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DISCUSSION PAPER ON REPRESSION

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INTRODUCTION

This paper has been prepared to provide a basis for discussion in a seminar consisting of lawyers and members of organisations within the oppressed community at large. Of necessity such a discussion would bring under the spotlight the function of the judiciary in this country as well as the role of lawyers.

This paper does not purport to review recent legislation, restriction orders or court decisions. For practising lawyers, it is necessary that there be a constant review of judgments, legislation and orders. Otherwise they would not be able to pursue cases in the best interest of their clients. But this is not the main purpose of the present paper which is designed to serve as a basis for discussion between lawyers and the community they serve.

RECENT TREND IN COURT CASES

The community, however, must know what the trends are in our courts. One must guard against two extremes, namely on the one hand the attitude that one can achieve nothing through the courts, but on the other hand placing all one's faith in courts. And so some comment on the recent trend would be justified.

Some of the provincial judgments over the last 3 years provided one with a little ray of hope that courts would begin to play a more meaningful role - through the process of accepted judicial interpretation - in upholding elementary common law principles of justice, procedural fairness, principles of the Rule of Law and the liberty of the subject. Let us say immediately that such hopes have been dashed by the highest court in our land, namely the Appellate Division whose decisions are binding on all the courts in the country. I refer here to the case of Omar v The Minister of Law & Order, Fani v Minister of Law & Order and Minister of Law & Order v Bill 1986(2)SA 756 AD.

Professor John Dugard commented on the judgment in the South African Journal on Human Rights (Vol.3 Part 3 November 1987) and said that it had been hoped (prior to the judgment) that the judicial dark ages had come to an end and that "the Appellate Division had embarked upon a course in which fundamental common law rights would be given preference over interests of national strategy and governmental bullying in the interpretation of ambiguous statutes and the review of administrative action". The judgment, says Dugard, suggests that this optimism was misplaced. Since the judgment in Omar's case, the A.D. has also reversed the judgment of Marais J in the Dempsey case. Alas, this did not come as a surprise!

There is, for the purpose of present discussions, no point in embarking upon a review of the various judgments which preceded Omar. Our participants expect - and deserve - some consideration. For us as black lawyers and democratic lawyers, what is required is an understanding of the social milieu and environment in which these events ie repression, states of emergency, detentions, suppression of media and the resultant pleas to the Supreme Courts - are taking place.

SOVEREIGNTY OF PARLIAMENT

We need not for the purpose of drawing appropriate conclusions and above all learning lessons, restrict ourselves to the periods of the various

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states of emergency. The plain fact of the matter is that - despite notable exceptions (which we salute) - our judiciary has never been independent.

IN THE FIRST PLACE according to S.A. law, the South African parliament is sovereign. In fact now that the locus of power has shifted away from parliament, we will indeed have to face up to the fact, sooner or later, that even parliament is no longer sovereign. Heil the President! Heil the security forces! Heil SADF!

The irony of our situation is that whilst government has become extra-parliamentary, it seeks to crush all extra-parliamentary opposition and drive opposition into an impotent parliament. That however is by way of digression. Let us for present purposes maintain the fiction that parliament is sovereign - a fiction which has been upheld in South African courts throughout South Africa's history.

The total subservience and impotence of the judiciary in matters relating to political rights, civil rights and discrimination - which is what we are talking about - was underlined by the outrageous manner in which the government handled the crisis relating to the removal of "coloured people" from the common voters roll. Initially defeated in the courts for having tampered with the entrenched clauses in a way not permited by the constitution, the Government packed the Senate and manufactured its two-thirds majority for a joint session of the House of Assembly and Senate. It then proceeded to ride roughshod over the hallowed "entrenched clauses" in the Union Constitution. This manoeuvre was upheld as perfectly legal and constitutional in the case of Collins v Minister of Interior & Another 1957(1)SA 552 AD.

PARLIAMENT IS PARLIAMENT OF THE OPPRESSOR

IN THE SECOND PLACE, South Africa has always been a land in which whites enjoyed dominance. Blacks were reduced to a position of landlessness and rightlessness. With the assistance of London, whites grabbed political rights and privileges for themselves. They ruled and lorded over blacks on whose backs they enjoyed these privileges. Reduced to landlessness and rightlessness, blacks were subjected to pass-laws, the migratory labour system and other humiliations too innumerable to mention. The vehicle for effecting this state of affairs was this very "sovereign parliament" which was for whites only. History teaches the indisputable fact that there has never been any hope whatever that such a "whites only" parliament never did (or could do) anything to protect the rights of blacks or remove the yoke of oppression. It has in fact been the chief instrument of oppression. This "sovereign parliament" has historically been (as creted by Great Britain), the parliament of the oppressor. In such a situation therefore, where parliament was sovereign, it meant that the oppressor was sovereign.

JUDGES AND MAGISTRATES DRAWN FROM RANKS OF OPPRESSOR CLASS

THIRDLY, the personnel in South Africa's judiciary have always been drawn from the ranks of the white privileged caste (In keeping with the policy of co-option, token drawing in of blacks is now being attempted). These are the men (and women) who sat in judgment (as they still do) over their slaves. They brought with them (and still do) all the prejudices and bias of their upbringing, training and environment. Many of them wallow in the massive propaganda and sick values emanating from the ruling class. They reflect it in their attitudes. By and large they accept the mores, standards, moral judgments and standpoints which exist within the white laager.

