

Unity in Diversity: A Roadmap to Understanding Reconciliation
Keynote Address | FW de Klerk Foundation

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Real, deep and meaningful friendships are rare and difficult to come by. I was fortunate to have a few close friends who inspired and motivated me to continue working in the fight for rights for all. This morning, I would like to talk about my friendship with two such friends – Nelson Mandela and Bram Fischer – whose struggles may have been aligned, but were in themselves unique. Alongside them, we played our parts in working to create a new, united South Africa, and part of what I hope to convey this morning is the vision for the country that we shared.

At the end of 1955, 165 men and women were charged with treason before Judges Rumpff, Bekker and Kennedy. Various of the charges related to the accused having adopted the Freedom Charter, which declared that "South Africa belongs to those who live in it"; according to the prosecution, this was a communist-inspired document calling for the overthrow of the government. While the number of people was reduced to approximately 30 after advocates such as Izzy Maisels, Sidney Kentridge and Bram Fischer successfully challenged the indictments, Nelson Mandela's charges remained.

During the hearing, Judge Bekker took it upon himself to ask Nelson questions. One of the key issues that he raised was the demand of 'one man, one vote', and noting the concerns that white South Africans had with this notion, asked whether the ANC would settle for less. To this, Nelson responded, "My lord, I am alone in the witness box, I can't speak for my organisation. We have been knocking on

the door of the deaf for a hundred years but there has not been a response. Put something on the table and we will consider it".

There was no response, and, as we know, it would be decades before this became a reality for the majority of South Africans. In the meantime, we saw many people wounded and killed, including at Sharpeville and during the student uprisings; the formation of the Pan African Congress under Robert Sobukwe and the ANC's armed wing, Umkhonto we Sizwe, which was sanctioned even by the ANC's peace-loving leader, Chief Albert Luthuli; and pervasive social and economic repression. The government of the day hit back with detentions without trial, violence and torture, as well as more insidious ways to achieve their desired ends. The minister could extend terms of imprisonment longer than that imposed by the courts, and black people were prohibited from traveling around the country to seek jobs, occupy homes or live as equal citizens of the country. The rural areas were in turmoil, and I, for instance, assisted Chief Abram Moilaw to resist the so-called Bantu Authorities. Out of the media spotlight, many innocent people were arrested, jailed, beaten, tortured and murdered.

During one of Nelson's appearances in court, he took on the full might of the white supremacist government, and eloquently and succinctly summarised why the case was a farce. He said:

"The point I wish to raise in my argument is based not on personal considerations, but on important questions that go beyond the scope of this present trial. I might also mention that in the course of this application I am frequently going to refer to the white man and the white people. I want at once to make it clear that I am no racist, and I detest racialism, because I regard it as a barbaric thing, whether it comes from a black man or from a white man. The terminology that I am going to employ will be compelled on me by the nature of the application I am making.

I want to apply for Your Worship's recusal from this case. I challenge the right of this court to hear my case on two grounds.

Firstly, I challenge it because I fear that I will not be given a fair and proper trial. Secondly, I consider myself neither legally nor morally bound to obey laws made by a parliament in which I have no representation."

The government justified its conduct on religious and political grounds, relying on isolated acts to justify its mode of collective punishment. The arrest of Walter Sisulu, the leader of the African National Congress, with Govan Mbeki and others at Liliesleaf Farm was considered a triumph for the apartheid regime. (Fortunately, Bram was not there on the day of the raid, although he was a frequent visitor.) With complete disregard for due process, members of the government, with the media and the majority of the white population supporting it, proclaimed that the death sentence was the only appropriate sentence to be imposed, not only for those detained in Rivonia but also their comrades who were being held under the 90-day detention without trial provision.

At the request of Bram Fischer, attorney Joel Joffe asked Arthur Chaskalson and I to accept the brief to defend the Rivonia accused. We believed that the campaign against the people by the media was unlawful. We made an application to court on the behalf of Govan Mbeki and other detainees, with whom we could not consult, to have the media cease the propaganda that they were conducting against our clients. We failed. The court held that the relief we sought was available to accused persons, but at the time we did not know whether they would be charged or not; on this basis, our application was dismissed.

During the Rivonia Trial, Nelson read the speech that he had written from the dock with the agreement of all his co-accused and the legal team. He and the other accused had decided to challenge the regime through his spoken

statement, and through the others giving evidence on oath in order to expose the truth about the oppression of the South African people and to appeal to the international community.

