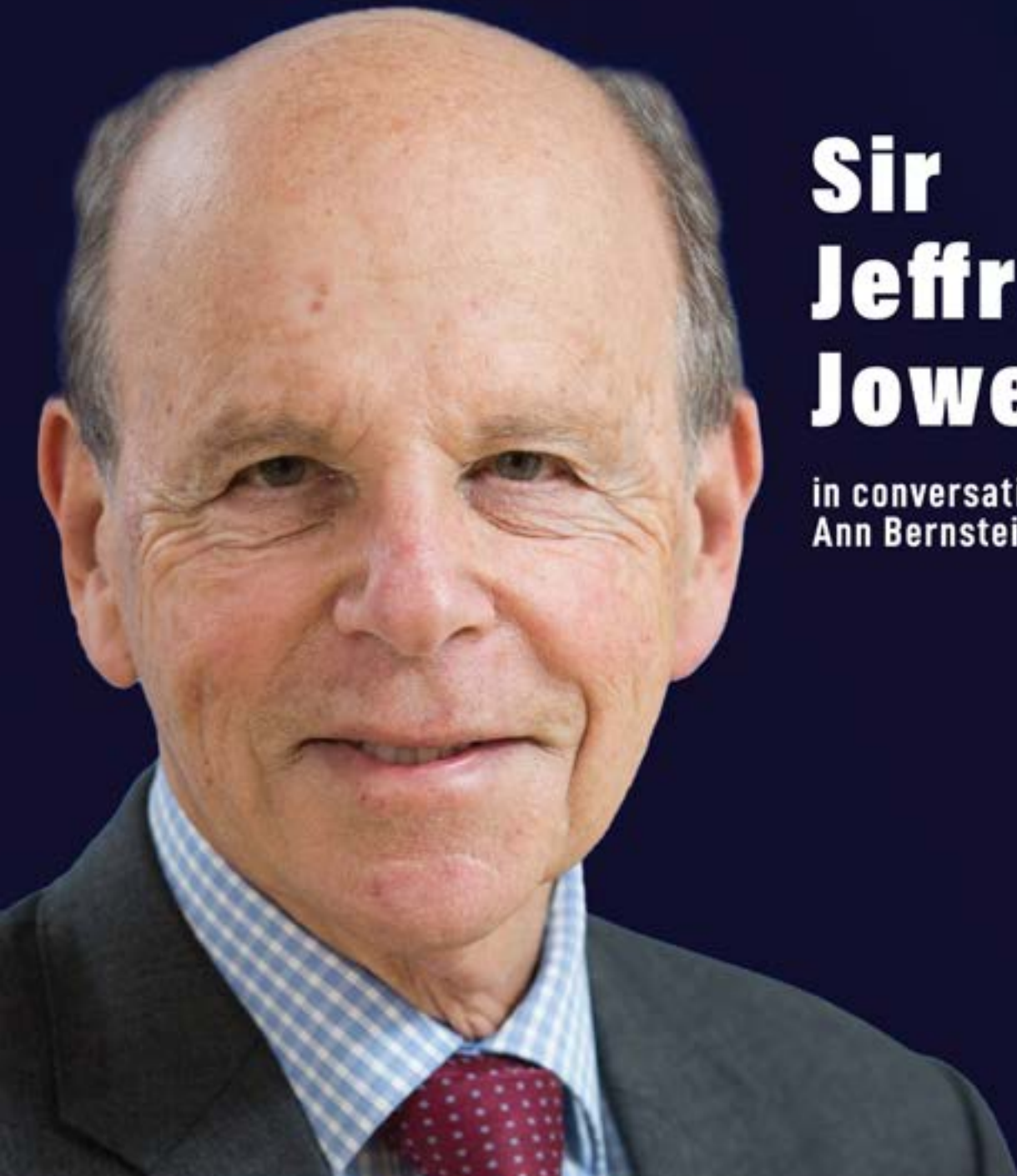




A Global Forum



# Sir Jeffrey Jowell

in conversation with  
Ann Bernstein

In November 2020, CDE initiated a series of events to celebrate 25 years since its launch in August 1995. The series focuses on global conversations on democracy, business, markets, and development.

