



Helen Suzman votes against whole House

IT was a case of Helen Suzman voting against the whole House of Assembly yesterday when she alone voted in committee against a bill...

RIGHT TO PROTEST IS Book bans under criticism

February, June 6, 1962

THE MINISTER: It is difficult to put one's own views on the matter...

DEMOCRATIC-MRS. SUZMAN

MRS. H. SUZMAN (P.P., Houghton) said yesterday during the Sabotage Bill debate the right of protest was a normal freedom enjoyed in democratic countries...

WAGE UR

'Thousands starvating wages'

Mrs. Suzman: This is the Intimidation Bill

Secret intentions? 'Stamp of the Nazi jackboot'

'FINAL STEP TO CAMOUFLAGED DICTATORSHIP'

HOUSE OF ASSEMBLY. Mrs. Helen Suzman (P.P., Houghton) and Mr. J. M. Basson (T.P., Swartburg) yesterday led the attack on the Government's Intimidation Bill...

SUZMAN HITS AT 'Bantustan expansion doomed to failure'

World wants no apartheid — not more

STATE REPORTER

THE Progressive Party M.P. for Houghton, Mrs. Helen Suzman, yesterday attacked the official commission's plan for South West Africa...

SUZMAN ATTACKS CHANGE IN POLICE SECRETS BILL

HOUSE OF ASSEMBLY. — The abolition of the Secret Service Amendment Bill by the Minister of Justice, Van der Merwe, yesterday had left the bill "just about as dead as it was in the first place," Mrs. Helen Suzman (P.P., Houghton) said in an interview last night.



The Inaugural Helen Suzman Lecture

2008

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HELEN SUZMAN FOUNDATION

The Helen Suzman Foundation seeks to promote constitutional liberal democracy and human rights. As an active member of South African civil society, The Helen Suzman Foundation contributes to debates on contemporary events and institutional challenges that form part of efforts to consolidate democracy.

The sole objective of The Helen Suzman Foundation Trust is to conduct public benefit activities in a no-profit manner by:

- Carrying out and commissioning research into political, social and economic affairs in South Africa and elsewhere in order to provide information and to stimulate debate on issues relevant to the future of democracy in South Africa.
- Publishing a journal, Focus, as a vehicle for information and comment on issues relevant to the future of democracy in South Africa;
- The arrangement of and attendance at roundtables and conferences on matters related to politics and governance in or of relevance to South Africa;
- Advocating measures designed to promote the ideals of liberal constitutional democracy in South Africa, including the improvement of race relations and the combating of any discrimination on the grounds of race, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.
- Forging relations with other actors in civil society that seek to protect liberal constitutional democracy and human rights.

Co-hosted by

The Isaac and Jessie Kaplan Centre for Jewish Studies
University of Cape Town



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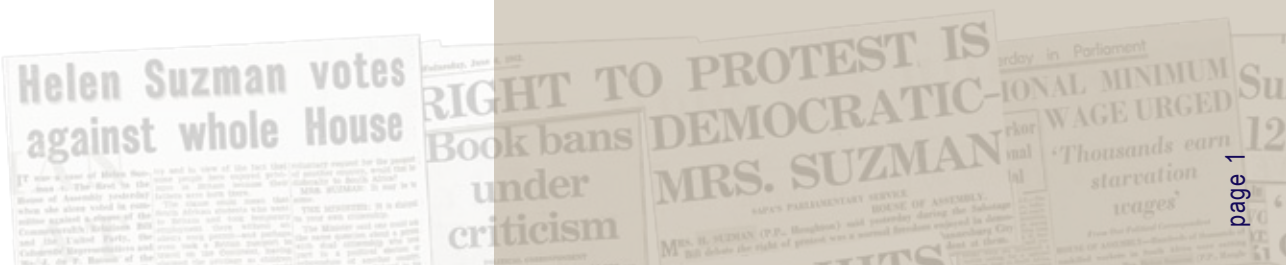
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Professor Milton Shain

Director: Isaac and Jessie Kaplan Centre for Jewish Studies (UCT)

Good evening. I'm Milton Shain, Director of the Kaplan Centre at the University of Cape Town [UCT] and it's my pleasure to welcome you to this first Helen Suzman Annual Lecture, jointly sponsored by the Helen Suzman Foundation and the Kaplan Centre for Jewish Studies and Research at UCT. Our association with the Foundation goes back to an exhibition the Kaplan Centre mounted in 2005, which traced the career of Helen Suzman. We decided jointly soon after the exhibition to recognise, through an annual lecture, the contribution of this extraordinary lady. As you know, Helen played a prominent role in the fight for human rights and the rule of law in South Africa.



From the start of a political career that spanned almost four decades, she challenged the iniquity of apartheid and used the privilege of Parliament to expose the inhumanity of a system that came to be defined as a crime against humanity. Her struggle against the National Party, both within and outside of Parliament, was relentless and often lonely. From 1961 to 1974, she was the only member of the Progressive Party in the House, resisting the apartheid government against great odds. Although she represented an affluent white constituency, she saw herself as “an honorary ombudsman for all those people who have no vote and no member of Parliament”.

Despite an enormously heavy parliamentary burden, Helen never failed to investigate as far as possible the often tragic consequences of apartheid legislation. While her main concern lay with apartheid's erosion of civil liberties and the rule of law and its appalling human costs, she also concerned herself with the abolition of capital punishment and gender discrimination, particularly as it affected African women whose status in customary law was that of perpetual minors. Helen had the privilege of witnessing the collapse of apartheid and the introduction of parliamentary democracy.

The Foundation and the Kaplan Centre are delighted that she agreed to have us host an annual lecture in her name. I also want to wish Helen well for her 91st birthday, which will be in two days' time; the anniversary of the Russian revolution. Unfortunately, Helen is unable to be with us, but she has sent me a note expressing her appreciation for inaugurating this annual lecture and she's asked me to convey her best wishes and appreciation to Professor Kader Asmal and to her long-time colleague, Colin Eglin. Tonight each of them will talk for about 15 or 20 minutes and then there will be a conversation led by Raenette Taljaard, Director of the Helen Suzman Foundation.

The subject, the Rule of Law and Constitutionalism, is hugely topical and the speakers perfectly situated to offer experienced and knowledgeable comment. Both have devoted much of their lives to the rule of law and constitutionalism. Kader Asmal is a constitutional law professor and political activist and Colin Eglin a long-time opponent of apartheid and politician who devoted decades to the struggle for the rule of law. Both were prominent in forging the South African Constitution and both, no doubt, have much to say on the subject that has increasingly been in the spotlight.

Ms Raenette Taljaard

Chairperson

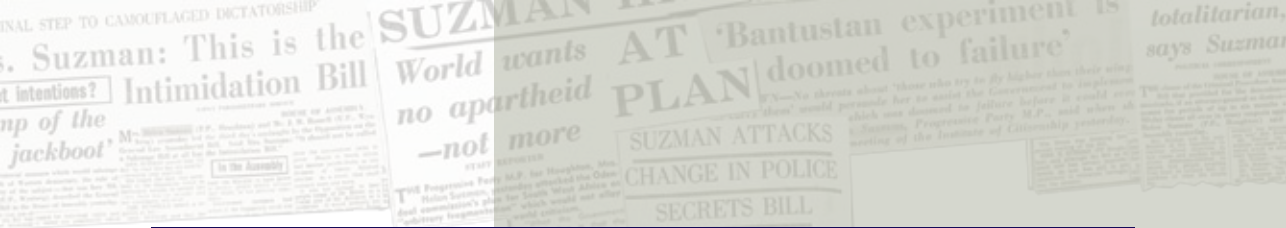


It truly is a great honour to be hosting the first annual Helen Suzman Lecture. Many of you who observe lectures that are named after activists, former political leaders or, indeed, great struggle veterans would have noticed a certain peculiar absence in the panoply of names celebrated in them, and at the Helen Suzman Foundation we decided that we needed to ensure that Helen assumed her position among the many great South Africans who have not only their legacy and their contribution to the country's trajectory, but indeed the values that they represented in their individual and public lives [celebrated in this way]. We are very happy and grateful that the Kaplan Centre has joined us in this endeavour.

