

LAW, POLITICS AND RIGHTS

*Essays in Memory of
Kader Asmal*

Edited by
Tiyanjana Maluwa

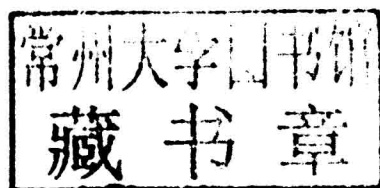
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Law, Politics and Rights

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The idea behind this book was conceived in the course of a conversation among some members of the Governing Board of the African Foundation for International Law on how best to honour the memory of their late colleague and fellow member Professor Kader Asmal. I assumed the responsibility of coordinating and editing the book. I was lucky to work on this project with colleagues in the Foundation whose encouragement and support never once faltered. Judge Abdulqawi Yusuf and Dr. Edward Kwakwa both deserve my special thanks. Without their shared commitment and enthusiasm this tribute would never have seen the light of day.

I owe an immense debt of gratitude to all the authors who accepted the invitation to contribute to this tribute. Some of them knew Professor Asmal personally and worked with him in one way or another. Others never met him at all, but share his commitment to the ideals that he espoused and the causes he fought for. All admire the contribution that he made to the struggle for freedom, justice and equality not only in his native South Africa but to the wider world in general as a legal scholar, human rights campaigner and politician. Perhaps more than some other exercises engaged in by academics, the coordination and publication of a collection of essays by various writers require an enormous amount of cooperation and support. All the contributors to this volume supported this project enthusiastically and responded positively at every turn even when I placed seemingly unreasonable demands and deadlines upon them.

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FOREWORD

"Where's your constituency, Kader?" It wasn't easy to non-plus Kader, but this question threw him a mile. After more than thirty years of banning, prison and exile, the first National Conference of the African National Congress (ANC) on South African soil was in full session in Durban, only seventy kilometres from Kader's birthplace. And Kader, together with the person who had asked the question and I, were amongst those competing for election to the National Executive Committee (NEC). Who in South Africa, Kader was wondering, would back this wandering legal philosopher and activist, who, even if famous in Ireland and well-known in international legal circles, had been absent from his homeland for three decades? For me it was easy: my constituency was the sea, the mountain and the fynbos (indigenous flora) of my beloved Cape Town, to which I had returned after twenty-four years of exile. But Kader had been away even longer, and having chosen to settle with Louise and their children, Adam and Rafiq, in Cape Town, found himself in a city that none of them had known, and where no one knew him. Where was his constituency?

As it turned out, both Kader and I were elected to the NEC, and the person who had asked the question did not make it. But the question had been an interesting one: what was the constituency of somebody who had travelled the world with the aid of his brain, his heart and his legal acumen, denouncing apartheid and projecting the vision of a non-racial, non-sexist and democratic South Africa? What would his role be in the new society, and where would his academic prowess fit in? The two thousand delegates at the Conference had in fact heard of the work that Kader had done in the international field and on the Constitutional Committee of the organisation. So his constituency had not been this community group or that, but the consciousness of the delegates.

Elements of his fame had reached South Africa before he had returned. Kader was undoubtedly an outstanding pedagogue, an excellent thinker, and an extraordinary source of information. Recently in Kenya, a British scholar came up to me and in his second sentence mentioned that he had been a student of Kader Asmal. Two Irish Presidents have said the same to me. Kader had an enormous influence as a teacher at Trinity College, Dublin. I never attended any of his classes, but I know that he is one of those educators who are mentioned for decades afterwards as having

influenced their learners for life. My guess is that Kader's impact came from a combination of intellectual acuity, irrepressible passion and wit, and the emotional significance of the cause that was at the centre of his life, the struggle for a free South Africa. At any rate, he proved to be distinctive, important and unforgettable.

Most of us recall details of information that we imbibed at some point early in our education, without remembering exactly who it was who imparted them to us – “photosynthesis”; “the three causes of the French Revolution”; “the longest river in the world” – I have no memory at all of who passed on these concepts or pieces of information to me. But there are other educators we remember because of their idiosyncratic overall influence, without recalling the details they imparted. Kader was in the latter category, transmitting through his sharpness, personality, passion and sense of principle, a pedagogy not just of information, but of life.

Yet the very fertility of his mind and encyclopaedic character of his knowledge sometimes rebelled against organising his material in a traditional – some might say disciplined – scholarly fashion. His restless intellect constantly craved more data and fresh ideas. He couldn't find points of repose. His appetite for yet further research grew by what it fed on. Thus, his inaugural lecture at the University of the Western Cape, given not long after his return from exile, introduced to a large and amazed audience masses of information about a totally new theme, one that nobody had even realised was on the agenda – transitional justice. How should the new democratic society deal with the crimes of apartheid? His research had taken him far and wide, covering post-conflict mechanisms used in various post-authoritarian societies in different continents. We rediscovered familiar notions such as the principles of the Nuremberg trials, and encountered for the first time new terms like “lustration”. But he could not easily at that stage settle on an end-point, a set of notions distilled from the extraordinarily varied experiences that we could apply to post-apartheid South Africa.

