SPEAKING YOUR MIND ABOUT THE JUDGES AND THE LAW

FREEDOM OF SPEECH AND THE ADMINISTRATION OF JUSTICE. COLLEGE LECTURE UNIVERSITY OF NATAL PIETERMARITZBURG – 9 AUGUST 1978

by Barend van Niekerk

Perhaps my address here today will be seen by many as an apologia for my many sins as regards the speaking of my own mind about the Law and especially the judges. In a sense these persons will be right, I have the dubious distinction as some of you may know of having been in more trouble than perhaps any other academic in the English speaking world over speaking out about the law and especially the judiciary, and it may well be time therefore, belated as it may be, to justify my vehement indulgence in what I consider to be my basic right of speaking my mind, and the truth as I see it, about the administration of justice and about the law.

My fundamental proposition today and indeed the basic theme of my lecture is this: For a variety of factors, some of a legal nature, others of a societal and yet others of a psychological nature, we have the **socially catastrophic situation** today – that on a number of highly important concentrations of power there is a well-nigh total abdication, forced or voluntary, of critical responsibility on the part of those best able to shoulder such responsibility: the press, the legal profession and the legal academics. We have a situation where certain very important people who have in their mortal hands very important powers are for all practical purposes almost entirely removed from any incisive and meaningful scrutiny and criticism. As a concomitant to this situation we also have the situation that one of the traditional arms of government under the classical **trias politicas** concept is not at all sufficiently subjected to the cleansing and correcting and democratic control of free speech.

Now of course, inherent in what I have just said about the cleansing, correcting and democratic control of free speech and inherent also in my attack on the abdication of several critical forces towards the administration of justice, there is a fundamental built-in assumption. It is the assumption that freedom of speech is **good** for society, that it constitutes a **fundamental human right** and that it constitutes a **sine qua non** for the control of power and the avoidance of abuse of power. This is an assumption more easily stated than proved and it is one which is at the core

of the Western democratic ethos as it developed, painfully and haltingly, over the centuries. Most people, and certainly most people of liberal persuasion pay frequent but far too facile lipservice to the validity of this assumption. Whether or not this assumption holds true can ultimately not be determined with any scientific certainty but Western societies are predicated on the faith that it holds true and in their better moments they endeavour to act on that faith.

True and self-evident as most people in the West, and also in South Africa, and especially, in solidly decent and liberal quarters, regard this assumption in theory, there is a remarkable reluctance to extend the reach of that assumption to the most uncontrolled pocket of power in a democracy, namely the administration of justice and especially the judiciary. Concerning South Africa specifically I have no hesitation to state – and I state so on the basis of extensive research I have undertaken – that we have reached the situation, partly as a consequence of recent legal constraints and partly, and more tragically, as a consequence of the self-imposed social abdication of lawyers, academic lawyers and journalists, a situation of which it can be said that for all practical purposes the administration of justice has become enveloped in a shroud of wellnigh total silence on a score of crucial issues.

Now of course as any newspaperman will tell you it is the **law** – and especially the law of contempt but also of defamation – which has turned justice into that proverbial cloistered virtue'. And of course some of these newspapermen will not fail to point an accusing finger at me personally whilst stating that the trilogy of **Van Niekerk** contempt and defamation cases are chiefly to blame for this situation. Now of course, true as this may partly be, it is far from the whole truth and with your indulgence I wish to put the boot on the other foot and to transfer a major part of the blame for the situation we have today **upon** the **media, upon** the legal profession, and upon my fellow **legal** academics and indeed ultimately **upon you and me.**

Legal restraints on free speech such as contempt of court and defamation are not based on statutory provisions but on our uncodified common law. The importance of this is that courts cannot so easily, as they can with narrowly defined statutory provisions, put the blame for a restrictive approach on a legislature dominated by farmers, legal drop-outs and other petty crooks. Bound as they undoubtedly are by precedent, they have nevertheless effectively a well-nigh limitless discretion on issues such as contempt and defamation, especially when serious considerations of public policy are involved. When therefore they opted in that unfortunate trilogy of cases to snuff out crucial aspects of free speech in the legal domain. they were doing so willingly and without compulsion from the Legislature above. But I am not here to bury the courts, although I have certainly very little personal reason to praise them:

Indeed, much as I have criticised them in the past I wish today to extend to them a partial **exoneration** – (mind you, I emphasise, only **partial**) – and to transfer the real blame to those genteel and gentle forces of so-called liberal opinion in our society: the lawyers, and especially the academic lawyers, and even more especially the newspapers.

