HELENSUZMAN
FOUNDATION

DELIVERY OF JUSTICE

INDEPENDENCE AND ACCOUNTABILITY OF THE JUDICIARY

VISION

PROMOTING INDEPENDENCE AND ACCOUNTABILITY IN THE JUDICIARY

MISSION

TO START A DISCUSSION ON THE STATE OF THE JUDICIARY AND HOW TO IMPROVE ON ITS INDEPENDENCE AND ACCOUNTABILITY.

TO CREATE AWARENESS ABOUT THE JUDICIAL SERVICE COMMISSION (JSC) AND THE MAGISTRATES COMMISSION.

TO PROMOTE REFORM.

THE HSF IS DRIVEN BY THE FOLLOWING PRINCIPLES

Independence: structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference.

Security of tenure: as a feature promoting institutional independence, this provides certainty that certain office-bearers cannot be removed from office except in exceptional and specified circumstances.

Accountability: answerable to the public, with consequences for improper or incompetent conduct.

FRIEDRICH NAUMANN FOUNDATION For Freedom.

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CONCEPT NOTE

The appointment and removal procedures of the heads of the NPA, SAPS, the Hawks, IPID, the SIU, the office of the Public Protector, the Financial Intelligence Centre ("FIC"), and the judiciary (comprising both superior and lower courts) are of immediate concern in the era of state capture.

The HSF regards these procedures as an integral part of its ongoing research into the Delivery of Justice. This research commenced in 2010, and laid the foundations for our litigation in the fight for the independence of South Africa's criminal justice system institutions. The current initiative in this ongoing project is centred on the legal gaps in the law identified in HSF's publication of *The Criminal Justice System: Radical reform required to purge political interference* (https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf).

The HSF recommends legislative reform to codify the constitutionally required independence of these institutions. The HSF also strongly recommends that a modified Judicial Service Commission-type model be used in the appointment of all the heads of the criminal justice system institutions, with strict limitations on the number of politicians as members of such appointment committees. It further suggests that these appointment committees be made up not only of experts, but that the laity also be represented for increased public participation in a criminal justice system which is meant to be working in the interest of the public.

Similar considerations would apply to effective removal procedures which would allow for a balance between security of tenure and holding the leadership accountable.

The focus of this particular roundtable is the judiciary. The HSF's involvement in the reform of the appointments process of judges dates back more than six years, and found its first public expression in *Helen Suzman Foundation v the Judicial Service Commission*[1]. More recently, the HSF was cited as *amicus curiae* in *Lawrence v the Magistrates Commission and 3 Others*[2], for which judgment is awaited.

Very general recommendations are made in our original research paper. (We have submitted an edited version of this paper to the South African Law Reform Commission[3]). This leaves room for debate on how best to address the outlined gaps in legislation, as well as minimising political interference and ensuring accountability in our criminal justice system.

Proposed central questions to be addressed are:

1. How should we interpret sections 174(1) and (2) of the Constitution in the context of demands for independence, competence and diversity in the judiciary?[4]
2. How can the composition and/or procedures of the JSC and the Magistrates' Commission be reformed to ensure the appointment of independent and competent judges and magistrates?
3. How can the composition and/or procedures of the Judicial Conduct Committee ("JCC") and Magistrates' Commission be reformed to ensure effective accountability of judges and magistrates?
4. Is legislative reform necessary for the improved *"transparency, efficiency and independence"* of the judiciary? Is it a matter of policy instead?
5. What other recommendations can be made to improve the *"transparency, efficiency and independence"* of our judiciary?

1. (CCT289/16) [2018] ZACC 8.
2. case no 1070/19 in Free State Division of the High Court.
3. https://hsf.org.za/news/press-releases/submission-to-salrc.pdf.
4. Section 174: (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
   (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

PANELLIST PROFILE

PROF TANIA AJAM

Prof Tania Ajam is a professor of public financial management at the University of Stellenbosch's School of Public Leadership. Prof Ajam also recently became an economic advisor to President Cyril Ramaphosa. She is a public policy analyst and an economist with broad experience in the design, analysis and implementation of fiscal policy and intergovernmental fiscal relations. She also has experience in government-wide monitoring and evaluation systems.

Prof Ajam holds a Masters degree in Business Science from the University of Cape Town and a PhD in Public Management from the University of Pretoria.

Prof Ajam has held several directorships in both the private and public sectors: including the Reserve Bank of South Africa. She was the CEO of the Applied Fiscal Research Centre (Pty) Ltd. She served on the Financial and Fiscal Commission for a decade as its Commissioner until 2014, and chaired its Research Committee. She has also been a Senior Advisor at the Government Technical Advisory Centre (GTAC) in the National Treasury and is a member of the Davis Tax Review Committee.

ADVOCATE SUSANNAH COWEN SC

Advocate Susannah Cowen SC has been practising as an advocate since 2001. She started practising in Cape Town and, in 2010, moved to Johannesburg. She was awarded silk in July 2018.

Her preferred areas of practice are commercial law, constitutional law, administrative law, land law and customary law. She has appeared in the Constitutional Court, the Supreme Court of Appeal, the High Court (various divisions), the Land Claims Court and regulatory tribunals. She has acted as a Judge in the High Court in Johannesburg.

