

## **The Debate on the Constitution in South Arica**

deeper love

Greetings, greetings to you all. And welcome to the Sapphires Trust Policy Dialogue Forum on Zoom. And it's being streamed live streamed streamed on Facebook. And subsequently on YouTube. Welcome especially to our guests from all over the world. more so for our panelists. And in this regard I'm pleased to welcome my old comrade LB Sachs. Former justice of the Constitutional Court. Rwanda, Kaso, Attorney Rita, Author, contributed to the book, One Law, One Nation. In celebration of the 14th anniversary of the constitutional Constitution of South Africa. Aubrey Mashike, another old comrade of mine. Rickle analyst and prominent commentator. Stephen Friedman, Professor. For the study. of democracy. and Welshman Movement says Zimbabwean academic professor of law. Prominent politician. Today we are looking at the raging debate on the constitution in South Africa. Contextualising it in relation to the Zimbabwe situation in particular. And the African continent in general. the debate the so-called raging debate was prompted, of course, by the statement by Minister of Tourism Lindi Wesisulu. Uh dear comrade of ours. Um and the debate has been so interesting.

That we felt necessary to discuss it in the context. Of highlighting the importance of constitutionalism. The rule of law.

Contrasting that as we say in our our concept note notwithstanding the pitfalls, shortcomings of the South African situation. We'd like to extoll it Is a good example. In constituism and rule of law. And the and the and the maintenance of the institutions. Including the judiciary as we have seen. This is a sharp contrast to the situation here in our country Zimbabwe. It is that contest that we want to at first at the Stephen Friedman as captured the debate quite well. And we have we caught him in the concept note but I like to quote him again. In setting the tone for this discussion. I quote South Africa is trapped in the past. Not by its constitution. But by the actions and inaction or or politicians who the law never prevented from divi and implementing an effective plan for moving to a more equal future. This should help us place in perspective the claims of politicians who advance their ambitions by blaming a document. For their indifference towards the people related them. End of quote. With that. We entered the discussion immediately and I invite Albi Sachs

Thank you Ibbo and hi to many of you who haven't seen for quite a long time. And I promised the other participants that there'll be quite a few surprises in my presentation. Uh I'm sure of that because although I was central to this story I'm going to tell preparing for this and preparing for the run up to this presentation. I encountered many surprises myself. And I'm going to start with nineteen Seventy-nine LDSATs still had two arms. It's December.

It's a very hot day in Maputa, Mozambique. And I've been invited by Oscar Montero, one of the prelimal leaders to attend the Central Committee Meeting. I was very excited Since the committee of Relimore which was effectively the government. Because we were both Oscar, myself, teaching law at the Faculty of Laws. Uh in in Mozambique. And I'm wearing my Safari suit. That short sleeves. It didn't have collars and ties. And there I see Samora. And there maybe 200 or so. Members of the central committee. Uh Portuguese is quite good. Um hearing everything unaccessible. Keeping looking all the time to the back of the room. And Vivas and discussions and he's looking to the back of the room and somebody comes in with a piece of paper, a huge smile on his face. He says, finally,

finally, finally, at Lancaster House in London, the parties have agreed to a new constitution, the war is over, ceasefire, new constitution, and two hundred members of the committee stood up and sang beautifully and powerfully a song about Shivurenga. Very identified with it. And I started shivering. I was shivering because I was in an air conditioned room. This was the old officer's mess of the Portuguese Army was now where the Central Committee met. It's the only cool place in Maputu. I'm shivering because it's cold. I'm shivering because I'm so excited and I'm so sad. We were the first in South Africa. 1912 the INC set up. And now we're the last Zimbabwe getting independence. When will it be our turn? So it was a moment of huge breakthrough and great meaning. And yet Lancaster House became the symbol of everything we didn't want in South Africa. And in a way I think it's part of the foundation of today's discussion. In South Africa our constitution as I'll explain has very deep roots in the struggle of the people. In the case of Zimbabwe it was imposed by British lawyers wanting to get out of Zimbabwe. It was hated by the white minority rulers because it displaced them. It was hated by Zanu. It was hated by the only thing they had in common. They all

hated that British made constitution. And so it had no authority, no prestige, it was just a document that ended the war and provided for independence. Massively important to historically totally without importance. In fact it's an ugly constitution. Guaranteeing I think twenty wide seats, four whites in the parliament. Uh no land reform for 10 years. It was everything a constitution shouldn't be. I move forward to nineteen eighty-five. Conference in Kabwe. ANC. Consultant of Conference. We're surrounded by Zambian troops. In case commanders come from South Africa to take us all out. And we discuss the four pillars of our struggle Uh which is is the underground resistance, popular mobilisation. international boycott and arm struggle. Armed struggle being one of the pillars of struggle but not the struggle. quietly out of the tumble is opening the possibilities of negotiations. Not calling for it but the possibilities. And quietly sets up a think tank. It was actually called a secret think tank. The Constitution Committee. Professor Jack Simons and some of you might know was the chair's artist was the deputy. Moderna was a member. Uh Teddy Petani, on we were joined by Bridget Mabundler. And from outside myself and and Kaidu Asma. I

don't think there's ever been a legal team quite like that in the world. And in a very wonderful book that Andre Ordendale is completing almost as I'm speaking now. Called dear comrade president. However the Thombo laid the foundations of South Africa's constitution. The story is told and I'm going to pick up a few highlights of a particular role that Oliver Thambo plays. And the deep rootedness in Africa and the African continent of our constitutional order. So in a way it was a sense of the first will be the last, the last will be the first. Even the first, we became the last. And now in some ways we become a first brigade So I move forward to the Constitutional Committee Meeting in in the soccer And deciding we base our constitution on the Freedom Charter. But we don't copy it. Freedom Charter has to be converted from a document of principles and ideas and values into a functioning operational constitution document for the country. We decide as a matter of principle we don't draft the constitution externally. Only the South African people can draft the constitution a constituent assembly in South Africa. But we decide on certain key foundational principles that eventually after a seminar of which has never been a seminar quite like that in the world at the

Zimbabwe University and sorry  
the  
Maybe  
University in Osaka. we decide  
on certain core guidelines.  
This will be our approach. And  
the key foundations came from a  
paper that Palo Jordan  
delivered in 1985. before the  
Cadbury Conference to the  
National Executive. How to deal  
with future counter revolution  
in South Africa. His position  
was one day not too far away.  
The white going to have to  
concede to universal franchise.  
And they preparing their  
trenches to ensure that white  
domination is retained. With  
black majority rule. And what  
is our answer? And he said the  
answer is not to go along with  
their power sharing ideas,  
group rights, the three whites,  
Afrikanas, Zulus, Blacks. Uh we  
would have ended up with three  
presidents with Mandela on  
Monday and the Cap gone Tuesday  
in Motulesi on Wednesday.  
Having to agree by consensus.  
Uh it would have been white  
domination or white privilege  
in South Africa. He said our  
answer to the group rights  
proposition is a bill of  
rights. An ANC had had a bill  
of rights in 1923. Had a bill  
of rights during African  
claims. At the time of the  
Atlantic Charter. What about us  
in South Africa by the rights  
in 19 forty-four. The freedom  
filter was like a bed of  
rights. He said that's our

constitutional answer to the attempts to use what is called consociationism to maintain the division of South Africa. We all have rights under the bid of rights not because a majority, minority, black, white or brown because we're human beings. And that must be foundational to our project. So we had all these themes lined up. I'm looking forward to Fruto

The battle at the so decisive in terms of Southern African history and certainly the story that follows from that. Uh the Cubans defending Khuta Kennevali, Pit Butler, managing to give a bloody nose to the South African military. Their war is becoming unsustainable in Namibia. Now the Soviet Union, United States get involved. Uh and there's a whole change in the climate and pressures being put on ANC, you've got to negotiate. You can't use our countries anymore with spaces. We'll kick you out. If you don't find a settlement. And Oliver Tumbo now takes the initiative. And he places his initiative on Namibian experience positive and negative. Lancaster House negative. We don't want United Nations to become involved. Hunte came to Namibia and took over the authority of Namibia. Because in other under western control will be trying to protect the interests of the whites. And and they will say

black majority rule. We have to have white minority protection. And that will fuel the status quo. Uh we don't So that's what we don't want from Namibia. And we don't want the Lancaster House. We don't speak about that majority rule because then the answer is white minority protection. Uh so that became foundational to his approach and he said we must take the initiative in negotiations. And the initiative took the form of what ultimately became called the Harari Declaration. Which has the AMC it was a type on Becky. It was very involved. Benoit Maduna. Oliver Tumbled Simon's contribute a little bit. A document produced in the Saca the whole process of negotiations to proceed in in in South Africa. And it lay down principles and conditions. We can't negotiate while our people are in prison. We can't negotiate why we don't have free political activity. We can't negotiate while the armoured cars are in the townships. We can't negotiate while there isn't freedom. Uh to speak and to consult with our people. Sangotiations became a lever for getting Mandela others out of prison to get unbanning of the organisations. But it also laid down a vision of a united non-racial democratic South Africa. And they flew with this document from to to Angola. To

Tanzania down ended up in  
Hawaii, Botswana, Harari  
Consulting. To get African  
support for the document, so it  
wouldn't just be an ANC  
document, it would be an  
African document. And the most  
important discussions took  
place in Tanzania. With Julius  
Nireri, who said, it's a great  
document I support it, but  
you're asking too much. You're  
asking the whites in South  
Africa to lay down the hand  
over the government, surrender  
to your vision. Don't be so  
bold. Rather set out principles  
that you want. Like was  
happening in Namibia.  
Principles for the Namibian  
independence.  
were agreed to in advance. And  
they became so it's Judas  
Niareri coming up with the  
ideas of certain principles  
being key to constitution  
making in South Africa. Uh the  
document underwent certain  
changes and Robert Mugabe was  
the last one they consulted.  
And he said we're having a  
meeting. We OAU. Uh in Harawi.  
next week. And let's call it  
the Harani Declaration. and  
we'll take it to the OAU. The  
OAU was adopted. So the OAU  
adopted the Harari Declaration  
which became foundational to  
our whole constitutional  
process at the core of our  
process. It was then picked up  
by the non-aligned movement of  
the Commonwealth, even Margaret  
Thatcher had to submit to it.

