

**Mr Acting Vice-chancellor, Mr Dean, family, friends, colleagues, ladies and gentlemen:**

The title of my address tonight is “**FAILED STATES, FADING DREAMS AND A FAILING DEMOCRACY: THE CRITICAL ROLE OF PUBLIC LAW ACADEMICS**”. Since there are so many qualified lawyers present, let me start with the enabling provision for this address, as well as the inevitable disclaimer.

According to the University of Pretoria guidelines on inaugural lectures, the basic principle of an inaugural address is that the person should (amongst others)

**... speak on his/her discipline and its development, including its historical context; his/her perspective on his/her task; his/her objectives; how the discipline serves, can serve or should serve the community; and in this respect he/she may allude to new vistas or make a policy declaration.**

However, tonight’s gathering comprises both academics and (hopefully) interested laypersons. This means that I have to impress my peers, my friends and my family; the lecture must be academic, entertaining, informative, profound, critical, understandable, and above all, it must be brief: I have only 40 minutes to do it in. Whichever way you look at it: I am probably on a hiding to nothing!

Now a double-barrel disclaimer about what I want to say tonight:

At the start of the Reformation Martin Luther uttered the following famous line:

**I cannot and will not recant anything, for to go against conscience is neither right nor safe. Here I stand, I can do no other, so help me God.**

More recently the American folk-rock protest singer Steve Earl made a remark during a live performance. For those of you who know Steve Earl, I provide an edited version (not only because my parents are here (this is a family show), but also to reflect the recent reaction to Justice Kriegler’s scathing criticism about the lack of action by the Judicial Service Commission in the Hlophe-debacle):

**It is never unpatriotic, unconstitutional, inappropriate, improper or disloyal to question anything in a democracy!**

## **PART 1 — THE CRITICAL ROLE OF PUBLIC LAW ACADEMICS**

In the first part of my address I would like to examine the critical role of public law academics in South Africa, and for that purpose I want to distinguish between “critical” and mere “criticism”. “Critical” refers to raising vital questions and problems, coming to well-reasoned conclusions and solutions, testing them against relevant criteria and standards; thinking open-mindedly within alternative systems of thought, recognizing and assessing their assumptions, implications, and practical consequences. A critical public law discourse is about (amongst others) the failure of the state to act under, through and within the supreme Constitution.

On the other hand, in the context of tonight’s address, mere criticism is related to finding fault, or to trash without constructive empowering engagement with the issues and questions. The critical role of public law academics is not the typical knee-jerk reactions one finds around a *braai* on a Sunday afternoon. It is not the I-told-you-so and what-else-did-you-expect criticism of people who, for instance, will still not admit that apartheid was inherently evil and wrong, and who still maintain that the TRC hearings were nothing but a circus. (On that point, let me recall the standard joke that did the rounds after 1994. According to the joke it was difficult to understand how the National Party could have stayed in power for so long, because after 1994 one was hard-pressed to find anybody who actually voted for the previous government. However, I have news for you: just be at Loftus on a Saturday afternoon when they play *De la Rey* — they are all back again!)

Years ago Pieter-Dirk Uys remarked that it was easy to write political satire in South Africa, because the South African cabinet ministers provided all his material. With respect to my address tonight nothing has changed: the politicians still provide the inspiration and the material — although, sadly, tonight’s lecture is

not political satire. It is also not specifically about crime, and farm murders, and affirmative action, and Bok van Blerk, and *Boetie is die bliksem in*, and Khutsong, and abject poverty, and AIDS, and administrative ineptitude. But in a sense, it is about all of those. My address is also **not** about a failed state, but rather about a **faltering democracy and the failing constitutional state**.

A standard question in the United States still is: “Where were you when Kennedy was shot?” In South Africa, a similar question could probably be: “Where were you on 2 February 1990?” I still vividly remember that day. I was part of the Department of Constitutional and Public International Law at UNISA, and we listened to FW de Klerk’s speech in one of the offices of the old Skinner Street building. There was elation and hope: The dark days of the state of emergency and the political violence of the struggle seemed to be over. For public law lawyers in particular, the New Jerusalem of a new and just constitutional dispensation was beckoning. With the conclusion of the negotiations, the adoption of the interim Constitution and the transition to a constitutional democracy, an exciting era started. Not only did we have to rewrite and redevelop our study material and textbooks, but we were part of a monumental political and legal paradigm-shift. Indeed, as Cameron J (as he then was) stated in *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W) at 863J:

**The Constitution has changed the ‘context’ of all legal thought and decision-making in South Africa.**

All lawyers, but public law academics in particular, started to engage with new themes, which were dominated by the human rights discourse. The discourse included the notions of a supreme constitution, a justiciable Bill of Rights, socio-economic rights, and of course, the express application of fundamental constitutional values in the post-apartheid legal domain. Public law academics especially, embraced the Constitution, and started to analyse a wide range of themes, including, amongst others, legal interpretation, and the practical implications of the founding values of equality, human dignity, freedom, non-racism and non-sexism.

