SOUTH AFRICAN JUDGES AND HUMAN RIGHTS[1]

THE HON MR JUSTICE RALPH H ZULMAN[2]

I THE "APARTHEID YEARS"

One might be forgiven for believing that in the apartheid era South African society and in particular its white component generally had scant regard for human rights. Whether this was true of the almost all white male dominated judiciary at the time is a matter of some debate. There are those who argue, convincingly, that the then South African judiciary, in enforcing discriminatory apartheid laws, "for the most part failed in the role which independence protects because they confused government with the state, thus permitting the government to fail to live up to the responsibilities that attend a claim to be a democratic state;[3]" that they "are accountable for having facilitated the shadows and secrecy of the world in which the security forces operated and for permitting the unrestrained implementation of apartheid policy"[4]; that they were

[1]This article is based substantially upon an address given by the author to the Supreme Court History Society in the Banco Court, Supreme Court, George Street, Brisbane, Queensland, Australia on 4 July 2001.

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[3]Dyzenhaus *Truth Reconciliation and the Apartheid Legal Order* (Juta & Co Ltd - 1998) 172

[4]Op cit 160

complicit in the "pernicious system"[5]. There are others who contend, with equal conviction, along the following lines enunciated by former South African Chief Justice Corbett in a written presentation to the Truth and Reconciliation Commission (TRC):

> "The courts had no power to question the validity of the laws Parliament made. Still less could they declare them invalid. The courts had no option but to apply the law as they found it, however unjust it might appear to be. Of course, often the statute passed by Parliament was unclear and in such cases, when required to interpret it, the court was presented with a choice between an interpretation which produced inequity and one which did not. In such cases the courts were in a position to make the latter choice in the process of construing the will of Parliament, and they often did so. In this they were legitimately applying the principles of Roman-Dutch law relating to statutory interpretation, which included the presumption that the legislature did not intend to oust the jurisdiction of a court of law, or to interfere with the common law more than was plainly and unambiguously indicated; the presumption against retrospectivity; the presumption that the legislature did not intend an inequitable, unjustifiable or unreasonable result; the restrictive interpretation given to penal provisions and the presumption *in favorem libertatis*; and so on."[6]

Professor Colin Tatz is a former South African who was the Director of the Macquarie University Centre for Comparative Genocide Studies in Sydney. He makes the valid point that it never occurs to those who deny involvement, or legal or moral guilt for the inequities of the apartheid system and who seek to distance themselves from it, that they are indeed companions in the system, and therefore in some degree complicit.[7]

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[5]Per Cameron J in his representation to the Truth and Reconciliation Commission reproduced in 1998 SALJ436 at 438

[6]1998 SALJ17 at 19

[7]*Genocide in Australia*- Research Discussion Paper No 8 page 8

The author's attention was drawn by Professor Blumberg[8] of the University of Connecticut to the moral dilemma which faced many northern judges in America with respect to the enforcement of fugitive slave laws in the period before the Civil War. In many ways the conflict which they faced between their moral duty and the responsibility entrusted to them under a society dedicated to the rule of law, to paraphrase Professor Blumberg, "imbedded with fundamentally immoral principles," was one which also faced South African judges, especially in the apartheid era.[9]

Professor Robert Cover refers to "the story of earnest, well-meaning pillars of legal respectability and of their collaboration in a system of oppression - Negro slavery"[10]. He suggests that a judge caught between law and morality has only four choices:-

> "He may apply the law against his conscience. He may apply conscience and be faithless to the law. He may resign. Or he may cheat: He may state that the law is not what he believes it to be and, thus preserve an appearance (to others) of conformity of law and morality."

Prior to the new order in South Africa, which is embodied in the final Constitution[11] which came into full effect in June 1997, Parliament was supreme.[12] It could, for all practical purposes, pass any law it liked: and it did

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[8]Dean and Professor of Law and Business, Emeritus, University of Connecticut, Hartford in a letter to the author

[9]At Professor Blumberg's suggestion I propose at some later time to examine in more detail the parallel between the dilemma which the American judges faced and that which faced South African judges

[10]*Justice Accused - Anti-Slavery and the Judicial Process* : New Haven: Yale University Press 1975, p 6

[11]Act 108 of 1996

[12]For a summary of the role of Supreme Court judges in South

so. Judges in the "old South Africa" took an oath of office in which they swore to "administer justice to all persons alike without fear, favour or prejudice, and, in accordance with the laws and customs of the Union [later Republic] of South Africa."[13]

Given the discriminatory nature of many of the laws, it was not possible to administer justice to all alike as the oath required. This divergence was not often enough recognized by most judges. A notable exception and recognition is afforded in the following words in the judgment of the late Didcott J:

> 'Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation.'[14]

