Introduction

South Africa today is hurtling towards some or other form of non-racial democracy. Although much is uncertain, clearly the era of institutionalized apartheid has passed and White domination is soon to end. The old path of intransigence has failed. But even evolutionary change is fraught with difficulty. Violence is endemic. Polarisation between and within races is deep-rooted. Attempts to create some common ground (literally and figuratively) show this.

It is of course not unusual at junctures like these to seek new solutions, new strategies and new alternatives. Thus there is much talk of the creation of a special constitutional court or commission with general accountability to Parliament; of jettisoning entirely the present judiciary and of restructuring it afresh; of the reintroduction of the jury system; of the codification of Roman-Dutch law, and even of the survival or otherwise of that system.

Legitimacy of courts

At the end of the day, however, when the present political order is succeeded by a new order, and should the ordinary courts of the land be retained – with a power of judicial review – (as is portended by the situation in Zimbabwe and Namibia and in ANC and other debates), the present attitude of the South African people towards the courts will be crucial. For one thing, if the existing court structure is retained, the question of suggestions of a large-scale loss of legitimacy in the courts in the eyes of the masses, must be addressed. It is on this issue which I would like to focus.

Of course, if the considerable legal literature dealing with the South African judiciary's performance is taken as a criterion, one could be forgiven for taking it for granted that its track record in the field of civil liberties has been lamentable. Nor has the accusation contained in such literature of the judiciary's seeming ineffectualness been frequently rebutted, despite the tendency in such studies towards oversimplification, generalization, exaggeration, one-sidedness, and even, distortion. The reason for such omission, therefore, cannot lie in the fact that the allegation is irrefutable. Rather, the doleful reason – not unrelated to my own experience – lies in the controversy and sheer unpleasantness which joining issue with the little band of critics of the South African Bench entails. On the other hand I suppose, on the few occasions where such critics of the judiciary have been brought to book, the shrill shrieks of frenzied indignation which such criticism of them has elicited, has carried its own neutralizing antidote.

I must confess to remaining an unrepentant non-conformist. I still subscribe to the view that needless damage has been caused to the judiciary by unwarranted criticism and that if the courts are perceived to be unjust, as has been increasingly suggested over the last twenty years, at least some of the blame must be borne by those who contributed so substantially to it.

The allegations of a crisis of confidence in the courts has been endorsed by an Official Report of the Human Sciences Research Council. In terms of the latter Report, the various population groups in...
South Africa differ appreciably in their estimation of justice meted out in the courts – the Whites having the most positive impression, the Blacks the most negative, while the Indians and Coloureds fall somewhere in the middle of these two extremes. According to the Report, it is particularly in sentencing, that Blacks believe that they are discriminated against. The compilers of the Report did not commission new research on sentencing, but based their conclusions, that there was merit in the perception that the race of the accused has an undue bearing on the sentencing process, on statistical analyses which have appeared from time to time over the decades. It is on these statistical analyses which I would like, firstly, to focus in order to determine whether they justified the creation of a widespread perception of racial discrimination in sentencing.

Data inconclusive

Given that the South African Supreme Court has been racially exclusive, it was inevitable perhaps, as in the Southern States of America in the 1950's, that South African judges would come under fire of allegations of racial discrimination in the sentencing process. In this respect an immense input has been made in obtaining statistical evidence which could fuel the suspicion. Often, however, as I will attempt to show, the data was as inconclusive as the zeal, to demonstrate the point, was great.

Probably the first legal academic to venture into this contentious field was the late Professor Barend van Niekerk. For Van Niekerk, the statistics – often outdated, bolstered by probabilities, possibilities and assumption – were to become a recurring theme. So, for example, data given by Van Niekerk which are imprecise and frothy, to say the least, are the following: Probably 95 per cent of all executions since 1910 have been of Blacks; since 1910 there have apparently only been five executions of Whites for the murder of Blacks. [T]here has since 1910 been about 130 executions for rape, all but two being of Blacks. It is assumed by most observers that the vast majority, probably well over ninety per cent of these cases concerned the rape of White women by Black men. It seemed also that an expectant outside audience conducted to even greater generalization. Thus in New Orleans Van Niekerk stated:

First and foremost, the privilege of being hoist by the hang-man’s noose in Pretoria is, in purely statistical terms, that of the Black man . . .

