

THE PATHOLOGY OF A LEGAL SYSTEM: CRIMINAL  
JUSTICE IN SOUTH AFRICA\*

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A surprisingly large number of American lawyers visit South Africa or follow closely what is happening in that country. Their fascination with the legal institutions of a small and distant country, whose common law is the Roman-Dutch law, has often struck me as remarkable. I do not complain of it, as one of its agreeable consequences (from my point of view, at least) is that I have been invited to give this lecture. Part of the explanation, no doubt, is that the courts in South Africa deal with laws and institutions that bear an uncomfortably close resemblance to those with which American courts had to deal in the fairly recent past—laws and institutions that permit or even ordain discrimination on grounds of race and colour. Perhaps a more profound reason for American attention to South Africa is that South Africa exemplifies in the most intense form what is possibly the major international issue of the second half of the twentieth century—namely, the correlation between skin colour and enjoyment of political power, civil liberty, and economic affluence. Attention is focused on South Africa not because it has quantitatively less freedom, less justice, or less democratic government than a hundred other countries one could name. Those goods do exist in South Africa, but they are strictly rationed on the sole basis of colour—not on citizenship or birth or merit, but colour alone. Discrimination on the ground of colour in South Africa is not an aberration to be deprecated and remedied, but an institution that is authorised and, frequently, actually commanded by statute. That is the essential difference from the discrimination that undoubtedly continues to be found in the United States, in England, or in New Zealand. It is not discrimination but integration that is expressly forbidden by the Parliament of South Africa.

At the time when *Brown v. Board of Education*<sup>1</sup> was before the United States Supreme Court, and the doctrine of “separate but equal” was on the point of disappearing from American jurisprudence, the same doctrine, which had been blessed twenty years

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\* This Article is based on the Owen J. Roberts Memorial Lecture, delivered 18 October 1979, under the auspices of the Pennsylvania Chapter of the Order of the Coif, the Law Alumni Society, and the University of Pennsylvania Law School.

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<sup>1</sup> 347 U.S. 483 (1954).

earlier by South Africa's highest court,<sup>2</sup> was also disappearing from South African law. It was, however, disappearing in a different direction. A short statute, known as the Reservation of Separate Amenities Act, 1953,<sup>3</sup> simply and clearly provided not merely that public premises or public vehicles would be set apart or reserved for the exclusive use of persons belonging to a particular race or class,<sup>4</sup> but also that any such setting apart or reservation would not be invalid on the ground that the premises or vehicles reserved for the use of one class were not equal to those reserved for any other race or class.<sup>5</sup>

Another aspect of the South African system makes it a particular subject of interested observation by lawyers in Western countries. Notwithstanding statutes such as that I have just mentioned, and notwithstanding the increasingly authoritarian tone of government in South Africa, the traditional forms of legal process have not been abandoned. Trials, including trials of enemies or critics of the government (two categories which those in high levels of government often have difficulty distinguishing), take place in ordinary courts, open to the press and usually to the public, before the ordinary judges of the land. The accused are entitled to be defended by counsel, and there are always counsel willing to defend them. For many years (and for good reasons into which I need not enter here), we have had no jury trials in South Africa. The judge himself is the trier of fact. Save for this feature, however, a criminal trial in South Africa, up to very recent times at least, was conducted subject to those rules of evidence and procedure that, with the English language and the game of cricket, have been the most beneficent and lasting legacies of the British Empire.

But in very recent times, under the stress of sharpened conflict between the rulers and the ruled that has gone hand in hand with the increasingly authoritarian tone of government to which I have referred, we have witnessed—or, some of us, experienced—a profound distortion of our traditional legal system. A distortion, but not a disappearance. So there is something to be observed, by ourselves as South African lawyers, as well as by foreign lawyers who have a fundamentally similar conception of what constitutes a fair trial: the pathology of a system of criminal justice. This applies largely, although not entirely, to political trials, that is, prosecutions for

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<sup>2</sup> *Minister of Posts & Telegraphs v. Rasool*, [1934] App. Div. [A.D.] 167.

<sup>3</sup> Act No. 49 of 1953.

<sup>4</sup> *Id.* § 2.

<sup>5</sup> *Id.* § 3(b).

political offences. It is this pathological condition to which I shall devote most of this lecture. I shall describe it, attempt to define the "philosophy" underlying this departure from previously accepted norms of proper judicial process, and finally say a word about those who participate in it, both judges and lawyers.

There are two preliminary observations to be made. First, by reason of the similarity between the American system and the South African system, one may take this to be an implicit exercise in comparative criminal procedure. Comparative studies, especially in this field, tend to contain a strong moral element, sometimes disquieting but to American lawyers, no doubt, usually satisfying. The procedural novelties—to use a neutral term—that I shall describe have been created not by the judges, but by a sovereign legislature that is unfettered by any such eighteenth-century institution as a bill of rights. Americans may understandably take comfort in the fact that their Constitution, as presently interpreted, does not permit such things to happen. In many Western countries, including the United States, however, there are persons in powerful positions who maintain that existing forms of criminal procedure are weighted too heavily in favour of the accused, and that politically motivated crimes in particular call for special forms of procedure making it easier to obtain convictions. An examination of what may happen to a legal system when these views prevail may therefore be of some general interest.

