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The role of civil society in sustaining our constitutional democracy

In the preparations for this evening, I shocked Francis Antonie with the request that we change the topic of the lecture. My basic suggestion – and the one that appears to have caused all manner of reverberations at the Foundation – was to publish the following quotation, as an overture for the discussion of our Constitution and the role of civil society in maintaining our democracy:

> "*The disposition to admire, and almost to worship, the rich and the powerful, and to despise, or, at least, to neglect, persons of poor and mean condition…….[is]……..the great and most universal cause of the corruption of our moral sentiments*."

The quotation is meant to invoke exactly the shock that it does. There is a palpable relief when one explains that words are from Adam Smith's "Theory of Moral Sentiments", which was published in 1759, almost 100 years before the "Communist Manifesto" was published (1848). In fact, the other durable literature from the same period is Oliver Goldsmith's poem "The Deserted Village", published in 1770. Goldsmith's haunting words include:

> *Ill fares the land, so hastening ills a prey,*
> *Where wealth accumulates, and men decay;*
> *Princes and lords may flourish, or may fade;*
> *A breath can make them, as a breath had made;*
> *But a bold peasantry, their country's pride,*
> *When once destroyed, can never be supplied.*

These two contemporaneous pieces of literature, now some 250 years old, speak to a profound set of difficulties that faced what is now the UK. The question in the current context that arises is, what do our writings of the present reflect? And how would they be read

250 years hence? Who is admired? Who flourishes? Who is despised? Who is in the process of being destroyed?

These questions arise from the perennial debate about values in society. Surely the most important challenges of this milieu are poverty and inequality. Granted, these are not uniquely South African challenges, but they assume a particular significance because our struggle for liberation was driven by so much hope, and the Constitution in its making brought so much promise. All of these experiences are so recent 9the Constitution was adopted only 18 ½ years ago)to still be fresh in all of our minds. The inequalities that Smith and Goldsmith wrote of remain so very current and topical. The concern that we should all express in the context of a discussion about the Constitution is the risk that for many, it may appear, that the constitutional promise is now either extinguished or deferred.

I want to invite you into a discussion that we must have if we consider our responsibilities in the context of the Constitution. I want to emphasise that we have achieved much in our young democracy, but if we want to drive this nation forward on an inclusive basis, then we must talk about those challenges that present, and which if left unattended may sully the very achievements we are so proud of. Inequality is prime among the challenges that confront us.

You may argue that all of this is the consequence of economic policy decisions only, but it is important that we consider the constitutional context. Pause and reflect again on the Preamble, or the "Promise" of the very Constitution. We adopted the very document ***so as to***

- *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
- *Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
- *Improve the quality of life of all citizens and free the potential of each person; and*
- *Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.*

Granted, our much-admired Constitution is about much, much more than the binding objectives articulated in its Preamble. We will need to distinguish between the constitutional form – a democracy with regular elections, a voiced Parliament, an independent judiciary and an accountable Executive. All of those are fundamentally important victories secured – they did not exist in South Africa before democracy. Yet, I submit that they are merely the **form** of democracy – and we can tick all of the boxes for these claims. We must, however, turn our attention to the **substance** of democracy.

Are we moving in a direction that continually "improve(s) the quality of life of all citizens and free(s) the potential of each person"? Are we creating a sense of a rising floor of rights and opportunities? And are we consciously creating a sense of hope, measured by the feeling that each day is better than the previous one? In this context, we need to consider that it is entirely possible that we can tick all the boxes correctly about the ***form*** of our Constitution, yet avoid dealing with the ***substance***thereof.

What do we want, and what should we expect? Even in a discussion on "sustaining our constitutional democracy"? There is the common assumption that we all want the same things but that we may chose different paths to get there. This is simply not true. It is unfair to assume that the poor who are dependent on a salary for their income, public services provided by the State and whose daily experiences are so vastly different from the wealthy want the same things. The rich derive an income from accumulated wealth; they are able to acquire the services that they need from the marketplace such as private education, private healthcare and security. The disparities are much greater than simply a matter of income and services.

So how do **we** sustain of our constitutional democracy? And do we, a gathering such as we are, have the absolute right to determine what the needs and expectations of others ought to be?

Perhaps one of the biggest obstacles to overcome as we grapple with the challenge of sustaining our constitutional democracy is the sense that the circumstances of parents serves as too great a determinant of the opportunities available to their children. And that in the main, these circumstances are a direct product of our

history. So, in large measure, the landscape of opportunities still reflects the apartheidcontours. This is not to deny the fact that opportunities for the advancement of blacks and women, which was not possible under apartheid, now exist. We must also recognise the statutory and institutional mechanisms created to advance the interests of "persons or categories of persons, disadvantaged by unfair discrimination." This has resulted in the advancement of significant numbers of historically disadvantaged people. But for the majority, those opportunities still remain out of reach.

