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John Dugard, Human Rights in South Africa - Retrospect and Prospect, 1979 ACTA JURIDICA 263 (1979).

ALWD 7th ed.

John Dugard, Human Rights in South Africa - Retrospect and Prospect, 1979 Acta Juridica 263 (1979).

APA 7th ed.

Dugard, John. (1979). Human Rights in South Africa Retrospect and Prospect. Acta Juridica, 1979, 263-285.

Chicago 17th ed.

John Dugard, "Human Rights in South Africa - Retrospect and Prospect," Acta Juridica 1979 (1979): 263-285

McGill Guide 9th ed.

John Dugard, "Human Rights in South Africa - Retrospect and Prospect" [1979] 1979 Acta Juridica 263.

AGLC 4th ed.

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MLA 9th ed.

Dugard, John. "Human Rights in South Africa - Retrospect and Prospect." Acta Juridica, 1979, 1979, pp. 263-285. HeinOnline.

OSCOLA 4th ed.

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## HUMAN RIGHTS IN SOUTH AFRICA—RETROSPECT AND PROSPECT

It is an unenviable task to deliver a paper on 'Human Rights in South Africa' at the end of a conference in which so many aspects of this very subject have been examined in national, comparative and international perspective. Of course, there may be some who will argue that my task is a very simple one; that my paper should follow the lines of a study on animal life in Ireland which, under the chapter heading 'Snakes in Ireland', simply states: 'there are no snakes in Ireland.' South Africans of all races and political persuasions, and our foreign visitors too, I suspect, will realize the oversimplification and indeed incorrectness of this approach; despite the fact that it is one with considerable following abroad.

The truth is that the issue of the protection of human rights in South Africa is a highly complex one as there are so many contradictions and paradoxes within both the legal system and the body politic. Roman-Dutch law, like the English common law, recognizes most of the basic individual liberties and the notion of equality before the law.<sup>1</sup> On the other hand such serious legislative inroads have been made upon the common law that it is difficult to boast about the glories of the Roman-Dutch tradition. To cite but one example: the *interdictum de homine libero exhibendo* affords substantially the same protection as the writ of habeas corpus<sup>2</sup> and, indeed, was eloquently reaffirmed by our present Chief Justice as recently as 1975.<sup>3</sup> Yet in most cases it is of little more than academic interest as the main detention-without-trial laws—the Terrorism Act<sup>4</sup> and the Internal Security Act<sup>5</sup>—expressly exclude its operation. Equality before the law has been largely undermined by the laws of apartheid or separate development. Yet, in recent times, some of these laws have been relaxed administratively by means of exemption permits. Press freedom appears to flourish freely and many foreign visitors are astounded by the vehemence of the criticism of the government in the English press and, increasingly, in the Afrikaans press. But, on the other hand, every newspaperman knows of the numerous legal constraints<sup>6</sup> within which he must operate and of the need to have his lawyer constantly on call. Legal job reservation is rapidly disappearing, but conventional job reservation remains a major obstacle in the way of the Black worker. Our judiciary has a reputation for independence from the executive but, as in many Western societies, the judiciary has often been accused of leaning too heavily in favour of the executive.<sup>7</sup>

Political rhetoric is equally confusing. Until relatively recent times political

<sup>1</sup> H R Hahlo and I A Maisels 'The Rule of Law in South Africa' (1966) 52 *Virginia Law Review* 1.

<sup>2</sup> *Principal Immigration Officer v Narayansamy* 1916 TPD 274 at 276.

<sup>3</sup> *Wood & others v Ondangwa Tribal Authority & another* 1975 (2) SA 294 (AD) at 311.

<sup>4</sup> Section 6 of Act 83 of 1967.

<sup>5</sup> Sections 10(1)(a)bis and 12B of Act 44 of 1950.

<sup>6</sup> For a brief description of some of these constraints, see Dugard *Human Rights and the South African Legal Order* (1978) 181–6.

<sup>7</sup> *Ibid*, Part 4.

leaders refused to pay lip service to racial equality and respect for human rights. But now a different approach is adopted and the government claims to be 'moving away' from racial discrimination,<sup>8</sup> while the Minister of Foreign Affairs, Mr R F Botha, has expressed regret that South Africa did not vote in favour of the Universal Declaration of Human Rights in 1948.<sup>9</sup>

The very holding of an open International Conference on Human Rights in a country generally categorized as a principal violator of human rights emphasizes the complexity of the situation.

Most studies of human rights in South Africa compare and contrast South African legislation with the basic human rights enunciated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is an important method of examination as it serves to emphasize the extent to which South Africa is out of step with internationally accepted norms. I do not intend to follow such a course in my paper, however, as there are several studies<sup>10</sup> which provide a more comprehensive comparison of this kind than I would be able to achieve in the limited time available to me. Instead I shall attempt a brief description of those laws which most seriously undermine human rights in South Africa before considering the prospects for human rights in South Africa in the future.

#### HUMAN RIGHTS: RETROSPECT AND PRESENT

There is a marked tendency, both at home and abroad, to divide South African history relating to human rights into two phases: pre-1948 and post-1948. This approach to history, which accounts for the popular belief that the present evils of South African society are largely of post-1948 origin, is incorrect and has undoubtedly contributed to the feelings of persecution displayed by many White South Africans on the subject of human rights.

##### *(a) The Pre-1948 Period*

The seeds of modern South African race laws are clearly to be found in pre-1948 legislative enactments. A wide range of laws attempted in a somewhat unsystematic manner to divide the community into different racial groups;<sup>11</sup> and, while no law prohibited marriages between persons belonging to different race groups, it was a punishable offence for a 'European' to have illicit carnal intercourse with a 'native' of the opposite sex.<sup>12</sup> Severe restrictions were placed on the freedom of movement of Africans by the pass laws,

<sup>8</sup> *House of Assembly Debates*, vol 55 cols 382-3 (7 February 1975).

<sup>9</sup> *House of Assembly Debates*, vol 29 cols 2164-6 (21 August 1970).

<sup>10</sup> J D van der Vyver *Die Beskerming van Menseregte in Suid Afrika* (1975); J D van der Vyver *Seven Lectures on Human Rights* (1976); Dugard *Human Rights and the South Africa Legal Order* (1978).

<sup>11</sup> For a full account of these laws, see Arthur Suzman 'Race Classification and definition in the Legislation of the Union of South Africa' in (1960) *Acta Juridica* 339.

<sup>12</sup> Immorality Act 5 of 1927 ss 1-3.

which can be traced back to 1809,<sup>13</sup> and which were once described by a National Party spokesman as being 'as old as civilization in our country'.<sup>14</sup> A pass—in the sense of a document required for lawful movement into, out of, or within a specific area which must be produced on demand by a policeman—was essential for the movement of African males in most parts of the country, but certain categories of Africans attaching mainly to middle-class occupations, were exempted from these laws.<sup>15</sup>

Economic separation was maintained by a number of laws which reserved certain jobs for Whites<sup>16</sup> and by the prohibition placed on Africans from joining recognized trade unions.<sup>17</sup> The territorial division of South Africa into areas for African occupation and areas for occupation by other population groups was prescribed by the Bantu Land Act of 1913<sup>18</sup> and the Bantu Trust and Land Act of 1936;<sup>19</sup> and residential zoning laws designed to prevent Indians from owning land or occupying premises outside 'bazaars' set aside for their exclusive use date back to 1885. Separate schools for different races was already the rule well before Union and in one of its earliest pronouncements on race, in *Moller v Keimoes School Committee*,<sup>20</sup> the Appellate Division gave its approval to this practice. While there were no legislative restrictions on the admission of Blacks<sup>21</sup> to universities, in fact only the University of Cape Town and the University of the Witwatersrand admitted students on academic merit, with no regard to race.<sup>22</sup>

The South African courts, with no power of judicial review over Acts of Parliament, displayed a fluctuating attitude towards racial legislation but generally could be said to have been sensitive to the expectations of the White community. In 1911, in *Moller v Keimoes School Committee*, the Appellate Division gave its approval to legislation aimed at school segregation and, speaking through the Chief Justice, Lord De Villiers, declared:

'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 black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilization, they condemned intermarriage or

<sup>13</sup> In 1809 the Governor of the Cape, Earl Caledon, issued a proclamation prohibiting 'Hottentots' (Khoi Khoi) from moving from one district to another without a pass issued by a magistrate.

