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FOUNDATION



DELIVERY OF JUSTICE
INDEPENDENCE AND ACCOUNTABILITY

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VISION

PROMOTING INDEPENDENCE AND ACCOUNTABILITY IN THE CRIMINAL JUSTICE SYSTEM



MISSION

TO START A DISCUSSION ON THE STATE OF THE CRIMINAL JUSTICE SYSTEM AND HOW TO IMPROVE ON ITS INDEPENDENCE AND ACCOUNTABILITY.

TO CREATE AWARENESS ABOUT THE GAPS IN THE LAW GOVERNING THE CRIMINAL JUSTICE SYSTEM.

TO PROMOTE LEGISLATIVE 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
STIFTUNG **FÜR DIE FREIHEIT**

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CONCEPT NOTE

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

The HSF regards the appointment and removal procedures as an integral part of its ongoing project for the Delivery of Justice which commenced in 2010, and which laid the foundation for our litigation in the fight for the independence of South Africa’s criminal justice system institutions. The current initiative, as Part 4 of this symposium series, is centred on the legal gaps in the law identified in the HSF’s publication of *The Criminal Justice System: Radical reform required to purge political interference*.¹

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 of the heads of the criminal justice system institutions, with strict limitations

on the number of politicians as members of such appointment committees. It is further suggested that these appointment committees be made up of the laity, 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 central questions to be addressed are:

1. What effective appointment mechanisms should be established for the heads of the criminal justice system institutions?
2. What effective removal mechanisms should be established for the heads of the criminal justice system institutions?
3. Is legislative reform necessary for the improved “transparency, efficiency and independence” of our criminal justice system?
4. What other recommendations can be made to improve the “transparency, efficiency and independence” of our criminal justice system?

¹ <https://hsf.org.za/publications/special-publications/the-criminal-justice-system-radical-reform-required-to-purge-political-interference.pdf>.

EXECUTIVE SUMMARY OF THE CRIMINAL JUSTICE SYSTEM: RADICAL REFORM REQUIRED TO PURGE POLITICAL INTERFERENCE

In an effort to ensure the future transparency, efficiency and independence of the criminal justice system, the Helen Suzman Foundation has identified essential gaps in legislation which have been exploited to allow for the appointment or retention of questionable heads of key institutions. This has greatly assisted in the deterioration of the system over the past decade.

Legislation regulating the appointment and removal of the National Director of Public Prosecutions (“NDPP”), the National Commissioner of the South African Police Service (“SAPS”), the National Head of the Directorate for Priority Crime Investigation (commonly known as “the Hawks”), the Executive Director of the Independent Police Investigation Directorate (“IPID”), the Head of the Special Investigating Unit (“SIU”), the judiciary, the Public Protector and the Director of the Financial Intelligence Centre (“FIC”), have all been analysed.

According to the National Prosecuting Authority Act (“NPA Act”), the NDPP is required to have legal qualifications to practice in court, and must be a fit and proper person with due regard given to experience, conscientiousness, and integrity. The NDPP is appointed by the President (with no oversight) according to the Constitution. Only in 2012 was the President’s unfettered discretion curtailed by the Constitutional Court when it held that the NDPP’s appointment could be challenged on the basis of a rationality test, as the criteria were objective and not subject to “the President’s view”. The NPA Act also provides that the NDPP may be removed by the President subsequent to an inquiry into his/her fitness to hold office. A resolution must, however, be passed by Parliament confirming the recommendation.

The National Commissioner of SAPS is appointed at the sole discretion of the President without any oversight or eligibility criteria. This is according to both the Constitution and the SAPS Act. According to the SAPS Act, the National Commissioner may only be removed by the President upon the recommendation of a board of inquiry established to determine his/her fitness to hold

office. The board of inquiry must consist of a judge of the Supreme Court of Appeal.

The National Head of the Hawks is required to be a fit and proper person with due regard given to experience, conscientiousness and integrity. The SAPS Act stipulates that the National Head be appointed by the Minister of Police in concurrence with Cabinet. The High Court in 2017 confirmed that the same objective test that the Constitutional Court confirmed was applicable to the appointment of the NDPP was also applicable to the National Head. Subsequent to another Constitutional Court decision, which deleted sections of the SAPS Act, the National Head may now only be removed by resolution of the National Assembly with a supporting vote of at least two thirds. This resolution must follow a finding of a Committee of the National Assembly requiring his/her removal.

