2. MORE VIOLENCE

The appearance on our political scene of the extreme right-wing Afrikaner Volkswag with its neo-Nazi trappings is disturbing enough – but no more so than other things which have been happening recently and which have enjoyed none of the hostile Press and Television cover which the Nationalists have thought it proper to afford the Volkswag.

Some years ago scarcely a week would pass without there being an attack on the home, office, motor-car, protest stand or public meeting of individuals or organisations which the Government regarded as being of 'the left". In one of those attacks Rick Turner died. Neither in his case, nor any others, was anyone ever caught. Then, with the departure of Mr. Vorster, things seemed to improve. There was even a trial in Cape Town, and some of the hit-men went to gaol. Now it seems all to be starting again, and spreading.

There has recently been a spate of attacks on the homes, cars and offices of opponents of the Government in Johannesburg, following much the same pattern as in the past. But at the University of the Witwatersrand, once a bastion of liberal tolerance, where anyone could expect to express controversial views without interference, there have been incidents of violence whose origins seem to range from the ethnic to the religious to the political. What could be more in conflict with the traditions of that great institution than that its campus should have come to this unhappy pass?

On the broader political front, in Johannesburg and other centres, supporters of the United Democratic Front have been harassed and manhandled while going about the perfectly legal business of collecting signatures and support for their petition against the new constitution. The deep divisions in Zulu society have again expressed themselves in violent terms. In early May, at a UDF meeting in Empangeni, Mr Archie Gumede, vice-President of the UDF, was knocked unconscious by, and had to be rescued from, a group which invaded the platform at a meeting he was addressing. Mr. Gumede's commitment to non-violence could hardly be stronger or his record of service to the cause of black liberation more honourable. That a man with his views and record should, at the age of 70, be treated in this manner is a disgrace to all of us. Elsewhere on the political spectrum students at the University of Zululand are reported to have marked Republic Day by staging a march on their campus which culminated in the burning of an effigy of Chief Buthelezi – an inherently violent and highly provocative act if ever there was one.

Political violence which once used to be almost exclusively the prerogative of the antecedents of the Afrikaner Volkswag (one of which was the Nationalist Party) is ne threatening to become endemic in other levels of our political activity. Not much can be done to persuade the Volkswag (one of which was the Nationalist Party) is now threatening to become endemic in other levels of our political activity. Not much can be done to persuade the Volkswag to see the dangers of this. Its leaders subscribe neither to the principles of non-violence nor those of rational argument. But this does not apply in the other areas where violence is increasing and we are entitled to demand firm action from leaders on all sides now, to ensure that their supporters practise what they preach. □

by DAVID UNTERHALTER

THE HOEXTER COMMISSION AND THE INDEPENDENCE OF THE JUDICIARY

The South African Government frequently claims its critics are unjust. Whatever the disfigurations wrought upon society by the byzantine legislative intrusions of apartheid, the judiciary remains independent of executive control. Judges usually affirm their independence as a self-evident feature of judicial office, unsullied by the taint of political partiality. Lord Diplock is perhaps representative, 'the administration of justice in our country depends upon respect which all people of all political views feel for the judges, and in my opinion that aspect depends upon keeping judges out of politics.'[1)]

The legitimacy of the judiciary in South Africa is rooted in this assertion of political neutrality. Confidence cannot rest upon proud assertions. Doubts as to the independence of the judiciary have been publicly aired, but caution prevails. Critics have generally made two claims. First, certain judges have been appointed on the grounds of political affiliation above merit and seniority. Secondly, certain judges are curiously vigorous in upholding the claims of the state in arguable cases where the rights of individuals are at stake.[2)]

The Commission of Enquiry into the Structure and Functioning of the Courts (the Hoexter Commission) was appointed on 29 November 1979. Its terms of reference were, to inquire into the structure and functioning of the courts . . . and to make recommendations . . . on the desirability of changes which may lead to the more efficient and expeditious administration of justice.' Many parts of the Commission's 583 pages will only be of interest to the legal profession and those concerned with the more technical aspects of the administration of justice. One of the matters taken up by the Commission which has a wider significance, is the relationship between the judiciary and the executive in South Africa.