<sup>14</sup> *House of Assembly Debates*, vol 104 col 4549 (31 March 1960).

<sup>15</sup> See Ellison Kahn 'The Pass Laws' in *Handbook on Race Relations in South Africa* ed Ellen Hellmann (1949) 275.

<sup>16</sup> See, for example, the Mines and Works Act 12 of 1911, re-enacted as Act 25 of 1926, which permitted the granting of certificates of competency for a number of skilled mining occupations to Whites and Coloureds only.

<sup>17</sup> Industrial Conciliation Act 36 of 1937 s 1.

<sup>18</sup> Act 27 of 1913.

<sup>19</sup> Act 18 of 1936.

<sup>20</sup> 1911 AD 635.

<sup>21</sup> The term Black is used in this paper to include Africans, Coloureds and Indians.

<sup>22</sup> See *The Open Universities in South Africa and Academic Freedom* (1974).

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 the 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.<sup>23</sup>

While the Supreme Court of the United States gave its imprimatur to the 'separate but equal' doctrine as early as 1896 in *Plessy v Ferguson*,<sup>24</sup> the South African courts hesitated in this regard and, in some decisions, inclined to the view that separate facilities could never be reasonable.<sup>25</sup> It was only in 1934 that the Appellate Division, in *Minister of Posts and Telegraphs v Rasool*,<sup>26</sup> upheld the validity of regulations establishing separate facilities for White and Black on the ground that separation coupled with equality was not unreasonable.<sup>27</sup>

Laws designed to maintain White domination and secure racial separation resulted in serious inroads being made on the freedoms of person, movement, speech and assembly. Wide powers to detain without trial were vested in the Governor-General as the supreme chief of all Africans in Natal, the Transvaal and the Orange Free State.<sup>28</sup> The executive was empowered to confine political dissidents to particular areas without judicial authorization by the Riotous Assemblies Act and the Native Administration Act. The former statute gave the Minister of Justice the power to prohibit any person from being in any area when he was satisfied that such person was 'promoting feelings of hostility' between Whites and Blacks,<sup>29</sup> while in terms of the latter the Governor-General might banish any African to a particular part of South Africa in much the same way as successive Russian regimes have banished political opponents to Siberia.<sup>30</sup> Freedom of speech was curbed by laws which

<sup>23</sup> 1911 AD 635 at 643-4.

<sup>24</sup> 163 US 537 (1896).

<sup>25</sup> *Williams and Adendorff v Johannesburg Municipality* 1915 TPD 106; *R v Platjies* 1910 EDL 63. See further Alfred Avins 'Racial Separation and Public Accommodations: Some Comparative Notes between South African and American Law' (1969) 86 *SALJ* 53.

<sup>26</sup> 1934 AD 167.

<sup>27</sup> While South African courts may not pronounce on the validity of Acts of Parliament, they may set aside subordinate legislation where it is 'unreasonable'. In essence, therefore, in *Rasool's* case the Appellate Division held that the reservation of separate facilities for different racial groups was 'reasonable'.

<sup>28</sup> Under the Natal Code of Native Law and the Native Administration Act 38 of 1927 which permitted the Governor-General to authorize the detention for three months of any African who in his opinion might be 'dangerous to the public peace, if left at large'.

<sup>29</sup> This provision now appears in s 3(5) of Act 17 of 1956.

<sup>30</sup> Section 5(1)(b) of the Black Administration Act 38 of 1927.

made it a criminal offence to utter any words or publish material calculated to engender hostility between Whites and Blacks<sup>31</sup>—laws which were generally enforced in such a way as to restrict criticism of White supremacy.<sup>32</sup>

The South African legal order was thus not free from discriminatory and repressive features before 1948. But, compared with the contemporary response to laws of this kind, there was little reaction to such laws. This can be explained on both historical and jurisprudential grounds. While Africa was under colonial rule the legal orders of most colonies were not substantially different from that of South Africa. Moreover in the United States many southern states had laws on the statute book which were remarkably similar to South Africa's racial laws. There was little concern over the use of the legal process to achieve a discriminatory order as, in the pre-World War II era, law was seen essentially as a mechanism of control by lawyers and politicians reared on the positivist legal tradition, which denies the importance of legal values.

The post-World War II period brought about fundamental changes to this way of thinking. The advancement of human rights and the elimination of racial discrimination now became primary goals of the international community. The Charter of the United Nations set the scene by declaring its commitment to work for 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. This was followed by the Universal Declaration of Human Rights (1948), and by multilateral treaties such as the European Convention on Human Rights and Fundamental Freedoms (1950), the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and the International Covenant on Civil and Political Rights (1966). This international human-rights programme, together with the decolonization movement, has been one of the major forces in international politics in the post-war era and has contributed substantially to a new approach to the legal process.

The revolution in thinking about the role of law is undoubtedly the result of the Nazi experience. The debasement of the German legal system by Hitler made lawyers and politicians alike cognizant of the need for law to adopt a more purposive function in the promotion of equality and respect for fundamental freedoms.<sup>33</sup> This was reflected not only in the new approach of international law but also in the adoption of national constitutions with bills of rights. In the United States the Supreme Court initiated change to the edifice of American law with its decision in *Brown v Board of Education*,<sup>34</sup> in which the 'separate but equal' doctrine was held to violate the requirement of equal protection of the law contained in the Fourteenth Amendment. This was followed by a host of decisions of the Warren Court designed not only to

<sup>31</sup> Section 29 of the Black Administration Act 38 of 1927 and the Riotous Assemblies Act 27 of 1914, as amended by s 1 of Act 19 of 1930.

<sup>32</sup> A S Mathews *Law, Order and Liberty in South Africa* (1971) 209.

<sup>33</sup> This new approach is particularly apparent in the writings of Lon L Fuller. See, in particular, *The Morality of Law* 2 ed (1969).

<sup>34</sup> 347 US 483 (1954).

achieve racial equality but also to promote freedom of speech and association and to protect the procedural rights of an accused person in a criminal trial.

While nations and the international community increasingly invoked the legal process to further equality and individual rights, the South African legislature, firmly controlled by the National Party, continued to use the law as an instrument of discrimination and repression. Herein lies the root cause of South Africa's present situation. Before 1945 the South African legal system was not seen as being particularly out of step with international expectations or as being fundamentally different from other legal systems. But after 1945 the new idealism brought about heightened international expectations which prompted many states, particularly in the Western world, to introduce domestic reforms. South Africa not only remained impervious to this jurisprudential wind of change: it rejected it.

*(b) The Post-1948 Period*

In 1948 the National Party came to power on the platform of apartheid. For the first decade of National Party rule apartheid was generally perceived as a policy of racial domination and there was little talk of self-determination as a component of this policy. This was reflected in the laws enacted during this period, which set out to institutionalize and consolidate racial discrimination. After 1959, and the passing of the Promotion of Black Self-Government Act<sup>35</sup> which set the legislative scene for a commonwealth of nations in South Africa, new emphasis was placed on separate development and self-determination for ethnic groups. But by then the harm had been done: racial domination had been entrenched.

