LAWYERS IN AN UNJUST SOCIETY - REFLECTIONS ON A CONFERENCE OF THE LEGAL RESOURCES CENTRE OF SOUTH AFRICA

LAWYERS IN AN UNJUST SOCIETY - REFLECTIONS ON A CONFERENCE OF THE LEGAL RESOURCES CENTRE OF SOUTH AFRICA*

The Hon Justice Michael Kirby CMG**

CONFERENCE IN JOHANNESBURG

In April 1989, the Legal Resources Centre of South Africa (LRC) organised a significant conference in Johannesburg, South Africa to address the likely changes in the South African legal scene in the years immediately ahead. The LRC did so as part of the celebration of the achievement of its first ten years of operation. It was established by a group of lawyers concerned about aspects of the apartheid censorship and security laws which have marked South Africa's legal scene, particularly since the early 1950s. The LRC, with branches in the major cities of South Africa, collects lawyers and other workers of every race to uphold the rule of law and to protect, before the courts, the legal and human rights of people in South Africa. One of its founders, Mr Sydney Kentridge QC, a trustee of the LRC, provided the closing summary of the conference in a session chaired by Mr Roger Cleaver, former President of the Association of Law Societies of South Africa. Mr Kentridge now practises both in London and in the courts of his native South Africa. He has a notable record in appearing for detainees and their families in leading cases in the courts of South Africa. For example, he represented the Biko family in the inquest into the death of Steve Biko, the courageous Black South African, who died in police custody. The convenor of the conference was Mr Arthur Chaskalson SC, a leading Johannesburg silk who is the National Director of the LRC. The organiser was Mr Geoff Budlender, director of the Johannesburg LRC. Three principal overseas lawyers were invited to participate. One was Chief Justice Enoch Dumbutshena of Zimbabwe (formerly Rhodesia). Another was Mr James Robertson, a United States lawyer who was formerly the Director of the United States Laywers' Committee for Human Rights. He participated in the civil rights movement in that country in the 1960s. I was the third overseas lawyer invited to participate.

Zimbabwe shares with South Africa the inheritance of the tradition of Roman Dutch law. Dumbutshena CJ was, for most members of the South African judiciary and other lawyers participating in the conference, the first judge of non-European race whom they had met. Immediately after the conference, Chief Justice Dumbutshena was invited to meet for the first time the new Chief Justice of South Africa (Corbett CJ) and other members of the Appellate Division of the Supreme Court of South Africa in Cape Town.

THE SOUTH AFRICAN APPELLATE DIVISION

Present and former members of the Appellate Division and judges of the provincial courts of South Africa attended the conference and the functions associated with it. Most Australian lawyers today know little of the legal system of South Africa, even of the Appellate Division which stands at the apex of that country's judicial hierarchy. But it was not always so. Australian lawyers of an older generation followed its jurisprudence with admiration, particularly during the time that Albert Centilivres was Chief Justice and especially in the latter judgments of Schreiner JA.

The Appellate Division was established by the South Africa Act 1909 (Imp) by which the Union of South Africa was created out of the former British colonies and the Boer republics. In the constitutional arrangements of the settlement, the seat of the Appellate Division was designated as Bloemfontein. The court began its operations for the first time in 1910. As with the High Court of Australia, it commanded, from the start, high respect not only in South Africa but abroad. To the techniques of the common law of England, there was added the conceptual strength and extensive scholarly learning associated with Roman Dutch law. With few exceptions, before 1950, the judges were more liberal than the successive governments, local magistrates or ordinary citizens of South Africa. This feature of judiciary was explained by the fact that most of the judges were trained in universities overseas and, disciplined by Privy Council appeals, their thinking was constantly stimulated by their association with the general developments of English law.[1] One South African judge, Claasen J, once even remarked "I am told on good authority that the English judges, who are undoubtedly the most eminent judges in the world, consider only the South African judges as their equals".[2]

But that view of the South African judiciary was never universal. Nelson Mandela, long imprisoned leader of the banned African National Congress declared in a magistrate's court in October 1962 words to the effect that judicial officers of European race could not fail, in the circumstances of South Africa, to be but biassed towards the causes of the White government. Mandela's actual comments may not be published in South Africa because they are excluded from publication under the Internal Security Act 1982 (SA)[3]. An ominous black space with asterisks in the textbook signals the work of the legislative censor in this regard.

Mandela was himself a qualified attorney. The perception of Mandela's importance to the future of the law in a changing South Africa is seen in virtually every circle in that country and in the public press. The African National Congress was established in 1910, in reaction to the

exclusion of Blacks from the post-Union dialogue between the English, the Boers and the Cape Coloureds. Doubtless, as with the Indian National Congress (predecessor to the party which still governs India and which was set up forty years earlier) its first meeting began with the singing of "God Save the King". Its anthems today are different.

CRITICISM OF THE A.D. AND ITS PERILS

Whatever high opinions were formerly held in some quarters about the Appellate Division, both within and outside South Africa, it is today coming under increasing scrutiny and criticism.[4] South African lawyers generally wish to remain proud of the high intellectual tradition of their Appellate Court. Even the lawyers working for the LRC acknowledge that the outward forms of independence are still there. The courts of South Africa, including the Appellate Division, remain the only effective refuge available to challenge, and sometimes to overturn, repressive Executive Government acts performed under legislation providing officers of the state with very wide powers and, sometimes, purported exemption from judicial scrutiny. In the words of Arthur Chaskalson the judiciary can fill the cracks and gaps left in the law by the legislation enacted, or the regulations made, under the current State of Emergency. But the once proud tradition of liberalism in the Appellate Division, grounded in the equitable principles of Roman Dutch law and the development by analogous reasoning of the common law inherited from England, has come in for a battering of late. South African legal academics have criticised the judges in strong terms in articles published not in clandestine and prohibited journals but in the South African Law Journal (SALJ) and the South African Journal of Human Rights (SAJHR)[5]. The latter, in particular, provides something of a diary and critique of the work of the LRC. It reports, reviews and analyses, amongst other things, the leading decisions, particularly of the Appellate Division and especially in challenges of alleged Executive Government oppression in South Africa.

