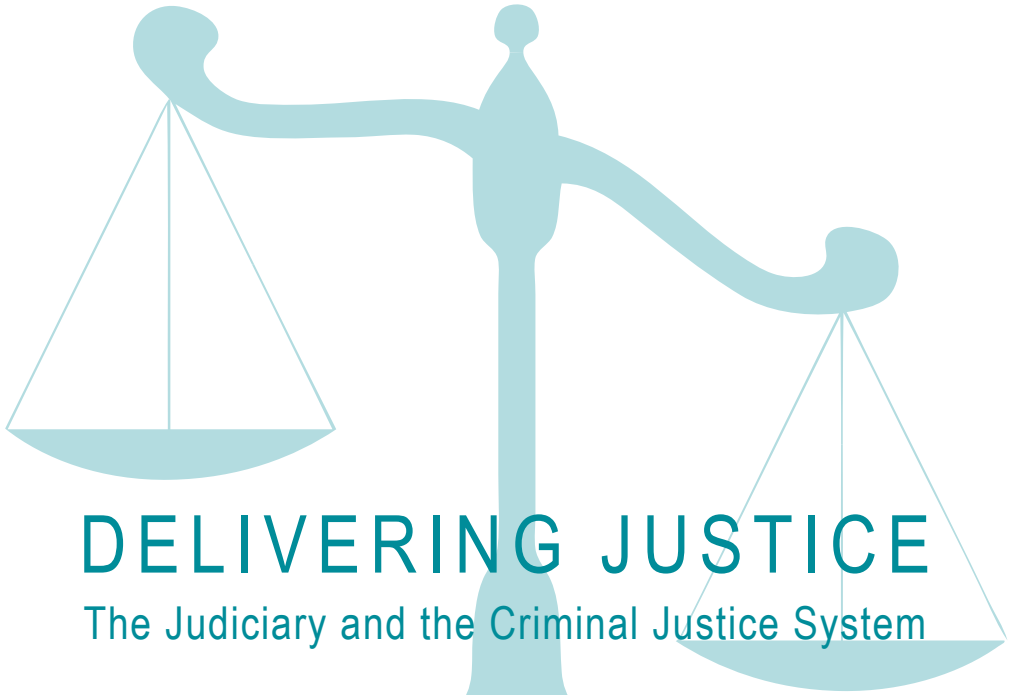


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DELIVERING JUSTICE

The Judiciary and the Criminal Justice System

SYMPOSIUM SERIES
PART TWO

dedication **justice** honesty
honour courage public service
freedom

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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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Profiles



Adv Menzi Simelane

Advocate Menzi Simelane was appointed as the National Director of Public Prosecutions (NDPP), in the National Prosecuting Authority (NPA), by the President with effect from 1 December 2009. In June 2005, he was appointed Director-General of the Department of Justice and Constitutional Development, a position he held until the end of September 2009 before moving to the NPA as Deputy National Director of Public Prosecutions.



Judge Azhar Cachalia

Azhar Cachalia is currently a Judge of Appeal. Azhar was a founding member of the United Democratic Front in 1983 (a coalition of anti-Apartheid organisations) and has served on various community-based organizations throughout his life. In 1996 he joined the Government as Secretary for Safety & Security and was involved in the drafting of the Police Services Act. In 1999 he returned to legal practice and in 2001 accepted an appointment to the bench of the High Court. From 2005 to 2006 he was an Acting Judge of Appeal and was confirmed as a Judge of Appeal in September 2006.



Judge Thami Makhanya

Judge Thami Makhanya practised as an advocate at the Johannesburg Bar between 1989 and 1999. He was appointed as a High Court Judge in November 1999 and presently serves on various judicial committees at the Witwatersrand Local Division, including the education committee. In 2004 he acted as judge in the Namibian High Court.



Prof Stephen Tuson

Stephen Tuson is an adjunct professor at the Wits School of Law. He has taught Criminal Law and Criminal Procedure, and is a practicing attorney, currently working in the Family Law Clinic at the Wits Law Clinic. He has spent many years in the magistrate's court, appearing as defence counsel in criminal matters, and has acted as a Public Defender at the Jeppe Magistrate's court for a number of years.



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 and Development Management at Wits University. He was the founding Managing Director of Strauss & Co.

Executive Summary

South Africa has a crime problem! However, the integrated system which has the responsibility of dealing with crime is also seemingly wrought with problems of its own. These problems constrain the system's ability to prevent and combat crime effectively in South Africa. Questions abound in editorials, on radio shows and around dinner tables on just what is being done to address these problems.

The Helen Suzman Foundation organises and hosts public fora to discuss serious issues affecting South Africans. The Foundation's second Symposium on Justice was held on 28 October. The focus was on the Criminal Justice System. Advocate Menzi Simelane (National Director of Public Prosecutions), Judge Azhar Cachalia (Judge of Appeal), Judge Thami Makhanya (Judge of the High Court) and Professor Stephen Tuson (Wits University) addressed a large gathering in Johannesburg.

ADV SIMELANE stated from the outset 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. The judiciary administers the processes of judicial functions and these processes in turn contribute to the running of the entire system. If these discrete processes do not

If these discrete processes do not perform properly, the system suffers, as when, for example, the police or the prosecutors do not carry out their functions properly.

perform properly, the system suffers, as when, for example, the police or the prosecutors do not carry out their functions properly. Among the constraints which Adv. Simelane pointed out as severely impacting on the criminal justice system, were the sheer number of cases reported to the police. He stated categorically that no amount of extra resources would bring this number down. At the root of the problem 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. Adv. Simelane stressed that crime needed to be de-politicised, as it affected everybody, regardless of political affiliation, race or class.

Given his previous role as Secretary for Safety and Security, **JUDGE CACHALIA** of the Supreme Court of Appeal, focused his deliberations on Policing in particular. He had been responsible for the redefining of the role 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. His primary concern was with the re-militarization of the police under the new government, which he labelled as regressive. Judge Cachalia argued that the assumptions for this move were not only wrong but potentially dangerous. This move goes against the trend in modern policing all over the world. He suggested that the major problem facing the police is inadequate training. Military titles will not overcome this problem, but may actually compound it, given that the combination of poor skills and arms is potentially very dangerous. In this situation police violence may actually escalate when supported by the incendiary statements made by those who exercise political responsibility for policing. Judge Cachalia was also disturbed by



perceptions that the police and prosecuting authority are mere instruments of the governing party, or factions of that party. He argued that serious action was needed to counter this view. The political deployment of individuals who lacked the requisite skills and experience to perform these tasks was crippling the effectiveness of the system to be responsive to the citizenry. He concluded that a number of issues also needed to be addressed and, in particular, sentencing policy, as it compounded the problem of overcrowded prisons and rehabilitation.

JUDGE THAMI MAKHANYA argued that, 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. Judge Makhanya highlighted the important role the judiciary plays in maintaining the principle of legality. Without this, the foundations for liberty do not exist. He proffered a number of key interventions to enhance the effectiveness of the criminal justice system. Key among these was 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 had to be applied consistently and equally to all citizens, regardless of position or authority. Only then would confidence in the criminal justice system be inspired.

A call for accountability across the entire system was made for by **PROF STEPHEN TUSON** of Wits University. He argued that the core reason for the breakdown in the effectiveness of the system was due to the erosion of accountability across all departments. Poor detective work which resulted in failed prosecutions was not dealt with. Poor work done by any part of the system resulted in postponement of cases. This meant that the system became clogged and could not function as it is supposed to. Yet, nothing happened to those who are responsible for the delays or the poor work. Tuson also argued that 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 accountable those people who simply do not adequately prepare for court hearings.

While there was a general consensus around the issues plaguing the system, there needs to be much more focused dialogue on strategic interventions which will enhance the system. Adv Simelane pointed out the World Cup as an instance when all South Africans, including those working in the criminal justice system, were united behind one cause, the successful hosting of the World Cup. It is time South Africans became united behind the fight against crime, as it affects us all equally.

