

Legal specialists confer on democracy and the judiciary

MARION SHAER AND SHARON SOROUR

THE value of a conference addressing the role of the judiciary and the legal profession in an unjust society is essential in heightening people's awareness of their role in a changing South Africa. As Advocate Arthur Chaskalson pointed out, the time could come when their part could become futile. The problem is that people become numb to the situation. Through open debate, academic input and media coverage of the extent that this conference had, people are reminded of the importance of the Rule of Law. The Conference, which was held at the Century Hotel in Sea Point on 14 & 15 October, was attended by 145 delegates in total.

DEMOCRACY AND THE JUDICIARY

The judiciary in an independent, democratic country has to adhere and conform to democratic principles, Namibian Advocate Anton Lubowski told the conference.

"The law itself is not a neutral body of rules but a product of political struggle, an expression of the existing political reality," he said. The political realities that inspired the apartheid and emergency laws bear witness to this.

Adv Lubowski noted that judges made choices influenced by their personal background and experience. Judges and magistrates knew little, if anything, about the fears and expectations of black people. Yet 90% of criminal cases involved

blacks sent to prison by white judges and magistrates. "Supreme Court judges tend to be an isolated elite, and are of a particular race, sex and social class," he said. "Magistrates have a built-in bias, being drawn from the ranks of public prosecutors; and the public should have access to the legal system," Adv Lubowski said. No person should be sentenced without legal representation; cases should be reported thoroughly in the lower courts; a judiciary needs a free press and all members of society should have the opportunity to know and understand the laws that affect them; detention without trial should not exist.

"The real test of a democratic judiciary is whether the people perceive it as being fair and just," Adv Lubowski said. The judiciary should serve the democratic interests of all the inhabitants, and should not follow the path of the National Party.

THE RECORD OF THE JUDICIARY

A controversial choice of speakers assured contending opinions. The conference was addressed by Prof Adrienne van Blerk from UNISA, author of the book, *Judge and be Judged*, which defends the role of judges in the SA situation; and Prof Hugh Corder of the UCT contended that judges are doubtlessly influenced by their racial and class background education and train-

ing. He further explained the executive-mindedness of the judiciary.

Prof van Blerk repeatedly admitted that the SA situation allows "little or no press freedom" but is given a distinct negative bias in coverage; and she said that misleading and incorrect reporting discredits judges.

Prof Corder sketched the historic role of judges. Positive mention was made of the influx control and industrial law developments. Security trials, however, have seen no development from the mentality of the 60s and 70s. The balance has swung back to the hands-off approach evident in the cases State President v UDF and State President v Release Mandela Campaign.

Prof Corder mentioned the mythical nature of the independence of any legal system. The judiciary is part of the dominant group of society and can only be of value where there is a representative democracy. This has been proved by the Hoexter Commission's finding that the judiciary has no legitimacy in the black society.

THE ROLE OF LAWYERS IN SOUTH AFRICA

South African judges who found the law morally indefensible should not resign, Prof John Dugard of Wits University said.

In all societies judges are faced with moral dilemmas and difficult



L to R: Prof Hugh Corder of UCT, Mr Thaabit Albertus (convenor of the conference) and Mr Mike Robertson.



Adv Jules Browde (SC) (Lawyers for Human Rights).



Adv Arthur Chaskalson (SC).



The Honourable Justice John Trengove



Prof Laurie Ackermann (University of Stellenbosch)

decisions. "Where the laws are unjust, immoral or abnormal, the dilemma was greater for 'moral' judges," he said.

Prof Dugard referred to Prof van Blerk's book which argues that the legal system in SA is not grossly abnormal. Participation of judges who perceived the legal system as abnormal and grossly unjust should be considered from an ideological and jurisprudential perspective. "Certain ideologies saw the judge simply as an apartheid tool," Prof Dugard said.

"Our law requires judges to interpret and apply the law in a constructive and idealistic manner," he said. It was difficult to call for the resignation of "moral" judges because our law still allows — or requires — the judge to advance justice in the gaps, the interstices of the law.

Mr Essa Moosa, civil rights lawyer, said, "Lawyers in a future democratic system have a vital role to play if we are to become responsible members of a new society".

Apartheid is a crime against humanity and lawyers should contribute to dismantling apartheid laws and institutions.

Lawyers would need to establish a new legal order, draft a constitution and bill of rights and devise a

legal system consistent with the new democratic order.

"The role of lawyers in a future democratic system would be to apply and interpret the new legal system," he said.

