



The FW de Klerk
Foundation

Consensus

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FW addresses threats to the National Accord



Mr. FW de Klerk

Mr. FW de Klerk addressed the Cape Town Press Club on 25 June 2008 on his deep concern over a number of recent developments – developments that could undermine the national accord upon which the new South Africa has been established. That national accord is articulated in the 1993 and 1996 constitutions. It was negotiated in a process which involved painful compromises from all sides. It resulted in a solemn commitment to clearly defined principles which form the cornerstones of our new dispensation.

"I believe that I have a residual duty to all those, who supported the efforts to work for an historical constitutional settlement, to stand by those agreements and - wherever I can - to help uphold the rights and values that they represent.

There is no question that a number of those rights and values are under severe pressure in the South

Africa of 2008 – pressures which give rise to serious concerns.

Threats to kill

Firstly, I am deeply concerned by the statements recently made by Julius Malema and Zwelinzima Vavi that they are prepared to kill in their efforts to support Mr. Jacob Zuma. These statements cannot be dismissed as mere rhetoric and nor can there be any debate regarding their meaning. Neither can they be viewed as being inconsequential - because they have been made by leaders of two of the main formations in the ruling alliance.

They show a fundamental disregard for the values enshrined in our constitution which establishes a society based on law - where all disputes are resolved by constitutional means and in accordance with the law. The constitution also specifically prohibits propaganda for war, incitement of imminent violence and advocacy of hatred based on race.

The statements follow on the recent murders of some 65 people in xenophobic attacks. Only a few days ago, Mr. Mcebisi Skwatsha, the ANC's Secretary in the Western Cape, was stabbed in the neck by a member of an opposing faction. If the leaders of the ruling coalition publicly proclaim their intention of killing their political enemies, how can they possibly expect that any disaffected person should not feel that they have a licence to do likewise? If every group with a political grievance were to believe it has a right to kill its opponents, we would very soon be confronted by anarchy.

What message do such statements send to the general public in a society where more than fifty

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Right to equality central to Constitution



Mr Dave Steward

At a recent conference on Human Rights held at the University of Stellenbosch, Mr. Dave Steward, Executive Director of the FW de Klerk Foundation, discussed the Bill of Rights, which is central to the Constitution and the challenges confronting South Africa today.

He said the achievement of equality is one of the first two values on which the new South Africa has been founded (the other is human dignity). The first right that the Constitution recognises is the right to equality. However, there is little agreement on the notoriously illusive meaning of equality. Some regard it as an empty concept "with no substantive moral content of its own". Former Constitutional Court judge Laurie Ackermann links it to the

Thus the requirement is for "access to adequate housing", "sufficient food and water", and "basic" education and "basic" adult education.

"common and immeasurable human worth (dignity)" of people. This accords with the Constitutional Court's view that equality of human dignity lies at the heart of the concepts of equality and non-discrimination.

The Constitution provides some guidance in helping to define equality: in the first place it proclaims that "Everyone is equal before the law and has the right to equal protection and benefit of the law". This means, above all, that nobody should be subjected to unfair discrimination of any kind. Secondly, section 9.2 states that "Equality includes the full and equal enjoyment of all rights and freedoms."

"The rights that we should be able to enjoy fully and equally are set out in the Bill of Rights and include the right to life and security; the right not to be arbitrarily deprived of property; the right to housing; the right to health care, food, water and social security; and the right to education," he said. Does the requirement that everyone has a right to "full and equal enjoyment" of all these rights mean that everyone has a right to an equal amount of

property; equally large houses; equal health care and food and equally advanced education? It would appear that this is not the intention and that equality relates to the full and equal enjoyment of the *right*, and not necessarily to the equal enjoyment of the outcome of that right. Thus the requirement is for "access to *adequate* housing", "*sufficient* food and water", and "*basic*" education and "*basic*" adult education. The property clause does not provide less protection to the property of the rich than it does to the property of the poor. Instead, it stipulates that everyone's property is secured from arbitrary seizure.

The fact that section 9(2) states that equality *includes* the full and equal enjoyment of all rights and freedoms implies that it also encompasses other requirements - also above and beyond "equality before the law". It is often argued that in addition to these aspects of equality there must be greater equality of outcomes, particularly with regard to more equal distribution of wealth. Indeed, when most observers refer to the degree of equality or inequality in a society they almost invariably have in mind the degree to which material benefits are distributed. Such equality is measured by the GINI index which reflects the distribution of income on a scale where 0 indicates perfect equality - where all citizens would have exactly the same income - to 100 - where all the income in a country would be bestowed on a single individual.

South Africa's dismal failure to achieve greater income equality is reflected in the fact that, according to the UN Development Programme, our GINI index of 57.8 makes us the 12th most unequal country in the world. However, the South African Institute of Race Relations accords us an even worse GINI rating of 65 in 2005, which had *deteriorated* from 60 in 1996. It is shocking that a society dedicated to equality has, in terms of income distribution, actually become less equal during the thirteen years of its existence. At the same time, it has made only modest progress in providing 'equal protection and benefit of the law' to our people or in assuring that they have 'full and equal enjoyment of all rights and freedoms' - particularly with regard to education and security. There is, of course, little or no possibility that, given mankind's varied talents, proclivities and circumstances there is any prospect that any society will ever be able to attain a condition of absolute

Right to equality

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material equality (the last one that tried was Pol Pot's regime in Cambodia). Even supposedly communist countries like China and Viet Nam have only middling GINI indexes (China – 44.7 and Viet Nam 37) which puts them in the same range as the archetypal capitalist United States with 40.8. The most equal countries in the world are Japan (24.9) and social democracies like Sweden (25) where the top ten percent earn only six times as much as the bottom ten per cent, contrasted with South Africa where the top 10% earn 33 times more than the bottom 10%. It was with this degree of inequality in mind, much of it the result of discriminatory policies of the past, that the framers of the Constitution provided in section 9(2) that “to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.”