We have two of the great names of South African politics with us here this evening, and two of my former colleagues in Parliament that I have the greatest admiration and affection for, Professor Kader Asmal and Mr Colin Eglin. I admired them as a young back-bencher from afar and was really delighted that I had the opportunity to build a stronger relationship with them both over the years, and to learn from their insights and their opinions on matters constitutional and political. South Africa has seen a very controversial year in which we have seen questions raised about what constitutes valid criticism of the judiciary, we have seen various conversations and controversies surrounding the Constitution and, indeed, we've recently seen a National Convention called in defence of democracy, constitutionalism and the rule of law.

This has heralded the start of what will be quite a lengthy discussion about constitutionalism in South Africa. However, the two distinguished gentlemen we have with us this evening are not necessarily only going to focus on contemporary issues, indeed I expect them both to come from very varied analytical perspectives





Colin Eglin



I'm delighted and honoured to be one of the first participants at the annual Suzman Lecture. I want to say a word about Helen, and as background to try to pitch my contribution to what I call the Helen Suzman style of politics. She was a hands-on politician. She was not doctrinaire, not dogmatic, but she believed that people came before dogma. She said she had a straightforward political creed. She didn't have a formal liberal doctrine and political creed; she said: *"I hate bullies; I stand for simple justice, equal opportunity and human rights. These are the indispensable elements of a democratic society and are worth fighting for."*

Simple justice, equal opportunity, human rights.

I don't think any of those things are going to be attained in a society that doesn't also have the rule of law, because it's within that framework that people have the prospect of enjoying these concepts to which Helen referred. Simple justice and human rights mean that rule of law is not an abstract concept. It deals with a very specific thing. Simple justice, equal opportunity, human rights are integrally linked with the rule of law, and a society without the rule of law has no prospect of enjoying these things. To take it further, [rule of law comprises the] core tenets of law without which you would not have these physical benefits.

In fact, all of those three features that Helen was fighting for would be at risk. So there is a direct link between the rule of law on the one hand and the Constitution and constitutionalism on the other. And it is with this in mind that the architects of our new Constitution, over the period of 1992 to 1996, put the rule of law and its objectives, and the mechanisms for achieving it, among the top priorities of our new South African Constitution. Not only did they do that, they said that the Rule of Law is one of the founding values of the Constitution and is entrenched by a 75% majority. This is indication of the importance that was attached to the rule of law in order to achieve these benefits for ordinary citizens. The Constitution, then, not only had the rule of law entrenched, but had extensive provisions for seeing that the business of the rule of law was achieved. You had the Bill of Rights, which spelt out the individual rights; you had the courts presided over by an independent judiciary to protect the rule of law; you had the Public Protector, the Gender Commission, the Human Rights Commission. You've had a number of factors built into the Constitution to protect this key concept.

Simple justice,
equal opportunity,
human rights
are integrally linked
with the rule of law.





Above: In front of Parliament with the Commissioner of Police.



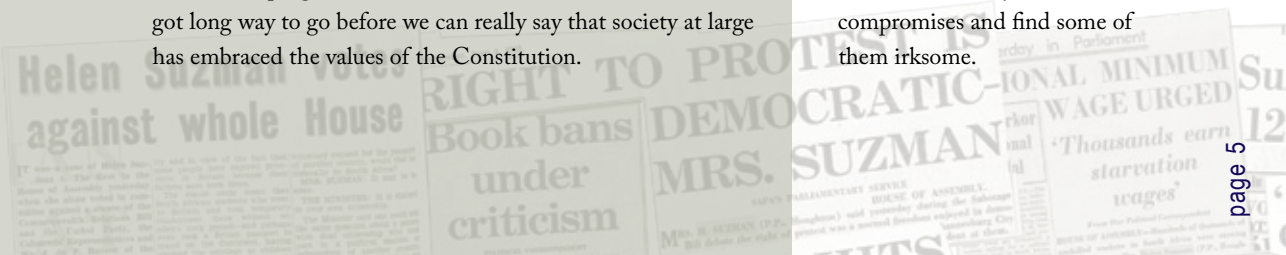
Above: Helen at home.

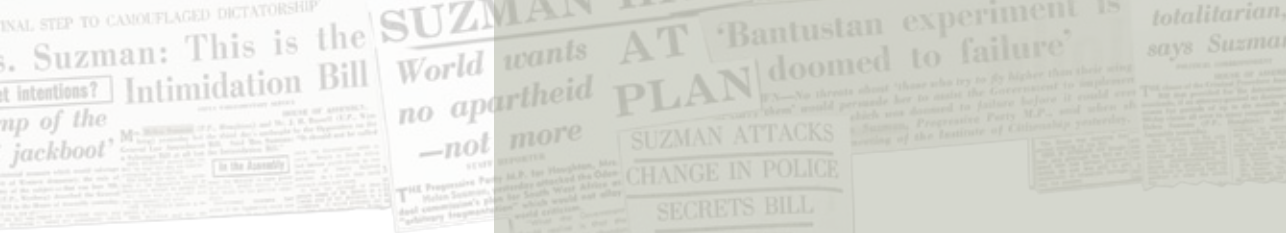
You might say: *“Has there been any catch?”*

You will recall, about 15 years ago, how enamoured we all were that this constitution was seen as the model constitution of the world. We saw how people queued up in their thousands and voted in their millions for the first time for what was going to be almost a referendum on their new constitution, and we believed that it was going to work like a charm. Well, it has worked, probably, well under all the circumstances. But I think problems have arisen in that it has been converted into reality for the people by other people. It's the people who are the functionaries in terms of the Constitution, who live under the Constitution and who live through the Constitution that make it work, and make it succeed or not succeed. And so one will ask: *“Have there been any snags, any problems?”*

The first point I want to make is that there were some inherent tensions between the Constitution and society. The values in the Constitution are fundamental, but in a sense more noble, politically more liberal-democratic than the values of any of the parties there at the time, and the values of a society at large. Human rights, freedom and respect for human dignity are fundamental, and either the society was going to start embracing those values and strengthen the Constitution, or it was going to turn its back on those values and undermine the Constitution. I think we've progressed in certain areas, but I believe we've still got long way to go before we can really say that society at large has embraced the values of the Constitution.

The second problem was a political one: that the Constitution was negotiated, and this very fact meant that there was an element of compromise. Negotiation involves a certain degree of give and take. Many of us at that time who were involved in it, and who lived through that process, said that there were compromises, but that it was a solemn compact; that it was the founding document of this nation and it was necessary to make those compromises and we stick by them. But I think that over the years, people will become less concerned with the concept of the founding document. They didn't live through that era; they will be less enamoured by the idea of compromises and find some of them irksome.





“ ... a liberation movement sees no difference between the party and the state.”



I have no doubt that in the course of time they will start treating the Constitution as just another law, and [believe that] irksome elements of the Constitution are there to be changed. So it's nobody's fault. I think it's the nature of society. It was ahead of the people in values and it was different from the parties' policies in concept because of the compromise.

The third problem arose from the nature of the circumstances in which it came about. There was a liberation struggle. Its intensity developed into something approaching a civil war, and that, largely through the initiative of Mandela and De Klerk, resulted in starting a process of negotiation. But the majority movement at that time, the African National Congress [ANC], which was the leader in the struggle and therefore had the moral higher ground, was in fact a liberation movement and not a



Nelson Mandela and Helen.

political party. It consisted of other political parties and other elements, but it was a liberation movement. It embraced and encompassed a number of different elements with the particular objective of taking over power, getting rid of apartheid and liberating the people. It suddenly came to power as a liberation movement without having gone through the process of becoming a political party, and so it had the concepts and many of the characteristics of a liberation movement. The difference between a liberation movement and a political party is that a liberation movement is there to take over power and it isn't particularly pleased when a Constitution

comes between it and power, and limits the power at the very time that it will take it over. Secondly, a liberation movement sees no difference between the party and the state. I don't think anybody in the liberation movement said: *“Well, when we take over power we're going to dissolve the party because we are going to be the state.”* The difference between the party and the state was blurred because it had not operated within the framework of formal state structures.

