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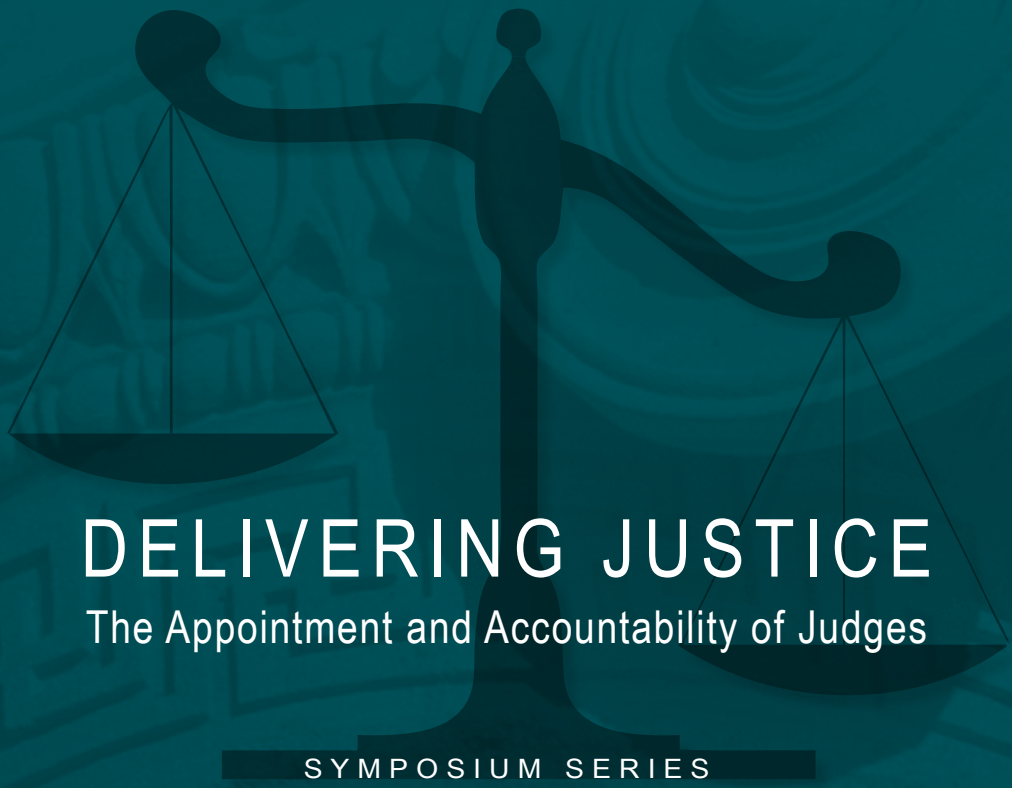

# DELIVERING JUSTICE

## The Appointment and Accountability of Judges

SYMPOSIUM SERIES
PART THREE

# helen.suzman.foundation

**promoting liberal constitutional democracy**

## Vision

Promoting liberal constitutional democracy in South Africa.

## Mission

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

These principles are:

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

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

*Hosted in association with our partner*
*The Open Society Foundation for South Africa*


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**Sir Jeffrey Jowell QC** is the inaugural Director of the Bingham Centre for the Rule of Law in London. He is also a practising barrister at Blackstone Chambers. He is Emeritus Professor of Public Law at University College London (where he was twice Dean of the Law Faculty and a Vice Provost). He was knighted in the Queen's Honours List in June 2011 "for services to human rights, democracy and the rule of law".

## Judge Pius Langa

**Pius Langa** was admitted as an Advocate of the Supreme Court of South Africa in June 1977, practised at the Natal Bar and attained the rank of Senior Counsel in January 1994. Justice Langa was appointed, together with ten others, as the first Judges of the new Constitutional Court. He became its Deputy President in August 1997 and, in November 2001, assumed the position of Deputy Chief Justice of South Africa. He was appointed as the country's Chief Justice and head of the Constitutional Court with effect from June 2005 until his retirement in October 2009.

## Ms Carmel Rickard

**Carmel Rickard** is a writer, journalist and editor. She specialises in writing about the law and legal issues, having been legal editor of the *Sunday Times* and now writing a weekly syndicated legal column in the popular press as well as a monthly column for a legal journal. She is the author of, among others, *Balancing Acts*, about public health (particularly HIV-Aids) and human rights, and *Thank You, Judge Mostert*, a biography of the life and times of the judge who blew the whistle on the Info Scandal of the 1970s.

## Francis Antonie

**Francis Antonie** is the Director of the Helen Suzman Foundation. He is a graduate of Wits, Leicester and Exeter Universities. He was awarded the Helen Suzman Chevenning Fellowship by the UK Foreign Office in 1994. From 1996 to 2006 he was Senior Economist at Standard Bank; thereafter he was director of the Graduate School of Public and Development Management at Wits University. He was the founding Managing Director of Strauss & Co.

# The Appointment and Accountability of Judges

Despite the appalling actions of the apartheid government, it at least obeyed the rule of law.

This is a myth: It confuses the rule of law with rule by law. It confuses legality, the base of the rule of law, with legalism, a tool of despots. The apartheid governments may have followed the tenets of legalism, but not the rule of law.

Helen Suzman delivered a blistering attack on the government in 1964 for disregarding the principles of the rule of law – detention without trial, infringements of freedom of movement, and political manipulation of judicial appointments.

Another myth: The Bill of Rights in our Constitution was a concession to liberalism and an individualistic political philosophy which did not fit into a transitional context.

The Bill of Rights was revolutionary in the literal sense. It turned practice on its head. It requires equality instead of discrimination; freedom instead of bondage; respect for dignity instead of abuse and neglect. It required the rule of law and just administrative action.

For the Bill of Rights to work the crucial first step is for judges to be independent. Judges are the ultimate arbiters of disputes about constitutional values. They anchor the delivery of just outcomes in the daily lives of individuals according to the fundamental values of the new constitutional dispensation.

The appointment of judges is crucial to their independence. The appointment process must try to guarantee that a judge is independent in fact and appearance, that the choice of judge will not predetermine the outcome of a case.

Three models of judicial appointment were available: First, executive appointment without parliamentary involvement. The process of appointment is closed. Judges are assessed through "secret soundings" from the legal establishment. Candidates of high legal quality may be selected. However, the problems are, firstly, a perpetuation of existing social biases by ignoring applicants from non-conventional backgrounds. Secondly, unchecked executive appointments raise perceptions of bias towards the government or actual bias, contrary to the principle of separation of powers.

The second model involves the approval of a candidate by a legislative body, such as the Senate in the United States for appointments to the Supreme Court. This model acknowledges that political judgment in the exercise of constitutional interpretation, is possible. The elected government may seek to influence that judgment.

South Africa adopted a third model – appointment by a Judicial Services Commission (JSC). This reduces the role of the executive alone or with the legislature, and reduces the opportunity for the political patronage of judicial appointments. It enhances the separation of powers and judicial independence.

This model can break the pattern of self-replication through recruitment of a more diverse pool of candidates as the Constitution requires the "need for the judiciary to reflect broadly the racial and gender composition of South Africa".

However, only 8 of its 23 members are lawyers, 15 are representatives of political parties or appointees of the President. This still permits political domination of judicial appointments.


*Provisions such as just administrative action codifying the requirement that actions of public officials must be legally authorised, fairly arrived at and reasonable in outcome, have proved inspirational.*

South Africans are often unaware of the impact of our Constitution on other democracies. Provisions such as just administrative action codifying the requirement that actions of public officials must be legally authorised, fairly arrived at and reasonable in outcome, have proved inspirational. This provision was incorporated into the new constitutions of Malawi, Kenya, Caribbean countries, the Maldives and the EU's Charter of Rights.

Another export was the notion of the JSC. A number of African and Commonwealth countries have moved from the executive model to the commission model. In 2005 the United Kingdom abandoned the first model for an independent Judicial Appointments Commission (JAC).

In 2011 the Council of Europe came out in favour of JACs for appointing judges in the new democracies of the former Soviet Union. During the Soviet Union judges were called "telephone judges" – when there was a case against the government they would telephone the minister to ask what they should decide. But here the similarity with South Africa ends. The European model insists on a majority of lawyers on JSCs and no politician members.

In some ways the JSC system has been a massive success. Its judges in the highest courts have been models of rigorous legal analysis, and have promoted transition and social change within the constraints of limited authority. The judiciary is being transformed into better representing the composition of the population. Initially even those appointed for their political attachments, avoided the conferment of political patronage. The interests of the ANC were subjugated to the interests of judicial independence and the rule of law.

