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1993

36th Alfred and Winifred Hoernlé Memorial Lecture

Do Judges Speak Out?

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Memorial Lecture

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MR JUSTICE
RICHARD GOLDSTONE

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THE ALFRED AND WINIFRED HOERNLÉ MEMORIAL LECTURE

The Alfred and Winifred Hoernlé Memorial Lecture commemorates the work of Professor R F Alfred Hoernlé, president of the South African Institute of Race Relations from 1934 to 1943, and his wife Winifred Hoernlé, also sometime president of the Institute.

Reinhold Frederick Alfred Hoernlé was born in Bonn, Germany, in 1880. He was educated in Saxony and at Oxford and came to South Africa at the age of 28 to be professor of philosophy at the South African College. He taught in Britain and the United States of America from 1911 to 1923, returning to become professor of philosophy at the University of the Witwatersrand, where his South African wife was appointed senior lecturer in social anthropology. His association with the Institute began in 1932, and it was as its president that he died in 1943. His Phelps-Stokes lectures on South African native policy and the liberal spirit were delivered before the University of Cape Town in 1939.

Agnes Winifred Hoernlé entered the field of race relations after the death of her husband, joining the Institute's executive committee in 1946. She worked for penal reform and to promote child welfare and the welfare of Asians.

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INTRODUCTION
BY THE REVEREND DR STANLEY MOGOBA, VICE-PRESIDENT OF THE SOUTH AFRICAN INSTITUTE OF RACE RELATIONS

It is a great pleasure to introduce Mr Justice Richard Goldstone this evening.

Judge Goldstone has been a judge of the Appellate Division of the Supreme Court of South Africa since 1989.

He was educated at King Edward VII high school and at the University of the Witwatersrand, where he served as president of the Students' Representative Council. Judge Goldstone graduated from Wits with a BA.LL.B *cum laude* in 1962, and was appointed Senior Counsel in 1976.

Judge Goldstone is currently the chairman of the Standing Advisory Committee on Company Law, as well as being the president of the National Institute for Crime Prevention and the Rehabilitation of Offenders, the chairman of the Bradlow Foundation and a governor of the Hebrew University in Jerusalem.

Judge Goldstone is also the vice-chairman of the executive committee of the World Organisation for Rehabilitation through Training, a member of the Council of the University of the Witwatersrand, and a member of the School of Law of his alma mater.

Mr Justice Goldstone is well known for the part he plays in the functioning of the *National Peace Accord*, through his chairmanship of the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation.

Through my own involvement as vice-chairman of the National Peace Committee, and in various dispute resolution committees, I have become deeply aware of the importance to this country both of the Peace Accord itself and of the outstanding work of the commission which Judge Goldstone heads.

Do Judges Speak Out?

It is an honour to present a paper at a lecture established in memory of Professor Alfred Hoernlé. Professor Hoernlé played a leading role in the Institute's founding years, was its president from 1934 to 1943 and was also a leading liberal thinker of his time.

Indeed, Professor Alfred Hoernlé saw the coming of policies of 'total separation' and warned, in 1939, that South Africa would see in such policies, 'not the breaking of dawn, but an intensification of darkness'. He continued prophetically, 'it is as certain as anything can be in human life that the spirit of liberty is ineradicable and cannot in the end be denied... If White South Africa continues along its present path of elaborating and strengthening its dominant position in a racial caste-society, it is probable that there lies ahead of it the tragic destiny of furnishing yet another instance of the old historic truth, that the great victories of the liberal spirit have been gained when those to whom liberty had been denied, have successfully achieved it for themselves'.

Alfred Hoernlé and his wife, Dr Winifred Hoernlé (who served as the Institute's president from 1949 to 1950) were true South African patriots. This lecture serves to bring recognition to them, in a country which has so often ignored its great sons and daughters.

The topic of tonight's address is one usually avoided in judicial and legal circles. It is not the subject of much public debate. It is avoided because it is both sensitive and complex. Its sensitivity springs from a general and praiseworthy desire not to involve the judiciary in controversy, whether political or otherwise. Its complexity arises from the absence of any sensible rules or standards which can be laid down in order to offer guidance in difficult cases.

I believe that this sensitivity and complexity is no reason to avoid the subject. It is one which confronts many judges frequently — both on and off the bench. It is also one which deserves to be made part of the public debate.