The second preliminary observation to be made concerns the legitimacy of the criticism of the South African system of political trials. The South African government justifies its security legislation, including those criminal procedure statutes to which I shall refer, on the ground that South Africa faces a serious threat of subversion from within and outside its borders. The existence of this threat may be fully accepted. Persons charged with political offences in South Africa have often been shown to have been engaged in activities that in any country would be regarded as criminal, activities involving actual or potential violence against the state. The question remains, however, whether this undeniable fact justifies the forms of procedure under which those charged with such offences are now tried.

Further, much as the South African government resents criticisms of its laws and practices, it has in a sense invited them. For the South African government firmly maintains that it is a part of the free world and that it is indeed the main, if not the sole, representative in Africa of Western civilization. The distinguished and

perceptive judge in whose honour this lecture is presented, in a celebrated address given at Oxford, referred to the rule of law as an idea recognised by what he called "highly civilised nations." Asked what countries he would include in this category, Mr. Justice Roberts replied: "My test would be, first, a country that has a representative form of government; second, a country where individual liberty and freedom are protected by law; [and third], where there are bounds and limits to what the government can do to an individual.'" <sup>6</sup> As a South African lawyer, that is the criterion by which I would want my legal system to be judged. I am not impressed when I am told that things are done worse in the USSR or Uganda or, for that matter, in the Comoro Islands. In South Africa we are the inheritors of two of the great legal systems of the world, the Roman-Dutch law of Holland and the common law of England. We should invite and accept judgment by the standards of those systems.

## I. CRIMINAL PROCEDURE IN SOUTH AFRICA

### A. *The Traditional Standards*

In order to understand the pathology of a body, one must know something of its normal functions. It is not necessary for me to describe at length the normal rules of South African criminal procedure, as most of its features will be exceedingly familiar. First, the rules relating to arrest, with or without warrant, are similar in general to those of American law. The arrested person has the right to remain silent and must be warned by the police that he has this right before he is interrogated. He has a right to consult a legal adviser immediately after he has been arrested. He must be brought before a court within forty-eight hours of his arrest. He may apply for bail. Even before the process in court commences, he has (or had in the past) the broad protection of the writ of habeas corpus, or its Roman-Dutch equivalent, the writ *de homine libero exhibendo*.<sup>7</sup> His trial is an adversary proceeding in which he is

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<sup>6</sup> Discussion by Mr. Justice Owen J. Roberts at Oxford following his lecture, *The Rule of Law in the International Community* (Nov., 1951), quoted in Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 943 (1958).

<sup>7</sup> See 6 J. VOET, *THE SELECTIVE VOET, BEING THE COMMENTARY ON THE PANDECTS* 528-29 (P. Gane trans. 1957); Kentridge, *Habeas Corpus Procedure in South Africa*, 79 S. AFR. L.J. 283, 285 (1962).

In the Roman-Dutch law the approach to this writ is entirely without technicality. As stated by one South African judge, the rule is simply that every arrest is prima facie unlawful and must be justified in court by the arresting authority if

protected by the privilege against self-incrimination and in which the burden of proof rests upon the prosecution. He has the right to counsel of his choice (subject, admittedly, to paying the going fee or to finding someone else willing to pay it) and, in general, the right to be confronted with the witnesses against him. The rule against hearsay evidence applies with full, some would even say outmoded, rigour. And no confession is admissible against him that was not in all respects freely and voluntarily made.

Of course, as in all systems, these rules have not always been observed. Confessions made under physical or mental duress do slip past judicial scrutiny; often the requisite police warning of the right to be silent is not given; various statutes alter the burden of proof; the accused cannot always afford counsel, especially the black accused who, in an average year, constitute ninety per cent of all criminal defendants.<sup>8</sup> Nonetheless, these rules, some statutory and some judge-made, have set a standard of due process, the standard by which the fairness of a trial ought to be judged.

The time has now come to examine to what extent these standards still apply in South Africa to trials for political offences. I do not pause to define minutely what is meant by a political offence. It has sometimes been disputed in South Africa, as it has elsewhere, whether such offences exist. It is enough to say that I am referring to crimes committed with the political motive of altering or protesting against the current political dispensation.

South Africa has had an interesting—some would say an over-interesting—history of political turbulence, which has been marked by many series of political trials, including trials for high treason. During the Anglo-Boer War, many Boers living in the British colonies of the Cape of Good Hope and Natal assisted the Boer forces; in 1914 some thousands of diehard veterans of the Anglo-Boer War went into rebellion against the government of what was then the Union of South Africa; in 1922 there was a revolt of white workers on the Witwatersrand; and from 1939 to 1945 a number of Afrikaner nationalists acted in support of the German cause. All these events resulted in trials for treason. In 1958, thirty leaders of the African National Congress and its political allies were charged with con-

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called upon to do so. *Principal Immigration Officer v. Narayansamy*, [1916] Transvaal Provincial Div. [T.P.D.] 274, 276 (quoting the unreported opinion of Wessels, J., in the court below). See also the powerful opinion of Rumpff, C.J., in *Wood v. Ondangwa Tribal Auth.*, [1975] 2 S.A. 294, 310-11 (App. Div.), in which the Appellate Division (South Africa's final appeals court) reemphasised that the remedy should be construed as broadly as possible.

