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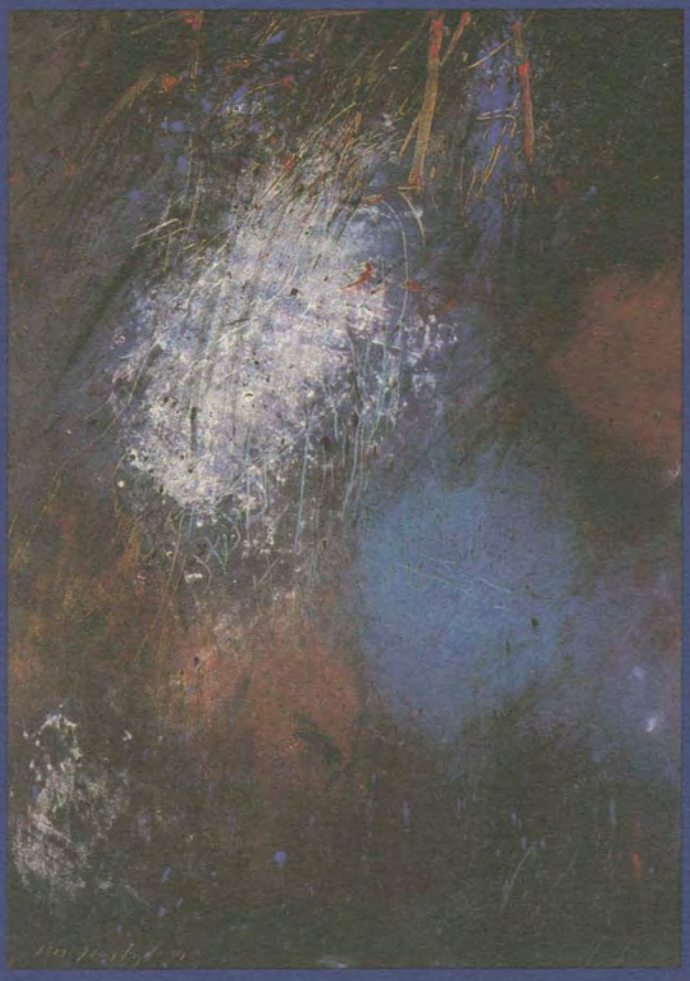

Diversity

Apartheid and the South African Judiciary

*Lawrence G. Baxter**

Recently, while standing at the library check-out counter, a student noticed the journal in my hand. He pondered for a moment, then offered this reflection: "Hmmm—the *South African Law Journal*; isn't that an oxymoron?" I am not sure he quite appreciated how complex his rhetorical question really was.

South African lawyers have always been proud of the rich blend of Roman-Dutch and Anglo-American common law that constitutes their legal system. We like to believe our judges have taken the best from each to build a body of contractual, delict (tort), property, criminal and commercial law doctrine that is sophisticated, rich and flexible.

We also like to recall those grand moments in which judges upheld the principles of liberty and democracy in the face of authoritarian government. In 1879, when a part of the Cape Colony was in a state of rebellion, a Griqua chief and his son, suspected by the government of instigating rebellion, had been unlawfully detained. The chief justice, Sir John Henry de Villiers, granted their petition for habeas corpus. He strongly rejected the government's contention that this action would foment further disturbances:

> It is said the country is in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country. If a different argument were to prevail, it might so happen that injustice towards individual natives has disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance.[1]

Soon afterwards the chief justice issued another writ of habeas corpus, and he was then able to observe with satisfaction that "none of the disastrous consequences which were confidently predicted [by the Crown in the earlier case] ever ensued."[2]

Nearly two decades later the judiciary in the old South African Republic, now the Transvaal, clashed head-on with both President Kruger and the Trekker Parliament. The Court, quoting (in Dutch translation!) from Alexander Hamilton's *Federalist No. 78* and from John Marshall's opinion in Marbury v. Madison,[3] declared a resolution unconstitutional,[4] thereby precipitating a constitutional crisis which was resolved only by the eventual departure of the Chief Justice for another South African bench.

Much later, South Africa's highest court, the Appellate Division, took a heroic stand against parliament and the executive when the new Nationalist government attempted—successfully in the end—to disenfranchise non-white voters in the 1950's.[5] In the process the court attracted international admiration.

But the South African courts have more recently acquired a different reputation. To some South Africans and many foreign observers, the legal system now seems a grotesque parody of everything Western lawyers value.