The trends over the past twenty years are actually quite disturbing. In 1995, the poorest 40 percent of the population received about 6 percent of national income.

Today, that figure is slightly below 6 percent, notwithstanding a massive expansion of social grants. In 1995, the top 20 percent of income earners earned about 72 percent of national income. That figure today stands at about 70 percent. For the top 10 percent, however, the figure has actually gone up. More starkly, the unemployment rate for young, black South Africans stands at over 50 percent. The comparable figure for white South Africans is below 10 percent. Notwithstanding significant social change, the chasms remain unbearably large.

The problem of growing inequality is, of course, masked by the mathematics of aggregation and averages. For elites, like ourselves, there is a sense of boundless accumulation, which may numb our senses to the harsh lived reality for the majority. Robert and Edward Skidelsky, in their authoritative book, "How much is enough? Money and the good life" write,[1]

> *Experience has taught us that material wants know no natural bounds, that they will expand without end unless we consciously restrain them. Capitalism rests precisely on this endless expansion of wants. That is why, for all its success, it remains so unloved. It has given us wealth beyond measure, but has taken away the chief benefit of wealth, the consciousness of having enough.*

But, to the point of capitalism having given "wealth beyond measure", I must add, "misery without measure" for the majority.

It brings me back to that extract from the Preamble to our

Constitution (yes, we are still on page 2 of the Constitution) that defines its very purpose (so as to), “improve the quality of life of all citizens and free the potential of each person.” What do we ask of civil society to do in order to check the excesses of some and to open opportunities for the many?

The first provocation is that it would help tremendously if we were neither neutral, nor indifferent to these unfolding realities; we need an understanding amongst the elites in society that they might be part of the problem. Secondly, we must expand our understanding of development impelled by a focus on ‘capabilities’ – which is defined as ‘concrete powers of thought and action’. Thirdly we should engage in a discussion about how we can assert the voice of those who feel excluded. Fourthly, we must revisit our common purpose.

So let us try to unpack some of the means to open opportunities for the many.

What would we want to happen in South Africa? How far would we push the envelope? What would civil society wish to do with their powers to sustain our constitutional democracy? Let’s return to what the organs of civil society might consider.

Firstly, in working to counteract the complacency that comes from indifference, we fail to appreciate that the burden borne by the poor in South Africa goes way beyond the absence of jobs, and money. There are a range of deep social problems that afflict the poor and their impoverished communities. We must be bold to draw the links between the realities of inequality and poverty and their manifestations in infant mortality, criminality, unemployment, malnutrition, teenage pregnancy, illegal drug use, alcoholism, gangsterism and associated ills. The deep tragedy is that frequently a very rapid addiction to some hard-hitting drug, such as methamphetamine, leads into gangs, and then petty theft that strips every material object that the family has accumulated.

Add to this the high levels of personal indebtedness, primarily from unsecured lending that shackle the poor and drive them back into the abyss of poverty as soon as they are able to raise their heads above the precipice. So, if civil society wants to act to preserve our constitutional democracy, there is a veritable

smorgasbord of opportunities.
I want to invite you to follow closely the litigation brought by the University of Stellenbosch's Legal Aid Clinic against the Ministers of Justice and of Trade & Industry, the National Credit Regulator, 13 micro-lenders and a law firm. If the case succeeds, and I sincerely hope that it does, the legality of emolument attachment orders (garnishee orders, in the legal parlance), and the days of unscrupulous and exploitative micro-lending will end. With it, a small chink of light of the promise of the Constitution. It has taken a while, and dogged determination of some very resolute people – including employers, who cannot bear to see the impoverishment of their employees – to bring this particular matter thus far. The rest of us cannot merely cheer on their efforts; there is so much work for organisations of civil society to liberate people from the trappings of poverty. But, do understand that engaging in support of poor and exploited people, denied access to the joys of our Constitution, may cost you some friends.

The problem of rising inequality cannot simply be placed at the door of government, regardless of how you might feel about the general performance of government. The World Bank study released last week confirms that fiscal policy is significantly redistributive, on both the tax and spending sides – but it is not enough. The stark reality is that inequality will remain high until we campaign together for job creation. It is not a matter that can be left to either the government or the trade union movement alone. What distinguishes South Africa from our peer group countries – Brazil, Mexico, Indonesia, and Uruguay, for example, is that a much smaller percentage of our compatriots work. Regardless of how redistributive spending is, we will not deal with inequality without creating large numbers of additional jobs. This is a topic that has to involve current and prospective employers.
We can easily get trapped into a discourse where investment is weak, growth is weak, social mobility ceases and social tensions rise. This raises the probability of populist policies, which threaten investment. It is up to all of us, the elites included, to break this cycle.
It is worth repeating that merely being the proud owners of a

Constitution such as we have, without working to implement its spirit, is actually quite futile.