Lawyers would have to assess punishment and its purposes. "Our penal code should be to rehabilitate transgressors through an educational process," Mr Moosa said.

HUMAN RIGHTS AND JUDICIAL REVIEW IN AN EMERGENCY-ORIENTATED SOCIETY

"The principles now under attack have survived for far longer than has the present membership of the court, and they have a great deal of resilience left in them yet," was the positive conclusion Prof Etienne Mureinik delivered after two speeches which placed human rights in perspective within a state of emergency.

Prof Laurie Ackermann from Stellenbosch University explained that human rights were aimed at preventing a state from abusing its power against the individual. It was emphasised that both the right of access to legal advice and the right of access to the courts are fundamental rights. The fact that the Appeal Court has failed to protect

these rights "was therefore a betrayal of principles" and demonstrated that "the concern for fundamental rights runs shallow in Bloemfontein," Prof Mureinik stated.

States do, however, derogate from human rights in times of emergency. The first principle that must be adhered to, according to international standards, is that the magnitude of public emergency must threaten the life of the nation as a whole.

Prof Ackermann stated that the SA security legislation is out of step with Western human rights standards.

His plea was that the judiciary be given the widest possible powers of review. Martial law, or a state of emergency, should be regarded as "at the best a lamentable necessity" and conditions should be thoroughly embodied in a statute.

THE ROLE OF JUDGES IN A DEEPLY DIVIDED SOCIETY

Judges have not been able to resist the advance of discriminatory laws in order to uphold basic human rights and fundamental principles of justice, the Honourable Justice John Trengove told the conference.

He stated two reasons for this: acceptance of parliamentary sove-



Prof Gerhard Erasmus (University of Stellenbosch)



Mr Essa Moosa (NADEL)



Prof Adrienne van Blerck (UNISA)



*Prof Etienne Mureinik
(University of Witwatersrand)*



Dr Sandra Berman



*Adv Anton Lubowski
(Namibia)*

reignty and the absence of a Bill of Rights.

SA was "partially democratic" and parliamentary sovereignty was out of place in a plural society "where the legislature and executive power are vested in a minority," he said.

"A judge must administer justice to all persons alike without fear, favour or prejudice, in accordance with the law and customs of the country." According to Judge Trengove, the judge's dilemma arose when he had to administer justice in accordance with laws inherently unjust.

Judge Trengove emphasised that all members of a plural society should have confidence in the judiciary, its independence and its impartiality.

Prof Gerhard Erasmus of Stellenbosch University said that SA "was heading for a blow-out."

"There is no middle ground or shared interests and ideals in our country," he said. The law and the courts had become instruments for oppression and the State President was vested with powers of sovereignty.

"The courts were not a bastion of justice, and replacing parts of the system would not be sufficient —

everything must be replaced," he said.

THE ADMINISTRATION OF JUSTICE IN A CHANGING SOUTH AFRICA

The suggestions Adv Lubowski made at the beginning of the conference were echoed by Dr Sandra Berman and Mr Wilfred Schärf in a presentation on people's courts.

People's courts can be defined as non-state or informal courts. This is not a new phenomenon in SA and, contrary to popular belief, they are not a reaction to the current illegitimacy of the courts. They developed when colonial authorities made laws which they could not enforce and had to approach the tribal chiefs for assistance.

The townships have a network of informal courts. They are not official or regulated although they work on a street committee basis. Given the population represented by the informal courts and the number of cases they decide on, it can be argued that the state judicial system is peripheral.

The informal courts are considered problem-solvers and are not isolated from the community. The cases they hear are of a domestic nature and include custody, main-

tenance and house applications. Their major exclusion is blood cases which include severe fights and murders.

This particular session drew much interest because few people knew the facts involved in people's courts as the media has so discredited these courts.

Mr Schärf explained the accessibility of people's courts. The time when they operate is convenient, the proceedings are conducted in the mother tongue, people do not need representation, the process is cheap and no distinction is made between cases, which are simply problems that need solving.

The emphasis is on achieving reconciliation rather than alienating people. The courts also serve as a site of information exchange and education on desired morality.

Mr Schärf explained the courts as a historical manifestation which should be taken seriously. These courts promote a legal culture that starts at grassroots level and conveys norms and values of a new kind. They constitute the marriage of customary law and general law.

Adv Chaskalson closed the conference with a brief summary and pointed delegates to the needs of a new democratic South Africa.



*Adv L.A. Rose-Innes
(Chairperson)*



*Ms Christine Burger
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*Mr Wilfred Schärf
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