PARLIAMENTARY OVERSIGHT

EXHIBIT ZZ 11

HUGH MICAH
CORDER

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

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IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE

AFFIDAVIT BY HUGH MICAH CORDER

I, the undersigned, Hugh Micah Corder do hereby make oath and state as follows:

1. I am an adult male.

2. Save where otherwise stated, or where it may otherwise appear from the content hereof, the facts deposed to in this affidavit are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

3. **PURPOSE OF THIS AFFIDAVIT**

   3.1. I make this affidavit in order to assist the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (the Commission), which was established in terms of the Constitution of the Republic of South Africa, 1996.

   3.2. I have been requested to set out my experiences on the question of the meaning of the doctrine of the separation of powers under the Constitution of 1996, and in particular the duties of Parliament to oversee and hold accountable the executive branch of government in relation to its exercise of public power.

4. PROFESSIONAL BACKGROUND

4.1. I am an emeritus professor of public law, who has been active in this field at the highest level since 1983 at the latest.

4.2. I append hereto marked "A" a copy of my full *curriculum vitae* in support of this statement.

5. PARLIAMENTARY OVERSIGHT OVER THE EXECUTIVE : THE CONSTITUTIONAL VISION

5.1. A critical building block of the constitutional democracy ushered in with the transitional Constitution of 1993 was a fundamental realignment of the doctrine of the separation of powers. The relevant aspect for this Inquiry was a decisive break with the past practice based in the Westminster system, which had gradually allowed the executive to dominate the legislature. This process had gathered pace in the dying decades of apartheid, as a subservient Parliament acquiesced in executive lawlessness, especially under emergency rule in the 1980s. Those who drafted and agreed on the transitional Constitution of 1993, and even more so the final Constitution of 1996, were determined that this pattern should be substantially altered, and many provisions were thus included to give Parliament the authority and constitutional obligation to oversee the exercise of public power and hold the executive accountable.

5.2. The Oversight and Accountability Model document commissioned by Parliament in or around 1999[1] contains in section 2.3 (no page numbers supplied) a long list of constitutional provisions which bear testimony to this determination that the patterns of power of the past should not recur. [For ease of reference, I replicate the list here: Final Constitution, sections 41(2), 42(3)&(4), 55(2), 56, 66(2), 67, 69, 70(1), 89, 92, 93(2), 100(2), 102, 114(2), 125(4), 133(2)&(3), 139(2),(3),&(6), 146(6), 154(1), 155(6)&(7), 194(1), 199(8), 201(3)&(4), 203, 206(9), 210, 216(3)&(4), and 231(2),(3)&(4).]

5.3. The single most important point in all this is the following: the foundational values of "accountability, responsiveness and openness" in section 1(d) of the Constitution

[1] I have been led to understand that this document, sometimes colloquially referred to as the OVAC Model, is referred to in part 2.3 of the submission to the Commission by Ass Prof R Calland and is attached as annex 3 to his submission.

demanded a radical rethink and realignment of the role of Parliament in its relationship with Cabinet and the rest of the executive, central to which was the obligation, spelled out repeatedly in the Constitution, to exercise oversight and require accountability.

5.4. In my view the judiciary at the highest level endorses this substantial shift in the balance of authority from the Westminster system to the current model of the separation of powers implicit in and essential to our constitutional democracy. In making this submission, I am emboldened by several judgments of the Constitutional Court which relate directly to the workings of Parliament and its failure to fulfil its constitutional mandate as far as oversight and accountability are concerned. I refer particularly here to the following judgments: *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC), and *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

6. RESEARCH PROJECTS REQUESTED BY THE OFFICE OF THE SPEAKER DURING THE LIFE OF THE FIRST PARLIAMENT

6.1. The Office of the Speaker of Parliament embarked from 1994 on a range of initiatives to seek to realise this vision, and to equip Parliament to fulfil its duties.

6.2. I was privileged to be involved in three such research projects at the request of the then Speaker, Dr Ginwala:

6.2.1. first, regarding a system of mandatory disclosure of financial interests by every Member of Parliament, not only of themselves but also in some respects those of their immediate family members, which led to the establishment of the current system, documented by the Registrar of Members' Interests and regulated by the Committee of the same name (1996);

6.2.2. second, regarding a proposed system whereby Parliament would scrutinise every piece of subordinate legislation made pursuant to authority delegated to

the executive branch of government, as is the practice in several members of the Commonwealth (1999); and

6.2.3. third, an attempt to clarify and propose greater detail of the Legislature's obligations under section 55 of the Constitution, insofar as oversight and accountability of the Executive were concerned. I was assisted by Ms Saras Jagwanth (senior lecturer in public law) and Mr Fred Soltau (research assistant), mainly due to my assumption of the deanship of the faculty of Law at UCT, which limited the time available to devote to the basic research. This resulted in the 'Corder Report', which is the primary subject matter of this affidavit. I do not propose to annex a copy thereof to this affidavit as I have been led to understand that a copy has been annexed to the submission to Commission already lodged by by Ass. Prof. Richard Calland.

6.3. All of this work was accomplished during the life of the First Parliament, by mid-1999.

7. REPORT ON OVERSIGHT AND ACCOUNTABILITY ("CORDER REPORT")

7.1. The Terms of Reference of the third project referred to above were as follows:

(1) Outline and explain the nature of the obligation that s 55(2) places on the National Assembly. Incorporated in this task is the list of bodies that should under section 55(2) of the Constitution account to Parliament, including 'organ of state' and 'national executive authority'.

(2) Establish the nature, frequency, contents and purposes of reports currently submitted to Parliament, and provide an overview of existing Parliamentary procedures for dealing with reports that are submitted. In the light of this what processes in addition to reports are necessary to ensure effective oversight.

(3) Should the entities which are accountable report to both Houses of Parliament or only the National Assembly?

(4) How does Parliament ensure the accountability of State Institutions Supporting Constitutional Democracy without infringing their independence?

(5) What mechanisms and procedures could be put in place to achieve the fulfilment of the constitutional obligation of Parliamentary oversight of the executive?

7.2. Research and consultation work began in the last few months of 1998, an interim/progress report was circulated for comment in March 1999, and the final report submitted to the Speaker by July 1999.

7.3. The Executive Summary of the Report serves as a convenient summary for present purposes of the conclusions reached in the report. It reads as follows:

Introduction

This report addresses the following main points:

a. *the constitutional and theoretical values that underpin the concepts of oversight and accountability and the purposes they serve in a democracy;*

b. *the meaning of 'oversight' and 'accountability' in relation to the constitutional roles of the National Assembly and the National Council of Provinces;*

c. *an overview of and the problems with the existing procedures for dealing with reports submitted to Parliament;*

d. *recommendations about mechanisms and procedures that can be put in place to realise the Constitutional obligation of parliamentary oversight of the executive. More specifically we look at the nature of reporting to Parliament and make detailed recommendations on the content of reports and the manner in which reports must be dealt with upon their receipt by Parliament. In this regard we make recommendations dealing with both legislation and structures that need to be put in place to give effect to Parliament's obligations under the Constitution; and*

e. *an analysis of the ways in which Parliament can ensure accountability of constitutional institutions while at the same time respecting their independence. Here too we recommend both legislation and the establishment of structures.*

Accountability and oversight

Basically accountability means 'to give an account' of actions or policies, or 'to account for' spending and so forth. ***Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its***

recurrence in the future. A condition of the exercise of power in a constitutional democracy is that the administration or executive is checked by being held accountable to an organ of government distinct from it.[2]

Oversight refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government. The term refers to a large number of activities carried out by legislatures in relation to the executive. In other words oversight traverses a far wider range of activity than does the concept of accountability.

Section 42(3) sums up in a nutshell the essential functions of the National Assembly (NA). 'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

The most important point to note here is that the scrutiny and oversight of executive action are, like the passing of legislation, part of the NA's constitutional obligation.

The oversight obligation created by s 55(2) of the Constitution

Section 55(2) provides as follows:

'The National Assembly must provide for mechanisms -

(a) *to ensure that all executive organs of state in the national sphere of government are accountable to it; and*

(b) *to maintain oversight of-*

(i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.'

The requires the NA to do two things: hold organs of state in the national sphere accountable, and exercise general oversight over national executive authority and organs of state.

We are of the view that section 55(2)(a) sets obligatory minimum standards of accountability for executive organs of state in the national sphere of government. The NA must set up mechanisms to hold them accountable. Within the confines of the Constitution the NA would remain at liberty to set up mechanisms to hold other bodies accountable where this was thought appropriate.

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[2] Emphasis added. I will revert below to this conception of "amendatory" accountability.

The mention of oversight in section 55(2)(b) describes the broader and more flexible activity of a legislature in relation to the executive. Oversight is a function of a legislature which flows from the separation of powers and the concept of responsible government, like law-making, which entails certain powers. Foremost among these is the power to hold the executive accountable. Monitoring the implementation of legislation goes to the heart of the oversight role. The manner in which the oversight function is carried out will vary according to the circumstances.

The report shows how s 55(2) allows for different levels of reporting in respect of different bodies. The list of bodies that Parliament should oversee covers an extremely wide range and a policy decision needs to be made regarding the feasibility and desirability of Parliament holding all these bodies to account. We have made a preliminary recommendation that the financial accountability of bodies that are presently accountable under the Public Finance Management Act should also be extended to other areas including the implementation of policy. We have recommended that the list of bodies that are accountable could be extended on an incremental basis taking into account Parliament's resource constraints.

The oversight role of the NCOP

While the Constitution does not explicitly require the NCOP to perform an oversight function, leaving this role mainly in the hands of the NA, various provisions leave no doubt that the NCOP must exercise oversight as defined by its constitutional mandate. This is clear from provisions such as ss 66(2) and 92 of the Constitution. The NCOP's oversight role is limited to issues which affect provinces on a national level and inter-governmental relations. In particular the Constitution envisages the NCOP overseeing any executive interventions in terms of ss 100 and 139. Further relevant constitutional provisions are detailed in the report.

