THE RESPONSIBILITY OF JUDGES IN APPLYING UNJUST LAWS IN SOUTH AFRICA

With acknowledgements to the Civil Rights League.

In all the painful clash of the forces and counterforces for change, is there any hope that the voice of the Judiciary may at last be raised in an attempt to influence the Legislature to amend or repeal laws which make it impossible for judges to carry out the terms of their oath of office, namely to administer justice?

JUDGE'S OATH

(Supreme Court Act No. 59 of 1959)

> "I (full name) do hereby swear-solemnly and sincerely affirm and declare that I will, in my capacity as a judge of the Supreme Court of South Africa, *administer justice* to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa." (Emphasis added.)

It is true that in our Parliamentary system, judges cannot challenge the creation of law, which is the prerogative of Parliament. And no judge can refuse to apply the existing law, however inconsistent it may be with any concept of justice. Yet there is an undeniable tension between the narrow test of validity, based on procedural formalities (the law has been passed by the requisite majority in Parliament, has been signed by the State President, and published in the Government Gazette) and the Christian basis of the Constitution.

THE CONSTITUTION not only acknowledges the sovereignty and guidance of God, but specifically declares that "we are conscious of our responsibility towards God and man." (Republic of South Africa Constitution Act No. 32 of 1961). Daily in Parliament legislators pray ". . . . that we may, as in Thy presence, treat and consider all matters that shall come under our deliberation, in so just and faithful a manner as to promote Thy honour and glory. . ."

RESPONSIBILITY OF JUDGES

What then is the responsibility of judges, when a succession of statutes has limited or removed the inherent jurisdiction of the Supreme Court, or when they are called upon to apply such blatantly unjust laws as the pass laws (which govern only certain people, because of their race, namely Africans) or the Group Areas and Mixed Marriages Acts, or Security laws which provide for banning and incommunicado detention without due process?

THE MEMORY OF NUREMBERG

Gustave Radbruch, prominent German jurist "was compelled by the experience of the Nazi Holocaust to argue that there is a stage at which a law ceases to be a law, when it sinks below a minimum level of humanity or justice. He contended that:

> "positivism with its creed of *law is law* rendered the German legal profession defenceless against statutes of an arbitrary and criminal content", and declared:
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> "when laws consciously deny the will to achieve justice, for instance if they grant or retract human rights from people according to arbitrary caprice, such laws are devoid of validity, and the people owe them no obedience and even lawyers must then find the courage to deny them the nature of law." [1]

Commenting on the South African situation, a professor of law has written: "It is almost as if the courts have invoked the contempt power to protect them from the memory of Nuremberg, to spare them the agony of deciding, or even considering, at what point a law ceases to be law on account of its immoral content and at what point confrontation or resignation becomes the lot of the judge". [2]

DETENTION INCOMMUNICADO

Section 6 of the Terrorism Act epitomises the erosion of the Rule of Law in South Africa.

- It provides for indefinite detention without trial for the purpose of interrogation.
- The Minister of Police is not obliged to give details about such detainees.
- The definition of terrorism is so wide that someone who cannot remotely be viewed as a terrorist can be held.
- The acceptance in court as valid evidence of statements made by people who have been kept in solitary confinement persists – in spite of widespread consensus that such imprisonment is a form of torture in itself. In no sense can people kept in such conditions be said to be making free statements. Such a detainee has no right of access to his own lawyer or doctor, channels that would serve to curb possible unlawful methods of interrogation. The judiciary should regard this type of evidence with profound suspicion and misgiving and be aware of the unjust nature of the pre-trial interrogation permitted under our Security laws.

BANNING UNDER THE INTERNAL SECURITY ACT

The system of restriction and house arrest orders is inher-inherently unjust.

- Such restriction orders are based on secret reports made by Security Police, and this evidence is not tested in court.
- The Minister of Justice makes his decision in private. Justice is not *seen* to be done.
- There is no appeal to the courts from the Minister's decision, save on the grounds of his bona fides, an almost impossible case to prove.
- The banned person himself has no knowledge of the contents of information placed before the Minister, and is effectively silenced and prevented from defending himself, while the courts have no power to review the Minister's decision.
- When and if a banned person is charged with a consequent offence of having broken the restriction orders, the court has no knowledge of the grounds on which the person has already been banned.