That degree of tolerance seems to have been abandoned. Some rejected for judicial office, are lawyers of the highest ability in respect of their analytical skills, wider qualities, and commitment to equality and human dignity. Their rejection has been viewed internationally with disbelief. If their rejection was due to their political affiliations or their independence, then the loss for South Africa is beyond calculation.

Judicial accountability is closely linked to judicial appointments. Some argue that because they are unelected, judges have less or no legitimacy to decide constitutional constitutional – "dictatorship by judges". This is levelled by politicians or media that believe government's policies should not be thwarted by unrepresentative judges.

However, judges do not operate on the same decision-making field as politicians. The legislature makes policy for society on the basis of a calculation of preference.

# EXECUTIVE SUMMARY

Judges decide disputes on the basis of textual interpretation and the balance of principle.

The separation of powers does not permit the courts to substitute their opinion on policy. Courts decide whether the law permits the action, whether the decision has been properly arrived at, and whether there is a rational relationship between the decision taken and the purpose of the power under which it was taken.

Accountability must not be attained at a risk to judicial independence. Most sensible jurisdictions reject judges being elected to avoid influence by those paying for their campaigns and by populist demands.

Measures of judicial accountability include:

- Cases being heard in open court;
- Decisions made on the basis of evidence and argument;
- A reasoned judgment made available to the public;
- Judgments are usually published in official law reports which set precedents;
- Courts are assisted by an organised, independent legal profession governed by a code of professional ethics;

*This seems to be a shot across the bows of the judiciary by the Minister of Justice and the ANC. But even if it is genuine, is it appropriate for the executive to institute such an inquiry without breaching the separation of powers?*

- Judgments may be reviewed by or appealed to a higher court;
- Disciplinary measures against judges are possible.

Assessment is another method of accountability, provided it is performed by a system of peer review. Do mechanisms of accountability include the review that has been ordered by the Department of Justice and Constitutional Development? The Minister has issued a request for "the assessment of the impact of the decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence".

This seems to be a shot across the bows of the judiciary by the Minister of Justice and the ANC. But even if it is genuine, is it appropriate for the executive to institute such an inquiry without breaching the separation of powers?

Government may assess the effectiveness of the courts' organisation and management, because only government can decide whether to provide the resources or the expertise to remedy any deficiencies in organisational and managerial matters.

Although the purpose of this review is partly one of efficiency and impact, it also has another purpose – to undertake "a comprehensive analysis of decisions … to

- establish the extent to which such decisions have contributed to the reform of South African jurisprudence and the law to advance the values in the Constitution,

- to assess the evolving jurisprudence on socio-economic rights with a view to establishing its impact on eradicating inequality and poverty and enhancing human dignity and

- to assess the extent to which South Africa's evolving jurisprudence has transformed and developed the common law and customary law in South Africa as envisaged by the constitution."

These questions may legitimately be asked by academia or NGOs, but not by another branch of government. The executive is in effect assessing whether the judgments are correct. Government is second-guessing the judiciary in blatant disregard of the separation of powers and the right of the courts to arrive at their decisions irrespective of the executive's view and free of its pressure.

The quality of any judicial system is vital to democracy. This presupposes the willingness of outstanding individuals to apply for and accept appointment as judges. South Africa has attracted judges of the highest competence and integrity who have shown that socio-economic rights may be justiciable. They have set an intellectual standard for the world.

This crowning achievement is tragically easy to destroy. If people of quality feel that they will be passed over because they lack political credentials, or are independent, or harbour dictatorial tendencies, or they believe the executive will restrict their independence – then even the most resilient will not put themselves forward for selection.

If this happened, a key feature of the democratic revolution and a central element of the rule of law, will have been most profoundly betrayed.

# WELCOME AND OPENING ADDRESS

**Francis Antonie**

Good evening, ladies and gentlemen. On behalf of the Helen Suzman Foundation and our partner The Open Society Foundation for South Africa, I'd like to welcome you to this third symposium on delivering justice. I would also like to thank GIBS for hosting this symposium.

Helen Suzman was passionate about Public Service. The guiding principle that informed Helen's life work – an unwavering respect for human rights underpins the work of the Foundation. Our research focuses principally on State institutions and delivery, and the relations between the State and Civil Society.

The delivery of justice forms an integral part of these research areas. This is the third and final symposium in this series which focuses on practical aspects of the justice system in South Africa. The previous symposia picked up on some of the themes explored in an issue of Focus, the Foundation's flagship journal. That edition explored images of justice.

The first symposium dealt with civil justice and focused on civil litigation. It provided a framework by which reform measures could significantly enhance access to civil justice. We were fortunate to have the keynote address delivered by Judge Murray Kellam from Australia who outlined the various reforms which have taken place in Australia.

These reforms helped to structure reform programmes in other jurisdictions finding their most comprehensive impact in the United Kingdom with the introduction of the Woolf reforms.

The second symposium explored the challenges facing the enhancement of criminal justice in South Africa. For the layperson, it appears that a number of obstacles readily emerged when considering the state of the criminal justice system in South Africa.

Amongst these are firstly, inadequate training in essential and focused skills and secondly, the poor management of human and physical resources. This includes the failure of line management accountability.

*Without the constitutionally enshrined protections afforded by the separation of powers, South Africa will find its entire justice system compromised.*

Thirdly, possible or potential political interference and lastly, clearly defined boundaries between law enforcement and the judicial process. On that occasion Judge Azhar Cachalia of the Supreme Court of Appeal led our discussion.

The HSF was also fortunate to host Judge Kate O'Regan who delivered the annual Helen Suzman Memorial Lecture in November of last year. In her lecture, Judge O'Regan elucidated on some of the challenges which the Constitutional Court faces in determining its jurisprudence.

Without the constitutionally enshrined protections afforded by the separation of powers, South Africa will find its entire justice system compromised. In order to begin this discussion, we must examine the appointment process of judges and seek to understand the accountability of judges.

Sir Jeffrey Jowell will begin this evening's symposium by delivering the keynote address which deals specifically with these issues. Jeffrey Jowell is the inaugural director of the Bingham Centre for the Rule of Law in London. He is also a practicing barrister at Blackstone Chambers.

He is an emeritus professor of public law at University College London where he was twice dean of the Faculty of Law and a Vice-Provost. He was knighted in the Queen's Honours List in June 2011 for services to human rights, democracy and the rule of law.

One of the UK's leading public law scholars, he has authored numerous publications in the area of constitutional and administrative law. He was born and brought up in South Africa and attended UCT which Wits graduates won't hold against him. He was active in student affairs and the anti-apartheid movement. He then went to Oxford after UCT where he is President of the Oxford Union.

He married Frances Suzman, Helen's daughter. He then trained further in law at Harvard. He has always retained his South African connections being visiting professor at UCT in the 90s, participating in various legal events and assisting in different ways with the constitutional drafting from 1994 to 1996 and then with the Promotion of Administrative Justice Act.

He has recently been one of the counsels in the successful litigation before the now suspended SADC Tribunal in the case for the farmers against the Mugabe regime and has acted in a number of constitutional cases in Malawi.

From 2000 to 2011 as the UK's member on the council of Europe's Commission for Democracy through Law known as the Venice Commission where he assisted with the Constitutions and public law of a number of countries of the former Soviet Union.

Former Chief Justice Pius Langa and legal commentator Carmel Rickard will respond to Jeffrey's address and then the discussion will be opened to the floor. Pius Langa is a graduate of UNISA with a B Juris and LLB degree. He was admitted as an advocate of the Supreme Court of South Africa in June 1977, practiced at the Natal Bar and attained the rank of Senior Counsel in January 1994.

When the Constitutional Court of South Africa was established with the advent of a post-apartheid constitutional and democratic era in 1994, Judge Langa was appointed together with ten others as the first judges of the new court.

He became its Deputy President in August 1997 and in November 2001 assumed the position of Deputy Chief Justice of South Africa. He was appointed as the country's Chief Justice at the Head of the Constitutional Court in June 2005 until his retirement in October 2009.

Carmel Rickard is a distinguished writer, journalist and editor with graduate degrees in humanities and the law. She specialises in writing about the law and legal issues having been legal editor of the Sunday Times. She writes a weekly syndicated legal column in the popular press as well as a monthly column for a legal journal.

She is the author of, among others, *Balancing Acts*, about public health (particularly HIV-Aids) and human rights, and *Thank You, Judge Mostert*, a biography of the life and times of the judge who blew the whistle on the Info Scandal of the 1970s. This is her night job. In her day job, she runs a very flourishing Bed and Breakfast in Smithfield.