Finally taken to the General Assembly. Where where where Thabo and and one other had to persuade everybody. Meeting all the different blocks there. And it was accepted by acclamation. Now this story is hardly known in South Africa. Hardly known in the world. Hardly known in Africa. Yet Africa was central to our achievement of our new constitutional order. Because if you see what the collect did afterwards he was boxed in. And he had to release a particular prisoner's allowance house to return. Take the troops out of the townships and allow free political activity. The other aspect that we battled over also was who would write the constitution? And we insisted on constituent assembly in South Africa, constitution making process was very frazzled. It had breakdowns, because Harney was assassinated, we had rolling mass action, there were threats of 40, 000 armed whites, seasoned power, we had problems with Freedom Party in KwaZulu and Natal. It wasn't an easy ride, it wasn't a simple compact is produced between Mandela and a few capitalists and a few politicians on the contrary. And the two stage process of constitution making gave birth to the Constitution Court. Because the breakthrough in in negotiations Um came through when the regime was compelled by the roaming mass

action. By the huge support for change in South Africa about the clarity and position of our views and international support giving us more and more support to capitulate and agree that we wouldn't write the constitution by the negotiations. We had to have elections to produce the body to rate the constitution. And if you look at the interim constitution and the final constitution the interim constitution was there to give us elections and the final constitution. With a few limited bill of rights. The final constitution was not negotiated round a table. It was produced by four hundred and ninety members of parliament. The majority of them had been in prison, in jail, in exile, had known torture, the theme of freedom and never again, this very, very powerful. The theme of dealing with the gross economic disparities in our country was very very powerful. But also the of not simply planning to achieve power. Cos we've seen bad things happen. In the countries we've lived in, in Africa, and other parts of the world, in our side, our own organisation. We wanted a constitution in that sense against ourselves. And that's why we ended up with like many regard as the finest, most progressive constitution in the world. It wasn't because we had clever lawyers. It's because we

had lawyers in the struggle and lawyers outside the struggle, we could find the language, but the spirit and the trust of our constitution came from struggle and also this desire to have a country where everybody could live in as equals with dignity. This wasn't a concession. This is what we wanted. We didn't want. We didn't want a country of dominators and dominators and so on. We wanted a country. This was the deep belief of Oliver Tumble. We African people who suffered so much in our skins for being who we are. We will prove to the to the world it is possible for people of different cultures and backgrounds and beliefs to live together. That is a source of pride for him. Then who was to decide once we'd agreed on the constitution making body would be the new parliament. We agreed on the principles in advance. And these are principles that we were fighting for. They were negative principles. There's nothing that says there shalln't be any economic transformation There's nothing in the principles about that. We wanted a separation of powers. We wanted an independent judiciary. He wanted a lively free press. We wanted freedom of movement. These are things that we wanted. And these were embodied in the principles. But the parliament sitting as a

constitutional assembly had to adopt a constitution within two years. In keeping with those principles. And who's to side if the principles had been agreed to. Couldn't be parliament itself. So it was decided to have a constitutional court. primary functi on To determine if the constitution was constitutional. Secondary function to serve as a constitutional court in the interim period. By the final constitution's bill. Preserved. Uh being debated to promote fundamental rights in that period. So the Constitutional Court then received the document. We had 10 days of challenges to the document. Are people saying that principles won't adhere to. From 70 different RTAs. And in the end we upheld ten changes. overwhelmingly parliament sitting with Constitutional Assembly had done its job. We approved overwhelmingly but in ten respects we found it failed we sent it back to parliament. We declared the constitution be unconstitutional. A constitutional assembly made the corrections and on December the sixth I think it was. Uh nineteen ninety-six. We certified was okay. And December the tenth ninety 96 Uh Nelson Mandela signed the Constitution into law. Now it's so different from Lancaster. Uh

and it meant the constitution has an embedded meaningful quality in South Africa that the Lancaster House Constitution never had. And the Constitutional Court very carefully chosen consisted of people who had all resisted apartheid. Now I think we also caught in Zimbabwe. I've had some of those elements in the post-constitutional era. And when we are on the court were established we cited Dumbochela, Gabe and others. In in Zimbabwe. For very progressive, forward looking, thoughtful decisions. And it was very painful to see how through what looked like cavalry and threats. After Dumbashena died. Gabi was forced out. He left. Uh and what had been a very strong and meaningful institution in Zimbabwe. Uh nobody cites their decisions today throughout anywhere in the world. Uh it doesn't have prestigious as far as I can see. Uh I don't like to speak badly about colleagues in my in a sister country. But it hasn't become a beacon of of anything positive in in Zimbabwe. Uh just two more things. Before I conclude. output from the beginning decided we didn't use the term decolonise. But we decided point was we're not going to be called my Lord, my lady anymore. For honourable You think it's a small thing but it became huge in South Africa. To

this day the other court still speak by my Lord my lady. We decided to drop that. And we decided not to use Latin. despite the Roman Dutch rule we decided that the court would be seated at a level council's eyes were the same height as ours. We're not sitting up there. We decided to rotate our seatings that there's no hierarchy in the courts. We decided to have workshops to discuss the cases as they came. We go round and round the table several times. And change and so on. Uh we changed the because so many of us had been in struggle. We were used to discussion. We were used to workshops. It was natural to us Why shouldn't it be? And we had people like Arthur Traskelson, Ifa Mohammed, Pius Langa, being maybe the three key people, and wonderful colleagues from the old judiciary who'd hated apartheid, who now felt liberated, and were able to contribute enormously to the richness of the tapestry that we were creating. So it was a court in that sense, totally in line with the constitution, with the values of a constitution that was a very valued laden constitution. Speaking about the injustices of the past. Uh speaking about change, the need for transformation and change. We use reinvented the word transformation. In fact, in South African lexicon came from

the Constitutional Court. To summarise the nature of of of our constitution. And when it came to putting up a building, we chose the site of the Old Fort Prison. Where we say with the dubious pride, we have the only jail in the world where Gandhi and Mandela and Albert Lutuli and and Roberts of workwear and Winnie Mandela and all the others were locked up. We had that prison and that's where we put our court. And the court's built on the principle of justice under a tree. The traditional African way of of settling disputes. We didn't say decolonise, decolonise. We decolonised in our own minds because that was what we wanted. We fought hard for our own constitution. Uh we want our own building. Representing our own style. Uh and and our own own aesthetic. And the decisions of the courts were admired by the people. Even if there was no jumping for joy in the streets when we struck down capital punishments. Even if many people found it hard to accept homosexual love. They respected the fact that we explained our decisions. We gave a hearing to everybody. Uh and we gave reasons with a kind of judicial emotion to justify the decisions. Uh that that that we were presenting. So I'd say the court in that sense particularly the Constitutional Courts if not all the levels of the judiciary established a

reputation. Not just internationally. But internally. For seriousness, for integrity, for feeling, for being linked to the people. be put interpretation booths in the Constitutional Court Building. People have the right to use any of their languages. If you look outside you'll see the name of the constitutional court in the 11 official languages. Uh a whole series of features like that. Cos that's what we wanted. We want everybody. And to feel welcome there. Some of the most important cases dealt with social economic rights. Which deals specifically with a gap between the broad aims of the promise it makes. And the lived realities of ordinary people. Uh and it shifted the judicial gaze from protecting property and power. To the poor, the vulnerable. And you'll find that in the decisions all the way through. So these are all factors that have given the court an entrenchment. Uh a rootedness in South African society. Uh and and and a certain level of prestige. Uh I remember the leader EFF saying that I'm not scared of Jacob Zuma. The only thing I'm scared of is the Constitutional Court. And he took a case to the constitutional court and won that case against Jacob Zuma at that stage. So at different stages, different parties, different people have been

there. Have had their victories  
have had their defeats. Uh and  
and so the verbal attack on the  
courts in that sense was  
extremely facing To all of us  
who've been involved in in in  
that project. Uh the physical  
attack that we went with a  
hammer was I would say equally  
clumsy. And I like to believe  
equally he he he unsuccessful  
in bringing that edifice down.  
So the final point is that  
looking to Africa I spent 15  
months in Kenya as a member of  
the Kenya Judicial Judges and  
Magistrates Vetting Board. Uh  
at a time of transformation  
bear, Transformation coming  
about through a new  
constitution and getting a new  
court. Uh and the constitution,  
the court having a lot of  
prestige. It's a difficult  
country. It's a very difficult  
process. Uh removing colleagues  
of our for twisting the law in  
ways to protect power. But the  
Kenyan courts produced a number  
of brilliant judges. Uh Malawi  
Court recently not too long ago  
was strong enough, felt strong  
enough to challenge elections,  
the Kenyan Court also  
challenged elections. Uh I've  
just received a note from  
Rwanda. They want to hear more  
about the South African  
experience. Uh and we have  
links these times I think are  
extremely important in Africa.  
Important for we used to feel  
for the moral if you like  
jurisprudential strength that

we developed unconstitutional here in Johannesburg to provide support to democratic forward looking judges and people in other parts of the continent and there may be a little bit of solidarity coming back to us. We'll also will also be welcome.