In the ill-fated article of Van Niekerk, which earned for him prosecution – and acquittal – the picture of racial prejudice is blurred even more by the fact that no statistics were available at all in several specific periods of the overall period for which the data was extracted. Van Niekerk himself had conceded as much. When, on a previous occasion, I had drawn attention to Van Niekerk’s unwarranted assumptions, a reviewer, in the event also critical of the judiciary, while endorsing my views that Van Niekerk had gone further than was justified by the evidence, nevertheless attempted to excuse Van Niekerk by stating, somewhat feebly, that I had failed “altogether to come to grips with the character of Van Niekerk”, who, the reviewer said, was “ebullient, persistent, egotistical, irritating and often wrong . . .” One can’t have it both ways. One doesn’t have to do much analysis of this defence of Van Niekerk by that reviewer to learn about specious conceptions of impartiality.

Narrow focus

Then, too, attempts to demonstrate a trend by statistics, at best a contentious methodology, covering only two or three year periods, is too short to permit an unimpeachable conclusion. Yet, despite the narrow focus, the authors of such data are able to identify the seemingly built-in judicial prejudices. So, for example, according to Welsh, “(t)he sense of shock experienced by the judge in sentencing a White to death is likely to be considerably greater than in the case of a Non-White”, and, according to Hoernle, “(p)hysical violence by a White on a Black is more readily legitimized as ‘teaching the nigger to respect the White man’.”

In these years a tendency also existed of an uncritical, incestuous repetition of statistics produced in earlier writings. So, for example, statistical data, pre-dating the 1970's, has been used to substantiate allegations of racial bias in the late 1980's. This was pointed out by Mr Justice Coetzee to Professor Dugard at a conference organised by NICO. It is also difficult to avoid a suspicion of bias when a quote from Harry Morris, KC, dating back to 1949, that in South Africa the privilege of hanging is reserved for the Black man, is called in aid today as evidence of racial prejudice.

Needless to say, the over hasty and unwarranted averments of judicial racial bias based on imperfect statistical techniques were followed by a litany of vilification in the local and foreign press: for example, the stark accusation of one overseas commentator that, in South Africa, the death penalty is “used almost exclusively against Blacks”, or the comment of Columnist Bernard Levin that “[t]he enormity of the judge’s behaviour was not the deed of a wrongdoer but the result of a withered imagination made sterile by the South African osmosis”. Inevitably also, the significance read into the statistical information – both at home and abroad – were given provocative press headlines such as “Bias in the South African Courts: Apartheid Justice”; “Justice, South African-style!” or “Justice for All: A South African Myth”, and “Our Legal System faces a Credibility Crisis”. As one writer, acknowledging the validity of my attack on the unwarranted assumptions gleaned from the statistical data, stated, “(i)f mice will play with dubious statistics and if their play things are used as potent propaganda by others, the mice should realize that they are doing something fraught with danger and potential prejudice.” Recently also, Mr Justice Corbett has stated that he was often shocked by the unfair criticism of the South African courts which appeared in overseas publications. In this regard he stated that he found these misrepresentations and distortions a matter for real concern. But not only does it seem that the data on which the conclusions arrived at are insubstantial, either because the figures are incomplete or complete but for so short a period as to be undemonstrable of anything, a further weakness lies in what the limited analyses obscure. In the United States, increasingly in-depth empirical studies take into their sweep a range of alternative explanations, additional to race, which diminish the probability of racial considerations entering into sentencing patterns.

Harmful picture

The above debatable attempts to demonstrate racial bias in sentencing,
Role of judiciary

Rudimentary as the following explanation may seem, the oversimplification in the above terms, overlooks the unconventional form in which the judiciary operates under the Westminster system of Parliamentary sovereignty in the South African context. In its proper historical application, Parliament is assumed to represent the wishes of the majority of society and can therefore make any law it likes. Within such a system, the role of the judiciary is simply to interpret and apply the law. While such judicial deference to Parliament, with its built-in predisposition towards the status quo, may hold advantages in a democratic society, under a racially oppressive political structure, in which the views of the majority do not prevail, it renders the judiciary’s position highly invidious: If the wording of a statute is clear, the judge has no option but to give effect to it. Given the fact that, in the past, the South African Parliament has intended to curb individual liberty and, given also that Parliament has tended not to mince its words in its enactments, judges have had little option but to apply the law, however discriminatory, unfair or unjust it has been.