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South African lawyers have always been proud of the rich blend of Roman-Dutch and Anglo-American common law that constitutes their legal system. We like to believe our judges have taken the best from each to build a body of contractual, delict (tort), property, criminal and commercial law doctrine that is sophisticated, rich and flexible.

Critics have used various epithets: "quintessentially unjust," "wicked," "repressive."[6] Lon Fuller once used South African legislation to illustrate his thesis that legislation lacking certain moral characteristics could not be described as "law" at all.[7] A fact-finding team of the International Commission of Jurists recently announced that "the 'judges' presence on the bench lent 'undeserved credibility' to a legal system in which personal and political freedom was left unprotected;"[8] and some jurists have called upon the judges to resign from the bench.

There are a number of reasons. First, the South African government has used sweeping, often draconian, legislation as the primary means of articulating and implementing the policy of apartheid. The constitutional model that was adopted in South Africa is that of parliamentary government. The executive is theoretically accountable to parliament; in practice, however, it has been able, through the party system and a permanent parliamentary majority, to gain full control over the legislature. With one trivial exception (relating to the official languages), the Republic constitution contains no protection of human rights; these can be infringed by ordinary act of parliament. It therefore fails to operate as a significant restraint. Unlike their American counterparts, judges cannot strike down acts of the "sovereign" parliament. They are confined to interpreting and applying this legislation.

Second, the government has attempted to foreclose the remaining avenues of review insofar as administrative rules, orders, and actions are concerned. Although theoretically subject to judicial review (for want of compliance with the relevant act of parliament), the governing statutes have themselves frequently contained provisions purporting, in the clearest possible terms, to preclude any judicial review whatsoever. One of the most explicit examples is section 29 of the Internal Security Act,[9] which reads: "No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section." Provisions such as these led one jurist to liken the role of the South African judiciary to that of an umpire who has been stripped of the power to rule on all the essential aspects of the ball game.[10]

The executive also controls the appointment of judges, all of whom, with one recent exception,[11] are white. Unlike the lower magistracy, which is staffed entirely by employees of the Department of Justice, the judges of the Supreme Court do enjoy security of tenure until the mandatory retirement age of 70, but it is inevitable that the appointment power should influence the character of the judiciary to some degree. In 1955, after the government had suffered a series of adverse decisions in the Appellate Division, the size of the court was increased to enable the government to add six judges to the five then sitting. These factors, coupled with the fact that the government has remained in power for nearly forty years, led to the creation of a judiciary that displayed meek acquiescence in the face of an increasingly draconian body of apartheid and security legislation.

During the 1960's and 1970's the role of the courts as protectors of liberty and equality reached its nadir. In a manner reminiscent of some judges during the slavery era in the United States,[12] the South African judiciary protested their inability to ameliorate the harshness of the legislation they were called on to apply. The most notorious example was *Minister of the Interior v. Lockhat,*[13] where the court had been asked to rule that group areas legislation (which requires that land be demarcated for exclusive use by members of one race group) should be applied in a manner that did not have disparate impact as between races. Notwithstanding the existence of an important precedent to this effect,[14] Holmes JA, speaking for the unanimous court, concluded that

> [t]he Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will ultimately prove to be for the common weal of all the inhabitants is not for the Court to decide.[15]

Even where statutes were vague, judges seemed to have little difficulty filling in the details, thereby intensifying the harshness of their application. An illustration is *Rossouw v. Sachs,*[16] where the Appellate Division ruled that a detainee was entitled to no more daily exercise or reading material than that officially permitted, even though the relevant act of parliament was silent on this point and despite the existence of precedent to the effect that a prisoner awaiting trial retains whatever rights the empowering legislation does not expressly take away.[17] By a spectacular piece of anti-libertarian reasoning, Ogilvie

Thompson JA took the view that since the statute already constituted a drastic inroad into traditional principles of South African criminal procedure, one had to assume that it also intended to eliminate all residual rights of detainees other than the right to basic "necessities"![18]

A leading South African jurist has concluded that "the Supreme Court, since 1950 when the total onslaught on freedom and legality began, has failed (with some exceptions) to protect individual liberty, to understand and apply the requirements of due process, to check or restrain arbitrary action and to speak resolutely against uncivilized and sometimes barbarous official behavior."[19]

Casual observers might be tempted to conclude that the South African legal system not only fails to protect the vast majority of South Africans but actively facilitates the imposition and maintenance of apartheid. Like the legal systems of Nazi Germany and various other totalitarian regimes of recent history, it must be a gigantic and tragic farce.[20] But such a conclusion would be too facile. Not only does it depend upon simplistic analogies and a narrowly segmented view of the legal system which overlooks large areas of the law that are almost untainted by apartheid legislation, but it also fails to take into account the fact that thousands of black South Africans, including most of those who are politically sophisticated and of radical persuasion, regularly resort to the courts in an attempt to challenge various facets of apartheid. It overlooks the fact that many (black and white) South African lawyers, possessing impeccable democratic and human rights credentials, regard the legal system as providing at least a partial protection against the onslaught of apartheid.