These criticisms have not gone unremarked by authority. From the earliest days of the courts in South Africa, scandalization contempt has been broadly defined.[6] The precise extent of government sensitivity to the suggestion that the courts are partial may be seen in the celebrated case of State v van Niekerk.[7] Professor Barend van Niekerk, a professor of law, was charged with contempt for two successive articles in the SALJ, "Hanged by the Neck Until You are Dead".[8] He reported opinions concerning the prospects of a death sentence in the case of a convicted European and a non-European accused. The perception was one of unequal treatment. The result of the professor's conviction for contempt was, naturally, a degree of self-censorship in academic and professional legal writing. But it radicalized van Niekerk. He was later to stand trial

again under the security legislation for other speeches made protesting at the death of a person detained under the Terrorism Act.[9] The van Niekerk and other cases have recently been scrutinized and the courts' responses to them strongly criticised.[10]

Notwithstanding the intimidating prosecution of legal academics, the law schools in a number of the South African universities still remain vigorous centres of criticism and dissent. They offer their criticism and legal analysis by reference to comparative law materials, including those from Australia. The Law School at the University of Witwatersrand, in the centre of Johannesburg, is one of the chief such places. Many of its graduates have served in the LRC. It is in Johannesburg that the LRC was established. Here are the centres of industry in South Africa to which Black labour from within the republic and from neighbouring states congregate. They are housed in the dormitory townships of Soweto and Alexandratown close to Johannesburg. As is notorious, these townships are frequently swept with unrest stimulated by the shocking conditions of housing and life which obtain in areas of them. The vibrant economic strength of modern industrial and technological South Africa in the city of Johannesburg and the manicured lawns of nearby Pretoria (the seat of the Executive Government), contrast sadly with the deplorable shanty conditions of Alexandratown in particular. This township, a ten minute drive from the centre of Johannesburg is the venue of much conflict. It is overcrowded because it is one of the few convenient areas where Blacks may own the freehold of land, close to Johannesburg. It is patrolled constantly by armoured troop carriers, filled with rifle carrying young White soldiers performing national service. Eerily and silently they edge their way through the narrow unpaved streets, cluttered with uncollected garbage. At night each batch is replaced. The soldiers hurry back to the sterile cleanliness of the affluent suburbs for people of European race, whose close proximity stands as a reproach to a sense of equity and equal human opportunity in such a resource-rich country.

Many South Africans of every race perceive this injustice. Many lawyers deplore the legislation which the courts must daily enforce, the great power given to the agencies of the government in which the vast majority of the people have no say and the frequently supine response of the courts, including the Appellate Division, to assertions of state power. A consequence of the termination of Privy Council appeals was the gradual erosion of the links with the generally liberal spirit of the common law of English as interpreted by its judges. The growing battery of apartheid and security laws forced even unwilling judges daily to perform illiberal and even oppressive actions. The growing isolation of South Africa, as a country, has cut many of its lawyers off from the mainstream of legal, human rights and other intellectual developments in countries which were

previously regarded as being in the same legal tradition. The foreign exchange difficulties which have occurred in more recent years together with visa and other restrictions imposed by the majority of countries, have tended to diminish the travel overseas of South Africans. Increasingly they are isolated. Many of the lawyers, including the judges, feel this isolation. This was the reasoning behind the invitations extended to Dumbutshena CJ, Mr Robertson and me to add our perspectives to the LRC conference.

Evidence of the anxiety about the growing divergence of legal principles in the Appellate Division in South Africa and in the other courts of the former British Empire, have led to increasingly self-critical commentaries in South African legal journals. Thus, Christopher Forsyth has suggested that the Appellate Division has failed to make the most of the opportunities provided to it by recent security cases. He says that it has failed to adopt the approach of keeping the Executive Government within legal boundaries.[11] He is particularly critical about that court's response to cases regarding the treatment of detainees. Commenting on Heffer JA's judgment in Castel NO v Metal and Allied Workers' Union,[12] Forsyth claimed that it "showed an ignorance of the applicable English law" and brought "to mind the vision of some dark-ages lawyer surrounded by classical texts peering over these jewels of legal scholarship yet understanding almost nothing in them". His final conclusion was: "This is the point, in public law at any rate, to which the Appellate Division has sunk".[13] Professor Dennis Davis of the University of Cape Town has suggested that the Appellate Division has "offered little in the way of a buffer between an Executive, armed with ferocious emergency powers" and the individual citizen wishing to enjoy the ordinary civil liberties to which each citizen in any society claiming allegiance to the western democratic tradition is entitled".[14] Particular concern has followed[15] what is perceived to be the unnecessary restrictive interpretation of the Appellate Division in Omar v Minister for Law and Order.[16] of its power to supervise the agencies of the state in respect of persons detained under the emergency.

JUDGES AND LAWYERS IN AN UNJUST LEGAL ORDER

For all this, the judges of the Appellate Division sometimes determine that executive acts have been unlawful or disallow regulations. They free detainees, whose detention is set aside. An important example of such action is the judgment of Jansen JA in Theron v Ring van Wellington[17] where the Court went beyond the earlier "formal approach" to the power to review decisions by public officers and statutory bodies. It there embraced a broad test by which official action would be reviewed by reference to the touchstones of fairness and reasonableness. The hope presented by Theron was not, however, fulfilled in later judgments of the Appellate

Division, including in Mandela v Minister of Prisons[18] where judicial review was denied. But the occasional successes of lawyers, the effective defence of persons accused of capital and other crimes, the high exaction of the death penalty at least upon Black prisoners in South Africa and the use of the courts occasionally to reverse and discipline the oppressive state, combine to provide the motivation of the LRC lawyers.

The successes also provide the justification for the participation of the LRC in the South African legal system. This is seen in many parts of the world (and in some quarters in South Africa) as illegitimate because the system itself is established under a Parliament elected by only a small minority of the citizens of the territory of the Republic of South Africa. A question faces lawyers and judges in such a state. Do they add legitimacy to the state by participating in its institutions and accepting the premises upon which the institutions are based? Should they deny that participation, lest they themselves become contaminated and thereby further the interests of the state or even themselves come to accept implicitly the legitimacy of its institutions? On other words, do judges and lawyers have a duty to refuse to serve or participate in legal process in a country controlled and ruled by a minority of its citizens? Do they have a duty to resign from such activity lest they become the hapless instruments of the political organs of such a state, including the courts? Should a conscientious and moral person, reflecting upon such questions, choose another vocation?

Commenting on the case law on section 92 of the Australian Constitution in quite different circumstances, Sir Robert Garran in Prosper the Commonwealth suggested that a student of law would despair, "close his notebook, sell his law books and resolve to take up some easy study like nuclear physics or higher mathematics".[19] This suggestion was quoted with ironical humour by the Justices of the High Court of Australia in Cole v Whitfield. In South Africa, for different reasons, it is seriously suggested in some quarters that intelligent and moral people should not enter the legal profession or the judiciary because each is intimately associated with the organs of a government which derives its legitimacy from institutions which are elected by, and accountable to, a small minority only of the citizens of the State. They should close their law books and turn to other vocations not involved with the state. These are the questions which have agitated many lawyers and academic writers in South Africa. They did so with greater intensity after Professor Raymond Wacks delivered his inaugural lecture as Professor of Law in the University of Natal, Durban in March 1983. His essay produced a response by Professor John Dugard, a long-time teacher of jurisprudence and public law, who has influenced generations of South African lawyers.[20]

Wacks himself acknowledges that judges have choices in the performance of their tasks and differ in the ways in which they respond to those choices. Sydney Kentridge has pointed out that some judges have "done what they can to mitigate the harshness of the South African system".[21] Wacks also acknowledges that there is a fundamental difference between accepting judicial appointment (and thereby becoming part of the organs of government) and acting as an advocate in the defence of people oppressed by the state. Lawyers have certainly proved of critical importance in asserting these considerations which provide the moral basis upon which the work of the LRC is done at the present. People (mostly Blacks) are detained, imprisoned and sometimes tried. The legal system can, to some extent, protect them. Occasionally, it will vindicate them and secure their release. In these circumstances, at least at the present, the lawyers of the LRC, working on a strictly multiracial basis and with a vision of a more just society for all South Africans before them, continue to do what they can in a legal environment which is virtually unthinkable for most lawyers in western democracies. In such countries the legitimacy of the state and its laws can ultimately be traced to the authority of the whole people to whom the law-makers are ultimately accountable. That is not the case in South Africa at present.