Judicial law-making on all issues but especially on issues relating to free speech and matters of obsenity does not take place in a kind of intellectual vacuum nor does it drop like manna from heaven, but it takes place within, and is formed, determined or at least conditioned by an intricate web of intellectual cross-currents and societal stimuli emanating from and operative within the society in which the judiciary operates. Put differently, the standards which judges ostensibly derive from some obscure nook of the law and with the help of some secret formula of legal alchemy, really come from you and me, including from your silence and mine. There is an old cliche which says that a society gets the government it deserves; it is a verity which applies much more strongly as far as the quality of justice in matters relating to speech is concerned. What we are reaping to-day is very much the product of the seed that you and I, and especially the press, sowed yesterday or *failed* to sow yesterday.

What this means now in relation to free speech concerning the administration of justice is the following. If judges for instance are regularly dressed down for their mistakes or their views, and if their decisions are subjected to the same kind of outspoken and even robust comment and critique as is reserved for other state officers, and if the individuals who get appointed to the Bench are put under the same magnifying glass as is reserved for other repositories of power, and if the administration of justice generally receives the kind of critical attention which it deserves in relation to its inherent importance, there can be no doubt that the critical and robust atmosphere which will spring up around this important pocket of semi-uncontrolled power will not fail to insinuate itself into the judicial decision making on all issues relating to free speech in the legal domain. Contrariwise again, if for whatever reason, whether it be based on psychology or social delicacy or simply social irresponsibility, an atmosphere of exaggerated discretion, mystification and of silence is thrown up around the administration of justice, this atmosphere will not fail to be adopted as the yardstick for the legal criteria generated by the judiciary. Let us not forget here a fundamental psychological truth, namely that no-one likes being criticized and that all institutions, whether it be universities or municipalities or individuals, prefer to sweep their weaknesses and their dirt under the carpet. It will be so also with a judiciary such as ours which in any event has

always snugly warmed itself in the sun of self-adulation and the adulation of others. When therefore our judiciary has to interpret legal restrictions on the basis of what is **reasonable** (whatever that may mean) or what is **fair** or what is **temperate**, they will almost invariably start with a subconscious supposition that *all* fundamental criticism of such a venerable institution is really undeserved and therefore unreasonable, and that the infrequency or absence of fundamental criticism will be a strong indication of the basic unreasonableness of such criticism.

Turning now to our South African situation, this is exactly what we have: we have an uncritical atmosphere in which judges and even sensitive issues are not subjected to more than peripheral criticism, if at all, as far as fundamental issues are concerned; an atmosphere in which judicial incompetence must rather not be mentioned, leave alone roundly criticized; in which blatant injustice must rather be played down if it is indeed referred to at all; *an atmosphere in other words into which the gusts of free speech must preferably not penetrate.* Do you think I am exaggerating the situation? Let us go back then first to a period of almost virginal honesty when the legal landscape was still unspoilt by the unseemly sight and sound of odd-ball professors stirring up the mud from the depths of the pool of the administration of justice, indeed before the contempt power was rediscovered. Here then is an extract from an editorial appearing in the most liberal South African newspaper, then and now, the *Rand Daily Mail,* on 5 January 1955, on a topic not concerned with, say, incompetence, racism or corruption but with the freedom of criticising the appointment *procedure* of Supreme Court judges. This is what the *Mail* said then in a statement which is even more relevant today after the judiciary, with the Appellate Division at the helm, have effectively put up the shutters around the Bench in order to protect it from the penetrating gaze of critics. I quote:

> *'No one who respects the dignity of the judiciary would lightly criticise the system by which judges are appointed. Clearly there is a danger that comment on this subject might give the impression that judges themselves were being criticised. That would be the first step towards undermining confidence in the Bench, a disaster that no sane citizen would court.'*

It is my pleasure indeed to introduce myself then here today as a very insane person who is not only willing but even very keen to court this ineffable disaster of questioning not only the system of appointment of judges but also every aspect of their performance and their quality.

Given now this basic philosophy on the part of the most liberal newspaper as regards critical reporting, can one be surprised to find that *where* really sensitive issues are involved there will be an almost absolute unwillingness to subject the judiciary to meaningful and outspoken scrutiny? Can one therefore really take the justification seriously that they are hampered by the contempt law in their scrutinizing functions when in fact there is possibly no real concern in the first place to rock the boat in really controversial issues? But moreover, can we really be astounded when we find that courts when called upon to strike the very delicate balance between conflicting interests in speech matters and to draw the lines between legal permissibility and impermissibility in such matters, that they would as a matter of practical psychology draw the lines and strike the balance in such a way that *less* rather than *more* speech freedom is permitted as regards criticism in which either they themselves or their natural habitat, the legal system, are involved?

