



## CONSULTATION AND THE CONSTITUTION



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QUARTERLY

roundtable

THE HELEN SUZMAN FOUNDATION  
SERIES

# roundtable

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Promoting liberal constitutional democracy in South Africa.

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

These are:

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

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

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

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# Profiles



**Mtende Mhango**

**Prof Mtende Mhango** is the Deputy Dean of the Wits School of Law. He holds a BA degree from Morehead State University, a Juris Doctorate from Michigan State University and a Master of Laws from Wayne State University. His research interests are in pension and constitutional law.



**Iraj Abedian**

**Dr Iraj Abedian** obtained his BA (Honours) and MA in Economics from the University of Cape Town. He received his PhD in Economics from Simon Fraser University in Canada in 1993. He was a Group Economist at Standard Bank and a member of the Banks Executive. He is the founder and Chief Executive of Pan-African Capital Holdings(Pty) Ltd. He is a prolific researcher and has written numerous articles and coauthored books. In 2003, the Association of Black Securities and Investment Professionals (ABSIP) awarded him the title of “Top Economist of the Year”. As of March 2014, he is an Honorary Professor of Economics at Graduate School of Business, Nelson Mandela Metropolitan University, Port Elizabeth.



**John Jeffery**

The Honourable **Mr John Jeffery** is the Deputy Minister of Justice and studied for a BA degree at the then University of Natal Pietermaritzburg (now UKZN) majoring in Political Science and English. He went on to read for an LLB and completed articles and practiced briefly in Pietermaritzburg. He was elected to the KZN Legislature as an ANC MPL in 1994 and was elected to the National Assembly in 1999. He was Parliamentary Counsellor to the President and Deputy President at various times over a 14 year period during which he also served on the Justice Portfolio Committee as well as on the Rules Committee. He was appointed Deputy Minister of Justice and Constitutional Development in July 2013.



**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 Chevening 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 Development and Management at Wits University. He was the founding managing director of Strauss & Co.

## INTRODUCTION

The Roundtable explored whether the existing public consultation mechanisms are adequate, or whether these mechanisms need to be adapted to allow for greater buy-in. The development and implementation of law via regulation rather than legislation – and whether the requirements/tests are the same – was ventilated in light of more recent initiatives which impact on the process of consultation. The panellists engaged issues concerning the Private Security Industry Regulatory Amendment Bill, amendments to the Mineral and Petroleum Resources Development Act as well as amendments to the Immigration Act.

## THE SPEAKERS

The first speaker, Professor Mtende Mhango, reaffirmed the sections in the Constitution mandating public consultation in the creation of legislation. Professor Mhango said that he would seek to address three areas of relevance: first, the importance of public participation; secondly, the consequences as a result of a lack of public participation; and lastly, the purpose for public participation. At the onset he stated that what we understand consultation to be is informed by the decisions of the Constitutional Court.

As to the importance of public participation, Professor Mhango noted that the Courts have said that when Parliament passes legislation there must be public participation proving that citizens are actively involved in the process. Public participation enhances the civic dignity of those to be governed and increases levels of compliance. In the case of *Doctors for Life* and *Matatiele* this was seen as speeding up democratic promotion. Compliance with the e-Toll process has been minimal as in that case public participation was perceived as minimal.

**Professor Mhango** enquired as to the purpose of public participation and more to the point what we are trying to achieve through it. In the *Merafong* case, the Court held that the purpose is not to have the public dictate its demands but, instead, to enable the Legislature to inform itself of the fears of the people. Parliament is supposed to try and hear what will happen in terms of how it has currently drafted. The decision lies with Parliament. Parliament may ignore our views



as long as we were consulted. Parliament was given the mandate to pass laws for this country.

The second speaker, **Dr Iraj Abedian**, approached the issues from a social governance perspective. Dr Abedian started by noting that many forget about society when arguing their points in creating law and policy. He emphasised that we are involved with a Constitutional democracy and that all the stake holders are still getting used to this regime. This is evident in that we are all quick to revert to autocratic postures as a default position.

Dr Abedian stated that the past twenty years are important to the workings of the Constitution – as we are still laying the foundations. Our future will be affected by our compliance with the spirit of the Constitution and not the letter of the law. We produce social capital through the creation of understanding and trust within society. Consultation creates the social capital as it gets members engaging. If we act in a democratic manner. But with majoritarian tendencies we destroy social capital. We judge an environment, regulated by a specific tendency, and decide our level of participation.

Investment shies away from governance which is erratic, destabilizing and destroys social capital. Societies that use force are subject to self-destruction in the eyes of the public. Consultation becomes the mechanism for editing the ethos of social governance. It either generates confidence across the board



or destroys it. It needs to promote and cement the confidence between those who are governed and those in governments.

The third speaker, the Honourable Mister John Jeffery stated that he would approach the discussion, initially, from a practical perspective. He began by stating that the South African miracle really was people with different interests being able to get together and discuss and resolve problems in the context of where we came from.

Government has put in place statutory mechanisms to deal with public participation: school governing bodies; policing fora; and wards. The extent to which they have worked is another question. People tend to want to get on with their own lives until something goes wrong.

There is the requirement for consultation and this is not always a case of going around and deciding against the majority. There can never be agreement between all participants. Consultation and public participation is linked to interests shown in a particular matter.

Some departments see public participation as a singular engagement and others do not, whilst some continue the engagement right to the end. He asked who is making the representations. He noted that this is a difficult task as it requires a certain level of education and access to the forum. He noted that interest groups become so invested that they believe that they are speaking on behalf of all. He asked who is actually affected by

the e-Tolls as the facts tend to get distorted. The case of the Legal Practice Bill is one such example. Entrenched interests and views are hurting the cause. South Africa is behind other countries as the legal practitioners are reluctant change.

The Deputy Minister said that the process does not sufficiently involving ordinary people.

## THE AUDIENCE

The issues were opened to the floor and the result was a concise and targeted engagement. The concerns raised included the perceived failure or disregard for the substance of public participation, and, regarding specific industries, the lack of proper impact analysis by those lobbying for the Bills. The Deputy Minister pointed out that some of the concerns raised had never been tested by courts and that public engagement was easier at the level of the NCOP. He added further that the consultation needs to be meaningful. Prof Mhango noted that participation is part of the process and not the outcome. Dr Abedian stressed that we should adhere to the spirit as opposed to the purpose of engagement.

## CONCLUSION

The final decision lies with Parliament and whether it chooses to ignore the views raised during public consultation is a matter it decides. The only requirement is that South Africans are consulted and what this entails changes from case to case. People tend to want to get on with their own lives and public participation only becomes evident when something goes wrong.



Good evening, ladies and gentlemen. On behalf of the Helen Suzman Foundation, I welcome you to tonight's roundtable on *Consultation and the Constitution*.

This year marks 20 years since the start of our transition to a state founded on democratic principles and the rule of law. The adoption of the Constitution in 1996 has had profound consequences for legal and social relations. Crucial to our constitutional order are questions of transparency and accountability, and one way in which accountability can be achieved is through the process of consultation.

Civil society, business and other affected parties continue to raise concerns regarding the infringements of rights, or the threat thereof, in the absence of proper consultation. Is it the right to consultation which has been infringed and is there such a right, or is there another right which may be infringed? We need a clear understanding of what constitutional consultation is all about.

The question of civil society's interaction with members of the Legislature and the Executive in South Africa, as in many other countries – as I suspect in many

others – is not a simple one. It is at times fraught with difficulties. These include determining which government department or committee to engage with, and facilitating that engagement.

The Constitution promotes and protects public engagement through the enactment of legislation and decisions of an administrative nature. In terms of the National Assembly, Section 59 of the Constitution is explicit, that.

“The National Assembly must:

- a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
- b) conduct its business in an open manner, hold its sittings, and those of its committees, in public, but reasonable measures may be taken...”

The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

Section 72 of the Constitution, pertaining to the National Council of Provinces, has similar provisions. Likewise, the Provincial Legislature is governed by Section 118 of the Constitution. Furthermore, just administrative action is provided for in Section 33 of the Constitution.

