



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Centre for Human Rights
Faculty of Law

PRESS STATEMENT

CENTRE CELEBRATES AFRICA DAY (AND 30-YEAR BIRTHDAY) BY REFLECTING ON THE SOUTH AFRICAN CONSTITUTION AT 20

31 May 2016

The Constitution of the Republic of South Africa, 1996, symbol of a transformative South Africa emanating from a deeply divided society, was adopted on 8 May 1996. On 25 May 2016, the Centre for Human Rights celebrated Africa Day, as well as the 20-year existence of the Constitution, as part of a series of events commemorating the Centre's establishment 30 years ago, in May 1986.

The Centre was founded by a small group of academics at the Faculty of Law, University of Pretoria, in the wake of an epoch-making conference reflecting on the possibilities of a Bill of Rights – and a culture of true constitutionalism more broadly – for a post-apartheid South Africa. Three of the speakers at the Africa Day event – founding Centre Director Professor Johann van der Westhuizen (now retired judge of the Constitutional Court), Justice Zak Yacoob (now retired Justice of the Constitutional Court), and Dr Mathole Motshekga (now Chairperson of the Parliamentary Portfolio Committee on Justice and Correctional Services) – were present at that [initial 1986 conference](#).

On Africa Day 2016, seven guest speakers made presentations as part of a discussion form “*By, for and of Africa? Reflections on the South African Constitution at 20*”. The presenters took different and thought-provoking stances on the Constitution, its “African-ness” and its impact. In addition to Justice van der Westhuizen, Justice Yacoob and Dr Motshekga, the following speakers made presentations: Dr Frene Ginwala, first Speaker of the National Assembly, Professor Sandy Africa of the Department of Political Sciences at the University of Pretoria and Dr Alfredo Tjiurimo Hengari, of the South African Institute of International Affairs. The Chairperson of the Tanzanian Commission for Human Rights and Good Governance, Advocate Bahame Tom Nyanduga, presided over a session and provided some introductory thoughts.

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In his introduction, the Director of the Centre, Professor Frans Viljoen, gave a background to the Centre, on the occasion of celebrating 30 years of existence this year. He traced the Centre's evolution in focus, from deep involvement in South Africa's constitutional future, to a broader African perspective and involvement. Two projects in particular propelled the Centre into a more African-centred role: the annual African Human Rights Moot Court Competition, which started in 1992, and the Master's programme focusing on human rights and democratisation in Africa, which started in 2000. Professor Viljoen then introduced the matter at hand, by explaining that the Centre is celebrating the South African Constitution as an African Constitution and that discussions will be based on the African-ness of the Bill of Rights, and the role of South Africa's Bill of Rights in Africa.

Professor Charles Ngwena spoke under the topic "Framing African-ness". Aiming to problematise African identity, he referred to former president Thabo Mbeki's "*I am an African*" speech and stated that the speech is fitting to the African identity as it is all inclusive. He then framed the discussion around the disagreement between the Nigerian author Wole Soyinka and a Kenyan Professor Ali Mazrui on African-ness. He went on to conclude that even between Africans, there are different opinions as to what African-ness really means and because of this, he disputes the notion of "authentic African identity" because there is no archetypical "African". Identity should not be essentialised, but should be viewed as a socially-constructed "invention", which is being re-invented all the time. When identity is essentialised, it leads to exclusion, as exemplified by apartheid's obsession with categorisation. The idea of "Africa" is complex. In order to understand Africa one must look at both its past and future because African identity is subject to transformation. Professor Ngwena opted for an African identity derived from one's "belonging" to Africa.

Justice Johann van der Westhuizen reflected of the drafting of the Constitution. He recalled section 1, which sets out the founding provisions. He also remembered the drafting of the preamble and how overwhelmed he was when Dr Blade Nzimande, later the Minister for Higher Education and Training, read it out loud. This then led to him to recount that he has recently encountered three different worlds in our country. One came alive after the farewell function of the former Deputy Chief Justice Dikgang Moseneke, where he observed that there was unanimity with regards to the value of the Constitution among everyone who was present. They all took the time to appreciate the integral part which it has played in South Africa's immediate past. They did however acknowledge the fact that poverty and other socio-economic rights are to be taken seriously by the courts. Conversely, the second world was brought to his attention during an event he attended, at which a group of young people stated that they have found no value in the Constitution as they find it to be a "colonialist" constitution. This group went further to say that they have resultantly formed their "own constitution". The last world is

one that is mixed: one that appreciates the Constitution and acknowledges that there is more that can be done, however what it has achieved so far is something to commend.