I propose, in the first place, to canvass many of the contradictory views expressed on the subject in South Africa, England,

the United States of America and Canada. I shall then attempt to formulate what I believe to be an acceptable approach to the issues raised.

On 27 October 1972, the Chief Justice of South Africa, Mr Justice N Ogilvie Thompson, spoke at the centenary celebrations of the Northern Cape Division of the Supreme Court. In the course of his remarks he referred to the role of judges in our system. He said:

> 'In the very nature of things, a measure of aloofness attaches to judicial office. This is, let me at once say, not because of any vaunted superiority — for the most part, judges are humble men very conscious of their own limitations — or because of any unwarranted ivory tower concept. It necessarily flows from the fact that, by virtue of his office, a judge is not only required to be wholly divorced from politics, but also that he must, in civil cases, adjudicate between the conflicting contentions of contestant litigants and, in criminal cases, determine the guilt or otherwise of his fellow man. Consequentially, it behoves a judge not only to conduct himself in a manner compatible with his office but also to endeavour at all times to avoid creating, however unintentionally, any impression that he holds views which might, albeit perhaps unwarrantedly, be construed as evidence of some sort of prejudice regarding, or prejudging of, some issue which, directly or indirectly, may conceivably subsequently fall for decision in his court. For all these reasons, the expression in public, and in particular in the Press or other media, by judges of opinions on controversial issues, whether or not such issues have political overtones, is to be deprecated. Independence, detachment and impartiality are of the essence of judicial office. Justice, it is often rightly said, must not only be done; it must also be seen to be done. It is likewise highly desirable that the independence, detachment and impartiality of judges should be seen to be observed.'

Similar views were expressed by Chief Justice L C Steyn in 1967.

In Great Britain there has been criticism of the involvement of judges in enquiries and commissions. In an editorial in the New Law Journal of 18 February 1971 it was said that:

'Judicial involvement in inquiries of a highly political character is a comparatively recent development and therefore lacks the protection which a longstanding tradition sometimes confers on practices that are not in themselves beyond criticism... We understand of course how they happen — and why. Precisely because a particular matter arouses strong and widely divergent political opinions, the Government of the day, themselves deeply politically involved, wish to show what is done on the basis of an impartial investigation... Governments, of course, are not above rejecting the findings and conclusions of an impartial tribunal when they have got them, if it suits them to do so — thereby, after the event, involving the tribunal itself in bitter controversy.'

Yet, in an article published in *De Jure* in October 1990, Professor Ellison Kahn cited interesting statistics. In Great Britain, from 1945 to 1969 seven out of twenty-four royal commissions were chaired by judges, most of them law lords; and out of 358 departmental committees no less than 118 were headed by judges. In South Africa from 1910 to 1990 there were approximately 400 commissions of enquiry. About ninety were chaired by judges.

Professor Kahn refers also to two contradictory views expressed on the subject — both by Lord Hailsham. In *The Door Wherein I Went* (1975) he said:

'As a means of probing the conduct of public men, the Select Committee was, I hope finally discredited by the Marconi case. Where such enquiries are necessary, they are better chaired impartially, and in most cases by a High Court Judge, supported by impartial and experienced lay members.'

Not long after, in 1978, when he was Lord Chancellor, he said according to a report in *The Times*:

'It is very easy for politicians or for newspapers to begin calling for public inquiries if police work proves difficult or police inquiries appear to have run into the earth... It is impossible for judges to keep independent if they are constantly being exposed, through being chairmen of tribunals of inquiry, to the legitimate and inevitable ordeal by public criticism, often of a bitter and party political kind, and sometimes in Parliament.'

These contradictions by way of word and deed reflect a fundamental policy conflict which is not easy to resolve. Judges are ideally placed by reason of their training, experience and impartially to head delicate commissions of enquiry. However, it is such extra-judicial work that may be harmful if not destructive of that very impartiality. Indeed in the United States of America the Code of Judicial Conduct which was published by the American Bar Association in 1972 provides in Canon 5G that:

> 'A judge should not accept appointment to a government committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice.'

Yet, one of the most controversial enquiries of the 20th century was conducted by the Chief Justice of the United States of America. I refer, of course, to the enquiry by Chief Justice Earl Warren into the assassination of President John Kennedy.

Controversy and contradictory views are similarly to be found regarding the platforms on which judges should speak and the topics which they should address.

