HAVE WE GOT USED TO IT?

by W.H.B. Dean

Our daily average prison population in South Africa during 1972 was 91 253 persons. The Department of Prisons has estimated the cost of each prisoner as being R1,82 per day making the total daily cost of maintaining our prisons R178 000. At much the same time an average of 71 persons were hanged annually in South Africa while in 1972 4 536 strokes were inflicted upon male adults convicted of a variety of offences. No figures are available for corporal punishment imposed on male juvenile offenders but according to one authority: "No less than . . . . 57% of those convicted (in the juvenile courts in Cape Town in 1968) were whipped". These figures by and large represent the response of the Rupublic's system of administration of justice to the growing crime problem. The following figures for the Cape Peninsula give some idea of the magnitude of this problem. In 1974 there were 1 284 criminal homicides in this area as compared with 860 in 1973. In four of the Coloured townships (with a total population of about 327 000) around Cape Town the following crimes were committed in an eight-month period during 1973/74: 91 murders; 201 rapes; 2 585 assaults; 941 burglaries; 565 robberies; 1 198 cases of malicious damage to property; 2 131 thefts; 294 dagga offences and 4 269 drunkenness offences.

It was with statistics such as these in mind that members of NICRO* and the Law Faculty at U.C.T. decided to hold a conference in Cape Town in April this year on the subject: "Crime, Law and the Community". Measured in terms of numbers the conference was a tremendous success. It attracted participants from the United States, the United Kingdom, West Germany, Israel, Lesotho, Rhodesia and Swaziland. It was attended by over 320 delegates from all over the Republic and attracted considerable publicity throughout the country.

It was primarily a lawyers' conference and was, therefore, concerned mainly with the impact of the legal process upon crime. It took this process right from the question of the proper rôle which the law should play in relation to antisocial conduct through investigation, prosecution, trial, sentencing and the treatment of those found guilty of contraventions of the criminal law. This is of course a vast subject and what follows can only be a highly selective and subjective collection of impressions gained from the conference.

First and foremost, and what may seem to many to be self evident, the Conference brought home the fact that dealing with crime is a vast and complex problem which admits of no easy or quick solutions. As Professor S.A. Strauss (University of South Africa) put it right towards the end of the conference: "There ain't no miracles to cure the crime problem".

The proceedings at the conference brought out at least three important reasons for this. In the first place crime touches on some of the most fundamental issues in our society if only because crime cannot be divorced from the society in which it flourishes. The roots or causes of crime, as speaker after speaker observed, lie in large part in the social, economic and political structure of societies. Moreover, any solution proposed for dealing with the criminal have to be seen in the broader context of the society in which he lives. There is, as one speaker pointed out, no point in releasing a prisoner on parole if this simply means he is returned to the environment which in part caused him to turn to crime in the first place. Although crime touches broad social issues, it is a problem which is not susceptible to broad ranging solutions which treat all criminals in a uniform manner. The criminal is an individual, not merely the faceless member of a criminal class and his problems demand individual consideration and treatment.

Arising out of this is the second contributing factor, namely, that the effort to deal with crime must be a co-ordinated interdisciplinary effort. No one discipline can provide a complete answer. The latter requires a co-operation between disciplines as diverse as law and architecture, economics and psychology, sociology and politics. Such co-operation has proved extraordinarily difficult to achieve. Problems of communication, methodology and so forth have proved substantial obstacles to co-ordinated research.

Finally, dealing with crime raises fundamental questions about the relationship between the individual and the state for the criminal law authorises the most serious and far-reaching inroads upon the rights of the citizens in respect of his life and liberty. To quote Professor Strauss again, the study of the criminal law is:
". . . . to a large extent a study in conflict—of conflicting interests and desires . . . . There is a desire for law and order on the one hand, and social protection on the other and the desire to preserve fundamental democratic principles . . . . There is the desire for retribution which is still very much alive in the community. . . . (and) there is the desire for rehabilitation of the offender. . . ."
Dealing with the criminal, therefore, involves the very delicate and complicated process of balancing these interests or desires to produce a harmonious and effective system of law enforcement and administrative procedures.