Nor is this view of omnipotent Parliamentary sovereignty “mere trade in discredited merchandise”, or confined to myself, or Government or conservative judges. Indeed, judges of impeccably liberal persuasion have emphasized it time and again.

To be true, where ambiguity or obscurity in the language of the statute permits, the courts may construe it, if it is restrictive in regard to individual liberty, to provide for the least interference with that liberty. The question which becomes acutely important here is, on what basis other than alleged personal political predilections of judges, does one judge find a restrictive statute to be crystal clear, which perforce means a finding against individual liberty, while another judge finds the same enactment sufficiently obscure or ambiguous to give a judgment in favour of individual liberty.  

JUDICIAL BEHAVIOUR

David Dyzenhaus has offered an alternative theory to that of Dugard which comes as an overdue change from the oversimplistic and, by now, rather threadbare liberal/conservative base to explain judicial behaviour. According to Dyzenhaus, mere executive-mindedness cannot explain a restrictive judicial decision. If a judge gives a harsh interpretation to a statute, according to Dyzenhaus, it is plain and simply because the judge has found no obscurity or ambiguity in the statute. The judge may come to his conclusion that the statute is not ambiguous reluctantly, but he regards himself as having no choice. The end served by the role-stricture is, of course, the judge’s mindfulness of his institutional role under Parliamentary Sovereignty. On the other hand, the judge who finds the same statute to be sufficiently ambiguous to find for the individual, more often than not, fictitiously imputes a will to Parliament which it in fact never intended. And one might safely add here that, inevitably, in such cases, Parliament, at its next session, has impatiently expressed its true intentions more vividly. Be this as it may, the important point to my mind, although not made by Dyzenhaus, is that choosing the one or other approach cannot be attributed to the different regard for justice of the judges. That the judicial regard for their institutional role under Parliamentary sovereignty is also not an affliction of White judges only, has been pointed out recently by Professor Amon Dlamini.

Unrealistic calls on Bench

My own criticism of Dugard’s work and of those who followed closely in his footsteps, is that their uncritical assumption that judges decide relatively unfettered by Parliamentary sovereignty, fosters the unfounded perception of a wider judicial choice than actually exists within the parameters of Parliamentary supremacy. Much of the debate about judicial performance which has been inspired by the work of Dugard has elicited from the often inarticulate premise that because South Africa is an undemocratic society, a greater responsibility has been placed on South African judges to protect individual liberties, than is shoulder ed by judges elsewhere. This seldom articulated premise has not been admitted by Dugard in the following terms: “In essence, we who call for
judicial activism are calling for a greater level of courage than that displayed by judges elsewhere." "This", he said, "we must acknowledge."

The danger of such unfounded and unrealistic calls upon the Bench lies, in my opinion, in the creation of the perception that it is the judiciary rather than an undemocratic Parliament which is the real culprit in the political impasse.

I make the above observations with a certain amount of trepidation. I remain aware of one academic's pique over a reviewer's opinion that my adverse assessments of unjustified criticism of the Bench demonstrate that, "if criticism of the Bench is not warranted, it becomes the stuff of ideological warfare rather than true scholarship".

Geographic differentiation

Having said this, I would like to point to what I see as some of the unfortunate consequences of the compartmentalization of assumed judicial attitudes into "liberal" and "conservative" categories. Time will only permit a brief discussion of one such assumption, namely, the trend in the criticisms to draw an inference that the Benches in the traditionally English-speaking provinces are more liberal than their predominantly Afrikaans-speaking counterparts.

Signs of the trend became apparent when the Appellate Division's reversal of the Natal Provincial Division decision in S v Meer elicited the view of Professor Mathews that it was a rebuke against "the aberrant 'boys' of Natal". By this, and other assertions of the greater independence of the Natal Bench vis-à-vis the other provinces, the critics may have created an impression of lack of independence rather than greater independence - ironically in the very statements asserting the liberalism. Thus, speculation that a judge or court will or does give anti-executive decisions may create the impression that the seemingly greater independence derives from the judge's identification with a prevailing popular cause, or at least a concern about how his decisions will be viewed, rather than that the judge, on the merits of the particular case, was simply able to find in favour of the individual. This it seems may be seen to be implicit in the assertion of one academic that the greater Natal liberalism is the reason that most civil rights cases are argued before that Bench. Unfortunate too, but inevitable, it seems, is the implication that a seeming unorthodoxy is characteristic of the Natal Bench in the statement of another academic that, "...Natal judges do seem to have a particular propensity for overcoming the apparent legislative will.