I urged him to add "if needs be" to his statement that he was prepared to die for the society for which he had fought. I was concerned the statement might be read as an invitation or challenge to the court to acquiesce. After some thought, he agreed to put those words in. However, his resilience was absolute as he stated to the court that:

"During my lifetime, I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and achieve. But if needs be, it is an ideal for which I am prepared to die."

A key part of our discussions was whether we should immediately give notice of appeal if the death sentence was imposed, but this was unanimously rejected by the accused. In his book, "Long walk to freedom", Nelson wrote as follows about his consultations with the legal team:

"Bram was very sombre. In his quiet voice, he told us that we were facing an extremely serious trial and that the state had formally advised him they would ask for the supreme penalty permitted by law, the death sentence. Given the climate of the times, Bram said, this result was a very real possibility. From that moment on we lived in the shadow of the gallows. The mere possibility of a death sentence changes everything. From the start, we considered it the most likely outcome of the trial. Far lesser crimes than ours had recently been punished by life sentences."

Prison officials never let you forget that you might hang. That night, a warder rapped on my cell door at bedtime. 'Mandela, you don't have to worry about sleep,' he said. 'You are going to sleep for a long, long time.' I waited for a moment and said, 'All of us, you included, are going to sleep for a long, long time.' It was small consolation."

Nelson had written a short note in case the judge asked if he had anything to say before the death sentence was handed down, in which he boldly intended to tell the court that many patriots' blood had been shed in the past, and that if he was going to die, he was going to die like a man. Nothing in this note showed any remorse or appeal for mercy. Fortunately, he didn't have to use those notes, but eight life imprisonment sentences were handed down at the end of the Rivonia Trial.

Even in prison, Nelson's rousing character stood out. In one example of many, when one visited him on Robben Island, you would be invited to lunch at the officers' club and served seafood cocktails and grilled lobsters. If you visited anyone else, the only lunching option was the warder's canteen, serving liver hamburgers. This special treatment was unrequested, and Nelson always insisted that his cohorts be treated in the same manner. He also made it quite clear that he would not be walking out of prison before all his fellow Rivonia Trial inmates had gone before him.

However, his time in prison was an exceptionally difficult time for him. The system ensured that prisoners were made to feel as isolated as possible. He and the other prisoners were kept in the dark about what was happening outside the prison walls; Nelson did not even know what was happening to his wife and children. One of the first things he would ask me when I visited him was how his children were, and he was deeply troubled by concerns that Winnie Mandela may herself be sentenced to imprisonment.

In another devastating instance, Nelson was not permitted to attend the funeral of his mother. In his biography, he wrote as follows:

"A mother's death causes a man to look back on and evaluate his own life. Her difficulties, her poverty, made me question once again whether I had taken the right path. That was always the conundrum: Had I made the right choice in putting the people's welfare even before that of my own family? For a long time, my mother had not understood my commitment to the struggle. My family had not asked for or even wanted to be involved in the struggle, but my involvement penalised them.

But I came back to the same answer. In South Africa it is hard for a man to ignore the needs of the people, even at the expense of his own family. I had made my choice and, in the end, she had supported it. But that did not lessen the sadness I felt at not being able to make her life more comfortable, or the pain of not being able to lay her to rest."

This is an important point of distinction between Bram and Nelson. Bram was born into a position of wealth, power and privilege, both by mere virtue of his race but also as the son of a judge-president and the grandson of a prime minister. However, whereas Nelson enjoyed the support of the majority of his people, Bram did not. Bram had every opportunity available to him to live a comfortable and easy life, but instead chose to dedicate his life to a struggle for the rights of all South Africans. He was an exceptional man and lawyer, and championed above all the rule of law and the independence of the judiciary. However, he paid a high price aid for pursuing his ideals; as Nelson Mandela said of him:

"As an Afrikaner whose conscience forced him to reject his own heritage and be ostracised by his own people, he showed a level of courage and sacrifice that was a class by itself. No matter what I suffered in my pursuit of freedom, I always took strength from the fact that I was fighting with and

... *for my own people. Bram was a free man who fought against his own people to ensure the freedom of others."*

I worked with Bram both in the Treason Trials of 1956-1961, and then again during the Rivonia Trial of 1963. Although Bram managed to get the initial indictment quashed, the accused were promptly rearrested as soon as the judge left the room and the prosecution issued with a new indictment that corrected some of the previous defects. We had decided that the crux of our strategy would be that the accused would become the accusers. Bram thought Nelson Mandela should make a statement. It was also Bram's idea that Walter Sisulu should be put up as a witness to give evidence due to his ability to withstand cross-examination. Bram meticulously prepared Walter for his role as a witness, and Walter had his answers easily at hand for his cross-examination. As Nelson later remarked, this was less about testing the law, and rather about offering a platform to the accused to air their beliefs.