<sup>8</sup> See, e.g., SOUTH AFRICA INSTITUTE OF RACE RELATIONS, *A SURVEY OF RACE RELATIONS IN SOUTH AFRICA* 66 (1978).

spiracy to overthrow the state by violence. The charge there too was treason. This trial differed in an important respect from previous South African treason trials in that most of the accused were black. After a trial which lasted from August, 1958, to March, 1961, all the accused were acquitted.<sup>9</sup> All these trials were conducted according to the normal rules of South African criminal procedure. Indeed, when the charge was treason, the prosecution had the added burden of complying with a provision that, up to 1977, had always been embodied in the South African Criminal Procedure Acts.<sup>10</sup> These Acts provided that no court would "convict any accused of treason except upon the evidence of two witnesses where one overt act is charged, or where two or more overt acts are so charged, upon the evidence of one witness to each such overt act."<sup>11</sup>

### B. *The Terrorism Act*

Possibly because of the highly publicised failure of the prosecution in the treason trial of 1958 to 1961, possibly influenced also by the happenings at Sharpeville in 1960<sup>12</sup> as well as by disturbances in the Cape in 1962,<sup>13</sup> the South African government adopted a new approach to the prosecution of political offenders. After experimenting with amendments to various other statutes—all designed to facilitate the prosecution and conviction of persons alleged to be carrying on subversive activities against the state—the government, in 1967, put through Parliament an Act that introduced, under the name of "terroristic activities" or "terrorism," a new form of statutory treason.<sup>14</sup> According to this Act, a person is guilty of the

<sup>9</sup> The record of this trial is analyzed in T. KARIS, *THE TREASON TRIAL IN SOUTH AFRICA* (1965).

<sup>10</sup> *E.g.*, Criminal Procedure Act, No. 56 of 1955, § 256(b), *repealed by* Criminal Procedure Act, No. 51 of 1977, § 208.

<sup>11</sup> *Id.* This provision was first enacted in England in the reign of William III in the Statute of Treasons of 1695, 7 & 8 Will. 3, c. 3, § 2. It was repealed in England by the Treason Act, 1945, 8 & 9 Geo. 6, c. 44, § 2, sched. 1, and in South Africa by Criminal Procedure Act, No. 51 of 1977, § 208. It is embodied in U.S. CONST. art. 3, § 3, cl. 1. For a further discussion of this provision, see text accompanying notes 34-40 *infra*.

<sup>12</sup> On March 21, 1960, a crowd of some thousands of blacks gathered at the police station in Sharpeville (about 30 miles south of Johannesburg) to protest against the pass laws. The police fired on the crowd. Sixty-nine blacks were killed, and 180 were wounded.

<sup>13</sup> On 21st November 1972 in Paarl, a small town near Cape Town, a rioting black mob killed two whites and seriously injured three others. They also set fire to shops.

<sup>14</sup> Terrorism Act, No. 83 of 1967. For a thorough, perceptive, and authoritative account of this Act and of other South African security laws generally, see J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 250-365 (1978).

offence of participating in terroristic activities if he commits any act whatsoever with the intention of endangering the maintenance of law and order in the Republic of South Africa.<sup>15</sup> Upon conviction he is liable to the penalties appropriate to common law treason, including the death penalty, and subject to a minimum sentence of five years' imprisonment, which may not be suspended.<sup>16</sup>

This Act is a considerable extension of the concept of treason. In the Roman-Dutch law, the crime of treason is limited to acts committed with the intention of overthrowing the state by violence. That element is not essential under the Terrorism Act. On the contrary, the Act, with the aid of presumptions that transfer the burden of proof to the accused,<sup>17</sup> covers a range of offences going well beyond what would ordinarily be regarded as terrorism or treason. For example, the Act prohibits activities that are likely "to cause substantial financial loss to any person or the State."<sup>18</sup> Thus, if it is proved that the accused organised a strike or an economic boycott that was likely to result in such loss, then, unless he can prove beyond a reasonable doubt that that was not his intent, he must be found guilty of terrorism.

The Act's practical effect is greatly extended by the inclusion of a second class of actions that would not ordinarily be regarded as treasonable, namely, actions calculated to create feelings of hostility between the white and black inhabitants of the country.<sup>19</sup> An actual case illustrates the operation of this provision. A young black man wrote a violently anti-white poem. He showed it to only one person, a seventeen-year-old girl. The publication of the poem to this girl was found to have had the likely result of causing her to feel hostile towards whites. The accused could not prove beyond reasonable doubt that he did not intend her to have such feelings. He was consequently convicted of terrorism and sentenced to five years' imprisonment.<sup>20</sup>

The Act contains many procedural provisions designed to assist the prosecution. The rule against documentary hearsay evidence is modified in favour of the state by an extraordinary, but much used, provision.<sup>21</sup> No court is permitted to grant bail to a

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<sup>15</sup> Terrorism Act, No. 83 of 1967, § 2(1).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* § 2(2).

<sup>18</sup> *Id.* § 2(2)(h).

<sup>19</sup> *Id.* § 2(2)(i).

<sup>20</sup> *State v. Motsau* (Witwatersrand Local Div. Apr., 1974) (unreported).

