KEYNOTE ADDRESS - *REFLECTIONS ON SOUTH AFRICAN CONSTITUTIONAL DEMOCRACY – TRANSITION AND TRANSFORMATION*

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AT THE MISTRA-TMALI-UNISA CONFERENCE

*20 YEARS OF SOUTH AFRICAN DEMOCRACY: SO WHERE TO NOW?*

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*Introduction and salutations*

I salute you all distinguished people of our great country. I am grateful to be here rather than in court this morning. I owe gratitude to Mapungubwe Institute for Strategic Reflection (MISTRA), the Thabo Mbeki African Leadership Institute (TMALI) and special thanks to my alma mater and the only university I have ever attended and from which I acquired no less than 3 degrees during my short stint of 10 years on Robben Island. Yes, 10 years can only be a short stint if one remembers that our departed and beloved leader, Mr Nelson Rolihlahla Mandela, was there for 27 years.

I have been asked to reflect on our constitutional democracy with a slant on transition and transformation. This I propose to do by looking at the past 20 years only fleetingly in order to proffer reflections on our collective future. Our hosts have urged that our dialogue in the next two days should be not diagnostic but rather prognostic. The thematic conversations at this conference seem to require of us not to analyse the past until we are hypnotised but rather to probe the future, as Lenin famously asked: "*what's to be done*." Appropriately, we have been counselled to dwell in the past only so that we may thoughtfully pose the question: "so where to now?"

This conference will be reflecting on selected trends and features of our democratic transition. I hope not to venture into allotted terrains of distinguished leaders,

scholars and other thinkers who will be presenting in panels. Therefore, I will not recount historical moments, nor dabble in the discourse on our political economy or African economic renewal, let alone the global economy. There are others better suited to that task. Similarly, I won't debate values, nation formation and social compacting. Nor will I venture into a discussion on innovation, trans-disciplinary knowledge or of the prognosis for a developmental state. These matters will enjoy the attention of distinguished contributors.

I propose to stick to my knitting. I must remind myself that, although I am a child of our revolution for a just society, I am a sitting judge in the service of all our people and their democratic state. It behoves me to speak like a judge, a role I have played so long that it now feels like the only thing I have done all my life. I will describe briefly our transition and the normative scheme of our democratic enterprise. Next, in broad brush strokes, I will depict what the transition has yielded. Being a judge I will catalogue what the courts have done in the two decades of transition. I will then turn my lens onto four selected features of our democratic project that pose trenchant challenges to the democratic project. These challenges, I think, deserve our careful reflection, as we, patriots, ask what is to be done.

The first of the challenges is the land question. Here, I will be probing whether the democratic project has secured urban and rural land justice. The second issue flows from the first. It is the vexed terrain of the achievement of equality, non racialism and restitution. In the third instance, I will ask questions about the impact of concentrated executive power on our public institutions and lastly I will reflect on the mediation and adjudication of public disputes.

*Transition and resultant normative scheme*

Let me start with a touch of patriotic vanity. In the wake of the Arab Spring, a US Supreme Court Justice, Ruth Bader-Ginsberg, whilst visiting Egypt was asked to provide advice on constitution-making. She is reported to have said: "I would not look to the United States Constitution if I was drafting a constitution in 2012". She recommended to the Egyptians to look, in her

words, to "the South African Constitution and perhaps the Canadian Chapter on Rights and Freedoms, and the European Convention on Human Rights."[1]

A fascinating law journal article: '*The Declining Influence of the United States Constitution*'[2] penned by two American Law Professors,[3] bemoans the decline of American constitutionalism around the world. The article reports on an empirical study of constitutions of the world and finds that four constitutions are influential benchmarks for modern constitution-making. It lists the constitutions of South Africa, Canada, Germany, and India.[4] So we can afford to be gentle on ourselves. We have managed our post-conflict arrangements better than we grant ourselves.