Opening & Welcome

Mr Francis Antonie

Good evening, ladies and gentlemen. On behalf of the Helen Suzman Foundation and our partner, the Open Society Foundation for South Africa, I would like to welcome you all to the second symposium on Delivering Justice. Helen Suzman was passionate about public service, and the guiding principle that informed Helen's life's work, an unwavering respect for human rights, underpins the work of the Foundation. Our research focuses principally on state institutions and delivery as well as the relations between state and civil society. Justice is one of these research areas.

This is the second in a series of three symposia which focus on practical aspects of the justice system in South Africa. These seminars pick up on some of the themes explored in a recent issue of Focus, the Foundation's journal that explored images of justice.

The first symposium on justice dealt with civil justice and focused on civil litigation. It provided a framework by which reform measures could significantly enhance access to civil justice. We were fortunate on that occasion to have a keynote address delivered by Judge Murray Kellam of Australia who outlined the various reforms which have taken place in Australia. These reforms helped to structure reform programmes in other jurisdictions; they found their most comprehensive impact in the United Kingdom with the introduction of the Woolf reforms.

This second symposium seeks to explore and inform discussions around the enhancement of criminal justice in South Africa. From a comparative perspective, South Africa has high levels of crime, whether measured by police recorded crimes or based on citizens' experience with crime.

Understandably, citizens are not interested in departmental boundaries and definitions and simply want to see results. This, in many ways, is the crux of what a Criminal Justice System must be able to deliver. One way of addressing these high crime levels is to implement strategic interventions aimed at enhancing the Criminal Justice System.

From the detection of crime, to the investigation of crime, to the prosecution of that crime and the subsequent incarceration of the offender, the South Africa criminal justice seems to be heavily overburdened and, apparently, according to some, in a state of some disarray. For the lay person it appears that a number of obstacles readily emerge when considering the state of the Criminal Justice System in South Africa.

Amongst these are inadequate training in essential and focused skills, the poor management of human and physical resources, including the failure at some level of line management accountability, possible potential political interference, as well as clearly defined boundaries between law enforcement and the judicial process.

Three questions emerge which I hope our team of panellists will consider addressing tonight.

- First, what are the major constraints facing the South African Criminal Justice System, and how can they be overcome in order to achieve an integrated and effective crime fighting system?
- Secondly, how does the judiciary, including the magisterial district and regional courts, effectively administer the Criminal Justice System in the light of the pressures on it in order for it to uphold the rule of law, to afford individuals procedural fairness and balance the demands from government and communities for quicker, cheaper and more effective justice?



- And thirdly, what role can civil society partnerships and the private sector play in building an integrated network of safety and security?

I would like to introduce our panellists. They are all men. And it may appear that we believe that crime is essentially a male problem. Let me dispel this immediately and indicate on this occasion we were unfortunate in not being able to confirm the participation of a female jurist. I also have a strong sense of Helen Suzman somewhere observing that this is a male panel, but I trust she will excuse me on this occasion.

Our first speaker is Adv Menzi Simelane, who was appointed as the National Director of Public Prosecutions in the NPA by the President with effect from the 1st of December 2009. In June 2005, he was appointed Director General of the Department of Justice and Constitutional Development, a position he held until the end of September 2009 before moving to the NPA as Deputy National Director of Public Prosecutions.

Our second speaker tonight will be Azhar Cachalia who is currently a Judge of Appeal. Azhar was a founding member of the United Democratic Front in 1983, which was a broad coalition of anti-apartheid organisations. He has served in various community-based organisations throughout his life. In 1996 he joined the government as Secretary for Safety and Security and was involved in the drafting of the Police Services Act. In 1999, he returned to legal practice and, in 2001, accepted an appointment to the Bench of the High Court. From 2005 he's been a Judge of Appeal.

Our third speaker is Judge Thami Makhanya who practised as an advocate at the Johannesburg Bar between 1989 and 1999. He was appointed a High Court judge in November 1999 and presently serves in various judicial committees of the Witwatersrand Local Division, including the Education Committee. In 2004 he acted as a judge in the Namibian High Court.

Our last speaker is Steve Tuson. He is an adjunct professor at the Wits School of Law. He has taught criminal law and criminal procedure and is a practising attorney currently working in the Family Law Clinic at the Wits Law Clinic. He spent many years in magistrates' courts appearing as defence counsel in criminal matters and has acted as public defender at the Jeppe Magistrate's Court for a number of years.

I have proposed to our speakers that they each speak for between 10 and 15 minutes. Thereafter I'd like to open the discussion to the floor. I'd like to call on Adv Simelane to begin our discussion.

The Judiciary and the Criminal Justice System

Thank you very much, Mr Antonie, for the kind introduction and the invitation to come and share views on the topics and on the questions that have been proposed for discussion. I have speaking notes to which I will speak and I will try and cover issues that relate to each of the questions but overall I will talk to the issues at hand.

When I looked at the invitation and looked at the issues and the questions, I could not help noticing the fact that it's almost like déjà vu, in that, having worked in government for many years, these questions have been asked almost every year, over and over again. One cannot help worrying about the fact that we seem to be discussing the same things over and over again and we do not seem to be making any headway or progress.

I started to think about whether it is because nothing is being done or nothing appropriate or important enough is being done to deal with the issues. Or are we in a position where we are so desperate that we sometimes do not notice some of the significant progress that has been made, to the point that we keep rehashing the same things over and over again?

I saw the questions and the issues on the invitation and I wondered whether things are really that bad or whether it is just a function of who we are as people, that we tend to want to deal with things until such a time that we are absolutely certain that things have been resolved. I did not find an absolute answer to that question but I thought that nonetheless, discourse is good.

It is a good thing that we are talking about these things as opposed to not talking about them. On the question of whether the Judiciary effectively administers the Criminal Justice System, one of the things that I considered and I looked at is in fact whether the question is correct. Does the Judiciary, in fact, administer the Criminal Justice System?

One of the challenges that we sometimes face when we deal with these issues is not to put them in their proper context, or sometimes we use terminology in a way that it is not necessarily appropriate. So in looking at this question, I asked another question and that is, can it be said that in carrying out judicial functions, the judiciary is engaging in the administration of the Criminal Justice System?

As you know there are three levels of government. There is the Executive, the Judiciary and the Legislature. I always believed that the Executive is enjoined to properly administer the Criminal Justice System, in the sense that the proper administration of justice is the responsibility of the Executive.

The Judiciary is supposed to carry out judicial functions and there is a distinction between the two. We should properly draw the distinction between the two so as not to conflate their responsibilities.

If in one area we feel that there is no proper exercise of discretion or proper carrying out of responsibilities, then we should not shift those responsibilities to another area. We should rather fix that particular environment. When I looked at the question at hand, I thought to myself, that is probably not



I asked another question and that is, can it be said that in carrying out judicial functions, the judiciary is engaging in the administration of the Criminal Justice System?

necessarily an accurate representation of the issue.

The Judiciary, in my view, does not engage in the administration of the Criminal Justice System. The carrying out of judicial functions contributes to the administration of the Criminal Justice System. Those are just my views, I am sure other people may have a different view. The Judiciary, in my view, administers processes dealing with the carrying out of judicial functions.

Those processes contribute to the administration of the Criminal Justice System, so in that sense, they are very important. If they are carried out effectively, they enhance the proper administration of justice and they enhance the administration

of the Criminal Justice System. I will give you an example.

There are a number of departments that are responsible for and are involved in the administration of the Criminal Justice System. These include, the Department of Justice and Constitutional Development through its officials in the courts, the clerks, the registrars, its prosecutors and other officials; the Police through its police officials, Social Development through its social workers and others, Correctional Services through its warders. Those departments should correctly administer the Criminal Justice System.

And what they do, and how they do it, has an impact on society. The Judiciary

Advocate Menzi Simelane

actually performs a complementary role. The exercise of judicial discretion can either enhance the work of those departments or it can undo it and contribute to further maladministration. So it is important, therefore, to look at each department for what that department represents and look at whether or not work is being done properly in each department.

If you look at the motor industry, there is a manufacturing aspect, there is the retail aspect, there is the components aspect, and there are all sorts of aspects which all complement the total value chain. If any one of these does not function very well it has a spill-over effect. The same logic applies to the Criminal Justice System.

