Volume FOUR Chapter FOUR

Institutional Hearing: The Legal Community

• INTRODUCTION

1 In his speech from the dock in 1962, Nelson Mandela said:

> *I would say that the whole life of any thinking African in this country is driven continuously to a conflict between his conscience on the one hand and the law on the other… The law as it is applied, the law as it has been developed over a long period of history, and especially the law as it is written by the Nationalist Government is a law which in our view is immoral, unjust and intolerable. Our consciences dictate that we must protest against it, that we must oppose it and that we must attempt to alter it.*

2 All branches of the legal profession and interested organs of civil society were invited to make submissions on the role played by lawyers between 1960 and 1994. Those who responded to the Commission's invitation are listed elsewhere in this volume. The Commission was deeply disappointed that judicial officers (both judges and magistrates) declined to attend the hearing and that their responses took the form of a few written submissions. The representative bodies of the rest of the profession were slightly more forthcoming: written and oral submissions were received from the General Council of the Bar (GCB), the Association of Law Societies (ALS) and the Society of Law Teachers. Several individual practitioners also submitted their views, as did the 'alternative' lawyers' organisations – the National Association of Democratic Lawyers (NADEL) and the Black Lawyers Association (BLA). The Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR) also made significant submissions. From government, the Minister and Department of Justice put forward their views in submissions, and several attorneys-general also attended. Amnesty International and the Centre for the Study of Violence and Reconciliation gave the Commission the benefit of their views.

3 In its invitation (which was issued both generally and to particular organisations and individuals), the Commission requested that, where appropriate, attention be paid to the following issues, indicating the general thrust of the hearing:

a The relationship between law and justice.

b Principles and standards by which to evaluate the legal system.

c What informed judicial policy?

d What, if any, attempts were made by the executive or other organisations or individuals to undermine the independence of the judiciary?

e The relationship between the judiciary and the state, the State Security Council, political parties or organisations.

f The appointment of members of the judiciary.

g The role of the judiciary in applying security legislation.

h The relationship between the South African judiciary, the legal profession and the law schools.

i The exercise of judicial discretion.

j Racial and gender discrimination in the judiciary, legal profession and law schools.

k The role of other role-players – namely the Minister of Justice; the Department of Justice, its line functions and Justice College; magistrates; attorneys-general; the legal profession, including the Bar Council, the Association of Law Societies and the Para-Legal Association; lay assessors; interpreters; and the 'homelands' (self-governing territories and independent states).

l Recommendations on how the legal system can be transformed to reflect a human rights culture and respect for the rule of law, and which will address the perception that justice is the privileged domain of few in our society.

4 The Commission was at pains to stress to those invited that:

> *It is not the purpose of the hearing to establish guilt or hold individuals responsible; the hearing will not be of a judicial or quasi-judicial nature. The hearing is an attempt to understand the role the legal system played in contributing to the violation and/or protection of human rights and to identify institutional changes required to prevent those abuses which occurred from happening again. We urge all judges both serving and retired to present their views as part of the process of moving forward.*

• SUMMARY OF THE SUBMISSIONS

5 The transcript of the hearing runs to more than 650 pages, to which must be added the hundreds of pages of written submissions.[1] What follows must, therefore, be read as an extremely generalised summary of the main points made by those who submitted their views. In the light of their pivotal role in the administration of justice and the controversy that surrounded their decision not to appear in person at the hearing, the chief focus was almost inevitably on the judges. This concentration on the superior court judiciary should not, however, be allowed to obscure the lamentable non-appearance of the magistracy, especially when it is considered that this is the level at which most South Africans engage with the courts. In addition, magistrates played a critical administrative role in the implementation of state policy throughout the period under review.

6 In addition, valuable insights were gained into the crucial supportive roles played by the advocates, attorneys, academics and the prosecutorial authority in facilitating the enforcement of the law — both where it resulted in injustice as well as, more seldom, justice.