Susannah holds BA and LLB degrees from the University of Cape Town and a BCL degree from the University of Oxford. In 2000 she clerked at the Constitutional Court for then President of that Court, Justice Arthur Chaskalson.

Advocate Cowen has published a paper on *Judicial Selection in South Africa*, which identifies five general characteristics for a fit and proper judicial officer. These characteristics include independence, impartiality and fairness, integrity, a judicial temperament and a commitment to constitutional values.

PANELLIST PROFILE

JUDGE AZHAR CACHALIA

Judge Azhar Cachalia is a judge of the Supreme Court of Appeal. Judge Cachalia was born in Scotland but was later educated in Johannesburg. He studied science at the University of Durban Westville and law at the University of Witwatersrand. In 1981 he was elected Vice-President of the Black Students Society at Wits. He was later detained with his brother Firoz (who later became MEC for Safety and Security in the Gauteng Legislature). In 1983 he graduated from Wits with an LLB degree.

He was an office holder of the United Democratic Front (UDF) until 1990 and was the National Treasurer of the UDF for 28 years. In 1986 he was admitted as an attorney, and was detained for six weeks thereafter under the State of Emergency Regulations. In 1988 he joined Cheadle Thompson and Haysom in Johannesburg as an attorney. He was one of the managing partners until 1996 when he resigned to become an MP. While working at Cheadle Thompson, Judge Cachalia studied towards a Higher Diploma in Income Tax Law.

In June 1994 he was appointed to serve on the Interim Advisory Team for the Minister of Safety and Security. He also worked as a technical expert on the Constitutional Assembly, and then on the Committee on Security and Defence. He was also responsible for convening the team that drafted the New Police Act. On 8th of January 1996, Judge Cachalia was appointed Secretary for Safety and Security, becoming a peer of the National Commissioner of Police, and chief policy advisor to the Minister of Safety and Security. He was also tasked with the implementation of the National Crime Prevention Strategy. Judge Cachalia then left parliament and returned to the legal profession. He was first appointed to the bench of the High Court in 2001 and then to the Supreme Court of Appeal in 2006.

WELCOME AND INTRODUCTION

FRANCIS ANTONIE

Good evening ladies and gentleman, and a very warm welcome to the roundtable of the Helen Suzman Foundation. I would like to immediately acknowledge the support of the Friedrich Naumann Foundation in hosting this. We have finally come to the end of the year.

The question of the judiciary, which has been one of our central areas of focus, comes out of a long series of symposia. We were funded by the OSF, at that stage, to look at the delivery of justice. There were 3 areas of concern: civil justice, constitutional justice and criminal justice. One of our panellists tonight, Judge Azhar Cachalia, gave the keynote address at that last symposium.

Insofar as we continue this work on the delivery of justice, our focus tonight is on the judiciary. But the judiciary is not only judges. It is also the magistracy. There are two matters that I want to flag. The first is that we were, in a wondrous way, successful in our attempt to gain access to the private deliberations of the Judicial Service Commission ("JSC"). What the JSC was saying about non-appointments really needed to be questioned. This was a 5 and a half year journey. We lost in the Cape Town High Court and in the SCA, but won in the Constitutional Court. That changed much of the jurisprudence around confidentiality regimes. We were also concerned about the relative merits of s174(1) and s174(2) of the Constitution – which are the sections that govern the appointment of judicial officers. Our involvement around the delivery of justice continues.

I do not want to rehearse some of the things which are well known to you all about the independence and the accountability of judges. As a lay person, I sometimes wonder what the criticisms are that one would level at the judiciary? There have been some extraordinary criticisms in the past week about the judgement delivered in the case of John Kolane. There are more serious, or other criticisms, about the delays taken in holding certain judges accountable for their shortcomings, like Judge Motata and the Judge President of the Western Cape High Court. Why does the JSC take so long? We go around the world saying that our judiciary is intact; that it is not subject to state capture. I think the threat is there. You will recall that, when the previous Chief Justice's term of office came to an end, President Zuma persuaded him to stand for another term. This was against the law and I am glad that the Constitutional Court ruled against that. Our concern is the architecture of our judiciary and it concerns the architecture of the entire criminal justice system.

At this point I would like to call on my colleague, Lee-Anne Germanos, to sketch out some of the concerns that the HSF has had. Lee-Anne has worked very hard on this document.

WELCOME AND INTRODUCTION

LEE-ANNE GERMANOS

Thank you Francis.

In December last year the Helen Suzman Foundation published, *The Criminal Justice System: Radical reform required to purge political interference.* The publication was an in-depth legal analysis of the appointment and removal processes of the heads of 8 identified criminal justice system institutions. These institutions include the National Prosecuting Authority, SAPS, the Hawks, the Independent Police Investigative Directorate ("IPID"), the Special Investigating Unit ("SIU"), the Financial Intelligence Centre, the office of the Public Protector and the judiciary (both the superior and lower courts). With the focus of this roundtable being on the independence and accountability of the judiciary, reference will be made to that specific part of the publication.

In the superior courts, judicial officers are constitutionally required to be fit and proper persons. Judges are appointed by the President in consultation with the Judicial Service Commission (the "JSC"). The JSC comprises of 23 members – 8 of whom are affiliated with the legal profession. The remaining 15 members are politicians. The concern with this ratio is that it will only be a matter of time before our judiciary too falls prey to the political influences that appoint it. This judicial appointment process requires a public call for nominations by the JSC, public interviews of shortlisted candidates and a private deliberation of the JSC before recommending a candidate to be appointed by the President. The private deliberations of the JSC were challenged by the Helen Suzman Foundation. In 2018, the Constitutional Court in the *HSF v JSC* ordered that even the private deliberations of the JSC be made public in certain cases.