Revising present arrangements

In the light of Parliament's constitutional obligations and present practices ***the legislation we propose would provide for amendatory accountability (which requires that where deficiencies have been uncovered they be corrected wrongs be redressed)***[3] *and prescribe standards, content and format for reporting. The procedure on receipt of reports would be that:*

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[3] Emphasis added. As stated above, I will revert below to this concept of "amendatory accountability"

- *all reports be received by a Central Receiving Office (a joint NA-NCOP office we recommend be established to co-ordinate the receipt, indexing and distributing reports received)*
- *all reports be acknowledged and indexed;*
- *there is a duty to review all reports received;*
- *reports must be responded to in certain circumstances as per our detailed recommendations in this regard;*
- *Parliament must be informed as outlined further below; and*
- ***there is a procedure for follow-up action by committees.***[4]

Accountability and Independence of Constitutional Institutions

We have argued that state institutions supporting constitutional democracy, as well as other similar bodies set up in terms of the Constitution, support and aid Parliament in its oversight function, and together with Parliament, they are watchdog bodies over the executive government and organs of state. The constitutional provisions relating to the independence of the Chapter 9 institutions make it imperative that steps be taken to guarantee their institutional independence. These concerns have been underscored in the recent judgment of the Constitutional Court in New National Party v Government of the RSA and Others 1999 (5) BCLR 489 (CC). The judgment clearly shows that steps need to be taken so that the Constitutional guarantee of independence for the Chapter 9 institutions is realised in practice. In particular we endorse with respect the observation of the Court that both financial and administrative independence are required for the effective performance of their functions. The way in which these institutions receive their funding needs to be re-examined in light of their constitutional status and special role in relation to the executive. It is our recommendation that they should not receive their funding via the budget vote of departments of State.

We recommend that legislation be considered to guarantee the independence and accountability of constitutional institutions. We also recommend the establishment of a Parliamentary Standing Committee on Constitutional Institutions. Such a body would scrutinise the reports of the constitutional bodies as well as make recommendations on their budgets to Parliament.

Summary of Recommendations

In summary we have made the following recommendations:

[4] Emphasis added. This issue will be reverted to below.

a. *legislation in the form of an Accountability Standards Act and an Accountability and Independence of Constitutional Institutions Act;*

b. *amendment to the Rules of the NA and the NCOP for regulation of reporting to parliamentary committees; and*

c. the establishment in Parliament of a Standing Committee on Constitutional Institutions.

8. FATE OF THE "CORDER REPORT"

8.1. As the views expressed in the Corder Report are arguably germane to this Inquiry, it may be useful to consider the report's fate, which was as follows:

8.1.1. The Report was submitted in July 1999, just after the second democratic election. I was asked by the Joint Rules Committee (as far as I can recall) to attend a meeting at which I was to speak to the Report. There was no real engagement with the analysis or the recommendations; rather, there were complaints of insufficient consultation with MPs, which is only accurate as far as it was obvious -- those serving as MP's had changed to a significant extent after the election, including the members of the Committee, so that many of them had indeed not been consulted in the report's preparation.

8.1.2. Again as far as I can recall, the Committee then appointed a subcommittee, chaired by Fatima Chohan MP, to formulate a response. I don't remember being asked again to appear before the committee, nor to engage with any proposals made by the Chohan subcommittee.

8.1.3. At some stage I saw a report from that subcommittee, which appeared to dismiss the Corder Report due to its perceived lack of legitimacy, but then went on to endorse many of the sentiments underlying it.

8.1.4. Indeed, the OVAC recommendations (of 2009) go some way towards implementing the chief recommendations that we made in 1999, but stop short of implementing the critical recommendations that the Corder Report made in 1999. In particular, no legislation as recommended, nor its equivalent in some or

other form, was drafted or passed, the concept of 'accountability' was left at face value, and no real practical steps were taken to *realise* the obligations imposed by section 55(2), let alone many of the other Constitutional provisions listed above in para 5.2 of this affidavit.

8.1.5. I am unaware of the extent to which the OVAC document has been implemented in practice, and I do not wish to speculate now on the reasons which may explain this.

8.1.6. I have not been intimately involved since 2000 and others are better placed than me to pronounce on this issue. But on the evidence in the public domain, it appears that, despite a promising start, Parliament has failed over the past twenty years to fulfil its constitutional mandate in respect of oversight and accountability. The record appears to show that, with very limited exceptions, Parliament and its committees failed to monitor and regulate the exercise of public power by the executive, failed to expose the abuse of power, and failed to call those responsible to account.

8.2. A detailed review is in my view thus called for, to strengthen mechanisms and processes by which oversight and accountability may be promoted and ensured.

9. SUGGESTIONS

(i) Re-examining the National Assembly's rules

9.1. I am not fully conversant with the current Rules of the National Assembly but in preparation for this affidavit I had a look at them, particularly the section dealing with the work of Committees.

9.2. I noted in passing, for example, that Parliamentary Portfolio Committee members need **their party's** permission to absent themselves from meetings: this strikes me as odd, surely they should need the permission of the Committee Chair? This is an example of the excessive influence of political parties over their representative members.

9.3. And surely the role of Chair of committees should be distributed proportionately among the largest parties represented in parliament? Why should it only be that the chair of SCOPA is an opposition MP?

9.4. I would suggest that the Rules of the NA, in particular the section dealing with the work of Committees, should be reviewed, with the overall objective of enhancing oversight and accountability. This step was advanced in section 6.3 of my report; I am not aware of the extent to which this has been carried out. I assume that the OVAC exercise has addressed this to some extent, nevertheless I would think that a further review could be helpful.

(ii) **Legislation to enhance the effectiveness of Parliamentary oversight**

9.5. However, my chief set of recommendations repeats the central tenets of what the Corder Report advised Parliament 21 years' ago, namely the desirability of legislative reform.

9.6. In emphasising and further justifying the steps which I highlight below, I would draw the attention of the Commission to the by now well-known device used in the Bill of Rights, by which a right is protected, but additional statutory clarification is called for, to add "flesh to the skeleton" so to speak. I refer here to sections 9, 32 and 33 of the Constitution, which enshrine the rights to equality, access to information, and just administrative action. Each of these rights requires a statutory complement, which had to be enacted within a relatively short period of time after the coming into force of the final Constitution in early 1997. Thus we now have the following Acts of Parliament on the statute book: the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000; the Promotion of Access to Information Act, 2 of 2000; and the Promotion of Administrative Justice Act, 3 of 2000. Each of these Acts enhances the effectiveness of the constitutional right in question, by providing greater definition and the means of enforcing such rights.

9.7. Similarly, I would urge, following this precedent and for all the reasons set out twenty-one years' ago in my report, that steps be taken to enact legislation of the following types:

9.7.1.An ***Accountability Standards Act*** (ASA, see section 6.1 of the Report).

9.7.1.1. Having listed in the Report the then existing means whereby Parliament was already able to hold the executive to account, the following section of the report substantiated the justification for the drafting, adoption and urgent implementation of an ASA, to which views I still adhere. It may naturally be possible that some aspects of these recommendations have been implemented since 1999; at the very least, however, an audit of what is in place should be undertaken, and an undertaking made to do what remains undone:

"We recommend that legislation, such as an Accountability Standards Act, be passed to complement the Public Finance Management Act (which will come into force in April 2000) which will serve the following purposes:

(i) *partially to fulfil the NA's constitutional obligations for establishing accountability mechanisms;*

(ii) *to set the broad framework and minimum requirements for accountability; and*

(iii) *to provide an authoritative and mandatory framework within which committee members can perform their oversight task.*

Earlier in our report we pointed out that parliamentary government and the party system can be a powerful obstacle to effective accountability. It is said that committee members who belong to the majority party are uncomfortable with and fear the consequences of calling 'their' minister to account.
While effective oversight activity is ultimately dependent on the willingness of members of Parliament to perform it, the proposed legislation will go some way towards providing the legal back-up and justification for the exercise of this function.

The Act should provide for the following:
(i) Amendatory accountability

Amendatory accountability refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered. This Act should give strong effect to the constitutional requirements of accountability. Presently there is no effective machinery by which Parliament can compel the executive or an organ of state to answer to it. But as has been highlighted the South African constitution makes accountability to Parliament mandatory. Accountability is therefore removed from the realm of vague political convention to that of concrete constitutional law. Interaction between branches of government should be governed by the principles of co-operation set out in chapter 3 of the Constitution, but Act should oblige executive and organs of state to answer and submit to scrutiny, as well as imposing on them an obligation to redress grievances. This means that remedial action should be authorised for exposed errors, defects of policy or mal-administration. This form of amendatory accountability is essential to an effective system of reporting.[5]

What mechanisms can be put in place to realise amendatory responsibility in the face of what may be a recalcitrant and unrepentant executive? Firstly, the question of who is accountable needs to be answered. Ministers are collectively and individually accountable to Parliament (see the above discussion of ministerial responsibility in Chapter III). The extent to which they are held accountable for their failings is an intensely political question. However, where those in political office have made themselves guilty of corruption or financial misconduct responsibility should be legislated, just as it is in the case of civil servants. In terms of the Public Finance Management Act offences by accounting officers (Heads of Departments or CEOs of institutions) are punishable either by a fine or imprisonment.

The degree to which civil servants should be held accountable is a vexed question. Clearly junior civil servants cannot be held accountable on issues of policy. However, Parliament has the right to demand at least explanatory accountability (why and how a policy or legislation was implemented) from each and every public servant. Traditionally Ministers have had to account for policy and broad outcomes, and the accountability to Parliament of public servants was limited to the non-political matters such as the detail of implementation and specific outputs. In Commonwealth systems it is still the rule that civil servants cannot be criticised. In an administrative setting where many governmental functions are being privatised or hived off to agencies outside ministerial control the traditional doctrine of ministerial accountability is clearly inadequate. In our political system it is true to say that high-ranking public servants are not merely implementers but also play an important role in advising their Ministers and formulating policy with or for them. It may therefore be that it is appropriate to require more accountability from senior public servants, and not to allow them to shelter behind their Minister as 'faceless' public servants. On the other hand an obvious danger exists that Ministers may attempt to make scapegoats out of their public servants.

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[5] Emphasis added.

Improving the accountability of senior public servants to Parliament may require first clearing up the lines of accountability between the bureaucracy and the Ministers. The relationship between the Ministers and their D-Gs is the crucial link in the chain of accountability. As is pointed out above the traditional view of ministerial accountability, with all its vaguenesses and uncertainties is not conducive to meaningful parliamentary oversight. The relationship [between] Ministers and D-Gs needs to be formalised and responsibility allocated. Once this is done as between the bureaucracy and the Ministers principles need to be developed which guide accountability to Parliament. For instance Ministers might be responsible for setting the policy agenda, specifying policy outcomes, and the departmental outputs necessary to achieve those outcomes. D-Gs would be responsible to their Ministers for the quantity and quality of outputs delivered. Ministers would in turn be accountable to Parliament for the outputs chosen and for the outcomes of those choices. We recommend that a set of principles covering the accountability of senior civil servants and Ministers be included in the proposed legislation.