A statement to different effect is to be found in the judgment of a former South African Chief Justice, in *R v Pitje*.[15] The court found that a magistrate's order to a black lawyer to sit at a separate table in a courtroom reserved for black practitioners was reasonable and thus lawful. The learned judge rejected the argument put up that this separation entailed inequality or that it prejudiced the conduct of the case being conducted by the lawyer on behalf of his client, stating:

> "...... from the record it is clear that a practitioner would in every way be

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Africa in 1985 reference may usefully made to G A Andrew - Chapter 25 in *Judicial Independence : The Contemporary Debate* (edited by Shimon Shetreet and Jules Deschenes - 1985 Martinus Nijhoff Publishers)

[13]Section 10(2)(a) of the Supreme Court Act 59 of 1959

[14]*In re Dube* 1979(3) SA 820 (N) 821 G-H

[15]1960(4)SA 708 (A)

> as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table"[16]

This view, as Professor Dugard a leading proponent of human rights[17] correctly points out, "fails to take into account the effect that such a separation may have on the perception of both attorney and client of the likelihood of equality of treatment in the trial itself. In short, it is a case in which justice was not seen to be done."[18] It should be noted, however, that some judges solidly resisted attempts to segregate courts. In 1960, for example, Mr Justice Beyers, the then Judge President of the Cape Provincial Division, prohibited segregation notices being erected in the Cape Supreme Court. Similarly Judge Fagan who was on circuit in the small rural town of Oudsthoorn refused to sit in the court building before a barrier separating black people in the court's public gallery had been removed by officials of the Public Works Department.[19]

Racism in the courts routinely impeded the work of black practitioners. Respect for basic human rights and dignity was relegated to a back seat on the court bus. Former President Nelson Mandela recalls the frequent refusal of white witnesses to answer questions from a black attorney: "Instead of citing them for contempt of court, the magistrate would then pose the questions they would not

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[16]Op cit 710 E-F per Steyn CJ

[17]Now Dean of the Law School at Leiden University in The Netherlands

[18]*Human Rights and the South African Legal Order* (Juta & Co Ltd 1978) 322

[19]Referred to by the then Justice Minister Omar in an address at the opening of a conference of the Judiciary held in Cape Town in December 1997 and reproduced in *The Judiciary in Africa* (Juta & Co Ltd 1998) xxvii

answer from me."[20] On another occasion a magistrate violated court practice by refusing to hear Mr Mandela's case and even having him evicted from court until he could see his "certificate" of qualification.[21]

In the early 1980's a lively debate erupted concerning the question whether judges who were morally unable to support government policy on apartheid and the restriction of political opposition should remain on the Bench. The debate was initiated in an inaugural lecture of Professor Raymond Wacks at the University of Natal. Professor Wacks argued that if a judge is to square his conscience with his calling, there would appear to be no choice open to him but to resign.[22]

Professor Dugard responded. He accepted that South Africa had a repressive legal system, but contended that the opportunities for "judicial manoeuver and creativity.....[had] not been totally blocked."[23] Dugard also challenged the utility of resignation. He maintained that isolated resignations would not have much impact on the system. He acknowledged that just and honest judges on the Bench did lend credibility to the legal system, but claimed that such credibility was also afforded by lawyers appearing before courts and even by academics. Finally, he quoted the late Professor Etienne Mureinik's following powerful observation:

> 'If we argue... that moral judges should resign, we can no longer pray, when we go into court as defence counsel, or even as the accused, that we

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[20] *Long Walk to Freedom* (Macdonald Purnell 1994) 140

[21] Op cit 140

[22] 1984 SALJ 266 at 282. See also Dyzenhaus (supra) 164/165

[23] 1984 SALJ 286 at 291

find a moral judge on the bench.'[24]

One is tempted to equate the position of South African judges at the time with the dilemma that faced some German judges who had been appointed during the Weimar Republic who were called upon to administer anti-semitic and racist Nazi laws. This dilemma is graphically portrayed in the award winning movie "Judgment at Nuremberg". In the movie, Burt Lancaster plays the role of Ernst Janning a fictional character based upon an amalgam of individuals who were the accused at the trial. Janning is portrayed as a respected German academic and Minister of Justice who became a judge and who did not resign as a judge despite his misgivings about what Hitler was doing.[25] It may well be that it was not only because of a fear for their lives that many German judges during the Nazi era behaved as they did. Perhaps they were much influenced by the fact that they had been schooled in the ingrained positivism of German legal thought. The content of the law is exhausted in the enactment of the duly constituted authorities.

The judge cannot bend, let alone nullify, such enactments by appealing to principles of natural law.[26]

[24]Op cit 291 note 42

[25]Learning Guide to: "Judgment at Nuremberg" (www.teachwithmovies.com/guides/judgment-at-nuremberg.hml.)