The first ten years of National Party rule witnessed the systematization and consolidation of racial legislation. Whereas pre-1948 racial legislation relied partially on social convention to ensure racial separation—as for instance in the case of marriage—every effort was now made to divide South African society by legislative means.

Race classification was given new form by the Population Registration Act of 1950<sup>36</sup> which provides for the compilation by the Secretary of the Interior of a register of the entire South African population, which is to reflect the race classification of each individual. In order to maintain the 'purity' of race classification marriages between Blacks and Whites were prohibited in 1949<sup>37</sup>. The 'separate but equal' approach to public amenities was repudiated in 1953 by the Reservation of Separate Amenities Act<sup>38</sup> which catered for the provision of unequal facilities for different races. New legislative curbs were placed on the rights of Africans to remain in urban areas<sup>39</sup> and the pass laws were consolidated and extended by a statute bearing the misleading title of

<sup>35</sup> 46 of 1959.

<sup>36</sup> 30 of 1950.

<sup>37</sup> Act 55 of 1949.

<sup>38</sup> Act 49 of 1953.

<sup>39</sup> Act 25 of 1945 s 10; inserted by s 27 of the Black Laws Amendment Act 54 of 1952. See further on the history and effect of this provision *Mtima v Bantu Affairs Administrative Board, Peninsula Area* 1977 (4) SA 920 (AD).

the Blacks (Abolition of Passes and Co-ordination of Documents) Act of 1952.<sup>40</sup> Residential segregation was extended beyond its previous limits by the Group Areas Act,<sup>41</sup> which provides for the creation of separate group areas in towns and cities for Whites, Coloureds, Indians and Africans. Job reservation was expanded and African workers were totally prohibited from striking.<sup>42</sup> University segregation was introduced by the Extension of University Education Act of 1959<sup>43</sup> which provided for the establishment of separate universities for Black students and prohibited Black students from attending any 'White' university without a permit issued by the government.

Inevitably the intensification of discrimination promoted increased Black resistance which in turn led to new legislative curbs on individual liberty.

During the 1950s legislative restrictions sought mainly to outlaw communism and to limit the activities of popular African political movements. In 1950 the Suppression of Communism Act<sup>44</sup> was introduced to proscribe the Communist Party. In addition, however, the Act placed serious restraints on Black political activity by prohibiting the advocacy of 'communism' which was defined, *inter alia*, to include any doctrine 'which aims at bringing about any political, industrial, social or economic change . . . by the promotion of disturbance or disorder, by unlawful acts or omissions'.<sup>45</sup> The Minister of Justice was furthermore empowered to impose severe restrictions on individuals by means of a 'banning order' which drastically curbs the freedoms of movement, speech and association of any person whose activities he deems to be furthering the achievement of the objects of communism. There is no right of appeal to the courts against such an order with the result that the executive has been able to silence many of its political opponents in this way.<sup>46</sup> The Suppression of Communism Act was followed by the Public Safety Act<sup>47</sup> which allows the government to declare a state of emergency and rule by executive decree, and by the Criminal Law Amendment Act<sup>48</sup> which provides harsh penalties for advocacy of or participation in acts of civil disobedience.

In 1960, following the Sharpeville tragedy, a state of emergency was declared and special legislation introduced to proscribe the African National Congress (ANC) and the Pan-Africanist Congress (PAC).<sup>49</sup> This emergency had disastrous economic consequences as foreign investors lost faith in the country's political stability. Consequently the government set about devising

<sup>40</sup> Act 67 of 1952.

<sup>41</sup> Act 41 of 1950. This Act was consolidated by Act 77 of 1957 and later by Act 36 of 1966.

<sup>42</sup> See, for example, the Black Building Workers Act 27 of 1951. The Industrial Conciliation Act was re-enacted in 1956 to allow the Minister of Labour to reserve specified classes of work for specified races as a 'safeguard against inter-racial competition' (s 77 of Act 28 of 1956). The prohibition on strikes was provided for in the Black Labour (Settlement of Disputes) Act 48 of 1953.

<sup>43</sup> Act 45 of 1959.

<sup>44</sup> Act 44 of 1950.

<sup>45</sup> Section 1.

<sup>46</sup> By 1974, 1 280 persons had been banned in this way.

<sup>47</sup> Act 3 of 1953.

<sup>48</sup> Act 8 of 1953.

<sup>49</sup> Unlawful Organizations Act 34 of 1960.



measures which would enable it to deal effectively with its political opponents without the necessity of declaring a state of emergency.

The result was a new system of detention-without-trial laws which has contributed as much to South Africa's poor image abroad as its battery of discriminatory laws. In 1963 provision was made for 90 days' detention without trial;<sup>50</sup> in 1965 for 180 days' detention;<sup>51</sup> and in 1967 this trend was taken to its logical conclusion with the enactment of the Terrorism Act,<sup>52</sup> which allows a person to be detained indefinitely without trial in solitary confinement for the purpose of interrogation. In terms of this law habeas corpus is discarded and the detainee is denied the right to see his lawyer, medical adviser or indeed anyone other than an official of the state.

The tentacles of the Suppression of Communism Act—renamed the Internal Security Act in 1976<sup>53</sup>—have been expanded to tighten their grip on the South African body politic. The Act may now be invoked to proscribe organizations, silence newspapers, detain individuals in preventive detention<sup>54</sup> and ban persons without access to the courts, where the executive considers that such organizations, newspapers or individuals are engaged in 'activities which endanger the security of the State or the maintenance of public order'.

Freedom of assembly and the right of political protest are seriously undermined by a number of statutes, and in particular by the Riotous Assemblies Act as amended in 1974.<sup>55</sup> In its new form this Act permits the Minister of Justice to prohibit any gathering in order to maintain peace or prevent the engendering of racial hostility and since 1976 a continuous ban has been imposed on open-air political meetings.

Although the government claims to respect freedom of the press, the truth is that this freedom is seriously curtailed by the general restrictions on freedom of speech, by the use of arbitrary detention and banning laws against journalists and editors, and by the Internal Security Act which empowers the executive to silence newspapers without appeal to a court of law.<sup>56</sup> The regular press is excluded from the wide scope of the Publications Act of 1974,<sup>57</sup> but other newspapers, books, magazines and films are all subject to this Act which empowers administrative bodies (and not courts) to prohibit the distribution and, in some instances, the possession of works determined to be 'undesirable'. Both 'obscene' and politically undesirable works are affected by this statute with the result that a considerable number of literary and political works are withheld from the South African public.

The above-described laws, which permit persons to be detained without trial and 'banned', allow organizations to be proscribed, newspapers to be silenced, meetings to be prohibited and publications to be outlawed, have in

<sup>50</sup> Section 17 of the General Law Amendment Act 37 of 1963.

<sup>51</sup> Section 215*bis* of the Criminal Procedure Act 56 of 1955 as inserted by s 7 of the Criminal Procedure Amendment Act 96 of 1965.

<sup>52</sup> Section 6 of Act 83 of 1967.

<sup>53</sup> Internal Security Amendment Act 79 of 1976.

<sup>54</sup> Sections 2(2), 6 and 10(1)(a)*bis* of Act 44 of 1950.

<sup>55</sup> Act 17 of 1956 as amended by Act 30 of 1974.

<sup>56</sup> Section 6 of Act 44 of 1950.

<sup>57</sup> Act 42 of 1974.

effect introduced a permanent state of emergency, which explains why, despite the general deterioration in the security situation, the government has not felt obliged to declare a formal state of emergency since 1960.

