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THE JUDICIARY IN A STATE OF NATIONAL CRISIS— WITH SPECIAL REFERENCE TO THE SOUTH AFRICAN EXPERIENCE

JOHN DUGARD*

Can judges save a society in which the ruling regime has embarked upon a program involving the suppression of basic human rights and the departure from accepted principles of legality? In an exchange of views between Judge Learned Hand and Judge Jerome Frank on the role of the judiciary in such a society, Judge Hand warned: "A society so riven that the spirit of moderation is gone, no court *can* save."¹ To this Judge Frank replied:

Judge Hand thinks it folly to believe that the courts can save democracy. Of course, they cannot. But it seems to me that here, most uncharacteristically, Judge Hand indulges in a judgment far too sweeping, one which rests on a too-sharp either-or, all or nothing, dichotomy. . . . Obviously, the courts cannot do the whole job. But, just as obviously, they can sometimes help to arrest evil popular trends in their inception.²

This exchange raises the question of what judges can or should do in a "riven" society—or what I prefer to call a society in a national crisis. It matters not how the crisis has been brought about, whether by external war, civil war, political repression, racial injustice, or sectarian strife. For in all these cases, if the judiciary is permitted to operate with a substantial degree of independence, the same questions arise. Should judges assume a subordinate role and adopt a policy of judicial restraint in pursuance of the philosophy expounded by the Privy Council in 1916 that "[t]hose who are responsible for the national security must be the sole judges of what the national security requires?"³ Or should they continue to assert the basic

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1. Hand, *The Contribution of an Independent Judiciary to Civilization*, reprinted in *THE SPIRIT OF LIBERTY*, Ch. 20 (1952).

2. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 697-98 (1957). When he made this comment, Frank probably had the South African experience in mind, for in the same address, after making his general observation, Frank commented as follows on the absence of a bill of rights and judicial review in South Africa and on the way in which the South African legislature had "overruled" decisions of the South African Appeal Court in the early 1950's: "whether if supported by a bill of rights like ours, the South African court's decisions would have withstood the onslaughts of the regnant majority in the legislature, no one can say with certainty. But who can say that such decisions would not have done much to stem the terrifying growth of tyranny in that troubled land. . . ." *Id.* at 698.

3. *The Zamora* [1916] 2 A.C. 77, 107 (P.C. 1915) (per Lord Parker of Waddington).

principles of justice and fairness that form the foundation of all civilized legal systems "to arrest evil popular trends" (in the words of Judge Jerome Frank), even if this results in a confrontation with the ruling regime? Or should they resign from office lest they be used to lend legitimacy to the regime?

In this paper I shall examine what judges have generally done in a state of national crisis, and consider the jurisprudential explanations for their behavior. I shall begin by looking briefly at judges in societies other than South Africa, and then turn to the performance of judges in South Africa itself. I shall conclude by considering the options open to judges in a national crisis.

Apart from the experience of Germany in the 1930s, I shall confine my comparative survey to common-law jurisdictions. I do this not only because they are the jurisdictions most familiar to me, but also because the judiciary occupies a special status in countries that have adopted the English common law. The Continental career judge, professionally close to the bureaucracy, and bound to reach some agreement with his brother judges in a majority judgment, is seldom able to display the same degree of *public* independence as the Anglo-American type judge, appointed from private practice and granted the right of public dissent.⁴ This makes it more difficult to assess judicial responses to national crises in Continental systems. The judge appointed by a military junta has no place in the present study either, as his independence is suspect from the outset. This is illustrated by the tragic case of Argentina.⁵ When the military took power in 1976, it immediately appointed to the Supreme Court and Provincial High Courts new judges who were required to uphold the legal process of the military junta. Not surprisingly, these judges, with a few exceptions, acquiesced in the policy of detention and forcible abductions that resulted in the disappearance of some 9,000 people. The experience of other Latin American societies under military rule is substantially similar.⁶

Some may question my failure to distinguish sharply between the American-type judge, called upon to interpret a federal constitution and pronounce on a bill of rights, and the British-type judge, who has no power to sit in judgment on legislative policy. Although there are important differences between these two judicial prototypes, these differences should not be exaggerated: the British-type judge, who serves as a model for the South African judiciary, may seriously obstruct the legislature by restrictive methods of interpretation and halt executive excesses by means of the power

4. W. FRIEDMANN, *LEGAL THEORY* 532 (5th ed. 1967).

5. For a full account of this tragedy, see *Nunca Más, THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED* 386-427 (1986).

6. See *TORTURE IN BRAZIL: A REPORT BY THE ARCHDIOCESE OF SAO PAULO*, Ch. 13 (J. Dassin ed. 1986) (translator by Jaime Wright); *HUMAN RIGHTS IN COLOMBIA AS PRESIDENT BARCO BEGINS: AN AMERICA'S WATCH REPORT* 37-40 (Sept. 1986); *LAWYERS COMM. FOR INTERNAT'L HUMAN RIGHTS, NICARAGUA: REVOLUTIONARY JUSTICE: A REPORT ON HUMAN RIGHTS AND THE JUDICIAL SYSTEM*, Ch. 2 (*Popular Anti-Somocista Tribunals*) (April 1985).

to review administrative action and subordinate legislation.⁷ Consequently, although the *degree* of intervention open to the British-type judge is more limited than that of his American counterpart, both have the judicial power to obstruct injustice.⁸ Similarly, judges in both jurisdictions carry individual responsibility for failure to oppose "evil popular trends" inflicted by legislatures and executives.

I. JUDICIAL BEHAVIOR IN JURISDICTIONS OTHER THAN SOUTH AFRICA

In order to place the behavior of the South African judges in proper perspective, it is necessary to examine briefly some of the responses of judges raised in a similar tradition to societal injustices and the violation of human rights during a period of national crisis.

A. United States

Under the Chief Justiceship of Earl Warren, the Supreme Court of the United States outlawed racial segregation, expanded the bounds of freedom of speech, and introduced new standards of criminal justice. The Warren Court's activist record, which is still fresh in the memory of many Americans, obscures some of the bleaker periods in American judicial history.

American judges hardly distinguished themselves in their interpretation of the slave laws.⁹ The judgment of Chief Justice Taney in the *Dred Scott* case,¹⁰ in which he described blacks "as beings of an inferior order . . . altogether unfit to associate with the white race. . . , and so far inferior, that they had no rights which the white man was bound to respect"¹¹ stands as an awesome reminder of judicial prejudice and fallibility. Judgments of this kind were not, however, confined to racist and pro-slavery judges. Even judges opposed to slavery, such as Joseph Story, John McLean and Lemuel Shaw, managed to enforce the Fugitive Slave Law by emphasizing their formal duty to apply the law and by denying moral, personal responsibility for its application.¹² According to Robert Cover, in his thorough study of slavery and the judicial process, "a thoroughgoing legal positivism was one of the many factors that determined the complicity of the antislavery judge in the system of law that he himself considered immoral."¹³ Consequently:

7. W. FRIEDMANN, *supra* note 4, at 440-51.

8. In *Southern Pacific Co. v. Jensen*, Justice Oliver Wendell Holmes, Jr. stated: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." 244 U.S. 205, 221 (1916). British and South African judges generally claim that their American counterparts engage in "molar" judicial motions, while they are limited to "molecular motions."

9. A.L. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS IN THE COLONIAL PERIOD passim* (1978).

10. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

11. *Id.* at 407. See further on this decision *Dred Scott and Brown v. Board of Education: A Frances Lewis Law Center Colloquium*, 42 WASH. & LEE L. REV. 1 (1985).

12. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

13. *Id.* at 1.

