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court do so merely in order to protect the interests of their clients – some of whom being victims of apartheid – and not to legitimise the system. This is no doubt a laudable practice. If the emphasis, therefore, is on coming to the aid of the helpless victim, I believe having blacks as judges is even more imperative. A legal practitioner only makes submissions on behalf of his client, but the person who takes the ultimate decision is the judge. If that is so, then there is all the more reason for calling for the appointment of black judges and more black magistrates.

A rejoinder to this argument is that if you appoint a black judge in the present legal dispensation you would be placing him in an untenable situation because he would have to apply unjust laws. That is not denied, but the question is whether refraining from having blacks as judges at the moment does improve the situation. In my humble opinion it does not. If we had a few black judges, they might express their views on certain unjust

laws. Moreover, they might influence their colleagues. One of the problems in South Africa is that the judiciary is all white and they have never associated with blacks on a level of equality as colleagues. Most of them have related to blacks on a master-servant relationship.

Problems for black judges

When blacks are appointed as judges before the system has changed they may well experience a number of problems. No doubt they would still have to apply some unjust laws. No one has suggested that the present judiciary should refuse to apply the laws of the land. It is their duty to do so. But the major complaint has been that some judges when confronted with a choice, do not give that interpretation which favours the liberty of the individual, but rather the one that supports the State. Moreover, so it has been contended, if they have no choice but to apply the

unjust law, then by all means they should do so. But then, as they have done in other less sensitive areas, they should make it clear that the law is unjust and discriminatory. They should not close their eyes to injustice particularly in race and security legislation. By failing to express their views on unjust laws, they are guilty of complicity in the whole episode. This also contradicts one of the tenets of a democratic society that judges must be the protectors of the rights of the individual.

Conclusion

Be that as it may, there is no sound and convincing argument against the need for appointing blacks as judges. Many of them are already magistrates who are applying some of the unfair laws of the country. Appointing blacks on the upper bench therefore is in my opinion no extraordinary step. The sooner that is realised the better. ■

Note: See also the Editorial 'Confidence in the legal system' (1988) 1(2) *Consultus* – Editor.

Press Statement Issued by the General Council of the Bar of SA on 2 February 1990

The General Council of the Bar of South Africa ('GCB'), welcomes the State-President's announcement that the law relating to the death penalty is to be drastically revised and that measures taken under the state of emergency, including detention without trial, are to be ameliorated.

The GCB recently called for an exhaustive inquiry into the death penalty by the SA Law Commission and has long urged that there should be an automatic right of appeal to the

Appellate Division against the imposition of the death sentence. The GCB has also consistently advocated the principle of discretionary rather than mandatory sentencing in criminal cases. It is therefore gratifying to note the Government's proposals to provide for the discretionary imposition of the death sentence only in extreme cases and for an automatic right of appeal in such cases.

The GCB has persistently opposed the detention of persons without trial as an infringement of the Rule of

Law, but welcomes the extension to detainees of the right of legal representation and a doctor of their own choosing, as well as the abolition of the principle of repeated periods of detention.

The GCB further welcomes, as essential for public confidence in the proper administration of justice, the appointment of a judicial commission to enquire into the alleged existence of a death squad responsible for the politically motivated murders of lawyers, amongst others. ■

ERRATUM

Op bladsy 76 van Vol 2 is berig dat die ABR (tydens sy 44ste Algemene Jaarvergadering) 'n besluit soos uiteengesit onder die opskrif 'Klagtes teen regters' geneem het. So 'n besluit is nie geneem nie. Die berig moes geleses het dat 'n voorstel met daardie strekking

voor die ABR gedien het maar dat dit uitgestel is na 'n dagbestuursvergadering van die ABR wat later sou plaasvind. Enige ongerief wat deur die foutiewe berig veroorsaak is, word betreur.

– Redakteur