As for the removal of judges, this can only be done subsequent to a finding in favour of removal by the Judicial Conduct Committee (the "JCC"). The JCC recommendation to remove must be adopted as a resolution of parliament with a 2/3 majority vote, following which the President is required to remove the judge/s in question. The JCC, however, is shrouded with a reputation for being ineffectual because of its failure to investigate and remove figures such as the Judge President of the Western Cape High Court 11 years later – despite numerous court orders instructing it to finalise its investigations.

As for the lower courts, magistrates are appointed by the Minister of Justice on recommendation by the Magistrates Commission. The Commission is comprised of 24 members. 13 members of the Commission are affiliated with the legal profession while the remaining 11 are political appointments. Magistrates are also required to be fit and proper persons. The Helen Suzman Foundation is currently involved in litigation against the Magistrates' Commission for its application of the constitutional requirements for the appointment of judicial officers.

In terms of removal procedures, a statutory complaints commission is meant to investigate the improper conduct of magistrates. Any recommendation by the Commission to remove a magistrate must be confirmed by the passing of a resolution of parliament and subsequently removed by the Minister.

As has now become evident, both the appointment and removal procedures for the judiciary involve a significant amount of political participation. It is thus the Helen Suzman Foundation's recommendation that the composition of the JSC and Magistrates' Commission be remodelled to consist of legal experts and lay persons or representatives of the public with no political affiliations. In addition, independent disciplinary/complaints committees, separate from the current ineffective committees in place, should be set up to hold the judiciary accountable to the public.

Thank you.

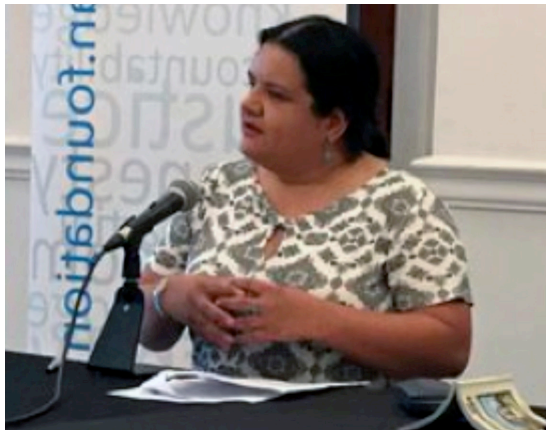
PANELLIST

PROFESSOR TANIA AJAM

Good evening and thank you for sacrificing sunlight and a beautiful evening to be here. Francis has put the caveat upfront that I am not a legal expert but, as a scholar of public policy and public governance, the role of the judiciary is absolutely critical. Looking at the topic for this roundtable, judicial independence and accountability, it would be the perfect type of examination question for my graduate students. It is a question that would be relevant for every year, but the answer would continuously change. Before going into the details of the judiciary, it would be worthwhile taking a step back to consider where we are and why the answer changes. As a country, we are in a posttraumatic recovery phase from state capture. State capture wasn't just corruption. It was corruption to such an extent that it created a shadow state that repurposed institutions to serve an elite few. That type of trauma to the fabric of institutional governance is not something that one recovers from immediately.

Fortunately there was some resistance from the judiciary and civil society. What can we do to future proof the country so that we don't have version 2.0 of state capture after the next set of elections? Yes, individual agency and lack of integrity are important, but there are systemic flaws in our governance systems which create certain incentives. Even if we have new incumbents they will be subject to the same set of incentives, and we are likely to have the same outcomes. So if we salvage anything from this very sorry episode for which we will be paying dearly for the next 5 years; if we look at all of the bail outs for all of the SOEs, those are the price tags for which we will be paying for state capture. During this process it has not only been the judiciary that has come under attack, but also the Reserve Bank and SARS. The issue of independence is important not only for the judiciary but other institutions supporting democracy, and constitutionally created institutions. It is fairly accepted that the judiciary has been one of the more resilient institutions in terms of acting as a check and balance of the executive (which is a cornerstone of our constitutional democracy). There are sufficient weaknesses that we need to reflect upon to ensure that we build even more robust institutions.

When I look at the Hlophe enquiry it really beggars belief that this enquiry could have dragged on from 2008 to the present with no resolution. From my perspective, the JSC's conduct in this instance



really erodes trust and faith in the entire system of checks and balances on the conduct of judges. For me this is very concerning because, during state capture, the executive was compromised and parliament was completely disempowered. Holding the executive accountable, therefore, fell on to the shoulders of the judiciary. In Michelle Le Roux and Dennis Davis' book *Lawfare*, they cite many examples of this concerning tendency. The quality of judicial decisions, particularly in the magistracy, is concerning. There is the example of a magistrate in KZN that gave a rapist of an 11 year girl, who was his own daughter, a wholly suspended sentence. This was not an isolated incident. Several of her decisions went on review, with different benches coming to different conclusions. This raises concerns for the person on the street who wonders why minimum sentence frameworks are not being applied.

