

OPENING ADDRESS BY THE DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, MR ANDRIES NEL, MP, ON THE OCCASION OF THE OFFICIAL OPENING OF THE CONFERENCE ON AFRICAN CONSTITUTIONALISM: PRESENT CHALLENGES AND PROSPECTS FOR THE FUTURE, UNIVERSITY OF PRETORIA, SOUTH AFRICA, 1 AUGUST 2011

Programme Director: Prof Erika de Wet, (Co) Director: ICLA
Prof Cheryl de la Rey: Vice-Chancellor and Principal of the University of Pretoria
Prof Yash Ghai: former Chairperson of the Constitution of Kenya Review Commission
Justices Zak Yacoob and Johann vd Westhuizen of the Constitutional Court
Chief Justice of Uganda and Judges from the African continent
Ambassadors and High Commissioners and other diplomats
Former Foreign Minister of Ghana and current Presidential candidate, Mr Nana Akufo-Addo
Prof Chris de Beer, Senior Deputy Principal and members of the UP Executive
Ms Futhi Mtoba Chairperson of UP Council, and Dr Piet Botha the Deputy Chairperson
Prof Esmé du Plessis, Former Chairperson of the UP Council
Delegates and Speakers for the Conference on African Constitutionalism
Mr Christian Roschmann and other members of the Konrad Adenauer Foundation, guests from OSISA, and from the African network of Constitutional Lawyers
Ladies and Gentlemen
Comrades and friends

On behalf of Minister Jeff Radebe, MP, allow me to express our sincere gratitude at being invited to this very important conference on African Constitutionalism.

As government, we are heartened by the fact that leading minds of esteemed scholarship from our continent and across the world have gathered at the University of Pretoria to contribute to the renaissance of our continent in a manner that future generations shall remain immensely indebted.

This conference takes place against the background of the 30th anniversary of the African Charter on Human and Peoples' Rights, the 25th anniversary of the establishment of the Centre for Human Rights of the University of Pretoria, and the 20th anniversary of the African Human Rights Moot Court Competition. This year's Moot Court Competition took place from 7 to 12 July 2011 and participants argued whether a hypothetical African government has contravened the African Charter or other international law by relocating an indigenous group from the land which they traditionally occupied, and granting an exploitation license over that land to a mining company. I could unfortunately not attend the final day of the Competition and would therefore like to make use of the opportunity to congratulate the winners of the African Human Rights Moot Competition for 2011, Ms Lee-Ann Germanos and Mr Bukithi Gumede both from the University of Pretoria.

The past 20 years have witnessed tremendously positive developments in the entrenchment and enhancement of constitutional democracies across our continent. National Constitutions, as we have witnessed in our own country, play an extremely important role in building and guiding democracies across the world. The wave of Constitutionalism that has in recent times swept across our continent, brings with it a promise of a prosperous Africa, stronger democracies, enhanced socio-economic development and good governance. As we have

seen with our own Constitution-making process, the nature of contemporary Constitutions have transcended the traditional political and legal framework. Modern and progressive Constitutions have become transformative in nature, providing socio-economic tools to address transformation issues in emerging democracies, making Constitutionalism a dynamic evolving process involving a range of role players and stakeholders with specific mandates tied together by and based on the National Constitution.

This brings me to the key elements of constitutionalism being the promotion, protection, and fulfilment of fundamental human rights and freedoms, supremacy of the Constitution, the separation of powers, an independent judiciary, the review of the constitutionality of laws and constitutional provision for the management of constitutional amendments.

Constitution making, constitutionalism, democracy, good governance and the rule of law are all very important, complex and essential concepts underscoring smooth functioning democracies across the world. I note that the Conference will reflect more in-depth on these issues and I look forward to the outcome of these deliberations.

Constitutions are usually drawn up in a particular historical trajectory of the political development of a country. South Africa has been no exception to this global development. South Africa has a painful past, well known to the world, we endured a brutal system of oppression and apartheid, later declared a crime against humanity by the international community.