The sheer complexity these issues raise would appear to be sufficient to daunt even the boldest and most optimistic. Yet one of the most remarkable features of the conference was that notwithstanding the complexity of the problem, notwithstanding that many solutions tried to date have done little or nothing to reduce the crime rate, there are many who are prepared to continue to seek new solutions rather than return to the older methods of more severe and cruel punishments inflicted to revenge society against those who have by their antisocial conduct injured it or its members. This fact came out most clearly in the paper delivered by Dean Robert B. McKay, of the New York School of Law. After detailing the enormous

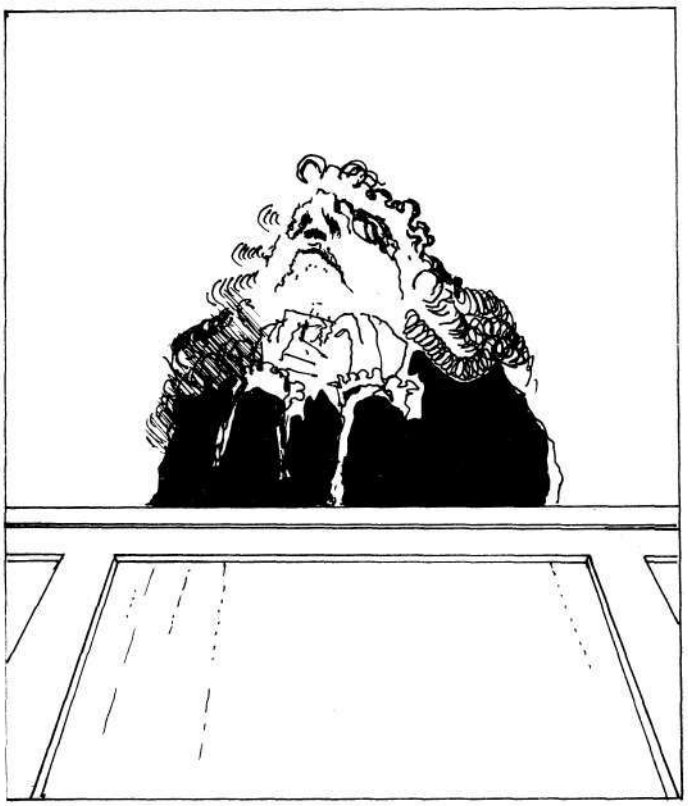
*National Institute for crime prevention and rehabilitation of offenders.

increase in crime in the United States, particularly crimes of violence and juvenile crime, the enormous expenditure incurred on seeking solutions and the movement towards raising the minimum standards for treating criminals in the United States, Dean McKay refused to be pessimistic. "The difficulties", he said, "may not be quite as insurmountable as the admittedly dismal statistics suggest". The main reason for the apparent failure, as he saw it, was the refusal of government to accept and implement the advice which had been given by the experts. He felt that while there was a broad consensus among those qualified in this field as to what should be done, there was resistance to doing it. The reason for this resistance was brought out by another American speaker, Professor Norval Morris, Director of the Centre for Studies in Criminal Justice at the University of Chicago, in a passage which deserves quoting in full. Talking of crimes such as gambling, drunkenness, the use and transmission of drugs, he said:
". . . . these crimes tempt the politician to substitute facile demogoguery . . . . for serious efforts at the frustrating task of preventing and treating crime. Better protection of person and property will require large investments of funds, and intelligence . . . . The criminal converts . . . . (in) America are not likely subjects for swift or cheap reform. The same is true of our antedeluvian correctional systems. Reform in those areas of police, courts and corrections earn few votes . . . . If the politician balks at such an uninviting prospect, he can nevertheless give an appearance of responding to the crime problem by declaring war on addicts, prostitutes, porno-peddlars—whatever people are excited about at the moment. These wars will not touch crime in the streets or houses; they will do no harm; they may even gain a few votes. The temptation to substitute this mindlessness for the serious problems of creating an efficient and humane criminal justice system is a serious problem."

What is equally important is that the optimism appears to be tempered with realism. We have moved beyond the initial, almost evangelical, period of reform of the criminal justice system when facile solutions were propounded as panaceas for a multitude of evils. This realism, however, has left the basic values which underpinned the "evangelical" period untouched. There is still the rejection of inflicting cruel punishment out of revenge. There is still the recognition that the criminal is a human being like all other human beings and needs to be treated as such. In response to a suggestion that part of the explanation for America's crime wave was that the system was being "soft" on criminals, Dean McKay replied:
"I trust that nothing I said was to be understood as believing that criminals are entitled to our sympathy. What I believe is true is that within the criminal justice system it is important to be fair . . . . in order to protect society . . . . the . . . . citizen (and) the integrity of the democratic process".