Most important of all, such a conclusion does not square with the dramatic judicial about-turn that has occurred during the past five years. This truly remarkable development merits some description since it has been little noticed or understood in the United States.[21] How, I am often asked, can judges do much in a system that has the features I have briefly described? Faced by a sovereign, executive-controlled parliament, no bill of rights, powers delegated to officials and the police in far-reaching terms and protected by a web of unreviewability clauses, what could the judges really do to protect individual rights and political expression, even if they wanted to? The answer is, quite a lot. But it requires a major shift in judicial attitude—a shift in which Duke Law School can claim a small part!

As the pro-apartheid attitude of the Appellate Division became clear during the 1960's, a few South African jurists began to level criticism at the judges for their failure to apply presumptions of interpretation that were more favorable to individuals than to the government. Among the most prominent of the critics was John Dugard, a former visiting professor at Duke Law School and presently professor of law at

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the University of the Witwatersrand and Director of its Center for Applied Legal Studies. During visits to the United States he had been impressed by the success of the civil rights movement in the courts. Of course, the United States Constitution was central to the movement's strategy, and South Africa lacks a counterpart. But Dugard was also influenced by the views of the American legal realists, from whom he learned that judges enjoy a much greater range of choice in the characterization of evidence and the construction of statutes than they are often prepared to admit. He began to advocate the persistent resort to the courts in South Africa as a means of resisting government action. In 1974, while visiting at Duke, he wrote the bulk of his most important work, *Human Rights and the South African Legal Order*,[22] a comprehensive study and critique of the role of the South African judiciary in the maintenance of human rights in South Africa.

Criticisms such as those leveled by Dugard and others at first enraged the judges. They were met with stern reproach from the Chief Justice.[23] One outspoken critic, the late Barend van Niekerk, was actually twice prosecuted for contempt of court.[24] But some judges gradually began to respond. Towards the end of the 1970's, and especially since about 1983, a few started handing down decisions in the field of race and security legislation that were surprisingly adverse to the government. A Natal judge, setting aside an influx control order that had been issued against an African who had been deemed "idle and undesirable," severely criticized the legislation concerned in terms that attracted considerable local publicity.[25] A judge in the Transkei granted habeas corpus to a detainee who had been held under broadly-couched security legislation. Echoing Sir Henry de Villiers, he declared that "the criteria [for] ascertaining the intention of a statute do not differ according to the relative tranquility or disruption of a community, but remain the same."[26]

This trickle of judicial resistance has since become a flow that even the two states of emergency, accompanied by regulations that are breathtaking in their sweep, have failed to stem. At all levels and in most provincial jurisdictions of the Supreme Court, judges

have declared executive action under widely-framed statutes governing forced removals,[27] pass law violations[28] and influx control[29] to be illegal. In 1982 they effectively paralyzed the South African government's attempt to denationalize almost a million blacks by transferring their residential areas to an independent country, Swaziland.[30] An order of the State President requiring removal of a black tribe from its ancestral home against its will was declared unlawful, notwithstanding the fact that in 1975 the South African Parliament had attempted by resolution to validate his action in advance.[31] The administration of influx control was severely hampered by a series of decisions that imposed liberal constructions upon the narrow statutory rights of residence enjoyed by Africans living in urban areas;[32] these decisions have affected the lives of thousands,

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and potentially hundreds of thousands, of African urban dwellers, and the government was eventually compelled to repeal the governing legislation.[33] A series of decisions of the Transvaal Provincial Division has also effectively brought to a halt prosecutions of blacks living in white areas in violation of group areas legislation.[34]

Most striking of all has been the judicial response in litigation involving the actions of the police and security forces, under both the permanent security legislation[35] and the states of emergency.[36] Even in strong democracies, such as Britain and the United States, the courts have a predictable tendency to defer to the executive at times of national crisis.[37] Nor should we assume that this occurs only at a time of war;[38] the contrary is amply illustrated by recent cases in both Britain[39] and the United States.[40]