The road leading to the adoption of the South African Constitution can be traced back to 1923 when the African National Congress called for the adoption of a Bill of Rights in South Africa. This was followed by a full and detailed Bill of Rights which was adopted by the leadership of the African National Congress in 1943 referred to as the African Claims. The African Claims asserted on behalf of the people of South Africa all the rights and freedoms referred to in the Atlantic Charter signed by US President Roosevelt and British Prime Minister Churchill. It is quite ironic that when Dr AB Xuma sought a meeting with the then Prime Minister JC Smuts, the Prime Minister responded by stating that he was not prepared to discuss proposals which were “wildly impracticable”. Today those seemingly impracticable proposals are, may we dare to say, part of our practicable Constitution.

In June 1955, following a proposal by Professor Z K Mathews, the Freedom Charter was adopted by the Congress of the People at Kliptown. This document became a beacon for millions of South Africans uniting in a common struggle for dignity, equality and social justice. Just a year ago, we celebrated the 50th Anniversary of the adoption of the Freedom Charter.

It was only in 1993 when the Interim Constitution, a product of a protracted process of negotiation and compromise, often marred by widespread public disturbance, acrimonious debate and unspeakable violence, was born. It was required in terms of the Interim Constitution that the Final Constitution must comply with the 34 Constitutional Principles set out in Schedule 4 to the Interim Constitution. To ensure that these Constitutional Principles were complied with, the Interim Constitution required that the constitutional text must be referred to the Constitutional Court for certification.

The South African Constitution was adopted on 08 May 1996 by an overwhelming 87 percent of the members of the Constitutional Assembly. Following adoption, the constitutional text was referred to the Constitutional Court for certification and consequent to two hearings by the Court, the constitutional text was given a stamp of approval on 04 December 1996.

In the foreword to Post Apartheid Constitutions former President Nelson Mandela described the Constitution as follows:

“The Constitution of South Africa speaks of both the past and the future. On the one hand, it is a solemn pact in which we, as South Africans, declare to one another that we shall never permit a repetition of our racist, brutal and repressive past. But it is more than that. It is also a charter for the transformation of our country into one which is truly shared by all its people – a country which in its fullest sense belongs to all of us, black and white, women and men”.

Our Constitution commits us to build a nation based on the democratic values of human dignity, equality and freedom, through constitutionalism and the rule of law. It describes the mechanisms and institutions which we have created to ensure that we achieve this. A Constitution is a living document, and the judiciary breathes life into it, hence a thriving and an independent judiciary is paramount to supreme law of the land. Our understanding of its requirements will and must adapt over time. But the fundamental principles are and must be unchanging.

The Preamble to our Constitution, amongst other things, speaks of the need to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights as well as improving the quality of life of all citizens. It was imperative that a constitution drafted for South Africa responded to the reality faced by our people and imposed obligations and established structural imperatives which sought to ameliorate the apartheid legacy. A constitution which failed to do this would not have accorded with the South African reality and thus would have been singularly inappropriate and unacceptable. Improving the quality of life of citizens and freeing their potential is a moral, constitutional, and political imperative. South Africa has inherited a society which was based on a pernicious and deliberate policy of white supremacy and favouritism. It is morally necessary to remedy this. If the quality of life of the majority of people is not radically improved, then the very existence of the constitutional democracy would be threatened. Why would people defend a constitutional order that provides neither amelioration of their present predicament nor benefits? The temptation to try something else would become irresistible. That has been the constitutional lesson emerging out of Africa. The words of the former President Mandela are therefore apposite:

“The new Constitution obliges us to strive to improve the quality of life of the people. In this sense our national consensus recognizes that there is nothing else that can justify the existence of government but to redress the centuries of unspeakable deprivations, by striving to eliminate poverty, illiteracy, homelessness and disease. 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 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.”

Ladies and gentlemen, this has been one of the main challenge with regards to constitutionalism on our continent, the balance between the rule of law on the one hand, and the expediences of development on the other. Certain countries on our continent negated constitutionalism on the general grounds that it lacks or had the propensity to impede the emancipation of the people.

The constitution must therefore not only be the lasting codification of basic laws that ensures the stability of society in an environment of inclusive justice, but must also facilitate and ensure that justice prevails in a socio-economic development.