The conservative approach expressed in this country by Chief Justices Steyn and Ogilvie Thompson are reflected in the United States Model Code. That Code, however, is not applicable throughout that country and practices vary from state to state. Some examples will illustrate this.

In 1983, Judge Alcee Hastings, a Federal district court judge in Florida, in a press statement, called President Reagan a 'deceitful liar' and 'a racist in more senses than we can imagine'. In a collateral matter he was indicted on charges of judicial corruption. He publicly attacked the prosecution's investigation as 'replete with instances of overzealousness, lies, innuendos, misquotes, inaccuracies, media leaks, snide remarks by investigators, unprofessional interrogation, mistakes and callousness'. In subsequent speeches he referred to Justice Sandra Day O'Connor as a 'woman troglodyte', and he urged support for presidential candidate Jesse Jackson. A Senate committee subsequently recommended the removal of Judge Hastings as unfit to hold judicial office. The legality of those

proceedings has been placed in issue by Judge Hastings and the matter is still pending in the United States Supreme Court. In November 1992 Judge Hastings was elected to the Congress of the United States!

In 1980 the Supreme Court of Missouri removed the Honourable Lloyd G Brigger from office for his partisan political activities. The charges against him were: contributions to the campaign of the Governor, attending fundraising functions, and making recommendations to the Governor for political appointments.

In 1978 Justice Potter Stewart of the United States Supreme Court at an address at Yale Law School praised the press coverage of the Watergate Affair. In a public address in 1979, Justice Thurgood Marshall spoke out against the majority opinions delivered in his own court regarding the general denial of court supervision of the rights of prisoners and the wide protection granted to journalists in libel suits against public figures. In the same year, Justice Harry Blackmun discussed his own important judgement on abortion in which he wrote for the majority of the Court in favouring free choice in the first trimester. He also indicated his own personal views against the death penalty.

It was presumably because of the divergence in practice that the American Bar Association brought out its Model Code of Judicial Conduct. Indeed in 1971 the Pennsylvania Supreme Court referred to 'a widespread impression that the courts are falling far short of discharging their duty to provide justice and the appearance of justice.' *In re Greenberg*, 442 pa 411 [1971]

In a thoughtful article by Professor Steven Lubet of Northwestern University [Judicature Vol 69, No 2 Aug-Sept 1985] he gives four policy justifications for placing restrictions on extra-judicial activity by judges. They are:

'[1] the need to avoid the appearance of partiality or favouritism;

[2] the need to maintain public confidence in the women and men who comprise the judiciary;

[3] the need to ensure that judges will not be distracted by non-judicial activities;

[4] the need to maintain the separation of powers.'

The first and second justifications are reflected in the approach of Chief Justice Ogilvie Thompson referred to earlier. The first three were referred to by a judicial committee in Canada which was established in 1983 to enquire into the conduct of Mr Justice Berger of the Supreme Court of British Columbia. It declared that:

> 'The history of the long struggle for separation of powers and the independence of the judiciary, not only establishes that the judges must be free from political interference, but that politicians must be free from judicial intermeddling in political activities. This carries with it the important and necessary concomitant result — public confidence in the impartiality of judges — both in fact and in appearance.'

In the United States the Model Code has been accepted in most of the states. However, the standards are amorphous and difficult to apply with any uniformity or consistency. Their application depends upon the climate of the time, the party preferring the complaint, public sentiment and the composition of the court or disciplinary committee hearing the complaint.

In the case of Mr Justice Berger, the judge addressed a university graduation. He criticized two features of the constitutional accord that had just been reached between Prime Minister Trudeau and the premiers of nine of the provinces. His criticism related to the failure to guarantee native rights and the denial to Quebec of a veto over constitutional change. The committee of Enquiry appointed by the Canadian Judicial Council reported that although Mr Justice Berger had committed an 'indiscretion', his action 'constitutes no basis for a recommendation that he be removed from office.' Some three months later, however, Mr Justice Berger stepped down from the bench.

The extra-judicial conduct of judges has also been the subject of discussion and concern in Britain. In the 1950's Lord Goddard, then Lord Chief Justice of England, conducted an outspoken public campaign against capital punishment. Lord Justice Scarman has called for an extended Bill of Rights in the United Kingdom. In his book *What Next in the Law*, Lord Denning criticized the powers of trade unions. Of an opinion of the House

of Lords reversing a judgement of the Court of Appeal Lord Denning wrote:

> 'They criticized me roundly for making use of *Hansard*. All I had done was to refer to a speech by a distinguished lawyer, Lord Wedderburn. If he had said the same things in an article in the *Modern Law Review*, they could have made no complaint.'