Possibly because it was a lawyers' conference, the proceedings only dealt with the causes of crime incidentally but two papers did deal with crime and the function of the law in a broader context. In an analysis of crime and punishment in an historical perspective, Professor Beinart (now of the University of Birmingham, England) concluded that we are moving towards a period of more humane treatment of the criminal (history having clearly demonstrated the futility of vengeful punishments). He felt that the problem of punishment was basically a moral problem because "even the criminologists are beginning to find that it is difficult to prove what works and what doesn't".

The main thrust of Professor Morris's paper was twofold. In the first place we expect too much of the criminal law, in the sense that we deal with too many problems as problems of crime when they could be more effectively dealt with in other ways; and secondly, as a consequence of this, by far the greater part of the energies and resources of the law enforcement agencies were tied up in basically unproductive activity. One of the keys to the reform of the criminal justice system was decriminalisation of many activities which are today regarded as crimes. By way of example he pointed out that "In the District of Columbia, in Washington, six habitual drunks in their sad careers had been . . . . arrested for public drunkenness a total of 1 409 times. They had collectively served 125 years in the city's prisons. Their arrests, prosecution and incarceration had cost more than $600 000". More arrests for public drunkenness are made in the United States than for all serious crimes of violence and damage to property; the estimates of annual expenditure in dealing with public drunkenness "are comfortably in excess of $100 000 000." The strain on the system, police courts and jails is enormous.



The solution suggested by Professor Morris was not simple decriminalisation or legalisations. In this his views represented an interesting development on the famous debate between John Stuart Mill and James Fitzjames Stephen and their twentieth century counterparts, Professor Hart and Lord Devlin. Professor Morris felt that the system should take more account of the views of John Donne who emphasised the brotherhood and unity of mankind and the legitimate interest of all, in the well-being of each other and mankind as a whole. Decriminalisation should therefore be coupled with administrative procedures aimed at preventing abuse (for example, a system of licensing of the sale of liquor and other drugs) and at providing the in-

dividual with the opportunity to overcome his problems himself. Prohibition which was common today made it impossible to regulate and therefore deal with the activities prohibited. The only effect was to drive the activity underground and to breed a whole series of undesirable by-products, discriminatory enforcement of the law, corruption in the police force and other governmental agencies, the development of organised crime and other crimes of a more serious nature.

Attempts are now being made in the United States to take public drunkenness out of the scope of the criminal law and to treat it as a social welfare problem. Institutions are being established to provide residential centres for alcoholics which in turn provide inmates with spartan accomodation, plain food, clothing, medical attention and counselling for those who want it. To quote Professor Morris again,
"Is that subsidising alcoholism? Nonsense. It is cheaper than the jail, less offensive than the doorways, more humane than the gutters and hardly imaginable as an inducement to alcoholism."

Although none of the papers delivered at the conference touched directly on the causes of crime, the last, and probably the most interesting session, was held in one of the depressed coloured townships which have been established on the outskirts of Cape Town and have increased rapidly in size over the last decade with the serious implementation of the Group Areas Act. The areas visited were Bonteheuwel and Manenberg. They are communities which have only recently been established, where the quality of housing and life in general is very low, where there are few amenities for recreation and where crimes of all kinds are commonplace. Notwithstanding all this the picture gained from a visit to these areas and listening to the views of members of its community was not entirely depressing. True enough there was an appalling lack of trust in the authorities (a belief that local authorities profited out of rents, whether justified or not, was common; so too was experience of police brutality and corruption). There was also a feeling of overwhelming restriction on any initiative (through prohibition on improvement of houses etc.) and an almost resigned acceptance of things as they were. At the same time, however, there were signs that the community was beginning to help itself. The Vigilante movement is but one example of this. The movement started off as a mutual assistance group operating in one of the blocks of three-storied flats in Manenberg. A siren was installed in the block and each member of the group agreed to help when the alarm was sounded. The idea spread rapidly. The groups moved onto the streets, the object being, as Mr. Davids (leader of the movement) put it, not to declare
" . . . . war against the gangsters because for that matter most of them were our own family, our own brothers, our own sisters. Our approach was merely to prevent them; in other words, we were there, we were going to stay on the streets with them so that they could see that there were also other people around, people that were concerned about their own well-being . . . We didn't go hunting down these mobsters, we didn't go looking for them; it was only when they caused trouble that we acted".