So irrespective of the crime that has been committed, the first point of call is that the law dictates that a person shall be entitled to be released. Not may be entitled but rather shall be entitled. The law is therefore, if the interest of justice so permits, quite peremptory.

The example I want to give you is the one of bail. Bail is probably the most common thing that we all come across, because bail involves a number of important processes and affects us in many ways and it is a topic which we discuss often in the country.

Section 60 of the Criminal Procedure Act provides as follows:

“That an accused who is in custody in respect of an offence *shall* be entitled to be released at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interest of justice so permits.”

Quite clearly there are parts that we can break down in that section. It says “shall be entitled to be released”. So the first point of call is that if you are arrested for any offence, you are actually entitled to be released right there and then, at any stage before you are actually convicted – if the court is satisfied that the interest of justice so permits.

So irrespective of the crime that has been committed, the first point of call is that the law dictates that a person shall be entitled to be released. Not *may* be entitled but rather *shall* be entitled. The law is therefore, if the interest of justice so permits, quite peremptory. So the question is then what is the interest of justice?

There is the Constitution which is the first point of reference. That is the supreme law of the country which, in Section 12 provides for the right to freedom and security of person. The Constitution ensures your right to freedom. If you are arrested for an offence, it's always against the backdrop of the fact that the Constitution demands that you have a right to freedom. So you are able to claim your right to freedom.

Judicial officers immediately get faced with a challenge when arresting a person who has committed a crime or is alleged to have committed a crime, in that, that person has a constitutional right to freedom – that person shall be entitled to be released. How do you reconcile this with the interest of justice?

Judicial officers must make a proper evaluation of the facts of that case and the law at hand. Also, Schedules 5 and 6 of the Criminal Procedure Act provides for offences that fall within either of those or both of those particular schedules.

In Schedule 5, if somebody has committed any of the crimes in Schedule 5, that

person must be held in custody unless that person can adduce evidence that shows that the public interest or the interest of justice requires that that person be released on bail. In other words, if somebody has committed a murder, for example, and that person is brought before court, strictly speaking, that person should not be released until that person has adduced evidence that shows that the public interest justifies or requires that that person be released.

With respect to Schedule 6, if you commit any of those crimes, you are required to be held in custody until such time that as an accused, you must show that there are exceptional circumstances that require for you to be released. If you look at those provisions they reflect, in my view, or constitute a reasonable limitation to your right to liberty that is provided for in the Constitution.

... why is it that we have many people in this country who have committed serious crimes, multiple murders, multiple robberies, who still get bail over and over again, even where there is an argument by the prosecution that bail not be granted under those circumstances?

The Legislature quite easily looked at the constitutional framework and considered that yes, while there is a right to liberty, there are, however, circumstances that sometimes will justify that your right to liberty be limited. The Constitution allows for such limitation of rights provided there is reasonable and sufficient jurisprudence that give us that indication.

So with that backdrop, again in the context

of bail, why is it that we have many people in this country who have committed serious crimes, multiple murders, multiple robberies, who still get bail over and over again, even where there is an argument by the prosecution that bail not be granted under those circumstances? How do we reconcile the law as it is, and the facts that we have at hand?

The exercise of carrying out a judicial function under those circumstances can have an impact in the administration of the Criminal Justice System. In the case of the prosecution, we constantly have to argue in respect of one or two individuals that they should be held in custody because they've committed an offence or offences that fall within Schedule 5 and Schedule 6, yet they continue to get bail.

There are consequences of this, because when offenders get released, we have to worry about them re-offending. The point I am making, is that when one looks at this question one has to be mindful of the fact that there are many actors at play here, each with different responsibilities, but which responsibilities are quite complementary.

For me then, the impact and effectiveness of the Judiciary is felt when the manner in which judicial functions are carried out enhances the effectiveness of the administration of justice. The input departments must be put in a position where their processes must also respond to the needs of the Judiciary. Judges must also take control of their courts, as matters get postponed over and over again for a variety of reasons.

Often, disputing parties are not ready for court. I have seen cases that have been postponed 52 times because parties are not – for a number of reasons – ready. Questions have been asked as to what is

Advocate Menzi Simelane

the role of the judicial officer under those circumstances?

Clearly, we should not seek answers from the Judiciary only, as if the Judiciary has all the solutions to these problems. It can only do its best if the environment is sufficiently conducive and that requires other players who are involved in the system to come to the party.

What are the major constraints facing the South African system? What I would venture to say is that we must not lose sight of the history from which we come. It has only been 16 years since 1994, which is not a very long time and if you think about it correctly, the resources then or before then were always skewed. Most of the police resources – most of the best resources in the country were allocated towards a minority group of people.

Post 1994, those small resources had to be spread out and include everybody else. So there was a situation where the resources that the country had available had to be spread so thin, as there was now a wider pool of people that needed to have access to those resources. We should not then forget that there was a backlog that had to be attended to as part of the system.

If you look at issues of training, this morning alone, I was looking at a murder docket regarding a case of attempted murder.

The accused was released on R5 000 bail and while he was out on bail he then went on to kill one of the persons he had intended to kill in the first instance. He was then charged again with murder and possession of a weapon. As I was going through the docket I was struggling to read the police statement. I could not read it as a result of the language and the handwriting. I kept trying to strain my eyes to read what

... within the Criminal Justice System, between the police and the prosecution, I would venture to say that there is an equal need for increased training and education about how the system should work. We should not just point fingers at the police.

the police official was writing there, but it did not make sense. I asked somebody else to read it, but by the time I left the office this afternoon he had not made any sense of it either.

There is a huge gap as far as training is concerned and, again, we tend to always say it is the police but it is not only the police. I must tell you that within the Criminal Justice System, between the police and the prosecution, I would venture to say that there is an equal need for increased training and education about how the system should work. We should not just point fingers at the police.

Prosecutors actually decide whether you get prosecuted or not. So if you have a bad prosecutor, people can actually be let off the hook.

There are many decisions you are unaware of, where the exercise of prosecutorial discretion was exercised very poorly.

I would like to give you the example of Section 204 regarding witnesses, which is both an enabling provision that is useful and very necessary. But it is also an equally dangerous provision in the wrong hands. Section 204 works basically along these lines: somebody should be charged after committing an offence, as there is a prima facie case against them.

However, because the state believes it does not have sufficient evidence on which it can succeed in a prosecution, it makes a decision regarding the case. The state looks at the available information and determines that one of the accused persons can actually give evidence against the others. The state then makes a call not to prosecute that individual on the condition that the individual testifies against the others. In other words, you make a deal with a criminal to say "we will not prosecute you provided you testify against some of your people". It is a necessary provision, and it works.

The danger is that the person then incriminates him or herself and tells the prosecution everything that he or she has done and then goes into the witness box and testifies against the others. The problem is that if that person does not tell the truth, you now cannot use the information that the person has given and you require fresh evidence to prosecute.

I am using this in the context of the Agliotti case to basically indicate to you how difficult the process of prosecution is. The people that actually committed the murder were given immunity and protected from prosecution. Now that Mr Agliotti has not received the immunity that he thought he was going to receive, or he was hoping to receive, he now has to be prosecuted using completely fresh evidence. Whilst we know everything that has been confessed by the others, we have to continue arguing the case and hope that we will be able to prove our case beyond a reasonable doubt.

When it comes to the Judicial system, it is not only physical resources that we are concerned with, it is also the availability of police cars, the availability of officials that work in the courts, and so forth. It also has a lot to do with the integrity of individuals

within the system. If some people within the system do not possess that integrity then we face a major problem.

What role can civil society and other private sector partnerships play in building an integrated framework? No matter how many resources we put into the system, if people continue to commit crime, we will never win. It is not always going to be how much money we can throw at the system. It has got to be about changing the mindset of people so that people stop committing crime. If you look at the statistics for the past three years, on average there have been just over a million cases reported to the police every year, so when we look at our statistics, we plan for the next financial year.

Of those million reported cases, how many do we actually prosecute in the courts? Between 300 000 and 340 000. It is a third that we are able to prosecute. Naturally, some of the cases that are reported to the police are falsely reported for a variety of reasons, whether to claim insurance, and so forth. But the trend remains the same.