THE REMOVAL PROVISIONS OF THE IPID ACT WERE DECLARED UNCONSTITUTIONAL IN 2016 AND WERE SUBSTITUTED WITH THE REMAINING VALID REMOVAL PROVISIONS FOR THE NATIONAL HEAD OF THE HAWKS IN THE SAPS ACT.

The Minister of Police nominates a “suitably qualified” person to be appointed as the Executive Director of IPID in accordance with a procedure determined by the Minister. The Parliamentary Committee on Police confirms or rejects this nomination, according to the IPID Act. The removal provisions of the IPID Act were declared unconstitutional in 2016 and were substituted with the remaining valid removal provisions for the National Head of the Hawks in the SAPS Act.

The Head of the SIU must be a fit and proper person with due regard given to experience, conscientiousness and integrity, according to the SIU Act. The Head is appointed by the President at his discretion without oversight. The President may also remove the Head from office at “any time” if there are “sound reasons” for doing so. The SIU Act does not define “sound reasons”.

EXECUTIVE SUMMARY OF THE CRIMINAL JUSTICE SYSTEM: RADICAL REFORM REQUIRED TO PURGE POLITICAL INTERFERENCE

The appointment and removal of judges is provided for in the Constitution. They are appointed by the President from a list of nominees prepared by the Judicial Service Commission (“JSC”). They can be removed by the President when a finding of the JSC results in the adoption of a resolution by the National Assembly with a supporting vote of two-thirds. Magistrates are appointed by the Minister of Justice after consultation with the Magistrates’ Commission. According to the Magistrates’ Courts Act, a magistrate is only required to be a fit and proper person. No qualifications are required for such an appointment (not even legal qualifications). The Magistrates Act only allows for the removal of a magistrate by the Minister of Justice on recommendation of the Magistrates’ Commission, after the passing of a resolution by Parliament confirming the recommendation.

The appointment and removal of the Public Protector is enshrined in the Constitution. The Public Protector is appointed by the President on recommendation by the National Assembly. The National Assembly puts forward a candidate nominated by one of its committees. The nomination must attain a supporting vote of 60% in the adoption of a resolution by the National Assembly for such nomination. Additional to the usual requirement that the appointee be a fit and proper person, the Public Protector Act has detailed eligibility criteria for the position. The Public Protector can only be removed by the President after a finding to that effect by a committee of the National Assembly which results in the passing of a resolution by it with a supporting vote of two thirds.

The Director of FIC is appointed by the Minister of Finance in consultation with the Money Laundering Advisory Council. The Director, again, need only be a fit and proper person according to the FIC Act (commonly known as FICA). The Minister of Finance may remove the Director from his/her office subsequent to an inquiry into his/her fitness to hold it. On a reading of the wording in the relevant removal provision in FICA, the inquiry does not appear to be a mandatory prerequisite for removal.

It is clear that all of the heads of the aforementioned criminal justice system institutions (with the exception of the judiciary and the Public Protector) may be appointed and removed, for the most part, at the behest of the President or one of his ministers (subject only in some cases to Parliamentary approval). An overhaul of relevant legislation is required to provide for new appointment and removal procedures/mechanisms that will ensure the appointment of competent and independent heads, while simultaneously enabling the removal of those that are not. General application of the JSC appointment model (which relies on a broad-based committee to appoint judges) throughout the criminal justice system and the establishment of independent disciplinary/complaints committees should be put in place in order to avoid appointments and removals being subject to the decision of a single political office holder.

PANELLIST PROFILE

JUDGE ZAK YACOOB



Judge Zak Yacoob is a former Justice of the Constitutional Court of South Africa. He was appointed to the Constitutional Court bench in 1998 by the late former President Nelson Mandela. He briefly served as Acting Deputy Chief Justice of the Constitutional Court.

Prior to his appointment on the bench, Justice Yacoob was a member of the Society of Advocates of Natal and practised as a junior counsel from 1973 until he took silk in May 1991. During his years in practice he represented the “Durban Six” in negotiations with the British government when they occupied the British Consulate in Durban in protest against apartheid and unjust laws; he was part of the team that defended officials and members of the UDF and its affiliates in the ‘Delmas Treason Trial’; and he represented the accused in the “Vula” trial, which involved high-ranking members of the ANC.

Justice Yacoob has a Bachelor of Arts degree and an LLB degree from the University of Durban-Westville.