It is my great honour to ask Jeffrey to address us this evening.

KEY NOTE ADDRESS

**Sir Jeffrey Jowell QC**

# The Appointment and Accountability of Judges

Thank you very much, Francis. First of all I want to congratulate the Helen Suzman Foundation on the rigour and quality of their research into at least my background. I'm not sure that I remember most of what you attributed to me but I'll take all that nonetheless. Thank you very much.

One of the things that you perhaps left out was the fact that from the years of 4 to 13, I lived just around the corner here in Melrose Street, but perhaps that's not terribly relevant to the subject matter of tonight's talk although it has filled me with intense nostalgia.

I feel greatly honoured to have been asked to give this lecture and moved to speak to this Foundation bearing Helen's name and so ably led by Francis Antonie.

When a constitution is interpreted, a balance is required between the original intent of those who drafted it and its need to develop in accordance with the underlying principles it promotes. Both memory and principle are tools of constitutional evolution.

Let me start with memory. It is far too often said that, despite the appalling actions of the apartheid government, it at least obeyed the tenets of the rule of law and although the apartheid laws may have been harsh, they were, at least officially authorised. According to this view the rule of law was therefore followed in those days.

That view is a distortion of the proper meaning of the rule of law, which it confuses with rule by law (or rule by the law, any law). It confuses legality, which is at the base of the rule of law, with legalism, which is a tool of tyrants. The apartheid government may have followed the tenets of legalism, but not the rule of law.

Helen Suzman knew this when she delivered a blistering attack on the apartheid government as early as 1964 for its blatant disregard of the principles of the rule of law through its sanctioning of detention without trial, its infringements of freedom of movement, and a host of other measures, including the political manipulation of judicial appointments.

*… it required the rule of law in place of rule by law, including as a vital part of the rule of law the need for just administrative action when before there was arbitrariness, despotism and the abuse of power.*

Resort to memory is also necessary to scotch another myth: that the bill of rights in the South African Constitution was a concession to liberalism and an individualistic political philosophy which others believed did not comfortably fit in a transitional context. In fact the bill of rights was a revolutionary document. Revolutionary in the literal sense in that it turned previous practices around by 360 degrees. It required equality in place of discrimination. It required freedom in place of bondage. It required respect for dignity in place of abuse and neglect; it required inclusiveness when before there was exclusiveness. And it required the rule of law in place of rule by law, including as a vital part of the rule of law the need for just administrative action when before there was arbitrariness, despotism and the abuse of power.

I can hear Helen Suzman's response to what I have just said: "What is the use of all these words if there is no enforcement, no implementation on the ground?" To which the answer is of course: nothing can be guaranteed, and many different institutions will be needed to make it all work as intended, but the first crucial step on the road to implementation is the need for judges to be independent because judges are the ultimate arbiters of disputes about constitutional values. They anchor the delivery of just

outcomes in the daily lives of all individuals in accordance with the fundamental values of the new constitutional dispensation.

The appointment of judges is therefore crucial to their independence. What system can best guarantee that the judge is independent in fact and appearance? What method will best ensure public confidence that the choice of judge will not predetermine the outcome of a case?

At the time of the founding of the constitution three principal models of judicial appointment were available in international practice: First, executive appointment; by the minister of justice, sometimes attorney general, or head of government, without parliamentary involvement. This was the previous method in South Africa, and in most Commonwealth countries of that time, including Canada, Australia and the UK, where the Lord Chancellor (effectively the UK's minister of justice then) appointed all judges. The process of appointment under this system is normally closed, and judges are assessed through "secret soundings" from within the legal establishment, and especially from judges before whom the candidate has appeared. Where this system is conducted with integrity, it may have the advantages of selecting candidates of high legal quality, but it has two drawbacks: first, it can too easily perpetuate existing social biases and ignore applicants from non-conventional backgrounds. Secondly, the fact of unchecked executive appointment raises a perception (whatever the reality) of bias in favour of the government of the day, and indeed can all too easily result in bias in fact due to the temptation (under the secret process) to make political appointments contrary to the principle of separation of powers.

The second method of appointment which was considered at that time was that of the United States appointment to their Supreme Court where the President nominates a candidate, who must then be approved by a legislative body, the US Senate. There is a similar procedure in Germany for appointment to its constitutional court although nomination there is by political parties and the approval by either House of Parliament requires a two thirds majority.

This model acknowledges that there is room, in the exercise of constitutional interpretation, for political judgment and that it is therefore legitimate for the elected government of the day to seek to influence that judgment. Some judges may disappoint their political nominators and approvers, but the hope is that they will keep the faith.

*During the negotiating period I recall well the blandishments of the USA, of European countries and others to simply accept their constitutional models, but it was decided to adopt a South African model that would sit comfortably on this soil and reflect the history and aspirations of this country.*

South Africa, to its credit, rejected the executive and legislative models of appointment and went for the third model that of appointment by a judicial services commission. This would reduce the role of the executive alone or in combination with the legislature and thus reduce the opportunity for political patronage of judicial appointments, and thus enhance the separation of powers and judicial independence.

South Africa made its choice against the USA model on the ground that it tended to politicise the judiciary, even before its worst features were confirmed after the Bush v Gore election in 2004. When the result of the election was challenged in the forum of the US Supreme Court, those judges who were initially nominated by Republican presidents sided solidly with the republican litigant, Bush, and the Democratic appointees voted solidly for Gore. The day the judgment (Bush v Gore) came out I was in a meeting in Europe where the Yugoslavian delegate said archly to the US member that the US should never again preach about judicial independence to countries of the former Soviet Union when its highest court had shown itself so blatantly political, in defiance of the rule of law.

The other valuable feature of a judicial appointment commission is that it could seek positively to break the pattern of self-replication, or 'cloning', of the conventional judiciary, through the positive recruitment of a more diverse pool of candidates. The South African Constitution specifically requires the "need for the judiciary to reflect broadly the racial and gender composition of South Africa".

However, the South African model reflected a compromise as accounts of the last-minute agreement on this issue have confirmed. As a result, 8 of its 23 members are lawyers, but the other 15 are representatives of political parties or appointees of the President. It still potentially permits political domination of judicial appointments.

South Africans often seem insufficiently aware of the impact of the 1996 constitution both on other democracies then emerging and on old democracies. It was an innovative constitution in a number of respects, but particularly for its bill of rights. During the negotiating period I recall well the blandishments of the USA, of European countries and others to simply accept their constitutional models, but it was decided to adopt a South African model that would sit comfortably on this soil and reflect the history and aspirations of this country. Some of the provisions have in turn proved inspirational. The provision for just administrative action, for example, actually codifies the requirement that actions of all public officials must be legally authorised but also fairly arrived at and reasonable in outcome. This provision found its way into the new constitutions of Malawi and Kenya, but also to Caribbean countries, the Maldives and even in the recently drafted Charter of Rights of the European Union – in a slightly modified form and called the right to good administration.

Another export was the notion of the judicial services commission. A number of African and Commonwealth countries have moved from the executive model to the Commission model. Even the United Kingdom, in 2005, was persuaded to abandon its model of judicial appointments through the secret soundings of the Lord Chancellor and opted for an independent Judicial Appointments Commission.

In Europe over the past year the Council of Europe has come out unambiguously in favour of JACs as the preferred method of appointment of judges in the new democracies in the countries of the former Soviet Union. This is based on a more considered reading of two international instruments in particular,

Article 10 of the Universal Declaration of Human Rights:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"

Article 6 of the European Convention on Human Rights is in similar terms:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

The provisions in both Conventions requiring the independence and impartiality of judges was previously read into the actual hearings, that they be fair and unbiased.

However, they have recently been extended to the issue of the independent appointment of judges as well.

But here the similarity with the South African JSC ends, because the European model insists, unlike the South African model that there be a majority of lawyers on the Commissions and often, as in the UK's model, which has no politician members at all. I recall a few years ago when, on the Venice Commission I was a rapporteur considering the composition of the JAC for a new democracy in East Europe. I sat together with a Polish judge. Influenced by the South African model, I said that I had no quarrel with the President nominating some members of the Commission. She, however, was outraged. "You simply do not understand", she said. "In the bad old days of the Soviet Union we used to call our judges "telephone judges". Appointed by the "ruling party" and responsible to its interests, when there was a case against the government they would telephone the minister to find out what they should decide. This must never happen again. There must never again be any political members on judicial appointment committees".