These provisions collectively highlight a number of points. First, the importance of the rule of law, and secondly, the separation of powers thereby allowing for meaningful engagement between the rulers and ruled. These provisions will, by their nature, produce tensions between the rulers and ruled on the one hand, and between different interests in civil society on the other. These tensions have been tested by the Courts as well; there are three important cases which I suspect we'll come to in the course of our discussion.

The first being *Doctors for Life International v Speaker of the National Assembly and Others*; the second *Matatiele Municipality and Others v President of the Republic of South Africa and Others*; and lastly *Merafong*

*Demarcation Forum and 10 Others v The President of the Republic of South Africa and 15 Others*. These are three landmark cases which have helped determine the nature of consultation.

This roundtable will seek to explore some of the following questions:

- Do the existing mechanisms provide for meaningful consultation so that informed decisions are made?
- Does government allow the mechanisms to operate in such a way as to create meaningful consultation?
- Is there sufficient consultation with affected parties?
- If there is still dissatisfaction, do the mechanisms themselves need to be adapted or altered to allow for greater buy in?
- Development and implementation of law via regulation rather than legislation – are the requirements/tests, in terms of consultation for both the same?
- Lastly, recent initiatives which impact on consultation relating to, among others, the Private Security Industry Regulatory Amendments, the Tobacco Control Amendments, the Immigration Regulations and, of course, this being a welcome to Gauteng, the implementation of Toll-Roads. These are things which we live with on a daily basis.

It gives me great pleasure to welcome our Panellists.

I would like to introduce **Professor Mtende Mhango**, who is the Deputy Dean of Wits Law School. He holds a BA from Moorhead State University, a Doctorate from Michigan State University and a Master of Laws from Wayne State University. His research interests are Pensions and Constitutional Law.

Our second speaker is **Dr Iraj Abedian**, the founder and CEO of Pan African Capital. He has a BA and an MA in Economics from the University of Cape Town, a PhD from Simon Fraser and was for many years a professor at UCT before he went into the business sector. He had also spent some time at the International Monetary Fund and in January

2000 he joined Standard Bank as the Group Economist where he was a member of the Bank's Executive. He has done research in a wide variety of areas, including economic growth, the economics of tobacco control and inter-generational equity.

In 2003, the Association of Black Securities Investment Professionals awarded him the title of "Top Economist of the Year". He is currently an Honorary Professor of Economics at the Graduate School of Business, at the Nelson Mandela Metropolitan University.

Our third speaker is the **Honourable John Jeffery**, the Deputy Minister of Justice. I have a problem at this point. We received two CVs from the Deputy Minister's Office yesterday. I have taken the liberty of reading the second one which I will not take as a confession at this point.

"I studied for a BA Degree at the then University of Natal, Pietermaritzburg (now UKZN) majoring in Political Science and English. I had the fortune or misfortune to be taught political philosophy by Francis Antonie. Maybe that explains why I'm not a liberal."

The Deputy Minister went on to complete an LLB at the same university. He completed articles and practiced briefly in Pietermaritzburg. He was elected to the KZN Legislature as an ANC MPL in 1994 and was elected to the National Assembly in 1999. He was Parliamentary Counsellor to the President and the Deputy President at various times, over a 14-year period. During that time he also served on the Justice Portfolio Committee as well as on the Rules Committee. He was appointed Deputy Minister of Justice and Constitutional Development in July last year. We wish to take this opportunity to congratulate you and to wish you well in your position.

WELCOME

# mtende mhango



## mtende mhango

**T**hank you very much, Francis, and good evening ladies and gentlemen. I've been given a timeframe in which to speak so I will get right into it. As I understand the theme we're talking about Consultation and the Constitution. Francis has already laid out the constitutional basis for public participation so I won't go into that, but just to note that it is in Sections 59, 72 and 118 of the Constitution.

I want to talk about three things: The importance of public participation; the consequences for the lack of public participation; and lastly, the purpose of public participation. My discussion is informed by what the Constitutional Court has said about public participation – its interpretation of the provisions of the Constitution.

In relation to the importance of public participation, the Courts have said that it is important that when Parliament is in the process of passing legislation, there must be public participation because it encourages the

citizens of our country to be actively involved in public affairs. I think many people agree with this, as it allows the public to become familiar with the laws before they are passed. They are able to engage with those rules and see what is being proposed to govern the affairs of the country.

It also enhances the civil or the civic dignity of the people that are going to be governed by those laws. Some have even argued that it enhances the levels of compliance because people have been put on notice as to what the laws are going to be and how their conduct is going to be governed.

More importantly the Courts have, in the cases that Francis mentioned – *Doctors for Life*, as well as in *Matatiele Municipality* – held that public participation is also important because it promotes the spirit of democratic and pluralistic accommodation which is calculated to produce laws that are likely to be accepted by the public.

Now many of you, who live in Gauteng, will be familiar with the Transport Laws and Related Matters Amendment Act which governs the e-tolls. The levels of compliance with regard to that legislation have been very minimal and part of that relates to the issue of public participation.

*Public participation also strengthens the legitimacy of legislation that is passed by our Parliament in the eyes of the people that are to be governed by such laws.*

Where there is public participation, and people are consulted and are taken seriously, the laws that come out of that process have very high levels of compliance.

There are many examples where the levels of compliance have not been particularly high because the laws weren't widely accepted. Public participation also strengthens the legitimacy of legislation that is passed by our Parliament in the eyes of the people that are to be governed by such laws.

The Courts have also noted that because public participation happens in an open and transparent manner, it acts as a counterweight to the secret lobbying that might happen when laws are being passed.

In other words, where there is public participation – and because it happens in a very open and transparent manner – there is no secret lobbying that may happen where somebody will get a deal that the public is not aware of.

Public participation allows for the legislative process to happen in such a way that we all know what the laws are going to be asking us to do before they are passed. The Courts have stated that these are some of the reasons that the Framers of our Constitution included this obligation, to ensure that these values are achieved.

I think I would even add that in our country there are great disparities in terms of wealth and influence. Some people have more voices than others. Public participation allows for

those who are economically disempowered to be able to have their voices heard.

Now you might ask a question: the Constitution allows for public participation, but what are the consequences if there is no public participation? What should happen? What does the Constitution say about that?

In *Doctors for Life* the then Chief Justice, Sandile Ngcobo, said that the obligation to facilitate public participation is part of the law-making process. It is not something that you do because you want to be liked by the people that you're consulting, but it is part of the law making process.

It has to happen, and if there is no compliance, then the laws that are passed are invalid. Therefore it has the effect of invalidating legislation that has not gone through this process.

The question you might ask then is: what about the Transport Laws and Related Matters Amendment Act? It was passed and people are still unhappy about it. Well, you'll remember that there was public consultation, and despite the fact that people are unhappy, public participation did take place. This is why the Act was never invalidated on those grounds.

But there have been many cases where the Courts have invalidated legislation because there was no public participation. In *Doctors for Life*, there was at least three pieces of legislation that were invalidated because Parliament had not consulted with the public before those laws were passed.

I think the e-toll case requires of us to ask what the purpose of public participation is and what we are trying to achieve. Is it just to get the people to tell us whether they like the legislation or not? One would argue that, in the e-toll case, there's a vast majority of people in Gauteng who are unhappy about it yet the law is there. Now what happens next?

What's the purpose of public participation? Well no other person explained the purpose for public participation better than, the then Chief Justice Sandile Ngcobo in the *Merafong Demarcation Forum* case that Francis mentioned earlier. I would like quote



him because I don't want to misquote. I think there's a very important constitutional point that he made in this case and he said the following:

"The purpose for facilitating public involvement...is not to have the views of the public dictate to the elected representatives what position they should take on a bill. The purpose of facilitating public involvement is to enable the legislature to inform itself of the fears and the concerns of the people affected. The decisions as to how to address those concerns and fears is, by our Constitution, that of the elected representatives."