The focus of the Johannesburg conference of the LRC was to analyse the situation in which South Africans, particularly lawyers, now find themselves. It was to look to a future where the major premise of the state would be legitimate, the laws just, the judges wholly independent and the South African legal system returned to the mainstream of the legal systems of the common law world. Elsewhere in southern Africa, the steps towards such ideals have occurred, although not without pain. The independence of Zimbabwe was achieved in 1980, after the war which followed the unconstitutional seizure of power by the minority White government. After independence, Dumbutshena CJ was successively promoted to various posts in the Zimbabwe judiciary, and ultimately to be the second Chief Justice in succession to Fieldsend CJ. The Chief Justice's promotions followed, on each occasion, important decisions of his which were adverse to the submissions of the Executive Government, led by President Robert Mugabe. One of these cases was the widely publicized acquittal of White officers in the Zimbabwe Air Force who had been charged with treason. These features of the resolute career of Dumbutshena CJ were emphasized in the course of the Johannesburg conference, as if to underline the respect given in Zimbabwe, to the rule of law and the independence of the judiciary. There could have been few more vivid illustrations of the independence of the judiciary in a neighbouring country, governed by a legislature elected now on a non-racial basis, than the career of Dumbutshena CJ itself. The steps now being taken towards the independence of Namibia (formerly South-West Africa) were also seen in

some circles as the provision of the opportunity of removing more of the Black people in southern Africa from the remaining vestiges of rule by a minority White government.

THE LAW COMMISSION PROPOSES A BILL OF RIGHTS

On the eve of the conference in Johannesburg, the South African Law Commission published a working paper on a Bill of Rights for South Africa.[22] The Chairman of the Commission (Olivier J) attended the LRC conference. Many references were made during debate to the proposals of the Commission, which were seen by some participants as providing a prerequisite to the establishment of a non-racial legal system in South Africa. A Bill of Rights which guaranteed the protection of the human rights of all South Africans of every racial origin and of the communities of different races in South Africa is perceived both in the ANC and in many quarters in the Government and Parliament of South Africa, as a fundamental first step towards a different legal and constitutional system. There is much talk of reform in South Africa. The withdrawal from Namibia is cited as an illustration of the willingness of the Pretoria Government to accept reform and to change. The support for the Law Commission's project on group and human rights was given as another illustration of the new spirit of reform which is abroad. Generally speaking, the working paper has been welcomed by the English-speaking press. Furthermore, it is understood that there may have been informal contacts by interested lawyers with the ANC which has its own "Freedom Charter" as part of its plans to accompany a multi-racial constitution for South Africa with a justiciable Bill of Rights, enforceable in the courts.

Immediately after the Johannesburg conference I visited the Law Commission of South Africa in Pretoria. I had discussions there with the Chairman, Commissioners and research staff. I was the first person, associated with an overseas law reform agency, who had ever called on the South African Law Commission. Such is the measure of the isolation of lawyers in that country. There was an appropriate recognition in the Law Commission that the great decisions of constitutional change for South Africa would be made elsewhere. It was clearly seen that such changes were tied in with issues having more to do with economics, racial psychology and international pressure rather than law and proposals for a Bill of Rights. Even discussing a Bill of Rights, available to all South Africans, at a time when many (mostly Black) citizens are detained under emergency powers, for whom effective judicial review is not available, seems somewhat unreal. But people must look to a future day of a legitimate non-racial legal régime in South Africa. The work of the Law Commission, paralleling work by academics, including some engaged by the ANC based in Lusaka, Zambia may therefore be a useful step which one day may be called upon

in devising a just legal system for a democratic South Africa. Similarly, the convening of the conference by the LRC was designed to provide a forum in which people committed to the common ideal of a multi-racial South Africa and to the complete overhaul of the present system of government and law, could exchange ideas, reflect upon their current situation and secure knowledge of relevant developments elsewhere. In such a conference, the participants could derive strength from their common commitment to human rights and receive energy from the recognition that things cannot remain the same and that ultimately, inexorable forces will replace the present minority regime with another, founded on a quite different principle.

THE ECONOMIC AND SOCIAL CONTEXT OF LEGAL CHANGE

Following Arthur Chaskalson's opening review of the work of the LRC during the past ten years, the conference turned from the sponsor and its activities to the general economic, political, legal and judicial situation of South Africa.

Professor Francis Wilson is Director of the Carnegie Inquiry into Poverty and Development in South Africa. He holds a chair in economics in the University of Cape Town. He put the legal struggles into their economic context. He pointed out that about 65% of Black South Africans were living below the accepted minimum standard of living. Eighty per cent of Black South Africans had no access to electricity even though South Africa produced 60% of the electricity on the African continent. The failure properly to reticulate electricity had forced large numbers of Black citizens to scrounge for firewood for fuel. This had had a devastating ecological consequence for the environment, particularly as a result of the disruption caused by forced rural resettlements. Infant mortality which stood at 12 per 1,000 in the White community was approximately 100 per 1000 in the Black. This figure was much higher than Algeria or Zimbabwe. In Australia the 1987 figure was 8.7 per 1000 live births. The bitter fruits of political powerlessness were demonstrated by the social instability in the poor areas. A murder rate of 4 or 5 per 100,000 in White districts leapt to 48 and even 150 in Black. Similarly, rape and other serious crimes were disproportionately incidents of poverty and despair in the Black community. According to Professor Wilson, in resource -rich South Africa, poverty is largely man-made. It has stemmed from the gross malapportionment of wealth and the assaults on human dignity both by apartheid and by the migrant labour system which treats human workers as mere labour units.

The only ways of reform, Professor Wilson declared, would come from repeal of the Land Act under which the richest and most desirable land in South Africa is reserved to White ownership and occupation. The recent repeal of the hated

pass laws had been a beneficial development. It had removed a form of modern slavery which had first developed to meet the demands of mine owners for migrant workers, after the large mineral discoveries of southern Africa of the 1880s. The Group Areas Act and the other vestigial legislation of apartheid would need to be removed. Under that Act urban Blacks, Coloured, Indians and Whites are all compelled to live in their "own" areas, as designated by the state. Some 86.3 percent of the land of South Africa is reserved to Whites. Only 13.7 percent is reserved to Blacks although they are six times more numerous in population than the Whites Reparation for the non-White communities so long deprived of land and economic opportunity would be essential. This would have to be accompanied by laws providing for positive discrimination in their favour and a redistribution of land accompanied, above all, by a nonracial franchise. It would be necessary to restore the rule of law in the sense of a law supported by appropriate legitimacy. Censorship would have to be abolished. Officials would have to be made fully answerable in the courts in a way accepted as normal in other modern western communities.