JUDICIARY AND EXECUTIVE

The Commission points out that the independence of the judiciary is rooted in the constitutional doctrine of separation of powers. This doctrine requires the formal structural separation of the judiciary, the executive and the legislature. Notwithstanding the discharge of certain quasi-judicial functions, the Commission suggests that the doctrine is complied with in South Africa and other traditional safeguards are provided, such as security of tenure and qualified immunity from liability.

It is conceded by the Commission that these formal attributes of independence need not entail substantive independence. The view of B R Bamford is set out as follows:[3]

> 'All these safeguards, valuable as they are, touch only the periphery of the problem of judicial independence; without them the good judge remains incorruptible, and, with them, the weak and partial judge can deflect the course of justice. The only true and embracing protection to the citizenship is a proper method of choosing proper men'.3)

Evidence before the Commission indicated that 'the method of choosing proper men' betrayed an element of arbitrariness and merit was not always the decisive factor in making judicial appointments. The Commission quotes from a much publicized paper read by Advocate Sydney Kentridge in 1982:

> 'Over the past 30 years political factors have been placed above merit – not only appointments to the Bench, but in promotions to the appeal court . . . Fortunately such blatant political appointments have constituted a small minority of the Bench. But there have been enough of them to cause disquiet especially as this tendency has clearly not ceased.[4])

It was the opinion of the Commission that the legitimacy of the Bench would be gravely prejudiced if this suspicion about the pedigree of the judiciary was to continue. It was a finding of the Commission that it is essential for the proper administration of justice that prior to the appointment of any Supreme Court judge the Bench directly concerned should be consulted.[5]

The Commission recommended that 'before the Minister of Justice advises the State President in regard to the appointment of a judge in a provincial division of the Supreme Court, the Minister will be obliged by law to consult the Judge President of the division in which the vacancy occurs.'

It is, of course, significant that a Commission of Enquiry should concede that the independence of the judiciary in South Africa is not a self-evident fact. The Commission appears to have recognised the political motivations behind certain appointments to the Bench and the dangers of such a policy in a society where the majority of people have no access to political representation in Parliament.

There is an oddity in the recommendations made by the Commission. Recourse to political considerations in the appointment of judges does not simply taint particular judges who are appointed to the Bench, but extends to the whole system of selection.

The appearance of impartiality in the selection of judges is not secured by consulting with those who are the beneficiaries of office as a result of a tainted system. Furthermore, although Judge Presidents are men of robust independence, one cannot under the present system preclude the possibility of the appointment of a Judge President on grounds other than merit, thus perpetuating the very evil the commission hoped to remedy. It is rather surprising that the Commission thought the possibility of a more heterogeneous advisory body to have the least merit. The cause of legitimacy would have been better served had such a recommendation been made.

MERITS

A further unexplored assumption which runs through the considerations of the Commission is that there is some clear and obvious distinction between an appointment on the grounds of merit alone and an appointment which involves extraneous political factors. What exactly are the merits which will secure the appointment of 'proper men' to the Bench?

It is often claimed that our legal system upholds an immanent morality, enshrined within the common law, which represents the values of the community. Notwithstanding the statutory intrusions upon this morality which reflect the designs of the dominant political power, it is widely believed that the moral consensual core remains. It is for this reason that judges claim to speak for society when they settle disputes. The moral code of our legal system is said to stand for individual liberties when challenged by the state and ideally stands for the judicial virtues of impartiality and neutrality. Impartiality is the virtue of deciding a case by listening with equal attention to the arguments presented by each side, irrespective of personal views about the litigants. Neutrality is the virtue of upholding the immanent morality of the law which consists in the values of the community and not the private commitments of the individual judge.

An ancilliary aspect of this view is a tacit assumption that those members of the Bar who have risen to the top of the profession are imbued with the values of our legal system, especially the independence of the judiciary in countenancing the claims to individual rights in the face of coercive government authority. That the upper echelons of the profession are peopled with such individuals cannot be doubted, but it is not a necessary feature of such status. Since the

appointment of a person to the Bench is a decision reversible only in the most exceptional of circumstances, the wider the scrutiny given to candidates for appointments the better. Such scrutiny should not be confined to the professional peers of the candidates, but should enjoy a more public assessment. The real difficulty is to set out the criteria which ought to inform such scrutiny.