One of the initial public law themes was the perception that, through the adoption of a supreme constitution, South Africa was elevated to the status of a true substantive (or material) constitutional state (or *rechtsstaat*, in the German sense of the word). A supreme constitution is not merely another legislative document, but the supreme law (*lex fundamentalis*) of the land. A constitutional state (which has a supreme constitution) is underpinned by two foundations: a **formal** one (which includes aspects such as the separation of powers, checks and balances on the government, and the principle of legality: in other words, the institutional power map of the country); and a **material or substantive** one (which refers to a state bound by human rights and a system of fundamental values such as social justice and equality).

On the face of it the new South African constitutional dispensation complied with those lofty requirements. The interim Constitution expressly referred to South Africa as a constitutional state (*regstaat* in the Afrikaans text). Although the express reference to a constitutional state was omitted from the 1996 Constitution, all the conditions for a substantive constitutional state were there: the formal requirements of separation of powers, checks and balances, a multi-party political system, universal franchise, provisions for regular elections, and so on, as well as the substantive trimmings (such as the supremacy of the Constitution, a progressive justiciable Bill of Rights, fundamental values, as well as the legacy of the fundamental constitutional principles which were laid down in the interim Constitution).

However, not all public law academics agreed that the new South Africa was a complete constitutional state, both formally and substantively. During his inaugural lecture in 1996 Hennie Strydom (as published as “The international and public law debate on cultural relativism and cultural identity: origin and implications” (1996) *South African Yearbook of International Law* 1 – 28) questioned the reference to post-apartheid South Africa as a constitutional state.

He argued that what was missing was the very nature of a constitutional state: the implication of the state being bound to an inherent substantive juridically-qualified limitation. He argued that this substantive qualification

**... manifests itself in the primary (and limited) function of the constitutional state ... namely to realise the equal status of its citizens in both the public and private law spheres regardless of race, culture, origin, religion, gender or political persuasion. This is the essence of the principle of constitutional justice and requires governance in the interests of all, underpinned by constitutional safeguards for human rights and freedoms.**

He based his argument (that the post-apartheid state does not fully comply with the substantive notion of a constitutional state) on the absence of (at least) three core issues: administration of justice, legal certainty and personal security of the person.

Hennie Strydom's viewpoints also link with the arguments raised by Marinus Wiechers ("The fundamental laws behind our Constitution" in Kahn (ed) (1985) *Fiat iustitia: essays in memory of Oliver Schreiner* 383ff) in his article about the Schreiner minority judgment in *Collins v Minister of the Interior* 1957 1 SA 552 (A). In this contribution Wiechers makes the point that there are certain immutable and non-negotiable "supra-constitutional" principles that transcend the text of a constitution. One of these fundamental principles is the prohibition of the manipulation and abuse of democratic institutions by a majority in parliament. Bear in mind, however, what Wiechers wrote about occurred in a system of parliamentary sovereignty five decades ago during another constitutional crisis, but his comments are again very valid in the new South Africa.

In the initial afterglow of the constitutional jurisprudence flowing from Braamfontein, these now-prophetic words were largely ignored in the wider public-law discourse. Now, eleven years later, Hennie Strydom's scepticism has returned to haunt us, and maybe the time has come for new themes in the public law discourse to be explored. On the other hand, as I will illustrate shortly, maybe it is time to critically revisit **old** themes in the **new** South Africa. In view of current

public law developments in South Africa, I would like to illustrate the notion of a failing constitutional democracy with a simple metaphorical construct.

### **The metaphor of the inverted hurricane**

A hurricane is swirling, violent and destructive on the outside, with a calm and silent centre. On the other hand, the current “storm” in South Africa seems to be the opposite. Our public law landscape is characterised by a calm constitutional exterior (values, promises and ideals), but with a violent, imploding centre.