Clearly, there is just far too much crime being committed, so we must ask ourselves, as a people in the Republic of South Africa, why do we commit so much crime? Some people suggest that it is because of poverty. That cannot always be correct. It cannot necessarily be correct because there are countries on the continent that are poorer than South Africa but do not have the same level of crime that we have. So it cannot necessarily be poverty.

There are people in this country living in abject poverty but who have never committed a crime. So why do some people commit crime and others not, when they are in exactly the same social

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Crime affects all of us, irrespective of which political party one may belong to, irrespective of which government department you belong to.

circumstances? Our discourse then has to look at those types of factors, which make us commit crime. Maybe it is the history of the country that has made us inherently violent. So we have to address these issues as opposed to simply putting R5 billion more, R20 billion more per annum into this system.

I must also emphasise that we should not politicise crime. The discourse regarding crime cannot be about which political party did this or which political party did not do that. Crime affects all of us, irrespective of which political party one may belong to, irrespective of which government department you belong to.

Many of us who work within the system have been victims of crime and the system has not worked for us. It may be hard to believe, but even I struggle to get the system to work for me! You look at those things and you shudder to realise that, actually, you are not that influential – you are not that powerful – because the power rests with the person at the courts, at that particular point in time, who, under those circumstances, is the most powerful person because you need them to get certain forms filled out and signed by the relevant people. Even though you can try and make your phone calls from headquarters, if the necessary people do not feel like it, then you are not going to get your form signed.

It just shows that irrespective of who you are, if you are affected by crime, you are affected in exactly the same way as everybody else. Many people believe that the more influential you are, or the higher up you are in government, the more you are likely to get things to go your way. I can tell you that if anybody tells you that, it is probably a lie; it really does not work that way.

There is also an issue regarding the way crime is reported. Crime cannot be reported in such a way that it suggests that some people are more affected by crime than others – that other people are more important victims than others. A rape victim everywhere or anywhere is like any rape victim anywhere and everywhere. A robbery victim is like any other robbery victim. People respond and are affected in exactly the same way. We require responsible reporting.

There is a great role that the media can play in ensuring that we all see crime and we respond to crime the same way. The positive stories regarding crime prevention may not be newsworthy stories but, in my view, these stories are more relevant and, thus, we should try and find a balance in our reporting to help us go forward in our fight against crime.

CHAIRPERSON:

Many thanks, Adv Simelane, for a frank, open discussion about some of the issues you're faced with, that we are faced with as a society.

I'm going to call on Azhar Cachalia to reflect on these questions. Thank you, Azhar.

Judge Azhar Cachalia

Judge Azhar Cachalia

I wish to thank the Foundation for organising this discussion on the Judiciary and the Criminal Justice System. In the short time available to me I thought it apposite to approach my task against the background of my own experiences with Criminal Justice Reform, first in the Department of Safety and Security, secondly, as a judge in a trial court and of appeal, and from the perspective of civil society where I have had some involvement through the Open Society Foundation and the Criminal Justice and Crime Prevention Centre. I currently serve on the Board of the Centre as its Chairman.

Let me start with policing. Here it would be useful to take a step back very briefly. The task given to me by the government in 1996, when I was appointed Secretary for Safety and Security, was to establish a secretariat for safety and security which would be responsible for developing policing policy, co-ordinate initiatives across government departments to ensure policy integration, and to establish an Independent Complaints Directorate whose function would be to investigate complaints from the public against the police in relation to police misconduct.

Among the key policy shifts was a move away from the militarised structure that characterised apartheid policing. There were two reasons for this: First, it was neither efficient nor effective because it was not responsive to the community's security concerns; and secondly, because it bred an authoritarian culture which gave rise to the police mistreating the community. Related to this was pressure to make the institution demographically more representative. Henceforth our mandate was to focus on safety and security, not law and order. Thus police ranks were changed from military ones to civilian ones, and community policing was introduced. A national police commissioner, who was an experienced



police officer, was appointed. An Executive Director was appointed to the newly created Independent Complaints Directorate. There would also be renewed emphasis on improving the skills of the detective services so that detection and investigation of crime improved.

In this regard - and we were not starting with a clean slate - we thought it appropriate to build on some of the very good detective skills that we already had, and benchmark these against detective practice and techniques in other democratic societies. New public order policing techniques were introduced to oversee public demonstrations rather than break them up.

But we realised that this would not be enough because it was the Criminal Justice System as a whole and not just the police that needed reform. We therefore worked with the departments of Justice and Correctional Services to remove

Judge Azhar Cachalia

blockages across these departments. This involved analysing why there were delays in processing cases through the system.

These results showed that there were too many awaiting trial prisoners, most of whom should not have been denied bail. The Department of Justice had an antiquated information management system. A decision was therefore made to remove these obstacles by introducing a project which we called the Integrated Justice System. I understand it is a system which is still being worked on, 15 years later.

What is required is a set of preliminary forms of justice process that need to be gone through, such as mediation, conciliation, early neutral evaluation and other alternative procedures.

And because there was a great clamour against a rising tide of crime, the bail laws were tightened and minimum sentence legislation introduced for certain categories of serious offences. And to give effect to the Constitutional requirement for an independent professional prosecuting service, the office of the National Director of Public Prosecutions was created.

There was one other very important policy development. This was the adoption of the National Crime Prevention Strategy with its emphasis on crime prevention rather than on crime combating. Its need arose from the realisation that the police could not, by themselves, tackle the causes of crime – a fact only too well known among crime specialists.

A very well known British criminologist once emphasised the point by saying that trying to

get the police to solve crime is like treating a brain tumour with a disprin. There are many examples of how crime prevention works but I will give one quick example. We found that when we patrolled in and around the proximity of schools, there was a very high instance of crime even during school hours. We found that many of the learners were just not attending school. There were no security fences around the perimeter of the school and often the teachers and the principals were not performing their duties properly. Now that typically is not a policing issue. That should be a Department of Education issue. Are your teachers managing, is your principal managing his or her school, are there enough security arrangements around the perimeter of the school? Those are the sorts of questions that are appropriate for a Department of Education or a community policing forum to address rather than the Police.

In broad brush strokes, this was the approach that was adopted more than a decade ago. I am not familiar with all the new initiatives of the current government and so my contribution on this aspect can therefore only be impressionistic. I will concentrate on some of the problem areas which I think government can improve on, some of which Adv. Simelane has already alluded to.

First, in the policing area, the re-militarisation of the police, I think, is a regressive step. It is premised on the assumption that this will inspire the police to be more disciplined and allow them to regain the confidence of the community. This is just nonsense: these assumptions are not only wrong but dangerous, and they go against the trend in modern policing all over the world.

As Adv Simelane has indicated, significant numbers of the police have inadequate skills, are armed and therefore dangerous. Giving them a military rank is only likely



to compound the problem. It is very clear from what we see in the courts that many cases are poorly investigated. Statements are taken from suspects and witnesses by police officers who are functionally illiterate. How do you solve this problem by giving the police military titles? The numbers of deaths resulting from police action, and cases that point to police frequently resorting to violence, and even, I might add, torture, will increase not decrease with a militarised policing establishment supported, of course, by incendiary statements made by those who exercise political responsibility for the policing function.

Steps must also be taken to counter the very serious perception that the police and prosecuting authority are mere instruments of the governing party or factions of the party, and those decisions, regarding the investigation and prosecution of powerful individuals in this society, are influenced by political considerations. Some of these cases are making their way through the courts and

it is better that I say no more about them. But it does seem to me that the assertion, by some, that appointments are being made to senior positions in some of these departments of persons who neither have the experience nor skill to perform these difficult tasks, is not without merit.

Court delays in prosecuting criminal cases are just unacceptable. I was going to give a few examples of that but I think, given the time constraints, the time may better be used in discussion later on.

Let me conclude by dealing with one other problem and that is the introduction of an increasingly punitive regime. I do not think that is the answer either. People who engage in serious criminality do so because they calculate that they will not be arrested or successfully prosecuted, not because they fear long sentences – a point our Constitutional Court has emphasised.

