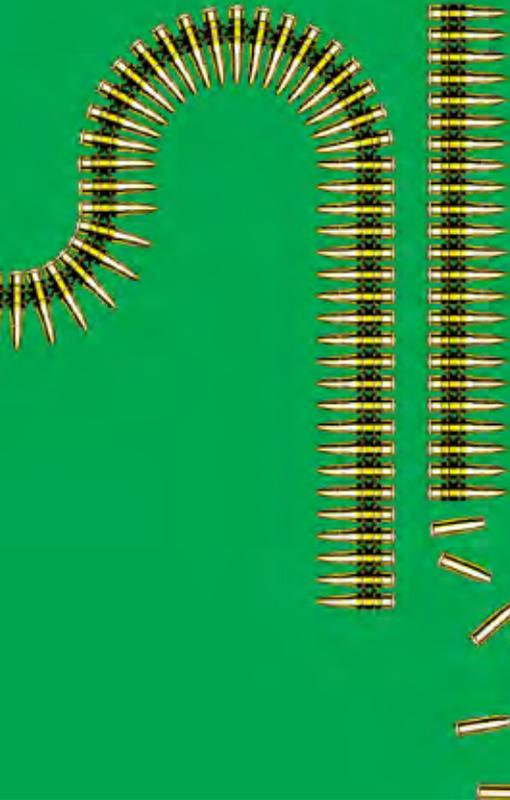


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Protecting and Defending *our* Constitution

NINTH ISSUE DECEMBER 2008

QUARTERLY

roundtable

THE HELEN SUZMAN FOUNDATION

SERIES

Roundtable

The 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 non-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.

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HELEN SUZMAN FOUNDATION

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Profiles

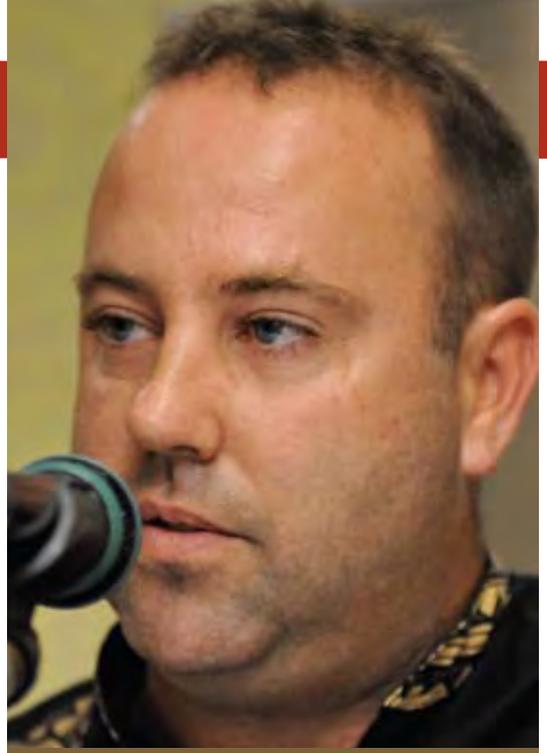


Siphon Seepe

Professor Siphon Seepe holds a Dip Sci (Ed – Unibo), B.Sc Ed (Physics – Unibo), M.Sc (Physics – Wits), M.Ed (Harvard University), PhD (Physics – Uni. Nwesi), and Advanced Management Programme (Henley UK).

He has served as the Academic Director of Henley Management College, Southern Africa, and as the Acting Vice-Chancellor of Vista University, and was appointed in 2002 as Deputy Vice-Chancellor at Vista University. He held teaching positions at various levels both locally and abroad and writes extensively on a wide array of matters of public interest, and was a columnist and an associate political editor of the Mail & Guardian.

He is a recipient of the prestigious Fulbright South African Researcher Grant and Harvard South Africa Fellowship. Prof Seepe serves on the HSF and SAIRR boards and was invited by the Presiding Officers of Parliament to serve as member of a panel tasked with reviewing Parliament's performance with regard to its constitutional mandate.



Lance Greyling

Lance Greyling is an MP for the ID and the Chief Whip of the parliamentary caucus as well as the interim National Policy Convenor. His major areas of interest are environment, rural development and energy.

Before assuming public office Mr. Greyling was the Regional Programme Manager for GLOBE Southern Africa, where he was in charge of capacitating Members of Parliament in the Southern African region on environmental and sustainable development issues.

Mr. Greyling has an honours degree in African Studies from the University of Cape Town and is presently completing a Masters programme on sustainable energy.

He serves on the board of My Life, an organisation aimed at empowering youth who are currently living on the streets, and on the board of the Bulungula Incubator, an NGO concerned with the development of a rural community.



Bantu Holomisa

Major General H Bantubonke (Bantu) Holomisa co-founded the United Democratic Movement (UDM) in 1997 and currently serves as its President. Previously, he was the Commander of the Transkei Defence Force and Head of the Transkei government up to the first national elections in South Africa in 1994.

Between 1988 and 1989, the government led by Gen. Holomisa un-banned approximately 33 organisations that were banned by his predecessors and his government worked closely with the liberation movements. As a result, Transkei had a smooth transition prior to the South

African national elections of 1994. Gen. Holomisa also led Transkei delegation to the Convention for a Democratic South Africa (CODESA) negotiations. He was chosen by the African National Congress (ANC) Election Committee to campaign nationwide alongside Mr. Nelson Mandela, Mr. Thabo Mbeki, Mr. Cyril Ramaphosa, Mrs. Winnie Madikizela-

Mandela, the late Mr. Joe Slovo and Mr. Steve Tshwete during the democratic election in 1994.



Zwelethu Jolobe

Zwelethu Jolobe holds a masters degree in international relations from the University of Cape Town (UCT) and is currently doing a PhD at UCT. His doctoral research topic involves refining theory on constitutional engineering and constitutional negotiations looking in particular at cases of South Africa and Zimbabwe.

He is a lecturer in Comparative Politics at UCT's Department of Political Studies.

Zwelethu is a regular commentator and political analyst on Western Cape and Cape Town electoral politics, local and provincial government and national political and policy trends.

Profiles



Steven Friedman

Professor Steven Friedman is a research associate at the Institute for Democracy in South Africa (Idasa) and Visiting Professor of Politics and International Relations at Rhodes University. Prior to this he was a senior research fellow at the Centre for Policy Studies, an independent, nonprofit, policy research centre.

He is a former consultant on urban politics to the Urbanisation Unit of the Urban Foundation and to the Development Bank of Southern Africa. He was national head of the Information Analysis Department of the Independent Electoral Commission and a member of the Commission on Provincial Government think-tank which explored constitutional options relevant to provincial government. He is a member of the international research council, International Forum for Democratic Studies, Washington DC, and is an editorial board member of the *Journal of Democracy*. Friedman publishes widely.



James Selfe

James Selfe is the Chairperson of the Federal Council of the Democratic Alliance (DA) and Spokesperson on Correctional Services.

Mr. Selfe was born in Pretoria and attended Diocesan College, Rondebosch. He obtained a Bachelor of Arts, Honours and an MA in Political Studies from the University of Cape Town, where he later became a teaching assistant in 1978.

From 1989 to 1992, Mr. Selfe held the position of Director of Communications for the Democratic Party (DP) and in 1992 he became the Executive Director of the DP, a position he held until 1997.

Mr. Selfe has been elected to various offices since 1989: He was a Member of the President's Council; the Senator from the Western Cape; a Permanent Delegate to the NCOP of the Western Cape. He is currently a Member of the National Assembly as well as Chairperson of the DA Federal Council.

At various stages Mr. Selfe has also held the position of spokesperson on Defence and Provincial and Local Government.



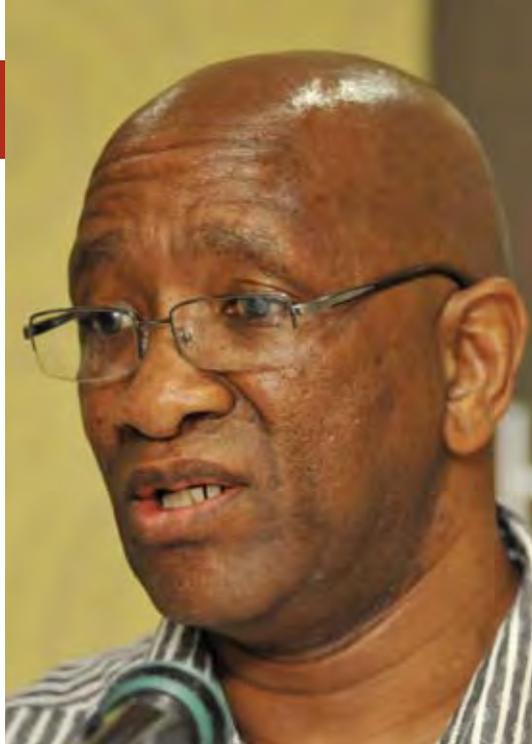
Musa Zondi

Reverend Keith Muntuwenkosi Zondi is the Secretary General of the Inkatha Freedom Party (IFP). He is also the Executive of the KwaZulu Natal Christian Council. Reverend Zondi was born in Nkandla, KwaZulu Natal and attended Dlangezwa High School.

In 1989 he obtained a Bachelor of Arts from the University of South Africa, specializing in Development Administration, African Politics and Theology.

Reverend Zondi has held several Chairmanships including the position of Provincial Chair for the IFP in KwaZulu Natal and National Chair of the IFP Youth Brigade. From 2001 to 2004 Reverend Zondi was the Deputy Minister for Public Works.

Reverend Zondi has also held memberships on various select Committees including Education, Arts and Culture, Economic and Foreign Affairs, and Labour.



Smuts Ngonyama

Lulama “Smuts” Ngonyama is the Head of Policy for the newly formed party, the Congress of the People (COPE).

Ngonyama was born in Uitenhage and attended school in Fort Beaufort. He graduated from the University of Fort Hare with a Bachelor of Commerce.

Ngonyama held several positions in the ANC; he was their spokesperson and a former head of the ANC presidency. He served on the executive from 1994, until he lost his seat in Polokwane in December 2007.

In November 2008, Ngonyama resigned from the ANC to join the Congress of the People.

Profiles



Raenette Taljaard

Raenette Taljaard is the director of the Helen Suzman Foundation. Taljaard, a former DA MP, served as Shadow Minister of Finance from 2002 and was a member of the Portfolio Committee on Finance. She also served on numerous other parliamentary committees, including the Standing Committee on Public Accounts during the arms deal investigation

Taljaard lectures part-time at the University of the Witwatersrand's School of Public and Development Management and locally and abroad on the regulation of private military and security companies.

Taljaard is a Yale World Fellow, a Fellow of the Emerging Leaders Programme of the Centre for Leadership and Public Values (UCT's Graduate School of Business and Duke University), a Young Global Leader of the World Economic Forum, and an ALI Fellow of the Aspen Institute.

Taljaard holds a BA in Law, RAU (University of Johannesburg), a BA (Hons) in Political Science, cum laude, RAU (University of Johannesburg), an MA in Political Science, cum laude, RAU (University of Johannesburg) and an Msc in Public Administration and Public Policy, cum laude, London School of Economics and Political Science.

Taljaard publishes widely.



HELEN SUZMAN FOUNDATION

*Protecting and Defending
our Constitution*



**OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA**





Introduction

The longevity of founding documents, declarations and constitutions are the preserve of all citizens who care about the ethos that inspires the societies they inhabit, and it lies in a complex process of internalising the visionary values of these social contracts and acting, and structuring our actions and our words, every day, to further the ideals espoused in them.

There can be little doubt that South Africa's founding mothers and fathers — and many are still with us to whom, as its shapers and crafters, the words in the Constitution have deep and profound personal meaning — would have wanted to see their laborious work celebrated only in its sheer longevity as our democracy's cornerstone, and in its tenacity and ability to withstand the buffeting winds of different political eras and a veritable panoply of successive leaders in office.

That is the stark and profound challenge we all confront, bound together by our founding document's ownership over us and our ownership of it. We all released the past to labour under a new social contract – the Constitution – for our new South Africa. It is a daily task we all are charged with as citizens to ensure that our founding document makes a difference to us all, equally.

This past year the question of the Constitution and constitutionalism has been under the political and media spotlight in various contexts. Attacks on the judiciary have raised questions about whether these statements violate the very founding provisions of the South African Constitution.

The prospect of the ongoing crisis at the Office of the National Director of Public Prosecutions and the suspension of National Prosecuting Authority (NPA) head Advocate Vusi Pikoli has highlighted the pressure that can be brought to bear on constitutional institutions, and the politically opportunistic dissolution of the Directorate of Special Operations (DSO), or the Scorpions, as they are fondly known in South African parlance, has caused anxiety about the possible collapse of the boundary between party interest and state interest, which has clear constitutional implications.

The removal from office of former State President Thabo Mbeki, and the manner in which it was done, has generated much debate about constitutionality. Some analysts have called it a “bloodless coup”, while others believe it was done without offending against the letter of the founding text – though the offence against the spirit of the text remains debatable.



These unprecedented events, including the removal of a head of state, led in November 2008 to a call for a National Convention to defend democracy by former African National Congress (ANC) leaders Mosioua Lekota, Sam Shilowa and Mluleki George — a step that in turn led to the subsequent formation of a new political party in South Africa, called the Congress of the People (COPE). The COPE has made the question of the protection of the Constitution a centre-plank in its electoral strategy for the 2009 election campaign.