DEPUTY MINISTER JOHN JEFFERY



Deputy Minister John Jeffery is the Deputy Minister of Justice and Constitutional Development of the Republic of South Africa; a position he has held since 2013 and was re-appointed as such in May 2019.

He has been a Member of Parliament for the ANC since 1999. He is also a member of the ANC Legislative and Governance subcommittee and the ANC Political Committee in Parliament.

Mr Jeffery is an admitted attorney and holds a BA degree, an LLB and a postgraduate Diploma in Environmental Law from the University of KwaZulu-Natal.

He served as Parliamentary Counsellor to the Deputy President from 1999-2005. He is also a former member of the Justice and Constitutional Development Portfolio Committee of Parliament where he was instrumental in shaping a number of pieces of legislation, namely:

- the Child Justice Act,
- the Prevention and Combating of Trafficking in Persons Act,
- the Protection from Harassment Act,
- the Superior Courts Act,
- the Protection of Personal Information Act, and
- the Legal Practice Act.

WELCOME AND INTRODUCTION

FRANCIS ANTONIE



Welcome to all our panellists and our guests. Unfortunately earlier today it was confirmed that Adv Cronje would not be able to attend. She sends her apologies and regrets. But, I am very delighted to welcome tonight Judge Zak Yacoob and Deputy Minister John Jeffery – both of whom, in the past, have appeared on platforms of the Helen Suzman Foundation.

I would also like to begin by thanking our various sponsors and donors – especially the Friedrich Naumann Foundation, an anonymous donor, and GIBS for facilitating and helping us with this event.

The whole question of independence of our state institutions and their accountability is one which is very much before us at the present moment. We are all aware of the phrase State Capture. There are various committees engaged in this at this moment. We are pleased that the Zondo Commission has commenced its work. The Nugent Commission has completed its work and there is a commission looking into the PIC. One of the things that does come to the fore is: how has our criminal justice system been compromised? This is a difficult question because it was through that compromise, I would argue, that the State Capture project, at the financial level, proceeded. We are fortunate that there has been an important sea change in our politics. How sustainable that sea change is going to be, we will have to wait and see. It is incumbent on civil society that what we can do, we must do. I think we are driven by the sense that this is our country and we have no other option but to do what we believe is the right thing.

In so many of these matters we come across difficult questions. As many of you know, we wrote to the Speaker of Parliament recently about one particular office of state. We want that office of state, as with all other offices of state, to be independent, but are they accountable? What do we mean by accountable? This is a difficult concept. One of our researchers has done quite extensive work on this question of accountability and perhaps we can persuade her down the line to intervene.

The concern that we have is how do we get the balance right between independence and accountability? Our preliminary work on this was brought to the fore by one of our researchers. I shall ask her now to join us to give us a brief overview of some of the work that she has done on this. With your support, please welcome Lee-Anne Germanos to give us this brief overview.

dedication justice
honour courage honesty public

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 NPA, 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).

The research found that for 5 out of the 8 institutions, the President has the discretion to appoint a candidate of his choosing, with little to no oversight. The appointment of judges to the superior courts and, to an extent, the appointment of the Public Protector, were the only exceptions out of the 5.

In contrast, legislation does not require that the President consult in order to appoint the National Director for Public Prosecutions, the National Commissioner of the SAPS and the head of the SIU.

The heads of the remaining institutions are appointed at the discretion of the Minister of Justice (for the Magistracy), the Minister of Finance (for the Financial Intelligence Centre), and the Minister of Police (in two instances – in the case of IPID and the Hawks). Francis will disagree with me on this regarding IPID because of the ongoing litigation surrounding this matter. Francis, don’t you have an affidavit to depose to right after this roundtable? The HSF has done a lot of work on both the Hawks and IPID matters – not forgetting the impact of the renowned *Glenister* case.

Just as alarming as this somewhat unfettered discretion to appoint, is the lack of prescribed eligibility criteria for the candidates for these positions. The Public Protector, once again, is the only exception with extensive criteria for appointment. Otherwise, vague terminology such as the candidate having to be “fit and proper”, “with due regard given to experience, conscientiousness and integrity” are applied in enabling legislation across all 8 institutions. In the case of the National Commissioner of SAPS, for example, no eligibility criteria exist at all.