[t]he prevailing course of action of the antislavery judge was to speak in conclusory terms of the obligation to apply "the law and the law alone;" of the obligation to refrain from considering conscience, natural right, or justice.¹⁴

The history of the internment of Japanese Americans provides a case study of the failure of lawyers and judges to confront injustice in time of war.¹⁵ Neither the A.C.L.U. nor the National Lawyers Guild were fully prepared to challenge the constitutionality of the internment program,¹⁶ while the Supreme Court, in judgments concurred in by activist justices Hugo Black and William O. Douglas,¹⁷ upheld the lawfulness of the program which resulted in the internment of 110,000 Japanese Americans on the ground that it was not proper for the Court to review the action of the military.¹⁸

In the post-World War I period of the "Red Scare" and the raids carried out by Attorney-General Palmer on aliens with communist leanings, the courts did little to halt the hysteria and indeed contributed to it in the notorious trial of Sacco and Vanzetti.¹⁹ Again, after the Second World War, during the bleak days of "McCarthyism" and the Cold War, the courts failed to assert their detachment from the anti-communist hysteria of the time. Two notable trials, and their passage through the appeals courts, testify adequately to the validity of this assertion: first, the prosecution of Julius and Ethel Rosenberg for atomic espionage,²⁰ and, second, the trial of the members of the Central Committee of the Communist Party of the United States.²¹ The trial judge in the *Rosenberg* case, Judge Irving Kaufman, has been extensively criticized for allegedly displaying partisanship throughout the proceedings,²² while the Supreme Court itself resorted to extraordinary procedures and indecent haste in order to expedite the execution of the Rosenbergs.²³

14. *Id.* at 233.

15. P. IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983).

16. *Id.* at 129, 171, 180-81.

17. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 215 (1944).

18. In *Hirabayashi v. United States* Chief Justice Stone stated, with reference to the decision of the military to intern Japanese Americans: "It is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." 320 U.S. at 93.

19. For a bibliography on this era, see 1 EMERSON, HABER AND DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES*, 45-46 (4th ed. 1976).

20. *Id.* at 63.

21. *Dennis v. United States*, 341 U.S. 494 (1951).

22. W. SCHNEIR & M. SCHNEIR, *INVITATION TO AN INQUEST, REOPENING THE ROSENBERG "ATOM SPY" CASE* (1973). *Contra*, Beier and Sand, *The Rosenberg Case: History and Hysteria*, 40 A.B.A.J. 1046 (1954).

23. For a criticism of the behavior of the Supreme Court, see Note, *The Rosenberg Case: Some Reflections on Federal Criminal Law*, 54 COLUM. L. REV. 219 (1954).

During the 1960s the Supreme Court built a reputation for activism in the causes of racial equality and individual liberty, but even the highly activist court of the 1960's was unprepared to force a confrontation with the executive over the issue which threatened to tear apart American society—the Vietnam War. During the final phase of United States military involvement in Vietnam, repeated efforts were made by opponents of the war to persuade the Supreme Court to rule on its legality, but the Court deliberately refused to become embroiled in this controversy by holding that the legality of the war was a political question outside the competence of the Court.²⁴

American judicial history is not one long saga of abstention and collaboration as the above account may suggest. There have been proud moments in even the most difficult of times. The role played by the Fifth Circuit Court of Appeals, under the leadership of judges Tuttle, Wisdom, Brown and Rives, in the desegregation of the "Deep South," in the wake of *Brown v. Board of Education*,²⁵ is an example of judicial courage and enlightened determination that serves as a constant reminder of what judges can do to advance racial justice.²⁶

B. United Kingdom

British courts have behaved in much the same way as those of the United States in time of war. In the notorious decision of *Liversidge v. Anderson*,²⁷ the House of Lords refused to review the exercise of the Government's internment powers under war-time regulations. Most critics today share the view of Lord Atkin, in his dissenting judgment, that the majority placed a "strained construction . . . on words with the effect of giving an uncontrolled power of imprisonment to the Minister" and that, in so doing, they showed themselves to be "more executive-minded than the executive."²⁸ Indeed one critic, C.K. Allen, has described the decision as the House of Lords' "contribution to the war effort."²⁹ *Liversidge v. Anderson* has now been discredited in the United Kingdom by a peacetime judiciary.³⁰ There is no guarantee, however, that its philosophy would not be resurrected in a national crisis or time of war.

24. For a thorough survey of the behavior of the courts during this period, see Rothenbühler, *The Vietnam War and the American Judiciary: An Appraisal of the Role of Domestic Courts in the Field of Foreign Affairs*, 33 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 312 (1973); see also Henkin, *Vietnam in the Courts of the United States*. 'Political Questions' 63 AM. J. OF INTERNAT'L LAW 284 (1969).

25. 347 U.S. 483 (1954).

26. For a full account of this history, see J. BASS, UNLIKELY HEROES: THE DRAMATIC HISTORY OF THE SOUTHERN JUDGES WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY (1981).

27. [1942] A.C. 206 (H.L.).

28. *Id.* at 244-45.

29. C.K. ALLEN, LAW AND ORDER 256 (3d ed. 1965).

30. I.R.C. v. Rossminster [1980] A.C. 952 (H.L.) at 1011, 1025.

C. Northern Ireland

The courts of Northern Ireland, in their efforts to maintain order in that strife-torn society, have generally leant in favor of the security forces.³¹ This is apparent from their readiness to admit unconfirmed verbal confessions made to police officers in the course of intensive interrogation³² and from their willingness to absolve the security forces from responsibility for the lethal use of force.³³ The House of Lords has also made clear its support for a strict law and order approach to justice in Northern Ireland. In *McEldowney v. Forde*³⁴ the House of Lords, by a majority, upheld the validity of a regulation, attacked on grounds of vagueness, proscribing "Republican Clubs or any like organization howsoever described." Lord Pearson declared in respect of the enabling statute's provision authorizing the Minister of Home Affairs to make regulations "for the preservation of the peace and the maintenance of order" that:

The Northern Ireland Parliament must have intended that somebody should decide whether or not the making of some proposed regulation would be conducive to the "preservation of the peace and the maintenance of order." Obviously it must have been intended that the Minister of Home Affairs should decide that question. Who else could? . . . The courts cannot have been intended to decide such a question, because they do not have the necessary information and the decision is in the sphere of politics, which is not their sphere.³⁵

This judgment, argued Boyle, Hadden and Hillyard, showed "the futility of pursuing the civil rights campaign through the courts."³⁶

D. The Kelsenian Option as a Judicial "Cop Out" in Rhodesia, Pakistan and Uganda

Revolutions usually result in the overthrow of legislature, executive and judiciary by the revolutionary power. In some instances, however, the

31. See generally Boyle, *Human Rights and Political Resolution in Northern Ireland*, 9 YALE J. OF WORLD PUB. ORD. 156 (1982-83).

32. K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND 76-77, 86 (1980); K. BOYLE, T. HADDEN & P. HILLYARD, LAW AND STATE: THE CASE OF NORTHERN IRELAND 102-03 (1975). In 1981 the author visited Northern Ireland on behalf of Amnesty International to investigate the case of Michael Culbert who was convicted on the basis of a verbal confession to a police officer by McDermott, J., in the Belfast Crown Court on 12 December 1979. The appeal against this conviction, which was based entirely on the verbal confession, was curtly dismissed by Lord Lowry, C.J., who made little attempt to examine the circumstances in which the confession was procured. This experience confirms the impressions of Boyle, Hillyard and Hadden.

33. Spjut, *The "Official" Use of Deadly Force by Security Forces Against Suspected Terrorists: Some Lessons from Northern Ireland*, 1986 PUB. LAW 38.

34. [1969] 3 All E.R. 1039 (H.L.).

35. *Id.* at 1066.

