

This brochure captures some moments of the Conference on the 20th anniversary of the South African Constitution from 6-7 May 2016. Its statements stay as authentic and original as possible.

“ Ultimately the guardians of our Constitution are the honest, trustworthy and morally upright citizens of our country.”
– Zak Yacoob

“ We all know that our Constitution is unique and was unique as a point of settling what appeared to be at the time a very intractable political conflict.”
– John Jeffrey

“ We are facing many challenges, sourced in the perceived failure of the Constitution to transform socio-economic relations and to advance social justice.”
– Hugh Corder

“ We had a crisis in the last 18 months. But the crisis is an opportunity to move to the next level.”
– Thuli Madonsela

“ This has been a terrific conference: lively, spirited, and engaging. I can’t imagine a conference quite like this anywhere else in the world.”
– Albie Sachs

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The Foundations of the Supreme Law
Conference on the Occasion of the

20th Anniversary of the South African Constitution
(History and Developments)

Venue: Women’s Gaol Atrium, Constitution Hill, 11 Kotze St, Johannesburg, 2017
6 – 7 May 2016



“ We, the people of South Africa,
recognise the injustices of our past;
honour those who suffered for justice and freedom in our land;
respect those who have worked to build and develop our country;
and believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives,
adopt this Constitution as the supreme law of the Republic. ”

Conference Report

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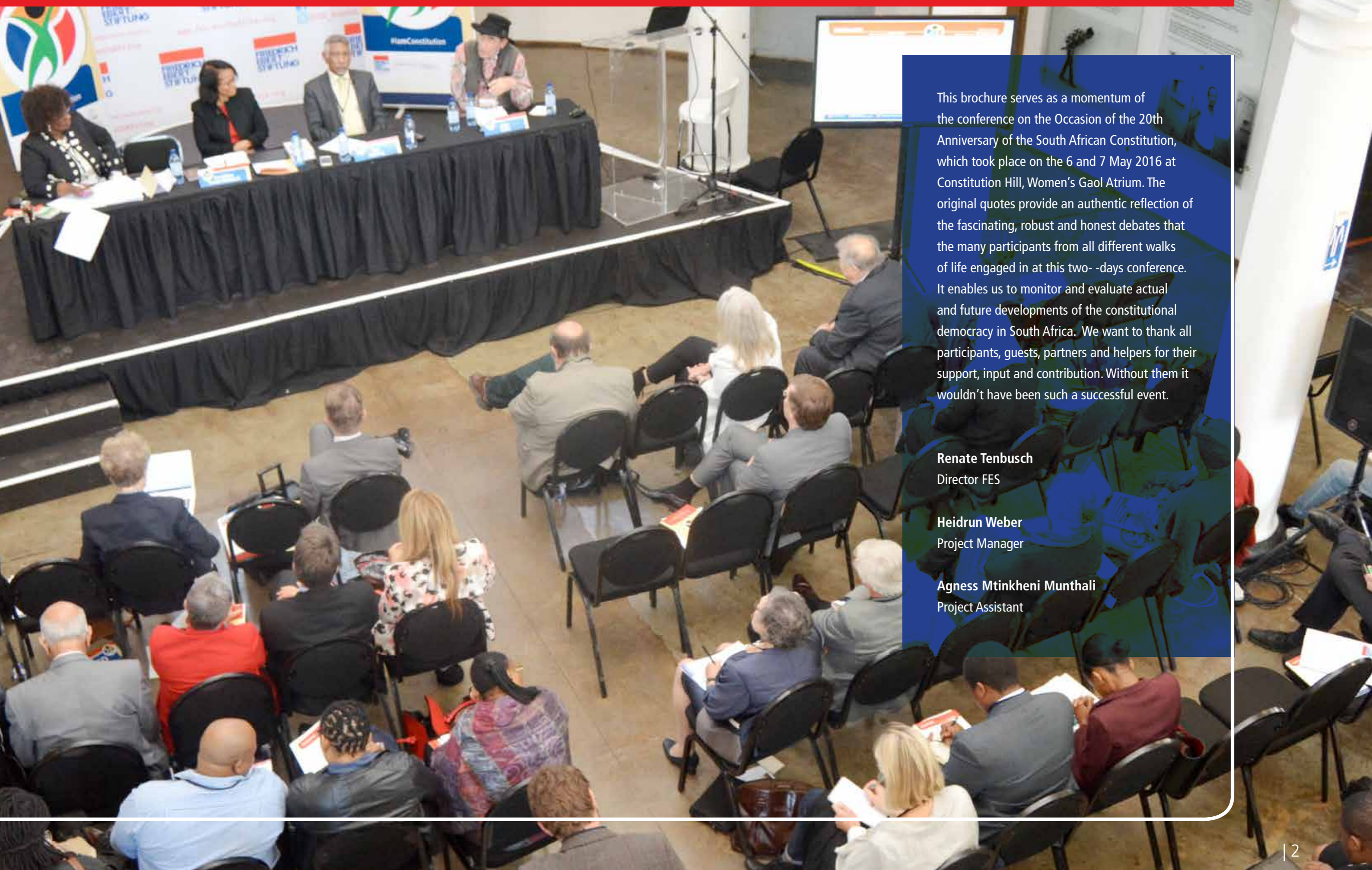
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FOREWORD FROM THE PUBLISHER



This brochure serves as a momentum of the conference on the Occasion of the 20th Anniversary of the South African Constitution, which took place on the 6 and 7 May 2016 at Constitution Hill, Women's Gaol Atrium. The original quotes provide an authentic reflection of the fascinating, robust and honest debates that the many participants from all different walks of life engaged in at this two- -days conference. It enables us to monitor and evaluate actual and future developments of the constitutional democracy in South Africa. We want to thank all participants, guests, partners and helpers for their support, input and contribution. Without them it wouldn't have been such a successful event.

Renate Tenbusch
Director FES

Heidrun Weber
Project Manager

Agness Mtinkheni Munthali
Project Assistant

IMPRESSIONS



“ IT IS CLEAR THAT WE FACE A MONUMENTAL TASK TO POPULARIZE THE CONSTITUTION, TO EDUCATE THE PEOPLE IN SA OF THEIR RIGHTS AND WAYS TO ENFORCE IT. ”

– Advocate Jacob van Garderen



“ ULTIMATELY, THE GUARDIANS OF OUR CONSTITUTION ARE THE HONEST, TRUSTWORTHY AND MORALLY UPRIGHT CITIZENS OF OUR COUNTRY. ”

– Justice Zak Yacoob



“ WE DO NOT HAVE THE BIG STICK TO BRING THE EXECUTIVE TO ACCOUNT. ”

– Thandi Modise





- 09.00 Registration
- 09.30 **Welcome** Introduction
Renate Tenbusch
- Followed by Q&A
- 10.00 **Keynote:** The Making of the Constitution
Albie Sachs
- 11.00 **Coffee Break**
- 11.30 **First Panel:** The Intent of the Founders
(Conceptual battles during the Constitution-making process)
Moderator: *Sisi Khampepe*
Presenters: *Geraldine Fraser-Moleketi*
Mac Maharaj
Albie Sachs
- Followed by Q&A
- 13.00 **Lunch**
- 14.30 **Second Panel:** Bill of Rights
(Human Dignity, Equality and Liberty: Cornerstones of Democracy)
Moderator: *Penny Andrews*
Presenters: *Johann van der Westhuizen*
Sandra Liebenberg
Jacob van Garderen
- Followed by Q&A
- 16.00 **Coffee Break**
- 16.30 **Third Panel:** Gender and Customary Law
(Gender, Indigenous Law and Traditional Leaders)
Moderator: *Aninka Claassens*
Presenters: *Sango Patekile Holomisa*
Nomboniso Gasa
Nomalanga Mkhize
- Followed by Q&A
- 18.00 Reception by the German Embassy

- 09.00 **Fourth Panel:** Co-Operative Government
(Three Spheres, Intergovernmental Relations, NCOP)
Moderator: *Nico Steytler*
Presenters: *Andries Nel*
Thandi Modise
Adv. S'du Gumede
Hans-Peter Schneider
- Followed by Q&A
- 10.30 **Coffee Break**
- 11.00 **Fifth Panel:** Guardians of the Constitution
(Constitutional Court, Chapter 9 Institutions)
Moderator: *Hugh Corder*
Presenters: *Thuli Madonsela*
Leon Wessels
Zak Yacoob
Reinhard Gaier
- Followed by Q&A
- 12.30 **Lunch**
- 13.30 **Sixth Panel:** The South African Constitution – Model for other countries in transition?
(The Influence on Foreign Constitutions)
Moderator: *John Jeffrey*
Presenters: *Nicolas Haysom*
Herta Däubler-Gmelin
Lourens M. Du Plessis
- Followed by Q&A
- 15.00 **Endnote:** *Albie Sachs*

INTRODUCTION

In 2016 the Constitution of the Republic of South Africa enjoys its 20th anniversary. The constitution was solemnly adopted by the Constitutional Assembly on May 8, 1996 and signed into law by President Nelson Mandela at Sharpeville on the 18th December 1996.

On this occasion the Friedrich-Ebert-Stiftung (FES) and the Constitution Hill Trust, with assistance of former Justice Albie Sachs and the German Institute for Federal Studies (DIF) organized a conference to reflect on the significance of the constitution for South Africa's democratic and socio-economic development over these past two decades up to today as well as in the future.