In terms of removal procedures, once again, the President or the relevant Minister may remove these heads. In most instances, it is subsequent to some sort of an inquiry into their fitness to hold office, followed by a resolution of parliament confirming the decision to remove. That said, the Head of the SIU may be removed by the President (and I quote) “at any time” if there are “sound reasons” to do so. It is quite obvious from this brief account that security of tenure and accountability in office are issues which need to be explored further given existing legislation. We hope that our discussion this evening will clarify some of these issues.

It has been suggested that our constitutional order was drafted with our late former President Nelson Mandela in mind. If so, this was an error. No constitutional order should be dependent on the stature and goodness of any individual. It is time to tighten the legislative framework which governs the criminal justice system.

The HSF publication suggests that one of the legislative reforms which should be introduced is that a Judicial Service Commission-like model be employed across the board for the appointment of all of the heads of criminal justice system institutions. In addition, that independent disciplinary/complaints committees be set up for each institution to ensure both security of tenure for those appointed to office, as well as to hold them accountable to the public. Thank you.

PANELIST

JUDGE ZAK YACOOB

Good evening everyone and thank you very much for the invitation to be here. It is always a pleasure and it is always a particular pleasure speaking on the same platform as John Jeffery. I hope he regards it as a pleasure too.

I am not going to dwell on how bad we have been. We all know it. It is now a boring subject. The level of the dishonesty and manipulation has been all too obvious for all to see and the troubles have been just horrendous. What I will go into is how we can change our system, bearing in mind the models we already have. Let us really try to look at where we went wrong ultimately. Let us look at the NPA. The method of appointment was meant to be done by the President in consultation with cabinet – in terms of the Constitution. So everyone was meant to be held accountable for the appointments that were made and not only the President. Unless the minutes show that certain members opposed the appointments vehemently, the cabinet would have done well to resign after those appointments.

THE MINISTER'S ROLE IN TERMS OF THE CONSTITUTION IS THAT HE/SHE BE CONSULTED ONLY TO THE EXTENT OF DETERMINING POLICY. POLICY IS TO BE LINKED TO THE POLITICAL DECISION MAKING. HOWEVER, THE APPLICATION OF THAT POLICY HAS NOTHING WHATSOEVER TO DO WITH THE MINISTER.

There is a distinction in the Constitution between the minister's job and the NDPP's job – and how that independence should be managed. Criminal prosecution is a professional system which has to be carefully and professionally managed. That sector has to develop in its own way in terms of its line function. The Minister's role in terms of the Constitution is that he/she be consulted only to the extent of determining policy. Policy is to be linked to the political decision making. However, the application of that policy has nothing whatsoever to do with the Minister. The NDPP runs the professional service in terms of policy determined by the Minister. Quite obviously, if the policy

determined by the Minister is not consistent with the Constitution, the NDPP should have sufficient integrity to take the matter to court. We were not thinking that the President would be like Nelson Mandela – but we did think that there would be a certain level of honesty, devotion and integrity. We knew there would be mistakes and dishonesty but no one could have predicted the rank nonsense that followed. So the appropriate checks and balances were actually set in the Constitution.

The Minister of Justice's visit to the NDPP (in the past) to check up on how an investigation into a particular case was proceeding was not the business of the Minister. That was highly inappropriate. For the Minister of Police to inquire with the National Commissioner of SAPS about how the investigation into a certain case is proceeding is just as inappropriate. So what we have done is to mix up the political and the professional. The political is the determination of policy and the professional is the execution of that policy in a manner required by that particular profession – which a politician can never be expected to even begin to understand. So the idea of mixing the two is a huge problem. Whatever happens, before we begin to amend the Constitution, we should start by not mixing the two roles. We must also make sure that cabinet begins to make these appointment decisions along with the President and that there is broad consultation.

It is very easy to deceive people regarding the integrity of that candidate in a job interview. So how do you determine integrity and honesty in an interview? There must be a determination of guidelines along the lines of the manner in which the job should be performed. In the case of the appointment of the NDPP, the candidate should have an understanding of the following: what prosecution systems do all over the world; the justification for prosecuting crime; the relationship between the NPA and the courts; the relationship between the NPA and the police; how to develop a working relationship with the police; how crime prevention and prosecutions go together; the relationship between the performance of the NPA's duty and the effect that it has on society. The NDPP and the National Commissioner of



Deputy Minister John Jeffery and Justice Zak Yacoob.

SAPS should have a passion for the prevention and prosecution of crime, with a particular perception of criminal justice, and a passion to achieve it.