So I'd just like to mention the book. Not simply for the sake of of doing a plug. For a book that I have. Quite a big hand in helping to produce. But it's Andre Urban. We're hoping it will come out in April. Uh it's called dear comrade president. Cos he noticed he would write letters. Dear Comrade President at one stage one chapter's headed with a comrade king telling the airbook. Please come to the microphone. It shows all the contradictions of developing the constitution at the heart of a revolutionary struggle and movement. Uh it's beautifully written. Uh it's it's evidence based and it's going to I believe completely recast the story of how the South African constitution came into being. And proved that it was very much an African document. Not only because of the leadership of people like Atombo and Palo and others intellectually leadership. And the traditions going back. But also because of the support that we got. Through the Irani Declaration. Uh through people like Drew History and Kenneth Cohen in particular. Samora

Michelle in a different way. Uh  
in in in Mozambique. Um and and  
at a late late stage from  
Robert Mugabe. All of these  
factors contributed enormously  
to our achievement of the  
constitution order in South  
Africa. We are embedded in the  
African continent and our  
destiny are so much tied to it.  
It it grieves me so much  
knowing that a Muslim died  
through the bomb that was meant  
to kill me. Uh to see the times  
when our people becomes  
xenophobic and blame  
Mozambiqueans. For Zimbabweans  
or somebody else. For for our  
problems. Uh so this particular  
conference discussion has a  
significance that I think is  
quite profound. And you're  
dealing with deeply rooted  
issues of emotion, of history,  
of episodes of documents. Uh  
and an looking forward very  
much to hearing the other  
speakers. Thanks Abby. Thanks  
very for that profound  
presentation. Touch of history.  
The the the transition. From  
apartheid. To democracy in  
19904. Represented in party. By  
the constitutional process as  
well. You said and we agree.  
The finest the most progressive  
constitution. Not only in  
Africa but elsewhere. In the  
world. It is value laden. It  
speaks of transformation. But  
it's a verse enough. There's  
nothing I quote you. There's  
nothing in the principles. That  
is averse to economic

transformation. And yet the debate which has been sparked by Ndiwe Sisulu speaks to the gap between the ideal. That is the constitution. On the one hand. And the living reality of the mass of the people. In South Africa. looking back in retrospect. Are there any areas of the constitution that you think would have written differently? Especially if we have to if we have to accept as we should. That both the transition to 1994. And the constitution itself. largely speaks to a compromise. And inevitable. Historical compromise Given the circumstances of the struggle. Against apartheid. Against wet centralisms in Southern Africa generally. What would you try differently? And how would you address? Yes. This yawning gap between the ideal. And the reliving reality of the mass of the people. 25 26 years after after the or if you don't mind I'll turn your question into two questions. Uh the one is what would we have done differently? Yes. Looking back their perspective. Uh and there's nothing in the constitution that I feel it would be very unjudicial. Oh \*\*\*\* I wish we hadn't done that. There's nothing like that at all. Okay. Uh there's there's no but I want to go beyond that. Um I don't like the word compromise. It wasn't a compromise. It was

a compromised me to give in on principle. Uh for the sake of it. it it was what I call an accommodation. An accommodation because it was one of our principles to make South Africa country everybody could feel they could live in. That wasn't a compromise. And to open the door to transformation and change. Land reform was seen as a huge issue. Uh and we opened the door for that. It's there. It's in the constitution. Commit that. And then we were proud of the sexual or the first in the world. We are proud of the environmental clause, the first in the world. We're proud of social and economic rights. The first in Commonwealth countries. To to have anything like that. We're proud of so many other aspects. At the institutional level I would have in a chapter nine where we now have and this is unique in the world. To have a chapter in the constitution to defend basic institutions that defend the constitution. Independent electoral commissions, their judicial service commissioners there, the auditor general is there, Commission for Human Rights is there, Commission for Gender Equality is there, and and there's some more. And they given special protection Now looking back, I wish we had an anti-corruption commission, built in from the beginning. Uh, it's easy to say that now,

but we, we knew the dangers of corruption. We had corruption Not big This morning our own organisation that we've seen it big in countries we've lived in. Uh and and but we didn't see that as we saw that as a political issue. That's the only change. We were forced to have more provinces than we would have liked. Uh and maybe bigger provincial governments that don't pay a very significant role. Uh we would have preferred strong national government and larger local governments. Uh without intermediary thing. But I can't say that we wouldn't have got it without Kwazulu-Natal having a degree, some degree of autonomy, the the Western Cape similar. Uh in terms of of forgets in the idea of the reality Yes, well, first of all, reality has changed. Uh it's wrong to say nothing's changed. It's just, you just walk down the street, it's different. before even the body language of people on the pavements. The service in the shops. Uh all of these things. It took some time Uh and and we got used to black government. Uh and one of the objectives of the Thembo Mandela generation was to say democracy works in Africa. And does provide a better life for everybody in Africa. Uh and we African people want democracy. We believe in it. It's the right to have Bandistans in

separation. We can't agree. And we wanted to work. And we don't want the counter revolutionaries as Pala called them. To to say you get democracy, one press, one vote once, everything breaks down. Uh the factory stopped running. People go hungry. Food isn't being produced. The trains don't work anymore. Things like that. So in that sense, the importance of keeping the machinery of the economy going. We're seen as if you like part of African pride. that we can manage, that we can learn, that we can provide the leadership. And and one of the saddest things for me, in recent months, is, is hearing people now, saying they're not sure about that. You know maybe it was better under the white things function then. It was better. Maybe we African people can't rule. It's it's deeply painful. Uh but that was a great success. The transition in that sense. Even Mandela putting on the rugby jersey. He knew what he was doing. He wasn't just being nice to the whites. The whites still had the guns. They ran the administration, the public service. And there's a gesture like that would make them less reculturant, less obstruction, less less likely to take up arms, you know, to, to, to resist us. Uh, and the fact that 4 million people have got homes free. They're not

wonderful homes. Uh we've been corruption in their distribution. But that means something like 16 million people have moved from shacks into homes with electricity, water, sewage, the fact that something like 16 million people a quarter of the population receive social assistance. I don't know what it's like in Zimbabwe. But it's very meaningful to the desperately poor. Even if we have the biggest genome coefficient in the world, that's based on income. But if you take the social income into account, the figures I think would, would come out very very differently. Cool, thanks, thanks, sir, Albie. Ja. Thank you. Thank you very much. I should just note that this this program is recorded. It will be transcribed and published. And you'll be getting a copy of that. So I think you've given us just say that that there's masses of stuff that's absolutely intolerable in South Africa now. Uh and and we've shot ourselves in the foot so many times. We ran out of feet. To shoot ourselves in. So that when I point to positives. And the biggest positives are we have regular elections. We don't have tanks going into the streets to bring about the regime change. Our press step down. Because they're going to be voted out of office. That's huge. And it's very meaningful

and very relevant to the discussion with Zimbabwe. Very important. The status quo is fully acceptable. That's a very important and profound statement RB. And I think now we move on I must apologise to the other panelists. I thought we would engage Albie. It's not often that we have him. So I think he has given us some rich material to discuss and debate. And an alcohol on Rwanda. To join in the debate. Rwando. Hi Igbo. Um, I didn't come prepared to debate anyone. I just wanted to make a few remarks and hopefully I won't be too long if I am, just give me a sign. And hi Alvi, good to see you. Uh, hi everyone, good evening. Um, I just want to talk about the the role that the judiciary plays. In strengthen our constitutional democracy. Um you know I was taken to one of the lowest moments of our constitutional democracy. Which was in twenty seventeen When due to the government's self-created nightmare, it was in danger of not being able to pay social grants to approximately 17 million of our people. A couple before, a couple of years before that, the Constitutional Court had invalidated the government's tender process, appointing a private party to distribute social grants. And at that that Tender was one of the the biggest tenders in our history. But it was riddled

with irregularities. And it would be the most impoverished amongst us who would bear the consequences. in the interest of the people. And in the face of a neglectful government. The court suspended the invalidity of the tender contract until the 30th of May 2017. To ensure that there would be no disruption to the payment of social grants. And to give the government sufficient time to rerun the tender process. The government decided that it would not rerun the tender process but instead it opted to take over the payment of social grants itself. As the deadline the 30th of March twenty 17 approached. It became very clear that the government had not taken the necessary steps to ensure that it could pay social grants. The government's poor planning placed the court between Iraq and a hard place. It either had to extend and now expired unlawful contract. Or it had to make sure that the the the government paid you know the the social grants and not jeopardise the lives of 17 million people. It was graceful disgraceful set of facts. It was also the kind of facts that unnecessarily burdened the court. Because the if the government had done its job diligently these facts would not have arisen. Once again, the court had to act as a janitor and clean up. And it did that. By having to extend

an unlawful contract and appointing itself, the court, appointed itself as a supervisor of the South African Social Security Agency. To make sure that it did it stop. This is a position that no court ever wants to be in. But there was no other choice The court the court neither created this crisis nor had it brought this matter to itself. Nor was it the one that had failed to implement the remedial action prescribed earlier of rerunning the tender. Which would have saved the country from these regretful circumstances. If we feel today that the court is far too dominant of an institution in our constitutional democracy. Whose fault is that In reaction to the court's decisions over the years, politicians and the members of the government have accused the judges of being traitors of our democratic cause as counter revolutionaries. You know I had to ask I have to tell you that that case emotionally affected me. The idea that 17 million people who depend on those grants may not be able to get them. I had to ask who is the counter revolutionary in those circumstances? with our constitutional democracy have been stronger or weaker if the court had simply folded its hands and said that this was not a matter in which it could engage. Last year the entire

world watched as lawless citizens stormed the capital in Washington DC. And in reaction to this to that scene this is what I wrote. Here in South Africa I have watched and shamed As our parliamentarians have physically brawled and fought each other in parliament. A space to me that is supposed to exemplify dignified discourse. I have watched politicians use language that betrays our founding values. I have watched thugs masquerading as servants of the people while they plunder and violate every line of the preamble of our constitution. I would like to say to our leaders that I hope this incident, the storming of the capital, shows you why the rule of law is critical to the survival of any country. I hope it shows you why polarisation sorry, I hope it shows you why polarisation is a danger, not only to the country, but to you too The rule of law which you violate with impunity will one day fail to protect you as your subjects storm your chambers. I hope this incident shows you that the problem starts with you. I don't want to pathologise Africa. Attacks against the judiciary happen across the world. From the US to New Zealand to the UK. When the judges in the UK were branded as enemies of the people when they made a ruling on the UK leaving the EU.