The second provocation requires us to unlock the essence of what the Nobel Laureate, Amartya Sen, called the capabilities approach in "Development as Freedom". He argues that there are five components in assessing capability:

- The importance of real freedoms in the assessment of a person's advantage;
- Individual differences in the ability to transform resources into valuable activities;
- A multi-variate of activities giving rise to happiness
- A balance of materialistic and non-materialistic factors in evaluating human welfare; and
- Concern for the distribution of opportunities within society.

Surely, we must be able to measure the value of the freedoms articulated by our Constitution to empower people to develop the courage of thought and action. Access to employment and the skills set to exercise choice in employment opportunities are fundamental to unlocking the energy produced by a capabilities approach. In understanding this aspect of our democracy, we re-enter the zone of the substance, rather than the mere form of democracy.

So how do we unleash the courage of thought and action? Obviously, it must come from the nurturing in society by virtue of a rational redistribution.

I would like to tie this up with the work of another great economist Thomas Piketty. In his much-talked-about book, "Capital in the Twenty First Century", he helps resolve the capabilities problem and the problem of inequality as follows[2]

> *Modern redistribution does not consist in transferring income from the rich to the poor, at least not in so explicit a way. It consists rather in financing public services and replacement incomes that are more or less equal for everyone, especially in the areas of health, education and pensions. In the latter case, the principle of equality often*

takes the form of quasi proportionality between replacement income and lifetime earnings. For education and health, there is the real equality of access for everyone regardless of income (or parents' income), at least in principle. Modern redistribution is built around a logic of rights and a principle of equal access to a certain number of goods deemed to be fundamental.

So what, for the majority of South Africans, impedes the attainment of these fundamental rights? We should raise education very strongly under this topic, and in this context, there are three issues that are worth exploring. First, whether the right is articulated strongly enough in Clause 29 of the Bill of Rights. The second question we have to answer is whether the education function is adequately resourced. And thirdly, whether there are other impediments that we should be conscious of. In respect of the first issue, I will take the plunge and proffer a view that the language in Clause 29 could have been stronger. As it stands, the phrasing about the right to a basic education, and to further education may not be as unambiguous as it could be. Perhaps when read with Section 28(2) "A child's best interests are of paramount importance in every matter concerning the child", it becomes a bit clearer. Perhaps we should raise the issue for further discussion so that there should never be a doubt about the intention of the clause(s).

Secondly, in respect of finances, I would hazard that we do not have a problem. In the 2014/15 financial year, the state provides R190,7 billion for Basic Education, of which R144,2 billion is for compensation, R18.0 billion for Goods & Services etc.; and an additional R 52,5 billion is budgeted for post-school education. I think that the allocations by the National Treasury pass the Piketty test.

The third component to understanding whether we are equipping a generation of young people with capabilities is, of course, the conduct of teachers themselves. Nowhere is this more clearly articulated than in the papers and resolutions of the recently-held SADTU conference. Mr Mondli Makhanya recently wrote of this conference[3]:

With education having been universally identified as the

most effective tool to take society forward, it would stand to reason that those who stand in the way of a better educated society are an impediment to progress. And with the most evidence pointing to the fact that SADTU's bullying tactics stymie efforts by government, parents, civil-society and hard-working teachers to improve the education system; the union is definitely an obstacle to progress.

What value does our rights and freedoms guaranteed in the Constitution have if we are not able to conquer the fundamental challenge of unlocking the capabilities in society?

We will not advance the cause of equity and inclusion unless we can campaign together to produce better outcomes from our spending in education, tackling those who impede the passage of the children of the poor, as Mondli Makhanya does, might be one of the responsibilities we must shoulder.

It brings me to the third provocation in the battle to deal with the challenges presented by inequality: we need to consider the functioning of democracy as provided for by our great Constitution. I was persuaded by the arguments of President Michelle Bachelet in the Nelson Mandela Memorial Lecture she delivered in Cape Town on 9 August this year. She analysed the quality of democracy, a bold approach in an environment where so many citizens now have access to information from a variety of sources. She commented on the fact that the hallmark of democracy sets a legal frame for regular elections of representatives. What struck me about her address was the fact that she argued that basic standards of legality and representative democracy were simply no longer enough for citizens. This is in the context of the civility of institutions and with regards to rights already been achieved. She made the compelling point that "on top of demands for democracy, and an equal distribution of opportunities, goods and services, the demand for participation is essential."

