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promoting liberal constitutional democracy

DELIVERY OF JUSTICE

BUILDING A HOUSE OF JUSTICE IN AFRICA

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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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CONTENTS

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EXECUTIVE SUMMARY

The HSF in association with the Open Society Foundation for South Africa launched its Justice Project in order to explore South Africa's constitutional dispensation as it relates to, and underpins, the delivery of justice. The Constitution is the supreme piece of legislation that informs South Africa's legal framework, and the separation of powers is the central principle which holds the system in place by providing the necessary checks and balances on the exercise of power. The *Delivery of Justice Project* has, thus far, explored the challenges facing the delivery of both civil justice and criminal justice, and the issues around the appointment and accountability of judges.

The *Delivery of Justice Project* has also been able to draw upon other projects the Helen Suzman Foundation has initiated. These projects include the Helen Suzman Memorial Lecture Series. Judge Meyer Joffe delivered the Second Memorial Lecture in 2010 when he argued that the independence of the judiciary was non-negotiable. Central to his argument was that the training of judges has to be of the utmost quality in order to equip them with the skills they require to fulfil their duties. Former Justice of the Constitutional Court, Judge Kate O'Regan, delivered the third Helen Suzman Memorial Lecture in 2011. She explored the parameters of a constitutional order and defended the separation of powers, as enshrined in the Constitution.

Also lending weight to this Project were articles written by three Helen Suzman Foundation Research Fellows – Claudia Braude, Amanda Reichmann and Harry Rajak. Braude, in her article *Justice, Forgiveness and a Culture of Impunity*, traces the "possible connections between the template of forgiveness central to the Truth and Reconciliation Commission, and the contemporaneous attitudes to amnesty and the rule of law". The central question Braude seeks to answer is what implications did the TRC's failure to close the door fully on Apartheid's criminality and lawlessness have on South Africa? If there are problems with our constitutional jurisprudence the problem may go back to the political compromise which

Francis Antonie

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gave rise to the TRC and the jurisprudence that flowed from there.

Reichmann makes the argument that the basic principles for a post-apartheid legal system emerged in a series of important Constitutional Court cases, beginning in 1995, with the abolition of the death penalty (*Makwanyane*), forced removals and land dispossession (*Richtersveld*), the state's socio-economic obligations (*Grootboom and the Treatment Action Campaign*), gender and racial discrimination in customary law (*Gumede*). These judgments have clearly and demonstrably enhanced South Africa's constitutional jurisprudence.

Harry Rajak contextualises our jurisprudence in the light of our common law and, although his account of the richness and diversity of South African Roman Dutch Law heritage does not bring into focus the specific role of the judiciary, nevertheless without the judiciary as a developed and politically independent institution of the State, that jurisprudence would be lost.

What emerges is a complex, yet impressive exercise in jurisprudence which is focused on the problem of service delivery in all of its forms. It is against this background that the Foundation seeks to address the central political issue which has arisen. The Executive charges that the judiciary has encroached on its ability to determine policy and that opposition groups are attempting to co-govern through the courts. In the light of this tension it would seem that the Executive is in danger of positioning itself as an object of judicial overreach.

It is important to recognise, however, that clashes between the executive and the judiciary are not uncommon in modern democracies, and possibly more so in constitutional dispensations that purport to respect a separation of powers doctrine. Examples include the USA, the UK and Israel.

The executive has a necessary role to play in the judicial branch. The executive is empowered to establish the judiciary and see to its proper functioning which includes its funding, staff training, infrastructure development, and the maintenance of existing infrastructure, on the one hand. On the other, the executive is obligated, under the Constitution, to protect judicial independence and the ability of the judiciary to function. The former must not be the excuse to undermine the latter. Sir Jeffrey Jowell QC of the Bingham Centre for the Rule of Law drew this distinction out very clearly when he examined the circumstances under which the executive could review the functioning of the courts in Section IV of this paper.

Equally important is that an independent judiciary has the responsibility of ensuring that narrow personal views of its judges do not impede policy decisions made by elected officials. Judges must apply the law to disputes which may arise. In South Africa's case the Constitution must be applied to disputes arising between government decisions and the rights of people affected by those decisions.

The Three Symposia

Each symposium (one on civil litigation, one on criminal law and finally one on constitutional law) explored a particular area of South Africa's legal system in order to unpack some of the challenges faced by those who interact with the system on a daily basis. In order for effective policy choices to be implemented across South Africa's legal system, a full account of the current problems which hinder the delivery of justice must be properly analysed. Instead the legal system is confronted with a myriad of problems that require a full policy overview before the delivery of justice can be realised.

Among the problems which were identified and which are common across the legal system were issues around access to the courts, representation, poor training, and poor policy intervention. A number of bottlenecks need to be rectified across a number of state institutions. These include the police, public prosecutor, the judiciary (from an operational side), and state security among others. At this level the executive has a huge role to play as it is responsible for the implementation of policy and the funding of these functions.

It was made clear throughout the Justice Series that political leadership needed to step up and take responsibility in order to address and rectify the current issues that hinder the delivery of justice. This requires the 'nuts and bolts' to be fixed, not a full blown review of the highest courts in the land. It is not so much the legal framework that needs reviewing as it is the implementation of policy directives and the proper management of resources which need to be improved.

Without adequate political leadership in the area of strategic reform and robust governance and accountability frameworks, the challenges highlighted throughout the Justice Series will not be overcome, and access to justice will remain a distant hope for the millions of South Africans who attempt to give it substance.

This Report provides an overview of the issues that were raised in three distinct areas of South Africa's justice system and, given the most recent tender for a review of the Constitutional Court and the Supreme Court of Appeal, it places them against the backdrop of the growing tension between the executive and judicial branches of government.

I. INTRODUCTION

The Helen Suzman Foundation (HSF) is guided by the principles enshrined in the Constitution and by a strong belief in the independence of the judiciary and the rule of law. Central to the HSF's conception of the constitutional state is the doctrine of the separation of powers, a constitutional principle which is of such importance that without it power becomes arbitrary. If the separation of powers is not understood and adhered to, then the delivery of justice is compromised.

The HSF is interested in the implications of this constitutional principle as it relates to the delivery of justice in South Africa. The consequences of this principle being undermined will adversely affect state delivery, state institutions, relations between state and civil society and the promotion of the Constitution.

The HSF launched its Justice Project, in association with the Open Society Foundation For South Africa, in order to explore South Africa's constitutional dispensation as it relates to, and underpins, the delivery of justice. The Constitution is the supreme piece of legislation that informs South Africa's legal framework, and the separation of powers is the central principle which holds the system in place by providing the necessary checks and balances on the exercise of power. *The Delivery of Justice Project* has, thus far, explored the challenges facing the delivery of both civil justice and criminal justice, and the issues around the appointment and accountability of judges.