The argument of establishment bodies

7 A general theme or argument that permeated almost all of the submissions by the judiciary and the 'establishment' legal professionals (the GCB, the ALS and the attorneys-general) can be expressed as follows:

8 It was argued that the doctrine of parliamentary sovereignty under the Westminster system required of lawyers (and especially judges) to respect, and indeed to defer to, the will of the majority in Parliament, thus denying the courts the opportunity to fashion statute law to achieve a degree of justice in the face of legislated injustice. In other words, the 'intention of the lawgiver' was the supreme guide in the interpretation of statutes.

9 Where there was some room for manoeuvre, particularly in the construction and development of the common law, or where clear statutory ambiguity permitted it, lawyers argued for and judges mostly adopted an interpretation that favoured liberty and equity.

10 Any attempt by the judiciary too obviously to circumvent the unjust effects of apartheid measures would, it was argued, have led inevitably (at best) to further legislative steps to reverse such decisions or (at worst) to the overt subversion of the formal independence of the courts and the 'packing of the Bench'.

11 While there were examples of judicial decisions, behaviour and professional conduct which were clearly unjust and ought to be apologised for, and while it was generally conceded that much of what happened in and around the administration of justice ought to have been resisted and condemned openly and forcefully by individual lawyers and the organised profession, the record of judicial impartiality and pursuit of justice was satisfactory, if not good.

12 This general picture, allied with enormously principled and courageous action by a small minority of lawyers from all the branches of the profession, assisted in establishing the climate in which the political negotiators in the 1990s could agree that a constitutional dispensation (resting on the twin foundations of a bill of rights and the power of judicial review) was the most appropriate guarantee of dignity, equality and freedom for a future South Africa.

13 It was argued that any fair and accurate investigation into, and weighing up of, past judicial and lawyerly conduct would have to involve an effective 're-trial' of the issues in their appropriate context – a complex, time-consuming, expensive and ultimately senseless undertaking. In any event, this could lead only to the blaming of individuals or groups of lawyers, which was not part of the Commission's agenda. It would also prove unhealthy for the development of a coherent and respected post-apartheid jurisprudence.

14 It would have been improper, both in form and substance, for judges to appear in person at the hearing, for this would affect their independence, which was guaranteed under the Constitution. This is all the more important now that the power of judicial review on constitutional grounds is entrusted to those judges.

15 Legal education and training had been largely uncritical of unjust legal dogma and practice. Those few academics who had dared to speak out had received insufficient support from their colleagues and institutions. This was not, however, particularly unusual in international terms and students needed to be familiar with current legal rules in order to be equipped to practise law.

16 At no stage, had there been any question of direct interference with the administration of justice by the executive or the legislature, in particular where disputes before the courts were concerned.

17 In a nutshell, it was argued that an administration of justice and a legal order that preserved a limited degree of impartiality and independence was better, in all circumstances, than a legal system that was completely subservient to the will and whims of the political masters in Parliament.

The counter argument

18 Naturally, submissions from bodies such as the BLA, LHR, the LRC and NADEL took issue with these propositions at almost every turn. For them, lawyers and the courts under apartheid, with very few and notable exceptions, had co-operated in servicing and enforcing a diabolically unjust political order. They argued that it made no sense to invoke a defence of parliamentary sovereignty. The validity of such a defence depended on at least a substantial degree of democracy in the political order, as well as a basic respect for the rule of law as a direct or necessary adjunct to legislative omnicompetence. Neither prerequisite was present to any significant degree in South Africa. Judicial independence was a myth that had been exploded in the daily experience, particularly in the magistrates', but also in the superior courts. Moreover, several meticulous empirical studies since the mid-1970s had demonstrated a judicial partiality towards the legislature and executive. The practising and teaching legal profession, it was stated, had willingly acquiesced in apartheid's subversion of whatever sense of justice may have hitherto been part of the common law and the legal system. Those practitioners and academics who dared challenge the political and/or legal order were not only not supported by their colleagues but were, more often than not, ostracised by them.

