

The Nelson Mandela Foundation
“The Constitution twenty years after its adoption”
by Deputy Chief Justice Dikgang Moseneke
Nelson Mandela Foundation Centre of Memory
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Salutations

Chairperson of NMF. CEO of NMF, Trustees and, above all, young participants of today. The exhibition is truly special.

Introduction

Today we celebrate the twentieth anniversary of the formal adoption of the Constitution. It is at the stage in its life that many of you 20-somethings are at right now. This book contains the aspirations and hopes of the nation, but it did not come easily. In fact ours is a post-conflict constitution. It was birthed after a horrific past of racial oppression and as a result of robust negotiations that broke down several times, but through resilience and perseverance, eventually produced a constitutional design that is revered the world over.

We have seen it through its infancy and development to young adulthood. And tonight, we reflect on what it has done and what more it still has to do. I hope that through this address, you will claim your place

in the advancement of the constitutional project and walk the Constitution through the next phase of its life into a more tangible realisation of the rights it carries.

History and importance of the Constitution

From the mid-1980s, there was an increasing realisation that the liberation forces must find a peaceful way to end conflict. Negotiations to end colonialism and apartheid and chart a path to a democratic society began with CODESA in 1991 and culminated in the adoption of the Interim Constitution two years later. The Interim Constitution was important for ensuring that the first democratic elections were lawful, and then for drafting the final Constitution. The final Constitution was adopted on 8 May 1996. It was signed into law by President Nelson Mandela in Sharpeville in December 1996 and came into effect on 4 February 1997, completing South Africa's revolution to democracy.

The adoption of the Constitution was meant to produce several outcomes. The two most important were to transform society by installing a democratic society and to heal the divisions of the past. It is now the compass we use to navigate through our post-conflict society. We must be careful not to take steps backwards because of people who make hateful comments that pick at the scabs of those old wounds. The preamble of the Constitution reminds us of our history and journey to freedom and democracy, but also reflects the collective aspirations of the people of South Africa. The Constitution embodies our collective convictions and the minimum virtues and values on which we agree to live by.

Founding provisions

Chapter one of our Constitution establishes the founding provisions of our country. In other words, it sets out the purpose on which this country will be governed. It will be governed as one sovereign state that is free and democratic. It also sets out the overarching principles of this country. The core of this being: human dignity, the achievement of equality and the advancement of human rights and freedoms. Our Constitution steadfastly guards against racialism and sexism. Under no circumstances will this country permit black domination or white domination nor will it allow men to oppress women or women to oppress men. Instead, the Constitution, as the supreme law, enjoins its people to live together peacefully and equally. Our Constitution undoubtedly fortifies the rule of law, which plainly means that nobody is above the law and all actions must be in compliance with the law. It ensures political freedom and promotes a culture of accountability, responsiveness and openness.

Guaranteed rights

I have noticed from the exhibition and your participation in it that you know much about fundamental rights and freedoms. Most young people tend to think our Constitution is made up of only fundamental rights and freedoms. They are indeed of vital importance, but they are not the only things our Constitution regulates.

Chapter two of our Constitution embodies the Bill of Rights. It is a cornerstone of the democratic process in South Africa. The Bill of Rights recognises the fundamental and inherent rights of all people in our country. It also recognises that these rights are not without limits. Of utmost importance is the obligation placed on the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights.

The right to equality is an example of a fundamental right. Everyone is equal before the law. In this way, no one is placed above another simply by arbitrary factors such as gender or skin colour. The Constitution guarantees that no person will be unfairly discriminated against on any of the listed grounds, including race, gender, sexual orientation, age, religion, culture or language.

Another core right is human dignity. The law of this country does not allow any person to degrade, demean, prejudice or enslave anyone. The dignity of any person is protected and respected by our Constitution. The Bill of Rights further entrenches other fundamental rights, including freedom of expression, political rights, housing, children's rights, just administrative action and access to courts.

At times, the character of our fundamental rights requires the balancing of competing interests. This balancing act is between both persons and also between the state and its people. By this token, the state is often charged to progressively realise the rights of its people.