36. K. BOYLE, T. HADDEN & P. HILLYARD, LAW AND STATE: THE CASE OF NORTHERN IRELAND, *supra* note 32, at 15. For a similar criticism of this decision, see Calvert, *The "Republican Clubs" Case*, 21 N. IRELAND L. Q. 191 (1970).

revolutionary power has allowed the judiciary appointed by the pre-revolutionary regime to remain in office and to pronounce upon the legality of the new regime in order to confer some semblance of legitimacy upon this regime. In such circumstances it would seem that a judge who had taken an oath of allegiance to the earlier constitutional order has only two options: he must resign from office (and accept or refuse reappointment by the revolutionary regime); or he must declare the revolutionary regime to be unconstitutionally installed in terms of the pre-existing order.³⁷ However, in several instances in recent times the judiciary of the *ancien regime* has remained in office and upheld the lawfulness of the revolutionary authority by invoking Hans Kelsen's *grundnorm* theory in terms of which one political order may be "lawfully" replaced by another by means of a successful revolution. Although it is highly unlikely that Kelsen foresaw the judiciary pronouncing upon a change of *grundnorm*,³⁸ in this way the common-law courts of Rhodesia,³⁹ Pakistan⁴⁰ and Uganda⁴¹ have upheld the lawfulness of revolutionary regimes. Surely this is the ultimate abdication of judicial authority to political power.

E. Nazi Germany

Although no study of the behavior of lawyers and judges in a society in crisis would be complete without consideration of the case of Nazi Germany, it is important to stress that the case differs fundamentally from those considered above. In Nazi Germany, as Hitler's tyranny intensified, any form of resistance to the will of the Fuehrer—now elevated to the position of the law itself—became an act of personal bravery. Moreover, Hitler made it clear that he would not tolerate judicial independence when he transferred jurisdiction in cases of treason from the Supreme Court (Reichsgericht) to the dreaded People's Court (Volksgerichtshof) after the Reichsgericht had acquitted three of the four communist defendants in the *Reichstag* fire trial in March 1934.⁴² In these circumstances it became meaningless to speak of judicial independence and choice. The main charge against the German judiciary is that it contributed to the fall of the Weimar Republic, was generally sympathetic to national socialism, and acquiesced

37. Welsh, *The Functions of the Judiciary in a Coup D'Etat*, 87 S. AFR. L. J. 168 (1970).

38. Brookfield, *The Courts, Kelsen and the Rhodesian Revolution*, 19 U. TORONTO L. J. 326 (1969).

39. *Madzimbamuto v. Lardner-Burke* N.O., 1968(2) S.A. 284 (R.A.D.); *R v. Ndhlovu*, 1968(4) S.A. 515 (R.A.D.).

40. *State v. Dosso* [1958] 2 Pak. S.C.R. 180, (1959) 1 Pak. L.R. 849. This decision was later overturned by the Pakistan Supreme Court in *Jilani v. the Government of Punjab*, P.L.D. (1972) S.C. 139. See the discussion of these two cases by Pliner, *Law and Political Reality*, 92 S. AFR. L. J. 325 (1975).

41. *Uganda v. Commissioner of Prisons* [1966] East Africa R. (Uganda) 514.

42. L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 269 (1962).

without protest in the lawlessness of Nazism.⁴³ Indeed, in 1933, shortly after Hitler had abrogated the most important basic rights in the Constitution, the Confederation of German Judges declared "its full trust in the Government."⁴⁴ Even the dismissal of their Jewish colleagues, who constituted eight per cent of the judiciary, was accepted without protest.⁴⁵ Collaboration, rather than abstention, probably more accurately describes the conduct of the German judges.⁴⁶

Lawyers, too, under the influence of positivism, saw it as not their task to question the conduct of a regime that had come to power by constitutional means, and in the early years, when opposition was still possible, acquiesced in what Gustav Radbruch was to describe as "lawless laws."⁴⁷

II. THE SOUTH AFRICAN JUDICIARY IN AN APARTHEID STATE

A. *The South African Judiciary*

Lower courts in South Africa are staffed by magistrates appointed from the ranks of the civil service.⁴⁸ They are products of their upbringing and captives of the bureaucracy. Generally, they display a subordination to the

43. In 1935, for instance, the Prussian Supreme Court of Administration ruled that the orders and actions of the Gestapo were not subject to judicial review. *Id.* at 271.

44. "Erklärungen" 7 DEUTSCHE JURISTEN—ZEITUNG 453 (1933).

45. Reifner, *Institutionen des Faschistischen Rechtssystems*, reprinted in DAS RECHTS DER UNRECHTSSTAATES 11, 30 (R. Rutner, ed. 1981).

46. Lovell Fernandez, a South African lawyer resident in Germany, sums up the position of the German judiciary during the Nazi era as follows:

Although in his private table talks Hitler condemned the judges, he avoided antagonizing them in public. . . . [T]he Nazis knew all too well that if they provoked the judiciary by impinging directly on their authority, they would endanger their main legitimizing apparatus. Instead, the regime sought to restore the old monarchical image of the judge—that of an elite official, a representative of the ruler, authoritarian and anti-democratic in outlook. The judiciary co-operated well. All the judges were from the upper class, and during Weimar the judiciary was already known for its anti-democratic and anti-republican outlook.

Occasionally, the regime tried to intimidate judges when it had a special interest in the outcome of the proceedings. Such sabre-rattling was, however, rare and was certainly never exercised against judges in the higher courts, in the pre-War years at least. Although no judge was ever arrested, delivered into a concentration camp or executed for refusing to yield to intimidation, only a handful were prepared to dissociate themselves from Nazi thinking in their judgments. On the whole, judges were wont to interpret racially discriminatory laws even more extensively than the regime expected them to.

Fernandez, *The Law, Lawyers and the Courts in Nazi Germany*, 1 S. AFR. J. HUM. RTS. 124, 129-30 (1985).

47. See Van Niekerk, *The Warning Voice from Heidelberg—the Life and Thought of Gustav Radbruch*, 90 S. AFR. L. J. 234 (1973); see also Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 636 (1958).

48. For a full account of the structure of the South African court system, see J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 10-13, 280-288 (1978).

executive which deprives them of real independence in disputes between individual and State. The judges of the Supreme Court of South Africa occupy a very different status. Although they are appointed by the executive, they enjoy security of tenure until the age of seventy. With very rare exceptions they are chosen from the private Bar, as in England, and model themselves upon the English judiciary.⁴⁹ They pride themselves upon their independence and their detachment from political life. Frequently they contrast their "independence" with that of the American judiciary whose involvement in the political life of the country is seen to undermine its independence. It is this judiciary, and not the magistracy, that forms the subject of this study.

The Supreme Court of South Africa is divided into provincial divisions, which enjoy a considerable amount of autonomy. All, however, are subject to the rulings of the Appellate Division of the Supreme Court. Today there are some 120 judges of the Supreme Court, of which 14 are judges of appeal. (The Appeal Court never sits *en banc*: in most cases five judges constitute a court.) Each Provincial Division is presided over by a Judge President, while the Chief Justice presides over the Appellate Division. Although no law prohibits (or has prohibited)⁵⁰ the appointment of non-whites to the Bench, only whites have held judicial office in South Africa.⁵¹ Of these judges, of whom all but one are men, the majority are of Afrikaans-speaking origin, which makes them prone to identify, consciously or sub-consciously, with the ruling Afrikaner regime. About 40 judges are drawn from the English-speaking community which identifies more closely with British traditions. Afrikaner judges cannot, however, be stereotyped as sympathetic to the Government, any more than English-speaking judges can be labelled as unsympathetic to the Government. While most of the judiciary are conservative by nature and outlook, a minority, comprising both Afrikaans and English-speaking judges, aspire to liberal traditions and values.