With regard to structuring the relationship between Ministers and their public servants it is interesting to note that the Public Finance Management Act requires that the contracts of employment of accounting officers must, where possible, include performance standards. Contracts containing performance standards should be made mandatory for all senior public servants.

As part of public sector reform the Department of Public Service and Administration has drawn up a Code of Conduct for public servants and details their relationship with the legislature. The accountability of regular public servants should take place through the proper application of the Public Service Act and the relevant regulations. In this respect the White Paper on Transforming Public Service Delivery (also known as the Batho Pele White Paper) spells out policy framework and practical implementation strategy for transforming public service delivery. The document spells out eight transformation principles, among them the citizens' right of redress and value for money in the public service.

The role of Parliament would be to see that the laws governing the public service are properly enforced and that preventative policies are put in place. In this respect the work of the Public Protector and the Public Service Commission should be of value in guiding Parliament and alerting it to problem areas.

(ii) Prescribed standards of administrative accountability

The Public Finance Management Act demands financial accountability from a range of listed entities in different forms in its schedules. It is due to replace the Reporting by Public Entities Act 93 of 1992. Constitutional institutions, made up predominantly of the Chapter 9 institutions are listed in Schedule 1 and special reporting procedures apply. Nineteen of what are termed 'major public entities', being the large parastatals such as ESKOM and the SABC, are listed in Schedule 2. They possess full managerial autonomy, with the government only being able to intervene through its power as shareholder. Schedule 3 lists 73 public entities that possess varying degrees of

autonomy, including the South African Revenue Service, the Financial Services Board, and the South African Rail Commuter Corporation. The existing Schedules must be amended by the Minister of Finance to include public entities presently not included. There is a potentially vast range of bodies that need to be added – a recent search by the Office of the Auditor-General revealed some 648 entities that ought to be accountable to Parliament. The Public Finance Management Act defines 'public entity' as:

'(a) a national government business enterprise

(b) a board, commission, company, corporation, fund or other entity (other than a government business enterprise) which is-

i. *established in terms of national legislation;*

ii. *fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and iii. accountable to Parliament.'*

It is crucial that the Schedules to the Act are amended rapidly so that they fully reflect the number of public entities that ought to be accountable.

The annual report of a public entity, the audited financial statements for that year and the auditors' report on those statements must be transmitted to the Minister accountable for that entity or within whose portfolio its falls. The Minister must then table the report and financial statements in Parliament. This provision is to be welcomed – in the past the reporting and tabling was governed by the enabling statutes and these often include arbitrary distinctions so that some entities have their reports tabled in Parliament while others report only to the relevant Minister. As the provisions of the Finance Management Act override other legislation dealing with finances, uniformity will be achieved in this respect.

If accountability is to be made effective, it is necessary to set objectives or standards against which performance can be assessed and measured. If this is not done then Parliament's oversight role is unclear because there are no identifiable criteria by which to judge the reporting bodies. Consequently the exercise of oversight becomes difficult and often meaningless.

The Public Finance Management Act focuses on the basics of financial management and limits itself to financial accountability. It is encouraging that the Act broadens existing reporting requirements by prescribing that both the annual report and audited financial statements must include particulars on any material losses; unauthorised, irregular as well as fruitless and wasted expenditure; any criminal or disciplinary steps taken as a result; and any material losses recovered or written off.

However other forms of accountability, such as policy implementation and the achievement of objectives, are equally crucial to the accountability function. In this regard the Act contains some provisions aimed at achieving performance management: when the annual budget is introduced in the NA the accounting officer must also submit 'measurable objectives' for each main division within a vote, the achievement of which must be reflected in the annual report. Thus section

40(3)(a) provides that the annual report of a department, trading entity or constitutional institution must:
'fairly present the state of affairs of the department, trading entity or constitutional institution, its business, its financial results, its performance against predetermined objectives and its financial position at the end of the financial year concerned.'(our italics)

Properly utilised section 40(3)(a) is a powerful tool in the hands of parliamentary committees. Since departments and bodies are now obliged by law to set objectives and detail the extent to which they have achieved them the onus is on Parliament to make use of this information. It is important that these set objectives are not 'soft' or too vague. In this regard committees will have to assert themselves to ensure that objectives set are relevant, appropriate and that their achievement is measurable.

A similar system where targets or objectives are set by the body itself is applied in New Zealand. In terms of the Public Finance Act every Crown entity (covering agencies, authorities and roughly the same as the bodies to which our Public Finance Management Act applies) must submit to the responsible minister a statement of intent (see Appendix 1 for an extract from the Act). This statement of intent sets out among other things the following: the objectives of the Crown entity or group, the nature and scope of the activities to be undertaken by the Crown entity or group, and the performance targets and other measures by which the performance of the Crown entity or group may be judged in relation to its objectives. This statement of intent is then tabled in Parliament by the responsible minister. At present the New Zealand State Services Commission is undertaking a project called the Crown Entities Initiative, which is looking amongst other things at the accountability of Crown entities to Parliament.

Three types of financial oversight activity can be isolated:

- *Financial and compliance audits determine whether there has been proper financial management, whether financial reports are fairly presented and whether there has been compliance with applicable law and regulations. This aspect is largely regulated by the Public Finance Management Act and encompasses the work undertaken by the Auditor-General.*

- *Management audits seek to determine whether a department or other organ of state is managing its resources in an economical and efficient way.*

- *Programme evaluation audits can be used to determine whether a particular programme has delivered the intended results or services and whether the objectives established for the programme have been met.*

Ideally, as in some other legislatures, a non-partisan agency similar to the Auditor-General would carry out such audits, which are then made available to Parliament for use by it in overseeing and holding the executive accountable. As a first step we recommend that the proposed legislation require reporting in terms of a fixed standard of accountability and performance related criteria

by certain categories of organs of state. At a minimum this should enable parliamentary committees to assess the extent to which an organ of state has met targets and complied with policy. If at a later stage resources can be diverted for this purpose, one of three options can be considered:

(aa) *Beefing up the existing parliamentary research capacity to undertake management and programme audits.*

(bb) *Establishing a specialised agency for this purpose. For instance in the United Kingdom the Auditor-General scrutinises accounts to see whether moneys have been spent as allocated and that there has been compliance with the relevant legal provisions. The Comptroller and the National Audit Office undertake value for money audits to assess the efficiency and effectiveness of government programmes.*

(cc) *Increasing the duties of the Auditor-General's Office. In this regard section 188(4) of the Constitution provides that the A-G 'has the additional powers and functions prescribed by national legislation'. A present the role of the A-G extends beyond pure compliance auditing. Section 3(4) of the Auditor-General Act 12 of 1995 states that: 'The Auditor-General shall reasonably satisfy himself or herself that:....satisfactory management measures have been taken to ensure that resources are procured economically and utilised efficiently and effectively.'*

The effect of this is to introduce performance and value for money (the three e's) by looking whether steps have been taken to achieve efficiency and whether policy goals have been clearly defined.

Since departments and other bodies covered by the Public Finance Management Act are now obliged to set measurable objectives and to report on their performance against those objectives (section 40(3)(a)) the question arises who will audit or verify statements made in this regard. The Office of the Auditor-General is suited for this task : firstly, that office already undertakes performance audits, and secondly the information about the performance against the set objectives must according to the Act be contained in the annual report and financial statements. The existing audit function of the Auditor General would also be enhanced because without commitments from departments and bodies it is difficult to carry out performance auditing.

(iii) Prescribed reporting standards

Accountability in its simplest form is linked to oral and written (or electronic) reports. This should remain one of the main conduits for feeding information to Parliament. But it is obvious that absence of requirements and guidelines with which written reports must comply results in ineffective accountability. Reports may contain too much information, overwhelming the accounting body with a mass of detail, or may contain too little relevant information to allow assessment of the body's performance. The Browne Commission of Enquiry (Report of the Committee of Enquiry into the Accountability of Public Corporations, Undertakings and Other

Institutions) of 1989 pointed out the importance of ensuring that the information in reports is presented in a way that is a manageable, reasonable, objective and accurate reflection of the performance of the task. The need for a common agreement between the reporting and the receiving bodies regarding the standards and conventions in accordance with which reporting takes place was also highlighted. The report recommended that public entities owe accountability to Parliament at least in respect of the following (at 31):

(a) *Do the given mandate and objectives continue to be pursued and complied with;*

(b) *Is the performance of the entity reported on in a meaningful way;*

(c) *Is the performance of the undertaking as reported accurate and in line with the objectives; and*

(d) *Are resources applied as economically, efficiently and effectively as circumstances and the environment allow in respect of the authorised objective?*

We endorse these recommendations.

In addition we propose that the Act provide for:

a. *the development of standardised formats for reports;*

b. *a requirement that reports contain information which establishes the quantity and quality of outputs;*

c. *the development of performance criteria in terms of which the report is submitted;*

d. *all reporting bodies to submit written reports to Parliament timeously so that there is an opportunity for the reports to be considered (for example, at least 10 days before the relevant committee meeting*
is to take place);

e. *the mandatory submission of an executive summary of the main points contained in the report;*

f. *a prescribed minimum number of copies of the report and the executive summary to be submitted*
by the reporting body; and

g. *that where findings or recommendations have been made by Parliament with respect to a department or other body's report that the reporting body must respond to the findings and recommendations formally within a specified time.*

(iv) Bodies to be covered by the Act

The question of which bodies should be covered by this Act is a complex one. As indicated above, it may be neither feasible nor desirable for Parliament to hold all organs of state as defined in section 239 to account. There is however in terms of section 55(2)(a) a minimum responsibility on the NA to create mechanisms to ensure the accountability of executive organs of state in the national sphere of government. As a preliminary step, we suggest that at present the ambit of the proposed legislation should extend to government departments and the administration and those bodies covered in Schedules 2 and 3 of the Public Finance Management Act. These are bodies which must report to

Parliament under this Act and it makes sense and will be easy to extend the ambit of the reporting of those bodies which already account to Parliament on financial matters. In terms of section 47(1) of the Public Finance Management Act the Minister must extend the list of public entities included in schedule 3 to include those public entities which are not listed. At the same time it must be borne in mind that a range of bodies not yet added to the Schedules to the Act will continue to report to Parliament in terms of their enabling legislation, where this requires it. A preliminary list of those bodies which should be covered should be set out in the proposed legislation (which will mirror the list in the Public Finance Management Act), and incremental changes and additions will be made to it as other organs of state that should account to Parliament are identified. This approach would be in line with the NA's responsibilities under s 52(2)(b) which provides for a broad and flexible oversight function. The list of public entities which should be accountable to Parliament could gradually be extended, taking into account resource constraints and the need for reporting. The proposed legislation should not cover bodies that for reasons of national security should be excluded, or constitutional entities for reasons outlined below.