The powers of the courts have been substantially curtailed both by discriminatory laws and by security laws, which generally exclude habeas corpus and the review of the executive action. Moreover the rules of criminal procedure have been heavily weighted in favour of the prosecution and it is no longer possible to see in these rules a safeguard of individual liberty.<sup>58</sup> Nevertheless the judiciary remains an important protector of equality before the law and of individual liberty as it retains the power to interpret vague and ambiguous statutes in favour of the individual and to enforce common-law rights in the absence of legislative interference. Unhappily, there have been notable instances in which our courts have not exercised their discretion in favour of the individual but have instead shown a preference for that interpretation of the law most favourable to the executive. This cannot, however, be described as a general trend as there have been a number of equally important cases in which the courts have displayed a commitment to basic Western values in their interpretation of discriminatory and repressive laws.<sup>59</sup>

#### HUMAN RIGHTS: PROSPECTS FOR THE FUTURE

In the preceding section I have briefly described the main discriminatory and repressive features of the South African legal order which have brought the system into national and international disrepute and have led to South Africa being viewed as a major human-rights violator in the international community. In this section I shall examine the prospects for a 'movement away' from discrimination and repression and focus attention on issues that I consider to be of special importance for the future.

##### (1) RACE DISCRIMINATION

When the National Party came to power in 1948 it unashamedly pursued a policy of racial discrimination or race domination and set about enacting a number of measures to give effect to this policy—notably the Group Areas Act, the Reservation of Separate Amenities Act, and the Black (Abolition and Co-ordination of Documents) Act. Gradually, however, this policy of racial discrimination or *baasskap* evolved into the policy of separate development which denies the acceptability of discrimination on grounds of race. This new approach reached its peak in 1974 when Mr R F Botha, then South Africa's ambassador to the United Nations, informed the Security Council that 'my Government does not condone discrimination purely on the grounds of race or colour'—a statement that was subsequently endorsed by Mr Vorster himself.<sup>60</sup> This was to herald in a new era of egalitarian rhetoric and it now became government policy to 'move away' from race discrimina-

<sup>58</sup> See generally on this subject, Dugard *op cit* ch 8.

<sup>59</sup> For a discussion of judicial decisions in the fields of race and security, see Dugard *op cit* chs 10 and 11.

<sup>60</sup> *House of Assembly Debates*, vol 55 cols 382–3 (7 February 1975).

tion. Unfortunately, more than four years later, there is little evidence of such movement in the legislative edifice of separate development.

The contemporary meaning of racial discrimination is reasonably clear. According to the International Convention on the Elimination of All Forms of Racial Discrimination, which came into force in 1969, racial discrimination is defined as

‘any distinction, exclusion, restriction or preference based on race, colour or descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.<sup>61</sup>

The essence of racial discrimination, according to this definition is the unequal allocation of human rights on grounds of race, an emphasis that appears in the Universal Declaration of Human Rights,<sup>62</sup> the International Covenant on Civil and Political Rights<sup>63</sup> and the European Convention on Human Rights.<sup>64</sup> To this definition should be added the important principle enunciated in *Brown v Board of Education*<sup>65</sup> that the ‘separate but equal doctrine’ is contrary to the notion of equality before the law on the ground that such separation is usually interpreted as denoting the inferiority of the group which has not participated in the law-making process.<sup>66</sup>

Judged by these standards the South African statute book is riddled with racially discriminatory laws. The pass laws and the job reservation laws openly discriminate by allocating rights unequally to Blacks. Some laws, such as the Reservation of Separate Amenities Act and the Group Areas Act, do not expressly provide for unequal treatment for Blacks but in practice there is no question about their discriminatory effect, which has been acknowledged by the courts.<sup>67</sup> Some, such as those dealing with education, create separate facilities that are either in fact inferior or produce a sense of inferiority among Blacks. Others, such as the race classification laws, the Prohibition of Mixed Marriages Act and the Immorality Act, appear to affect all races equally, but in fact produce a sense of humiliation or inferiority among Blacks on account of their professed goal to preserve the racial ‘purity’ of Whites. And, on the political front, there is of course discrimination in that Blacks—Africans, Coloureds and Indians—are denied full political rights on account of their race.

While it would have been too much to expect the government to repeal all discriminatory laws overnight, one might be forgiven for expecting that a policy of ‘movement away’ from race discrimination would entail at least some relaxation of the legislative structure of apartheid. But this has not

<sup>61</sup> Article 1.

<sup>62</sup> Article 2.

<sup>63</sup> Article 2(1).

<sup>64</sup> Article 14.

<sup>65</sup> 347 US 483 (1954).

<sup>66</sup> See further the comments by Beadle CJ in *City of Salisbury v Mehta* 1962 (1) SA 675 (FC).

<sup>67</sup> See *Minister of the Interior v Lockhat* 1961 (2) SA 587 (AD) at 602.

happened. To date only the masters and servants laws, which made it a criminal offence for an employee to breach his contract of employment, have been repealed,<sup>68</sup> and this action was prompted more by the threatened invocation of the United States Tariff Act of 1930, which prohibits the importation of goods produced by indentured labour under the threat of penal sanction, than by the determination to move away from discrimination.

So far the commitment to 'move away' from discrimination has been confined to administrative exemption rather than legislative action. The severity of the Groups Areas Act has been softened by the granting of exemption permits, which have resulted in the opening of some hotels, restaurants and theatres to Blacks and in the occupation of some premises reserved for Whites by Blacks. Moreover in 1973-4 a number of city councils desegregated facilities such as libraries and parks, which were under their control, and later the desegregation of post office counters was commenced on the instruction of the Postmaster-General. Job reservation has likewise been significantly relaxed by administrative fiat. Black students are increasingly being allowed to study at White universities by means of special permits and important efforts are under way to improve the quality of African education.

Although this administrative departure from the full severity of the law is to be welcomed, this cannot be viewed as final evidence of a determination to 'move away' from discrimination as it affects only 'the few' and is in any event susceptible to a reversal in policy—as indicated by the fluctuating policy of the government towards the granting of permits to Black students to study at White universities. The apartheid order is in essence a legal order. Only the abolition of the laws that comprise this order will convince a sceptical public, both at home and abroad, of the government's commitment to abandon racial discrimination.

While the government might have political difficulties in repealing all the laws of apartheid overnight, there is no satisfactory explanation for its failure to give even the slightest indication of a willingness to move in this direction. The prohibitions on both inter-racial marriages and extra-marital sexual relations between persons of different races<sup>69</sup> have been eliminated in Namibia without any apparent difficulties and one must pose the question why such a small step in the direction of non-discrimination has not been taken in South Africa itself.

Although legislation is responsible for most discriminatory practices in South Africa, there remains a wide area of human relations in which convention rather than law is to blame. Legislative job reservation has been substantially relaxed in recent years, but conventional job reservation still remains a powerful force. Here South Africans who claim to be committed to racial equality can surely be expected to behave with more courage and imagination in disregarding social and economic discriminatory conventions and ensuring that more Blacks are brought into management positions and into the profes-

<sup>68</sup> By s 51 of the Second General Law Amendment Act 94 of 1974.

<sup>69</sup> Proc AG 4 *Official Gazette Extraordinary* 3656 of 14 October 1977.

sions. Where necessary benign discrimination may have to be employed. White employers should not shy away from such a course for, in order to redress our legacy of discrimination, bold affirmative action programmes are essential. The separate opinion of Mr Justice Marshall in the *Bakke* case<sup>70</sup> is instructive in this regard. The learned judge stated:

‘Although Negroes represent 11,5% of the population, they are only 1,2% of the lawyers and judges, 2% of the physicians, 2,3% of the dentists, 1,1% of the engineers and 2,6% of the college and university professors.