Spheres of government

Chapter three of the Constitution provides for co-operative governance by recognising three spheres of government. They are the national, provincial and local spheres, and they must work together to effectively govern society. While each sphere is distinctive, they are interdependent and interrelated of one another. To govern the people under a unified and indivisible South Africa, the Constitution sets out principles for co-operative governance and intergovernmental relationships. It calls on government at all spheres to preserve the peace and national unity; entrust their loyalty to the Constitution, South Africa and her people; and to secure the well-being of society. Here, the Constitution places you and me at the forefront of these considerations.

Government spheres must respect the constitutional status, institutions, powers and functions of government in all other spheres. Spheres of government are also required to co-operate in mutual trust and good faith. Co-operative governance is important because it prevents one sphere of government from using its powers to undermine the integrity of another sphere, and it impacts on how we are governed. In essence, the principles provided in the Constitution create a framework for government relations and urge the three spheres to resolve disputes at a political level rather than through litigation.

Branches of government

In addition to the three spheres of government, the Constitution also distinguishes between legislative, executive and judicial authority. It outlines the powers and functions of these separate branches of government. While it is not explicitly mentioned in the Constitution, the separation of powers forms part of its design. The objective of the separation of powers was clearly articulated by the late Chief Justice Pius Langa when he said that it “is to secure the freedom of every citizen by seeking to avoid an excessive concentration of power, which can lead to abuse, in one person or body.” It requires checks and balances, which serve to keep the branches of government accountable to one another. Not only is this essential to a constitutional democracy, it also goes a long way in upholding the integrity of the different branches of government.

The legislative arm has the power to make law. It is made up of people we elect to represent us and to ensure government by the people in line with the Constitution. The executive authority has the power to execute and enforce the law. This is important to us because it has social, economic, political and environmental implications. Judicial authority is vested in the courts. Courts are independent and subject only to the Constitution and the law. Their role is to interpret and apply the law without fear, favour or prejudice.

Chapter nine institutions

Chapter nine of the Constitution establishes six state institutions specifically to strengthen and support our constitutional democracy.

They are the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General, Electoral Commission and the Public Protector, which I am sure you would have all heard of. Chapter nine institutions are independent and enjoy constitutional protection against any interference with their functioning. All other organs of state are enjoined to assist and protect these institutions so that they enjoy independence, impartiality, dignity and effective functioning. But their powers and functions are not unfettered. They yield both to the Constitution and the law. The National Assembly exercises oversight over these state institutions: they must account and report to the Assembly at least annually about their activities and performance of their functions. And their powers are all regulated by national legislation.

The state institutions share some common features: most of all, their common mandate, which is to strengthen constitutional democracy in our country. Other similar features include the criteria applicable for the appointment and removal of members of these commissions. Those in service in these institutions must enjoy security of tenure to execute fully their tasks without fear, favour or prejudice. In this way, these watchdogs are indispensable constitutional guarantees that facilitate good governance.

Over the twenty years, chapter nine institutions have and continue to play their part to safeguard our constitutional democracy. The Electoral Commission is one of them. Its task is to ensure that the will of the people is reflected through free and fair elections. It did just that on 27 April 1994 when all eligible adults, irrespective of race, had a say in

who would lead our country. They chose uTata Mandela. I was privileged to serve as the deputy chairperson of the Commission at the time of the first democratic elections. It is important to remember that when we place our marks on the ballots – as we will later this year to vote for local government – we solidify the values of our constitutional democracy. I encourage you all to exercise this right that came off the backs and lives of our freedom fighters. Have your say in our democracy – as the Commission says: “Your future is in your hands”.

The Public Protector is the institution that watches over the conduct of the government. Her office investigates, reports on and takes remedial action in matters concerning state affairs or government administration that is alleged or suspected to be corrupt or prejudicial. The office of the Public Protector has investigated and reported on certain appointments within the SABC; flawed processes in procuring office space to house the Post Office; renovations and improvements to the private residence of the President and financial mismanagement and tender irregularities by PRASA. It is open to anyone to lodge a complaint with the Public Protector.

An interesting feature: procurement

Our Constitution also has other interesting features. Procurement, for instance, is quite a unique inclusion. When an organ of state contracts for goods or services, it must do so in a system of fairness, equality, transparency, competitiveness and cost-effectiveness. All procurement by organs of state must be aligned with these five values. Importantly, it weeds out any form of corruption.