<sup>21</sup> See Terrorism Act, No. 83 of 1967, § 2(3). Under this provision, the prosecutor may produce, not through a witness but from his own file, any document that on

person charged under the Act without the consent of the attorney-general.<sup>22</sup> Acquittal does not preclude subsequent arraignment on another charge arising out of the same conduct.<sup>23</sup> Perhaps most remarkable, this statute became law on 12th June 1967, but its substantive, procedural, and evidentiary provisions are all deemed to have come into effect in June, 1962.<sup>24</sup> That is to say, the Act was made to apply retrospectively to a time five years before it was enacted. In one leading case, the accused had actually been arrested and in custody for about a year before the Terrorism Act was passed; they were nonetheless charged and convicted under that Act.<sup>25</sup>

These provisions do not in themselves explain the actual working of the Terrorism Act. The key to its practical operation is to be found in section 6. This section permits the police, without judicial warrant, to detain any person who any senior police officer has reason to believe either committed an offence under the Act or has any knowledge of such an offence.<sup>26</sup> The object of the detention is interrogation, and the detention may continue either until the detainee has answered all questions put to him to the satisfaction of the police or until the police are convinced that "no useful purpose will be served by his further detention"<sup>27</sup>—a phrase with chilling implications. It is also expressly provided that no court of law may pronounce upon the validity of a detention under section 6, nor order the release of a detainee.<sup>28</sup> Further, no person may have access to a detainee,<sup>29</sup> that is, he is held incommunicado. He may not see or even communicate by letter with a lawyer, a private doctor, or a member of his family. Habeas corpus is not permitted.<sup>30</sup> The Act does not authorise physical ill-treatment of detainees,<sup>31</sup> and indeed assault and torture as a means of interroga-

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its face emanated from any organization of which the accused was at any time a member. The document is admissible against the accused, and its contents are prima facie presumed to be true. *See, e.g., State v. Malepane*, [1979] 1 S.A. 1009, 1015 (Witwatersrand Local Div.) (per Le Roux, J.).

<sup>22</sup> Terrorism Act, No. 83 of 1967, § 5(f).

<sup>23</sup> *Id.* § 5(h).

<sup>24</sup> *Id.* § 9(1).

<sup>25</sup> *State v. Tuhadeleni*, [1969] 1 S.A. 153 (App. Div.).

<sup>26</sup> Terrorism Act, No. 83 of 1967, § 6(1).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 6(5).

<sup>29</sup> *Id.* § 6(6).

<sup>30</sup> *Id.* § 6(5).

<sup>31</sup> *Nxasana v. Minister of Justice*, [1976] 3 S.A. 745, 748 (Durban & Coast Local Div.) (per Didcott, J.). *Cf. Rossouw v. Sachs*, [1964] 2 S.A. 551, 561 (App. Div.) (decided under § 17 of the General Law Amendment Act, No. 37 of 1963, an earlier detention statute).



tion have been officially disavowed by the South African government and by senior police officers. The official attitude is that the only sanction available against a recalcitrant detainee is his continued indefinite detention in solitary confinement, without books, letters, newspapers, or any communication with the outside world.<sup>32</sup> In any country, however, if detained persons have no access to lawyers or to the courts, abuses are bound to occur—as they undoubtedly have in South Africa.

Section 6 detention has a profound effect on the conduct of trials under the Terrorism Act. First, the accused himself will probably have been detained in solitary confinement for weeks, months, or sometimes even years before he is brought to trial. Unless he is a person of extraordinary fortitude, he will probably have made a statement to the police, often in the form of a confession, whether false or true. He is unlikely to understand the rules relating to the admissibility in evidence of his statement. In a disquieting recent development, the police have brought some detainees straight from weeks or months of detention to a court without giving notice to their friends and families. The detainees have then and there been called upon to plead to a complex charge under the Terrorism Act, without the benefit of legal advice or representation. Only after they have pleaded are they able to obtain representation by counsel. Consequently, persons have pleaded guilty to serious charges under this Act without the benefit of legal advice. Perhaps equally important, many of the prosecution witnesses in these trials are persons who have been subjected to prolonged detention in solitary confinement under section 6. Often they too are brought straight from detention to court to give evidence. They will usually have made statements implicating the accused. These statements may be true, but even if they are not, the witness knows that if he retracts, the result may well be either his further detention under section 6 or a charge of perjury.

It is therefore understandable that I have referred to the mode of procedure under this statute as a distortion of South Africa's traditional system of procedure, or as the pathology of a legal system. What has been altered under this new system for trying political offences? To list them briefly: the rules restricting arrest without warrant, the right to be brought before a court speedily after an arrest, the right to bail, the right to legal representation immediately upon arrest, in practice the right to silence, the rule

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<sup>32</sup> See, e.g., 15 S. AFR. HANSARD cols. 7118-7121 (1978) (statement by Mr. J.T. Kruger, then Minister of Justice, in the House of Assembly in May, 1978).

that the burden of proof is on the prosecution, the rule against hearsay evidence, the court's discretion in sentencing, and along with all of these, the right to habeas corpus. That is to say, a good part of what people in both the United States and South Africa have regarded as essential to a fair trial.

The South African government would justify these departures on the ground that subversion is a real threat in South Africa, that important information about unlawful activities has been obtained by this system of detention without trial, and that many of those convicted under the Terrorism Act were in fact engaged in planning acts of violence against the state. Much of this is true, and the South African government is no doubt entitled to some credit for choosing to try political offenders before the ordinary courts of the land. The reason for this choice may be a residual respect for the judicial process. Or it may be the belief that imprisonment after conviction by a criminal court is politically the most persuasive way of disposing of the accused, and the least likely to provoke internal or international criticism. Either way, the choice is not a discreditable one.