Later, in 1964, Bram was put on trial himself after an infiltrator had given evidence against the Communist Party. We discussed the matter the Friday before he was set to appear in court. He told me that he had come to say goodbye, and requested that I do whatever I could to assist his children. On the Monday morning, Bram's counsel read a letter from Bram in his absence explaining that he would be going underground to continue the struggle. When Bram went underground, there were a lot of people concerned about him. Nelson, for example, would ask me when I went to visit him on Robben Island, "Is Bram Fischer still free or has he been caught?"

After being underground for about 290 days, I represented Bram after his re-arrest. When it was his turn to address the court, he spoke powerfully and movingly, and I would like to remember his words to the court now:

"All the conduct, my Lord, with which I have been charged, has been directed towards maintaining contact and understanding between the races of this country. If one day it may help to establish a bridge across which white leaders and the real leaders of the non-whites can meet to settle the destinies of all of us by negotiation, and not by force of arms, I shall be able to bear with fortitude any sentence which this court may impose on me. It will be a fortitude, my Lord, strengthened by this knowledge at least, that for the past twenty-five years I have taken no part, not even by passive acceptance, in that hideous system of discrimination which we have erected in this country, and which has become a by-word in the civilised world.

My Lord, in prophetic words, in February 1881 one of the great Afrikaner leaders addressed the President and the Volksraad of the Free State.

His words are inscribed on the base of the statue of President Kruger in the square in front of this Court. After great agony and suffering, after two wars, they were eventually fulfilled without violence. President Kruger's words were:

*Met vertrouwen leggen wy onze zaak open voor de gehele wereld.
Het zy wy overwinnen, het sy wy sterven: de vryheid zal in Afrika
ryzen als de zon uit de morewolken.*

[Translation: With confidence we lay our case open before the whole world. Whether we conquer or whether we die: freedom shall rise in Africa like the sun from the morning clouds.]

In the meaning which those words bear in the context today, they are as truly prophetic as they were in 1881. My motive in all that I have done has been to prevent a repetition of that unnecessary and

futile anguish which has already been suffered in one struggle for freedom."

In the end, he was found guilty of furthering the aims of communism and conspiracy to overthrow the government, and was sentenced to life imprisonment. He was not allowed to attend his son's funeral or his daughter's wedding. He received inadequate medical care - in fact, his terminal cancer was misdiagnosed, and he was treated incorrectly. He died shortly after being transferred to his brother's care, but his family was even denied possession of his ashes after his death.

Only four members of the Bar attended Bram's funeral, including me. As we were leaving the funeral, we saw Chief Justice Rumpff coming the other way. He asked us what we were doing in Bloemfontein when the Appellate Division was not in session, and we told him that we were there to attend Bram's funeral. The Chief Justice's response was prophetic: he said, "He will be remembered long after all of us have been forgotten".

It is a point of deep sadness to me that he did not live to see the end of apartheid (although I am heartened by the fact that he was reinstated as a member of the Bar, albeit posthumously). However, the struggle surged on, and by the 1980s it certainly seemed that the writing on the wall was clear, and that the time for change was upon us.

In 1982, Nelson Mandela was moved to Pollsmoor Prison in Cape Town. The move helped facilitate secret meetings with the government. An initial agreement was brokered, and after about five years, the meetings became more public. The talks continued and to gauge public response, a few Afrikaner businessmen and intellectuals engaged with the ANC in locations such as Dakar, Senegal and Germany. In 1989, Nelson contacted key leaders and offered proposals for

negotiations. Soon after, in 1990, President De Klerk announced the unbanning of the ANC, as well as the release of Nelson Mandela.

On release day, I was with my family. And it was very moving, as I had feared all the while that he was in jail that I would one day be called upon to make a speech at his funeral. It was a fear that I had lived with all those years. I still struggle to find the words to encapsulate everything that it meant to me, and to the country as a whole.

While the negotiations continued, so too did the violence – something that many of us, Nelson included, had believed would have come to an end. In May 1990, the ANC and the government signed the Groote Schuur Minute, which reflected a commitment to end the violence. The Pretoria Minute, which followed in August 1990, saw the ANC commit to suspending the armed struggle, as well as the National Party agreeing to negotiate a resolution to the political stalemate. This was followed by the National Peace Accord of September 1991; forming an important step toward formal negotiations, the National Peace Accord was signed by the representatives of 27 political organisations, as well as national and homeland government. This helped to set the stage for the CODESA negotiations.

