

helen.suzman.foundation
promoting liberal constitutional democracy



The Helen Suzman Memorial Lecture
2013

The Constitution: A liberal democracy
and patriotic criticism



constitution |kənstə't(y)oō sh ənl
noun
1 a body of fundamental principles
which a state or other organisation

helen.suzman.foundation promoting liberal constitutional democracy

Vision

Promoting liberal constitutional democracy in South Africa.

Mission

To create a platform for public debate and dialogue – through publications, roundtable discussions, conferences, and by developing a research profile through an internship programme – with the aim of enhancing public service delivery in all its constituent parts. The work of the Helen Suzman Foundation will be driven by the principles and values that informed Helen Suzman's public life.

These are:

- reasoned discourse;
- fairness and equity;
- the protection of human rights;
- the promotion of rule of law.

The Foundation is not aligned to any political party and will actively work with a range of people and organisations to have a constructive influence on the country's emerging democracy.

“I stand for simple justice, equal opportunity and human rights; the indispensable elements in a democratic society – and well worth fighting for.” — Helen Suzman

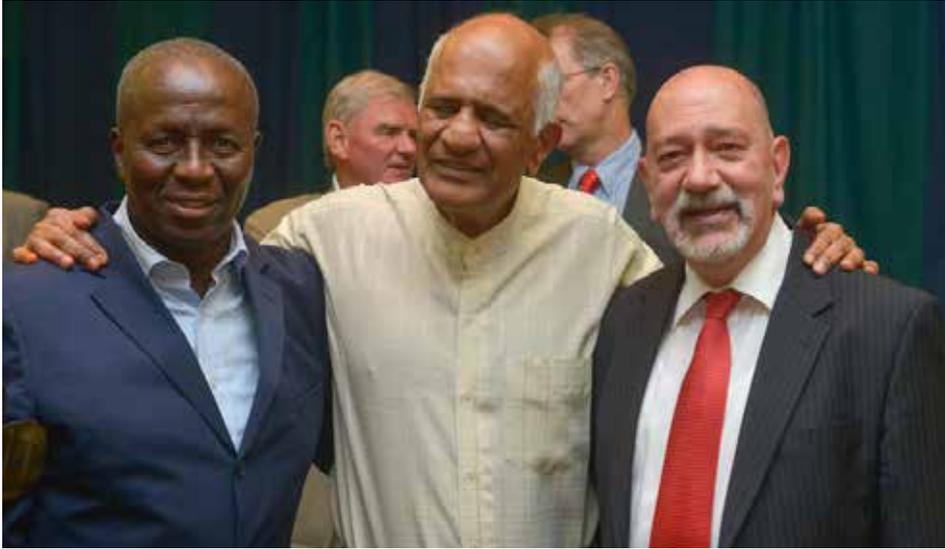
Photography: Caroline Suzman

Contact Details

Tel +27 11 482 2872 Fax +27 11 482 8468 Email luke@hsf.org.za Website www.hsf.org.za

Postal address Postnet Suite 130, Private Bag X2600, Houghton, 2041, South Africa

Physical address 2 Sherborne Road, Parktown, 2193, Johannesburg



On behalf of the Helen Suzman Foundation and our partners, the Gordon Institute of Business Science, the Kaplan Centre for Jewish Studies and Research at UCT and the Friedrich Naumann Foundation for Freedom, I welcome you to the fifth Memorial Lecture in honour of Helen Suzman. These lectures honour Helen's contribution to public life.

Her commitment to public service was legendary: even her political opponents recognised this. It is this commitment which we also celebrate tonight. But this celebration is not simply an end in itself. It should also serve to inspire us in our on-going engagement and involvement with the important, and often troubling, issues that confront our society.

Helen's public life embodied a set of values. Foremost amongst these were fairness and equity, informed and

reasoned discourse and, above all, the protection of individual human rights. The thread of reason, and reasonableness, runs through Helen's life's work.

Previous Memorial Lectures have been delivered by Dr. Mamphela Ramphele (who honoured Helen Suzman in her Lecture entitled Integrity in Public Life), Judge Meyer Joffe (on the training of judges), Judge Kate O'Regan, who reflected on the role and work of the Constitutional Court and Professor Jonathan Jansen who spoke on the mathematics of democracy.

