

## **THE APPOINTMENT AND ACCOUNTABILITY OF JUDGES**

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I feel greatly honoured to have been asked to give this lecture and moved to speak to this Foundation bearing Helen's name and so ably led by Francis Antonie.

When a constitution is interpreted, a balance is required between the original intent of those who drafted it and its need to develop in accordance with the underlying principles it promotes. Both memory and principle are tools of constitutional evolution.

Let me start with memory. It is far too often said that, despite the appalling actions of the apartheid government, it at least obeyed the tenets of the rule of law and although the apartheid laws may have been harsh, they were, at least officially authorised. According to this view the rule of law was therefore followed in those days.

That view is a distortion of the proper meaning of the rule of law, which it confuses with rule by law (or rule by the law, any law). It confuses legality, which is at the base of the rule of law, with legalism, which is a tool of tyrants. The apartheid government may have followed the tenets of legalism, but not the rule of law.

Helen Suzman knew this when she delivered a blistering attack on the apartheid government as early as 1964 for its blatant disregard of the principles of the rule of law through its sanctioning of detention without trial, its infringements of freedom of movement, and a host of other measures, including the political manipulation of judicial appointments.

Resort to memory is also necessary to scotch another myth: that the bill of rights in the South African Constitution was a concession to liberalism and an

individualistic political philosophy which others believed did not comfortably fit in a transitional context. In fact the bill of rights was a revolutionary document. Revolutionary in the literal sense in that it turned previous practices around by 360 degrees. It required equality in place of discrimination. It required freedom in place of bondage. It required respect for dignity in place of abuse and neglect; it required inclusiveness when before there was exclusiveness. And it required the rule of law in place of rule by law, including as a vital part of the rule of law the need for just administrative action when before there was arbitrariness, despotism and the abuse of power.

I can hear Helen Suzman's response to what I have just said: "What is the use of all these words if there is no enforcement, no implementation on the ground?" To which the answer is of course: nothing can be guaranteed, and many different institutions will be needed to make it all work as intended, but the first crucial step on the road to implementation is the need for judges to be independent because judges are the ultimate arbiters of disputes about constitutional values. They anchor the delivery of just outcomes in the daily lives of all individuals in accordance with the fundamental values of the new constitutional dispensation.

The appointment of judges is therefore crucial to their independence. What system can best guarantee that the judge is independent in fact and appearance? What method will best ensure public confidence that the choice of judge will not predetermine the outcome of a case?

At the time of the founding of the constitution three principal models of judicial appointment were available in international practice : First, executive appointment; by the minister of justice, sometimes attorney general, or head of government, without parliamentary involvement. This was the previous method in South Africa, and in most Commonwealth countries of that time,

including Canada, Australia and the UK , where the Lord Chancellor (effectively the UK's minister of justice then) appointed all judges. The process of appointment under this system is normally closed, and judges are assessed through "secret soundings" from within the legal establishment, and especially from judges before whom the candidate has appeared. Where this system is conducted with integrity, may have the advantages of selecting candidates of high legal quality, but it has two drawbacks: first, it can too easily perpetuate existing social biases and ignore applicants from non-conventional backgrounds. Secondly, the fact of unchecked executive appointment raises a perception (whatever the reality) of bias in favour of the government of the day, and indeed can all too easily result in bias in fact due to the temptation (under the secret process) to make political appointments contrary to the principle of separation of powers.

The second method of appointment which was considered at that time was that of the United States appointment to their Supreme Court where the President nominates a candidate, who must then be approved by a legislative body, the US Senate. There is a similar procedure in Germany for appointment to its constitutional court although nomination there is by political parties and the approval by either House of Parliament requires a two thirds majority.

This model acknowledges that there is room, in the exercise of constitutional interpretation, for political judgment and that it is therefore legitimate for the elected government of the day to seek to influence that judgment. Some judges may disappoint their political nominators and approvers, but the hope is that they will keep the faith.

South Africa, to its credit, rejected the executive and legislative models of appointment and went for the third model, that of appointment by a judicial services commission. This would reduce the role of the executive alone or in

combination with the legislature and thus reduce the opportunity for political patronage of judicial appointments, and thus enhance the separation of powers and judicial independence.