The provision for remedial or restitutive equality in section 9(2) has, in turn, become the fountainhead of all subsequent affirmative action and black economic empowerment legislation. However, in the face of persistent national inequality, however defined, there is good reason to conclude that such measures have failed to address the underlying reality of inequality - and in some respects might even have aggravated it. This is because most affirmative action and BEE occur in the top 20 per cent of the income pyramid and have little or no impact on the condition of the bottom 80 per cent of our society. It is like playing musical chairs in the first class salon of an ocean liner, while those in the economy and steerage classes are strictly confined to the lower decks. Indeed, precipitate affirmative action, which has led to the collapse of service delivery in half our municipalities and some key government departments, has undoubtedly had a detrimental effect on the access of people to “full and equal enjoyment of all rights and freedoms”, and may thus have *diminished* the level of equality in our society.

In addition, income and education levels no longer coincide exactly with race – particularly in the top 20% of income earners. For example, already by 2001 there were almost two million black, coloured and Indian South Africans who had higher education qualifications than almost three million whites. Another five million had the same education qualifications as these whites. By 2000

there were more than 2 million black, coloured and Indian South Africans who earned more than 1.6 million whites.

It is accordingly impossible to implement the remedial measures envisaged in section 9.2 without taking into account the actual circumstances of the individuals involved – particularly when it comes to affirmative action appointments or promotions. Clearly, if a black, coloured or Indian candidate from the privileged education and income group is “advanced” because of his or her race over a white South African from a less privileged education and income group, the result will not “promote the achievement of equality” but will increase inequality in society. It is difficult to see how such discrimination could possibly be regarded as “fair” in terms of section 9(5) and would accordingly be in contravention of sections 9(3) and 9(4) which prohibit unfair discrimination by the state or by any person.

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Affirmative action and black economic empowerment, when fairly applied, may play a role in helping to promote greater equality within the top 20% of income earners. However, it is becoming increasingly clear that they are not the most appropriate 'legislative and other measures' 'to promote the achievement of equality' in the broader population.

The State should instead be concentrating on measures that will provide all our citizens with much greater access to 'the full enjoyment of all rights and freedoms' – and in particular to the right to decent basic education, security, housing and health services. It should also address our shocking GINI index by tackling as urgently as possible the principle root cause of poverty – which is our high and unacceptable level of unemployment.

Managing the SA transformation process

Mr. Dave Steward, Executive Director of the Foundation, represented the FW de Klerk Foundation at the annual Chartered Institute of Management Accountants (CIMA) World Congress in Sri Lanka. He participated in the debate on "Peace". This is an extract from his speech.

The South African experience during the past eighteen years has shown that even the most intractable political problems can be resolved peacefully to the benefit of all the parties involved.

At the same time, it would be a mistake to suppose that the experiences of South Africa in the early 'nineties can be transposed to other complex conflicts or that there is any simple formula for the resolution of long-standing disputes.

Nevertheless, there are aspects of South Africa's experience that may be relevant to those who are grappling with conflicts elsewhere.

The speech will share some of South Africa's experiences – and will leave the audience to decide whether – and to what extent – they may be relevant to Sri Lanka.

Some of the key requirements that South Africans identified in their search for peace included the following:

- there must be genuine acceptance by all of the

parties to the conflict that there is no possibility of a military/revolutionary solution. Peace-making is very difficult if the balance of forces is such that any side believes that it can secure or indefinitely maintain its core interests by military force.

- The process must be as inclusive as possible. All the parties involved must negotiate with groups and individuals that they had traditionally regarded as their sworn enemies. They must concentrate on future benefits rather than past divisions.
- Demanding complete compliance with absolute conditions often gives wreckers on all sides the opportunity to derail the peace process.
- Wise leadership, open communication and timing are essential.
- Workable solutions inevitably require parties to make extremely painful sacrifices. There must be a reasonable balance of pain and gain for all the parties involved.
- There must be win/win outcomes.
- Complex conflicts cannot be solved without taking calculated risks.
- Perseverance is essential. Peace-making is not for cissies. It is difficult, dangerous, frustrating and often thankless.
- The peace dividend makes it all worthwhile.

Foundation rejects racism at Free State University

FW de Klerk and the FW de Klerk Foundation condemned in the strongest possible terms the disgusting behaviour of the students at the University of the Free State who were involved in the production of a video that grossly humiliated five elderly black female employees at their residence.

Their actions violated every norm of the common decency that they should have been taught by their families, their church and their community. They also violated the very essence of our Constitution which is founded on the values of human dignity, equality, non-racism and non-sexism.

The Foundation congratulated Prof. Frederick Fourie, the Rector of the University, for his decisive and immediate action and called for the speedy

investigation and prosecution, to the full extent of the law, of all those involved in the incident. The actions of the students are repugnant to the overwhelming majority of white South Africans and Afrikaners who share the understandable anger of black South Africans over the incident.

The challenge in such situations is to avoid the temptation of attributing the reprehensible attitudes and behaviour of individuals to whole communities or ethnic groups - since this contributes to a vicious circle of group recrimination that is welcomed only by racists. The challenge, instead, is for all South Africans, from all our communities, to unite behind the values in our Constitution and to condemn unequivocally any form or manifestation of racism.

Future of SA depends on rule of law - FW

Former President FW de Klerk recently addressed the British South African Law Association in London on the rule of law in South Africa - which he described as a topic on which the future success of South Africa would closely depend.

He pointed out that much of the injustice that afflicted South Africa before 1994 often lay in the absence or dilution of the rule of law. He said that South Africa's peaceful transition to multiparty democracy had not involved the transfer of power from the National Party to the ANC - but had instead been a transition from the old South African constitution where parliament was supreme to a new dispensation where the constitution - and not this or that political majority in parliament - was supreme.

South Africa's peaceful transition rested squarely on the premise that in the proposed non-racial democracy arbitrary rule by the executive and the parliamentary majority would be replaced by the rule of law. The constitutional negotiations had led to the adoption of a new constitution that included full provision for the separation of powers; appropriate checks and balances; and an "appropriately qualified, independent and impartial" judiciary.

