences for flagrant corruption and disregard of good governance.

The Capable State

The concept of a capable independent State, is fundamental to a functional constitutional democracy. I have been re-reading the excellent work of James Myburgh, on what it took to establish the idea of an independent, capable State in Britain, the mother of democracies. It was a very difficult process. It doesn't "just happen".

At the end of the 18th and beginning of the 19th Century the British civil service was both inefficient and horribly corrupt. Patronage and political favours determined who got appointed into positions. And civil servants routinely got involved in businesses contracting with the state.

In 1854 a report appeared co-authored by a member of Parliament, Stafford Northcote and Charles Trevelyan, a senior official in the Treasury. Their report became the catalyst for the development of "Her Majesty's Civil Service".

Northcote and Trevelyan proposed that entry into the civil service should be based upon competitive, independently adjudicated examinations, "open to all persons of a given age", provided they were of good moral character. Merit was to be the sole criterion for the advancement of civil servants following entry via examination.

It was only in 1870, when William Gladstone became Prime Minister, that these proposals actually implemented -- and enabled the creation of the capable, independent state.

Our transition to democracy was supposed to short-cut history and achieve the same thing. The Constitutional Principles, to which the final Constitution was meant to conform, required that "There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community" and that the "independence and impartiality" of the Public Service Commission be safeguarded.

Section 11 of the June 1994 *Public Service Act*, signed into law by President Mandela, stated that "In the making of any appointment or the filling of any post in the public service... only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer in question... shall be taken into account."

But this did not suit the National Democratic Revolution, which required a small vanguard to control the party, the party to control the State, and the State to control the economy. This is the very antithesis of constitutionalism as we understand it.

So the most critical difference between the interim and the final Constitution, that most analysts missed at the time, was the changing function of the civil service commission, now known as the Public Service Commission, according to Myburgh.

In early 1996 the ANC proceeded to set about systematically dismantling the 'merit-system' in civil service appointments. It signalled its intentions in its January 8th statement, that year, announcing that the state had to be "be structured and motivated to fulfil the democratically expressed will of the people". And to the party, the ANC and the will of the people were one and the same.

A few days later it was announced that the Public Service Commission was to be deprived of its powers over promotions and appointments in the civil service and would lose most of its staff.

The final Constitution, was given the stamp of approval by the constitutional court. It had stripped the Civil Service commission of the powers over the career incidents of public servants.

In June 1997 the ANC introduced amendments to the *Public Service Act* to abolish merit as the over-riding principle in the appointment of public services, and formally transfer the powers over the career-incidents of public servants to the political heads of each department. (The President went on to acquire the power to appoint Directors-General.) The Public Service Commission's strict requirements for appropriate skills and qualifications for civil service positions, were also discarded.

The *White Paper on Affirmative Action in the Public Service*, introduced in draft form in 1997 and adopted the following year, stated that the ANC government would seek to achieve "a Public Service that... represents the make-up of the population within all occupational classes and at all post levels of the Public Service". Broad representivity was now redefined as demographic representivity, where races were represented in direct proportion to their numbers in South Africa as a whole.

At the same time the ANC was formally adopting its cadre deployment policy, which in time was exposed as a figleaf, first for corruption, and later for a full-blown criminal State.

At roughly that time, in the late 1990s, I read a seminal book by Bayart, Ellis and Hibou called "The criminalisation of the state in Africa" in which they spelt out the trajectory we had begun to witness. The cycle starts with the centralisation of power in the political centre, followed by cronyism in public service appointments (known as cadre deployment) which turns the State into a vehicle for corruption and finally a fully-fledged criminal State.

So the sad truth that in South Africa today, the Rule of Law, a culture of accountability and a capable State are all in ICU. And if those are the three pillars of constitutionalism, then we are not doing very well. These are manifested in daily life by the break-down of service delivery ranging from electricity to sewage systems, the public lawlessness and violence; the political threats to property rights, and the independence of the Reserve Bank, to mention a few.

As a result, the conditions necessary to attract investment and economic growth have dramatically deteriorated.

This is nowhere as starkly reflected as in our number of unemployed people: 3.6 million in 1994. 9.9 million today.

The great emerging trend, that we see every day, is political leaders deflecting responsibility through a search for Scapegoats. Under Jacob Zuma the blame was placed on white monopoly capital. Today, the rhetoric on the left is to blame white privilege and whiteness, terms randomly used to refer to all whites. White privilege, people are told, is the reason you are poor. Scape-goating minorities has very dangerous historical precedents. We all know where that leads. It is hardly any wonder that emigration is picking up once again despite the fact that the vast majority of white South Africans wish to contribute to building our country.

The big question is: Can we restore the kind of constitutionalism envisaged by Presidents De Klerk and Mandela of a South Africa that belongs to all who live in it, united in our diversity; It was their joint commitment to transform a whites only Parliamentary democracy into an inclusive constitutional democracy, as the springboard for sustained economic growth and inclusion.

The great risk is the growing narrative, most clearly represented by the EFF, but not confined to it, summarised in a recent column by Jonny Steinberg. It is a situation in which the majority of South Africans are seen as permanent victims of colonialism and apartheid, whose birthright (symbolised by the land) was stolen by whites.

To those who believe this, the constitution represents a Faustian Pact that Mandela made with his conquerors. According to them, it is time to revive the unfinished revolution.

So the dividing line in SA today runs between those who believe that the Constitution, our founding compact, must define our pathway to the future. Our failure to honour it in letter and in spirit is the main cause of our decline.

On the other hand, are those who regard the Constitution as a symbol of a sold-out struggle, that must be revived.

That is the divide according to which, I believe, party politics must realign.

The choices President Ramaphosa has to make in this situation are momentous. Will he, like FW de Klerk, discard racial nationalists in his ranks, and forge ahead, to fulfil the dream of one South Africa for all under our Constitution; or will President Ramaphosa make ongoing concessions to his far left, in an attempt to keep the ANC united. Will he, in this way, propel South Africa down the electoral route of dismantling our Constitution?

The stakes could not be higher, and we all have a crucial role in exposing the truth and preventing further constitutional regression -- civil society, the Parliamentary opposition, the media, and the international community.

Our role is, collectively, to build a critical mass in defence of the Constitution, as a bulwark against those who would demolish it.

Thank you.