Arguably the ongoing legal woes of ANC President Jacob Zuma and repeated statements that he will not have a fair trial, which continue to be made in 2009, remain current challenges not only to the independence of the judiciary, but indeed to the fabric of the Constitution itself and the equality clause within it.

While these debates rage and the political rhetoric causes deep anxiety and concern about our respect for our founding document, South Africans have been left with a distinct impression that it is necessary actively to protect and defend our Constitution against these attacks.

This is an injunction that rests upon us all, as the Constitution itself instructs us to protect and defend it as part of our collective duty as a citizenry.

But this is not the only constitutional injunction. The fact that the realisation of all the rights in our Bill of Rights remains a distant reality to some — a reality yet to be realised — should also spur us all to greater action to protect and defend the long-term foundations of our Constitution by seeing to it that the rights to housing, education, health and a clean environment are realised for us all, if the fruits of our country's liberty are to be meaningful.

But there can be little doubt that protecting and defending the Constitution has to be about protecting the letter and spirit of our founding document against both rhetorical and real attacks; against those who seek to undermine its core values substantively and against those who fail to realise that the long-term protection and defence of our founding document lies in its values being universally enjoyed by all our citizens, and internalised accordingly. For without such a deep internalisation of the values and essence of the Constitution its long-term survival will forever be in jeopardy.

Introduction



Chairperson

Before I start the proceedings, I would like to share with you correspondence we received at the Helen Suzman Foundation yesterday from Jesse Duarte, the spokesperson of the African National Congress (ANC). As you can imagine, we invited all the political parties to this event, and regrettably the ANC will not be with us today.

“Thank you for the invitation to participate in the Helen Suzman Foundation Quarterly Round Table Series on ‘Protecting and defending our Constitution’. Please accept my apology for not having replied sooner. We regret to advise you that the ANC will not be participating in this round table discussion.”

“While we welcome the Foundation’s initiative to encourage public debate on the issues that most directly affect South Africans, we do not see the value in debating a subject that is not in fact one of the key institutional policy and political challenges that confront our country.” (Which is a quote from my correspondence.)

“If one looks beyond the rhetoric objectively, there is currently no threat to South Africa’s constitutional order, or to the rule of law. Certainly we should all stand ready to protect and defend our Constitution. But to suggest, as this debate would, that the Constitution is somehow imperilled is to misdirect our attention, and our energies.”

“The more relevant question as regards to the Constitution is whether we have made sufficient progress towards realising the socio-economic rights contained in Chapter two of the Constitution; what progress have we made since 1996 in realising the right of all South Africans to housing, health care, food, water, social security, and education. That, we would submit, is the debate we should be having.”

“Again, please accept my apology for any inconvenience my late response may have caused.”

“Yours sincerely, Jesse Duarte.”

We certainly regret not having the ANC present, particularly in the context of



comments made in today's *Business Day* by ANC President Jacob Zuma with respect to the need for national discourse and national debate on a variety of topic areas; we believe, quite crucially, also on the aspect of the Constitution and constitutionalism.

With that in mind, we've invited a panel that combines some of what we believe to be our most incisive political analytical views in the country. To my right and to my left, not in terms of their political views, are Prof Steven Friedman and Zwelethu Jolobe and Prof Siphon Sepe. In addition

we have a variety of our key players, some in Parliament, some not, in the political arena: Lance Greyling of the Independent Democrats (ID), who is also in charge of the ID's policy machinery, if I have my facts correct; the leader of the United Democratic Movement (UDM), General Bantu Holomisa; James Selfe, who serves in various capacities, including Federal Chair, in the Democratic Alliance (DA); the Rev Musa Zondi, who equally serves in a variety of capacities in the Inkatha Freedom Party (IFP); and Smuts Ngonyama, representing the Congress of the People (COPE).



Raenette Taljaard



Prof Sipho Seepe

Let me start by taking you to December [2007]. When the results came out, there was a sense of liberation in the country. When we went abroad, people said they did not think that a sitting president could be humiliated in the electoral process in South Africa, or in Africa. If you're going to talk about the Constitution and constitutionalism in South Africa, you should actually look at how parties handle themselves. So that party democracy, and the removal of people in positions of power, in itself says we are still on track. We may not like how these things happen, but at least the framework is there.

And we also saw the removal of the sitting President, and there were people who were angry about it. But if you look at the framework, most people will agree that there was nothing illegal or unconstitutional about that process. When you have a party democracy, that's what happens. We saw it happen in Britain to Tony Blair and also to Margaret Thatcher. Even in this country, some people will tell you that PW Botha was removed the same way. What is important is that these people were removed, not because

the electorate wanted them to go, but simply because we had that system of democracy. As far as constitutionalism is concerned, we are on track, even on that one.

Of course, we also saw the removal of former Deputy President Jacob Zuma, when there were indications of untoward behaviour. A number of us celebrated this as a commitment by the then President to deal with corruption. But we also know from the media that allegations have come, not only from this country, but from elsewhere, that suggest that we need to start worrying about what appears to be selective prosecution, or a selective approach in dealing with corruption.

What emerges, even as we debate, is the old saying that democracy is served when the citizens are eternally vigilant. Any government that gets into power will tend to be corrupted by power, and the role [of serving democracy] does not lie only with government, it also lies with us. We have also seen certain bills that people felt were going to threaten the judiciary, and a number of parties in Parliament and society, and even in the judiciary, took a position,

and those bills were actually parked. Now we know they are being dusted off.

But the issue of attacks on the judiciary did not start now. Some of you will remember when the former President, as State President and also as ANC President, read statements that talked about needing to change the collective mindset of the judiciary. And that continued, and some of us in the Helen Suzman Foundation and other formations have always been very concerned about the protection of the judiciary. But one must also understand that that does not mean that the judiciary should not be criticised. There are people who enter the debate as if the judiciary should be sacrosanct and should not be taken on, on a number of issues. Many scholars have written about judgements that were very problematic. We must also understand that the people have a sense of justice. So people will raise issues about judgements they find problematic, and that should not be considered to be a threat.

Justice Langa and other Chief Justices have commented that they welcome criticism of the judiciary. He went further, to say that the debate on the judiciary adds another element to demystify it, to demystify what happens in court. So I do not have any problem being critical of even the Constitutional Court and, as a matter of fact, I have actually been critical of the Constitutional Court. That does not mean that I'm not committed to constitutionalism.

Then there's the issue of protest. Some of my friends who are of a liberal kind have argued that demonstrations and protests outside the courts are a threat. I hold a different view. I do not subscribe to some of the statements that have been made by people like Gwede Mantashe about counter-revolution and all that. But I do think that we should not criminalise or demonise protest. I protest in a different way. I have a column, I write, I sit on boards, I have platforms in which I participate in protest. But all over the world people protest when they think that something is unfair.

We should quibble with the rhetoric or violence that we see. But as we know

that we are responsible for ensuring that there's respect for the Constitution, there should also be respect for the promotion of democracy.

There are a few instances of failure of the judiciary. I remember the Supreme Court of Appeal, dealing with the Shabir Shaik matter, when we were being told that the judges cannot be influenced, continued to use a statement that was never made in a court of law by Judge Squires. Effectively, what that says is that these people are actually influenced by the media, and also by their background.

“A number of judges have complained about the National Prosecuting Authority (NPA), but very few parties have actually said it is important that the institutions of democracy themselves are not seen to be violating the law.”

But the most basic thing is to know that law and justice are not an exact science. This is why even the judges themselves disagree. So when people protest outside the court they might actually be agreeing with those judges who hold a different view. We need a sophisticated approach when we talk about how we begin to protect our institution of democracy, and we should not demonise what is simply a democratic practice.

The interesting thing is that when these things happen outside our continent, nobody says democracy or the Constitution is under threat. It's only in South Africa. So I want to rally against alarmist responses. What we need is a sophisticated engagement in terms of whether justice is being served.

I've seen people keen to talk about individuals, but I've heard a lot of silence when it comes to how our institutions themselves participate in ensuring that there's law enforcement. A number of judges have complained about the National Prosecuting Authority (NPA), but very few parties have actually said it is important

Sipho Seape



“Constitutionalism is the responsibility of individuals, and it’s also our responsibility to ensure that the instruments that we’ve put together are not there to serve the interests of individuals.”

that the institutions of democracy themselves are not seen to be violating the law. And when there is silence on that, then we are failing to entrench and support constitutionalism in South Africa. Constitutionalism is the responsibility of individuals, and it’s also our responsibility to ensure that the instruments that we’ve put together are not there to serve the interests of individuals. Unfortunately I cannot say in this country that that has not happened.

We have also had the interesting case of Judge Hlope. From everything that I’ve read about him, there’s a sense that he should not be a judge. But when the Constitutional Court went public without even giving him an opportunity to comment on or reply to what two of them actually said he said to

them to try to influence them in the Zuma search and seizure case, I said “I’ve seen this movie before.”

I’ve seen for myself where someone in a community has stolen something, and two respectable members of the community suspect somebody and say that the people should be given instant justice. The behaviour of the Constitutional Court is no different. And very few people wanted to look at that because it is a court, and you cannot say that about the court.

But we also saw that another court felt that despite the fact that Hlope might not be right on this matter, his rights are being violated by the Constitutional Court. So effectively we have 11 justices, or perhaps there were nine of them – I don’t know, failing in their duty to make sure that they lead by example.

This is a case where it is also proper for us to raise our voices. We have a responsibility because the courts serve us, we don’t serve the courts. So when we talk about constitutionalism, we should actually be much more nuanced, and we should not be alarmists.

Lance Greyling



Lance Greyling

Recently, a number of individuals and political parties have been vocal on the need to protect and defend the Constitution. Some political parties have even gone so far as to assume the mantle of defenders of the Constitution. In fact, some parties have seemed to base their entire political platform on that sole directive.

The first point that needs to be made, though, is that the Constitution does not belong to any political party or institution, and that the job of defending it falls on the shoulders of every single South African. The Constitution was drafted after what must have been the most public participatory process in South Africa, where millions of citizens were able freely to give their inputs. It is therefore a document that codifies our aspirations as a nation and binds all of us, no matter how powerful or weak, under one supreme law.

What is required now, however, is for these progressive values to be inculcated into the society at large, and achieving this requires leadership that is truly willing to stand up

for these values in both words and actions, even when it might be unpopular to do so. Unfortunately, some political leaders have recently seen fit to resort to populist rhetoric which entrenches conservative values like patriarchy and undermines our efforts at building a progressive human-rights culture in South Africa.

The Constitution was drafted at a point in our country's history where we were determined to make a fundamental break with the past and entrench the human-rights culture that was so tragically absent during the oppressive years of apartheid. It does more than simply entrench human rights, though. It also recognises the need to transform our country, and that in this process, active steps will need to be taken to undo the huge socio-economic inequalities that were institutionalised during apartheid.

Some commentators refer to the Constitution as a liberal-democratic document, but as the ID, we in fact see it as a socio-democratic Constitution. This is because it goes beyond the fundamental human rights and places an obligation on

the state to address progressively the socio-economic needs of all South Africans.

And when we talk about defending the Constitution, it is important not to be selective in our reading of it. Too often this debate is confined to the governance framework of our Constitution, such as our democratic institutions, like the executive, parliament, and the judiciary. In this regard, the ID is obviously concerned with the recent statements and actions on the part of some individuals and political parties that have threatened the independence of these institutions. We have been fierce critics of these actions and have argued that as political leaders in South Africa, we have a duty to respect the separation of powers and the independence of our judiciary.

The ID's leader, Patricia de Lille, has herself been involved in many cases which have proceeded to the Constitutional Court. In some of those cases the Constitutional Court ruled in her favour, and in others, they ruled against her. At all times, however, she fully respected their judgement and did not cast aspersions on the judges.

And the same can be said about former President Nelson Mandela who, as a sitting President, complied with a subpoena to appear before the courts. And this is the

“Equality before the law is a fundamental principle that was fought for in this country and we need to ensure that we all uphold it, particularly political leaders.”

manner in which we believe political leaders and their followers should treat South Africa's judiciary.

Equality before the law is a fundamental principle that was fought for in this country and we need to ensure that we all uphold it, particularly political leaders. We also need to ensure that we don't engage in selective treatment of judges and judgements. It is therefore unacceptable that we hold up some judges as progressive individuals when they rule in our favour and as counter-revolutionaries when they rule against us. And with the Nicholson judgement, it's also interesting to note that the ANC lauded that part of the judgement that ruled in Jacob Zuma's favour, but conveniently ignores the part that states: “A commission of enquiry should be set up to investigate the arms deal.”

The ID believes that there is a strong Constitutional imperative for the President



to set up a commission of enquiry into the arms deal, given the havoc that it has already wrought in our democracy, and the fact that the Constitution is built on the principles of transparency and accountability.

As the ID, however, we believe that the best way to defend the Constitution is to give all South Africans a very real stake in it. Too often the Constitution is seen in the abstract, revolving around concepts such as the rule of law and the protection of human rights and freedoms. As vital as these concepts are in creating an environment conducive to South Africa's future development, it is often not tangible enough to the 20 million South Africans that continue to live in desperate poverty.