The experiment has proved very successful. Crime in Manenberg has been substantially reduced.
"People now tend to go out more at night and there seems to be quite a lot of interaction between families whereas in the past the attitude was, I in my small corner and you in yours"

Perhaps the most important gap in the proceedings of the conference was the failure to deal with the possible impact of South Africa's racial policies on crime. As one of the participants from the floor said rather plaintively:
"Until some of the laymen started talking just now, I found it difficult to believe that we were attending a conference on the law and community in Africa because the attention was so closely riveted on the technical rules concerning court proceedings most of which are direct transplants from the United Kingdom."

Mention was made of the fact that discriminatory enforcement of the law "breeds cynical contempt for the police, courts and the law itself." In his summing up Professor Morris mentioned the problem again, pointing out that although much of the discrimination which is apparent in the system of criminal justice in America can be traced to discriminatory practices in society outside the system itself, the system is an exaggeration of such social inequalities concluding that research in Philadelphia had shown that
" . . . . we have dealt more severely at every level, police, prosecution, court paroling with blacks than whites. Is that wickedness? No, it's fear. It's our difficulty of being able to adjust to change. But it's true . . . . and if you doubt it then you have to be serious about it and look at the data because they are strong . . . . It is obviously a central issue".

When the conference turned to investigation, prosecution and trial, it found itself embroiled in the usual dilemma of striking a balance between maintaining decent and democratic standards and making the system effective. A considerable amount of time was spent on the thorny problem of developing effective supervision over the police in the execution of their very extensive powers of arrest, detention and search. The American solution has been to exclude evidence which has in any way been obtained by the police by improper methods(such as search without a warrant, third degree interrogation or refusal to allow a detainee access to his legal representatives). This can of course result in the acquittal of an individual even where there is incontrovertable evidence of his guilt. The English participants seemed to doubt the value of this device on the ground that the police had little interest in the ultimate fate of those whom they had arrested. This was rejected by the Americans who pointed to considerable improvement in police practices in the States as a result of setting minimum standards and excluding evidence obtained in contravention of those standards. Alternative safeguards, which were suggested, were the recording of all interrogations by the police and ensuring the presence of a third party (usually a lawyer) throughout the interrogation. At the stage of the trial, it was emphasised that our adversary system only works if the accused is adequately represented and thus the importance of legal aid was emphasised. It is noteworthy that no-one in England can be sentenced to imprisonment unless he has been offered the services of a qualified lawyer. Similarly, the central place of the presumption of innocence in our scheme of fair trial was emphasised by a number of speakers.

At the same time Professor Sir Rupert Cross (Vinerian Professor of English Law at Oxford) came out strongly in favour of the abolition of the right to remain silent, regarding it as common sense to expect an individual who has been charged with an offence to answer it. Once again there was American opposition to this proposal, the view being that it derogated from the obligation of the state to prove the accused guilty and

it was, therefore, in conflict with the presumption of innocence.

That section of the conference which dealt with sentencing and the treatment of offenders brought out the difficulties of inter-disciplinary co-operation. The view that rehabilitation (whether by medical, psychological or other means) justified the granting of wide powers over the individual was vigourously attacked by Professor Morris.
"The jailer with a white coat remains a jailer. The jailer with a Ph.D remains a jailer. The thing we are talking about is the exercise of authority over the citizen."

The same kind of conflict was apparent in a paper delivered by Dr. J.O. Midgley (of the London School of Economics and Political Science). He showed that while sociological thinking emphasised the need for more informal treatment over juvenile offenders and the granting of wider powers to deal with them and the rights of their parents, lawyers had tended to see the problem as interference with the rights of the citizen without the procedural safeguards ordinarily written into procedures in a court of law.