Praising the work of the LRC, Professor Wilson pointed to a number of occasions where it had "halted the juggernaut" of the state and rendered the executive and its agents accountable in public for their actions. He declared that the LRC was a marvellous example of what could be done even in an authoritarian society.

THE LEGITIMACY OF THE COURTS IS QUESTIONED

Penny Andrews, now of Latrobe University in Melbourne, Australia, born a non-European South African put her focus on the law schools of South Africa. Despite the authoritarian rule, she stated that the voices of human rights were everywhere. They were particularly loud in the law schools. She stressed that the legal needs of the poor (mostly Blacks) were frequently different from those of White people. They were not simply White people without money; their encounters with the law were typically quite different. It was necessary for law schools to do still more to challenge the passivity of most lawyers. But it was also necessary to avoid separating the humanitarian and the professional role. To be good humanitarians, and effective defenders of liberty, it was essential to attract the best legal minds.

Mr Fikile Bam, Director of the LRC at Port Elizabeth, a Black lawyer, addressed the legitimacy issue. He described vividly the tyranny of bureaucrats in South Africa put over the people and of village heads in the so-called "homelands" and "independent states" whose tyranny was backed up by the authority of the South African government. Many obstacles to real progress remain. It should not be assumed that freedom for all in South Africa had a momentum of its own. Token reforms, such as the repeal of the Morality Act (which

forbade miscegenation) gained much media coverage overseas. But such changes were of little real importance in day to day life. They did not affect the central political and economic injustices of the government system in South Africa.

Mr Dullah Omar, an advocate of the Cape Town Bar and the subject of the Omar litigation previously mentioned, declared that the Black community had lost faith in the law and in the judiciary of South Africa. What was necessary at this stage was not more talk about reform but empowerment with an end to economic and legal exploitation. For too long law in South Africa had become an instrument of subjugation so that talk of the rule of law merely entrenched its legitimacy. According to Omar, the road ahead would lie in the direction of reducing the helplessness of the people, particularly in economic matters. The most urgent force for change in South Africa (as in the Soviet Union) would mainly be economic. Armed with experience derived from overseas, Black South Africans were now being organised into trade unions which were effective because they were democratically accountable to their members. These changes had occurred in the last five years. They had resulted in the reform of labour regulation, the greater mobility of people and the abolition of the pass laws. Lawyers in South Africa, according to Omar, must learn the inter-relationship of legal advances with the economic power of the Black majority in South Africa and the needs of the economy for the labour skills of Black workers. The relationship of these economic forces with political power was clearly recognised by the South African government. Hence the prosecution, even for treason, of workers who had endeavoured to organise an effective industrial union. One such treason trial, concerning a trade unionist in Alexandratown, was proceeding at the time of the LRC conference.

Mr James Robertson then outlined the developments which had occurred in the southern states of the United States towards the enfranchisement, and the political and legal advancement of Black (Afro-) Americans. Before the United States Civil War, Black citizens had been disenfranchised except in the six north-eastern states. The defeat of the South in the civil war had assured Blacks the right to vote. But that right had been frustrated by numerous legal devices. Robertson described the ways by which these devices were ultimately swept aside by reforms enacted by the United States Congress after 1965 and enforced resolutely by lawyers and the Federal courts in the United States. The analogies with the situation in South Africa were vivid, except for the striking fact that, in South Africa, it is the Black community which represents the overwhelming majority of the citizenry. It is not a minority.

APARTHEID STILL "POISONS EVERYTHING"

The conference was then addressed by Professor Johan van der Westhuizen, Professor of Law at the University of Pretoria. A legal expert of Afrikaner background, he is now one of the outstanding spokesmen in South Africa on human rights. He recently participated in a meeting in Harare with lawyers of the ANC and has had other discussions in African states, with African lawyers.

Acknowledging the erosion of the legal scaffolding of apartheid, Professor van der Westhuizen nonetheless asserted that the ideology of racism still "poisons everything" in South Africa. He declared that the "whole nature of the political system" had to change. Asking himself whether lawyers did not legitimize the legal and judicial system by participating in it, he answered that they could not just let people languish without trial waiting for the ultimate liberation.

Professor van der Westhuisen said that it was important to give hope to White citizens in South Africa. Otherwise, from ignorance and despair, they would cling blindly to economic and political power. They must have something to look forward to. He said that this would include a democratic, liberated South Africa "with a legal system to be proud of, for a change".

Mr Gilbert Marcus, an advocate in Johannesburg, examined the Law Commission's working paper on human and group rights. He explained the legal justifications of "positive discrimination" in favour of previously disadvantaged groups, mentioning the Bakke case in the United States Supreme Court. He stated that affirmative action in South Africa should not be an end in itself. It was simply one attribute of the transitional economic restructuring of the country to a democratic system.

Mr Ernest Moseneke, an advocate of Pretoria then spoke. He is a founder and trustee of the Black Lawyers' Association. He castigated his forebears, the indigenous people of South Africa, as having been "stupidly docile". Asserting that White South Africans could not understand the full impact of the Land Act, he explained this aspect of separateness of habitation from the viewpoint and psychology of a Black. He shared the concern expressed by Professor van der Westhuizen's about "group rights". For him the notion dangerously conjured up the idea of "separateness" of racial "groups". But he urged that human rights should go beyond the civil and political rights of which Western communities were so fond. Even though not readily justiciable in courts, human rights today included economic, social and cultural rights, such as the right to development. In a real sense these rights were the more urgent concerns for disadvantaged Blacks in South Africa. Mr Moseneke recounted some successes

in the courts. He saw the efforts to require the government and its agencies to comply with their own laws as a step in the process of developing the norms necessary for a future democratic society. Of the LRC, he declared that it was a "survival kit" for a nonracial society which would one day come to South Africa.

LIFE AFTER DEATH IS PROVED

Dumbutshena CJ (Zimbabwe) then spoke. He declared that what he had to say was less important than the fact that he had come to say it. He acknowledged that some White people in South Africa saw majority rule as a prospect worse than death. He had therefore, he said, come to tell South Africans what happens after death: something which had long intrigued philosophers.

The Chief Justice outlined what had been achieved in Zimbabwe since independence under majority rule. He paid a handsome tribute to the predecessor judges of the Supreme Court of Southern Rhodesia who had, for the most part, exhibited high learning, independence and wisdom. He acknowledged that the judicial task was one of the most difficult that could be assigned to a human being. He was not without criticism of his own government. He referred to the need for financial, as well as legal independence for the courts. But he asserted that there was no overt interference whatever in the work of the judges in Zimbabwe. They simply carried on the long tradition of the independent judiciary to which they were heir.