On the substantive outside the constitutional values are alive and well. Judgments by the courts (especially the Constitutional Court) are adorned with value-laden rhetoric and symbolism. Allow me to provide a few examples:

- The late former chief justice Mahomed explained constitutional supremacy as follows in *S v Acheson* 1991 2 SA 805 (Nm) 813A-C:

**(T)he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a “mirror reflecting the national soul”, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government.**

- In *S v Makwanyane* 1995 3 SA 391 (CC) para 262 he also referred to the new constitutional dispensation:

**The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.**

- In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) current chief justice Pius Langa stated the following:

**Section 39(2) of the Constitution means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The**

**Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance.**

- On the issue of constitutional symbolism, the late Ettiene Mureinik (“A bridge to where? Introducing the interim bill of rights” (1994) *South African Journal on Human Rights* 31) referred to the supreme Constitution as a bridge in a divided society: a bridge from a culture of authority (based on sovereignty of parliament) to a culture of justification (based on a supreme constitution).

All of this is fine — after all, the new Constitution should be more than a formal power map, and the rhetoric is an attempt to come to grips with the new value-laden constitutional paradigm. However, reality seems to indicate that while the constitutional values form the substantive “window-dressing” of this new constitutional state, the crucial centre is imploding in a formal sense of the word: the absence of accountability, lack of respect for the rule of law, the collapse of essential services [for example, a pathetic public health care system; a judicial system being strangled by administrative bungling and ineptitude; crime which is not rampant, but rather out of control; a poor social welfare system, and so on], denial about the HIV/AIDS epidemic, and the lack of a vibrant, active and vocal civil society, all seem to indicate an erosion of the central tenets of the constitutional state and democracy. In the process the following comment by Griffin (“Constitutionalism in the United States: from theory to practice” in Levison S (ed) (1996) *Responding to imperfection: the theory and practice of constitutional amendment* Princeton UP 43 – 44) about the American Constitution has an eerily South African relevance:

**Lawyers intend to regard the Constitution as a set of ultimate normative standards appropriate for judging any political practice. The Constitution occupies so much normative space that it is hard to see anything else.**

I want to highlight two recent events to illustrate this gradual implosion of the

central democratic core, happening behind the calm value-laden facade of a constitutional state:

- Allegations about the Commissioner of Police and his relations with organised crime have been circulating for a while. In reply the President asked for evidence to support the claims, and just when that evidence seemed to be forthcoming in the form of concrete charges and warrants of arrest, the National Director of Public Prosecutions is suspended by the President. The whole murky affair is now to be investigated by a commission of inquiry headed by the former speaker of parliament and ruling-party stalwart! On this issue Pierre de Vos (on his blogsite *Constitutionally Speaking*) recently commented as follows:

**If the President is allowed to get away with firing the National Director for vague and unspecified ‘national security’ concerns, we are on our way to a Putin style ‘democracy’ in which His Royal Highness has the final say in everything important – including who gets investigated and charged and who not. And then, well, goodbye rule of law and hello to a national security state.**

- Serious allegations (including alcohol abuse and possible criminal activities in a neighbouring state) are levelled against the Minister of Health. Apart from the possible prosecution of the journalists who investigated the matter, nothing more is done about the matter. However, when a member of the opposition exercised one of the most basic and traditional principles of parliamentary democracy by asking a question about the issue in parliament, the question was ruled out of order by the speaker of the national assembly. When the member persisted with the questioning, he was barred from the assembly!

According to media speculation the lack of government action might relate to the president’s campaign for re-election as leader of the ruling party. If so, it is an extremely disturbing development when the constitutional principles of openness, accountability, transparency and good governance are trumped by the internal political power-dynamics of the ruling party. (But then again, it resembles the



deafening lack of reaction — probably in order to preserve the myth of Afrikaner unity — to the infamous “It leaves me cold”-speech by a former apartheid-era Minister of Justice.)

Another disconcerting trend is (once again) that of a *de facto* one-party state (with one political party dominating parliament, with the cabinet in turn dominating parliament). Another academic has commented as follows:

**The South African executive is increasingly being given greater and greater powers to bring about fundamental social, economic, political and legal change simply by administrative fiat ... but if [these] developments ... continue, the constitution will cease to exist in all but the most formal sense.**

These are chilling words, indeed. But even more worrying is the fact that this was said by WHB Dean (“Wither the Constitution” (1976) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 266 at 287) during his inaugural lecture in 1975! Once again the South African democracy seems to be reduced to parliament acting as a rubber stamp for the executive. So we seem to have had a full circle: a return to a *de facto* one-party dictatorship, and a failing democracy not envisaged in the Constitution. What is disconcerting, to say the very least, is that this is happening under the cloak of constitutional democracy, and not in a Westminster model of sovereignty of parliament. This time around it is taking place inside the crumbling democratic core, despite the external value-laden “bumper stickers” (to use Stu Woolman’s description of hollow constitutional slogans) of South African constitutionalism. There is the very real danger of these fundamental constitutional values being used as a “substantive cloak” for a new type of orthodoxy.