When the minimum sentencing regime was introduced more than a decade ago, it was meant to be a short-term intervention to arrest what was then perceived to be a situation where crime was out of control. When it was first introduced it was introduced for one year; then it was increased for another two years; then it was increased for another two years, and now it is automatically being rubber stamped.

Since then, the courts have been dishing out disproportionately harsh sentences which prisoners, serve often in appallingly overcrowded prisons, with little chance of rehabilitation. I do not think that this is what was envisaged, nor do I think incidentally that this model is sustainable. You cannot lock up increasing numbers of people. It is not cost effective, but more than anything else, you are simply delaying solving the problem. So I think the whole question of sentencing policy is an area that unfortunately has to be re-looked at again.

Judge Thami Makhanya

Judge Thami Makhanya

Thank you for inviting me to participate in this discussion. I am not sure if my contribution will be up to your expectations but I regard this as a privilege and I want all of us to doff our hats to the name and personality after whom this Foundation is named, Helen Suzman. To me she is a leading doyen when it comes to justice and I am sure that most of us would not be sitting here had it not been for the tireless efforts and struggles by people like her.

I will talk here as a judge more than anything else. I may not have the experience which my senior colleague here, Judge Cachalia has, and I am not coming from the experience of Adv Simelane.

The task of the Judiciary is to supervise or devise a balance between the powers of the Executive and the rights of the accused with the aim or purpose of making life bearable and acceptable to the person whilst at the same time allowing the Executive to control crime and keep crime at reasonably acceptable levels. The balance is important. If the state enjoys absolute powers, subjects would be living in a police state and under a tyranny with no rights.

If, on the other hand, the subjects enjoyed absolute rights, the Executive would be powerless in its endeavour to control crime and to operate effectively in the Criminal Justice System. Compromises are therefore required in this regulation. As the Royal Commission on policy report puts it:

“It is to the public good that the police should be strong and effective in preserving law and order and preventing crime; but it is equally to the public good that the police power should be controlled and confined so as not to interfere arbitrarily with personal freedom.”

I need to emphasise that the Criminal

Justice System seeks to incorporate and balance basically two fundamental values; crime control and due process values. Crime control value implies the repression of criminal conduct, and due process value implies, or is based on, the principle that the primary function or goal of a criminal system is not merely to secure a conviction and sentence, but to ensure that the outcome comes about as a result of due acknowledgement and observation of the individual's rights during pre-arrest investigation, pre-trial and post trial stages. Both crime control and due process values are in the interest of the community and therefore are not necessarily rival values.

In this connection, in the matter of *S v Cloete*, 1999 (2) SACR 137 at 150h, Davis J observed:

“The burden of the crime wave and the need for crime control weighs very heavily. It is wrong to conclude that an attempt to preserve the Constitution is necessarily a nod in the direction of criminals. The Constitution is not the cause of crime in this country. The court's task is to uphold the Constitution in such a manner that gives it its proper effect which I consider is to attempt to achieve some balance between models of crime control and due process.”

The question can be asked why it is important for the Judiciary to play this supervisory role. The importance emanates from the maintenance of the principle of legality under the rule of law.

The principle of legality entails a trial leading to a conviction where the state as represented by the prosecution observes and duly complies with the rules pertaining to criminal law, criminal procedure, evidence and the Constitution. Indeed the suspect may be deemed guilty in the public's subjective view but that does not

mean that he can be found to be legally guilty by a court of law. In a state under the rule of law, (*rechstaat*), only legal guilt counts. To declare an accused “convicted” in any other way, save as sketched hereinabove may amount to kangaroo or mob trials and vigilantism. Packer, in the “Limits of the Criminal Sanction” (at page 156 puts it as follows)

“In the liberal democratic state where rule of law prevails there is a general assumption that a degree of scrutiny and control must be exercised with respect to the activities of law enforcement officers, that the security and privacy of the individual may not be invaded at will. It is impossible to imagine a society in which even lip service is not paid to this assumption.

Nazi Germany approached but never quite reached this position. But no one in our society would maintain that any individual may be taken into custody at any time and held without any limitation of time during the process of investigating his possible commission of crimes or would argue that there should be no form of redress for violation of at least some standards for official investigative conduct.”

The importance of the courts in the maintenance of the principle of legality was expressed as follows in the report of the Royal Commission on the Police that I referred to above:

“In countries to which the term ‘police state’ is applied opprobriously, police power is controlled by the government; but they are so called not because the police are nationally organised but because the citizen cannot rely on the courts to protect him. Thus in such countries the foundations upon which liberty rests do not exist.”



Kellam J, who was referred to earlier by Mr Antonie, delivered a paper at the first Justice Symposium of the Helen Suzman Foundation and observed as follows regarding rule of law:

“Rule of law requires fair and just resolution of disputes. The process used to achieve a resolution must not only be fair (a level of playing field), it must be designed to produce a just result. Just result comes in two forms – right based and interest based. In either case, [and this is important], a just result does not mean perfect justice.”

There is an inescapable viewpoint that the Criminal Justice System is offender-orientated to the detriment of the rights and the interests of the victim and ordinary citizens who look to the courts for the protection from the acts of criminality. Indeed over a decade and more under the new Constitutional Dispensation, emphasis has been on human rights with concomitant limitations on police powers.

Judge Thami Makhanya

Properly investigated crimes give impetus to successful prosecution. There is no doubt that a better educated, equipped and co-ordinated police force is more effective in controlling crime.

This phenomenon has been acknowledged by our courts. Davis J in the matter of *S v Hoho* 1999 (2) SACR 159 (C) at page 186b observed:

"The achievement of a sustainable balance between crime control and due process might well require legislative reconsideration."

A former colleague, Judge van Dijkhorst, as well asked:

"The Criminal Justice System in jeopardy – Is the Constitution our bane?" See 1998 Consultus page 136

It is true that crime in our country has reached completely unacceptable levels. We need more strategic interventions to enhance the Criminal Justice System and successfully combat crime.

I propose a few solutions. The Executive must endeavour in this regard to upgrade skills of detectives in the detection and investigation of crime. Properly investigated crimes give impetus to successful prosecution. There is no doubt that a better educated, equipped and co-ordinated police force is more effective in controlling crime.

Bearing always in mind that crime prevention and reduction should be a starting point in the Criminal Justice System. Crime prevention begins with:

- citizens' willingness and respect for the

existing law and abiding by the letter of the law;

- effective policing: crime prevention depends more on effective policing than on severe punishment. Add more police officers and make them visible and responsible for street patrols and roadblocks. The officers' conduct and concern for individual citizens and basic decency is people's measure of the law's fairness and honesty;
- laws must be applied consistently and equally upon all citizens. This inspires confidence in the Criminal Justice System otherwise the unequal application of laws suggest favouritism, irrationality, arbitrariness and corruption. These tend to diminish the public's trust and confidence and lead ultimately to anarchy.

Crime prevention requires as well a programme of thorough social reforms in all our areas, especially areas of previously disadvantaged people. Such a programme would include improved housing, schools and recreation facilities and perhaps more job opportunities. This is where our business community would help a great deal.

I pause here to refer to an organisation, Business Against Crime, which has contributed a great deal to organising workshops – attended by judges – where some of these issues are raised. I think it is contributing a great deal to the improvement of the issues that are raised here.

In an endeavour as well to reduce crime, citizens can be educated or persuaded to take greater precautions against crime. For example, citizens can be taught how to protect their homes against housebreaking or burglary. The education can take place in community organised workshops.

Of course the Judiciary, on their part as well, to help stave off this tidal wave of crime can and, should and do exercise their

discretion by criticising, sanctioning and bringing to the attention of the authorities, in deserving cases, any ill preparation and shoddy work in the ranks of the police and the prosecution. Often, this coming from the Judiciary has great effect.

Further constraints and complaints

As far as I'm aware and in my experience, further known constraints interfering with delivery of justice have been numerous and various. I just mention a few, keeping in mind that some of these have been addressed.