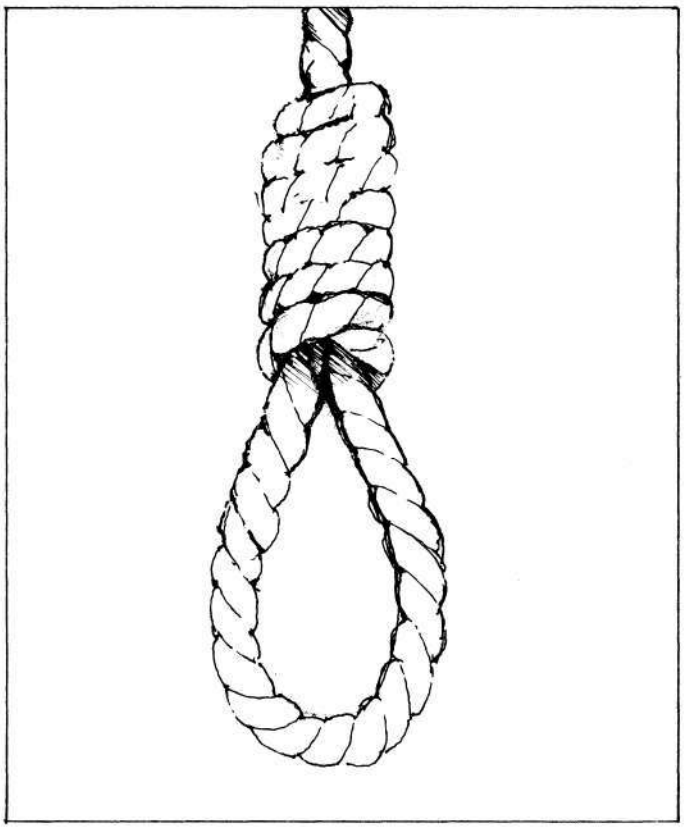
Dr. Midgley attempted to reconcile these two approaches by suggesting that by and large the activities of young children should be decriminalised. They should be treated as problems of social welfare and not be subject to the usual judicial process. At the same time if action to be taken in connection with the child required serious infringements of his rights, or those of his parents, the appropriate procedural safeguards should be written into the system.

The papers delivered to the conference on the treatment of offenders clearly brought out the strong tendency outside South Africa to diversify the way in which persons convicted of criminal offences are treated. They also demonstrated a strong desire to keep the offender out of prison. The point was most fully developed by Sir George Waller, an English High Court Judge, who has been very active in the field of penal reform. Sir George indicated the following alternatives available in England:

(a) Probation and release on parole. This system enables the offender to serve the whole or part of his sentence in the community under the supervision of a suitably trained welfare officer. A probation order can only be issued with the consent of the accused (who can therefore opt for a term in jail) and the only condition imposed is usually that of good behaviour, although other conditions, such as the undergoing of medical treatment, may be added. The system of parole is administered by a Parole Board whose members give their services part-time, and is made up of judges, probation officers, psychiatrists and criminologists. Every prisoner automatically comes up for consideration for parole after having served one third of the sentence, or twelve months, whichever is the longer. The Board itself is assisted by local review committees. The presence of judges on the Board has made the institution much more acceptable to the legal profession.

(b) The power to defer sentence with a view to seeing whether the criminal will compensate the victim of his crime. This is mainly used in connection with offences involving fraud.

(c) Criminal bankruptcy, which is used to trace money obtained through crime and which has been passed on by criminals to their relatives or associates. At the moment this applies only where the amount involved is more than £15 000.



(d) Community service orders. Such an order requires the offender to serve not less than 40, nor more than 240 hours of unpaid work. It can only be imposed with the consent of the offender. Such orders have proved reasonably successful and in some cases the individual involved has continued the work even when the sentence has been completed.

(e) Committal to training centres. The idea here being to provide the offender with training in an activity by which he can earn his living.

To reduce committals to prison, a prohibition has been placed on imprisoning those under 21 except where a very serious offence is involved. Similarly, where a person has never been imprisoned previously, the court should not sentence him to imprisonment unless it is satisfied that no other method is appropriate and it has received a full report about the character and background of the offender. Shorter periods of imprisonment (6 months or less) are normally automatically suspended.

The introduction of a greater variety of ways in which the criminal could be treated will obviously complicate the task of the person imposing the sentence. A considerable part of the conference was devoted to the question as to who was to have the power to sentence and what training he should receive. Interestingly enough Mr Graser, National Director of NICRO, felt the task should remain with the judiciary because training in the law inculcated a feeling for fairness and the ability to balance conflicting interests and needs. There was a strong call

for the use of assessors at the sentencing stage, particularly black assessors, and one had the feeling that this was a harking back to the jury system. Even though the retention of the judiciary as sentencers was favoured, it was generally acknowledged that their training was by and large inadequate for this purpose. It seemed that the best way to meet this problem was to provide training directly to members of the judiciary rather than at an earlier stage in their careers. A very successful sentencing seminar was held for judicial officers during the conference and is likely to be repeated.