The questions that we should be asking, therefore, is how we make sure that the Constitution speaks to the concerns and aspirations of those South Africans who are often left out of these elite debates.

In this regard, I would like to use a case study of the small rural community of Nceleni, which is in the Eastern Cape. There are thousands of rural communities in South Africa in a similar situation. This village of a thousand people currently has no piped water and all of the boreholes that they rely on for drinking water have E coli levels way above the World Health Organisation standards. As a result, many children contract easily preventable diseases, and when they fall sick they are unable to access health care as there is no ambulance that services the area. The primary school is a dilapidated mud hut which does not have any water, sanitation or electricity.

It is therefore clear that there are a whole host of constitutional provisions that are not being met in this village. In fact the constitutional argument could probably be made using the equality clause, in that this community could claim that it's being discriminated against on the basis of its geographical location.

But the question is who is going to make this argument, as the community is unaware of their rights and is in any event unable



Lance Greyling

to afford lawyers who can fight the case on their behalf. Civil society organisations have often stepped into the breach and taken up these kinds of issues on judicial review. But surely we have the right to expect public policy to be advanced in the Constitution, without been forced by the courts. There are also numerous examples where the government has simply dragged its heels on implementing such court orders.

The ID believes all South Africans must therefore be made aware of their constitutional rights, and government mechanisms must be put in place to ensure speedy recourse when those rights are not being protected. In this way the Constitution can become a living document, with ordinary South Africans breathing life into its progressive agenda for true social transformation.

The ID therefore believes that we should not simply talk about defending the Constitution, but rather defend it by advancing it to transform the lived reality of so many poverty-stricken South Africans.



HELEN SUZMAN
FOUNDATION

PROMOTING LIBERAL CONSTITUTIONAL
DEMOCRACY AND HUMAN RIGHTS

Gen Bantu Holomisa

We should never forget that our Constitution is not just the highest law in the land, it is also an expression of the principles that should underpin multiparty democracy. The attacks that have been launched at our Constitution, directly and indirectly, often aim at undermining those principles. It is to be expected that a ruling party that prefers one-party dominance would come into conflict with a Constitution that specifically aims to achieve multiparty democracy.

The UDM is particularly concerned about three constitutional and democratic principles that have come under systematic threat, namely inclusiveness, consultation and accountability. Indeed, we have witnessed the ruling party, being the custodians, of course, of our Constitution, campaigning and demonising the Constitutional Court judges and threatening to purge NPA personnel because they are expected to come up with a verdict which perhaps would be acceptable to the palace, and even calling for a political solution to their leader's serious criminal charges.

There may well be some areas which need to be addressed, but we have noticed that the Polokwane lynch mob lacks style in addressing these concerns. Allow me to address each of these separately.

Inclusiveness is one of the core objectives of multiparty democracy and was a consistent claim throughout the CODESA negotiations, as well as the drafting of the Constitution. It was agreed by all stakeholders that never again can we allow a form of government to emerge that purposefully excludes people on any basis. It was correctly decided that we should have a system of democracy that allows all viewpoints to be heard.

Unfortunately, the ruling party is fond of concepts such as hegemony and centralisation, which run contrary to the idea of inclusiveness. It has meant that alternative viewpoints and policy suggestions are raised in Parliament by the opposition but are hardly ever considered by the ruling party. One example is infrastructure development, where public-works projects are used to create jobs and stimulate the economy. Today that policy

is commonly accepted, but it took the UDM more than four years to convince the ruling party to consider it. During that time, people such as Minister Manuel would be fond of dismissing that policy suggestion as populist. In terms of the Constitution specifically, lack of inclusiveness is reflected in the manner in which Chapter Nine institutions, the public broadcaster and the NPA are stacked with people solely from the ANC.

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This lack of inclusiveness has been replicated throughout the civil service, which has become completely politicised. This politicisation not only excludes the many talented people who are not card-carrying ANC members, but encourages a culture of institutionalised corruption. Cronyism and nepotism put incompetent people in important positions with the result that service delivery suffers. It also opens the way for corruption in tender processes. Of course the vast number of such political appointments seriously back-fired once the ANC in-fighting started, because now institutions that should be focusing on service delivery have become battle grounds between the two factions.

Consultation is the second and related constitutional principle that the UDM believes has been under constant attack. Whereas we agreed at CODESA that we would create a constitutional democratic order that truly reflects government for the people and by the people, the reality has been something different. It was commonly accepted that we would move away from the big-brother style of governance where people are told what is good for them, to a style of government where people would have a say in how their needs and aspirations are met by government.

Under the ANC, the idea of consultation lasted only for a short while. You will recall that in 1995/96 financial year, the Growth

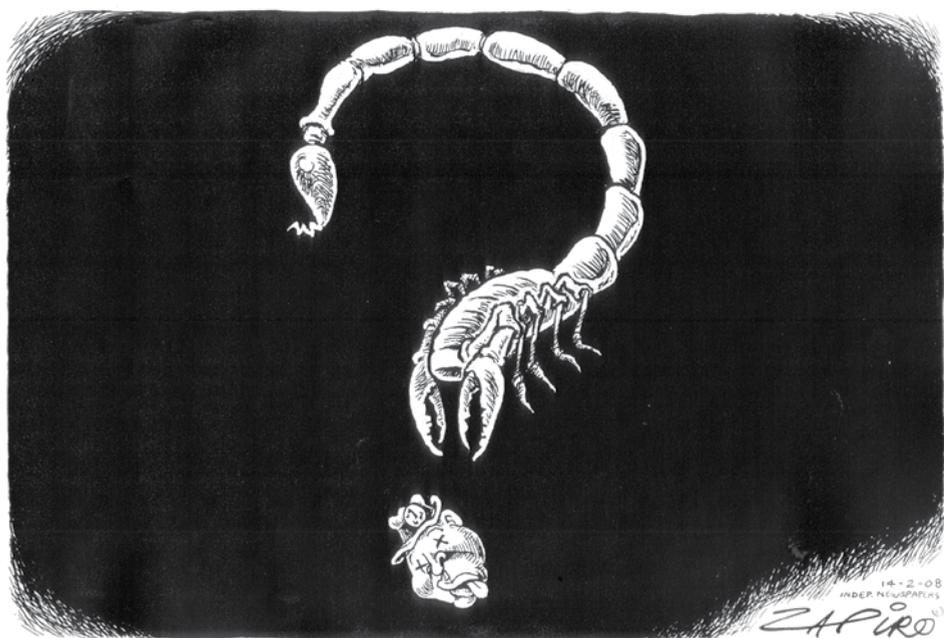
Employment and Redistribution (GEAR) policy was suddenly announced without any consultation and led to widespread unhappiness and a lot of retrenchments.

In 1998, the Arms Deal was escalated without much consultation either, and in the face of serious questions regarding the more pressing social investments that could be made. In fact in 1998, Parliament endorsed a need for this country to invest more on social security rather than buying weapons. But in hindsight we can say both Zuma and Mbeki could not their finish their terms of office precisely because of that Arms Deal transaction.

Whenever I visit a community, be it in Johannesburg or in Mkhhaluli, I am confronted with questions about laws that people don't understand and don't agree with. People ask me how we could pass legislation such as the property rates tax without asking them how it would affect them. And it isn't just legislation. People often complain about distant government officials who decide for them when they need houses, when they require water, for instance. State institutions such as the Demarcations Board are completely inaccessible and untouchable, yet they can decide on a whim where people live.

Another classic example is education. South Africans are deeply disturbed about the state of our schools and education system. They feel totally powerless in the face of an education policy that has been in flux since 1994. All they know is that nobody is asking their opinion. And every year hundreds of thousands of our children leave school without the necessary skills to find employment.

Finally, let me address the constitutional principle of accountability. At the heart of true democracy is the certainty that power resides with the people, not the politicians. For democracy to be legitimate, people need to have the certainty that they can hold politicians who disappoint or fail them to account. Yet the ANC has become increasingly distant and unaccountable. We have seen massive countrywide community protests for more than five years because



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people have become frustrated with this lack of accountability at local government level.

Legally, accountability depends on equality before the law, but the ruling party has a poor track record when it comes to respecting this principle. People facing serious allegations are kept in or appointed to senior positions, and convicted criminals are literally carried on shoulders and allowed to defy the judiciary and institutions of the democratic state.

The constant attacks on the judiciary and the NPA culminated in the disbandment of the Scorpions. That cannot be viewed as anything other than a despicable attack on accountability and equality before the law as enshrined in our Constitution.

Indeed, we witness a serving President being recalled from his office without following the prescribed constitutional route, and in that process, the person who is recalling him or who is engineering his departure is facing

serious charges. Some of us cannot support such a thing.

Politically, accountability is about the ability of voters to take politicians to task. The ANC's track record on this is also dismal. In particular, the shameful expedient of floor crossing that was designed to circumvent the express wishes of the voters. In this regard, the UDM believes that to protect our Constitution and ensure that multiparty democracy pushes back the spectre of one-party dominance, it will be necessary to introduce constituency voting into the proportional representation (PR) system, as well as a directly elected President for the country.

The upcoming election presents us with an opportunity to restore balance to the political playing field and begins the process of ending one-party dominance. The Constitution was always designed to foster multiparty democracy.



Zwelethu Jolobe

We need to ask ourselves two important and related questions. Firstly, what do we mean by constitutionalism? And secondly, linked to that, what is the relevance for contemporary South African politics, especially in the context of an upcoming general election campaign?

My presentation will largely address the conceptual part of this debate and conclude by looking at some of the more important aspects, as they pertain to our contemporary politics.

Now in order to answer this question of what constitutionalism is, it's important for us to first answer a more preliminary question: what is a constitution? A constitution basically sets out the form of the government. More specifically, it specifies the purpose of the government, the power of each department of the government, the relationships between the state and the society, the relationships between government institutions, and more specifically, the parameters within which the government exercises its power.

The Constitution in a democratic system is that fundamental contract between the state and the society. In a liberal system, one can identify two important differences between ordinary laws and the Constitution. The Constitution in this context is the supreme law, it is the highest law and, as such, is a guide for legislation and the interpretation of legislation. And while ordinary laws can be modified or repealed by the national legislature, or be declared illegal or unconstitutional by the judiciary, the national legislature cannot unilaterally modify or repeal the Constitution. And the judiciary has no power to declare the Constitution illegal.

For example, in the case of South Africa, the Constitution can only be modified with the supporting vote of at least six provinces, and that is in addition to a national assembly vote. A Constitution thus binds not only the government but also the people. Through the Constitution, people collectively commit to certain institutional procedures for managing public affairs and resolving social conflicts. The Constitution not only limits the arbitrary power of the government, it

also prevents the public administration from being poisoned by people's tempers and emotions. And through the Constitution, the people collectively commit to certain checks against such public sentiments.

Constitutionalism therefore refers to that system of political arrangements in which there is a supreme law; in which all is governed by the supreme law; in which only the people's will through a super majority vote can supersede or change a supreme law; in which changes can be made only infrequently, due to the difficulty of garnering the requisite popular support; and in which there is a separation of power, checks and balances, and an independent judiciary that is dedicated to legal and rational reasoning to safeguard the supremacy of the Constitution.

“Therefore rulers, like ordinary people, also need to be disciplined and constrained by the rule of law.”

Now my interpretation of constitutionalism therefore has a number of important implications. Firstly, I describe it as the institutional realisation of liberalism. By constraining and regulating government power through law and by preserving the principle of popular sovereignty, constitutionalism ensures the limitation of government. Secondly, constitutionalism does not recognise legislative sovereignty. Sovereignty is popular – that is, of the people – and no legislature has more power than the Constitution.

And thirdly, constitutionalism is based on the premise that as ordinary people, rulers need to be ruled. Therefore rulers, like ordinary people, also need to be disciplined and constrained by the rule of law.

Written constraints in the Constitution, however, are not constraining by themselves because tyrants will not become benevolent rulers simply because the Constitution tells them to. In order to guard against the violations against the letter and spirit of the Constitution, there needs to be a certain set of institutional arrangements.



Lewis Hempkin, for instance, identifies a number of such elements, namely that you need to have government according to the Constitution, the separation of powers, popular sovereignty, judicial review, the independence of the judiciary, etc. Hempkin's analysis highlights two crucial functions of constitutionalism. That is, power construction and rights protection. Under constitutionalism, the entire system of government is created by law. It defines, allocates and regulates government power. In such a system there are frequent elections in order to preserve the notion of popular sovereignty, and under this system there must be constitutionally enshrined civil and political rights.

It's important to note, however, that constitutionalism does not necessarily refer to a specific document, in the sense that you may have constitutionalism without a written constitution. The United Kingdom, for instance, does not have a document called the British or Royal Constitution, but nobody doubts that the British government is a constitutional government. It has had a number of documents that have contained constitutional thoughts, such as the



Zweliethu Jolobe

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Magna Carta, the Bill of Rights, the Act of Settlement, etc. These written documents, together with the British political and legal traditions, form the basis of constitutional government.

Therefore when we discuss constitutional government, we are really not only concerned with the existence of one specific document. We are also interested in a particular type of political behaviour, a particular type of political culture, and a certain type of political tradition and history. The forms may vary but the behavioural results are the same. Limits are imposed upon what governments may do, and basic civil and political rights are embedded in law.