Whatever the morals we employ, the first thing we should do is to determine the guidelines for what these heads should do (in relation to their respective institutions); what qualities they should have; and how they should be evaluated. Then we have to appoint appropriate expertise on the interview panel to evaluate these guidelines accurately. How many MPs would be able to properly fulfil this role? I am not even sure that most of the members on the JSC know exactly what the role of a judge is and are able to conduct the kind of evaluation that is required in that kind of an interview. We need guidelines and we need them urgently. We also need people who are able to professionally assess if these guidelines have been properly complied with.

I accept that the President should not be able to make these appointments on his/her own. There should be another body – a body of expertise – a body that is not only made up of politicians but of people who understand the importance of the system, the guidelines, the workings of these organs of state, and how they all work together. The NPA should

have an understanding of the constitutional requirement of a fair trial. What does a 'fair trial' really mean? There must be an understanding of the basic elements of the NPA, as well as an understanding of the difference between an inquisitorial and accusatorial system. That is why we need guidelines to cut through this.

We need to develop the expertise to evaluate candidates, policies and guidelines in order to appoint people who are suitable for the purpose for which they are being appointed. These people must be committed to making the necessary sacrifices to ensure that our criminal justice system furthers our constitutional democracy.

We have a long way to go, but get there we must.

PANELIST

DEPUTY MINISTER JOHN JEFFERY

Let us put things into context first. We are a young democracy of 25 years. We have come from an oppressive undemocratic system. As a result, the systems of appointment that were in place were not transparent. The appointment of judges used to be made by the President in consultation with the Minister of Justice. Judges used to be senior counsel who had made their mark. That is where we have come from. We have a constitutional imperative now to transform South Africa. That is what we have attempted to do with the current appointments. So the history of appointments must be looked at in that context. The initial National Directors of Prosecution were not career prosecutors because there was an attempt to move away from the old order. The position of NDPP is also new. During apartheid, each province had its own Attorney General. Bulelani Ngcuka was the first NDPP, then Vusi Pikoli. The dismissal processes first started with former President Mbeki. The last two NDPPs were/are former prosecutors.

The National Commissioners for Police have been George Fivaz, Jackie Selebi, Riah Phiyega (who were not career policemen), then Bheki Cele and Khehla Sitole (who were/are career policemen).

The idea that I am trying to convey is that the motive behind the past appointments of the NDPP and the National Commissioner of Police was probably that South Africa did not need someone within the old apartheid system, but rather people outside of it. That said, we now do have career professionals in both those positions.

The key issues raised by the HSF are: what are the alternatives and what happens elsewhere?

If we look at Canada, the Attorney General is the Minister of Justice. Invariably it is the executive that appoints the head of prosecutions around the world. It is a political appointment. My reading of the South African Constitution is that the appointment of the NDPP is made by the President as the head of the national executive and that there is no requirement for cabinet consultation – nor has it ever happened. My reading is therefore different to that of Judge Yacob's. Although, he has referred me to a footnote in the *Simelane* Constitutional Court

judgement on this issue. For now, we will just agree to differ on this point.

What was not statutorily provided for, but worked well, was the most recent appointment of the NDPP. The President formed a panel by approaching organisations (not individuals) to constitute it. That, however, produced an unforeseen consequence of an all male panel (as all of the organisational nominees were male). The interviews were initially meant to take place behind closed doors, but after being challenged, they took place in public, and that worked well.

With the appointment of the National Commissioner of SAPS, that is invariably an executive decision. In the past some were outsiders, but currently it is a career policeman. The issue that I would raise with the HSF is: what is the alternative? Who should be making the appointments? The same applies for the Head of the Hawks. I was on the panel that appointed the current Head and he is a career policeman. Having said that, with no disrespect to General Booysen, the previous Head was also a career policeman and he was removed by the courts. So career policemen are not necessarily an end in itself.

I see my comrade Robert McBride at the back. The issue with IPID, and I know that there is an ongoing case on this, is: can these kinds of positions be extended? The court seems to be adopting the position that they cannot be. This has been the Constitutional Court's position since the *Ngcobo* case. The question is always: what is the person willing to do to ensure his/her reappointment? Should these positions, which need to be un-influenciable, be renewable? For the Public Protector it's a non-renewable term. The Public Protector is also compensated well so that there is no need to worry about money. Judges are compensated for life after sitting on the bench for a number of years – for the same reason.