Like their English counterparts the South African judiciary has no power to review legislation enacted by the sovereign Parliament. Indeed the present Constitution of 1983, like its predecessors, expressly provides that "no court of law shall be competent to inquire into or to pronounce upon the validity of an Act of Parliament."⁵² Consequently, again like the English judiciary, the South African judiciary's scope for intervention and creativity is limited to the interpretation of statutes, the development of the common

49. In 1970 Mr. Justice Claassen of the Transvaal Provincial Division stated: "I am told on good authority that the English judges, who are undoubtedly the most eminent in the world, consider only the South African judges as their equals." *Retain the Bar and Side Bar*, 87 S. AFR. L. J. 25 (1970).

50. Section 10 of the Supreme Court Act 59 of 1959.

51. In February 1987 Mr. Hassan Mall, an Indian advocate from Natal, was appointed as an acting judge for one month to the Natal Provincial Division. Acting appointments of this kind are often followed by permanent appointments to the Bench. Mr. Mall's appointment as an acting judge is discussed *infra* at note 114.

52. Republic of South Africa Constitution Act 110 of 1983 (§ 34).

law, and the review of subordinate legislation and administrative action.

Although South African judges—with rare exceptions—have given their support to the maintenance of white supremacy since 1910,⁵³ when the Union of South Africa was created, they acquired a reputation for fearless independence as a result of a brief interlude of judicial glory in the early 1950s.⁵⁴ Shortly after the National Party Government came to power in 1948 it attempted to remove the colored⁵⁵ voters in the Cape Province—the sole remaining non-white voters in South Africa—from the electoral roll by the normal parliamentary majority, despite the fact that the Constitution required a two-thirds majority in both legislative chambers sitting together for such legislation. The Appellate Division, comprising mainly judges appointed by the earlier United Party Government of Jan Smuts, refused to condone this procedural irregularity and obstructed this legislative scheme for six years. Ultimately, however, the National Party Government got its way by enlarging one of the legislative chambers (the Senate) and by packing the Appellate Division with judges more sympathetic to its policies.⁵⁶ This succeeded in “putting down” the judicial revolt. However, for some time after, the South African judiciary continued to bask in the glory of the reputation acquired so briefly in this period.

B. *The Apartheid State and the National Crisis*

In 1948 the National Party Government came to power on the platform of apartheid. Initially its legislative program was directed largely at the achievement of racial separation in the social, economic, educational, and political life of the country.⁵⁷ However, as opposition to this policy mounted, the National Party Government enacted a host of draconian security laws designed to suppress political opposition.⁵⁸ By the mid-1960s racism and political oppression together formed the legislative pillars of apartheid. In recent years, in response to both national and international pressure, the National Party Government has effected the repeal of a number of the worst discriminatory laws⁵⁹ and promised to abolish the remaining discrim-

53. J. DUGARD, *supra* note 48, at 304-316, 325-328; H. CORDER, *JUDGES AT WORK: THE ROLE AND ATTITUDE OF THE SOUTH AFRICAN JUDICIARY, 1910-1950 passim* (1984).

54. For comprehensive accounts of this interlude, see J. DUGARD, *supra* note 48, at 28-34; C. FORSYTH, *IN DANGER OF THEIR TALENTS: A STUDY OF THE SOUTH AFRICAN APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA, 1950-1980*, 61-74 (1985).

55. The term “colored,” in the South African context, is used to describe persons of mixed racial origin.

56. C. FORSYTH, *supra* note 54, at 13-25.

57. J. DUGARD, *supra* note 48, at Ch. 4.

58. *Id.* at Ch. 5 & 6.

59. In 1986 the South African Parliament repealed the hated “pass laws,” which had placed severe restrictions on the freedom of movement of black South Africans, Abolition of Influx Control Act 68 of 1986, and restored South African citizenship to some 2 million blacks deprived of this citizenship on the granting of “independence” to Transkei, Bophuthatswana, Venda and Ciskei. Restoration of South African Citizenship Act 73 of 1986.

inatory laws. At the same time the government has intensified its security program in order to suppress internal opposition to its policies. Thus, at present, this component of the "law of apartheid" is dominant.

In 1960 the South African Government first declared a state of emergency for 156 days.⁶⁰ Thereafter it preferred to avoid the formal declaration of a state of emergency as this resulted in a loss of confidence in the economic stability of the country. Instead the government enacted a number of emergency-type laws as part of the ordinary law of the land. In 1985, when these measures proved to be inadequate, it declared a six month state of emergency which terminated in March 1985.⁶¹ However in June 1986 another state of emergency was declared⁶² which seems destined to continue indefinitely.

South Africa, thus, provides an excellent example for a study of judicial behavior in a state of national crisis. There is undoubtedly a "national crisis," resulting from the policy of racial discrimination, the denial of political rights to 70 per cent of the population, the suppression of political opposition, and the civil disorder generated by apartheid. At the same time there is a judiciary, comprising some 120 superior court judges, which prides itself on its independence and professes allegiance to the legal traditions of the Western world.

C. The Response of the South African Judiciary to the National Crisis, 1960-1986

From 1960 to 1982 the Appellate Division was presided over by Chief Justices who were politically sympathetic to the Government (L.C. Steyn (1959-1970); F.L.H. Rumpff (1974-1982)) or jurisprudentially sympathetic to executive power (N. Ogilvie Thompson (1971-1974)). The majority of Judge Presidents of this period were likewise inclined. Although there was some questioning of judicial behavior from academic quarters during this period, most judges seemed to be impervious to criticism and convinced that the policy of abstention or support for the executive was juridically sound.

Since the early 1980s there have been some changes in judicial thinking and leadership. Some judges, probably not more than thirty in number, are troubled by their office and seem to be determined to dissociate themselves from the executive or, at least, to maintain a decent distance from the executive. This is the result of a new awareness on the part of some judges of the increased lack of confidence in the courts among blacks, who now tend to see judges as part of the apartheid system and not as independent arbiters standing between the executive authority and the individual. This awareness has been heightened by intensified academic criticism of the

60. J. DUGARD, *supra* note 48, at 110.

61. Proclamation R120 of 1985, *Government Gazette* 9876 (21 July 1985).

62. Proclamation R108 of 1986, *Government Gazette* 18279 (12 June 1986).

judiciary: liberal critics have claimed that judges have failed to exercise judicial choice sufficiently in favor of racial justice;⁶³ while radical critics have argued that judges inevitably collaborate with the system and that a moral judge has no alternative but to resign.⁶⁴

In 1982 P.J. Rabie became Chief Justice. Although clearly a political appointee, he has turned out to be more moderate than any of his predecessors since 1960: under his leadership the Appeal Court has handed down a number of decisions in favor of racial equality and individual liberty which would have been unlikely in earlier years. There have also been important changes in the provincial divisions, particularly in the Natal Provincial Division, which has acquired a new reputation for judicial independence in matters affecting race and security. In large measure this is due to the appointment in 1982 of A.J. Milne as Judge President of Natal. In these circumstances it is necessary to divide any study of judicial behavior in South Africa into two main periods: 1960-1982 and 1982-present.

1. 1960-1982

During this period the South African Appellate Division handed down a number of decisions on race and liberty which showed a determination to buttress and extend the power of the executive and to further the legislative program of apartheid. In all these cases there was a clear judicial choice open to the judges in the sense that they were required to interpret ambiguous statutes or to apply the common law to new circumstances. Time and space do not permit a comprehensive study of these cases. Only the most damaging decisions will be considered.

In this survey only decisions of the Appellate Division are considered as the provincial divisions generally took their lead from the Appellate Division and failed to assert their independence where this was possible. Moreover, it became clear that, in some of the provincial divisions, judges sympathetic to the executive were regularly selected to preside over trials and proceedings of a political nature.⁶⁵ This gave the impression that judges in the provincial divisions had subordinated themselves to the Government more than was perhaps true.