These principles had served the new South Africa well and had enabled it to make impressive progress across a broad front. However, South Africa had entered a period of uncertainty after the ANC's Polokwane conference last December.

The next eighteen months would be critical and the litmus tests for the country's commitment to the rule of law would include:

- whether Mr. Jacob Zuma's trial would proceed freely, fairly and without any extraneous interference;
- whether the new priority crimes unit that the Police intended to establish to replace the Scorpions, would continue to investigate crimes and corruption in government and political circles with the same independence, zeal and success that were often manifested by the Scorpions;
- whether the Government would proceed with the adoption of the Expropriation Bill in terms of which the state would be empowered to expropriate virtually any property if it deemed the expropriation to be in the 'public interest'; compensation for expropriated property would be determined by executive diktat; market



At the BSALA dinner recently in London were, from left, Mr. Carl Lindenberg (Associate Dispute Resolution Solicitor at TWM Solicitors), Mr. FW de Klerk, Ms. Charmaine Hast (Principal and Head of Family Department at TWM Solicitors) and her Honour Linda Dobbs QC.

value would be downgraded as a factor in deciding compensation; and expropriated owners would have only limited effective recourse to the courts;

- whether the government would proceed with the re-introduction of legislation to reform the judiciary similar to the legislation that was vehemently criticised when it was first introduced two and a half years ago, and
- whether the government would be able to curb violent crime and the type of mindless xenophobic violence that South Africa had witnessed in recent weeks.

Mr. De Klerk said that the following factors would play an important role in determining whether we stayed on the high road of constitutionalism and the rule of law - or whether we strayed into the minefields of unrestrained executive power:

- the degree to which the pragmatists or the ideologists would determine the ANC's agenda during the coming years. Mr. De Klerk noted that the ANC had often shown a keen awareness of the importance of practical success and of adhering to the global consensus - even when this had involved deviations from its ideological programme. He also took note of the ANC's repeated undertakings to abide by the Constitution and the rule of law;

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Use of mother tongue language a constitutional right

International Mother Tongue Language Day provides an opportunity for countries throughout the world to take stock of the state of the mother tongues used by their people.

The objective is to promote the linguistic and cultural diversity in a world where many languages are seriously threatened.

In terms of our Constitution all our eleven official languages must enjoy parity of esteem and must be treated equitably. In addition, the state is required "to take practical and positive measures to elevate the status and advance the use" of our indigenous languages.

The national government and each provincial government must use at least two official languages for the purposes of government.

The national government and each provincial government must use at least two official languages for the purposes of government. In choosing these languages the national and provincial governments must take into account "practicality, expense, regional circumstances and the balance of the needs and preferences of the population."

The Constitution requires the establishment of a "Pan South African Language Board" to develop the use of the official languages, sign language and the Khoi, Nama and San languages and to promote 26 additional languages that are used by South African communities.

The Constitution also established a Commission for the Protection of Cultural, Religious and Linguistic Communities, "to promote respect for the rights" of such communities.

In addition, "everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable".

In implementing this right, the state must also consider all reasonable educational alternatives "including single medium institutions".

Unfortunately, in many important respects we are not recognizing these constitutional language rights:

- English has become the *de facto* single official language of the national government - despite the requirement that it must use two official languages;
- Our ten official indigenous languages clearly do not, in practice, enjoy parity of esteem with English and are not treated equitably;
- In practice, few provinces respect the requirement that they must use two official languages. In the Western Cape the SAPS has been ordered to use English only for most operational purposes despite the fact that a majority of the population - and of the SAPS members in the province - speaks Afrikaans;
- Very little is being done to develop indigenous languages - especially black indigenous languages;
- Recommendations have been made for the dissolution of PANSALB and the Commission for the Protection of Cultural, Religious and Linguistic Minorities;
- The state is not properly respecting the right to mother tongue language education - particularly for children who speak black African languages. Few receive mother language education beyond Grade 3 - often to the irreparable detriment of their subsequent education prospects;
- Many Afrikaans single-medium schools - and traditional Afrikaans universities - are under enormous pressure to introduce English parallel tuition with serious implications for their long-term viability.

The reality is that the State is simply not adequately respecting the constitutional mother language rights of the great majority of South Africans - to the detriment of our national goal to respect our linguistic and cultural diversity.

The state is not properly respecting the right to mother language education - particularly for children who speak black African languages.

Ensuring that the centre holds

Mr. FW de Klerk addressed the annual international Würth congress held in Cape Town and discussed the challenges that face South Africa.

Mr. De Klerk asked the question whether South Africa would be able of capitalizing on its abundant human and natural resources, whether it would become the first African country to break into the first world or if it will subside into the stagnation, corruption and conflict that sadly has come to characterize much of the rest of the continent?

In his famously disturbing poem, "The Second Coming", the Irish poet Yeats described the process of social disintegration:

*"Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity."*

The challenge for us in South Africa is to make sure that the moderate, rational centre will hold; that we will create a society where men and women of conviction can ensure that society will be safe from anarchy and the blood-dimmed tide; and where ordinary citizens will be able to practice the ceremonies of innocence in peace and security.

The challenge is to ensure that the forces of common interest, common humanity and common destiny that bind us, prevail over the forces of selfishness, racism and alienation that seek to drive us apart.

He said the people at Würth actually know a great deal about holding things together in the physical world: screws, dowels, plugs and fittings literally hold much of the world together and ensure that things do not fall apart! The question is: what screws, bolts and fixtures do we need to hold diverse and volatile societies together?

"I believe that societies are held together by good constitutions, good policies and goodwill.

"We South Africans are fortunate to have one of the best Constitutions in the world.

- It articulates the values upon which our society is founded - values of human dignity, equality and the sovereignty of the law;
- it prescribes the democratic system by which we choose to be governed - which includes free and regular elections; the independence of the judiciary; the separation of powers and strong independent institutions to support our constitution, and
- it includes an excellent Bill of Rights that protects the fundamental rights of all our citizens and

communities.