South Africa made its choice against the USA model on the ground that it tended to politicise the judiciary, even before its worst features were confirmed after the *Bush v Gore* election in 2004. When the result of the election was challenged in the forum of the US Supreme Court, those judges who were initially nominated by Republican presidents sided solidly with the republican litigant, Bush, and the Democratic appointees voted solidly for Gore. The day the judgment (*Bush v Gore*) came out I was in a meeting in Europe where the Yugoslavian delegate said archly to the US member that the US should never again preach about judicial independence to countries of the former Soviet Union when its highest court had shown itself so blatantly political, in defiance of the rule of law.

The other valuable feature of a judicial appointment commission is that it could seek positively to break the pattern of self-replication, or ‘cloning’, of the conventional judiciary, through the positive recruitment of a more diverse pool of candidates. The South African Constitution specifically requires the “need for the judiciary to reflect broadly the racial and gender composition of South Africa”.

However, the South African model reflected a compromise as accounts of the last-minute agreement on this issue have confirmed. As a result, 8 of its 23 members are lawyers, but the other 15 are representatives of political parties or appointees of the President. It still potentially permits political domination of judicial appointments.

South Africans often seem insufficiently aware of the impact of the 1996 constitution both on other democracies then emerging and on old democracies.

It was an innovative constitution in a number of respects, but particularly for its bill of rights. During the negotiating period I recall well the blandishments of the USA, of European countries and others to simply accept their constitutional models, but it was decided to adopt a South African model that would sit comfortably on this soil and reflect the history and aspirations of this country. Some of the provisions have in turn proved inspirational. The provision for just administrative action, for example, actually codifying the requirement that actions of all public officials must be legally authorised but also fairly arrived at and reasonable in outcome. This provision found its way into the new constitutions of Malawi and Kenya, but also to Caribbean countries, the Maldives and even in the recently drafted Charter of Rights of the European Union – in a slightly modified form and called the right to good administration.

Another export was the notion of the judicial services commission. A number of African and Commonwealth countries have moved from the executive model to the Commission model. Even the United Kingdom, in 2005, was persuaded to abandon its model of judicial appointments through the secret soundings of the Lord Chancellor and opted for an independent Judicial Appointments Commission.

In Europe over the past year the Council of Europe (expl) has come out unambiguously in favour of JACs as the preferred method of appointment of judges in the new democracies in the countries of the former Soviet Union. This is based on a more considered reading of two international instruments in particular,

Article 10 of the Universal Declaration of Human Rights:

“Everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”

Article 6 of the European Convention on Human Rights is in similar terms:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

The provisions in both Conventions requiring the independence and impartiality of judges was previously read into the actual hearings, that they be fair and unbiased. However, they have recently been extended to the issue of the independent appointment of judges as well.

But here the similarity with the South African JSC ends, because the European model insists, unlike the South African model that there be a majority of lawyers on the Commissions and often, as in the UK’s model, which has no politician members at all. I recall a few years ago when, on the Venice Commission I was a rapporteur considering the composition of the JAC for a new democracy in East Europe. I sat together with a Polish judge. Influenced by the South African model, I said that I had no quarrel with the President nominating some members of the Commission. She, however, was outraged. “You simply do not understand”, she said. “In the bad old days of the Soviet Union we used to call our judges “telephone judges”. Appointed by the “ruling party” and responsible to its interests, when there was a case against the government they would telephone the minister to find out what they should decide. This must never happen again. There must never again be any political members on judicial appointment committees”.

Opinion No. 10 of the CCJE, “*the Council of the Judiciary in the service of society*” further develops that position, providing, (at paragraph 16):

“The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the

perception of self-interest, self protection and cronyism must be avoided.” And (at paragraph19): “In the CCJE’s view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of Parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.”

How has South Africa fared under the existing appointments system? In some ways the system has been a massive success. Its judges in the highest courts have proved models both of rigorous legal analysis and how to promote transition and social change within the constraints of their limited authority. The judiciary has been transformed into one much more closely representing the composition of the population, in respect of race if not gender, although progress there too has been made. In the first years of the JSC even those members who were appointed for their political attachments, or by the President, strained to avoid the conferment of political patronage through judicial appointment. The interest of the majority party (or “ruling party” as it sometimes misleadingly called), was subjugated to the interest of judicial independence and the rule of law.

That degree of tolerance and discipline seems of late to have been somewhat weakened. It is not for me to judge the quality of recent appointments, and some have clearly been good. But I cannot help remark that a number of those whose applications for judicial office were rejected are lawyers of the very highest ability not only in terms of their analytical skills but in terms of their

wider qualities and commitment to equality and human dignity. Many of them are greatly respected internationally and it is with disbelief that their failure to be appointed has been viewed. They would simply grace the bench of any top court of any country in the world, and if their rejection was due to their political affiliation or lack of affiliation, or to their habit of independence (and I venture no opinion on that) then the loss is South Africa's alone, and the loss is beyond calculation.