The Delivery of Justice Project has been able to draw upon other projects the HSF has initiated in order to provide a substantive underpinning to its objectives. These projects include the Helen Suzman Memorial Lecture Series. Judge Meyer Joffe delivered the Second Memorial Lecture in 2010 when he argued that the independence of the judiciary was non-negotiable. Central to his argument was that the training of judges has to be of the utmost quality in order to equip them with the skills they require to fulfil their duties. Former Justice of the Constitutional Court,

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In evaluating the project we will also draw on three important articles published in the Helen Suzman Foundation Journal, *Focus 55*, *57* and *60* respectively, written by three of the HSF's Research Fellows: Claudia Braude, Amanda Reichmann and Harry Rajak. Their powerful contributions have all added further weight to the legal arguments around the delivery of justice and the constitutional framework which underpins the South African legal system.

Braude, in her article *Justice, Forgiveness and a Culture of Impunity*[1], traces the "possible connections between the template of forgiveness central to the Truth and Reconciliation Commission, and the contemporaneous attitudes to amnesty and the rule of law"[2]. The central question Braude

Adv. Menzi Simelane, Franics Antonie, Judge Makhanya and Judge Cachalia

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What emerges is a complex, yet impressive exercise in jurisprudence which is focused on the problem of service delivery in all of its forms. It is against this background that the Foundation seeks to address the central political issue which has arisen. The Executive charges that the judiciary has encroached on its ability to determine policy and that opposition groups are attempting to co-govern through the courts. In the light of this tension it would seem that the Executive is in danger of positioning itself as an object of judicial overreach.

The government has lost a number of constitutionally significant cases. This has resulted in senior members of the governing party and the Executive claiming that the Court has, therefore, overstepped its mandate because the rulings undermine party resolutions and thus government policy choices. However, it is not as simple as that. The Constitution empowers the Court to review policy choices if, and when, a challenge is brought against said policy choice. When a challenge is brought, the Court can only pass judgment on the facts before it and determine whether just administrative action has been pursued and whether the proposed legislation fits with the Constitution. In the cases where this is found not to be case, the Court will strike down the legislation, providing

I. INTRODUCTION

government with the opportunity to rectify the shortcomings. Unfortunately, this legitimate form of challenge has been interpreted by some members of the Executive and senior party members as illegitimate and counter-revolutionary.

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Simply ignoring the separation of powers and the importance of its inclusion to the constitution, especially as it relates to the rule of law and the independence of the judiciary, is to undermine the ability of the entire justice system to deliver justice. In order to enhance the separation of powers, appropriate processes and structures are needed. At this point institutional design and robust processes of operation become extremely important. If a system is to operate at its optimum capability then its overall integrity is of vital importance. Thus for the rule of law and the separation of powers to succeed in the delivery of justice, the processes by which judges are appointed become a very important aspect of the system's integrity, as does the appointment processes for all state institutions, and especially those that function within the justice system. If any of these processes is undermined then, again, the ability of the justice system to operate effectively is severely constrained. It is thus important to understand the role of the Judicial Services Commission in the selection and appointment of judges.

Important, also, are the practitioners of law who make up the other side of the equation. Jeremy Gauntlett SC has raised serious concerns with the proposed Legal Practice Bill that seeks to centralise law practitioners under a state run organisation and thus dissolve the bar councils and law societies, transferring their assets to this new body. These types of measures may have adverse effects on the independence of the legal profession, further undermining the independence of the judiciary[5].

The choice to adopt a constitution post-1994 brought with it key assumptions. Principally that the Constitution enjoys superiority over all branches of government and any act which is found to be inconsistent with the Constitution can and will be struck down by the Constitutional Court if that act is challenged. The Constitutional Court has an obligation and a constitutional right to determine whether or not government policy and legislation is compliant with the Constitution. The Constitution enshrined the separation of powers, the rule of law and an independent judiciary. These tenets ensure that the delivery of justice can take place without fear, favour or prejudice.

If this constitutional arrangement is deemed by some critics to be a foreign import and alien to South African political culture then it is worth remembering that the Constitution itself is rooted in the *Liberation Struggle's* own reckoning of the form of the State. This point was unambiguously made by Former Chief Justice Pius Langa at the third Justice Symposium hosted by the Helen Suzman Foundation. The principles enshrined in that document were given expression in the Bill of Rights. The current form of the Constitution thus derives from the Freedom Charter.

Two themes run throughout this paper, namely, understanding the alleged tension between the Executive and the Judiciary, and secondly, the separation of powers doctrine as it relates to the delivery of justice.

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1 Braude, C., *Justice, Forgiveness and a Culture of Impunity*, published in *Focus 55*, November 2009
2 de Kadt, R., *Editorial*, published in *Focus 55*, November 2009
3 Reichmann, A., *Fixing the Past: Constitutional Challenges*, published in *Focus 57*, May 2010
4 Rajak, H., *A Virile Living System of Law: An exploration of the South African Legal System*, published in *Focus 60*, January 2011
5 Gauntlett, J., *Radebe's calamitous Bill is an affront to the rule of law*, published in Business Day online 04/06/2012 [accessed at] http://www.businessday.co.za/articles/Content.aspx?id=173278

II. INTERROGATING SOUTH AFRICA'S JUSTICE SYSTEM

Judge Kate O'Regan, Deputy Chief Justice Dikgang Moseneke, Justice Zak Yacoob and Justice Edwin Cameron

Over the course of three separate symposia which explored the South African justice system, a number of overlapping themes were put forward as contributing to the underperformance of the justice system. The dual failure of reform measures and effective management structures has meant that, in most cases, the justice system is overburdened and thus unable to function properly.

Operational aspects, stemming from the poor management of departments, include the constant delay of trials, poor training (across the police, courts, prosecuting authority and the prison system), the high costs associated with litigation, prison overcrowding, remand detainees, lack of translators, lost dockets, failure of line accountability and the ever present potential of political interference continue to undermine the delivery of justice.

It will take a determined approach by those in power to adequately diagnose the issues and develop policy responses that will effectively be able to overcome these challenges. There are many jurisdictions which have successfully overcome similar problems by implementing forward looking, robust reform measures to tackle these issues head on. South African policy makers can and must draw on this expertise to inform the policy responses they embark on in order to fix the South African system. These interrelated issues must all be resolved within the framework of the Constitution and the powers it bestows upon the three branches of government. Acknowledging this framework as the legitimate means by which South Africans resolve their disputes, empowers the Constitution to protect and thus promote the rights of all South African's without fear, favour or prejudice. The Constitution is in place to guide the policy responses of government to act for the betterment of South Africans.

The Delivery of Justice – Civil Litigation

Among the many challenges facing the South African justice system are the prohibitive costs associated with accessing the legal system, the remoteness and alienability of the justice system to people living in rural and semi-rural areas of South Africa and issues relating to court management. The underlying efficiency prerogative of both markets and government is how to do more for less which, given the economic challenges and inequalities of South Africa, should be a key strategic goal of the justice system.

II. INTERROGATING SOUTH AFRICA'S JUSTICE SYSTEM

The Foundation's first symposium on the *Delivery of Justice* was framed by the following questions:

1. What are the correct court procedures, and how do these impact the successful delivery of justice?
2. What role can private mediation play in enhancing the efficiency of the legal process? Related to this is the question of authority. Where does the authority come from in shifting disputes to private arbitration and what is then allowed back into the courts?
3. Could Alternative Dispute Resolution (ADR) measures have a positive impact on cutting down the delays which are inherent in the current system?