Another difference is that liberation movements, by nature, can't afford to tolerate opposition. You don't have opposition when you're fighting for liberation. You don't tolerate it, and what



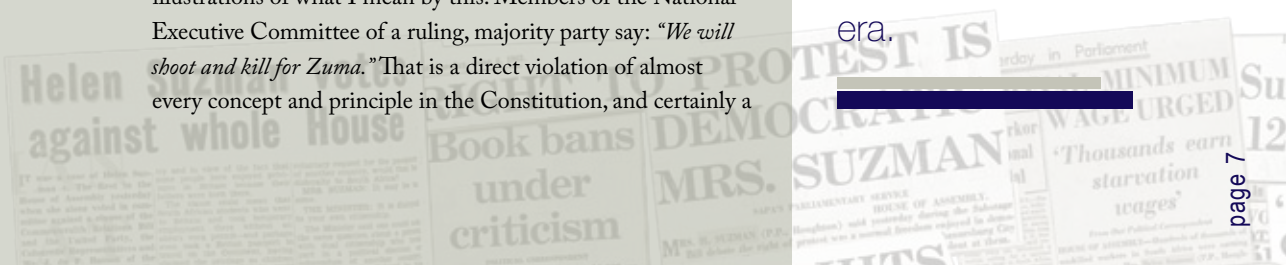
you don't say is that opposition is actually an essential part of democracy. You say: *"Get out of my way; we are going to liberate this country and we're going to take over power."*

So the ANC had this background of being the liberation movement rather than a formal political party. During the era of Mandela, with his iconic approach to life and his inclusiveness, very few of these characteristics became dominant or prominent. But in the Mbeki years we do find a centralisation of power, less tolerance to opposition than you should have. You only have to take the way the party in power tried to unseat or unravel the opposition parties who had the arrogance to take over power in Cape Town. So you had a clash, in a sense, of personalities, and all of this came to a head at Polokwane.

One of the good things about Polokwane — and there may be bad things as well — is that it's opened up the political debate. Suddenly South Africans are debating among themselves, the ANC are debating among themselves. We're all debating. We are looking at ourselves through a much more open prism than we did during the Mbeki era.

So those were the problems, and I think we overcame them to a very considerable extent, but I think right at the moment something has gone a little bit haywire, and our Constitution is under siege to a very considerable extent. I'll give you a few illustrations of what I mean by this. Members of the National Executive Committee of a ruling, majority party say: *"We will shoot and kill for Zuma."* That is a direct violation of almost every concept and principle in the Constitution, and certainly a

We are looking at ourselves through a much more open prism than we did during the Mbeki era.





violation of the concept of the rule of law: *"We will crush anybody who stands in the way of Zuma."* When the members of a ruling party call the judges of the courts counter-revolutionaries, when they hold mass demonstrations outside the courts while trials are taking place, and they call for a special deal for their leader in respect of charges that have been laid against him, then I say the Constitution, in that sense, is being attacked.

Then in Parliament — and this is an area where I know Helen herself has very strong feelings — when the majority of MPs of the majority party, who in terms of the Constitution are elected to represent the people and to ensure government by the people under the Constitution, weakly comply when they are told by the party who they must appoint to the board of the South African Broadcasting Corporation; when they supinely submit when they are told by the bosses of the party to defy the wishes of the people and to abolish the Scorpions; when they sit back meekly when the bosses of the party take action, without any constitutional right to do so, to remove or recall the President who was elected by Parliament and in terms of the Constitution can be removed by Parliament; then I say our Constitution itself is under attack.

And finally, a more political issue: when the Speaker of Parliament becomes the National Chairman of a political party, and when the Secretary-General of the majority party, who is also the Chairman of the South African Communist Party, declares that there is only one centre of power in South Africa and that is the party, this doesn't sound like people in South Africa. It sounds a little bit like Stalin.

And so I believe there are warning signals flashing; I believe South Africa will survive in spite of this process that's taking place at the moment, but I don't think we should just sit back. I think people fought for the rule of law, our Constitution as it is, for a long time. It was worth fighting for and I believe it's worth working to keep it in place.

"We will crush anybody who stands in the way of Zuma."



Professor Kader Asmal

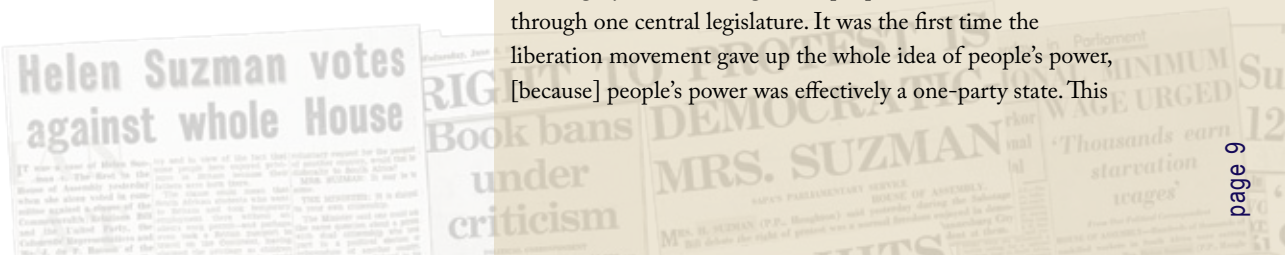


I'm delighted to be here and pay my tribute to Helen Suzman. I will take a much more legal approach, not because I'm a lawyer, but because law is congealed politics, and the function of commentators and practitioners is to uncongeal, and to look at the political aspects.

Why have we arrived here? The French have the general will of the people expressed in elections, and nothing must come before that because they do not have a Constitution; they don't have a Constitutional Court. The British, as recently as last year, produced a Bill of Rights document, and said that the Bill of Rights will not bind Parliament; it advises the Parliament. In New Zealand or in Israel, they don't have written constitutions. So how is it that we, with a deep suspicion of the judiciary — the South African judiciary hadn't covered itself with glory in the apartheid past, as you know; they were hanging judges mostly — and with a background of opposition support for Parliament as sovereign because we would undo the awfulness of the social engineering of apartheid, [came to acquire our Constitution]?

Many of us didn't know about the extraordinary Bill of Rights [drawn up by the ANC in] 1943 in reply to the Atlantic Charter of Churchill and Roosevelt in 1941. It was precocious; it talked of votes for all without distinction of race or colour in any form, of equal pay for equal work for women and men. It was really remarkable, and talked about a Parliament that belongs to everyone. That in 1943, long before human rights had ever been encompassed by liberation movements, five years before the Universal Declaration of Human Rights. And then, of course, we had the Freedom Charter, for the sovereignty of the people. And finally, when we were asked to draw up a constitution in the ANC in the 1980s, we refused to do that, we enjoined the constitutional right of the South African people. We were under great pressure from the American government for the constitution, so we drew up special constitutional documents relating to guidelines for a democratic South Africa, and these guidelines were very important because they gave the rise to a kind of ownership of a different view. And they were very clear — an independent, unitary, democratic constitutional state.

Sovereignty was to belong to the people, to be exercised through one central legislature. It was the first time the liberation movement gave up the whole idea of people's power, [because] people's power was effectively a one-party state. This





development wasn't a tactical one, it was an understanding of the South African situation. The basic principles embraced were constitutionalism, rule of law, democracy and the separation of powers.