Let me now turn to the issue of judicial accountability, which is closely linked to judicial appointments as it responds to the oft-made charge of 'juristocracy', or of dictatorship by judges; that judges are not elected and therefore have less or no legitimacy to decide matters constitutional. These taunts are levelled on judges in all countries by robust politicians or the media who believe that the policies of the government should not be thwarted by unrepresentative judges. Just read the English *Daily Mail*.

One answer to this criticism is that judges do not operate on the same decision-making field as politicians. The legislature makes policy for the future of society on the basis of a calculation of preference. Judges decide disputes between two sides on the basis of textual interpretation and the balance of principle. The issue could not have been put better than Justice Kate O'Reagan put it in her Helen Suzman Memorial lecture last year, where she stressed, as she and others in the Constitutional Court have in many judgments, as has Professor Cora Hoexter, that the separation of powers does not permit the courts to substitute their opinion on policy, or to substitute the opinion of experts. Courts decide simply whether the law permits the action and whether the decision has been properly arrived at, and whether there is a rational relationship between the decision taken and the purpose of the power under which it



was taken. As O'Reagan said: "Citizens' entitlement to ensure that government complies with. . . constitutional requirements does not diminish government's capacity to govern, nor does it entitle citizens to co-govern the country".

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But judicial restraint or deference is not a complete answer to the plea for judicial accountability. As Professor Hugh Corder has rightly pointed out, in the new South Africa the exercise of all public power and the performance of all public functions necessarily demands some form of justification.<sup>1</sup> And that is true for all proper democracies. The late and great Etienne Mureinik said that South Africa had changed, in 1994, from a culture of authority to a culture of justification and this applies also to the judiciary. But this accountability must be attained at no risk to judicial independence, and hence most sensible jurisdictions reject the notion of electing judges because, as is shown in studies of United States state jurisdictions where judicial elections are permitted, judges may all too easily be subject to influence by those paying for their campaigns, and also by populist demands, at the expense of unpopular minorities and society's most vulnerable.

There are, however, forms of accountability other than elections. What we might call common law methods of judicial accountability are probably more stringent than those faced by any other decision-maker in society. There is a range of methods of judicial accountability and justification which include the following:

- Cases are almost always heard in open court, so that any member of the public and the media can observe judicial authority at work, and can criticize it, disseminate reports about it, stimulating public debate and

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<sup>1</sup> See Etienne Mureinik "A bridge to where? Introducing South Africa's Interim Bill of Rights" NNCCD

open and free criticism. Compare that to the hole-in-the-corner decisions of most private and public decision-making bodies.

- Every judicial decision is argued on the basis of proofs and argument from each side, and must then be supported by a reasoned judgment, which must be made available to those who request it. At least in the higher courts, these reasons extend to scores of pages. Compare that to the reasons we get from most areas of public administration (if we get reasons at all) .
- Judgments are likely to be published in official sets of law reports, which set an open precedent to which the public can have recourse.
- The courts are assisted by an organized legal profession, which is both independent (at least in being largely self-regulatory) and adheres to a strong code of professional ethics;
- the possibility of review by or an appeal to a higher court exists in respect of every judicial decision, except naturally that of the highest court in the hierarchy;
- the admittedly remote possibility of disciplinary measures, or even more unusually, removal from judicial office, exists in law, although this result is difficult to achieve without gross misconduct (for reasons of the preservation of judicial independence), and here the process needs the participation of all three branches of government.

We could take accountability even further if we wished. There is surely no reason, in my view, why the financial interests of judges should not be disclosed. And there is no reason why judges should be forbidden from accepting any emoluments once their tenure has begun. Conflict of interest should be avoided at all costs. It seems important too that all judges of equal rank ought to be given precisely the same payments in salary and in kind and

that any exception should be properly justified so that they do not give the impression that any one judge is favoured by their executive paymaster.

In case any judge present are concerned about what I have just said, I would add that it is also important for judges to be decently compensated for their important tasks, again to avoid the temptation of corruption. I heard recently of a woman judge in Africa with a family of four whose husband was dead and who had not been paid by the state at all for 9 months. In a letter to the minister she admitted that the temptation to accept a bribe might be simply too difficult for her to resist.