Opinion No. 10 of the CCJE, "the Council of the Judiciary in the service of society" further develops that position, providing, (at paragraph 16):

> "The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided." And (at paragraph 19): "In the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of Parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice."

How has South Africa fared under the existing appointments system? In some ways the system has been a massive success. Its judges in the highest courts have proved models both of rigorous legal analysis and how to promote transition and social change within the constraints of their limited authority. The judiciary has been transformed into one much more closely representing the composition of the population, in respect of race if not gender, although progress there too has been made. In the first years of the JSC even those members who were appointed for their political attachments, or by the President, strained to avoid the conferment of political patronage through judicial appointment.

The interest is the majority party (or "ruling party" as it is sometimes misleadingly called), was subjugated to the interest of judicial independence and the rule of law.

That degree of tolerance and discipline seems of late to have been somewhat weakened. It is not for me to judge the quality of recent appointments, and some have clearly been good. But I cannot help remark that a number of those whose applications for judicial office were rejected are lawyers of the very highest ability not only in terms of their analytical skills but in terms of their wider qualities and commitment to equality and human dignity. Many of them are greatly respected internationally and it is with disbelief that their failure to be appointed has been viewed. They would simply grace the bench of any top court of any country in the world, and if their rejection was due to their political affiliation or lack of affiliation, or to their habit of independence (and I venture no opinion on that) then the loss is South Africa's alone, and that loss is beyond calculation.

*Courts decide simply whether the law permits the action and whether the decision has been properly arrived at, and whether there is a rational relationship between the decision taken and the purpose of the power under which it was taken.*

Let me now turn to the issue of judicial accountability, which is closely linked to judicial appointments as it responds to the oft-made charge of 'juristocracy', or of dictatorship by judges; that judges are not elected and therefore have less or no legitimacy to decide matters constitutional. These taunts are levelled on judges in all countries by robust politicians or the media who believe that the policies of the government should not be thwarted by unrepresentative judges. Just read the English *Daily Mail*.

One answer to this criticism is that judges do not operate on the same decision-making field as politicians. The legislature makes policy for the future of society on the basis of a calculation of preference. Judges decide disputes between two sides on the basis of textual interpretation and the balance of principle. The issue could not have been put better than Justice Kate O'Reagan put it in her Helen Suzman Memorial lecture last year, where she stressed, as she and others in the Constitutional Court have in many judgments, as has Professor Cora Hoexter, that the separation of powers does not permit the courts to substitute their opinion on policy, or to substitute the opinion of experts. Courts decide simply whether the law permits the action and whether the decision has been properly arrived at, and whether there is a rational relationship between the decision taken and the purpose of the power under which it was taken. As O'Reagan said: "Citizens' entitlement to ensure that government complies with... constitutional requirements does not diminish government's capacity to govern, nor does it entitle citizens to co-govern the country".

But judicial restraint or deference is not a complete answer to the plea for judicial accountability. As Professor Hugh Corder has rightly pointed out, in the new South Africa the exercise of all public power and the performance of all public functions necessarily demands some form of justification[1]. And that is true for all proper democracies. The late and great Etienne Mureinik said that South Africa had changed, in 1994, from a culture of authority to a culture of justification and this applies also to the judiciary. But this accountability must be attained at no risk to judicial independence, and hence most sensible jurisdictions reject the notion of electing judges because, as is shown in studies of United States state jurisdictions where judicial elections are permitted, judges may all too easily be subject to influence by those paying for their campaigns, and also by populist demands, at the expense of unpopular minorities and society's most vulnerable.

There are, however, forms of accountability other than elections. What we might call

[1] See Etienne Mureinik *"A bridge to where? Introducing South Africa's Interim Bill of Rights"* NNCCD

common law methods of judicial accountability are probably more stringent than those faced by any other decision-maker in society. There are a range of methods of judicial accountability and justification which include the following:

- Cases are almost always heard in open court, so that any member of the public and the media can observe judicial authority at work, and can criticize it, disseminate reports about it, stimulating public debate and open and free criticism. Compare that to the hole-in-the-corner decisions of most private and public decision-making bodies.

- Every judicial decision is argued on the basis of proofs and argument from each side, and must then be supported by a reasoned judgment, which must be made available to those who request it. At least in the higher courts, these reasons extend to scores of pages. Compare that to the reasons we get from most areas of public administration (if we get reasons at all).

- Judgments are likely to be published in official sets of law reports, which set an open precedent to which the public can have recourse.

- The courts are assisted by an organized legal profession, which is both independent (at least in being largely self-regulatory) and adheres to a strong code of professional ethics;

- the possibility of review by, or an appeal to, a higher court exists in respect of every judicial decision, except naturally that of the highest court in the hierarchy;

- the admittedly remote possibility of disciplinary measures, or even more unusually, removal from judicial office, exists in law, although this result is difficult to achieve without gross misconduct (for reasons of the preservation of judicial independence), and here the process needs the participation of all three branches of government.

We could take accountability even further if we wished. There is surely no reason, in my view, why the financial interests of judges should not be disclosed. And there is no reason why judges should be forbidden from accepting any emoluments once their tenure has begun. Conflict of interest should be avoided at all costs. It seems important too that all judges of equal rank ought to be given precisely the same payments in salary and in kind and that any exception should be properly justified so that they do not give the impression that any one judge is favoured by their executive paymaster.

*I heard recently of a woman judge in Africa with a family of four whose husband was dead and who had not been paid by the state at all for 9 months. In a letter to the minister she admitted that the temptation to accept a bribe might be simply too difficult for her to resist.*

In case any judge present is concerned about what I have just said, I would add that it is also important for judges to be decently compensated for their important tasks, again to avoid the temptation of corruption. I heard recently of a woman judge in Africa with a family of four whose husband was dead and who had not been paid by the state at all for 9 months. In a letter to the minister she admitted that the temptation to accept a bribe might be simply too difficult for her to resist.

Peer review is another method of accountability which is these days imposed upon virtually every other area of administration, public or private. It involves an internal assessment, seeking to determine whether the person reviewed is meeting targets of efficiency, courtesy, accessibility, and so on. A recent review of the judicial role in the UK is suggesting that as an additional course of judicial accountability.

On a recent visit to Brazil I discovered another deeply impressive method of accountability. In the basement of the Supreme Court building in Brasilia a television station broadcasts

for most of the day about cases as they are decided, with summaries in accessible language, and debates structured around the results. This programme is deeply popular, has an audience of millions, including in schools, and provides both a means of communication of the law and accountability for the process and substance of decisions.

Finally, let me ask whether mechanisms of accountability might properly include the kind of review that is now in train in South Africa, initiated by the Department of Justice and Constitutional Development, for "the assessment of the impact of the decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence".

*... let's assume the best of motives that it is an attempt genuinely to review the progress to date of the two courts. Is it appropriate for the executive to institute such an inquiry, or does it constitute a breach of the separation of powers?*

Given the context of some of the statements made before the present request for bids on the review was somewhat toned-down, it seems clear that this is a shot across the bows of the judiciary by the minister and the party he represents. But let's assume the best of motives that it is an attempt genuinely to review the progress to date of the two courts. Is it appropriate for the executive to institute such an inquiry, or does it constitute a breach of the separation of powers?

To me the answer depends not only on the motives of the review but also upon its content. It is perfectly appropriate for the government to assess the effectiveness of the courts' organisation and management. Are they acting sufficiently quickly? How clogged is the docket? Are individuals provided with reasonable access to the courts? Are they employing their resources efficiently? Might they need more resources, or more resources in certain geographical areas or in some areas of legal dispute? Are the costs of litigation reasonable? Is legal aid sufficient? Is justice provided evenly across the land? These questions are appropriate for government to answer because it is government that can decide whether to provide the resources or the expertise to remedy any deficiencies in those organisational and managerial matters.

It may also be proper for the government to seek to determine whether implementation of the courts' decisions have been effective and the extent to which it could be improved. Matters such as these, and especially the issue of a serious backlog of cases, prompted a recent review by first Switzerland and then the United Kingdom of the European Court of Human Rights in Strasbourg that has jurisdiction over human rights matters for Europe.

The purpose of the review in the present case, however, is partly of those two kinds (efficiency and impact). However, it also has another purpose, which is to undertake "a comprehensive analysis of decisions [of the courts] to

- "establish the extent to which such decisions have contributed to the reform of South African jurisprudence and the law to advance the values in the Constitution,
- to assess the evolving jurisprudence on socio-economic rights with a view to establishing its impact on eradicating inequality and poverty and enhancing human dignity" and
- to assess the extent to which South Africa's evolving jurisprudence has transformed and developed the common law and customary law in South Africa as envisaged by the constitution."