It gives me great pleasure to introduce this evening's lecturer. Helen would have been delighted by the subject matter. And I have no doubt that she would have applauded our choice of speaker.

constitution |kənstə't(y)oō sh ənl
noun

1 a body of fundamental principles
which a state or other organisation



Retired Constitutional Court Judge, Zakeria Mohammed Yacoob will be delivering this evening's Memorial Lecture. Zac Yacoob was born in Durban where he has lived most of his life. After completing and LLB at University College Durban, he was admitted as an advocate in the Natal Provincial Division of the Supreme Court. He practised at the bar for 25 years, dealing with a wide variety of legal issues.

Much of his practice involved using the law in the struggle against apartheid and for the protection of human rights. He represented and advised people prosecuted under apartheid legislation and defended victims of oppressive

segregation laws. His distinguished legal career extended to important contributions to South Africa's transition to democracy. He was a member of the Panel of Independent Experts that advised on the drafting of South Africa's Constitution. He also served on the Independent Electoral Commission during South Africa's first democratic elections.

His knowledge and understanding of South African Law and his unwavering commitment to the protection of human rights, led to his appointed as a Justice of the Constitutional Court in February 1998. His recent retirement from the bench concluded 15 years of distinguished judicial service.



During his time on the bench, he has made substantial contributions to the development of Constitutional law in South Africa. He has written a number of ground-breaking judgements dealing with the interpretation and enforcement of socio-economic rights, including the landmark case of *Grootboom v Government of the Republic of South Africa*.

His understanding of the Constitution as an agent of social change has given content to key provisions of the Bill of Rights and the type of society envisaged by the pre-amble to our Constitution. This dynamic approach to constitutional interpretation has been a feature of his

Jurisprudence and has provided for the legal protection of some of the most vulnerable members of our society.

The title of Zac Yacoob's Lecture this evening is *The Constitution, a Liberal Democracy and Patriotic Criticism*.

There will also be an opportunity for members of the audience to ask questions at the end of the lecture.

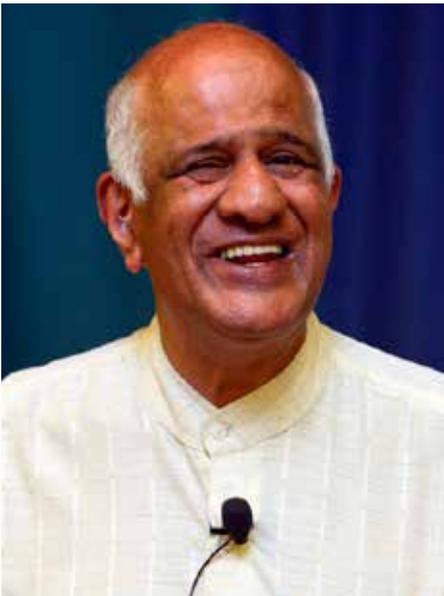
Without further ado please join me in welcoming Justice Zac Yacoob to the podium to deliver the 2013 Helen Suzman Memorial Lecture.

Thank you.

constitution |kənstə't(y)oō sh ənl
noun

1 a body of fundamental principles which a state or other organisation

The Constitution: A liberal democracy and patriotic criticism



Justice Zakeria Mohammed Yacoob

INTRODUCTION

Good evening everybody, thank you very much for those wonderful words of introduction. There are here some colleagues of mine, friends and other important people – many of whom I admire greatly. I'm sure that once I get to know everyone who is here, I would conclude that the majority of you would yourselves have made a phenomenal contribution to our society. I must particularly recognise two of my ex-colleagues from the Constitutional Court, Justice Cameron and Justice Moseneke.

Let me say something about Helen Suzman to start with. This is important because there has been some noise in the recent past in some or other quarter, that has attempted to reduce the contribution Helen Suzman made to the downfall of apartheid. Helen may not have shared the precise views of the African National Congress (ANC) in relation to what ought to happen in our society and what changes should occur. She may not have shared the views of many others on what should happen in our future. However, there can be no doubt that the contribution she made was skilful and courageous and we must make sure that we do not lose sight of everything that Helen Suzman did for our democracy.

As has already been said, Helen and I worked together in the Independent Electoral Commission. I had differences of opinion with many people in the Commission. Dikgang Moseneke was also on the Electoral Commission and he will confirm that Helen always agreed with me. She and I had no debate during that four-month period; we worked closely together and it was a very rewarding time.