Our constitutional democracy was forged on the anvil of division, past injustice and economic inequity, but also on the hope for reconciliation, nation building and social cohesion. Notionally, our Constitution is premised on the will of the people expressed in representative and participatory processes. It does not only establish its supremacy, rule of law and fundamental rights but also recites our collective convictions.[5] It contains our joint and minimum ideological and normative choices of what a good society should be. It enjoins the state, all its organs, to take reasonable steps without undue delay to achieve that good society. The virtuous society envisioned has a significant social democratic flavour, some reckon, and yet others take it to be a neo-liberal compromise. Aside facile tags, the Constitution provides for many progressive things. It protects and advances fair labour practices.[6] It compels all to preserve an environment that is not harmful; for the benefit of present and future generations.[7] It envisions restitution of land to victims of dispossession but does not permit arbitrary deprivation of property. It permits

[1] New York Times, article titled "'We the people' Loses appeal with people around the world" published, February 6 2012.
[2] Published in New York University Law Review, Vol. 87, 2012.
[3] Prof David Law and Prof Mila Versteeg.
[4] At p 809-29.
[5] Section 1 of the Constitution of the Republic of South Africa.
[6] Section 23.
[7] Section 24.

expropriation and redistribution of land for public good provided that it is against just and equitable compensation.[8] The envisioned society sets itself firmly against poverty, ill health and ignorance. This it does by promising everyone the right to have access to adequate housing, healthcare, food, water and social security subject to available resources and progressive realisation.[9] A child's best interests are of paramount importance in every matter concerning it.[10] And everyone has a right to basic education including adult basic education.[11]

The Constitution enjoins and hopes for an effective, responsive, open and accountable governance from all organs of state inclusive of parliament, the executive and the courts. Parliament must make laws, hold the executive accountable and provide a forum for the debate of matters of national importance. The executive must implement laws, makes policy and spend fiscal allocations. Courts must resolve disputes in accordance with the Constitution and the law which includes African indigenous law and the common law.

It must follow from what I have said that our constitutional design is emphatically transformative. It is meant to migrate us from a murky and brutish past to an inclusive future animated by values of human decency and solidarity. It contains a binding consensus on, or a blueprint of, what a fully transformed society should look like.

*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

[8] Section 25.
[9] Sections 26 and 27.
[10] Section 28.
[11] Section 29.

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[12], the Auditor General, the Electoral Commission, the Human Rights Commission and the Public Protector, to name a few, 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; on genderised violence and on 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 has 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 proliferated. In a series of notable cases, courts have refused to tolerate inequality and discrimination.[13] They have struck down scores of laws that undermined appropriate respect for diversity or that harboured

[12] Section 181 – 194 of the Constitution.

[13] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004); *August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999); *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197; 1996 (6) BCLR 752.

antiquated prejudices.[14] 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.[15] We have insisted that laws and policy must provide for adequate protection of children, people with disability and refugees as well as migrants and root out domestic violence.[16]

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.[17] 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.[18] We have mediated differences around rampant eviction of homeless, urban and rural occupiers who are said to be unlawful.[19] We have insisted that land owners must display patience as homeless occupiers find other refuge.[20] Often we have ordered municipalities to engage meaningfully with communities in order to avert inhumane evictions.[21] We have ordered government to find alternative accommodation should evictions ensue.[22] Courts have insisted that drinkable water be made available to vulnerable

[14] *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC); *Larbi-Odam and Others v Member of the Eexecutive Council for Education (North-West Province) and Another* (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745.

[15] *Minister of Finance and Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC).

[16] *Grootboom and Others v Oostenberg Municipality and Others* [1999] ZAWCHC 1 (17 December 1999) *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC); *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143.

[17] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033.

[18] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

[19] *Zulu and 389 Others v eThekwini Municipality and Others* [2014] ZACC 17; 2014 (4) SA 590 (CC); 2014 (8) BCLR 971 (CC).

[20] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC).

[21] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC).

[22] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC)* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC).

members of society.[23] We have protected learners from being subjected to a medium of instruction they don't want.[24] We have required that learners be furnished with study material.[25] Courts have required the social grants to reach all including vulnerable migrants and that grants be paid promptly, particularly in the rural neighbourhoods.[26]

Our courts have developed a proud jurisprudence on justice at the work place.[27] 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 of 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.[28] 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.[29]

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[23] *City of Johannesburg and Others v Mazibuko and Others* (489/08) [2009] ZASCA 20; 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 (SCA) ; [2009] 3 All SA 202 (SCA).

