

Sunday Times Literary Awards

Summer Place, Saturday 29 June 2013 19h00

Keynote by Edwin Cameron, Constitutional Court of South Africa

1. Thank you for the honour of inviting me to speak at the Sunday Times Literary Awards gala dinner. The awards are now well-established as South Africa's premier literary prizes, and this evening's event as perhaps the country's premier literary occasion. It is a privilege to be asked to participate in it.
2. This is in fact the second time I have spoken at the awards. The first was in June 1997. That was 16 years ago – just three years after we became a constitutional democracy. The final Constitution, which the democratically elected Constitutional Assembly finalised in 1995-1996, had just come into effect.
3. That evening, I addressed scepticism about the culture of rights the new Constitution embodied.
4. I spoke soberly, because of the breathtaking surge in crime that then had the country in its grip. I noted that politicians in both government and opposition were blaming constitutionalism for the

spike in crime. I said the temptation was to blame rights and constitutionalism for social problems whose causes lay very deep and very far away. I said that the Constitution could not guarantee a fair, non-violent society. But, without it, I said, we had no hope of attaining that society.

5. We are now nearly twenty years into our constitutional democracy. Much has been achieved – perhaps more than those of us who tend to worry realise.
6. Almost all violent crime is down. Compared to 1994, the murder rate has almost halved. Government’s housing program has put many millions of South Africans into their own homes. In 1994, just over half of households had electricity. Now 85% do. In 1994, just more than one-third of six-year-olds were in school. Now 85% are.
7. The income of the average black family has increased by about a third. And, through the system of social grants totalling about R120 billion every year, the very poorest in our country are

afforded some elements of a dignified material existence and access to a measure of social power.

8. Most importantly, these material gains have been achieved within a functioning democracy. Our polity is boisterous, rowdy, sometimes cacophonous and often angry. That much is to be expected. But after nearly two decades, we have more freedom, more debate, more robust and direct engagement with each other: and certainly more practically tangible social justice than twenty years ago.
9. But all is not well. Many of us are troubled by the state of our country. Political debate is sometimes annihilatingly divisive. Race rhetoric still sometimes substitutes for performance. Gross inequality, largely racially structured, persists. Public schooling for poor black children seems to be lamentably lacking. In some areas, institutional decay and infrastructural disintegration have reached dismaying proportions.
10. Last year saw the highest number of service delivery protests since 2004 – and very nearly nine out of ten (88%) were violent.

11. And more and more municipalities and national departments fail to fulfil basic auditing requirements.
12. Not unconnected with the accounting chaos, the tide of corruption washes higher and higher. It threatens to engulf us. The shameless looting of our public assets by many politicians and government officials is a direct threat to our democracy and all we hope to achieve in it.
13. To many, the culture of high-minded civic aspiration that characterised our struggle for racial justice and our transition to democracy seems distinctly frayed, if not in tatters.
14. In all this, what does it mean that we are a constitutional state? I said sixteen years ago that “the Constitution embodies our best hopes and our highest aspirations”. I spoke then with the determined optimism of a human rights activist who had recently been appointed a judge.
15. So I feel happy to be able to affirm now – on the basis of a bit more street wisdom and hard experience – that the Constitution is still our best practical hope.

16. And street wisdom and practical sense are what we badly need to survive these tough times. The Constitution's lofty language and vaulting aspirations certainly won't see us through.
17. But we don't need to rely on its high rhetoric. Quite the opposite. In a time of structural disintegration, social fraying and predatory looting, the Constitution is proving itself a viable framework for the practical play of power needed to vest our future beyond our current problems.
18. And "framework" is the word we should emphasise. The Constitution is not self-executing. It is not a performative instrument. In itself, it has no agency.
19. All the Constitution does is to create the practical structures that enable the rest of us – that is, you and me, together with principled leadership, a committed government, an active citizenry and vigorous civil society institutions – to perfect our future.
20. In saying this, I do not ignore those who are sceptical about the whole business of constitutionalism. Their views claim respect and consideration.

21. Constitutional sceptics fall roughly into two opposing categories.

a) On the one side are those who think that rights and constitutionalism have diverted social power away from “the people”, who should rightly own it. The Constitution was a misguided compromise that fettered the people’s power to radically transform our unjust society. This form of scepticism was most potently expressed by deputy minister Ngoako Ramathlodi. He said in 2011 that the constitutional transition was a victory for apartheid forces who wanted to retain “white domination under a black government”. This was done “by emptying the legislature and executive of real political power” and giving it to “the judiciary and other constitutional institutions and civil society movements”.

More recently, National Union of Metalworkers of SA (NUMSA) general secretary Irvin Jim has said the clause in the Constitution protecting property rights should be “dumped” so that radical change can be effected immediately.