Defying the vote of 17 million people in favour of Brexit. But for a young democracy like ours. This kind of attack against the judiciary can cause irreparable harm. Helen Susman lecture in 2020 eleven Justice O'Reagan said we should not immediately be alarmed when debates about the proper ambit of judicial power arises. It is a debate that is endemic in democracies. The questions of the proper role of the courts and the constitutional court is a recurring question in our democracy. End quote.

Constitutionalism is a discourse that needs critical perspectives. But let us not state political manipulation as progressive constitutional discourse. It is not. It is deception. As a people we have been deceived too long by leaders who amplify harmful rhetoric not to change the status quo but for their own political ends. Justice Oregon also said that the corollary of constitutional supremacy is a strong form of judicial review which permits our courts. And again particularly the constitutional court to determine what conduct is consistent with constitution. A further logical consequence of constitutional supremacy is that a court when deciding a constitutional matter within its powers must declare the law or conduct that is inconsistent with the constitution to be

valid or invalid to the extent of its inconsistency. governance model without judicial review would be a keen to the apartheid regime. Which sought a bias in compliant judiciary under which the judges were appointed by the president on the direction of the Minister of Justice. And not by a rigorous and independent body like the JSC today. This is a quote by the secret barrister in the UK. He says judicial review is what protects us. The individual from the overbearing might of the state. It exist to ensure that however venal, corrupt or maligned politicians who govern us, we are treated equally and according to the law. The government's claims to be restoring trust in democracy by rolling back these checks and balances. Masks and audacious power grab. Allowing them to govern unlawfully and without accountability. If we lose judicial independence, we lose the rule of law. The day a judge makes a binding affecting the rights and liberties of one of us. Not on the legal and factual merits but with the nervous glance to the press and the public galleries or with the BDI on political favour or punishment is the day that the decay in our democracy turns terminal. The work of the court places it in a position to overturn the decision of a government elected by the

people. In order to uphold the constitution. If the rules of the constitution could routinely be overridden by acts of parliament passed with the majority. The constitution would effectively be rendered meaningless. This could have implications for minority groups that are not represented by the majority in parliament. But whom seekers but those who seek the the the protection of the constitution and the government. And here when I to minorities. I not only refer to white people. I refer to myself as a woman. I refer to members of the LBGTQIA community. I refer to religious minorities and other minority groups that have benefited from the court's decisions and the constitution's protection. Asher Cohen writes that a counter majoritarian dilemma arises when an unelected body like the constitutional court overturns the ruling the rulings of an elected government In effect, this means that 11 justices of the constitutional court can tell the majority of South Africans that their wishes are invalid. Is that okay? This seems to run counter to the basic premise of democracy. However, it is a necessary tenant of a constitutional democracy. The will of the majority cannot cannot be the only factor to be considered. As then president of the constitutional court put

it, Arthur Charlesson, he said, if public opinion were to be decisive. There would be no need for constitutional adjudication. The protection of rights could then be left to parliament which has a mandate from the public and is answerable to the public for the way it's mandated is exercised. But this would be a return to parliamentary sovereignty. And would also lead to tyranny by the majority. That is my part at the end. The tyranny of the majority. With the deliberate weakening of other structures and institutions meant to support our constitutional democracy. And with the rise of extreme polarisation of political parties rendering rendering them unable to talk to each other. The courts, particularly the constitutional court are overburdened. When other institutions of democracy fail to respond to matters such as corruption, the courts have the tendency to move in and fill the vacuum. The courts become a rallying point in the democratic process. Those are the words of Jeff Buglinder. Of course the courts are aware of this predicament that they in. And as a result have largely approached their work with caution. Jeff Badland pointed out that our courts repeatedly and rightly draw attention to the need for judges to approach policy questions with some

respect. They repeatedly and rightly point out that in cases, the questions, sorry, that in these cases, the question for the court is not whether the policy is right or whether it is the best policy. But whether it is a policy which is permissible under the constitution. They repeatedly and rightly point out that the executive has advantages that the court do not have dealing with questions of policy choice. The executive is the one that has specialist knowledge not them and experience. They can have access to a wide range of advice. They are not limited to the materials and the arguments between the parties before the court. In an eviction in an eviction matter between the local government and the occupants of a run down building which reached the constitutional court a number of years ago. Instead of deciding the matter itself. The court may do the following order. It asked the parties to engage with each other meaningfully. And as soon as it is possible for them to do so. In an effort to resolve the differences and difficulties add in the matter in the light of the values of the constitution. The constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned had to be

balanced. This is one of the judgements that a lot of people don't know about. Where the court has expressed the fact that it doesn't always want to intervene in these matters. It wants parties to be able to talk to each other. And this order was quite successful because the parties went back. You know to negotiating and were able to resolve the matter themselves. Uh the court's direction was able to strengthen the relationship between citizen and government. And underscore our forgotten ability to engage with each other outside of the courtroom. Jeff Badlander commented that what the court order did was open up the process of participation in our democracy. People who were powerless became powerful. Because they were the holders of rights and were treated accordingly. They became citizens and not subjects. This order revealed to me how self-aware the court is. It is a court that desires to promote and deepen democracy rather than impede it. And these are my concluding remarks. Many have written about the failures of liberal constitutionalism on our continent. That the normative ideas of constitutionalism rooted in our colonial past are unsuitable for Africa. As much as these critical perspectives need to be seriously engaged, we cannot deny that despotic

leaders and corruption have caused greater harm. The courts are just one of the means available to us as ordinary citizens to hold our government accountable. Jeff Butlander also wrote that one of the most important mechanisms through which accountability is exercised is the court. It is important to recognize that while the courts are a critical mechanism of accountability that accountability is not to the court. It's to the people. Courts deepen democracy by holding power accountable. The courts enabled the people to insist that those who exercise power whether public or private account for their conduct and justify it. So in conclusion I want to say that years of trying to tear down our judiciary are starting to show in very real ways. Last July the constitutional court was flanked by an army of police vehicles. And judges needed to have personal security and protection. Not only are we endangering our democracy. We are endangering the lives of real people. The judges and the staff members of the Constitutional Court. Reckless words have consequences. Judges need the ability to call it as they see it. To be faithful to the law without fear. And these attacks threaten that imperative. Decisional independence is key. Judges and courts have to model critical

thinking and healthy democratic dialogue. By listening to all sides dispassionately, even handedly. Where where parliament has become a sideshow. The court still model behaviour that we should aspire to. whether the judiciary is revered or reviled, it must persist without fear, favour and prejudice. Politicians being frustrated by the courts is a sign of a of a healthy constitutional democracy. And that's all I have to say.

Thanks for your time. Go on. Thanks Rwanda. A compelling defence of the courts. And the fascinating case study on the role of the constitution. In protecting the poor and the vulnerable. The court is a rolling point in the democratic process. We've made a very strong case. We feel we feel we feel convinced. thanks very much Mando. Thank you. Move on to Aubrey.

How was that? Good evening. Hi Obrihan. Let me say right at the outset that a feel free to stop me When you run out of patience, because I speak slowly. So you are likely to run out of patients at some point.

Um I want to start with an act of theft.

I want to steal from Stephen Friedman first. And then steal from George Owa.

Um not in what is quoted in the concept note. But elsewhere and several times. Stephen Friedman

has argued that South Africa is a society of outsiders. And insiders. I will add two things to that. Out of the many things I would like to add to the statement. Firstly that the outsiders are in the majority. And secondly in making this statement, Stephen Friedman is talking about all countries in the world without exception.

Therefore there is no country in the world. that can be that cannot be described. as a society of insiders. and outsiders. In the context of South Africa one of the ways in which we create a majority of outsiders.

is through language. Languages. English and its ten bridesmaids. And therefore social, political, economic and other gravities. Tend to be refracted, refracted through the medium of English.

There are some among us who seem to think that to speak in English, to opine in English is to be rational. and not to do so is to be irrational, which means the majority of South Africans are irrational because they do not engage with social economic, cultural, political and other realities.

So to the extent that language excludes so many in this country. Steven Friedman is right. that our society is a society of insiders. And outsiders. It is a society of insiders. And outsiders. In

other ways. politically,  
socially, economically  
culturally and otherwise. And  
that ours is a so-called  
constitutional democracy.  
Doesn't change that. It doesn't  
change the fact that in this  
constitutional democracy the  
majority of citizens are  
outsiders.

George Owen once said that just  
because one lives in a  
democracy does not mean that  
one will not be subjected to  
authoritarianism.

some of these authoritarianism  
we have seen in the debate  
about the article authored by  
our tourism minister Lindiwe  
Sisulu. in support of what she  
said.

in criticising what she said in  
the article. we have seen  
something I always say about  
these debates that every cause,  
no matter how noble has its  
tyrants. and I have seen  
tyrants. I've heard tyrants. On  
both sides. of the debate about  
the article that was written.

by university. So,  
That's like Rwanda, I'm not  
here To agree or disagree with  
anyone.

I'm here to argue In defence of  
a specific formulations in our  
constitution. I'm not here to  
attack specific formulations in  
our constitution. I'm here to  
talk about one thing and one  
thing only. I'm here to talk  
about where this constitution  
comes from. And therefore where  
our constitutional order itself

comes from. Today that's the only argument I'm interested in sharing. Let me start by saying that my primary authority is my relationship with my ancestors. And when I talk about ancestors of I'm talking about two things. I'm talking about a historical fact. The historical fact that there were people who were there before us. who were on this before us. But when I talk about they are no longer here. I am therefore talking about them as spirit. And hence I want to start by saying that my primary authority is my relationship. with my ancestors.

When

I talk about my ancestors as a historical fact As those were here before us.