63. J. DUGARD, *supra* note 48, at 279-388.

64. Wacks, *Judges and Injustice*, 101 S. AFR. L. J. 266 (1984).

65. In 1982 the author carried out a survey of the allocation of judges to hear political trials in the largest provincial division, the Transvaal Provincial Division. From this study it appeared that from 1978 to 1982 there were 25 trials in the Transvaal of persons charged with common-law treason and statutory treason. These cases were tried by 12 of the 45 judges of the Division. Moreover 8 judges heard 21 of the cases. In effect this meant that about 17 per cent of the Transvaal judiciary heard 84 of the cases in question. See Dugard, *The Judiciary and National Security*, 99 S. AFR. L. J. 655, 657 (1982).

(a) *race discrimination*

Before 1960 the courts had a mixed record on matters relating to race.⁶⁶ In 1911 the Appellate Division gave its approval to school segregation in language reminiscent of that of Chief Justice Taney in the *Dred Scott* case;⁶⁷ and in 1937 it held,⁶⁸ like the Supreme Court of the United States in *Plessy v. Ferguson*,⁶⁹ that separate facilities for the different races were reasonable and therefore lawful. In the 1950s, however, the Appellate Division sought to limit the injustices of the "separate but equal" doctrine by insisting on *substantial* equality of treatment when separate facilities were provided.⁷⁰ After 1960, and the appointment of L.C. Steyn as Chief Justice, decisions of this kind ceased and the courts gave their full backing to apartheid. Two decisions—separated by twenty years—dealing with the interpretation of the Group Areas Act illustrate the approach of the Appellate Division to apartheid.

The Group Areas Act⁷¹ is one of the main pillars of apartheid as it authorizes the executive to establish separate residential and business areas for the different racial groups. Although the enabling statute provides for the division of South Africa's towns and cities into different group areas it does *not* expressly permit an unequal allocation of land and property to

66. For a comprehensive study of the cases on race discrimination, see J. DUGARD, *supra* note 48, at 304-24.

67. *Moller v. Keimoes School Committee*, [1911] App. Div. 635. Here the Chief Justice, Lord De Villiers, stated:

[I]n construing a vague expression in a statute, like that of "European parentage or extraction or descent," the Court should endeavor to ascertain its popular sense and place itself in the position of the authors of the enactment. As a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. . . . Believing, as these whites did, that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilization, they condemned intermarriage or illicit intercourse between persons of the two races. Unfortunately the practice of many white men has often been inconsistent with that belief, but the vast majority of Europeans have always condemned such unions, and have regarded the offspring of such unions as being in the same racial condition as their black parents. These prepossessions, or, as many might term them, these prejudices, have never died out, and are not less deeply rooted at the present day among Europeans in South Africa, whether of Dutch or English or French descent. We may not from a philosophical or humanitarian point of view be able to approve this prevalent sentiment, but we cannot, as judges, who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature to adopt the policy of separate education for European and non-European children.

Id. at 643-44.

68. *Minister of Posts and Telegraphs v. Rasool*, [1934] App. Div. 167.

69. 163 U.S. 537 (1896).

70. *R v. Abdurahman*, 1950(3) S.A. 136 (A.D.); *R v. Lusu*, 1953(2) S.A. 484 (A.D.)

71. Act 41 of 1950 (as replaced by Act 36 of 1966).

different race groups or authorize the forced relocation of people in a substantially unequal manner. The Appeal Court, in 1961, held, however, that such an inequality of treatment (in favor of the white group) was to be *implied* despite the absence of any statutory basis for such an interpretation.⁷² Consequently, it refused to apply the common law principle requiring a substantial equality of treatment of the races in the absence of clear statutory authorization which had been firmly asserted by the courts in the early 1950s.⁷³ This opened the door for large scale population removals, in which few whites suffered but thousands of colored and Indian families were forced to abandon their homes and be moved to less attractive areas far from the city centres.⁷⁴ In 1981 an attempt was made to persuade the Appellate Division to reconsider its notorious decision of 1961. But it refused to do so, despite the growing political opposition to the Group Areas Act, and instead confirmed its earlier decision on the ground that, although unequal treatment was not provided for in the statute, it was to be implied.⁷⁵

(b) *torture and cruel and degrading treatment*

In 1963 the South African legislature first introduced the principle of lengthy detention without trial for the purpose of interrogation,⁷⁶ and a number of applications were brought before the courts on behalf of detainees aimed at alleviating the hardships of detention or securing judicial protection of detainees. In a number of decisions the Appeal Court adopted a "hands off" policy. In *Roussouw v. Sachs*⁷⁷ it held that although the statute was silent on the right of a detainee to receive reading and writing materials, such "luxuries" were impliedly to be excluded because they might relieve the "tedium" of solitary confinement and thereby interfere with the purpose of the statute—to induce detainees to talk. Shortly after this decision was handed down, the Appeal Court refused an application⁷⁸ to allow a detainee to testify in court about allegations of mental torture on the ground that

72. *Minister of the Interior v. Lockhat*, 1961(2) S.A. 587(A). This judgment reversed a lower court decision which held that the Group Areas Act was to be implemented without discrimination in the absence of statutory authority to the contrary. *Id.*, *rev'g* 1960(3) S.A. 765(D).

73. *See supra* note 70 and accompanying text.

74. By the end of 1982 81,948 colored families, 39,485 Indian families, and only 2,285 white families had been relocated in terms of the Group Areas Act. SURVEY OF RACE RELATIONS IN SOUTH AFRICA 233 (1983).

75. *S v. Werner*, 1981(1) S.A. 187(A).

76. In 1963 such detention was permitted for 90-days only. § 17 of Act 37 of 1963. In 1965 this was increased to 180 days; and in 1967 provision was made for indefinite detention without trial for the purpose of interrogation. Act 83 of 1967. This position still prevails today. Internal Security Act § 29 of Act 74 of 1982.

77. 1964(2) S.A. 551(A). This decision reversed a decision of the Cape Provincial Division holding that the deprivation of reading and writing materials constituted a punishment which could not be implied. *See J. DUGARD, supra* note 48, at 332.

78. *Schermbrucker v. Klindt N.O.*, 1965(4) S.A. 606(A).

this would interfere with the interrogation process and “negative the inducement to speak.”⁷⁹ Again, the court inferred that its jurisdiction to intervene had been *impliedly* excluded as the statute itself was silent on this matter.

These decisions, which according to academic critics supported the argument that “the greater the expressed restrictions, the greater the implied restrictions,”⁸⁰ were clearly intended as a statement of judicial policy on the new draconian security laws, and as a guide to the lower courts. In this respect, the decisions were highly successful.

Provincial courts were quick to follow the policy of the Appellate Division and applications aimed at restraining the excesses of police interrogation were generally rejected.⁸¹ To make matters worse, the Appellate Division in 1972 upheld the conviction of a law professor—Barend van Niekerk—for contempt of court for appealing to the courts to adopt a more activist approach to the interpretation of the security laws in order to curb police torture.⁸² This decision was not required by the common law or judicial precedent, and clearly represented a statement of judicial policy aimed at silencing critics of the passive judiciary.

In this climate of political repression and judicial abstention, the security police were given a free hand. Allegations of torture of political detainees became widespread; and over fifty persons died in detention in highly suspicious circumstances. It was the killing in 1977 of the young black leader, Steve Biko, by the security police, while he was a detainee under the security laws, that revealed the extent to which torture, both physical and mental, had become part of the interrogation process. It was the public outcry in response to this killing, and not judicial intervention, which resulted in some improvement of the treatment of detainees. Had the courts adopted an interventionist approach towards the treatment of detainees in the 1960s, it is more than probable that Biko and other detainees would not have died, and that torture would not have become an accepted pattern of police conduct.