But tonight I should talk only about the rule of law and, of course, constitutionalism. Constitutionalism is the idea that government should derive its powers from a written constitution, and should limit itself entirely to those powers set out in the Constitution. The idea therefore is to replace parliamentary sovereignty with the sovereignty of the Constitution. In everything in life, vigilance is absolutely necessary and I am one of those lawyers who believes that struggle is part of the democratic process. Without struggle, you don't achieve anything, right?

I'm very proud that six cases came up in the Constitutional Court that there is to be no discrimination on grounds of sexual orientation. There was no struggle in support of

that; it was the basic decency of a movement, and of people, that this should be in the Constitution. But a struggle, and vigilance, are still absolutely necessary in whatever kind of situation you find yourself in, so I'm not wringing my hands about attacks that are taking place. After all, I was the one who opposed the statements about *"we shoot to kill"*, and of course, they violate the Constitution. And I asked others to join in this whole struggle against verbal attacks on the Constitution.

We talk about constitutional supremacy; why? South Africa was a multicultural society, a multi-religious society. Nobody mentions that. In other countries they have been fighting wars about cultural languages and religions. In Europe, they're fighting against multiculturalism; they are repudiating multiculturalism, because how can you have a multicultural society if you have *"Muslim terrorists"* to use an overburdened loaded phrase there? Something's gone wrong; multiculturalism is attacked, but you must have some vague notion of 'Britishness'.

After all, I was the one who opposed the statements about *"we shoot to kill"*, and of course, they violate the Constitution.



It can't be Englishness, because the Prime Minister is from Scotland, isn't he? So he has to invent their Britishness about things, when the Irish and the Scots in the West won't support the idea of Britishness, will they? For us, multiculturalism is essential to our development as a robust constitutional state.

I think it's very important that our constitutional supremacy is also based on some values — not the values of the foundation documents, but of freedom, liberty and dignity. I think the most important value in our Constitution is the right to dignity. For me, everything — the right to vote, freedom of movement, the right to marry, everything — flows from the right to dignity. It's a wonderful development that we elevate dignity, which the vast majority of us never enjoyed. Now a person would think that whites never enjoyed dignity in South Africa either, because you couldn't exercise [your right to] social intercourse with others, and that is a violation of your own right to dignity. So I think that's very important.

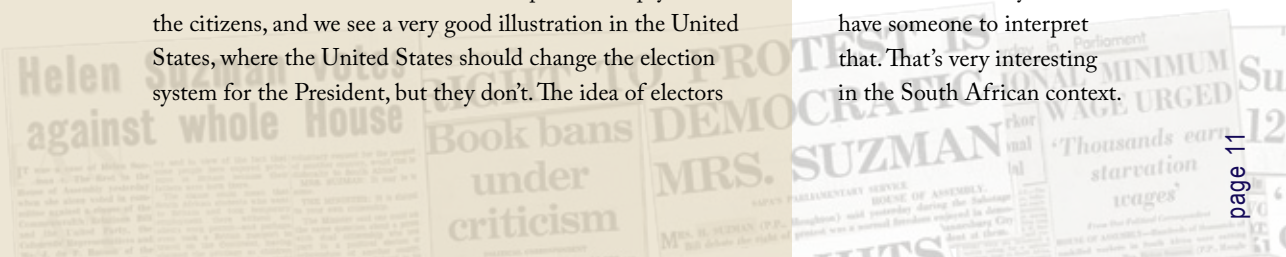
But to look at this issue: the Constitution is the supreme law of the state and anything inconsistent with that is invalid. That is especially important for the ANC to say. I remember the first technical case involved President Mandela; the pharmaceutical case in 1999. A very technical issue it was, and the Constitutional Court said [President Mandela] was badly advised, therefore the pharmaceutical bill cannot become law. And Mr Mandela appeared on television that night, and he said he accepted the ruling wholeheartedly. The moral of that is to support the Constitution, you mustn't qualify it. You mustn't have semi-detached view of the Constitution. It must be wholehearted commitment because the Constitution provides a basic distribution of power. We treat Mr Mandela as an icon. "Icon" is wrong; he's a human being. He understood the politics of the Constitution. How he must uncongéal the Constitution — and how do you uncongéal it? By his own behaviour and by going on television to say: "*I accept the decisions of Constitutional Court.*" That was profoundly important.

You see, constitutions are very slowly accepted. I lived in Ireland for nearly 30 years and I remember a vagrant coming to me one day in 1968, 30 years after the Irish Constitution was adopted, and he said: "*The police are hounding me, don't you think they are violating my constitutional rights?*" So I wrote an article in the Irish Times saying: "*When did the Irish adopt the Constitution as part of their consciousness?*" And the letters flowed into the newspaper supporting my view. But it takes a lot of time for constitutions to become part of the psyche of the citizens, and we see a very good illustration in the United States, where the United States should change the election system for the President, but they don't. The idea of electors



voting for the President [came about] because the founding fathers had a dislike of the sovereignty of the people; they didn't trust the people, so the people had to vote for electors. So again and again the President was elected with a majority in the electorate college without a majority of votes. Hamilton and the others didn't support the idea of popular sovereignty. Now, they don't change it, although it's basically undemocratic to have a system like that.

So let me just finish up on this idea of constitutionalism to say, of course, if you have a division of powers in the Constitution then you must have someone to interpret that. That's very interesting in the South African context.





We were the first country in the Commonwealth to say that we will have a superior court called the Constitutional Court. Now about 60 countries have them. But we had a Constitutional Court where not only lawyers, but even academics would be appointed to it. We had one of the British academics from Wits University, who will retire next year. So people who are suitable for the posts will be appointed. The Constitutional Court has covered South Africa with glory because our cases are now being quoted in other parts of the world. A small, young jurisdiction has added so much; not on the equality principle only, but in other areas of life too. And so we had to have — again it's a very difficult thing to swallow — a system where an external body, a third body, would judge whether the legislature

or the executive have worked within their powers and enforce that. And, of course, it's the courts who will decide whether the Constitution has been properly amended; that's very important. One of the nicest things Mr Mandela said in 1994 was that he was very pleased the ANC didn't get a two-thirds majority in 1994. I think it's a very good idea that, as Colin has mentioned, the foundation article of the Constitution requires a 75% majority, because it gives you the foundational values; it gives you an insight into the rest of



the Constitution. So I think that the idea of constitutionalism is very important.

It's tied up with the next concept, of the rule of law. The rule of law is something that I was brought up in as a student in London a long time ago, and I still don't understand how South African writers still refer to this superannuated English writer called AV Dicey. For Dicey, the rule of law meant simply: if it was a rule properly passed by the rule-making body and interpreted by a court, it is a proper rule.

If a rule didn't exist, then the government could not perform a function. So for him, the technical process was the most important thing. Was it passed by the rule-making body? Was the rule-making body acting in accordance with the big rule as how to pass legislation, and would a court be able to interpret it? For Dicey, the rule of law was entirely procedural. The state institution must act in accordance with the law. Now, this is

Mr Mandela said in 1994 was that he was very pleased the ANC didn't get a two-thirds majority in 1994.

a very interesting argument because there was a big debate in 1945 when Hitler was overthrown. I must remind you about that, because it's relevant to South Africa. The Nazis gave power to Hitler to make laws in 1933, I think it was, and a lot of the laws were about confiscation of property and housing and deprivation of citizenship rights. So the debate that took place in 1945 was: were these laws valid? If you take the Dicey view, yes, of course they are valid; they were passed by proper procedure that was laid down. But then Professor Jaffe and others from the United States said: *hold on, the rule of law means something more than that; it deals with the morality of the laws, the value judgements of the laws*. These laws were decadently immoral. You could not use the word "law" to describe the Hitler legislation.