This is the eighth conversation in the CDE@25 series, with Sir Jeffrey Jowell QC, Emeritus Professor of Public Law at University College London, where he was Dean, Head of the Law Faculty, and Vice Provost. He is an international authority on constitutional and administrative law. In his role as an academic and practising lawyer, he has advised on the constitutions and human rights issues in a number of countries, including South Africa. He was the founding director of the United Kingdom's Bingham Centre on the Rule of Law, set up to advance the rule of law worldwide. In 2011 he was knighted "for services to human rights, democracy, and the rule of law".

Ann Bernstein started the event with remarks about the critical time facing South Africa. "Last week, we reinforced our constitution and jailed a former President who had tried to undermine everything that our 27-year-old democracy stands for. Today, the country is battling lawlessness, destruction of property, and looting.

"This has partly been orchestrated by those who participate in corruption and state capture, who do not believe in our constitution or our democratic ideals, and who have absolutely no interest in making this a better country for the more than half of us who live in poverty. CDE stands with all those who are committed to 'building up' South Africa and pays tribute to the many brave people defending the rule of law on our streets. Our conversation could not be more pertinent to the events unfolding in this country right now, and to the vital importance of the rule of law."

Retired Constitutional Court Judge, Johann Kriegler, opened the event. "As a result of the dramatic recent developments around the arrest of ex-President Zuma and the looting and unrest that emerged subsequently, the notes that I made for this event a fortnight ago have been overtaken by the reality of our country in flames.

"The rule of law is critically important at the present moment, when we are facing the gravest threat our democracy has had to confront since we emerged from darkness two decades ago. It is crucially important that we calmly reappraise where we are, why we are here, and how we get out of this mess. I cannot think of a more fitting aegis under which to conduct such a discussion than CDE, which for some 25 years now has been South Africa's foremost think tank. CDE has always been a serious debating society, relevant, scholarly, and yet accessible. It has conducted deep research and provided fearless commentary and recommendations. It has focused on the major challenges facing our country, and now that the country has burst into flame, it will be all the more relevant. Its commentary has at all times been sober, with an emphasis on market-oriented solutions, but also engaging with those of different views. Civil society has always been South Africa's safety net and its lifesaver on occasion. CDE is one of the foremost of those civil society organisations."

"Our conversation could not be more pertinent to the events unfolding in this country right now, and to the vital importance of the rule of law." **Ann Bernstein, executive director, CDE**

**Ann Bernstein:** It is a privilege and a pleasure to welcome Sir Jeffrey Jowell to this CDE event. Born in South Africa, he is one of our most famous exports! He played an important role in contributing to the development of South Africa's democratic Constitution. He was knighted for his services to human rights, democracy, and the rule of law in 2011, the same year in which he received recognition from the President of Brazil for his work on constitutionalism and the rule of law. Welcome back, Jeffrey, to South Africa and to CDE.

The apartheid government, while doing appalling things, claimed to be ruled by laws and legality, but you have said that they confused the rule of law with legalism, which is in fact the tool of tyrants. What is the rule of law?

**Sir Jeffrey Jowell:** Thank you Ann. And I want to echo the admiration of Judge Kriegler for the crucial contribution of you and CDE to the causes you so excellently advance.

Yes, I do not think that the rule of law applied in apartheid South Africa. The rule of law steers a path between tyranny, on the one hand, and anarchy on the other. South Africa then was closer to tyranny, and I'll explain why in a moment.

You ask what is the rule of law. It is often said that it is a contested concept and excessively vague. That is just not so. It is perfectly understandable and clear. It is, however, difficult to describe because there are four interrelated ingredients, all of which are necessary for the rule of law to exist.