(v) Who can be called to account?

Consideration must be given to who should be called to account. This may vary depending on the circumstances. Our Constitution makes provision for both ministerial and administrative responsibility and both the NA (section 56) and the NCOP (section 69) have powers to summon 'any person' to appear before them. In general terms ministers are responsible to account for the development of policy while the officials under them are responsible for its implementation. However it must be noted that with the increase in growth and complexity of government departments this distinction has been blurred and civil servants can and do make important policy decisions. In addition civil servants provide information that is often outside the knowledge of ministers. In this regard the Act should recognise that ministers and officials can be called to account.

(vi) Procedure on receipt of reports

The Act should require the Rules of the NA and the NCOP to set out a prescribed procedure that should be followed on receipt of reports. Our recommendations in this regard are outlined under (3) below.

9.7.1.1 At this point, it is highly relevant to return to the meaning of the concept of "accountability", as set out above in the Report. In brief, it is widely accepted that there are two critical elements to this idea: "explanatory" and "amendatory" accountability. To some extent, the first aspect is complied with by the committees of Parliament, in that they typically call on the Minister concerned to explain and justify their decisions or actions, or those of their department. This constitutional obligation is entirely appropriate, and closely complements the responsibilities of all Ministers "collectively and individually" to account to Parliament for "the exercise of their powers and the performance of their functions" (see sections 92(2) and (3) of the Constitution). This is not mere lip service to the notion of "ministerial responsibility" inherited from the Westminster system: it is an explicit and strong endorsement of a greater degree of executive accountability to the legislature than formerly applied in South Africa, a constitutional commitment born of the bitter injustices and abuse of power by the executive in the past. I submit that, while the explanatory element of accountability has largely been satisfied since 1994, there has been little evidence of the fulfilment of the amendatory aspect.

9.7.1.2 While much work would be needed to give appropriate and effective shape to the concept of "amendatory accountability", I would argue that this is essential. At present there seem to be few if any mechanisms in place, short of the tabling of a motion of no confidence in either the President or his Cabinet (see section 102 of the Constitution), an admittedly radical step, which should not be lightly countenanced. What is necessary are steps short of a motion of no confidence, through which individual or groups of ministers may be required to take amendatory action, sufficient to satisfy Parliament.

9.7.1.3 On the understanding that the primary locus for accountability would be through the committee system in Parliament, and in the knowledge that the committees are relatively well supported by research and administrative capacity, it could be provided, for example, that a significant number of the members of each committee (say at least 30%, so that frivolous or meddlesome enquiries do not cause bottlenecks, BUT not a majority, so that the apparently errant Minister cannot be shielded by the representatives of the majority party alone) should be authorised to take some or all of the following steps:

- To require the Minister/ Director General of the relevant department, within a relatively short time period, to supply particular facts, documents and justifications in relation to an apparent failure to account;
- After receipt of such information, again within a specified period, to appear before the committee for oral engagement with its members;
- With the support of a majority of the members of the Committee, to put the Minister to terms in respect of remedial action to satisfy executive accountability;
- To stipulate appropriately urgent and regular reports-back to the committee; and
- To give appropriate publicity of these actions through the media to the broader electorate.
- To engage the Speaker of Parliament, on her own or in consultation with the Chief Whips of the political parties represented in Parliament, to exert her authority as head of the legislature and to intercede with the President, as head of the national executive, to ensure compliance by Minister/s with the obligation to amend.

This is just one possible mechanism which could be put in place. Further such examples could well be devised, with relevant comparative input from foreign jurisdictions. I have no doubt that, to some extent, elements of this proposal are already in place, and that the fundamental stumbling block in reality is the hegemonic control exercised by political party leadership. If indeed this is the case, then at least such a mechanism will allow a greater degree of "openness" to inform the work of Parliament, and perhaps over time a culture of accountability will develop, albeit grudgingly. This is just one suggestion for consideration: I am sure that more such could be devised, in consultation with the Speaker, Members of Parliament, and scholars of legislative work, both here and abroad. Any such mechanisms would have to be carefully researched, formulated, and negotiated before implementation---- this is not a quick fix. However, it is vital to note that no constitutional amendment would be necessary; indeed, the building blocks are already in place, and this objective could be achieved by appropriate changes to the Rules of the NA and NCOP.

9.7.2. An ***Accountability and Independence of Constitutional Institutions Act*** (see section 7.3 of the Report)

9.7.2.1. Similarly, and directly aligned with the above proposal, the passage into law of an Accountability and Independence of Constitutional Institutions Act was argued for in the Report as follows. Again, as above, at the very least, current processes in Parliament should be audited, in order to determine what remains to be done, if any aspects of these recommendations have been implemented in the interim::

> *In the light of the above discussion we proceed to make recommendations regarding the ways in which the accountability and independence of constitutional institutions may be secured. Our recommendations fall into two categories, viz. legislation, and structures.*
>
> *It is recommended that the accountability and independence of constitutional institutions be outlined under separate legislation. This legislation should recognise the interrelationship between these institutions and Parliament's oversight function and would ensure their independence. In this way effect will also be given to sections 181(3) and 196(3) of the Constitution which requires legislative and other measures to ensure the independence and impartiality of these institutions. The Act should cover the institutions listed in s 181(1) of the Constitution, viz:*
> *The Public Protector;*
>
> *The Human Rights Commission;*
>
> *The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;*
>
> *The Commission for Gender Equality;*
>
> *The Auditor-General; and*
>
> *The Electoral Commission.*
>
> *In addition it should also cover those institutions set up in terms of the Constitution which perform similar functions including:*
> *The Independent Broadcasting Authority;*
>
> *The Public Service Commission;*
>
> *The Financial and Fiscal Commission; and*
>
> *The Judicial Service Commission.*

The Act should provide for the following:

i. the full financial independence of constitutional institutions. To give effect to this it should be provided that the budget of these institutions should not be linked to the budget of a government ministry, ensuring that they will not be vulnerable to political pressure by way of financial penalties.

The options are a separate vote for each institution, or a separate vote for all institutions as a group.

The first option best secures the independence of the institutions. However, it will have to be assessed in terms of the possibly disproportionate accounting and administrative resources that it will require, both on the part of the institutions concerned and the Department of Finance. Providing for a separate vote for the institutions as a group may save scarce accounting and financial resources and also permit easier monitoring of the entire cost of the Commissions by Parliament and civil society. If this option were accepted it would enhance the control that the bodies have over their budgets but also demand greater responsibility. In terms of the current framework as we understand it an accounting officer from one of the institutions would have to account for all the funds in the vote. The option of a separate vote for the institutions as a group would also require that the institutions establish a central administrative structure or secretariat to gather the budget submissions of the various bodies. These would extend to expenditure estimates for the next three years, in order to comply with the medium term expenditure framework (MTEF).

By giving the constitutional institutions a separate budget vote their status as separate constitutional entities is recognised and they would be able to emerge from the shadow of the executive. We regard this as a minimum to fulfil the requirements of the Constitution.

ii. *the full administrative independence of constitutional institutions. Provision should be made for parliament, through its relevant committees, to exercise both a supportive and monitoring role for constitutional institutions.*

iii. *the establishment of a Standing Committee on Constitutional Institutions. The establishment of this*

Committee appears to be required by s 193(5)(a) of the Constitution, which provides for nominations for membership of constitutional institutions by a Committee of the National Assembly. A more detailed outline of the functions of this Committee follows."

9.7.2.2. This last aspect is of particular relevance to the current inquiry, because the Chapter 9 and similar institutions provide critical and independent means for monitoring the exercise of public power, raising awareness of good governance practices within the public administration, and alerting Parliament (to which these institutions report) to trends which need its attention.

9.7.2.3. In addition, if there is not already some centralised and co-ordinated means of receipt, circulation, and consideration of the multitude of reports from bodies

which are accountable to Parliament (for an overview of the issues of concern, see section 6.3 of the Corder Report), then this needs to be implemented.

9.8. THE ESTABLISHMENT OF A JOINT STANDING COMMITTEE ON CONSTITUTIONAL INSTITUTIONS

As indicated immediately above, a ***Joint Standing Committee on Constitutional Institutions*** should be established, to which the oversight and accountability of all aspects of the Chapter 9 (and any other appropriately authorised organs of state) should be entrusted (see section 7.4 of the Report). The overriding motivation of this set of proposals was both the strengthening and the subjection to an appropriate degree of constitutional accountability of the Ch 9 and associated institutions, as critical complements to the role of Parliament, and as its servants. This was proposed based on the following reasons:

> *"In general terms this Committee would act both as an accountability and oversight structure. The functions of this Committee (which could operate in a similar fashion to the present Audit Commission) would include*
>
> i. *to nominate and make recommendations for appointment of members to constitutional institutions;*
>
> ii. *to receive from the central receiving office and consider all reports of constitutional institutions;*
>
> iii. *to hold hearings and call recalcitrant respondents to account before it where such respondents*
> *resist the recommendations of the constitutional institution concerned. This practice is followed by similar committees in many countries such as New Zealand and the United Kingdom;*
>
> (iv) *after having considered the reports to report to Parliament and make appropriate recommendations for changes in legislation or practice;*
>
> (v) *to support the role of constitutional institutions and to protect and enhance their independence as*
> *oversight agencies and in their operations;*
>
> (vi) *to review results or performance with each constitutional institution and to discuss performance deficiencies or improvements. This is an essential function to ensure accountability as well as resource requirements;*

(vii) *in consultation with the constitutional institutions to establish uniform rules and practices relating to the submission of reports including length, frequency and content, and to establish procedures for mandatory report-backs to constitutional institutions on the steps which have been taken to implement recommendations made.*

In drawing up this report we have been mindful of the financial and human resource constraints under which Parliament is operating, and have as far as possible tailored our recommendations to accommodate existing structures to perform oversight functions. In recommending the establishment of SCOCI we have considered the fact that such a body would serve the dual functions of both an oversight and accountability body. It would in other words provide an important additional parliamentary mechanism to oversee the executive, and would be a body through which constitutional institutions may be called to account, thus fulfilling two important constitutional obligations set out in s 55(2) of the Constitution.

So that the workload of SCOCI does not affect the carrying out of oversight the bodies it oversees should be 'clustered' where feasible so that those with broadly similar briefs are dealt with together. For instance rather than holding separate hearings for the Human Rights Commission, Public Protector and the Commission on Gender Equality the Committee could deal with them in sequence at certain points during the year.

