THE EMPEROR'S CLOTHES: RACE, POVERTY AND DUE PROCESS OF LAW

by Julian Riekert.

> ". . . every country . . . gets the law it deserves; the law after all, is only the expression of society's beliefs about the order that shall prevail. The breakdown of law is not, as is usually maintained, a threat **against** society; it is a threat **by** society."
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> — Bernard Levin

In 1969 and 1970 The South African Law Journal published an article by Professor Barend van Niekerk of the University of Natal.[1] It was entitled ". . . Hanged by the Neck Until You are Dead" and was a scholarly and incisive study of the law and some sociological aspects of capital punishment in South Africa. In his search for empirical data the author had circulated a questionnaire among the judges and practising advocates in South Africa, in which he solicited their views about certain aspects of capital punishment. Two of the questions, namely "Do you consider, for whatever reason, that a Non-European tried on a capital charge stands a better chance of being sentenced to death than a European?" and "If your answer to (the previous question) is 'Yes' or 'Only for certain crimes', do you think that the differentiation shown to the different races as regards the death penalty is deliberate?" drew an interesting response. Almost 50 percent of the advocates who replied[2] answered the first question in the affirmative. Of that 50 percent, 41 percent believed that the discrimination was conscious and deliberate.

For publishing these views, which were not his own, but those of practitioners familiar with this unhappy aspect of our criminal law, Professor van Niekerk was indicted and tried for contempt of court.[3] He was acquitted for the technical reason that he lacked the necessary intention for the crime. However, with the stated purpost of showing that the prosecution "cannot be blamed for having brought this matter to court", the judge in Van Niekerk's case went on to discuss the published replies and concluded that the information which they contained might well have been in contempt of the courts in South Africa.

Reading between the lines of the Van Niekerk case, one comes to the conclusion that the truth or otherwise of the advocates' opinions was irrelevant. It is sufficient for one's statement to be unlawful if its effect would be to impute even unconscious racial bias to the judiciary. This was not always the case. In a case decided in 1956 Judge Ogilvy Thompson stated that "I imagine no fair-minded and adequately informed person would assert that injustices, or what appear to persons not knowing the full facts to be injustices, never occur in our courts . . . in cases where whites and non-whites are involved."[4] D. D. T. Jabavu recorded the private comment of a judge to the effect that "the natives got a stinking deal in the courts." He also attacked the racial bias of all-white juries and detailed several instances of disparity in sentencing, including one where:

> "a native youth with no previous record against him received at East London the brutal sentence of six weeks' imprisonment with hard labour, solitary confinement, and spare diet on two days in each week for being 'insufficiently clothed in the vicinity of the bathing houses set aside for natives' on the sea front."[5]

Since both extra- and intra-curial discussion of racism in South Africa unlooses such deeply-seated and hypersensitive springs of emotion, let us repair to the more tranquil waters of the United States Supreme Court and its decision in **Furman v Georgia.**[6] This was a case brought to test capital punishment against the "cruel and unusual punishment" prohibition contained in the Eighth Amendment to the United States Constitution. In his opinion Mr Justice Douglas made the following observations:[7]

> "The President's Commission on Law Enforcement and Administration of Justice recently concluded:
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> 'Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'
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> A study of capital cases in Texas from 1924 to 1968 reached the following conclusions:
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> 'Application of the death penalty is unequal: most of those executed were poor, young, and ignorant. Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.
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> Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.'
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> Warden Lewis E. Lawes of Sing Sing said:
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> 'Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes

such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.'

Former Attorney General Ramsey Clark has said, 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death."

This opinion raises the issue of structural inequality within systems. On the basis of these remarks it is clear that even if the judiciary is totally devoid of bias the weight of criminal sanctions leans more heavily on the poor, and ipso facto therefore, upon the blacks and other disadvantaged groups. Few lawyers would dispute that in non-criminal litigation the quality of representation a litigant receives is to a large extent determined by his financial resources. Yet a fundamental postulate of our adversary system of justice is the equality of each party's champion. True, the system of legal aid is intended to overcome this disadvantage but in South Africa the funds available for such purposes are pathetically inadequate.[8]

To revert to the position in the United States, Friedenberg comments that:

"Administrative delay effectively tips the scales of justice in favour of the state in criminal cases and the wealthier and, especially, the corporate litigant in civil cases. The poor must settle sooner; they cannot risk the possibility of extended court costs, they have no staffs and files prepared to hold litigation in abeyance for a period of years. By setting bail higher than they can raise, poor defendants may be punished without trial, a common practice with those charged with highly unpopular or quasi-political offenses like draft evasion or for those, like young offenders or blacks, whom many judges regard as "uppity" if they behave as if they had any legal rights at all.