Now looking at the judiciary and international comparisons, it is the English system which is dominant in the Commonwealth countries. Then there is the continental system which is a bit different. The Americans of course do their own thing – which is elections or, in the case of the Supreme Court, nomination by the President



Deputy Minister John Jeffery

and confirmation by the legislature. This results in a politically appointed Supreme Court and judges remain on the bench until they pass away (which is not particularly appropriate). In South Africa there was an innovation in the early 90s resulting in the JSC. Since then, other countries have gone on to create a similar commission. Most of them don't have politicians. But is it appropriate for judges to appoint themselves? Lawyers tend to be conservative. So would it be appropriate for them to do the selection? This is a hypothesis, but I am not aware of any judge being appointed without the support of the relevant head of court. Do politicians maybe not play a role in terms of the questions that they are able to ask? In Germany, half the justices are chosen by the Bundestag (the lower chamber). Judges must obtain two thirds of the votes cast in a secret ballot (without debate). In Canada the Prime Minister has recently had to defend a number of appointments. In the rest of the world the head of state appoints on advice of the Minister of Justice or a judicial type commission. Ghana has an 18 member judicial council, of which 7 are judges.

How accountable are the judges? There is an issue of delayed judgments. Attorneys do not want to raise this issue out of concern that judges will rule against them. So there is an issue of judicial accountability to the public.

The last category is the Public Protector. His/her appointment is a parliamentary process which requires 60% support in the legislature. With the previous Public Protector (Thuli Madonsela) it was unanimous. In the case of the current Public Protector there was general support for her appointment – except by the Democratic Alliance. Let me say no more on that. My own experience of parliamentary processes is that there is too much horse trading. It does involve a multi-party group, but it is not a particularly good process.

These positions must be seen in the context of the history of our country – coming out of an apartheid past that was not democratic and had no link to human rights values. The issue of transformation is obviously quite key. Clearly mistakes have been made in terms of appointments. The question is how do we improve and what do we do? We do need to look at international comparisons. My challenge to the HSF is, what are the alternatives that you are suggesting? I do think that it is an important debate that has to be had.

I see that there are a number of distinguished guests in the audience with some very strong views, so let us hear what they have to say.

QUESTIONS AND ANSWERS

MARK OPPENHEIMER

This question is for Deputy Minister Jeffery. I gather that you played a pivotal role in the Legal Practice Act which has led to the creation of the Legal Practice Council. There have recently been elections for the appointment of the members of the Council. You have just spoken about South Africa's democratic values, which includes free and fair elections. How do you explain the removal of a black woman from the Council on the basis that she is a black woman, because of the strict quotas for the composition of the Council (provided for by the regulations to the Legal Practice Act)?

DEPUTY MINISTER JEFFERY

I suspect that the Act required gender and race representation. I suspect that the National Forum was concerned that, with the election of the members of the Legal Practice Council, predominantly white males would be elected. The number of black female silks (senior counsel) in South Africa can be counted on one hand. We need to transform. The allocation of member seats in the Council was done for purposes of race and gender transformation.

MIKE BROWN

With accountability you look at how to adhere to some form of terms of reference or a code of conduct or framework for behavioural guidelines. In terms of the law, it appears that the accountability is to the Constitution or certain legal principles. In other professions there are codes of ethics. Should the legal profession not have the same codes or frameworks?

DEPUTY MINISTER JEFFERY

Previously the advocates and attorneys' professions were self regulating. It was done by the Bar Council and the Law Society. The public perception is that there is no accountability for legal practitioners. The Legal Practice Act has taken care of that. It is meant to create more transparency and provide more information about what is happening with complaints submitted by the public. There is also a requirement that a non-legal practitioner



Robert McBride and Judge Johan Kriegler

sits on the newly legislated disciplinary panel. These sections in the Act are yet to come into effect. They also provide for a retired judge to be an ombudsman.

JUDGE YACOOB

By and large the matter of accountability is coloured by race which complicates things. The professional bodies have policed their members, in relation to honesty, quite well. However, the concept of honesty is suffering a little today. The problem with accountability today is that it is turned into a racial issue. Everyone has their own axe to grind. It makes things more complicated. There should be stricter accountability mechanisms. The accountability of judges is complicated. There is a difference between not delivering judgments on time and being dishonest. With regard to the delivery of fair judgments – we have an appeal process which takes care of that. It is up to the public to accept the outcome of that extensive appeal process. Our society is fundamentally unequal and for as long as it remains unequal, the professions will remain unequal.