7.4.1 The Relationship between SCOCI and other Parliamentary Committees
It must be borne in mind that despite the establishment of SCOCI, constitutional institutions would still continue to report to and interact with various other parliamentary committees. For example if the Gender Commission reports on sytemic discrimination against women in the health sector, such information would be of relevance to both the Joint Standing Committee on the Improvement of Quality of Life and Status of Women (JCIQLSW) and the Portfolio Committee on Health.

In addition, presently existing parliamentary committees perform some of the tasks that we propose should be performed by SCOCI. For example the Commission on Gender Equality has a close working relationship with the JCIQLSW, and the Auditor-General accounts to the Audit Commission as well as the Standing Committee on Public Accounts. In addition certain pieces of legislation require the establishment of committees of the National Assembly, for example section 2 of the Public Protector Act 1994 requires the establishment of a committee of the National Assembly to deal with matters referred to it in terms of the Act. The question which arises is whether SCOCI would be best suited to oversee all the work and functions of constitutional institutions or whether existing committees would still have a role to play.

We submit in this regard that existing parliamentary committees, particularly those which perform specific discipline-related functions such as JCIQLSW and/or those that have been set up under governing legislation continue to exist. As pointed out elsewhere in this report, the oversight role is

one that should not be limited to a few specialist committees or individuals but should permeate and inform all parliamentary structures. The function of SCOCI as an umbrella oversight and support committee would be tasked with the formulation of general uniform rules and practices governing constitutional institutions, and does not preclude the efficient functioning of other committees designed to achieve more specific objectives.

Conclusion

10. It is not being argued here that the implementation of the recommendations made 21 years' ago would have prevented the substantial levels of corruption and abuse of power that have been exposed through the work of this Commission. For that to have happened, both the implementation of the essential elements of the constitutional design AND a human commitment to their achievement would have been needed.

11. However, had those essential elements been in place, vigilant Members of Parliament of all parties, aided by vibrant media such as exist in this country, would have been able to expose to public scrutiny much of the misconduct which lies at the heart of such multiple instances of the abuse of public power, and the erosion of public trust in Parliament. While what has been done cannot be undone, at the very least a framework for "accountable, open and responsive" governance may be enhanced.

12. Thank you for this opportunity to make this submission. I stand ready to answer any questions which may arise from it.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Rondebosch on this 18th day of JANUARY **2020**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
Full Names: SAGEER PANSARI
Office: ATTORNEY
Business Address: 32 STUDY STREET
FLAMINGO VLEI
7441

Sageer Pansari
Commissioner of Oaths
Ex Officio
Practising Attorney
32 Study Street
Flamingo Vlei,7441

Appendix A

CURRICULUM VITAE

HUGH MICAH CORDER

A. PERSONAL

Date of Birth 25 July 1954

Addresses **Postal** Faculty of Law 31 Thornhill Rd
University of Cape Town RONDEBOSCH
Private Bag 7700
RONDEBOSCH SOUTH AFRICA
7701
SOUTH AFRICA

Tel: (021) 650-3085 Tel: (021) 686-6219
Fax: (021) 650-5673 Cell/mobile: (082) 337 3317
E-mail: Hugh.Corder@uct.ac.za

Nationality South African

NRF Rating B2 (as from 2013) (B1 in 2003, renewed in 2008)

Languages English and Afrikaans (fluent)

b. UNIVERSITY EDUCATION

1973 to 1977 Undergraduate

University of Cape Town **BCom LLB**

Additional activities: Served as a Tutor in Accountancy (1976 and 1977).

Member: of the Executive of Rag (1976); of the Law Students' Council (1975 to 1977); of the Legal Aid Committee (1975 and 1976, founded a new clinic); of the editorial board of the Student Law review, Responsa Meridiana (1976 and 1977) and of the Diocesan Board of Social Responsibility, Anglican Church (1977 to 1978).

President: Law Students' Council (1976 and 1977).

Co-editor: Responsa Meridiana (1977).

Founding editor: Bona Fide (law students' newspaper)(1976).

Student representative: Law Faculty Board (1976 to 1977)
University Planning Committee (1976 to 1977)
University Senate (1976 to 1977).

Director (not for profit company): South African Students' Travel Service, Ltd (1976 to 1978).

Trustee: South African Prisoners' Education Trust (1977 to 1978).

Participant: National Union of South African Students (NUSAS) Congresses (1976 and 1977).
Foundation meeting of Preventive Legal Education Association (Durban, 1977).

Sport: Played soccer and rugby in Internal League (1973 to 1977). Ran cross country for the University in 1975.

Awards: Awarded Wille Research Scholarship, 1976.

Vacation work: For the Border Council of Churches at Dimbaza near King William's Town (July 1974).
Holy Cross Hospital in the Transkei (July 1975).

Postgraduate

1978 to 1979

Trinity Hall, Cambridge, England **LLB**

with the following subjects: Civil Liberties, Comparative Private and Procedural Law, the Law of International Institutions, and Judicial Review of Administrative Action.

1979 to 1982

Keble College, Oxford

Took up Rhodes Scholarship, and completed a **DPhil** in Jurisprudence supervised by Dr J M Finnis and Prof A M Honoré. Thesis entitled 'The Role and Attitudes of the South African Appellate Judiciary, 1910-1950'.

C. EMPLOYMENT (and associated activities)

January to September 1978 **University of Cape Town**

Employed full-time as a Tutor in the Faculty of Law, teaching Evidence, Accounts, Constitutional Law, Labour Law, Criminal Procedure.

Awarded Wilfred Kramer Grant for overseas study in Law, and the Diocesan College Rhodes Scholarship, tenable for the 1979 academic year.

National Organiser for Legal Aid and Education for NUSAS, attending national law students' conference, Johannesburg, founding and editing two numbers of the journal Lexis.

Honorary Life Member, NUSAS.

Admitted as an Advocate of the Supreme Court of South Africa.

January to June 1983 **University of Cape Town**

Temporary lecturer in the Faculty of Law, University of Cape Town, teaching Jurisprudence and a course on 'The Judicial Process'.

Served on a National Commission of the Anglican Church, to enquire into the Constitution and Canons of the Church.

June 1983 to July 1987 **Stellenbosch University**

Senior Lecturer in Public Law, teaching Constitutional and Administrative Law; Interpretation of Statutes; Jurisprudence; the Judicial Process; Law, State, and Ideology; and Media Law.

Consultant: To student law review, Responsa Meridiana (1983 to 1987).

Chairman: Stellenbosch Branch of Lawyers for Human Rights (1984 and 1985).
Stellenbosch Advice Office Trust (1985 to 1989) (Founder).
Regional Committee (Cape Western) of the SA Institute of Race Relations (Vice-Chairman 1984 to 1985, Chairman 1986 to 1987).

Founding convener: 'Law, State and Society' Discussion Group (Western Cape) (1985).

Member: Committee of the Stellenbosch Branch of Lawyers for Human Rights (1984 to 1986)
National Council of Lawyers for Human Rights (1986 to 1989).
Regional Committee of the SA Institute of Race Relations (1984 to 1996)

External examiner: For Jurisprudence (at UCT).

Conference presentations: Carnegie Conference on 'Poverty and Development' (1984)
UCT Conference on 'Law in a State of Emergency' (1986)
Pretoria Symposium on a Bill of Rights (1986)
'Law in a Democratic Society' (UWC, 1987).

July 1987 to the end of 2019 **University of Cape Town**

Professor of Public Law. Teaching Constitutional Law; Administrative Law; Advanced Jurisprudence, Foundations of South African Law; and Media Law (at Stellenbosch until 1989)

Head of Department of Public Law, 1988 to 1993.

Director of the School of Advanced Legal Studies, 1996 to 1998.

Deputy Dean, Faculty of Law, 1993 to 1994, 1996 and 1998.

Dean, Faculty of Law, January 1999 to December 2008.

Director, Postgraduate Studies, University of Cape Town (part-time), 2011

Fellow, University of Cape Town, 2004 to present.

Special Adviser, Office of the Vice Chancellor, January to August 2016, and January to March 2017.

Acting Deputy Vice Chancellor, April 2017 to January 2018.

Acting Dean of Law, May 2018 to January 2019.

Interim Director, Graduate School of Business, January to September 2020.

External Examiner: Various courses offered at Universities of the Western Cape, Natal (Pietermaritzburg) and the Witwatersrand, and Rhodes University.
Many Masters and Doctoral Theses in Law (including four PhDs from Australia, and one from Oxford).

Supervision: Successful supervision of many LLMs by dissertation, and eleven PhDs in Law. Current supervision/ co-supervision: eleven PhDs.

Visiting Professor: College of Law, University of Florida (Gainesville) (October 1994); Queens University, Ontario, Canada (November 2002); University of Adelaide, Australia (November 2009)

Senior Fellow: Faculty of Law, Melbourne University, Australia (2004, 2006 and 2009)
Bingham Centre for the Rule of Law, London, May 2011 to date.