Peer review is another method of accountability which is these days imposed upon virtually every other area of administration, public or private. It involves an internal assessment, seeking to determine whether the person reviewed is meeting targets of efficiency, courtesy, accessibility, and so on. A recent review of the judicial role in the UK is suggesting that additional course of judicial accountability.

On a recent visit to Brazil I discovered another deeply impressive method of accountability. In the basement of the Supreme Court building in Brasilia a television station broadcasts for most of the day about cases as they are decided, with summaries in accessible language, and debates structured around the results. This programme is deeply popular, has an audience of millions, including in schools, and provides both a means of communication of the law and accountability for the process and substance of decisions.

Finally, let me ask whether mechanisms of accountability might properly include the kind of review that is now in train in South Africa, initiated by the Department of Justice and Constitutional Development, for “the assessment of the impact of the decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence”.

Given the context of some of the statements made before the present request for bids on the review was somewhat toned-down, it seems clear that this is a shot across the bows of the judiciary by the minister and the party he represents. But let's assume the best of motives, that it is an attempt genuinely to review the progress to date of the two courts. Is it appropriate for the executive to institute such an inquiry, or does it constitute a breach of the separation of powers?

To me the answer depends not only on the motives of the review but also upon its content. It is perfectly appropriate for the government to assess the effectiveness of the courts' organisation and management. Are they acting sufficiently quickly? How clogged is the docket? Are individuals provided with reasonable access to the courts? Are they employing their resources efficiently? Might they need more resources, or more resources in certain geographical areas or in some areas of legal dispute? Are the costs of litigation reasonable? Is legal aid sufficient? Is justice provided evenly across the land? These questions are appropriate for government to answer because it is government that can decide whether to provide the resources or the expertise to remedy any deficiencies in those organisational and managerial matters.

It may also be proper for the government to seek to determine whether implementation of the courts' decisions have been effective and the extent to which it could be improved. Matters such as these, and especially the issue of a serious backlog of cases, prompted a recent review by first Switzerland and then the United Kingdom of the European Court of Human Rights in Strasbourg, that has jurisdiction over human rights matters for Europe.

The purpose of the review in the present case, however, is partly of those two kinds (efficiency and impact). However, it also has another purpose, which is to undertake "a comprehensive analysis of decisions [of the courts] to

- (a) “establish the extent to which such decisions have contributed to the reform of S African jurisprudence and the law to advance the values in the Constitution,
- (b) to assess the evolving jurisprudence on socio-economic rights with a view to establishing its impact on eradicating inequality and poverty and enhancing human dignity” and
- (c) to assess the extent to which South Africa’s evolving jurisprudence has transformed and developed the common law and customary law in South Africa as envisaged by the constitution.”

The probing of these questions is perfectly legitimate for any academic or NGO or any other individual, but surely not another branch of government, even by means of contracted out tender. The executive here is assessing the substance of the courts’ decisions. It is asking whether the actual judgments of the courts are correct. It is claiming the right to second-guess the judiciary, in blatant disregard of the separation of powers and the right of the courts to arrive at their decisions irrespective of the view of the executive and free of any executive pressure. There is also a clear implication that if the courts fail the examination, a penalty will ensue. Why else conduct the inquiry? What concealed sanction is contemplated that could not amount to an interference of judicial independence and the separation of powers?

The quality of any judicial system, and thus of an important part of the democratic corpus, depends upon the willingness of outstanding individuals to apply for and accept appointment as judges. The new South Africa has been fortunate in attracting judges of the very highest competence and integrity who elevated the principle of ubuntu and have shown that socio-economic rights are

important and may be justiciable. They have set intellectual standards for the world, which increasingly cites them and learns from them.

This crowning achievement – a majestic export of this country, of which it should feel immensely proud - is tragically easy to destroy. Being a judge has its satisfactions, but it also has its anxieties and tensions. If men and woman of quality feel that they will be passed over because of the lack of political credentials; or that their independence will be portrayed as heresy; or that they will be constantly accused of harbouring dictatorial tendencies not appropriate to non-elected office; or if they believe that the executive harbours plans to restrict their independence by undisclosed sanctions – if that is the culture in which they will operate as judges, then even the most resilient of them will no longer put themselves forward for selection.

If this were to happen, a key feature of the democratic revolution, and a central element of the rule of law, will have been most profoundly betrayed.