[24] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC).

[25] *Section 27 and Others v Minister of Education and Another* [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP).

[26] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

[27] *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC); *South African Police Services v Nkambule and Others* [2013] ZALCPE 11.

[28] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7, 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC).

[29] *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)

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.[30] 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.[31] 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 inimical to and 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*[32] and *Shaik*[33] 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

[30] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC).
[31] Section 217.
[32] *Selebi v S* (240/2011) [2011] ZASCA 249; 2012 (1) SA 487 (SCA); 2012 (1) SACR 209 (SCA); [2012] 1 All SA 332 (SCA).
[33] *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC) ; 2008 (2) SACR 165 (CC) ; 2008 (8) BCLR 834 (CC).

because of structural and behavioural anti-competitiveness. Some of our manufacturing and retail businesses 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 work to remedy or reduce commercial injustices to consumers that flow from collusive pricing.[34]

*Trenchant challenges*

I turn to look at the four trenchant challenges we would do well to heed in our further democratic journey.

*(a) Land restoration, urban and rural land justice*

Nearly 70 years ago, in *The Wretched of the Earth*[35], Frantz Fanon, observed that "[F]or a colonized people the most essential value, because it is the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity."

Fanon's remarks were apt but not a new insight, if one remembers that the organising principle at the formation of the African National Congress in 1912 was the impending wholesale land confiscation prefigured in the 1913 Land Act. The land dispossession, coupled with urban spatial apartheid, led to immeasurable social devastation recorded in many invaluable studies.[36]

The land question was foremost at the time of the formulation of the Constitution. This is displayed in the careful formulation of the property clause which is often more maligned than carefully scrutinised.[37] Let us quickly look

[34] *Competition Commission v Engen Petroleum Ltd* [2012] ZACT 14; *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 (Commission imposed unprecedented R 1 000 000 000 penalty on Pioneer for collusive price fixing, with respect to bread and flour which undoubtedly harmed the most vulnerable consumers.)
[35] Originally published as *Les damnés de la terre* (1961, François Maspero éditeur: Paris).
[36] A recent account of this can be found in *We want what's ours: Learning from South Africa's Land Restitution Program* by Prof Bernadette Atuahene (2014 Oxford University Press).
[37] Section 25 of the Constitution reads:

> 1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application -
> (a) for a public purpose or in the public interest; and

at the scheme of the property clause. I start with land restitution. The section envisions restitution of land to victims of dispossession but does not permit arbitrary deprivation of property. A person or community dispossessed of property after June 1913 by racially discriminatory laws is entitled to either restitution or equitable redress.[38] Similarly a person or community whose land tenure is insecure because of apartheid laws is entitled to a secure land title.[39] Commendably, parliament passed the legislation to give effect to land restoration within 12 months of democratic rule and established a dedicated Land Claims Court.[40]

The property clause permits expropriation of land by a law of general application provided it is for a public purpose or in the public interest and it is against just and equitable compensation reflecting an equitable balance

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(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.
(4) For the purposes of this section -
(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land.
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
(9) Parliament must enact the legislation referred to in subsection (6).

[38] Section 25(7).
[39] Section 25(6).
[40] This legislation is the Restitution of Land Rights Act 22 of 1994.

between the public interest and the interest of the landowner. The extent of the compensation may be fixed by agreement or by a court guided by a number of listed factors. Let's slaughter a few shibboleths. The Constitution does not protect property it merely protects an owner against arbitrary deprivation.[41] Deprivation that is not arbitrary is permissible. The property clause does not carry the phrase: *"willing buyer: willing seller"* which is often blamed for an inadequate resolution of the land question. The state's power to expropriate does not depend on the willingness of the land owner. The compensation may be agreed but if not, a court must fix it. The compensation must be just and equitable and not necessarily the market value of the land. Market price is but one of five criteria the Constitution lists for a court to set fair compensation.[42] The property clause is emphatic that the state must take reasonable measures, within available resources, to enable citizens to gain access to land on an equitable basis.