The relationship between these figures and the history of unequal treatment afforded to the Negro cannot be denied. . . . In the light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. . . .

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America.’<sup>71</sup>

This statement is of particular relevance to the legal profession in South Africa where there are less than 15 Black advocates out of a total of some 550 advocates and about 200 Black attorneys out of a total of some 4 200 practising attorneys. There is no legal restriction on the training of Black attorneys by White attorneys or on the admission of Black advocates to the various societies of advocates. Yet in practice many White firms refuse to employ Black articulated clerks and at least one of the societies of advocates refuses to accept Black members. If lawyers cannot adopt a more progressive attitude towards the training of Black lawyers and their admission to practice there is little hope that the legacy of racial discrimination in South Africa will ever be redressed.

## (2) FREEDOM OF EXPRESSION

There are numerous legislative and administrative restrictions on freedom of expression in South Africa.<sup>72</sup> Time does not permit me to list all these laws, but there is one general observation on this subject that cannot be omitted.

These laws have created a climate of repression which has inevitably resulted in a disturbing measure of self-censorship on the part of individuals, and on the part of the press over the past few years. Happily the scandal surrounding the Department of Information has produced a new licence in this regard and the press has been instrumental in bringing about a new era of debate and criticism in South African society. To some this may be seen as undesirable ‘rumour-mongering’ but it is better viewed as a renaissance of

<sup>70</sup> *Regents of the University of California v Bakke* 1978. Docket No 76-811, 28 June 1978.

<sup>71</sup> Separate opinion, pp 9, 10, 15.

<sup>72</sup> For a detailed account of these laws, see Dugard *Human Rights and the South African Legal Order* ch 6.

political expression which one can only hope will not disappear when the information scandal is finally laid to rest. South Africans of all races and persuasions should not forget—as Chief Justice Rumpff has warned—that ‘freedom of speech is a hard-won and precious asset, yet easily lost’.<sup>73</sup> Unfortunately there is a real danger that this treasured asset is more likely to be lost by self-censorship produced by the fear of administrative action than by direct legislative action itself.

In recent years a new threat to freedom of expression has emerged on the South African scene. I refer here to the implementation of the Publications Act of 1974<sup>74</sup> which has introduced a far-reaching form of political censorship that has gone largely unnoticed by South Africans. Under the pre-1974 censorship regime<sup>75</sup> attention was focused largely on obscenity and, in any event, the bodies established under this regime had no power to prohibit the possession of ‘banned’ works—although such a power did vest in the authorities under the Suppression of Communism Act (as it then was). During the first year of its operation the machinery established under the 1974 Act continued to follow this approach and in 1975 (April to December) only 191 publications of a total of 938<sup>76</sup> were found to be undesirable on ‘political’ grounds<sup>77</sup> as opposed to obscenity or blasphemy. Moreover only 20 works were prohibited in respect of possession and all of these works were so prohibited on account of obscenity.<sup>78</sup> In 1977, however, 317 works of a total of 1 160 were declared undesirable on political grounds and 282 works were prohibited in respect of possession on political grounds out of a total of 394 works banned for possession.<sup>79</sup> The figures available for 1978 show a similar trend.<sup>80</sup> The result of this form of publications control is that newspapers—particularly student newspapers—not members of the Newspaper Press Union are increasingly being eliminated from circulation by bannings, as are other publications, both local and foreign. In this way political orthodoxy is protected and the South African public is denied the opportunity of reading of the anger and ideologies of persons totally opposed to and embittered by the *status quo*. This is a dangerous development as it means that the South African reader is lulled into a false sense of security which fails to prepare him for the turbulent times that lie ahead.

### (3) FREEDOM OF PERSON AND THE SECURITY LAWS

While the government is on record as being opposed to discrimination on the ground of race, there is no such commitment in respect of repression. On the contrary, South Africa’s formidable array of repressive security laws is added to regularly and there seems little awareness on the part of the

<sup>73</sup> *Publications Control Board v William Heinemann* 1965 (4) SA 137 (AD) at 160.

<sup>74</sup> Act 42 of 1974.

<sup>75</sup> Under the Publications and Entertainments Act 26 of 1963.

<sup>76</sup> GN 395 GG 5002 of 12 March 1976.

<sup>77</sup> That is under subsections 47(2)(d) and (e) of Act 42 of 1976.

<sup>78</sup> GN 395 GG 5002 of 12 March 1976.

<sup>79</sup> GN 1288 and GN 1289 GG 6081 of 23 June 1978.

<sup>80</sup> See L. Silver ‘The Statistics of Censorship’ (1979) 96 *SALJ*.

government of the extent of the resentment to these laws and their implementation among the Black community. This insensitivity was starkly revealed following the death of Steve Biko and the inquest into his death when no government spokesman was prepared to raise his voice against the inhuman treatment meted out to Steve Biko, and by necessary implication to other detainees.

Internal and external opposition to South Africa's policies is focusing more upon political repression and less upon racial discrimination. It should be recalled that one of the major causes of the continued unrest of 1976 was the detention of large numbers of schoolchildren. Although the initial protest was sparked off by Bantu education the emphasis soon shifted to protests against the security laws and their implementation. On the international front, it should be recalled that it was not the laws of apartheid—viz the laws of racial discrimination—that finally led the Security Council of the United Nations to impose a mandatory arms embargo against South Africa in November 1977, but the Internal Security Act, under which organizations, newspapers and individuals were silenced, and the Terrorism Act, under which Steve Biko was held at the time of his death. The law is increasingly seen among Blacks as an instrument of repression designed to maintain White supremacy. In its efforts to suppress extra-constitutional political dissent by all means the government has given the value of effectiveness chief place of honour. The security laws may have saved lives and have led to the suppression of subversion. But at the same time the enforcement of these laws has lost the sympathy of a large section of the Black community.<sup>81</sup>

In this brief survey of the state of human rights in South Africa there are two central issues relating to the security laws to which I wish to draw attention; first, the absence of executive accountability for action taken under the security laws, and, secondly, the incompatibility of the regime created by s 6 of the Terrorism Act with the widely accepted freedom from inhuman treatment.

*(a) Executive Accountability under the Security Laws*

Until very recently the White South African public has been prepared to accept almost any form of administrative conduct—provided the responsible cabinet minister was prepared to give it the assurance that such conduct was in the 'national interest', 'in the interests of the security of the state' etc. Now, however, there is a new scepticism on the part of the public as a result of the disclosures of the Erasmus Commission Report on the Department of Information.<sup>82</sup> As far as government spending is concerned the White public is apparently prepared to accept that absolute power corrupts absolutely.

But the lesson of the Department of Information scandal should not be

<sup>81</sup> This consequence of the vigorous enforcement of security laws was one of the reasons advanced by Lord Gardiner for opposing 'in-depth' interrogation of detainees in Northern Ireland. See his Minority Report in the Parker Committee Report, Cmnd No 4901 (1972).

<sup>82</sup> Report of the Commission of Inquiry into Alleged Irregularities in the Former Department of Information RP 113/1978.

confined to the sphere of government spending. Many of the comments of the Erasmus Commission on uncontrolled executive spending in the interests of the security of the state are equally applicable to action taken under the Internal Security Act<sup>83</sup> and the Terrorism Act<sup>84</sup> in the interests of state security.