The main objectives of the conference were;

- to reflect on the struggle for the constitution as a peace agreement amongst former hostile forces,
- to illustrate how compromises can be reached in a constitution making process between antagonistic political parties and stakeholders,
- to underline the importance of the constitution for the transformation to an open, non-racist and democratic state based on the rule of law,
- to focus on the impact of the constitution on the lives of every citizen
- to observe the development of the constitution in the past 20 years,
- to elucidate the instruments, it comprises which ensure enforcement of the constitutional rights
- to stimulate an informed debate on a number of selected themes related to current developments in the country
- to strengthen awareness and underline the importance of the constitution for democracy and stability in South Africa.

Former Justice Albie Sachs, delivered the keynote speech under the theme "The Making of the Constitution" followed by the First Panel on "The Intent of the Founders". This panel reflected on the constitution making process and gave some insights into this exciting, extremely tensed but also exceptional time of historical importance. Panel Two discussed the meaning of the "Bill of Rights" and its influence on the people of South Africa's everyday life. The Third Panel's theme was "Gender and Customary Law" which touched on questions around gender equality, the role and power of traditional leaders in rural areas as well as the application of indigenous respective customary law and its consequences. This entered into the Fourth Panel in which matters around "Co-operative Government" were discussed, mainly questions regarding the overlapping competencies between the three spheres of government and its challenges, the impact and reality of the federal idea and the functionality of the National Council of Provinces (NCOP). Panel Five pondered on the "Guardians

of the Constitution", primarily on the Constitutional Court and the Chapter 9 institutions, their acceptance, functionality and mode of operation. The conference concluded with the Sixth Panel on "The South African Constitution – Model for other countries in transition?" in which the question was raised to what extent the South African Constitution is compatible and exemplary for other countries in a peace process.

While most of the speeches referred to the prevailing political situation in the country, it was in the interaction with the audience in the "Question & Answer" sessions where topical debates on political, social and economic issues were brought up. The discussions clearly demonstrated the broad spectrum of rights the constitution offers to further and protect a democratic political and socio economic transformation. The debates were at times robust and controversial, but always fair and balanced.

Each panel was chaired by a moderator and consisted of at least three speakers. Each speaker gave a ten to fifteen minutes input followed by a 30 minutes "Question and Answer" session with the audience which can be described as a lively, vivid and comprehensive interaction with the panellists.

In the following you will find quotes of each panellist combined with pictures from these two days. This brochure presents highlights from these inspiring, informative and also controversial debates and reflects the remarkable atmosphere on Constitution Hill during the conference.

My special gratitude goes to the panellists who gave their time, knowledge and wisdom to let this conference happen.

To end with Albie Sachs' words:

"I can't imagine a conference quite like this anywhere else in the world, with that range of people, the seriousness of the concept, the attention that's been shown - that's all part of the uniqueness of South Africa."

Johannesburg 2016
Renate Tenbusch Director FES

WELCOME

Biography Renate Tenbusch

Renate Tenbusch is currently Resident Director of the Friedrich-Ebert-Stiftung (FES) South Africa Office in Johannesburg. Previously, she was the Regional Coordinator for Africa at FES Berlin's International Trade Union Project. In her time at the FES India Office, she was Head of the Regional Project for South Asia. She has a Magistra Artium Degree in Political Sciences and German and English Philology from the University of Cologne.

Renate Tenbusch, Director of the Friedrich-Ebert-Stiftung South Africa Office, opened the Conference on the 20th Anniversary of the South African Constitution with a welcome speech. She explained why German organisations, like the FES and the German Institute for Federalism (DIF), are part of celebrating the South African constitution:

"The initiative was presented to me by the honourable former Constitutional Justice Albie Sachs and Professor Hans-Peter Schneider. Justice Albie Sachs and the Friedrich-Ebert-Stiftung have a longstanding relationship, that started at the beginning of the nineties. Albie Sachs made it quite clear in the beginning what his expectations from a German organisation like the FES were: 'We don't want to be consulted by the German Experts; we are seeking information about comparable experiences in Germany.'

This statement, voiced on the occasion of a FES conference entitled 'Constitution in the Making in South Africa' in 1991, set the tone for all FES projects, not only in relation to the process of drafting a new constitution, but also in relation to all other areas of cooperation between FES and its partners in South Africa up to today."

"During the process of drafting the constitution between 1991 and 1996, the FES worked closely with the relevant committees in the ANC (African National Congress). Results of the so called 'Kempton Park Negotiations' had to be discussed within the ANC, with the relevant ANC bodies and with the ANC constituencies. FES supported the ANC in conducting these seminars and provided, if requested, international expertise."

"The first conference on constitution-making in South Africa was supported by the National Association of Democratic Lawyers, an association close to the ANC, and was attended by international experts from Germany, Spain and the USA. Among these experts was Prof Hans-Peter Schneider from the Institute for Federalism (DIF) at Hannover University."

"This conference precluded a series of conferences on different constitutional questions. A very important topic became the establishment of the Constitutional Court. FES organized conferences on the Constitutional Court in South Africa, as well as in Germany, and offered a platform for information-sharing between the experts on both sides. ... I think it is not wrong to say that the German Constitutional Court served as an important reference point for the South African Constitutional Court."

"The other important question was the territorial re-organisation of the Apartheid spatial order, which comprised the four white provinces and the so-called 'independent' Homelands. The ANC promoted a centralized state, whereas the other parties, such as the NP (National Party), DA (Democratic Party, now the Democratic Alliance) and IFP (Inkatha Freedom Party), promoted a decentralised system. Following a request from the ANC, FES once again, together with the DIF under the leadership of Prof Schneider, organized an expert delegation to Germany, as well as several conferences and workshops on this important issue. Again, I think, it's not too much to say that to learn about the emphasis on the subsidiary principle of the German Federal System helped the ANC to re-think their position, and a compromise for establishing a decentralised system in South Africa was found."

Ms. Tenbusch ended with the words: "I am looking forward to the robust and constructive debates here today, and to learn more from the experts in relation to the South African Constitution."



KEYNOTE

- THE MAKING OF THE CONSTITUTION

Biography Justice Albie (Albert Louis) Sachs

Albie (Albert Louis) Sachs is a former Justice of the Constitutional Court of South Africa and a well-known peace activist, not only in South Africa but all over the world. He started practicing as an Advocate at the Cape Town Bar at the age of 21, working mainly in the civil rights sphere. In 1966, he went into exile in England where he spent eleven years studying and teaching law. In 1977 he moved to Mozambique, and worked there as law professor and legal researcher for another eleven years until his attempted assassination by South African security agents in 1988, when he returned to England. There, he devoted himself full-time to preparations for a new democratic Constitution for South Africa. In 1990 he returned back to South Africa, and as a member of the Constitutional Committee and the National Executive of the ANC, took an active part in the Constitution-making process. Sachs was appointed to the Constitutional Court of South Africa by Nelson Mandela in 1994.

In addition to his work as a Justice, he has travelled to many countries sharing South Africa's experience in healing divided societies. He still teaches as Professor Extraordinary at the University of Cape Town.

In his keynote, Albie Sachs gave a comprehensive insight into the history and the actual process of the writing of the South African Constitution. He in detail talked about the crises, the eruptions, the breakdowns, the wrestling around certain topics such as "Bill of Rights, Federalism, Property" etc., but also about the hopes, the surprises and the successes.

"If you made a paternity test on our constitution, whose DNA would come up? – Oliver Tambo!"

The non-racial vision of Oliver Tambo in 1988 was "to have a Bill of Rights that protects all people, not as whites, as blacks, as minorities, as majorities, but as human beings."

"We need a Bill of Rights against ourselves. Often, some of the bravest freedom fighters around the world ended up becoming very authoritarian. ... We need to instil the principles and values we were fighting for into the institutional mechanisms of our country..."

"For us it wasn't just drafting a document. It was an act of decolonisation, it was our independence moment. The constitution-making gave us our equivalent of independence not through separation, but through democracy. National liberation through democracy and the vote."

"Before [the negotiations] we used to speak of 'the enemy', when we started negotiating we started speaking about 'the regime', as the negotiations advanced it became 'the other side'."

"My heart just swells with pride to think what we South Africans have achieved. When the whole world was predicting chaos in this country, when people were saying black people can't rule ... we succeeded: the Constitution is there, we have elections, ... we have fundamental rights, we have a free press, we have a civil society, we've got a Constitutional Court – we put so much pain into it, and it works, the Constitution works, Constitution and democracy work."





THE INTENT OF THE FOUNDERS

- Conceptual battles during the Constitution-making process

PANEL 1

Moderator: Justice Sisi Khampepe
Presenter: Geraldine Fraser-Moleketi
 Mac Maharaj
 Justice Albie Sachs

“ OUR CONSTITUTION-MAKING PROCESS WAS ONE WHICH WAS INFORMED BY ORDINARY SOUTH AFRICANS. ”
 – Former Minister Geraldine Fraser-Moleketi



MODERATOR:

Sisi Khampepe, Honourable Justice of the Constitutional Court, acted as the moderator on the first panel.

“We must commend the founders, the founding parents of the Constitution, for today we have a constitution that guarantees the rights of all people. We have Chapter 9 Institutions which are very effective, and which are ensuring that we have democracy that will be sustained for many centuries to come.”

“Democracy is about the participation of our people.”

“I am intrigued by the inclusion of socio-economic rights in our Constitution. We are one of the very few countries in the world which include socio economic rights as justiciable in our Constitution.”



Biography Justice Sisi Khampepe

Justice Sisi Khampepe is currently a Justice of the Constitutional Court of South Africa. After being admitted as an attorney in 1985, she established her own law firm. In 1995, she was appointed by former President Nelson Mandela as a TRC (Truth and Reconciliation Commission) Commissioner, and the following year she became a member of the TRC’s Amnesty Committee. In 2004, she was appointed to oversee the elections in Zimbabwe. In February 2006, she was seconded as a member of the Commonwealth Observer Group to the Presidential and Parliamentary Elections in Uganda.