For the past fourteen years the government has implemented responsible macro-economic policies:

- we have balanced our national budget;
- we have opened our economy to international competition;
- we have encouraged foreign and domestic investment;
- we have waged a long - and generally successful - campaign against inflation - although like many other countries around the world we are now struggling with escalating energy and food prices.

We have reaped the benefit of these policies in the form of fourteen years of uninterrupted economic growth and generally high international investment ratings.

In the sphere of goodwill we have done well. Despite our very diverse society and troubled history, South Africans from all our communities have adjusted very well to our new multiracial society. The remarkable thing is not that we experience racial tensions from time to time, but that South Africans, on the whole, have managed to integrate schools, neighbourhoods and workplaces with so few incidents and with so much goodwill.

"These centripetal forces made it possible for parties as deeply hostile to one another as the National Party which I led, Nelson Mandela's African National Congress and the Zulu-based Inkatha Freedom Party of Dr. Mangosuthu Buthelezi to reach fundamental agreement on issues that had divided us for decades.

"There are many people in South Africa today who forget the forces that bind us together and who spend too much time and energy worrying about the centrifugal forces that drive us apart. The reality is that we are going through a period of uncertainty after the ANC's conference in Polokwane last December. There is a change of guard in the offing between President Mbeki and everything that he has represented for the past ten years and the new leadership that was elected in Polokwane. And there is inevitably some uncertainty regarding the role that Mr. Zuma will play in our future because of the criminal charges hanging over his head. I am confident that we can address the challenges that confront us – if we work together – just as we addressed and resolved the enormous challenges that confronted us in the 1990s.

**Read the full speech at
www.fwdklerk.org.za**

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people are murdered every single day of the year? I accordingly welcome the firm position adopted by the Human Rights Commission regarding Malema's statement and its admonition of Vavi. It is also appropriate that Jacob Zuma himself and Kgalema Mothlanthe have criticised the statements. More, however, must be done to make it absolutely clear that any incitement to kill will not be tolerated by any quarter in the future.

Independence of the judiciary

Secondly, I am deeply concerned by recent developments in our judiciary. The highest court in the land has accused the most senior Judge President of trying to influence its deliberations regarding the most senior office-bearer in the governing movement. This is dynamite! We cannot let it pass as simply an issue for domestic housekeeping within the judiciary. The complaint strikes at the heart of the independence of the judiciary, upon which our whole constitutional edifice rests. The JSC must thoroughly and impartially consider all aspects of the complaint. It must ensure that its proceedings are as transparent as possible. Anything less will deepen perceptions of interference by powerful political forces.

All this comes at a time when the judiciary finds itself under increasing pressure from the executive. A constitutional amendment and various bills aimed at making the judiciary "more responsive to the aspirations of the people" were first gazetted in December 2005. After a vociferous outcry in which all living Chief Justices participated, they were withdrawn in July 2006.

However, at its Polokwane conference last December, the ANC once again called for the implementation of far-reaching reforms of the judiciary before the end of the present government's term of office.

The reforms would resurrect many of the aspects of the Bills that were withdrawn in 2006, including transfer to the Minister of Justice of ultimate responsibility for "the administration of courts, including any allocation of resources, financial management and policy matters".

Separation of powers

Everywhere the dividing lines between the state and the ruling movement are becoming more blurred.

The Polokwane conference adopted a resolution requiring "all senior deployed cadres in various centres of power to go through political classes to

understand the vision, programme and ethos of the movement." Presumably these include the public service and the security forces, institutions which globally are required to be objective and distanced from political involvement.

Further, the incoming NEC was instructed "to give strategic leadership to cadres deployed in the state and to improve capacity to hold cadres deployed accountable".

The Polokwane conference resolved that the media should "contribute towards the building of a new society" and that the arts and culture should "serve the purposes of its National Democratic Revolution".

The Minister of Health has been given powers in recent legislation to appoint the board of the association that represents the medical profession. She is intervening in the private health sector in a manner that threatens to cripple private medical care and the world standards that it has been able to maintain. Policy proposals on the Legal Services Charter would also give the Minister of Justice excessive powers. In the sporting field the Minister has been given powers to interfere even in the selection of teams. How can all this possibly be reconciled with the democratic principles and advancement of freedom on which our society has been established?

The Scorpions

The most serious blurring of the lines between political party, the National Executive and the Institutions of the State has, however, centred on the Polokwane resolution to dissolve the National Prosecution Authority's Directorate of Special Operations - the highly successful crime-fighting unit otherwise known as the 'Scorpions'. In the absence of any cogent explanation the perception is taking root that once the unit is disbanded, the final decision as to who should, and who should not be prosecuted will be taken by the government and not by a constitutionally independent body. In effect, the ruling party would have the ability to place itself above the law.

Expropriation Bill

Finally, I am deeply concerned by the nature and implications of the Expropriation Bill that is currently being considered by parliament. The property provision, section 25, in the Constitution was one of the most intensely debated and contested elements in our national accord. The final text reflects a carefully

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crafted balance between the need to protect *bona fide* property rights on the one hand, and the unquestioned need for land reform on the other. The fulcrum of this balance was that, failing agreement, just and equitable compensation would be paid for expropriated land and that affected parties would have proper recourse to the courts should they not be satisfied with the amount of compensation.

The Bill destroys this balance by striking at the heart of property rights. Its purpose is "to provide for the expropriation of property, including land, in the public interest and for public purposes..." Its purview thus includes all property. Any property can be expropriated in what the Minister construes to be in the "public interest".

In terms of its provisions the Minister can expropriate property - which could include shares - on behalf of a "juristic person" - which could be a private or public company - if the juristic person reasonably requires the property in the 'public interest' and has failed to reach agreement with the owner; the expropriating authority will determine the amount of compensation that can, specifically, be below market value; the courts cannot overturn compensation awarded by the expropriating authority but can only refer it back for reconsideration; and the court's role is further restricted to review the decision to expropriate.