I am reminded of the words of Walter D. Mignolo. when he talks about the darker side of western modernity. And he says that the darker side of western modernity is coloniality. A logic. Which gives us colonialism. Now in passing let me make two points. First of all, that colonialism in a formal sense may be gone. But the coloniality, I mean coloniality, the logic. Which gives us colonialism. Is still very much alive. And secondly, when it comes to South Africa South Africa is a country in Africa, but is not an African country. It is a country that is governed quite firmly. Still, by the logic of

coloniality. And one of the challenges we face in our neo-apartheid reality. is that too many amongst those who governs Particularly in our ruling party have become allies to and of coloniality. But these these are two points I'm making in passing. Let me go back to the point I was making. about Walter Minyolo.

the Thaka side of western modernity. And the logic of coloniality which gives us colonialism.

So when I talk about my ancestors I'm reminded of the fact that one of the questions which comes with the European period of enlightenment.

A period which was quite dark in some ways.

is a question about those who are not European. A question about those who are not white. And European.

A question which the logic of coloniality answers in this way, in two ways. Firstly those who are not European who are not white and European. are epistemologically inferior, incapable therefore of creating and grasping knowledge.

Secondly, they are ontologically inferior. In other words, are not human if they are. They are not as human as those who are European and white.

This

is

which gave us the colonialism

That

so much suffering was visited  
upon  
my ancestors.  
As a result of the same  
colonialism manifests  
partly as apartheid  
colonialism. Later in history.  
what happens is that  
as I  
always say.  
those who are a numerical  
minority have become a cultural  
majority. Whose world view  
whose whose ways of seeing  
whose ways of being  
whose ways of doing have become  
the dominant reality. And those  
who are a numerical majority.  
Have become a cultural  
minority. And before I  
continue, let me make this  
point about the constitution.  
Every constitution, in every  
country in the world that has  
adopted a constitution.  
represents the triumph of a  
particular worldview. It is a  
product over time of battles  
and conflicts. Between  
contending worldviews. And  
therefore the adoption of a  
constitution in any country,  
anywhere in the world.  
Represents the triumph of a  
particular  
The South African constitution  
is no exception. In this  
regard. the South African  
constitution represents the  
triumph of a particular  
worldview.  
And to the  
fact that you can  
talk about subsets. Of a

particular worldview. You can talk about our constitutional order. As a subset of the worldview that has given birth to it. And therefore no I'm sorry. You can talk about it as the triumph. Yes of a worldview that has given birth to it. this takes me back to where? I started when I talk about my ancestors. the victims of colonialism. But what happens with a dismembering A dismembering from who they are. They are dismembered from their relationships with the self. They are dismembered from their relationship with the land. They are dismembered from their essence. Their spirit. And they are dismembered from their relationship. With their ancestors. They are dismembered from their relationship with what they understand to be God. therefore to talk about colonialism is to talk about the colonisation of all these areas of their being. And therefore to talk about decolonisation is to talk about the remembering of all these areas of our being. in this regard the South African constitution will never be enough because itself as a representative of a triumph of a particular world view. And one of the components of this worldview. Being whiteness. And here I'm not talking about skin colour. I'm talking about ways of seeing, ways of being, ways

of doing And the worldview.  
therefore  
in part is a product  
Well done. Worldview as I.  
Chad. Nineteen sixty.  
no just say it will end up  
Okay.  
and therefore if we accept  
that the South African  
constitution and any  
constitution in the world,  
including the Zimbabwean  
constitution.  
represent the triumph of a  
particular worldview.  
We must accept something else.  
We must accept that the  
struggle against apartheid  
colonialism. Was a struggle for  
the creation of a society that  
is the antithesis of Afrobeat  
society. Having accepted that  
we must accept something more  
challenging. That the creation  
of a society that is the  
antithesis. apartheid society  
is itself not an end.  
then we must accept. that once  
such a society is accepted,  
what begins is another task.  
The task of creating a society  
that is the antithesis of the  
various society that is the  
antithesis of apartheid  
society. If you accept that you  
must excel.  
that this time is an eternal  
task. And if you accept that  
you must accept that the task  
of renewing our society.  
is a never ending task itself.  
And if you accept that, you  
must choose an order. And  
therefore the constitution is

itself a never ending task. It must be a never ending task. Because words are not what they describe. The word cat is not a cat. The words in the constitution are not what they describe. It is a never ending task. Because we must bridge the gap between the words of the constitution. And the reality it seeks to describe.

Thoza.

Thanks

Aubrey.

a heavy intervention. The logic of coloniality. The constitutions reflects a world view. Perhaps also an epoch. A class class question. Steven Friedman. Maybe you want to respond to those very powerful words from Albury. In the course of your presentation. I apologise again for the time but I would we should not feel constrained by time. We can go beyond 730. This is a very important question. Yes. Even. I'll try to keep the time anyway. Um but probably academic time rather than human time. So that's the I'll try and I'll try and make concessions to human time. Um look you've heard a bit about what I have to say about this issue. But when from the quote that you used and from the comments all been made. Uh but just to to put this in context. Uh and doesn't come across as a plug but it's it's it's an explanation. The the article I wrote in response to Minister

Sisulu, was, was actually based very heavily on, on a chapter in my book, Prisoners of the Past, which came out in the middle of last year, and which makes the argument that Orbi was referring to, that post apartheid, South Africa. Uh, is, is, is still divided between insiders and outsiders. Uh, and that in it's part of a a bigger problem and and the bigger problem is that a lot of the patents of pre nineteen ninety-four South Africa are still very visible and and and still very deeply embedded in the society. Uh of which the division between insiders and outsiders is one. And and Albury is absolutely correct. To say that there are divisions between insiders and outsiders in every society. Uh but I of the disturbing feature of South Africa's divisions is that they they approximate very largely to the kind of divisions which existed under apartheid. Uh with important differences. Uh and when I say that I'm I'm not disagreeing with the point. In fact I I argue the point very strongly in the book. That that I'm not taking the view that nothing has changed. Uh a great deal has changed. Uh what I am saying is that certain underlying patterns have not changed. Uh and that those patterns describe some of the symptoms if you like of what the country is going through at the moment. Um but of course

you didn't ask me yet talk about the argument in the book. You asked me to talk about the constitution. And there is a chapter in the book on the constitution in which I engage with a range of of of legal scholars and former judges etcetera on this issue. Um and to some extent the argument is probably not that relevant to Zimbabwe situation today but but on another extent I think that it's it's it's very relevant. Um now although most of the chapter is is is a defensive of or or is a is critical of people who blame the constitution as my article was. Uh I am not what Faroz Kichalia a legal scholar who I I quoted some links in the article cause a constitutional triumphalist or a constitutional fetishist. Uh not one of those people who argue that you know we have an absolutely model constitution which has solved all the problems which constitutions are supposed to solve. I don't really enter that debate. Um I mean I would for example want to debate very vigorously some of the things that had to say. Uh because I do think that and that's not an argument against constitutional democracy but I do think that there there are problems Uh about the assumption that the judicial process can fix problems which politics can't fix. Um so that's why I'm not a

constitutional fetishist  
because I I believe  
ultimately  
problems are solved  
or not solved in democratic  
societies by democratic  
politics. Uh and that  
constitutions are obviously  
democratic constitutions are  
obviously essential to  
democratic politics. But  
they're not a substitute for  
democratic politics. Um so to  
illustrate this in very  
concrete terms which which  
sometimes upsets people who who  
probably are close to  
constitutional fetishists. Uh  
one of the most unjustifiably  
so. One of the most important  
social and economics rights  
cases. Uh which our  
constitutional court has  
pronounced over. Uh was the  
case. Uh and the Krutbum case  
concerned the rights of  
homeless people to housing. And  
it was so named because the  
lead plaintiff was a woman  
called Irene Propo. Uh and the  
case was won and the rights of  
eh people to to decent housing  
were established in that case.  
Sadly Missus herself died  
without  
process should have given her a  
house. But it does to me  
illustrate the point that I'm  
making that there aren't limits  
to constitutional processes. Uh  
whether Mister Missus got a  
house or not. Uh depended on on  
on political factors. Uh which  
sadly did not move in her

favour and social factors. Uh which were even more stacked against him. Uh it has to do with to a certain extent with power. To a large extent with power. Uh and Missus sadly was not among those South Africans who will tell. Um so the the the point of of of the argument is not to say look we have you know we we we have the this life saver which we was told onto at all costs. Uh I do think we must hold onto it. Uh I do think that it it it supports our democratic rights. Uh but I'm simply asking for a sense of perspective about this. Uh and an standing that once again to quote Kachalia these matters are settled by democratic politics or or should be settled by democratic politics. But by far the bulk and that with came across very clearly in the article which you were kind enough to quote. Uh by far the bulk of my argument. Uh is a response to academic colleagues. Uh who see feel that the constitution is is the problem. So in other words if you go back to what I said a few moments ago about the fact that we're divided into insiders and outsiders the constitution is the cause of that. Uh and I think implicitly most of what Elvis said to say was a was a response to that. Uh and and there's no need to repeat some of the points which were made. Uh but but clearly what he he was responding to

was the idea that this was a a  
a acceptable compromise that  
the reason that we have the  
divisions and the the the  
survival of the past that we do  
have was the fault of the  
constitution. Now I'm afraid  
that there's simply no evidence  
to support the view that our  
current problems are the fault  
of the constitution. Uh because  
the point that I I continually  
make when colleagues raise this  
point is could you please point  
me to the clause in the  
constitution which prevents  
change. Can you maybe shaming  
the clause in the constitution  
which prevents us dealing with  
this insider outsider division.  
Uh in a way which doesn't as  
Albury has pointed out get rid  
of it entirely. Uh but at least  
minimises it or reduces it. And  
the answer I'm always given not  
only directly but in what  
people write about this issue  
is section twenty five of the  
constitution. Now now section  
25 of the constitution is the  
property clause. Uh and it's  
it's it's entrenches the right  
to property. Uh and it it it  
says in effect that you cannot  
deprive people of their  
property unlawfully. Um so the  
argument is obviously made that  
the property clause rewards ill  
gotten gains. It it rewards the  
theft of of of land by by the  
colo of the colonised. Uh and  
that it is therefore a blocked  
change because you cannot make  
the social and economic changes

