



# Mervyn King - why fairness matters

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Last week saw the announcement of this year's Festival of Governance - Good governance because fairer is better.

Judge Professor Mervyn King, whose seminal reports on corporate governance form the basis of GGI's consultancy approach, makes the case that fairness belongs at the heart of good governance.

For Judge Professor Mervyn King, fairness lies at the very heart of good governance.

The former South African Supreme Court judge says: "Fairness is one of the four key criteria of good governance. I use the acronym RAFT: R for responsibility, A for accountability, F for fairness and T for transparency. You cannot have fairness if you don't have the other factors as well.

"These four criteria are inextricably intertwined. If you're going to be fair, you've got to be responsible, you've got to be accountable. The more informed you are reporting-wise, the more transparent your accountability."

Professor King's seminal reports on corporate governance establish the principle that



governance is about good corporate citizenship, not merely tick-box compliance, and this has always been at the core of GGI's approach to good governance.

He says fairness was always a key consideration: "Back in 1994, when we issued the first King Report, we said that a board, acting as a collective mind, should learn and understand the needs, interests, concerns and expectations of stakeholders, take them all into account, but then remember the legal requirement that your duty as a director is to make a decision in the best long-term interests of the health of the company. If that collective mind gets this right, it's in the best long-term interest of all the stakeholders.

"But as a matter of fairness, from time to time in making that business judgement call, you will prefer one stakeholder above another, called trade-offs between stakeholders.

"Directors should be able to explain to a stakeholder why they made a decision – taking account of that stakeholder's needs, interests and expectations – in the best long-term interests of the health of the company. If the board's decision is correct, it will be in that stakeholder's best long-term interest."

### **Fairness in South Africa**

From being one of the world's least fair governments in the age of Apartheid, there can be no question that South Africa made huge strides in the years following the release of Nelson Mandela in 1990 and the reforms that followed.

But in more recent years – and especially during the second term of President Jacob Zuma between 2014 and 2018 – the blight of corruption put a dent in that progress. And Professor King says there remains a great deal of work to be done. He says: "Unfortunately, the story of governance is a reason for failure in our public sector at the moment. And there is the question of corruption and self-enrichment, people thinking of self rather than acting as a conscious leader acting in the best interests of the third party you represent.

"Under the presidency of Jacob Zuma, there was a commission of enquiry set up [under the chairmanship of Deputy Chief Justice Raymond Zondo], which would be a Royal Commission in UK terms, to enquire into what we call state

## **About Mervyn King**

Mervyn King is a senior counsel and former Judge of the Supreme Court of South Africa. He is professor extraordinaire at the University of South Africa on Corporate Citizenship, honorary professor at the universities of Pretoria and Cape Town and a visiting professor at Rhodes.

He has honorary doctorates of law from the Universities of the Witwatersrand in South Africa and Leeds in the UK, an honorary doctorate from Deakin University, Melbourne, Australia and an honorary doctorate in commerce from Stellenbosch University in South Africa. He is chair emeritus of the King Committee on Corporate Governance in South Africa, which produced King I, II, III and IV, and chair of the Good Law Foundation.

He is also chair emeritus of the International Integrated Reporting Council (IIRC) in London and of the Global Reporting Initiative in Amsterdam and a member of the Private Sector Advisory Group to the World Bank on Corporate Governance. He chaired the United Nations Committee of Eminent persons on Governance and Oversight and was president of the Advertising Standards Authority for 15 years and a member of the ICC Court of Arbitration in Paris for seven years.

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capture. What is that? It's alleged in Judge Zondo's Report, that a family called the Guptas befriended President Zuma and his acolytes, and that the Zuma administration made it easier for people well-connected to the Guptas to be appointed in departments of government and on the boards of state-owned enterprises. So, this was an avenue open for corruption. Because you didn't have that independent mind.

"The government, the sole shareholder in our great state-owned enterprises, made the mistake of permitting the minister under whose charge the state government enterprise was to appoint the chairman and chief executive of the organisation. Now, the chairman should be appointed from the directors who must appoint their leaders. Shareholders shouldn't impose a leader on the board because then the chairman sits there with two pips on his shoulder, leader of the board and representing the sole shareholder. It changes the whole mood and thinking inside the boardroom.

"A dictum of good governance is that one of the great responsibilities of a board is to appoint the chief executive because he or she is leading the management team, carrying out the decisions of the board. If the shareholder appoints the chief executive, there's a lack of fairness. Of course, when something goes wrong, who is liable? Who's accountable? It's the directors, not the shareholder. Yet the shareholders appointed the chief executive, which in some cases, the allegations go, were placed there as connected people to President Zuma and the Gupta family. So, you had an avenue open for corruption."