In terms of the Internal Security Act the Minister of Justice has completely uncontrolled power to impose a banning/restriction order on any individual who in his opinion engages in activities 'which endanger or are calculated to endanger the security of the State';<sup>85</sup> the State President is empowered to outlaw newspapers<sup>86</sup> and proscribe political organizations<sup>87</sup> in similar circumstances without having to account to Parliament or to the courts; and the Minister of Justice is authorized to detain a person without trial where he 'is satisfied' that such person engages in activities 'which endanger or are calculated to endanger the security of the State or the maintenance of public order'<sup>88</sup> subject only to review by a tribunal whose membership remains a closely guarded secret<sup>89</sup> and whose recommendations may be ignored by the Minister. Section 6 of the Terrorism Act confers far-reaching powers of arrest and detention on senior police officers<sup>90</sup> who may arrest and hold a person without any time limit where such person is suspected of having committed or of having information relating to the commission of the crime of 'terrorism' under the Act. Habeas corpus is expressly excluded and the Minister of Justice is not obliged to provide information relating to the identity or number of persons held under this Act.

These laws have been vigorously implemented and all appeals to bring their implementation under judicial control have been firmly rejected. Many South Africans have ceased to believe that action taken under these laws is objectively designed to promote the security of the state, but there is no statutory provision which permits control of executive action in these cases in the form of an appeal to Parliament or to a court of law. *A fortiori* the following comment of the Erasmus Commission on the 'secret funds' designed to promote the national interest is applicable to the security laws:

'The purpose of the secret fund had all the attraction of a lovely fresh apple, but the germ which could cause complete rot to set in was already there at the flowering stage because of lack of clarity in the existing statutory control.'<sup>91</sup>

<sup>83</sup> Act 44 of 1950.

<sup>84</sup> Act 83 of 1967.

<sup>85</sup> Sections 9 and 10 of Act 44 of 1950. An order may in theory be set aside where the Minister has acted in bad faith or failed to apply his mind to the matter, but in practice this is impossible to prove as the Minister cannot be compelled to disclose his reasons for banning a person and without the disclosure of such reasons it is impossible to show that either condition applies. See Dugard *Human Rights and the South African Legal Order* 139.

<sup>86</sup> Section 6 of Act 44 of 1950.

<sup>87</sup> Section 2 of Act 44 of 1950.

<sup>88</sup> Section 10(1)(a)bis of Act 44 of 1950.

<sup>89</sup> *House of Assembly Debates*, vol 69 col 85 (Questions) (1 February 1977).

<sup>90</sup> Of or above the rank of lieutenant-colonel.

<sup>91</sup> RP 113/1978 3.36.



Another apposite passage from the Erasmus Commission report reads:

'It is clear from the evidence that the door to malpractices had been opened by the phrase "secret funds", which was so widely interpreted that any expenditure that had the slightest connection with a secret project was met from "secret funds".'<sup>92</sup>

The Erasmus Commission emphasized that secrecy, in the form of executive non-accountability, 'gives rise to arrogance and inefficiency'<sup>93</sup> and that it was imperative to ensure that control over secret funds was 'constitutionally secured'.<sup>94</sup>

One can only hope that the White South African public, which has been lulled into a sense of false security over the past decades by ministerial assurances that arbitrary action against individuals, organizations and publications under the security laws has been taken in the 'national interest', will have the intelligence to question these assurances in the light of the Erasmus Commission Report and the courage to demand that some form of judicial control be introduced to prevent 'arrogance and inefficiency' in the implementation of the security laws which have so tarnished the reputation of South Africa.

*(b) The Terrorism Act and the Freedom from Inhuman Treatment*

Section 6 of the Terrorism Act has come to symbolize the repressive nature of the South African legal order.<sup>95</sup> As already mentioned, this provision allows a person suspected of having committed offences under this Act, or of withholding information relating to the commission of such offences, to be held indefinitely in solitary confinement for the purposes of police interrogation. In a number of trials police witnesses have testified that detainees are questioned for lengthy periods of time and there can be no doubt that such an environment creates a situation of extreme stress and tension for the detainee. On the other hand, the authorities have consistently denied that physical torture is used to induce detainees to speak—despite the fact that there have been numerous allegations of physical assaults and over 40 persons have died in detention while held under the Terrorism Act or one of its predecessors.

The implementation of s 6 of the Terrorism Act was highlighted during the inquest into the death of Steve Biko, but, despite the evidence of inhuman treatment which emerged in the course of those proceedings, the government has remained steadfast in its opposition to calls for a full-scale judicial enquiry into the methods of interrogation employed by the security police. Indeed a publication issued by the South African Institute of Race Relations cataloguing allegations of maltreatment of detainees and calling for a judicial commission of enquiry into such allegations was banned both in respect of distribution and possession in 1978.<sup>96</sup>

<sup>92</sup> Ibid 13.451.

<sup>93</sup> Ibid 14.474.

<sup>94</sup> Ibid 10.302.

<sup>95</sup> For a more comprehensive discussion of the implications of this provision, see Dugard *Human Rights and the South African Legal Order* 117, 132.

<sup>96</sup> *In re Detention without Trial 1976–1977*, Publications Appeal Board 91/1977.

Essentially there are two questions that must be posed in respect of s 6 of the Terrorism Act. First, is physical violence used to extract information from detainees? If the answer to this question is in the affirmative, it is clear that the police have exceeded their powers and the law is being employed as an instrument of torture. The second question that must be posed, however, is whether, *on the assumption that no physical violence whatsoever is employed*, the methods of interrogation used by the police are in accordance with South African law<sup>97</sup> and in accordance with the widely recognized freedom from inhuman and degrading treatment and torture?<sup>98</sup>

There is a strong body of opinion in the modern world which inclines to the view that in-depth methods of interrogation of detainees in isolation constitutes a form of inhuman treatment or torture.<sup>99</sup> In 1976 the European Commission of Human Rights found that certain methods of interrogation employed by the British police in Northern Ireland violated article 3 of the European Convention on Human Rights which prohibits torture and inhuman and degrading treatment.<sup>1</sup> Later, in January 1978, the European Court of Human Rights found that the techniques of interrogation could not be described as 'torture', but only as 'inhuman and degrading treatment' on the ground that 'they did not occasion suffering of the particular intensity and cruelty implied by the word torture'.<sup>2</sup> The five techniques in question—wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink—<sup>3</sup> all fell short of physical assaults but this did not preclude the European Court from finding that the United Kingdom had violated article 3 of the Convention on the ground that

'they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of

<sup>97</sup> For a statement of some of the guiding principles of South African law on this subject, see *Gosschalk v Rossouw* 1966 (2) SA 476 (C).

<sup>98</sup> Article 5 of the Universal Declaration of Human Rights, article 3 of the European Convention on Human Rights and article 7 of the International Covenant on Civil and Political Rights.

<sup>99</sup> See, for example, the decision of the Supreme Court of the United States in *Miranda v Arizona* 384 US 436 (1966) at 457-8, 448; and General Assembly Resolution 3452 (XXX) of 9 December 1975.

<sup>1</sup> *Ireland v United Kingdom* 1976 *Yearbook of the European Commission of Human Rights* 512, especially at 944-6.

<sup>2</sup> *Ireland v United Kingdom*, judgment of 18 January 1978, para 167.