Such remarks would be unusual in a judgment delivered from the bench — how much more in a book written by a sitting judge who was Master of the Rolls.

In South Africa, too, notwithstanding the conservative approach already described, some judges have spoken out. In 1979, the present Chief Justice delivered the opening address at the First International Conference on Human Rights in South Africa held at the University of Cape Town. In that speech, Mr Justice Corbett, then already a member of the Appellate Division, said;

> 'Turning to the contemporary scene in South Africa, one cannot avoid the conclusion that in many areas the freedom of the individual and his basic human rights have been severely curtailed. This is particularly evident in regard to such matters as the freedom of movement, equality of treatment, equality of opportunity, freedom of association, freedom from detention or arrest except by process of law (and here I have in mind the various laws aimed at maintaining the safety and security of the state) and to some extent freedom of speech and assembly. The full extent of their curtailment is something that will be examined in detail at the various sessions of this conference. Among the questions we, as South Africans, will have to ask ourselves are whether such curtailment actually promotes the common weal; to what extent dangers, internal and external, justify extraordinary measures and arbitrary powers intruding upon the liberty of the subject; to what extent these dangers are not the product of our own socio-political system; to what extent the risk of injustice or of abuse of power can be, and is being, obviated, by checks and controls; whether society can accept measures, normally regarded as temporary expedients in a time of crisis,

as a more or less permanent feature of its pattern of life; and to what extent we do not tend in most of our thinking on the subject to identify with the interests of the white group in South Africa.'

The learned Judge of Appeal went on to suggest that a Bill of Rights and the judiciary being given the full power of judicial review is a system—

'worth trying and to my mind it is one of the more hopeful possibilities along the road which lies ahead.'

I need hardly remind you that in 1979 the questions raised by the present Chief Justice and even the cautious support he gave to a Bill of Rights were politically charged and caused much debate in political and legal circles. And how quickly times change. In May 1990 Chief Justice Corbett delivered the 35th Jubilee Hoernlé Memorial Lecture. It was entitled *Guaranteeing Fundamental Freedoms in a new South Africa.* He concluded his address with the following words:

'A justiciable bill of rights provides no infallible guarantee that human rights will be respected or that, if infringed, the infringement will be redressed. It all depends upon the attitude of the people. If they accept the concept of human rights and their enforcement by the courts and if all those in positions of power, legislators, government executives, administrators, are willing to bow to the superior authority in this sphere of the courts, that is, if the courts enjoy the power of legitimacy, then a bill of rights can provide a unique form of protection for rights of the individual in a new South Africa.'

In 1990 that address by the Chief Justice was well reported in the media. There was no suggestion from any quarter, so far as I am aware, that the topic was not one appropriate for a judge to address in public.

A number of other judges, both of the Appellate Division and the Provincial Divisions of the Supreme Court, have spoken in public on matters concerning human rights and the administration of justice. On some occasions such comments have received publicity in the news media. Most recently my colleague, Judge Howie, at a graduation ceremony at the

University of Cape Town, trenchantly criticised the 1992 Further Indemnity Bill. He concluded his address by saying that:

> 'I would suggest ... that there are substantial reasons for the view that the scheme implemented by the Act is fundamentally flawed and profoundly in conflict with our legal principles and traditions. Those who seek redress as a result of the sort of conduct covered by the Act should be free to pursue their cases in the courts of the land. And so let the rule of law prevail.'

What of a judge's statements on the bench and, in particular, in judgements? Should controversial topics be avoided? This question has been particularly relevant for South African judges who for many decades have been implementing discriminatory laws based on racial criteria. The great majority of our judges applied such laws without commenting upon their moral turpitude. A significant number, however, did not remain silent. I have no doubt that the criticisms of the latter in no way harmed our Bench. On the contrary, I would suggest that they materially assisted in preserving the independence and some of the credibility which our courts have retained.