FRANCIS ANTONIE

Johan, any reflections on the question of judicial discipline?

JUDGE JOHAN KRIEGLER

Discipline is not about sophisticated systems and checks and balances. It is about integrity and honesty in the end. Like Judge Yacoob



Florenca Belvedere

said earlier, when the Constitution was drafted it postulated an honest President and Judge President. It did not postulate a Jacob Zuma or a John Hlope. It also did not postulate that the JSC would not do its job because of political interference. It does not matter how you design bodies like the JSC, it is for the people in office to be honest and adhere to their oath of office. We have a Public Protector at the moment who is a public disaster and she was appointed through the most open and transparent process in the world. There is nothing wrong with our systems. There is no need to change the model. It comes down to the honesty and integrity of the people that occupy these positions.

FLORENCIA BELVEDERE – PARI

There are two issues that I would like to bring into the discussion: 1) The power lies with the President to appoint not only the heads of these institutions, but also the lower tier – the second layer. If we look at the NPA, the NDPP is appointed by the President, but if we look at the Directors and Special Directors, they too are appointed by the President. The Minister of Justice appoints the Deputy Directors. There is a provision that requires that the President and Minister make these appointments ‘after consultation’ with the NDPP. We know that this requirement does not necessarily mean that they will take into consideration the recommendations of the NDPP after such consultations. I would argue that a large part of that decision vests in either the President or Minister. Yet it is the NDPP who has to work



Paul O'Sullivan

with these appointees. So should the NDPP not be making these appointments? 2) The issue of the budget of the NPA – the fact that it is mediated by the Department of Justice. Again we have a crossing of the lines between the political and the professional.

DEPUTY MINISTER JEFFERY

I think the first issue raised was more of a comment than a question. It is actually the institutions (NPA) that negotiate their own budget with Treasury, and is not mediated by the departments. It is Treasury that makes the budget allocation which then must be approved by cabinet and by Parliament. Parliament cannot amend budgets yet, and I do not think cabinet has amended them before either. There should be more transparency on how budgets are spent by these institutions.

JUDGE YACOOB

Institutions are squeezed by budget constraints which are allocated by Treasury, which are squeezed by the political. It is impossible to say that Treasury makes these allocations totally independent of political influence. I agree with the comment that legislation has made things worse by giving the President more appointment powers than the Constitution. In terms of section 85(2) of Constitution, the President is meant to make these appointments together with cabinet. But we can engage in that debate another day.

QUESTIONS AND ANSWERS



Matthews Sesoko and Robert McBride

PAUL O'SULLIVAN - FORENSICS FOR JUSTICE

Thank you Francis for convening this. We should be focusing on what has gone wrong in the criminal justice system and not as much on the judiciary. In fact, if it were not for the judiciary this country would be in a complete mess right now. Civil society has spent the last few years enforcing rights that are there but have been ignored by the unethical behaviour of the President's appointees. So how do you legislate that a person must be ethical?

DEPUTY MINISTER JEFFERY

What safeguards are you suggesting we put in place? There is a requirement that these officer bearers be fit and proper. I agree with Judge Kriegler that the appointment of the Public Protector was a transparent process. I say no more.

JUDGE JOHAN KRIEGLER

How do you keep people honest? By watching them. It is done by others doing their jobs properly. If cabinet had kept Zuma honest by adhering to its oath of office we would not be here.

JUDGE YACOOB

Going through the motions of public processes is one thing, but doing it properly in a way that matters, effectively and with a knowledge of what is required, is another. Speaking for myself, I was very disconcerted by the Mkhwebane process. I was very disconcerted by the kinds of issues that were addressed. That's why I say that there must be criteria and



Prof Raphael De Kadt and Judge Johan Kriegler

professional people who can evaluate whether or not the criteria are being complied with. It is not about going through the motions and making it look good to the public. It is not about ostensible reality.

DEPUTY MINISTER JEFFERY

If we take the issue of the Public Protector, did the courts not give the Public Protector great powers – greater powers than those enjoyed by anyone else – certainly greater powers than those enjoyed by any judge? The Public Protector does not even need to be a judge, or on the same level as a judge. There is no hearing or transparency by the Public Protector when compiling a report. An investigation is conducted and the same person who conducts the investigation is the person who makes the decision. There is no appeal process and the remedial action is binding. There are some who are of the opinion that the Constitutional Court judgment was wrong; that it was born of the circumstances of its time.

