

Constitutional Values and Rule of Law

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At the United Nations World Summit in 2005, the world's leaders reaffirmed that "democracy is a universal value based on the freely expressed will of the people to determine their own political, economic, social and cultural systems, and their full participation in all aspects of their lives", and that "democracy, development, and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing".

Constitutions are the founding texts by which societies reflect these aspirations and values that they aim to achieve.

The focus of my address today will be on the Constitution, Constitutionalism, and Constitutional orders with an emphasis on the Rule of Law, and its role in strengthening and deepening democracy.

Constitutionalism and Constitutional Orders

The concept of "Constitutionalism" provides a set of values and principles, essentially indigenous, and in conformity with (and sometimes, hopefully superior to) the concepts, values, principles and standards set out in universal human rights and in international law. At the core of such values and principles is the rule of law.

While country contexts vary greatly, "Constitutionalism" embodies values such as voice, participation, representation, non-discrimination, transparency, accountability, the rule of law, separation of powers, judicial independence, and human rights, including the right to effective remedies, to enumerate but a few.

Moreover, the crucial task is to move forward from the values and principles that comprise "Constitutionalism," as set out in a Constitutional document, to the establishment of "Constitutional orders," i.e. the institutions and processes of governance that ensure the practice of Constitutionalism and that provide the actualisation and

realisation of the values and principles of Constitutionalism embodied in such document, most notably the rule of law and respect for human rights. Only then can a Constitution truly become a social compact between government and the governed.

I would like to simply restate the point made by the Prime Minister in his opening statement: we must not forget that solutions to the problems besetting democracies are more democracy, a deepening of democracy, and an increase in the quality of democracy – not an abandonment of democracy!

Rule of Law

The normative foundation for the UN's work on the Rule of Law is the UN Charter itself.

Promoting and establishing the rule of law is essential to achieve sustainable development, peace, and to ensure the protection of human rights of every individual. It is also a fundamental foundation for a strong democracy.

Historically however, the Rule of Law was not always associated with democracy, justice, or human rights. In colonial times, the Rule of Law was established to legitimise colonial power. We saw this in the instance of the Weimar Republic and in more recent history in the instance of South Africa.

A Constitutional order makes the difference between mere rule by law (such as prevailed in Germany under the Third Reich/Weimar Republic) and South Africa (under Apartheid), and the rule of law which respects, protects and promotes that most cherished of all human rights, the right to be human.

Establishing a Constitutional order becomes all the more challenging in societies where the need is for inclusive democratic governance, not only for majority groups, but also, importantly, for minorities and for vulnerable and disadvantaged groups as well.

Even today, laws can be the source of injustice and denial if laws do not meet the three core principles that are embodied in the concept of Rule

of Law – 1) no one is above the law, 2) all persons are entitled to equal protection of the law and 3) for every right, there must be a remedy.

For the UN today, the understanding and application of the Rule of Law is one that stresses and values the rights of the individuals – it is a principle that everyone, from the individual to the State is accountable to laws, which are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.

This is the fundamental concept that drives the work of the United Nations. In the UN Millennium Declaration of 2000, Heads of States and Government recognised their collective responsibility to strengthen the Rule of Law, and respect for all internationally recognised human rights and fundamental freedoms.

Inclusive Constitution Making

Allow me to highlight the experience of Constitution in South Africa. The Preamble of the 1996 Constitution states:

“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 elected representatives, adopt this
Constitution as the supreme law of the Republic so as to –
Heal the wounds of the past and establish a society based on
democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which
government is based on the will of the people and every citizen is
equally protected by the law;
Build a united and democratic South Africa able to take its rightful
place as a sovereign state in the family of nations...”

The South African Constitution - making process illustrates well the practice of inclusive Constitution making. The process leading up to the

Constitution's adoption consciously involved the citizenry of the country.

The processes in the lead up to the formation of the Constituent Assembly and adoption of "The Constitution of the Republic of South Africa, 8 May 1996" (Act 108 of 1996) was very important - some may argue an outcome in itself. Structures were established, which led to the adoption of the Interim Constitution, which took into account the realities that South African society confronted. Looking back, reaching agreement involved bringing all parties in the deliberative process, including the oppressors. All key stakeholders participated in the drafting of a new Constitution for purposes of conflict resolution as well as to ensure the longevity of the new Constitution.

The 1993 Interim Constitution was a power - sharing agreement. The basic rationale for power sharing was to prevent a counter - revolutionary threat to the new democracy from the bureaucracy and security forces. Concessions were made which was referred to as the "Sunset Clause" to ensure the commitment of these parties and bringing them into the power - sharing agreement (the Government of National Unity).

The South African power - sharing arrangement had a five year timeline (the much debated sunset clause) and indeed was replaced by a modified majority - rule democracy. Nevertheless, the culture of inter - group bargaining persists and is deeply embedded in many sectors of South African society, including its new political institutions.

The conscious involvement of the people has been crucial, as well as placing national interests above the individual interests. It required institutions and consultations to take this process forward. It could not have been achieved by an elite acting alone. No elite can enforce a Constitution, especially if they are not able to communicate and inform about the process.

The historical precedent of the elaboration of the so - called "Freedom Charter" (1955) proved very informative in this sense. Several of the older leaders in the early '90s still remembered the experience of how

the Freedom Charter was drafted through the involvement of 10,000 volunteers (in 1954) who went out all around the country to find out among people working in factories, hospitals, schools, and communities, what they believed had to be the basic principles and values for a free South Africa.

Similarly the proceedings of the 1996 Constitution - making were open and transparent with a very high level of public education on the issues and public input (via email, meetings, surveys, and contributions on the internet). Everybody was able to contribute and this resulted evidently in a text that resonated greatly with the general public.

The Constitution also included economic, social and cultural rights and ensured their enforceability by the courts. A Constitution remains a promise on paper, unless the judiciary is able to uphold the Constitution and enforce its applicability alongside the government.

Conclusion

In summary, past experience indicates that an inclusive Constitution - making process is beneficial to the legitimacy and longevity of the Constitution. When one group dominates the process, it fails to reach a genuine consensus among all significant political actors. On the other hand, inclusiveness should not compromise substantive agreement on key Constitutional principles.

It's important also to rely on technical expertise, especially from international experiences, to ensure that the Constitution benefits from the lessons learned from other Constitutions - making processes.

In closing, allow me to refer to some Buddhist thinking. His Holiness the Dalai Lama said that, "Modern democracy is based on the principle that all human beings are essentially equal, that each of us has an equal right to life, liberty, and happiness. Buddhism too recognises that human beings are entitled to dignity, that all members of the human family have an equal and inalienable right to liberty, not just in terms of political freedom, but also at the fundamental level of freedom from fear and want. Irrespective of whether we are rich or poor, educated or uneducated, belonging to one nation or another, to one religion or

another, adhering to this ideology or that, each of us is just a human being like everyone else. Not only do we all desire happiness and seek to avoid suffering, but each of us has an equal right to pursue those goals”.

It is not enough to rebel against the lack of justice; we should rebel against a lack of imagination. The most important thing to remember when confronted by scepticism and the sense of despair is that hope is the consequence of action, not its cause, and therefore, we should act in order to hope. By doing little things, we acquire the energy to do bigger things. The little thing may be Constitutionalism; the bigger things are its full realisation in society. It’s our sincere hope that conferences such as the one today may allow us to exchange and learn from each other, and ultimately contribute to gross national happiness.