So much for detail. What of overall impressions?

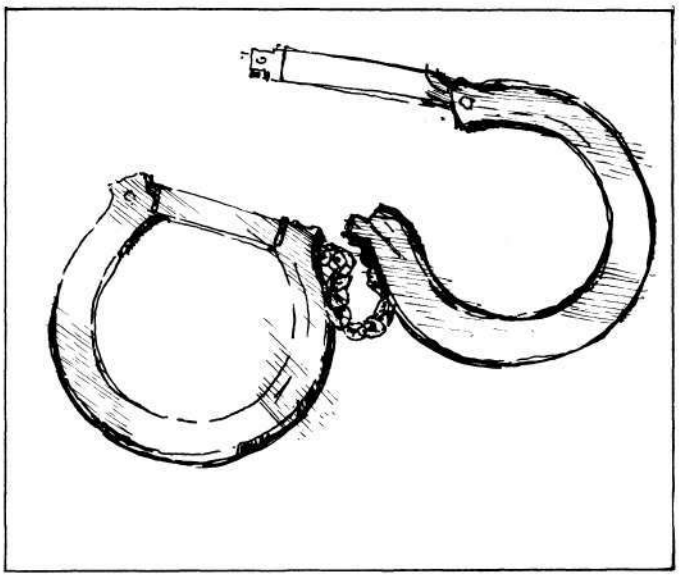
The overseas contributions and particularly those of the Americans were impressive in their willingness to acknowlege criticism of the situation in their own country, in their willingness to discuss issues openly and in their utter and uncompromising commitment to the basic values of a free and open society. The benefits of a constitution which clearly requires implementation of these values in everyday life was amply demonstrated. This is not to ignore the contributions of local participants. The paper delivered by Professor J.D. van der Vyver (of Potchefstroom University) for example was equally impressive. After stressing that "modern exponents of Calvinism have rejected without reserve Calvin's supposition that the Ten Commandments contain natural law principles that ought to be incorporated into positive law, he launched an attack on Sunday observance law, inequality of the law on the grounds of race in South Africa and the far-reaching interference by "South African law upon the private enclave of an individual's day to day life . . . . prescribing amongst other things whom one is entitled to marry and to have sexual intercourse with, what one may read, where one is permitted to live . . . . and so forth."

And finally, being a South African one had to ask oneself: "And what of us? " There is little doubt that criminal law does overreach itself. Technical offences abound particularly for the black man. It must be difficult for any black man to live in this country without however innocently breaking the law on numerous occasions. Unequal treatment by the law is self-evident. In many cases conduct is or is not criminal depending solely on the colour of the accused's skin The cynical contempt which all this must breed for the law and the law enforcement agencies is horrifying to contemplate. It is little wonder that we have a crime problem of enormous proportions. To meet this problem we have resorted to that unholy trio of death, chastisement and incarceration.

We too suffer from the politicians tendency to pick on the superficial and that which is likely to catch votes. We spend enormous sums of money on elaborate systems of censorship (an ever popular cause in this country) and upon the complicated machinery which struggles in vain to stem the urbanisation of black people in this country. As a result little in the way of time and resources is employed to meet the real problems of rapid urbanisation, social upheaval, poverty, inadequate housing, inadequate educational and other facilities, and real crime.

We hear constant complaints of police brutality but little of attempts to eliminate it for the benefit not only of the criminal but also the police.

We are proud, and in many respects rightly proud of our system of courts but we tend to forget that the adversary system requires equal representation to be fair and in the vast majority of criminal cases the accused is unrepresented. We tend to forget that the presumption of innocence, the cornerstone of a fair trial, very often does not apply in our statute law.



What is more, as time goes by, we seem to be growing increasingly indifferent to it. It is part and parcel of our life and although it might originally have been shocking or alarming, one adjusts to it. Dean McKay quoted the following passage from G.K. Chesterton:
"The horrible thing about legal officials, even the best of all judges, magistrates, barristers, detectives and policemen is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent) it is simply that they have got used to it".

It is a sentiment which can be applied to white South Africans in general. Conferences of the type held earlier this year in Cape Town at least remind us of what we have got used to.□

A short article of this type cannot reflect all the contributions made at the Conference. A full version of the proceedings is to be published, probably by the end of the year. Anyone interested should contact Prof. Dean at the Faculty of Law University of Cape Town.