[26]Justice Deborah Lucas Schneider trans. 1990 - first published (in German in 1987). See also Lovell Fernandez, *The Law, Lawyers and the Courts in Nazi Germany* - (1985) South African Journal on Human Rights 124 at 129-130 and Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany,* trans. By Thomas Dunlap, Chicago and London: University of Chicago Press, 1998 page 15.

Posner[27] in a review of the German lawyer NGO Müller's book, *Hitler's Justice : The Courts of the Third Reich,* makes the telling point that the book which tells "an ugly story of moral corruption and professional degradation" can help us "to see that judges should not be eager enlisters in popular movements of the day, or allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions". Another reviewer of the book, V R Berghahn, points out that Müller "effectively destroys one pious myth to be found in post-war legal literature - that judges never wavered from the positivistic tradition of German law and did no more than apply existing codes."[28]
The Promotion of National Unity and Reconciliation Act,[29] created the TRC to which I have made previous reference. Archbishop Desmond Tutu headed the commission. In its final report the TRC was highly critical of the fact that South African judges refused to appear before it to give oral testimony. Many leading judges contended that to do so would negatively affect their independence and would harm the institution of the judiciary.[30]

In a recently published book, Dennis Davis, now a judge of the Cape High Court, sketches the situation in these terms:

> "That the judiciary shapes public opinion is hardly a revolutionary proposition for a South African audience. The imbrication of the

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[27]R Posner, *Overcoming Law,* Havard University Press, 1995, Ch 4 145 - 159 at 146

[28]New Republic

[29]Act 34 of 1995

[30]Volume 4 Chapter 4 paragraphs 31 to 48 and Volume 5 Chapter 1 paragraph 29. See also Dyzenhaus (supra) 170/174

> judiciary in the reproduction of apartheid over many decades has been superbly documented and analysed in a number of different works. In particular, the record reveals a judiciary which, at the very least to the white population, was seen as impartial and independent. By placing the status of the judiciary behind apartheid rule, whether the case turned on the erosion of yet another common-law freedom or the assessment of the opposition to apartheid by means of the oft-employed political trial, the outcome would cause people's views either to change or to be confirmed."[31]

To my mind the position of the judiciary in the "old South Africa" is best dealt with, subject to one significant qualification, in these words of Justice Arthur Chaskalson, the President of the Constitutional Court, in an article which he wrote in 1989:[32]

> "In reviewing the history of the courts of this country some writers have criticized the way in which South African judges have discharged their duties over the years. That they could have done better than they did is I think now clear. But that is true of all of us, and little is to be gained by lamenting the past. What is important is the future, and it is here that I believe that we will come to appreciate that we owe much to our judges, and a great deal to some of them. For despite all the paradoxes they have somehow held to the infrastructure and have kept alive the principles of freedom and justice which permeate the common law. True, at times no more than lip service has been paid to these principles, and there have been landmark cases where opportunities to give substance to and uphold fundamental rights have been allowed to pass without even an expression of discomfort, let alone a vindication of the right. Yet the notion that freedom and fairness are inherent qualities of law lives on, and if not reflected in all the decisions, is nonetheless acknowledged and reinforced in numerous judgments of the courts. That is an important legacy and one which deserves neither to be diminished nor squandered."

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[31] *Democracy and Deliberation - Transformation and the South African Legal Order* (Juta & Co. Limited 1999) at p 11.

[32] *Law in a Changing Society* - (1989) 5 South African Journal on Human Rights 293

The qualification is that one should be careful not to forget nor to lightly gloss over the past but rather to recall it and learn from it.

II THE "NEW ORDER"

So much for the past, what of the present?

As already mentioned the final Constitution came into full effect in June 1997. There can be no doubt that the Constitution "does not debate whether there should be affirmative action, it commands that it happen. It equally does not question socio-ecomic rights, it spells them out."[33]

Nobody reading the Constitution can be in any doubt but that the Bill of Rights is an intrinsic part of the new constitutional vision for South Africa.[34] That this is so is repeatedly affirmed throughout the Constitution. The preamble proclaims:

> "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
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> > Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> > Improve the quality of life of all citizens and free the potential of each person.
> > Build a united and democratic South Africa able to take its rightful

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[33]*Business Day* May 10, 1999 p11- Too Many Courts Spoil Judicial Broth

[34]O'Regan J - *The Enforcement of and Protection of Human Rights : The Role of the Constitutional Court in South Africa*: An address given at the Judicial Conference referred to in note 19 above and reproduced in - "The Judiciary in Africa" 1 at 9/10

place as a sovereign state in the family of nations."