## II. THE PHILOSOPHY UNDERLYING THE TERRORISM ACT

This choice having been made, however, what is the reasoning behind the new, second-class procedure? It is simply that the more serious the crime, the easier it should be to convict the accused. This view has its adherents in all countries. It has often prevailed, especially in the case of political offenders. And it is an understandable view. As Macaulay wrote, in a trial for treason an acquittal must always be considered a defeat of the government.<sup>33</sup> But until recent years, this was not the prevailing philosophy in South Africa any more than it was in the United States of America. For political crime, the traditional view was the opposite one.

I referred earlier to the two-witness rule in treason cases.<sup>34</sup> This has always been an exception in the English law of evidence<sup>35</sup> which, unlike Mosaic law<sup>36</sup> or the canon law,<sup>37</sup> did not require a

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<sup>33</sup> 7 T. MACAULAY, *THE HISTORY OF ENGLAND* 313 (Westminster ed., n.d.).

<sup>34</sup> See note 11 *supra* & accompanying text.

<sup>35</sup> The only other exception to the English law of evidence in modern times has been perjury, which has a history of its own.

<sup>36</sup> *Deuteronomy* 17:6, 19:15.

<sup>37</sup> According to Professor C.S. Kenny of Cambridge, under canon law no cardinal could be convicted of unchastity without at least 12 witnesses, and a woman could not be a witness. C. KENNY, *OUTLINES OF CRIMINAL LAW* 519 n.6 (19th ed. 1966).

multiplicity of witnesses to prove the commission of a crime. Why should there be this exception in the case of treason? The seventeenth century in England was a century of revolutions and revolutionary plots. Charles II, restored to the throne in 1660, had good reason to fear for his security. Yet one of the first acts passed by the Restoration Parliament was an act requiring proof by two witnesses of certain forms of treason.<sup>38</sup> And in 1695 the Whigs themselves enacted the Statute of Treasons, which reinforced the two-witness rule and provided that persons accused of treason were to be allowed privileges that they had never before enjoyed, such as the right to counsel.<sup>39</sup> This was at a time when the threat of counterrevolution was real and when the only immediate effect of the new law could be to provide the advantages of a fair trial to the government's most intransigent opponents. Perhaps those legislators thought that one day they might again be in opposition. One may nonetheless think that the passage of this law in England in 1695 constituted one of the highest achievements of that Western civilization of which we in South Africa are said to be amongst the heirs and guardians.

Why should anyone think that a person charged with treason required more protection than persons charged with lesser offences? Sir William Blackstone, writing nearly a century after the Statute of Treasons was passed, gave a straightforward answer: "[T]he principal reason undoubtedly is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages."<sup>40</sup>

The procedure under the South African Terrorism Act represents a complete reversal of the philosophy behind the Statute of Treasons. It embodies a feeling, popular in many places and times, that the more reprehensible an offence is, the easier it ought to be to obtain a conviction, that enemies of the government should not be entitled to the ordinary protection of law, but should be placed at a special disadvantage if accused of a political offence. I do not believe that today special privileges are necessary, but to subject the accused to special disabilities and disadvantages is in a measure to condemn him before he has been tried. The removal of the presumption of innocence is very close to the assumption of guilt.

<sup>38</sup> 13 Car. 2, stat. 1, c. 1, § 5 (Treason) (1661).

<sup>39</sup> Statute of Treasons of 1695, 7 & 8 Will. 3, c. 3.

<sup>40</sup> 4 W. BLACKSTONE, COMMENTARIES \* 358. See T. MACAULAY, *supra* note 33, at 313-14.

One is reminded of the views of that otherwise humane and enlightened French jurist of the sixteenth century, Jean Bodin, on the crime of witchcraft. He said that persons accused of witchcraft ought to be convicted without further proof unless they could demonstrate their innocence. For, he said, "to adhere, in a trial for witchcraft, to ordinary rules of procedure, would result in defeating the law of both God and man."<sup>41</sup>

Have the extraordinary rules worked in South Africa? From the point of view of the government, the answer is yes. Information has been extracted from detainees that would probably not have been obtained under the ordinary rules, and persons have been convicted who might have gone free under ordinary procedures. Whether this is worth the price paid is a question of political and moral judgment. One's answer will no doubt depend on the importance one attaches to meeting the criteria for what constitutes a highly civilised nation, as proposed by Mr. Justice Roberts.<sup>42</sup> A South African judge, referring to section 6 of the Terrorism Act, said:

In providing for the detention for indefinite periods of those who have not been convicted of crimes, for their isolation from legal advice and from their families, and for their interrogation at the risk of self-incrimination, the Legislature has pursued its object by the enactment of measures which are undoubtedly foreign to the ordinary principles of our law. Whether the end justifies the drastic means that have been sanctioned because they are necessary in troubled times for the security of the State, as they are apparently thought by Parliament to be, is a controversial question . . .<sup>43</sup>

Later in the same judgment he said that effect must be given "to stringent enactments which are positively shown by Parliament's choice of plain legal words to have been meant, however offensive to conventional legal standards they may be."<sup>44</sup> He described this conclusion as axiomatic in South African law. On this point he is undoubtedly correct.

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<sup>41</sup> 4 J. BODIN, *DÉMONOMANIE* ch. 4 (1598), *quoted in* C. KENNY, *supra* note 37, at 517-18.

<sup>42</sup> See text accompanying note 6 *supra*.

<sup>43</sup> *Nxasana v. Minister of Justice*, [1976] 3 S.A. 745, 747 (Durban & Coast Local Div.) (per Didcott, J.) (citation omitted).

<sup>44</sup> *Id.* 748.