I liked her immensely and I am certain that if Helen Suzman were here today she would without doubt have adopted



... if Helen Suzman were here today she would without doubt have adopted the proposition by Voltaire, that while “I disagree with what you say, I will defend to the death your right to say it.”

the proposition by Voltaire, that while “I disagree with what you say, I will defend to the death your right to say it.” There may be a number of people, including Helen if she were here today and including people in power, who might disagree with what I have to say. But what I am absolutely certain about is that Helen Suzman would have defended to her death my right to say what I will say today.

A LIBERAL DEMOCRACY

We are at a very difficult time in our history. It is 20 years since the passing of the interim Constitution and 20

years is a long time. It is time to take stock. It is a time for careful evaluation and for thinking things anew. We must regenerate our understanding of our dynamic Constitution and express our views of its importance to our society. Next year will be 20 years since our first election and our approach to evaluating constitutional achievement differs depending on whether we are talking 5 years down the line, 10 years, 15 or 20. While my approach would have been different if I had been talking 15 years ago, 20 years one must accept, is a long time.



constitution |ˈkɒnstə't(y)oʊ sh ənl noun 1 a body of fundamental principles which a state or other organisation

Our Constitution was a negotiated compact. It was a document of compromise and has various features in. I have taken an oath to respect it, obey it and act in terms of it and I did not do so lightly. I took that oath because I agreed with every word of it. I had an understanding that the Constitution gave a vision of what our society was going to be.

The Constitution provided the launching pad, if you like, to enable all of us to contribute towards the creation of the society that it envisaged.

So what can we say about our Constitution today? The first point to make is that unlike a popular belief, our Constitution did NOT create the society it envisaged. Let me explain: The Constitution says that we are all equal before the law. It also proclaims we all have human dignity, freedom of expression, freedom of religion and so on. Nevertheless, we look around and find that the Constitution is, in a sense, "lying" to us because none of these things have truly been achieved. If you realise that, you begin to wonder what the value of the Constitution is.

In my view, the Constitution was never intended by itself, by magic as it were, to create the kind of society that we wish

to have and that it contemplated. The Constitution provided the launching pad, if you like, to enable all of us to contribute towards the creation of the society that it envisaged. This means we must continue our work of achieving constitutional values by understanding the Constitution, appreciating it, talking about it, committing ourselves to those values and working very hard to achieve them in every way we can. If we, as people, do not make a contribution to the achievement of the wonderful values in our Constitution, that society, sadly will never be achieved.

It is not true to say that no positive changes have taken place. Important changes have indeed occurred though there are many differences of opinion about how valuable these changes are. However, I think all of us would agree that we are far away from the kind of society contemplated by our Constitution. We must also agree that unless we want to do no more than pay lip service to the Constitution, we are required to understand that the Constitution places obligations upon each one of us to leave no stone unturned towards the achievement of the constitutional vision and towards the achievement of the constitutional project. To that end, we should try and reach agreement on precisely what the Constitution means.

There's been a lot of talk recently about freedom. Much has also been said recently about the kind of democracy we are, and



of course when talking at a foundation of this kind, I think I shall be remiss if I didn't say something about liberal democracy because that is what the Helen Suzman Foundation and many others say they promote and advance, presumably in accordance with our Constitution.

I thought it important to look at the concept of a liberal democracy from the point of view of the Constitution because my approach is simply this: I believe in the kind of society required by the Constitution. If a liberal democrat also believes in precisely that society, then I am a liberal democrat. I have no difficulty with that.

I don't want to get involved in all kinds of theories, descriptions and political

niceties. I had the chance to be a politician once but I threw that away and became a judge so I must not go there. What we do need to talk about though, is this whole concept of liberal democracy and how it squares with our Constitution. I'd like to open up the debate about how many of us see our Constitution as advancing liberal democracy.

On its face, liberal democracy is about freedom. To that extent, the concept of a liberal democracy might be said to agree with the Constitution. The Constitution deals with freedom in a very extensive way. We have of course various rights which we know about. The right to freedom and security of the person,¹ the right to freedom of religion,² thought and belief, freedom of expression,³



constitution |kənstə't(y)oō sh ənl noun 1 a body of fundamental principles which a state or other organisation

freedom of association⁴ and even the right freely to choose one's occupation.⁵ However, what we do not have in our Constitution is any open-ended and self-standing right to freedom.

The limitations clause allows rights to be limited only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.

Freedom is also mentioned in Section 1 of our Constitution which espouses the principles of human dignity, equality and freedom. Of course freedom must be regarded as something very important in our constitutional structure.