19 As a result, it was alleged, the basic fabric of the legal system had been subverted and become rotten with injustice. In order to begin to reverse this process and to lay the basis for the new constitutional order, a public reckoning and apology by the 'old-order' lawyers was essential. Arguments about the erosion of judicial independence held no water when it was judicial action in the past which was being scrutinised, and when such independence was, in any event, more ritualistic than real.

20 These extraordinarily brief summaries of the positions presented and argued at the hearing cannot hope to portray the extent and complexity, littered with examples, of most of the submissions. Taken as a whole, the submissions and oral testimony form a valuable archive that bears close examination as one set of versions of the past. It will be for others to analyse and debate the arguments in the detail that they deserve.[2] For present purposes, the chapter proceeds to make certain assumptions and to draw conclusions concerning the above arguments, and to consider their impact on the way forward for the administration of the law and justice in South Africa.

• ASSUMPTIONS

21 In reaching its findings, the Commission assumed the validity of certain principles and concepts, although aware that almost every one of them is a matter for extensive debate, and that such debates are not easily resolved. One must also acknowledge the benefit of hindsight, but the Commission feels sure that this factor has not made a material difference either to the assumptions or conclusions. It is not expected that the views expressed will be uncontroversial, for this is the nature of the exercise and the issues being reviewed. Nonetheless, in the starkness of the apartheid-context and in the light of the debates on such issues which took place in legal circles and the popular media throughout this period[3], few lawyers and certainly no judges could claim to have been unaware that the role of law and lawyers under apartheid was at least open to question if not criticism.

22 The following appear to be assumptions about that role that enjoy relatively widespread acceptance, although the legal establishment was dismissive of them in the past and may still resist them today.

23 First, judges were able to exercise a choice in almost all circumstances, although in some cases the range of options might have been extremely narrow. The inherent ambiguity of language and the diversity of factual circumstances with which judges were confronted allowed them a degree of latitude in deciding what the law was (even if it was cast in statutory form, and the more so if a part of the common or customary law) and in applying such legal rules to the concrete situations before them. Choices of a different and more far-reaching nature were available to legal practitioners (despite the much-vaunted ‘cab-rank’ approach said to apply at the Bar), to law teachers and students.

24 Second, all lawyers, as human beings, bring to their professional lives the baggage of their personal past, to which is added the communal culture so characteristic of the Bench and Bar, and to a lesser extent the side-Bar and academy. The values thus inculcated play an important part in shaping individual and corporate responses in situations where choices have to be made manifest in the courts by expressions of judicial policy. This is a proper part of the judicial process. It does, nevertheless, provide insights into underlying values.

25 Third, in the rare circumstances where little or no judicial choice exists, certain steps short of resignation are open to the judge. These include criticism of legislative policy both on and off the Bench, within the limits of propriety. Such limits are largely determined by the judicial oath of office and the doctrine of the separation of powers. In the case of South African judges, the oath demanded that they administer justice “to all persons alike without fear, favour or prejudice and in accordance with the law and customs of the Republic”.[4] Obviously central to the maintenance of a semblance of justice in the face of legislated executive injustice would be the meaning given to ‘customs’ (which could have been extensively interpreted to include the practices, and thus interests, of all the people of the Republic), as well as the prominence and scope given to the common law presumption of statutory interpretation (such as that the legislator intended minimal deprivation of rights and liberty and that its legislation should impact as equally as possible, and did not intend retrospective operation of statutes).

26 Fourth, the doctrine of the separation of powers naturally applied imperfectly in a system of government based on Westminster. Although the judiciary was formally independent of the legislature and executive once appointed, the very appointment process (which was in the almost-complete gift of the executive) as well as the execution of court decisions (again dependent on administrative co-operation) severely limited substantive independence. This inhibited

the will and authority of the judiciary to exercise a real checking and balancing of the other two branches of government.