### **Huge corruption**

Professor King continues: "There has been huge corruption. We have a new word in South Africa, tenderpreneurship. Tenders were made worth billions of pounds for huge contracts on some of our great state-owned enterprises like Eskom the energy provider, Transnet, South African ports and railways throughout the country.

"Tenders went through at hugely inflated prices with kickbacks to the person at the head of a department or the head of a company. At the same time, the Zuma administration hollowed out from a skills and quality point of view appointments in our revenue service, the collection of taxes, income tax, in our police service, in our intelligence services and in our National Prosecuting Authority. Once you hollowed that out, they almost acted with impunity. Although there were cries of wrongdoing, there were no prosecutions, no investigations...

"So, this investigative committee was set up under Judge Zondo, who is the current deputy chief justice of South Africa, and he's found there is substance in these allegations, and he's recommended the prosecution of certain of the untouchables, as some people call them.

"It's completely unfair to the citizens of South Africa for the government, which should be acting in the best interests of the citizens, to be a party to this Gupta family, who were criminally stealing state resources and the money from taxpayers."

### **The importance of ethics**

For Professor King, the story of South African corruption underlines the importance of going beyond mindless conformity towards developing an ethical culture. He says: "It's a very good example of what I've been saying for 30 years: that governance is not a matter of rules that you mindlessly tick-box, and to legislate about good governance is very dangerous because you have a conformance mindset of your board and executive management. The conformance mindset becomes mindless instead of being mindful in applying outcomes-based governance.

"I was talking to someone in government the other day. I said, 'let's look at our private sector, let's take out companies listed on the Johannesburg stock exchange, give me the name of all the bad apples, 300-odd companies listed'. We arrived at five names. I said, 'let's take all our state-owned enterprises, name one that's been acting from a quality governance point of view, name them and put them in a basket'. There were no names.

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“Just to flip that around, instead of asking who is bad, we asked the question ‘who is good in the public sector?’, because these state-owned enterprises effectively are publicly owned by the taxpayer. Yet, they were allegedly used to enrich certain politicians and this Gupta family, who have fled to Dubai.”

## **A tale of two presidents**

Mervyn King has a more positive view of President Cyril Ramaphosa, who, King says, is ‘trying to follow the path of renewal’. But he sees troubled times ahead for the president. He says: “If you go back to '94, the ANC, which is the party of government now in South Africa, won I think 74% or 75% of the vote. In the recent local government elections, the ANC got something like 48% of the vote.

“They're starting to lose favour with the voters. Cyril Ramaphosa has started a period of renewal as he calls it, not only of the ANC party but of government. For example, he's appointed a new head of our National Prosecuting Authority, or CPS in the UK, a new head of our revenue services, and he's about to appoint a new head commissioner of our police services.

“So, he's acting on what he said was a period of renewal, and to rid the country of this corruption. But there is a faction in the ANC which wants to go back to the Zuma days; they adopted the language of radical economic transformation, which includes, for example, expropriation of land without compensation.

“It's not certain at the next Congress of the ANC that Cyril Ramaphosa will be reappointed president of the ANC, so he could lose the presidency of South Africa. I think that would be very sad, because he's made some good progress. For example, he appointed a new SA Revenue Service (SARS) Commissioner, Edward Kieswetter, who I know personally. In the year-and-a-half he's been in post he's been doing a fantastic job. I think we collected about another R189 billion more than was budgeted for in income tax. It just shows you the application of acting in the best interests of the citizens.”

Meanwhile, the fate of Jacob Zuma remains uncertain. Professor King says: “Zuma has been charged with fraud and money laundering and racketeering and that trial is still to start. He's had a Stalingrad defence. He keeps on taking points to get postponements, medical certificates etc. He's asked for the removal of the state prosecutor because he's not acted fairly; that has been dismissed and he's taking that to appeal. So again, the trial is postponed. He's using every legal technique he can. Although he says I want my day in court, he doesn't seem to want to go to court.

“Again, the question of fairness arises. Here is a man who is alleged to have hollowed out our state institutions, to have corruptly worked with the Gupta family to place puppets as heads of departments and chief executives of state-owned companies, and to have arranged contracts worth billions of rand more than should have been accepted, and there were kickbacks all over the place.

“He's using our rule of law and our independent judiciary to delay his trial. Well, that's his right, I suppose. But is it fair?”