There was no repentance on the part of the Appellate Division. In 1979 it refused to intervene to assist political prisoners who were subjected to a more harsh form of treatment than ordinary prisoners.⁸³ Moreover, in 1982, the Court accepted the confession of a political detainee without giving adequate attention to the circumstances in which he had been interrogated.⁸⁴ Indeed it can generally be said that the judiciary has failed to exercise its supervisory powers over the admission of confessions from political detainees

79. *Id.* at 619.

80. Mathews & Albino, *The Permanence of the Temporary—An Examination of the 90-Day and 180-Day Detention Laws*, 83 S. AFR. L. J. 16, 27 (1966).

81. J. DUGARD, *supra* note 48, at 339-40.

82. *S v. Van Niekerk*, 1972(3) S.A. 711(A); see J. DUGARD, *supra* note 48, at 290-302.

83. *Goldberg v. Minister of Prisons*, 1979(1) S.A. 14(A).

84. *S v. Christie*, 1982(1) S.A. 464(A).

with the vigor expected of judges in such cases.⁸⁵ In this respect South African judges have behaved in the same way as their counterparts in Northern Ireland.

(c) *arbitrary executive action*

The security laws permit the executive to proscribe organizations and newspapers and to impose severe restrictions on persons without the need for judicial approval. In such cases the sole function of the courts is to determine whether the executive has acted within the limits of the enabling statute and observed those principles of natural justice (such as the right of an organization or individual to be heard before he is restricted) which have not been excluded by the statute.

Here, too, the courts adopted a pro-executive policy. In 1967 the Appellate Division upheld the ban on the South African Defence and Aid Fund,⁸⁶ an organization committed to providing legal assistance to political prisoners, despite the fact that it had been denied an opportunity to make representations to the executive authority before its banning. This failure to comply with the common law principle of *audi alteram partem*, which had not been excluded by the enabling statute, led the minority of the court to hold that the ban was invalid. The majority, however, had no hesitation in finding that the *audi alteram partem* principle was excluded by necessary implication. Decisions dealing with the "restriction" of individuals were also characterized by judicial abstention: the courts, led by the Appellate Division, refused to invoke the normal principles of administrative law in order to review arbitrary executive action.⁸⁷

In 1960 the South African Appellate Division enjoyed a reputation for courage and independence—largely as a result of the manner in which it had obstructed the National Party Government's legislative scheme to remove the colored voters from the electoral roll in the Cape Province. Although the South African judiciary was completely white, it was still highly regarded in the black community. By 1982 the reputation of the South African Supreme Court had changed substantially as a result of its executive-mindedness over two decades. It was now viewed as an instrument of apartheid in many quarters; and increasingly blacks tended to see the judicial process as a method of maintaining white control under a pretext of legitimacy.

2. *1982-Present*

A number of factors probably account for the improvement in judicial performance since 1982. These include changes in judicial leadership; the

85. Mathews, *The South African Judiciary and the Security System*, 1 S. Afr. J. Hum. Rts. 199, 203-05 (1985).

86. S. Afr. Defence and Aid Fund v. Minister of Justice, 1967(1) S.A. 263(A).

87. Minister of Justice v. Alexander, 1975(4) S.A. 530(A); S. v. Meer, 1981(4) S.A. 604(A), rev'g 1981(1) S.A. 739(N).

termination of the practice of selecting pro-executive judges to preside over political trials; expanded judicial contacts with the United States, which have introduced South African judges to a more activist approach to the judicial role; and increased academic and professional criticism of the judiciary from home and abroad. Furthermore, the "reform debate," coupled with the repeal of several discriminatory laws, has served as a signal to judges that a liberal interpretation of the race laws (but not security laws) will not be unwelcome to the government.

In this new climate the South African courts have succeeded in retrieving some of their lost reputation. Not surprisingly, the courts have adopted a more liberal approach to the interpretation of the race laws. Even before the "pass laws" were repealed in 1986,⁸⁸ they extended the right of migrant workers to acquire permanent residence in the cities,⁸⁹ and effectively destroyed a law providing for the banishment of "idle and undesirable" blacks from the cities.⁹⁰ Moreover, although the Group Areas Act remains on the statute book, it has been rendered largely inoperative by judicial decisions requiring the prosecution to show the availability of alternative accommodation in colored, Indian and black areas—which in practice is usually impossible—before the courts will evict persons belonging to these racial groups from "white group areas."⁹¹

The assertion of judicial independence is not, however, limited to racial matters. There are also signs of a greater willingness to scrutinize the exercise of governmental powers under the Internal Security Act than in previous years. In *Nkondo and Gumede v. Minister of Law and Order*⁹² the Appellate Division held that the Minister of Law and Order is required to furnish proper reasons for the preventive detention of individuals; while in *Minister of Law and Order v. Hurley*⁹³ the same court ruled that a police officer's decision to arrest and to detain indefinitely a person for interrogation is subject to judicial review. Although neither of these decisions makes startling reading, as they are simply examples of the application of ordinary principles of judicial review of administrative action to the security laws, they contrast starkly with decisions of the earlier period in which the courts generally overlooked their ordinary review powers in order to avoid confrontation with the executive branch.

In 1985⁹⁴ and, again, in 1986,⁹⁵ the State President declared a state of emergency that still prevails today. Regulations issued under the emergency powers authorize, *inter alia*, detention without trial, the prohibition of meetings, and far-reaching press censorship. Although these regulations

88. Abolition of Influx Control Act 68 of 1986.

89. *Oos-Randse Administrasieraad v. Rikhoto*, 1983(3) S.A. 595(A).

90. *In re Duma*, 1983(4) S.A. 469(N).

91. *S v. Govender*, 1986(3) S.A. 969(T).

92. 1986(2) S.A. 734(A).

93. 1986(3) S.A. 568(A).

94. See *supra* note 61 and accompanying text.

95. See *supra* note 62 and accompanying text.

attempt to oust the jurisdiction of the courts, some judges have succeeded in limiting the excesses of the regulations by benevolent means of statutory interpretation; by insisting on the continued existence of fundamental rights except where they are expressly excluded; and by setting aside subordinate legislation on grounds of unreasonableness. In this way the courts have limited the police powers of arrest;⁹⁶ obliged the executive authorities to give the individual an opportunity to be heard when his rights are infringed;⁹⁷ upheld the right of a detainee to be visited by a lawyer;⁹⁸ and struck down regulations restricting freedom of expression.⁹⁹

These decisions affect only marginally the severity of the emergency measures. Moreover they do not necessarily reflect judicial attitudes throughout the country. Nevertheless they do represent an assertion of judicial independence and an act of dissociation from the executive on the part of a number of judges. This new judicial mood is particularly apparent in Natal (the only provincial division with a majority of English-speaking judges) where judges have repeatedly placed their allegiance to the traditions and values of the common law above loyalty to the white South African way of life. All this augurs well for the future and there is a growing belief that judicial power may, after all, have a role to play in the construction of a just legal order in South Africa.

III. JURISPRUDENTIAL EXPLANATIONS FOR JUDICIAL BEHAVIOR IN SOUTH AFRICA

In several of the jurisdictions canvassed in this study, judges have been placed in personal danger and subjected to harassment and intimidation. Federal judges in the American South during the years of the civil rights campaigns were ostracized, abused and threatened;¹⁰⁰ judges in Northern Ireland are the targets of sectarian violence and require constant police protection; and, of course, judges in a totalitarian society, such as that of Nazi Germany or military Argentina, cannot function free from fear. In South Africa it is not so. Although on occasions judges are granted police protection, for most of the time they are able to live normal, if isolated, lives without fear of reprisal action from the left or right. Moreover, although the Government has on occasion made known its displeasure over certain judicial decisions, it has carefully refrained from direct action against any judge, however liberal he may be. South African judges enjoy security of tenure until the age of seventy and may be removed before that time only by the State President at the request of Parliament on grounds of

96. *Dempsey v. Minister of Law and Order*, 1986(4) S.A. 530(C); *Radebe v. Minister of Law and Order*, 1987(1) S.A. 586(W).