What Ngcobo CJ was saying here is that Parliament is supposed to, in the public participation process, hear what people think is going to happen if they were to pass a law in terms of how it has currently crafted it.

The participation process would only go as far as to make Members of Parliament think about what is going to happen, if they were to pass this Transport Laws and Related Matters Amendment Act, to the lives of people in Gauteng. But the decision as to what must happen is to be made by the Members of Parliament.

*In other words, it is not designed for us to dictate to Parliament what must happen, that's a decision that Parliamentarians must make, but they must take into account the views of the public.*

In other words, it is not designed for us to dictate to Parliament what must happen, that's a decision that Parliamentarians must make, but they must take into account the views of the public.

What is the role of the public? The public is to air its views, express its concerns and fears even though the Constitution and the Court says that Parliament can ignore these views, and go ahead and pass law. Law would be valid so long as they consulted us. It will, however, be foolish for a legislature to ignore the views of the majority and go ahead and pass laws. I think the e-toll case is one example that highlights that notion, because then you're going to have a problem with levels of compliance. But the Court also says that you have to listen. It doesn't mean that you must brush off the fears of the public and the concerns that they raise.



We have many public issues in our country that we're currently discussing, the laws around the issue of euthanasia, the issue of medical marijuana, and the issue of the death penalty which comes up every time a crime is committed. The Constitutional Court has said don't ignore the public's fears, if people fear that crime is going up, listen to them.

You might decide that we don't want to amend the Constitution and bring back the death penalty. That might be the view that you might want to take. There are political reasons for you to do that, but listen to what the people are saying.

It might be that you don't want to legalise marijuana, because you feel that it will be difficult for you to enforce laws that prohibit the possession of marijuana, but listen to what the people are saying about what direction our country should go in terms of these particular issues.

At the end of the day the Parliamentarians must make the decision. We have voted them into power and we have given them a specific mandate to pass laws for this country. There is nobody else who has that authority. But they get that mandate from us.

The Court say's once we give them that mandate, we cannot take it back up until the next elections. During elections that's when we can withdraw that mandate. But in the period between now and the next election, they have to listen to us but they can decide differently from the views that we have about particular public issues.

I think in a nutshell that's what our Constitution says about the issue of public participation and the limits of the law and what the law allows us to do as members of public. It gives us a right, the right to be consulted, particularly when it comes to passing laws, but it also relates to making decisions that affect us.

It is not always about laws, but even other decisions that affect us. That as well, the Constitution says we have to be consulted about.

**CHAIRPERSON:** Many thanks, Prof Mtende, for beginning this discussion and setting the parameters on the question of marijuana. I'm not allowed to talk too much – I don't think my trustees will be very happy. But I want to just remind the audience that it was one of Helen Suzman's unfinished acts of business to have decriminalised that. So it is quite interesting that it has come back tonight without any prompting. Thanks. I would like to call on Dr Abedian now to take the discussion forward.



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ira]

iraj abedian

**T**hanks very much. Not being a lawyer and not having anything to do with these fine issues of law and constitutionality, I'd like to deal with the issue from a completely different perspective – a social governance perspective – and the impact that it has on the perception of the society that we are, the involvement that we create for prosperity or lack thereof.

Often lawyers and politicians in the heat of their exchanges forget about the country, about the society, and what effects their actions have on society. I think the starting point for South Africa in its democratic dispensation is that South Africa has chosen to have a constitutional democracy and, I would submit, that all the stakeholders, political parties, business and others haven't yet gotten used to the operations and the requirements of a constitutional democracy.

We are so proud to be democratic but we are very quick to act autocratic because that's our default mode and it applies to white, black – all the tribes that we know, indigenous and

otherwise. When the going gets tough, you're very happy to become undemocratic.

*The past 20 years are really the very earliest stages of getting used to the workings of a Constitutional democracy – no wonder that many of these mishaps do happen, even by the same parties, by the same political orientation.*

The foundations here are really important because that's what sets the tone for future generations, sets the legal language, the precedence for what future generations will follow.

The past 20 years are really the very earliest stages of getting used to the workings of a constitutional democracy – no wonder that many of these mishaps do happen, even by the same parties, by the same political orientation.

abedian

We need to regard consultation and participation in the broader scheme of what we are busy developing. If constitutional democracy is an edifice we are busy laying the foundations. We haven't really gotten off the ground yet, from a 'construction' point of view.

Therefore brand 'South Africa', today and in the future, will be affected by the degree to which we act in the spirit of the constitutional democracy, not by the letter of the law. Often people's default is that they want to satisfy themselves with the letter of the law whereas what matters here, in my view, is the spirit of the brand South Africa which they want to produce.

Societies today are by nature heterogeneous, there is no homogenous society left. In no island, in no small or big country, do we have homogenous societies. In heterogeneous societies there is only one means of creating some level of what, in economics and in the public policy debate, is called 'social capital'. Social capital you either produce or you destroy.

Social capital has many dimensions, but for the sake of the discussion we ask: How do we create some level of understanding, some level of trust, some level of intra-group, intra-tribe, intra-class, intra-everything that constitutes the society? How do we form some level of workable functional space?

Now how else do you do it other than through consultation? If I don't know what your views are, I don't know what you like and what you dislike, I cannot even be sensitive or insensitive about it.

The formation of social capital can only be done as much in the United States, as in China and Russia and any country of your choice through consultation. The fact that our Constitution requires that in the process of legislation we embark on consultation is just neither here nor there.

The imperative of a prosperous society in today's multi-everything society, everywhere that you go is consultation. The only means through which we can either generate social capital, which is one of the requirements of prosperity, or destroy it. When we want to be democratic but majoritarian, we destroy social capital if we don't engage in consultation and

*You would decide whether you would want to reside in that place or not, which is your human capital, your investment capital.*

through that of course you affect the culture of governance.

At the end of the day, when all is said and done, you portray a particular approach to social governance and social governance does have an immediate impact upon investment decisions.

If I judge an environment that is governed by a particular tendency, I would decide whether or not to invest there. You would decide whether you would want to invest in that place or not, which is your human capital, your investment capital. Whatever capital you take, today's globalised environment is strongly focused on the culture of governance.

Investment shies away from places where the culture of governance is erratic, unpredictable and destabilising. Even when there is a majority, if the culture of governance becomes destabilising in the form of destroying social capital and leading to contestation, it's not a good place for investment.

The question of governance, or the ethos of governance becomes a very important element of defining a country as a platform for prosperity, or as the beginning of the destruction of welfare and development.

It was a long time ago, maybe 30 or 40 years ago, that in the investment analytics world this was quite the opposite. They didn't want much consultation. They wanted clarity. They wanted certainty. They wanted predictability. These are the terms that are found in the text books we used to teach. Some newer textbooks still repeat them interestingly enough.

The reality is that in a complex world, the instantaneous access to information has changed the context of actual power.

This is evident when one considers the powers that we think they have, such as those who thought just because the office gives them a particular title, they can control people.

The rise of the shift in the power base within society has redefined power and the sustainability of control, and therefore the culture of governance in multi-cultural, multi-tribal societies depends upon the extent of consultation as a cement or as a channel, or if you like, as a portal of creating intra-group understanding and hence legitimacy and sustainability, hence the ability of power.

*All they do is they destroy their own legitimacy in the eyes of the citizenry and even if they become too autocratic and too brutal, SMSes and the Facebook and WhatsApp and what's not apps, they will destroy their power base and that's the new society.*

Societies that want to ram things through, may do it. They may pass the legislation but who cares? All they do is destroy their own legitimacy in the eyes of the citizenry and when they do become too autocratic and too brutal, SMSes and the Facebook and WhatsApp and what's not apps, will destroy their power base and that's the new society. I'm referring to the change in the power base.

Corporations are subject to the same forces. If they want to disregard consultation and do what they have been doing, they may achieve short term, but unsustainable patterns of control. Therefore governance of corporations much the same as governance of societies is subject to these new impulses in power base.