PRESENTERS:

Biography Geraldine Fraser-Moleketi

As the Special Envoy on Gender at the African Development Bank, Geraldine Joslyn Fraser-Moleketi leads a strategy to mainstream gender in the Bank’s policies and operations. Geraldine was previously Director of the United Nations Development Programme’s (UNDP) Democratic Governance Group (DGP). She served as Minister of Public Service and Administration, for two consecutive terms; and was Minister for Welfare and Population Development in South Africa’s first democratic government. Geraldine served as a parliamentarian and a member of the Constituent Assembly responsible for drawing up the South African Constitution adopted on 8 May 1996; she served on various subcommittees of the Constituent Assembly. She is a fellow of the Institute of Politics, Kennedy School of Government, at Harvard University, and has completed a leadership course at Wharton Business School at the University of Pennsylvania. Geraldine holds a Master’s Degree in Administration, and has received several awards including the OP Dwivedi Public Service Award from the International Association of Schools and Institutes of Public Administration, and a Special Award for Outstanding Achievement from University of Pretoria’s School of Public Management and Administration. Most recently she was named the “2016 New African Woman of the Year.”



A strong supporter of intergenerational dialogue, Geraldine mentors young women and men across the continent on leadership and resilience.

The first presenter on the panel was Geraldine Fraser-Moleketi. She was in exile when the discussion about constitutional matters started within the ANC in the 1980s. She returned to South Africa in the early 1990s and was part of the Constitution-making process. Geraldine gave insights into the internal debates and discussions about the different positions in constitutional questions that took place within the structure of the liberation movement which she was part of.

“Our Constitution has come through a democratic process. It is a constitution that was not written by the best constitutional lawyers in South Africa, or the best legal minds internationally

coming around the table: It was one which was informed by ordinary South Africans.”

“As we moved and engaged in the negotiating process itself, we said that whilst the negotiators are at the table the voices of the masses should come through the windows.”

“We wanted to have a constitution that would be able to withstand the rigours of changing government.”

“The Chapter 9 Institutions are required to ensure that there are vigilant and strong countervailing institutions in South Africa.”



PRESENTERS:



Biography Mac Maharaj

Former Minister Mac Maharaj served as advisor and spokesperson for President Zuma from 2009 until his retirement in April 2015. He became active in the struggle in 1953, and was imprisoned on Robben Island from 1964 to 1976. After being released from prison in 1976, he was deployed by the ANC to Zambia in 1977, and was the Secretary of the Internal Political and Reconstruction Department of the ANC. From 1985 to 1990, and from 1991 to 2000, he served on the National Executive Committee of the ANC. He was appointed joint secretary of the multiparty negotiations (CODESA and the Multi-Party Negotiating Forum) and the Transitional Executive Council. He was Minister of Transport in the government of President Nelson Mandela.

The Second speaker of the first panel was Mac Maharaj, who was also part of the making of the Constitution. He emphasised the importance of a fundamental democratic understanding for every democratic system, and the problems of representative governments elected by the people. He, too, was focusing on the process that produced the constitutional democracy.

“Democracy is an evolving concept and almost all democratic systems in the world today are under stress. The common factors in this regard are the increasing numbers of citizens who feel marginalized, the manifestation of abusive power and the need for greater accountability.”

“Our Constitution emerged from a negotiating process which was aimed at resolving the ongoing political conflict. It was quintessentially a political process.”

“I quote Mandela: ‘White South Africans simply have to accept that there will never be peace and stability in this country until the principle of majority rule is fully applied’.”

“Representative democracy is inseparably linked with the empowerment of the people.”

“Much of the debates and tussles that took place at the negotiating table and the bilateral meetings, as well as in the streets, had their source in finding ways to reconcile the principle of majority rule with the demand of the white minority for structural guarantee against black domination.”

“Our Constitution does not limit the participation of people to elections or to hearings of the legislation. Participatory democracy has been talked about, but there has been no real or serious effort to develop it. We need to remind ourselves always that - in whatever debates we have and whatever changes we propose to our Constitution - democracy is about the empowerment of the people. Our commitment to freedom therefore should inspire us to take up this challenge with the sense of purpose that goes beyond any ad hoc response to an immediate problem.”

“We have failed to tell the story of our transition, and we have failed to experiment with participatory democracy.”

“We should be displaying to the world that our Constitution is living, because it continually addresses living questions.”

PRESENTERS:

Albie Sachs, who was also part of this panel, referred to his keynote speech and was actively involved in the “Questions & Answers” which followed the speeches.

“We were not fighting a racial war, we were fighting a system. It wasn’t an issue of race. We wanted to have a Constitution for all our people.”

“We worked very hard in explaining why a ‘Bill of Rights’ was needed. We wanted them [the people] to feel represented in the whole project,

and the workers: very strong workers’ rights in the Constitution. We were fighting for these things.”

“If we feel that some of our leaders ... are trying to avoid the rules, then why should we obey the rules? It is not the Constitution that is the fault; it’s the problems that we are grappling with today.”

“The main thing that worries me is the new generation: they just don’t know ... how tough and robust and difficult and complicated the Constitution-making process was.”

Biography Albie (Albert Louis) Sachs

See page 11





THE BILL OF RIGHTS

- Human Dignity, Equality and Liberty:
Cornerstones of Democracy

PANEL 2

Moderator: Prof Penny Andrews
Presenter: Justice Johann van der Westhuizen
 Prof Sandra Liebenberg
 Adv. Jacob van Garderen

“ THIS IS A GREAT ACHIEVEMENT OF OUR BILL OF RIGHTS, THAT IT RECOGNISES ALL ASPECTS OF WHAT IT MEANS TO BE A FULL HUMAN BEING IN A MODERN SOCIETY. ”

- Professor Sandra Liebenberg



MODERATOR:

Professor Penelope Andrews, Dean of the Faculty of Law at UCT, moderated the second panel about the Bill of Rights.

“The South African Bill of Rights is a model and there is a lot of cause for celebration for South African lawyers and for South Africans generally, but I suppose at this point there is also some lamenting ... there is a distance between the aspirations and ideals of the Constitution and the reality of South Africa today: marginalization, alienation, poverty, inequality, violence against women and so on ...”



Biography Prof Penny Andrews

A noted human rights scholar and activist, and Advocate of the Supreme Court of South Africa, Professor Penelope Andrews is Dean and Professor of the University of Cape Town (UCT) Faculty of Law. Prior to joining UCT, she was President and Dean at Albany Law School in New York, USA, the first female president and dean for the School since its founding in 1851.

She was previously the Associate Dean for Academic Affairs at the City University of New York School of Law (CUNY), where she also sat on the Senate. Prior to joining CUNY, she was a Professor of Law and Director of International Studies at Valparaiso Law School in Indiana, USA.

PRESENTERS:

Biography Justice Johann van der Westhuizen

Justice Johann van der Westhuizen joined the Constitutional Court of South Africa from February 2004 till January 2016. Prior to that, he was professor at the University of Pretoria's Faculty of Law, as well as the founding Director of the University's Centre for Human Rights. He served as an in-house advocate for the Legal Resources Centre and on the governing body of Lawyers for Human Rights. He is currently an Honorary Professor at the University of Pretoria and a member of the Centre's Board of Trustees, the Law Faculty Council of the University of Pretoria and council of the Judicial Education Institute of South Africa.



Justice Johann van der Westhuizen, the first speaker on the panel, was on the independent panel of constitutional experts during the Constitution-making process. He also was part of the technical refinement committee which checked the language in the drafting of the Constitution.

Justice van der Westhuizen gave a very personal and profound insight into what it meant in those days to draft the Constitution: about the political climate, a few anecdotes regarding the drafting of specific sections, and about the deadlocks, some of which were able to spoil the whole process. He also touched briefly on issues around property, socio-economic rights, dignity and equality.

“There are so many memories, that I am really irritated by anybody who says ‘I was there and therefore I know what it means’. What I can remember is some kind of an atmosphere. I remember what the environment was like, I remember which issues were high on the agenda. Some of them don't seem to be anymore, like gender equality for example, because political circumstances changed.”

“We sit there [in the Court], we try to understand the wording of something and now you do remember the debate, perhaps you do remember what specific people said. Again, what I thought is useful is simply my understanding of the climate at the time.”

“We thought: let's write a nice introduction, a preamble – [the] Bill of Rights is the cornerstone of [our] democracy.”

Section 25, on the right to property: “People often don't understand that it does not say there is a right to property. But the right in Section 25(1) is the right not to be arbitrarily deprived of property.”

“The present issue, if you listen to the politicians, is expropriating without compensation. That's where the debate is now.”

“It is interesting that something which at that stage [of the drafting process] could threaten to disrupt the whole process, just fades into insignificance.”



PRESENTERS:



Biography Prof Sandra Liebenberg

Prof Sandra Liebenberg is the HF Oppenheimer Chair in Human Rights Law and Distinguished Professor in the Faculty of Law, University of Stellenbosch. She is also Co-Director of the Faculty's Socio-Economic Rights and Administrative Justice Research Project (SERAJ).

She has been involved in supporting public interest litigation and advocacy in the area of socio-economic rights for a number of years. In December 2014, she received the University of Stellenbosch's top accolade, the Chancellor's Award, for her contribution to community service in the field of law in South Africa. In 2016, she was elected as a member of the United Nations Committee on Economic, Social and Cultural Rights (ECOSOC).