Member: National Council of SAIRR (1988-1992), re-elected (1992-6), resigned 1994.
Committee of the Civil Rights League (1988 to1994).
Sub-Committee on Education of the National Association of Democratic Lawyers (1989 to 1990).
National Council of Lawyers for Human Rights (1990);
Arbitration Panel of the Independent Mediation Service of South Africa (1988 to 1999);
International Council on Governance, Transparency International (1996 to 1999).
Interim Advisory Board on Judicial Education, Republic of South Africa (2006 to 2009)
Council of the South African Judicial Education Institute (May 2009 to January 2014)
Judicial Service Commission of South Africa (alternate representative of the law teacher constituency) (July 2009 to present)

Chair: UCT Societies Council (1988-1990).
Regional Committee of the Society for the Abolition of the Death Penalty in South Africa (1988 to 1990).
UCT Academic Freedom Committee 2001 to 2004.
UCT Creative Works Award Committee 2012- 2019

Conference presentations: (Selected)

1. Intervarsity Law Students' Council (Johannesburg, September 1987)
2. Conferences of Society of University Teachers of Law (Durban, 1987 and Cape Town, 1989)
3. Focus on Legal Education (Stellenbosch, August 1988)
4. Democracy and the Judiciary (Cape Town, October 1988)
5. Artists for Human Rights (Durban, December 1988)
6. Institute for a Democratic Alternative for South Africa (Cape Town, March 1989)
7. Land Reform (Houw Hoek, March 1990)
8. Book Publishing in the 1990s (Cape Town, November 1990)

9. Administrative Law Reform in South Africa (Cape Town, February 1993)
10. Freedom to Read (Cape Town, June 1993)
11. Commonwealth Judicial Colloquium (Bloemfontein, September 1993)
12. The Protection of Rights During the Transition: What Prospects? (Cape Town, January 1994)
13. Ensuring Government Accountability: Accessibility and transparency in the New South Africa (Cape Town, February 1994)
14. Human Rights for South Africans (Pretoria, May 1994)
15. Controlling Public Power in Europe (London, December 1994)
16. Controlling Public Power in Southern Africa (Cape Town, March 1996)
17. Ideas in Action: In Honour of Peter Russell (Toronto, Canada, November 1996).
18. Administrative Justice and Law Reform (London, June 1997; Leeds Castle, Kent, England, July 1999; Cape Town, February 2001)
19. Australian Institute of Administrative Law Annual Conference (Adelaide, Australia, June 2000)
20. Compiling a Codebook for Judicial Activity (Denton, Texas, USA, March 2000)
21. The Promotion of Administrative Justice (Johannesburg, August 2001)
22. American and European Constitutionalism Compared (Göttingen, Germany, May 2003);
23. SALJ Jubilee Conference (Johannesburg, October 2003)
24. SAJHR Twentieth Anniversary Conference (Johannesburg, July 2004)
25. Queen's University, Belfast, Ireland: Conference in Memory of Stephen Livingstone (October 2005)
26. Ugandan Judicial Conference, Entebbe, Uganda: "The Judicial Institution in Southern and East Africa" (August 2006)
27. Globalization and Legal Governance, Beijing, China (May 2009)
27. Public Law Weekend, Australian National University, Canberra (November 2009)
29. Private Law and Human Rights, Herzliyya Interdisciplinary Centre, Israel (April 2010).

I have ceased to note conference papers since 2010: suffice to say that I have presented papers at national and international conferences regularly each year since then.

Conference participation: (Selected)

1. Conference of legal academics from South Africa, Zimbabwe and the ANC (Harare, February 1989).
2. Meeting organised by Prof Ronald Dworkin attended by South African judges and lawyers, both exiled and from South Africa (Nuneham Park, Oxford, June 1989).
3. Conference on 'Human Rights in the Post-Apartheid South African Constitution' (Columbia University, New York, September 1989).

4. Roundtable on a Constitutional Court for Palestine (Cairo University, Cairo, Egypt, May 2009).

Conference convening:

1. Organised and chaired public seminar on the 'Appointment of Judicial Officials in a future South Africa' (University of Cape Town, May 1992)
2. Organised and convened International Workshop on Administrative Law Reform in South Africa (Cape Town, February 1993)
3. Organised short course on the Significance of the 1993 Bill of Rights for Practitioners (Cape Town, May-August 1994) and follow-up seminars (August 1995)
4. Co-convened International Workshop on Controlling Public Power in Southern Africa (Cape Town, March 1996)
5. Convened International Workshop on Realising Administrative Justice (Cape Town, February 2001)
6. Convened Workshop on Comparing Administrative Justice across the Commonwealth (Cape Town, March 2005)
7. Co-convened Workshop on Global Administrative Law with New York University School of Law (Cape Town, March 2008)
8. Convened workshop on "Challenges to administrative justice in South Africa" (Cape Town, January 2012)

Memorial lectures:

1. Mortie Malherbe Memorial Lecture at the Faculty of Law, University of Stellenbosch, September 1994.
2. Carter Memorial Lecture, Centre for African Studies, University of Florida, Gainesville, October 1994.
3. Peter Allan Memorial Lecture in Public Law, University of Hong Kong, Hong Kong (November 2000)
4 Geoffrey Sawer Memorial Lecture, Australian National University (November, 2009)

Editorial Boards:

Member of the Editorial Boards of the following journals:

1. SA Journal on Human Rights (1985 – 2015);
2. Natal University Law and Society Review (1985-1990);
3. SA Public Law (1987 – present)
4. Stellenbosch Law Review (1990- present)
5. Editor of Acta Juridica (1993, 2006, and 2009)
6. Griffith Law Review (Australia) (1995- present)
7. Public Law Review (Australia) (1997- present)
8. Review of Constitutional Studies (Canada) (1998- 2004)
9. Editor of the South African Law Journal (2010-present).
10. Editorial Advisory Board, Law and Philosophy Library, Springer, Dordrecht etc (2010-present)

Directorships of Companies (not for gain)/ Trusteeships/ Voluntary Associations:

Centre for Intergroup Studies/Centre for Conflict Resolution

(1987 – 2001)

Director, Institute for Justice and Reconciliation (2000 – present) (Deputy Chair, 2004 to 2007)

Director, Mosaic (2001 – 2006)

Trustee, African Scholars' Fund (2003 – present) (Vice Chair 2010-present)

Member, Diocesan College Council (2005 – 2008)

Director, Freedom Under Law (2009 to present)

Member, Board of Governors, St George's Grammar School (2010- 2014).

Member, Council for the Advancement of the South African Constitution (2010- present)

Trustee, University of Cape Town Trust (UK) (2010-present)

Co-Chair, Advisory Board, Democratic Governance and Rights Unit, University of Cape Town (2010- 2016)

Member, Academic Advisory Board, Community of Democracies, Warsaw, Poland (2011-present)

Member, Advisory Council, EEE Mediation, London, UK (2011- present)

Community Service: Particularly since 1994, I have frequently addressed gatherings of public representatives at national, provincial and local levels, public officials, other state bodies, (such as the IBA, SAHRC and Commission on Gender Equality) and community organisations. The theme of most of these presentations has been the transition to constitutional democracy, the structure of South Africa's Constitution, and administrative justice. I have no formal record of such events, but can state with confidence that I have spoken at least two hundred such gatherings over these years.

Constitutional Advice: Member of the Technical Committee on Fundamental Rights during the Transition, Multi-Party Negotiating Process, May to November 1993. (Drafted Chapter 3 on Fundamental Rights in South Africa's 1993 (Interim) Constitution).

Convener of Technical Committee advising Theme Committee 1 and Technical Adviser on Self-Determination, Constitutional Assembly (February-October 1995), drafting of the final South African Constitution.

Selected Consultancies to:

1. The Parliamentary Portfolio Committee on Health, 1996
2. The Parliamentary Joint Rules Committee, drafting the 'Code of Conduct on Disclosure of Financial Interests of Parliamentarians' (May to October 1996);
3. The Speaker of Parliament, drafting two reports – on the 'Scrutiny of Delegated Legislation' (January 1999) and 'Legislative Oversight of the Executive" (July 1999);

4. The SA Law Reform Commission, Project Committee drafting the Promotion of Administrative Justice Act (November 1998 to October 1999);
5. The Canada – South Africa Justice Linkage Project, Report on 'Judicial Education and Training' (March 2003).
6. The Office of the Chief Justice of South Africa, reports on judicial governance and management in South Africa (March to July 2011)

Law Reform: Consultant to Department of Defence on revision of the Defence Act and Military Discipline Code (1999)

Consultant to the Chair of the Parliamentary Portfolio Committee on Defence, drafted Bill on a Military Ombud for South Africa. (2006)

Consultant to the Namibian Law Reform Commission on Administrative Justice (March 2011- 2016)

Travel Abroad

International Visitor: Toured the United States on the International Visitor Program of the US Information Agency (October 1989).

Visited universities and judicial bodies in Paris and Aix-en-Provence as guest of the French Ministry of Foreign Affairs (November 2001)

Sabbatical Leave, 1991: Visitor, University of Adelaide Law School, Australia (January to April), also visited Melbourne, Sydney, Canberra and Gold Coast.

Further travel to Singapore and Canada (Halifax, Ottawa, Toronto, Vancouver and Regina) during May, consulting with academics, researching and speaking at universities in each city.

Visitor, University College, London, from June to September, researched in Institute for Advanced Legal Studies Library.

Attended International Conference, American Law and Society Association, Amsterdam, Netherlands, June.Theme of Research: 'Empowerment and Accountability of the Executive', awarded a CSD Senior Researcher's Award for this purpose.

Sabbatical leave

April to July 1997: Visiting Scholar, Centre for Socio-Legal Studies and Wolfson College, Oxford (April-July).

Seminars presented in Oxford, Bristol, Sheffield and Aberdeen.

Assisted with convening of workshop on 'The Codification of Administrative Law' by Professor Jeffrey Jowell, University College, London, which focussed on South Africa but was attended by lawyers from Australia, Canada, France, Germany, India, Japan, Nigeria and the UK (mid-June), at which I presented two papers.

Presented paper on 'The Law and Change in South Africa' at a workshop on 'The Hidden Structures of the Law' at the International Society for the Sociology of Law, Oñati,
Spain (May)
Theme of Research: Codified administrative justice, chiefly in the Commonwealth.
Financial support was provided by a CSD Overseas Research Grant.

Visiting Fellowship
(Sept/October 1997): Awarded by Australian Commonwealth Government.
Host institution: Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne.
Presented seminars to academic and practising lawyers in Adelaide, Brisbane, Canberra, Melbourne and Sydney.
Researched the Australian system of administrative justice, and interviewed judges and public servants.
Keynote speaker at two-day 'round table' discussion with about twenty leading Australian administrative lawyers on the 'Codification of Administrative Law'.

Sabbatical Leave
(January to December 2009) Participated in conferences in Cairo and Beijing (above). Travelled to Australia in September (taught an intensive LLM course on Judicial Review in the British Commonwealth at Melbourne University) and in October/November (visitor at Adelaide University, presented seminars at Monash University, Melbourne, at the University of Tasmania, Hobart, and at Adelaide University).

D. PUBLICATIONS

i) Books

1. Judges at Work Cape Town: Juta (1984) (252 pp)
2. Essays on Law and Social Practice in South Africa (editor) Cape Town: Juta (1988) (368pp).
3. Democracy and the Judiciary (editor) Cape Town: IDASA (1989) (185 pp).
4. Empowerment and Accountability London and Cape Town: SA Constitution Studies Centre (1991) (89pp).
5. A Charter for Social Justice (co-author with seven others) Cape Town: Dept of Public Law, UCT (1992) (76pp).
6. Understanding South Africa's Transitional Bill of Rights (with Lourens du Plessis) Cape Town: Juta (1994) (216pp).
7. Controlling Public Power (Edited with Fiona McLennan) Cape Town: Dept of Public Law, UCT (1995) (236pp).