that you would need to make. Uh because of the property clause. Now the problem with this is that the property clause is like all the other rights in the constitution. Subject to what is called the limitation clause. Uh and obviously don't need a non-lawyer like me to give you a lecture on on on the ins and outs of the constitution. Uh but in effect the limitation clause says that you can override in effect any right in the constitution. As long as you can say that by doing that what your your action is consistent with the values of a democratic society. Uh now clearly it should be pretty straightforward to demonstrate that attempt to to rest to, to, to, to alter the power balances, the economic power balances, which apartheid bequeaths to us, is consistent with democracy. Uh, and therefore that in itself means that the constitution is not a block. Secondly, within twenty section 25 itself, section 258 which for some reason, seems to be entirely ignored in the debate. Uh and section twenty-five eight says that much of the property clause says that you can't deprive the person of property without trust compensation or without appropriate compensation. Uh and the station twenty-five says that you can override this if if you're doing it in order to rectify past racial

injustices. Um which of course is the is the whole point of of trying to overri particular property loans. So in other words the constitution does not prevent any political initiative which is is is designed to change the economic imbalances which which racial minority law imprinted on South Africa. Now one of the arguments you always you get in response to this and I deal with it in in in the chapter. Is that well in principle that may be the case. But as long as we have the current constitution the judges are free to interpret this in any way they like. And the judges may interpret this in a way which which bolts which which prevents social and economic trade. Uh the problem with this and that's now we're coming to the nub of my argument with with Minister Sisulu. Is that this has never ever been tested. Uh former Deputy Chief Justice Mosanake who has had a great deal to has written quite a bit and said quite a bit on this issue. Has pointed out on several occasions that at no stage during the entire period when he was deputy president of the Constitutional Court. Did any case come before the court in which the court was asked to uphold a government action. A changing redistribution in South Africa. It's never happened. Uh and and therefore there are some voices saying

quite accurately. Uh as as Judge Mosuneki himself said in in in one of his in his discussions of this issue. Uh that the politicians are blaming the constitution for their own limitations, their own failures. You clearly can't say that you're being prevented from redistributing land by constitution when you've never actually tried to redistribute land. Uh in a way which which would be tested by the constitution. Uh you can't say that the constitution is preventing you making these changes when when you've never tried to make it. Uh and that is is the nub of the issue as as as far as I'm concerned. Uh which is that there is simply no evidence to support the view that the constitution was a block to change. Uh and the and the the politicians and we want to bear in mind that Minister Sisulu is not the first politician to to to make these points. Uh the politicians continually blame the constitution for their own failings. And and let me say that these are not just the politicians who do. That's not just politicians in the governing party. Uh it seems to be a problem across the spectrum. Uh the the the federal chairperson of the of the Democratic Alliance. Uh written some entirely evidenceless and factless attacks on the court. Uh from

the other perspective, which which imply that every every ill in the country is the fault of the court for other reasons. But the point is that until you have, you know, if we were in the kind of situation that the United States was in in the nineteen thirties when the Roosevelt administration was trying to push through the New Deal and the courts blocked them at every turn. Then these arguments would be very strong. But we're not in that position. Uh, political decisions have been taken and political decisions have been made. Uh, not to challenge these issues. Uh, which some of us would argue is a mistake. Uh and we're not arguing incidentally. For some of the things you hear in the rhetoric. We're not arguing that you should pass a whole lot of laws depriving people of property and and and cause a great deal of of of of violence and economic growth as a result. We we saying that you need as a democratic government a coherent strategy for how you deal with the question we're a highly unequal society. Uh and how do you tackle the power of the people who have too much? Uh so that other people can have enough. Um that hasn't been done. And until it has been done the argument that the courts are the problem. Uh is not valid. I suspect. Certainly as as things develop at the moment. I suspect that if that

was tried the courts would not be a problem. Uh or certainly not under current conditions. Certainly despite the the mildly critical marks I made earlier, the courts have not been a problem up to now. Uh in fact, the courts have on occasions been ahead of the politicians. Uh the courts are happy. The case is a good example. The case challenges government policy at the time which didn't provide for for housing for homeless people. Uh the famous tech case in which the court wrote that anti-retroviral medication should be made available free of charge. Uh to to expectant mothers. Uh was also perhaps even a a repudiation of government policy at the time. and and so we go on. So if you to look at the scorecard of 27 years the democratic constitution in South Africa are the question of social and economic rights. Uh and and award points for who is actually tackling the issue. The judiciary at the moment. Despite the limitations of of of relying on the constitution to address these issues. Uh the judiciary is substantially ahead of the politicians. The only point I would make in in wrapping up having defended as as as as I have which most of my fellow panelists will continue to do the importance of democratic constitutionalism. Uh I I think that we need and and perhaps

this is something which people.  
Hey Steven. Uh it's not. Sorry.  
Sorry, if you're asking me to  
wrap up, I'm on my last points.  
It's going to be one more  
minute. Sorry? Yours, you're  
frozen for a while. Oh, sorry.  
I, I, I don't know what's, ja,  
it said my internet  
connection's unstable, but no,  
Ebo, the, the, the last point I  
simply wanted to make is, is,  
having made the point  
repeatedly, that the  
politicians are blaming the  
constitution for their own  
failures. Uh, I, I do want to  
inject a note of caution into  
this which I, I, I think speaks  
to something, some issues  
Albury was raising. And that is  
that we need to ask,  
continually ask questions about  
why there are these attacks on  
the constitution. And to a  
certain extent, they, I think  
in some cases, they are cynical  
and in some cases, they have to  
do with, with, with protecting  
the powerful and certainly to  
be quite specific if you are a  
former president who who  
appointed  
the chair of the of a  
particular commission to to  
claim that the entire judicial  
system is biased against you  
because the person you  
appointed doesn't behave in the  
way in which you were being  
would behave. Uh is entirely  
invalid. Um but I think that  
democratic constitutionalism is  
a very fragile plant. Uh and I

believe that it only survives when there is a strong where there is strong social support for it. Um my concern is, as long as these inequalities persist in the, in the gross form that they exist at the moment. As long as the patterns of the past continue to imprison us. Uh, the more likely it is, that it will be difficult to find support. For democratic constitutionalism when it's understood. Uh, so although I think it's, it's, it's valid to question the motives of, of, of, of many of the people who challenged the constitution. I think it's also important to be mindful. Uh that unless we take poverty and inequality seriously. Uh and regard the need to address them as urgent. Uh then we may find that the needed social consensus in support of the constitution. Uh may evaporate as as as people become frustrated with pressures. Uh of trying to eek out a living in the society. Thank you. Thanks dude. I think the last statement speaks to the problem. The elephant in the room. Which is the spiritual economy of South Africa. There. The poor economy of post a budget. The post the political economy of post. What said Lakron University. that which you talk about. I mean therefore to say that the constitution does not prevent the politicians from doing what

they should do. Eh raise the  
the clearly the the big class  
question. Which is why they are  
not doing anything to change  
things. That's a that's subject  
for another discussion. True.  
Thank you very much. Thank you.  
Um let me bring my my fellow  
countrymen. and colleague  
comrade Welshman Ngube.  
Welshman.

Weshman

Uh thank you very much. I think  
I've now unmuted myself. Can  
you hear me? Okay here it's I  
hear you and see you too.  
thank you very much ma'am. To  
to be part of this fascinating  
discussion. Um  
must say that I I enjoy the  
this presentation and I've  
equally enjoyed the  
interventions by my by my  
fellow panels in in this  
discussion. Um like my fellow  
panelists I didn't prepare a  
statement. Uh I came  
speak to. the issues as a  
picture.

eh my picture. your bandwidth  
is quite low. And that that  
might help. Sorry. If you say  
that again. Your picture. If  
you switch off your picture you  
may may get less distortion on  
your much more important  
things. Okay.

Thank you very much.

I

Let me just say the following.  
Firstly I am singularly  
qualified to to speak about the  
South African situation. But  
nonetheless I I will hazard

on the trigger to this debate  
to the state. Uh

opinion

please depend by

Minister Sisulu. Uh I would  
also say in in old age I have  
tended to be

a

bit more skeptical. Uh being  
sure about things that I would  
ordinarily have been more  
certain of in my younger  
younger years. But this this is  
what I understand to be the  
essence of the issues that's  
raised by Minister Nesisole. Uh  
I think what she's saying Eh is  
worth taking heed of. Firstly  
she makes point that  
of any country of South Africa  
is not a eh it is manment it it  
it is such a need to to  
regulate eh basically the  
relationship between the state  
and citizens, the exercise of  
power, eh how to constrain and  
lean, how to facilitate  
sometimes this exercise. And I  
think that's correct.

and

she she warns against  
raising any any constitution to  
the reveals the scripture.  
However good that constitution  
is. Eh two. She makes the point  
which has been made in this in  
this discussion. And for me  
that point raises the issue.

What

what what are the purposes of  
of of constitution Uh sometimes  
we we tend to, to repose on  
constitution,  
which are not intended, for a

constitution. When you begin to talk about insiders and outsiders have and have not. We must then ask ourselves, Is it one of primary functions of a constitution? To deal with for instance, social inequality. Is it one of the primary function of a constitution to deal with structural deep seated economic exercise and we need to answer that question. If the answer to that question is that one of the intentions, the purpose of a constitution is to deal with such issues. Then it is legitimate. To raise that question in context of South Africa. I think generally accepted that South Africa is one of the most societies in the world. And the stability of stability of any constitutional order, depends on the accepted of the extent of the norms, the values that the constitution enunciate. And we are reminded of some of these challenges. By what I call ambition. The what what happened in the United States shows some of the challenges that constitutions will offer. a significant segment of society Believes that a constitutional order is not firm or is long for them. You establish and eh them existe nce South Africa. eh South Africa should be able to locate them in the eye at the promise each other in 1994.