The following section unpacks these questions in order to argue that more can be done in order to streamline the delivery of justice, in this case, by enhancing the use of ADR techniques and other civil court reforms.

What is changing and why is the change taking place?

There has been a global shift in terms of compliance with governance frameworks for all types of entities, be they private, public, or NGO-type entities. The King Report on Governance for South Africa 2009 (King III) provides a list of best practice principles to assist and guide directors to make the right choices for their company. These principles have become an indispensable guide on corporate governance to directors, executives and regulators alike. Importantly, King III recognises the growing significance of Alternative Dispute Resolution (ADR) measures as a key component of good governance. It favours mediation or conciliation and, failing that, arbitration. The benefits of ADR include reaching conclusions faster, the ability to conduct ADR processes in private and the opportunity to reach creative or novel solutions.

While mediation and conciliation have not been defined in the South African Companies Act, these measures can still be utilised by conflicting parties in their attempts to resolve disputes. In future there would need to be an emphasis placed on constructing more legally binding agreements around these forms of dispute resolution. Judge Kellam[6], in his keynote address to the First HSF Justice Symposium, made the point that, with the assumption of control by the judges in the management of the courts, a positive result was the introduction of ADR, and in particular mediation, as a court connected process.

Judge Murray Kellam

… with the assumption of control by the judges in the management of the courts, a positive result was the introduction of ADR, and in particular mediation, as a court connected process.

Case management reforms must focus on providing judges with the power to identify issues early on. If the real issues are not identified early, interlocutory steps will be dictated by process rather than the ends to which they should be directed[7]. Often this results in expensive litigation which can extend over years as each technicality is argued over, the result of which is that the issues at the core of the dispute get overshadowed and the associated costs of litigation skyrocket.

Along with court managed ADR process, Judge Kellam also highlighted a number of other successful reform measures undertaken in Australia and which informed the Woolf Reforms in the United Kingdom. These included measures for judicial case management aimed at enhancing the early resolution of disputes, reduction of trial time, more effective use of judicial resources, the establishment of trial standards, the monitoring of case loads and the development of information technology support. These measures were undertaken to increase the accessibility to the courts, facilitate planning for the future, and enhance the public accountability of the courts[8].

While there has been criticism of some of these reform measures, Judge Kellam was adamant that they had indeed benefitted the Australian system enormously[9].

Enhancing the delivery of justice

The purpose of pursuing a reform agenda is to enhance efficiencies across the operation of the system. Therefore, any reform agenda must properly diagnose the problems throughout the system and then provide solutions aimed at overcoming them[10].

A number of key reform measures were identified by Judge Kellam. The purpose of these reforms was to enhance the delivery of justice in a range of jurisdictions. By reforming the system in a way which focused on the delivery of justice, marked improvements have been seen in these jurisdictions according to Judge Kellam[11]. There are certainly lessons for South Africa to emulate as it tackles its own problems. Key among these problems is to develop reform programmes which will enhance the delivery of justice for all South Africans.

From an adversarial role to a managerial role for the courts

The Bill of Rights provides that all citizens have the right to have any dispute resolved by the application of law in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The Bill of Rights would not hinder the expansion of ADR solutions to disputes within the South African justice system. In accordance with the Bill of Rights, courts are empowered to develop common law or customary law so long as the spirit, purport and objects of the Bill of Rights are promoted. ADR clearly offers measures to the legal system which could add major efficiencies and truly enhance the delivery of Justice to South Africans.

If we look at the Woolf Reforms in the United Kingdom, these aimed to speed up the legal process by implementing strict deadlines for filing court papers and arguments. The reforms are intended to cut down the time delays often inherent in the legal system and to cut costs. They also intended to lower the number of cases piling up in the courts by encouraging parties to use pre-action protocols and forcing parties to employ co-operative litigation where the judge manages the timescale of the case. These reforms have been seen as constituting a minor revolution in civil justice. Taking on board the issues that arose during the Symposium it is clear that South African civil law could benefit greatly from the introduction of some of these reform measures. Time delays and excessive costs could be overcome, and proper case management systems could be implemented by empowering the courts to take control of their workloads.

On August 30 2002 the government of the United Kingdom announced in a press release that it believed the Civil Procedure Rules (CPR), introduced as part of the so-called 'Woolf reforms' over three years previously, were continuing to work well. The Lord Chancellor's Department published an updated evaluation of the reforms in a report entitled "Further Findings: A continuing evaluation of the Civil Justice Reforms"[12].

The report was based on various surveys and studies carried out in the last few years, as well as judicial statistics and anecdotal evidence. It followed on from a March 2001 report called "Emerging Findings: An early evaluation of the Civil Justice Reforms", building on the earlier evidence and including additional information.

II. INTERROGATING SOUTH AFRICA'S JUSTICE SYSTEM

The key findings of the report were as follows:

- Overall there had been a drop in the number of claims issued;
- Evidence suggested that pre-action protocols were working well to promote settlement and a culture of cooperation;
- Part 36 (offers to settle) had been welcomed by all interested groups as a means of resolving claims more quickly;
- There was evidence to show that settlements at the doors of the court were fewer and that settlements before the hearing date had increased;
- After a substantial rise in the first year following the introduction of the CPR, there had been a leveling off in the number of cases in which alternative dispute resolution was used;
- The use of single and joint experts appeared to have worked well, and it was likely the use of such experts had contributed to a less adversarial culture and helped to achieve earlier settlements;
- Case management conferences were a key factor in making litigation less complex, and appeared to have been a success;
- The time between issue and hearing for those cases that go to trial had fallen, apart from small claims, at the time had risen (but since may have fallen);
- The number of appeals in the course of proceedings appears to have fallen sharply;
- It was still too early to provide a definitive view on costs – the picture remained relatively unclear, with statistics difficult to obtain and conflicting anecdotal evidence. Where there was evidence of increased costs, the causes were difficult to isolate; and
- The views of litigants in person were difficult to obtain, as they tended to use the system only once.

The report also refers to a widely held view that there had been a change of culture and there remained a willingness among all those interested in civil justice to work in partnership in the continuing programme of reform[13].

The South African judicial system has to make the necessary changes that will enhance the efficiency and effectiveness of the current overburdened courts in the interests of delivering justice to every citizen that seeks it. It also needs to find a way to incorporate aspects of customary law into its jurisprudence. Judge Denis Davis made the argument that more needed to be done to incorporate customary law into South Africa's legal framework as it directly affected the majority of people living in South Africa. The Traditional Courts Bill currently being considered has come under pressure, however, for failing to adequately resolve some of these tensions.

It is vital that any reform programme which is instituted helps to build public confidence in the legal institutions tasked with delivering justice.

Any reform programme must be able to overcome the South African specific problems such as physical location, geography, cost effectiveness and accessibility to the people. It would have to ensure that South Africans receive just outcomes from the courts. There are a number of reform programmes from other jurisdictions which could help to inform a reform agenda aimed at enhancing South Africa's justice system and its ability to deliver[14].