And this kind of scepticism was evident also in SAPS

Commissioner Riah Phiyega's recent statement to Redi Thlabi, on Al-Jazeera, that criminals are brazen because we "have the most beautiful Constitution that allows rights and rights are not limited".

Sceptics in this camp say that the Constitution is too powerful to allow us to do what we must to make our society as it should be.

b) On the opposing side are those who think, most recently through Ken Owen and RW Johnson after Arthur Chaskalson died, that the Constitution is not powerful at all. They suggest it is a mere guise under which radicals in the ANC and the SACP have seized for themselves as much power as they want, and through which they are distorting all state institutions in order to impose centralised control.

Sceptics in this camp suggest not only that the Constitution is not formidable enough, but that the whole constitutional project may have been a sham.

22. The two groups stand at opposite poles. The first say the Constitution is indeed powerful and its effects all too real in

preventing popular power from being exercised – whether to stop criminals or to effect distributive reform.

23. The second say that, far from being a brake on radical exercise of power, the Constitution is a flimsy veneer and perhaps a con designed to license it.

24. To the constitutional sceptics on both sides, I say: thank you. Your accounts of history are both, I very strongly suspect, wrong. But your warnings are important. You alert us to the limitations of rights-talk. You are impatient with the clogs and inhibitions the rule of law places on the exercise of power. And you caution that constitutionalism may prove ineffectual as a bulwark against authoritarianism.

25. These warnings are well-directed. And I do not try to disclaim them. On the contrary, I can only seek to counter scepticism by arguing that constitutionalism remains the best path we have.

26. In doing so, I do not call for naive optimism. Rather, I propose a sober assessment of what constitutionalism has yielded in our democracy over the last two decades.

27. The Constitution is not just a document of high aspiration and idealism. It is a practicable, workable charter. And it has proved itself modestly but practically effective as a basis for the democratic exercise of power in our half-broken, half-fixed country.
28. There are five reasons for my cautiously upbeat assessment.
29. **First**, the Constitution has not yet stood the test of time. But it is on its way to doing so. We have had nearly two tempestuous decades of disputes, clashes of interests and contests. There have been conflicts between civil society and the state, between provinces and central government, between dispossessed land claimants and urban tenants, on the one side, and landholders and property owners, on the other – these have all been adjudicated within the Constitution’s framework of values and the distribution of power it creates. It is quite remarkable that after two decades these are proving resilient and practically effective.
30. **Second**, the separation of powers in the Constitution has proved practically effective. The legislature, executive and judiciary have

settled into a sometimes-tense but reasonably effective working relationship. The courts are cautious when it comes to purely policy decision (witness the reversal of the interdict against electronic tolling in advance of sorting out its legality). But they hold government strictly to account on its social delivery programs.

31. Perhaps the best instance is the Constitutional Court's decision, thirteen years ago, in the *Grootboom* case. The Court declared government's housing program constitutionally invalid because it failed to make provision for the most desperately poor and vulnerable. Government said it was doing all it could to build bricks and mortar houses for those in the housing queue. The Constitutional Court said this was not enough. The desperate, the unsheltered and those rendered homeless by emergency also had to be provided for. The result of the decision was a radical overhaul of government's entire housing program. While still inadequate to the demands of a growing and loudly clamant population, housing delivery has undoubtedly been one of government's better

successes. This has resulted from the judicially enforceable promise of access to housing in the Constitution.

32. An even more famous instance is the Court's order to the government of President Mbeki, at the height of presidentially-licensed AIDS denialism, to start making anti-retroviral drugs available to poor people at public health clinics.
33. South Africa now administers the biggest publicly provided ARV treatment programme anywhere in the world. More than two million people living with HIV and AIDS, like me, are on life-saving treatment in our country. That is a proud and suggestive achievement. It resulted from the Constitution's judicially enforceable promise of access to health.
34. What does this show? It shows that claims that the Constitution would protect only privilege have proved unduly pessimistic. The promises in the Constitution, enforceable by recourse to the courts of law, have ensured a significant shift in resources (both government and non-government) to the poorest of the poor.

35. That I think is right and just. And it is a proud achievement. It is one that may help ensure the success of constitutionalism and the rule of law in our country.
36. Connected to this is a **third** reason for cautious optimism. This is that the notion of constitutionalism is extremely widely disseminated in our country. Perhaps the most remarkable feature of our democracy is the extent to which nearly everyone claims the Constitution. Gay and lesbian youngsters from the rural areas, service delivery protestors in towns and cities, opposition parties and political factions within the ANC – all not only accept the legitimacy of the values and rights the Constitution sets out – they claim them for themselves.
37. More than this, South Africans loudly demand that the rights in the Constitution be realised, in their lifetimes, in their lives, now.
38. Fears that constitutionalism would be an elite phenomenon, confined to lawyers and armchair idealists, have proved entirely misplaced. Constitutionalism is one of the most powerful motive forces in our politics and national debate.