8. Administrative Justice in Southern Africa (Edited with Tiya Maluwa) Cape Town: Dept of Public Law, UCT (1997) (206pp).
9. Realising Administrative Justice (Edited with Linda van de Vijver) Cape Town:, Siber Ink (2002) (128pp).
10. Comparing Administrative Justice across the Commonwealth (Edited) Cape Town: Juta (2006) (449pp) – first published as 2006 Acta Juridica
11. Global Administrative Law: Development and Innovation (Edited) Cape Town: Juta (2009) (402pp) – first published as 2009 Acta Juridica
12. The Quest for Constitutionalism South Africa since 1994 (Edited with Veronica Federico and Romano Orru) Farnham, England: Ashgate (2014) (272 pp)
13. Securing Judicial Independence. The Role of Commissions in Selecting Judges in the Commonwealth (edited with Jan van zyl Smit) Cape Town: Siber Ink (2017) (181 pp)
14. Pursuing Good Governance. Administrative Justice in Common-Law Africa (edited with Justice Mavedzenge) Cape Town: Siber Ink (2019) (150pp)

ii) Chapters in Books (* Peer reviewed)

1 'A Fragile Plant: The Judicial Branch of Government and the Hoexter Report' Ch 4 in Van Vuuren, D J et al (eds.) South Africa: A Plural Society in Transition Durban: Butterworths (1985) pp80 – 98.

2 'The Supreme Court: Arena of Struggle?' Ch 6 in James, W G (ed.) The State of Apartheid Boulder, Colorado: Lynne Rienner (1987) pp93-115

'Law and Social Practice: An Introduction' (with D M Davis) Ch 1 in Corder (ed) Essays on Law and Social Practice in South Africa Cape Town: Juta (1988) pp1-30

'The Judicial Eye: Change and the Courts 1985-1987' Ch 9 in DJ Van Vuuren et al (eds.) South Africa: The Challenge of Reform Pinetown: Owen Burgess (1988) pp203-224

'n Menseregtehandves vir Suid-Afrika' in J van der Westhuizen and H Viljoen (eds.) A Bill of Rights for South Africa Durban: Butterworths (1988) pp132-3

'The Judicial Branch of Government: An Historical Overview' in D P Visser (ed.) Essays on the History of Law Cape Town: Juta (1989) pp60-78

'The Right to Equality before the Law' Ch 8 in Mike Robertson (ed.) Human Rights for South Africans Cape Town: OUP (1991) pp53-60.

'Censorship: a model for a new South Africa' in Book Publishing in South Africa for the 1990s Cape Town: SA Library (1991) pp29-39.

'Administrative Justice' in D van Wyk et al (eds.) Rights and Constitutionalism Cape Town: Juta (1994) pp387-400.

10. 'The Judiciary and a Bill of Rights in a Changing South Africa' in E Kahn (ed.) The Quest for Justice Cape Town: Juta (1995) pp132-147.

11. 'Introduction: Controlling Public Power' in Corder and McLennan (eds.) Controlling Public Power Cape Town: Dept of Public Law, UCT (1995) pp1-9.

12. 'We know what the constitution means but we are not telling you yet: The first years of the Constitutional Court' (with D M Davis) in Bertus de Villiers (ed.) State of the Nation 1997/8 Pretoria: HSRC (1998) pp67-106.

13. 'Law and Struggle: The Same but Different' Ch 9 in C Villa-Vincencio and W Verwoerd (eds.) Looking Back/Thinking Forward Cape Town: Juta (2000) pp99-106.

14. 'Constitutional Change in South Africa: Some Indian Connections' in Venkat Iyer (Ed) Constitutional Perspectives: Essays in Honour and Memory of HM Servai Delhi: Universal Law Publishing (2001) pp177-196

15. 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa' in Peter Russell and David M O' Brien (Eds) Judicial Independence in the Age of Democracy Charlottesville, University Press of Virginia (2001) pp194-206

16. 'Administrative Justice' in Halton Cheadle, Dennis Davis and Nicholas Haysom South African Constitutional Law: The Bill of Rights Durban; Butterworth (2002) pp 593 – 616

17. 'Reviewing "Executive Action"' in Jonathan Klaaren (Ed) A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy Johannesburg: Siber Ink (2006), pp 73 to 78.

*18. 'Judging Rights in a Democratic South Africa' in Tim Endicott, Joshua Getzler and Edwin Peel (Eds) Properties of Law: Essays in Honour of Jim Harris Oxford: Oxford University Press (2006) pp 317 to 331.

*19. 'From Despair to Deference: Same Difference?' in Grant Huscroft and Michael Taggart (Eds) Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan Toronto: Toronto University Press (2006) pp 327 to 350.

* 20."Judicial Authority in a Changing South Africa" pp 187-210 in Guy Canivet, Mads Adenas and Duncan Fairgrieve (Eds) Independence, Accountability and the Judiciary London, British Institute of International and Comparative Law (2006)

*21. 'Judicial Activism of a Special Type: South Africa's Top Courts since 1994' in Brice Dickson (Ed) Judicial Activism in Common Law Supreme Courts Oxford: OUP (2007) pp323-362

22. "Introduction" pp 10-11, and "Human Rights in Practice, 1994-2005" pp54-67, in Hugh Corder (ed) Constitutional Rights Book 1 in the series "Turning Points in Human Rights", Cape Town: Institute for Justice and Reconciliation (2009)

*23. 'Appointment, Discipline and Removal of judges in South Africa' in HP Lee (ed) Judiciaries in Comparative Perspective Cambridge: CUP (2011) pp 96- 116

*24. 'Republic of South Africa' in Dawn Oliver and Carlo Fusaro (eds) How Constitutions Change A Comparative Study Oxford and Portland, Oregon: Hart (2011) pp 261-280

*25. 'Securing the Rule of Law' in Marita Carnelly and Shannon Hoctor (eds) Law, Order and Liberty Essays in honour of Tony Mathews Scottsville: UKZN Press (2011) pp 23-42

*26. 'Judicial Review of Parliamentary Actions in South Africa: A Nuanced Interpretation of the Separation of Powers' in DM Chirwa and L Nijzink (eds) Accountable Government in Africa Cape Town: UCT Press (2012) pp 85-104

*27 'Ancient and Modern: Access to Information and Constitutional Governance' (with Thomas Bull) in Mark Tushnet, Cheryl Saunders and Thomas Fleiner (eds) Handbook on Constitutional Law London and New York: Routledge (2013) pp 219-230

* 28 ' J C De Wet: A personal view' in Jacques Du Plessis and Gerhard Lubbe (eds) J C De Wet (Juta, 2013) pp 23-38

* 29 'Judicial Accountability' in Cora Hoexter and Morne Olivier (eds) The Judiciary in South Africa (Juta, 2014) pp 200-244.

*30 'The Constitutional Court'(with Jason Brickhill) in Cora Hoexter and Morne Olivier (eds) The Judiciary in South Africa (Juta,2014) pp 355-402.

*31. 'Constitutional Reform in South African History' in Hugh Corder, Veronica Federico and Romano Orru (eds) The Quest for Constitutionalism South Africa since 1994 (Ashgate, 2014) pp181-194

*32. 'Judicial Regulation of Administrative Action'(with Lauren Kohn) in Christina Murray and Coel Kirkby (eds) South Africa Constitutional Law in International Encyclopaedia of Laws – Suppl. 108 (2014), (Kluwer, Netherlands), Part IV, Chapter 4, pp 253-277.

33. 'An Unlikely friendship, yet typically South African' in Jacques De Ville (ed) Memory and meaning Lourens Du Plessis and the haunting of justice (Lexis Nexis, 2015) pp 285-292.

*34. 'The development of administrative law in South Africa' in Geo Quinot (ed) Administrative Justice in South Africa An Introduction (OUP, 2015) Chapter 1, pp 1-26.

*35. 'Struggling to Adapt: Regulating Judges in South Africa' in Richard Devlin and Adam Dodek (eds) Regulating Judges Edward Elgar (2016) Chapter 19, pp 372-389.

*36. 'A Sense of Grievance and the Quest for Freedom: South Africa's Constitution---The Struggle Continues' in Michael Dowdle and Michael Wilkinson (eds) Constitutionalism beyond Liberalism CUP (2017) Chapter 11, pp 282-314.

37. 'Introduction' in Hugh Corder and Jan van zyl Smit (eds) Securing Judicial Independence Siber Ink (2017), pp vii- xviii.

*38. 'A right to Administrative Justice: "New" or just repackaging the old?'ch 38 in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds) The Cambridge Handbook of New Human Rights, CUP (2020), pp 493-506.

39. 'Constitutional contribution: reflections of a technical committee member from 1993 to 1996' in Enver Surty (ed) Cape Town: Parliament of South Africa (2019).
40. 'Administrative Justice in South Africa: An Overview of our Curious Hybrid' (with Lauren Kohn) in Pursuing Good Governance. Administrative Justice in Common-Law Africa (edited with Justice Mavedzenge) Cape Town: Siber Ink (2019), pp 120-150.

iii) Articles (* Peer reviewed)

1 'The Right of Africans to remain in Urban Areas' 1977 Responsa Meridiana 213-227.
*2. 'The Content of the Audi Alteram Partem rule in South African Administrative Law' 1980 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 156-177.
*3. 'The Rights and Conditions of Entry into and Residence in Urban Areas by Africans' 1984 Acta Juridica 45-63
*4. 'The Little List Lengthens' (1988) 4 SAJHR 233-238.
*5. 'A Long March: Administrative Law and the Appellate Division' (with D M Davis) (1988) 4 SAJHR 281-302.
*6. 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' (1989) 5 SAJHR 1-25. (Also published in the inaugural lecture series of the University of Cape Town).
7. 'Homelands Incorporation: the courts overruled' (with C Murray) (1989) 21 De Rebus 529
*8. 'The Constitutional Guidelines of the African National Congress: A Preliminary Assessment' (with D M Davis) (1989) 106 SALJ 633-647
*9. 'Restructuring the Rural Economy: Legal issues' (with D M Davis) (1990) 5 SA Public Law 157-168
*10. 'Lessons from North America (Beware the "Legalization of Politics" and the "Political Seduction of the Law")' (1992) 109 SALJ 204-224.

*11. 'The Appointment of Judges: Some Comparative Ideas' (1992) 3 Stell Law Review 207-230.
*12. 'Judicial Service and Accountability: Some Questions and Suggestions' (1992) 7 SA Public Law 181-193.

'The Law will Provide' 1994 (Summer) Oxford International Review 9.

*14. 'Towards a South African Constitution' (1994) 57 Modern Law Review 491-533.