Let me cite some examples. The first is a personal one in which speaking out had very unexpected consequences. *S v Govender*, 1986(3) 960 (T) was a case in which an elderly Asian woman had been charged under the Group Areas Act with unlawfully occupying premises in a White group area. She pleaded guilty. In mitigation she explained that there was no accommodation available in an area in which Asians could lawfully reside and that she had exhausted every avenue in her quest for a lawful residence. As in many thousands of cases before that of Mrs Govender, the magistrate considered himself obliged to grant an order ejecting the accused and her family from their home. With the concurrence of Le Grange J, I held that on a proper interpretation of the legislation, the making of an ejectment order was discretionary. Among the considerations which I said were to be taken into account in deciding whether to make such an order were:

> 'the personal hardship which such an order may cause and the availability of alternative accommodation.'

The consequences of those words could not have been anticipated. No further prosecutions were launched under the Group Areas Act and by the time of its repeal years later those provisions were already a dead letter and many previously White areas had become residentially nonracial. Here was a case where pointing to the unfairness of the consequence of the manner in which the law had been implemented had not only legal consequences but also far-reaching political consequences. I do not believe that it was in any way improper or compromising of the integrity of the bench to have spoken out in that way. I would like to believe that the opposite conclusion would be justified.

Judicial comment on the unfairness and injustice resulting from racial laws is to be found with regard to legislation which empowered administrative officers to make orders seriously affecting the rights of black citizens by sending them to penal institutions for no other reason than that they were held to be 'idle'. As long ago as 1925, Searle J.P. delivering the judgment of a full court of the Cape Provincial Division in R v Jacobs 1925 CPD 20 said [at 26/7]:

> '... I consider that this new procedure constitutes a departure from the well-known principles of our criminal law which have been established here from the date of the Charter of Justice at all events — nearly a hundred years ago. In my opinion the function of the judiciary with regard to criticism of legislation should be most carefully and most sparingly exercised. It is the duty of the judges to interpret the law as they find it, not to question its suitability ... But I do not consider it out of place to make reference to the grave dangers that may arise to the liberty of the subject if persons can be dealt with in this informal way, contrary to the well-established principles which have been laid down for criminal trials, and if they can be sent for long periods of detention to penal institutions...'

Solomon J A associated himself with the latter comment of Searle J P in *Hashe and Others v Cape Town Municipality and Others* 1927 AD 380 at 388.

The same type of legislation which drove Searle J P to speak out in 1925 caused a similar response from Didcott J in 1979. In *S v Dube* 1979 (3) SA 820 (N) a Commissioner had declared Mr

Dube to be an 'idle person' and conditionally consigned him to a farm colony for two years. Didcott J said [at 82] E-G]:

> 'When the commissioner has finished with you, the papers in your case go on review to a Judge of the Supreme Court. He is expected, if everything is in order, to certify that what happened to you appears to him to have been 'in accordance with justice'.
>
> The trouble is that it was not. It may have been in accordance with the legislation and, because what appears in legislation is the law, in accordance with that too. But it can hardly be said to have been 'in accordance with justice'. 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.'

I have cited just two examples in which during the darkest years of apartheid some judges commented from the bench on the injustices and hardships resulting from racial laws.

Many judges, however, remained silent. In *Minister of the Interior v Lockhat and Others* 1961[2] SA 587 [A] the question was whether the Group Areas empowered the Executive to discriminate to the extent of partial and unequal treatment to a substantial degree between members of different race groups. In terms of our common law such a power would not be attributed by a court unless it is given expressly or by implication in the statute concerned. No such power was given expressly in the Group Areas Act. The Appellate Division held that it was clearly implied. Holmes J A explained the reason for that decision in the following terms:

> 'The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will be for the common weal of all the inhabitants, is not for the Court to decide ... The question before this court is the purely legal one

whether this piece of legislation implied authorizes, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view, for the reason which I have given it manifestly does.'

Accepting the correctness of the decision, it is, in my respectful view, a matter of regret that from our highest court there was this bland and mechanical approach without comment on legislation that already then caused misery and disruption to the lives of hundreds of thousands of South Africans on account of their skin colour. A word of regret, even if not condemnation of a gigantic social injustice, would not have been out of place.

Where does the aforegoing somewhat discursive discussion lead? Should judges speak out? The dangers referred to by Chief Justices Steyn and Ogilvie Thompson are real and the consequences they wished to avoid are of fundamental importance to the independence of the judiciary.