If that editorial of 1955 may not be so easily repeatable in the less honest intellectual climate of today, it must at least be conceded that the unspoken premises on which it was based are today as strong as they ever were. Do you often read criticism in *your* newspapers of the appointment or promotion of judges, not to speak of magistrates? Do you often see analyses of the possible obtrusion of the racial factor in sentencing or judicial law making? Or do you perhaps (together with our silent press) assume that the obtrusion of such racial factors is inconceivable? And did I by any chance miss out on an editorial scrutiny here in Maritzburg on the qualities of the chairman, say, of the judicial commission of enquiry into the Soweto riots? Surely by definition this was the most important such commission ever to have sat in South Africa. Although I am sure that the particular incumbent would have passed such a scrutiny with flying colours, it still does not of course mean, I should like to think, that such a scrutiny must not be undertaken in the first place. On all these and many more issues relating to the judiciary we either have silence or meaningless comment or, what is worse, an outpouring of effusive praise-singing not reserved for any other profession or group of mortals, not even for men of the cloth.

And when criticism is voiced – and it is often voiced – it is directed at symptoms rather than structures, at trivia rather than essentials, at peripheral rather than basic issues. So for instance you would often find academics and newspapermen blowing off their tops, and quite correctly so, about abortion laws or the pass laws and in so doing create the facade – or is it charade? – of being wedded to a critical approach to law, whilst leaving aside matters such as class justice, racisms, judicial incompetence and the like which may perhaps also be operative within the vast structure of the administration of justice.

Now of course, like in many other things some good and some bad we have inherited much of our speech attitudes from the English including the veneration of any person, whatever his personal merits, who wears judicial robes. Also the legal sanctions which we have such as contempt of court in the form of so-called scandalising the courts and the *sub judice* restrictions have insinuated themselves into our legal system via the English law. A decade ago two English writers described the English situation as regards the veneration of judges and the revival of the contempt power as follows:

> *'Once the power had been reinacted the judges seemed to take pleasure in using it. Within a decade the criticism of judicial behaviour which had been so outspoken was replaced in the press by almost unbroken sychophantic praise for the judges.'*

And later:

> *'As the judges removed themselves from sensitive areas where their discretion or law-making activities had previously been obvious, criticism of the judiciary, which earlier in the century had been open, began to disappear. The absence of criticism was partly the result of the development of what many felt to be an excessive power to commit for contempt of court those who criticize judges . . . the general absence of criticism ensured that even bad judges were protected from any sort of criticism.'*

(Brian Abel-Smith and Robert Stevens *Lawyers and the Courts. A Sociological Study of the English Legal System 1750 – 1965 (1967)* at 126 and 289).

Although there are still important remnants in England inhibiting free speech as regards judges, there has been a slow but very pronounced shift away from invoking the contempt sanction for criticism of judges. Independently of this shift in constitutional practice there has been a greater willingness on the part of the newspapers to *break through* the suppressive barrier of taboos surrounding the judiciary and in so doing also to challenge the law. As a joint committee of British lawyers and pressmen put it in 1965, in words which I would like to commend to our own press and academic journals:

> *'We support the view of one editor who said that if a*

criticism needed to be made, the Press should have the courage to make it and risk the consequences.' (The Law and the Press (1965) 17).

The same committee also emphasised in the same breath something which needs particular emphasis in South Africa especially when our Press is compared to that of Britain and America. It stated:

'A large measure of responsibility rests upon the Press to keep a constant watch on the proceedings in the courts at all levels and to make such criticism as appear necessary in the interests of justice' (idem).

The fact that there have at times been some editors in England who have been willing to publish 'criticism which needed to be made' has not failed to influence the law, and the greatest judicial blow for this right of the citizen to indulge in robust and even misguided criticism was struck in the case of Mr Quintin Hogg (now Lord Hailsham and later, by a nice quirk, to become Lord Chancellor who is in charge of all judicial appointments). Writing in *Punch* Mr Hogg directed scathing criticism at a particular court for a particular line of decisions. Unfortunately, as can happen to the best of us, his critique was directed at the wrong court. Acquitting him of contempt Lord Denning in effect furnished us with the basic philosophical objection to a restriction of robust comment on the judiciary, an objection which has indeed become an invitation to the press to scrutinise the administration of justice with greater and more robust fearlessness. This is what he said:

'Let me say at once that we will never use this jurisdiction (to punish for contempt) as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself . . . We must rely on our conduct itself to be its own vindication (R v Com. of Police of the Metropolis: Ex Parte Blackburn (19687 2 All ER 319 AT).