Why and how, then, has the question of constitutionalism become central in our

political discourse as we approach the 2009 general election? Recent developments that flowed from the ANC’s Polokwane conference are illustrative. Firstly, at the procedural level, political behaviour has indeed been consistent with regard to the norms and the expectations of the Constitution. While we may cringe at what some may have called purges of Premiers and the recall of the President, Sections 89, 90 and 102 in Chapter 5 and Sections 130 and 131 in Chapter 6 provide for the removal of Presidents and Premiers respectively. Members of the Executive Branch need not have committed serious violations in law to be removed through politics.

Further, Section 50 of the Constitution, combined with the respective sections I have mentioned, establishes South Africa as a parliamentary system, and what that means is that we all need to get used to the fact that leaders will come and go and sometimes they won’t necessarily finish their terms. This in no way means that it is a deviation from what is expected in the Constitution or from the behaviour that is expected as per constitutionalism.



“... examples of that type of behaviour that violates the rights to human dignity, freedom of expression, assembly and association, and various other rights.”

At the substantive level, however, one may argue that there are some causes for concern. For instance, events around the ANC's response to the formation of COPE, it is argued, are worrying. We have identified issues of hate speech emanating from the ANC Youth League and various cases of intimidation of COPE personnel and the disruptions of their meetings. And all of this, it is argued, can be seen as examples of that type of behaviour that violates the rights to human dignity, freedom of expression, assembly and association, and various other rights.

How then should we read these events? In terms of constitutionalism it's important to note that there is no pre-determined existence of constitutionalism in a democracy. Constitutionalism is a function of conflict. So what we should be looking for is not necessarily whether or not people

are overtly emotional in critical discourse. We should not necessarily be looking for whether or not people criticise judgements, but what the institutions do about such instances. By implication, I mean that even judicial independence is a consequence of conflict. The judiciary needs to be challenged for it to be independent, it doesn't come the other way round.

Perhaps the events surrounding the formation of the COPE have highlighted a vacuum in the realisation of some of the more substantive aspects of civil and political rights. South Africans, however, need a better understanding of, and easier access to, the legal system, because in a constitutional democracy it is the citizens, through their access to the legal system and through the courts, who are the defenders of the Constitution and the protectors of constitutionalism.



Prof Steven Friedman

There is something uniquely and delightfully South African about the current constitutional debate, and what I have in mind is that absolutely everybody is out there defending the Constitution and nobody at all can agree on what it is that they are defending. That is, to me, part of the South African reality.

When I say that everybody is out there defending the Constitution, I find the letter our Chair read out from the governing party a little odd, because the committee which is presently assisting Mr Zuma in the courts calls itself the Committee for the Defence of the Constitution. So clearly, Mr Zuma's supporters feel that the Constitution ought to be defended. Mr Zuma's opponents think the Constitution ought to be defended. Everybody thinks the Constitution ought to be defended. But of course one has to be careful about this because, as is clear from debates about the judiciary, which some of my colleagues have already talked about, and debates about many other aspects of the Constitution, the fact that people are agreeing and, if you like, paying lip service to the idea of constitutionalism doesn't mean

that there's any fundamental agreement at all on what it is that ought to be defended.

The question is whether we should be worried about this or not. I think that that begs another question, because whether we should be worried or not depends on what we think ought to be defended. On the one hand, I don't think that we should be worried at all about debates about particular sections of the Constitution and, indeed, debates about the Constitution itself, because it's a fundamental principle of a democratic society that everything is up for debate. You can't foreclose debate in a democratic society – you shouldn't, and therefore debates about the Constitution are entirely appropriate. I would be surprised if there was anybody in this room who, having carefully read the Constitution, agreed with every clause, and that would be the same in any other constitutional state.

So debates about what should be in our Constitution are not a problem. On the other hand, we do run the risk that people simply use terms like constitution and constitutionalism in order to hide the fact

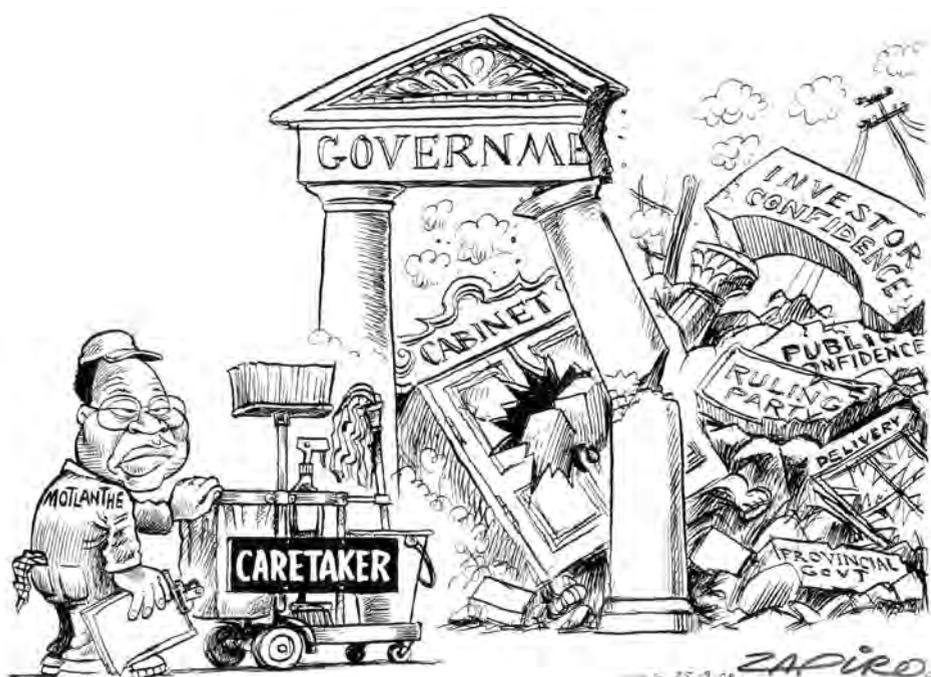
“The question is, what is it that is essential for South Africa to remain a democratic society governed by democratic rule?”

that they are not particularly interested in the kind of rules that bind a democratic society. I think it's always sobering to bear in mind that if you want to look at quite a useful constitutional model, one which on paper looks pretty effectively democratic, Stalin's 1936 constitution passes most of the tests. Clearly that was of very little use to the millions of people in the Gulag.

So where are we in this process and what is it that ought to be defended? The question is not whether we are going to hang on to the precise set of phrases which exist in our Constitution at the moment. The question is, what is it that is essential for South Africa to remain a democratic society governed by democratic rule? I think Zvelethu is right to place at the centre of this the idea of popular sovereignty. But I think we need to go a little bit back from that and take this out of the academic realm and say, what does popular sovereignty mean? To me, it means two very simple but very important points.

The one is that we are all equal before the law, whether we are university professors or street sweepers. I know that for some of us the idea of giving the vote to university professors goes against the grain, but in a democratic society even professors are entitled to vote. In principle, in a democratic society every person, whether or not you are educated, whether or not you are in the minority or the majority, bears the same rights. But equally importantly, which is how I understand democratic constitutionalism, every person who is a member of the political community has an equal right to participate in the decisions of that community. And if you go through our entire Constitution, if you go through any democratic constitution, that is fundamentally what it's about.

It's not the kind of idea that tends to get dismissed as simple majoritarianism. Majorities have very important roles in democracies, but if we say that every single individual has a right to participate and certain rights which can never be taken away from that individual, you obviously need constitutional rules in place to assure that all of us, whether we're in the minority or the majority, whether our views are popular or not, enjoy in principle the same





Steven Friedman

rights to participate, even at the same time, as in a democratic society actual laws and policies are quite appropriately enacted by the majority.

I think if we get down to the essence of that, we will begin to distinguish between something other panellists have also talked about as well, which are real threats and phoney threats. I don't particularly want to enter into that debate, but as Zwelethu has said, there is absolutely nothing unconstitutional about a State President resigning and being replaced by another President. You might find the politics of that offensive for various reasons, but it's not a constitutional issue.

There are, however, worrying constitutional implications when people insist that certain politicians ought to have special legal dispensations, and when it's suggested, for example, that we need particular legal or political remedies, as has been suggested,

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for certain politicians. Why don't we need the same political remedies for indigent shack dwellers who spend two years as awaiting-trial prisoners because they can't afford bail? There are rather more of them than there are senior politicians who need political and legal solutions.

So these rules are not there as some kind of abstract which we worship, they are not there because somewhere somebody decreed that civilised people have constitutions, they are there in order to protect the equal right of every one of us to participate. I think that it's very important, and I'll come back to it.

We need as a society to distinguish between two ways of looking at a constitution, which I think are very important for us as South Africans today, and both of which, incidentally, we find in the liberal tradition.

The one, which is associated with the type of liberalism the Canadian philosopher CB McPherson called possessive individualism, is basically the attitude to the Constitution which says, to be quite frank, the most important contribution a constitution can make to society is to constrain the actions of democratic governments to make sure that those people who have the goodies manage to cling on to them.

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“Constitutions will be endorsed and defended to the extent that key actors in the society are convinced that the constitution works for them.”

But there’s another way within the liberal tradition of looking at democratic constitutionalism, and that is to look at its rules – the rules that limit the role of government, that ensure the rights of citizens – in a way that says that this is not a way of limiting democracy, this is a way of enabling democracy. The important difference is that all these rules are there to enable democratic participation and to ensure the fundamental principle that everybody gets to participate. We don’t restrict participation simply to those people who have read the right economic text books.

Now, if that is where we are, how do we understand what is happening in our society at the moment? I think the first thing we are learning and need to learn, and it’s very much part of our reality, is that you can’t take constitutions and popular sovereignty for granted. There is nothing natural or normal at all about the idea that people who have won power in an election ought to be constrained by a particular document. It’s an important principle, but it’s not something which simply pops out from the sky and people accept.

There is still less that is natural or normal about the idea that people who have won power in a democratic election ought to be told what to do by 11 people in rather faded green gowns. None of this is natural or normal, and whether it actually happens in society depends on a number of other issues which I want to talk about to conclude.

The first is that there is nothing disturbing about this principle being neither normal or natural, or about constitutions or constitutionalism being tested. They are always tested, that is the only way in which constitutions and constitutionalism become embedded in society. As in many other societies, you are inevitably going to have



situations in which the rules that limit the power of elected politicians are going to seem unreasonable to those politicians, and then you are going to have tension. This is not unique to Africa or to new democracies. Reflect for a moment on the kind of debate and the kind of conflicts we saw in the United States of America in the ‘30s over President Roosevelt’s conflicts with the Supreme Court, where at one stage he threatened, though he didn’t carry out the threat, to pack the Supreme Court with his nominees in order to get his legislation through. Then the judges decided that what he was trying to do was constitutional after all.

So these things don’t only happen in our sorts of societies, they happen in all sorts of societies. It’s entirely natural, and the question is not whether they happen but whether we get through them with the principles intact. And I think that, as some speakers have begun to hint at, that depends on whether we understand adequately what is necessary to defend and protect and strengthen a constitution.

I said earlier that I don’t see democratic constitutions as means of preventing people participating so that those people who have goodies should hang on to them. But I think that it’s very important that we understand that democratic constitutions only survive to the extent that a constituency in the society is built up to support them. People will not simply endorse a constitution because



Steven Friedman

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somebody once wrote a book saying it’s a good idea. Constitutions will be endorsed and defended to the extent that key actors in the society are convinced that the constitution works for them.

In South Africa at the moment we have a pretty vigorous democracy for about a third of the population and not very much democracy at all for the other two thirds – not that people don’t have rights, it’s just that they can’t access them. So my particular concern in this process is the extent to which we are able, within this society, to

make participation and constitutionalism something grass-roots South Africans can be part of and come to value as protecting their right to participate and their right to human dignity. Or whether we are going to do as we too often do, as a society – regard it as something for the elites, and not for grass-roots South Africans.

I don’t think that democratic constitutionalism protects rich people. I don’t think that democratic constitutionalism protects powerful people. I think precisely the opposite, that it protects and empowers powerless people and poor people, and that the key to participation by the majority of South Africans is democratic constitutionalism. But I don’t think we’re going to defend or protect our Constitution, I don’t think we’re going to make it a living document, unless we understand that our challenge is (a) to build a broad social constituency in defence of the Constitution, and (b) to make sure that these important rights which are contained in our Constitution are part of a daily lived reality of grass-roots South Africans and are not restricted to people like us.



James Selfe

James Selfe

Constitutionalism, as we know, relates to the manner in which power is distributed and limited by a system of laws that must be obeyed, not only by the ruled, but also by the rulers, and observed, not only in letter, but also in spirit. In Afrikaans, a distinction is descriptively made between a *regstaat*, a rights-based state, which is what constitutionalism seeks to engender, and a *magstaat*, or a power-centred state, which results where constitutionalism is undermined.

In South Africa we've come from a past where there has been a gross distortion and disregard for the fair distribution of power, where no heed was paid to the need for limitations of power, and where the letter and spirit of what stood in our statute books were contorted and bent countless times to suit the agenda of the government of the day. We have, in other words, come from a long and painful tradition of having been a *magstaat* rather than a *regstaat*.

But at a particular point, and perhaps not perfectly, we miraculously arose from the ashes of that history, looked one another in

the eye and, in the spirit of many historic accords that have made some of the great nations of the world what they are today, we committed ourselves to each other and to a common future through a constitution of our own. That constitution was both a settlement of the conflicts of the past and a compromise between profoundly divergent views.