<sup>3</sup> The five techniques were described by the court as follows (*ibid*, para 96):

- (a) *wall-standing*: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
- (b) *hooding*: putting a black or any coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
- (c) *subjections to noise*: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- (d) *deprivation of sleep*: pending their interrogations, depriving the detainees of sleep;
- (e) *deprivation of food and drink*: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.'

inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.<sup>4</sup>

The European Court has been criticized for drawing a distinction between 'torture' and 'inhuman or degrading treatment' and for not following the earlier finding of the Commission that the techniques in question constituted 'torture'. Be this as it may, the fact is that mental suffering of the kind occasioned by the 'five techniques' of interrogation has been authoritatively condemned by the world's leading human-rights judicial tribunal as contrary to Western standards of conduct—a finding accepted by the British Government itself.<sup>5</sup>

While no one outside government and the security police can accurately describe the methods of interrogation employed to obtain information from 6 detainees, there is information to suggest that detainees are at least compelled to stand for long periods and are deprived of sleep during interrogation sessions. Moreover many persons, both at home and abroad, justifiably or unjustifiably, believe that the methods of interrogation used by the security police far exceed the five techniques employed in Northern Ireland in their severity. This is why South Africa today stands accused of practising systematic torture or 'inhuman and degrading treatment' in respect of its political opponents.<sup>6</sup>

Such accusations cannot be allowed to go unanswered for they grievously undermine the reputation of both the country and its system of justice. Unfortunately, it is not enough for the Minister of Police to deny these allegations himself. Nor is it sufficient for him to appoint two distinguished lawyers to visit detainees, however welcome such an innovation may be. Nothing short of a full-scale judicial enquiry into the methods of interrogation employed by the security police will satisfy a hostile world and a sceptical South African public.

If the government persists in its opposition to such an enquiry that need not be the end of the matter. In the first place, judges can actively conduct

<sup>4</sup> *Ibid*, para 167.

<sup>5</sup> The British Government had in fact abandoned the 'five techniques' in 1972, shortly after their introduction in 1971, following publication of the Compton (Cmnd No 4823 (1971)) and Parker (Cmnd 4901 (1972)) committees reports. The British Government therefore had no difficulty in giving the European Court of Human Rights the assurance that the five techniques 'will not in any circumstances be reintroduced as an aid to interrogation' (judgment, para 102).

<sup>6</sup> In Resolution 417 (1977) adopted on 31 October 1977 the Security Council unanimously demanded that the South African Government 'release all persons imprisoned under arbitrary security laws and all those detained for their opposition to apartheid; cease forthwith its indiscriminate violence against peaceful demonstrations against apartheid, murders in detention and torture of political prisoners; abrogate the ban on organizations and news media opposed to apartheid'.

See, too, General Assembly Resolution 32/65 of 1977 which condemned, in relation to South Africa, 'the practice of subjecting political detainees . . . to torture and other cruel, inhuman or degrading treatment or punishment'.

enquiries into the methods of interrogation used to persuade witnesses held under s 6 to testify for the state and to extract confessions from accused persons. In trials under the security laws confessions are seldom produced—perhaps, precisely because of the duress to which detainees are subjected—but there have been numerous cases in which accomplices testifying for the state have alleged that they have been subjected to mental and physical methods of ‘persuasion’ of doubtful legality. In some cases these methods have been queried by the trial judge, but in others judges have refrained from a vigorous investigation into the reasons behind the witness’s decision to testify. In strict law such reasons may not be relevant to the trial in progress, but where they reveal a pattern of intimidation affecting and undermining the administration of justice it is surely the duty of the trial judge to conduct a full enquiry into the methods of interrogation employed.

Secondly, it would not be impossible for the organized legal profession to carry out some form of investigation into techniques of interrogation. The General Council of the Bar and the Association of Law Societies might jointly establish a commission comprising senior advocates and attorneys to investigate the complaints of ex-detainees and the allegations of ill-treatment made to advocates and attorneys appearing in trials under the security laws. Members of the police force might be invited to testify before such a commission, but, of course, there would be no compulsion upon them. Obviously such an enquiry would not be as effective as a judicial commission with power to summon witnesses to appear before it. On the other hand, if such a commission were *prima facie* satisfied that investigative intimidation is employed this would stand as an authoritative indictment of the system. Alternatively, an exoneration of police methods of interrogation would do much to restore the reputation of the police force.

There is no precedent for such a professional commission of enquiry, but this should not be allowed to obstruct such an investigation. The reputation of the whole South African legal profession is at present being questioned both internally and externally as a result of its passive acquiescence in the legal order that *arguably* permits inhuman and degrading treatment. The once high reputation of the South African legal profession can be restored only by active dissociation from such an evil—if it exists—and the above suggested method would be one way of manifesting such a position of principle.

#### (4) DENATIONALIZATION

South Africa has achieved notoriety in the past decades as a result of its legal entrenchment of race discrimination and political repression. But since 1976 it has added another feature to its repertoire of legislative measures in violation of human rights norms. This is denationalization, which threatens to join race discrimination and political repression as the main targets of an increasingly hostile world.

The ultimate goal of separate development is the creation of some nine or ten independent mini-states within the pre-1976 borders of the Republic of South Africa. As each such state becomes independent all those African

persons in South Africa itself who are ethnically connected with the new state, however remotely, will be deprived of their South African nationality and linked to the new state through the bond of nationality. For this is the price of independence, the price that has led urban Blacks to brand those homeland leaders who have accepted independence as 'traitors'. In the fullness of National Party fantasy, when (if?) all these ethnic entities achieve independence, it will be possible, or least so the argument runs, for the National Party Government to turn to the world and say: 'There are no Black South Africans.'<sup>7</sup> The many million Black Africans who reside and work in South Africa (viz after the homelands have been excised) are guest workers (previously known as migrant labourers) who should be compared to the Turkish migrant workers in Germany and the Algerian migrant workers in France. Like these Turkish and Algerian workers they are foreigners who cannot hope to exercise political rights within South Africa. Such rights are reserved for South African nationals who are white, coloured and Indian.<sup>8</sup>

This process of denationalization has already begun. The Status of Transkei Act<sup>9</sup> provided that on Transkei attaining independence, in addition to those persons born in Transkei or directly descended from Transkeians, any person who was a citizen<sup>10</sup> of Transkei before independence or who has linguistic or cultural connections with the Xhosa or Sotho groups in Transkei 'shall cease to be a South African citizen'. The Status of Bophuthatswana Act of 1977 contains a substantially similar denationalization provision.<sup>11</sup>

Although neither of the above statutes expressly provides for denationalization on the ground of race there can be no doubt that they are intended to apply to Africans only.<sup>12</sup> As such they offend international law for, as

<sup>7</sup> Mr B J Vorster, while Prime Minister, is on record as having said that 'as far as we are concerned all black people are citizens of one or other homeland' (cited in Patrick Laurence *The Transkei: South Africa's Politics of Partition* (1976) 112).

<sup>8</sup> Such a statement is premised on the success of the present constitutional proposals designed to extend political rights to Coloureds and Indians.

<sup>9</sup> Section 6 read with Schedule B of Act 100 of 1976.

<sup>10</sup> 'Citizenship' here refers to that form of citizenship referred to in s 7(1) of the Transkei Constitution Act 48 of 1963 and is a somewhat confusing term as in 1963 all Transkeians were under international law very clearly South African nationals—as was acknowledged by s 7(3). This comment applies with equal force to the Black Homelands Citizenship Act 26 of 1970. For an illuminating discussion of this matter, see W H Olivier 'Statelessness and Transkeian Nationality' (1976) 2 *South African Yearbook of International Law* particularly at 149–51.

<sup>11</sup> Section 6 read with Schedule B of Act 89 of 1977. Unlike the Status of Transkei Act this statute makes provision for renunciation of Bophuthatswana citizenship after independence on conditions agreed upon between the governments of South Africa and Bophuthatswana (s 6(3)). This is apparently intended to allow a person to renounce Bophuthatswana citizenship on condition that he assumes the 'citizenship' of a self-governing homeland within South Africa.