The majority of people who have little ability to access courts are more often than not unable to challenge unfair administrative procedures that impact so negatively on their lives. Having institutions in place equipped to deal with unrepresented parties (such as the CCMA), is critical to meeting the rights of all citizens. The incapacity of many of the institutions in South Africa means that these rights are far from being realised. With legal aid resources scarce, dispensing disproportionate amounts of resources to criminal processes further undermines access to civil processes. It is vital that any reform programme which is instituted helps to build public confidence in the legal institutions tasked with delivering justice.

While the legal fraternity is required to carry out pro-bono work, and a number of legal NGO's exist to assist people unable to afford legal services, this is not enough. More needs to be done in order to provide an adequate

Judge Denis Davis

Supreme Court of Appeal Judge Azhar Cachalia

degree of legal services to those in society who remain unable to access the courts.

The Department of Justice and Constitutional Development needs to examine the regulatory environment with the view of developing strategic reform programmes aimed at enhancing the ability of the system to deliver effective justice to all. It needs to focus its work on providing the necessary resources to the courts so that court backlogs can be cleared. It needs to provide assistance and resources for legal aid, and it needs to focus its efforts on making access to state legal practitioners and the courts much easier for the vast majority of South Africans. An effective reform programme must aim to overcome these problems while seeking to resolve disputes in a just manner.

The Delivery of Justice – Criminal Justice System

The Second Justice Symposium explored the criminal justice system. Supreme Court of Appeal Judge, Azhar Cachalia, National Director of Public Prosecutions, Menzi Simelane, High Court Judge, Thami Makhanya and Prof. Stephen Tuson all made presentations on their specific areas of interest within the criminal justice system.

Any criminal justice system is a complex structure in which many different organisations play a critical role in ensuring that people's rights are upheld. Each organisation has a significant impact on the overall functioning of the system. To provide a simple overview of how the criminal justice system operates one must be cognisant of which institutions are vital to its functioning. In the South African context the players include the South African Police Service (SAPS), the National Prosecuting Authority (NPA), the Judiciary and Correctional Services. Each one of these players is responsible for a particular function within the overarching structure.

For the system to operate as it is envisaged one would expect the following: The SAPS detect and investigate crimes that are committed. Those investigations, once concluded, would be handed over to the NPA for charges to be brought against the accused. The accused would be arrested and brought before a judge where a trial date would be set. Depending on the outcome of the trial, the accused would either be freed or found guilty. If a guilty verdict is reached the perpetrator would be handed over to correctional services to begin incarceration.

II. INTERROGATING SOUTH AFRICA'S JUSTICE SYSTEM

Adv. Menzi Simelane, former National Director of Public Prosecutions

Referring to this simplistic breakdown of the system it is easy to recognise that if any one of the parts does not function as it should, the integrity of the system is compromised. The adverse affects may result in massive rights abuses taking place.

Administration of Justice

In contrast to Judge Kellam who argued that the judiciary should be responsible for the management of their caseload and thus have greater powers, Adv. Simelane – who was the National Director of Public Prosecutions at the time – argued that the administration of justice resides with the Executive, and that the exercise of the judicial function is a part of the administration of the criminal justice system[15].

But is this the case?

An independent judiciary is crucial to the promotion of the rule of law and follows from the separation of powers doctrine which is central to South Africa's constitutional dispensation. The Executive oversight role must remain that of oversight, responsible for ensuring that policy choices enhance the delivery of justice. This requires that the available resources are utilised in ways that will allow the institutions operating in this system to carry out their duties effectively.

The implications are:

- that the people who are appointed to fulfil these functions must be suitably qualified for the roles in which they have been entrusted;
- that it requires that each institution is afforded the independence with which to perform its functions free from the political constraints imposed from above; and
- that it requires that the governance and accountability frameworks within which these institutions operate are protected and enforced so that each institution is able to function effectively in carrying out its mandate.

Central to these requirements being met is the institutional design. In order for the institution to function properly its design will be crucial in determining its ability to remain both structurally and operationally effective.

Among the constraints which Adv. Simelane pointed out as having a severe impact on the criminal justice system, was the sheer number of cases reported to the police. At the root of the problem, for Adv. Simelane, was a misunderstanding about the causes of crime, and the attitude of those in the system towards crime prevention. Adv. Simelane argued that there needed to be a change in the discourse about the causes of crime and the correct measures to deal with these causes. This, he suggested, would help to inform a change in the mindset of South Africans which would help to build some degree of accountability.

The political climate of impunity for office bearers assists in breeding a culture of impunity throughout the SAPS resulting in a loss of public confidence in the men and women responsible for the public's protection.

Notwithstanding the sheer number of cases reported to the police for investigation, if the police are not sufficiently able to deal with the task at hand then the pressure on this pillar of

the criminal justice system will increase. The SAPS, unfortunately, is seen to be a poorly managed institution, often finding itself in the middle of the political events which unfold in South Africa.

Two National Police Commissioners have been sacked – Jackie Selebi for corruption and Bheki Cele for maladministration. These high level dis-appointments do not instil confidence in the regular service members of the SAPS. The political climate of impunity for office bearers assists in breeding a culture of impunity throughout the SAPS resulting in a loss of public confidence in the men and women responsible for the public's protection.

This can also be said for the NPA which was itself the object of a Supreme Court of Appeal challenge to the 'fitness to hold office' of its National Director, Adv. Simelane. At the root of this case was the degree of discretion in the exercise of Executive Power by the President[16]. (One need only browse through various newspaper articles to gain an insight into the dysfunctional operation of South Africa's prisons and other correctional facilities.)

Poor policing and the criminal justice system

In his former role as Secretary for Safety and Security, Judge Azhar Cachalia of the Supreme Court of Appeal, had been responsible for redefining the role the police were to play in the newly democratic South Africa. He oversaw the de-militarization of the police force into a police service focused on safety and security instead of law and order. In his address to the HSF's Second Justice Symposium, Judge Cachalia's primary concern was the re-militarization of the police under the new government. In his view, this was regressive. Judge Cachalia argued that the assumptions for this move were not only wrong but potentially dangerous. He asserted that the re-militarization of the police went against the trend in modern policing all over the world[17].

At the root of the problem with policing is poor and inadequate training, and not a lack of military titles and firepower. The concern raised was that by re-militarizing the SAPS an already serious problem may actually be compounded. The combination of armed officers with poor training, a lack of skills, a shift in institutional mentality – from safety and security to law and order – may result in a very dangerous situation developing[18].

Police brutality and violence may escalate when supported by the incendiary statements made by those who exercise political responsibility for policing. The perception that the police and prosecuting authority are mere instruments of the governing party or factions of that party is a dangerous one that has severe implications if not dealt with. Serious action is required to counter this view. The political deployment of individuals who lack the requisite skills and experience to perform these tasks is crippling the effectiveness of the system to be responsive to the citizenry[19].

An Independent Judiciary

The Criminal Justice System is there to regulate or administer the powers of the State and the rights of the accused. This regulation or administration is conducted by the judiciary. The task of the judiciary is to strike a balance between the powers of the Executive and the rights of the accused with the aim of making life bearable for the accused while not limiting the ability of the State to effectively control crime.