- Our jails are overcrowded with awaiting trial prisoners.
- Lengthy delays in the resolution of cases where convicted accused are out on bail pending their appeals. Some of these delays have been known to extend over a year or more.
- In some cases there have been complaints of convicts' appeals having been dismissed but those convicts not turning themselves in to serve their sentences.
- Criminals who have slipped through the net of conviction because of weak presentation of state cases.
- Laxity in the observance of courts' starting time and courts not running normal hours.
- Suspects not being apprehended because of uninterested or understaffed police or shoddy police work.
- Matters postponed repeatedly causing witnesses to lose interest and therefore staying away.
- Prosecutors presenting state cases, who are inexperienced, underpaid and overworked.
- And that, because of all this, magistrates are disillusioned and leave the service;

Here are a few suggested solutions as a response to some of these constraints.

- A culture of justice delivery must be cultivated, evolved and developed. As Adv Simelane has said, it is very important that we engage ourselves as a community in a campaign that people should respect the laws of the country. By doing this, we will cover greater ground in solving some of these problems.
- Procedural observation of and respect for court time must be put in place.
- Courts must sit full hours. Cases must not be postponed for flimsy reasons. Those cases not yet ready for hearing must not be put on the roll.
- The guilty must be convicted without delay.
- The Judicial Service Commission and the government must appoint more judges. In my division, for example, I know that sometimes it turns out that ripe criminal cases often get postponed because there are no judges available to preside over the matter. We also depend excessively and sometimes even abnormally on acting judges to assist us and yet it should be the task of appointed judges to attend to the matters.

Finally I state that there are no easy solutions. But we cannot afford to fail. Working policies must be put in place. I thank you.

CHAIRPERSON:

Thank you for opening up the discussion even further. I also want to thank you for recalling and remembering Helen Suzman's extraordinary good work in the area of justice and human rights. You have reminded us again about the principle of legality and I thank you for your various policy and practical interventions which you suggested. I will now call on Prof. Stephen Tuson to give us his remarks. Thank you.

Professor Stephen Tuson

Prof Stephen Tuson

In this talk I'm going to try and deal briefly with how the Criminal Justice System works, and then set out what I think the problem is which, I think, is a lack of accountability. I'm going to give two positive case studies where I think magistrates and people have been innovative and made the system work better. And then I'm going to make a final recommendation, which is the introduction, into our Criminal Justice System, of elements of the inquisitorial system of justice and I'll explain why I make the recommendation.

Our Criminal Justice System can be likened to an engine with four separate parts. We have the police, and particularly the detective service. The detectives investigate criminal matters which have been reported by the public. They work them up for trial, they co-operate with the prosecution, and get the matter ready for court.

We then have the prosecutors who take the prepared, investigated case through the courts and prosecute the criminals, make them answer to their crimes. Then there is the court administration. We have clerks of the court, interpreters, orderlies, magistrates who are assigned to courts, and filing administration. All of this is an essential part of the Criminal Justice System.

Finally we have the defence counsel and various other role players, all parts of an integrated system. The main point about this is that these systems – these four separate systems – have to work together. If any one of these systems fails, the engine grinds to a halt.

An example: I was in Court 1 in Johannesburg recently and the interpreter didn't come to work. The entire court roll of cases, some 20 cases, was moved to Court 2. The poor magistrate in Court 2 now had his roll plus Court 1's roll. What did

he do? He postponed the entire two rolls because he couldn't get to his roll of cases.

This adversely affects new appearances, applications for bail, and the rights of individuals who have to go through this process. The end result is that, in two courts, instead of just one, no work is done for the day because the interpreter didn't pitch up. That's part of the administration problem and it adds to the backlogs. I can also point fingers at the attorneys who arrive late, some who don't even show, witnesses who are subpoenaed for 8.30 in the morning who only arrive at 11.00, magistrates who don't advise the administration that they are on leave. All of these things compound to adversely affect the functioning of the entire system.

The solution is simple: enforcement of accountability, follow up, discipline, and making sure people do their jobs. People are paid to do a job and to deliver. When they don't deliver they are not held to account. It is vital that this changes.

As I mentioned at the beginning, if any one of these parts of the system doesn't work, it results in the entire system grinding to a halt. Why is the filing not up to date? Why are the charge sheets from the clerk of the court not with the prosecutor in court? Why has the policeman – the detective – not brought his docket to court so that the prosecutor has the docket in order for him to prosecute the matter? Why aren't witnesses subpoenaed timeously? Why do witnesses not come to court on time? Why do attorneys arrive at 11.30? Why do magistrates take inordinately long tea breaks? These questions highlight the very serious problems throughout the entire criminal justice system in South Africa.



My point is – and this is my thesis – there is a total lack of accountability! What is the solution? The solution is simple: enforcement of accountability, follow up, discipline, and making sure people do their jobs. People are paid to do a job and to deliver. When they don't deliver they are not held to account. It is vital that this changes.

There are many actions for damages against the police and what happens? You and I, the taxpayer, are ordered to pay the damages for torture, for wrongful arrest, detention, for a failure of the system, while the individuals concerned are not held to account. Are they disciplined, are the police who tortured, who are identified, put before a disciplinary panel, are they asked to account for their behaviour? In many circumstances they are not. You and I pay and they carry on working.

I came across this quote from Judge Roelof

du Plessis in the North Gauteng court just a week ago. He was lambasting the officials involved in the arrest of a driver for a traffic offence and the refusal of the officials to grant him bail for a traffic offence. The defence were obliged to bring an afterhour's late bail application. The judge insisted that all involved come to his court and explain their behaviour. And this is what he said, reported in the Pretoria News:

"The time has come for courts to bring down the full wrath of the law on state officials who arrogantly breach constitutional imperatives by acting with impunity and are not taken to task by government."

This highlights my point about accountability. They are not taken to task mostly because of inability, unwillingness or political reasons. The judge added that the damages claims brought against the police do not seem to be a deterrence to this behaviour. In fact -

"The only party prejudiced as a result of damages claims based on unlawful arrest and detention is the taxpayer. South Africa is facing a tsunami of corruption, bribery, incompetence and malicious execution by public officials in the exercise of their duties and in breach of every other obligation. The only defence against the threat to innocent citizens and to the poor are the courts and the rule of law."

I have underlined the courts because I believe that we need to start taking stern action and I think the courts need to step in.

There is a magistrate in a magistrate's court in Soweto who has decided to be proactive. The prosecutor is *dominus litis*. He is the person who runs the prosecutions for the day. He decides which cases to

Prof Stephen Tuson

call when, which witnesses to call, what charges to put to the accused, and he only calls the magistrate when he's ready.

When he can't find the charge sheets, or the docket hasn't arrived, or his witnesses haven't come to court then the magistrate isn't called until 11.30. This magistrate decided enough was enough. He is in court at 9 o'clock, he takes the court book and he starts to read the roll, *S v Jones*. The prosecutor says the docket's not here and he issues a warrant for the arrest of the investigating officer.

The next case, *S v Smith*, the attorney has not arrived. He holds an enquiry and he reports the attorney to the Law Society. Next matter, the docket's not here, struck off the roll. Are the complainants in court? Yes. Stand up, your investigating officer is Constable so and so, he's at the police station across the road. His station commander is Captain so and so. Go and complain to the captain.

This judicial officer is taking action. Attorneys are reported to the Law Society; policemen are arrested under warrants; witnesses are arrested under warrants for failing to obey the summonses and the subpoenas. What is the affect of this? If you go to that court there is a line of investigating officers with dockets in their hands. There are witnesses and attorneys waiting. They are present because, God help them, if they're not, they will be held to account by the magistrate.

In a similar case. There is a Randfontein magistrate in a maintenance court who has become more active in getting the non-paying fathers to pay the maintenance owed to the women and children who need it. Typically, if the father stands up and says "I'm unemployed" the matter gets postponed for six months. He's unemployed and he can't pay. This does

not work with this magistrate. He asks the defendants whether or not they have got two arms, and two legs? "So, you can work. What did you have for lunch yesterday?" "Kentucky Fried Chicken". "What kind of cell phone do you have"? "Do you understand what I'm saying"? This magistrate holds people to account; he does not accept spurious excuses. Now, I do accept that we have due process. We do have to acknowledge that, and it calls for a balance, as the judges say. But, I think that what we need to do is hold people to account.