Section 1 immediately provides that:

> "The Republic of South Africa is one sovereign democratic state founded on the following values:
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> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
>
> (b) Non-racialism and non-sexism.
>
> (d) Universal adult suffrage, a national common voters roll, regular election and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Chapter 2 of the Constitution contains the Bill of Rights, Section 7, the first provision in this chapter, provides that:

> "(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
>
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
>
> (3) The rights contained in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in this Bill"

Section 36 is in these terms:-

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including -

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Section 39(2) of the Constitution effects "a complete transformation of South African jurisprudence, since the common law and African customary law will be infused with a culture of fundamental rights and liberal democratic values, more especially the values of race and gender equality.[35] The section furthermore provides that when interpreting any legislation and developing the common law or customary law, every court must promote the "spirit, purport and objects of the Bill of Rights." Indigenous concepts such as *ubuntu* (humanness) must be given effect to.

Makgoro J, a judge of the Constitutional Court, explains *ubuntu* in these succinct terms:

> "While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, making a shift from confrontation to conciliation."

Chapter 2 enshrines the following rights:

- ? the right to equality;
- ? the right to dignity;
- ? the right to life;
- ? the right to freedom and security of the person;
- ? the right to privacy;
- ? the right to freedom of conscience, religion, thought, belief and opinion;
- ? the right to freedom of expression;

[35] *LAWSA* Vol 5 part 3 para 70 p 84

? the right peacefully to assemble, demonstrate, picket and present petitions;
? the right to freedom of association;
? political rights, including the right to form a political party, to free and fair elections, and to vote;
? the right not be deprived of citizenship;
? the right to freedom of movement;
? the right to choose a trade, occupation or profession;
? the right to fair labour practices;
? the right to form and join trade unions and employer associations;
? the right to bargain collectively and the right to strike;
? the right to a healthy environment;
? the right not to be deprived of property;
? the right to use the language of choice and to participate in a cultural life of choice;
? the right of access to information;
? the right to fair administrative action;
? the right of access to courts;
? the right to a fair trial;
? the right of children, amongst other rights, to a name and nationality, to family care, to basic nutrition, shelter and health care, and to protection from exploitative labour practices;
? the right of all to have adequate housing which the state must take reasonable legislative and other steps, within its available resources, to achieve;
? the right to have access to health care services, sufficient food and water, and social security which the state is once again under an obligation to take reasonable steps to achieve;

- The right to a basic education and to further education which the state must take reasonable steps to achieve.

The rights are binding upon the legislature, the executive, the judiciary and all organs of state.

The Constitution in section 39(1) provides that:

"When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and
(c) may consider foreign law."

Respect for human rights and international law are important elements of a democratic culture. A significant document which South African courts may have profitable regard to when considering questions of human rights is of course the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly on 10 December 1948. Its preamble, which encompasses much of what is set forth in the South African Bill of Rights, recognizes that:

> "The inherent dignity and ... equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and that disregard and contempt for human rights resulted in barbarous acts."

Of particular relevance to the judiciary is Chapter 8 of the Constitution. This chapter in some 15 sections (sections 165 to 180), deals with the courts and the administration of justice.

Under the new Constitution, as was also the position under the interim Constitution[36] the judiciary's function and credibility is enhanced. This is of importance because, as Basson[37] observes, the legitimacy crisis that confronted the judiciary during the apartheid era and the early period of transition flowed from the fact that, due to the principle of parliamentary sovereignty, an elitist, virtually all white male judiciary, was obliged to enforce unconscionable apartheid and security laws.

Since the Constitution is the supreme law and provides for judicial review and

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[36]Act 200 of 1993

[37]*South Africa's Interim Constitution* p 148

the testing right of the courts,[38] the judiciary plays an indispensable role as a guardian of the Constitution and of its ethos and values.

Section 165(2) states that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." The present Chief Justice of the Supreme Court of Appeal, Mahomed CJ, in a thought provoking address which he delivered at a first orientation course for new judges in July 1997 entitled "The Role of the Judiciary in a Constitutional State,"[39] pointed out that:

> "What judicial independence means in principle is simply the right and the duty of judges to perform the function of judicial adjudication, through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution."[40]

III THE JSC

Sections 174 to 178 of the Constitution contain important provisions relating to the appointment of judicial officers, acting judges, the terms of their office and remuneration, their removal and the appointment of a judicial service commission. One of the objects of these sections is to ensure that judicial officers are independent, appropriately qualified and "reflect broadly the racial and gender composition of South Africa". In this latter regard the Judicial Service Commission (JSC) plays a most important role. This body was created in the interim Constitution. Until the coming into effect of the interim

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[38]Once described by President Paul Kruger as a "principle invented by the devil" - see Hahlo & Kahn - *The South African Legal System and its Background* (Juta & Co Ltd - 1968) 109

[39]1998 SALJ 111

[40]Op cit 112

Constitution of 1994, appointments to the superior court Bench were made by the Minister of Justice, almost without exception from the ranks of senior counsel practising at the Bar.

