by RICHARD LYSTER

THE ROLE OF LAW AND LAWYERS IN AN UNJUST SOCIETY - CURRENT TRENDS

Lawyers continue to be regarded by the majority of South Africans as an extension of the broader establishment – elite, expensive, and, by and large, in favour of maintenance of the political and social status quo. The daily contact that thousands of people have with the law in its widest context, is hardly likely to promote a positive attitude in the minds of those on the receiving end: arbitrary arrests and imprisonment, random pass searches and impromptu road blocks at the hands of an increasingly aggressive and hostile police force, callous and indifferent treatment by prosecutors, magistrates, and commissioners who every day sentence thousands of unrepresented persons to prison terms or fines for 'offences' no more serious than failing to carry a reference book, frequently violent treatment at the hands of warders in grossly overcrowded prisons – all experiences which lead to the rapid alienation from the state, its laws and its law enforcement agencies. Not surprisingly, a common perception of the lawyer in a society that cries out so desperately for protection and help against oppressive laws and brutal law enforcement, is that of a cynical opportunist, living off the misery generated by the establishment to which the lawyer belongs.

The lawyer naturally sees himself differently. He must of necessity, ply his trade within rigid professional limits, obey the rituals of procedure, dress with decorum, operate from an urban base – all factors which generate expensive overheads which the lawyer in turn looks to his clients to pay. He has, by a simple process, become part of the elite.

The scepticism with which lawyers are regarded is further enhanced by the nature of the laws with which they deal. To their credit, a sizeable minority of South African lawyers have aligned themselves closely with the unenfranchised majority in this country and have doggedly fought to prevent the complete eclipse of the few rights and privileges which Black South Africans enjoy. They have been harassed every step of the way and what little gains have been made in the Courts, have frequently been simply over-ridden and side-stepped by the Legislature. Legal loopholes have been closed whenever they have been exposed, leaving lawyers powerless and frustrated. A good example is the Black (Prohibition of Interdicts) Act of 1960. It was passed largely in response to a series of successful legal actions instituted in the 1960s by Blacks in townships around Johannesburg, who were being forcibly removed from their homes by the agents of the new apartheid Government. Interdicts, a potentially powerful legal remedy, were brought to resist removal, causing great frustration and embarrassment to an administration imbued with the righteousness of its distorted cause. The answer was simple – remove the common law right to Blacks to bring interdicts in regard to removals and housing. The cynicism behind legislation of this nature defies easy comparison.

GAINS

Despite this, lawyers have traditionally assumed leadership roles in the various forums of the struggle against the successive repressive regimes in South Africa – largely because the law has been considered one of the few platforms outside of unlawful violent activity, from which positive gains have been made in the context of social and political change in South Africa.

But how important are these gains? With what relevance should one regard them, considering the supreme power of the South African state and its pervasive relentless ideology? Some recent legal conflicts allow us to analyse the importance of legalism as a forum for change in South Africa.

The cornerstone of the Government's urban Black policy is the Urban Areas Act of 1945. Its basic aim is to keep, in the cities, a stable, functional population of employed and employable Blacks, to man industries, mines and essential services, and to generally perform those unskilled and semi-skilled functions considered to be beneath the dignity of Whites. Section 29 of the Act is one of the methods of removing from the urban areas, persons who are performing no 'useful' function and who are or who have become, in the eyes of the law, 'idle' or 'undesirable'. The section has no equivalent in any Western system of jurisprudence and is widely acknowledged to be a particularly drastic piece of legislation with often horrific social consequences. The Act empowers a commissioner to declare people who have been unemployed for a particular length of time to be idle and undesirable, and to send them to be detained at places which amount to prison farms for up to two years, to do hard labour. The commissioner's decision is subject to Supreme Court review. In the past, the courts have fairly consistently 'rubber stamped' the decisions of the commissioners. In 1982 almost 3 000 people were 'removed from the urban area in this way.

