



THE FW DE KLERK FOUNDATION

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding the Constitutional Accord

STATEMENT BY F W DE KLERK ON THE LAUNCHING OF THE F W DE KLERK FOUNDATION CENTRE FOR CONSTITUTIONAL RIGHTS: JOHANNESBURG, 25 OCTOBER 2006

“Honourable Judges, Ladies and Gentlemen

I would like to welcome you to the Johannesburg launch of the F W de Klerk Foundation Centre for Constitutional Rights.

We chose this venue - in the precincts of our Constitutional Court - to highlight the centrality of our Constitution to the future security, freedom and prosperity of every citizen of this country. We specifically chose the Women’s Gaol for this function because we also wished to accentuate the importance of our Constitution for the poor and the marginalised of our society. It reminds us of the enormous distance that we must still travel, before all the people of this country can enjoy all the rights in the Constitution.

Some people have asked me why the FW de Klerk Foundation has established “yet another” organisation to promote the Constitution. I should like to mention three points in that regard:

Firstly, although I am now a private citizen with no party political affiliation, I believe that I have a clear residual duty to do everything I can to help uphold the 1996 Constitution – the national accord that I helped to launch and negotiate.

I say this, not in the spirit of claiming a sort of ownership of our Constitution. I say it in the same spirit that Albert Luthuli said:

“What is important is that we can build an homogeneous South Africa on the basis not of colour but of human values.”

In the same spirit that Desmond Tutu said:

“A person is a person through other people.”

In the same spirit that Nelson Mandela said:

“Never, never and never again shall it be that this beautiful land will experience the oppression of one by another.”

Our Constitution belongs to all of us. It was rigorously negotiated - on and off - over six long years. It was adopted by parties that represented substantial majorities from all our communities. During the negotiations all sides had to make painful concessions and compromises.

When the government that I led had played its part in those negotiations, it gladly transferred sovereign power - not to another political party - but to this Constitution.

Secondly, we have established the Centre for Constitutional Rights because of the centrality of the Constitution to our future as a nation.

We don't think that there can ever be too many organisations supporting our founding document. However, in practice different organisations tend to concentrate on different sets of rights.

Many of them are doing excellent work in the field of AIDS, or children's rights, or gender rights – but there are very few organisations that are genuinely involved in promoting the full spectrum of rights in our Constitution. There are even fewer that are concerned with the rights that the minority parties negotiated into the Constitution. And yet, if we want our Constitution to succeed, it must work for all of us – for the majority and the minorities alike.

Thirdly, we decided to establish the Centre for Constitutional Rights because many key rights are under threat:

- At the end of last year the Government introduced alarming draft amendments to the Constitution. In the opinion of many jurists and commentators from across the spectrum, the draft bill would seriously have undermined the independence of the judiciary. Fortunately, wiser counsel has prevailed and the draft amendments are being reconsidered.
- However, we cannot ignore calls that were made at the beginning of last year that the judiciary should see themselves “as being part of the masses, accountable to them, and inspired by their hopes, dreams and value systems.” If this were ever to be the case what hope for justice would there be for those – from all our communities - who are not part of the masses? Although our courts must be broadly representative of the people, in terms of Section 165 of the Constitution, their only frame of reference must be the Constitution and the law - and not this or that sectional interest.
- In the same vein, the draft Legal Services Charter that was released a few months ago, would summarily abolish the bar. It would establish a council to represent the legal profession that would, in effect, be appointed by the Minister of Justice. This would also have serious implications for the independence of our judicial processes.
- There were also rumblings earlier this year regarding the future of the provinces. Although some provincial governments have appalling service delivery records, provinces are a central facet of our constitutional system. They play an important role in ensuring that government is able to respond effectively to regional differences - including the provision of services to people in languages that they can understand. They help to create alternative centres of power and they bring government closer to the people. For all these reasons we need to support the principle of subsidiarity - that government should be devolved to the lowest level where it can be effectively administered.
- Neither can we ignore the ANC's plan to review the question of property relationships, prior to their next National Consultative Conference in 2007. The question to be considered is whether the property clause in the Constitution "adopted by us and endorsed in the 1996 national constitution is still relevant now". Clearly, any attempt to change the property clause - with its careful balance between expropriation in the national interest and the legitimate interests of property holders - would have far-reaching implications.