The Bill is, in our opinion, unconstitutional. It will have very serious consequences for our economy. The degree to which compensation falls short of perceived fair market value will be regarded by markets as unfair deprivation of property.

The degree to which the role of the courts in deciding compensation is restricted, will likewise determine perceptions of the arbitrary nature of the expropriation.

The consequent perception of arbitrary deprivation of property will have a very negative impact on national and international investor confidence - and will seriously damage South Africa's international credibility. At a stroke much of the excellent work that the government has done over the past fourteen years to establish South Africa's credit-worthiness could be undone.

I am equally concerned over the implications of the Bill for inter-community relations in South Africa. Apart from its proclaimed objectives, the Bill's primary intention, stripped to its essence, is to deprive members of a section of our population -

against their will and on the basis of their race - of property in which they might have invested their life's labour and resources; and with which they might have deep and long-standing emotional and family connections.

It will inevitably be widely viewed by the targeted community as an assault on a fundamental constitutional right; as an attempt to limit the protection that citizens can expect from the courts and as another blow to our national accord.

None of this is necessary. Organised agriculture genuinely supports land reform and has repeatedly offered to assist with a sustainable process. Five percent of agricultural land comes onto the market each year - and it is estimated that at least one third of the land that has already been transferred from white to black ownership has occurred through normal market processes.

The main obstacles to accelerated and sustainable land reform have been the lack of capacity of the responsible authorities and the lack of suitably trained, financed and equipped farmers to take over transferred properties.

Positive achievements

It is appropriate in these somewhat gloomy times to remember how we have confounded prophets of doom in the past and how exceptionally well our new society has done in so many areas since 1994: We have had 14 years of uninterrupted economic growth and now produce 45% of the GNP of sub-Saharan Africa. We have rejoined the international community. Our country is widely respected and plays a leading role in promoting the well-being of our continent. There are more foreign embassies in Pretoria than in any other capital in the world with the exception of Washington. Our sportsmen and women have attained new heights in international competition: we are the rugby world champions - again; we are the top one-day international team in world cricket. We have been given the honour of hosting the 2010 Soccer World Cup. Our country has become an increasingly popular tourist destination - and tourism now contributes 8% to our GNP - more than gold. Some of our restaurants and hotels are counted among the best in the world in international surveys. Our car and truck industry also contributes about 8% of GNP - with exports of the highest quality, from Mercedes-Benz and BMWs to Volkswagens and Fords, to countries all over the world. According to a recent survey three

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- the degree to which South Africa's increasingly representative bench would exercise its crucial role, independently, impartially and in strict accordance with the Constitution and the law, and
- the role that civil society could - and would have to - play in upholding the Constitution and the rule of law.

Mr. De Klerk said that he hoped that South Africa's friends overseas would continue to take a benign interest in the country's affairs and that they would 'support the maintenance of the rule of law with the same vigour as they criticised its absence in the past'. The South African Constitution was very clear on the issues involved. Section 1(c) stated unequivocally that the new South Africa was founded on the 'supremacy of the constitution and the rule of law'. Upon this simple premise would rest the future of the great national accord that South Africans reached with one another between 1990 and 1996. Mr. De Klerk concluded by saying that upon it depended 'the continuation of the

South African miracle and the future happiness, prosperity and success of our country and all its people'.

READ THE FULL SPEECH AT
www.fwdklerk.org.za.



Mr. De Klerk played golf with members of the BSALA in London at the Swinley Forest Golf Club. At the event were, from left, Paul Roskilly, Gary McCarthy, Mark Quigley, Mr. F W De Klerk, Seamus Smyth and Alan Burnett.

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South African cities - Cape Town, Johannesburg and Port Elizabeth - are regarded as being among the best 100 cities in the world in which to live. The *Financial Mail* reports that the black middle class grew by 30% in 2005 - which is not only a spur to consumer growth - but it is also a major factor in promoting stability. It is not only the black middle class that has benefited from the new South Africa. Since 1994 we have been building an average of 500 houses per day, most of them for disadvantaged communities. Huge progress has also been made in bringing electricity and water to South African households which did not have it in the past - and more than 12 million South Africans now receive pensions or children's allowances. We have managed the transition to multiracial democracy with surprising ease and goodwill.

The continuation of all this success depends on our continuing adherence to our constitution and the values and rights that it contains. Whenever we have done well, we have done well because our policies have been in conformity with the global consensus on economic policy and democratic

governance. Whenever we have deviated from this consensus we have done badly.

Undoubtedly we face many serious challenges, including inequality, high unemployment, a dysfunctional education system, and the continuing scourges of crime and HIV infection.

However, we will solve them only if all sections of the population work together. I implore the new leadership of the ANC to regard all South Africans as partners in this great endeavour - and not view some, on the basis of their race, as antagonists of transformation.

The need for a new debate

I invite the new leadership to enter into a sincere and fundamental debate with all sections of our society to enable us to dispel the growing alienation between our communities; to reaffirm the spirit of 1994 and the optimism, the common purpose and the values on which our new society was founded, and to reach agreement on how we can, together, best achieve the vision of justice, human dignity and equality that is proclaimed by our Constitution.

Constitutionalism in South Africa

Adv. Paul Hoffman, Director of the Centre for Constitutional Rights (CFCR) recently addressed the Colloquium on Governance in Africa in Polokwane on the question of constitutionalism in South Africa.

He said being a relatively young and developing democracy, it is important for constitutionalism in South Africa that problems are appropriately addressed. He quoted three tests for constitutionalism:

- does the Constitution impose limitations upon the powers of the government?
- does the Constitution enjoy domestic legitimacy, in the sense that it is accepted by the people and
- does it protect, promote and enforce human and peoples' rights?

Hoffman said the Constitution places limitations on the powers of the government by making the supremacy of the Constitution and the rule of law founding provisions; by establishing an independent judiciary whose judgments and orders bind all organs of state; by separating power between the Executive, the Legislature and the Judiciary and by establishing independent state institutions supporting democracy.