In June, 1983 the Supreme Court, in reviewing the decision of the Durban commissioner to declare a woman idle and undesirable, placed a different interpretation on the section, which would have the effect of requiring a commissioner to decide whether a person was within the ordinary dictionary definition of the terms 'idle' and 'undesirable', and not according to the technical definition which had been used by the commissioners in the past. The decision was received as a landmark judgment; and indeed, if properly

applied as a precedent, the judgment will have the effect of drastically reducing the number of people who are subject, each year, to the possible consequences of the section's application. Clearly, the decision does not affect the substance of the Act, and may not do so. It is as well to bear in mind that the Constitution Act provides that no court of law may pronounce upon the validity of any Act of Parliament. Thus, any law, no matter how discriminatory and partisan, is rendered unassailable by the stroke of a pen.

WIDE POWERS

The State President, Ministers, and administrative bodies and office holders, are often given extremely wide powers by statute to make decisions, rules and regulations which directly affect the lives of others: so-called 'executive legislation'.

Because of the wide powers conferred, those exercising the powers are often required, prior to making decisions materially affecting the lives of others, to apply what may be generally called the rules of natural justice, i.e., the obligation to give the persons affected a fair hearing, to allow them to be represented, and to put forward their version of the events, before some form of independent or non-partisan tribunal. Administrative officials are also, in terms of the laws that create and control them, obliged to perform certain duties and to do so reasonably and timeously. A pension official is, for example, obliged to consider an aged person's application for a pension and, if certain requirements are fulfilled, to pay the pension.

Administrative officials frequently act in total disregard of their obligations and introduce an element of personal or bureaucratic discretion into their roles, creating the firm impression that public office is synonymous with stagnation, corruption, and the right to control and to dispense largesse at will.

The administrative powers and responsibility held by certain pension officials in Natal, officials of the Unemployment Insurance Fund, officials of the Department of Education and Training and certain officials in control of certain Black townships in Natal, have recently been the subject of vigorous litigations following on either their failure to fulfil their administrative roles, or their acting in disregard of the limits placed on their powers. Large numbers of Supreme Court applications have been brought by affected persons against the KwaZulu pensions authorities for non-payment of social pensions and unlawful suspension of pensions. None has ever been challenged by the Respondents and the department concerned has just launched a commission of inquiry into pension matters, calling upon interested parties to submit recommendations to facilitate the functions of the department. Similar sustained legal action was taken over the plight of workers against an inefficient, ineffective, and understaffed U.I.F. office in Natal. Again, no cases were ever successfully defended and indications and assurances from the Fund now show that extensive steps have been taken to improve and streamline the operations of the Fund in Natal to ensure the achievement of its prime function, viz., the timeous payment of benefits to unemployed people.

Successful legal action has been taken this year, on several occasions, against particular township administrations following arbitrary and unlawful evictions of people from township houses.

Seen in their context, these decisions of the Supreme Court may be regarded as particularly important, regard being had to the dangers inherent in placing the control of extremely limited and highly sought after resources, i.e. housing, in the hands of relatively minor administrative officials.

Similarly, legal action has prevented arbitrary and unlawful attempts by school and university heads to expel students and staff, and been used against education officials who withhold examination results from students.

The number of cases that reach court is miniscule when looked at against the number of administrative officials exercising power, and the number of arbitrary and unlawful decisions made by them, but there is no doubt that as test cases, with the attendant publicity, wasted legal costs, departmental admonishing, etc., they usually have a disproportionately affirmative effect.

INDUSTRIAL COURT

With the establishment in 1982 of the Industrial Court – a statutory tribunal which deliberates on labour disputes and is designed specifically to encourage disputes' settlement by lawful means rather than by resorting to strike action, – Natal has been the site of some protracted legal battles between unions and employees on the one hand, and employers on the other. The legal field of industrial relations is a new and burgeoning one and the participants are eager to make new law through the courts. Although the state has traditionally shown an open bias towards capital in its clashes with labour, and has freely made available to embattled employers its coercive agencies in the form both of the security and regular police, the Industrial Court has introduced an element of neutrality to the struggle between the two groups, and has, to a degree, detracted from the doubtful benefits of strike action.