One of the primary aims of any Constitution should always be to establish and safeguard a representative democracy which ensures that our people shall govern through a government by the people's elected representatives. The Constitutional framework must encourage public participation by allowing our people to participate in government decisions affecting them.

The principle of democracy is inextricably linked to the values of openness, responsiveness and accountability which are contained in the founding provisions of our Constitution. Governments must therefore be accessible and responsive to the peoples' needs. Constitutions must make government accountable to the people it governs.

The supremacy of the Constitution presupposes a respect for the rule of law. The rule of law entails a safeguard against arbitrary use of power; an effective institutional regulatory framework; an open, free and fair due process; and equal and consistent application of the law to all.

One of the pillars on which our constitutional democracy rests is the separation of powers between the legislature, the executive and judiciary. This separation ensures that each branch of government does not exceed its assigned authority. This also provides the courts the scope to pronounce on legislation that does not conform to the Constitution.

The Chapter 9 Institutions have a significant role in the safeguarding of the rule of law and the promotion and protection of a human rights culture. It is through these Institutions that government is assisted in promoting a human rights culture.

Ensuring that all of the above are integrated into a vibrant constitutional democracy remains a task we are all seized with. Working together in our respective environments through knowledge sharing and capacity building in the constitution building process, reviewing best practices models in the constitutional implementation process, interacting at a regional, continental and international level to explore emerging constitutional development trends, and participating in global forums where key constitutional issues are discussed are all important in strengthening African Constitutionalism.

This conference that brings together constitutional academics, government policy makers, civil society, community organisations will most certainly yield a more multi-faceted response to some of the global challenges we are faced with.

The significance of continued comparative analysis in strengthening constitutionalism in Africa cannot be over emphasized. In this regard, the influence of international law on domestic constitutions is important.

On the African continent, the African Court on Human and People's Rights and the SADC Tribunal remains important institutions that we must, collectively, at all times, safeguard.

Government therefore welcomes the establishment of the Institute for International and Comparative Law in Africa, based at the Faculty of Law at the University of Pretoria, aimed at promoting the rule and the role of the law in Africa through advanced research through partnerships on the continent and abroad.

The Faculty of Law of the University of Pretoria is well-placed to launch the Institute for International and Comparative Law in Africa. It has a long track record of positive involvement in the area of law in South Africa and on the African continent as a whole, not only through its moots and through the Masters programmes in human rights but also, subsequently, in the field of trade and investment law. To this should be added initiatives such as the Law of Africa Collection, the International Development Law Unit, and also the publications of the Pretoria University Law Press or PULP – all of them with a unique focus on promoting the rule and the role of law on the African continent.

It has been good to see that these have not been once off initiatives, They are sustained over many years, and have as a result already had a far-reaching impact on the role that law plays on our continent.

I would urge the Faculty to continue with this tradition of forming long term, mutually beneficial partnerships, and to find innovative ways of promoting development through law.

Continuous and robust dialogue between universities, both domestic and international and also between universities, government departments and other organs of state, should therefore be encouraged.

The topic of this conference, the first to be hosted by the Institute – Constitutionalism in Africa – is highly relevant to the future of our continent, and the quest to establish stable societies, responsive to the needs of their people, which allow them to flourish. The capacity that the Institute is developing in respect of constitutionalism in Africa has the potential, over many years, to be highly beneficial to the future constitutional development of our continent. Again it will be important to make sure this is done in a sustained way, and that Africa's own experts, based at the Institute or elsewhere, develop the necessary institutional memory to learn from good and bad practices.

I have been informed that the Faculty of Law is also in the process of setting up new centres of specialisation, focussing on a wide range of important issues such as intellectual property law, sport law, international humanitarian law, medical law, space law and education law. It has well-recognised expertise in areas such as company and insolvency law, and a very active Law Clinic. It is important that we Africans should establish our own centres of excellence here, as part of continental networks, and not always have to turn to the outside world for advanced expertise, although we should always be open to learn from the outside world as well.

I wish you well in your deliberations and have no doubt that the sharing of knowledge and expertise will further strengthen constitutionalism in Africa.

I thank you.