The next context in which freedom is mentioned in our Constitution, and you need to remember this for the purpose of determining whether a liberal democracy as you conceive it, accords with the Constitution, is in the provisions of Section 36.⁶ The rights in our Constitution can be limited in terms of Section 36. The limitations clause allows rights to be limited only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom. I attach no significance to the fact that freedom is mentioned last. If one were to take freedom lightly because

of where it appears, that would amount to unacceptable and unsustainable literalism.

The question of the exact importance of freedom in our constitution is an important one to try and resolve. The fascinating case of *Ferreira vs Levin*⁷ was decided almost 20 years ago in the Constitutional Court and there was a considerable split in relation to the meaning and importance of freedom in our Constitution.

Ackermann J had quite an interesting argument. He started with the accepted principle that human dignity is vital to our society and then went on to say that it is impossible to have human dignity without freedom. Accordingly, freedom was found to be an equally important right. Therefore, to the extent that Section 12 of the Constitution talks about the right to freedom and security of the person, it has built within it, over and above the security of person requirement, a general independently justiciable right to freedom. His difficulty was that in his view the applicants in that case would not have been successful if freedom had not been seen as an independent and self-standing right. The majority of the court came to a different conclusion.

In the judgement by Chaskalson P, as he then was, our previous Honourable Chief Justice, took issue with the approach of Ackermann J and made it quite plain that, in his view, freedom is not a

accountability honesty, knowledge or established precedents according to is acknowledged to be governed. freedom



general right at that level. It is primarily a right for your physical freedom not to be interfered with. He left open the question as to whether there were other levels of freedom and for the moment we can leave that open too. He disagreed with Ackerman J's conclusion that freedom was that important in our constitutional structure, and that freedom required that all obstacles which prevented people from making free choices be removed, otherwise the right to freedom is unlimited.

Chief Justice Chaskalson's conclusion in relation to the right to freedom was largely affected by notions of social justice and the need for government to effect reconstructive change. He was

motivated by the fact that it would be quite impossible for government to effect necessary change on the approach taken by Ackerman.

Mokgoro J, took a slightly different approach. She had a more limited approach to freedom and said that freedom was closely linked to security. Freedom really was about the importance of ensuring that one's physical security was not interfered with.

Now I don't want to get into that debate because the problem with that debate is that it concentrated on the right to freedom alone in the Constitution, without reference to other rights. While this case did make reference to freedom



constitution |ˈkɒnstə't(y)oʊ sh ənl
noun
1 a body of fundamental principles
which a state or other organisation



I just need to say that equality is fundamentally important to our society and one needs to work out the balance between freedom and equality very carefully.

and equality, it was as though equality was in a sense synonymous with freedom.

I must emphasise that our Constitution is not about freedom alone. It is about much more than freedom. It is about much more than liberalism. It is more about humanity and it does other things too. I will try to demonstrate the proposition that an overemphasis of the right to freedom in the Constitution will not help solve the problems of our country and

will probably not be consistent with our constitutional structure.

Over and above freedom, which is referred to often, our Constitution is about equality. Our Constitution addresses not only the problems arising out of the lack of freedom, but also the problems arising out of the lack of equality for hundreds of years. I will not go into the issue of whether freedom or equality is more important. I just need to say that equality is fundamentally important to our society and one needs to work out the balance between freedom and equality very carefully.

So let's look at Section 9.⁸ I told you what our Constitution says about freedom; freedom is linked to a number of different rights and to the security of the person –



Equality is contained in Section 9 of the Constitution which provides that everybody is equal before the law and has a right to equal protection and benefit of the law.

there is no separate, free-standing right to freedom in our Constitution. Equality is different. Equality is contained in Section 9 of the Constitution which provides that everybody is equal before the law and has a right to equal protection and benefit of the law.

Now it is my understanding that the subsection does not stop at the words

“is equal before the law. Therefore the additional right to “equal protection and benefit of the law” must mean something. In my view, the addition of this phrase foreshadowed and in a sense, introduces the distinction between notions of formal and substantive equality.

I would also suggest, an overemphasis on the liberalism tenets of our Constitution tends to blur the distinction between formal and substantive equality and ultimately creates the danger that formal equality becomes constitutionally sufficient. We also know that the emphasis on liberalism has an impact on the permissible level of government regulation and the amount of change that government can constitutionally bring about.



constitution |känstə't(y)oō sh ənl noun 1 a body of fundamental principles which a state or other organisation

Freedom to achieve one's full potential is extremely important but in a society as unequal as ours, limiting equality in the advancement of individual freedom, will not, in my view, begin to cut the ice.