“But if the great constitutional experiments of the world have taught us one thing, it is that having a constitution is about an agreed destiny, but not necessarily about having arrived at that destination.”

None of us who were privileged to have been part of that process that negotiated our Constitution got everything, or even most of, what we wanted. But it was a very finely balanced package deal. Remove one element of it, tinker with it here and there, and that balance could be lost forever. But what it was beyond any doubt was a liberal constitution, favouring the

individual over the state, protecting and advancing the rights of individuals and groups of individuals, creating checks and balances on the exercise of power, promoting transparency and accountability. It was a classic blue print for a *regstaat*.

But if the great constitutional experiments of the world have taught us one thing, it is that having a constitution is about an agreed destiny, but not necessarily about having arrived at that destination. Once former President Mandela signed Act 108 of 1996 into law, the serious task of making our Constitution real to the people of South Africa began. This task should have been much easier than it has proved to be because the Constitution was based on some key realisations about our past. It acknowledged how weak our divided history had made us and therefore chose to emphasise our common destiny. It recognised the devastating affect that reactionary nationalism had had on our people and therefore chose an inclusive style of decision making. It understood what pain and suffering the deprivation of basic human rights had caused to our people and therefore chose to base our common future on a fundamental and comprehensive respect for human rights.

“ ... we needed a government that would act in the interests of all the people and would be accountable to all the people. That was the spirit of the 1996 Constitution, ...”

It comprehended that because previous governments had acted on behalf of the few, we needed a government that would act in the interests of all the people and would be accountable to all the people. That was the spirit of the 1996 Constitution, but this spirit has gradually been dissipated and with it, the promise of a brighter future. The Constitution has been undermined over the past 12 years, where the power of the state was misused for the benefit of the ruling party, or worse, one faction of the ruling party, to ensure its hold on power – where there was a conflation of the party and the state, best illustrated by the deployment of members of the ruling party into positions of power in the civil service, business, educational institutions and the media; where transparency and accountability were supplanted by opaqueness and obfuscation; where the separation of powers has been undermined and where the imperial



presidency re-asserted itself. In critical respects, South Africa was once again on its way to becoming a *magstaat*, instead of the *regstaat* that the Constitution envisaged.

Now we all know matters came to a head in the perceived or real interference of the executive in both the NPA and the judiciary as a whole, a perception that found some justification in the later judgement of Judge Chris Nicholson. This led us in the DA to the conclusion that the situation was untenable and that President Mbeki could no longer continue in office; something on which we acted immediately by submitting a motion in Parliament to ask that the National Legislature resolve to dissolve itself so that a fresh election could be called, and the people of South Africa themselves could be given the opportunity to chose a new government and a new president.

Despite numerous opportunities, there has never been a discussion on this motion. Instead, the ruling party opted to force President Mbeki to resign, not by the decision of the electorate of South Africa but by invoking the law which in ANC practice has become higher than any law on the statute books: the higher law of the party. And the rich irony lies in the fact that one segment of the ruling party, which has been the victim of *magstaat* practices, has itself resorted to precisely the same practices to settle internal disputes.

We have seen these practices continue in the political purges that have taken place since then in the national government, in the provinces and in councils across the country. We have seen it happen through opportunistic dismissals and in making life untenable for those who desire to return to a *regstaat* and those who differ from one faction in the ANC. We have seen it in the effective control of the provincial government through transitional committees in the provincial structures of the ruling party.

Even more worryingly, we have seen it in the populist rhetoric of the ANC leaders who, in seeking solutions, as they call it, to challenges as diverse as crime and teenage pregnancy, advance arguments that undermine the values of the Constitution.



Mr Zuma himself is quoted in today's Business Day as saying that in many places these people haven't even heard of the Constitution and what it says. There is certainly a deep desire among South Africans to solve these sorts of problems, but there is also a deep desire among ordinary South Africans to be rid of the pervasive evidence of the higher law of the party and to return to constitutionalism, to bring South Africa back on the road to becoming a true *regstaat*.

This desire is expressed in calls for clean government, for crime to be combated, for infrastructure to be repaired and expanded. It is a desire felt by ordinary South Africans who want discipline and proper learning in schools, functioning hospitals, safe streets for kids to play in, old people to be treated with dignity and a police service that can be trusted.

We know that these concerns signal a deep desire for the return of constitutionalism because we can only achieve them if we adhere and defend and protect our Constitution and if we strive to make South Africa a true rights-based state. If we are to achieve these good things, if we are to remain one nation with one future, then there can be no return on the journey for which our Constitution is there to guide us. Let us therefore re-assert the spirit of 1996. Instead of trashing the Constitution, let us make sure that the people Mr Zuma is talking to understand how important the Constitution is to solving their problems and advancing their interests.



Rev Musa Zondi

The IFP has always championed constitutionalism and the notion that respect for a good constitution is fundamental to ensure that those in power serve the people and not themselves.

Our Constitution has been betrayed in many respects, and in many respects obliterated. Our democracy is ailing, the people of South Africa have been forgotten. Our liberation struggle has been hijacked and our Constitution, our Parliament, ought to be central in the formation of policies, the making of laws and the governing of our country. Instead, our Parliament has been bypassed, the President of the country has been fired and a new one selected elsewhere, and Parliament is merely called upon to ratify this decision.

The policies of government are formulated in an unaccountable party executive committee, comprised of people who are not even elected, and are handed down to our departments of state, which then transform them into laws which are in turn handed down to Parliament to adopt. In the past 15 years,

Parliament has adopted hundreds of laws handed down to it without any substantial changes, perhaps with the exception of the legislation which my leader, Buthelezi, introduced when he was Minister of Home Affairs for ten years.

The IFP believes therefore that this top-down approach is not how our Constitution was meant to work. Yet this is but a small part of an autocratic broader picture in which the powers which our Constitution distributed to a broad range of leaders, institutions and systems of checks and balances, or which it reserved for the people, have now been centralised in the hands of a few oligarchs.

Provinces, premiers and provincial legislatures have been emasculated. Instead of being the centres of policy formulation which they were constitutionally supposed to be, provinces have become mere administrative implementers of what has been decided centrally and outside of public scrutiny in a conveyor-belt of power and decision making, which leads straight into closed meetings of an executive



committee, which is not open to the public or accountable to Parliament.

The same conveyor-belt of power extends beyond government and reaches into all segments of our civil society and economy. People are deployed from this closed centre of power into state companies and, through the influence of government and political power, into private companies, non-governmental organisations (NGOs) and many other organs of civil society alike. In this context, the divides between the ruling party and state, government and civil society, different branches and spheres of government, and private and public interest have collapsed.

All this enriches and empowers a few, while disenfranchising and impoverishing the rest of our people. All this undermines the democracy promised our Constitution, without which there cannot be any genuine development and prosperity, as the state is enslaved to deliver to a powerful oligarchy rather than serving the masses. We are now at the centre stage in which the values and opinions of our society are under threat.

What we have today is a far cry from the future our forebears promised us in 1912 and to which generations of our people dedicated their lives of struggle. We must not leave or waste this legacy but must

preserve it as a pool of values to inspire future generations. Our society must actively engage these issues, as we are doing today, and not only because we are approaching an all-important election but because this issue goes to the very heart of our democracy.

The IFP believes that the time has come truly to empower our provinces, our municipalities, state-owned enterprises, private companies, NGOs and other organs of civil society and free them from the web of political power, influence and intrigue so that in freedom and liberty they may provide their contribution towards our common prosperity. The time has come to free the state and the independent commissions established under our Constitution from political manipulation so that they may serve all. This was the betrayed spirit of 1912, the Freedom Charter and our Constitution. We must regain this spirit without fearing the freedom and liberty it promised for all.

Finally, we hope that this Helen Suzman Round Table discussion today will focus on the fundamental value of our politics and the future of our Republic. If we fail to empower the values of our liberation and those underpinning our Constitution in the running of our country, our common future is bleak indeed.

Smuts Ngonyama



Smuts Ngonyama

In modern states and modern democracy, Constitution is at the centre, and the objective of that is to ensure that the democracy of any country, of any modern state, is fully consultative. I therefore believe that the fundamental objective of today's discussion that we welcome so much, as this new baby in the broader landscape of South Africa, COPE, is in essence about consolidation of democracy in South Africa. Because without respect for the Constitution, you cannot consolidate democracy.

We believe that for democracy to be consolidated there must be stability in the country, there must be respect, and the basic socio-economic needs of the citizenry of the country must be met. There must be respect for the Bill of Rights and the Constitution in general, as well as respect for the institutions of democracy, the institutions of governance. In the South African context, there has to be respect for the fundamental objective of our society that was introduced by the then President of South Africa, Nelson Mandela, for nation building and reconciliation, bearing in mind our

background. And lastly, I believe that one of the most important areas for consolidation of democracy is an electoral system that is free and fair.

Currently, I believe that we have been exposed to totally intolerant behaviour, where there is no respect for the Constitution, which contains clear stipulations with regard to the choices of any South African with regard to affiliation to any political persuasion. Statements like "we will kill for a particular person if that person doesn't become President" are definitely not adding value to the consolidation of our democracy, which is the fundamental objective of our society.

I heard last night that one of the youth members of the ANC was asked: "Are you still calling these people that joined COPE cockroaches and baboons?" Given an opportunity to retract the statement, which was a clear demonstration of commitment to defacing and undermining the rights of members of this society, the youth member said: "I am not prepared to retract that statement." So many people in South Africa



died in order to make sure that, as Nelson Mandela said, “never, never again” must South Africans live in a situation that is belligerent. However, in this day and age, we still have people who, because of the power that they think they have in belonging to a ruling party, refer to other people as baboons and cockroaches.

We do believe, also, that we have been exposed to an unprecedented attack on the judiciary of the country, which is a very, very important instrument that strengthens our democracy. That raises a number of questions and that’s why we believe that as South Africans we need to ask a number of questions about whether we are really faced with a big threat to our democracy and of our Constitution.

My colleagues have referred to the removal of the President of South Africa in what President Kikwete of Tanzania called nothing else but a bloodless coup. We went to bed on a particular Friday night and when we woke up the following morning we didn’t have a President, and what came out as one of the reasons given to South Africans was the comments of Judge Nicholson. However, a President has been removed, and not because of a resolution of the National Assembly. If it’s because of those comments,

and as stipulated in Section 89 a President can be removed if there is serious violation of the Constitution or the law of the land, a key question we have to deal with as South Africans is whether that was the case with respect to former president Mbeki.

The second reason is serious misconduct; is that the case? The third is inability to perform the functions of office. And it goes on to say, this Constitution which was wisely constructed by South Africans: “Anyone who has been removed from the office of the President in terms of sub-section (a) or (b) may not receive any benefits of that office and may not serve in any public office.”

The President that has been removed is still receiving all those benefits, and therefore what do we say? This Constitution says that if the President is removed on those bases, he’s not supposed to receive those benefits. Are we not having a serious constitutional

“Why is it that a particular case has to be regarded as a national case for which even the Constitution of the country has to end up being somehow undermined?”

crisis here? I'm raising the issue for South Africans. Even South Africans who actually chose this particular president on the basis of what appeared on the ballot were never consulted.

The other threat that is facing us is the question of political intervention or the undermining of judiciary in [the call for] political intervention with regard to a case of an individual. Where is equality before the law? Why is it that a particular case has to be regarded as a national case for which even the Constitution of the country has to end up being somehow undermined?

Yes, I do definitely believe that there is a question of a regstaat in South Africa. That's a call that we are making, precisely because we still believe that we need to defend the Constitution as the supreme law of the land. We do believe that we have civic duties as South Africans to protect the Constitution that so many people died for, that so many people suffered for.

We also want to call for respect for all South Africans, irrespective of whatever race and tribe or ethnic group one belongs to. We take serious exception to situations where because certain Zulu people, women, behave in a certain way, people say that it is in the culture of the Zulu people. I take serious exception to that because that's a very, very important community in our society and we know that is a complete distortion of our own culture and tradition as South Africans.

I want to make the point that we have to take these things very seriously. Blind loyalty to our political parties is very, very dangerous. What we had in Germany with Nazism and the Holocaust was precisely because of that blind loyalty that led to many, many people being slaughtered. The situation that faced us in Rwanda was again that blind loyalty, where people were called cockroaches and a whole group of people, because they happen to be Tutsis, were slaughtered, and a genocide was committed in front of all of us. And we do say that South Africa belongs to all who live in it, both black and white. That's why we say that we have a civic duty to defend our Constitution.

The last point that I would like to raise is the question of the basic needs of South Africans, their socio-economic rights. I'm not a lawyer, but having listened to various debates, I believe that one unique thing about the Constitution of South Africa is that in no country in the world is there a Constitution that actually enshrines socio-economic rights as part of the Bill of Rights. It is only in South Africa that we have that.

This therefore means that for us to make sure that we consolidate our democracy we have a responsibility to make sure that we meet the basic needs of our people in the rural areas, the poorest of the poor, the working class.

And, definitely, clean leadership is needed in South Africa. We do need leadership that is completely incorruptible, and we do need a different electoral system, which we believe, as COPE, should be a mixture of a constituency and PR. Why do we go for a mixture? Precisely because of accountability, with the benefit of hindsight that you can have a President and tomorrow you don't have a President, and, secondly, because we believe that still we have distortions in our society, especially with the undermining of women's rights – the gender question – and of people with disabilities. In order to deal with all those issues we must have an element of PR in our electoral system.