A small minority of South Africans blame Mandela of selling out. In my view, they are not well informed. President De Klerk and President Mandela did not have an easy task, and to their infinite credit, they were able to avoid a civil war. Blood shed would not have solved the problems – it would have only made it worse.

Over a period of almost four years, parliamentary political parties, provincial and city councils, academics and lawyers debated at CODESA about what the interim and final constitutions should provide. The four groups of CODESA tried to achieve consensus. We were beautifully naïve when we began on this road to freedom, cautiously optimistic but almost too afraid to truly imagine the potential

that a democratic South Africa could hold. I recall a visit that Nelson paid shortly after his release to the ANC committee responsible for drafting a proposed constitution for South Africa, in which he enjoined us to "[d]raft a constitution that is good for South Africa as a whole and not only for the ANC" – and that, I believe, is what we did.

Today, we continue to hear calls from time to time for the Constitution to be amended, in order to, for instance, expropriate land without compensation. While I agree to some extent that the government has failed, as yet, to make full and effective use of the property clause in the Constitution, and that more must be done to address wealth disparities in the country, I do not believe that such an amendment to the Constitution would be the answer.

It is my hope that the principles and values underpinning the Constitution are never allowed to wane. However, I accept that the Constitution itself is not necessarily cast in stone. It should, and must, be given the space to evolve naturally in line with society's evolution if appropriate. This is clear from the Constitution itself, which allows for its own amendment. In my biography, *Odyssey to Freedom*, I began the chapter on the Constitution with a quote from Nelson Mandela, in which he says in reference to the Constitution that:

"[It] is a living document. Our understanding of its requirements will and must adapt over time. But the fundamental principles are and must be unchanging. Full understanding of how and why those principles were adopted will help us to ensure that we remain true to the solemn undertakings which we have made to each other and to those who will follow us."

This has also been the position adopted by the Constitutional Court. As stated by Mohammed DP in *Premier of Kwazulu-Natal v President of the Republic of*

South Africa 1996 (1) SA 769 CC at para 47, quoting from a decision of the Indian Supreme Court:

"[The Constitution] did not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution ... The power to amend did not include the power to abrogate the Constitution ... The word 'amendment' postulates that the old Constitution must survive without loss of identity, ... the old Constitution must accordingly be retained though in the amended form, and therefore the power of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution."

In order for an amendment to the substantive rights and duties contained in our Bill of Rights to be passed, a significant majority of the votes in Parliament would be required. Section 74 of the Constitution provides that section 1, which sets out the values on which our constitutional democracy is founded, would require 75 per cent of the National Assembly and 6 of the 9 provinces in the National Council of Provinces to vote in favour of the amendment; similarly, an amendment to the Bill of Rights would require two-thirds of the National Assembly and again 6 of the 9 provinces to vote in favour.

This is an important safeguard. On the one hand, it provides protection for the rights that were guaranteed under our Constitution by a process of negotiation and certification, and is the product of the hard work of some of our country's greatest leaders of the democratic era. On the other, however, it does not present an insuperable bar to there being an amendment in appropriate circumstances where it is supported by the clear majority of the country's leadership (and bolstered by the support of their constituencies). It is clear, however, that it is no small task to amend the Constitution – a decision deliberately and carefully taken by the drafters – and it is through this framework that we must consider any calls for amendments to the Constitution.

We need strong leadership more so now than we have for some time. We need leaders who espouse the ideals and values of people like Nelson Mandela and Bram Fischer. We need leaders who believe in the value and promise of the Constitution, and want to see it upheld and realised. It is inappropriate for leaders to make reckless statements about race that incite hatred or violence, or to speak flippantly about amending the Constitution without due regard to what is in fact required to achieve this. Certainly more can – and must – be done to achieve the vision of the country that many of us, not least of all Nelson and Bram, had for an equal and united South Africa.

To quote an English judge of many years ago, generalisations are the products of vulgar minds. It is of no assistance to us to utter such generalisations about black people or white people, Christians or Muslims, men or women, but rather to follow the example of Nelson Mandela, Bram Fischer and innumerable others, irrespective of their colour, religion or political views. Instead of blaming one another or pointing fingers, let us work together to achieve the aims that the new Centre for Unity in Diversity aims to achieve, including building constructive national unity, promoting constitutional rights and promoting harmonious non-racialism between all who live in South Africa.