27 Fifth, the judiciary is part of government, a vital cog in the day-to-day execution of policy and enforcement of current law. Yet, the courts fulfil another function. As Lord Devlin has said, "the social service which the judge renders to the community is the removal of a sense of injustice". Such a function contributes to stable order and peaceful government, but it cannot be wholly illusory. On occasion, the judiciary must be permitted to overrule executive action or temper legislative pronouncements that operate too unjustly. There needs to be substance to the notion of judicial independence, otherwise the courts will be seen as the mere obedient servants of the other branches of government. It is precisely this 'space', available to the judiciary and to lawyers, which can be legitimately and legally used to preserve basic equity and decency in a legal system. As so powerfully catalogued by Richard Abel[5], creative and courageous lawyering (and judging) can be deeply influential in the body politic. Whether such initiatives became possible in the late 1970s and 1980s must be questioned.

28 Sixth, the appearance of judicial independence and adherence to legalism under the guise of 'rule by law' serves as a powerful legitimating mechanism for the exercise of governmental authority. It is all the more useful to a government which is pursuing legislative and executive injustice to be able to point to superficial regulation by the judiciary, while being able to rely on the courts not to delve too deeply in their interpretation and enforcement of law.

29 Seventh, there is an interdependence between all parts of the legal profession, such that most of the references to the judiciary above can be applied to the advocates, attorneys, teachers and students to some degree. No one who participates in an evil system can be entirely free of responsibility for some injustice; although it is possible for the good achieved by some to outweigh the negative aspects of their participation. Judge Edwin Cameron in his submission stated that:

> *The overriding point is thus that all lawyers and judges, whatever their personal beliefs and the extent of their participation, were complicit in apartheid… but this does not conclude the moral debate about the role of lawyers; nor does it mean that there were no degrees of complicity or moral turpitude in the legal enforcement of apartheid.*

30 Law and justice are by no means co-extensive although, at a fundamental level, their interests and constituent elements are likely to coincide, and although the ultimate objective of a legal system (to endure) must be a quest for justice. An uncritical acceptance of promulgated rules of law is unlikely to contribute to the achievement of justice in any more than a formal sense.

• FINDINGS: Arising out of Legal Community Hearings

31 The hearing and written submissions to the Commission touched on all the above matters and many more. In setting out the findings below, the Commission merely accentuates those issues that seem to be relatively generally acknowledged in legal circles today, in a post-apartheid context. The absence of findings on other matters is not intended to signify their irrelevance, but is rather a reflection of the magnitude of the task that a comprehensive response would entail. As was stated in the invitation to participate in this process, it bears repetition that the findings

that follow do not imply the ascription of guilt to any one lawyer or group of lawyers. The purpose of this exercise is rather to draw on the lessons of the past so that the legal process can be transformed in the future, the more surely to attempt to avoid the tragic injustice of apartheid-at-law.

The Commission finds that:

32 Part of the reason for the longevity of apartheid was the superficial adherence to 'rule by law' by the National Party (NP), whose leaders craved the aura of legitimacy that 'the law' bestowed on their harsh injustice. Significantly, this state of affairs was not achieved in the early stages of NP rule. It began after the coloured vote crisis in the mid-1950s, when the restructuring of judicial personnel and the Appellate Division took effect, and the white electorate lent its support to the constitutional fraud resorted to by the government to circumvent the entrenched clauses of the South Africa Act. It was manifestly abandoned when emergency executive decree became the chosen medium of government towards the end of formal apartheid – from the mid-1980s – when a climate of 'state lawlessness' prevailed and the pretence of adherence to the rule of law was abandoned by the Botha regime.

33 In the intervening thirty years, however, the courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice, as was pointed out by a few at the time and acknowledged by so many at the hearing. Perhaps the most common form of subservience can be captured in the maxim *qui tacet consentire* (silence gives consent). There were, nevertheless, many parts of the profession that actively contributed to the entrenchment and defence of apartheid through the courts. The Pretoria Bar, for example, refused to admit black members and only passed an apology for its racism in October 1997.