Two more points before my time runs out. The credit rating of the country comes to the forefront. If you look at the last two downgrades that South Africa has had, and if you read the fine print, a lot of reflections on the governance, on the lack of delivery, on the lack of respect for people's contestation, or the lack of urgency. You can define it in different ways. The inability of those in power to convert resources to the crying needs of the people is exactly the same as not hearing that people object to whatever it is.

Whether it is e-toll or something else, the principle is the same: Do you hear your citizenry? Do you have a mechanism of addressing it? If not, you may have the

majority but I have absolutely no doubt that in time to come, whether it is three months or three years, they are going to win and you are going to lose.

Therefore, consultation becomes a mechanism for defining the ethos of social governance, and that brings me to my second last point. In that ethos, you either generate across the board confidence in your approach to governance, or you destroy it.

If you lose the confidence of your citizenry as a result of the way you go about it, the consequences are pretty predictable and therefore it's a two-way approach in promoting and cementing the confidence between those who are governed and those who are in governance, is very, very important.

These have material impacts on the functions of the economy. Yes, we need capital, yes we need the skills, yes we need resources to have prosperity, but also we need confidence and social capital.

Lastly, it's not just South Africa that is subjected to these nuances of social capital. South Africa's success is important not only for itself, but also for the region. As I travel across Africa, many a times the issues that we think are only South African issues come up in the west and the east and southern parts of the country. I think this question of the culture of governance has implications beyond our borders and we should be sensitive to it.

**CHAIRPERSON:** Thank you, Dr Abedian. I was wondering if somebody was going to mention South Africa's downgrade. It's a very non-consultative process, this I've always thought, but a lot depends on it.

**DR ABEDIAN:** It's not true. They do consult behind the scenes very extensively before they release the notice.

**CHAIRPERSON:** It's like being back at Standard Bank. Thank you, Dr Abedian. It's my great delight to ask John Jeffery to address us now.



# John Jeffery

## john jeffery

**T**hanks very much, and good evening everybody. I'll try and give a slightly more practical perspective from the sides of Parliament and the Executive as a whole.

The first point is that we all know the South African miracle. The South African miracle was people with different interests, sometimes extremely divergent interests, being able to get together and discuss and resolve problems. That is effectively where our transition and our constitutional democracy came from and I think that's important to remember.

Government has put in place a number of statutory mechanisms for public participation. Things like statutory community police fora, a forum to deal with crime, school governing bodies for parent participation, ward committees to assist the ward counsellors at a local government level, a statutory requirement for integrated development plans to be consulted, or the community to be consulted on an annual basis, and there is a variety of others, these are just some.

The extent to which they have worked is another question. We have a lot of service delivery protests. Have people made use of the opportunities for engagement on the Integrated Development Plans (IDPs)? In most cases they haven't.

*They tend to want to get on with their own lives until something goes wrong.*

It may be an issue of whether they were sufficiently empowered, but there's also the issue that people tend to want to get on with their own lives because public participation is quite time consuming. They tend to want to get on with their own lives until something goes wrong.

Government, on different levels, is given an electoral mandate. Then there are requirements within that for consultation on different matters. It's not always a case that government will deliberately go against the majority, because it feels its position is right.

Take, for example, the Termination of Pregnancy Act – I think if you had a referendum, the polls would show that there isn't majority support for the termination of pregnancy. We're a conservative country. But the decision to proceed with that legislation was for reasons beyond consultation or popular support. It was for reproductive rights and the rights of women over their bodies.

*From the Executive side when laws are proposed, they're invariably published for public comment and those comments are taken on board before the Bill, if it's a Bill, is sent to Parliament.*

It is interesting with the *Doctors for Life* case because that was an amendment to the Termination of Pregnancy Act. It wasn't actually a fundamental amendment, but often when it comes to the views of the public, there won't be consensus. There will never be agreement between, I think, the ANC and *Doctors for Life* over the issue of termination of pregnancy.

Definitely *Doctors for Life* have to be listened to but there will be many instances – and it will be issues like tobacco restrictions – where there will not be agreement, and ultimately somebody has to decide and it's the elected representatives that have the electoral mandate.

There was another Bill that was part of the package which was, I think, the Dental Technicians Amendment Bill – but nobody was particularly interested in that Bill. Nobody indicated that they wanted to make any comment and the Court in *Doctors for Life*, when it sent back the Termination of Pregnancy Amendment Bill, said look, as nobody has said anything on the Dental Technicians Bill that Bill can remain. So consultation and public participation is linked to interests shown.

From the Executive side when laws are proposed, they're invariably published for public comment and those comments are taken on board before the Bill, if it's a Bill, is sent to Parliament.

A more controversial matter was the Immigration Regulations. Regulations are delegated legislation where the power to make law on particular aspects is given to the Minister.

The Minister of Home Affairs advertised those regulations, extended the deadline because there was a request for more time, and considered the matters and then used its powers and made the regulations.

As far as Parliament is concerned, the public participation process on legislation is very useful. You will have interest groups, primarily, who will help focus the committee on the shortcomings in a particular piece of legislation.

There've been different approaches followed in Parliament. Some Committee Chairs have seen that when you have the public participation process, you get the written inputs, you have the public hearings and then you close off the process and deliberate.

From my own side in leading processes on Bills, I found it much more useful to continue engaging stakeholders. The Protection of Personal Information Bill for example, which I think there is general acceptance for, saw interested parties making inputs right up until the final finalisation of the Bill, and I think that is useful.

One of the key issues is who is making the representations. The difficulty with the process from the Executive and from Parliament is that it requires a level of access to media and a level of education to be able to engage with a Bill or with Regulations.

When I was in the KwaZulu-Natal Legislature we used to have public hearings and try and travel around the province in main centres. But with those hearings, instead of waiting for people to come and make inputs, you'd invariably end up engaging a group of people from a particular area, explaining the Bill to them and discussing it. That was a different form of public participation and at least you've got a different set of views.

The difficulty, I know, or the frustration that Parliament often finds is that it's the interest

groups that come and make representations and that is often because they are so convinced about the accuracy and the righteousness of their cause, that they believe they are speaking for everybody.

The issue of e-tolls, for example – I've heard Stephen Friedman raise the point of how much this is actually a question affecting the majority of people in Gauteng, or is it more an issue affecting the middle classes, because they are the people with cars, working class people. The registered taxis and the busses are exempt.

I heard you say that this is an issue, and I think you're also indicating that the public viewpoint will hurt the majority party, but I think it is a question of who is actually making the position. Often in the public participation process facts tend to get a bit distorted.

One Bill that's interesting from the point of view of public participation is the Legal Practice Bill. I think there's general consensus, although some of the Bar Councils disagreed, and that went on for 15 years because there were attempts to get advocates and attorneys to reach agreement with each other.

Even then, when the Bill is signed into law, the Legal Practice Council can't be established for at least another three years because there's provision made in the Bill for a forum of advocates and attorneys to resolve the issues

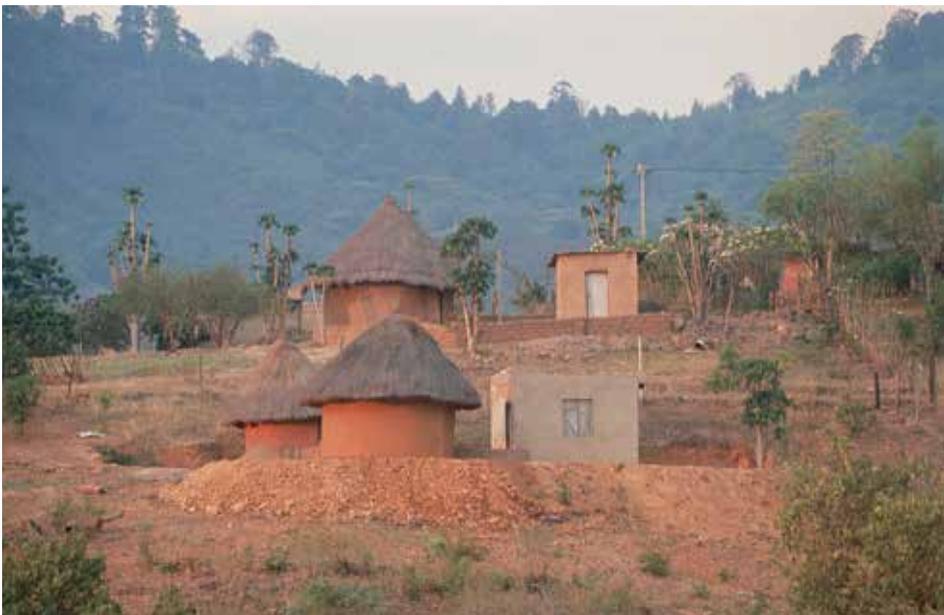
they couldn't resolve. So that's an example of, I think, the problem with public participation and entrenched interests or views.