97. *Buthlezi v. Attorney-General of Natal*, 1986(4) S.A. 377(D); *Momoniat and Naidoo v. Minister of Law and Order*, 1986(2) S.A. 264(W).

98. *Metal and Allied Workers Union v. State President of the RSA*, 1986(4) S.A. 358(D).

99. *Id.*; *Natal Newspapers v. State President of the RSA*, 1986(4) S.A. 1099(N).

100. See J. Bass, *supra* note 26, at 78-83.

misbehavior or incapacity.¹⁰¹ To date no judge has been dismissed in this way or even been threatened with dismissal. Thus, fear of reprisal action or dismissal are not factors to be reckoned with in a consideration of South African judicial behavior.

There is another socio-political explanation of judicial behavior which warrants serious consideration. As whites, with an interest in the maintenance of the *status quo*, judges have a personal interest in backing the Government which bears principal responsibility for the preservation of the *status quo*. Executive-minded decisions may therefore be seen to reflect this identification with the interests of white South Africa—either consciously or subconsciously. Although this explanation is clearly valid in some instances, it is not completely satisfying. First, it completely ignores judicial denials of political complicity; secondly, it fails to account for the response of judges who are out of sympathy with the National Party Government. This suggests that an explanation for judicial behavior should be sought in the juridical as well as the political sphere.

Although jurisprudence is not a principal preoccupation of the judiciary, the way in which a judge thinks about law and the make-up of his legal value system must inevitably influence his judicial decision-making. In this sense jurisprudence may in part explain the response of judges to the South African crisis.

Three theories of law seem to explain the executive-minded behavior of the South African judiciary, particularly during the period 1960-1982: historicism, Calvinism, and positivism.

A. *Historicism*

In the post-World War II period Afrikaans lawyers and judges have sought to suppress the cosmopolitan influence of the English common law and to resurrect Roman-Dutch law of the 17-18th centuries. This program has been pursued in a manner reminiscent of Von Savigny's 19th century historical school in Germany. While Von Savigny argued that Roman law as received in Germany represented the *volksgeist* of the German people, Afrikaans lawyers maintain that Roman-Dutch law reflects the spirit of the Afrikaner *volk*, or people. Moreover, like Von Savigny, Afrikaans lawyers decry judicial innovation and activism where it runs counter to the will of the people—in *casu* the Afrikaner *volk*. As the National Party Government reflects the will of the Afrikaner *volk*, judges are advised not to interpret the law in a manner that fails to give expression to the will of the *volk*.¹⁰²

The historical movement has done little harm to the substance of South African law. The English common law, introduced into South Africa in the nineteenth century, is so deeply embedded in the South African common

101. Supreme Court Act § 10(7), at 59 (1959).

102. J. DUGARD, *supra* note 48, at 396; C. FORSYTH, *supra* note 54, at Ch. 4; Cameron, *Legal Chauvinism, Executive-Mindedness and Justice—L.C. Steyn's Impact on South African Law*, 99 S. Afr. L. J. 38 (1982).

law that it was able to withstand the onslaught of the historicists under Chief Justice L.C. Steyn in the 1960s. The influence of this movement on the judicial process has, however, been more pervasive. The nationalist message inherent in its philosophy has curbed judicial creativity in the cause of human rights among some Afrikaans judges, who still seem to cling to the belief that the judicial decision must reflect the will of the Afrikaner people represented by the National Party Government.

B. Calvinism and Anti-Humanism

The Calvinist Dutch Reformed Church is the dominant church among Afrikaners and one to which many judges belong. Inevitably the influence of Calvinism is strong. Calvinist legal theory, at least as expounded in South Africa, emphasizes the interests of the State and opposes humanism and any philosophy which makes man the principal consideration.¹⁰³ This was clearly demonstrated by the response of the President's Council, a constituent body of the South African Parliament, to the suggestion that a Bill of Rights be included in the 1983 Constitution. In rejecting such a proposal, it stated that a Bill of Rights was unacceptable because of the humanist emphasis it placed on individual rights *vis-a-vis* the authority of the State, "whereas particularly the Afrikaner with his Calvinist background is more inclined to place the emphasis on the State and the maintenance of the State."¹⁰⁴ Judges raised in a religious environment which places the interests of the State above those of the individual are likely to translate this belief into their judicial decisions.

C. Positivism

Although lawyers and judges in South Africa (or elsewhere) seldom engage in sophisticated jurisprudential speculation, there is considerable support for the two basic principles of Austinian positivism: first, that law is the command of the sovereign, and, second, that a strict division must be maintained between law as it *is* and law as it *ought* to be—that is between law and morality. Modern positivists may rightly protest, as has Professor H.L.A. Hart,¹⁰⁵ that Austin is much maligned and much misunderstood, and that he stood for judicial creativity in the direction of law reform. This is readily conceded. But it is the popular, vulgar, positivist message, which does not necessarily reflect Austin's views accurately, that prevails. The notion of law as the command to a political inferior coupled with a sanction,¹⁰⁶ the view that "the existence of law is one thing; its merit

103. J. DUGARD, *supra* note 48, at 41.

104. Second Report of the Constitutional Committee of the President's Council, P.C. 4/1982, ¶ 9.10.

105. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608-09 (1958).

106. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, Lecture 1.

or demerit is another,"¹⁰⁷ Austin's harsh criticism of civil libertarians,¹⁰⁸ and the declaratory nature of the judicial function are the components of the legal philosophy of the average lawyer in many English-speaking countries, including South Africa.

This jurisprudential outlook possibly accounts for the manner in which judges have applied the "laws of apartheid." Judges have adopted the sharp distinction between the legislative function and the judicial function inherent in the positivist, or command, theory of law, and regard it as their duty solely to analyze, interpret and give effect to the will of Parliament. This has permitted them to apply unjust laws obediently, and has often resulted in a failure on their part to invoke common-law presumptions and principles in order to moderate the law's injustices. This mechanical approach to statutory interpretation has been accompanied by a rigid adherence to the distinction between law and legal values with neglect of considerations of human dignity and freedom of speech that, together with similar principles, make up the value system of the South African common law. This mechanical, positivist approach to the judicial process has, possibly, given encouragement to the operation of the inarticulate major premise, which in South African terms, for the all-white judiciary, generally means loyalty to the *status quo*.

Perhaps the major vice of vulgar positivism of the kind described above is that it denies the element of choice in the judicial decision.¹⁰⁹ This has enabled South African judges to pretend that they have no choice in the interpretation of racist and repressive statutes because their sole duty is to "apply" the law. The advantage of such an approach to the judicial process is that it absolves the judge from personal responsibility. It is the body of statutory law which contains the law of apartheid, the laws which depart most fundamentally from the accepted tenets of justice, and it is this body of law which must surely most trouble the consciences of those judges who do not support the National Party Government's legislative program and policies. If statutory interpretation were to be accepted as an exercise in judicial choice, this would emphasize the personal responsibility of the judges for the interpretation, application, and enforcement of these laws. It is therefore comforting for the judge opposed to the laws he is required to enforce to seek refuge in the knowledge that his role is purely declaratory and mechanical.

The result of this allegiance to the positivist creed is that statutory interpretation is seen as a mechanical operation in which value judgments play no part. Many South Africans regard this as an excellent state of affairs and attribute the "excellence" of the South African and English judiciary to their acquiescent, neutral, and "objective" attitude towards

107. *Id.*, Lecture 5 (concluding note).

108. *Id.*, Lecture 6.