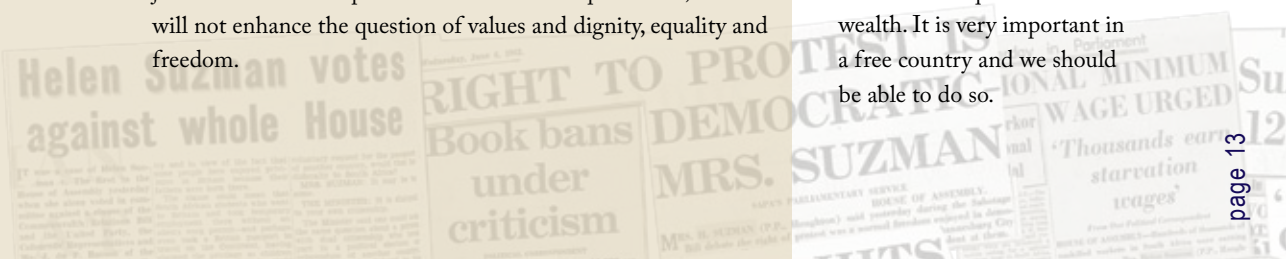
I remember arguing also about South Africa, when a distinguished judge in the Supreme Court of Ireland said that the South Africans passed the law by reference to their own procedures, and these procedures were clearly laid out, and therefore you must say the rule of law was supported and has to be carried out. South Africa are not violating any particular precept of the rule of law. Of course, this was the decadent view of the rule of law because you had to look at the substance, the content.

The Constitutional Court has taken the view that you must look at the content. Human rights are relevant to the rule of law. The Constitutional Court has said everything that is done in the rule of law must take into account, not only the legality, but the context in which the rules are passed. Basically, has it something to do, effectively, with what, properly, the government has to do? In other words, the process is important, but also, at the same time, the basic rights of the individual must be looked at — for human dignity, equality and protection — the founding principles, which one writer calls a mini Constitution. So in South Africa the rule of law goes further. Does it in fact extend the foundational documents? The late Professor Etienne Mureinik of WITS Law School, whom we miss very much, developed this idea that any law that's passed has to be justified. The notion of justification is enormously important. Is this law justified? He works on the whole principle under which a law is justified, and that is why one cannot only look at technical procedural aspects of law but also ask questions about their legitimacy.

We find, for example, that laws were introduced which were not justified to meet the particular constitutional provisions, which will not enhance the question of values and dignity, equality and freedom.

Human rights are relevant to the rule of law.

Let me also mention what other values give rise to this new South African word "cohesion". I don't understand that, by the way. People want to work out what cohesion means; what are the values that bind us together? I had that when I was Minister of Education. We inherited a school system; it was an English-speaking white system, an Afrikaner school system, an Indian school system; 10 different African school systems and a Coloured system. Every country in the world has a value system for its education. How then do you abstract a value system for this extraordinary, horrid system divided by racial and religious grounds? So we had a wonderful Commission of Enquiry and we claimed that the constitutional values are the values that we should aspire to, to hold the country together, and, added to that, tolerance and reconciliation, and those are the values that should hold the country together. Values can't be imposed; they must be negotiated in a multicultural, multi-religious society with enormous inequalities in wealth. It is very important in a free country and we should be able to do so.





... every member or organ of state must support the independence of judiciary. To demonstrate outside the court is to violate that important principle.

So we come to other issues arising under the broad banner of the question of constitutionalism. Separation of powers is not mentioned in the Constitution, it's implied, because the Constitution says that there shall be the legislators who make laws, the executive which implement laws and laws shall be judged by the judiciary. Every organ of the state is enjoined to support the judiciary, and I agree with Colin: the idea of a Premier in the Western Cape demonstrating about a case taking place 1 000 kilometres away is contrary to the Constitution, because every member or organ of state must support the independence of judiciary. To demonstrate outside the court is to violate that important principle. And I think it is very important that you support the entirety of the Constitution, not, selectively, parts of the Constitution. That's very important for all of us, with the tendency of many of us to support parts of the Constitution which we approve of and not other parts of the Constitution we don't approve of. It's a benighted tendency, which we must oppose because the Constitution has to supported in its entirety. The separation of powers is very important.

Secondly, the nature of the government in power is very important. I should say that one of the unfortunate results in the American debate is this tendency to say the President should be elected by the people. We discussed it at great length, what that implies in a democracy. There are very serious implications,

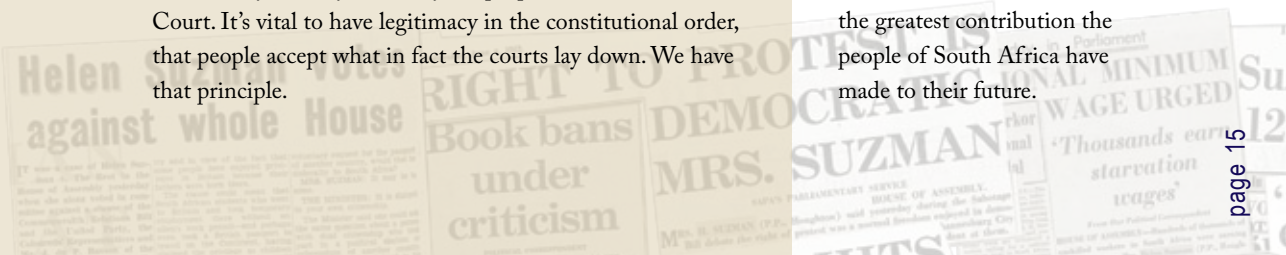
but this is a kind of parochial, small-town approach, to say that because they do it in the United States then we should do it here too is frankly over simplified and short-sighted. The implications are very serious. We have representative government. The President does not sit in Parliament, but is accountable at Parliament to an extent. But we have a cabinet system of Government. I don't approve of the proposal there should be a super cabinet: I know who will decide things in the super cabinet; three or four people especially placed to perform certain functions in the economy, in politics and international relations. The collective cabinet responsibility is there.

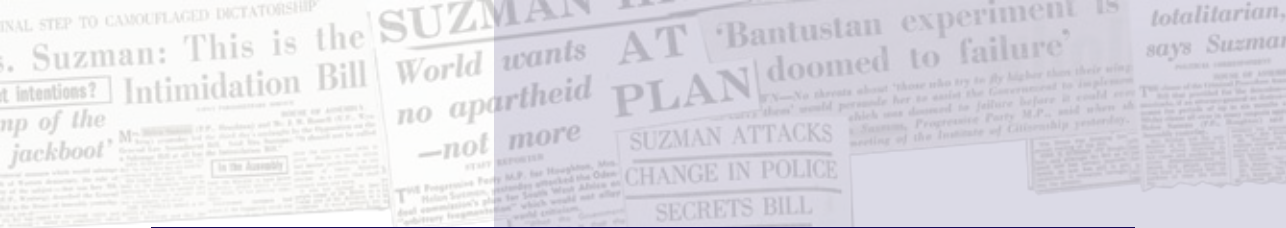
I believe very much in the integrity of the Constitution and that the Constitution should only be amended under very limited grounds. One of the grounds is Oliver Wendell Holmes's very famous statement on "*clear and present danger*". When there is clear and present danger, then you have to amend the Constitution. In his case it was crucial to detain people during the First World War for being enemy aliens. He said there was a clear and present danger, and therefore the detention of people in 1918 was very valid. For me, also, when there is an urgent need to bring the Constitution up to date [it should be done]. Otherwise the Constitution's integrity should be maintained because it's a very good balance. We came of a [specific] background, but as long as the aims of what we fought for are maintained, then there must be compromise. I don't believe that compromise is a bad thing. I think it is necessary, whether it's in a marriage, personal relations, or collective relations. Government compromises to enable you to move forward to the next step. So I don't think we should regard compromise as though it violates some more noble principle that was not achieved. Mr Mandela never interfered; we explained to him in Stellenbosch that we must get as many people as possible into Parliament and that's why we had this party list-based PR electoral system. So we have nearly 50% women, we have nearly every minority religious and non-religious body in Parliament. Whether that has served its purpose or not is a different matter.