How would this participation be achieved by organs of civil society? And what are the risks? There are various initiatives to close the gap between elections; the Swiss system of frequent referenda, and the Californian system of propositions stand out

among these. There remains, of course an enormous risk that some propositions may produce outcomes that may not articulate with our constitutional values. The question is whether the risks outweigh the opportunity to explore the argument presented by President Bachelet on the inadequacy of merely the standards of legality.

In many respects, legislation and funding allocations provide for a closing of the gaps between citizens and political power. I have established that the parliamentary system, that is the National Assembly and nine Provincial Legislatures, will spend approximately R800 million this year to support the 860 members to perform their responsibility of engaging the electorate, by closing the information gap and dealing with the needs and lived experience of citizens. The averages are quite amazing – the numbers average out at one elected representative for each 65 000 people, and give or take an allocated approximately R 1 million annually to serve the electorate.; and to these numbers we must add the actions and spend by directly elected ward councillors.

The Constitution [S42 (3)] says that "The National Assembly is elected to represent the people and ensure government by the people under the Constitution." To enable the principle of 'government by the people' the parliamentary programme is so adjusted that its members are required to be in Cape Town for parliamentary committees and sittings for about three days of the week. Mondays, weekends and of course the periods that coincide with school holidays are set aside for constituency work and while Fridays according to the Rules are parliamentary working days, it is seldom used for plenaries with only a handful of committees that meet. All citizens should know how the system works for them, in closing the gap between officialdom and their daily lives.

This is not an unimportant point in the context of this evening's discussion – we are remembering Helen Suzman, perhaps the most tireless of MPs, in spite of having been a sole representative for a long period of time. So my question to civil society is: why are you so tolerant? If President Bachelet is correct and 'mere representative democracy is not enough', how do we energise

democracy?

The final provocation is, 'what exactly is our common purpose'. Perhaps the most persuasive articulation of common purpose is expressed in the Constitution itself. Earlier I drew on the Preamble to our Constitution – that well–crafted, cogent piece that gives us purpose. It does not stand alone; it is followed by the Founding Provisions that similarly leave no space for guesswork.

It lists the following values:

> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

And defines citizenship by stating that:

> All citizens are -
> (a) equally entitled to the rights, privileges and benefits of citizenship; and
> (b) equally subject to the duties and responsibilities of citizenship.

So there are clearly no problems whatsoever with our Constitution or the clarity of argument used to set the course for transition. No court would ever have to think very hard to answer the question, "what was in the mind of the legislators?" The language is so abundantly clear – it says for example, "law or conduct inconsistent with it is invalid, and the obligations imposed by it **must** be fulfilled." There is no stronger language possible in Constitutional Law. The problem seems to be that we have forgotten why we co-exist in the same geographic space. The author Tony Judt speaks directly into this vacuum of purpose when he wrote,

> "*If we remain grotesquely unequal, we shall lose all sense of fraternity: and fraternity, for all its fatuity as a political objective, turns out to be the necessary condition of politics itself. The inculcation of a sense of common purpose and*

*mutual dependence has long been regarded as the linchpin of any community. Acting together for common purpose is the source of enormous satisfaction, in everything from amateur sports to professional armies. In this sense, we have always known that inequality is not just morally troubling: it is inefficient"**[4]***

So, if civil society is asking for a re-examination of its role – it has to be that because it does not need permission – there are four provocations that I submit it has to respond to –

- the indifference to what we see, feel and hear, and bear in mind that Helen Suzman's motto was "See for yourself";
- the need to focus on the concrete power of thought and action, or capabilities, that the key public services must unlock;
- the energizing of our democracy by paying close attention to both the representative and the participatory elements thereof; and
- re-establishing our common purpose.

In conclusion, ladies and gentlemen, our Constitution is drafted in a manner that sets an enormous, ongoing task to create a society that, not only deals with the deficits of the past, but one that is considerably better for all. The deviation from this path is measured by the gross inequalities that obtain. We can and must use this fact as a measure of our collective neglect. It can and must be dealt with, because we know that it will not self-correct. The actions required of us start with each of us, making a choice about what we want our country to be.

Thank you.

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[1] Robert and Edward Skidelsky, "How much is Enough?; Money and the Good Life", p 67

[2]Thomas Piketty, Capital in the Twenty First Century, p479
[3]Mondli Makhanya in City Press, 21 October 2014
[4]Tony Judt, Ill Fares the Land, Chapter 5, p184.