Neither the State nor the citizen can enjoy absolute power or absolute rights. Compromise is essential to promote the public good. The judiciary plays an important role in maintaining the principle of legality – which requires that all law be clear, ascertainable and non-retrospective. Without this, the foundations for liberty do not exist. Key interventions to enhance the effectiveness of the criminal justice system include the need for government to upgrade the skill levels of detectives in order to enhance the investigation of crimes as this gives impetus to successful prosecution. Also, the law must be applied consistently and equally to all citizens, regardless of position or authority. Only then would confidence in the criminal justice system be inspired[20].

II. INTERROGATING SOUTH AFRICA'S JUSTICE SYSTEM

The lack of accountability across the entire criminal justice system remains a major concern and may be the core reason for the breakdown in the effectiveness of the system. It may now be appropriate for the South African judiciary to adopt a more inquisitorial approach during hearings. This would give judicial officers more power to hold to account those people who simply do not adequately prepare for court hearings[21].

It is imperative that each component part of this system be able to perform its functions, having due regard for the rights contained in the Bill of Rights and the laws of the Republic.

The criminal justice system is a complex system comprised of many different parts. Each needs to function effectively in order to achieve their particular mandates. It is imperative that each component part of this system be able to perform its functions, having due regard for the rights contained in the Bill of Rights and the laws of the Republic. The institutions that comprise the criminal justice system must accord with good governance and accountability frameworks in order to be successful in carrying out their duties. The politicisation of these management structures has resulted in the integrity of these organisations being severely tarnished. If, for instance, proper investigations are not carried out by an effective police service, then the ability of the state prosecutors to prosecute the case is hampered, leaving judges with few options when it comes to passing judgment. This will adversely impact on the rights of victims and the rights of the accused in those crimes.

The Delivery of Justice – the appointment and accountability of Judges

The Third Justice Symposium shifted its focus to the accountability and appointment of judges. These two issues take on a degree of importance given the unfolding drama around the proposed review of the Constitutional Court and the Supreme Court of Appeals by the Executive. At the centre of this discussion is an examination of the limits

Sir Jeffrey Jowell QC

of power placed on the three branches of government by the Constitution. In particular, we need to understand the foundation upon which judges exercise their powers within the confines of the Constitution.

In order to promote the rule of law and an independent judiciary, the practical processes by which judicial appointments take place are of significant importance. South Africa's Constitution represents a negotiated settlement by the parties involved in its drafting. This settlement was crucial in order to preserve the integrity of the state and lay the foundations for a free and democratic society to emerge from the confines of its brutal past.

In his keynote address Sir Jeffrey Jowell QC elucidated the very clear distinction between the *rule of law* and the *rule by law*. Sir Jeffrey argued that often this distinction is misused to confuse legality, which is at the base of the rule of law, with legalism, which is a tool of tyrants[22].

Constitutional evolution depends on both memory and principle by striking a balance between the original intent of the drafters and the need to develop the Constitution in

accordance with the underlying principles that it promotes. Therefore the accusation made by some that the Constitution has emptied the state of its ability to drive policy formulation does not stand up to scrutiny[23].

The Bill of Rights is a revolutionary document, in that it fundamentally changed previous practices[24]. It replaced discrimination with equality. It required freedom in the place of bondage and it replaced abuse and neglect with a respect for dignity. By replacing *rule by law* with the *rule of law* the South African state was bound to adhere to just administrative action in place of arbitrariness and the abuse of power. These are powerful constitutional principles which form the foundation of the South African Constitutional State.

The Appointment of Judges

In order to protect these constitutional rights and the institutions created to promote them, it is vital that the judiciary remain independent because ultimately the judges are the arbiters of disputes about constitutional values. It is the judges who anchor the delivery of just outcomes in the daily lives of all individuals in accordance with the fundamental values of the new constitutional dispensation[25].

Thus the appointment of judges takes on an invaluable importance in maintaining the separation of powers and upholding the rule of law. If this process is compromised then the long term viability of the constitutional state is threatened.

During the constitutional negotiations South Africa decided against the US-style Executive Appointment process and eschewed the UK-style parliamentary system which had been in use under Apartheid and, instead, opted for appointment by a Judicial Services Commission (JSC).

As Sir Jeffrey argued, theoretically this would reduce the role of the Executive alone or in combination with the Legislature, reduce the opportunity for political patronage of judicial appointments, and thus enhance the separation of powers and judicial independence[26]. That was the aim.

The structure of the JSC still, therefore, potentially permits political domination of judicial appointments. In order to enhance the delivery of justice South Africa must move away from overly politicised functions of state.

However, as Sir Jeffrey pointed out, the South African model did reflect a compromise in favour of the incoming political class. The history of the negotiations highlights this point as only eight of the Judicial Services Commission's twenty three members are lawyers but the other fifteen are representatives of political parties or appointees of the President. The structure of the JSC still, therefore, potentially permits political domination of judicial appointments. In order to enhance the delivery of justice South Africa must move away from overly politicised functions of state.

The Constitution and Just Administrative Action

South Africans need to realise the significance of the Constitution as a living document and guard against any attempt to undermine or delegitimate its existence. The Constitution itself is a document that was drafted by South Africans for South Africans. It was not imported from Europe, the United States or elsewhere. As a country South Africa should be proud to know that its Constitution has also influenced other countries around the globe. As Sir Jeffrey pointed out, some of the provisions have proved to be 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, and 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*[27].

These are important markers when South Africans are called upon to defend constitutionalism. It cannot be said that just administrative action undermines the ability

of government to function. However, it is the case that a government department that fails to adhere to this principle does, indeed, undermine the rights of citizens. Nevertheless these principles can only be enforced when there is a strict adherence to the independence of the judiciary. Thus, the key to maintaining an independent judiciary is the inviolability of the appointments process.

Judicial Accountability

Turning to judicial accountability, Sir Jeffrey made reference to the accusations against judges in a number of jurisdictions that, as non-elected members of government, they have less or no legitimacy to decide on policy matters. Sir Jeffrey maintained that these taunts are levelled at judges in certain countries by robust politicians or the media who believe that the policies of the government should not be thwarted by unrepresentative judges[28].

Judge O'Regan stressed – as she and others in the Constitutional Court have in many judgments – that the separation of powers does not permit the courts to substitute their opinion on policy, or to substitute the opinion of policy experts with their own.

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 in her Helen Suzman Memorial Lecture in 2011, where Judge O'Regan stressed – as she and others in the Constitutional Court have in many judgments – that the separation of powers does not permit the courts to substitute their opinion on policy, or to substitute the opinion of policy experts with their own[29].

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

Judge Kate O'Regan

taken and the purpose of the power under which it was taken. As Judge O'Regan 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"[30].

"...every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion"

The late jurist Ettiene Mureinik made the point that the new dispensation establishes a *"culture of justification"* in which *"...every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion"*[31].

These words lie at the very core of South Africa's constitutional identity and underpin the supremacy of the constitutional principles adopted in 1996. It is in the light of the above that the Review process 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", should be viewed. We explore this in section IV of this paper.