Yet it is in the area of state security that the activism of the South African courts has been greatest. In Natal, the Eastern Cape, the Transvaal and Namibia, in the Appellate Division and in other provincial jurisdictions, judges have rendered ineffective the most broadly phrased unreviewability clauses in the South African statute book. Though expressly forbidden to review the lawfulness of police action in detaining individuals or to grant writs of habeas corpus and related remedies, they have done so repeatedly and have ordered the release of numerous detainees.[41] The courts have literally interpreted the preclusionary clauses, including the one quoted in this article, out of existence.[42]

Employing expansive canons of construction and drawing on common law presumptions of statutory interpretation, the courts have rejected as inadequate the provision by the government of sham or "skeleton" reasons for detentions (in other words, mere regurgitations of the empowering statutory clauses),[43] and in some cases have imposed fair hearing requirements even where the legislation seemed not to contemplate that these should be observed.[44] They have ordered prison officials to allow detainees access to legal advisers in the face of regulations to the contrary.[45]

Using the technique of strict construction, judges in Natal and the Transvaal have rejected certificates presented by the Attorney-General purporting to prohibit the granting of bail to persons charged with security offenses.[46] In a particularly outrageous instance of police intimidation, the traditional protection of attorney-client privilege was reinforced when a court ruled illegal the police's seizure on warrant of a written statement taken from a witness by a firm of attorneys acting for the wife of a detainee who had died while under arrest. The court very strictly construed the ostensibly-broad wording of the warrant.[47]

Some judges have begun to subject official action to vigorous, "hard look" review. In Natal, the Western and Eastern Cape and the Transvaal they have set aside banning orders placed upon individuals,[48] meetings[49] and funerals[50] by officials acting under broadly-phrased security legislation. In Natal, especially, they have ameliorated the draconian scope of the statutory offenses against the state, which have been used to harass opponents of the government, by imposing tough procedural and evidential requirements,[51] by restricting the scope of the offenses[52] and by inserting a requirement of subjective, specific mens rea where the wording of the provisions has remotely permitted.[53]

They have also become more receptive to allegations of maltreatment. Courts around the country have upheld claims of torture by ex-detainees[54] and have issued interdicts[55] to the extent that the government has been driven, in many cases, to release detainees[56] and settle damages claims out of court for fear of permitting yet further adverse precedents to be created.[57] Some judges have adapted a remedy, derived from English commercial law, which authorizes the preemptive search, without notice, of a police station or prison for the purpose of obtaining evidence relating to allegations of torture or maltreatment.[58]

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tion it would avoid embarrassment and obstruction in the courts. After all, a state of emergency, like martial law, is usually thought to suspend, in practice if not in theory, the jurisdiction of the courts. But here too judicial protection has not been entirely eliminated. Various courts have ruled sections of the emergency proclamations affecting detainees,[59] the press,[60] freedom of expression,[61] and public gatherings[62] invalid. Under the second state of emergency (imposed in June of 1986) there had already been 218 court applications against the validity of the declared state of emergency itself, or actions taken under it, by late September of 1986![63]

These decisions have forced the government to amend and tighten the wording of the emergency proclamation and associated regulations under the glare of international publicity and without ever being sure that it has plugged all the gaps. And now, having created an unwieldy tricameral parliamentary system in which South Africans of Indian descent and of mixed race have a limited role, the government can no longer rely on the speedy assistance of a compliant "sovereign" legislature to validate its illegalities; instead it has been forced, after first having to wait until Parliament actually *is* in session, frustratedly to coax unwilling legislators, many of whom have resorted to dilatory tactics to stall legislative amendments.[64]

The full implications of the cases described here, as well as their overall impact, require much fuller examination and should not be exaggerated. There have also been a significant number of decisions in favor of the government, and judicial activism is probably still confined to a minority of judges. There are still a number of judges who appear to be adopting the views and attitudes of their counterparts of the 1960's and 1970's; some have meted out savage sentences to youthful protesters; the notorious Delmas treason trial proceeds in the Transvaal.

Even so, the mere existence of contrary decisions, let alone their actual number, is remarkable. This raises a wide range of questions concerning the constitutionalist and interpretive theories that might explain these decisions. It reminds us of the obvious but frequently forgotten fact that judges, having once acquired tenure, often surprise those who appointed them. More importantly, it demonstrates the complexity of the lengthy debate among liberal South African legal scholars over the appropriate role of judges in an unjust society and whether they should resign. The legal system and the judiciary cannot simply be dismissed as a reflection of the apartheid state, nor can the decisions surveyed here be fairly described as "occasional judicial expostulations in the name of justice" or "faint voices in the wilderness."[65] Large numbers of real people are enjoying the benefits of these "expostulations."