The probing of these questions is perfectly legitimate for any academic or NGO or any other individual, but surely not another branch of government, even by means of contracted out tender. The executive here is assessing the substance of the courts' decisions. It is asking whether the actual judgments of the

*The quality of any judicial system, and thus of an important part of the democratic corpus, depends upon the willingness of outstanding individuals to apply for and accept appointment as judges.*

courts are correct. It is claiming the right to second-guess the judiciary, in blatant disregard of the separation of powers and the right of the courts to arrive at their decisions irrespective of the view of the executive and free of any executive pressure. There is also a clear implication that if the courts fail the examination, a penalty will ensue. Why else conduct the inquiry? What concealed sanction is contemplated that could not amount to an interference of judicial independence and the separation of powers?

The quality of any judicial system, and thus of an important part of the democratic corpus, depends upon the willingness of outstanding individuals to apply for and accept appointment as judges. The new South Africa has been fortunate in attracting judges of the very highest competence and integrity who elevated the principle of ubuntu and have shown that socio-economic rights are important and may be justiciable. They have set intellectual standards for the world, which increasingly cites them and learns from them.

This crowning achievement – a majestic export of this country, of which it should feel immensely proud – is tragically easy to destroy. Being a judge has its satisfactions, but it also has its anxieties and tensions. If men and woman of quality feel that they will be passed over because of the lack of political credentials; or that their independence will be portrayed as heresy; or that they will be constantly accused of harbouring dictatorial tendencies not appropriate to non-elected office; or if they believe that the executive harbours plans to restrict their independence by undisclosed sanctions – if that is the culture in which they will operate as judges, then even the most resilient of them will no longer put themselves forward for selection.

If this were to happen, a key feature of the democratic revolution, and a central element of the rule of law, will have been most profoundly betrayed.

CHAIRPERSON: Jeffrey, many thanks for that inspiring lecture. I'd like to call on Judge Pius Langa to respond.

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## Judge Pius Langa

Firstly, I would like to thank Sir Jeffrey. Jeffrey gave me a preview of his talk. I got it sometime today and I've been readying myself to disagree with him. That is what I understand responding to mean.

Then of course he has made it very difficult for me to disagree with him. He has said some of the things I would have said myself but I'll go on scraping the barrel and hopefully we can have some sort of debate.

I am in the fortunate position of having listened to an erudite presentation by Jeffrey and knowing that there is another expert who is going to be following me, in the person of Carmel Rickard, particularly when it comes to issues around the Judicial Service Commission, because she has written a lot about that. I know people buy newspapers because of what they can read in them.

During sittings of the Judicial Service Commission, many newspapers got sold-out because Carmel Rickard would be writing something, possibly speculating, about who was going to be appointed and how the Judicial Service Commission was going to handle the matter.

I remember one heading in her article when I was about to preside over the Judicial Service Commission for the first time. I think it read: "Big test for Justice Langa." She will tell me today whether I passed the test.

I agree a hundred percent because mostly everything which Jeffrey has said is my orientation. It is the sort of thing I would say myself. So I will say I agree. Then where I agree enthusiastically I will say I agree a hundred percent.

On the issue of the rule of law or rule by law – we grew up in a dispensation where those who wielded power actually respected the law. They did not choose to do things without a legal imprimatur. So when you were about to be tortured, the law gave them the space to do that.

You would be kept in solitary confinement because the law decreed that you could be kept in solitary confinement. You could be detained for upwards of 180 days because the law decreed that. So it's absolutely correct, a hundred percent, that, that was not the rule of law but the rule by law.

If they were brought to court themselves to answer for their misdeeds, they would point at a section and a subsection in the chapter and say we did this in terms of that. This is what prompted one judge who got fed-up with this ambivalence to say once, this may be the law but it is not justice, that is the South Africa that some of us grew up in.

It is the same thing with the Bill of Rights; those of us who have longer memories will remember the Freedom Charter as the basis of the Bill of Rights. The Freedom Charter came about because people demanded certain things from the State.

So when discussions around the Bill of Rights came about, it was because the ordinary person, the men and women in the street, wanted guarantees that when the transition came the State should be obliged to do certain things.

There was nothing there about a fancy kind of Constitution or ideas which came from overseas or from the west or from wherever. It was simply and plainly to make sure that having been bitten once by a government which deprived us of rights, freedom and dignity, we were not going to be bitten again. We were adamant that this time around it would be "a never again situation" so we wanted all this to be in writing and they (the people) demanded a Bill of Rights.

*The way, of course judges were appointed seemed to indicate that the State was merely "forum shopping." Only certain judges seemed to be given certain matters to deal with and, I mean, particularly political matters.*

If South Africa had come up with a Constitution without a Bill of Rights, it would have been a betrayal of the people who had been denied their rights for many decades. In that Bill of Rights, you can see the centrality of values such as equality and human dignity; these are values which had been trodden upon most severely by the previous system.

On the appointment of judges – from time to time I travelled to Europe and other places before 1994. I had discussions with the Judiciaries in those places and one thing which I was able to say to them was, you know, our judiciary in South Africa is very much like your judiciary in Europe; it's all white. But of course I was wrong because there was a gender mix.

One thing about South Africa's judiciary and the need to transform it was to bring about that mix which would make our judiciary look like the people they served. There were some good judges during that old dispensation but the problem was that when you looked at them, you didn't see that they looked like the population of South Africa and that became an objective of the Constitution, to say that we the judges should look like the people we serve.

That, of course, enhances confidence in the judiciary and the fact that, that was not the case before, also enhanced criticisms against the judiciary itself. It was seen to lack legitimacy. It lacked the confidence of the people who appeared before them.

The way, of course judges were appointed seemed to indicate that the State was merely "forum shopping." Only certain judges seemed to be given certain matters to deal with and, I mean, particularly political matters.

I know that when we practised law in the Province of Natal, the counsels or legal representatives would make it a matter of concern; who is the judge that is going to be sitting on that case.

If it happened to be a judge who you accepted was a progressive person, you would be happy but if it was the usual judge who would more likely be executive-minded, it used to be a problem and some people might even be driven to seek postponements so that their cases would come before other judges.

We did have discussions; Jeffrey would remember some of them, before the new Constitution came about. We used to go and have conferences in other places as well where those discussions would take place about a future judiciary and how it should be appointed and that is where the idea of a Judicial Service Commission actually germinated.

The permutations about the composition of the Judicial Service Commission which was finally agreed upon, was indeed supposed to be a compromise.

That is why you have members of the legislature, you have lawyers, you have judges in it and you have people appointed by the President. The question of course is, is this the best permutation? I would say that at that time when this was agreed upon, it would have been the best permutation.

I know the Judicial Service Commission from three angles, maybe four. The first angle was, apart from discussions about the composition of the Judicial Service Commission, when I

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myself appeared as a candidate before that Commission, I can tell you that the people who were sitting around that horseshoe table were a mixture. There were judges. There were members of the legal profession. There were politicians as well.

But simply by virtue of the fact that this was a specialist body, the people who had the dominant role, even though they were in the minority, were the legal people. All the other people, the members, could ask questions.

They could cross-examine but it was the legal people, the Chief Justice and the other judges who had played the role of probing to make sure that the people got appointed were suitable people to occupy the Bench.

I say I have seen the Judicial Service Commission functioning from a number of directions. The other direction was when I chaired the Judicial Service Commission. I will leave that to Carmel Rickard. I won't comment on that.

Then of course I've looked at the Judicial Service Commission as a mere observer after I retired. One could comment on one or two things but I don't think that I've got the time to do that.

**CHAIRPERSON:** On this occasion I will allow you the time.

**JUDGE LANGA:** On this occasion I'm going to pass on to something else. Let's leave it there. Thank you.

**CHAIRPERSON:** Thank you, Judge Langa. I'm going to call on Carmel.

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**Carmel Rickard**

I just made my way here from the Free State via Franschhoek where I was briefly at the Literary Festival and I shared a panel with Dennis Beckett on one occasion. He was waxing about his central thesis and that is a deepening of democracy. I'm not entirely sure that I understand what it is or what it implies but I must say that it left me feeling something like this.

That is in response to something that you said at the beginning, Jeffrey, that I feel quite attracted to – the idea of citizens co-governing. It was supposed to have been sort of a shock and horror but it does sound rather a nice kind of thing to think about.