These magistrates are adopting inquisitorial procedures and putting them into use in their courtrooms. They are taking control of the case, which is not really their role. We have an adversarial system where the judge is an independent arbiter and the two parties fight it out, and then the judge makes a decision. But these magistrates are stepping in and being proactive. They are saying enough is enough! I think that one of the solutions to problems throughout the criminal justice system is that we need to legislate or change the system to give a mandate to the judicial officers. I heard Adv Simelane saying judges must take control of their courts. I agree with him. But station commanders must take control of their detectives'. These captains must have their weekly meetings with the detectives.

The people in charge must find out why a case was struck off the roll, why a subpoena was not sent to the witnesses? To back this effort up, there must be consequences. We have poor line management, we have extremely poor supervision and a failing criminal justice system is the result.

CHAIRPERSON:

Thank you, Stephen. From the heart and, I think, got to the heart of the matter as well. Thank you.

Discussion

CHAIRPERSON:

I am now going to open the discussion to the floor. We will take three questions at a time. Given the time constraints, I would ask you to be as concise, pointed and as brief as possible. Please identify yourself for the record.



MS PRATT:

My name is Anne Pratt and I have two questions. The first question is, where do we position the police? The softer approach has not worked; the military

approach is not working, so where do we go from there?

The second question is, during the World Cup somehow we seemed to have a highly effective system so what can we do to replicate that in the future?



MR DOSIO:

Good evening. Dario Dosio, I am a regional magistrate in Soweto. I would like to thank the speakers. I think what they have said is very important. I think there are very

apt observations that have been made. Just to remark on some of the speakers' points of view. What Justice Cachalia indicated about sentencing. I think it is really important and I think it is high time that government should look at forensic psychiatrists and involve them more in the system.

Having sat in the regional court for more than 10 years; I think it is very important to understand what actually causes these criminals to act. It is quite correct, as Adv Simelane has stated that it is not poverty that triggers these criminals to act. There are many factors and I think government should invest in looking at what these factors are, looking at the triggers. If we can actually assess what these triggers are, I think we can help enable our society to keep a good lookout for potential criminals and also to assist those that are on the wrong path to look at the various deterrents.

What Justice Makhanya stated is also very important. He indicated that there are not sufficient judges to address the criminal backlog. I think that has always been a problem. Judges should have the knowledge of both civil and criminal matters. We have a great base of potential regional magistrates who have a good knowledge of criminal matters and we should actually invest in those magistrates.

I would like to ask Prof Tuson what he intends to suggest to the legislature regarding the inquisitorial system. We already have the quasi-inquisitorial system where inquests are held. We do actually enter into the arena and call for witnesses if we are not satisfied with what has been placed before us. However, I have a problem with issuing a warrant of arrest for an investigating officer, because that investigating officer, unless he has been warned to appear in court, cannot really be arrested.

In those circumstances I think it is appropriate to have that particular investigating officer arrested. But I would like to know how you intend introducing that system? It is a very interesting one. It is utilised in many European countries and I think it would work well in our country.

Discussion



**MR
RAMULIFHO:**
My name is Khume Ramulifho. I am a member of the Gauteng Provincial Legislature and the DA's (Democratic Alliance) education spokesperson in

Gauteng. My first question is, whether or not we have an intelligence unit which is effective and actually doing its job?

I will make reference of the trends which we have observed in the schooling system. Most of our schools are currently run like prisons, with many security measures in place. In Soweto for example, all the computers which were installed in schools were all stolen. There are no schools which have survived burglaries to date since the Gauteng online project has been put in place. However, to date, no arrests have been made.

Is there any relationship between the Department of Justice and Constitutional Development and the Police, in which there is communication regarding how to accurately open a case or a docket so to avoid those dockets being dismissed and serving no purpose.

CHAIRPERSON:

I am going to ask Judge Cachalia to begin addressing our questions in terms of policing and the World Cup?



**AZHAR
CACHALIA:**
With regards to the question of where you position the police? I must reemphasise the point I was making about militarisation and so on: that at

worst it does not work and at best it is really an attempt to deflect attention from the real issue.

The real issue is, as Steve Tuson mentioned earlier, that we need people in every agency, and particularly the police, where there is proper leadership and management. If somebody lays a charge at a police station, the first thing the person wants to know is that they will receive some sort of sensitivity from the police officer.

So, first, it is about how you manage your interaction with the public. Secondly, having taken a complaint, do you follow that complaint up? You then need the appropriate skill to investigate that matter and take it through the system. There was a reference earlier as to how cases get delayed; a very simple question. I am, incidentally at the moment, a witness in a criminal trial of police bribery and corruption, so I have been going to the magistrate's court since January. There have now been four consecutive postponements.

It is absolutely appalling. Nobody has been contacted two or three days ahead of time to confirm their participation.

On the morning of the trial at 08.55 – the trial due to start at 09.00 – the prosecutor will stand up and say “Captain so and so is on course today, he cannot attend court”. The attorney is not prepared, he is

in court but he is not prepared to proceed with the case because he has not been paid.

It vacillates between Kafka and Monty Python. It really is quite bizarre. The point should be about proper management, proper skill. The police must act under the law, they must do that efficiently, and I believe we will start turning things round.



**MENZI
SIMELANE:**

On the question of the World Cup, nothing magical was done, I must tell you. Naturally, as in all cases, there was an element

of planning between different players that needed to be involved, from the police, to the prosecution, to the Judiciary. All parties planned together to achieve the same goal.

The important thing that we observed was that everybody in the country had a unity of purpose, irrespective of race, irrespective of class, irrespective of whatever differences people had. Even criminals wanted to watch the World Cup and make the World Cup successful. There was a unity of purpose.

Nobody saw things from a political perspective, nobody saw things from an ideological perspective, and nobody saw things from a race or class perspective. All that people wanted to do was get to the game, get out of the game, get home and wait for the next game and so on and so forth.

So we have got to find that which makes all of us behave in unison. That is basically what made the World Cup work. That is why, as soon as it ended, things changed

and went back to normal because the World Cup was no longer there. People's attitudes changed, yet nothing in their material conditions changed.

Some people say it is because officials were paid overtime. I must tell you, overtime has nothing to do with it; it was a very small incentive. People worked very hard for no extra pay because they maintained the right attitude.



**STEPHEN
TUSON:**

I just want to make one comment on the World Cup courts. They were dealing with very low volumes of cases and so the

prosecutors and investigating officers who were dedicated to the case were able to focus their attention on a few cases, and do it properly. In any magistrate's court, on any day, you will find a court roll of up to 20 cases. Any one investigating officer has over a 120 dockets that he has to personally bring to trial. If you have at least two witnesses in each case, that is, 240 witnesses that he has to interview, take statements from, follow up and, and ... and ... All the administration, all the paperwork, all the SAP 69s, previous convictions, all the blood reports, the fingerprints ... all takes time.

Those World Cup courts were successful simply because there were very low volumes and people were able to focus. We need more resources to handle the huge volumes that we have.

CHAIRPERSON:

Judge Thami, I am going to ask you to address the question of the number of judges.

Discussion



THAMI MAKHANYA:
This is a very difficult subject. Sometimes, at the Johannesburg High Court, you find that cases get postponed because there

are not enough judges to preside over matters. That is a fact, but we must also keep in mind that at the Johannesburg High Court, on a daily basis throughout the year, we have got about 13 or 14 criminal court trials going on.

We really serve a big geographical area. Also, the population is increasing all the time and the number of active criminals is increasing all the time, so we need more people to preside over these matters. I know that there are some magistrates who are duly qualified and who can preside over these matters in the High Court but we must also consider the whole question of jurisdiction.

It is not a simple process being appointed to be a judge in the High Court. Judges must be approved by the Minister, and the Minister has to consider quite a number of factors before a person is appointed. I do know of some magistrates - in the past, not presently, who have presided in some matters at the High Court.

The Judicial Services Commission often and repeatedly mentions that it must address, in terms of the constitutional imperatives, the whole question of transformation. The demographics of the country must be addressed before an appointment is made, so it is not a simple matter. But it is important of course that we have got more people appointed because cases really suffer.

CHAIRPERSON:

I am aware that there is still a question that is standing about the relationship between the Department of Justice and the police, so we'll come back to that. But two questions for now please.