The first election we had to do as we did because there was no system you could trust with the registration of voters. In the United States they are still having problems with the registration of voters, by the way. Secondly, we proposed a Constitutional Court. It's vital to have legitimacy in the constitutional order, that people accept what in fact the courts lay down. We have that principle.

When there is clear and present danger, then you have to amend the Constitution.

It's very important, therefore, that the structure of the Constitution rose out of compromise. My own view would be that there's too much emphasis on individual rights and not great recognition of collective rights, but that can be debated. It was at that time necessary to allay the anxiety, [to establish] that whites would not have their privileges taken away and that blacks would have an assertion of the rights of freedom of movement, free trial, and all that. So tinkering with the Constitution is an important matter, because if you tinker with bits and pieces, you might lose the overall strength of the Constitutional order. I'm grateful for Helen Suzman and that her work and life has given us the opportunity to discuss what I think still is the greatest contribution the people of South Africa have made to their future.





Questions & Answers



CHAIRPERSON:

I would like to kick off with two questions. The first is more of a future perspective on constitutional democracy, particularly under the jurisdiction of our Constitutional Court, and the other question is more of a political one. Let's start with the, perhaps, less controversial part. The existing bench of the Constitutional Court is facing a number of imminent retirements, and we will have a new government in 2009 that will be making most of the appointments to the bench. Do you see us having similar debates to what the United States has in relation to the direction of the court under new judicial appointments — bearing in mind that we are already in a period where we're struggling to find candidates for the Constitutional Court appointments?

MR EGLIN: Well, I hope we're going to have a debate about it, but whether we will or not I'm fascinated with the American debate. But yes, I think we should perhaps be discussing them openly. One of the things that Kader and I were involved in in CODESA and the Constitutional Assembly was very frank, open discussion. No holds were barred. And then every effort was made to include the public to the extent they wanted to be included in it. We spent lots of your taxpayers' money trying to bring people in; so apart from the fact that the Constitutional Assembly was elected as the Parliament, knowing it was going to draw up the Constitution on behalf of the people, it also tried to make the debate much wider. In the interest of making people feel that whatever changes there are belong to them and are not imposed on them by other people, I think an open debate on anything relating to the Constitution or the functions in the Constitution is going to be positive.

PROF ASMAL: After ten years, I think we need to accept that there is always a challenged and challenging relationship between the executive and the courts, everywhere in the world. But the Constitutional Court has a special place in the delicate balance that ties the three branches of government.

When the US Supreme Court invalidated Roosevelt's legislation on industrial codes he threatened to pack the Court with political appointees. In our case, we said that that there must be a capacity to 'second-guess' in a positive sense both Parliament and the Executive based on clear and core values.

And we got a court which had a value system — the very constitution it is tasked to protect and defend. Lawyers have got black-letter law interpretation, as if words had an objective meaning. Words don't have objective meaning; words have [a variety of meanings, depending on] variations in context. We hope, therefore, that the four or five [new Constitutional Court judges] will not be black-letter lawyers. But remember, the United States, with a very open judicial selection system, ended up with a Supreme Court that gave the election to Bush eight years ago. No doubt about that.

Instead of ordering a recount in Florida, they gave it to Bush, and to the eternal discredit of the losing Democrats; they didn't make an issue of that. The whole world, even Iraq, would have been different if, in fact, the election in Florida hadn't been validated in this way.



So judges play a political role; we must be aware of that. It's a Republican court in the United States, and we hope that therefore that one judge, who is now 87 years old, will soon retire so the new President could appoint someone who believes in rights of women to choose their own abortion, who believes trade unions have a right to exist in a constitutional order, and in these kinds of human-rights issues; that social rights come to be part of the human-rights tradition in the United States.

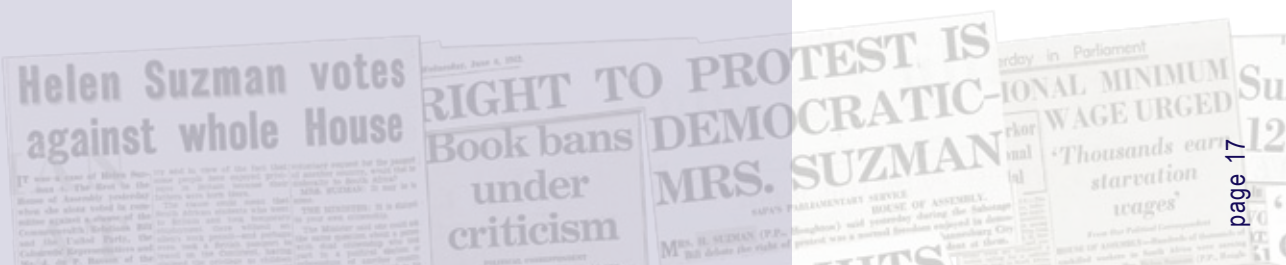
There is a fickleness about this process in the United States it seems. You know, Bush proposed his private lawyer as a member of the Supreme Court. Fortunately, it was struck down by his own party. We have to have a very open discussion and get the background and values of the candidates, as you saw in recent JSC hearings on future Constitutional Court candidates.

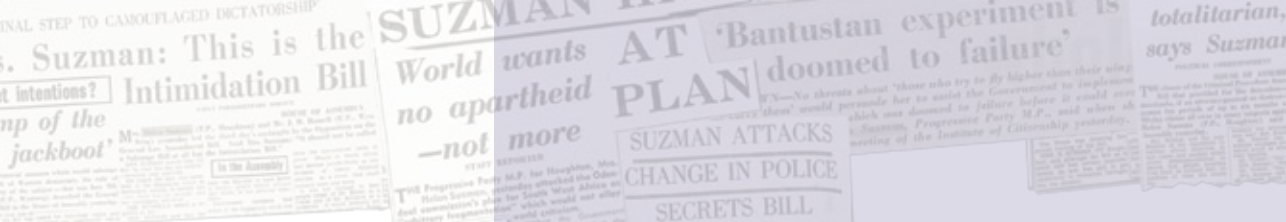
We have a Judicial Service Commission (JSC) provided for in our constitution. If I had any power in that, I might change the composition of the Judicial Service Commission.

But all of you should be writing about it because, in the end, the judges are the guardians of the Bill of Rights and the whole constitutional order, and we want a continuation of the courts that we have, representing many different traditions, but coming together in defence of the constitutional system. All of you should be writing about what kind of court we want.

CHAIRPERSON:

We've seen a number of political events, including potentially judicially activist rulings, that have raised questions about whether or not we are imperilling the rule of law and constitutionalism. Equally, we've seen the notion of constitutionalism emerging as the key mobilising factor within the National Convention. Do you not believe that we are imperilling the Constitution and constitutionalism by having them feature quite so prominently as they are in the political space, or is it natural for them to feature quite so prominently?





Parliament is one of the essential elements of the Constitution.



MR EGLIN: I'm not sure that the National Convention used the word constitutionalism as such. As I understand it, it was dealing with specific issues within the Constitution at the moment. But I think that there should be a continuing open debate on constitutionalism, as to how the Constitution is functioning. I would hope that the debate could be constructive, and look at it from a point of view of seeing that the Constitution is either maintained and/or even improved. But I think the debate about whether the Constitution is functioning properly is taking place. I happen to be sitting on a panel of experts to see whether Parliament is living up to the constitutional expectations. Our report will be coming out one of these days and you will see what our views are. I think it's good that that discussion takes place, because Parliament is one of the essential elements of the Constitution. One of the compromises was a three-tier system of government: national, provincial and local. Others just wanted two tiers, and I see there is now a move to have two tiers with a consolidated list of the civil services. Whatever it is, I think these are the kind of constitutional issues that don't belong to a one or other political party, they really belong to the people as a whole. So the more open the debate is, the better. I think in the past year there have been more roundtables and public discussions on constitutionally orientated issues than there have been for a very long time, and I hope that will continue.