AN AFROBAROMETER SURVEY, IN 2019, FOUND THAT 32% OF THE RESPONDENTS OF THE SOUTH AFRICAN PUBLIC BELIEVED THAT THE MEMBERS OF THE JUDICIARY WERE INVOLVED IN CORRUPTION – WHICH IS UP FROM 15% IN 2002.

Public opinion surveys, such as Afrobarometer, conduct surveys on the public's trust in certain institutions and compare them across countries in Africa. An Afrobarometer survey, in 2019, found that 32% of the respondents of the South African public believed that the members of the judiciary were involved in corruption – which is

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PROFESSOR TANIA AJAM

up from 15% in 2002. To place this in context, as compared to the public's trust in parliament or the executive, this is still relatively good. But if you look at the trend, there is a loss of trust in the judiciary, which is a worrying trend indeed. Justice Michael Kirby once said that a judge without independence is a charade wrapped in a farce inside oppression. I think that summarises why the issues of individual independence and accountability of judges, as well as the judiciary as an institution, are very important.

Here, I have to pause to think a bit more about the case of Judge Nkola Motata who crashed his Jaguar into a wall while drunk and hurled racist remarks. Once again, that incident happened in 2007, but a conclusion was only reached in 2019. It is said that justice deferred is justice denied. It seems to me that the JSC doesn't really care about the public's perception of its independence and accountability – which is just as important as actual independence and accountability. Being an economist, I'm also interested in the financial implications. If we consider that the judge was initially fined R20 000 for drunk driving. Then, in 2019, the JSC fined him R1.1 million – equivalent to 12 months' salary. But he had been on special leave with full pay since 2007 – for 11 years – until his retirement in February 2018. He is now on a retired judge's dispensation. This alone would have cost the taxpayer R20 million, which is outrageous in a country where children are actually dying in their own excrement because we are not delivering services.

I think it is quite important that we also look at the imperative to transform as well as competence, and how we reconcile those, because we are not at the dawn of democracy anymore. For me, competence has got to come first. The world is becoming more and more complex. The decisions that we have to now take about climate change; about the fourth industrial revolution; about international tax treaties, are becoming more and more complex. We need people who can understand and adjudicate on these issues. If we look at the composition of the JSC, I wonder what value those politicians really add. I have watched some of the interviews and I would never apply to be a judge. Highly skilled persons are often subjected to bad treatment at the hands of the commissioners. There are major issues around the effectiveness and legitimacy of the JSC. If we want to avoid a recurrence of state capture, the judiciary is an institution that we must focus on, along with institutions such as the NPA. Some of the compromises made when negotiating our Constitution (the influence exercised by the ministries over these institutions) should no longer have to be compromises that we make now.

PANELLIST

ADVOCATE SUSANNAH COWEN SC

Thank you Francis for this invitation to participate in this very important discussion here tonight. I am very pleased and honoured to be here. I stand here conscious of the role that organisations such as the HSF have played in stemming the very heavy tide that has very nearly destroyed our criminal justice system in a short decade.

The reason that I am sometimes asked to speak about judicial selection is because, as Francis alluded to, in 2009/10 I wrote a monologue under the auspices of the Democratic Governance and Rights Unit at UCT called *Judicial Selection in South Africa*. It is accessible online. The paper essentially contains what substantially remain my views, ten years later, on two of the six questions that we, as panellists, were asked to think about tonight – being the interpretation of s174(1) and s174(2) of the Constitution. These concern the requirements to be a fit and proper, and an appropriately qualified judge, as well as the diversity requirement which requires that the judiciary reflect broadly the race and gender composition of South Africa. In this paper, I explored in great detail what it means to be appropriately qualified. I find that section to be very pedestrian, but is an important issue that requires detailed consideration what competence and what type of level of experience matters. I also explored what it means to be a fit and proper person. I did that under five headings: 'independence', 'impartiality and fairness', 'integrity', 'judicial temperament' and 'commitment to constitutional values'. Each of those sections is long and detailed. My central thesis is that the JSC must have known – publically known – and detailed criteria which I then propose. I then analyse the race and gender representivity criteria in s174(2) which I consider to address past injustices and to secure the legitimacy of the judiciary. All I want to say about s174(2) tonight is that it is not and should not ever be considered to be in tension with the other requirements in the Constitution. This section is simply not in tension. My own view is that it is profoundly offensive for those of us who are female and those of us who are black to suggest that it is. Since I embarked in 2009 on, what I now regard, as the rather precocious task of setting out what makes an ideal judge, I have had the privilege of twice serving as an acting judge and I appreciate (just a little bit better) how hard it is to be one. It means that I have to be quite polite tonight because I am still in practice and I am still acting. I do understand a bit better now why people who write about the topic ask the question: "Are judges human?" It seems like a slightly odd question. But, happily, I will tell you in a moment that the Constitutional Court has decided that issue.

The monograph that I wrote also deals with how to go about strengthening the systems and processes of selection by the JSC. Selection systems and processes matter profoundly. That is because there is no algorithm to apply in order to test if someone will be a good judge. So only good systems and good processes will yield good results. Since I wrote the section on transparency, the Constitutional Court and the SCA have, in the last decade, opened up the JSC process to a level of scrutiny that I did not anticipate. Francis alluded to the *HSF v JSC* case, which opens up the record of deliberations under judicial review, which I did not expect. There is also the JSC v Cape Bar case which gives candidates the right to reasons for not being appointed, which I also wasn't sure would happen. There are still issues about transparency which we need to look at, but I do not plan on taking you through my whole paper.