Sandra Liebenberg, the second speaker on the panel, served as Chair of the Technical Committee advising the Constitutional Assembly on the drafting of the Bill of Rights in the 1996 Constitution of South Africa.

Sandra highlighted three areas in her speech: the Bill of Rights and democracy; the social and socioeconomic rights; and the public and private accountability for human rights.

1st area: "I think right at the outset of the Bill of Rights we have an indication that human rights are constitutive of our new democracy. They are not a distraction from them, they do not take away from democracy, but they actually constitute the South African vision of post-apartheid democracy."

"In order for allowing all these voices to contribute to this debate, to help in the fulfilment of human rights, we need a deep participatory democracy."

"There is a perception in many countries that there is a huge distance between the elected representatives and the people, that they are increasingly unresponsive to people's rights."

2nd area: "There was definitely, to a greater or lesser extent, a lot of support amongst all the political parties for the recognition of social and economic rights in the Bill of Rights. Again, it wasn't simply a political party-driven process, but there was a very active civil society campaign."

"I think this is indeed one of the great achievements of our Bill of Rights, that we have this holistic integrated Bill of Rights which recognizes all aspects of what it means to be a full human being in a modern society."

"I think the South African experience is not just having these rights as window dressing in the Constitution, but showing that they can be meaningful, that they can work in practice, that they can be real accountability tools."

3rd area: "The prohibition on unfair discrimination applies not only to the state but also to private parties."

"Private parties, when they interact with citizens as workers, as consumers, as patients ... must come to understand themselves as bearers of human rights duties, and that they can and they should be held accountable for these duties."

"In conclusion, it's hard to imagine a more enabling legal framework within which to retrace the injustices of our past and to transform society for the future."

"We have to face the fact that we have lost sight of the values on which our constitutional project is founded: human dignity, the rule of law, transparency, non-racism, non-sexism, a commitment to political as well as social and economic emancipation; and if 20 years of constitutionalism is to be meaningful it should involve a re-commitment to these fundamental values."

PRESENTERS:

Adv. Jacob van Garderen was the last speaker on the panel. He is the National Director of Lawyers for Human Rights, and in this position he focused on constitutional rights for non-nationals and on rights awareness and access to justice.

"Soon after the adoption of the Constitution in 1996, our country was faced with a new human rights challenge, and one that I doubt was foreseen by the drafters. This was to protect and assist a small but increasing flow of persons fleeing persecution and conflict in other parts of the region and further afield."

"In line with the constitutional principles of dignity, equality and liberty, parliament adopted a new Refugees Act in 1998 that grants asylum to those fleeing persecution and affording them most of the Chapter Two rights. Sadly, since the adoption of the Refugee Act, the government has struggled to give effect to these provisions. As a result, refugees and asylum seekers remain without legal documentation and are subject to serious levels of violence and harassment."

"The reach of the Bill of Rights for non-nationals has been the subject of contested interpretation since the passing of the final Constitution. The inclusion of the term "everyone" as opposed to "every citizen" in the Bill of Rights makes it clear that the vast majority of rights under the Constitution will have broad reach."

"Someone recently said that the South African Constitution is world famous for its impressive Bill of Rights and constitutional mechanism to protect rights; but that it is ironic that the Constitution may be better known outside the country than inside South Africa."

"Despite a number of initiatives by government, civil society and Chapter 9 Institutions to inform and educate people of their constitutional rights, rights-awareness among people in South Africa has remained low, particularly among poor and marginalised communities."

"It is clear that we face a monumental task to popularise the Constitution, to educate people in South Africa of their rights and ways to enforce it."

"Unfortunately, there is often a stark contradiction between the written rights and the lived reality of so many people. Access to justice is mostly determined by economic and political position. The poor face exclusion from justice on multiple levels. Firstly, the overwhelming majority of courts, legal aid offices and civil society organisations are located in places far from rural areas and informal settlements. Secondly, obtaining private legal assistance is unaffordable, even for middle class persons. This needs to change, however complicated and expensive it may be."

Biography Adv. Jacob van Garderen

Advocate Jacob van Garderen is the National Director of Lawyers for Human Rights (LHR). During his nearly 15 years at LHR, he also headed the Refugee and Migrant Rights Programme and Strategic Litigation Unit. Before joining LHR, he worked for the Centre for Human Rights in Pretoria. He was admitted as an advocate in 2003 and has since then been a member of the Johannesburg Bar. Jacob has written and lectured extensively on refugee law and practice. He has also served on the boards and advisory committees of various NGOs and research institutions.





GENDER AND CUSTOMARY LAW

- Gender, Indigenous Law and Traditional Leaders

PANEL 3

Moderator: Dr Aninka Claassens
Presenter: Hon Sango Phatekile Holomisa, MP
 Nomboniso Gasa
 Dr Nomalanga Mkhize

“ THE ISSUE OF GENDER AND CUSTOMARY LAW WAS A MAJOR ISSUE DURING THE MAKING OF THE CONSTITUTION. I WANT TO EMPHASIZE THE FACT THAT IT REMAINS SORE. ”

- Nomboniso Gasa



MODERATOR:

Dr Aninka Claassens is chief researcher and Director of the Land & Accountability Research Centre in the Faculty of Law at UCT. She moderated the third Panel.

“In three of the main cases about customary law, they have all been about women’s rights. We’re seeing not only women have the courage to claim their rights, but actually men are upholding those claims.

In a sense, one of the things that motivated those claims is the kind of symbolic value of the Constitution and the value of equality. And what is fascinating about those claims, is they are not claims about equality versus custom, they’re claims in which both rights – customary belonging and equality – are all mixed together.”



Biography Dr Aninka Claassens

Dr Aninka Claassens is chief researcher and Director of the Land & Accountability Research Centre (LARC), Faculty of Law, University of Cape Town.

Aninka has been a land activist in South Africa for many years. She worked with communities who were resisting forced removals and farm evictions during the 1980s. She was a technical advisor on land and property rights to the Constitutional Assembly. From 1996 to 2000, she worked for the postapartheid Ministry of Land Affairs as Special Advisor. She joined the University of Cape Town in 2009, where she founded the Rural Women’s Action Research Programme (RWAR). RWAR has become a leading voice on issues of land, power and custom in the former Bantustans.

PRESENTERS:

Biography Deputy Minister Advocate Sango Patekile Holomisa

Honourable Sango Patekile Holomisa is the Deputy Minister of Labour, and former President of the Congress of Traditional Leaders of South Africa (CONTRALESA). He also serves as a Chief of the AmaGebe Tribe in the Eastern Cape. Since 1994, he has been an ANC Member of Parliament, and is also affiliated as an Advocate at the High Court of South Africa.

Previously, Hon Holomisa was a Chairperson and member of Parliamentary Committees of Agriculture and Land Affairs, Constitutional Review, Justice and Constitutional Development, and Provincial and Local Government. He also served as a member of the University of Transkei (now the Walter Sisulu University), Magistrate Commission and various other public bodies.



Hon Sango Patekile Holomisa, Deputy Minister of Labour, spoke as a representative for traditional leaders and indigenous law. He was President of the Congress of Traditional Leaders of South Africa (CONTRALESA) from 1990 until 2013.

Holomisa pointed out that traditional leaders were left out of the Constitution-making process, and spoke about the negligence of the importance of issues around possession of the land.

“That’s the Supreme Law of the new South Africa – it was drafted and adopted in the absence of the direct descendants of the original owners of the land – the people from whom the country, its wealth and freedom were stolen.”

“We continue to administer and allocate ancestral communal land ... Yet, under this Constitution, no legislation is in place to guide us. We rely on customary law and colonial apartheid legislation.

The Communal Land Rights Act (Act 11 of 2004) was struck down as unconstitutional on technical grounds. It has not yet been replaced by anything that would be acceptable.”

“There is a need for a serious and meaningful discussion of all of these issues. There is a need for a way to be found for the education of our children about the African way of life.”

“The poor are not equal with the wealthy when it comes to obtaining justice through services of lawyers, that I call [the] service provider. Poverty and inequality remain with us for as long as land, the source of life, is for sale. In African culture, the land belongs to all community members: the rich and the poor, women and men, land is shared by families ... This is one of the values which indigenous law and traditional leadership seek to promote.”



PRESENTERS:



Biography Nomboniso Gasa

Nomboniso Gasa is a researcher and analyst on gender, politics and cultural Issues. Her work which spans more than two decades, weaves academic, lived experience and constant engagement with contemporary and historical issues. She interrogates the intersections, continuities and discontinuities between the past and the present on land and customary systems; spirituality and rituals, ascribed and fluid identities.

Her current work – the land remembers, inter and intra boundaries – looks at violence and reprieve offered by identity politics.

She has worked on male initiation in South Africa – manhood carved on the body - for almost two decades and has expanded the focus into the study of the body as a site of identity, ritual and manhood, issues that continue to mark South African society today.

Gasa’s political understanding derived much from experience, first imprisoned at the age of 14. She took her early vigour and passion into the new platforms that have opened, participating in debates and a range of processes aimed at influencing public policy towards a transformatory and emancipatory direction.

Nomboniso Gasa engages with scholars and political and cultural actors on the continent, notably in Nigeria where she worked for over four years prior to and after the 1999 elections. This forms part of a wider range of networks in various parts of the world with whom Gasa has related on gender, human rights and issues of peace and democratisation

Ms Nomboniso Gasa, a political analyst and specialist in gender and custom, was the second speaker on the panel, and reflected around issues of indigenous law, customary law, traditional leaders and the gender aspects.