- There are also concerns regarding the freedom of expression. In the opinion of most journalists and commentators the proposed Films and Publications Amendment Bill would seriously undermine freedom of expression. The media's main concern is that the amendment removes the exemption from censorship, and other provisions of the Films and Publications Act that the print and broadcast media have enjoyed for more than 40 years. The removal would mean that the media would be subject to Film and Publication Board pre-publication censorship. The problem is not the Bill's ostensible purpose to crack down on child pornography – but the fact that its authors have tacked on a prohibition against 'hate speech' as well. At the same time they have tried to circumvent the Constitution by removing the critical qualifier that 'hate speech' must constitute 'incitement to cause harm'. This means that virtually any contentious statement relating to race, gender, ethnicity or religion could be subject to censorship.
- The ICASA Amendment Bill would give the Minister of Communication the power to choose the councilors, manage the affairs and control the finances of the Independent Communication Authority of South Africa. This would clearly negate the independence of an institution established under Chapter 9 of the Constitution to “ensure fairness and a diversity of views broadly representing South African society.”
- We have recently seen how important it is that we should ensure the independence and impartiality of our national broadcaster. Last week the Group Chief Executive, Adv Dali Mpofu, made an impassioned speech in which he declared that neo-liberalism was “the enemy”. He apparently called for an open struggle between the idea of a “liberal democracy” and the “more community-orientated approach that is rooted in Africa”. The point is that any attempt to impose any ideological approach on the national broadcaster - whether it is neo-liberalism or African communalism - would be unconstitutional. What is more serious is that the Head of our National Broadcaster apparently rejects our Constitution and the liberal democracy *par excellence* that it has created.
- Language rights are also under pressure. For example, the South African Police Service in the Western Cape has, for all practical purposes, prohibited the use of Afrikaans within its own structures - even in parts of the province where 95% of the population speak Afrikaans. The Centre for Constitutional Rights has obtained legal opinions that indicate that this action is probably illegal and unconstitutional.
- We are also concerned about the Government's failure to comply with court orders - particularly in the Eastern Cape. The public servants involved fail to do so in the mistaken belief that they cannot be held in contempt of court.
- Recently, in the Western Cape, we have seen efforts by the provincial government which would clearly encroach on the functional and institutional integrity of Cape Town municipality, apparently in contravention of sections 41 (1) (g) and 151(4) of the Constitution.

Many of these concerns are fortunately still the subject of comment and debate. In a number of instances, Government is clearly taking the objections of stakeholders into account and is trying to find acceptable solutions. I welcome this. However, all of us need to be part of these debates.

We must realize that it is inevitable that, with changing circumstances and shifting power relationships, there will be attempts to re-engineer aspects of our Constitution. All such efforts should, however, be approached with the greatest caution. The 1996 Constitution articulates a national accord that provides the basis for national unity. Any attempt to dispense with key rights and democratic practices would have very serious implications for both national unity and for international confidence.

Under all these circumstances, there can be no doubt about the need for vigilance.

The challenge is to make the Constitution work for all South Africans. As our Chief Justice, Pius Langa, recently observed, the Constitution is, without doubt, a transformative document. Quite

rightly, one of its central objectives is to change our society by addressing the continuing inequality and inherited disadvantages of so many of our people.

But as Chief Justice Langa also pointed out, quoting the current Deputy Chief Justice, “the meaning of transformation in juridical terms is as highly contested as it is difficult to formulate”.

I would suggest that the future of our national accord - and indeed of our new society - will be determined by how our courts finally give meaning and content to the concept of balanced transformation.

On the one hand, it is essential that our society should move forward as rapidly as possible to promote equality – which in terms of Section 9 (2) of the Constitution includes “the full and equal enjoyment of all rights and freedoms”.

On the other hand, the Constitution also contains the full spectrum of rights that are essential for the maintenance of a prosperous multicultural democracy. It provides for the protection of the reasonable core interests of all our communities and all elements of society.

We should all enthusiastically and actively support transformation that is intended to help all South Africans to enjoy the full spectrum of rights guaranteed by the Constitution. However, if transformation is used to abrogate or dilute other constitutional rights – particularly if this is done on the basis of race - it will be a negation of our national accord and will have the direst consequences for national unity, reconciliation and the long-term success of our society.

In practice this means that the courts will continuously have to find a balance between the transformational need to promote the right to equality on the one hand and the need to uphold the rest of our of constitutional rights on the other. It will need to find a fair balance

- between the right to equality and the prohibition of unfair discrimination;
- between the need for land reform to redress skewed property relationships, and the need to protect property rights - without which no modern economy can function;
- between the need to promote national unity and the need to nurture cultural diversity; and
- between the requirement for representivity in our public institutions and the need to retain essential skills and promote effective service delivery.

It is for these reasons that we at the F W de Klerk Foundation have decided to establish the Centre for Constitutional Rights. It has no political affiliation and will promote the full spectrum of rights, values and principles in the Constitution. It supports provisions in the Constitution that promote the equality of people who were previously disadvantaged by unfair discrimination. It accepts the need for balanced affirmative action and land reform. However, it will try to ensure that such policies are implemented in a balanced manner consistent with the promotion of all the other constitutional rights. The Centre will adopt a consensus-seeking, non-confrontational style and will attempt wherever possible to achieve its goals through discussion and persuasion.

I can think of no greater challenge than the challenge of supporting our Constitution and of making it work for all our people.

Let us take hands tonight and accept this challenge.”