There are three issues which I would like to focus on. The first concerns the JSC's composition, I do not share the view that there needs to be a constitutional amendment to alter its composition. This may be a controversial thing to say to this audience. My view is that what we have is ultimately structurally sound and we could do a lot worse if we were to reopen the constitutional debate. We must also remember that during the certification process of the Constitution in the mid 90s, the Constitutional Court rejected the argument, which I was party to advancing at the time (then not yet an advocate), that the JSC's current political composition jeopardises judicial independence. The JSC is not perfect, but its size and the multiplicity of the institutions it represents makes it very difficult to capture or control. And we may yet come to depend on its structural integrity in the years to come. For me, my view in 2009 remains my view now, and that is despite the accountability issues that Francis has alluded to. The challenge rather is how do we strengthen its processes and that of the Magistrates Commission? On that there is much constructive work to be done.

Second, I applaud the HSF in its efforts to bring the Magistrates Commission into the same

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ADVOCATE SUSANNAH COWEN SC

conversation as the JSC. Much of what I say is equally applicable to the magistracy. However, the magistracy is more susceptible to capture because it is less visible. Civil society doesn't watch the magistracy as closely as it does the higher courts. The issues facing the magistracy in trying to rebuild our criminal justice system might be even more pressing than those facing the high court. What I thought I would do tonight is, instead of telling you my views, I would tell you some of the process questions that I asked in respect of strengthening the JSC's processes.

The first is, how do we ensure that our candidate pool is large and diverse and suitable for office? The object must be that the JSC and Magistrates Commission are spoilt for choice. This is the hardest question to answer because it requires an honest engagement on a wide range of matters: from the health of the legal profession, whether it has confronted discrimination adequately (it has not), to structural issues such as judicial salaries and conditions of work. The judiciary must be an attractive and well resourced place to work. There is a perception that at the moment, it's only the SCA and the apex court that are.

JUDGES CAN'T BE INDEPENDENT UNLESS THEY'RE ALSO ACCOUNTABLE. MY SENSE IS THE FUNCTIONING OF JUDICIAL COMPLAINTS MECHANISMS MAY REQUIRE A RELOOK AT LEGISLATION.

The second question is: how do we put into place legitimate, structured, fair and rigorous processes of professional peer review to enable the legal profession to properly assist the JSC in evaluating criteria such as: professional competence and experience, temperament, independent mindedness, and integrity? It is easy to state criteria but very difficult to work out how to interrogate them and test suitability. How do you go about assessing a candidate's independent mindedness? What questions do you ask? Who must ask them? When? How do you assess that from a written record? The third question is: what information should be collated from a candidate's record? Who should have access to it and how? The fourth question is: who are the stakeholders in the judicial selection process? Both from governmental and non-governmental agencies? What must be done to maximise civil society's engagement in the process (which is currently far too limited)? The fifth question is: what principles should guide the rules of engagement between the JSC and candidates being interviewed, and how do we hold the JSC to account if it errs? The sixth question: is the judicial selection process adequately transparent? Despite recent case law, I think the answer is still "no". We should be asking whether the public has sufficient access to a candidate's application and record. What are the JSC's criteria? What reasons should be given to the public generally about the outcome of any appointment process? Should the deliberative process, such as it is, remain closed, or should it be open? The seventh and final question is: what resources are required to improve the JSC's processes and where do these resources come from? These are not the only questions but they are matters which warrant being on someone's agenda.

I would just like to turn very briefly to the issue of judicial accountability. That is the twin requirement of judicial independence. You can't have one without the other. Judges can't be independent unless they're also accountable. My sense is the functioning of judicial complaints mechanisms may require a relook at legislation. The point I want to make is less ambitious. What might be termed 'informal' means of holding the judiciary accountable are as important as formal complaints and concerns the value of informal complaints procedures. The 'informal' means require greater attention than we have been giving them to date. Where the Constitution, quite correctly, makes it difficult to remove a judge from the bench both substantively and procedurally, the JSC's power to sanction goes further than that. The JSC has the jurisdiction to deal with misconduct (since 2008). To trigger the JSC's jurisdiction you have to be dealing with a wilful or seriously negligent act. So it is a serious matter that triggers the JSC's jurisdiction. My question is: is this enough? The answer is: no it is not. The judicial code of ethics is not only about the big issues. It also deals with the day-to-day ethical behaviour of judges. It seems to me that there remains an absence of clarity about what type of conduct falls into what category. What is impeachable? What is serious but not impeachable, and therefore triggers the JSC's jurisdiction? What is not sufficiently

serious to trigger the JSC's jurisdiction but still important? And if it falls into that category, what must we do about it? My view is that, unless there is a better public and institutional understanding on where the lines are to be drawn, the system is bound to fail. My first point is that we have to start engaging publically on where those lines are to be properly drawn. My second point is how does one deal with the less serious matters – which in my view is as important, if not more important, than the serious matters because they affect the day-to-day administration of justice. What do we do when faced with a judge who conducts himself/herself in court in a manner that is not acceptable to a client? Former Chief Justice Ngcobo held in *Bernert v ABSA* that judges are only human, and, if need be, legal representatives, on behalf of their clients, must stand up and respectfully correct judges when they conduct themselves in a manner that is not appropriate. Ten years ago I motivated why it was timely to have a debate about judicial selection. It will always be timely to have that debate. There is a wonderful passage by Mohamed CJ in my paper which I will read quickly:

> *'The independence of the judiciary is crucial. It constitutes the ultimate shield against that incremental and invisible corrosion of our moral universe, which is so much more menacing than direct confrontation with visible waves of barbarism. …Subvert that independence and you subvert the very foundations of a constitutional democracy. Attack the independence of Judges and you attack the very foundations of the freedoms articulated by the Constitution to protect humankind from injustice, tyranny and brutality.'*

The need to be ever vigilant about the judiciary is very real indeed.