What's quite fascinating with the Legal Practice Bill is that we are way behind other countries in the British Commonwealth as far as legal reform is concerned. Our attorneys and advocates, with respect, seem to be ossified and frightened of change. You would find more of an open attitude in England than in South Africa.

But one of the features was how one of the complaints was raised: Oh no, the independence of the profession is undermined because the Minister of Justice can shut down the Legal Practice Council. Now that doesn't sound very good, does it, but it's not true.

What's in the Bill is that the Minister of Justice can approach the court after a particular process to give an order that the Legal Practice Council should be dissolved and a new one established, which is much more acceptable.

Another Bill, a case in point is the Traditional Courts Bill, and it's quite interesting in terms of the public response. Now the reality is our Constitution recognises customary law. Traditional Courts, or whatever name is given to them, are a feature of customary law and happen to exist and provide access for many people in rural areas to resolution of conflicts.



John Jeffery



*The people who are responding are people with resources, people who are educated and the ordinary people who actually need the Bill explained to them are getting left out, and that's something that needs to be addressed.*

So those are also the difficulties of public participation, but I think a fundamental problem is that – at a parliamentary level and at an executive level – we are not sufficiently involving ordinary people.

The people who are responding are people with resources, people who are educated and the ordinary people who actually need the Bill explained to them are getting left out, and that's something that needs to be addressed. Let me leave it at that, but I do think the point I made originally that there are lots of fora for public participation, the problem with us, as South Africans, is that we tend not to want to get involved until things go wrong.

From a constituency level you would have a school. The School Governing Body doesn't function, but the moment the school gets closed because the toilets have become a health hazard, then the parents start getting involved for the first time.

I think it's the human condition of 'why all this stuff? It's time consuming. Why get involved in it if it's working fine?' and it's only when it goes wrong and what do we do about that aspect. So let me leave it at that for now.

**CHAIRPERSON:** Thank you, John. You've brought into the room the problems of Parliament and of the Executive in terms of both consensus and consultation, not participation, and I think it's a salutary moment here where you've got to observe that we need more participation but it needs to be more widely spread and I think that's a challenge which we all have to face in this country.

I must reassure you that we never commented on the Traditional Courts Bill, we did do it on the Traditional Affairs Bill. It was a good commentary I think. I'm going to open up the floor to discussions. I would like to take three questions at a time.

Sometimes there may be problems, but I think in the majority of cases conflicts are resolved satisfactorily. Now those structures need to be regulated to bring them in line with the Constitution. When the Bill was first introduced in 2007 there were a lot of views and it was pretty constructive. I was on the committee at that stage. We couldn't finalise the Bill because of the 2009 elections. We then asked as the National Assembly Justice Committee, for the Minister to reintroduce it into the National Council of Provinces because were busy with other matters and we asked him not to change the Bill, to introduce it as it was so that the debate could continue where it had left off. Then some people, many of the same people who had made submissions in 2007, that had been relatively constructive, went hysterical, and you heard things that we didn't hear in 2007, that this Bill was going to re-entrench Apartheid. I don't know why the people didn't think of that in 2007, or why they only thought about that in 2012, but that was a feature.

One NGO in a town – not you, no, no, in a town, Francis, an NGO that you and I both know, that deals with land – when I raised the issue with them, they had said: Well, we were exaggerating; but they felt it was easier to campaign in the public domain if they exaggerate and sensationalise.



## discussion

**MR OPPENHEIMER:** *My question is for the Deputy Minister. The question is: Given that a lack of consultation has a very serious effect, which is that the legislation comes out as invalid, it's quite important to understand what constitutes proper consultation.*

*What is the extent of the duty to have an ongoing consultation given that the nature of legislation is that it evolves over time? The example that you gave was that of the Legal Practice Bill evolving over 15 years.*

*I'd like to look at a different case, the Private Security Regulation Amendment Bill. In an earlier draft there was a section which stated that foreign-owned security companies will be required to sell off 51% of their ownership and control to local-owned companies. Representations were, from what I gather, made at an earlier stage and this section was then withdrawn.*

*Then very recently, this section was put back in without further consultation and has then been passed but yet to be signed into law by the President. So the question: Is it sufficient for parliament to consult once on an issue, or do they have to consult whenever there is going to be a dramatic change to that legislation, and if they fail to do so, does that make the legislation invalid?*

**MS BOLANI:** *Good evening. I'm Noma from SABC Radio News. I have a question for the Deputy Minister. You have identified as Parliament that there are problems in terms of consultation and public hearings.*

*If you are aware that the ordinary people aren't being reached, or that they are not educated or knowledgeable enough, what is Parliament doing in order to educate the broader public so that they are able to participate in these consultations and that they have their voices heard?*

*Because when you look at these public consultations you have situations where in Ward Committees people are being, for lack of a better word, abused if they're not cadres and they are called certain words just because their view is against that of the ruling party of that ward. That's just an example. So if you have identified the problem, what's the way forward?*

*Race is not just a proxy for some kind of abstract disadvantage. Race is a fundamental dimension and cause of ongoing discrimination and disadvantage in the world today, especially in South Africa. It is not just a proxy for how poor you are or how many assets you have or do not have. It is a dimension of disadvantage and discrimination in the world.*

# questions



*Talk of race as a transitional measure or a temporary measure that we soon get to move away from almost always comes from people, to be blunt, who are white or from vested interests that are defending those who broadly are so-called 'white'. It generally reflects blindness, I would say, from white people that they live and experience the world in a way that is not necessarily racialised. That is the default that white is taken to be the default.*

*You see this in the global media. You see this in advertising. You see it in marketing. You see it in culture, all around the world today and especially in South Africa. So I say again, race isn't a proxy for past disadvantage.*

*It is a fundamental dimension in the same way that gender continues to be a fundamental dimension of the way that women experience the world and the way that they don't experience it equally to men. That's my challenge.*

**COMMENT:** *My question is also for the Deputy Minister. Up until recently, I ran an organisation that trained in management and organisational development as well as Know your Rights at the Community-Based*

*Organisations (CBOs) in townships and we did this over at least 14 years.*

*Part of that was getting communities to participate in the Integrated Development Plan and we got people to draw up plans, we got them to register themselves as part of representing people in the local community.*

*We never succeeded ever. We sort of used a methodology from a three-day conference in which we invited local business, local government and of course our participants. The problem was that the government always sent low level reps.*

*But when the problem hit the fan, then the big guys came up and they blocked us. They blocked those communities. They actually called my organisation either a third force or a DA front and I can assure you in 12 years, except for a little bit in Randfontein in the townships there, we never succeeded and I'm talking from many, many townships.*

*My question is, I think Dr Abedian made the point about democratic and autocratic, this schizophrenia in government, but I mean it's a real problem and how are we ever going to overcome that?*



# comment



**MR JEFFERY:** Consultation needs to be meaningful. You should have consultation which consists of inputs whether they're written, or whether they're oral. You must have some kind of engagement. I think it is better to have ongoing engagement. In legislation that I've worked on when I was on the Justice Committee that process worked quite well.

I think the issue of Parliament changing legislation significantly, and whether it has to go back and engage in a further round of public consultation is really a moot point that nobody has taken to the court yet.