“I agree that the issue of gender and customary law was a major issue during the negotiations and during the making of the Constitution. I want to also emphasise the fact that it remains sore.”

“I think that there is a need to actually unpack and to theorise what we mean by indigenous law. And I want to put my cards on the table very clearly: I don’t believe that there is such a thing as indigenous law. I believe in endogenous law. I believe in an endogenous form of living.”

“There is no society in the world – in the human history – that has never had its own customary law.”

“The institution of traditional leadership is not synonymous of customary law, but it is a part of it.”

“There is a need in South Africa to imagine how customary law can be part of a mainstream way of thinking. There is a need to ensure that if I am in Johannesburg and I want it to apply to me, I can be able to access that.”

“If traditional leaders choose to push legislation, practices and policies that are against the spirit of the Constitution and human dignity, and the rights that are enshrined in the Bill of Rights, we will defend our rights that are in the Constitution, and will defend the kind of society that has raised us and the kind of society that we want to see.”

PRESENTERS:

Dr Nomalanga Mkhize, the final speaker of this panel, is a lecturer in history at Rhodes University. The heart of her talk was around issues in the gender debate.

“There is some kind of an idiomatic limitation in the way in which the Constitution comes across in the public sphere. Perhaps part of the problem is that we face a public discussion forum in South Africa largely in English. This is not the root of our problem, but it does speak to the fact that we can speak past each other.”

“I think if we are honest, everybody in this room buys into this concept of the South African Republic which is governed by the Constitution.”

“One of the most strident confrontations at the Constitution-making process was between African women feminists and African male patriarchs.”

“Fortunately for us, there was a South African Constitution-making process in which very

strong women decided to fight for this [gender equality] and say that we want fully equality now, not gradually equality.”

“What our new traditionalists are interested in, is not in fact preserving culture for the benefit of people, but preserving culture selectively for the benefit of the male patriarch.”

“It is interesting that whilst our radical black consciousness critics of the Constitution say that the Constitution preserves the white status quo, what the new traditionalists are arguing is the opposite in many ways: that the problem with the Constitution is that it unravels the status quo. it creates too many independent women, too many independent children. So in that sense, the Constitution is an ‘unmaking’ kind of process, not a preservationist process.”

Biography Dr Nomalanga Mkhize

Dr Nomalanga Mkhize is a History lecturer at Rhodes University, South Africa. Mkhize completed a doctoral thesis in Land and Agrarian Studies, University of Cape Town. She has a Masters in History from Rhodes University, and takes a special interest in 19th century Eastern Cape history. Outside of her academic pursuits, she advocates for equitable access to quality education for all South African children. She is also part of a creative collective that writes children’s books in African languages.





CO-OPERATIVE GOVERNMENT

- Three Spheres, Intergovernmental Relations, and the National Council of Provinces (NCOP)

PANEL 4

Moderator: Prof. Nico Steytler
 Presenter: Hon Andries Nel, MP
 Thandi Modise
 Adv. S'du Gumede
 Prof. Hans-Peter Schneider



“ WE COME TO AN IMPORTANT PART OF THE CONSTITUTION, PERHAPS THE MOST CONTROVERSIAL AND ALSO THE MOST INNOVATIVE. ”

- Professor Nico Steytler



MODERATOR:

The moderator, Professor Nico Steytler, has been involved in the development of the constitutional order in South Africa for the past two decades. He gave a short introduction into the topic of this panel:

“We come to an important part of the Constitution, perhaps the most controversial and also the most innovative.”

Referring to the final 1996 version, regarding provincial autonomy: “One of the reasons why the Constitutional Court decided to return the [interim] Constitution to the Constitutional Assembly, was because the powers of the provinces were substantially reduced in the draft.”

“What was very innovative in the Constitution, was the establishment of the articulation of cooperative government, devoting a whole chapter to it. ... Also a rather unique body: the NCOP [National Council of Provinces] ... And then, very significantly, the introduction of local government as a full sphere of government.”

“What we have now, 20 years later, is a robust local government system. The growth of cities wasn’t thought through or envisaged at the time, but we have now real multilevel government.”

“Intergovernmental relations were controversial, but it has been one of the best exports from our Constitution to other countries, this system of multilevel government.”



Biography Prof Nico Steytler

Prof Nico Steytler is the South African Research Chair (SARChI) in Multilevel Government, Law and Policy at the Dullah Omar Institute of Constitutional Law, Governance and Human Rights, at the University of the Western Cape, Cape Town, South Africa. He was a technical advisor to the Constitutional Assembly drafting the 1996 Constitution, as well as the Western Cape Provincial Constitution of 1997. He was a member of the Municipal Demarcation Board (2004-2014), and is currently a commissioner of the Financial and Fiscal Commission (2013-2017).



PRESENTERS:



Biography Deputy Minister Andries Nel

Honourable Andries Nel is South Africa's Deputy Minister for Cooperative Governance and Traditional Affairs (COGTA). Elected to Parliament in 1994, he was Deputy Minister for Justice and Constitutional Development, Deputy Chief Whip of the African National Congress (ANC) and served on a wide range of portfolio committees. In the Constitutional Assembly he served on the committee dealing with provisions relating to the judiciary and legal system. Since 2009 he has served on the ANC National Election Team as co-ordinator of the Legal and Monitoring Team.

Honourable Andries Nel, the first speaker on this panel, entered Parliament in 1994 and played an influential role in a number of committees. As the Deputy Minister of Cooperative Government and Traditional Affairs (Cogta), he deals directly with provinces and local governments.

Nel spoke about the challenges within the local government system, and the National Development Plan (NDP), which wants to tackle these problems.

"Tomorrow, it will be 20 years ago that we voted to adopt the Constitution. For many of us, that was probably one of the proudest days in our lives. It was the fulfilment for that struggle and the opportunity to set out a vision where we want the country to go."

"Our system of local government is comparatively new. The Constitution has been in force for 20 years, we've had fully democratic local government for 15 years. Our local government system is still firmly in its teens. Some are functioning excellently, others functioning okay, and some are quite frankly completely dysfunctional and needing a lot of assistance."

"The National Development Plan (NDP) makes the point very, very strongly that what is most crucial at this junction is to try to make that system work, not to engage in attempts to reform the system as a whole. Let's make sure that what we have, we can actually implement and get to work."

"Our intergovernmental relation system, and provinces in particular, is the result of compromises. I don't think that the fact that it is born out of compromise makes it fundamentally flawed."

"The National Development Plan (NDP) recognises that there are in certain instances very high levels of distrust, and at times even conflicts, between spheres of government. Those often lead to very, very serious paralysis, with very negative impact on service delivery."

"We've got a sound institutional architecture. The challenge is to make that work. In many parts of the system it's working well, but there are other areas where it is not working well; partly because of uncertainty about the distribution of powers across the spheres of government."

PRESENTERS:

Thandi Modise, the second speaker on the panel, is the Chairperson of the National Committee of Provinces (NCOP). She pondered upon the role and the challenges of the NCOP within the system of intergovernmental relations and cooperative government.

"The Constitution for us [in Parliament] embodies that collective which must represent the aspirations of those who cannot speak for themselves at any particular time."

"When we look at how we do our work, and where we are as a country, the legislative sector is certainly the weakest of the three."

"They [local government] come in, they debate, but they can't vote [in Parliament]."

"When legislation is introduced, it is through the NCOP [National Council of Provinces] that it gets to local government and the provinces."

"We have taken it as our role to bring together the executive, local government and the provinces."

"For us, intergovernmental relations mean you ensure that the executive does their work. You ensure that these minimum standards apply across the country, and therefore you ensure that all provinces have as much a say as the bigger ones, and the smaller ones."

"Even though you want to ensure standards that cut across, you have not ensured that you budget to meet those standards."

"We do not have the big stick to bring the executive to account, and we think that big stick comes in training and re-training the members of parliament to be able to speak freely, to be able to challenge ... to be able to also suggest and recommend solutions to what is happening on the ground."

"It needs us to have more and more resources into training, not only training, but maintaining Members of Parliament, because every five years we are changing. The NCOP is now about 90% new, that does not do well for issues of experiences in holding the executive to account."

Biography Thandi Modise

Thandi Modise is a South African politician, currently serving as chairperson of the National Council of Provinces. She served as the Premier of North West from 2010 to 2014. She left South Africa in 1976 to join the African National Congress (ANC), and received training in Angola. She returned to South Africa in 1978 as an Umkhonto weSizwe (the armed wing of the ANC) operative. Modise was arrested and imprisoned in 1979, becoming the first woman in South Africa to be jailed for activities by Umkhonto weSizwe.



PRESENTERS:



Biography Adv. S'du Gumede

Advocate Sduduzo S. Gumede is the Ombudsman for the City of Johannesburg. As the city's Ombudsman, he investigates complaints of maladministration, human rights abuses and the unfair treatment of citizens and customers by employees and leaders in the City of Johannesburg.

He has over 19 years' experience as a lawyer, and has been a member of the Johannesburg Society of Advocates for the past 8 years, specialising in commercial and constitutional litigation. For 11 years Gumede worked as a Legal Advisor, Senior Legal Advisor and General Counsel at Old Mutual, the Financial Services Board and BP Southern Africa.

Advocate S'du Gumede, the third speaker on the panel, is the ombudsman of the City of Johannesburg, with the task of getting clean government in the city. Adv. Gumede introduced the office of the Ombudsman, which he was tasked to establish in July 2015.

"Ombudsman means 'representative of the people', that's what I am: the representative of the people."