Judges should avoid becoming or giving the appearance of being committed to a political party or policy. They should not show prejudice against particular persons or groups of persons. They should not make comments offending against generally accepted moral standards. They should avoid gratuitous controversy. These are the obvious cases.

There are, however, many hard cases. Frequently it is difficult to decide where moral precepts and standards end and where strictly political doctrine begins. In that area, in my view, if a judge is to err, it should be on the side of defending morality. By doing so he or she will be protecting the integrity of the judiciary. Mr Justice Rand of the Canadian Supreme Court wrote in 1951 that:

'the courts in the ascertainment of truth and the application of laws are the special guardians of the freedom of unpopular causes, of minority groups and interests, of the individual against the mass, of the weak against the powerful, of the unique, of the non-conformist — our liberties are largely the accomplishments of such men.'

How much more so is this so in South Africa where the vast majority of the citizens have been without a vote and have not

been represented in the Parliament which makes the laws our courts apply? I do not believe that any South African judge speaking out against unjust or immoral laws whether in or out of Court, has made himself unfit to sit on the bench. Indeed, as I have already indicated I believe that judges who did so tended to preserve the integrity of the South African bench.

For the same reason there can be no basis for criticising a judge for being a member of an association or organization which furthers the moral norms of society. I have in mind the SPCA, NICRO and, indeed, the South African Institute of Race Relations. In a number of states in the United States of America there is a rule that judges should avoid membership of even the most praiseworthy and non-controversial organisations which espouse a particular position. In my view there is no warrant for that over-cautious approach.

Decent members of society will assume that judicial officers have strong views against criminal conduct and a convicted murderer or robber should not expect a judge to have neutral views concerning murder and robbery. Judicial officers, when sentencing criminals, express strong views on those subjects on a daily basis. That is hardly a ground for recusal. Why should they not express these views in public off the bench? It would enhance the integrity and credibility of the courts. Not the converse. So, too, any other principles of morality which are of universal application. In order to do so in South Africa judges have not needed to look to the precepts and principles of international law. They need have gone no further than our own common law. For there are to be found virtually all of the principles which are enshrined in most Bills of Rights. It is precisely those common law principles which were so frequently overriden by South African Parliaments for more than a century. I cannot imagine that it would be improper for a judge to speak out when Parliament or any public official acts in conflict with precepts of our own common law. On the contrary, it is more likely to be objectionable when he or she supports such conduct or even remains silent when confronted with it.

A judge must clearly not become partisan. In 1906 during a debate in the British House of Commons on the alleged misconduct of Sir William Grantham, a judge of the King's Bench Division, the Attorney-General, Sir John Walton

described the nature of partisanship which would justify removal. He said:

> 'I understand partisanship to mean a conscious partiality leading a Judge to be disloyal even to his own honest convictions. I understand it to mean that the Judge knows that justice demands that he should take one course but that his political alliance or political sympathies may be such that he deliberately chooses to adopt the other.'

Clearly the criticism of legislative or executive action would not *per se* constitute improper conduct. In December 1992, in England, Lord Chief Justice Taylor is reported in *The Guardian* to have:

> 'launched an unprecedented attack on planned legal aid cuts affecting an estimated 7 million people. He also castigated the Government in stronger terms than before for what the judges see as a longstanding failure to provide enough judges to man the High Court ... There may not be many votes or economic gains in funding the justice system adequately, but to deprive the system endangers the very framework of our society. If the rule of law and citizens' rights are not safeguarded, the result may be not only injustice but even unrest, especially during high unemployment.'

Both Lord Taylor and Lord Justice Bingham, the recently appointed Master of the Rolls, have publicly advocated the incorporation into British domestic law of the European Convention of Human Rights, and, according to *The Guardian*—

> 'further increasing pressure on the Government to act.'

On that subject Lord Taylor said on British Television:

> 'Our ratification of the convention obliges us in the end to accept it, but our refusal to incorporate means acceptance occurs only after a decision in Strasbourg, much delay and humiliation.'

It is also relevant to refer to the call made by Lord Chief Justice Taylor for judges to speak out of court. He said in July 1992 that judges could safely speak out of court about their work and legal issues without endangering their judicial

independence. He said that greater openness in the judiciary would help to restore public confidence.