Thank you to the Foundation for this timely intervention. It raises many burning questions and I'm sure we're also grateful for your input. I particularly liked your reminder that our Constitution was a revolutionary document.

It was good to hear these words when it is under such attack for representing some kind of an Uncle Tommish approach. It's really good to be reminded by in fact both you and by Pius of what its origins actually are.

I'd like to raise a few areas of comment, some bigger than others. It's true, as you were saying that judges should be the good guys that the Constitution envisages. That's very necessary. But in a constitutional democracy, it's just not good enough. There are other people who should be just as upright, just as committed to constitutionalism.

We've been forced recently to bring into public debate the sort of thing that is usually just discussed in academic circles namely, accountability of judges and on what basis they exercise their power.

But judges aren't the only ones to take an oath of office. Others in authority must also consider their undertakings seriously as well. Political leaders too, take oaths of office in which they say that they're going to obey and maintain support and uphold the Constitution and other laws.

*I think it would be very important, although we're focusing on the judiciary at the moment, to see us holding our political leaders accountable to the same set of criteria.*

In the cases of lesser officials, they say that they're going to be faithful to the Republic which must obviously include the Constitution and its laws. I think it would be very important, although we're focusing on the judiciary at the moment, to see us holding our political leaders accountable to the same set of criteria.

On the question of judicial accountability, again here I agree completely with Jeffrey's comments about judicial accountability and the way it is experienced through collegiality, judgments and open court.

I don't know how many of you here have actually been to the Judicial Service Commission hearings, but I think it's a very important moment for constitutional democracy, for the relationship between people and judges when somebody actually submits themselves to the questioning in front of people who represent the media and the South African public. I think it's a very

important dynamic that happens there and it is part of the sense of accountability that we develop.

You spoke about the judgments that people give and my concern is about the magistracy and the judgments that they deliver. I have read a number of Supreme Court of Appeal judgments delivered last term. I try to read all the judgments from that court that I can.

*… I believe that ironically it's become, in South Africa, a potential Achilles' heel for the judicial system. I think that it is far too big. It is too politicised and that it is starting to do South Africa and the judiciary a disservice.*

In the last week of that court's term I think they handed down no fewer than six judgments in which they criticised, in one case an acting judge and in other cases magistrates, for the poor judgments that they were giving including, that these judges weren't giving reasons, that they were simply summarising evidence and then handing down a decision. I think if judicial accountability is partly expressed through judgments and reasons, I think that this is an area where some attention needs to be given.

Now I come to a very sensitive question which I hope I can handle delicately. The point made by Jeffrey about accountability and judgments explains largely, I think, the concern of many people raised during the process of appointment of our current Chief Justice.

If you remember, he had noted his dissent in a controversial case that seemed to involve an important matter of constitutional rights but he gave no rationale for that position. Even before he was tipped for the highest office, the anomaly had been raised, queried and written about.

The problem is that if he didn't see it as an absolute imperative for himself to give that reason in the judgment, we had to question at the time of his judicial interviews for office whether he understood that it was part and parcel of judicial accountability for judges to give reasons and we had to ask how he would be able to give an example, or lead by example on that very difficult and central issue.

The next thing I want to talk about is how the United Kingdom in 2005 went over to a system rather like ours. In 2002 when the UK was considering this change, a number of consultations were held. One of them, to which I was invited to explain and comment on the South African system, was held in Cambridge.

This afternoon I re-read what I had said on that occasion and some of the things that I said there I feel more strongly than ever about although there is one thing on which I began to change my mind.

I very much support a system such as the JSC and that's what I told the people at the conference. But I believe that ironically it's become, in South Africa, a potential Achilles' heel for the judicial system. I think that it is far too big. It is too politicised and that it is starting to do South Africa and the judiciary a disservice.

I would prefer a far smaller body with a majority of its members being senior lawyers. There is, I strongly believe as well, an important role for ordinary members of the public for non-lawyers but they should not be in the majority. I've sometimes been at the JSC and seen or heard ordinary people like you and me who make a point that really focuses everybody's attention.

Suddenly they're a bit like the child in the story about the emperor's clothes, and this person would suddenly say: "But that person has no clothes on," and all the niceties that the lawyers are busy observing are just cut through and you get the truth from that person and it really is riveting.

But I had also observed them at a loss about the significance when a candidate is asked about an ethical problem or a basic mistake that should never have been made.

Sometimes they don't really get it and that can be quite embarrassing.

I don't know whether everybody here remembers, but it was a very close thing whether or not our JSC sessions would be open to the public and the media. It seemed right at the beginning that it might well not happen.

But they are now established as open to the public and to the media. In that 2002 conference I was talking about, I strongly urged that the UK should follow suit. I would be interested to know from Jeffrey what the current position is, whether those hearings are open to the media and to the public or not.

I said at the time that if you wanted to convince people that the system had really changed and it was now open and responsive to the constitutional imperatives, then the interviews had to be open. No one would believe that there was change if they couldn't see it for themselves or if they couldn't read about it for themselves.

But this is where I've begun to change and I said that there was a good argument to be made for keeping the deliberations and the voting closed. That's what I'm not so sure about anymore.

As we grapple with how to reduce the Commission's politicisation, I've begun to think it might help if we could actually observe and report on the discussions. We'd be able to see what's going on and it would also, I think, reduce this new ethos that the JSC has imposed on itself – one of very great secrecy with dire consequences for people who are in breach of secrecy.

That's become far more pronounced over the years and if there were to be reporting or more openness on the part of the Commission, it would at least reduce the issues over which there is such a dire need for secrecy.

Finally, I would like to say something more about the media. I'm concerned about the level of expertise in the media to write about the issues which you discussed and the growing threat to the judiciary and to constitutionalism. It's one of the biggest and most worrying stories since 1994 and I'm not convinced that the media is adequately equipped to deal with it.

*We'd be so passionate about the Constitution, as I said, that we wouldn't be prepared to let it be watered-down or its character to be changed. Now we are moving in that direction and I'm obviously very saddened, first of all, that the politicians are doing this, but secondly, that there isn't more of an outcry to this great threat and I wonder if the media did enough.*

But I also have a sense of failure. It's a personal sense and also relates to the media generally. I've always seen it as part of my task and that of the media generally, to write stories that create a kind of passionate conviction in the public about the significance of the Constitution so that they would feel that they would always be prepared to defend it.

They would understand what a significant difference it has made to their lives and really be prepared to do whatever it took to defend it so that if ever we got to a situation where the Constitution, the Bill of Rights or the rule of law itself was threatened, the public would be moved to defend it.

We'd be so passionate about the Constitution, as I said, that we wouldn't be prepared to let it be watered-down or its character to be changed. Now we are moving in that direction and I'm obviously very saddened, first of all, that the politicians are doing this, but secondly, that there isn't more of an outcry to this great threat and I wonder if the media did enough.

On a final note, I want to say thank you, I listened more attentively than I had when I had read what you had said, for putting your finger on what's wrong with the proposed review of the courts. I heard from you for the first time, Francis, of your involvement on the

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SADC Tribunal in cases before them so you will probably share my concern about what happened to that tribunal.

There was an evaluation, a review of the SADC Tribunal, and after that the tribunal has been dissolved and I must say that after the demise of that court in response to an evaluation and a review, I feel very concerned and I'm sure I'm not the only one, about the intention and the impact of this review. So thank you again for raising that problem.

CHAIRPERSON: Many thanks, Carmel. Jeffrey, there was a question directed at you and I am going to give you the opportunity to respond.

**SIR JEFFREY:** I can do so very quickly. The UK Judicial Appointments Commission has no politicians on it. It has a majority of lawyers and judges but it has a good dash of laypeople.

About 6 of the 15 members are people from just ordinary different backgrounds and they apparently contribute an awful lot to the discussions and they have, I think, redefined the notion of merit, in a sense, that initially it was thought of sharp analytical ability that the judges of old used to have and which are needed in judges, of course. But there are other aspects to it, one of which is accessibility, humanity and so on. So these qualities are assessed perhaps more than they were through a Commission.

The second point, it wasn't questioned but it was raised, was about diversity, about representativeness, about the judges looking like the population. Judges shouldn't necessarily be representative of interests the way the politicians are. They should, I can't find a better expression than, resemble, in a broad sense of that word, the people, feel like the people, to some extent, understand the people in order to give confidence.

The judicial appointments, the Commission is trying to do much more in the UK to achieve what is called diversity. It hasn't done enough yet bringing women on to the Bench or minorities in that country. It does not hold its hearings in public. It has rigorous scrutiny.