"One of the issues that has come up for discussion when I interacted with various departments of the City in the context of IGR [Intergovernmental

Relations], is the frustrations that exist as a result of the separation of the spheres of government ... What I think needs to happen is at the level of the city at least, city and provinces in particular, that we need to have a forum where we debate those issues. For example, one head of department said to me: "We often have to return a budget for clinics. We want to build clinics but we don't own the land; the land is owned by the province. And to get the province, to deliver the land when we need it, is hard."

PRESENTERS:

Prof Hans-Peter Schneider, the last speaker on this panel, played an important role in the overall multilevel government system in South Africa. He hosted the ANC Constitutional Committee in 1992 in Hannover, Germany, at his Institute for Federal Studies, and introduced them to the German system of cooperative government. He also dispensed his advice as an expert in questions around multilevel government to the Constitutional Assembly, during the drafting of the Constitution.

Schneider gave some insights into the development of thoughts of cooperative government during the Constitution-making process, as well as some information about the internal structure of South Africa, as compared to Germany.

"It was a very wise decision of the South African drafters to underline in the Constitution the need for inter-governance and relations."

"We have three very important mechanisms to keep these intergovernmental relations vivid and lively: the first one are the forums of the Premiers and the

MEC's [Members of the Executive Council], they are very important to exchange the different views and to keep the national politics in line with the politics of the provinces and the municipalities. The second was to create a chapter named Co-operative Government, Chapter 3 in the Constitution. This chapter reflects the way and the methods of playing together ... And the third institution was the creation of the NCOP."

"There are rumours to reform the NCOP. I think you should not do it. It is a very important institution or organ of state."

"... a lot of special provincial interests are coming up in the NCOP, which create a lot of debates which are fruitful to give each of the provinces its own shape, vision and way to make politics."

"You should develop the structure as you have it, if I may say so. And you should keep the NCOP in the Constitution. Even the provinces have a say in national politics."

Biography Prof Hans-Peter Schneider

Professor Schneider is a German constitutional lawyer, and Acting Director of the German Institute for Federal Studies (DIF) in Hannover. In 1975, he was appointed as professor at the Technical University of Hanover in the Department of Constitutional and Administrative Law, where he remained until his retirement of 2003. He has also served as a member of the Lower Saxony State Court, the Constitutional Court of Saxony, the Constitutional Court of the Free Hanseatic City of Bremen, and the Executive Board of the Association of the German Constitutional Lawyers. Furthermore, he was a member of various expert committees of the German Bundestag, the Federal Government, the Federal President and Advisor to several foreign governments. He is the holder of the Saxon Constitutional Medal.





GUARDIANS OF THE CONSTITUTION

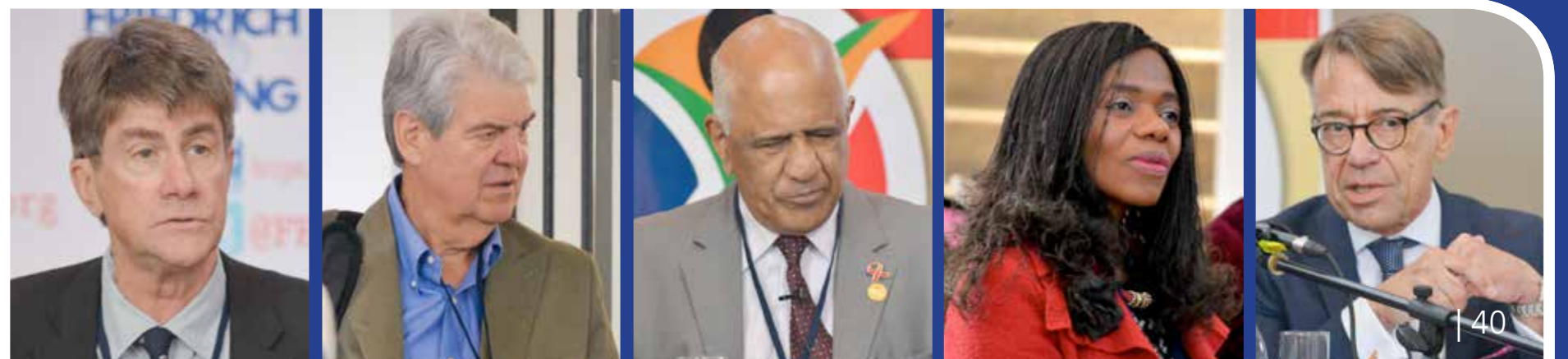
- Constitutional Court, Chapter 9 Institutions

PANEL 5

Moderator: Prof Hugh Corder
 Presenter: Prof Leon Wessels
 Justice Zac Yacoob
 Adv. Thuli Madonsela
 Prof Reinhard Gaier

“ WE HAD A CRISIS IN THE LAST 18 MONTHS. BUT THE CRISIS IS AN OPPORTUNITY TO MOVE TO THE NEXT LEVEL. ”

– Advocate Thuli Madonsela



MODERATOR:

Prof Hugh Corder was the moderator of the fifth panel.

“This is for me a vitally important occasion, not only to wallow in the glories of the past, but also to express our concern about the current vigour and legitimacy of the constitutional enterprise as a whole. We are facing many challenges, sourced in the perceived failure of the Constitution to transform socioeconomic relations and to advance social justice.”



Biography Prof Hugh Corder

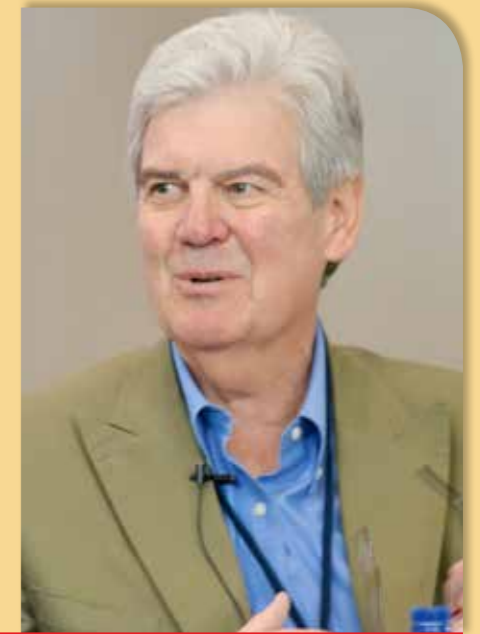
Hugh Corder has been Professor of Public Law at the University of Cape Town since 1987, and a Fellow of the same University since 2004. A graduate of the universities of Cape Town, Cambridge and Oxford, his main teaching and research interests fall within the field of Constitutional and Administrative Law, particularly judicial appointment and accountability mechanisms to further administrative accountability. Professor Corder has been widely involved in community work since his student days, concentrating on popular legal education, race relations, human rights and the abolition of the death penalty. He served as a technical adviser in the drafting of the transitional Bill of Rights for South Africa.

PRESENTERS:

Biography Prof Leon Wessels

Professor Leon Wessels is the Director of the Centre for Human Rights at the University of the Free State, and honorary professor of Public Law at the North West University.

Previously, he was a Member of Parliament for Krugersdorp, and served as a Minister in FW de Klerk’s Cabinet. He participated in the CODESA-Kempton Park negotiations from 1991 to 1994, and was the Deputy Chairperson of the Constitutional Assembly from 1994 to 1996. He stepped down from parliament and politics at the inception of the final Constitution in December 1996. From 1999 to 2009, he served as a Commissioner in the South African Human Rights Commission.



Professor Leon Wessels, the opening speaker for this panel, was part of the last Apartheid cabinet, and played a critical role in the Constitutional Assembly after 1994. In his speech, he spoke about the international context in which the Constitution-making process took place, as well as the role and function of the Human Rights Commission today.

“In the midst of all the CODESA excitement, I refer to two very important international events that provided guidance: it is the so-called Paris Principles ... and the so-called Vienna Declaration. The outcome of those deliberations were clear: human rights are universal, indivisible, independent and interrelated.”

“One of my favourite of the 34 principles that found their way into the Interim Constitution, and finally into the Constitution, was that every person is entitled to all universally accepted rights.”

“I was granted a very special lap of honour when I served for 10 years on the South

African Human Rights Commission (HRC). A new excitement was about to begin, a new journey, it was exciting beyond expectation. The responsibility was huge, because people expected the HRC to be the delivering agency.”

“At many times I was disappointed. I was disappointed because we had a very poor relationship with Parliament and with the Executive.”

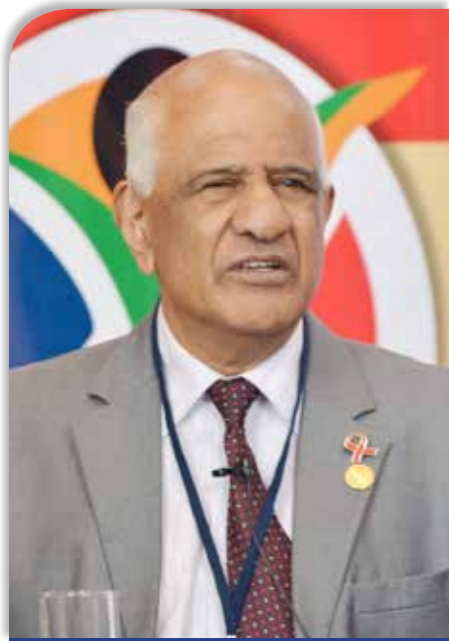
Quoting from a newspaper, in April 2016: “20 years later – and the HRC still in business, complaining about racial incidents in Pretoria.”

“So in conclusion: there is no finish line. We are still dealing with an unfinished piece.”