The cutting question is whether our democratic consolidation has achieved urban or rural land equity? Although much has been done, the answer is no. Present statistics on land redistribution show very little movement away from apartheid patterns of the use and ownership of land.[43] Only a small percentage of land restitution claims have been finalised[44]. The bulk is yet to reach the courts.[45] Land claims that do reach the courts, display remarkable delays of years before reaching the courts. The claims are also beset by bureaucratic inadequacies. And there are severe difficulties for claimants in gathering evidence to back the claims and to overcome legal resistance by

[41] Section 25(1).
[42] Section 25(3).
[43] The most recent Annual Report by the Commission on Restitution of Land Rights, for the review period 01 April 2013 – 31 March 2014, provides the following information: "A total of 3.07 million hectares acquired at a cost of R17 billion and financial compensation in the amount of R8 billion has been awarded to 1,8 million beneficiaries coming from 371,140 families of which 138,456 are female headed families. In addition R4,1 billion has been awarded to those beneficiaries that have been awarded land as development assistance. The total cost of the restitution programme to date stands at R29, 3 billion."
[44] This Annual Report also reflects that to date the Commission on Restitution of Land Rights has settled 77610 claims.
[45] On 01 July 2014 the Restitution of Land Rights Amendment Act 15 of 2014, came into effect which reopened the restitution claims process that closed at the end of 1998 and gives claimants five years until 30 June 2019 to lodge further claims.

some owners. On another front, there is very scant evidence of the use by government of expropriation to achieve land equity.

In 20 years our Court has not resolved even one case of land expropriation under the property clause by government for a public purpose. Similarly, in the same time the courts have never been called upon to give meaning to the property clause in the context of land expropriation or to decide on what is a just and equitable compensation. One would have expected that a matter so pressing as land use, occupation or ownership would pre-dominate the list of disputes in the post-conflict contestation. Sadly, urban homelessness persists. Apartheid spatial patterns remain. People in informal settlements run the risk of mass evictions such as in *Lwandle* in the Cape[46] or Cato Crest in KZN[47].

Rural land hunger stands in the way of genuine rural development. Women who till the soil and live on communal land don't have the protection that security of land tenure provides. Communal land vests in traditional authorities who do not always act in the best interest of their communities made up mainly of women and children. In at least two cases relating to the platinum rich Limpopo and North West Provinces our Court had to intervene where the traditional leaders had concluded mining arrangements on communal land without proper consultation with the traditional community.[48]

It may be that the property and restitutionary provisions in section 25 of the Constitution on land have been hopelessly under worked. I want to suggest that we cannot talk about transformation or social justice and cohesion when urban and rural land injustice dominates the lives of a majority of our citizens.

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[46] *South African National Roads Agency Limited v City of Cape Town and Others; In Re: Protea Parkway Consortium v City of Cape Town and Others* [2014] ZAWCHC 125.

[47] See *Zulu* n 19 above.

[48] *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC).

Millions will continue to live in desperately undignified conditions unless we confront land inequity.

*(b) Equality, non-racialism and restitution and social justice*

The achievement of equality is a founding value of our Constitution[49] and it is said to be the most prominent organising principle of our democratic enterprise. And yet our reality is starkly different. Several socio-economic measures suggest that we are the most unequal society on the globe Lately a World Bank study compared us with 11 other middle income countries[50] and concluded that:

"However, even with a progressive tax system, inequality in South Africa was still higher than the other 11 countries in the sample. This was because it was one of the most unequal countries in the world.

"Even though South Africa has a very effective use of its fiscal tools, the original problems in income inequality are so high that South Africa is going to need other things to help it address the problem of inequality.

"To make further progress going forward, you need to complement fiscal policy with higher more inclusive growth that essentially generates jobs, especially at the lower end of the distribution."[51]

I must immediately add that the study commended our state for the way it has used fiscal tools to reduce poverty. 3.6 million people have been lifted above the poverty line. The use of social grants has also lowered the Gini co-efficient on income, which measures inequality.