JUDGE YACOOB

I would really hope that my friend, John, knows that a) the Public Protector's decisions are as binding as any other administrative decision made by any other administrative body in the country. We all know that until an administrative decision is set aside by the courts it remains valid. The same applies to the Public Protector's decisions, which can be challenged on review. Some political administrative decisions are worse than those of the Public Protector and those decisions also fall to be set aside by the courts, but remain valid until



Judge Edwin Cameron

then. So it is a mistake to say that the Public Protector has been given extra powers.

DEPUTY MINISTER JEFFERY

No Public Protector in the world has such powers and I think international comparisons are important in this case.

MATHEWS SESOKO - IPID

I am often asked if IPID is really independent – seeing that we fall within the Ministry of Police. I know that this is a policy decision (this question is addressed to the Deputy Minister), but does our legislative framework not put the Minister of Police in a difficult position where he is both the Minister of Police and yet he is also responsible for an institution which oversees the police? He is the same Minister that makes a nomination for a candidate for the position of the Executive Director of IPID to Parliament. Does that not cause a problem? Is there not something that should be done? We are in the process of amending the IPID Act. As an institution, when we (IPID) made recommendations for the amendment, we addressed the issue of security of tenure regarding the renewal of the Executive Director's tenure. Looking at other departments, what should be done about this?

PROF RAPHAEL DE KADT - FELLOW OF THE HSF

I want to say two things: 1) I agree with the Deputy Minister absolutely – that we have come a long way. 2) Liberal democracies globally (we are a version of such democracies), are in serious trouble. Part of the cause of that problem is a



Vandana Hingorani-Meyer

breakdown in the people's trust in the state. The South African economy might be dire but our democracy is still quite healthy. With respect to Judge Kriegler, the integrity of the incumbents of office is important, but we do need checks and balances to hold these incumbents to account. We need to start looking progressively at how to improve on our institutional domain without subtracting from the emphasis on honesty and integrity.

VANDANA HINGORANI-MEYER

For my sins, I have Prasa and Eskom as two of my major clients. There are people within these institutions that have integrity, but it is the justice system that fails them. There are people, whistle-blowers, who are dying every day and we don't even know their names.

WILLIE HOFMEYR - NPA

I was in charge of the chapter in the Constitution dealing with the NPA and for the drafting of the NPA Act itself. We were naive about what could go wrong in a democracy. One of the issues for me is how frighteningly easy it was to capture law enforcement. This was mainly facilitated by the fact that the top positions in the NPA can be appointed by the President without any processes. I think there needs to be a serious debate about the processes that need to be adopted for these appointments – including the appointments of those in charge of budgets. There are instruments that can be used to determine the competency and integrity of a person in an appointment process. These instruments are used by the SIU and should be looked into.

QUESTIONS AND ANSWERS



Judge Edwin Cameron, Francis Antonie, Judge Johan Kriegler and Judge Zak Yacoob

JUDGE YACOOB

On democracies, I am not a liberal democrat. I am a democrat who believes in the values of human dignity, equality and freedom – without too much of an emphasis on freedom. The wealthy are able to use their money and influence to gain political power in democracies. I think I would stay away from lie detectors for the moment. It was the second speaker that I was most persuaded by. The criminal justice system has become so corrupt that we want to send everyone to jail in a big way. What we have lost sight of is that the criminal justice system is a broader system. There are problems of access to justice at every level. There are problems with the poor and weak being disregarded by the justice system itself. There are problems with the powerful being regarded by our criminal justice system as good. The democratisation of our criminal justice system is also important. It is dangerous to say that, in order to fix the criminal justice system, more people need to be imprisoned. We need to consider restorative justice, persuading people, mediation, crime prevention and bringing society together. It is

not to say that those who deserve to go to jail should not go to jail. The reform of the criminal justice system needs to be more democratic, sympathetic, understanding of human frailty and most importantly, needs to punish where punishment is required.

DEPUTY MINISTER JEFFERY

This discussion has been very useful and enlightening. It needs to continue. It should be more solutions orientated. The question on IPID is very valid and needs to be addressed. I think we have a problem of corruption becoming endemic in South Africa and we need to all pull together in the same direction to resolve it.

FRANCIS ANTONIE

There is a sense that things continue with no consequences. I want to end off by thanking our donors, my colleagues at the HSF, the panelists, and our guests.

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