109. On choice in the exercise of the judicial decision, see Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527 (1947).

the will of Parliament.¹¹⁰ Praise singers of this kind forget the inarticulate premise. They forget that legal positivism, judicial aloofness, and protestations of political neutrality are often an unconscious device for disguising inarticulate considerations. In South Africa the inarticulate major premise is support for the *status quo*: white supremacy. There is much evidence to support the view that legal formalism or vulgar positivism is simply a jurisprudential fig leaf for this inarticulate major premise.

In recent years there has been much criticism of the South African judiciary from academic quarters. Judges have been openly accused of seeking refuge in legal positivism in order to avoid making difficult policy choices.¹¹¹ The change in judicial performance during the past few years suggests that some judges have heeded this criticism and are now prepared to exercise their choice with a greater awareness and with a determination to be guided by decent legal values in the exercise of that choice.

IV. THE OPTIONS FOR THE JUDICIARY IN A STATE OF NATIONAL CRISIS

The performance of South African judges in the national crisis that has characterized South Africa since 1960 is not unique or even unusual. Judges in South Africa have behaved in much the same way as have judges in other societies where the English common-law tradition prevails when faced with a crisis involving the suppression of human rights. In these societies, too, judges have resorted to formalism, vulgar positivism and, on occasion, Kelsenian positivism in order to justify a policy of judicial abstention or support for the executive authority. This does not exonerate the South African judiciary from complicity in the maintenance of an evil system. It simply shows that judicial courage is a rare quality when prejudice and hysteria grip a nation.

Unfortunately, there has been too little discussion of the options open to judges in a state of crisis. In the jurisdictions that I have considered in this paper, critics have generally maintained a discreet silence about the judicial role—until the passing of the crisis, when they have tendered advice in retrospect. This is hardly a constructive attitude: judges need to know what courses are open to them, and what the public perceptions of the judiciary are *during* and not after the crisis. In this way judges might be persuaded to consider their options more carefully and to avoid sheltering themselves behind legal formalism and different brands of positivism.

At present, after many years, such a debate has surfaced in South Africa among lawyers and there seems little doubt that the pervasiveness of this debate has had some impact on judicial performance. The relevance of

110. Professor A.S. Mathews has suggested that the conservative approach of the English judiciary has had a harmful impact on the South African judiciary. Mathews, *supra* note 85, at 205.

111. See, e.g., J. DUGARD, *supra* note 48; Dugard, *Some Realism about the Judicial Process and Positivism—A Reply*, 98 S. AFR. L. J. 372 (1981).

this debate is not confined to South Africa: it applies to any unjust society which permits its judges to continue with their duties, free from personal harassment, but limited in what they may do by the law.

In South Africa today there are three schools of opinion on the judiciary. Conservatives plead for a policy of judicial restraint, arguing that only a complete detachment from "politics" will preserve the "independence" of the judiciary. In practice this policy amounts to abdication and it is precisely this policy that is to blame for the present loss of confidence in the judiciary. Radicals, angered by decades of judicial restraint and legislative curbs on judicial freedom, now argue that the judiciary no longer has a role to play in the restoration of a just order in South Africa; and that its role is that of a collaborator that lends legitimacy to an evil regime. The moral judge, argue the radicals, has no option but to resign.¹¹² Liberals, on the other hand, claim that the judiciary has a role to play:¹¹³ that by adopting an activist approach to human rights, judges cannot change an evil system but they can curb its excesses, do justice in individual cases, and keep the candle of justice burning in a society that has entered the darkness. In this way judges can maintain respect for legal institutions and values not linked to the ruling party; they can give the lie to the argument that law is simply the instrument of the ruling elite in society. If this is done, there is a greater likelihood that there will be a place for justice, judges and lawyers in the reconstructed society that emerges from the abyss.

In contemporary South Africa the debate between conservatives and liberals over the judicial role has been overtaken by the exchange between radicals and liberals. Radicals generally oppose any form of working within the system. For this reason they reject proposals for a bill of rights that serves as a transition to a just society and is not the product of a completely new political order. They also oppose the acceptance of judicial appointment by blacks on the ground that this lends legitimacy to the present judicial system.¹¹⁴ Their calls for judicial resignation are in line with this approach. Judges, it is argued, cannot do substantial justice in South Africa by reason of their limited powers in a system which places final power in an unrepresentative Parliament. By remaining in office they simply lend credibility to an evil system; hence the conclusion that the moral judge should resign.

Obviously there must come a time when the moral judge has no option but to resign. Many may argue, persuasively, that this point has already been reached in South Africa: that the passing of discriminatory laws, or the introduction of indefinite detention without trial, should have served as signals for resignation. That may be true. As it is, no judge has resigned

112. Wacks, *Judges and Injustice*, 101 S. AFR. L. J. 266 (1984).

113. Dugard, *Should Judges Resign? A Reply to Professor Wacks*, 101 S. AFR. L. J. 286 (1984).

114. In February 1987 Mr. Hassan Mall, a senior Indian advocate, was appointed as an acting judge in Natal. This appointment has been sharply condemned by radical groups on the ground that Mr. Mall will be required to implement unjust laws. See *The Star* (Johannesburg) 30 Jan. 1987, at 5.

in protest against the enactment of such laws and the members of the present judiciary have all accepted appointment *after* the passing of these laws. Clearly those judges who oppose such laws—and there are a number who do so—believe that they can contribute more to the advancement of racial justice from their position on the Bench than they could by emigration or by indulging in lucrative commercial-law practice. This argument, based on utility, is difficult to refute. The moral judge is, however, required to continually examine his position, for the passing of some new offensive law, or the regular overruling of progressive judicial decisions¹¹⁵ may at any time tip the scales of utility in favor of resignation.

Those who urge the judiciary to resign, or to seek refuge in the neutrality of formalism and vulgar positivism, show insufficient appreciation of the role of the judiciary in a society that is unjust and oppressive but not lawless—such as South Africa. They fail to appreciate the extent to which judicial decisions such as *Brown v. Board of Education*¹¹⁶ have advanced society; and the extent to which other judgments have hindered progress. Surely the course of history would have been different if the *Dred Scott* case¹¹⁷ had been decided differently; if the Rhodesian Appellate Division had declared the Smith Government to be unlawful in 1968; if the International Court of Justice had ruled against South Africa over Namibia in 1966;¹¹⁸ or if the South African Appellate Division had taken a firm stand against police torture in the 1960s. If this is indeed so, then the wisest and most effective course would seem to be to “pack” the courts in an unjust society with judges whose moral standards are in advance of the ruling regime. For only such judges, with a proper appreciation of their power to do good in the interstices of evil, are likely to deliver progressive judgments and obstruct retrogressive decisions.

There is no easy answer to the question of whether judges in South Africa should resign or use their office to pursue racial justice. The performance of the South African judiciary in the 1960s and 1970s supports the radical position. In recent years, however, there have been signs of a re-awakening of the judicial conscience and of a determination to oppose the injustices of the Apartheid State among some judges. In such an environment, advocacy of resignation may be counter-productive. It may

115. In recent times the South African legislature and executive have in effect overruled important judicial decisions involving questions of security by the enactment of new laws or regulations aimed at circumventing the decisions in question. The Westminster Parliament has also adopted such an approach to decisions from Northern Ireland. See Boyle, *supra* note 31, at 162.

116. 347 U.S. 483 (1954).

117. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

118. In 1966 the International Court of Justice avoided pronouncing on the status of Namibia and the legality of apartheid under international law by a highly positivistic method of reasoning which signified a clear statement of judicial restraint. SOUTH WEST AFRICA CASES, SECOND PHASE 1966 I.C.J. Reports 6. For criticisms of this controversial judgment, see J. DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE* (1973).

be wiser for critics to stress the positive role that judges can play by emphasizing areas of judicial choice, by condemning judicial cowardice, and by praising judicial courage.

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