The first is legality, which means that we are all under a government of law, and not of man or woman. So, we must all obey the law, and so should public officials. They must act within the scope of their own powers. So, all public officials, however highly ranked they may be, must obey the law and act in accordance with it. It follows that they cannot be permitted to act in a way that is arbitrary or unconstrained by law.

The second element of the rule of law is certainty. This is very important. It means that the rules governing our lives should be as clear and accessible as they can be, and not made up on the spur of the moment. They can, of course, be changed, but with fair warning, and they should not be applied retrospectively.

The third element of the rule of law is equality. Laws should be applied equally to everyone, whether they are rich or poor, powerful or marginalised. Laws should also provide equal respect and equal human dignity for everyone. This key element is too often overlooked.

The fourth element, which is access to rights and justice, is often neglected as well, but this is really what springs the rule of law into life. Unimplemented laws are dead letters. And this aspect of the rule of law requires that people be able to challenge decisions that affect their lives, and to have a fair trial before independent judges.

None of the four elements comprising the rule of law are vague. Nor, as is also often claimed, is the rule of law only applicable to the developed world, and not to the developing world, or only to the north, and not the south, etc. I believe that such a claim is condescending; it implies that legality, certainty, equality, or access to justice are only for some. The rule of law is for everyone.

So, applying these features of the rule of law to the old South Africa, there was a semblance of legality. There was a degree of legality and certainty, but of course, law was not applied equally: people were told what to do, where to live, how to move, and so on. People could be detained without trial. Public officials had impunity; it was almost impossible to bring them to book. There were some independent and very brave judges, but they were circumscribed by the situation, which was characterised by a harsh legality, which in no way resembles the rule of law.

**Ann Bernstein:** Your definition of the rule of law includes access, and many people point to differences that exist between access to the law between richer and poorer segments of the population. From your global experience, are there any countries that are doing really well at providing poor people access to the law? Is there any advice that you might have, or examples you can cite, of programmes that achieve the goal of equal access, which can be very difficult for most societies?

**Sir Jeffrey Jowell:** Well, there are some countries, northern European countries mostly, which provide legal assistance as part of a welfare package. They, of course, can afford to do this. In the UK, there is criminal legal aid, as well as some civil legal aid which has been badly cut over the years. Those cuts have, by the way, been

criticised as reducing access to justice. There have been a couple of occasions when even the price of getting into court, which is known as a court fee, has been raised too high. British courts have said that this was against the rule of law as a constitutional principle, despite there being no written constitution in the UK. So, there are ways of providing access it through official state-assisted legal aid, but many states are limited in what they can afford to provide. In such cases civil society organisations often step in. We have seen that in South Africa over the years where a number of organisations support legal challenges which would otherwise have been unredressed..

**Ann Bernstein:** Why should anyone living in Khayelitsha or Bushbuckridge care about the rule of law?

**Sir Jeffrey Jowell:** If they want to walk safely at night in the streets; not be cheated by the local shop; not be beaten up in an arbitrary fashion by the police, they should care about the rule of law. If they don't want to live in a society where their neighbour gets benefits - to which they would not otherwise be entitled - because they paid a bribe to the local authority, they should care about the rule of law. Or if they simply want to be able to challenge actions taken against them in a court or in another tribunal, they should care about the rule of law.

**Ann Bernstein:** But this person may not get the best legal advice. How does a legal aid lawyer, who is generally perceived as not being the best, compete with an excellent lawyer like yourself that, say, a big firm can afford to retain?

**Sir Jeffrey Jowell:** Firstly, I think it is the obligation of high-paid lawyers to provide as much pro bono advice as they can. Secondly, do not underestimate the legal aid lawyer. They are heroes, and often very fine lawyers who take cases that never would have been heard, and who bring out principles that might not have been considered, simply because they are close to the people they represent, and they understand the impact of legal decisions on the lives of their clients.

**Ann Bernstein:** In your view, how does the rule of law differ from human rights and democracy? Can they be lumped together or are these different concepts?