Similarly in 1981 in *The Judge*, Lord Devlin, an eminent law lord, said:

> 'He will accept invitations to address societies, not only of magistrates and lawyers but also of social workers and other bodies concerned with criminal law and administration. All this he will do as a matter of private enterprise. It is certainly to be encouraged.'

I would go further and suggest that particularly when the constitution is in flux and fundamental legal rights are being debated by the nation, the judges have a duty to join the debate. They are clearly well qualified to do so. If they enter that debate in a non-partisan manner they can hardly be accused with any justification of displaying bias or interfering with their independence or that of their colleagues.

Let me draw some conclusions. In my opinion, a judge may freely speak in court on any topic strictly relevant to the matter before him. If appropriate he is entitled to criticize the law he is required to implement if, in his opinion, it offends against morality or justice. Indeed, in some cases it may be his duty to do so.

Off the bench, in my judgement, a judge may freely speak about any topic relating to the law and the administration of justice.

Where the area he chooses is controversial or has political overtones he should be especially careful and take into account the inadvisability of embroiling the courts in controversy. The judiciary is subject to public criticism today more than ever before in our history — and not only in this country. This is to the good. It helps demystify the law and the judiciary. It also frees the judges to the extent that in appropriate circumstances they can defend themselves. As did Chief Justice Rabie in an address to the first National Bar Conference in Cape Town in 1988. He defended a judgement of his own court which had been attacked both inside South Africa and abroad.

The platform on which a judge should speak is no less important than the topic he chooses. I believe that a judge should restrict his off-bench public addresses to academic, legal and

other neutral venues. Clearly he should not appear in public on any platform which has the appearance of lending support to any political party or policy.

The question of judges heading commissions of enquiry, as I have already indicated, is also one of some difficulty. Whether it is appropriate will depend on a number of factors. Not the least of them is the general public interest and the political and other circumstances generally prevailing at the time. Having regard to my own involvement in commissions during the past two years it hardly behoves me to make further comments on this topic. I must leave that to other more objective commentators.

In conclusion, I would like to refer to contrasting views of two of the outstanding judges in the history of the United States Supreme Court. I choose judges from that country because it would appear to be likely that very soon we, too, will have a justiciable Bill of Rights. That will thrust the judges much more than ever before into the political arena.

Justice Oliver Wendell Holmes said in an essay entitled *The Path of the Law* (1920):

> 'I trust no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind ... But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it.'

On the other hand, in *Dennis v United States*, 341 US 494 (1957) Justice Felix Frankfurter, who was a conservative on the subject of judicial activism, said:

> 'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgement is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing economic and social pressures.'

The answer to the question 'Do judges speak out?' is thus not a

simple 'Yes' or 'No'. The decision is a matter of judgement, taste and good sense. The test is whether by speaking out the judge will compromise the bench in general or himself in particular. Will it interfere or seem to interfere with the impartiality of the judge or impair the dignity and prestige of his office? Where the answer to all these questions does not preclude speaking out, to do so will, I suggest, increase healthy contact between the judiciary and the public, enrich and educate audiences on matters on which judges have expertise and experience and will generally help to demystify the judiciary.

I would suggest that respect for the judiciary should be earned and should be the consequence of the integrity, fairness and ability with which judges conduct themselves both on and off the bench.

VOTE OF THANKS BY THE EXECUTIVE DIRECTOR OF THE SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, MR JOHN KANE-BERMAN

The question posed by Judge Goldstone is, as he put it, 'both sensitive and complex' — so complex in fact that Lord Hailsham managed to contradict himself as to the desirability or otherwise of judges accepting appointments to tribunals of enquiry. Judge Goldstone went on to say, of course, that 'sensitivity and complexity' were no reasons to avoid the subject of whether or not judges should speak out, a view with which the Hoernlés would have concurred and to which the Institute itself adheres.

Our speaker this evening observed that the significant though relatively small number of judges who have spoken out against discriminatory laws have 'materially assisted in preserving the independence and some of the credibility which our courts have retained'. He referred inter alia to the judgement in State vs Govender in 1986, the decision which played a major role in undermining the Group Areas Act.

Judge Goldstone, who was on the bench in that case, is fortunate that President Paul Kruger is no longer with us or in power. The circumstances were rather different, but Kruger took exception to a judge who, as he put it, 'adopted the right of criticism and became as wanton as a fish in the water that was free to swim about as it pleased. However, he jumped out of the water, that is to say out of the law, on to dry land.' The consequence was that the judge in question, Transvaal Chief Justice Kotze, was fired. His offence was to have claimed a testing right over legislation of the Volksraad which ran contrary to the constitution.