15. 'Challenges for the Law (and lawyers) in South Africa' (1994) 1 Law and Justice (India) 203-210.

*16. 'Establishing legitimacy for the administration of justice in South Africa' (1995) 6 Stell Law Review 202-216.

*17. 'What Value the Background in Constitutional Interpretation? A Response to Matthew Chaskalson' (with Lourens du Plessis) (1995) 11 SAJHR 601-609

*18. 'South Africa's Transitional Constitution: Its design and implementation' 1996 Public Law 291-308.

*19. 'A Ringing and Decisive Break with the Past?' (with D M Davis) (1996) 3 Review of Constitutional Studies 141-165

*20. 'Administrative Justice in the Final Constitution' (1997) 13 SAJHR 28-43.

21. 'The New Chief Justice: A Ringing and Decisive Break with the Past' (1997) 10 Consultus 18.

*22. 'The Constitutionalization of South African Administrative Law' (1997) 3 European Public Law 541-559.

*23. 'Administrative Review in South African Law' (1998) 9 Public Law Review 89-97.

*24. 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 SAJHR 38-59.

25. 'Le Contrôle de l'administration – du common law á la constitutionnalisation du contrôle de l'action administrative' (1998) 85 Revue Francaise d'Administration Publique 75-86.

*26. 'Privatised prisons and the constitution' with (Dirk van Zyl Smit) (1998) 11 South African Journal of Criminal Justice 475-490.

27. 'Administrative Justice in the South African Constitution' 1998 Admin Review (Australia) 4-19

*28. 'From Separation to Unity: Accommodating Difference in South Africa's Constitutions During the Twentieth Century' (2000) 10 Transnational Law and Contemporary Problems 539-559

*29. 'Prisoner, Partisan and Patriarch: Transforming the Law in South Africa, 1985 – 2000' (2001) 118 SALJ 772-793

*30. 'Judicial Authority in a changing South Africa' 2004 Legal Studies 232-253

*31. 'Without deference, with respect' (2004) 121 SALJ 438 - 444

32. 'South Africa's first Bill of Rights: Random Recollections of one of its Drafters' (2004) 32 International Journal of Legal Information 179 – 187

*33. 'Comparing Administrative Justice Across the Commonwealth: A First Scan' 2006 Acta Juridica 1 – 10

'A Cautious Revolution' 2005 Advocate 41- 43

*35. 'Globalisation, National Democratic Institutions and the Impact of Global Regulatory Governance on Developing Countries' (with Dennis Davis) 2009 Acta Juridica 68-89

*36. 'The Administration of Justice' (with Dennis Davis, Gilbert Marcus and Jonathan Klaaren) 2008 Annual Survey of South African Law 1-23

37* 'Principled Calm amidst a Shameless Storm: Testing the Limits of the Judicial Regulation of Legislative and Executive Power' (2009) 2 Constitutional Court Review 239-268 (published 2010)

37. 'Preface: Law and Social Justice in the Eastern Cape, September 2011' (2011) 25 Speculum Juris v-ix

*38 'Constitutional Reform in South African History' 2011 Diritto Publico Comparato ed Europeo 1346-1362

*39 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2009 Annual Survey of South African Law (published 2010)

*40 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2010 Annual Survey of South African Law 1-40

*41 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2011 Annual Survey of South African Law 1-48

*42 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2012 Annual Survey of South African Law 1-24

*43 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2013 Annual Survey of South African Law 1-60

*44. 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2014 Annual Survey of South African Law 1-45

*45. 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2015 Annual Survey of South African Law 1-50

*46 "'Lawfare' in South Africa and Its Effects on the Judiciary" (with Cora Hoexter) African Journal of Legal Studies 10 (2017) 105–126

*47. 'The Administration of Justice' (with Jason Brickhill, Dennis Davis and Gilbert Marcus) 2016 Annual Survey of South African Law 1-48.

*48. 'Navigating the Straits of Deference: defining the Appropriate Judicial Role in a Transforming South Africa' Journal of International and Comparative Law 5(2018) 411-435

iv) Published Conference Proceedings (*Peer Reviewed)

1. 'Poverty and Co-option: The Role of the Courts'(with DM Davis) Carnegie Conference Paper No 90 (1984) pp 1 – 25

2. 'The Record of the Judiciary (2)' in H Corder (ed.) Democracy and the Judiciary. (1989) pp46-57

3. 'Restructuring the Rural Economy: Legal issues' (with D M Davis) in Michael de Klerk (ed) A Harvest of Discontent. (1991).

*4. 'Introduction: Administrative Law Reform' Acta Juridica 1-20

5'State Control of Information: The Current Situation' in Freedom to Read. (1994)
a. pp1-14

6'Introduction: Controlling Public Power' in Corder and McLennan (eds.) Controlling Public Power (1995) pp1-9

7 'Piercing the Paper Curtain: Prospects for an Administrative Justice Act' in Gretchen Carpenter (ed) Focus on the Bill of Rights (1996) pp78-97

8 'Administrative Justice in Southern Africa: Background and some issues" (with Tiyanjana Maluwa) in Hugh Corder and Tiyanjana Maluwa (eds.) Administrative Justice in Southern Africa. (1997) pp 3-14.

*9. 'South Africa's Constitutional Odyssey: Can the law be trusted?' Ch14 in J Fletcher (ed) Ideas in Action. Toronto: University of Toronto Press (1999) pp242-262

*10. 'Reinventing Administrative Law in South Africa' in Chris Finn (Ed) Sunrise or Sunset? Administrative Law for the New Millennium. Canberra, AIAL (2000) pp100-115

*11. 'Comments on Human Dignity' in George Nolte (Ed) European and US Constitutionalism Cambridge: Cambridge University Press (2005) pp 128 to 134.

*12. "Judicial Policy in a Transforming Constitution" in John Morison, Kieran McEvoy and Gordon Anthony (Eds) Judges, Transition and Human Rights Oxford: Oxford University Press (2007) pp 91 to 104.

*13 ' "Building a Nation": the Judicial Role in South Africa" (2012) 28 Law in Context 60-75

*14 'Judicial Capacity in a Transforming Legal System' Oñati Socio-legal Series, v. 7, n. 4 (2017) – 'Too Few Judges?' Regulating the Number of Judges in Society
ISSN: 2079-5971

v) Book Reviews

1. Ackerman, M F Die Reg insake Openbare Orde en Staatsveiligheid in (1985) 1 SAJHR 182-184.
2. Basson en Viljoen Suid-Afrikaanse Staatsreg in 1991 De Jure 182.
3. Ellmann In a Time of Trouble in (1993) 9 SAJHR 549-552.
4. Boister and Ferguson-Brown (eds.) South African Human Rights Yearbook in (1995) 21 Social Dynamics 146-149.
5. Schwarze European Administrative Law in (1996) 7 Public Law Review 345.
6. Michael Lobban White Man's Justice in (1997) 6 Social and Legal Studies 588.
7. Murray Hunt Using Human Rights Law in English Courts and Michael Taggart (ed.) The Province of Administrative Law in (1998) 49 Univ of Toronto Law Journal 575-581.
8. Brenda Grant Administrative Law through the Cases in (1998) 14 SAJHR 603-605.
9. Currie and Klaaren's The Promotion of Administrative Justice Act Benchbook (2002) 119 SALJ 463 - 465
10. Cora Hoexter The New Constitutional and Administrative Law (Volume 2) (2003) 120 SALJ 408-411
11. Adbullahi An Naim (Editor) Realizing the Promise for ourselves: Human Rights Under African Constitutions (2004) 26 Human Rights Quarterly 512 – 518
12. David Beatty The Ultimate Rule of Law (2004) 121 SALJ 677 - 682
13. Christopher Roederer and Darrel Moellendorff Jurisprudence (2006) 123 SALJ 539 – 546
14. Jens Meierhenrich The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000 45(2011) Tulsa Law Review 763-769
15. Geo Quinot State Commercial Activity (2011)22 Stellenbosch Law Review 430-433
16. Michael Kidd and Shannon Hoctor (eds) Stella Juris: 100 years of Teaching Law in Pietermaritzburg (2011) 129 SALJ 785-790
17. James Fowkes Building the Constitution. The Practice of Constitutional Interpretation in Post-Apartheid South Africa. Forthcoming (2018) ICON

18. Graham Gee and Erika Rackley (eds) Debating Judicial Appointments in an Age of Diversity (2018)135 SALJ 805-810

vi) Policy reports

Scrutiny of Delegated Legislation, report written for Parliament, 1999 (pp1-24)

Parliamentary Oversight and Accountability, report written (with Saras Jagwanth and Fred Soltau) for Parliament 1999 (pp1-64)

Judicial Education and Training, report written for the Canada –South Africa Justice Linkage Project 2003 (pp1-98)

Review of Administrative Justice in Namibia Discussion Paper 28; Commissioned and Published by the Law Reform and Development Commission of Namibia; March 2014, Windhoek, Namibia.

vii) Keynote Plenary Addresses

Keynote address on 'An Ombudsman for the Elderly' at seminar organised by the Concerned Friends of the Frail and Aged (June 1996).

'The Law and Change in South Africa' Plenary address to workshop on the Hidden Structures of the Law at the International Society for the Sociology of Law, Onati, Spain. (May 1997)

'Administrative Law Reform in South Africa' Keynote address at Roundtable Discussion on the 'Codification of Administrative Law' at Melbourne University, Australia. (October 1997)

viii) Other Research Outputs

Documents: How to obtain identity documents, passports, birth, marriage and death certificates Cape Town: Grassroots Advice Project (1977)
"Rules of Detention" in Public Safety Act Brief, prepared by UCT Faculty of Law (1986).
Death by Decree: South Africa and the Death Penalty compiled by Roelien Theron and Julia Sloth-Nielsen, for the Society for the Abolition of the Death Penalty in South Africa (1991) (46pp).

MISCELLANEOUS

Many articles written for newspapers and magazines in South Africa.

Many half-hour interviews broadcast on SABC Radio, 'The Law Report', 1992-2011.

Television interview (half-hour) in Canada, 1991.

Radio interview (half-hour) on Australian Broadcasting Corporation Radio National, The Law Report, October 1997.

Op ed article (2200 words) for the Church Times (UK), June 1998.

Several op eds for The Conversation (Africa), 2016.

RESEARCH INTERESTS

1. The roles played by the law and the courts in society, particularly their legitimating and ideological functions.
2. The judicial process.
3. The use of the legal process as a means of achieving social justice.
4. The rule of law in South African history.
5. Administrative justice through the law.