I would suggest that Subsection 1, by introducing equal benefits of the law, is a nuanced rejection of formal equality and an acceptance of the idea of substantive equality. My own definition of these terms, though not as scholarly as it might be, may be useful.

Formal equality is where you pretend that everybody is absolutely equal in society and then treat everybody alike, as if they were the same. Whereas substantive equality recognises that in the process of the achieving equality, it must be accepted and understood that we have grave inequality in society. Therefore we need to do much more than ensure, as some have said, that people have freedom to achieve their full potential. Freedom to achieve one's full potential is extremely important but in a society as unequal as ours, limiting equality in the advancement of individual freedom, will not, in my view, begin to cut the ice.

So the first point to be made is that equality is specifically mentioned in our Constitution as a right and is historically very important. Unlike the right to freedom it is not coupled with something else. It is a self-standing right that is extensively dealt with independently of any other right. The right to equality is contained in five subsections of the Constitution and is dealt with very carefully.

Let's get to Section 9 (2). The first sentence of Section 9 (2) states that equality includes the full and equal enjoyment of all fundamental rights and freedoms. That means that equality is all embracing, it affects everybody, it affects every aspect of life. It raises the question, and the Constitutional Court has not yet dealt with it – what is more constitutionally acceptable – a case in which the government tries to cut back on equality to increase freedom of some, equality of some to increase the freedom of others, or one in which the government or legislation does it the other way and tries to cut back the freedom of some very privileged people to achieve equality in the marginalised sectors of society. This is a vital question and we should all think about it.

Then of course, before I get to the second sentence of Section 9 (2) which I will talk about in more detail, I must first say something about Sections 9 (3) and 9 (4). They cut down the freedom of people fundamentally because they



The way these sections are crafted demonstrates how important the equality provisions are to our Constitution.

say that neither the state nor anybody else may unfairly discriminate on certain grounds which must be quickly mentioned: These include, race, gender, sex, disability, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, culture, language and birth.⁹

There are two points to be made about Section 9 (3) and (4). The way these sections are crafted demonstrates how important the equality provisions are to our Constitution. The equality

provisions and the non-discrimination provisions are the only part of the Bill of Rights which expressly creates both vertical and horizontal obligations. So the Constitution creates obligations on everyone not to discriminate against other people. Those sorts of obligations are not expressly placed upon any person anywhere else in the Bill of Rights and the obligations apply equally and importantly to government.

All other provisions of the constitution place obligations only upon government and Section 8¹⁰ of the constitution applies when provisions that are not expressly horizontal might create obligations on people other than government. Section 8 of the Constitution contains some complex provisions which I don't fully understand (and I'm glad I haven't



constitution |känstə't(y)oō sh ənl noun 1 a body of fundamental principles which a state or other organisation

had to write a judgement on it yet), about when and in what circumstances provisions of the Constitution operate horizontally as between subjects and when they operate vertically in the sense of government having obligations.

The second point is in my view a very important observation to be made on the non-discrimination provisions. They tell us more about the values of the Constitution. They emphasises certain constitutional values in a way that raises the importance of these values beyond that of the right to freedom.

Let's look at the categories of people that are protected here: The grounds of sex, gender and pregnancy provide for the protection of women. The grounds of race, colour, ethnic or social origin, culture and language protect all race, ethnic and cultural groups. Sexual orientation and marital status give protection to vulnerable people who have orientations which are different from others. The grounds of religion, conscience and belief raises the idea of people who belong to minority religions because majority religions look after themselves. People with disabilities are also catered for as are the elderly and the very young.

What inference do we draw from this? The inference I draw is that this and other parts of the Constitution say loudly to us that it is no longer going to be business as usual in our country if

all of us obey the Constitution. The law of the jungle, which is about the strong conquering the weak, which is about the rich running roughshod over the poor, and about the strong taking advantage of the weak, is no longer for us.

Vulnerable people are important members of our society and we want to appreciate and care for them for OUR own sakes because WE do not want to live in a society in which vulnerable people are trampled upon.

We want to move from this law of the jungle which existed a long time ago and we want to say that in our society, poor people, vulnerable people, people with disabilities, people of minorities, people who suffer, people who need help are as important to our society as everyone else and are important to our society not only for their own sake.