What procedures should public entities follow in procurement? Although there are no prescribed procedures, various methods are made available to organs of state. National Treasury advises that all procurement above a specific amount must invite competitive bids. The tender process still remains the most suitable method for procurement. It directly affects service delivery, job creation and addresses past discrimination.

Your obligations as good citizens

A duty falls on all of us, young and old, to build a better society, starting first with upholding the Constitution. It is the yardstick against which we should test all our actions. The rights and freedoms enshrined in the Constitution come with responsibilities. These responsibilities call on us as individuals to take our rightful place as active and responsible citizens, and to contribute to building the kind of society that makes us proud to be South African. The Constitution facilitates public involvement in legislative and other processes. Play your part. You cannot afford to simply sit idle. We can and should take hold of every opportunity to participate in the law-making processes that affect us. Like we used to say in the old days: “Nothing about me without me.”

You have the benefit of youth. Use it to develop the community by being a proponent of positive change. Be creative: come up with innovative ideas to address social challenges. Expand your networks to tap into

new opportunities. And once your endeavours prove to be successful, pay it forward and empower others. Every little bit counts.

What has the transition yielded?

We are dismantling racial domination. We have managed a treacherous transition and set up ground rules that underscore our democratic ethos, public morality and governance. We have established and maintained a functional democratic state with all the customary markers including multi-partyism, regular elections and rule of law and separation of powers. Our parliamentary system functions certainly more at an elective than at a participatory level. Our fiscal and state treasury functions are not shabby and our revenue collection is world class. Our courts are independent and effective. Our chapter 9 institutions have teeth and often do bite. We boast of a robust civil society that takes up social causes around just about every social issue: for instance, campaigns on HIV/Aids and access to healthcare; genderised violence and access to textbooks and education. For good measure one may add poo protests; wide-spread opposition to e-tolling; objections to the use of labour brokers and the campaign on the right to know. We have our more than fair share of open and public dissent and street protests amongst marginalised people. We are blessed with a vigilant labour movement, a free press that is prying, fearless and unbending. None of our citizens have been jailed only for political, religious or other beliefs. We are not pitted against each other in a civil war or genocide or terrorist attacks. Our transition has indeed yielded much.

If you think that is an overly rosy picture of our democratic transition I urge you to suspend your judgement until I finish. I will shortly debate future challenges to our democracy.

What value have the courts added?

In many senses our courts have been remarkable. Shortly after our transition, equality and discrimination cases were many. In a series of notable cases, courts have refused to tolerate inequality and discrimination. They have struck down scores of laws that undermined appropriate respect for diversity or that harboured antiquated prejudices. Amidst many rumblings, courts would not tolerate, for example, homophobia or gender inequality inspired by religious or cultural patriarchy. They have fashioned the notion of substantive equality that travels well beyond the liberal notion of formal equality. We have insisted that laws and policy must provide for adequate protection of children, people with disabilities, refugees as well as migrants and root out domestic violence.

Courts have, time without count, required the executive to give effect to socio-economic claims of the poor and vulnerable. We have required government to provide appropriate access to health care. Happily so today, our jurisdiction has arguably one of the best public treatment regimes for HIV/Aids patients. We have reminded the executive of its duty to provide access to housing. We have mediated differences around rampant eviction of homeless, urban and rural occupiers who are said to be unlawful. We have insisted that land owners must display patience as homeless occupiers find other refuge. Often we have

ordered municipalities to engage meaningfully with communities in order to avert inhumane evictions. We have ordered government to find alternative accommodation should evictions ensue. Courts have insisted that drinkable water be made available to vulnerable members of society. We have protected learners from being subjected to medium of instruction they don't want. We have required that learners be furnished with study material. Courts have required the social grants to reach all including vulnerable migrants and that grants be paid promptly, particularly in the rural neighbourhoods.

Our courts have developed a proud jurisprudence on justice at the workplace. That is a consequence of the vital choices our founding mothers and fathers have made on worker rights, the recognition and formation of trade unions and employers organisations, the resultant collective bargaining and fair labour practices. Properly so, courts have refused to sacrifice work place justice on the back of claims or promises of economic growth that a so-called open labour market will bring to us. That may, or may not, be so. But that is not for judges to decide. Courts are bound by labour laws. Just labour laws are integral to a more equal and caring society where the dignity of all, including working people, is well shielded.