As regards race and the judiciary, it is an undoubted fact that, until the permanent appointment of the late Judge Mahomed who died approximately 18 months ago, the Bench in South Africa was, as I have already indicated, white and almost exclusively male. The legal profession was, and still is predominantly white and male, although the position is changing fairly rapidly. When viewed in the light of the policy of apartheid, it can be no surprise that the Bench did not reflect the composition of the population of South Africa. Indeed, it is difficult to believe that any competent black lawyer would have been willing to accept an appointment to the Bench in an apartheid South Africa.

Lamentable as the situation undoubtedly is, it is difficult to conceive how it could have been any different, bearing in mind the political policies applicable during the period in question. The failings of the education system as far as black people are concerned have been well documented.

The JSC consists of:

(1) the Chief Justice, who presides at meetings of the Commission;

(2) the President of the Constitutional Court;

(3) one Judge President designated by the Judges President;

(4) the Cabinet member responsible for the administration of justice, or alternate designated by that Cabinet member;

(5) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(6) two practising attorneys nominated from within the attorney's profession to represent the profession as a whole, and appointed by the President;

(7) one teacher of law designated by teachers of law at South African universities;
(8) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
(9) four permanent delegates to the National Council of Provinces; designated together by the Council with a supporting vote of at least six provinces;
(10) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the national Assembly; and
(11) when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate by the Premier, of the province concerned.[41]

The JSC is obliged in considering judicial appointments to have regard to the specific provisions of section 174 of the Constitution. This section stipulates, *inter alia* as follows:

> "174. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
>
> (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

In 1990 there were no judges of colour. In stark contrast in June 2001, of the 192 permanent judges in the various superior courts, including the Land Claims Court, 52, or roughly 27%, were persons of colour. Furthermore, and probably of more significance, six of the Provincial Divisions as well as the Land Claims Court, are headed by persons of colour.[42] This represents some progress in a

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[41]Section 178

[42]See 2001 (2) SA v-x for a list of the names of the judges in the various superior courts including the Land Claims Court

relatively short time towards ensuring a judiciary that reflects broadly the racial composition of South Africa. However, if one bears in mind that according to the latest published census statistics the total population of the country is approximately 40.5 million, of which approximately 76.7% are African or black, one may reasonably argue that 27% is still relatively disproportionate. On the other hand, sight should not be lost of the fact that according to the same census statistics just over 19% of the total population over 20 years of age, had no schooling at all whilst only 6.2% had an educational level higher than standard 10 or grade 12.[43] Of some significance, is the fact that of the 192 permanent judges many were appointed after December 1994. The "old guard" thus still represents a significant majority.[44]

The new system of judicial appointments is a substantial improvement upon the old. It facilitates the public scrutiny of candidates for judicial office and it permits representations from interested parties, including the Bar. However, even this process is not above criticism. The composition of the JSC combines both lawyers and politicians, the latter being in the majority. It is still possible, therefore, for political factors to influence judicial appointments.[45]

Originally, in terms of the interim Constitution the JSC was evenly balanced between practising lawyers and politicians. It is a matter of regret that over the protests of the President of the Constitutional Court, Justice Chaskalson, and

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[43]*The People of South Africa Population Census, 1996* - Report No 03-01-11 (1996) pages 8 and 36

[44]Compare the list of names of judges appearing in 1994(4) SA v-x with that appearing in 2001(2) SA v-x

[45]For a critical evaluation of the work of the JSE see, Kate Malleson: *Assessing the Performance of the Judicial Service Commission*, 1999 SALJ 36

the late Chief Justice, Mr Justice Mahomed, and the then Chief Justice, Mr Justice Corbett, as well as the GCB, a political compromise was struck in the final days of constitutional negotiations relating to the 1996 Constitution which tilted the balance in favour of politicians. It is too early to say what the effect of this will be, but in the light of the abuse of political appointments in the past this change is to be regretted. There is a need not only to be vigilant in pursuing an independent judiciary but to be aware of the possibilities for undermining that independence inherent in the present system of appointments, which, like its predecessor, ultimately leaves the power of selection of judges in the hands of politicians.

The JSC has been criticized by some white lawyers for passing over well qualified and experienced white practitioners and recommending less experienced black persons for appointments especially to senior judicial office. Examples of this are the appointments of black men to the positions of Judge President in the Gauteng and KwaZulu-Natal provinces. Indeed in Gauteng the President of the Labour Court, a former white barrister of undoubted experience and competence who had been nominated for the position of Judge President of Gauteng resigned after failing to be appointed to the post. The occupant of the office of Deputy Judge President of the province, also a white man and an experienced judge, resigned his position when he was not recommended for the vacant position of Judge President.