The judges are not only interviewed by the panel but they are also set with real problems and some of the problems are set for them to do in half an hour like an examination question.

So they are very carefully and rigorously scrutinised but they do not hold them in public and it is felt that, that would put off a number of judges from applying because it can be quite a humiliating experience.

If it is done with sufficient rigour, then it can actually put off a lot of people because if they don't get the job, they will feel they have been put through the mill. Perhaps that shouldn't apply. Perhaps that's rather a weak need and wimpish but it seems to me to be a fact of life.

In any event this was considered by a parliamentary question of publicity recently and they gave some good reasons worth reading, for those interested. The House of Lords in the Constitution Committee looked into the big document which I have here. It was decided interviews should be conducted only in private.

CHAIRPERSON: The speakers have agreed to answer questions and to have discussion. I'd like to have a first round of questions. If you are identified, please identify yourself for the record.

MR LEON: *Carmel has actually partly answered it but maybe the rest of the panel would look at it. It's a point started off in Jeffrey's presentation about the size of the Judicial Service Commission which has 23, one-third of the Commission being lawyers and the rest of the Commission either being politicians or appointed by the President.*

*This is the very point that came out of Carmel's comments, which I think strikes me as being very apt, that is that in recent times, particularly under the Zuma administration, the Minister of Justice Mr Radebe appears to have got much more interventionist in the scrutiny of judges, ostensibly on the basis as to whether or not or how they are committed to transformation.*

*Now transformation is obviously an important aspect of our constitutional system. But the question I would like to ask the panel is what do they think the Minister of Justice means by transformation?*

*It seems to me that one outcome of that has been the appointment of a Judge President recently by the Commission in Gauteng where one of the candidates, the Deputy Judge President in Johannesburg, had written an article which was apparently critical of the government and appeared not to be appointed as Judge President as a result of that article which clearly exercised the Minister of Justice's mind.*

*I think the point that Judge Langa was making in his comments was that under the previous administration, the Chief Justice as the head of the judiciary, where the lawyers who were the minority, effectively managed the Commission.*

*It now seems to me, and it's just an observation because I haven't attended a meeting but just based on what I've read, that the Minister of Justice and, as you might want to call it, the ANC Caucus on the Commission, are determining who or who does not become a judge in this country ostensibly based on commitment or lack of commitment to transformation.*

CHAIRPERSON: Could we take two more questions.

NTSWANE: *Thank you very much. My name is Ntswane. I am from Pretoria. You see, in this country the social structure is complicated.*

*Maybe I must remind those who might have forgotten, that we have a social structure where we have got a greater inequality in terms of development, in terms of education and otherwise. This has been the case for generations. This also reflects itself with the relationship that you have with a predominantly black government or African, if you like. There is this perception of saying, but you know anything that goes against us is a plot. But this thing it cannot be set straight. You see it in action.*

*My point is, on this appointment of judges, I was thinking that maybe what we need to do as a country is, take the institutions and the processes seriously, especially the Office of the Chief Justice, politicians should not be allowed there. You have eminent international jurists, we can decide as to how many, so that when they probe, because they should probe around - the questions that they ask should be relevant to that office and not politics. Thank you.*

**CHAIRPERSON:** The final question in this round.

MR LEKOTA: *Thank you very much. Having been a long time visitor to the Presidency and the courts of our country, the issue of the judiciary sits very heavily with me. I know that if it is properly managed, then citizens will benefit. It's really very sad what happens when it is not properly managed.*

*Many innocent people lost their lives. Many of us lost the best years of our lives for no reason. We have the damage. Yet at this time I think our country is moving again, I'm sad to say, in the direction that we will repeat the mistakes we did yesterday.*

*I'm sitting here wondering to myself, there's talk of the rule of the law and I was very happy to hear your enunciation of this, Sir Jeffrey. But I also now am asking myself whether this rule of law should not also be combined with rule by law. The two must be together.*

*We have passed a good Constitution. Among other things, it says if you seek permission, you may exercise your rights. For instance, you may demonstrate. That's one of the things the Bill of Rights is there to ensure.*

*In the security section of our Constitution, it says that those who serve in the security cluster, Defence Force and Intelligence, must serve all of us fairly and equally.*

*Yet very sadly I watched yesterday when young black South Africans, they may well have been wearing blue t-shirts, they were as black as I was when I grew up and as I am still now, trying to exercise their views in what they believed to be a democracy. But the others, who had no permission to march or to be there, blocked this. Of course we know what happened; blood flowed.*

*Now the police, who are supposed to be neutral, are in alliance with the other organisation. But the Constitution states that they must be neutral. I was part of organising when we were fighting for freedom but then we had no Constitution. We had no political rights. What was the point of passing this Constitution if now we don't deal with that?*

*I can see deterioration. What I see is deterioration. Injustice, when it happens, does not choose colour. Under apartheid we went to jail with Bram Fischer. We followed them there with Hannekom and others.*

*I can see now that what is going on may well lead us to a situation in which large numbers of us will be taken back into the prisons, this time with white counterparts.*

**SIR JEFFREY:** I think I'll leave it to my panellists to respond to questions because I think it would be wrong for me to comment on what Peter Leon has raised. But I would simply say that I agreed one hundred percent with both panellists and I'm very pleased, it's not entirely on topic, but I am pleased that Carmel raised the issue of the SADC Tribunal.

The world again had great hopes for this tribunal, and I declare an interest as a counsel there, but the first case was a remarkable case because it seemed as if the Mugabe government's position, all the

way until practically the end of the case, would be upheld.

But the judges said famously, we want to build a house of justice in Africa and they held that there had been a breach of the rule of law and there had been discrimination and there had been improper purpose in the distribution of those particular farms.

Twice that same court provided a contempt judgment against the Government of Zimbabwe for failing to implement the judgment of the court and again and again nothing was done about it.

At the summit meeting, Mr Mugabe persuaded the SADC Summit to disband the court. This has hardly received any attention and there has been no particular outcry but it is quite extraordinary that this has been permitted to happen.

**JUDGE LANGA:** Let me deal with the issue of how the JSC works. I agree with Carmel regarding the size of the body. I think it's a huge body. But insofar as there is criticism regarding the choices made in that body, I would want to make one or two points.

The mandate of the JSC is to find appropriate persons to be appointed and that really is the basic criteria by which it functions. The fact that the composition of the JSC has politicians in it, people

*The Judicial Service Commission is meant to appoint people who are people of integrity in whom the whole population would have confidence …*

nominated by the President and a huge number of people from Parliament, that is the part which is the compromise. As compromises go, there is bound to be positives and negatives

The Judicial Service Commission is meant to appoint people who are people of integrity in whom the whole population would have confidence, and in order for that to happen in South Africa, with its diversity and with its past, its history and so on, there are politicians.

One could argue about the great number of non-lawyers or non-judges in the Judicial Service Commission. But this was done to assuage the fears of people who had experience of bad handling by judges so they wanted this safety valve for protection and to say the people must be represented as well.

If we had to do it all over again, one issue I would raise about the JSC would be that there should be a rule that once you are in the body, it doesn't matter where you come from, it doesn't matter how you got in. Whether you are appointed by the President, or whether you have been nominated by a political party or Parliament or whatever, or whether you are a judge or a lawyer, one rule that should

operate is that once you are there, there should be no lobbying.

You don't represent anyone. You are a member of the JSC. There should be no lobbying, no caucusing by groups so that people who are there are there independently and they make up their minds on the merits of what they have in front of them.

CHAIRPERSON: Thank you. Carmel, you have the last word.

**MS RICKARD:** I would like to look briefly at part of your question on transformation. I think it goes to what I sometimes fear is happening at the JSC and that is a lack of rigour that I perceive is a problem. It's a question that, to me, illustrates one of the problems of the JSC and that is the lack of evenness in questioning.

I think that when people talk about transformation, they have in their heads, a very one-dimensional understanding of transformation taken to mean the race and gender composition of the Bench. Obviously you're never going to get anyone who will say, actually, I don't agree with that.

But what about the other dimensions of transformation, the idea that the Constitution brings in a whole different approach to the law, to the relationship between people and the law, a new spirit and so on? That kind of understanding I don't find examined very often. I'm sorry to say, but there is no examination about the way our approach to the law has been transformed.

CHAIRPERSON: Judge Yacoob.