And lastly, security of our country is very important. We believe that we can only respect the sovereignty of other countries in the world in the context of the national interests of South Africans. And those national interests are based on the values of human rights and democracy, as well as the economic interests and security of citizens of our country.

Lastly, we are members of the United Nations and therefore we have to respect the international law that calls upon us to respect the Constitution of our country and respect democracy. Therefore all the elements that I've referred to are definitely a challenge for us as South Africans to take into consideration, lest we slide into what we have seen with our neighbours, because of blind loyalty.

Questions



Questions & Answers

Mr Ramolepo: *My name is Khume Ramolepo. I'm the DA youth spokesperson. Prof Seepe indicated that it's alarmist to regard the Constitution as under threat. I just want to draw his attention to a few issues.*

Firstly, the Scorpions. I think that was not the will of the people. I also refer to the National Youth Development Agency, that's the combination or disbandment of Umsobomvu and the Youth Commission. I must indicate that as much as there might be a sense that we need to dissolve or disband the institutions, Parliament only did it for compliance purposes. There were not enough consultations or by that time the decision was already taken. So I consider that as a threat to the independence of the Constitution.

Obviously we don't want to talk about what Malema has said, because when you talk about that you influence him to feel as though he's important, while he's not.

Mr Maratona: *My name is Sheba Maratona. I'm a director at Business Leadership South Africa, but my questions are perhaps on a personal note.*

Firstly, a quick observation. Perhaps we should be allowing international organisations such as the International Commission of Jurists (ICJ) to come and launch in the country for standard-setting purposes, especially on these difficult issues such as an attack on the judiciary, so that we know what international best practice is.

Having said that, let me disclose that I'm a lawyer by profession and I'm a bit worried by Prof Seepe's assertions, specifically on the issue of Judge John Hlope. We're talking about 11 justices here. We call them "law lords" in law school. In my view it would be very difficult for 11 judges in the Constitutional Court to take a particular view without having consideration, for instance, on issues of due process.

In fact, as was argued before the Supreme Court of Appeal by Wim Trengove, they are not even actually supposed to give anybody that chance. I subscribe to that school of thought. So I'll do it like a lawyer and put it to you that in my view that shows that we are not on track with constitutionalism, as you claim. I think that we've got a crisis if 11 judges can be faulted like that on a split decision, by the way, of a lower court.



Mr Nkonyama: I definitely do believe that we have a challenge with regard to the dissolution of Scorpions. I really concur with that. That's why, as COPE, we believe that one of the most important decisions that we would have to take if we were to win elections would be to go back to the issue and find a way of re-establishing the Scorpions.

I say so precisely because in the nascent democracy that we are in South Africa we have a situation where we can have the temptation of corruption even up to the highest level. We have seen that. That is why there are many people, even within the ruling party, that currently have cases pending, including some of the members of the National Assembly.

That's why I believe that in order to make sure that we strengthen and stabilise our democracy and keep a clean government, we need the Scorpions, and even special investigation units, because of the situation where the rights of women and children are undermined.

The reason why we decided to move quite strongly in the establishment of COPE is fear of blind loyalty, loyalty which does not have a conscience, and loyalty which doesn't listen. I've been in the ANC for more than thirty years, speaking for the ANC for more than ten years. But one must actually take a decision at some point, because absolute power can actually corrupt absolutely.

I want to concur with the last speaker on the question of an international association of jurists, that perhaps there is a need for us to go that route. I don't know the details of it because I'm not a lawyer, but I think we do need some kind of supervisory mechanism.

Rev Zondi: Let me not respond directly to the questions that were raised, but make a statement that affirms what my fellow panelist, Smuts, referred to. I am a South African of Zulu extraction. I know nothing about the claims that we have made regarding the purported way in which Zulu women, or black women, African women, are supposed to be treated in our society by some high-ranking political figure. I think it's an abuse of the culture of our people.

But also I want to also echo what the leader of the DA youth has said here. Many laws, as I indicated, are passed without due regard to the sentiments and feelings of the majority of our people. They are rammed down their throats and majoritarianism is being used, and, in

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fact, this notion that democracy is only to be enjoyed by those who are in the majority is as pervasive in our society as it can be, and therefore it must be uprooted.

Prof Friedman: In response to the gentleman from Business Leadership, firstly, constitutionalism is a very important principle. Every significant adult in my life is a lawyer, so I have to believe that even if I didn't, but I do believe it anyway. But there's a downside about constitutionalism, which is that we need to distinguish between what we don't like and what is unconstitutional.

With respect, you cannot say that a split decision by the High Court is unconstitutional, by definition. You might say it's a lousy decision, and we can have a public debate on it, but there's not much difference in principle between saying a split decision is unconstitutional and saying some of the judges are counter-revolutionary. So I think it's very important that we make that distinction.

The same point I would make goes for this debate we're having about the removal of presidents, and I'm not making any distinction between which president ought to be there and which ought not to be there. The President resigned. The Constitution permits presidents to resign and has a procedure for the replacement. Now you may say that the politics of it was undemocratic because the people who persuaded him to resign didn't pay any attention to the ten million people or whatever who voted for him, and you would have a legitimate point, but that's not the same as being unconstitutional.

The second point, which I think is vital to the discussion we're having today, is that I appreciate your motives, but I think, with respect, that the idea of a panel from the ICJ coming here in order to protect our Constitution is an exceedingly bad idea. The point some of us are making is that there is only one group of people on this planet who can protect the South African Constitution, and that is the South African citizenry. If we start believing for a moment that our Constitution depends on other people setting some sort of imaginary standard from outside, then we are never going to defend our Constitution. This Constitution's future will be settled here by us, not by the ICJ.

Mr Jolobe: I think there's an inherent assumption of constitutional democracy's conflict, in that people are going to fight and not going to agree with each other, and make outrageous statements; some you won't like, some you will.



But in terms of how we measure to what extent a polity prescribes to constitutionalism, we have to look at the ways in which that country's institutions manage conflict. Leaders will make bad decisions. We need to come to accept that. But making a bad decision is never really going to be a true indicator as to what extent a polity deviates from constitutionalism. I think that is the important thing, and that the courts and the rule of law play a crucial part in terms of how constitutional values are strengthened. Unfortunately that usually comes as a result of conflict, and we should be quite mindful of that.

Mr Greyling: I would like to comment on two issues. Firstly, I think we can see how the Constitution could have been used to protect the Scorpions. What we did, as the ID, was to propose a referendum on the issue, because it was clearly something that was unpopular. Opinion polls showed that. The majority of South Africans didn't want the Scorpions to be dissolved. That was contested, of course, by the ANC, who claimed that they had a mandate, being the majority party in Parliament, to dissolve the Scorpions.

But the argument of the ID at that stage was that their mandate comes from their election manifesto. It comes from what they have promised the voters, and, specifically, that election manifesto in 2004 stated that they would strengthen the Scorpions. In no way is dissolving the Scorpions strengthening them. So, in a sense, we said they were going against their mandate; therefore we should use the constitutional provision to test the will of the people, and have a referendum on the issue. But obviously we lost that battle.

The other point, just briefly, is that it's interesting to sit on a panel with Smuts Ngonyama and with other COPE leaders. They often bring up the points about electoral and party-funding reform. We asked questions about electoral reform in Parliament about three years ago. We were shot down by the people there. This is when Terror Lekota himself was Chairperson of the ANC. It was clear that they had no commitment towards electoral reform at that point.

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The same happened with party funding, when we took a motion to him to say we needed the ANC's support to set up an ad hoc committee to look into party-funding regulations. That was never supported, and to this day that motion has not been passed, because the ANC never gave it its support. So I think we also need to look at who is saying what, and what the credibility is on these particular issues. I think that is vital.

Prof Seepe: On the issue of law, it's important that there are many other lawyers who do not agree that the Constitutional Court was correct. The matter was taken to a high court and a full bench came to a finding that the Constitutional Court was incorrect, and that's why it's appealing. It will be interesting what the Supreme Court of Appeal says.

So the fact that there are 11 judges in the Constitutional Court does not mean that they will always be correct. We hope that they are, because that's where the integrity of the system is, but it is not a given. Talking about standard setting and best practice, one of the best practices is that a sitting judge should not receive an award from a politician, and yet the Constitutional Court was quiet when President Mbeki gave an award to the Chief Justice.

The court could have actually said to the Chief Justice that, given this practice, it was not right for him to accept that. So it is possible that those 11 people can actually be wrong. But the most important thing about what we are saying is that constitutionalism is something that we're going to live and defend.

And I agree with the issue of the sovereignty of the people. This is where I have a concern, especially among my friends who call themselves liberals, that when they look at the people out there, they see the Constitution as something that has to be defended against them. That is



actually incorrect. The supremacy of the people is something that we must bring about so that they can then defend our courts, they can defend our judiciary, they can defend our democracy.

Lastly, all the things that Smuts was saying about the ANC are true. We've been saying that for the past ten years, and I wish the issue of loyalty could have actually have come about when there were many children who were dying unnecessarily. We now say with ease that over 300 000 children died as a result of loyalty. So I'm pleased that he has seen the light.

Chairperson: Ladies and gentlemen, it would be remiss of me not to beg one more minute of your indulgence, given that the election campaign is in full swing and we've had two stabs at COPE. I think COPE can have at least a minute in response and then I will close.

Mr Ngonyama: Well, Chair, I want to say that the Constitution of the country to me is a point of focus currently, and we have to take seriously the fact that the ruling party, after taking decisions that impact on the Constitution on the collective responsibility of the Cabinet members, now, all of a sudden, in the last National Executive Committee meeting, take the ministers and other members of the Cabinet out of the case and say the decision is only applicable to President Mbeki.

The Constitution stipulates otherwise. I'm saying again to my colleague Professor Seepe that we rely on people like him to look at these issues without the blindness of loyalty. I concur with everything that other members said. I've been the spokesperson of the ANC for ten years. People don't even know what the internal debate within the ANC was. However, there were collective positions and I definitely defended those positions. But the issue of collective and blind loyalty is very, very serious in a democratic situation.

ANSWERS

Annexure A

Speech by the President of the Republic of South Africa, Kgalema Motlanthe, at the opening of the World Conference on Constitutional Justice — 23 January 2009

Honourable Chief Justice of the Republic of South Africa, Pius Langa;
The visiting Honourable Chief Justices and Presidents of the Supreme Courts of the participating countries;
Heads of Delegations;
Honourable Deputy Chief Justice, Dikgang Moseneke;
Members of the Judiciary and the Magistracy;
Deputy Secretary General of the Council of Europe Ms M De Boer-Buquicchio;
President of the Venice Commission, Mr Helgesen;
Honourable Minister of Justice and Constitutional Development, Mr Enver Surty;
Your Excellencies, Ambassadors and High Commissioners;

Distinguished guests, Ladies and gentlemen:

It is an honour for me to address this gathering of eminent jurists from around the world at the opening session of this important conference.

I am particularly thankful to our Chief Justice, Justice Pius Langa, for hosting this historic event.

This being the first event of its kind, I am confident that we will set a good precedent for future gatherings of this nature.

On behalf of the government and the people of the Republic of South Africa, I welcome you all. I hope you will find our country to be warm, gracious and hospitable.

This kind of interaction between legal minds and judicial systems and their related institutions from all over the world has contributed immensely to the development of our body of law and our judicial system.

During the process of crafting a new Constitution for our country, although we drew on our own sources such as the ANC's Bill of Rights of 1923, the Africans Claims of 1943 and the Freedom Charter of 1955, we necessarily also drew quite

heavily on other countries' experiences with the Bill of Rights, Constitutional Court and an independent judiciary.

This conference, under the theme "*Influential Constitutional Justice — its influence on society and on the development of a global jurisprudence on human rights*," takes place when the world faces trying times: world economies have plummeted due to the global economic crisis, the destruction of lives and displacement of people continues in certain parts of the world due to political conflicts and instability, and poverty and the diseases and other afflictions that go with it, remains the biggest challenge facing the underdeveloped countries.

I am certain that the Heads of Constitutional Courts, Supreme Courts and Human Rights bodies and senior Judges present here will reflect on these challenges and in particular how the global constitutional and human rights jurisprudence can assist in addressing them.

In positioning law and human rights in the world today we should be guided by the simple precept expounded by Michael Beloff QC who said: "*Justice is both the father and the son of the law. The law's substance is — or should be — informed by a sense of justice; the law's procedures should produce a just outcome.*"

Distinguished Guests,

It is fifteen years since the advent of democracy in this country. Later this year South Africans will go to the polls to elect this country's fourth democratic Parliament.

I am certain that during the deliberations your South African counterparts will share with you some of the hard-fought gains we are enjoying and the challenges we face as we seek to normalise our society.

In spite of these gains we have some way to go in creating a better society for all South Africans.

The challenges of poverty, unemployment and inequalities in wealth still remain with us.

The apartheid regime bequeathed us even a judicial system and judicial institutions that had been unashamedly manipulated to implement and uphold apartheid policies.

During the apartheid era, the judicial system was, in the eyes of the disfranchised and marginalised millions of this country, rightfully perceived and experienced as just another arm of a repressive regime.