On Sharpeville and the signing of the Constitution: “Sharpeville – it had to be there so that the victims should know that their struggle was not in vain.”



PRESENTERS:



Biography Justice Zac Yacoob

Justice Zac Yacoob, a former Constitutional Court Judge, served during the transition period on the Independent Electoral Commission (IEC) from December 1993 to June 1994, and was a member of the Panel of Independent Experts of the Constitutional Assembly. He was also a member of the Technical Committee on Fundamental Rights, in the transitional negotiating process prior to the 1994 democratic elections. As a member of the Panel of Experts, who advised on drafting the New Constitution, he was part of South Africa's Constitution-making process. From 2013 to October 2015, Justice Yacoob chaired the South African National Aids Council Trust, and is now President of the Kwazulu-Natal Blind and Deaf Society.

Justice Zac Yacoob, the second speaker on the panel, was part of the formal Constitution-making process from the beginnings of the Convention for a Democratic South Africa (CODESA), as a member of the ANC Constitutional Committee. In his talk, he reflected on the question of who ultimately serves as the guardian of the Constitution.

"Ultimately, the guardians of our Constitution are the people of our country. I like to qualify that a little bit, and say ultimately the guardians are the honest, trustworthy and morally upright citizens of our country."

"There are always differences of opinion on whether something complied with the Constitution or not. Different people do differ, sometimes eleven justices of the Constitutional Court will be divided 6/5. So we are not fixing motorcars, with the result that there is no absolute right or wrong. Our Constitution makes the point that the majority of the Constitutional Court and their judgements are binding, and are for all practical purposes right ... All of us must have the discipline to accept this."

"The question has been asked: why can't the judiciary be corrupt? Of course, certain members of the judiciary may or may not be corrupt. There are some cases which go on. Notionally, corruption is a possibility. The only way we can avoid that is by having the checks and balances which we want, which the Constitution has put in place."

"I would say that the judiciary has served as the guardian of the Constitution in upholding, and in resolving disputes between the individual and government. The judiciary has been given the role of ensuring that the government act consistently with the Constitution, to bring government to account; and it is wonderful that it has done so."

"Do people know about the Bill of Rights in this country? And my view is that every citizen, all of you here, should be knowing it, understanding it, embracing it, knowing what it's all about and live it, so that you can persuade other people to live it. And that, I am afraid, many of us don't know, many politicians don't know, many cabinet members don't know."

PRESENTERS:

Thuli Madonsela, the Public Protector of South Africa, spoke as the third person on the panel. As a member of the ANC, she was an advisor in the pre-1994 Constitution-making process, and part of the panel which advised the Constitutional Assembly thereafter.

Madonsela touched on the role of the Chapter 9 institutions within the structure of the state, and its shortcomings and false positioning within the structure because of pre-Constitutional thinking.

"I agree that the guardians of the Constitution are all of us, including ordinary people ... Our democracy is built on the understanding that there will be multiple centres of accountability, and there will be checks and balances."

"The architects of our democracy were wise. They realised that if we were going to walk this new journey, there were two things that were going to work against us: our own history was going to work against us, because when you don't know what you're doing, often you revert to what you know. What did we know? We knew parliamentary supremacy, we knew an insular state ... The other thing that was going to work against us, is the fact that thinking about democracy is not the same thing as walking the journey into democracy ... Therefore, there was a need to build these multiple pillars of democracy. In our case, they introduced Chapter 9 of the Constitution."

"Chapter 9 [institutions] are the super administrative guardians. We have to understand that Chapter 9 is a unique part of the Constitution. The only institutions that are in Chapter 9 are institutions supporting and strengthening democracy, no other. Because all of the others are linked to the Executive, and controlled by the Executive."

"We were introducing something new, where these institutions will now have a final say ... Public Protector, Human Rights Commission with powers to make a final decision, and the possibility of only being reviewed by a court of law, was not always something that we were familiar with."

"Why did we need these institutions? We needed it to ensure that the promises that have been made in the Constitution were kept, and that when they were not kept there was accountability for that."

"The notion of administrative scrutiny has worked wonderfully. We had a crisis in the last 18 months. But the crisis is an opportunity to move to the next level."

"The architects of our constitutional democracy had made it clear that these institutions initially belonged to organs of state, and pulled them out and made them organs of state in their own rights. So the Public Protector is an executive authority, exactly the same level as a Minister of Justice. But he or she has to get her money from the Minister of Justice: that's pre-Constitutional thinking."

On the opening of parliament: "The Public Protector and others sit there as visitors. That just shows how apartheid is still with us, without us thinking about it. Up there is for people who are visiting, down there is for people who are part of the state. We've kept those who were part of the apartheid state down there. The new entities that are part of the new state, but were not in the apartheid architecture, they are visitors upstairs."

Adv. Madonsela closed with an observation that "primarily in the area of social justice we haven't done well", that "poverty was getting worse" and "inequality was getting worse".

Biography Adv. Thuli Madonsela

Advocate Thulisile Madonsela is South Africa's Public Protector (PP). Prior to her appointment as PP, she served as a full-time Commissioner in the South African Law Reform Commission. She is one of the 11 Technical Experts that assisted the Constitutional Assembly in drafting South Africa's new Constitution. Adv. Madonsela is a human rights lawyer, equality expert, constitutional analyst and policy specialist.

She has played a central role in the drafting of various transformational policies.



PRESENTERS:



Biography Prof Reinhard Gaier

Reinhard Gaier is a Justice of the First Senate of the Federal Constitutional Court of Germany (Bundesverfassungsgericht). Previously, he was a judge at the Federal Court in Karlsruhe (Bundesgerichtshof), Judge at the Frankfurt/Main Higher Regional Court (Oberlandesgericht) and Judge at the Regional Court district of Darmstadt (Landgericht).

Gaier completed the first state examination in 1980 and the second in 1982. In 1998, he received his doctorate in Dresden. Since August 20, 2008 he has been an Honorary Professor at the University of Hannover.

Prof Reinhard Gaier, Justice at the Federal Constitutional Court of Germany, was the last speaker on the panel. He shared his experiences with the Federal Constitutional Court of Germany as the guardian of the Constitution in the German democratic structure.

“In Germany, the role of the Guardian of the Constitution is assumed not only, but primarily, by the Federal Constitutional Court.”

“Every person who feels that his or her fundamental rights, i.e. the human rights guaranteed in the Constitution, are infringed upon, may approach the Federal Constitutional Court with a constitutional complaint ... The importance of a constitutional complaint cannot be overestimated.”

“The fundamental rights can now also be claimed; they become subjective rights to which every individual is entitled.”

“In international comparisons, the Federal Constitutional Court is often seen as the court, besides the US Supreme Court, that has the strongest powers. As in South Africa too, this strong position is the result of painful historical experience.”

After the failure of the Weimar Constitution and the Nazi dictatorship: “However, it was not the Constitution that was to blame for the failure of democracy, but the people who did not want to live under it. The period of the Weimar Constitution was also referred to as ‘a democracy without democrats’, and this sentence gets to the very heart of the matter: a constitution must also reach the minds of people, and to a certain extent also the hearts of people.”

“Today, we have in Germany a democracy of permanent stability. One of the main reasons for this is that human rights and, first and foremost, human dignity are guaranteed, and were declared to be the state objective.”

“Citizens experience constitutional law not only as empty promises, not only as a non-binding programme, but as a vital right that is applied and verified on a daily basis.”

“To ensure the trust of citizens in the protection by the Constitutional Court, it is of utmost importance that this court is truly independent.”





THE SOUTH AFRICAN CONSTITUTION – MODEL FOR OTHER COUNTRIES IN TRANSITION?

- The influence on foreign constitutions

PANEL 6

Moderator: Hon John Jeffrey, MP
 Presenter: Dr Nicholas Haysom
 Prof Herta Däubler-Gmelin
 Prof Lourens M du Plessis



“ THE CONSTITUTION IS AN EXPRESSION OF NATION’S HIGHEST VALUES AND ASPIRATIONS. ”

– Dr Nicholas ‘Fink’ Haysom



MODERATOR:

Hon John Jeffrey, Deputy Minister of Justice and Constitutional Development in South Africa, moderated the last panel of this conference.

“This topic is ‘The influence of the South African Constitution on other constitutions around the world’. We all know that our Constitution is unique, and was unique as a point of settling what appeared to be at the time a very intractable political conflict.”



Biography Deputy Minister John Jeffrey

Honourable John Jeffrey is South Africa’s Deputy Minister of Justice and Constitutional Development since July 2013, and has been a member of the National Assembly of Parliament since 1999. He is a member of the ruling party, the African National Congress. His constituency is in Kwazulu-Natal.

He joined the liberation struggle and became actively engaged in politics from an early age at university. After South Africa’s transition to a constitutional democracy in 1994, he became a member of the KwaZulu-Natal Provincial Legislature, where he chaired the Environment and Conservation Portfolio Committee. He then served as Parliamentary Counsellor to the President and the Deputy President from 1999 till July 2013.

PRESENTERS:

Biography Dr Nicholas Haysom

Nicholas “Fink” Haysom serves as United Nations Special Representative of the Secretary-General for Afghanistan, having previously been Director for Political, Peacekeeping and Humanitarian Affairs in the Office of the UN Secretary-General. He has worked on constitutional reform, electoral reform, conflict resolution, good governance, and democracy-building in several countries in Africa and Asia, most notably in Burundi, Sudan and Iraq.

Mr. Haysom was closely involved in the constitutional negotiations leading up to the interim and final Constitutions in South Africa. He served as Chief Legal Adviser throughout Mr. Mandela’s presidency until 1999, and continued to work with Mr. Mandela on his private peace initiatives until 2002.