PANELLIST

JUDGE AZHAR CACHALIA

The topic that we are discussing is a difficult one because it often generates more heat than clarity. The reason is obvious. It forces us to confront the difficult issue about race and merit in the selection process. The issue is present whenever an appointment is made – in the private and public sectors. It is unavoidably politicised because it also indirectly involves questions of access to power and privilege. Even though this is a difficult terrain to navigate, it must be done openly and honestly so that we can contribute to strengthening the judiciary which remains a vital institution for the protection of our constitutional order. So I hope my remarks this evening will shed more light than heat on this vexed topic.

I shall advance the following argument: the JSC has, particularly over the last decade, overemphasised race or other factors and paid less attention to skill and competence in the appointment process. This approach does not accord with the proper interpretation of the relevant provisions of the Constitution. The result is that the judiciary has been denuded of skills. This has caused concern in the legal profession and the broader public. It is therefore important that the appointment of judges is once again placed back on a proper constitutional footing.

IN THE EARLY DAYS OF THE JSC IT BECAME CLEAR THAT ACTING JUDGES AND SOME JUDGES WERE NOT PERFORMING THEIR JOB SATISFACTORILY AND WOULD SIT ON JUDGMENTS FOR 5/6/7 YEARS.

The relevant provisions that we are talking about, and that I was asked to focus on, are s174(1) and s174(2). In its relevant part s174(1) requires an appropriately qualified man or woman to be appointed a judge, who is a fit and proper person. S174(2) requires, and let me read this slowly, the need for the judiciary to reflect broadly the racial and gender composition of South Africa. Remember what we are dealing with here. It is "reflect broadly" and "racial and gender composition of South Africa". I will come back to this provision shortly. For now, I need only observe that because those provisions lack elaboration, which is really characteristic of constitutional provisions, they have given rise to much debate and disagreement – especially on how we deal with the broad reflection, and racial and gender composition provision.

In 1998, the JSC at the time adopted the *Mohamed Guidelines* of Chief Justice Mohamed (who was also the Chairman of the JSC). I am not going to go through all of the guidelines except to say that the important provisions there were that the person had to be competent – both technically and with respect to his/her capacity to give expression to the values of the Constitution. The person had to be experienced technically. The question was whether the appointment would be more symbolic to send a message to the community more broadly. It is a difficult provision to understand and adhere to. I will come back to that. What was important then was that the JSC noted that the candidate must have acted, at least, as a judge for a while; performed satisfactorily with reference to qualitative judgments; and the comments of judges who worked with the candidate must be taken into account. It should also be a consideration whether the judge unduly delayed delivering judgement. In the early days of the JSC it became clear that acting judges and some judges were not performing their job satisfactorily and would sit on judgments for 5/6/7 years. The JSC elaborated important criteria. They would look at the judicial needs of the division concerned. It may require a person with a particular skill set. That was the position then.

In September 2010, shortly after Jacob Zuma was elected President, the JSC elaborated another set of criteria and the appointment of Constitutional Court judges were suspended to give President Zuma the opportunity to make further appointments (to the JSC). There was a sea change in the culture of the organisation after these set of appointments. This was apparent from the interviews of the candidates for the Constitutional Court positions of that year. I was in fact a candidate in those interviews. One of the President's political appointments, during those interviews, felt the need to point out that his approach to the appointment of judges was to apply the governing policies of the National Democratic Revolution ("NDR"). What this required of him, he implied, was to advance the interest of what the NDR referred to as "*blacks in general and Africans in particular*". I refused to answer his question. Perhaps that is why I was not appointed. That is besides the point. That commissioner's approach was completely at odds with what the Constitution requires. Interestingly enough, another candidate

was asked why he always seemed to accept briefs against the government.

The first set of criteria used by the JSC was the provisions spelt out in the Constitution. Then there were supplementary/additional criteria, which were requirements of competence, technical competence, and experience. Compliance with the criteria set out by the Constitution was initially applied as a box ticking exercise and then the additional criteria were applied. But eventually, the additional criteria became less important because there was a drive to meet the transformation needs of the country (which was viewed to have been insufficiently achieved in the first 10 years of the JSC's existence). So the idea then of technical competence and experience (which is the heart of what a judge is about) began to be treated as considerably less important.