The World Bank update talks about *the original problem in income inequality* and that South Africa is going to need other measures to help reduce inequality. That historical inequality of both income and wealth still persists

[49] Section 1 of the Constitution.
[50] SA Economic Update –The other 11 middle-income sample countries were Armenia, Bolivia, Brazil, Costa Rica, El Salvador, Ethiopia, Guatemala, Indonesia, Mexico, Peru and Uruguay. Available online at http://www.worldbank.org/content/dam/Worldbank/document/Africa/South%20Africa/Report/south-africa-economic-update-2013.05.pdf.
[51] Economic Update.

and race and gender, in most instances, are markers of past exclusion or disadvantage. In order to address historical disadvantage our equality clause permits legislative and other measures to achieve equality. These are restitutionary measures sometimes inappropriately called affirmative action. The two most prominent examples of such measures are the employment equity and black economic empowerment laws.

At the turn of two decades of our democratic project there has been an increasing discourse about the appropriateness of restitutionary measures within a democratic project that prides itself on non-racial and non-sexist values. As I understand the one end of the argument, there is an inherent tension between requirements of equal protection of the law and of non-racism on the one end and affirmative action measures which are intended to benefit the previously vulnerable groups. The argument is that race or gender are not always useful or accurate markers of past disadvantage. The further point is made that young people born in 1994 have no business to look to affirmative action measures because they did not live under racial disadvantage and in any event many middle class black youth have been as advantaged as much as or more than white youth. In certain quarters employment equity and other related matters are considered to be reverse racism.

There is indeed force in the argument that mere race or gender may not be an accurate index of social exclusion and disadvantage. We know that one of the trophies of the national democratic phase of the transition is that the African middle class has shot up from 1.8 million to 5.7 million. That may indeed appear to be an indicator of a more equal society until one locates 5.7 million within a population of 52 million people. Then the black middle class peters out to a mere 10 per cent of the population.

Of course there is an inherent tension between transformative goals based on race and gender in the face of the constitutional value of non-racial and non-sexist equality. It is necessary that legislation and executive action is limited

to permissible ameliorative measures that fall within the strict carve-out created by the Constitution itself. It clearly permits legislative and other measures to promote the achievement of equality.[52] The measures must be designed to protect or advance persons disadvantaged by unfair discrimination. The measures may not amount to quotas. They must be applied rationally and only to procure a more equal society. In the second 20 years of our democracy we will have to think carefully whether the measures continue to be justified. This is so because fewer and fewer people will be able to claim legitimately that they have been disadvantaged by unfair discrimination of the past. For now the measures would enjoy constitutional protection because the Constitution permits restitutionary measures in so many words.

The time may not be far off where the national psyche may not be able to tolerate the notion that class interest may very well supersede interests forged around race, gender and past disadvantage. A last point has to be made. The most effective way of confronting past disadvantage must lie in the broader socio-economic transformative agenda. In a non-racial way we must strive for an equal and socially just society. We must harness public resources carefully towards quality education, entrepreneurial capabilities, better health care, and access to housing. For instance, fiscal interventions have funded social grants for all vulnerable people irrespective of their gender or race. To conclude, our constitutional design permits ameliorative or restitutionary measures and courts are obliged to give effect to them. As I conclude I pose the question whether a race-based transformation continues to be consistent with a broader constitutional transformation. Many transformative projects in the Constitution, and in particular its socio-economic guarantees, are not race or gender based and need not be.

*(c) Executive power and public institutions.*

[52] Section 9.

Much of the glowing talk about our constitutional architecture relates to fundamental rights and freedoms. And yet the manner in which public power is allocated within it is not always optimal for advancing our democratic project. I suggest that in the next two decades we may have to revisit the dispersal of public power. Because of time and space I will limit the discussion to the national executive. Of course amending executive power may be a difficult task that calls for an amendment. Much as the Constitution is premised on principles of co-operative government[53] binding the national, provincial and local spheres of government, a careful examination of the powers of the national executive in chapter 5 of the Constitution and in other legislation displays a remarkable concentration of the President's powers of appointment. In a few instances the President exercises these powers of appointment together with Parliament and other organs of state. As for the rest, the President appoints within his exclusive discretion.