The idea that judges and other officers of the law must rely on their conduct to be their vindication is one which is easily stated but seldom applied, and in South Africa this notion is totally absent as an article of faith within our judiciary. But, I am not here to flog that favourite old hobby horse of mine again but rather to indicate where *you* and *I* have gone wrong and what we can do about the vital matter of increasing the scope of free speech in the legal domain.

Now this emphasis of free speech by Lord Denning and his colleagues did not come about as painlessly as it may seem, and it actually follows a line of decisions where indeed every effort was made to prop up the dignity of sensitive judicial souls with the sting of criminal law. But it did follow a period during which sections of the press re-asserted their basic right to scrutinize the judiciary in outspoken terms. As an example of the kind of criticism which, at times, has to be made and which is made in England – and I should stress that by comparison judicial criticism in America and in Germany can be much stronger than is customarily the case in England – I can do no better than to quote from an article by the inimitable Bernard Levin who regularly writes in iconoclastic terms in the *Times*, writing however in this instance in *The Spectator* of 16 May 1958; a full decade before the *Quintin Hogg* case at a time when the sting of contempt was still very much alive and when there was an even greater reluctance than today to topple the fat holy cows from their gilded pedestals. He was writing about none other than the Lord Chief Justice, Lord Goddard. As I now read a few extracts from this article – in actual fact a book review – consider just three things: first, should the mention of these sentiments if true, (as they undoubtedly were) be permissible; secondly, if so, can you imagine for one moment that only a fraction of this legitimate criticism can be directed at, say, our own chief justice or any judge for that matter; and thirdly, do we not also have our own Lord Goddards? And remember also that this was not written in a scurrilous student newspaper but in a serious high brow journal:

'It is true that Lord Goddard's law is generally quite good; though he is far from being one of the great jurists, The trouble with Lord Goddard begins precisely where his law books end; in so many of the things, apart from knowledge of statutes and case-history, which a judge ideally needs, the present Lord Chief Justice is woefully deficient. Most notorious of his blind spots is his astonishing ignorance of mental abnormality . . . Along with this deficiency goes the girlish emotionalism which seems to be his only reaction to such subjects as capital and corporal punishment.

In detailing to the House of Lords, during one of the debates on hanging, two particularly dreadful cases, he said of one (in which a man had raped and mutilated an old woman whose house he was burgling), "The prisoner, thank God, was not a British subject". . . . What is so alarming about this kind of emotional spasm is not that anybody should be so silly as to imagine that terrible crimes are more terrible when committed by British subjects, nor even (though this is bad enough) that these remarks should be made by the premier judge on the English bench. What is so shocking about it is that Lord Goddard's citing of these examples was prefaced by the astounding assertion that they were examples of murders "where there is no question of insanity". That anybody in any judicial position at all should be so blinded by his feelings so seriously as to believe that men capable of such acts are men in whose make-up "there is no question of insanity" would be deplorable; that a judge of Lord Goddard's rank should cleave to such fantastic beliefs is indeed a wretched blot on the English legal system, far out-weighing such trivia as, for instance, the appallingly indiscreet vulgarity of his speech at a Royal Academy Banquet, in which he made puns on the two meanings of the word "hanging" (and also, one might say, of his speech to the Savage Club, much of which seemed to be taken up by an interminable tale about a man who made lavatories), or his curious liking for what the authors of this study call "masculine" or "belly-laugh" stories, but which most of us know as dirty jokes.

And indeed, on the question of insanity in murder, Lord Goddard walks hand in hand with ignorance on one side of him and barbarism on the other . . . Still, it would be idle, even if agreeable, to maintain that Lord Goddard is, as far as general opinion goes, anything but typical. Muddled, narrow, overwhelmingly emotional, with a belief, the roots of which he is a thousand light-years from understanding, in retributive punishment and the causing of physical pain to those who have caused it to others – in all this he represents only too well the attitudes of most people in the country whose juduciary he heads. Perhaps every country gets the Lord Chief Justice it deserves.'

I come to my plea and my basic message. What I am arguing and pleading for in effect is for a more incisively critical role and attitude on the part of the press in the first place but also on the part of the informed sections of the public towards the law and towards the personalities within the administration of justice. If we are serious about liberty we can never be serious enough about keeping every aspect and every personality within the legal administration of justice under the closest and the most incisive scrutiny since it is on this level of government, it is trite to say, where a large part of the edification and the erosion of civil rights take place, it is on this level where substance is given to any

right which we regard as important. And when rights are eroded or lost it is only a vigorous policy of free speech which will ultimately – at least so we must believe – keep the faith in their revival alive.