But I think generally if consultation results in sections of the Bill being amended that were not there before, the committee will approach the relevant house for permission to proceed with a further amendment and there will be public consultation on that.

If a Bill says there should be a certain ownership of a particular industry at 50% and Parliament decides or the committee decides to change it to 60%, I would probably argue

that the issue is around the principle and the extent and there's already been consultation over that. However, everything would vary on a case by case basis.

One thing that was disappointing with the Legal Practice Bill was the lack of engagement from the advocates and particularly from the General Bar Council.

The Law Society was engaging on a much more regular basis, the Bar Council didn't make use of the opportunity at all for whatever reason.

One of the other aspects that I don't think has been resolved is that we have two types of legislation: legislation that deals with exclusive national competencies, and legislation that deals with concurrent competencies. The legislation that deals with concurrent competencies has a different procedure in the National Council of Provinces.

The Provisional Legislatures have to give mandates and that is where the *Doctors for Life* case come from. These were in terms of Section 76 of the Constitution. So basically if it's a provincial competency matter, provinces



have to have hearings – especially if they are requested to, and that’s really as I said the *Doctors for Life* case.

What hasn’t really been determined is the extent to which there should be hearings at a provincial level if it’s a National Competency Bill. But as far as what Parliament are doing, well look, it’s difficult because of time issues.

Public participation as we are talking about here as a law, as a legal requirement and a value, it’s the right thing to do when you are trying to achieve or trying to build the society that was fractured before 1994.

The law requires that somebody must make a decision. It is something that has to happen because it will produce the greater good for all parties concerned.

Public participation is here, because the Constitution also tried to create a culture of justification. The decisions made by government have to be rational and they have to be capable of being justified. You can only do so through the process of public participation where you can give reasons why you are taking certain decisions. That is something of the value that we want to achieve. You have the authority to tell me

what to do, but give me reasons that I can understand. Reasons which are rational and that nobody would disagree with. That’s what public participation is trying to achieve.

We must live the Constitution, we must live the values in our Constitution, we must consult each other, even in how we deal with one another.

How we deal with one another is not always about government officials but also about the public. Public consultation, as with various other values that we find in our Constitution must be part and parcel of how we live and how we treat each other.

Our children must also grow up to understand the values of our Constitution. There was a time former President Mbeki said that a Constitution is like a love letter, it sets out what the nation feels about itself and it sets out the kind of things that a lover tells the person that they love – this is how I want to be treated.

It’s not about the power relations, but it’s also about the soft touch, the soft things that we want to achieve as human beings in our society that, we must not lose sight of.



**CHAIRPERSON:** Thank you for those observations. They are quite moving as well. I really appreciate that, but they were far too sedate, that's the first thing. You are not used to such a sedate audience, I know, so I think we can become a little bit more rowdy. We can also have a conversation not only from that side to this side, but amongst the audience as well.

There's one point I just want to raise again: this question of values. It's not only the numbers of people, I think that's something that you'd spoken about earlier in terms of the one court case in *Doctors for Life*. There is another part of me saying I'm worrying about the economic impact, for example, that something like the toll roads could have on Gauteng, and this is something which has been in the background.

Dr Abedian has spoken about the impact of this, not of this particular issue, but, more generally, the lack of trust when it comes to economic development. Why the Cape has escaped this, I don't know, and this is an old envy here I suppose.

**MR STEYN:** *Thank you. I'm Richard Steyn. I'm a trustee of the Helen Suzman Foundation. I wonder if the panel would comment on a question, particularly the Deputy Minister, but I would like to hear the other views as well.*

*Would consultation not be enhanced in a constituency-based rather than a list-based system that we have at present? It seems to work fairly well at a local government level, but at provincial and national level I certainly, as an individual, feel kind of disengaged, disempowered if you like, whereas if one had an MP to go to, I think one would feel considerably better consulted and I just wondered what the panel would make of that.*

**MR IRVIN:** *My name is Douglas Irvin. I want to make a point about consultation not only with ordinary people which I think is very important, but also with people who have special knowledge. I don't mean only technical knowledge, but knowledge of a particular context or professional sector of business for instance. In this regard, for example, the consultation or lack of consultation or adequate consultation about e-tolling comes to mind because though I'm no expert in this, it seemed to me that there was a very good case made that there might*

# questions



*be better ways of raising the money, which was ignored by SANRAL.*

*But that leads into a point I want to make about the process of consultation. Once you already have a Bill, for example, it's rather late in the day to go to the public and ask for views on it, because it's very difficult to make major modifications at that stage.*

*In fact, the really important stage for consultation is in the development of the Bill, in the drafting of the Bill where you have consultation with affected interests and there is indeed a particular technical process which is called Regulatory Impact Assessment Bill Analysis, which aids that process enormously.*

*A decade ago, the economic policy in the Presidency was in fact embarking on a project to introduce regulatory impact assessment into the general procedure in the development of Bills in departments.*

*Very briefly, the idea is similar to an environmental impact assessment on the proposed law, and using the idea of environment very broadly, there's a whole social political and economic environment, and therefore testing the likely impacts on*

*affected groups, another metaphor, doing a cost benefit analysis.*

*But not only economic costs and benefits, also social costs and benefits so that one might look at a particular business sector and look at the impacts on the business owners but also on workers, on employment in general, on the poor, on equity and society and so on.*

*Now that process was piloted in a number of departments and a number of Bills under the auspices of the economic policy unit, and it seemed that we were moving towards a process where we would have real consultation with all kinds of interested and affected parties. The idea was that when the Bill eventually appeared, it would have been gone through scenario testing, two or three scenario options by way of the different impacts and so on.*

*We had the most rational Bill with the least costs and the greatest benefits to society, and that would be signed-off by the DG and the Minister and go to Parliament and Parliament could be assured that there has been a considerable rational consultation process behind the Bill. Then it would be for Parliament to take that further.*



# questions

*All seemed to be going well. I was involved in some ways in that process but under the current administration, with respect to the Deputy Minister, it seems to me that interest has been lost or momentum has been lost, and my question then is, what is the state of regulatory impact assessment in the current Cabinet's view?*

**LOUIS:** *Thank you. My name is Louis. I'm representing the Private Security Industrial Alliance. Deputy Minister, I would just like to go back to the question which was asked by the gentlemen there on the Private Security Bill, which actually intends to transfers 51% of foreign investment to the local ownership. I don't know if the Deputy Minister is aware of the Bill and the circumstances which surround that Bill, because I think that Bill is quite concerning.*

*I would like to address my question to the Deputy Minister. Earlier on you elaborated on other Bills which were consulted on quite efficiently. Do you think that in the case of the Private Security Regulatory Bill, there was enough consultation on that particular clause of 51% local ownership?*

**CHAIRPERSON:** I'm going to suggest that the panel first addresses Richard Steyn's question and then come to Douglas in that order and I think the last question will be for the Deputy Minister specifically.

Constituencies, that's the blunt question. This question then of consultation becomes linked to accountability and I think that is in some ways one of the biggest problems that many people have with our present parliamentary system. There's some more success on the local government's side so it's linking this question of consultation with accountability. Who would like to start?



**DR ABEDIAN:** I think there is no question that for as long as we don't have that constituency base democratic order, our democratic system is so much less democratic, which means access to accountability, forms of accountability, and the probability of autocratic behaviour is so much higher.

For those who are interested in the evolution of democratic order in the United States,

# Comment



there's a book which is called the Bully Pulpit. I was absolutely fascinated to see the similarities between their evolution and what we are going through now. Half of it is really as if you've picked it from the Daily News here.

The levels of corruption, abuse of public resources and the shenanigans that go with this business is just phenomenal. It was exactly the same in the United States and the point I'm making is that democracy is a process, it's not an event and we've just started.

I started by saying it's a foundation, as far as I'm concerned, as far as I understand. If our democratic system is a building, we haven't really put the first brick on the ground yet. We're still doing the dirty work in the foundation. We're excited and we must celebrate because we've taken on a very mammoth job and we made good success of it, but the game is not finished.