### III. THE ATTITUDE OF JUDGES AND LAWYERS

This brings me to the last part of this lecture, the approach of the judges and lawyers to legislation of this type. South Africa has, as I have said, no bill of rights. Our political system is one of complete parliamentary sovereignty. No court can declare any of the provisions that I have described unconstitutional. Many years ago a South African judge of appeal said that it was the duty of the courts to act as buttresses between the executive and the subject.<sup>45</sup> But how are they to do so in the light of their duty to give effect to parliamentary enactments however draconian and however "offensive to conventional legal standards"? The answer ordinarily given is that their sole power is the power to interpret those enactments. In the judgment previously quoted, the judge put this in clear language:

Our Courts are constitutionally powerless to legislate or to veto legislation. They can only interpret it, and then implement it in accordance with their interpretation of it. When there is a real doubt about the meaning of a statute, their tradition is to construe it so that it provides for the least amount of interference with the liberty of the individual that is compatible with the language used. The tradition has been observed for so long, and has permeated so many fields of our law, that it is unnecessary to cite authority for its acceptance.<sup>46</sup>

So this too is axiomatic.

No doubt the question will be asked: how have the South African courts performed this function of strict interpretation *in favorem libertatis* in the field of the security and procedural legislation with which I have been dealing? In my—I hope sufficiently—respectful opinion, their performance has been mixed. If I were to mark them by the Oxford method, I would give them a *beta*, query *beta* minus. On the positive side, there has been some attempt to give a restrictive interpretation to those provisions of the Terrorism Act that place the burden of proof on the accused and to ensure that the procedural advantages of the prosecution are not improperly extended. This is at least true of the Appellate Division of the Supreme Court, which has set aside on appeal several verdicts given by trial judges for want of sufficiently con-

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<sup>45</sup> *Rex v. Pretoria Timber Co. (Pty)*, [1950] 3 S.A. 163, 182 (App. Div.) (opinion of van den Heever, J.A.).

<sup>46</sup> *Nxasana v. Minister of Justice*, [1976] 3 S.A. 745, 747 (Durban & Coast Local Div.) (per Didcott, J.).

vincing evidence of guilt. In upholding these appeals, it has even reversed the trial judge's findings on the credibility of witnesses.<sup>47</sup> Further, although section 6 (5) of the Terrorism Act states that no court shall pronounce on the validity of any action taken under section 6 or order the release of any detainee, this section does not preclude the court from enquiring into the lawfulness of the treatment that a detainee receives in detention.<sup>48</sup> The court will therefore on suitable evidence enjoin the police from using unlawful methods of interrogation.<sup>49</sup>

On the negative side, however, the courts have shown a marked reluctance to permit evidence of ill-treatment to be given by the person most concerned, namely the detainee himself. In 1964 a case came to the courts under another "security" statute which, like section 6 of the Terrorism Act, provided for detention without access to lawyer or friend for the purposes of interrogation.<sup>50</sup> The wife of a detainee had received a smuggled note from him saying that relays of policemen had interrogated him for twenty-eight hours on end without allowing him to rest or even to sit down. When he fell to the floor out of exhaustion, the police threw cold water over him and dragged him to his feet. The wife applied urgently for an injunction restraining the police from continuing this method of interrogation. The police made affidavits denying the allegations, and the wife's counsel asked the court to order that the husband be brought to court to give evidence himself. This was refused by the judge, and his refusal was upheld by a majority in the Appellate Division.<sup>51</sup> The ground of refusal was that to have the detainee brought to court would interfere with the object of the statute—continuous detention, in isolation, for the purposes of interrogation. Whether this was an inevitable conclusion, having due regard for the terms of the statute, may be judged in the

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<sup>47</sup> See, e.g., *State v. Mdingi*, [1979] 1 S.A. 309, 317 (App. Div.); *State v. Essack*, [1974] 1 S.A. 1, 16-17, 20-21 (App. Div.); *State v. French-Beytagh*, [1972] 3 S.A. 430, 446 (App. Div.). See also *State v. Mushimba*, [1977] 2 S.A. 829 (App. Div.), in which the Appellate Division set aside a conviction under the Terrorism Act on the ground that the security police had unlawfully obtained material from the defence files through an agent in the defence attorney's office.

<sup>48</sup> *Nxasana v. Minister of Justice*, [1976] 3 S.A. 745, 748 (Durban & Coast Local Div.) (per Didcott, J.).

<sup>49</sup> *Essop v. Commissioner of South African Police*, [1972] 1 Prentice Hall Reports, H. 4 (Transvaal Provincial Div.).

<sup>50</sup> General Law Amendment Act, No. 37 of 1963, § 17.

<sup>51</sup> *Schembrucker v. Klindt, N.O.*, [1965] 4 S.A. 606 (App. Div.), *aff'g* [1965] 1 S.A. 353 (Transvaal Provincial Div.). See Dugard, *The Courts and Section 6 of the Terrorism Act*, 87 S. Afr. L.J. 289 (1970).

light of the fact that two judges of appeal, including the present Chief Justice,<sup>52</sup> wrote powerful dissents.