I would like to give a recent example of how the JSC approaches the formal criteria set out by the Constitution and the need for technical expertise. Recently there were five vacancies in the SCA for which candidates were shortlisted by the JSC. Among the candidates were two white males who were shortlisted. There was a third candidate who had acted in the SCA (very competent) but he was not shortlisted because there was an unwritten policy not to shortlist too many white males. It was almost seen as unfair to shortlist them because it would create an unrealistic expectation of appointment for them. Until then, we had understood the policy to be the following: if you were a competent judge of good standing you would be at least shortlisted unless there was a compelling reason not to do so. There is now a spectacle of legal professionals being asked to "help out" because of a shortage of skills – even at SCA level – who are then not shortlisted for or appointed to permanent positions because of race. The judicial institutions currently have a shortage of skills. The SCA's President was informed that she would not be able to appoint more than one white male. I make no comment on the qualities of the other candidates, but this policy is applied despite the fact that there is a skills deficit in our courts.

I was recently asked to represent the SCA in the JSC to interview candidates for two positions on the Constitutional Court bench. The reason I participated was because the President of the SCA had to recuse herself for reasons that are not important. Some background first: a few years ago the Constitution was amended to give the Constitutional Court the jurisdiction over arguable points of law of general public importance. Until then it only had the jurisdiction to deal with constitutional disputes. The expanded jurisdiction meant that the Constitutional Court now had to deal with commercial law disputes, tax law, intellectual property law, competition law and the like. So I thought that I should test some of the candidate's knowledge and experience in commercial law. And I did. Several of my co-commissioners did not appreciate my line of enquiry. There was a suggestion that I was, not so obliquely, trying to undermine the black candidates who did not have commercial experience. This, despite the fact that the criteria explicitly required an investigation into technical expertise. I was also enquiring into whether some of the candidates were aware of recent trenchant criticisms of some recent Constitutional Court judgements in some of the academic journals. There was one article in a journal which lamented that no follower of the court's judgements can fail to have noticed a decline in their recent quality. It argued that over the last few years the court has increasingly grown unaccountable to the legal and academic communities, to the law (including their own precedents), and even to logic and argumentation. To private lawyers, the quote continues, it has long been evident that the court lacks sufficient expertise in their field. But even to public lawyers, academic criticism betrays more than a hint of exasperation. Those are some pretty strong views which reflect a growing unease in the academic community and, I should tell you, in the profession as a whole, as to what is happening even in our top courts. I do not wish to dwell on these interviews much longer except to say that my line of enquiry had less than universal acclaim in the JSC. But I am not too bothered about that. More troubling was that there was more of a hint of anti-intellectualism in the way that at least one of the senior members of the Commission responded to this line of enquiry by suggesting that academic criticism should really not be taken too seriously.

Let me say that these criticisms of the appointment process are not new. As far back as 2011, when the National Development Plan ("NDP") was signed off by President Zuma, the NDP warned that there is little or no consensus between the

PANELLIST

JUDGE AZHAR CACHALIA

JSC and the legal fraternity about the qualities and attributes needed for the bench. It recommended reforms, because, and to quote it, *"the composition of the JSC itself...is argued to be too large to function effectively, and...[is] hamstrung by political interests"*. President Ramaphosa was the vice-chairman of the NDP, so he should be fully aware of the political interests at play. For those of you who watch the proceedings of the JSC one has the distinct impression that it is not able to assess the merits of applications properly. The results, more often than not, are also a foregone conclusion. Regard being had to it being hamstrung by political interests, there are also other interests at play. So it would not be unusual for a candidate to be asked, "why are you not a member of this particular legal organisation?" The inarticulate premise is that if you have not joined the organisation which represents the interests of its members you are not a suitable candidate. Of course it has not gone unnoticed that there are lawyers who then join one of these organisations in order to find at least one of the pathways to appointment as a judge. The question is: are those judges then truly independent? Can they be? Or are they beholden to the interests of the institutions and groups that nominated and put them there? So the conclusion is really unavoidable that the way the JSC has approached its task has led to a weakening of the judiciary from top to bottom. As I said, that includes my own court in that it now has fewer judges with skills in areas such as commercial law, income tax law and intellectual property law. There is much anecdotal evidence that commercial disputes are increasingly being diverted from the courts to arbitration, which is a most unsatisfactory state of affairs. And counsel who are asked to advise on the prospects of success in litigation will increasingly say, "this is the law, but it really depends on the judge." This is a sign that the law is becoming more unpredictable and less certain.

So to conclude, let me return to s174(1) and s174(2). In my view – properly understood – they must be read together. The suitable qualification requirement goes beyond the question of whether the person has a formal qualification. It involves all other questions – the skills, expertise – all of that comes into s174(1). Once those matters have been canvassed properly (that applies to all candidates alike) – the question of skills, expertise and experience – then s174(2) kicks in. Here, the issue is how the provision reads. One always has to pay fidelity to the language of a constitutional provision. It's not simply what one wants it to mean. It's about what in fact it does mean. How does it read? The provision says consideration must be given to what is broadly representative. This does not mean demographic proportionality, as some would have it. This is a statement that it is important to build the legitimacy of the judiciary by taking into account diversity. Broad representivity means diversity. It does not mean exact proportions of population groups. It can't mean that. What does it mean to say "consider". I suggest that when race and gender questions are considered, this must mean "take account of" – which must mean "take account of seriously". In other words it is not to be ignored. But this does not mean, having taken into account, an appointment may not be made if it does not advance those goals. Typically if one has a situation where candidate A will advance the broader goals (the transformation goals), but given the particular needs of a particular court (e.g. the need for an intellectual property lawyer), the appointment should go to a candidate with that particular skill set.