CRITERIA

The Commission is concerned with who should be consulted in deciding upon judicial appointments. A much more important issue is, as indicated, to specify the recognized criteria used in constituting the judiciary. It is a matter of difficulty and importance because it seeks to define the relationship between the exercise of legal authority and the democratic rights of people in society.

It is an extraordinary, though obvious, sociological fact that the judiciary is drawn from a limited social background. In South Africa judges are white and predominantly middle class and in England they are predominantly white and upper-middle class.[6] How important is this fact? If you believe in the idea of our legal system as a commonly shared bounty of values, then a 'good judge' is simply a person who embodies these values in the discharge of his duties of adjudication. Judges, on this view, do not need to be socially representative. What counts is adherence to the values of our law.

Many would doubt this view. The theory that judges are 'but the mouths which pronounce the words of the law'[7] may still be heard, but today it has no adherents among those who have given any serious attention to the act of adjudication. The sceptic would go further and question whether the law can be adequately understood as a store-house of well-tried principles invoked to resolve the novel disputes which come before the courts. Two positions are possible, though they are not exclusive of one another. First, in deciding novel disputes the applicable values of our legal order may conflict, leaving the judge a discretion to make a value judgement. Secondly, though the law may include certain values which win the adherence of most people in society, the structure of the law is skewed in favour of the powerful. The first position raises the problem of why judges should have the power to create rights outside the embrace of parliamentary democracy. The second position suggests judges are instruments of the prevailing social and political order, though they are not necessarily aware of this rôle. In both, the representativeness of the judiciary matters, because judicial decision-making ought to be democratic if it is to be just, and to be democratic ought to represent the diverse values of the society.

If neutrality, in the sense defined, is a pipe-dream, how can judges be made more representative? An important limitation must be recognised. Adjudication requires considerable technical competence; such competence depends upon an academic training in the law and, more controversially, upon professional practice. A pre-requisite for representative recruitment to the Bench is a positive strategy to open up academic and professional opportunities to Black persons and women.

SELECTION

How should selection be done to achieve representativeness?[8] The goal is to obtain public debate and participation in judicial selection, whilst ensuring technical competence and personal attributes other than a commitment to particular value positions. An evaluation of all the alternatives is beyond the scope of this article. Some of the possibilities are:

1. Direct election of eligible candidates by the community as a whole.
2. Nominations by political parties according to their strength in Parliament.
3. Selection by a committee appointed by M P's again according to their strength in Parliament.
4. Nomination by a number of elected political figures.

Difficulties may be raised about each of these suggestions, but they have a common objective. Instead of pretending that there is some way of choosing judges who will uphold and unproblematically apply the consensual values of the law, it would be better to recognize that judges make value-choices among legal principles and rather ensure that judges are representative of value positions across the social spectrum. In this sense, the judiciary may truly be said to be representative of the community.

Such a strategy isn't free of difficulty. Judges appointed in this way may not live up to the expectations of those who nominated them. Conversion to new creeds is not the sole preserve of religious belief. This possibility only heightens the importance of the distinction between a procedure of selection to encourage representativeness and the principle of accountability. The procedures of selection set out do not render the judge beholden to a particular constituency. Rather they hope to secure the use of judicial independence by a more socially representative Bench.

South Africa is not a country well known for its dedication to democratic principles. The legitimate exercise of authority depends upon such principles. This holds good for political power and judicial authority.

The rôle of the judiciary in a democratic society is an important matter and one considered by the Commission in a rather shallow and cautious way. Given the patent lack of democracy in South Africa, one would have expected the Commission to have made a more realistic appraisal of the legitimacy of the judiciary in a bitterly divided country. Instead the Commission demonstrates a rather hollow belief in a consensual legal order. □

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1. 396 H.L. Deb., col. 1367.
2. See E Cameron (1982) 99 **SALJ** 38.
3. 1956 **SALJ** 390
4. Commission p 60.
5. Commission Report p. 36.
6. J A G Griffith, **The Politics of the Judiciary** (2nd edn. London, 1981).
7. Montesquieu, **De l'esprit des lois,** Book X1, ch.6).
8. See J Bell, **Policy Arguments in Judicial Decisions** 1983 Oxford pp 256-64.