But is constituency necessarily improving the Act and so on? Not necessarily because we can go to the counter evidence of finding constituency-based democratic system where the Acts in a majoritarian way run through at the committee level, and that's the end of it.

You can go to your MP, you can carry your heart on their shoulders, but the Act is gone, the interest groups have captured it. The United States so often provides an example that you can have your senator and your MP, but the corporates get their way, or the military complex gets its way as is the case in the United States very often.

It is not an easy process, as far as I can see, but would it make it more democratic? Will it make it more likely that we'll get the first hand feedback from your constituency? We doubt that.



**MR JEFFERY:** Maybe let me pick up on that point: will it be more democratic with the constituency system? You're saying without a doubt, obscure but interesting facts. Does everybody here know that Great Britain has not

had a government elected by the majority of people who voted in this century or the last? Even in the height of Thatcherite hegemony, the majority of people who voted did not vote Conservative. It wasn't over 50% and that was because in the constituency system, the losing votes get discarded, and so that's how you can have it.



I would say that it's not democratic to have a government that goes to war in other countries, and the majority of, not the majority of people, not the majority of voters, the majority of people who voted, didn't actually vote for that government. That's what happens in a constituency system.

That's what we had in South Africa pre-1994 in the tricameral Parliament and I think it was also the system in the so-called self-governing states. We opted for a proportional representation system to be as inclusive as possible and to ensure that we could have representation from the Freedom Front.

I mean, the ANC would benefit from the British system because it would clean up most of the constituencies but it's a matter of debate because there is the issue of greater accountability. That's also arguable where you have a strong party system.

Even in Britain, in Westminster would a member of the ruling party – now it's the Conservative Party – be prepared to actually stand for their constituents against the views of government knowing that in the next election they will not be able to stand on a Conservative Party ticket? They would therefore probably not get elected because

independents don't do particularly well in that system.

There's greater space for more independence in America where there is a weak party system but that's not what we have. We have a strong party system here.

The Slabbert Commission didn't actually recommend constituencies or the same system as with local government. Local government, to remind everybody, is Wards and then proportional representation seats to ensure that a party has the number of seats reflecting their share of the votes. If you lose out in the wards, if you've got support, you will then get compensated with proportional representation seats.

That's not what the Slabbert Commission recommended. They recommended multimember constituencies at a local government level. So the Metropolis of Johannesburg would then have a certain, probably quite large number of MPs.

Mr Steyn, would you feel happier because you've got a MP, even though that MP is representing together with maybe 20 other MPs the City of Johannesburg? But don't we already have that system because we

# Comment

# comment



have 400 seats in the National Assembly? 200 you vote for on the national list, the remaining 200 are divided up amongst the provinces proportional to the registered voters. Gauteng, I think, has 48 seats, KwaZulu-Natal 40, so you do almost have multi-member constituencies.

I think it's difficult. I don't think local government works particularly well, you at least do have a ward Councillor but then you have a large number of proportional representation councillors who often don't know how they fit in with the community. It's complicated.

I think it is something we need to carry on debating but unfortunately I don't think there's any simple solution. It has been very useful having the smaller parties. I can't remember how many parties we've actually got now in Parliament, but I mean at one point I think before 2009 it was 13, it is useful having those parties. They do add a dimension and if you didn't have proportional representation it would probably be the ANC and the DA.

But the point that I wanted to make is that, interestingly, the Slabbert Commission didn't recommend that the local government system be applied to national and to provincial.



**PROF MHANGO:** It would be interesting to see what will happen to this question or what is the appropriate constituency-based system if we're considering this 50 years from now in 2064, because the Constitution must endure and that we must make decisions that we believe generations to come are going to agree that these were the best decisions.

It will be interesting to see, if we are a constituency based system in 50 years or 100 years from now, if the ANC will sweep all the seats and continue to have the majority. But, we have to make the decisions now that we think are in the best interest for us today and even for generations to come in terms of our Constitution.

**CHAIRPERSON:** On this particular matter I can say that the Helen Suzman Foundation has been involved in a project re-examining this very issue, both looking at the existing arrangement and also evaluating the Van Zyl Slabbert Commission report. We look forward to release our findings one of these fine days. I'm going to ask the

**Deputy Minister now to tackle the question which Douglas Irvin posed.**



**MR JEFFERY:** Thanks. Maybe just to say that it isn't just Francis Antonie who lectured me and who is present in this room, but also Douglas Irvin. I think as far as regulatory impact assessments go, I'm actually not too sure what the position is currently. I think they are still being performed, if that's the right word, on certain pieces of legislation in the Performance Monitoring and Evaluation Department, I think, but speak under correction.

I think the problem from before was not really knowing where they fitted in. A regulatory impact was done. It was done for the Executive and I think meant to inform decision making on the part of the executive of Cabinet and then its relationship with Parliament was unclear. I suppose the easiest for me to do is to admit it and say I don't really have an answer. That was an attempt.

**CHAIRPERSON:** And the last question on the security firms. This I knew would come up because it must come up. We've done e-tolls. We've done lawyers. We've done *Doctors for Life*. Thank you.



**MR JEFFERY:** Look, it's not a Justice Bill, so I don't have direct knowledge, but as Francis said, I was informed that it was likely to come up. The note I've got is that during public hearings it became clear that the industry as well as certain departments were of the opinion that not enough consultation took place.

The committee, that's the Police Portfolio Committee, at the same time decided to do a comprehensive review of the existing legislation. This was done because of the number of challenges in the governance of the authority in regulating the industry.

The committee in agreement with the Minister appointed a Technical Committee to

further consult and to address those issues already identified by the committee. The Technical Committee finalised its work and the Bill came back before the committee in late 2013. The report that I was given, and I don't have personal knowledge of it as I said, is that there were problems. There was further consultation done before the Bill was finalised.

The Bill was passed. It's with the President. The President has to consider the constitutionality of Bills and that task is taken very seriously but I don't know whether that aspect is being looked at or if objections were raised with the President.

For example, to the gentleman from the Bar Council, you know the reason the Legal Practice Bill has not been signed is that there were objections made relating to the processing of the Bill in the National Council of Provinces and whether the Gauteng

Legislature gave a mandate to its delegates in the National Council of Provinces, and the President has been looking at that issue. So that is what the delay has been. I don't know what the situation is with the Private Security Industry Bill. But if such an objection was raised with the President relating to consultation, then that would, I'm sure, definitely be looked at.



**PROF MHANGO:** I want to comment, not just concerning the security view, but just legislation generally and to the question of whether consultation was proper and that sometimes objections are raised not to the process but rather the outcome.

In other words, people are unhappy with the outcome and not necessarily the process, and as I have said the outcome is a decision and the decision is made by Parliament or the National Assembly.

If one is unhappy with the decision that contains the provision that says 51% must be locally owned, then in the public consultation, I think the question is that there was a Bill that had a provision and then at some point the



provision was taken out comment and then it came back in – is there public consultation in that context?

I guess one would have to test it in court, but I think that in my view, my own sense is that it's really the outcome of the decision to say that 51% must be local and that's the problem.

Suppose we take it out there. Every newspaper in the country publishes that provision and the majority or one hundred percent of South Africans say no, we don't want the 51% to be locally owned, and Parliament goes back and passes it with that provision, that would still be a problem because the outcome is not what you want.

But in terms of the Constitution that will still be valid legislation, because what you must remember is that the political decisions made by the politicians as to how you inform legislation, is something for relevant political branches of the State to decide. Not even a court can tell what laws you must pass, because political branches of the State must decide what is in the best interest of the public.

Courts cannot decide for us. It's the political branches. By political I mean the Executive and the legislature. If they have made a

political decision to say we want 51% of security companies to be locally owned, that is a political decision, that not even the courts can overturn. We can delay the process by saying we want more of consultation, but we're just delaying the inevitable.

What we must do is to consult or to persuade the politicians that this is a bad political decision to make. However, there's a difference between law and politics. Here we're talking about a political decision that now must be implemented legally and we want the political decision to be implemented within the constitutional confines. That's what we want, but we can't challenge that political decision.