The apartheid regime of yesteryear operated in a public law system devoid of substantive “higher law” norms, but it tried to comply with the positivist (formal) aspects of a mere *Gesetzesstaat*. Paradoxically, we might now have the situation where the post-apartheid government seems to be violating certain **formal** aspects of the constitutional power map under the convenient cloak of pseudo-

substantive constitutionalism and constitutional supremacy.

Maybe it is time to explore another public-law theme (however scary and far-fetched it may seem now): are we not slowly moving beyond just another authoritarian and centralised *de facto* one-party oligarchy (operating as a democracy under the smokescreen of constitutional values) towards a new subtle and sophisticated form of totalitarian rule? I do not refer to the classic totalitarianism of the former Soviet Union, Nazi Germany, and perhaps Peronist Argentina. This subtle and incremental shift to a seemingly new (paradoxically constitutional) neo-totalitarianism entails the increasingly centralised control of society in its entirety: education, telecommunications, sport, economic development, safety & security, health care, over-broad anti-mercenary legislation, even proposed new race-based property registrations, possible executive control of the judiciary in the future, and so forth. What is more, these step-by-step moves towards a centralised and total control of society are taking place in terms of the ruling party's own interpretation and application of transformation, under the authority of the supreme Constitution.

Time does not permit a detailed analysis of the literature on totalitarianism (including the work of Karl Popper, Hannah Arendt and Alfred Stepan), but this is a new theme that should be explored by public law academics, as well as political scientists.

## **PART 2 – THE CRITICAL ROLE OF ALL LEGAL ACADEMICS**

In *Pharmaceutical Manufacturers Association of SA In re: the ex parte application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44 former chief justice Chaskalson redefined the South African legal system:

**I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law,**

**including the common law, derives its force from the Constitution and is subject to constitutional control.**

In other words, all law are now constitutionalised. Although we still accept and recognise various branches of law, all legal academics necessarily form part of the public law endeavour — under the supreme Constitution — in the wide sense of the word.

In this second part of my address I would like to briefly discuss the critical role of **all** legal academics in the sense of “**critical** as decisively important in the success or failure of something”; critical as **crucial** to a possible outcome.

In 2005 Jan Botha (“Towards responsive and effective provision in Higher Education – challenges, opportunities and choices”, paper delivered at the Higher Education Leadership and Management Performance Management Workshop, Cape Town 2005) considered four metaphors for a university, namely the imaginary universities of “Athens”, “Berlin”, “New York” and “Calcutta”.

### **Athens**

The “Athens” type of university can be characterised as a university dedicated to the pursuit of wisdom. Although the study of the humanities flourishes in the “Athens” university, the activities of these universities are not limited to the humanities. However, in its values and ethos it emulates the philosophy or history departments of the university.

### **Berlin:**

The “Berlin” type of university strives to achieve a unity of teaching and research to provide students with an all-round humanist education. In this type of university, research in the basic natural and social sciences, as well as postgraduate studies thrive. In its values, ethos and practices, it emulates the chemistry or physics department with its scientific rigour.

## **New York**

The “New York” type university educates and trains students to succeed in the dynamic world of the market place, characterized by market principles and market language. This type of university emulates the ethos of the business school or the faculty of commerce.

## **Calcutta**

To a large extent the “Calcutta” university is a development-orientated university. It focuses on the underprivileged in society and the eradication of poverty through developmental activities. It emphasises service learning and life-long learning, as well as applied research, and it has (quite often) an activist stance. In its values and ethos it emulates the departments of social work or nursing.

I do not intend to analyse and categorise the University of Pretoria according to these metaphorical guidelines. Suffice to say that we probably comply with some of the characteristics of all four. What the “Calcutta” model does tell us, though, is that our role (especially in the Law Faculty) extends beyond mere formal teaching of prescribed curricula in the lecture halls. In my view all teaching and research necessarily include a form of initial community engagement.

Are we so busy with NRF ratings and CV’s and research outputs and throughput-rates (however important they are) in our own little academic worlds (where the fights are so vicious because the stakes are so low), that we forget about our vision, mission and the bigger picture in the process? What is it we leave with the students? Are we doing more than merely downloading the basics of the law? What are we doing extra to produce more than merely a stream of future lawyers with visions of a house in a security estate and two BMW’s in the garage?