At the other end of the spectrum many lawyers were highly critical of a judgment given by a white High Court judge, who had been appointed at the time of the "old regime". The judge made adverse findings of credibility against President Mandela who appeared as a witness before him. The case concerned the appointment by the State President of a Commission of Inquiry into the administration of rugby - a matter of no little importance to many white

South Africans and needless to say to many Australians. The court set aside the State President's appointment essentially upon the basis that the State President had not applied his mind to the matter before making the appointment.[46]An appeal to the Constitutional Court succeeded and the appointment of the commission was re-instated.[47]

I believe that the judiciary will weather these temporary storms and that on balance the JSC is going about its difficult task in a courageous and sensible way. After all "a journey of 10 000 miles begins with a single step."[48]

IV THE HUMAN RIGHTS INSTITUTIONS

Not only the Constitutional Court but all of the courts of the land bear the responsibility of ensuring the proper and meaningful protection of human rights for all the inhabitants of South Africa. Langa J, the Deputy President of the Constitutional Court, speaking for a unanimous court, put the matter in these terms in *S v Williams and Others*:

> "Courts do have a role to play in the promotion and developing of a new culture founded on the recognition of human rights, in particular, with regard to those rights which are enshrined in the Constitution. It is a role which demands that a court should be particularly sensitive to the impact

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[46]An abridged version of the judgment which runs to over 1000 pages is reported as *SARFU and Others v President of the Republic of RSA and Others* 1998(10) BCLR 1256(T)

[47]A decision concerning the dismissal of an application for the recusal of certain of the members of the Constitutional Court in the same case is reported as *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999(4) SA 147 (CC). The judgment on the merits is not yet reported in he law reports but appears on the internet (www.wits.law.ac.za/)

[48]*The Venerable Maha Ghosandra*

> which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that, as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored."[49]

Most criminal trials take place in the magistrate' courts: the importance of these courts in the application and enforcement of the right to a fair trial, for example, cannot therefore be overemphasised.

The Constitution itself recognises that, in striving to achieve the recognition of human rights, institutions other than the courts have an important role to play. Paramount among these is the Human Rights Commission. This institution was established in terms of the interim Constitution. It will continue in terms of the new constitutional dispensation. Chapter 9 of the Constitution is concerned with state institutions supporting constitutional democracy and provides for the establishment of the office of Public Protector and Auditor-General, and for the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Electoral Commission, and the Independent Authority to Regulate Broadcasting.

All of these institutions are independent and impartial. Their function is to strengthen constitutional democracy in South Africa. Many of them are modelled on institutions found in other democratic countries : the Public Protector, for example, is a local title for the post of Ombudsman, first known in the Scandinavian countries and now present in many democracies. The Public Protector is empowered to investigate any improper conduct in state affairs, or in the public administration in any sphere of government (national, provincial or

[49] 1995 SA(3) SA 632 (CC) para 8

local).

The Human Rights Commission (HRC) must, according to section 184(1) of the 1996 Constitution:

> "(a) promote respect for human rights and a culture of human rights;
> (b) promote the protection, development and attainment of human rights; and
> (c) monitor and assess the observance of human rights in the Republic."

The HRC was established at the end of 1995. It has extensive powers to investigate and report on the observance of human rights in South Africa, to take steps to secure redress for the violation of rights, and to educate members of the public about their rights.

The HRC is therefore a vitally important institution. It must take the initiative in order to establish respect for human rights in South Africa. Unlike a court, therefore, it can set its own priorities, identify areas which need investigation, undertake those investigations, take appropriate steps to secure redress for violations, and report to parliament on its findings. The need for an institution of this nature, in the light of the patterns of human rights abuses in our past, is undeniable. It will provide a necessary agency to complement the role of the court in the enforcement of human rights.

As O'Regan J points out:-

> "...................., in considering the need to enforce human rights within our society, we must not ignore the importance of the contribution of people and organisations outside of government. Fortunately South Africa has an extremely vibrant non-governmental organisation section committed to human rights and their achievement. Many of these organisations were formed to resist *apartheid* during the years prior to 1994. And many of them have reassessed their role and function in the light of the constitutional changes that have taken place. But it is not only non-

> governmental organisations committed to human rights values that can play an important part in the recognition of human rights. The Constitution imposes obligations upon ordinary citizens and corporations to give effect to the rights enshrined in chapter 2 of the Constitution."[50]

V THE PROMOTION OF EQUALITY AND THE PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000 (the EQUALITY ACT)

The Equality Act was enacted in terms of section 9 of the Constitution. The Equality Act seeks:

To give effect to section 9 of the constitution read with item 23 of schedule 6 of the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and to eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.