**Sir Jeffrey Jowell:** They do overlap. If you are writing a new constitution, you determine at the beginning who rules, what the limits of rulers are, and how they should rule. In respect of who rules, if it is decided that the people, through their votes, elect representatives to the legislature, that is democracy in the narrow sense of the word. A broader sense of democracy is a rights-based democracy, which provides that there are limits to what the people who have been elected to the legislature can do.

Most democracies now provide an entrenched Bill of Rights, which says you cannot interfere with freedoms of expression, movement, demonstration, and so on, within limits.

Finally, in respect of how to rule, the four elements of the rule of law I have described provide people with the opportunity to hold those who make government decisions legally accountable for their actions.

**Ann Bernstein:** You have said that the South African constitution and Bill of Rights were extraordinary, even revolutionary documents. Why?

**Sir Jeffrey Jowell:** They were revolutionary in that the previous regime was so different from the one that followed it. What went before, in all respects, was the antithesis of democracy, because the majority of the population did not have the vote. It was the antithesis of human rights because there were none to speak of, and it was the antithesis of the rule of law for reasons I have given. So, the constitution involved a 360-degree turn.

At the time, South Africa had the opportunity to simply adopt other constitutions that countries were trying to foist upon it. Nelson Mandela, to his eternal credit, said, "No, we want something that addresses our problems. Let us write an original Constitution that tackles our circumstances and gives the message that we will never again return to what we had before."

It, therefore, became a truly original constitution because it took on four issues which had dominated the apartheid years and sought to reverse each of them: discrimination; lack of human rights; economic deprivation; and tyranny. With respect to the latter, the constitution dealt full-square with the problem of the overweening power of government officials, the lack of rule of law, for example introducing a new provision, now section 33 - "the right to just administrative action" - which enables individuals to challenge decisions at all levels

of government, including even those of the president, or, indeed, of a past president. Under that section, all decisions have to be lawful, procedurally fair, and reasonable, with reasons for decisions and enabling access to information. So, the rule of law is built into the South African constitution in a completely novel way. This idea (sometimes called 'the right to good administration') has since found its way into other constitutions throughout the world and even into the Charter of Rights of the European Union.

**Ann Bernstein:** A lot of countries claim to have the rule of law, yet are clearly undemocratic. One thinks of China, Russia, Venezuela, or Belarus. What does this mean? Do China's economic achievements prove that countries can be successful without the rule of law?

**Sir Jeffrey Jowell:** I was in China when the whole economy was controlled by the party. Since then, it has made big steps towards liberalising its economic system. It used to be thought that if you liberalise the economic system, allowing free trade and a market economy, that this will inevitably lead to political liberalisation. That has not happened in China, which is now promoting its 'alternative model' of autocratic capitalism under the iron rule of Chairman Xi Jinping. A number of countries see China gaining in wealth and confidence and might be tempted to follow. Especially when they are offered what seems to be generous infrastructure aid under China's "belt and road" scheme.

China claims to have the rule of law, but they only have some elements of it – legal certainty in some areas, legality because what the party says goes, and some commitment to social equality. However, there is little access to justice and few opportunities to challenge official decisions in the area of human rights. So, there is a thin legality. China has what is sometimes called 'rule by law'.

So, can we call China a success? Is it in fact a model which others should follow? Would you like to live in a country where there could be knocks on the door at night to take you away because you, or CDE, criticised the government, as you sometimes have to do? Would you like to be in a country where you cannot really challenge any decision made about you? You can call China a success, if you like, but, at best, it can only be a qualified success.

Is there any chance that China will move towards the rule of law in the long run? It is difficult to say, but one important factor is whether democratic countries hold their nerve, keeping to their democratic systems and not apologising for them. In the United Kingdom, we have recently had judges called 'enemies of the people' by some elements of the media when they made judgements against the government. When democracies start moving in that direction, it becomes increasingly important to call out China when it violates our values, and to stick resolutely to those values ourselves.