A few years ago in Stellenbosch I was complaining to Andre van der Walt about undergraduate students’ increasing lack of reading and writing skills, as well as their lack of any knowledge about history and politics. I complained about lack of

resources, and too little time in the LLB curriculum to address these problems. He fully agreed about these problems, but then added that, whether we like it or not, we have to tackle the issues: **if you are not part of the solution, you are part of the problem.** Let's face it: most of the time we are the only interface between Grade 12 learners and the profession, and ultimately we influence the quality of the law graduates ("the products") leaving our faculty every year. Yes, we are not trained to teach reading and writing skills, nor do we have the time and resources. Of course the university should do more to assist us in grappling with the problems. However, the role of legal academics goes wider than mere number crunching: what are all of us doing to instil respect for the rule of law?

We are trained to provide more than formal training: we do have the skills to impart legal leadership and to provide a value framework for our graduates. In other words, we can and should play a role in an attempt to move from hollow "bumper stickers" to substantive justice. The rule of law also implies judicial (and legal) leadership. Remember the well-known adage: in order to take ownership of a process, one must be prepared to take leadership as well.

In the Faculty Plan of the Faculty of Law (2007 – 2010) the promotion of the rule of law (and legal leadership) form an integral part of the vision of the faculty:

**[An] efficient and just legal system depends, amongst other things, on the quality of the knowledge and skills and the leadership abilities of its lawyers and, therefore, in the final analysis, on the quality of legal education and research.**

What are we doing to polish the "mirror reflecting the national soul"? With reference to the role of legal academics in a democratic system that seems to be crumbling, we might consider the words of Odinkalu ("Why more African don't use human rights language" (2001) *Human Rights Dialogue: Human Rights in Times of Conflict: Humanitarian Intervention Series 2 no 5*):

**In an ideal world, we can envisage human rights norms without taking account of the deficiencies of the groups that promote them. But no such world exists.**

Coming back to my earlier warnings about the implosion of the democratic core of South African society, do not misunderstand me. Fundamental transformation of society is necessary, not only formally (because of the supreme Constitution as a profoundly transformative document tells us so), but substantively as a result of the legacy of our history, and the social context around us. Society still needs to go a long way to be fully transformed — for example, the systemic and institutionalised patterns of gender discrimination under the cloak of religion, tradition and culture is still one of the areas where we have not yet crossed Ettiene Mureinik’s bridge completely.

Transformation is a “big” word, and cannot be discussed tonight. The question is: What are we as faculty doing to sensitise our students about the underlying historical reasons for transformation of society? In spite of my doomsday prophecy in the first part of my address, the correct and just transformation of South African society is still crucial, and we as legal academics still have a critical role to play. In the words of Tshepo Madlingozi (“Legal academics and progressive politics in South Africa: Moving beyond the ivory tower” *Pulp Fictions: a space for dialogue* November 2006 5 at 7):

**Critical reflection, particularly by academics, is ... needed in order to assess whether power has been sufficiently transformed and not just transferred. This would enable us to see whether power relations that enable the reproduction of inequality and social unevenness that produce patriarchy, racism, xenophobia and homophobia, have been dislocated.**

To illustrate my point about the lack of general acceptance of transformation, allow me to relate a hard-hitting sermon on social justice delivered a while ago by one of the ministers in my congregation. In the sermon he remarked that during the plenary meeting of the General Synod of the Dutch Reformed Church earlier this year, the Synod (as highest policy making body in the church) spent a total of four sessions (probably the best part of a day) on the issue of “gays in the church”. This esteemed body of elders and pastors then went on to spend a

staggering 20 minutes only on the social-justice issues of poverty and HIV/AIDS in South Africa!

In view of our “critical” role as legal academics, let me quote from Pink Floyd’s “Welcome to the Machine” (on their seminal 1975 album *Wish you were here*):

**Welcome my son, welcome to the machine.  
What did you dream?  
It's alright – we told you what to dream.**

The “constitutional democracy” dream of 1990 seems to be fading. As Bob Dylan put it in a recent version of his 1991 song “Dignity” — **the soul of the nation is under the knife.**

However, all is not lost (yet): I started with a theologian (Martin Luther), so let me end with another man of the cloth (Martin Luther King, and I quote from his famous speech on 28 August 1963 in Washington):

**Now, I say to you today my friends, even though we face the difficulties of today and tomorrow, I still have a dream.**

Ladies and gentlemen, I thank you.