39. A **fourth** reason for cautious optimism is the state of the judiciary. Judges have an unavoidably central role in sustaining the rule of law. Hence, constitutionalism requires a strong and honest judiciary. That I think we have. As a judge myself, I feel no self-congratulation in noting this. The judiciary is frail and overworked. And the police and courts serve far too many people far too poorly to feel any complacency.
40. Judges cannot investigate crimes. They cannot produce laboratory results on time. They cannot ensure that criminals are prosecuted competently. Nor can they deliver basic services. Or put a stop to corruption.
41. But neither they nor the Constitution prevent any of that from being done. It is not the Constitution that prevents efficient police enforcement, detective work, investigative follow up and prosecution.
42. As my colleague, Deputy Chief Justice Moseneke, recently noted, neither the Constitution nor the courts have prevented an effective programme of land reform and land redistribution. The

much-reviled “willing-buyer, willing-seller” principle, that is said to inhibit land reform, is contained nowhere in the Constitution.

All the Constitution outlaws are arbitrary deprivations of property.

And all it requires is just and equitable compensation when

government takes property. For that, all amongst us, shack-

dwellers and home-owners, rich and poor, should be thankful.

43. Neither the Constitution nor judges can create social justice. All they can do, when presented with cases, is what the Constitution tells them to do, and what by their judicial oaths they have undertaken to do. This is to dispense justice without fear or favour, impartially, and staying faithful to the high aspirations of the Constitution.

44. That, I think, is more or less what the judiciary has been doing these last two decades.

45. I can report truthfully and with some pride that every one of my colleagues on the Constitutional Court, starting with Chief Justice Mogoeng, and Deputy Chief Justice Moseneke, and every one of the judges I know from the Supreme Court of Appeal and the high

courts, take certain fundamentals for granted. These are the value of independent institutions, the autonomous functioning of the judiciary, the utter integrity of judges, the vital significance of the rule of the law and the supremacy of the Constitution. And, most importantly of all, they know that the high language of the Constitution's promises must be made real in people's lives.

46. Whether the litigants before us are a private citizen or government, the Speaker of Parliament or the official opposition, a civil society group or a faction within the ANC – all are judged rigorously on the strength of their claims alone, measured only against the promises of the Constitution.

47. A functioning, honest and robust judiciary, committed to the values of the Constitution, is not an insignificant achievement.

48. I offer a **fifth** and final reason for some measure of sober confidence. This lies in the fundamental structure and values of the Constitution. These are democracy, equality, a separation of power between independent institutions, and a commitment to social justice.

49. The Constitution is a social democratic document. It demands that institutional planning include the poorest in our society. But, beyond that, the Constitution leaves space for governmental pursuit of different economic theories, different paths of development and different conceptions of productive social investment.
50. The “left” has never fully explored the radically egalitarian assertions in the Constitution’s equality clause – including the promise that “Equality includes the full and equal enjoyment of all rights and freedoms”.
51. The “right” has never fully explored the freedom of trade, occupation or profession enshrined in the Constitution.
52. The basic structure of the Constitution demands concern for the poor and the most vulnerable. It enjoins protection for the weak and for minorities without social or political power. This is right and necessary. Without it, constitutionalism and the rule of law would not be worth their name.
53. In addition, the Constitution requires progressive realisation of basic social and economic rights. And it builds in protective

institutional safeguards to support constitutional democracy through institutions such as the Public Protector and the SA Human Rights Commission.

54. But the Constitution stops there. Nothing in it prescribes what social remedies a democratically elected government would be free to pursue to create jobs, to advance social equity and to give historical redress.

55. It could well be that the ANC stays in power till the second coming. It may not be. We don't know. But what we do know is that, whatever happens, our Constitution gives a democratically elected ANC government as much power as a democratically elected non-ANC government to advance the common welfare, to rectify injustices and to create social wealth.

56. After 19 years, we have much about which we should feel disquiet and dismay. But we also have much about which we can feel at least a small measure of tentative pride.

57. We have the most active and engaged citizenry on our continent. We have the loudest and most diverse media on our continent and

perhaps anywhere in the global south. Our national debate about values, about means and about goals is passionately serious.

58. We have not stood still since 1994. We have lost our virginal sense of innocence. We have lost our aspirational, wish-list way of planning.

59. We have become acquainted with the constraints and the evils of power, including insidious looting of public assets for private gain.

60. But, after 19 years, we have a battered, partly time-tested, mostly viable and certainly functioning constitutional democracy. We have a viable structure to create the future – and one that affords us a number of viable pathways to reach it.

61. The Constitution is exists not only for high dreams and good times. It is there also for the moments of dismay and sobriety. That is not a bad achievement for our first two decades. It is certainly one that has a claim to our fierce commitment.