In a later case the fathers of some young men detained under section 6 of the Terrorism Act applied to the Transvaal court for an injunction to restrain the police from assaulting the detainees during their interrogation. Because of the earlier case, the applicants asked not that the detainees be brought to court but merely that affidavits be taken from them by a government official. The court held that the Act prevented any such affidavit's being placed before it.<sup>53</sup> In other cases also the requirements of the interrogators would seem to have been placed above those of the detainee. It is enough to mention just one more—a much-criticised opinion of the full bench of the Eastern Cape court in which that court held that the threat of further detention did not make the detainee's confession anything but freely or voluntarily made, and thus admissible against him.<sup>54</sup>

These cases give some indication of the judicial approach to the Terrorism Act and to similar statutes. They show judges about their ordinary business of interpreting statutes, evaluating evidence, and reaching varying conclusions. But, it may be asked, what do they feel about these forms of procedure, and especially about indefinite pretrial detention incommunicado, which have so distorted the traditional legal standards they were trained to follow? One may of course ask the same question about the many statutes embodying racial discrimination which the judges are compelled to apply, whatever the hardship those statutes cause. The answer is that on the whole the judges do not say. No doubt some of them regard this legislation as justifiable and proper. Others do not and occasionally hint as much. Some judges who have to enforce these laws emphasise that they are bound by Parliament's law and have no option but to apply it. For example, in a recent case a judge upheld the conviction of an Indian man for unlawfully renting an apartment in a "white" area, and ordered his ejection although the evidence showed that no habitable accommodation

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<sup>52</sup> Mr. Justice Frans L. Rumpff.

<sup>53</sup> *Cooper v. Minister of Police*, [1977] 2 S.A. 209 (Transvaal Provincial Div.) (per Trengove, J.). This case was decided in 1974, but not reported until 1977. More recently, a Natal judge has refused to follow this decision. *Nxasana v. Minister of Justice*, [1976] 3 S.A. 745, 753-55 (Durban & Coast Local Div.) (per Didcott, J.).

<sup>54</sup> *State v. Hlekani*, [1964] 4 S.A. 429, 439-40 (Eastern Cape Div.) (decided under General Law Amendment Act, No. 37 of 1963, § 17). The correctness of this decision was left open in *State v. Alexander*, [1965] 2 S.A. 796, 814 (App. Div.).

was available to him and his family in the "Indian" area of his city. In giving judgment the judge said:

An Act of Parliament creates law but not necessarily equity. As a judge in a court of law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself, and if I were sitting as a court of equity, I would have come to the assistance of the appellant. Unfortunately, and on an intellectually honest approach, I am compelled to conclude that the appeal must fail.<sup>55</sup>

This passage echoes the statement of the great dissenter in *Dred Scott v. Sandford*,<sup>56</sup> Mr. Justice McLean. A lifelong opponent of slavery, Justice McLean excused or explained his enforcement of the fugitive slave laws as follows: "With the abstract principles of slavery, courts called to administer this law have nothing to do."<sup>57</sup> "[T]he hardship and injustice supposed arises out of the institution of slavery, over which we have no control. Under such circumstances, we can not be held answerable."<sup>58</sup>

This reasoning did not go unscathed in the United States, nor has it, entirely, in South Africa. In 1971 a Durban law professor asked, in a public address, whether the time had not come for judges to stand up in defence of the rule of law and to say something about an institution, the Terrorism Act, "which they must surely know to be an abdication [*sic*] of decency and justice."<sup>59</sup> In particular, he suggested, the judiciary could make the Act less useful to the authorities "by denying, on account of the built-in intimidatory effect of unsupervised solitary confinement, practically all creditworthiness to evidence procured under those detention provisions."<sup>60</sup> At that time, as the professor knew, a trial under the Terrorism Act was in progress in which allegations had been made that the police had intimidated state witnesses while in detention. The melancholy result, for the professor, was that he was prosecuted on a charge of attempting to obstruct justice. The prosecution's theory was that he was exhorting the judge to disregard admissible evidence and thus to act improperly. On this

<sup>55</sup> *State v. Adams* (Transvaal Provincial Div. Sept., 1979) (unreported).

<sup>56</sup> 60 U.S. (19 How.) 393 (1857) (McLean, J., dissenting).

<sup>57</sup> *Miller v. McQuerry*, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9,583).

<sup>58</sup> *Id.* 340.

<sup>59</sup> Address by Professor Barend van Niekerk at Durban City Hall (Nov. 9, 1971), quoted in *State v. van Niekerk*, [1972] 3 S.A. 711, 716 (App. Div.). For a discussion of this case, see Dugard, *Judges, Academics and Unjust Laws: The Van Niekerk Contempt Case*, 89 S. AFR. L.J. 271 (1972).

<sup>60</sup> *State v. van Niekerk*, [1972] 3 S.A. 711, 716-17 (App. Div.).



theory, the professor was prosecuted and convicted.<sup>61</sup> The judge who tried his case said that "in a society such as ours"<sup>62</sup> it was not for judges to take sides in public controversies. Nevertheless, he said, this did not mean that a judge must acquiesce in legislation of a really monstrous kind; his way out would then be to resign.<sup>63</sup>

I know of no South African judge who has in fact found any law so monstrous as to compel him to resign.<sup>64</sup> I do not say this as a criticism of individual judges, least of all as a criticism of those whose minds are troubled by the laws that they have to apply. After all, Justices Story and McLean did not feel called upon to resign from the bench rather than enforce the fugitive slave laws.<sup>65</sup> And one is grateful for those judges who have done what they can to mitigate the harshness of the South African system. The only generalization in which I shall indulge is that if one participates in a system that distorts justice, truisms about the limited functions of a judge will not necessarily save one's soul.