The play on the geographical differentiation at home has provided grist to the mill of the overseas journalist. The creation of a perception of a deliberate ideological challenge by the Natal courts is evident here too: So, according to one particular overseas journalist:

The driving force in judicial activism has been the Natal Provincial Supreme Court, in which Judge Didcott sits. For a decade, Natal's most liberal judges never sat on political trials. Virtually every political case went to a group of four conservative Afrikaner judges... By assigning a share of political cases to liberal judges, Justice Milne has turned South Africa's legal world upside down... But weighing in against the Natal liberals are a substantial number of conservative judges, most prominent among them the chief justice of the Appellate Division, Pieter J Rabie... (H)is conservative roots run deep in the Orange Free State, the most socially and politically conservative of South Africa's four provinces...

The "provincial" refrain has also been taken up by overseas lawyer-politicians. Thus Geoffrey Bindman, who has visited South Africa for the International Commission of Jurists on several occasions, has made the following one-sided representation. Again the insinuation of a deliberate side-taking by the Natal Bench does it no credit.

Mr Justice Milne, Judge President of Natal, is a prime example of the liberal and independent judge who no doubt deserves his Government and will do his best to find a way of acquitting the accused... The 22 defendants in the Transvaal have been refused bail, this time by judges who are ready and willing to follow Government dictates.

Deliberate side-taking

I have stated that the assertions of a deliberate side-taking by the Natal Bench could do that Bench no credit. Nor, and this is perhaps more important, did some of the judges singled out as virtually conducting a campaign against the political order see themselves that way. Thus Mr Justice Milne has stated with reference to the arguments of those urging the Bench to greater action, that they reminded him of the answer of Chief Minister Buthelezi to a group of vociferous hecklers that "those people who most strongly advocate a bloodbath are always those who are furtherest from the bathroom". Mr Justice Milne also stated with reference to the urgings that, "those who think like me are not afraid of the consequences, we are simply unconvinced that we have the heady power the critics would allot us".

In the same regard, Mr Justice Didcott has said: "Judicial endeavours have been made to keep the process of executive power under some sort of control... And this has been attempted by no wild unorthodoxy, by no splurge of adventurism..."

It is a pity when such one-sided representation as I have referred to, coming as it does from academic writers within the profession, creates perceptions which breed suspicion and disquiet to an extent that it is now alleged that the judiciary faces a legitimacy crisis. On the other hand, that indeed a low credibility rating of the legal system exists as regards other factors, I take for granted, for example, the high cost of litigation which makes the legal process unattainable to Blacks (and most Whites as well), insufficient legal representation, lack of courtroom communication and familiarity, and an absence of Black judges on the Bench.

New dimension

I would like finally to turn to yet another attack launched upon the courts which cannot have done the administration of justice any good. Highly ironically, this onslaught took the form of a diametrically opposite concern to that voiced about a large-scale loss of legitimacy in the courts. Here paradoxically the concern went over the very legitimacy which the courts had come to enjoy as a result of the fair measure of judicial victories which had been won. Again time will only permit a brief discussion of this new dimension to the battle.

Amidst the vigorous criticism of the judiciary and the seeming concern for its diminishing reputation, the Bench had continued to operate in an increasingly repressive context. In this process, it cannot be denied, through the instrument of Parliament's legislation, the courts were forced to implement injustice time
and again. But, during the same period, the courts had also decided against Government and, in doing so, had alleviated some of its harsher policies. Thus the courts had prevented the denationalization of millions of Blacks;29 prevented the forced removal of tribes from their land;30 allowed tens of thousands of Blacks to remain in the cities;31 ordered the re-building of squatter homes32 and, yes, even the Appellate Division in political trials, had ordered the release of detainees and curbed other executive excesses. Acting Chief Justice Rabie, after all, also gave judgment in the decisions in Minister of Law and Order v Hurley43 and Nkondo and Gumede v Minister of Law and Order.44