Dr Frene Ginwala reiterated the importance of looking into history. She recalled that, during the drafting of the Freedom Charter, the question arose “who will choose” what will go in the Charter, and that the answer was: “the people will choose”. She explained that many events preceded the CODESA negotiations, including the multiple meetings she and others in exile had with delegations from South Africa at the American Embassy. She explained that much has changed in our country. We moved from a parliament that used to hold whites only, to one that is multiracial, in conjunction with the transformation occasioned by the Constitution and greater awareness of African identity. She concluded that when looking at our history and where we are now, there is a reflection of change. She said that our identities are what we are, good and bad, and have come out of a long history.

Dr Mathole Motshekga recalled the 1906 essay by ANC founding father Pixley ka Isaka Seme in which he had already proclaimed: “I am an African”. He suggested that President Mbeki was not the first to utter these words, and that he thus was either unaware of the 1906 essay, or just did not “reference his sources very well”. He further focused on the importance of interpreting of the Constitution correctly. In his view, there is nothing wrong – and nothing “un-African” – about the Constitution. The problem is that it is being interpreted incorrectly, causing African traditions to be violated on the basis of constitutional interpretations. The Constitution is good and has African elements, but without proper interpretation, this becomes a problem. In his view, African jurisprudence should be used when interpreting the Constitution, using elements such as consensual dispute resolution, mediation and conciliation. He lamented the judicialisation of politics (and even attempts at “judicial regime change”), and contended that the courts should use African jurisprudence to avoid the destructive nature of judicialised politics.

Justice Zak Yacoob reiterated that the struggle against apartheid was aimed not only at South Africa’s liberation, but that of Africa as a whole. He disagreed with Dr Motshekga. If there are problems with “African-ness”, he suggested, they may derive not primarily from judicial interpretation, but from the text of the Constitution itself. In his view, the Constitution may lack some explicitly African features, but it has many elements that are particularly focused on African realities. These include justiciabile socio-economic rights, which are in line with the African Charter on Human and Peoples’ Rights, the under-emphasis of freedom, and the stress on dignity and equality. He pointed to some judgments in which the Constitutional Court invoked African values, including “Ubuntu”, but conceded that the Court could have made more consistent and meaningful reference to the case-law of other African courts. In his words: “It is possible, necessary and important that the Constitutional Court’s jurisprudence squarely fit and make reference to the judgments of other African courts.” He

encouraged academics to educate lawyers to be better equipped to make appropriate reference and place reliance on the African Charter and the judgments of other African courts.

Prof Sandy Africa focused on national security, as defined in Chapter 11 of the Constitution. She elaborated on the impact of South Africa's ideas of national security, as encapsulated in the Constitution, on the African continent, and on the effectiveness of South Africa in upholding the relevant constitutional provisions. She spoke about how other Africans look at the South African Constitution with admiration, which inspires them to thrive to achieve good governance. She stated that the Constitution is a "very nice" model, but questioned whether we have been true to it. She described our country as one that has an oversised system which is collapsing. She explained that we have delayed reports that come in years later, and that there has been a politicisation of processes. As a result, "what we try to promote as good governance becomes dismissed" she said. In her conclusion, she explained that the solution to our problem lies in promoting peaceful approaches to problem solving, and, more importantly, in addressing the need to have strong, effective, accountable and legitimate institutions.

Speaking under the theme "*South Africa's exceptionalism in Africa at the crossroads*", Dr Alfredo Tjiurimo Hengari stated that South Africa is a key promoter and contributor to sustainable development, the rule of law, human rights and peace on the continent. He the remarks made by Barbara Masekela (during her time as South Africa's Ambassador in France and the US) very instructive: that South Africa has confronted and dealt with many difficult challenges that have left other countries in ashes and found it fit to call us problem solvers. Ambassador Masekela also said that we are still revolutionaries and want a better world in the future. Hengari mentioned that South Africa's ethical intervention on the African continent was informed by its own exemplary political transition entrenched in values such as human rights, democracy and constitutionalism. He stated that in order to guarantee stability in our own country, we needed to guarantee stability for the continent. He further explained that Africa as a whole had certain expectations for what a democratic South Africa would achieve, some of which were not. Consequently, South Africa can no longer be seen as "exceptional" on the continent. He did however acknowledge that even though South Africa failed to solve some disputes, it has been influential and had a positive influence in resolving conflict in many parts of the African continent. In summary, he contended that South Africa is no longer in a position to present an unproblematic image of a democratic human rights-based state, as it is itself plagued by issues such as a President seen to be flouting the Constitution, and xenophobic violence against fellow Africans.

The general mood at the end of the evening was one of pride and appreciation for being "African". This was captured in a [poem](#) delivered by the Assistant Director of the Centre, Mr Norman Taku, in

which he highlighted the complex and hybrid nature of his own “African-ness”, and that of many Africans.

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