The courts are, in effect, compelled to reinforce this administrative punishment without having any knowledge of the grounds on which it was imposed. Thus in cases involving banned people, it is impossible for judges to administer justice in terms of their oath, because a vital area of justice has already been excluded from the jurisdiction of the courts.

WHAT JUDGES COULD DO

"The only generalisation in which I shall indulge is that if one participates in a system that distorts justice, truisms about the limited functions of a judge will not necessarily save one's soul." [3]

Should judges not find ways of coming together to consider the implications of what to many is a manifest contradiction between the terms of their oath and their present hearing of cases under the above legislation? Parliament is sovereign, and judges hold office to enforce and uphold a system created by that body. But increasingly the bulk of the population now regard the legal order as "oppression" and a growing number of lawyers overseas, and of law students in South Africa, consider that the legal profession here is "collaborating with and lending respectability to a fundamentally illegitimate process". [4]

The Legislature has placed the Judiciary in an increasingly intolerable position. But between the extremes of acquiescence and resignation from the Bench lies a not inconsiderable area of action which judges could take.

- There is nothing to prevent a judge in a judgment from drawing attention to the unjust consequences of the application of a law, and indeed some have done this, to their credit. More judges could follow this example. They should firmly reject any criticism that such judgments bring them into the political arena. Indeed the matter is much more fundamental than party politics.
- Just as evidence revealing criminal behaviour on the part of individuals or officials is sometimes referred by judges to the Attorney General for his consideration, so the unjust consequences of any law should be referred by judges to the appropriate Cabinet Minister for his consideration.
- Possibly only after discussion of these matters between brother judges has resulted in some approach to the judge President of each Division, and from them to the Chief Justice, will a degree of support be established for some stronger approach to the Prime Minister.

Unanimity about the occasion or justification for resignations is hardly likely to be achieved in present circumstances, but it is contended that the situation is a deteriorating one, and the prime concern is that future generations of South Africans should retain respect for the Rule of Law and the value of an independent judiciary. Resignations on grounds of conscience may, looked at retrospectively, then be seen as the sparks which kept alight a fundamental belief in the best traditions of our Western legal heritage.

LAWYERS' COMMENTS

SECTION 6 OF THE TERRORISM ACT

1. Prof. J. Dugard: "No statement obtained from a person held in such circumstances can truly be the product of his free choice." (P. 271). "Is the retention of fair procedural standards at the trial alone sufficient? Should they not extend to the pre-trial proceedings as well? Indeed are they not more important at this stage when the detainee is secluded from public scrutiny?"(P.273)

A trial in such circumstances becomes a mere appeal against the interrogation finding.

2. Adv. S. Kentridge also cautions wariness in accepting the type of evidence secured under Sec. 6 of the Terrorism Act, explaining why it is unreliable. "Perhaps equally important, many of the prosecution witnesses in these trials are persons who have been subjected to prolonged detention in solitary confinement under section 6. Often they too are brought straight from detention to court to give evidence. They will usually have made statements implicating the accused. These statements may be true, but even if they are not, the witness knows that if he retracts, the result may well be either his further detention under section 6 or a charge of perjury". . . . "It is therefore understandable that I have referred to the mode of procedure under this statute as a distortion of South Africa's traditional system of procedure, or as the pathology of a legal system." (A "profound distortion" in another reference).

RESPONSIBILITY OF JUDGES

3. Mr. Douglas Shaw: "I believe that the status of the Supreme Court and with it the whole foundation of the administration of justice in the country is in danger at this time."