Courts have been properly pre-occupied with the protection of the right to free expression, including a free press and the right to impart and receive information and art. Our judgments point to the intrinsic worth of free expression and the many public and private blessings of a free and open and debating society. And yet our judgments have also warned

that free expression has limits, particularly when it encroaches on dignity and privacy. However, when public interest is in issue other, and perhaps more pressing, considerations come to the fore. That balance is not generic; it can be properly struck only on a case by case basis.

Courts have intervened where valid allegations have been made about wrongful procurement of goods and services by government. This is a sequel to the important requirement of our Constitution that when all spheres of the state contract for goods and services they must do so within a system that is fair, equitable, transparent, competitive and cost-effective. To that end, Parliament is enjoined to legislate in order to prescribe an appropriate framework of a procurement policy. Of course, the Constitution was alive to the fact that government procurement practices would be vital in the achievement of a more equal society.

In the same breath, our constitutional project is properly intolerant of corrupt state tender practices and all forms of public or private corruption. Courts can only deal with prosecutions that come before them and these sadly have been surprisingly few. In the last two decades no criminal prosecutions on tender irregularities, misuse of public funds or related fraud have served before our superior courts. The celebrated cases of *Selebi* and *Shaik* related to private and not public funds. This begs the question whether there was no misuse of public funds or tender fraud in the last 20 years worth prosecuting? The record shows that when the prosecuting authorities have ventured into courts, my judicial sisters and brothers have not wavered.

Competition law has found a niche in our courts. This is admirable. In the past, our economy allowed very little or real competition in the market because of structural and behavioural anti-competitiveness. Some of our manufacturing and retail business have been found by our courts to have engaged in collusive practices including price fixing. The Competition Commission and its tribunals have done much enviable to remedy or reduce commercial injustices to consumers that flow from collusive pricing.

Conclusion

Twenty years of the operation of the Constitution has gotten us this far. It is true that we face very real challenges, but I have no doubt that the Constitution will continue to better our country. As we move into the next twenty years, let's take the virtues of the Constitution with us and pursue their realisation. Use the Constitution as a tool to maximise the common good, remembering that as powerful as the Constitution is, it cannot realise its aims without our involvement. You, young people, need to be the wind behind its further progression.

I will end with the growing suggestion that leaders like Mr Mandela have sold out the aims and object of our initial revolution and struggle for fundamental change. Those claims are baseless and uninformed. By 1990 we emerged from a long struggle written in blood and sweat and tears. Sacrifices over three centuries led us to where we were. When the transition started, we had won many battles in the long struggle but we had not vanquished our opponents to the ground. That explains why we negotiated the transition to democracy. Mr Mandela and other

leaders did that with aplomb. We wrote down the aspirations of our struggle line by line. The Constitution represents that collective social pact.

It is true that the paper on which the Constitution is written did not give us the land back. It did not resolve the class distinction in society. It did not with one wand induct social equality. In fact the Constitution, as a written pact, cannot on its own transform society. I want to suggest to you that the Constitution envisaged and allows great and honest leaders to lead their people to a re-imagined social condition.

The true challenge of our time is not a paucity of vision or re-imagined political and social virtues. Truly, truly it is the remarkable paucity of women and men in the public and private spaces who understand the transformative power of our collective vision. Our dream is deferred but only because those tasked with helping realise it have been fiddling. They have merged their private greed with their public obligations. They have jettisoned the centuries old ideals for freedom, inclusivity and justice for kleptocracy and patronage. They choose to forget that the public purse derives from our joint contributions and is sacrosanct. It may be disbursed only to advance public good. They have forgotten that all public power derives from the people. And once given by the people all power must be deployed exclusively to the benefit of the people and no one else. Power must be used lawfully and only to create a better life for all.

You as young people, as Frantz Fanon warns, your generation has its own mission to discover, fulfil or betray. Mr Mandela and other great freedom fighter have not sold out. They laid down beginnings that leave you with the clear mission to change your world within the value of a great constitution.