In those dark days the judicial system was not a refuge for those seeking justice. The majority of this country's people only approached the judicial system when they had little, if any, choice.

Of course there were great individuals who served in the system and endeavoured to ensure that justice was not only done but seen to be done. But their efforts in a sea of collusion with an evil repressive system were unfortunately the exception.

It is precisely for these reasons that over the last fifteen years we have worked tirelessly to unseam the thread of injustice that was so deeply embroidered in the fabric of our society.

One of the first steps in the normalisation of our society was the creation of universal respect for the rule of law, in South Africa. Central to this was the adoption of our Constitution which provides for a culture of rights, responsibilities and freedoms.

However, in the context of a nation where these rights had been denied to the majority of the people, we also needed constitutional agencies that would uphold and protect these hard-won rights.

An independent, vigilant, fearless, vigorous and sensitive judiciary is the cornerstone of that protection.

More importantly we need a transformed judiciary that relates to and understands the realities of the society it serves. It is also crucial that the judiciary must earn the respect and support of the overwhelming majority of the people of the country.

There is no doubt that, in just over a decade of democracy, important changes have taken place to win legitimacy and respect for our judiciary from the wider South African society.

We now have a judiciary that is committed to implementing the letter and the spirit of our Constitution and apply and interpret laws impartially and to the benefit of all the people of this country.

Prior to 1994 our judiciary was almost entirely white and male. Through the efforts of the Judicial Services and the Magistrates Commissions, the race and gender composition of the judiciary has markedly improved.

The role of the Judicial Services Commission in the appointment of judges constitutes a radical break with the past, when judges were appointed and served at the behest of the State President.

Distinguished Guests

I have learnt from some of our judges that the South African system of judicial appointments, like our Constitution is exemplary and compares well with the best in the world.

In spite of these advances, challenges still exist. More work needs to be done in changing the attitudes of some of our judicial officers, not just with regard to race and gender but also with regard to the less privileged members of our society.

In a country with 11 official languages, massive efforts should be made to ensure that access to justice takes place in the language of the person seeking justice.

Our Constitution, with its justifiable Bill of Rights and Constitutional Court is the foundation stone of our democracy. The Constitutional Court in particular plays a crucial role in the transformation of society.

In the South African context, transformation is mandated, driven and guided by the Constitution which seeks to, as stated in the Preamble, improve the quality of life of all citizens and free the potential of each person.

The quest is to create and ensure a united, non-racial, non-sexist, democratic and prosperous South Africa and the enforceable socio-economic rights in our Constitution reflect the commitment to substantially improve the lives of the people of this country.

Our Constitution and legal framework provide the tools to change the lives of our people.

In his paper "Lessons from South Africa" Cass Sunstein, an American Legal Scholar, says:

"Some constitutions are preservative; they seek to maintain existing practices, to ensure that things do not get worse ... By contrast, some constitutions are transformative; they set out certain aspirations that are emphatically understood as a challenge to longstanding practices.

They are defined in opposition to these practices ... The South African Constitution is the world's leading example of a transformative constitution."

But constitutions need more than enlightened intentions. They need reliable allies over a broad front. So for instance, a collective effort by government, the judiciary, the business community and other formations of civil society and the support of the international community is necessary for us to achieve the Millennium Development Goals adopted by the UN in September 2000, in particular the eradication of poverty and hunger, the promotion of gender equality and empowerment of women, the combating of HIV and AIDS and the establishment of a global partnership for development.

Chairperson,

For the public to respect the decisions and the decorum of the courts it is important that the conduct of judicial officers is beyond reproach.

Our Constitution requires that judicial officers be fit and proper persons. The requirement of "fit and proper person" connotes persons of high competence and integrity as the integrity and ethical standards of the judiciary lie at the heart of a fair and impartial judicial system as envisaged by the Constitution.

The late Chief Justice Ismael Mahomed, when addressing the Second Annual General Conference of the Judicial Officers' Association of South Africa reiterated that professional and ethical standards as

well as judicial temper should inform the conduct of Magistrates in the pursuit of justice.

And I quote from his speech:

"The ultimate power of the courts must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation and in the confidence it enjoys within the hearts and the minds of potential litigants in search of justice. No public figure anywhere, however otherwise popular, could afford to be seen to defy the order of a court which enjoys, within the nation, a perception of independence and integrity".

You may be interested to know that Parliament has recently passed legislation, which the President has signed into law, to provide for a complaints mechanism for judges.

I am referring to the Judicial Service Commission Amendment Act No. 20 of 2008 which provides for a Code of Conduct for members of the judiciary, a tribunal for the handling of complaints about judicial officers and a register of financial interests of judges.

This Act seeks to strengthen the independence of the judiciary and enhance judicial accountability.

Honourable guests,

If the judicial system is to contribute to the reconstruction and development of our society we must address the inequalities and imbalances which stubbornly remain as part of its defining characteristics.

We still have a problem where those of us with deep pockets have greater access to justice than the indigent. If a rich person is dissatisfied with a judgement from say a magistrates' court they would have the resources to appeal to the High Court, the Supreme Court of Appeal and ultimately the Constitutional Court — something that a poor person would battle to do.

Clearly, there is a correlation between unequal social conditions and access to justice in modern societies, with the result that the poor and downtrodden often get the short end of the stick in comparable legal conditions.

The Constitution provides the paradigm within which any policy development for judicial

transformation must take place and the primary objective is to establish a judicial system that would serve the new social order based on the values of the Constitution.

The envisaged system must lay the foundations for the development of a society based on human dignity, equality and fair administration of justice.

Recent assertions in the local and international media that the judiciary is being undermined are untrue and without basis.

There is a serious and necessary debate and a contestation regarding the balance of power between the judiciary, the executive and the legislature.

Sometimes this debate can get a little heated. We however, feel that this debate is essentially beneficial to our fledgling democracy which is being deepened as a result.

One of the challenges we face today is that of achieving a common understanding of the meaning of judicial independence and the boundaries of the separation of powers, particularly between the judiciary and the other arms of Government.

It is common cause that constitutional democracies across the globe are characterised by the inherent and indeed necessary tensions that exist between the three arms of Government which much necessarily co-operate even as they discharge their mandates.

There is no common approach through which different countries have organised and managed the complex and at times contentious relationship between the three arms of government.

In the judgment of *Van Rooyen v the State*, the former Chief Justice, the Honourable Arthur Chaskalson contended that different democracies have drawn the boundaries at different places depending on their constitutional framework and socio-political context while maintaining the universally acknowledged core principles of judicial independence as articulated in the United Nations Basic Principles on the Independence of the Judiciary.

In South Africa the Constitution and the interests of society are the primary guiding factors to be taken into account in the process of easing and normalising these tensions.

The challenge presented by the delicate balance is particularly important in our country, where the Executive has a duty to implement policies that are necessary to transform a society which is emerging from centuries of institutionalised discrimination, oppression, inequality and poverty.

Our Constitution is explicit in committing all organs of State to achieve this national goal - it obliges organs of State to cooperate with one another and act in mutual trust.

It is a source of comfort for us to note that we are not alone in our search for answers to these questions. This is a global quest which I am sure you will reflect on during the course of the deliberations.

The government has unequivocally pledged its commitment to and respect for the independence of the judiciary and the rule of law.

Distinguished guests,

I am pleased to announce that the Judicial Education Institute Act No. 14 of 2008 which establishes the Institute that will be managed by a Council chaired by our Chief Justice, comes into effect today.

Not only will the Institute be a reservoir of judicial knowledge and jurisprudence in Southern Africa and the African continent, but will also facilitate an exchange of knowledge with the rest of the world.

On a different but exciting note, South Africa will be receiving, in the very near future, soccer teams from some of the countries represented here to participate in the FIFA Confederation Cup, which is the precursor to the FIFA 2010 World Cup masterpiece. Since you are umpires and referees of the courts, we believe that your presence here will inspire the many teams that will be participating in these events to abide by and accept referees decisions.

We hope that you will find the facilities placed at your disposal for the duration of your stay in our country, particularly at this conference, good enough to meet your expectations.

I wish you well in your deliberations and thank you.

Issued by The Presidency on 23 January 2009

ANC shuns debate over constitution

Party says focus not relevant, other participants cite attack on judiciary as threats to enshrined rights

Sibongakenke Shoba

Staff Writer

THE African National Congress (ANC) yesterday turned down an invitation to participate in a debate on "protecting and defending" the constitution organised by the Helen Suzman Foundation, saying the constitution was not under threat.

In a letter sent to foundation director Raenette Taljaard, ANC spokeswoman Jessie Duarte said the party saw no value in debating a subject that was not one of the "key institutional, policy and political challenges that confront our country".

"If one looks beyond the rhetoric, objectively there is currently no threat to South Africa's constitutional order or to the rule of law."

Duarte said all citizens should be ready to protect and defend the constitution.

"But to suggest, as this debate would, that the constitution is somehow imperilled is to somehow misdirect our attention and our energies," she said.

Instead, what needed to be discussed was whether SA had made sufficient progress towards realising the socioeconomic rights contained in Chapter 2 of the constitution.

"What progress have we made since 1996 in realising the right of all South Africans to housing, healthcare, food, water, social



Smuts Ngonyama, left, representing COPE and Musa Zondi (IFP) yesterday at a debate held by the Helen Suzman Foundation on "protecting and defending" the constitution. Picture: ALIX CARMICHELE

security and education? That, we would submit, is the debate we should be having."

Taljaard said the foundation regretted the ANC absence.

Present was Congress of the People (COPE) member Smuts Ngonyama, United Democratic Movement leader Bantu Holomisa, Musa Zondi of the

Inkatha Freedom Party (IFP), the Independent Democrats' Lance Greyling, Democratic Alliance MP James Selfe and political analysts Siphon Seepe, Steven Friedman and

Zwelethu Jolobe. All speakers except Seepe highlighted the ANC leaders' alleged attack on the judiciary and cited calls for a political solution to ANC president Jacob Zuma's criminal trials as possible threats to the constitution.

"There are worrying constitutional implications when certain people need political remedies for certain politicians," said Friedman.

All the analysts disagreed with Ngonyama's view that former president Thabo Mbeki's removal was illegal. "There is nothing wrong with the president being replaced," said Friedman.

Jolobe said that while people may not agree with the removal of premiers and the president, sections of the constitution allowed for such action to be taken.

"Section 50 established SA as a parliamentary system. Leaders will come and go and may not finish their term."

"It is not a deviation from what is expected from the constitution."

Jolobe said, however, there were causes for concern in the manner the ANC had reacted to the formation of COPE.

He said the reported intimidation and disruptions of COPE meeting were affecting human rights.

Ngonyama confirmed to Business Day that there were discussions within his party regarding bringing back the Scorpions should COPE win elections.

ANC had 'not the time or energy for debate'

CHRIS BATHEMBU

THE ANC has been slammed for its decision to snub a political debate with other parties after it turned down an invitation from the Helen Suzman Foundation yesterday.

The hard-hitting debate, held in Johannesburg yesterday, was part of the foundation's quarterly round table series.

The theme was 'protecting and defending our Constitution'.

In a last minute reply, ANC spokesman Jessie Duarte made it clear that the ruling party did not have time nor energy to be part of such a forum.

"While we welcome the found-

ation's initiative to encourage debate on the issues... we do not see the value in debating a subject that is not in fact one of the key institutional, policy and political challenges that confront our country," Duarte wrote.

She said: "Certainly, we should all stand ready to protect and defend our Constitution. But to suggest, as this debate would, that the Constitution is somehow imperilled is to misdirect our attention and our energies."

The foundation's Raenett Taljaard said it was regrettable that the ANC chose not to take part.

"There is currently a huge discord among South Africans over

the Constitution, its regrettable that the ANC does not see that," Taljaard said.

United Democratic Movement leader Bantu Holomisa said it was "dishonest" of Duarte to say the Constitution was not under threat. "They will continue to dodge these debates because they know they can't defend statements, for example that of a political solution to their leader's corruption charges," Holomisa said.

Participants have made renewed calls for the review of SA's electoral system with opposition parties calling for SA's President to be directly chosen by the electorate. – politics@citizen.co.za



ANC CONSPICUOUS BY ABSENCE. COPE's Smuts Ngonyama, IFP's Musa Zondi and the DA's James Selfe at a round table discussion on the country's constitution. *Picture: Petros Rapule*

Media coverage — Annexure A

THE
WEEKENDER

Saturday-Sunday,
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SA courts 'are not being subverted'

President says SA needs a transformed judiciary that enjoys the respect and support of the majority, writes FRANNY RABKIN

ASSERTIONS in the media that the judiciary is being undermined are "untrue and without basis", says President Kgalema Motlanthe.

Motlanthe told the World Conference on Constitutional Justice in Cape Town that there was a "serious and necessary debate and a contestation regarding the balance of power between the judiciary, the executive and the legislature", but this was good for democracy and not unique to SA.

The conference was attended by chief justices and senior judges from 93 countries.

"Sometimes this debate can get a little heated," Motlanthe said.

He said SA faced the challenge of "achieving a common understanding of the meaning of judicial independence and the borders of the separation of powers".

He said that in SA, the challenge was particularly important because the executive had a pressing duty to "implement policies that are necessary to transform society". To protect the hard-won rights of the people of SA, an "independent, vigilant, fearless, vigorous and sensitive judiciary was necessary".