MS MORNE:
I am Karen Morne from E News. I wanted to question Adv Simelane on a point of qualification with regard to the 204 situation. Are you saying that you are going to

struggle to prosecute Agliotti for corrupting Jackie Selebi because you cannot use his statements against him? Or are you saying that there are questions about whether you should have granted indemnity to the so called Kebble Killers in exchange for the evidence against Agliotti?

Second of all, we know that the Hawks Unit have effectively dropped the arms deal investigation because they say prosecutors cannot find evidence to sustain it. Given the kind of concerns raised by Judge Cachalia, how do you respond to criticism that the investigation was in fact dropped because it was politically unpalatable?

CHAIRPERSON:

I won't allow the first question. I will take two more questions.



MS BRAUDE:

Thank you. Claudia Braude. I just want to link a few things said by each of the speakers and pose a question which is not really a question because I do not presume

that there is an answer. It is really just to point out a couple of things for all of us to think about, in terms of, not just law and justice, but also the link between law, justice, history and memory.

Adv Simelane asked why people commit crime and suggested that maybe it has to do with a certain mindset. In answering the question about the World Cup, Adv Simelane suggested that part of the solution in terms of the World Cup was an attitude, that social distinctions fell away when people were united around sport. So you were suggesting that social distinctions which presumably originate from our history are part of the problem of the mindset.

Judge Cachalia, you suggested that people who engage in criminality calculate that they will not be arrested or prosecuted. I want to link those two thoughts and state that maybe the history of the country suggests that people will not only not be arrested and prosecuted but even in the event of a successful prosecution, will receive amnesty.

I think we have inherited a culture of amnesty in South Africa. I know people may be familiar with my own work, including my work in the Helen Suzman Foundation's journal, Focus. We have inherited a situation out of a culture of amnesty that potentially has corroded our general attitude to law and to justice in this country. I want to also pick up on what Prof Tuson said when he suggests that what is going on is a total

lack of accountability. Instead taxpayers pay, and those who are responsible carry on working. You could also be describing amnesty to perpetrators of acts which created trauma during apartheid.

And then to conclude, and this is where the question comes in, Judge Makhanya said that we must develop a culture of justice delivery and engage in a campaign to encourage people to respect a culture of justice and the rules of the country. I am suggesting that until we really address what happened in giving people amnesty for all the reasons in the days of the Truth and Reconciliation Commission, until we really address how that might have corroded how people understand law in this country, you are not going to be able to create a new culture. I am saying we have to address history and memory while we are talking about law and justice at the same time. Thank you.

CHAIRPERSON:

One last question and then I will ask our panellists to comment.



MR NGOEPE:

Good evening, ladies and gentlemen. My name is Kenny Ngoepe. I am a member of the public. My question is addressed to Adv Simelane as

the head of the NPA (National Prosecuting Authority). How do I, as a practicing attorney, go back to my community and explain or justify a situation where a plea bargain has been reached with a murderer? In my community I would need to explain that. How do I justify that to my community? Thank you.

Discussion



MENZI SIMELANE:
Thank you. With respect to the arms investigation, the police took that decision. We have nothing to do with it as the prosecution.

But invariably, as in every case, when prosecutors assess the information available in the dockets they will make a decision to prosecute if they believe that, in addition to the suspects that are identified, there is evidence that can be placed before courts and succeed with a prosecution.

You can have suspects named, you can have facts that suggest that a crime has been committed, but when you look at what you need to prove and what you need to have in order to prove that, you may actually not have a sound case. What we invariably do as prosecutors is refer back to the police and say we need evidence on the following and require follow ups on the following issues.

We send the docket back to the police and request them to do further investigations on outstanding issues. You can start a case but we know we won't win it so it's not worth continuing with. That is what happened in that particular case.

What the police do with that, we actually never know. We simply wait for them to come back to us with facts on whether they have been able to get what we needed for a successful prosecution or not. With respect to Mr Ngoepe, I will touch on the issue of intelligence. I am sure you have heard of informant systems that work, in that police pay informers for information. Sometimes, the way that

system works is that people who are involved in criminality will come forward and become informers themselves and give police tip offs about where the next act of crime is going to happen.

The police have a system and the intelligence services have a system where their lists of informers are kept private and they pay those informers. You can question the morality of using informers to prosecute, but it is a system that works.

Similarly with prosecution. Many criminals know that, to avoid a prosecution, they must get rid of the evidence. Sometimes there may not be enough evidence, there may be facts about the crime committed, but there is no evidence to prove it. You may have a suspect that everybody generally knows is guilty, but without proof you can't do anything.

What you then need in order to get a case against that person, which will be successful, is to find somebody who is closely linked or who may have been part of that crime. What we try to do is target the person who has contributed the least and aim to strike a balance by lowering their sentence in exchange for evidence against the others.

You turn people against each other. It happens in gangs where we turn one against the other. So the system works. It may, however, come across to the ordinary person as something that should not be done. But remember that the downside of not using it is that you may actually have nothing at all so, in and of itself, it is not a bad thing to do.

What has to be carefully looked into is the type of choice you make as a prosecutor when you select which of the perpetrators you will use as a witness. It is not the system itself that is a problem but it is in

the exercise of discretion with respect to who you choose amongst those perpetrators as a witness. Thank you.

CHAIRPERSON:

I am going to ask Judge Makhanya to reflect on Claudia Braude's reflections about justice and memory.



THAMI MAKHANYA:
It is very important what has been raised and it is quite appropriate that we should develop a culture of justice. But I do not know if we

have got the resources, the time and the people who can actually do that. It is so that if we want to successfully develop this culture of justice we must go back to our roots - we must go back to the history of this country.

There was a time in this country, and I am sure Judge Cachalia will agree with me, when we had a system of disrespecting the laws because they were white men's laws. There was a culture of not respecting those laws. Now things have changed because of the new dispensation. The laws that we have, are laws that have been passed by our own legislature. We, therefore, need to conscientise people about respecting those laws.

People must be brought right round into the culture of respecting the law and I think we have got to do something about that.

CHAIRPERSON:

Thank you for those reflections. I am very aware that the time is going by. We can continue the discussion outside. I hope that you will join us for some refreshments.

I want to thank our panellists for being here tonight, for being as frank and as open as they have been. It helps us all to have some sense of understanding of the problems which they face in their judicial capacities and in their prosecuting capacities. The problems are daunting. This question of legality has to be brought back to the centre of our lives.

I think Claudia Braude's comment which we go back to again and again in these discussions is important. Did we not create a template with the TRC (Truth and Reconciliation Commission)? We never understood what the actual consequences of that template were going to be. I think these are the challenges which we face.

I can say from the Helen Suzman Foundation's point of view we will be continuing these discussions around justice on the 17th of November. Judge Meyer Joffe will deliver the annual Helen Suzman Memorial Lecture and the topic of his lecture is promoting the Constitution through judicial excellence. Next year we will continue the series with a set of discussions around constitutional justice.

I want, again, to thank our speakers on your behalf and also on behalf of the Helen Suzman Foundation and the Open Society Foundation for South Africa. Thank you.

Military titles for police a step back, says judge

THE remilitarisation of the police in SA is a “regressive step”, Supreme Court of Appeal Judge Azhar Cachalia said last night

FRANNY RABKIN

THE remilitarisation of the police in SA is a “regressive step”, Supreme Court of Appeal Judge Azhar Cachalia said last night.

The return to military titles for police officers was a controversial step for police commissioner Bheki Cele when he was first appointed.

Judge Cachalia did not mince his words, saying the assumptions that giving police officers military titles would inspire them and restore public confidence were “just nonsense”. He was speaking at a justice seminar of the Helen Suzman Foundation.

Also speaking was National Director of Public Prosecutions Menzi Simelane . Mr Simelane spoke of a lack of skills in the police force. He said that he was going through a docket recently and could not understand the police statement.

He attributed it, in part, to SA’s history, saying that for many years resources were “skewed” towards a minority group.

Judge Cachalia said there were cases coming through the courts where police statements revealed some police officers to be “functionally illiterate”.

The result was police officers were inadequately skilled yet “armed and dangerous”. Giving them a military rank could only “compound the problem”, he said.

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