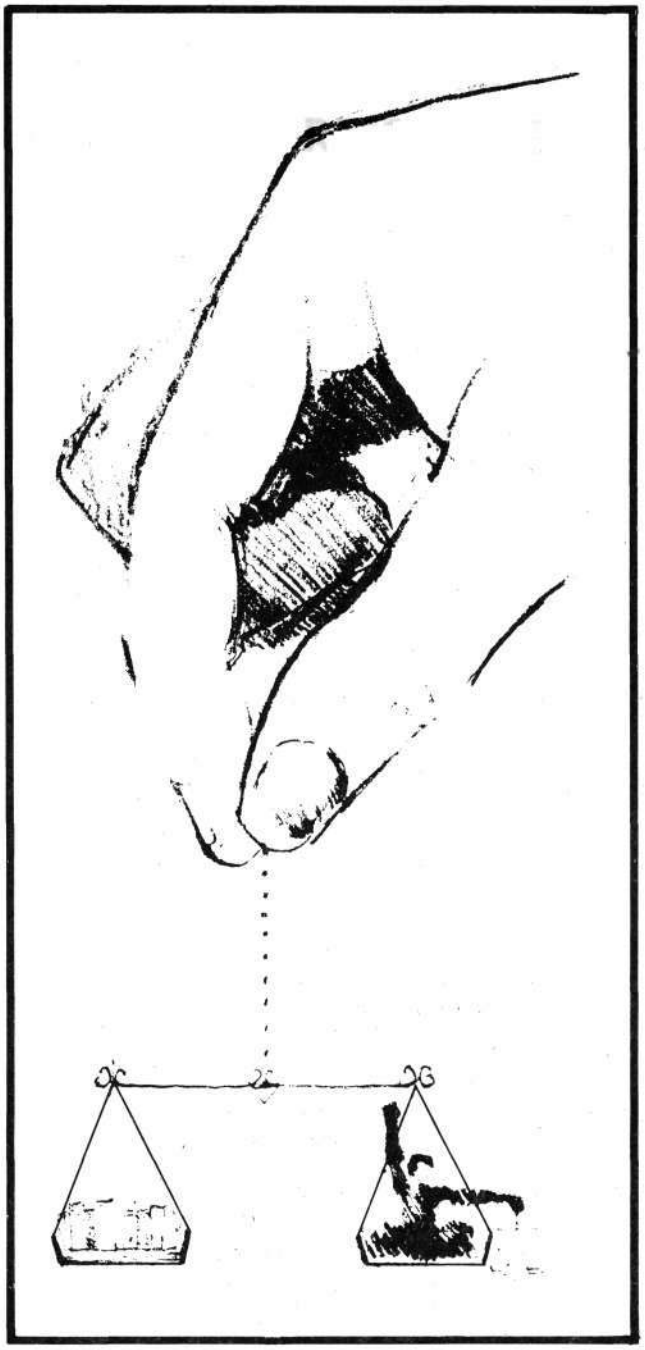
The fact that the quality of legal service available to the poor is inferior to that available to the wealthy would hardly be worth mentioning except that it may be useful to point out that more is involved here than the simple question of having a less qualified attorney and fewer services from him. Except in actions covered by insurance and cases taken on a contingency basis the civil courts are unavailable to poor plaintiffs. If charged in the criminal courts, their defense is likely to be hampered at least as much by the late entry of their defense attorney into the proceedings, and the peculiarities in the way his role is institutionalized, as by his casualness or incompetence."[9]

Is the position in South Africa any different?

Another structural disadvantage which operates against the poor and ignorant is the whole atmosphere which prevails in court. As Herbert Read has written of the English courts:

"The independence of the judiciary is symbolized in various ways. By means of wigs and gowns, the participants are dehumanized to an astonishing degree. If by chance, in the course of pleading, a hot and flustered barrister lifts his wig to mop his brow, an entirely different individual is revealed. It is as if a tortoise had suddenly dispensed with its shell. The whole business is carapaceous; a shell of custom and formality against which life, plastic and throbbing, beats in an effort to reach the light."[10]

Where the disparity in status, class and culture between the judges and the people is even greater, as in South Africa, the effect can be even more debilitating, as this item from an early South African Law Journal records:



Daryl Nero

"An energetic Judge of the High Court went on circuit and reached Solot, then the Ultima Thule of civilised Ugands. A learned and humane judge, he little guessed how cataclysmic his visitation would be. Despite the fact that it was the dry season and the temperature was uncomfortably high, he took his seat in the "Courthouse" (a grandiose term for an insignificant mud building), fully bewigged, powdered, and caparisoned in flaming red. The prisoner was brought in – a wild Sabei, who till his arrest for a harmless, necessary homicide had never seen a white man. He gave one look at the judge, let loose a terrified yell, and fell into a dead faint."[11]

Does the mediaeval costuming of both judges and practitioners serve any purpose other than to make a powerful class statement?