They are not important to our society merely because we feel sorry for vulnerable people and we want to be generous and charitable. Vulnerable people are important members of our society and we want to appreciate and care for them for OUR own sakes because WE do not want to live in a society in which vulnerable people are trampled upon. Our Constitution is for everybody.



In other words, I work to the achievement of a constitutional democracy, not because I feel sorry for vulnerable people, but because I don't want to LIVE in a society where there are so many poor people, where there are so many vulnerable people, where there is so much discrimination and where the law of the jungle reigns supreme. I for myself don't want to live in that society and I hope that all of us will be able to say that we don't want to live in that society. This arguably entails more than liberalism, because essentially, I read something in the founding definition of liberal democracy which says that liberal democracy must extend to poor and marginalised people and that's where problem comes in.

For me, the kind of democracy that we have in our country does not merely extend to poor and vulnerable people, does not merely extend to taking away suffering, does not merely extend to reconstruction, and does not merely extend to the recalibration of our society. Our constitutional democracy directly embraces all these things and that is what we need to understand. The importance of freedom in our society must be understood in this context; in the context of the objectives we have just referred to.

Now we go back to this wonderful second sentence of Section 9 (2) of the Constitution which is dealt in the judgement of Moseneke DCJ (dealt with later) and which says:



constitution |kənstə't(y)oō sh ənl
noun
1 a body of fundamental principles
which a state or other organisation



They say that in consequence of the use of the word “may” that the government is not obliged to take these measures – it can take them if it wishes.

“To promote the achievement of equality, legislative and other measures designed to protect and advance persons and categories of persons disadvantaged by past discrimination may be taken.”

This, in my view, is the typical affirmative action clause. What does it say? It says, firstly, that it is used to promote the achievement of equality. Then it says that to promote the achievement of equality, certain measures may be taken. What

are these measures? These are legislative and other measures aimed at protecting and advancing those who were disadvantaged by past discrimination.

Some comments are appropriate. The first arises from the fact that some people take refuge in the notion that the second sentence of Section 9 (2) merely requires that legislative and other measures may be taken. They say that in consequence of the use of the word “may” that the government is not obliged to take these measures – it can take them if it wishes. I’m sure all of us have seen cases in which courts have held that “may” means “must” and “must” means “may”. In these circumstances, it is absolutely unacceptable to me that “may”, in the context of Section of 9 (2) and the Constitution as a whole means

Let us all accept that the advancement and protection of people who have been disadvantaged by past discrimination is a constitutional imperative which we ignore at our peril.

“may.” It can never be said that any government in this country, whichever political party it is motivated by, if it is to be constitutionally compliant, can ever say that they have the option whether to take measures to ensure that people who were disadvantaged in the past are taken forward, protected and advanced, government MUST do so.

There have recently been a number of debates about this and on the issue of affirmative action. Opponents of affirmative action say that it has failed. It may have failed for one or other reason, for example because it has not been properly implemented or practised. But let us all accept that affirmative action is a constitutional imperative until we amend the constitution – but let us accept this premise in the meantime. Let us all accept that the advancement and protection of people who have been disadvantaged by past discrimination is a constitutional imperative which we ignore at our peril. This brings me to the case of *Van Heerden*.¹¹

The second sentence of Section 9 (2), read together with Section 9 (3) and

(4) raises very interesting questions. We have all heard the argument that affirmative action mandated by section 9 (2) is reverse discrimination in violation of Section 9 (3) and 9 (4).

What happened in *Van Heerden* that Parliament had determined pension packages somewhat more beneficial to mainly African people who had not been able to be in Parliament before, and not to mainly white people who had been in Parliament before, and I say mainly white because there were other categories of people there too. The objection was and the High Court held, that this was discrimination. The High Court held in no uncertain terms, without going into the history of past discrimination and so on, that this was discrimination on the ground of race and because there had been racial discrimination in the past that this was the most egregious form of discrimination. The High Court completely and inexplicably ignored the fact that in the past there was discrimination by whites against blacks and the fact that this was now the other way round, but we will leave that aside for the moment.

The ruling party appealed to the Constitutional Court (delivered by Moseneke DCJ) and we must all appreciate the impact of the *Van Heerden* decision when we reflect on the problems we face in addressing the relationship between freedom and equality. On appeal, the decision of the Constitutional Court was that once it is clear that the



constitution |kənstə't(y)oō sh ənl

noun

1 a body of fundamental principles which a state or other organisation

action taken by parliament qualifies under the second sentence of Section 9 (2), in other words, once the action has been taken to promote equality and is designed to protect and advance people and categories of people who have been disadvantaged by past discrimination, then it does not matter whether it is discriminatory or not.