Dumbutshena CJ showed understanding of the work of the LRC in the current situation in South Africa. He pointed out that even revolutionary situations require the dispensation of justice and therefore the work of judges and lawyers. He recounted a number of detention cases in Zimbabwe where the Supreme Court had insisted upon proper reasons for the detention,[23] proper procedures during detention and observance of guidelines laid down by the Court at the invitation of the State. He said that Zimbabwe was practising a policy of reconciliation, believing that it was wrong to discriminate between people on the ground of race or other immutable characteristics. He believed that the courts and lawyers of Zimbabwe had to their credit the achievement of justice "to all manner of people" which was the oath the which judges took.

At the end of Dumbutshena CJs address, a tribute was paid to his example by the Hon G P C Kotze SC, a former judge of the Appellate Division of South Africa. He said that it was feared in many circles in South Africa that an independent, learned and fearless judiciary would be impossible under majority rule. The Zimbabwe Chief Justice had demonstrated that this was simply not so.

RULE OF LAW AND LIMITS ON THE STATE

Professor Laurence Ackerman of the Faculty of Law at Stellenbosch University put discussion of human rights into the context of social and economic circumstances. A person who was free but starving, could readily be induced into losing his rights without the slightest physical bullying. It was clear that apartheid had failed in South Africa. But it was difficult for politicians to admit that they had made such a fundamental mistake. It was especially difficult to dismantle a complex system in which there had been so much emotional and political investment. Yet if this could occur in the Soviet Union with President Gorbachev's Glasnost, it could also occur in South Africa with a return to critical rationalism. Preservation of the rule of law, even in its defective South African form, was essential as a transitional mechanism to democratic rule, accepted by all the people.

Ms Shehnaz Meer, an attorney with the LRC in Cape Town made the important point now increasingly emphasized in discussions of the rule of law. It is not enough to insist upon strict compliance with the law because it is made by an organ of power. Attention must be paid to the content of the law. The mere promulgation of law in an authoritative way was insufficient. The rule of law, without legitimacy and justice in the laws enforced, could otherwise amount to a formula for continuing oppression and for resistance to the reforms necessary to achieve freedom and peace.

Professor Marinus Wiechers of the Faculty of Law in the University of South Africa followed this talk with an exposition of the 19th century Diceyan concept of the rule of law. Professor Weichers is a highly influential scholar in the Afrikaner community. He was part of the South African legal team in the South West Africa case before the International Court of Justice. He emphasized that in Roman Dutch law, the notion of the rule of law went beyond ideas of formalism. Thus, it was necessary that the law should not be arbitrary and that it should operate in a fair and equitable manner to all people, regardless of irrelevant distinctions such as those based upon race or colour. Because human rights are inherent in the very humanness of individuals, the state cannot abolish fundamental rights and freedoms. This is because it is not the State which first creates those rights. They inhere in humans as such. The state can regulate them. But not abolish them. It was in this sense that the fundamental flaw of the South African legal order was exposed. Insofar as it had attempted to take away basic rights from non-White citizens, it had acted outside the legitimate entitlement of a Rechtstaat, or a government adhering to the rule of law.

LEGAL CONTROLS OVER ADMINISTRATIVE ACTS

The final session included two papers. The first was presented by me. In it, I outlined some of the recent developments in Australia, both in the courts and by legislation, designed to enhance the accountability of the government and its agencies to the individual affected by their decisions. Of course there is no State of Emergency in Australia. There is not detention without trial. All lawful detention is strictly ancillary to transferring an accused person from the committed executive arm of government and its agencies, to the neutral and independent judicial arm of government in the courts. But instances of official oppression occur in Australia as in every land. The courts have in recent years significantly developed judicial review. In Australia, as in England, the courts have expanded the circumstances of judicial review of administrative decisions. They have done so by expanding notions of standing to sue,[24] enlarging the class of those with legitimate expectations to procedural fairness who may invoke the courts' intervention,[25] limiting the reliance by officials on government policy not specifically included in the law[26] and strictly holding Ministers and officials to compliance with the law and to the proper exercise of discretions conferred by law.[27]

Quite apart from these developments in the courts, the legislatures have been busy in Australia providing effective and sometimes cheaper and more accessible redress for the individual affected by administrative decisions. Thus an Ombudsman has been appointed in every jurisdiction of Australia, Federal, State and Territorial. In South Africa there is an Advocate General, with legislative authority to enquire into complaints related to corruption (van der Welt J). It appears that there have been discussions for some time about enlarging his powers to provide a wider mandate to receive complaints of administrative wrong-doing. But, so far, no general Ombudsman has been created. Clearly, in the circumstances of the emergency laws, detention without trial and alleged acts of oppression and official violence, the provision of an effective Ombudsman in South Africa is long overdue.

The other legislative developments for administrative review in Australia were outlined. They include the reform of judicial review in Federal Courts by the Administrative Decisions (Judicial Review) Act 1977 (Cth); the provision of access to official information by the Freedom of Information Act 1982 (Cth); and the establishment in the Federal sphere and in Victoria, of a general administrative tribunal[28]. That tribunal has large powers concerned not only with how the administrative decision was made but also with whether, in the circumstances, it was the right or preferable decision to make. A preliminary evaluation of the tribunal and whether it was appropriate for export to a country such as

South Africa was attempted. Finally, the statutory provision for a right to reasons for administrative decisions under s 13 of the Judicial Review Act was mentioned, together with Professor Dennis Pearce's opinion[29] that this "has had a greater impact on administrative review than any other" reform. Mention was made of the attempt to develop a common law right to reasons from administrators. However this was rejected by the High Court of Australia.[30]

The discussion of judicial review was of relevance to a South African audience because of the vital importance of this means of providing scrutiny of official acts and because of related reforms proposed by another working paper of the South African Law Commission.[31] This working paper proposes simplification and extension of the grounds of judicial review in South Africa and a statutory right to reasons for administrative decisions. Reforms, along the lines proposed, have not yet been translated into legislation.

Judicial review has great significance for security cases in South Africa. There, it may be the only effective redress open to the detainee. Once again, the situation in South Africa defies simple description. Rabie A-CJ, whose extension in office as Chief Justice of South Africa after his retirement was widely criticised in some legal circles because of his alleged authoritarian leanings,[32] led the Appellate Division in an important judgment in which he emphasized the entitlement of a detainee to more reasons than the simple assertion of the belief that he or she was a security risk.[33] More was needed, he explained, so that the entitlement to challenge the order in the courts could have utility and so that representations made to the authorities concerning the detainee could be made with knowledge, at least, of the general character of the grounds said to justify the detention.