34 There are many other examples:

a Prosecutors who knew that the police had used brutal means to extract information from suspects and then assisted such interrogators from being questioned too closely on their methods.

Captain Jacques Hechter, a police officer who applied for amnesty for his part in a number of gruesome murders testified before the Commission that, prior to appearing in court, he was called in by the prosecutor and given the questions that would be put to him in court, together with the answers he should give. He would also be coached on what to say.

André Hendrickse, a prosecutor in the Cape, noted that his refusal to prosecute persons under the Group areas Act was because there was an official moratorium on prosecutions. The pressure that was placed on him by his superior because of pressure by the National and Conservative Parties eventually led to his resignation.

b Attorneys-general who too easily launched prosecutions or granted 'no-bail' certificates on flimsy evidence.

c Magistrates who uncritically granted police search and seizure warrants, and who conveniently found no one responsible for injuries and deaths in detention at inquests. Priscilla Jana noted in her submission that:

There were several inquests where nobody was found responsible … the inquest of Ernest Dipali when he was found hanging in his cell, the inquest of Sipho Motsi, a COSAS [Congress of South African Students] leader who was arrested and found dead a few hours later.

d Attorneys who failed to accept an unpopular political person as a client, perhaps for fear of social ostracism or the loss of lucrative commercial clients.

e Advocates who were willing to appear for the government in civil actions where some of the basic building blocks of apartheid, such as racial classification or influx control or group areas, were being attacked as the unreasonable and invalid exercise of executive discretion.

f Law teachers who chose to concentrate on 'safe' areas of the law or to teach in such a way that no critical ability was imparted to the students.

g Students who chose to be blinded by the glamour and material returns of the conventional mainstream of the profession, neglecting his or her potential role as a fighter for justice for all in South Africa.

h In the greatest injustices of all, judges who too easily made sense of the illogical and the unjust in legislative language, and who too quickly accepted the word of the police or official witness in preference to that of the accused. Kathleen Satchwell in her submission deals extensively with the case of Linda Mogale, her client who was assaulted and tortured in detention. Despite evidence to this effect, the judge nevertheless rejected "as impossible" a process of police violence and system of intimidation.

i The judiciary, which unthinkingly allowed judicial policy to be influenced by executive dictate or white male prejudice; which was intent on maintaining and protecting the *status quo*; which willingly participated in producing the highest capital punishment rate in the 'Western' world by the mid-1980s and an execution-rate that impacted overwhelmingly on poor black male accused. In her submission to the Commission, Paula McBride deals with a number of cases to illustrate this point.

j The organised professional bodies which were obsequious in their attitudes to government policies, hounding those of their members who chose to buck the system politically. The GCB stated in its submission that the basis for striking Bram Fischer off the role of advocates was that he had dishonourably breached his undertaking to the court to stand trial. They dismissed suggestions that political considerations had any part in the application. Whilst the GCB apologised to the family, the apology was qualified and besmirches their conduct even more. Indeed, the Fischer family testified that the striking off of their father was done with indecent haste and was regarded by Bram as the "worst professional and personal betrayal he experienced".

k The organised profession took no effective initiatives to make the administration of justice more accessible to those who could not afford it, not at least until apartheid's days were numbered. Their complacency in the face of the challenges thrown up by government injustice internally, and their defensiveness in international forums when foreign lawyers' organisations dared criticise, are matters of public record.

35 The Commission believes that this was the position during the apartheid years. Many of those who appeared at the hearings and who made submissions acknowledge this to have been the case, although several qualified such admissions.