The Equality Act provides a framework for the dual task of achieving equality through the prohibition of specific conduct that constitutes fair discrimination and provision for active measures to advance equality. The Act provides fairly extensive guidance to the key concepts relating to unfair discrimination and establishes enforcement mechanisms for the pursuit of complaints under the Act. The central mechanisms are the specialist Equality Courts that will be established in the Magistrates' and high courts and will have presiding officers drawn from the ranks of judges and magistrates. These courts are sprouted by the complaint processes of the institutions established in terms of Chapter 9 of the Constitution (including the Human Rights Commission and the Commission for Gender Equality).

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[50] O'Regan J (supra) 14/16

The framers of the Act were mindful of the historical legacy of systemic inequality, particularly relating to race and gender, that pervades virtually all aspects of South African life. The aspiration to address this is underpinned by the country's constitutional commitment to achieve equality. The preamble to the Act alludes to this in these words:

> The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;
>
> Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;
>
> The basis for progressively redressing these conditions lies in the Constitution, which amongst others, upholds the value of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish . . .

However, the achievement of equality does not only envisage the removal of inequality, it also contemplates the affirmation of South Africa's rich diversity that flows from the many positive sources of differences amongst its people, including culture, religion, language, race and ethnicity. It is anticipated that those who implement the Equality Act, including presiding officers of the Equality Courts, will be mindful of the constitutional commitment to substantive equality the various patterns of discrimination that act as barriers to this goal, as well as the many forms of diversity that enrich our social fabric.

It is increasingly recognised in other jurisdiction that awareness of social

context is essential to fair and impartial decision-making. The Lord Chief Justice of the United Kingdom said the following about judging and diversity in the UK context:

> The cardinal principle that underlies the [judicial] oath is that of equality before the law. In deciding guilt or innocence, or in weighing the merits of claims between private individuals or between individuals and the state, judges must have reference only to the facts (so far as they can be established), the merits of each party's position and the relevant law.
>
> But this does not mean that judges should ignore factors such as ethnic origin, gender or disability. On the contrary, justice requires that judge mush understand all the factors relevant to the factual situation they are considering, including those which may affect the way those present in the court room behave or perceive the court process.[51]

The importance of an appreciation of diversity and an awareness of social context is fundamental to a proper understanding of the Equality Act. Of particular importance to judicial officers is Chapter 4. This chapter deals in some eight fairly detailed sections with newly created Equality Courts. The author's colleagues, Judges Farlam of the Supreme Court of Appeal, Mokgoro of the Constitutional Court and Traverso of the Cape High Court and the author are members of a committee which is concerned with the "training" of judicial officers to preside in these courts. The author has been seconded to assist with this aspect of the matter and is engaged full time on it at the Centre for Applied Legal Studies at the University of the Witwatersrand as a visiting professor. The section has raised some concern amongst some who believe that such "training" is no more than an attempt to indoctrinate judges in the "party line" and seriously comprise judicial independence by seeking to instruct judges as to

[51] Lord Bingham of Cornhill (August 1999) 'Foreword' *the Equal Treatment Benchbook* (UK Judicial Studies Board 1999) vii.

what they should do. The author does not agree. The way the matter being dealt with is to provide judges with information and orientation concerning an important and unfamiliar piece of legislation without any attempt to prescribe to them how they should write judgements in specific cases. A conference was held in April this year near Johannesburg. The participants included a number of prominent overseas experts, including Mr. Justice Kirby of the High Court of Australia and Justice Roslyn Atkinson of the Supreme Court of Queensland and a group of about 50 South African judges and magistrates who are to be trained to train other judges and magistrates who are preside in the Equality Courts. 'Train the Trainers – Phase 2' is scheduled to take place at the end of July 2001. A comprehensive Bench Book is being prepared for the guidance of those who are to sit in the equality Courts.

S 16 deals with the presiding officers in the Equality Courts

S17 deals with the clerks of those courts

S 18 deals with the Rules and proceedings before the Equality Courts. The Rules are still to be finalised and enacted

S20 is a procedural section setting out details as to the institution of proceedings in terms or under the Act.

S 21 contains details of the powers and functions of the Equality Court.

S 22 provides for the appointment of assessors to act in the Equality Courts.

S 23 is concerned with appeals and reviews.