My paper was followed by an address by Ismail Mahommed SC, a leading Johannesburg silk who has been counsel in many leading cases for the LRC. He reviewed the recent decisions of the Appellate Division of South Africa concerning judicial review for unreasonableness of the Wednesbury kind.[34] He evaluated the track record of that court on ouster clauses. On both grounds, his assessment was sharply critical of the Appellate Division, measured particularly against equivalent English authority in recent years. He illustrated the extent to which that once fine court had departed from the developments of judicial review in England, Australia and other countries of the Commonwealth during the past twenty years. Of South Africa it cannot be said, as it was of England in 1962 by Lord Diplock, that the progress made over the past thirty years toward a comprehensive system of administrative law was "the greatest achievement" of a contemporary legal lifetime.[35] The comprehensive system which has been put together as legal scaffolding in South

Africa is one which, on the contrary, frequently denies and excludes judicial supervision or offers it in an often timorous and whispered version of the beneficial checks now insisted upon at Westminster, Canberra and elsewhere.

THE VITAL NEED FOR CREATIVE LAWYERING

The closing summary of the conference was offered, as I have said, by Sydney Kentridge. He isolated the two main themes of the meeting:

1. What will the law be like when South Africa changes to a democratic society? What then can the law be expected to do? What will be the role of an independent judiciary and the function of the rule of law and of a Bill of Rights under the new dispensation? And will affirmative action laws be necessary together with reparations and economic redistribution? and;

2. What are lawyers in South Africa to do in the meantime to obtain a more just legal order for everyone living under the law of present-day South Africa? Is it feasible and right to attempt the task of developing a workable system of administrative law which, despite all the obstacles, renders the state and its agencies accountable to independent courts?

Mr Kentridge stressed that the independence of the judiciary was vital for South Africa, as for every land. Without it, any system of law was meaningless. Paradoxically it was necessary for the independent lawyers of the LRC to rely heavily upon the self image of the judiciary as independent of the government. Using the choices open to them, the judges could have done more and better in the past, especially the recent past and especially in judicial review of security cases. Yet, that said, the record of the South African courts was not one of unrelieved failure.

Mr Kentridge invited the lawyers present to contrast the judgments of the South African and Zimbabwe courts. They were different in tone, he said. There was in the latter less rhetoric. There was a greater reflection of the genuine feeling of the Zimbabwe Supreme Court that it sees its role as a guardian of individual rights; that it sees detention without trial as an undesirable and temporary evil and that it makes it its business to mitigate such an evil to the fullest extent that the judicial power allows. The result had been that the Zimbabwe court has reduced the alienation of the citizens of that country from the law, which was now

such a feature of the relationship of Black people in particular with the law and the courts in South Africa.

The way forward, declared Mr Kentridge, was the way illustrated by Mr Ismail Mahommed. It was the way of creative lawyering. Courts could not pick and choose cases. Nor could the LRC. The role of the LRC and of lawyers generally in South Africa was to make the most of each case. This could be done by becoming knowledgeable about relevant legal developments abroad, perceiving points of challenge and urging them upon South African judges; offering them a staff of courage procured from reliance upon what judges are regularly doing in other lands. The key to progress, at least in the courts, was not sentimental argument. It was thoroughly professional lawyering.

Quoting Lord Chief Justice Lane in a recent speech in the House of Lords on the debate concerning the Green Paper on the legal profession, Mr Kentridge said that judicial review was the one means whereby an Executive Government, which starts bullying citizens, can be "brought to heel". The Executive may get "ideas above its station". Judicial review may then be the one thing to stop a "bullying government" in its tracks.

Quite apart from the future rule of the judges, the role of the independent Bar in South Africa had a distinct value of its own, according to Kentridge. In the words of Penny Andrews, the Bar had become "the voice of the voiceless". Its defence of basic human rights was a vital and a moral mission. It was so even if the judge was not listening or proved indifferent to the arguments of law and justice. It was vital for the future of South Africa that the profession of a Bar should exist which will speak to the court for the litigant, doing so fearlessly and putting the case as he or she would want it to be put. Whatever the position in the past, Mr Kentridge declared that the law in South Africa was not <u>necessarily</u> an instrument of oppression. It could, at least sometimes, be seen as an instrument for the protection of the weak and for the attainment of justice. In securing those ends, the LRC was indispensable.

TWO WORLDS: A STUDY IN CONTRASTS

In the course of offering my final remarks to the conference, I took the occasion to draw attention to the contrast between a decision of the Appellate Division of South Africa and a recent decision of the Court of Appeal in New South Wales in which I had participated. The latter was arrived at without knowledge of the former which had been decided many years earlier. Yet there were parallels and differences in the two cases.

The first decided in 1960 concerned an articled law clerk, Mr Pitje. He was Black. On the occasion giving rise to the litigation he attended a magistrate's court to defend a client, Mr Stefaans Niekerk. He had reached a stage in his career where he was entitled to appear in a magistrate's court. He was motioned to a separate table reserved for non-European advocates. He resisted that assignment and remained occupying the place at the Bar table provided for practitioners of European race. The following exchange then took place between Mr Pitje and the magistrate according to the judgment of the Appellate Division:[36]

> "He did not comply with the request but remained where he was, protesting and enquiring why he should sit at the other table. The magistrate informed him that it was his (the magistrate's) court, that he wanted him to sit there and that he was not prepared to argue with him about it. Thereupon the following passed between the appellant and the magistrate:
>
> The appellant: 'Is this an order of the court?'
> The magistrate: 'Yes, this is an order of court and unless you comply with it, I shall have no alternative, but to fine you for contempt of court.'
> The appellant: 'I must protest...'
> The magistrate: 'I have already warned you what the consequences will be unless you abide by the order of the court.'
> The appellant: 'But I demand an explanation.'
> The magistrate: 'If you do not address me from the table I indicate then I am not prepared to listen to any further argument.'
> The appellant: 'I am not arguing or protesting. I ...'
> The magistrate: 'Are you or are you not prepared to occupy that table.'
> The appellant: 'I must protest ...'
> The magistrate: 'In that case you are fined £5 or five days for contempt of court.'

Following his conviction for contempt of court, Mr Pitje sought judicial review in the Appellate Division. In that Court there was but one Bar table. Advocates of every race sat at it, as they had always done through the history of the Union and have done, since, under the Republic. In fairness, it should be said that after the Pitje case the practice of assigning advocates of non-European race to separate tables in the magistrates' courts was gradually phased out. It no longer obtains. But the Appellate Division had an opportunity, at least within the precincts of a court, to insist upon equal treatment of all lawyers entitled to audience. No express law requiring differential treatment

was involved.[37] Instead, the Appellate Division missed its opportunity. It turned its back on the approach of the Centlivers Court in R v Ngwevela[38] and that later taken by the dissenting judges (Williamson JA and Trollip A-JA) in dissent in South African Defence and Aid Fund v Minister of Justice.[39] It failed to hold that basic common law rights were preserved unless they were expressly or by necessary implication excluded by statute. Instead, like the majority in the South African Defence and Aid Fund case in the Steyn Court and the majority in Omar (above) it approached the matter on the footing that fundamental common law rights were excluded in the absence of a positive indication of a statutory intention that they should be retained.[40] It resorted to the right of the magistrate to control his own court and the disinclination of an Appellate Court to interfere with that control:

> "A magistrate, like other judicial functionaries, is in control of his court-room and of the proceedings therein. Matters incidental to such proceedings, if they are not regulated by law, are largely within his discretion. The only ground on which the exercise of that discretion and the legal competence of the order might in this instance be called in question, would be unreasonableness arising from alleged inequality in the treatment of practitioners equally entitled to practise in the magistrate's court. (Cf. Minister of Posts and Telegraphs v Rasool, 1934 AD 167; R v Abdurahman, 1950 (3) SA 136 (AD)). But from the record it is clear that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table. Although I accept that no action was taken under the 1953 Act, the fact that such action could have been taken is not entirely irrelevant. It shows that the distinction drawn by the provision of separate tables in this magistrate's court, is of a nature sanctioned by the Legislature, and makes it more difficult to attack the validity of the magistrate's order on the ground of unreasonableness. The order was, I think, a competent order. [I]t is apparent that the appellant, when he went to court on this day, knew of the existence of the separate facilities in the court, that he purposely took a seat at the table provided for European practitioners, that he expected to be ordered to the other table and intended not to comply with any such order. He further had in mind eventually to

withdraw from the case after having informed the magistrate that the interests of the accused would be better served, and that he would by implication have a fairer trial if he, the appellant, were to refrain from defending him. It follows, I think, that his failure to comply with the order was deliberate and premeditated. It cannot, therefore, avail him to contend that he did not intend to insult the magistrate and was not motivated by contempt. It is true that the insulting statement which he intended to make, to the effect that the magistrate would not give the accused a fair trial if defended by him, he did not make, but that does not alter the fact that, in spite of repeated warning, he wilfully disregarded the order. That was contempt of the court. The appeal must accordingly be dismissed."[41]

This decision, and the approach inherent in it, may be contrasted with what happened recently in the Court of Appeal of New South Wales. In Gadidge v Grace Bros Pty Limited[42] a case was stated by the Compensation Court of New South Wales. It asked, in effect, whether the action of a judge was within the legitimate bounds of his control of his courtroom. The issue arose in circumstances which in some ways were as unusual as those of Mr Pitje. The claimant for compensation was deaf and mute. A member of the government panel of interpreters was sworn to interpret. At a point in the claimant's evidence, objection was taken to a question. There then followed exchanges between the judge and counsel. Counsel for the employer noticed that the interpreter was continuing to interpret these exchanges. He protested. The judge requested, and later directed, the interpreter to desist from interpretation. The interpreter declined to do so asserting that it was her "ethical duty" to continue interpretation. The judge declined to continue with the trial. He asserted that the interpreter was, in effect, usurping his control of his courtroom.

The Court of Appeal unanimously held that the judge had erred. Whilst the litigant was in open court, she was entitled to have interpretation of the proceedings there. If there was anything which should not come to her knowledge (as in her case, by interpretation) she should have been sent from the courtroom. The interpreter was merely a means of overcoming the physical handicap associated with her being a deaf mute. To the argument that the court should respect the judge's right to control his courtroom, I said:

"A deaf person, save for lip-reading, will be in a silent world where the mysteries of the court's process will inevitably be enlarged. The need is accordingly greater to ensure that

such a person has as full an understanding as possible of what is occurring in the case.

It is not, in my opinion, the Judge's province to deny that understanding where an interpreter in the Government panel quietly and unobtrusively proceeds to turn the silence of a deaf party into understanding. A judge should welcome the opportunity for understanding in the case of a deaf party. If for any reason the party should not have communication in a matter proceeding in open court, that party should be excluded from the court as any other party would be. That is the proper way to prevent the corruption of his or her evidence. It is not proper to have a person with a hearing disability sitting silent and uninformed about what is going on in a public courtroom about her. Least of all is it appropriate where a sworn interpreter on the Government panel is present in court and able to inform that person of what is happening...[S]o long as the person is in open court and that person is deaf, he or she has an entitlement to translation of what is passing in the court, subject only to the overall residual control of the judge to be exercised for proper reasons to ensure that the proceedings are properly conducted. If it were otherwise, our vaunted boasts about open justice and fair procedures would be empty of content for the person who is deaf. I cannot believe that this is what the law requires or permits.[43]".

In the course of his judgment, Samuels JA said:

"For the present purposes it is essential to balance what procedural fairness requires in circumstances such as this against the necessity to permit a trial judge to retain the ultimate command of order and decorum in his or her court. It seems to me that the principle which applies is clear enough: It must be that any party who is unable (for want of some physical capacity or for lack of knowledge of the language of the court) to understand what is happening must, by the use of an interpreter, be placed in the position in which he or she would be if those defects did not exist. The task of the interpreter in short is to remove any barrier which prevent understanding or communication. This must, of course, be subject to the overriding right of the judge, first to determine whether those barriers exist and,

> secondly, to decide in what way the corrective mechanisms may be applied without disrupting or adversely affecting the forensic procedures which he is charged to undertake. It must be borne in mind that there are cases where the provision of an interpreter might produce unfairness to the adversary. The principle to which I have referred so far as criminal proceedings are concerned is acknowledged by the International Covenant on Civil and Political Rights, Article 14, which is now to be found as part of Schedule 2 to the Human Rights and Equal Opportunity Commission Act, 1986, (Cth)."[44]

Clarke JA agreed with Samuels JA and with me.

These two cases demonstrate the reactions of appellate judges linked by the same general tradition but separated in jurisdiction and by a gulf as wide as the Indian Ocean in their approaches to a common issue. In the one case, the judges of the Appellate Division of South Africa were impervious to an obvious injustice to, and discrimination against, an authorized person in the legal profession appearing for a client before a court where he had a right of audience. In the more recent case, the Australian court would not permit the injustice or sanction the discrimination. It would not do so, even on the ground invoked by the judge himself and the other party, that a judge must be left a large measure of control of the proceedings in his courtroom.

Of course, there were many differences between the cases. Their circumstances and the conditions of the countries in which they arose were quite distinct. But they neatly sum up a basal difference of judicial attitude concerning the role of courts and judges and to the respect to be given by them to basic human rights.

LAWYERS AND THE FUTURE OF SOUTH AFRICA

At the end of my address to the LRC conference, the Chairman of the Session, the Hon John Trengove, a former judge of the Appellate Division, made a remarkable statement. He said:

> "I would like to take the opportunity of making a personal comment arising out of what Judge Kirby has said about the judgments and the esteem of our courts. It is a sad fact that the image of our judiciary, the esteem which their judgments enjoyed in the past and the general perception of the administration of justice, that they have been adversely affected by our courts' application and enforcement of unjust

> and discriminatory laws. Our courts have appeared to have accepted in many instances their passivity and their subservience to the sovereignty to Parliament, a doctrine which should really have no application in a country where there is an absence of a general right of franchise. The courts have on occasion, it is true, expressed their regret at having to bow to the sovereignty of Parliament. But I believe that we have failed, and I regret that I also have at times been guilty of this failure, to express unequivocally our displeasure at having to apply and enforce discriminatory and unjust laws. And I do hope that our courts will realise what effect this has had on the public perception of the administration of justice, and that they would in future take a bolder stand."[45]

It was a sombre moment and a painful one.