Important to note here is the issue of transformation which always tends to underpin challenges to the judiciary's legitimacy. Legal academic and columnist, Carmel Rickard made a very important observation, in response to Sir Jeffrey's lecture, on the topic of transformation. She argued that in South Africa the dominant view of transformation is one dimensional in the sense that it only recognises the race and gender composition of the bench when, in fact, given South Africa's dramatic move from Apartheid to a constitutional democracy, the entire relationship between the state, its citizens and the law was fundamentally altered. The adoption of a Constitution inculcated a new set of rights, of values and of obligations which had not existed before. This reading of transformation is often mischievously absent when analysing the issues[32].

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6 Judge Murray Kellam AO was a partner in a Melbourne law firm before spending many years on the Victoria County Court, the Supreme Court and the Court of Appeal in Australia. He is the Chair of the Australia Institute of Judicial Administration and the Chair of the National Council, which advises the Australian government on dispute resolution.

7 Judge Kellam, *Delivering Justice – International Trends in Civil Justice*, paper delivered at the first Helen Suzman Foundation Justice Symposium – *Delivering Justice: The changing role of the courts in civil litigation*, 3 March 2010

8 *Ibid*

9 *Ibid*

10 Prof. Laurence Boulle was Director of the Mandela Institute an Issy Wolfson Professor of Law at the University of the Witwatersrand at the time of the symposium. His remarks were made in response to Judge Kellam's paper.

11 Judge Kellam, *Delivering Justice – International Trends in Civil Justice*, paper delivered at the first Helen Suzman Foundation Justice Symposium – *Delivering Justice: The changing role of the courts in civil litigation*, 3 March 2010

12 The International Law Office, 24 September 2002, [accessed at] http://www.internationallawoffice.com/Newsletters/detail.aspx?g=3b4b81dd-d2e2-4aa1-905a-86370b406b05

13 The International Law Office, 24 September 2002, [accessed at] http://www.internationallawoffice.com/Newsletters/detail.aspx?g=3b4b81dd-d2e2-4aa1-905a-86370b406b05

14 Prof. Cathi Albertyn is a Professor of Law at the University of the Witwatersrand and a part-time commissioner at the South African Law Reform Commission. Prof. Albertyn was also speaking in response to Judge Kellam's paper

15 National Director of Public Prosecutions, Adv. Menzi Simelane delivered the opening address at the second Helen Suzman Foundation Justice Symposium, *Delivering Justice: The Judiciary and the Criminal Justice System*, 28 October 2010

16 Democratic Alliance v President of the Republic of South Africa and others (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011)

17 Judge Azhar Cachalia of the South African Supreme Court of Appeal was a panelist at the second Helen Suzman Foundation Justice Symposium, *Delivering Justice: The Judiciary and the Criminal Justice System*, 28 October 2010

18 *Ibid*

19 *Ibid*

20 Judge Thami Makhanya of the South African High Court was a panelist at the second Helen Suzman Foundation Justice Symposium, *Delivering Justice: The Judiciary and the Criminal Justice System*, 28 October 2010

21 Prof. Stephen Tuson was a panelist at the second Helen Suzman Foundation Justice Symposium, *Delivering Justice: The Judiciary and the Criminal Justice System*, 28 October 2010

22 Sir Jeffrey Jowell QC, Director of the Bingham Centre for the Rule of Law, in London, delivered his keynote address at the third Helen Suzman Foundation Justice Symposium – *The Appointment and Accountability of Judges*, 17 May 2012.

23 *Ibid*

24 This revolutionary theme was subsequently taken up and explored vis-à-vis the Freedom Charter by former Chief Justice Pius Langa in his response to Sir Jeffrey's Lecture delivered at the third Helen Suzman Foundation Justice Symposium – *The Appointment and Accountability of Judges*, 17 May 2012.

25 Sir Jeffrey Jowell QC, Director of the Bingham Centre for the Rule of Law, in London, delivered his keynote address at the third Helen Suzman Foundation Justice Symposium – *The Delivery of Justice: The Appointment and Accountability of Judges*, 17 May 2012

26 *Ibid*

27 *Ibid*

28 *Ibid*

29 Judge Kate O'Regan, Helen Suzman Memorial Lecture 2011 – *Reflections on the role and work of the Constitutional Court*, 22 November 2011

30 *Ibid*

31 Etienne Mureinik "A Bridge to Where? Introducing the interim Bill of Rights" (1994), 10 SA *Journal on Human Rights* 31 – 48 at 32

32 Carmel Rickard is a legal commentator and presented her views in response to Sir Jeffrey Jowell's address at the third Helen Suzman Foundation Symposium – *The Delivery of Justice: The Appointment and Accountability of Judges* 17 May 2012.

III. THE JUDICIARY AND THE RULE OF LAW

Two contrasting views on the relationship between justice and the rule of law are to be found in the works of two of the Foundation's Research Fellows which were both published in the Foundation's journal, *Focus*.

Braude argues, in *Focus 55*, that South Africa's attempt at reconciliation through the Truth and Reconciliation Commission (TRC) represented a "failed chance to close the door on apartheid's fundamental criminality and lawlessness… South Africa – through the institution of the TRC – squandered the opportunity to draw a line in the sand and mark the beginning of the rule of law"[33]. By failing to conduct select prosecutions across a range of crimes, the rule of law was manipulated in later criminal cases against senior politicians, often resulting in charges being dropped. This, as Braude's argument suggests, created the culture of impunity with which South Africa currently battles.

While the TRC approach may be responsible for inculcating a culture of impunity, certainly all is not lost. Reichmann, writing in *Focus 57*, provides a sketch of South Africa's constitutional framework. Against the backdrop of the abuses which took place under Apartheid, Reichmann's argument is that, with the creation of the Constitutional Court to adjudicate on matters relating to the Constitution and the Bill of Rights, South Africa is well on its way to defining a new future predicated on due process and fundamental human rights.

The Grootboom judgment is another foundational ruling by the Constitutional Court. It made clear to the Government that in order to uphold the dignity, equality and freedom of those most desperate in society, the State's omission in this regard was a breach of its constitutional obligations.

The judgments on which she bases her argument are fundamental to understanding the course of South Africa's forward looking jurisprudence and are the foundations upon which the constitutional state is built. In *S v Makwanyane and Mchunu*, the Court abolished the death penalty. This judgment represents a complete break from the past, where institutional killing by the state had a chilling effect on society at large. The Court found that the death penalty was unreasonable and therefore unjustifiable. It found that other, more humane, deterrence measures were appropriate[34].

In the Richtersveld Community Case, the Court was able to undo some of the deleterious effects of enactments that deprived people of land on racially discriminatory grounds. This judgment became an important pillar in South Africa's socio-economic rights jurisprudence. It upheld the obligation on the state to provide the 'minimum core' of socio-economic rights under the United Nations Covenant on Economic, Social and Cultural Rights[35].

The Grootboom judgment is another foundational ruling by the Constitutional Court. It made clear to the Government that in order to uphold the dignity, equality and freedom of those most desperate in society, the State's omission in this regard was a breach of its constitutional obligations[36].

These judgments, along with many others including the *Minister of Health v Treatment Action Campaign* and *Gumede v President of the Republic of South Africa*, have been instrumental in defining and broadening South Africa's constitutional state. These cases have allowed ordinary people to challenge government's failure to provide adequate services to which they are entitled in order to uphold their rights. The judgments have also helped to define the parameters in which government power must be exercised.