I believe and would stress that, unless you have certain basic standards of living, to even talk about freedom is not to understand the realities of life itself.

Again I come back to my theme, which is that if the theory of liberal democracy rejects that constitutional interpretation and rejects the notion of how important affirmative action is in our society, then I am not a liberal democrat, otherwise I am.

Then the next factor which in my view goes against the notion of a liberal democracy as I understand it, is the Constitutional provision for social and economic rights; the right to housing,¹² social security and health¹³ in particular.

What we have done by providing for socio-economic rights is create a constitutional situation in which a person's dignity is more than about freedom. I believe and would stress that, unless you have certain basic standards of living, to even talk about freedom is not to understand the realities of life

itself. I would suggest that the inclusion of social and economic rights in our Constitution militates against the idea of mere liberal democracy.

So let us talk about these concepts and there ends my discourse on a liberal democracy. Let us start the discussion.

I end this section by repeating that even if Helen Suzman was to disagree with me on what I have said so far, she would have defended to her death my right to say what I said. This takes me to the topic of patriotic criticism on which there could never be any difference of opinion between Helen and myself.

PATRIOTIC CRITICISM

Our Constitution talks about openness, responsiveness and accountability. It provides for the right to freedom of speech and the right to campaign politically. This, in my view, creates an obligation on us to achieve a particular kind of open society. A society in which we can honestly engage with each other, a society in which we can honestly talk to each other, a society in which we try to understand each other's points of view, a society in which we are not impacted upon by political point scoring.

I must say, and this is a matter of considerable importance in the light of the elections that are about to happen next year, that there is a certain darkness which tends to pervade some political circles. There is an attitude which says (and this is in all political parties and you



Openness is a constitutional imperative; secrecy destroys openness as does private criticism.

will think of the examples yourself), if you represent a minority opinion within the party then you will be chastised. It is an attitude which says that you will not criticise majority views in public. You criticise us privately, behind closed doors so that we can do what we wish to do. I think that this approach is undoubtedly antithetical to the democracy created by our constitution. In my view one of the imperatives of achieving the constitutional project is to engage in discourse, to criticise, to be honest and to engage without risk.

That freedom to criticise is vital and the

risk of its absence or denial, whether you are in a large political party or a small one, whether you are a political party in power or a political party not in power, is considerable. The private criticism contributes to the erosion of democracy itself. Openness is a constitutional imperative; secrecy destroys openness as does private criticism.

The first speech contest I participated in was a speech contest when I was in matric and the topic interestingly was “a true patriot must when necessary criticise his or her country.” I must confess that at that time we were not so advanced in our gender sensitivity, so the “or her” was not in the topic.

But I’ve always believed, and I think it is right, that it is that duty of a patriot to criticise government, to criticise the



constitution |känstə't(y)oō sh ənl noun 1 a body of fundamental principles which a state or other organisation

country, to have an openness of ideas and I hope that all of us will begin to think about this, that all of us will begin to understand that unless we open things up, unless people are able to express their views, unless people are able to say what they have to say, we are going to be in very, very serious trouble and I can do no more than to repeat that patriotic criticism is vital.

These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.

I want to say one more word about freedom, again asking the liberal democrats if they would agree with me about this – you know we had the Five Freedoms Forum some years ago and that Forum identified one important aspect of freedom, which has always sat well with me and appears to have been forgotten today. This is the notion of freedom from poverty. May I suggest to you that freedom from poverty, as demonstrated by our need for reconstruction and the Constitutional provision for housing and like matters is perhaps, in the South African context, one of the most important freedoms.

Again, Chief Justice Chaskalson in the case of *Soobramoney*¹⁴ talked about the troubles we've had in the past, how much people have suffered, and unless we put things right, all these constitutional claims will still have a "hollow ring." What he said was this:

"We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."¹⁵

The point is that people still suffer. The point is that there are too many people in this country who are still far too poor. The point is that there are far too many people in this country who live a sub-optimal existence and the plight of poor people is not part of the dominant discourse. The discourse is something else.

When miners' strike in Marikana, and they get 12 or 14% increases, the thought is not that these poor people were earning so little money, it's a good thing that they've got something more. The thought is that if you give illegal strikers extra money,



however poor they may have been, it will spoil the market, as it were.