TOTAL ONSLAUGHT THEORY

Finally, on this aspect, our whole situation today makes it difficult for

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Judges (and Magistrates) to avoid being guided by considerations of national security or loyalty to the executive. Day in and day out government ministers, the radio, television and newspapers churn out in factory-like production style, so-called news. Thus slant and distort all news and information. Isolated from the rest of the world by deliberate policy, our population has been drowned with noises of the "total onslaught" upon South Africa by evil revolutionaries. Rare individuals aside, we have yet to come across a court in this land which has not been swept up by this wave. So much for the independence of the judiciary in South Africa.

PRESENT DAY REPRESSION

We are living through a period of severe repression which includes the arbitrary detention of thousands of people, the suppression of the media, the virtual banning of organisations, the restrictions placed on individuals and the licensed presence everywhere of the security forces. It has been argued in some circles that this repression is justified because the regime has the good intention of creating a climate in which to implement a policy of orderly reform which would lead to power sharing and the extension of rights to blacks. We need to examine this contention. What are the elements of the reform strategy? We itemise some of the elements to show that "Reform" is a fraud and that "Reform equals co-option".

(a) Wiehahn Strategy

At the time of the Wiehahn inquiry, black workers in many parts of South Africa were in the midst of a massive worker revolt against law wages, terrible working conditions and rightlessness. These revolts led to massive strikes, particularly Natal and the Eastern Cape. These thretened to spread to the rest of the country. They led to the breakdown of the collaborationist machinery created by the Black Settlement of Disputes Act for resolving industrial disputes - which black workers found totally useless.

Until 1979 when the Labour Relations Act was amended, "African" workers were denied the right to participate in the collective bargaining processes. To strike was a crime. Unionisation of "African" workers was totally taboo. Any strike or threatened strike by "African" workers led invariably to employers calling in the police resulting in the arrest and imprisonment of "African" workers. In the 1970's "African" workers defied these restrictions and began to form themselves into unions which managed to survive and grow despite repression. "African" workers learnt in their struggles that their lack of political rights was largely responsible for their state of helplessness. Hence their struggles began to reflect the need to strive for access to direct political power.

It is in this situation that the government, recognising the need to make a shift in strategy, appointed the Wiehahn commission. Wiehahn represented the response of the regime to the crisis on the labour front. It was both a retreat and a trap. The aim of the Wiehahn strategy was in a sense to co-opt the rising trade union movement - confine it to traditional western trade union/factory floor issues! Turn the eyes of workers away from the political struggle! That was the one element of "reform".

(b) Riekert Commission

The second element was contained in the Riekert Commission report

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which heralded the official end of the traditional pass law system (only to be replaced by another system of "influx" control which was more sophisticated). Once again it was designed to co-opt - at different levels - or at least neutralise and silence various layers of the "African" population - legals as opposed to illegals, citizens as opposed to homeland citizens etc.
An essential element of the whole "Reform" strategy was the greater emphasis and acceptance of the homeland citizenship concept which has robbed millions of South Africans to their citizenship. It is a strategy to divide and rule. This aspect, too, held out a carrot for the homeland elite - a collaborationist class - once again a form of co-option of a class at the expense of the vast majority.

(c) PRESIDENTS COUNCIL

The next instalment in this "reform strategy" came in the form of the establishment of a rubber stamp Presidents Council which dutifully made proposals for a new Constitution for South Africa. It produced a blue print for the tricameral parliament and the systemn of Regional Services Councils. Once again the so-called reform measure was, plain and simple, a policy of bullying collaborators. Again: a case of co-option.

(d) TRICAMERAL SYSTEM

Blacks were never consulted or asked to decide whether they indeed were in favour of such a dispensation or not. Not that they were ever consulted in the formation of union or the creation of a republic. As in the case of the 1961 Constitution when only whites took part in a referendum to decide whether South Africa was to become a republic or not, only whites were asked to participate in a referendum to decide whether or not to adopt the tricameral system. To this day the whole system remains fundamentally flawed and illegitimate in that blacks in South Africa had no say whatever in its creation.

POWER-SHARING A MYTH

There is no power-sharing in South Africa. Only collaboration in the exercise of dictatorial powers by a presidential dictatorship. Whatever vestiges remain of a democratic environment and tradition - no matter how warped - has been and is being swamped and destroyed by the awesome National Security Management System - with Joint Management Centres - operating and being extended to every level of S.African life. A tradition of autocracy, decisions from above and obedience is rapidly being implemented.

REPRESSION: WHY

If the scenario is as sketched above, why then repression? Why the state of emergency? Why the banning of organisations? Why the suppression of the media? Why the amendment to the Labour Relations Act? Why the new clampdown on Funding?

RESPONSE TO POLITICAL AND SOCIAL CRISIS

The new political dispensation - a policy of co-option is the ruling class response to the political and social crisis in our country. The massive struggles and revols of workers and students and indeed youth generally in the 1970's and 1980's, represented a massive defeat for the traditional

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strategy of apartheid rule. Important facets of that strategy, such as the Bantu Education policy, the local authority system (community councils and management committees) and the whole system of collaboration - lay in tatters. The "Reform" strategy is an attempt to resolve this crisis. But the political initiatives referred to above can never be implemented without repression. The regime simply cannot allow the oppressed people to have a say as to whether they want such a system or not. The regime cannot allow any democratic activity or democratic expression of opinion for this will result in a massive rejection of the system by the oppressed. It can also not tolerate the free flow of information or free debate. Therefore it suppresses the alternative media.
The regime is seeking to create an environment in which (or a protective umbrella under which) it will find it possible to implement its political initiatives - in immediate terms with an eye on the apartheid, ethnically organised, local authority elections in October this year.

CONCLUSION

It is in this context that we need to look at repression in South Africa and in particular

(a) The State of Emergency
(b) Detentions and Political trials
(c) The suppression of organisations, alternatively
(d) The Suppression of the Media
(e) Legislation to control trade unions