36 Yet, for all that this was the overwhelming pattern of the law and lawyers' conduct under apartheid, there were always a few lawyers (including judges, teachers and students) who were prepared to break with the norm. These lawyers used every opportunity to speak out publicly and within the profession against the adoption and execution of rules of law that sanctioned arbitrary official conduct and injustice. They explored the limits of their forensic skills in defending those on trial for offences in terms of such legislation, or in arguing for the invalidity of vague or unreasonable administrative action. They worked ceaselessly to prepare the cases of those targeted by the state, often in trying conditions and for little material reward. They advised and educated those in the community most vulnerable to official excesses, such as the rural poor and workers, through advice offices and religious bodies. They challenged their students to confront the relationship between law and justice and to translate their ideals into practice. They forswore the comforts of commercial practice for the sake of the upliftment of those excluded from all forms of power. They exercised their judicial discretion in favour of justice and liberty wherever proper and possible.

37 These actions demanded courage, strength, perseverance and clarity of purpose. There were not many in each generation who chose this lonely path, but there were sufficient of them and they were influential enough to be part of the reason why the ideal of a constitutional democracy as the favoured form of government for a future South Africa continued to burn brightly throughout the darkness of the apartheid era. Had their number been greater, had they not been so harassed and isolated by both government and the profession, the moral bankruptcy of apartheid would have been more quickly and starkly exposed for the evil that it was.

38 In a sense, those both inside the country and abroad who might have been embarrassed by the gross racism and exploitation of apartheid could seek some comfort in the semblance of an independent legal system. This 'justification' would not have been possible had even a strong minority of the legal profession united to strip the emperor of his clothes.

39 In the light of the above, should the lawyers who fought for justice against all odds have abandoned their cause for fear that their actions would lend credibility to such a semblance of independence? This question was, of course, ever present and sometimes furiously debated, going to the heart of much of the jurisprudential controversy that surrounds the fundamental issue of 'what is law, and how does it relate to justice?'

40 The Commission does not intend to enter the lists in this regard, but simply states its conclusion as briefly as possible. While the Commission does believe that substantive resistance to the injustice of apartheid by a significant number of lawyers would have undermined its effectiveness and betrayed its reliance on brute force — even if only through a prosecutorial authority reluctant to act and a judiciary uncomfortable with its complicity in injustice — in the light of the reality that those who chose to resist were relatively so few, the Commission finds that the alleviation of suffering achieved by such lawyers substantially outweighed the admitted harm done by their participation in the system.

41 Much was made, particularly by some of the judges who made submissions, of their relative impotence in the face of the exercise of legislative power by a sovereign Parliament. In doing so, reference was often made to the position of the judiciary in other parts of the British Commonwealth and Britain itself. The Commission regards this as a flawed argument, only partially of assistance. As argued so impressively by Dicey more than a century ago, parliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that Parliament. This situation never applied in South Africa: not only was representative (and responsible) government conferred effectively only on the white inhabitants of the Union in 1910 (at maximum less than 20 per cent of the population), but South African political and legal life was never characterised by that unwritten sense of 'fair play' which is so much a part of the native Westminster tradition.

42 In other words, it is not enough for South African lawyers to parade the sovereignty of Parliament as if that alone explained (and excused) their conduct. The social contract which has for so long been the foundation for such sovereignty in the United Kingdom (and to an extent in Canada, Australia and New Zealand) was absent in South Africa, therefore requiring something more by way of response (and responsibility) from the judiciary and the legal profession. The point has been made that judges had a choice, and it has been suggested that it was feasible for them to have heightened their alertness as to government abuse of powers in the power vacuum created by the partially-representative legislature and the absence of basic fairness in the citizen-state relationship.

43 It could be argued that the die was cast immediately after Union by a judiciary which acquiesced in segregationist policies, so that by 1948 (and certainly 1960), the courts were locked into the overwhelmingly passive mindset that characterised their judgements in the face of brutal injustices of apartheid. While this may be partially true, the horrific extremes to which Parliament and the executive went to implement apartheid should surely have provided the basis for judges and practitioners, had they wished to do so, to resist such encroachments on basic rights and fairness, using the skills and knowledge which they manifestly possessed and arguing from common-law principles. And if such a concerted stand had moved the government formally to curtail the jurisdiction of the courts, then perhaps the degeneracy of its policies would have been laid bare earlier and more devastatingly.