**Ann Bernstein:** In a democratic society like South Africa, where there is currently mass looting taking place, do you think that the police or the army should be instructed, under any circumstances, to shoot looters? How do you see the relationship between the rule of law and public order?

**Sir Jeffrey Jowell:** I doubt whether decency and peace would be advanced by simply meeting anarchy with a different kind of anarchy. Allowing the police to take certain measures to restrain people and bring about public order is, of course, within the bounds of any democracy. It might be done through a declaration of a state of emergency. But even that does not mean resorting to arbitrary killing or disproportionate violence, which always leads to new injustices and lasting resentments. There are ways to effect restraint by less invasive means than simply killing on site, and these are always preferable.

**Ann Bernstein:** Let me turn to the judiciary. There are some people in South Africa, including some cabinet ministers, who feel that judges have too much power. After all, who elected these judges and who are they to tell an elected government and its top officials what they should or should not do? Some citizens might think that the politicians have a point. How do you see the claim that judges, as one branch of our democracy, have too much power? How would you answer this charge?

**Sir Jeffrey Jowell:** It depends on what you mean by power. Politicians deal with policy, which should be based on calculations of what the greatest good is for the greatest number of people. They can decide, for example, that setting up a nuclear power station near a park is necessary. That is a policy decision, and it is not for judges to deliberate on that. Judges deal with legal principles. However, judges can ask whether relevant interests were consulted under the statute, or whether the decision complies with the constitutional necessity of procedural fairness. These are legal principles, rather than public policies, for which the decision-maker might answer to



an electorate. Judges cannot say, "We would prefer not to have a nuclear power station here because that is our opinion." It is, therefore, surely best that judges are not elected and, like impartial referees, apply the country's rules without fear or favour, rather than to be held accountable by any political constituency.

**Ann Bernstein:** You have said that judges face more stringent forms of accountability than any other decision-maker in our society. That is a bold assertion. What do you mean, and how do you justify this claim?

**Sir Jeffrey Jowell:** I stand by that assertion. In what other area of public decision-making does the decision-maker give you sometimes 150 pages of reasons justifying their decision? That is one kind of accountability. Another form of accountability lies in the fact that legal cases normally require independent legal professionals to argue the case, on each side, in open court, where everything can be seen and monitored. When the judgments come out, they are published, allowing academics and others to pour over them and criticise them openly. Lastly, in many instances, cases from the lower courts can be appealed to higher courts. If you add that up, you have a very deep form of judicial accountability.

**Ann Bernstein:** Judges are obviously important in any society, and they anchor the delivery of everyday just outcomes in the lives of individuals. Therefore, the appointment of judges is absolutely crucial to their independence. How should judges be appointed in a democratic society?

**Sir Jeffrey Jowell:** There are various models of appointment. In the United States, in some courts, judges are elected by the people and may also be so removed. Judges in the US Supreme court are nominated by the President with confirmation by the Senate. In Britain, up until 2005, it was the executive who appointed the judges, as used to be the case in apartheid South Africa.

Post-apartheid South Africa introduced a Judicial Services Commission (the JSC), which is an independent body that appoints judges. Professor Hugh Corder of UCT promoted this idea based on practice in some post-colonial British former colonies. This model has also spread throughout the world like wildfire, including to the UK and also to some countries in East and Central Europe after the fall of the Soviet Union. It has now become the norm to appoint judges independently. One of the problems in South Africa is that there are too many politicians on the Judicial Services Commission. If you want to be truly independent, providing impartial umpires without any political taint, the political input should be reduced.

**Ann Bernstein:** The quality of any judicial system evidently depends on the willingness of outstanding individuals to apply for and accept appointments as judges. Can you talk a bit about why this matters so much and how you think South Africa is doing on this front?