Kruger's view of the testing right is worth repeating. Addressing members of the judiciary, he said: 'You by virtue of your office represent the solidity of the state...it also depends on you that confidence in the country should not be shocked...and if you, honourable judges, in your own judgement, set aside a decree of the Volksraad, then you adopt the right of criticism from the devil.'

Much later, in the 1950s, it was evident that the views of our rulers on the testing right had hardly changed. Now, however, it is

a foregone conclusion that South Africa will at long last have a justiciable bill of rights. Even though much of what is likely to be found in this bill is already part of our common law, it will mean little without judges who have both the authority and the will to defend it. Our guest speaker is no doubt correct when he predicts, 'That will thrust the judges much more than ever before into the political arena.'

In this context I thought Judge Goldstone's quotation from Mr Justice Rand of the Canadian Supreme Court was particularly apposite. In 1951 Judge Rand made the point:

> 'The courts in the ascertainment of truth and the application of laws are the special guardians of the freedom of unpopular causes, of minority groups and interests, of the individual against the mass, of the weak against the powerful, of the unique, of the non-conformist — our liberties are largely the accomplishments of such men.'

One might add: 'and women.'

Judge Goldstone observed this evening, 'I do not believe that any South African judge speaking out against unjust or immoral laws, whether in or out of court, has made himself unfit to sit on the bench.' At the same time, as he says, there are always hard cases and 'frequently it is difficult to decide where moral precepts and standards end and where strictly political doctrine begins.'

Many would accept his view that if a judge is to err in this area, it should be on the side of defending morality — although that too, of course, is often highly subjective.

Ladies and gentlemen, on your behalf it is a pleasure to thank Judge Goldstone for his thought-provoking address this evening. The topic was his own choice, and, given that we are moving from an old order to a new one, I think this was an appropriate moment for this exercise in judicial stocktaking. The ease with which he moved from one decade to the next, or from one continent to another, shows the kind of grasp of subject-matter that we have come to except from this distinguished member of our judiciary because of his work as head of the commission trying to get to the truth behind the terrifying violence in this country.

At the end of his address Judge Goldstone said that 'respect for the judiciary should be earned'. Our previous Hoernlé lecturer, Chief Justice Corbett, has played a key part in earning that respect,

from a public point of view most notably in throwing the weight of his office behind the concept of a bill of rights. I think we would all agree that the country also owes Richard Goldstone a substantial debt for the way in which he is helping to earn respect for the bench which will stand this country in good stead in the years to come.

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Mr Justice Richard Goldstone was educated at King Edward VII School and the University of the Witwatersrand, where he took his BA. LL.B *cum laude* in 1962. He holds numerous positions of responsibility in a variety of organisations, is a judge of the Appellate Division of the Supreme Court of South Africa, and heads the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation.

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The Hoernlé Memorial Lectures

The IRR is republishing the text of the Hoernlé Memorial Lectures, a series of talks which started in 1945. The original introductory note to the lecture series reads as follows:

> *A lecture, entitled the Hoernlé Memorial Lecture (in memory of the late Professor R. F. Alfred Hoernle), President of the Institute from 1934—1943), will be delivered once a year under the auspices of the South African Institute of Race Relations. An invitation to deliver the lecture will be extended each year to some person having special knowledge and experience of racial problems in Africa or elsewhere.*
>
> *It is hoped that the Hoernlé Memorial Lecture will provide a platform for constructive and helpful contributions to thought and action. While the lecturers will be entirely free to express their own views, which may not be those of the Institute as expressed in its formal decisions, it is hoped that lecturers will be guided by the Institute's declaration of policy that "scientific study and research must be allied with the fullest recognition of the human reactions to changing racial situations; that respectful regard must be paid to the traditions and usages of the various national, racial and tribal groups which comprise the population; and that due account must be taken of opposing views earnestly held."*

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Since 1929, the Institute of Race Relations has advocated for a free, fair, and prospering South Africa. At the heart of this vision lie the fundamental principles of liberty of the individual and equality before the law guaranteeing the freedom of all citizens. The IRR stands for the right of all people to make decisions about their lives without undue political or bureaucratic interference.

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