The anecdotal account is that at the time of the formulation of the final Constitution, whenever there was a dispute about who should appoint a public functionary, the negotiating parties were happy to leave the power in the incumbent President, Nelson Mandela. He, after all, will do the right thing. In a footnote, I have rehearsed the complete catalogue of the President's power of appointment.[54]

I refer to a few. Unlike other countries where the Deputy President is a running mate, here he is appointed by the President.[55] This means he or she

[53] Section 41.

[54] Not included in the next paragraph: Section 84 (2)(f) of the Constitution empowers the President to appoint commissions of enquiry; Section 93(1)(a) and (b) of the Constitution enables the President to appoint any number of Deputy Ministers from among members of the National Assembly and no more than two Deputy Ministers from outside the Assembly to assist the members of the Cabinet, and may also dismiss them; Section 178(j) of the Constitution empowers the President to designate four person to the Judicial Service Commission in consultation with the leaders of parties in the National Assembly; Section 209(1) empowers the President alone to establish an Intelligence Service other than the defence and police force. Section 6(1) of the Electoral Commission Act 51 of 1966 empowers the President to appoint the five members of the Electoral Commission one of which must be a judge; Section 5(2) of the Telecommunications Act 13 of 2000 empowers the President to appoint one of the councillors as chairperson of the council; Section 22 (4) of the Restitution of Land Rights Act 22 of 1994 empowers the President to appoint additional judges to the Land Claims Court in consultation with the Judicial Service Commission.

[55] Section 91(2) of the Constitution.

may be dismissed summarily by the President. Our own history has shown how the dismissal of a deputy president could be deleterious to the executive function. The president appoints the Ministers of the Cabinet and Deputy Ministers, leaders of government business to the National Assembly.[56] He appoints all ambassadors.[57] The President appoints the Chief Justice and the Deputy Chief Justice after consultation with the Judicial Service Commission and appoints the President of the Supreme Court of Appeal.[58] He is also empowered to appoint the Judge President of the Land Claims Court[59] and Chairperson of the Competition Tribunal[60], and the Judge President of the Competition Appeal Court[61]. He appoints all judges on advice from the JSC and acting judges in consultation with the Chief Justice.[62] The President further appoints heads of many vital public institutions; these include the National Director of Public Prosecutions, the Public Protector[63], the Auditor-General, members of the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission on recommendation from the National Assembly[64] and may remove[65] members of Chapter 9 on specified grounds. She appoints commissioners of the Public Service Commission[66], the head of the Defence Force and the military command of the Defence Force[67], the head of the police[68], the head of the Intelligence Service[69] and members of the Financial and Fiscal Commission[70]. Under a variety of legislative instruments the President appoints the

[56] Section 91(2) and 91(4) of the Constitution.
[57] Section 84 (2)(i) of the Constitution.
[58] Section 174 (3) of the Constitution.
[59] Section 22(3) of the Restitution of Land Rights Act 22 of 1994 as amended by the Restitution of Land Rights Act 15 of 2014.
[60] Section 26(3) of the Competition Act 89 of 1998.
[61] Section 36(2)(a) of the Competition Act 89 of 1998.
[62] Sections 174 (4) and (6) and Section 175 of the Constitution.
[63] Section 179 (1)(a) of the Constitution.
[64] Section 193(4) of the Constitution.
[65] Section 194(1) of the Constitution.
[66] Section 196 (7) of the Constitution.
[67] Section 202 (1) of the Constitution.
[68] Section 207(1) of the Constitution.
[69] Section 209 (2) of the Constitution.
[70] Section 221 of the Constitution.

Statistician General[71], the Governor and Deputy Governor of the South African Reserve Bank[72], the Commissioner of South African Revenue Service[73], Members of the Tax Court[74], members of the Independent Communications Authority of South Africa[75]. As you would expect powers of appointment are often coupled with powers of removal albeit it subject to some prescribed process.