The founding principle is the supremacy of the Constitution and the rule of law. This is entrenched in section 1 of its Founding Principles. The ANC has committed itself to "the fundamental provisions of the basic law of the land", which it states accords with its own vision of a democratic and just society. However, it stresses that its commitment to the Constitution should be viewed "within the context of correcting the historical injustices of apartheid". It interprets the Constitution within the framework of its own National Democratic Revolution, whose central proposition is the elimination of the continuing inequalities arising from apartheid.

The independent judiciary represents the most important limitation on the power of government and is only answerable to the law and Constitution. The requirements of section 2 of the Constitution mean that all conduct by anyone and all legislation can be scrutinized for compatibility and consistency with the standards of the Constitution and can be struck down as invalid.

The Government accepts and implements the decisions of the courts, even where they conflict with its policies.

Moves to "transform" the judiciary are of concern.

Amending legislation aimed at making the judiciary "more responsive to the aspirations of the people" was withdrawn after a huge outcry. Last December, the ANC once again called for the implementation of far-reaching reforms of the judiciary before the end of the present government's term of office.

These would include the establishment of the Constitutional Court as the single apex court, removing the status of the Supreme Court of Appeal as the final arbiter of all non-constitutional issues; a warning that the courts should not unduly encroach on areas that are the "responsibility of other arms of the state" transfer to the Minister of Justice ultimate responsibility for "the administration of courts, including any allocation of resources, financial management and policy matters"; and the establishment of "a single rule-making mechanism for all courts, in terms of which rules drawn up by the Rules Board would be subject to the approval of the Minister and Parliament.

Another limitation of the power of government is the separation of powers. However, as Parliament is firmly under the control of the executive and the ruling movement, it often fails to carry out its oversight duties as envisaged by the Constitution. The manner in which it dealt with questions arising from the notorious arms deal is a case in point.

The Government is encroaching into areas of civil society that should be the preserve of the citizens involved.

The Minister of Health will now appoint the board of the association that represents the medical profession, without any say by association members. The lines between the ruling movement and the State are becoming increasingly indistinct. The Polokwane conference adopted a resolution requiring "all senior deployed cadres in various centres of power" "to go through political classes to understand the vision, programme and ethos of the movement."

The incoming NEC was instructed "to give strategic leadership to cadres deployed in the state and to improve capacity to hold cadres deployed accountable".

In addition to the checks and balances inherent in the separation of powers, Chapter Nine of the constitution creates institutions to uphold constitutional democracy, including the Human Rights Commission, the Public Protector and the

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Auditor-General. All should act impartially and perform their functions without fear, favour or prejudice. They constitute a means of limiting the exercise of power by government, by holding it to account and by dealing with improprieties as they arise.

Some of these institutions are under pressure, with most being crippled by inefficiency, accused of allowing government interference or facing possible abolition after an investigation by the Asmal Commission. The most serious erosion of the rule of law has centred on the resolution to dissolve the National Prosecution Authority's Directorate of Special Operations (Scorpions). It will soon be argued in court that this decision is illegal, unconstitutional, unreasonable, unfair and unresponsive to the needs of the people at a time when crime is rampant in the country. The challenge that the abolition of the Scorpions poses to constitutionalism cannot be over-stressed. If the unit is disbanded, the government will be left with the final decision as to who should, and who should not be prosecuted. This would constitute a major restriction of the ability of our constitutional dispensation to limit the power of the Government. Internal features of the Constitution which ensure domestic legitimacy include provision for regular elections, freedom of expression and freedom of political activity, the rights to assemble, protest and to picket.

As regards legitimacy, although our Constitutional dispensation enjoys domestic legitimacy and acceptance by the people, measured by free and regular elections, free media and no limitation on the expression of political opinion, there are, however, some reasons for concern:

The Polokwane conference resolved that the media should "contribute towards the building of a new society and be accountable for its actions". It also expressed the belief that the arts and culture should serve the purposes of its National Democratic Revolution" and that the media needed to "take on a specific responsibility in this regard."

The resolution on the media warned that "the right to freedom of expression should not be elevated above other equally important rights such as the right to privacy and more important rights and values such as human dignity". It called ominously for an investigation into the establishment of a Media Appeals Tribunal to "strengthen,

complement and support the current self-regulatory institutions". It is also disturbing that the ANC does not view itself as a political party but as a revolutionary liberation movement with an uncompleted mandate. It describes itself as a "hegemonic organization" that is not just the "leader of itself, nor just of its supporters". It believes that "History has bequeathed on it the mission to lead South African society as a whole in the quest for a truly non-racial, non-sexist and democratic nation."

In terms of section 7 (2) of the Constitution, the state is obliged to respect, protect, promote and fulfill the rights contained in the Bill of Rights. On paper therefore, it can be said that our constitutional dispensation complies with the third test of constitutionalism.

Unfortunately, this has not been the experience of many South Africans. South Africans do not enjoy many of the key rights guaranteed by the Constitution such as equality, freedom from violence, property rights, access to health care and the right to basic education.

There is much to be done before South Africa can say that constitutionalism has taken root and is flourishing. While the courts and the press remain free and independent there is still hope that this can be achieved. Not only politicians determine the fate of nations. Religious and traditional groupings, civil society organizations, the business sector and the international community, all have a role to play in promoting constitutionalism in South Africa. While the politicians are at least paying lip service to the values of the Constitution and to the rule of law it is incumbent upon all persons of goodwill to join in promoting the Constitution as the best means for achieving a prosperous and peaceful future.

Religious and traditional groupings, civil society organizations, the business sector and the international community, all have a role to play in promoting constitutionalism in South Africa.

Addressing “Xenophobia” constitutionally and neuro-linguistically

The recent wanton violence and hatred directed against persons who, by accident of birth, did not originate in South Africa, or were perceived as strangers by their attackers because they come from far corners of the land, where Vendas and Shangaans live, is cause for concern. The fact that 23 of the 65 recorded deaths in the violence were of South African born citizens is instructive in any analysis of the events that mercifully seem to have run their course.