The impact of "liberal" decision-making in South Africa may still be dwarfed by the larger political events. It is unrealistic to assume that the judiciary can be an important agent for the abolition of apartheid itself.

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The most the judges can do is serve to reduce the oppression, help to protect the agents of political change, and display the virtue of an independent judiciary to South Africa's future rulers. Perhaps in the end, through a combination of increasingly vicious reactions on the part of the government, exhaustion on the part of some judges and recalcitrance on the part of others, every ember of judicial protection will be snuffed out.

Nevertheless, we should not underestimate the significance of judicial resistance. The judiciary enjoys immense prestige and credibility in the eyes of most whites, and the business community could not function without it. To this extent, therefore, it is a branch of government that is very difficult to subordinate, which, through its very actions and criticism, can help further to erode the monolithic power base upon which the government presently relies. Parliament could theoretically abolish the courts altogether, or render judges removable at the whim of the executive. Or the government could just ignore their decisions.[66] But until this has happened, what the South African judges have been doing to resist apartheid, what they can and should be doing, and whether they should collectively resign are issues that demand much more complex analysis than has hitherto been accorded them in the United States.

1. *In re* Willem Kok and Nathaniel Balie, (1879) 9 Buch. 45.
2. Sigcau v. The Queen, (1895) 12 S.C. 256 at 270-71, *aff'd*, [1897] A.C. 238 (Privy Council).
3. 1 Cranch 137 (1803).
4. Brown v. Leyds, N.O., 4 Off. Rep. 26 (1897).
5. *See* Minister of the Interior v. Harris, 1952 (4) S.A. 769 (A.D.); Harris v. Minister of the Interior, 1952 (2) S.A. 428 (A.D.).
6. Wacks, *Judges and Injustice*, 101 S. AFR. L.J. 266, 269, 277 (1984).
7. *See* L. FULLER, THE MORALITY OF LAW 160-161 (rev. ed. 1969).
8. *See* The Financial Times (London), Mar. 17, 1987, at 4.
9. Act 74 of 1982.
10. *See* Wacks, *supra* note 6, at 278.
11. An Indian senior counsel, Mr. Hassan Mall, was appointed as an acting judge in Natal in February 1987.
12. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 27-28, 119-23 (1975).
13. 1961 (2) S.A. 587 (A.D.).
14. Rex v. Abdurahman, 1950 (3) S.A. 136 (A.D.) (espousing the "separate but equal" doctrine).

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15. 1961 (2) S.A. at 602.

16. 1964 (2) S.A. 551 (A.D.).

17. Whittaker v. Roos & Bateman, 1912 App. Div. 92.

18. *See Rossouw* 1964 (2) S.A. at 558-61.

19. Mathews, *The South African Judiciary and the Security System*, 1 S. AFR. J. HUM. R. 199, 202 (1985).

20. Indeed, there are some painfully obvious parallels between the Nazi and the South African legal systems. *See, e.g.*, Fernandez, *The Law, Lawyers and the Courts in Nazi Germany*, 1 S. AFR. J. HUM. R. 124 (1985).

21. For an exception, see Mufson, *South African Judges Flexing Their Muscles*, 9 (18) NAT'L L.J., Jan. 12, 1987, at 1, 30.

22. J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978).

23. *See* Steyn, *Regsbank en Regsfakulteit*, 30 TYDSKRIF VIR HEEDENDAAGSE ROMEINS-HOLLANDSE REG. 101 (1967).

24. State v. Van Niekerk, 1970 (3) S.A. 655 (T.) (acquitted, but only because of absence of mens rea); State v. Van Niekerk, 1972 (3) S.A. 711 (A.D.) (conviction upheld).

25. *See In re* Dube, 1979 (3) S.A. 820 (N.).

26. Sigcaba v. Minister of Police, 1980 (3) S.A. 535, 542 (Transkei Sup. Ct.). *See also* Honey v. Minister of Police, 1980 (3) S.A. 800 (Transkei Sup. Ct.).

27. *See e.g.* More v. Minister of Co-operation and Development, 1986 (1) S.A. 102 (A.D.).