The vast powers of the appointment of the national executive bring to the fore the debate whether the democratic project will be best served by a powerful central executive authority. Our courts have had to adjudicate challenges against the rationality of several appointments made by the President. It is self evident that an appointment by a deliberative collective is less vulnerable to a legal challenge of rationality than an appointment by an individual functionary. The ultimate question is how best we may shield appointments of public functionaries to institutions that gird our democracy, from the personal preferences and vagary of the appointing authority. The question may be asked differently. How best must we safeguard the effectiveness and integrity of public institutions indispensible to the democratic polity? Finally, an equally important debate should be whether appointing members of the cabinet exclusively from the ranks of members of Parliament best advances the duty members of Parliament have to hold the executive to account. If their career logical advancement is within the national executive, are members of Parliament likely to rattle the executive cage? Will they fulfil their constitutional mandate by holding the national executive to account? This uncanny concentration of power is a matter which going forward we may ignore but only at our peril.

*(d) Trends in conflict resolution*

Adam Przeworski is a Polish scholar on politics and democracy. He says:

[71] Section 6(1) of the Statistics Act 6 of 1999.
[72] Section 4(1)(a) of the South African Reserve Bank Act 90 of 1989.
[73] Section 6(1) of the South African Revenue Services Act 34 of 1997.
[74] Section 83(5)(a) of the Income Tax Act 58 of 1962.
[75] Section 5(1) of the Telecommunications Act 13 of 2000.

*Democracy is the realm of the intermediate; the future is not written. Conflicts of values and of interests are inherent in all societies. Democracy is needed precisely because we cannot agree. Democracy is only a system for processing conflicts without killing one another; it is a system in which there are differences, conflicts, winners and losers. Conflicts are absent only in the authoritarian systems.*

Statistics on the number of public protests, some of which tend to be violent, is startling. The last 12 months the police reported 11 688 service delivery or other protests in our country.[76] It is fair to consider public protests as a dispute resolution mechanism which is readily available to the working and the marginalised poor people. Some protests yield the desired results and officialdom acts to appease, others not.

A trend not unlike civil protests is the contestation that occurs in the rarefied setting of a court room. Litigation, in our country too, has become a preserve of those who wield public power and purse and those who can pay for it out of available resources. The ever bulging court roll at the Constitutional Court tends to be dominated by state litigants, followed by business enterprises and labour matters. All three classes of litigants are funded by a collective purse. A trickle of disputes is prosecuted by public interest law firms for vulnerable classes of citizens.

Superior courts of our country are confronted by an avalanche of litigation from powerful interests in land. This phenomenon is known as *lawfare*. In the past law has played a very important role in our history. Apartheid oppression was itself a collection of laws which were harnessed to achieve unjust economic and political ends. However, in the eyes of the majority of people there was no rational divide between law and politics. Law served narrow political ends and courts were seen as mere instruments. In the process their legitimacy suffered and waned. Activists prosecuted spirited political struggles

[76] Available at http://www.saps.gov.za/about/stratframework/annualreports.php .

in courts and through the law. Activists too used courts and the law to proclaim their cause. This point is made rather sharply by Dennis Davis and Michelle Le Roux in *Precedent and Possibility.*[77] They correctly observe that:

> "During the long night of apartheid, courts were often sites of vigorous political struggle, being places where different visions of the country were presented to the public by competing litigants, usually the state against accused persons or applicants whose rights were at stake. Since 1994, and the advent of constitutional democracy, similarly significant contests have taken place in the courts. There is however a major difference: Litigation now takes place within the context of the Constitution which provides a vast range of rights for all who live in the country."

Despite the advent of democracy, the tide has shot up. South African courts have, particularly of late, been confronted with a series of challenges which turn on a variety of disputes. Some are essentially of a political nature: the termination of the Scorpions and its replacement by the Hawks[78], the extension of the term of office of the Chief Justice[79], the appointment of judges to the Cape High Court[80], the appointment of the National Director of Public Prosecutions[81], the challenge into the arms deal which has finally ended with the appointment of a Commission of Enquiry, a parliamentary dispute over a motion of no confidence[82]; the powers of the public protector.; appointment battles within state enterprises. The labour movement itself resorts to the Courts often to resolve internal schism and contestation. Courts adjudicate

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[77] Davis and Le Roux *Precedent and Possibility-The (Ab)use of Law in South Africa* (Juta, Cape Town 2009) at p 1.