The recent judgment handed down by the court in the case of **M. Khan and Others v Rainbow Chickens** represented a fundamental limitation on the rights of a large corporation to treat its employees at will. The company had always regarded itself as a farming operation for obvious financial and tax policy reasons, as well as for the vital exclusion of farming operations from all laws and statutes that provide protection for employees in the work place and which lay down minimum conditions of employment and wages. Despite the fact that it is, in nature and operation, an obvious industrial operation operating in an industrial township, Rainbow perpetuates this fiction. In February this year, seven young workers were dismissed for refusing to do overtime. They challenged their dismissal as unfair and applied for reinstatement. The Court reinstated them and classified Rainbow as an industrial concern rather than an agricultural one, thereby fundamentally affecting the position of the many hundreds of other employees in the giant concern. The effect of cases such as this is of particular note for the organised labour movement which thereby vicariously gains confidence and is able to demonstrate to individual members of the working class that they are, in some measure, able to direct the forces that control them.

Denied any other form of viable expression, the Black working class has, in the Industrial Court, a potentially powerful and effective means in its attempts to achieve a greater degree of autonomy and expression in a society geared and conditioned to the continued subjugation of that class.

The recent decision of the Natal Supreme Court declaring unlawful the detention of several UDF and NIC members, is also seen as significant, and encourages the belief that our judicial system is independent, is in favour of upholding the rule of law and will not rubber-stamp the decisions of the administrators which are based on narrow sectional interests. Irrespective of whether this is true or not, the impression that it is independent is essential for its continued use by organizations and communities seeking to advance their interests in the short term.

OPPOSITE VIEWS

In conclusion, it is necessary to emphasise a most fundamental contradiction which arises when debating the issue of the judiciary in contemporary times. This involves looking at two diametrically opposite views of the courts as a site of struggle.

The social relations of racial capitalism that exist in South Africa today are basically unjust. The courts are, according to this view, an extension of the coercive influences of the state, and apparent 'independence' merely serves to legitimise the state locally and internationally and to detract from the real **locus** of the struggle – the community, the trade union, the progressive church. The opposite view, legalism or reformism, proposes the notion that the law is neutral and is capable of benefitting the masses provided all people are given equal access to the courts and to lawyers; i.e. access to law will resolve the conflicts in society.

Both views may be criticised – the former is essentialist and entirely non-pragmatic, ignores the important gains made by the disenfranchised communities in the courts and places them in direct confrontation with the establishment. The latter is probably more dangerous. It reflects a naive faith in the neutrality of the courts and their ability to bring about change. The excessive use of the courts as a forum for change often results in decisions being imposed on persons or communities which they could otherwise have successfully resisted. It de-emphasises the importance of grassroots community organisation, suppresses local democratic leadership, and places undue faith in professional experts who have very often no links of any sort (other than financial ones) with the community, and generally removes the forum of the struggle from the community to the court room – often in vain. The courts must be seen in perspective – if they posed a serious threat to the ruling order they would undoubtedly be curbed.

Between the two a pragmatic and strategic path can be taken. The assistance of the courts can undoubtedly be usefully sought by people and communities. The attendant publicity of a successful court action can regenerate the confidence of a community. Popular strategic gains can be made to show that conflicts such as those waged between unions and intransigent capital can be usefully resolved with obvious benefit to organisations. One has in mind a recent action taken by a large Black union in Durban. It was refused permission by the Chief Magistrate to hold an open air annual general meeting. The Supreme Court overruled this refusal and the meeting went ahead. University of Zululand students unlawfully expelled by the Rector, recently took successful court action to bring about their reinstatement and the setting aside of their expulsion.

If the decision has been taken to seek relief from a court of law, it is equally important to consider the effect of an unpopular verdict upon an expectant organisation or community: i.e., frustration, disillusionment and increased potential for confrontation. This spectre should serve to remind those actively engaged in the struggle for a just society of the need to act pragmatically, and to retain an organised community as the real basis for change. □

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