So let me round up. I think the judiciary has played a crucial role in protecting our democracy. It has stood firm against the predations of state capture and has largely maintained its independence despite often being subjected to unreasonable, unfair and sometimes scurrilous criticism. That, we need to protect. But that does not mean that we should close our eyes to the very worrying approach that has been adopted in the methods and considerations that influence judicial appointments. As I have said, there has been a gradual loss of skill, especially in the last decade, and especially in the areas of commercial law and the like. Those are matters that are of public concern. I commend the Foundation for making space for this debate and I trust that others will follow suit.

QUESTIONS AND ANSWERS

BARBARA GROEBLINGHOFF

I am from the Friedrich Naumann Foundation and my question goes to Judge Cachalia. My question is: how far, in your opinion, is there actually an awareness in the JSC that skills beyond the general are actually important?

JUDGE CACHALIA

There is less emphasis (and that is to put it at its best). At its worst, there is a blatant disregard of it. The former President of the SCA, Lex Mpati, would come back demoralised after a JSC hearing and would say to us that he would explain to the commissioners that a judge of the SCA is not an ordinary judge; that you need someone with a higher level of skill. He said that he felt that his pleas were falling on deaf ears. I should tell you that by the time I participated in the last round of interviews for the Constitutional Court, when I raised the question of skill (which I raised consistently and deliberately), they seemed to be less concerned about it. But the penny is about to drop. Legal academic journal articles have always been written very carefully and respectfully without any imputation about the judge's competence. I am now getting an increasing sense that they are beginning to become exasperated. The honeymoon days when courts could do no wrong are now over, and that's important.

MICHAEL KAHN

I am an independent analyst. I have a question for Professor Ajam. You seem to narrow down state capture to what is being interrogated at the Zondo Commission. I would like to suggest that it's much bigger than that. It's capture generally by interest groups. It's capture of a ministry by a particular union. This infects the entire body politic all the way through. If I think of this week's testimony about a particular family I shake with outrage (pun intended) because it goes right back to 1994.

PROFESSOR AJAM

Perhaps I did not express myself properly, but in no way do I confine state capture to what happened at the Zondo Commission. It is at literally every level. You can look at the Auditor General's report on municipalities and see this replicated a multiplicity of times. It's precisely the systemic nature, the magnitude and duration that it happened which has weakened our entire system of governance.

KEITH GOTTSCHALK

On the HSF's victory in the HSF v JSC case, a political scientist would anticipate that one limitation of that victory is going to be that, in future, the JSC will be very guarded and weary of what they say on the record; and all substantive lobbying and arguing will occur in caucus rooms outside the formal deliberations.

QUESTIONS AND ANSWERS

SHEILA CAMERER

I was on the JSC for 10 years – from 1999 to 2009. That was perhaps the golden age of the JSC – when it was presided over by Mohamed CJ and Chaskalson CJ – with legal luminaries like George Bizos to cross-examine candidates. I want to say that, in my experience of it, it was very valuable to have the deliberations held confidentially because commissioners who were affiliated to political parties could deviate from the party line without repercussions. It was wonderful to watch actually. You did mention that only on certain occasions the deliberations could be opened up. Maybe there are occasions where it is relevant. On the whole, it was valuable that the deliberations weren't in public. I support Adv Cowen SC's views on the composition of the JSC. Political parties are there because they represent the people. In fact, it is taken further, because when you have a provincial judge being appointed you also have a representative of the provincial premier to represent the local flavour.

JUDGE CACHALIA

To comment on Keith and Sheila's contribution, people forget that the reason for the HSF bringing its application in *HSF v JSC* is that a strong candidate, Jeremy Gauntlett, had been turned down. He was turned down for an appointment in the Cape High Court. The Cape High Court is a shadow of what it was 10 years ago – whether they like to admit it or not. It's because people like Jeremy Gauntlett, who had reached a stage in their lives when they wanted to make a contribution to the court, were turned down in a jaw dropping decision. The golden years of the JSC are over. I would have been a lot more sympathetic to the idea that the deliberations not be disclosed in those years. Now, I think they should be held more accountable. You don't want to write laws based on what people do, but that's the reality that we are now confronted with unfortunately.

MOTLATSI KOMOTE

I am from the Dullah Omar Institute and have been following the board appointments and dismissals of SOEs – most recently the NHI. The issue that we have been faced with is accessibility. With judicial appointment processes, we have been very luckily to have organisations such as Judges Matter that provide information to a much wider group of people. I want to know how the public can hold the judiciary accountability if they do not have access to information on particular candidates in order to make an informed decision.

ADV SUSANNAH COWEN SC

When I wrote my paper I was in the United States for a while. I interviewed a few civil society organisations and their level of engagement in judicial selection is remarkable. Within minutes of the announcement of candidates, everyone is looking at their records. In terms of South Africa, I see two challenges: one is for the JSC and the Magistrates' Commission, and the other is for civil society. The JSC needs to open up its processes. It is empowered (through its rules) to open up the comments process very broadly, whereas now the comments go to the legal profession only. As the legal profession we have not done enough to do peer review on our own. The JSC also needs to enable access to the candidate's records for public scrutiny. The challenge for civil society is to structure itself in such a way that it empowers itself to engage constructively. Women's organisations need to look at how candidates deal with rape cases. Labour unions need to look at how candidates deal with labour matters.

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