And and those remarks that I wish to make. I don't claim any answers. Um I do not claim to know which side is correct. As a comparative real historian. Uh I think it whites in South Africa To honestly of of the deaf. But let let me I will try and be Zimbabwean comparative. Eh scenario. Eh I think eh eh professor eh Aldi eh in his orientation. Eh did explain the job in bringing in eh from a a perspective in the historical situation in Zimbabwe. He pointed out quite correctly that the independence constitution in of Zimbabwe was loyal almost anyone It was lawed by the nationalist parties. Because it postponed 1 day. Told us fighting for the resolution of the land. Uh equal magitarian rule. And and therefore it was a discredited document from from day one. It of course was lawed by eh those who had eh fought on the side of colonialism to the extent that it brought eh a black majority eh eh rule. So it was always bound eh not to succeed from new one. And must always like this conversation. How were we going? To come up with document that we would all like. We would all be able to relate to. Unfortunately eh the ruling party after the election of the that eh eh how they referred to. Eh asserted eh units from the right. Arrow Jesus, the power, the right, then make and then make that

institution as deemed fit. Much of the the word by civil society asserting the right of the people to make a country for themselves. The final opportunity came during the days of the inclusive government. Uh nine eh the process. We then engaged in and which we thought eh would result in a constitution that would eh be identified as a Zimbabwean constitution by everybody. Eh by contributing we took a referendum it was adopted overwhelmingly at the agenda. But they regretted rejectable. Except among the elites except among what eh I could borrow the term insiders. Eh that question eh failed eh to be identified as a documented we should all fight for. And and hence the amendments that now being met will with Afghanistan. Almost the same that making amendments. So we have seen two or three amendments eh since then. And all those amendments reassessing the old imperial palace. But eh we we had created a between approximately nine nine and the time of eh of copper. And we therefore do not have the constitution as a unified principle Uh that is the ordinary citizen less to. And that immediately undermines the value of the conscience number. This then of course compounded by this that two

years after the adoption of  
that constitution  
Westman  
your I'm back. Okay.  
And finish my to  
where you  
eh committed  
we  
your audio  
is so bad now I  
think we have to a worseman  
I think we have to calls the  
day for you here. Connectivity  
is very bad for Welsh people.  
Let me me say  
is getting  
poorer and poor. So  
so so I I want to simply say  
that eh eh we now where there  
is a ability to to  
independence of the judiciary,  
the capture of practically all  
democratic eh constitutional  
institutions by eh those who eh  
executed the inter  
eh government. So so eh the the  
differences between South  
Africa and Zimbabwe could not  
be much darker. The economies  
could not be a more and we we  
are on a trajectory which is  
completely the opposite at at  
least let me say among the  
elites. And so those are are my  
my remarks. So in conclusion  
the the challenge that we have  
How do we a constitution work  
for both sides or if I may  
say. We make everybody or as  
many people as possible. in the  
process of our constitutional  
orders in South Africa. Uh be  
it in South Africa. Because if  
we don't they will always be

the populist, the Trump this world eh who will come in and who they do the constitutional order becomes or becomes in geopathy. Uh Igbo I thank you very much. Those are my steam marks. Limited by the poor network that I have. No thanks Washman. You are able to make the point. And resounding so at the end. Uh you've made the main point, The stark contrast between the South African situation. Whatever its limitations. And the Zimbabwean situation in which you know the constitutionalism and rule of law. Uh largely alien. And the judiciary is largely captured. I think we have made the point very well. I'm sorry that you had quick on activity. We hope next time we'll we'll we'll we'll help in getting you in a good connectivity. You must be somewhere in the bush. Thanks thanks Rochman. So now we have enough time for those who want to erase questions. And I'm going to ask Tony Rilla my co-host. To raise some of the questions which have come on the chat. Uh and direct them at at each of our panelists. But in in doing so the Pandas will respond to those observations as they wind up. Uh so in the meantime Tony and then any other person please raise your hand. this enough room, enough time to extend to extend the discussion. Thank you. Tony. Thank you Eva. And thank you. This I think has been such a

rich discussion for those of us sitting north of the Limpopo further up. Um and thanks to everybody. Um it hasn't been a lot in the chat but maybe I can just pick up a couple of themes that were picked. Uh and linked to them. Uh the first really is to to Albie. Um And the point about the homegrown process. And I was very struck by the notion that what was critical in that homegrown process was the creation of regional and international solidarity for a domestic process for a country in a crisis. and I think that's very important to look at in the context of Zimbabwe. Um and that links back to Welsh's last point and sorry the connectivity was so bad. But as he pointed out the contrast between Zimbabwe and South Africa could not be greater and as Zimbabwe sits in a particular crisis now in which it seems that everything is loading down on Zimbabwe to sort out their own domestic problems. The real question that if we are to solve the problem around adherence to constitutionalism, not necessarily the establishment of a new constitution but the way in which an existing constitution might be implemented properly. What is the role of that kind of solidarity? So, I think that's a very important one. The second one I think really came out of Steven's

presentation and I think Stephen's presentation is very important for the in which political economy factors a major effect on the way in which constitutionalism rule of law and human rights actually are respected. And how to work out the balance between the important role of the courts. And in at least the Zimbabwe context. The ways in which the state absolutely disregards every single one aspect of those things. The third thing I think really came out of the wonder. Which was I think very important where she amplified the ways in which the rule of law is critical. And the link between constitutionalism and rule of law. Um and I'm throwing these open to everyone else. And then of course Albury raised some really important questions. And and this has been really at the heart of the constitutional project in Zimbabwe. And the notion that started in the late 1990s with the notion of a people generated constitution. And the ways in which to some extent that is captured by elites. How do we capture the nature of the processes under which people have lived. And the processes under which they wish to live in the future. And to be authentic To their own aspirations, and, and, and I think implicitly, he's asking the question about whether constitutionalism or the

creation of constitutions, are, to some extent, a very elite project. So I'm throwing those observations out, and hopefully we'll get some, some feedback from everybody. Thank you. Yeah, before we bring the panelist, Eleanor, have your hand up. Eleanor, Sisulu. Yes, the lights are dark here so I'm not putting my camera. Eskom is not working. We need a constitutional intervention. Uh to get to get them to work. But I I want to say, first of all, Aubrey's point about insiders and outsiders and language. I think it's an extremely important point. Uh, that and, and, and language is an issue the United Nations has declared nineteen twenty to nineteen thirty-two, the decade of indigenous languages. And this has been prompted by a worldwide observation that people, indigenous languages are being increasingly marginalised. They've been threatened with things, extinction, and that people speakers of those languages are disadvantaged. And I think the one area where they are most disadvantaged, is when it comes to constitution, because constitutionalism is mostly an English or in the case of other countries. It's the language or the colonial language in which it's articulated. And I think it's important that and I wish that the the constitution, the South African constitution

protects the linguistic rights of everybody. And actually this constitutional constitutionally people should be able to get educated in the language of their choice. But in practice this doesn't happen. So I think this is a classic case where the constitution actually opposite of preventing inclusion is actually it's constitutionally protected. People's linguistic rights are constitutionally protected. But whether that becomes a substantive right it's a it's a case of political will. And maybe a case of the kind of colonial colonial coloniality that Aubrey referred to. So you know I would wish for a popular I I think constitutions would be incredibly enriched if there was a huge investment into those discourses in all the languages. And and and I think rights of people would be better protected. We have a case in South Africa where the the quality of court interpretation. Because of low investment and not spending on interpreters and proper training has compromised the the quality of legal representation that marginalised people gets in the courts. So there's a real practical a practical issue there. But I think I want to comment from a human rights point of view that you know South Africa is not different from the rest of Africa. Is

part and parcel of the continent. The and and I think the to me there's a difference of degree in constitutionality. But there's also a continuum. And there I I think the word accountability didn't come in anyway. That constitution no matter how defective they are, are an instrument to keep the ruling class accountable. And I think the African experience has told us that it's really important. Things like limitation of terms of the president, for which Africans across the continent has fought long and hard for. Uh, based on 30, decades of post-independence rule in Africa. And I think really South Africans would be really wise to, to pay attention to those processes in the rest of the continent. And that there's a value to your constitutionality. I won't say the constitution. I will say constitutionality. Because even under the most defective constitution you if you have a level of constitutionality the courts can be a terrain of struggle. For the poor, for the marginalised, for the the oppressed. And even under apartheid we saw that the courts was a very important terrain of struggle. So I get terrified when politicians start talking attacking constitutions. Because I don't trust their motives. Uh I think I would react differently with

comes from other sectors of the society. Uh but I think when it comes to politicians and and the the the narrative is the same. We can say South Africa is different but the narrative, the sound and I think the impulses that are driving those attacks are not much finally I just want to pay tribute to the incredible judges that South Africa has. To Arthur Head. Arthur Chaskelson, Pius Langa, Albie himself, Edwin Cameron. I think these are amazing human beings. And I must say I felt deeply deeply insulted when they were called Quizlings. I I just I I think the jump from the constitution which is which is a valid thing to do. And actually insulting judges is is for me I didn't see the the link between the two. Uh thank you. Thanks Elena. Anybody else before us the pundits to to come in and wind up. Anybody else?

ehm Aubrey I saw your hand but I will I will I will call on you just now. As we wind up. Let's begin then. I'll begin. Welshman are you able to say anything? And winding up? Welshman.

Where whereas your system broken down altogether? Welshman.

Okay, we forgive you We forgive you. Uh Steven.