I have, as you have no doubt noticed, handed out a few subtle and not so subtle hints about the failure of our press to give the leadership in this field of civil rights because it is the press more than any other institution which sets the tone and creates the atmosphere which ultimately rubs off onto the legal system. Of course the press acts really on your behalf and on mine and you and I and our society will ultimately get the press we deserve. But apart from the press, as far as the administration of justice specifically is concerned, it is the lawyers who for want of any better qualified group must give leadership, yes critical leadership, in this regard and who must verbalise society's expectations that this arm of government must also be subjected to the cleansing operation of vigorous dissent. We find of course nothing of the sort or at least we find very little in the writings of lawyers as they appear in their journals which adequately reflect the inadequacies of our legal system and which keep our judges, either personally or as group, on their toes. And here I must in the first place direct my critique to my own profession – the academic lawyer.

For a variety of reasons which I cannot deal with here I have given up hope about ever getting vigorous dissent and creative leadership from the judiciary and the practicing profession. Individual judges and three successive chief justices have time and again said they cannot and will not speak up on fundamental issues of justice which raise controversy or which involve political issues. But there is surely no reason, other than fear, cowardice or intellectual laziness dictating why academic lawyers do not at times say what has to be said and, if need be, take the consequences. Now there are some who speak in this vein but they are very few and very far between. The symptoms of this social abdication are there for all to see. I mention but two which are easily documentable. First, at not one recent law teachers' conference has there been a discussion of the attenuation of the academic's right of free speech in legal matters and at our most recent conference there was literally not one single contribution which concerned itself with fundamental issues of justice, which approximated controversiality or which just hinted that all in our legal system was perhaps not entirely honed to the achievement of fundamental justice. Instead we saw the collective legal academic conscience listening spell-bound without any dissent to a leading star in the firmament of Natal attorneys saying in so many words that there is not really a place for idealism in the teaching of law.

Secondly, take our legal periodicals, as I have done, and you will find over the last decade literally only about 4 articles in the *South African Law Journal* and not a single one in the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* which according to any reasonable international standard one can call controversial and/or outspoken as regards sensitive issues relating to the judiciary. Do I have to remind you of what has happened over the last ten years to our law, how rights have been diminished and eradicated and how freedom has been lost in so many of its quintessential aspects? You will search in vain if you search the pages of the law journals for a fundamental dissent on these issues.

And so you and I, and especially I and my academic legal colleagues – do our own little thing in stoking the fires of suppression by our failure to speak about so many aspects of our administration of justice; we allow our own holy cows and our own Lord Goddards to continue to graze on our legal pastures, with every day of silence ticking by we make it more difficult to reverse the trend, we make freedom of speech concerning the administration of justice more onerous and we make life easier for those who wish to suppress it. Freedom of speech which is not consistently and creatively used does not just remain in a state of hibernation but it decays and it decays in such a way that you don't even know about it. So for instance tomorrow, when you read your morning newspaper over toast and ham, you will not know and you will not be told that there is a vast concentration of power in our society about which you will not be informed. You will no doubt from time to time continue to nod approval when effusive praise is heaped on our legal system, not really caring about the fact that you cannot test that praise for its inherent validity and veracity on the platform of vigorous debate and robust dissent. What you will be doing and what your press will be doing and what your law faculties will be doing, will be to praise, in the words of John Milton 'a fugitive and cloistered virtue'. And this is the situation today as regards our administration of justice. We do in fact what John Milton said he could not do when he wrote as follows in his *Areopagitica:*

> *'I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where the immortal garland is to be run for, not without dust and heat.'*

In 1936 in one of the great judgments of our age – it was on contempt of court – an English judge, Lord Atkin, echoed this sentiment specifically as regards the administration of justice in words which are often quoted but seldom pondered and more seldom applied in the letter and in spirit:

> *'Whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice . . . Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.'*

If I plead here for anything, I plead for the same kind of *healthy disrespect* for the law as we display to other concentrations of power – with emphasis, I hasten to add, on the word *healthy*. If there is one place where there should be room for people to mention the unmentionable and to question the unquestionable in the administration of justice and elsewhere, it should be the universities and, especially, the law faculties. Instead, however, I see a whole new generation of law students arising, easing themselves into the legal profession and also the universities, who have *not* been exposed to fundamental criticism on scores of legal issues and I can only be reminded of the withering condemnation of N. P. van Wyk Louw when he wrote as follows in his *Logale Verset:*

> *'Opstand is net so noodsaaklik in 'n volk as getrouheid. Dit is nie eens gevaarlik dat 'n rebellie misluk nie; wat gevaarlik is, is dat 'n hele geslag sonder protes sal verbygaan.'* □