The discourse on corruption is absolutely excellent. But I think all of us, in terms of our constitutional structure, need to embrace the notion of freedom from poverty, need to understand how important social and economic rights are and appreciate that freedom with poverty and without equality is hardly useful or helpful.

So what kind of democracy are we? How would we like to describe our democracy? I already said, somewhat gently I hope, that the liberal democracy tone doesn't sit well with me. I would say that we should develop ourselves to be a people's democracy. A democracy that is truly interested in people, a democracy which begins to understand that power is there to be used for the benefit of the people in our country.

I would suggest that during the period preceding the next election, there needs to be much thinking, re-evaluation and careful reflection on how far we have come, what is still to be done and how best to do it.

How many of our newspapers in the last six months have raised the poverty discourse? We read about all kinds of other things and yet poverty remains and is arguably worse than it was before. Unless we reach a situation where all of us agree on a particular minimum level of humanity, and a particular minimum threshold at which people have to be able to live, and unless we commit ourselves to that, we will be doomed to absolute disaster. So let me cheer on the liberal democrats and say the most important freedom, is freedom from poverty.

Thank you very much.



constitution |känstə't(y)oō sh ənl

noun

1 a body of fundamental principles which a state or other organisation

- 1 12. Freedom and security of the person
- (1) Everyone has the right to freedom and security of the person, which includes the right-
- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right-
- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.
- 2 15. Freedom of religion, belief and opinion
- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that-
- (a) those observances follow rules made by the appropriate public authorities;
- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.
- (3)(a) This section does not prevent legislation recognising-
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.
- 3 16. Freedom of expression
- (1) Everyone has the right to freedom of expression, which includes-
- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to-
- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.
- 4 18. Freedom of association
- Everyone has the right to freedom of association.
- 5 22. Freedom of trade, occupation and profession
- Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.
- 6 36 Limitation of rights
- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.
- 7 Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)
- 8 9. Equality
- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
- 9 See note 8 above
- 10 8 Application
- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.
- 11 Minister of Finance and Other v Van Heerden 2004 (6) SA 121 (CC)
- 12 26. Housing
- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
- 13 27. Health care, food, water and social security
- (1) Everyone has the right to have access to-
- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.
- 14 Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC)
- 15 Para 8



"I stand for simple justice, equal opportunity and human rights: the indispensable elements in a democratic society – and well worth fighting for."

Helen Suzman

INVITATION TO BECOME A FRIEND OF THE FOUNDATION

We invite you to assist the Foundation in promoting liberal constitutional democracy.

Democratic South Africa faces challenging times. There is much to celebrate in South Africa but much that gives rise to concern, frustration and even anger. Each of us can make a difference to ensure the development of South Africa.

The Helen Suzman Foundation is making a difference. We protect the rights enshrined in our country's constitution, tackle issues of governance and accountability in the public arena, disseminate informed research and provide a platform for public engagement and dialogue.

More recently, the Foundation intervened successfully in the Constitutional Court challenge to the dissolution of the Scorpions and has also made significant interventions into the public domain. These include:

- National Health Insurance Green Paper
- The Independence of the Hawks
- The Protection of State Information Bill
- The SAPS Amendment Act
- Legal action with regard to the Judicial Service Commission

The Foundation is not aligned to any political party. We engage actively with a range of people and organisations to enhance the country's emerging democracy.

The Foundation invites you to support our work and become a **Friend of the Foundation**.

Subscription levels (per annum) – **Silver R1 000, Gold R5 000 and Platinum R10 000+.**

Donations are tax deductible and a receipt will be issued in terms of Section 18A of the Income Tax Act.

Our banking details are: Helen Suzman Foundation, Nedbank, Branch code: 195 805, Account Number: 1958 496006, Swift Code: NEDSZAJJ

We trust that you will respond positively to this appeal. If so, please confirm payment by advising name, email address, telephone number and postal address to Roshan Arnold (roshan@hsf.org.za).

yours sincerely

Francis Antonie
Director

constitution ˌkɒnstə't(y)oʊ sh ənl

noun

1 a body of fundamental principles or established precedents according to which a state or other organisation is acknowledged to be governed.

helen.suzman.foundation
promoting liberal constitutional democracy

The Helen Suzman Foundation would like to express its appreciation to its funders, donors and partners. Their support made this Memorial Lecture possible.