Happily, within two years he was able to pull together all the rich material he had unearthed in a moment of spectacular poignancy and enlightenment. It happened at an intensely emotional meeting of the NEC about six months before our first democratic elections. We were discussing what to do about a report commissioned by the ANC into the use of torture by ANC security personnel against captured apartheid agents. The Commission cited evidence of serious violations of human rights in camps in Angola during the liberation struggle, and recommended that

appropriate action be taken. A number of us supported the recommendation, saying that torture was torture, whoever used it. Others pointed to the horrendous circumstances in which ANC security had had to function. Then one comrade stood up and said that there was something unbalanced about the ANC examining its own wrongdoings without considering the violence inflicted for decades and centuries by the racists. It was then that Kader made what turned out to be the momentous proposal that South Africa should have a Truth and Reconciliation Commission (TRC). This, he said, should be an independent body representing the whole nation, set up to examine all violations of human rights from every quarter. Scores of articles and books have been written about the TRC. There has even been a play and a cantata. But Kader, the author of the idea, published relatively little on this specific subject. Although, of course, he published a fair amount, and he wrote well, he usually did so as part of a team. His strength, his unique intellectual contributions, though, belonged to the oral tradition, to the world of live debate, argument and storytelling, where he had few equals.

Kader was hugely knowledgeable about everything and anything. If you wanted to know who captained Somerset cricket team in 1949 you didn't have to pick up a copy of *Wisden*; Kader could tell you. During one intense debate of the ANC Constitutional Committee, I remember him quoting from a source none of us had heard of – a Papal Encyclical. The first time I met him – warm, jovial, provocative – he asked if I had worn a seatbelt on the way to his home. I replied that I wore seatbelts when I was on the motorway. With something mischievously between a chuckle and a chortle, he responded that statistics showed that 73.6% of injuries from car accidents took place in the towns, not on motorways.

Kader was a brilliant communicator, managing somehow when he was on TV to appear as though he was chatting to you in your home, while when actually speaking to you over the dinner table, sounding as though you were both on TV. If he could prickle, and be pricked, he was happy. He radiated common sense, generosity and humour. Instead of the flat cadences of typical South African English, or the boring phrases of political rectitude often emanating from spokespeople for the ANC, he would harrumph, crack a joke, raise his voice in astonishment or crease his brow in a profound frown. A master of the apt phrase, his great store of knowledge stood him in good stead in any verbal joust. Kader was not one of those disputants who diplomatically conceded something to his intellectual opponents as a prelude to putting the boot in. He put the boot in directly. But he did so with such panache and so great a sense of fun that

his argument did not seem to be crude or tunnel-visioned. On the contrary, his exuberance was so great and his voice so rich and the choice of language so spot-on that even his victims would admire his directness, style and wit, and leave the encounter both trounced and grinning.

Kader combined the greatest reverence for knowledge and ideas and the greatest loyalty to the struggle for liberation, on the one hand, with the greatest irreverence of style and manner on the other. It proved to be a superb and inimitable combination, producing a Catherine Wheel of gorgeous intellectual and spiritual fun. He introduced delight and fun into the most serious and grave of endeavours, namely, the emancipation of humankind. His constituency was a world-wide one, not only of freedom fighters and combatants for human rights everywhere, but of those who cheered on and supported the brave. This collection of essays is a tribute to the memory of a unique personality, a friend, comrade and colleague, Kader Asmal, one of a kind.

Albie Sachs

Cape Town, South Africa, 22 June, 2013

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Tiyanjana Maluwa

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INTRODUCTION

Tiyanjana Maluwa

Kader Asmal was born on 8 October, 1934 in a small town in South Africa called Stanger (now known as Kwa-Dukuza), which lies some seventy kilometres north of the port city of Durban. He died from a heart attack in Cape Town on 22 June, 2011, having been ill on and off for about year. Kader Asmal grew up in the part of Stanger which was, in his own words, an area of great poverty on the other side of the affluent part of town exclusively reserved for white residents. Yet, from these humble beginnings, he rose to become one of the best known, and most respected, political figures in modern South Africa, assuming a cabinet position in the first post-apartheid government under President Nelson Mandela. This was the culmination of a long journey, which saw him as a law student at the London School of Economics in the early 1960s, a law don for twenty-seven years at Trinity College Dublin, a founding member of both the British and Irish Anti-Apartheid Movements, chairing the latter for nearly three decades, and a leading light in the African National Congress (ANC) and the South African liberation struggle.

During his long years in exile, Kader (as he was fondly known to most of his friends and colleagues) also served as vice-president of the International Defence and Aid Fund for Southern Africa from 1968 to 1982, and as president of the Irish Council for Civil Liberties between 1976 and 1990. He was involved with civil rights campaigns elsewhere in the world, including Northern Ireland and Palestine, and over the course of the years participated in a number of international inquiries into human rights violations. Unsurprisingly, in 1983 he was awarded the *Prix* UNESCO for his contribution to the advancement of human rights. A few years later, he became a member of the African National Congress's constitutional committee when it was established in 1986. He was subsequently elected to the ANC's national executive committee in 1991 and was one of the party's delegates to the Convention for a Democratic South Africa (CODESA), as well as the Multi-Party Negotiating Forum where he helped to negotiate the new constitution for South Africa. Back in South Africa, he combined this political work with academic work, teaching at the University of the Western Cape, where he had been appointed Professor of Human Rights upon his return