It may be a misnomer to call the occurrences xenophobia. The dictionary definition of this term is usually “fear or dislike of strangers or foreigners.” It does not go as far as murder and mayhem, although in popular usage and some technical senses xenophobia does include this mindless form of violent action. This raises the question whether the violence experienced in South Africa in recent weeks is really to do with a hatred of foreigners or “makwerekwe” as they are known in local parlance. Some analysts view the recent phenomenon as the projection of frustration and anger [at service delivery (notwithstanding 10,000 protests annually), poverty, joblessness, overcrowding, homelessness, hopelessness and rises in fuel and food prices] against the weakest and most vulnerable scapegoats available – the impoverished immigrants living cheek by jowl with the least fortunate local people. The way in which to test this thesis is to pose the question: “Would the violence and looting, the rape and pillage have occurred if the perpetrators were adequately educated, serviced, housed, fed and employed?” The answer which suggests itself is resoundingly in the negative. Other analysts have delved into our history of relationships with people from elsewhere in Africa and have discerned the seeds of the events in our attitudes and habitual responses as far as foreigners of African origin are concerned.

Whatever history declares to be the cause, the effect remains devastating. The conduct of the crowds of thugs is lamentable. The apparent spontaneity of the violence and the opportunism of criminals who seized upon the chances which the chaos presented to them, are most unfortunate. It goes without saying that those who participated have let down their country. They have demonstrated that the values and responsibilities enshrined in its constitutional order mean very little to them. The rights guaranteed to all in the Bill of Rights, [and by “all” it generally means citizen and

foreigner alike], have been trampled upon in the bloodshed and destruction. In particular the rights to life, to dignity, to security of the person, to property, to freedom from violence from private sources and to freedom of movement and trade have been grievously infringed. These rights ought to be respected and protected, not flouted by those who should, but apparently don't, know better.

The Constitution sets up plain and sound rules for making South Africa a winning nation in which the tolerance of “otherness” is a given.

If the nation is to prosper in peace, a far more concerted effort needs to be made to take on board the values of the Constitution. The promotion of these values which in essence involve universal enjoyment of dignity, equality and the various freedoms set out in the Bill of Rights ought to be given national priority. It is not only the formal education system that needs to be inspanned in this necessary task.

The media have a role to play, religious and civil society organizations can help and all in positions of leadership can assist to ensure that there is no repetition of the atrocities seen recorded recently in the daily press. The Constitution sets up plain and sound rules for making South Africa a winning nation in which the tolerance of “otherness” is a given.

If the Constitution is not regarded as the appropriate framework within which to build a successful nation, the effort put into the process of forming our nation “united in its diversity” will be wasted. The legacy of Nelson Mandela and FW de Klerk, our joint Nobel Peace Prize winners, will be one brief shining moment instead of the lasting solution they sought in the arduous process that led to our model constitutional democracy.

That framework needs to become the lived reality of each and every South African resident, whether natural born citizen, or incomer. Vastly improved service delivery would also be crucial in defusing the situation.

Poverty alleviation will disengage the poor from the xenophobia which has only boiled over into violence in less affluent areas. (To p 14)

FW de Klerk toasts Israel's 60 years of independence

Sixty years ago the people of Israel re-established a Jewish state in the Holy Land. For the first time in almost two thousand years they again ruled themselves within their own state. This was the fulfillment of prayers of countless generations of Jews in the diaspora. It established a state where Jews could ensure their own security, after the horrors of centuries of pogroms and persecutions. South Africa was amongst the very first in the international community to officially recognize the new State of Israel. After 1948 Israel had to defend its independence and existence in four desperate wars and against persistent and continuing terrorist and other attacks. Despite all this, Israel has prospered and has brought freedom, democracy

and economic development to its part of the Middle East. Now, 60 years later, it continues to face great challenges - the greatest of which is the challenge of reaching a just and lasting peace with its Arab and Palestinian neighbours. I believe that Israel should seize every opportunity to achieve a just and honourable peace within secure borders. It will be difficult to achieve such a peace until all the parties involved unequivocally accept its right to exist. In South Africa we have learned it will take courage, some painful sacrifices and strong and visionary leadership.

Israel demonstrated all these qualities in the past 60 years. I have no doubt that it can do so again at this crucial moment in its history. -FW de Klerk

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How then, in practical everyday terms are we, as a nation, to address the damage that has been wrought by the recent outbreaks of violence and destruction? This is no easy task, but it is one which each and every person needs to ponder seriously. The policy of the government is to strive for the re-integration of foreigners, who are now in refugee camps, into the communities from which they fled in terror. This is an awesomely difficult task. There is a lot of broken glass lying around in the relations between those who fled their homes and those who made them flee. The idea of a welcome home party complete with spit braaied sheep, as planned in Khayalitsha in Cape Town, shows how seriously the authorities want to improve the situation on the ground. But mistrust and well founded fears still endure and the hopelessness in the refugee camps is illustrated by the threats of mass suicide at Soetwater, also in Cape Town.

Another key issue is whether the attitude of ordinary people towards foreigners or "makwerekwere" as they are known in the townships, can be radically improved. Experts in neuro-linguistics acknowledge that the way we name and talk about concepts influences our attitude towards them. The English term "foreigner" does have pejorative overtones, as does the onomatopoeic "makwerekwere." The Afrikaans, "uitlander," is almost a swear-word. The term "makwerekwere" was coined with mocking reference to the way in which the language of newcomers is heard and not understood by locals.

The word "foreign" [as in "there is a foreign object in my eye" or "that notion is quite foreign to me"] certainly has uses which do nothing to enhance the reputation of those we regard as foreign.

Experience elsewhere is instructive. The Scots live in perfect amity with persons from every continent on earth. There, the term in common usage for reference to these happily integrated folk is "incomers." This term is altogether a more felicitous way of talking and thinking about our neighbours who have suffered so severely of late. The Scots were not always like they are now. In 1857 two boys argued over an orange in the busy, overcrowded herring port of Wick. This sparked three weeks of rioting between local Wickers and migrant labourers in from the highlands for the herring season. The riots had to be put down by calling in the army. Sound familiar?