Further to the HSF's understanding of South Africa's constitutional order has been our ongoing participation in the process which saw the dissolution of the Directorate of Special Operations housed in the NPA and the creation of the Directorate for Priority Crimes Investigation, housed in the SAPS. The HSF's role as *amicus curiae* in the *Glenister Case*, which dealt with the transgression of

Deputy Chief Justice Dikgang Moseneke, Judge Kate O'Regan, Justice Edwin Cameron and Arthur Chaskalson former President of the Constitutional Court

power, is central to the HSF's understanding of the separation of powers and the defining characteristics of South Africa's Constitutional landscape.

While these judgments have certainly enriched the lives of many South Africans, often the failure to deliver has been borne at the implementation stage. The judiciary has become an easy target to blame for these failures. It must be stated clearly that the Courts cannot implement or deliver on those policies or services for which the State is responsible. Those functions reside with the Executive as they command the budgetary tools with which to do so.

The *Delivery of Justice Series* helped bring to the fore the erosion of the governance and accountability framework of South Africa's justice superstructure. Through a combination of poor management practices, political pressure, poor training, lack of resources and poor appointments to critical positions, the ability of South Africa's justice system to deliver justice is inhibited and undermined.

Some see the outcome of this 'blame game' resulting in a contestation developing between the government and the judiciary. They contend that the primary reason for the contestation at this level comes back to the idea of just administrative action which codifies the obligation on the State to act justly when carrying out its mandate. Often a challenge may be brought against the government on any number of issues that directly relate to just administrative action, as has been outlined above.

Most recently, in *DA v President of RSA and 3 other respondents* regarding the President's appointment of Adv. Simelane to head the NPA and the *Justice Alliance of South Africa (JASA) and Others v President of the Republic of South Africa and Others* regarding the President's extension of the Chief Justice's term of office, these matters have helped frame administrative interventions within the context of the rule of law. Indeed, they go to very core of just administrative action, in that they helped to define the powers of the President and entrench the culture of justification.

The challenge by some senior political figures to the role of the judiciary emanates from the misrepresentation of the constitutional framework. This can be seen as an attempt to undermine the legitimacy of the constitution to circumscribe the arbitrary exercise of power.

The objections raised by these political leaders in regard to these judgements and others are of a political nature and challenge the very conception of the constitutional state. What must be brought to the fore are the very serious systemic problems that face the justice system and which are predicated on the erosion of governance and accountability. If the constitutional and legal frameworks that promote governance and accountability are undermined, as some argue they have been, then the ability of the system to deliver justice will be compromised. At the centre of this dispute is the principle of just administrative action and a governing party battling to come to terms with the rigours attached to governing a modern constitutional state.

III. THE JUDICIARY AND THE RULE OF LAW

Judge Meyer Joffe

Judge O'Regan put it eloquently in her Memorial Lecture in 2011. "[J]udicial review cannot be seen as thwarting or frustrating the democratic arms of government – instead it must be seen as holding those who exercise public power accountable to the people"[37]. The government has a number of tools at its disposal to implement policy – including legislation, regulations, executive instructions, or the conduct of officials. The court does not prescribe which tools ought to be used, but only maintains that they comply with the Constitution[38]. "Disagreement with court decisions must not deter the courts from performing their constitutional mandate, and courts must carry out their constitutional role with integrity and with seriousness of purpose"[39].

Judge Joffe, in his 2010 Memorial Lecture, also made the point that the reason for existence of the judiciary is the maintenance of the rule of law in a free society. At the time Judge Joffe was the Director of the South African Judicial Education Institute which had the daunting task of establishing, developing, maintaining and providing judicial education and training for judicial officers so that the quality and efficiency of services provided in the administration of justice in South Africa could be enhanced. The importance of getting this right would help ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts in South Africa[40].

One of the key points made by Judge Joffe related to the powers conferred on South African courts by the Constitution. In effect, the Judiciary has the power to determine the constitutionality of the product of the Legislature and the exercise of power by the Executive. However, it is not only the Constitutional Court that has this power: South Africa's High Courts also possess this power, albeit an order of constitutional invalidity made by a High Court must be confirmed by the Constitutional Court in order for it to have force and effect[41].

The powers conferred on South Africa's courts have allowed people to challenge poor legislation or government action where there is a case to be made for the abuse of power or the abuse of rights. The positive effect of challenges of this nature has been to define more clearly the parameters of South Africa's constitutional dispensation. However, some of these challenges have been met with scepticism and opposition by those in power.

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33 Braude, C., *Justice, Forgiveness and a Culture of Impunity*, published in *Focus* 55, November 2009
34 Reichmann, A., *Fixing the Past: Constitutional Challenges*, published in *Focus* 57, May 2010
35 *Ibid*
36 *Ibid*
37 Judge Kate O'Regan, Helen Suzman Memorial Lecture 2011 – *Reflections on the role and work of the Constitutional Court*, 22 November 2011
38 *Ibid*
39 *Ibid*
40 Judge Meyer Joffe, Helen Suzman Memorial Lecture 2010 – *Promoting the Constitution through Judicial Excellence*, 17 November 2010
41 *Ibid*

IV. THE EXECUTIVE REVIEW OF THE COURTS

From as early as 2008, some senior ANC members have accused the Judiciary of being part of what Gwede Mantashe termed "counter-revolutionary forces"[42]. Gaining pace after the election of Jacob Zuma to the Presidency, other senior ANC and Government officials have levelled accusations and scorn on the role of senior judges and the judiciary as the final arbiters on constitutional matters. These include later statements made by Gwede Mantashe[43], Deputy Minister Ramatlhodi[44], Cabinet Minister Blade Nzimande[45] and the President himself[46]. It is difficult not to interpret these statements as an indicator of a concerted effort by some senior members of the government, and the governing party, to undermine the legitimacy of the judiciary and, therefore, the Constitution. The judicial review, when it was initially announced, seemed to support this view. However, when the terms of reference were released and the call for tenders went out, the scope of the review seems to have been watered down. The question still remains though as to what right the Executive has to undertake a review of the Judiciary's decisions.

Judge O'Regan defended the right of citizens and organisations to challenge government policy in the courts if they believed their rights were being infringed. This state of affairs is a normal part of the functioning of a constitutional order.

The argument presented is that the current constitutional order has emptied the state of its power to formulate policy choices. This argument suggests that, based on a majority mandate achieved at the polls, the Executive must be given the freedom to formulate policy. The underlying message is that the Executive is unhappy with court challenges to its policy direction.

What is important to note here is that where policy is alleged to conflict with the constitution, then civil actors have a right to challenge that policy through the courts. Judge O'Regan defended the right of citizens and organisations to challenge government policy in the courts if they believed their rights were being infringed. This state of affairs is a normal part of the functioning of a constitutional order. As Sir Jeffrey Jowell pointed out – 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[47].

However, even if one assumes the best of motives – that the review is an attempt genuinely to review the progress to date of the two courts – two questions arise:

- Is it appropriate for the executive to institute such an inquiry?
- Does it not constitute a breach of the separation of powers?

The answer will depend not only on the motives of the review but also upon its content[48].