But, more importantly, SA needed a "transformed judiciary" that enjoyed "the respect and support of the overwhelming majority of the people of the country".

He said that while there had been major advances in ensuring a representative judiciary, "more work needs to be done in changing

the attitudes of some of our judicial officers, not just with regard to race and gender, but also with regard to the less privileged members of our society".

Comments such as Motlanthe's raise questions around whether judges should be more executive minded or more in line with the African National Congress's views.

Speaking to The Weekender after the morning session of the conference, Justice Minister Enver Surty said judges should "understand the sociopolitical context under which people live".

He said if people could not relate to a judgment, it affected the credibility of the judicial institution. But, he said, since the constitution was a reflection of the collective aspirations of the people, Motlanthe's comments on a judiciary that had the "respect and support of the overwhelming majority" simply meant judges should enforce the constitution.

This was so even where a decision was unpopular, such as the Makwanyane decision, where the Constitutional Court declared the death penalty unconstitutional despite the fact that public opinion went in favour of it.

Motlanthe said the tension between the different units of government was not unique to SA, and there was no universal model on how they should relate to each other. In SA, he said, "the constitution and the interests of society were the primary guiding factors".



WELCOMING THE CHALLENGE: President Kgalema Motlanthe says there is a debate about how the judiciary, executive and legislature relate to each other – but this a healthy tension that is not unique to SA.

As judges from different regions in the world made their preliminary presentations to the conference, the "tension" that Motlanthe referred to was a theme that ran throughout.

Gagik Harutyunyan, president of the Constitutional Court of Armenia and a representative of the Conference of Constitutional Control Organs of Countries of Young Democracies (primarily countries of the old Soviet Union), outlined numerous challenges to ensuring a culture of constitutionalism in his region, includ-

ing "antagonism with other organs of power".

Judge Jose Cossio Diaz of the Mexican Supreme Court of Justice of the Nation, spoke of how the Guatemalan Constitutional Court had to declare as unconstitutional the Guatemalan government's decision to dissolve the court.

Chief Justice Pius Langa also referred to the case of Makwanyane, saying it did more than outlaw the death penalty: it "emphasised the important principle that the state should have respect for human rights".

Motlanthe: Judiciary in SA not being undermined

SELLO S ALCOCK | CAPE TOWN, SOUTH AFRICA – Jan 23 2009 11:40

Recent media reports that the South African judiciary is being undermined have no basis, says President Kgalema Motlanthe.

Motlanthe said this on Friday during his keynote address to judges from 93 countries at the first-ever World Conference on Constitutional Justice that is being held in Cape Town this weekend.

The Constitutional Court of South Africa in partnership with the Venice Commission is hosting the conference, which is being attended by chief justices and presidents of supreme courts from around the world.

The Venice Commission, which is also known as the European Commission for Democracy Through Law, was formed in 1990 and is an advisory body to the Council of Europe on constitutional issues.

“Recent assertions in the local and international media that the judiciary is being undermined are untrue and without basis,” Motlanthe said.

He added that there was a “necessary debate” and “contestation” taking place in the country regarding the balance of power between the judiciary and the other two arms of government.

“Sometimes this debate can get a little heated. We, however, feel that this debate is essentially beneficial to our fledgling democracy, which is being deepened as a result,” said Motlanthe.

One of the challenges facing South Africa, Motlanthe said, is that of finding a common understanding of what judicial independence means.

He added that a similar challenge exists in relation to the “boundaries of the separation of powers” between the judiciary and the other two arms of government.

“In South Africa the Constitution and the interests of society are the primary guiding factors to be taken into account in the process of easing and normalising tensions,” he said.

He added that the challenge around finding a balance in this tension is particularly important for South Africa as the executive, which he heads, is tasked with the role of transforming a country that has a history of “discrimination, oppression, inequality and poverty”.

Motlanthe lauded the role of Judicial Service Commission (JSC) in the appointment of judges and said this marks a “radical break with the past” where judges served at the pleasure of a president.

“I have learned from some of our judges that the South African system of judicial appointments, like our Constitution, is exemplary and compares well with the best in the world,” he said.

However, Motlanthe said challenges still exist in changing the attitudes of some judicial officers, “not just with regard to race and gender, but also with regard to the less privileged members” of South African society.

Source: Mail & Guardian Online

Web Address: <http://www.mg.co.za/article/2009-01-23-motlanthe-judiciary-in-sa-not-being-undermined>

Relevant articles

Sowetan

‘South Africans must defend the constitution’

Thobeka Magcai
4 December 2008

The Helen Suzman Foundation held its final quarterly Roundtable Series debate for 2008 where representatives from all political party's were invited to take part in discussions on various economic, social and governance issues.

Political party's attending the debate were UDM Leader General Bantu Holomisa, DA Member of Parliament (MP) James Selfe, COPE leader and former ANC spokesperson Smuts Ngonyama, IFP leader, Reverend. Musa Zondi, ID MP and Chief whip of the parliamentary caucus, Lance Greyling gave their input into the topic, Protecting and Defending Our Constitution.

Director of the Helen Suzman Foundation, Raenette Taljaard briefly gave an overview of the debate, started by the foundation in 2006, as "a debating platform, we try to create in order to have in-depth discussions on issues not only with political party's but combining political party's with analysts and academics, to really force the issues into greater depth of discussion."

Hoping to continue for a long time, Taljaard went to say, "in order to enrich the political discourse in our country."

Political analysts Professor Sipho Seepe, Professor Steven Friedman and Zwelethu Jolobe were the political analysts present at the debate.

Kick starting the debate, Seepe on the "framework" which former president Thabo Mbeki was removed from office; "there was nothing illegal or unconstitutional about that process. We may not agree that the citizens were not involved. But when you have party democracy that's what happens," commented Seepe.

"If you are going to look at the constitution and constitutionalism in South Africa, you should look at how party's themselves handle themselves," said Seepe.

COPE leader, Smuts Ngonyama criticized the controversial "kill for Zuma" statement made by Julius Malema. Ngonyama condemned the youth leader's statement as "not adding value to the constitution of our country."

He also criticized the manner in which it emerged during the rape trial of ANC president Jacob Zuma who used Zulu culture in defense of having sex with an HIV positive woman, saying he could not leave a woman aroused.

"I take serious exception to that because we know that that is a serious distortion of our own culture and tradition as South Africans."

Ngonyama defended his rights to leave the ruling party in establishing COPE due to what he terms the "intolerant behaviour" existing within the ANC and "blind loyalty", admitting he may have made bad decisions in the past due to "fear of blind loyalty and loyalty which does not have conscience and loyalty which does not listen."



UDM Leader General Bantu Holomisa and ID MP Lance Greyling.



COPE member Smuts Ngonyama holds up the constitution during the debate.

ANC PULLS OUT OF CONSTITUTION DEBATE

The ANC has pulled out of a public debate on the protection and defence of the constitution as it did not see the value of discussing subjects which did not pose “key institutional, policy and political challenges”.

The debate, hosted by the Helen Suzman Foundation on Wednesday, was attended by representatives of Cope, the DA, ID, UDM and academics.

Notifying the foundation of the ANC’s decision not to participate, spokeswoman Jessie Duarte wrote that if one looked “beyond the rhetoric, objectively” there was no threat to the country’s constitutional order or to the rule of law.

“Certainly, we should all stand ready to protect and defend our constitution.

“But to suggest, as this debate would, that the constitution is somehow imperilled is to misdirect our attention and our energies,” Duarte wrote in a letter to the foundation on Tuesday.

“The more relevant question as regards the constitution is whether we have made sufficient progress towards realising the socio-economic rights contained in chapter two of the constitution.

“What progress have we made since 1996 in realising the right of all South Africans to housing, health care, food, water, social security and education?

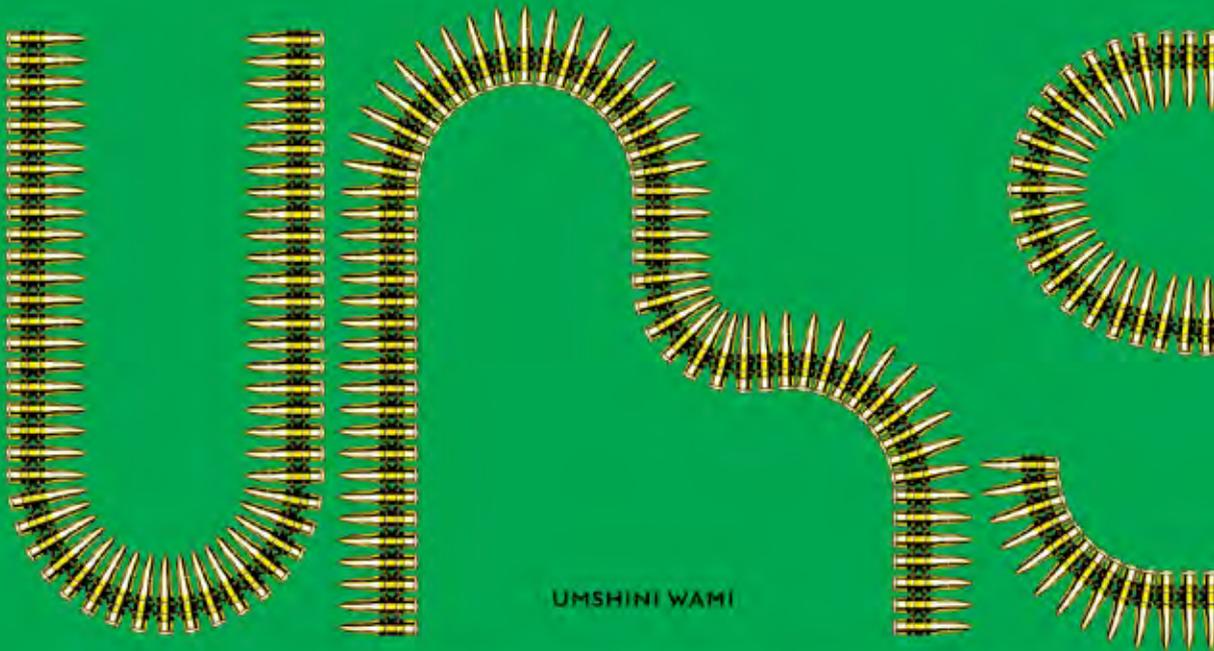
“That, we would submit, is the debate we should be having.”

The debate took place at the Rosebank Hotel between 12.30pm and 2pm on Wednesday.

In a response issued afterwards, debate moderator Raenette Taljaard, of the Helen Suzman Foundation, said the foundation regretted the ANC’s decision.

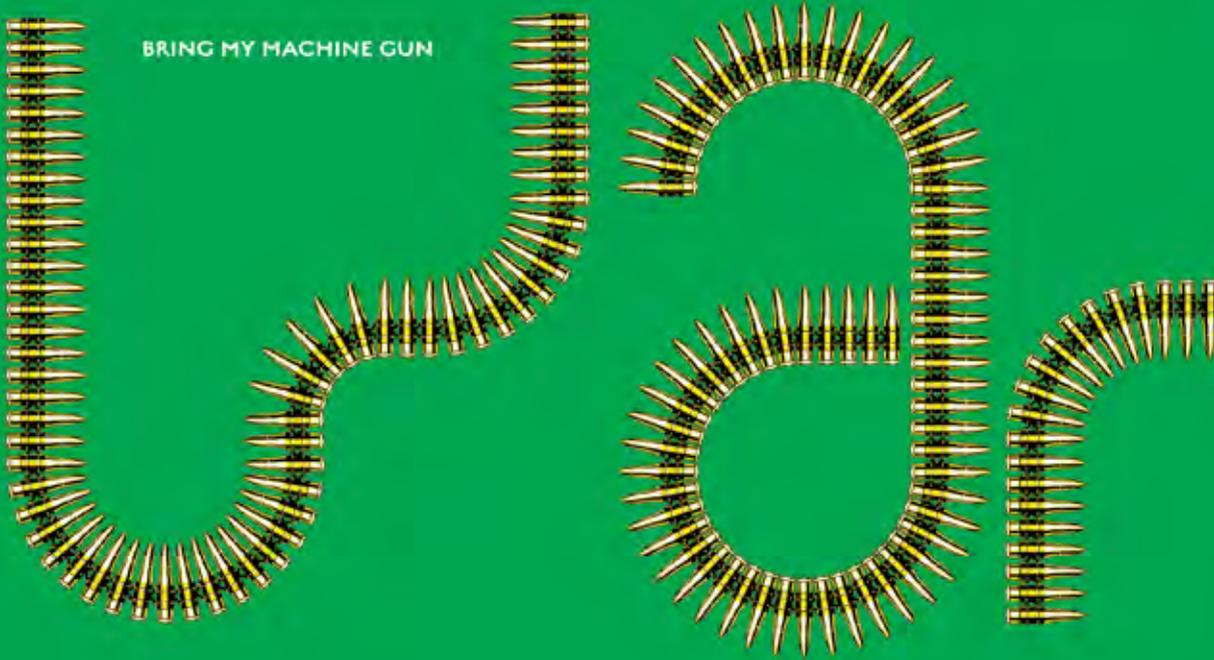
“We look forward to the opportunity to engage them on their correspondence,” she said.

Source : Sapa /clh/np Date : 03 Dec 2008 16:30



UMSHINI WAMI

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