VI THE PRACTICAL STEPS

Against this backdrop, including a justiciable Bill of Rights, which entrenches human rights, there is every reason to believe the South African judiciary, which enjoys complete independence and which hopefully will be drawn from persons possessing the necessary skill and competence, cannot fail to be aware of human rights and of the need to apply them in their work. However, this awareness of itself is not enough. The judiciary needs to be assisted in a number practical ways. The following are some of them:

1. The provision of training courses for newly appointed judges and magistrates as also refresher or continuing "education" courses or perhaps more palliatively, for the older and more conservative judges, "awareness programmes"[52]. In this regard I am pleased to note that the Department of Justice which maintains a special Justice College for the training of persons involved in the administration of justice in the country has in 1997 and 1998, in terms of a Canada- South Africa Justice Linkage Project, conducted two orientation programmes for newly appointed judges. A further programme took place in January 2000. In 1998, it also conducted a continuing education seminar for experienced judges. At the first of these seminars the late Chief Justice spoke on the role of the judiciary in a Constitutional State, whilst the President of the Constitutional Court dealt with some practical problems arising out of the application of the Bill of Rights.
   A judge of the Supreme Court of Appeal and a judge of the Constitutional Court addressed the continuing education course on the fair trial provisions of the Bill of Rights.
2. Facilitating discussion and debate among judges on a relatively organised basis of substantive human rights law.
3. Active programmes encouraging judicial contact with colleagues in other countries, which can only help to encourage "a spirit of independence,

[52]See the address given by Olivier JA at the Judicial Conference referred to in note 13 above and reproduced in *The Judiciary in Africa* 176 at 179

freedom and courage."[53]

4. Encouraging law schools and academics to play a "watchdog role" in pointing to any possible abuses of executive power and possible lapses on the part of the judiciary in a proper regard for human rights.[54]
5. The fostering and re-enforcing, especially by an independent and informed media, of a spirit "of judicial independence of mind and an awareness of the pitfalls of executive-mindedness" without judges being fearful of being accused of lacking in patriotism.[55]
6. The choice of competent and independent persons to serve as judges.
7. Proper remuneration and security of tenure for judges.

The Minister of Justice Dr Penuell Meduna, who is also the Minister of Constitutional Affairs, shortly after taking up his position, made the following statement:

> We will work for a legitimate and accountable administration of justice which ... can really help to restore the rule of law, so as to address violence and serious crime, create and stabilise accountability for human conduct and behaviour, and ensure that a new culture based on respect for human rights is promoted.[56]

In a document entitled *Justice Vision 2000* prepared by the Department of Justice, the department states, *inter alia*, that it will carry out its vision "according to the values that are in the new Constitution; that democracy and equality are at the heart of these values; and that in keeping with these values, it wants to move away from a rigid law order paradigm, and towards a human

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[53]Op cit 179

[54]Op cit 179

[55]Op cit 179

[56]Supplement to *Pretoria News* 26 October 1999

rights based rule-of-law paradigm."[57]

VII THE FUTURE

As a white South African judge and, despite the "baggage of the past" some white South African judges carry, the author takes tremendous comfort and encouragement from these concluding words of a separate personal submission that Langa J made to the TRC. (It will be recalled that Langa J is the Deputy President of the Constitutional Court and a black person. He is likely to succeed Judge Chaskalson as president of the Constitutional Court.):[58]

> I am making this submission because I believe that the judiciary occupies, and will continue to occupy, a crucial position in our democracy. The relationship which it has with the rest of the community is therefore important. It should be regarded as an integral part of the community it serves and it can only function properly if it enjoys the complete trust and confidence of that community. I believe that that confidence was severely damaged in the past. In order for it to be completely restored and its maintenance guaranteed, I believe that there should be a common undertaking of the role of the judiciary and the courts, as well as how they perceive their functions and responsibilities towards society. The divisions and conflicts of our apartheid past have distorted the relationship between, on the one hand, institutions involved in the administration of justice, including the judiciary, and, on the other, significant sections of the South African community. This has to be set right now in order to ensure and to maintain a healthy democracy, which fully espouses the values of a new constitutional dispensation. I make the submission in the hope that the story of some of my personal experiences, perceptions and observations, shared as they are by thousands of the citizens of this country who were similarly placed, might assist in bringing about a greater appreciation of how others were affected by the operation of the legal system during the period under review. I make this submission also because of my belief that the correction of this distortion, the restoration of complete trust, is not something which should simply

[57]Op cit p 1

[58] 1988 SALJ 36 at 37.

> be assumed because the country now has a new Constitution. A process needs to take place, a process which will not only liberate those members of the judiciary who have felt the alienation but which will also reassure the formerly oppressed about the judiciary's rededication to justice for all.

Equally encouraging are these words uttered by South Africa's President Thabo Mbeki in his Presidential Inauguration Speech delivered on 16 June 1999:-

> As the sun continues to rise to banish the darkness of the long years of colonialism and apartheid, what the new light over our land must show is a nation diligently at work to create a better life for itself.[59]

[59] 1999 SA Journal on Human Rights p 137