It is perfectly appropriate for the government, indeed any government, to assess the effectiveness of the courts' organisation and management in order to determine:

- Whether they are acting sufficiently quickly;
- How clogged the docket may be;
- Whether individuals are provided with reasonable access to the courts;
- Whether they are employing their resources efficiently;
- Whether 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?

Sir Jeffrey Jowell maintains that questions of this nature are appropriate for government to answer because it is government that can decide whether or not to provide the resources or the expertise to remedy any deficiencies in those organisational and managerial matters.

Thus to carry out an exercise in determining implementation standards of the courts' decisions would not be amiss for the Executive to conduct. This would help determine whether

they have been effective and the extent to which they can 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 which has jurisdiction over human rights matters for Europe[49].

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:

a "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,
b 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
c 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[50]."

Sir Jeffrey Jowell maintains that the probing of these questions is perfectly legitimate for any academic or NGO or any other individual, but not for 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 courts are correct. The Executive 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?[51]

Given the sequence of comments that have been made, starting with Gwede Mantashe in 2008, it is difficult not to interpret the review of the judiciary in a sinister light. Those in power who have a constitutional obligation to protect the judiciary and uphold the Constitution remain quiet while the threats levelled against the judiciary have grown into what can only be seen as a concerted effort to undermine these foundational pillars of South Africa's constitutional dispensation.

Judge O'Regan and Judge Joffe in their Memorial Lectures have elucidated the importance of an independent judiciary in order to maintain and uphold the rule of law. Sir Jeffrey Jowell touched on the accountability and appointment of judges and made an argument for why the executive should not be undertaking a review of the judiciary. Amanda Reichmann has sketched out South Africa's constitutional jurisprudence which highlights the great achievements of South Africa's constitutional state in adhering to, and promoting, human rights. The case against a review taking place as it is currently constructed is a powerful one. The Executive has failed to make a compelling case for why the review should take place.

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42 Gwede interview M&G July 4 2008 http://www.mg.co.za/article/2008-07-04-anc-boss-accuses-judges-of-conspiracy-against-zuma/
43 Mantashe Aug 18 2011 "Judges moving into politics" http://www.sowetanlive.co.za/news/2011/08/18/judges-moving-into-politics
44 Ramatlhodi 1 September 2011 http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions
45 Blade 18 Dec 2011 http://www.news24.com/SouthAfrica/Politics/Nzimande-slams-judicial-dictatorship-20111217-2
46 Zuma 12 Feb interview http://www.businesslive.co.za/southafrica/2012/02/13/zuma-wants-concourt-power-reviewed-report (original link broken)
47 Sir Jeffrey Jowell QC, third Helen Suzman Foundation Justice Symposium – The Delivery of Justice: The Appointment and Accountability of Judges, 17 May 2012
48 Ibid
49 Ibid
50 See DOJCD, "Terms of Reference 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", [accessed at] http://www.justice.gov.za/m_statements/2012/20120326_m_transformation-tor.pdf
51 Sir Jeffrey Jowell QC, third Helen Suzman Foundation Justice Symposium – The Delivery of Justice: The Appointment and Accountability of Judges, 17 May 2012.

V. CONCLUSION

Former Chief Justice Pius Langa

The Delivery of Justice Series was an attempt to examine three general areas of South Africa's justice system in order to identify some of the challenges being faced in each sphere and to highlight some of the successes. Post-democratic South Africa inherited a brutal system of regulation, hierarchy and inefficiency. The goal of the first democratic government was to transform this system of brutality into one where the Rule of Law and the Bill of Rights took centre stage. As Former Chief Justice Langa reminded us the conception of the Constitution was predicated on the Freedom Charter and thus finds its roots in the Liberation Struggle[52].

As Former Chief Justice Langa reminded us the conception of the Constitution was predicated on the Freedom Charter and thus finds its roots in the Liberation Struggle.

There are some extraordinary things happening throughout the justice system initiated by people and organisations determined to see justice delivered. However, some of the regulatory framework and support systems which would enhance the ability of people to access the justice system are woefully absent. Instead of diagnosing the structural problems and determining policy interventions aimed at enhancing the efficiency of the system to operate effectively, the independence of the system is undermined by ideological disputes which have emanated from the political terrain.

An independent judiciary is a cornerstone of South Africa's constitutional dispensation. The importance of remaining independent is because of the powers of review granted to the judicial branch of government. It is the judiciary that must, when a dispute is lodged, determine the outcome of that dispute according to the Constitution and the Rule of Law. It thus possesses the power to strike down that legislation or government policy which is not in line with the Constitution. However, the judiciary can only act when a case is brought, and then it can only judge on the facts; it cannot substitute its opinion for government policy. Therefore, its power is balanced against the powers of the remaining two branches of government.

Judge O'Regan said this in her 2011 Memorial Lecture as did Sir Jeffrey Jowell at the Third Justice Symposium. It is vital to read these lectures against the constitutional and legal landscape sketched out by Reichmann, Braude and Rajak in their pieces in *Focus*. The Constitution and the Constitutional Court are not inhibiting South Africa. The Constitutional Court in its rulings has enriched South Africa's jurisprudence around public interest law and socio-economic rights. This is why the thought of the Executive attempting to review the higher courts is regarded with such cynicism.

Already the judiciary finds itself under great pressure to yield to popular power and the threat of packing the courts with party pliant judges is on the horizon given the politicised nature of the Judicial Services Commission (JSC). Reforms in the way judges are appointed must seek to streamline the JSC and de-politicise its functioning. Any reform programme in this regard will also adequately deal with the issue of transformation and broaden the definition and scope of

V. CONCLUSION

Judge Kate O'Regan and Justice Zak Yacoob

transformation as a deciding factor, possibly in line with comments made by Carmel Rickard where she argued that transformation in South Africa is still defined too narrowly on race and gender grounds[53].

As urgent, are the operational issues within the criminal justice system. A poorly trained police service, which has had two National Commissioners removed from office, is unable to successfully carry out its mandate. The attempt to re-militarise the police may have had a small impact in some crime categories but has also brought with it an increase in the reports of police abuse and brutality. The National Prosecuting Authority has also had its share of criticism in how it handles itself and the carrying out of its functions.

Moreover, Correctional Services is battling to effectively deal with the prison population which includes remand detainees. In addition, the ability of Correctional Services to rehabilitate its prisoners has not met with success, and corruption seems to be endemic.

The fact that across the entire criminal justice supply chain there are systemic issues which have not been adequately diagnosed or dealt with raises serious concerns for the ability of the system to operate as it is envisaged.

Finally, we re-iterate that the Constitution is there to provide a framework of engagement and the courts are available to people who wish to challenge policies they feel undermine certain of their rights. An Executive review of the higher courts is unnecessary and no doubt masks an ulterior motive. If there must be a review it should rather focus on the implementation of court decisions by those who are politically responsible for implementation.

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[52] Former Chief Justice, Pius Langa in response to Sir Jeffrey Jowell's address at the third Helen Suzman Foundation Symposium – *The Delivery of Justice: The Appointment and Accountability of Judges* 17 May 2012.

[53] Carmel Rickard, third Helen Suzman Foundation Symposium – *The Delivery of Justice: The Appointment and Accountability of Judges* 17 May 2012.

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