As fate would have it, one of the lawyers present in the audience at the conference in Johannesburg was Mr Godfrey Pitje. He has been associated, from its inception, with the Legal Resources Centre. It was my privilege to meet him. When I did, I was told that at the time of the events just recountered he was employed in the then little known legal firm of attorneys, Mandela and Tambo. Nelson Mandela, the President of the ANC, has been imprisoned in South Africa for the past 25 years. In the words of the Secretary General of the Commonwealth (Sir Shridath Ramphal QC):

> "The walls of South Africa's prisons confine him but his spirit soars above them: a spirit of freedom, of nationalism rising above 'group'; of courage and resolve that humiliates oppression; a spirit of non-racialism that looks to a democratic South Africa acknowledging Black and White as fellow South Africans; a spirit that can release a whole nation from bondage."[46]

Oliver Tambo, the other principal of Mr Pitje's firm, occupies the President's seat during Nelson Mandela's absence and is now the President of the ANC. He is resident, in another form of exile, in Lusaka, Zambia.

Lawyers play a vital part in the life of South Africa. Some of them play an honourable part in and out of the courts for the protection of the human rights of citizens of every race in that that unfortunate country. Many such lawyers (but not all) are associated with the Legal Resources Centre.

Who knows? The partners of the humble firm of Mandela and Tambo - together with with the intrepid Godfrey Pitje and the resolute lawyers of the LRC may yet live to play an important part in the government of a democratic and multiracial South Africa. Then, once again, the Appellate Division of the Supreme Court of South Africa may be restored in esteem to its former prestige, with its jurisprudence respected in many lands for learning, wisdom and respect for the human rights of all.

END NOTES

* Held at the University of the Witwatersrand, Johannesburg, South Africa, 12-13 April 1989.

** President of the Court of Appeal, Supreme Court of New South Wales, Australia. Commissioner and Member of the Executive of the International Commission of Jurists, Geneva. Personal views.

1. See H Corder, Judges at Work, Juta & Co, Cape Town, 1984, 6.
2. See (1970) 87 SALJ 25.
3. See Corder, 6.
4. See eg C Forsyth, "The Sleep of Reason: Security Cares before the Appellate Division" (1988) 105 SALJ, 679.
5. See eg N Abrams, "A Hearing Before a Gathering" (1988) 4 SAJHR 179.
6. See eg In re Dormer (1891) 4 SAR 64.
7. 1970 (3) SA 655 (T).
8. See (1969) 86 SALJ 457 and (1970) 87 SALJ 60.
9. See State v van Niekerk 1972 (3) SA 711(A).
10. A E van Blerk, Judge and Be Judged, Juta, Cape Town, 1988, 21 ff.
11. Forsyth above n4. See also by the same author "In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa 1950-1980", Juta, Cape Town, 1985.

12. 1987 (4) SA 795(A).

13. Forsyth, ibid, 708. See to similar effect N Abrams, "A Hearing Before a Gathering", (1988) 4 SAJHR 178, 187.

14. D Davis, "Appeal to Reason".

15. See eg Abrams, above n 5.

16. 1987(3) SA 859(A)

17. 1976(2) SA(2)(A)

18. 1983(1) SA 938(A) at 964.

19. Ibid at 415. See Cole v Whitfield, (1988) 62 ALJR 309, 310 (HC).

20. See R Wacks, "Judges and Injustice" (1984) 101 SALJ 266; J Dugard, "Should Judges Resign? - A Reply to Professor Wacks" (1984)101 SALJ 286. See also discussion "Should Judges Work in an Unjust Legal System: in (1988) 12 Bulletin Aust Soc Legal Philos. 176-232.

21. See S Kentridge, "The Pathology of a Legal System: Criminal Justice in South Africa" (1980) 128 Uni of Pennsylvania L Rev 603, 619.

22. See South African law Commission. Group and Human rights, Working Paper 25, Project 58, Pretoria, 1989.

23. See eg Minister of Home Affairs & Anor v Austin and Anor [1987] LRC (Const) 567 (SCZ).

24. Australian Conservation Foundation Incorporated v The Commonwealth (1980) 146 CLR 493 (HC); Onus v Alcoa of Australia Limited (1981) 149 CLR 27 (HC); New South Wales Bar Association v Muirhead (1988) 14 NSWLR 173 (CA).

25. Kioa v Minister for Immigration and Ethnic Affairs (1987) 159 CLR 550 (HC).

26. See eg Ansett Transport Industries (Operations) Pty Limited v The Commonwealth (1977) 139 CLR 54, 87 (HC).

27. See eg Macrae & Anor v Attorney General for New South Wales (1983) 9NSWLR 268 (CA) and Cf FAI Insurances Limited v Winneke (1982) 151 CLR 342 (HC).

28. See Administrative Appeals Tribunal Act 1975 (Cth).

29. D Pearce, "The Fading of the Vision Splendid?" in unpublished papers of a seminar Administrative Law, Prospect and Retrospect, 1987.

30. Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 (HC).

31. See South African Law Commission, Investigation into the Courts' Powers of Review of Administrative Acts, Working Paper 15, Pretoria, 1986.

32. See eg van Blerk, above n 10, 142-3; Forsyth, above n4, at 704.

33. Minister of Law and Order & Ors v Hurley and Anor, 1986 (3) SA 568(A).

34. See Associated Provincial Picture House Limited v Wednesbury Corporation [1948] 1 KB 223, 230 (CA).

35. See R v Inland Revenue Commissioner, ex parte Hillingdon London Borough Council [1982] AC 617, 641 (HL).

36. R v Pitje, 1960(4) SA 709(A), at 710-711(A).

37. Ibid, 710.

38. 1954 (1) SA 123(A) at 131.

39. 1967 (1) SA 263(A).

40. Discussed J Dugard, "Should Judges Resign?" (above n20) at 208.

41. R v Pitje at 710. (Steyn CJ with whom Hoexter, van Blerk and Ogilvie Thompson JJA and Botha A-JA concurred without separate reasons.

42. Unreported, Court of Appeal (NSW), 4 November 1988, (1988) 5 NSWJB 219, manuscript, 18-19.

43. Ibid, 23-24.

44. Ibid, 23.

45. Hon J Trengove SC, statement at conference of Legal Resources Centre, Johannesburg, South Africa, 13 April 1989. From recorded transcript.

46. S Ramphal, Foreword by the Commonwealth Secretary General, Mission to South Africa, The Commonwealth Report. The findings of the Commonwealth Eminent Persons Group, Penguin, Commonwealth Secretariat, London, 1986, 15.