**Sir Jeffrey Jowell:** You need judges who are of the highest quality. One also understands the need for a diverse judiciary, something that has not gone far enough yet in the UK, although South Africa has done better in that regard with an important transformation of its judiciary. South Africa has produced some absolutely outstanding judges, including Judge Kriegler, who opened the session today. Their names are known now all over the world and their judgments are cited with approval. We saw that in the judgment by Judge Khampepe recently, in which former president Jacob Zuma was found in contempt of court. It was an outstanding, ringing endorsement of the rule of law. What is equally remarkable, however, is that there are many great South African lawyers who are known all over the world for their abilities who have not been appointed as judges. One has seen this time and time again, where lawyers who would grace the highest courts in any democratic country have been rejected by the South African JSC. This raises questions about whether they are being held back on account of their independence or due to other irrelevant factors. Either way, that is concerning.

**Ann Bernstein:** I am going to turn to something quite different now. You were involved in a study with the Economist Intelligence Unit on foreign direct investment (FDI) and the rule of law. What does growth and FDI have to do with the rule of law? Do big multinational companies and foreign investors care about the rule of law? After all, they invest in all sorts of places that have no such thing.

**Sir Jeffrey Jowell:** Investors often take punts on countries that do not have the rule of law because there seems to be a lot of metal or minerals under the ground and they are, despite the lack of rule of law, willing to take risks for quick profits. There are, therefore, some who deny any correlation between the rule of law and foreign direct investment (FDI).

At the Bingham Centre for the Rule of Law, we tested this question by seeking the opinion of around 300 senior

decision-makers from the top Forbes 2000 companies, each of which had a global revenue in excess of US\$1bn.

We asked them questions about what considerations influenced their FDI decisions. The rule of law came up as one of the top two factors for a number of reasons. First, they wanted the rule of law to prevail for the safety and security of their employees. Even more so, they wanted to do business in an atmosphere of legal certainty, involving adherence to prior commitments, contracts, and property; they wanted no retrospective taxation and legislation – all rule of law factors, including the opportunity to challenge decisions that they viewed as unjust or just plain illegal. The other factor that attracted them was the ease of doing business. The rule of law and ease of doing business are closely linked. It makes sense that countries that respect legal certainty, equality, legality, and judicial independence are going to make it easy to do business, and are seen as destinations for investment and places where reliable international partners can thrive.

Another question one could ask is, when these companies invest in developing countries, are the profits from that investment denied to the general populace by the ruling elite? There is likely to be much more equal distribution where there is rule of law because challenges can be made, corruption can be attacked, and government can be made to act within the boundaries of the legal system.

**Ann Bernstein:** I have one last question, which is related to economic development. You were involved in a famous case dealing with property rights in Zimbabwe, which you won at the South African Development Community's Tribunal. What were the key issues in the case?

**Sir Jeffrey Jowell:** After Zimbabwe changed its constitution, a white family had their farm, in which they had invested over the years, taken without any compensation. Due to a recent constitutional amendment, they had no opportunity to challenge this decision in Zimbabwe's courts. The case was taken to the SADC Tribunal in Windhoek. This court, composed of judges from all the SADC countries, ruled that there had been a breach of the rule of law because the farmers were prevented from challenging the decision in local courts and because the act was discriminatory and unjust. What was particularly interesting was that the Zimbabwean government claimed that their actions were legitimate because the taken farms were redistributed to the poor. The excellent lead counsel, Jeremy Gauntlett SC, arranged a little list, which revealed that all the expropriated farms were, in fact, given to government cronies; the ruling elite only, and this was called out by the Tribunal. But its judgment has never been enforced as SADC decided to abolish it a few years later.

**Ann Bernstein:** That is fascinating. It certainly has implications for how South Africans should think about the ongoing debate on land reform and expropriation without compensation. Thank you very much for a remarkable discussion on the rule of law and why it is of such paramount importance for democracies and everybody living in them.

**Sir Jeffrey Jowell:** Thank you very much for your invitation and the challenging grilling you have given me.

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Published in August 2021 by The Centre for Development and Enterprise  
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