The Deputy Minister mentioned the question about the Scorpions, the legislation removing the Scorpions that was a political decision that was made at Polokwane. The issue is that, once that political decision is made, the Constitution requires that you must implement it within the confines of the Constitution and that's what we can hold the Executive or the legislature to account.

**MR SANDERSON:** *I'm a repentant banker. I have two questions concerning the efficacy of the consultation process at present. Surely the consultation process should have begun before the legislative process was underway.*



*The issue here is that you can't unscramble an egg. At what point do I feel, as a public participant, that there's any value in my input, when I can see the gantries being erected, the upgrades being undertaken. At no point was I asked the question directly or indirectly, to my knowledge: Do you want the highway upgraded, and are you aware that you will be paying for it through a tolling process from this point forward?*

*The consultation process will draw people for whom the legislation poses risks. At no point will it draw people for whom the legislation offers opportunities. Why would I put my hand up and say if you enact the legislation, I will be enriched to an extent beyond that which is fair? This is missing from the process and the risk is that you are only listening to a subset of individuals and those are very, very special interest groups whose interests are quite narrow. They are the ones who may suffer. They are not the ones who may benefit.*

**MR PIENAAR:** *Thank you, Francis. Gary Pienaar from the Human Sciences Research Council. I'd like to give examples of good practice, I think, and examples of bad practice ending with questions.*

*I agree with the Deputy Minister that the Scorpions legislation was an example of good*

*consultation practice. There was an initial disaster when the presiding chairperson said public consultation is unnecessary, to which Parliament responded, to the ensuing outcry, by visiting all nine provinces for public hearings.*

*Another good example, I think, was the Department of Energy's Integrated Energy Plan, where simple mechanisms such as posting everybody's submissions online before the hearings allowed for people inform themselves of other points of view. It helps to moderate expectations. It helps to inform everybody's submissions and then at the end, in response to those submissions, tabulate reasoned replies. A very tense situation, enormous divides, differences of opinion, was moderated by clear reasoned responses to all submissions.*

*One current bad example is the Immigration Regulations by the Department of Home Affairs. My organisation was tasked with researching the implementation impact of those regulations and while we are still in the process of doing that, the regulations were published and implemented.*

*Parliament currently, I think, spends R100 million a year on constituency allowances for MPs. Are MPs capacitated and are they required to undertake consultations in their notional constituencies on legislation?*

*Are they required to hold workshops? Are they held accountable for having undertaken those workshops and are they required to show proof, for example, through bringing submissions back to Parliament? I just wonder whether that's a way of getting around the constituency debate, because there is currently a mechanism. I'm just not sure it's well implemented.*

**MR CURRIN:** *Thank you. My name is Brian Currin. I'm a Human Rights lawyer working mainly in political conflict resolution. Francis made a point earlier saying that this meeting wasn't rowdy enough and I've waited until the end to make it rowdy.*

*When I sit here and participate through listening to this meeting, it reminds me a lot of the party political meetings that I used to attend prior to 1994. We spoke about politics*

# questions

# Comment



*but there was scant reference to the elephant in the room, and of course the elephant in the room in those days was a reality that the vast majority of South Africans didn't have the vote.*

*This evening as well, there was scant reference to the elephant in the room and that was by Noma right at the beginning. The reality is that there is a huge percentage of our population who do not either know or believe that they live in a constitutional democracy. How can we have meetings of this nature in the future where those people who are genuinely excluded from public participation don't get an opportunity to share their experience of real exclusion from public participation?*

**CHAIRPERSON:** I'm going to ask the panellists to respond and I'll respond at the end.



**DR ABEDIAN:** I think the question of consultation before drafting of legislation goes to the spirit as opposed to the letter of consultation. These processes are monitored by lawyers because, as our learned Professor says, the question

that needs answering is: Is it constitutional? Yes. Have you consulted? Yes. Yet, the buildings are built, the e-tags are printed, and the judiciary holds that the process is constitutional.

I think we need to go back to learning how this system is meant to operate, not to let lawyers justify it or judges to rubber stamp it.

On the political side, a lot of what is said there has many contradictions. For example, the amendments to the Mineral and Petroleum Resources Development Act were done last minute, while everybody was opposing them within the party and Parliament. However, it was passed just before Parliament closed. Only heaven knows why nobody has up to now, has not contested it, but I'm sure if the going gets tough.



# Comment

There is the asymmetry that you mentioned concerning those who stand to benefit as opposed to those who lose. It's again part of the problem of public choice in policy making. It's not confined to our constitutional system. We must debate it and see how we are going to resolve it.

There is no easy answer. There's a body of literature on all the forms of democracy, but to the best of my knowledge, unless those who are in charge – those who are sitting in Parliament – unless they are completely committed to the spirit, not to the letters, they're not going to deal with those issues.

We don't have public debate about what values should qualify an MP, not membership, not anything else but their commitment to the values inherent in the spirit of our Constitution. That's the value system that we haven't really talked about – it is part of democracy and maybe a discussion for some other time.



**PROF MHANGO:** That's a very good question and goes to the heart of why we transformed this country in 1994. I think that you find the expression of your question in the preamble to the Constitution, because it talks about building and improving the quality of life of all citizens. It talks about healing the divisions of the past.

I am reminded of what former Chief Justice Pius Langa once said, that what the Constitution was trying to do was to create a bridge from the old order to the new order. He went on to say that there is no destination to where we are going, we have to keep going.

We have a transformative Constitution that was designed to transform our society but it didn't tell us exactly what the destination is. So we're in the process, as Dr Abedian says, that we haven't even built the house yet, we are still building the foundation.

I think that your question to me tells us that we haven't achieved a lot of what we set ourselves to achieve in this document and

that we need to do more, and I think that part of what we need to be doing is asking those questions to our leaders, to ourselves, particularly those in power as to what are the promises of the Constitution. That's where some of the public consultations should be. I think service delivery protests are crying out to the promises of the Constitution, that's what they're demanding because the Constitution promised that their lives are going to be different.

We are now in a constitutional democracy, but where are those promises, and I think we are not yet there. The question is how do we get there and I hope the Deputy Minister can answer that.



**MR JEFFERY:** I think important points were raised and they need to be looked at. I'm not quite sure how the public participation process on e-tolls worked and when it started, so I don't really want to engage on that.

Concerning Gary Pienaar's question the answer is yes, every Member of Parliament gets allocated money for a constituency. The money goes to the party, that money is audited. It's not something that comes into your own pocket that you can run off with. The advantage of having the list system is that you will have competition; you will have members of different parties having a constituency office in the same area.

The general point I want to make is that public participation is very important. It is important that we have an active and informed citizenry, and this should go broader than citizenry to the people in South Africa. If you look at the rights in our Constitution, rights to citizens are actually only a few, specifically most of the time it's to people in South Africa

We have a long way to go as a country and a lot of work to do. The only way we will make progress is if everybody does their bit.

**CHAIRPERSON:** Thank you. I suppose I have to have the last word and it's about the elephant in the room. Thank you, Brian, for raising that. You are right, it may also have to do with particular types of topics which are discussed, and different topics attract different audiences. We have seen this at roundtables concerning xenophobia and homophobia.

One of the donors that I did approach about Roundtables wanted to know why the Roundtables aren't being held in Soweto. I said I'd love to have them there, fund them. The donor ran away.

We have a project called Project Constitution, bringing the Constitution to young inner city school learners. It is successful. We were dealing today with Harvard Law Students who want this project and I think this is fantastic.

Why is it that the only body that will fund this programme is a London-based bank? Not one South African donor wants to fund it. The programme is good. We have judges participating here, members of the Bar and so forth, this is for young people. Why is it that we have to go to London to raise money for this?

Please become a Friend of the Foundation. On that happy note, I want to thank all our speakers and especially John for coming up from Cape Town to speak to us. It's been great to have you here and to see you again, and to Dr Abedian and Prof Mhango, thank you very much.



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

*Helen Suzman*

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