These are all issues which are as, if not more central, to any discussion of the administration of justice in South Africa as they are abroad. And yet as Professor van

Niekerk has pointed out on a number of occasions, they are very seldom raised in articles or papers by legal academics, let alone practitioners. The shroud of silence which surrounds these issues is, at least in part, due to the vigour with which the crime of contempt of court is prosecuted in South Africa.

Contempt of court is a unique species of crime in that it provides an exception to the rule of natural justice that no man may be a judge in his own cause. In effect the judges use the crime of contempt of court to define the bounds of permissible criticism of the judiciary and the administration of justice. The purpose of punishing contempt of court said Wilmot CJ in an eighteenth century English case "is to keep a blaze of glory around (the courts), and to deter people from attempting to render them contemptible in the eyes of the public."[12] A great deal of water has flowed under the bridge since then and most twentieth century lawyers would find Lord Denning's dictum in the Quentin Hogg case more compatible with contemporary notions on the nature and function of the judiciary. In dismissing the application for a **mandamus** he said "This is the first case, so far as I know, where this court has been called to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction 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."[13]

In his remarkable book "The Politics of the Judiciary" J. A..G. Griffith applies the analysis of realist jurisprudence to the English judges. In the opening chapter he delves into the socio-economic background of England's senior judiciary between 1820 and 1968 and concludes that 75,4 percent of the judges came from the upper and upper-middle classes. He goes on to postulate that this fact, combined with educational and other social factors, leads to the senior judges having a bias in favour of certain classes of litigant and against others. He illustrates the latter category by reference to some controversial cases involving trade unions and students. He concludes:

> "Students are not one of the more popular minorities and Her Majesty's judges in recent times seem to have shared much of the prejudice shown by other, equally senior, members of society . . . And as we have already seen, the judges have never taken kindly to trade unions in their relations with employers and the Government."[14]

A critical review of his book touched off a storm of controversy in The Times Literary Supplement but the sky did not fall down : nor for that matter was there any indication that anything but healthy dialogue came from his provocative analysis. And there certainly was never any question of a prosecution for contempt of court.

In South Africa the accused charged with an offence for which capital punishment is a real possibility is entitled to a pro deo or dock defence. The Sunday Express published an article on 21 May 1978 under the heading "Accused face 15 years jail with pro deo defence". In the article the reporter quoted an academic as saying that pro deo defence counsel were often inexperienced and that this prejudiced the accused in such cases. Shortly after the article appeared the newspaper company, its editor and a reporter were indicted for contempt of court and criminal defamation (of one of the advocates concerned).[15] As a result of evidence led by the defence the court accepted that pro deo defence counsel were often inexperienced. Mr Justice Milne observed that "Courts permit such persons to appear because they have a right to appear and, furthermore, they consider that some representation by counsel is better than none."[16]

While accepting the bona fides of the Attorney-General in the present case he added: ". . . there are two principles involved here, one the administration of justice and the other the right of free speech. Both require protection in the public interest, and it is what is best in the public interest overall and in the long term, that should prevail. Attorney-Generals should be wary of instituting prosecutions for contempt of Court lest they have the effect of stifling healthy and legitimate criticism . . . in considering whether a prosectution would be wise or expedient it is also necessary to consider whether a prosecution is not going to give the allegations in question a publicity which they would not otherwise have had."[17]

One hopes that this decision will mark a turning of the tide against the gradual erosion of the right to criticise the administration of justice in South Africa, and particularly in Natal.

If the Attorney-Generals continue to prosecute for contempt for even the mildest criticism of the judiciary or of the administration of justice, as in the **Gibson** case and if the judges convict in such cases the consequences could be disastrous. The judges are deliberately made independent of every other branch of government. They enjoy absolute security of tenure and remuneration. Their independence is further emphasised by the physical structure of their courtrooms and by their dress in court. They are required to exercise the strictest circumspection in both their private and public lives.

Inherent in all this is the real danger that they may lose contact with the lives and ideas of those who submit to their jurisdiction and particularly the poor. There are already signs that this may be happening. A Natal judge is on record as saying "If anything the non-whites get a better deal. We are always more benevolent in our approach to them."[18] While a white observer may regard the leniency shown by the Courts in cases with black accused, and involving witchcraft or faction fighting, as proof of their sensitivity to racial issues, it is interesting to note that Transkei has abolished the mitigating effect of witchcraft by statute. The contemptuous behaviour of some accused in trials under the security laws may also indicate that the courts are increasingly being seen as part of the system and not as the bulwarks of individual liberty.

All lawyers can and should play a role in preventing this. In the words of Gustav Radbruch:

> "Ultimately the task and duty and responsibility for legal knowledge and legal science of the nation . . . belong to the legal profession and particularly to the law faculties of our universities. We must first again become conscious of the proverbial opposition between law and caprice and between law and might, and we must see law again . . . as an attempt to achieve justice."[19] □

References on back cover