4. Prof. A. S. Mathews: "It is quite clear in present-day South Africa that the rule of law in the sense of the legal protection of civil rights is no longer honoured. Anyone may be detained or banned and deprived of freedom of

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FOOTNOTES:

1. Dugard, Prof. John: "Human Rights and the South Africar Legal Order". Princeton University Press, Princeton, New Jersey, p. 399
2. *Ibid* (commenting on the test enunciated for contempt of court in case against Prof. Barend van Niekerk, p. 300.
3. Kentridge, Advocate Sydney: " The Pathology of a Legal System: Criminal Justice in South Africa", University of Pennsylvania Law Review, Vol. 128: 544.
4. Didcott, Justice J.M. at Inaugural Meeting of Lawyers for Human Rights, reported in *Argus* editorial 23rd June 1980.

movement, speech or association on the mere'say so' of a Government officer, and such a person has no legal redress. People are daily tried, convicted and imprisoned under broad and vague political crimes according to disturbing rules of procedure for activities that are frequently not criminal in most Western democracies."

5. Prof. J. Dugard: "Whites who prosper under laws designed to maintain their privileged position seldom pause to ponder on the image of the South African legal system among blacks . . . For blacks it is not a body of rules which their elected representatives have conceived in Parliament, but a repressive system imposed without consultation and enforced by an array of instruments of coercion – the army, the police, and the legal-administrative machine." (Pp. 401,2).

6. Prof. B. van Niekerk speaks of the "state of decay of the South African legal system vis-à-vis the civil liberties of the individual" and goes on to say "Judges, especially senior judges, are in a peculiarly well-placed social position to give leadership in matters where leadership will often not be forthcoming from other sources."

7. Prof. van Niekerk is quoted in Dugard's book above (P.296) when criticizing lawyers and judges for their failure to condemn the Terrorism Act: "No doubt they will tell you it is not their function to criticize the law, but to apply it . . . we must surely ask when will a point ever be reached when their protests would become justified?" . . .

"Surely we have reached the stage that we are no longer merely dealing with a nicety of jurisprudence but with the essential quality and survival of justice itself!"
". . . has not the time come for them to stand up more dynamically in the defence of the hallowed principles of the rule of law in the Western sense?"

8. Prof. J. Dugard: "A more likely explanation for the adoption of the mechanical approach to statutory interpretation is that it absolves the judge from personal responsibility." (P.372).

"This enables judges to apply the harshest of laws obediently with an easy conscience and may result in a failure to realize the extent to which technical rules of interpretation may be invoked to moderate the laws' inequities." (P. 373).

THE FUTURE

9. Adv. S. Kentridge: "One day there will be change in South Africa. Those who then come to rule may have seen the process of law in their country not as protection against power but as no more than its convenient instrument, to be manipulated at will. It would then not be surprising if they failed to appreciate the value of an independent judiciary and of due process of law. If so, then it may be said of those who now govern that they destroyed better than they knew." (P. 621).

10. A Solzhenitsyn: "What is the most precious thing in the world? It seems to be the consciousness of not participating in injustice. Injustice is stronger than you are, it always was and it always will be; but let it not be committed through you."

1, 5, 7, 8, Prof. J. Dugard: *Human Rights and the S.A. Legal Order,* Princeton University Press, Princeton, New Jersey.

2, 9, 10 Adv. S. Kentridge: *The Pathology of a Legal System: Criminal Justice in S.A.* University of Pennsylvania Law Review, vol. 128: 544. Solzhenitsyn quotation is from *The First Circle* (Fontana 1970) Chap. 55 p. 418.

3. Adv. D. Shaw, Chairman, General Bar Council of South Africa: *Judges must be free* – article in *Argus* 28th July 1980.

4. Prof. A.S. Mathews: *Bleak Outlook for Civil Rights* – article in *Argus* 7th January 1980.

6. Prof. B. van Niekerk: *Silencing the Judges* article in Journal of Legal Profession, University of Alabama School of Law, 1979, vol. 4

by Vortex

We organized our festival
and erected our flags
and unwound our bunting
to celebrate the past––
to proclaim the past.

But our flags wouldn't flutter
and our bunting was dull
and other voices and noises emerged
to celebrate the present ––
to proclaim the future.