44 Again, those judges who made submissions justified their failure to appear at the hearing on the basis that such 'accounting' would somehow negatively affect their independence and would therefore harm the institution of the judiciary in its current role in South Africa's constitutional democracy. Although the Commission unreservedly accepts the need for the independence of the judiciary, especially under the present constitutional dispensation, it finds this approach extremely disappointing and deeply regrettable for the following reasons:

a The Commission fails to understand how an appearance before the Commission and the answering of questions on full submissions already made in writing by the most senior and respected judges would somehow undermine such independence. The terms of the invitation to appear (see above) emphasised deliberately that the proceedings were not about establishing guilt or re-opening a particular case or group of cases. In any event, the Commission's brief is limited to the period from 1960 to 1994. An exploration of judicial conduct at that time could hardly be said to impact on the current judiciary operating in such markedly different constitutional circumstances.

b Furthermore, it should be quite obvious that the notion of a body such as the Truth and Reconciliation Commission, mandated to call on all South Africans to account for their conduct during apartheid's worst excesses, is a unique event which would be unlikely to create some kind of precedent. If this was to be taken seriously as an argument, then the Judicial Services Commission provided for in the interim and final Constitutions ought also to be impeachable, for the reason that it has general powers to oversee the administration of justice and call wayward judges to account.[6] It is also quite clear that it was precisely the gruesomeness of atrocities committed during the period under review which warranted the establishment and authority of the Commission, and the elimination of such injustice (at least at the level of official policy) makes the idea of some kind of future investigative and reporting tribunal extraordinarily remote.

c The failure of the judiciary to appear is all the more to be lamented when the historic significance of the Commission is considered, as well as its envisaged role in the transformation of South African society into a caring, humane and just one. The Commission was thus denied the opportunity to engage in debate with judges as to how the administration of justice could adapt to fulfil the tasks demanded of it in the new legal system; not so as to dictate or bind them in the future, but so as to underline the need urgently to re-evaluate the nature of the judiciary. In some ways, it seems that the judicial non-appearance indicated a reluctance to consider alternatives to the conventions of the past, many of which might be conducive to justice, but which would clearly hinder the attainment of the type of society envisaged by the Constitution.

45 In his paper delivered at a meeting of the International Commission of Jurists (ICJ) held in South Africa recently, the Special Rapporteur to the United Nations on the Independence of Judges and Lawyers, Dato Cumaraswamy, considers judicial accountability. He says:

> *In a democracy, not one single public institution must be exempt from accountability…. However, judicial accountability is not the same as the accountability of the executive or the legislative or any other public institution. This is because of the independence and impartiality expected of the judicial organ.*

46 The Commission finds that an appearance before the Commission in such special circumstances would have demonstrated accountability and would not have compromised the independence of the judiciary. History will judge the judiciary harshly. Its response to the hearing has again placed the questions of what accountability and independence mean in a constitutional democracy in the public domain for debate.

47 The Commission has a good deal of understanding for the 'collegiality' argument, which says that the non-appearance by those judges willing in principle to appear will create greater mutual trust among the 'old order' and the 'new order' judges and so advance the cause of constitutional democracy. However, such benefits, if achieved in this way, are outweighed by the powerful symbolic effect of the judiciary showing themselves publicly and humbly to be accountable. For this is what the hearing was about and what the Constitution demands of a judiciary that is granted the onerous power of constitutional review. It is required that the judiciary display some sense of being able to balance its necessary and justifiable demand for independence with a measure of accountability to the South African nation it serves.

48 The Commission deplores and regrets the almost complete failure of the magistracy to respond to the Commission's invitation, the more so considering the previous lack of formal independence of magistrates and their dismal record as servants of the apartheid state in the past. They and the country lost an opportunity to examine their role in the transition from oppression to democracy.