What of the bar? What do they do when they get into court, under the heavily loaded rules of the Terrorism Act? The answer is: the best they can. Lawyers tend to play by the rules of the game; when the rules change, they try to win under the new rules. Indeed, one forgets occasionally that it is a different game. The court looks the same, witnesses are examined and cross-examined, lawyers address the court and cite authority. But the realities break through. A fifteen-year-old boy is called as a state witness. It turns out that he has been in solitary detention for three months before being brought to court. Or the accused are acquitted and discharged by the court, but when they leave the courtroom they are immediately re-arrested and detained.<sup>66</sup> What has the exercise in court been worth?

<sup>61</sup> *Id.* 711.

<sup>62</sup> *State v. van Niekerk* (Durban & Coast Local Div. Dec. 13, 1971) (unreported) (per Fannin, J.), *quoted in* Dugard, *supra* note 59, at 283.

<sup>63</sup> *Id.*

<sup>64</sup> Sir Robert Tredgold, then Chief Justice of the Federation of Rhodesia and Nyasaland, resigned in 1960 in protest against the Southern Rhodesian Law and Order Maintenance Act, No. 53 of 1960. He felt that it "would compel the Courts to become party to widespread injustice." R. TREDGOLD, *THE RHODESIA THAT WAS MY LIFE* 232 (1968). Whether the provisions of that Act go beyond those of the corresponding South African statutes is a nice point.

<sup>65</sup> See R. COVER, *JUSTICE ACCUSED* (1975), especially chapters 7 & 13.

<sup>66</sup> Cf. J. DUGARD, *supra* note 14, at 216 (describing the re-arrest of Mrs. Winnie Mandela and 21 other accused in Pretoria in February, 1970, immediately after their acquittal under the Suppression of Communism Act, No. 44 of 1950).

In this regard South African lawyers, including those who defend in political cases, have, like judges, had to face a fundamental attack on the part they play in the South African system. Mr. Joel Carlson, a South African attorney, who over many years had given service to his clients in political trials in South Africa, eventually went into exile. He considered that his work as a defence lawyer "was assisting the regime to present an overall image, at home and overseas, of judicial integrity and a fair legal system."<sup>67</sup> Others have echoed this view. The question raised, of course, does not apply only to lawyers. What is anyone's duty in a society that he believes to be unjust and that he does not believe can be changed by any effort of his? In *The First Circle* Solzhenitsyn has a character say: "What is the most precious thing in the world? It seems to be the consciousness of not participating in injustice. Injustice is stronger than you are, it always was and it always will be; but let it not be committed through you."<sup>68</sup>

P.W. Botha's South Africa is not by any means Stalin's Russia, but even so this austere imperative is not easy to live by. For judges it may be impossible, and, if Mr. Carlson is right, perhaps for practising lawyers too. Possibly our participation in the distorted legal process I have described does give it some respectability. I hope this is not so, but if so, what is the alternative? Must one refuse to take any part in these trials? A mere practising advocate cannot very satisfactorily explore the ethical and social ramifications of this question, much less offer a generally satisfactory solution. He must fall back on the traditional ethics of his profession, not to answer the question but to evade it.

The answer is one that more appropriately comes from his clients. For the most part the attitude of defendants in South African political trials has been that they wish to be defended—to be acquitted if possible, and, if not, at least to get the minimum sentence. There have been cases, however, in which the defendants have refused to recognize the jurisdiction of the court. These, so far, have been exceptional. This may change. A recent and disquieting tendency in South African political trials has been to exclude the public (although not the press) from the court and to forbid the press from publishing the names of state witnesses. The ground given for these rulings is the fear that those witnesses will be harmed or even killed by the political associates of the accused. In the most recent of the major political trials, in Pietermaritzburg

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<sup>67</sup> J. CARLSON, *NO NEUTRAL GROUND* 362 (1973).

<sup>68</sup> A. SOLZHENITSYN, *THE FIRST CIRCLE* ch. 55, at 418 (Fontana ed. 1970).

last September, when the judge ordered the public to be excluded from the court, all the defendants dismissed their counsel and refused to take any further part in the proceedings. This attitude may become more common. But as long as defendants want the services of an advocate, he is not to refuse them. And if it be said that by so doing he is bolstering up an unjust system, that is one more burden of an onerous profession.

By way of summing up, I limit myself to two propositions. One is obvious—in the absence of an entrenched bill of rights, the judiciary is a poor bulwark against a determined and immoderate government. The other is not so obvious, at least in South Africa. It is that legislation such as I have described does more than restrict judges' legal power to protect the liberties of the subject: it increasingly undermines their will to do so, even when it may still be possible. Too soon they accept a position of subordination and unprotesting powerlessness. And this has a reciprocal effect. Judge Learned Hand once said, "[a] society whose judges have taught it to expect complaisance will exact complaisance."<sup>69</sup>

That is the great loss. One day there will be change in South Africa. Those who then come to rule may have seen the process of law in their country not as protection against power but as no more than its convenient instrument, to be manipulated at will. It would then not be surprising if they failed to appreciate the value of an independent judiciary and of due process of law. If so, then it may be said of those who now govern that they destroyed better than they knew.

Is there any hope of restoring what has been lost? It would not be realistic to say so. But realism, however sombre, is not to be confused with silence or acquiescence. "It is not necessary to hope in order to work, and it is not necessary to succeed in order to persevere."<sup>70</sup>

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<sup>69</sup> L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 163 (3d ed. 1960).

<sup>70</sup> Attributed to William of Orange (1533-1584).