[78] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC).

[79] *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC)

[80] *Helen Suzman Foundation v Judicial Service Commission and Others* (8647/2013) [2014] ZAWCHC 136

[81] *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

[82] *Mazibuko v Sisulu and Another* (CCT 115/12) [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC)

routinely on disputes arising from state tenders. Indeed a plethora of business claims land in our courts whether it is about collusive trading and price-fixing to tax of forex claims such as of Mr Shuttleworth and the Reserve Bank.[83] But in the front row of litigation is our democratic state.

This excessive use of the courts speaks to the concern that democratic arrangements in our land are virtually devoid of non-litigious sites for mediation of conflict. Why would party faithful rush off to court to resolve an internecine dispute? Why is the state the chief of all litigators? How does it happen that labour federations should seek solace in court processes? It is not unusual to hear activists or senior politicians vowing to go to the Constitutional Court. Dennis Davis suggests that this trend is "*primarily owing to a manifest failure, perceived or real, of the political process. When politics fail, the last (and often only) avenue left to affected parties is to proceed to court*"[84]. The more this trend continues, the more the courts are drawn into the political arena.

But courts are not and should not be a substitute for the obligation to move our society to spaces envisioned in the Constitution. We must rethink our democratic processes in a manner that permits peaceable conflict mediation. We must find a new ethos that permits the lamb and the lion to graze together. Losers and winners should both overcome. Like Dennis Davis allow me to recall Achille Mbembe (forward to an Inconvenient Youth) who wrote of the current dangers of South Africa in these terms:

"A gradual closing of life chances for many, an increasing polarisation of the racial structure, a structure of indecision of the heart of politics itself and a re-balkanisation of culture and society. These trends clearly undermine the fragile forms of mutuality that could have painstakingly built in South Africa

[83] *Shuttleworth v South African Reserve Bank and Others (*864/2013) [2014] ZASCA 157.

[84] *Judge Dennis Davis - Supreme Court Judge @ The Pavilion, Kelvin Grove Club,Speech Transcript - Cape Town Press Clubhttp://www.capetownpc.org.za/Date: Friday, November 25, 2011*
*Venue: The Pavilion, Kelvin Grove Club (new venue near bowling green) THE JUDICIARY: IN THE POLITICAL STORM?TALK TO PRESS CLUB 25 NOVEMBER 2011.*

over a decade in half and further weaken the prospects of too non-racialism... Stuck in a field of blighted possibilities (young black youth) scavenge to live or simply to get through the day - so many bad jobs available to so few in one of the most racially unequall countries on earth so much rage and almost in the near future."

We in the courts are going to continue manning our posts and securing rule of law and justice. But in the end a just society envisioned in our Constitution will emerge only from truly democratic and socially inclusive practices of our people.

*Concluding remarks*

We have not found a satisfactory solution to spatial apartheid, equitable access to land, and housing and basic services. There is no significant rural development that would have stemmed poverty stricken urbanization. The epicentre of economic power is still vested in monopoly capital. Mineral resources in the past and now do not trickle down to workers and the broader populace. Race is still a marker of social inequality. The income disparity has become bigger and starker. Only a small crust of the black middle class has advanced economically against the backdrop of nearly a third of us on social grants and another third of our youth unemployed. We must be disturbed that up to now we have not learned how to create jobs for ourselves. After all a claim to liberty is a claim for space to prosper oneself or community. It is not happening. Instead poverty is deepening. We have not skilled our children enough to be entrepreneurs and not job hunters. Quality education and health care are still only for the financially healed. I am afraid I must add and confess that proper access to justice is often a function of one's bank balance. We have a lot to do in the next two decades.

Let me seek final refuge in two memorable quotations. Franz Fanon will have the last word:

“Each generation must discover its mission, fulfill it or betray it, in relative opacity.” — Frantz Fanon, *The Wretched of the Earth*

“A government or a party gets the people it deserves and sooner or later a people gets the government it deserves.” — Frantz Fanon, *The Wretched of the Earth*