It's okay, Welshman. We'll forgive you. Steven. Yeah, I think just to say I was asked a question on the chat which I

tried to respond to but let me just give you a couple of minutes. Uh, and it's a point that it's commonly made, which is that, yes, the letter of the law of the constitution doesn't prevent change. But the judges prevent change, because they have a particular view. Uh, and you know, in this discussion that I was talking about, which is based, I, I mean, I, I go into that at great length. Uh, but I said to say that there just isn't any evidence support this. Um this claim that the judges have ruled in a in a way which prevents change. Uh so you know I I I'm obviously not going to sum up you know discussion of of engagement with half a dozen legal scholars. But I think if you look at the court records and if you look at what arguments being made you will see that the argument that judges have been ruling in a way which prevents change because they have a particular perspective isn't actually worn out by by the evidence of their judgements. Thanks. thanks there Steven. Aubrey.

Thank you Ibbo. Um I was not raising my hand actually. I was this is how I gesticulate to look intelligent. Um let me start with a declaration. Um I am not a rabid opponent of the constitution. In fact, for the next 12 months on the chairperson of the Constitutionalism Fund in South

Africa. A fund that was put together by donor organisations to promote constitutionalism. In South Africa. That said Um I inhabit many wealth. Two of the worlds I inhabit is the world as it is.

the world as it should be. And therefore my my critique sometimes criticism. Of our constitutional order Represents it in. In an attempt to travel from the world as it is. To the world as an autism. It should be. I think another point I must make again to steal from Steven. The point of insiders and outsiders.

if you check you will realise that all of us, all of us, without exception simultaneously occupy the position of insider and outsider. And and we do so in multiple ways. And if this binary of insider and outsider is regarded as an identity We then have multiple identities. For instance, take that question of language. I have argued that the majority of South Africans are outsiders. But we are outsiders too because we have no access or have very little access to the stories they tell. About the South African story.

And in terms of class, the same thing happens. You can pick any indicator.

Simone simultaneously we all occupy this position. Uh of insider and outsider. So as much as I can speak with

righteous indignation about  
language

I myself I mean insider to the  
to the extent that I I belong  
to a group of people outside  
those who are not eloquent in  
the grammar. of English. Not  
just as a language but as  
cultural.

expression.

But another thing is this.

we Or it has become  
commonsensical. that the only  
democratic option available is  
the liberal democratic option.

I I always argue as one who  
taught English, that, the word  
liberal is an adjective,  
describing the noun democracy.  
Which means, potentially there  
are other adjectives we can put  
in front of the non-democracy,  
which means therefore there are  
other democratic options that  
are available for us.

Democratic options that are  
known, and democratic options  
that are unknown to the extent  
that they still need to be  
created. And therefore when I  
talk about all constitutions  
being a I mean representing the  
triumph of a particular  
worldview. I am also talking  
about the extent to which we we  
tend to pretend there's only  
one democratic option available  
to us. Let me say the last  
thing is this Igbo. Maybe the  
last two things. We extoll the  
independence of the judiciary.  
Now, if I'm correct in saying  
that our constitutional order  
and the constitution itself and

therefore the our judiciary.  
Represent the triumph of a  
particular worldview which has  
become dominant. In relation to  
that worldview. They are not  
independent. The last point I  
must make is that you know, I,  
I keep on talking about they,  
they never ending task of  
renewal.

let me borrow from physics. If  
you speed up an object fast  
enough at a certain speed, that  
object will disappear. When it  
comes to discourse,  
philosophical and otherwise. If  
you slow down a a particular  
reality such as slowing down  
the speed with which you travel  
from the world as it is. To the  
world as it should be. A few  
centuries down the line. You  
have people who have no memory,  
individual or collective.

where the point of departure  
was. And therefore in the same  
way with all the zigzagging but  
ultimately leading to a point  
of change. It's quite possible  
that what you have with this  
never ending task of renewal,  
renewing our constitutional  
order and the constitution. You  
may end up with an order that  
is the antithesis of what was  
there at the point of  
departure. But this task of  
renewal is not possible unless  
you do what eh Jay Krishna  
Muruti says. That we need to  
free ourselves from the norm.  
And if we free ourselves from  
the known we engage in the  
task. Each time when we find

the new norm. Of reaching for freedom from that norm. For me that's the ever ending. Must engage in. Thank you. Thanks Aubrey. Thanks very much indeed. Luando.

Rwando, your last words? Is Rhonda still there?

Rwanda

She's gone Eva. Moved to Albi.

Albie, your last words, Albie?

As you began, so you earned for us. Albie. It's also got it.

is Mike is muted. He's muted.

He's muted. He needs to unmute.

Abby, unmute.

Yes, I was wondering why you weren't laughing at my jokes.

I said I'm used to being the last as the only judge on the panel. Except you are the judge of the judge. Uh and and I was just thinking you know how how rich the discussion was because it was so diverse. Every voice was different. Every point of departure was different. Uh and and you know from Luando I picked up the importance of one case. You tell such a story through one case. It does so much to refute. Uh false things that are said about the court and the constitution and so on. Just through one case. Uh from Albury the importance of being it it just took me back so much in a in a strange way. I don't have your ancestors already. Uh my ancestors are kind of very very different. But joining the struggle and and down the street, singing the songs and I'm singing songs I don't even

know what the words mean. Uh and somebody laughs picks him up his head and she said Albie you you know what you're singing? I said no. She said you're singing when we get out of the right Whitesfield. Show them what. Uh but I'm singing away because I'm Africanising myself if you like. By shedding my tight white skin. But I'm not I don't speak African languages. I'm not fully involved. Uh and and that diversity of South Africa is part of the richness and it also become become a curse. Uh and the importance of dealing with that. Steven, you know, Steven, you provoke always strong responses in me. Uh, because you write strongly, and, and, not according to any ex paradigm. And usually I agree with two thirds and I disagree with one third. I think I agreed with everything you said today. But that might be could be, be because my law clock married your son, who was also a law crime at at the court. But I think we have a kind of feeling for constitutionalism. It's based not simply on the idea. But having seen it in practice. Seeing it functioning. Seeing what it means. Uh in in society. Uh Welshman I so wish I could have heard more. Uh because there was so much interference with what you were saying. Uh because to such a large extent the agony of of

Zimbabwe. Uh the moments of hope and the moments of depression has been extremely influential in South Africa. It's part of our never again, our never again. It's not only never again apartheid and never again the horrible exclusion of the humanity of the majority of our people. Never again, the conquest and the past laws and the Pakistans and the disrespect and so on. But it's also they never again of of of people who fought in the freedom struggle often very very bravely going on become oppressors and and and, and, and, and seeing that our constitution we must have land reform, we don't want land grabbing, to give it out to the, the sons in law and, and, you know, of the people who are in power, you know, these, there's other kinds of never again. The term limits, the importance of that. Uh, having independent institutions, chapter nine, an independent electoral commission, strong protections for at the the Judicial Service Commission Strong Protections for that. The Auditor General playing such an important role. So sad to say that some of the painful experiences of Zimbabwe entered into our constitution making in in a very very sound way. You had great moments when at one stage you did draft the new constitution. It was terrific involvement and and

participation. Uh and it was sad to see that that's honest that that seemed to hold at that time. Uh wasn't fully fulfilled. Uh I'm going to end up with another kind of of psychotomy. Uh and that's between skepticism and cynicism. And I think it's extremely important for those of us who think of ourselves as as intellectuals and and people configuring in the public debate. Uh and skepticism demanding evidence, challenging positions, holding people accountable is absolutely fundamental to what we do and to constitutionalism. Uh constitutions in that sense are based on skepticism. But nobody is anointed by history to take over and to rule and to rule well. Uh and we guard not only against return to the past a new oppressors. We can't against ourselves. And we were certainly aware of that. But cynicism is something toxic. Cynicism is a world of manipulation. Of of using words and phrases and ideas. twisting them around, ignoring things when you don't want them and and we find it inside South Africa. Uh it's been fought out to some extent in in in the in the courts in relation to a particular case involving a judicial officer won't go beyond that. But the cynical view is is of humanity. It's of institutions. It's of all

politicians. Uh it's of all freedom fighters. Uh it it of the trade union movement. It's of the women's movement. Uh it it's of the dreams that we each have as individuals. Uh there's a negativity that that that's corrosive. Uh and and undermining. skepticism is challenging everything. Uh and the debate that was launched by by the the the minister initially to my mind was based on deep profound cynicism it's not only the subject matter but the tone the the moment of of its presentation by somebody who'd been at the Constitutional Assembly who had shared and fought hard for rights in the Constitutional Assembly would be a believer then it it made it to me a cynical introduction to the debate. I don't want to go beyond that. Uh I am cautious as a former judge of becoming engaged in current controversies and events particularly if they might end up in court. But somehow because this is about the court. It's about my colleagues. It's about people like Pius Langa and Sifi Kampepi and wonderful wonderful human beings. Compassionate. Thoughtful. revolutionary in their spirit, in their thinking, in the ways that they do. And to my mind, that is can only be attributed to a sort of cynicism. And, and not to the skepticism that, that we need.

Thank you, forever for organising this and thank you for inviting me. Thanks, Albie. I think you have summarised it very well. And concluded the debate for time being. The distinction between skepticism. And cynicism. But more than that I think you have really summarised and we it takes us back to the quotation from Stephen which I read at the beginning. And highlights the the the point that Albury has made Every Epoc has its challenges. Ours are just so enormous at the moment. And the the the elephant in the room is the political economy. Of our countries. Which go beyond constitutions. But yet and very important in this very turbulent times. Confucialism and rule of law are the best defense that we can have. in the in the moment. I think Rolando's passionate presentation said it all. But therefore I want to thank the panelist, Rwando, Steven and Welshman. Thank you very much indeed. And as I said earlier on this this programme has been recorded. It described We published as a policy document. So that students of politics and constitutionism can read in the various eh institutions. And that such rich discussion is captured for posterity. Thank you very much and I want to thank my niece Eleanor Sisulu. for helping put

this together. He's done a  
fantastic job. And getting  
people like Albie. On on this  
platform. Thanks very much  
indeed. And good night.  
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