Front, left: Walter Stanford, Harry Lawrence, Boris Wilson, Jan Steytler, Helen Suzman, Colin Eglin, Owen Townley-Williams. Back, left: Ray Swart, Clive van Ryneveld, John Cope, Zach de Beer, Ronald Butcher.



PROF ASMAL: Nobody can run a campaign on constitutionalism, it's empty of meaning. It means nothing to a vast majority of people. I don't want to enter into debate as to whether the National Convention was valid or not.

What I'm saying — to answer your question — is that you can't run a national campaign on constitutionalism; it's abstract, it's inherent, it doesn't mean anything in people's lives. What we should be doing is asking what the values of the Constitution are that you wish to protect, and to what extent are they core values, and what the nature is of the society that we want to build in South Africa.

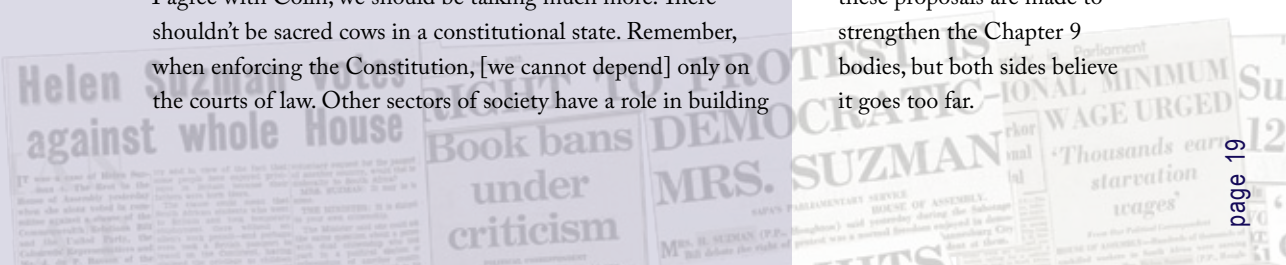
For example, how can the Police Commissioner say: *"I've seen much worse attacks on babies than this NGO is reporting?"* How can you say that, as a public servant?

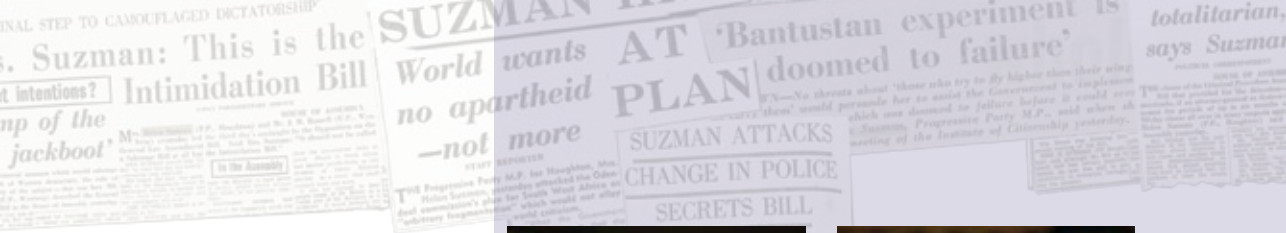
Beyond 'constitutionalism' it's the court system and its functioning that we should be looking at critically, rather than the constitutionally enshrined presumption of innocence — which cannot be selectively invoked; it must apply to everyone.

More fundamentally, justice delayed is justice denied. How can an ordinary murder case in Cape Town take eight months when there are no vast matters of legal involvement or complexity that could explain such grotesque delays? The only people to benefit from that are lawyers. It's preposterous.

I agree with Colin, we should be talking much more. There shouldn't be sacred cows in a constitutional state. Remember, when enforcing the Constitution, [we cannot depend] only on the courts of law. Other sectors of society have a role in building

a constitutional order in our country. There is freedom of press; it is enormously important. Then we are the only country in the world that has the Chapter 9 bodies. And Parliament asked us to do an investigation of these bodies, so we produced a 250-page report last year. Both sides at Polokwane — you know, BP and AP, before Polokwane and after Polokwane, are the deciding features in our lives now — both sides involved think that it's too liberal [the Constitution], that it goes too far. It's the first time anybody has accused me of going too far. Now [the report has] sunk without trace. It's an enormous disgrace that something to supplement our democracy, to bring the Chapter 9 bodies up to date, [has been ignored]. All these proposals are made to strengthen the Chapter 9 bodies, but both sides believe it goes too far.





And that is why the last point I make is that constitutionalism really is not a party-political matter. I would like a South African Council of Human Rights, non-party political, not associated with any ideology, but where people would feel a sense that we must expand the areas of rights for everyone. My test always is, when I go around asking people to register and they say we are soft on prisoners, to say: “*You have a beautiful 18-year-old son; what do you think will happen to him if he is in prison?*” And then we realise we are no longer soft on prisoners. That’s what I mean, that you must never take human-rights issues for granted. Always try to refer them to yourself and see the results of that.

I would like a South African Council of Human Rights, non-party political, not associated with any ideology ...



DR. KATHRYN STURMAN: *I am from the South African Institute of International Affairs. My question is for both the speakers. Going to Colin Eglin’s point about the safeguards that are built in to the Constitution, that threshold of a two-thirds majority to change the Constitution: do you think that the Constitution will be entrenched or further consolidated if the very overwhelming majority that the ANC has had in the past is reduced in the next election?*

MR PAUL HOFFMAN: *I’m the Director of the Centre for Constitutional Rights. I think it would be remiss of me if I did not congratulate Professor Asmal for making public his reasons for resigning from Parliament. Those of you who don’t know, he let it slip recently, because nobody asked him at the time, that he resigned from Parliament because he was not prepared to vote in favour of the disbandment of the Scorpions. If I can start with Professor Asmal, does the after-Polokwane ruling alliance take the National Democratic Revolution seriously, who is the revolution aimed against, and why is it necessary for a party in power to pursue a revolution? For Mr Eglin, my question is backward-looking: what, on the wish-list of the party that you represented in the constitutional negotiations, was not included in the compromise that was made between the parties that were represented, which actually represented the vast majority of South Africans, at the CODESA meetings?*

MR EGLIN: I was in a reasonably fortunate position at CODESA in that the ANC was coming from one side and the National Party from the other, and both were looking for, let’s say, an acceptable compromise, and much of that compromise was around what the Moltano Commission suggested many, many years ago. It was fairly confident that our position would be in the framework of the compromise in general, but not in detail. That was the nature of the reasonable amount of comfort

that one had, whereas the others might have felt less comfortable in coming together. But one of the compromises — well, it wasn't a compromise, it was forced on one — was the electoral system and the anti-defection clause. One was Clause 43(b); it was a blank on the order paper. That was about what would happen to somebody if he left his party — not left, but ceased to be a member. And it doesn't mean to say if he resigns — because he may be thrown out of the party and also cease to be a member. The other was the question of whether you should have people electing representatives directly, or whether you go on the list system and merely vote for the party. We felt fairly strongly we should have a direct election and secondly, we believed that you should allow people, not to defect, but that once you have a constituency system, it should be possible for people to vote according to their conscience in Parliament without the risk of being thrown out altogether. Those were compromises. Two gentlemen came, both of them were what I call chief whips, Alex van Breda of the National Party and Essop Pahad of the ANC, and they just said they wanted to tell me what they had agreed. And Essop said, *"We're going to scrap the anti-defection clause; you're going to be out of Parliament if you don't toe the party line."* Alex van Breda said: *"We want a party list because we don't think the National Party can win any constituencies."* But what he forgot was, of course, that the overriding consideration was that election had to result in proportionality. So whether you had constituencies or not, you would have the same number. But one wanted strong control over their members to the point of being able to expel them if they didn't behave, and the other one said: *"We can't win any constituencies; we are going for a list."* That is the compromise that didn't please me, and I wasn't party to it.