Now suddenly all of this was of no consequence. Indeed, on the contrary, the fact that judges had managed, sometimes, to do justice only made matters worse; because by their very success they lent legitimacy to the courts and, by extension, to the Government. The upshot were the calls for liberal or morally-inclined judges to resign their positions on the bench, because it was they, it was alleged, who lent the South African courts a veneer of seemingly undeserved respectability. The off-the-Bench calls of the liberal judge, coming as they did amidst the euphoria over the Natal liberalism and the-Bench calls of the liberal judge, were initiated so-called liberal judges were initiated by Professor Wacks, then of the University of Natal.45 The calls sounded the beginning of what was to become the most bitter round in the debate on the judiciary up until then.46 The attacks and counter-attacks tended to become disparaging and, at the end of the day, there was discord among liberal lawyers.47 More crucial though than the divisive aspect of the debate, was the insensitivity and, or, arrogance which lurked behind it.

Thus the question whether judicial victories lend a seemingly undeserved legitimacy to the courts must surely be preceded by an assessment of the extent to which the victims of the system have valued such judicial successes. Of course, to the extent to which they did, an aura of legitimacy was in fact conferred on the judiciary. The question which follows automatically then is, if legitimacy was so bestowed on the courts, why should this have been a cause for concern? The pertinent question then is, to what extent did potential litigants and accused turn to the legal system to seek relief? To date there has been meagre evidence of a denial of the jurisdiction of the South African Supreme Court by such persons. Exceptions do exist, but on the whole it seems quite apparent that such accused have almost always welcomed legal counsel — and, by implication, not questioned the legitimacy which judges might confer on the legal system. Even those individuals and organizations who deny the legitimacy of the State did not evince any reluctance to turn to the courts for relief. Indeed, that the South African judiciary can still look to an independent reputation is attested to, somewhat ironically, by the mushrooming of public interest groups and the fact that the last decade has been a record of mass civil rights litigation. In this regard it may be of relevance to quote Mr Justice Moloto's words to a Black Management Forum Seminar. Here Mr Moloto stated that it was of importance to remember that the opportunity must be created for the Courts to act. Therefore, he said, 'the more cases which are brought to court, the greater the opportunity'.48

The fact then, that accused under the emergency and race laws were prepared to take their chances in court does not seem to imply endorsement of the views of those who, purporting to speak on their behalf, called for the resignation of so-called liberal judges.

As I have stated the question which remains then is, if good decisions have served to legitimize the courts in the eyes of the victims of the system, why should this have been a cause of concern? If the majority of South Africans have concluded that some relief, some justice, is to be found in the courts, at least some of the time, so what? As long as people still embrace the idea that justice is to be obtained in the courts, is it incumbent on the armchair academic activist to attempt to persuade them otherwise?

The calls for the resignation of so-called moral judges came from a relatively sheltered sector of South African society, namely, the White academic institutions offering, let it be said, all the benefits of racial exploitation without any real decision-making responsibility. To say, as they did, that moral judges must resign in order that the courts be seen to be illegitimate, is to say that justice must not be seen to be done; that the majority of South Africans should remain ignorant of such justice as can be done. This does not give much credit to the views of those victims of the system who thought differently. But is this not, after all, typical of White South African racist paternalism? Small wonder there is a seething frustration among Black lawyers against White lawyers who, through opportunity and sheer weight of numbers, are seen not only to have insinuated themselves in a struggle for liberation which the Black lawyer essentially sees as his own, but are also seen as, 'people who are determined to perpetuate their position of power and omenence in the profession'.49 The feeling must be exacerbated when the views of the Black victims are not even correctly reflected or even elicited.