JUDGE YACOOB: *I wonder what the panel would think about the judicial area. We hear lots of things about this is how it was, this is how it is, things are changing and so on.*

*Would it not be an idea for the Judicial Service Commission to develop, in a transparent way, its own guidelines or criteria which it would stick to in making recommendations in relation to the appointment of the Chief Justice, the Deputy Chief Justice, the presidents of courts and judges and so on, so that they are actually able to work consistently? I would like to know especially from my ex-colleague Pius whether he thinks that will work.*

**JUDGE LANGA:** Zac, I think from time to time, from my knowledge, the JSC talk about their own rules, how to develop them, how to develop guidelines. There are guidelines, for instance, about questioning the candidates and there are guidelines in relation to procedures and stuff like that. They work.

For instance, there are questions which are not allowed because they contravene the rules which should be observed. There is a rule, for instance, that you can't put a query to a prospective judge about his or her judgment where this has not been raised with that particular judge and so on.

So, yes, developed rules and guidelines are there but it is for interest groups to promote the rules which they would like to see as part of the procedures of the JSC.

ANDILE: *Thank you. My name is Andile I'd like to put a question to the panel. The first one is: I'd like to establish from you the strength of the enforcement mechanisms in the Constitution?*

*I'm not necessarily referring to how its provisions are couched. I know that you get provisions that presuppose a choice like "may" and those that presuppose no choice like "must." I'm asking in reality, how strong are its enforcement mechanisms?*

*The second question, perhaps, relates to the first one. I know the building blocks of the Constitution are equality, human dignity and freedom. I'd perhaps like us to explore, or the panel to explore the notion of equality.*

*Is it worth the paper it's written on in the Constitution? I know the Constitution celebrates the notion of equality. I think Section 9 provides that everyone is equal before the law. But is that worth the paper it's written on in reality?*

*We have seen certain shenanigans replaying themselves over and over again especially when high profile politicians are supposed to do time in jail. The latest on the list is Sifiso Zulu who has just recently gotten ill. Instead of doing time in the coolers, he is in hospital all of a sudden and will probably emerge and go and play golf.*

*So is the notion of equality really worth the paper it is written on or is it a misnomer? Are some more equal than others? The last question is: is the law really value free? Ostensibly the law is supposed to be value free. But in reality is it value free? Thank you.*

CHAIRPERSON: Thank you.

MR RALFE: *Gary Ralfe. In relation to the appointment of judges, how good have we been in reconciling the constitutional imperative of representativity with what I think is another constitutional requirement of merit because of all the historical imbalances we are aware of? If it is true and I stand subject to correction, that the natural pool from which one draws judges, are the Senior Counsel, and if there are white males predominant in that pool and if they have the experience, what do we do in order to reconcile these two imperatives?*

*When I heard you say, Jeffrey, that there might be a number of people you know about of outstanding calibre who are discouraged from putting up their names again for appointment, are they discouraged, some of them, perhaps not because of their political views but because they have the misfortune, like me, of being white and male?*

CHAIRPERSON: Last question at the back.

# DISCUSSION, QUESTIONS AND ANSWERS

MR OLIVIER:

*My name is Morne Olivier. I'm from Wits University. I do some research on the judiciary. I have some observations to make and a couple of questions and I'd like your comments on my own comments.*

*The issue of judicial diversity has been raised. It is problematic. It's a constitutional imperative in terms of Section 174(2) of the Constitution. My observation is the following and that is that the initiative for ensuring that there is compliance with that particular provision must come from the JSC as opposed to the Ministry of Justice.*

*Should the Judicial Service Commission under the successive Chief Justices perhaps not have been more proactive in increasing judicial diversity particularly with regard to gender diversity which is problematic? At the moment we have a situation where the Constitutional Court only has two women judges. We have one woman judge on the shortlist.*

*The other issue related to judicial diversity is that of transformation. What is the meaning of transformation? Is it merely to be equated with judicial diversity or is it substantially more than that? Of course we all agree that it should be substantially more than that.*

*Carmel raised the issue of commitment to constitutional values and I have raised the point before in the media and elsewhere that one of the things that the Commission needs to establish through its questioning is a demonstrable commitment to constitutional values and that's an issue that was raised with Chief Justice Mogoeng's interview also.*

*I take particular issue with two things in the Commission at the moment. The one is the issue of inconsistent questioning which is quite clear and obvious. There are questioning guidelines that exist. Not only the 1994 guidelines, which were drafted by the first Commission, but also 2010 guidelines under the chairpersonship of Chief Justice Ngcobo.*

*The point is that the 2010 criteria are pretty cryptic and we do not understand precisely what they mean. For example, there are the criteria of potential. What exactly does potential mean? It says "appropriate potential." If there is a conflict potentially, no pun intended, between potential and experience, which one will tip the scale?*

*There are other issues also with regard to the guidelines that are problematic and that is the enforcement of them. They exist. They are fantastic in principle. In theory they are. But it's the responsibility of the Chief Justice as chairperson to enforce those guidelines. May I ask the former Chief Justice how he views the role of the chairperson? Should the chairperson perhaps be more interventionist and direct proceedings as such?*

*Lastly, on the issue of the composition of the Commission, I don't necessarily think that the size of the Commission is problematic or that the composition of the Commission is problematic. The issue is that of lobbying.*

*The issue is that of representing a particular constituency. If members of the JSC were to appreciate the fact that they're not there to represent a particular constituency, then perhaps things would not be as problematic as they are at the moment.*

*Wim Trengove commented in the media the other day saying that during his time on the Commission it was quite clear that one was independent minded and in fact encouraged to be independent minded and not follow a particular agenda. But is it too much to ask of political representatives not to represent their particular constituency? Thank you for your indulgence.*

**SIR JEFFREY:** I'll take questions which I feel comfortable with since I'm going first. If I may, I'll take the one question of the gentleman up there about equality. I completely agree with him.

One of the central tenets of the rule of law is that the rule should be applied equally between classes, between races, between the rich and the poor and the powerful and powerless and that is a basic fundamental tenet. You didn't mention the rule of law as one of the constitutional values and that is the one including equality which itself creates a great deal of equality within its content.

On the question of merit, perhaps I didn't explain it clearly initially. The UK Judicial Appointments Commission must appoint on merit but it must also take into account diversity. So it's merit. But what is merit?

Merit was initially included because the judges tend to clone themselves with analytical ability, higher level of expertise in their chosen profession, ability perhaps to absorb and analyse a particular kind of legal information with which they were very familiar.

But what about personal qualities particularly for judges at the higher level, integrity, judgment, decisiveness, objectivity, willingness to develop, to work with others, willingness to listen with patience and courtesy?

These are the criteria, and I'm reading from the list and there are many other qualities that are listed now, so that merit can be expanded upon so that judges don't simply feel the qualities that they had in order to be judges in the old days ought to necessarily be cloned and replicated in the future.

*… the progress in the United Kingdom towards gender equality on the bench is poor. There's only one woman in our Supreme Court, 5.1% of women overall are judges.*

As far as the UK is concerned, there is also the problem of representativeness. As I say, it shouldn't be quantity necessarily. For judges they don't have to represent any one group. In fact they shouldn't.

Once they're there, they should consider the issue in the public interest and apply simply the law. But it is still a question, as Pius so rightly said, of public confidence, the perception; do you feel that you can go to those judges because they will be sympathetic towards you?

That is what it is all about and unfortunately I have to say that at the moment the progress in the United Kingdom towards gender equality on the bench is poor. There's only one woman in our Supreme Court, 5.1% of women overall are judges. 5.1% is terribly low. 22.3% of what is now called Black Asian minority ethnic – BAME is the word that is used. All these figures are rising. They need attention.

Then to the final question, the part of it that I'd like to answer is, is there a structural defect in the JSC because of its appointment of politicians and presidential appointments?

I think ideally one could say that these people ought to be appointed and think only of the public interest and shed all political affiliations or feelings of promotion of their political cronies.

But life is not like that and the life of politicians is not like that. Politicians are politicians and they are there because they are politicians and they feel that as politicians they have been appointed to the JSC, and because they're appointed as politicians, they have a kind of duty to their political party to forward its views. That's sort of inevitable.

The restraint in the early years was quite remarkable. It couldn't continue unless there was a structural change, in my view, unless there is self-restraint and particular discipline is enormous.

That is why the European Commission and others are saying they would like people who are not necessarily judges or lawyers on these Commissions. We would prefer not to have political representation on those bodies because there is a bigger principle and that is the independence of the judiciary and the separation of powers.

## CLOSURE

CHAIRPERSON: Ladies and gentlemen, I want to thank Jeffrey and our panellists for the extraordinary way they have opened up this area for debate, for consideration. I know we will take the ideas with us into the larger community.

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