The interesting thing about the three-quarter majority is that it applies only to the founding provisions. What is important about that from a legal point of view is that they pervade the whole Constitution. In other words, if you are amending some other element of the Constitution and it can be shown that the amendment impacts on the founding provisions, then the three-quarter majority would have to apply. It looks a short chapter in the book; it actually pervades the whole Constitution.

Constitutions in fact aren't invariable; they have to be changed from time to time. There could be a very practical reason, including that the whole of society might want to change it. For a considerable time the ANC has had the power, or the numbers, to change the Constitution, and except on technical matters they've not done so. As I've known it, and when I was in Parliament, the ANC was still imbued with the spirit of the Constitution as it was agreed to. In other words, although they've got the power, it's not an ordinary law; it's a solemn compact and therefore we're not going to change it. I am hoping that the Constitution is seen in that light, and that while the percentages are there to change it when there is general agreement that it should be changed, that in fact the Constitution should not be changed unless there is that agreement.



PROF ASMAL: Let me give a concrete recent example in response to Paul Hoffman's question to explore some questions perhaps with a different nuance.

Parliament proposed courts bills that would have done more injustice to independence of the judiciary than any other proposal, so let's get rid of this myth that an assertive parliament is

always a progressive parliament. It can be a group of people motivated by particular factors who have sufficient strength at Polokwane, or before Polokwane, at Stellenbosch, to lay down the rules. So it's not something new now. The restructuring of the courts would have given the Department of Justice more power to administer the whole court system. It was an intervention of the President that withdrew those bills.

Secondly, as you quite rightly say, they could in fact have brought about these changes because these courts bills would require a majority of two-thirds only, right?

But the safeguard was that the ANC had difficulty getting the requisite majority into Parliament. Sometimes they can't get the quorum — that's a good protection, by the way, against laws being passed too rapidly with unintended consequences. Quorums are very important. I think Colin is right, though. Support for the Constitution is still imbued, and I think it's our function to ensure that this endures and outlasts us all.

I believe that the National Democratic Revolution is an outdated, outmoded description of our work in a democracy, because what's the revolution for? The real revolution is support for the Constitutional order; that's the revolution. The National Democratic Revolution was the decolonisation of South Africa. The important thing here is that we have not got over the old system of how we vote along racial lines and that is crucially an additional reason why the principles of the Constitution are very important as is a sense of a transcending constitutional state that has largely displaced the NDR and enjoys greater legitimacy.



The idea of National Democratic Revolution is now an artificial one. When I drew up the rule book of the ANC, I wanted to say the ANC was a political party, but it still says the ANC is the liberation movement, but it contests elections. It's a compromise, then.

I think that the outdated notions are not offensive or harmful, but politically they're irrelevant now. "Revolution" gives young people the wrong idea. You can do terrible things for a revolution, not so? And that is why I think we should remove these outdated notions.

That's my answer; it might get me into terrible trouble, but then, you know, I'm a free agent now.

Cape Argus

THURSDAY NOVEMBER 6 2008

Revolutionary talk is outdated – Asmal

Rhetoric 'gives young people the wrong idea'

By ELLA SMOOK
Staff Reporter

The use of revolutionary language by politicians is outdated and politically irrelevant, outspoken ANC veteran and former Cabinet minister Kader Asmal said.

Speaking last night at the inaugural Helen Suzman lecture, on the topic of The Rule of Law and Constitutionalism, and sharing the platform with opposition veteran Colin Eglin, Asmal commented on the political developments in South Africa, the Springbok emblem debacle, and the fact that he remains deeply loyal to the ANC despite quitting Parliament as a result of his party's position on the Scorpions.

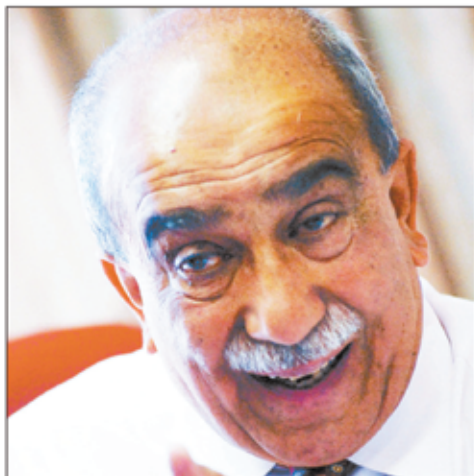
"Does the after-Polokwane ruling alliance take the National Democratic Revolution seriously?" asked advocate Paul Hoffman, director of the Centre for Constitutional Rights.

"Who is the revolution aimed against, and why is it necessary for the party in power to pursue a revolution?" he asked.

In answer, Asmal said the ANC was a political party, even though it still said it was a liberation movement.

"It (the vernacular of the National Democratic Revolution) is outdated. Not offensive or harmful, but politically irrelevant. The idea of a revolution gives young people the wrong idea. And you can do terrible things for a revolution," he said.

"That's why we need to remove this outdated notion. I know this (stated position) will



STRAIGHT TALKER: struggle stalwart Kader Asmal says he knows his views might get him into trouble

get me into terrible trouble, but I am a free agent now."

About the National Convention, from which a new opposition party driven by ANC dissidents is emerging, Asmal said a campaign could "not be run on constitutionalism. It is arid and empty of meaning".

He said he did not want to enter the debate on whether the National Convention was valid or not.

"All I can say is that running a campaign on Constitutionalism is abstract.

"It doesn't mean anything in people's lives.

"You must say which values you wish to protect, and to

which extent they are core values to the nature of the society you want to build."

Asmal said the enforcement of the constitution did not depend only on the courts.

"Freedom of the press is enormously important in the defence of constitutional rights, and so are Chapter 9 bodies."

He slammed as "a disgraceful thing" that the proposals flowing from an investigation commandeered by Parliament into Chapter 9 bodies – the state institutions established to support constitutional democracy – had "sunk without a trace".

Chapter 9 bodies are institutions such as the Public Protec-

tor, the Human Rights Commission, the Commission for Gender Equality and the Auditor-General.

"Most of the bodies are not working," said Asmal.

"The Gender Commission has more internal ideological debates than the SACP, and the Youth Commission has no function at all. And the Human Rights Commission is too small in number," he said, adding that he would like to see a civil liberties body in South Africa, which is non-party political and holds no ideology to expand the areas of rights of all.

Eglin said an "open debate on constitutionalism and how the constitution is functioning" was necessary.

He said he was currently part of panel of experts who were evaluating whether Parliament was living up to constitutional expectations and that the panel's report would be ready soon.

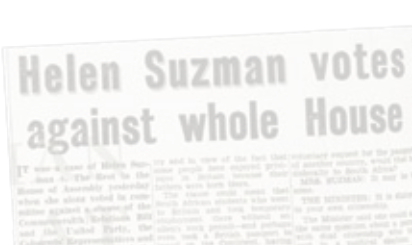
Moving on, Asmal said that tolerance and reconciliation would hold the country together.

The divisive debate about the Springbok emblem violated these values, he said.

"Values have to be negotiated, not imposed," he argued, saying that after two World Cup victories, one at which former President Nelson Mandela wore the Springbok jersey, the symbol belonged to all in the country.

However there remained lots of people who supported the Springbok who had not made the leap to reconciliation themselves, he added.

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AL STEP TO CAMOUFLAGED DICTATORSHIP
Suzman: This is the Intimidation Bill
 intentions?
 mp of the jackboot

SUZMAN AT
 World wants no apartheid —not more
 —not more
 STAFF REPORTER

'Bantustan experiment is doomed to failure'
 PLAN
 SUZMAN ATTACKS CHANGE IN POLICE SECRETS BILL

totalitarian, says Suzman





“I respect the institution of Parliament, for properly used it is the premier forum of the land, both for the dissemination of alternative policies and for the preservation of values pertaining to civilized, democratic countries...

It is a major channel whereby one can elicit valuable information and it provides the opportunity for a direct means of confrontation with the government of the day”

Parliament, 18 May 1989





HELEN SUZMAN
FOUNDATION