**Bill of Rights**

I have spoken about criticisms of the performance of the South African courts under apartheid and stated them to have been misguided, excessive and damaging. Undoubtedly, the attack on the Courts was part of the desire of White liberals to see as rapid a demise of the old political dispensation as possible. It is hardly surprising then, that the existing suspicion among Blacks to the appeals of Liberal Whites for a Bill of Rights has aroused in such liberals such righteous indignation. Yet it cannot be denied that the suspicion of Blacks is eminently legitimate, namely, that underlying the White man's desire for a Bill of Rights, is the fear of bestowing unfettered legislative power on the Black majority of the South African population. While it is justifiably arguable that Parliamentary sovereignty is a discredited doctrine in an undemocratic society, in a new non-racial, democratic South Africa, the argument cannot hold. After all, a sovereign legislature representing the will of all South Africans, would, in the best tradition of Western political circles, be regarded as impeccably liberal. Of course it can be argued, and indeed is argued, that unshackled legislative power - even in a democratic, one man one vote, constitutional structure - could be as oppressive as the regime which it will displace and that a change in victims does not make oppression any less obnoxious to those who embrace human rights.
But then White South African Liberals must be honest and not hide their fears behind the spurious argument that a racist White Parliament has debunked the theory of Parliament sovereignty universally. That perhaps White South Africans are not being entirely frank, is attested to by the fact that they have lost little time in drafting their Bills of Rights while paying scant attention to questions of redress and redistribution to which, as one author (who may now be quoted) has stated, “their liberal and lawyerly backgrounds ought to have made them more sensitive”. 50

It cannot be assumed that Black political support for a Bill of Rights is all-embracing. If the present support for a Bill of Rights among certain political Black groupings is based on expediency to mollify victimizing Whites, rather than from a deeply felt political conviction, it may be that the covert attempts by embattled White Liberals to transfer sovereignty from Parliament to the Courts, will be foiled. Thus should entrenched individual rights constitute an impediment to radical reform, this may provide a reason for jettisoning a declared commitment to a Bill or Rights. This would certainly accord with the coming and going of Bills of Rights. This would certainly accord with the coming and going of Bills of Rights. This would certainly accord with the coming and going of Bills of Rights. This would certainly accord with the coming and going of Bills of Rights.

FOOTNOTES

1 Law and Justice in South Africa (Pretoria 1986).
2 Ibid at 65.
3 Ibid at 63.
4 Ibid at 70.
5 See, for example, Gunnar Myrdal’s classic, An American Dilemma.
8 See Van Nierkerk “‘Hanged by the Neck until You are Dead’” (1969) 86 SALJ 457; (1970) 87 SALJ 60.
11 Hoernlé South African Native Policy and the Liberal Spirit (Johannesburg 1945).
13 See the Sunday Tribune of 26 January 1985. And of Morris The First Forty Years (Cape Town 1948) at 124-6.
15 Levin “‘Amid the Colour Blindness, A Vision of Hope’ in the Times of 30 July 1985. In all fairness it must be said that the acerbity of Levin in the above article has been far surpassed in his criticism of his own judges: See “Brother Savage” in the Spectator of 16 May 1985 and “Judgment on Lord Goddard” in the Times of 6 June 1971.
17 The Sydney Morning Herald of 30 October 1984.
22 For reference to a number of these studies, see Olmesdahl “Predicting the Death Sentence” (1982) 6 SACCC 201 at 201.
29 See Forsyth “Motes and Beams” (1989) 106 SALJ 374 at 376.
31 1981 (4) SA 604 (A).
33 See Dugard in the Financial Times of 10 September 1986.
34 See Hoexter (1986) 103 SALJ 436 at 446.
36 See Bindman in the Guardian of 28 October 1985.
40 Zone v Minister of Co-Operation and Development 1986 (1) SA 102 (A).
41 Komani v Banis Affairs Administration Board 1980 (4) SA 448; Oos-Randse Administrasie raad v Rikhoff 1983 (3) SA 595 (A).
42 Vena v George Municipality 1987 (4) SA 29 (C).
43 1986 (3) SA 568 (A).
44 1986 (2) SA 756 (A).
45 See Waaks “Judges and Injustice” (1984) 101 SALJ 266.
47 This latter aspect was apparent from the fact that in the ensuing debate, it seemed that it was at times precisely for lack of moral consciousness that so-called moral judges were derailed by so-called liberal academics. So, for example, one insinuation which crept into the debate was the allegation that moral judges could afford to choose to remain in office because they were spared sullying their hands with cases which arose under the unjust race and security laws since these were always allocated to those judges who had few qualms about hearing them. The utter incomprehensibility of the latter argument becomes glaringly apparent if one considers that it was precisely the liberal decisions of the moral judges in such matters which were alleged to lend legitimacy to the courts.