So let's make a conscious decision to ban the terms "foreigner" and "makwerekwere" from our thoughts and our lips. Let us instead refer to our new neighbours as "incomers" or just "neighbours." This is an altogether more positive way of naming them, which, in time, could lead to a more positive way of thinking about and interacting with them, as the biblical injunction suggests.

This, coupled with an effort to embrace the values and perform the obligations of our own Constitution both at personal and state level, could go a long way towards healing the wounds and improving relationships.

FW de Klerk Foundation supports children's charities

The FW de Klerk Foundation recently made donations amounting to R678 600 to a number of organisations that care for handicapped children and support education. The funds came from KidsRights in the Netherlands and the South African Golf Day in the United Kingdom.

On 2 April 2008 - World Autism Day - the Foundation announced a donation of R250 600 on behalf of KidsRights to Autism Western Cape. World Autism Day was instituted by the United Nations in 2007 to create awareness of autism spectrum disorder which affects about 1 in 158 people. In South Africa it is estimated that there are about 270 000 people who suffer from the condition. The donation will be used to help run Autism Western Cape's Growth Through Knowledge School and Therapy Centre. The school accommodates ten children on a daily basis, and the Therapy Centre is used by +/- 50 children who do not have placement in schools.

The Foundation also channelled an additional amount of R33 000 from KidsRights to the Woodside Special Care Centre which cares for children with severe mental handicaps.

At a golf day on 16 May 2008 hosted by the Institute for the Blind in Worcester, FW de Klerk presented the Institute with a cheque for R161 000 - which will be used to train approximately 20 blind and blind/deaf children to move about independently with a white cane and confidently reach their destinations. Life skills training also includes basic skills such as identifying money, buying groceries, making food, identifying clothing, etc.

At the same function Mr. De Klerk presented a cheque for R129 000 to the School for the Deaf

which will be used to train four students to operate as training assistants for the early childhood development of deaf children.

The Foundation also made good use of its share of the proceeds from the SA Golf Day in the United Kingdom. It donated R74 000 to the Alta du Toit After Care Centre - which provides sheltered employment for mentally handicapped people in the Western Cape and R37 000 to Study Trust - an organisation that provides bursaries to disadvantaged children. The funds will be used to erect a fence around the Alta du Toit After Care Centre to help protect the residents and to ensure that they do not stray onto busy highways near their facility. The Study Trust donation will help fund bursaries for young people from disadvantaged backgrounds. Study Trust bursary holders have consistently succeeded in achieving pass rates of between 80% and 90% in the high schools,



Jasper Steenkamp assisting Mr. De Klerk at the start of his round of golf during the annual golf day of the Institute for the Blind in Worcester.



Jasper Steenkamp, Michael Kotu, Mr. Freddie Botha, Executive Head of the Institute for the Blind, Mr. FW de Klerk, Ms. Colene Burger, Mr. Deon de Villiers, Executive Head of the Institute for the Deaf and Phumie Jemane.

Photographs: Worcester Standard

Foundation holds successful Conference on Unity in Diversity



On 28 February 2008 the F W de Klerk Foundation held a conference at the Radisson Hotel in Cape Town to consider how South Africa can best pursue its goals of promoting national unity on the one hand, while preserving and nurturing its rich heritage of cultural diversity on the other.



Mr. FW de Klerk, Dr. Werner Böhler of the Konrad Adenauer Foundation and Prof. Fernand de Varennes at the Conference on Unity in Diversity.

The conference was held in co-operation with the Konrad Adenauer Foundation of Germany. The objective was to create a platform for debate between government and civil society on the manner in which the constitution, education, language policy and sport can best contribute to the goal of promoting national unity and cultural diversity. With the support of the Office of the President the Foundation succeeded in securing high-level representatives from the side of government - and participants included Ms. Naledi Pandor, the Minister of Education, Dr. Pallo Jordan, the Minister of Arts and Culture, Prof. Kader Asmal, former Minister of Education and Dr. Vusi Gumede from the Office of the President.

The keynote address was delivered by Prof. Fernand de Varennes from Murdoch University, Western Australia, who is an international expert on multiculturalism.



Prof. Hermann Giliomee and Mr. Dave Steward, Executive Director of the FW de Klerk Foundation.

The panel that considered the role of the constitution in promoting unity in diversity included Prof. Francois Venter (UNW); Adv. Paul Hoffman (Centre for Constitutional Rights) and Judge Deon van Zyl. Leading educationist Clive Roos, Prof. Hermann Giliomee and Prof. Jonathan Jansen participated in the panel on the role of education.

The language policy panel included Prof. Danny Titus, Prof. W A M Carstens and Mr. Christo van der Rheede and the sport panel comprised former rugby Springbok, Hennie le Roux, Kallie Kriel, CEO of AfriForum and Dr. Cedric Frölick, the deputy chairperson of the parliamentary portfolio committee on sport.

Mr. FW de Klerk opened the conference with a strong call for a return to the principles that were included in the constitution to promote cultural diversity and national unity. In his keynote address, Prof. Asmal provided a South African perspective on the topic.

He accentuated the importance of hybridity and of allowing people to determine their own identities. He was followed by Prof. De Varennes, who presented an international view on multiculturalism.

The Conference was attended by a distinguished audience of approximately 90 people,

including HE Dieter Haller, the Ambassador of the Federal Republic of Germany; Dr. Werner Böhler, the Resident Representative of the



Prof. Norbert Kersting of the University of Stellenbosch and Mr. Herman Bailey.

Konrad Adenauer Foundation; several members of Parliament, including Ms. Patricia de Lille, the leader of the Independent Democratic Party; academics, community leaders and the media.

The Foundation will soon release a publication on the Conference that will contain extracts and summaries of the proceedings.