<sup>12</sup> W H Olivier disputes the view that the Status of Transkei Act provides for denationalization on racial grounds and argues that the Act is so phrased that it may extend to Whites, Coloureds and Asians (op cit (footnote 10) at 152–4). While it is readily conceded that the Act is ambiguous in this regard and that *in theory* it may be interpreted in a non-discriminatory manner, the unfortunate fact is that the denationalization provision has in practice been extended to Africans only. As far as the present writer is aware, no White, Coloured or Asian connected with Transkei or Bophuthatswana has been deprived of his South African nationality since the conferment of independence on these two states. Olivier's rebuke directed at the present writer (op cit

McDougal, Laswell and Chen conclude after a thorough study of this subject:

'It thus appears incontrovertible that denationalization measures based on racial, ethnic, religious or other related grounds are impermissible under contemporary international law.'<sup>13</sup>

In support of this proposition the learned writers point to the opposition to the 1941 Nazi decree which denationalized German Jews;<sup>14</sup> to the movement away from statelessness;<sup>15</sup> to modern human-rights instruments condemning denationalization, particularly the International Convention on the Elimination of all Forms of Racial Discrimination in which states undertake to guarantee the right of everyone, without distinction as to race, to equality before the law 'notably in the enjoyment of (*inter alia*) the right to nationality';<sup>16</sup> to the Convention on the Reduction of Statelessness which provides that a 'contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds';<sup>17</sup> and to the Universal Declaration of Human Rights which declares that 'no one shall be arbitrarily deprived of his nationality'.<sup>18</sup>

The intensity of modern opinion on denationalization is reflected in the statement by Hannah Arendt that

'One is almost tempted to measure the degree of totalitarian infection by the extent to which the concerned governments use their sovereign right of denationalization.'<sup>19</sup>

This view is shared by many urban Blacks and is one that is increasingly being articulated by their leaders. Denationalization is fast becoming the rallying point of opposition to separate development in much the same way that s 6 of the Terrorism Act has become the focus of antagonism towards the security laws.

#### CONCLUSION

South Africa, like many other countries in the modern world, is a violator of human rights. On the other hand, it is by no means the worst offender,<sup>20</sup> as (153) therefore appears unwarranted when the *reality* of the law, as opposed to the theory, is considered.

<sup>13</sup> 'Nationality and Human Rights: the Protection of the Individual in External Arenas' (1974) 83 *Yale Law Journal* 900 at 958. *Sed contra*, see Olivier op cit (footnote 10) 147, 154; G N Barrie 'A Legal View of Transkeian Recognition and so-called Statelessness' (1976) *Politikon* (No 2) 31 at 34.

<sup>14</sup> See F A Mann 'The Present Validity of Nazi Nationality Laws' (1973) 89 *LQR* 194 at 199-200.

<sup>15</sup> Africans deprived of their nationality by the Status of Transkei and the Status of Bophuthatswana Acts do not *de jure* become stateless as they have the nationality of Transkei or Bophuthatswana conferred upon them. But as neither of these states are recognized or are likely to achieve recognition, the individual is denied diplomatic protection in most instances. *De facto*, therefore, a form of statelessness results.

<sup>16</sup> Article 5(d)(iii).

<sup>17</sup> Article 9.

<sup>18</sup> Article 15.

<sup>19</sup> *The Origins of Totalitarianism* 3 ed (1967) 278.

<sup>20</sup> L H Gann & Peter Duignan *South Africa: War, Revolution or Peace* (1978) chapter 1.

much political rhetoric and many General Assembly Resolutions tend to suggest. This should not, however, be of much comfort to South African lawyers. Uganda, Chile, Ethiopia, the Soviet Union etc are certainly more ruthless in their suppression of individual liberty, but surely our standards are higher than those of countries of this kind. We South African lawyers, proud of our Roman-Dutch legal tradition, must aspire to Western standards as reflected in the European Convention on Human Rights.

The object of this paper is not to provoke feelings of guilt among South African lawyers but to appeal to them to act more purposively and constructively in the protection of those rights that remain and in the efforts to restore those rights that have been removed. There is much that can be done in the furtherance of this cause by lawyers working together. For professional purposes it is obviously necessary for advocates, attorneys and academics to work through separate organizations. But where the reputation of our legal system is at stake there is a need for a more concerted, co-operative approach.<sup>21</sup>

An independent and fearless judiciary is as indispensable to the protection of human rights in a legal order without an entrenched bill of rights as it is to a system such as that of the United States, in which the judiciary is empowered to exercise judicial review over legislative enactments to determine whether they comply with the provisions of the bill of rights. In fact the judiciary may have a more important role to play in the South African type system where there are no legislatively defined human rights and it is left to the judiciary to declare these rights in their decisions. The South African judiciary enjoys a high reputation for independence, a reputation which has recently been enhanced by the stance of Judge Mostert and the Erasmus Commission Report. On the other hand, a number of decisions of our courts in the field of race and security do not altogether accord with our legal heritage. These decisions have been fully examined in another work<sup>22</sup> and it would not be appropriate for me to embark upon an analysis of these decisions today. Suffice it to say that our judiciary has in recent times done its utmost to promote human rights on certain occasions<sup>23</sup> but that on others it has failed to display the maximum commitment to liberty *permissible within the limits of the judicial function*.<sup>24</sup>

<sup>21</sup> Dugard *Human Rights and the South African Legal Order* ch 12.

<sup>22</sup> *Ibid*, Part Four.

<sup>23</sup> *S v Ndou* 1970 (1) SA 668 (AD); *S v Mandela* 1972 (3) SA 231 (AD); *S v French-Beytagh* 1972 (3) SA 430 (AD); *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (AD); *Nxasana v Minister of Justice* 1976 (3) SA 745 (D); *Mtima v Bantu Affairs Administration Board, Peninsula Area* 1977 (4) SA 920 (AD); *Ebrahim v Minister of Interior* 1977 (1) SA 294 (AD); *S v Moroney* 1978 (4) SA 389 (AD); and the powerful dissent of Corbett JA in *Goldberg v Minister of Prisons* 1979 (1) SA 14 (AD) at 38.

<sup>24</sup> *Roussouw v Sachs* 1964 (2) SA 551 (AD); *Schermbrucker v Klindt NO* 1965 (4) SA 606 (AD); *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (AD); *S v Van Niekerk* 1973 (3) SA 711 (AD); *Sobukwe v Minister of Justice* 1972 (1) SA 693 (AD); *Minister of Justice v Alexander* 1975 (4) SA 530 (AD); *S v Wood* 1976 (1) SA 703 (AD); *S v Naude* 1975 (1) SA 681 (AD); *South African Associated Newspapers v Estate Pelsler* 1975 (4) SA 797 (AD); *Goldberg v Minister of Prisons* 1979 (1) SA 14 (AD).

Critics of the South African judiciary sometimes tend to forget that it is White South African society and not the judiciary that is responsible for the unhappy state of affairs in our country. This does not, however, mean that there is no positive role for the judiciary to play. The dilemma of the South African judiciary is accurately portrayed by two great American judges, Learned Hand and Jerome Frank, in an exchange on the judicial role in an unjust society: 'A society so riven that the spirit of moderation is gone, no court *can save*',<sup>25</sup> warned Judge Hand; to which 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 judgement 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.'<sup>26</sup>

The above comment of Judge Frank should not be confined to the judiciary but should be extended to the legal profession as a whole. Obviously our lawyers cannot 'do the whole job' in eliminating racial and political injustice, but they can take the lead in arresting 'evil popular trends' and in campaigning incessantly for the establishment of a decent legal order in South Africa.

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<sup>25</sup> 'The Contribution of an Independent Judiciary to Civilization' reprinted in *The Spirit of Liberty* ch 20.

<sup>26</sup> 'Some Reflections on Judge Learned Hand' (1957) 24 *Chicago Law Review* 697-8. As Frank discussed the South African Coloured vote cases in this article it is clear that he had the South African judicial experience in mind when he made this observation.