As the first speaker on the panel, Dr Haysom touched on the issue of comparative constitutionalism, its limitations, advantages and challenges. In addition, he showed practical examples he gained from his own experiences when working as a constitutional expert in other countries.

“The act of making and adopting a constitution is the quintessential exercise of national sovereignty. ... The constitution is an expression of a nation’s highest values and aspirations ... It is the citizens governed by any particular constitution who must defend it from attack, and they will only do so if they own it, not if they feel it was imposed. They are more likely to do so if they see themselves in it, and if they believe they had a hand in its making.”

“The most powerful limitation is the fact that most of us are held hostage by our own history, experiences, traditions and our way of seeing problems and formulating solutions. From this perspective, the task of comparative constitutionalism is to expand the imagination of constitutional negotiators, grow the tool box, reformulate problems, and offer a range of new solutions ... In this approach, it is not unpatriotic to look at other constitutions for inspiration. Indeed it is a duty.”

“For the practitioner of comparative constitutionalism, I would offer only advice, never presume to know better than nationals their history, values, anxieties

or aspirations. The foreign adviser is not a salesman. He or she is tasked to share a variety of constitutional ideals and different ways of achieving them.”

“That is why we borrowed shamelessly from wherever we found approaches we could apply and refine – from Namibia to Canada, from Germany to India – knowing always that we exercised our sovereignty, not in closing our eyes, but in picking, adapting or reformulating solutions to our own context, our own specific challenges.”

“Constitution-making is actually, necessarily, a divisive, disaggregating process. It cannot be otherwise. It forces citizens and groups to consider their own sectional interests. The failure to appreciate this, and the inappropriate sequencing of the transition process, has seen the Arab Spring turn rapidly into a bitter Arab Winter. It reminds us what might have happened if we had got it wrong, if we had not managed this.”

Haysom finished with addressing Nelson Mandela’s role: “He didn’t play a significantly engaged role in the mechanical process of making a new constitution and in the development of the text. But what was critical was the capacity to address those who really fear change, and those who rightfully demand change, and to reassure both that the process is addressing their concerns.”



PRESENTERS:



Biography Prof Herta Däubler-Gmelin

Prof Herta Däubler-Gmelin is the former Minister of Justice of Germany, and Chair of the Human Rights and Humanitarian Assistance Committee of the German Parliament. Among her many achievements, she launched and led the process of elaboration and adoption of the German corpus juris to fully implement the Rome Statute of the International Criminal Court (ICC) into national law.

She also works as a lawyer in Berlin, and has been Honorary Professor of the Otto Suhr Institute of the Free University in Berlin since 1996. She studied Law, History and Political Sciences in Tübingen, Germany. She has been active in numerous NGOs and parliamentary network, one of which is the Parliamentarians for Global Action (PGA).

Prof Herta Däubler-Gmelin spoke second on this final panel. She mainly reflected on the question: in what sense can countries copy or lean on constitutions from other countries?

“Can a constitution, be it as good as it is, and I would say that the South African Constitution is a really good one, be a model for others? And my answer is simply, if you talk seriously: ‘No’. I fully agree with Albie, that the thing to do is to look around and to look into the outcome of it, the implementation of it, and the chances they provide. And then pick out that what you feel that adopts the best to your historical, political and actual situation, and to the socioeconomic situation of today. If you follow this path, there are lots of elements in the South African Constitution that are highly attractive for other countries.”

“The lesson learned out of the Constitution-making process in South Africa is, it is not possible to change the bad situation in which you are by the Constitution itself in a satisfying way. That is a bitter conclusion: you have to compromise.”

“Looking into other constitutions, I really reject the idea of taking over even one clause, because you always have the background of your own socioeconomic and political situation.”

“You have an awful socioeconomic divide in your country. And of course, everyone sees that you have to find remedies to overcome this. But the question is: ‘Can you do that within your Constitution or not?’ I suppose you can.”

“I think the young generation has to be involved in legal education. Every person needs to know his or her rights, and how to enforce them. This is very important.”

“There is no area beyond legal and constitutional control. This includes the funds of the President and the accountability of the leaders. Do you know how admired you are that your courts dare to put the President before court?! This is absolutely inconvenient and uncomfortable and sometimes unbearable for politicians. But it is very healthy for the situation of the Constitution and the rule of law.”

“I think you are envied most for your lively and strong civil society and your free press, because without control from that, every legal instrument is only half its value. So I think this real, strong civil society is a good guarantee, so that people can look into the future to that what your Constitution offers.”

PRESENTERS:

The last speaker on the panel was Professor Lourens du Plessis. He talked about the Constitution in the international context of human rights, and briefly touched on the current political situation in the country.

“Thoughtlessly and liberally, too many South Africans find our Constitution as one of the best, actually they mean the best, and one of the most progressive, actually they mean the most progressive Constitution in the world.”

“Historically, it is a younger Constitution in a symbiotic relationship with international law in its widest sense ... When South Africa was in transition, international law became very important. That is one of the strongest points in our Constitution, that use was made of international documents in drafting the Constitution. ”

“Section 39 of the Constitution says that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law, and may consider foreign law. These provisions acknowledged in the most powerful way that the Bill of Rights and the Constitution as a whole are embedded in a transnational reality.”

“This is one lesson that people should follow when they write a constitution: the constitutionalisation of international law and the internationalisation of constitutional law is a reality. There must be proper provisions made for international law in a new Bill of Rights.”

“Human rights is a very international thing.”

Biography Prof Lourens du Plessis

Professor Lourens Marthinus du Plessis is an Extraordinary Professor in the Faculty of Law, North-West University, Potchefstroom. He is a legal philosopher, who specialises in issues of statutory and constitutional interpretation in his research.

He also shows a keen interest in South African politics. During July 1987, he was part of the so-called “Dakar Safari”, holding talks with members of the then-banned African National Congress (ANC). During 1993, he was actively involved in the Multi-party Negotiating Process at the World Trade Centre, Kempton Park, where he chaired the Technical Committee on Fundamental Rights during the Transition. This Committee drafted South Africa’s first Bill of Rights. He was also vice-chair of the Board of Directors of the Institute for Justice and Reconciliation.



ENDNOTE BY ALBIE SACHS



“ FOR US, IT WASN'T JUST DRAFTING A DOCUMENT. IT WAS AN ACT OF DECOLONISATION, IT WAS OUR INDEPENDENT MOMENT. ”

– Albie Sachs

As the endnote speaker, George Bizos, could unfortunately not attend due to health reasons, Albie Sachs took up this role, and closed the conference with some thoughts:

“This has been a terrific conference: lively, spirited, engaging, and in a sense it answers some of the questions that were proposed: ‘Where are we going? What is the future?’

We’re getting somewhere, we are somewhere. Look at us – it is that interaction, that diversity... For me what comes through is: I can’t imagine a conference quite like this anywhere else in the world, with that range of people, the seriousness of the concepts, the attention that’s been shown. That’s all part of the uniqueness of South Africa.”

“Now the word Ubuntu is actually beginning to be pronounced in many parts of the world. And I think that answers some questions made: our Constitution is an African Constitution. Africa is a very diverse continent, and we are making a huge contribution to reconceptualising what it means to be African.”

“The very seriousness we’ve given to the ideas, the openness we’ve been to listening to others, and the interaction of different viewpoints and different emotions, that’s what gives me hope.”

As a last point, Prof Hans-Peter Schneider mentioned that:

“The South African Constitution and the German Constitution have one important date in common: the adoption of the Constitution.” On 8 May, 2016, South Africa celebrated the 20th anniversary of the South African Constitution, and Germany celebrated the 77th anniversary of the German Constitution.



RECEPTION



On the evening of the 6 May, after the first day, the German Embassy to South Africa invited the panellists and the audience to a reception in the courtyard of the Women's Gaol Atrium. Two roaring fire pits gave some much needed warmth at this time of the year.

The Ambassador addressed the guests with a speech, where he related to the anniversary of the Constitution, emphasised its outstanding progressiveness, and highlighted the admiration of people around the world for this unique document, in particular for the participative process in which it was drafted.

While the discussions and debates on the Constitution and its relevance for the current politics in South Africa went on, all enjoyed nice drinks and food around the fire. It was a fantastic ending of that perfect day.





Dr. Jutta Kramer, Managing Board Member of the German Institute for Federal Studies (DIF), guided the speakers and guests through the whole conference as the Mistress of Ceremonies (MC). She ensured a smooth and even flow through these two days.



“ REPRESENTATIVE DEMOCRACY IS INSEPARABLY LINKED WITH THE EMPOWERMENT OF THE PEOPLE. ”
– Mac Maharaj



“ THERE IS A DISTANCE BETWEEN THE ASPIRATIONS AND IDEALS OF THE CONSTITUTION, AND THE REALITY OF SOUTH AFRICA TODAY. ”
– Professor Penny Andrews



IMPRESSIONS

“ THERE IS A NEED FOR A WAY TO BE FOUND FOR THE EDUCATION OF OUR CHILDREN ABOUT THE AFRICAN WAY OF LIFE. ”

– Deputy Minister Sango Patekile Holomisa



“ DEMOCRACY IS ABOUT THE PARTICIPATION OF OUR PEOPLE. ”

– Justice Sisi Khampepe

“ WE ALL KNOW THAT OUR CONSTITUTION IS UNIQUE AND WAS UNIQUE AS A POINT OF SETTLING WHAT APPEARED TO BE AT THE TIME A VERY INTRACTABLE POLITICAL CONFLICT. ”

– Deputy Minister John Jeffrey