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

29. *See* Black Affairs Administration Board, Western Cape v. Mthiya, 1985 (4) S.A. 754 (A.D.); Oos-Randse Administrasieraad v. Rikhoto, 1983 (3) S.A. 595 (A.D.); Komani N.O. v. Bantu Affairs Administration Board, Peninsula Area, 1980 (4) S.A. 448 (A.D.). *See also* Mahlaela v. De Beer N.O., 1986 (4) S.A. 782 (T.) (attempt by township superintendent to disestablish a black township by applying a policy of refusing site and residential permits ruled unlawful).

30. *See* Government of the Republic of South Africa v. Government of KwaZulu, 1983 (1) S.A. 164 (A.D.).

31. More v. Minister of Co-operation and Development, 1986 (1) S.A. 102 (A.D.).

32. *See* cases cited *supra* note 29.

33. Abolition of Influx Control Act 68 of 1986.

34. *See* State v. Govender, 1986 (3) S.A. 969 (T.).

35. Internal Security Act 74 of 1982.

36. Declared in terms of §3 of the Public Safety Act 3 of 1953.

37. As is illustrated by Lord Parker's speech in a case during World War I: "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." The Zamora, [1916] 2 A.C. 77, at 102 (H.L.).

38. Obviously relevant here are Korematsu v. United States, 323 U.S. 214 (1944), and Liversidge v. Anderson, [1942] A.C. 206 (H.L.).

39. *See e.g.* Council for Civil Service Unions v. Minister for the Civil Service, [1985] 1 A.C. 374 (H.L.); R v. Secretary of State for Home Affairs, *ex parte* Hosenball, [1977] 1 W.L.R. 766 (C.A.).

40. *See* Haig v. Agee, 453 U.S. 280 (1981). *See also* Dennis v. United States, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). The observation concerning the *Korematsu* and *Dennis* cases is more fully developed by Dugard. *See* J. DUGARD, *supra* note 22, at 362-64.

41. *See, e.g.*, Radebe v. Minister of Law and Order, 1987 (1) S.A. 587 (W.L.D.); Jaffer v. Minister of Law and Order, 1986 (4) S.A. 1027 (C.); Dempsey v. Minister of Law and Order, 1986 (4) S.A. 530 (C.); Nkwinti v. Commissioner of Police, 1986 (2) S.A. 421 (E.); Katofa v. Administrator-General for South West Africa, 1985 (4) S.A. 211 (S.W.A.), *confirmed* 1986 (1) S.A. 800 (S.W.A.); Moodly v. Minister of Law and Order, D.C.L.D. unreported (*see* The Weekly Mail, Feb. 13-19, 1987, p. 1); Vale v. Minister of Law and Order, E.P.D. Sept. 5, 1986, unreported; Bishop of Roman Catholic Church of the Diocese of Port Elizabeth v. Minister of Law and Order, E.C.D. Aug. 1, 1986, unreported (only one applicant released) (for the last two cases, see 2 S. AFR. J. HUM. RIGHTS 381-384 (1986)); Thabata v. Minister of Law and Order, E.C.D. Oct. 29, 1985 (unreported) (*see* 1 S. AFR. J. HUM. RIGHTS 300 (1985)).

42. *See esp.* Minister of Law and Order v. Hurley, 1986 (3) S.A. 568 (A.D.) (upholding Hurley v. Minister of Law and Order, 1985 (4) S.A. 709 (D.C.L.D.) (where the breakthrough was achieved)). *See also* Akweenda v. Cabinet for the Transitional Government for South West Africa, 1986 (2) S.A. 548 (S.W.A.); Nkwinti v. Commissioner of Police, 1986 (2) S.A. 421 (E.); Steel v. Minister of Law and Order, D.C.L.D. Sept. 20, 1985 unreported (*see* The Weekly Mail, Sept. 27-Oct. 3, 1985, at 1). For holdings to the same effect in the context of the emergency regulations, see Radebe v. Minister of Law and Order, 1987 (1) S.A. 586 (W.L.D.); Nqumba v. State President, 1987 (1) S.A. 456 (E.); Jaffer v. Minister of Law and Order, 1986 (4) S.A. 1027 (C.); Dempsey v. Minister of Law and Order, 1986 (4) S.A. 530, 534 (C.); Metal and Allied Workers Union v. State President of the Republic of South Africa, 1986 (4) S.A. 358 (D.C.L.D.).

43. *See* Nkondo v. Minister of Law and Order, 1986 (2) S.A. 756 (A.D.).

44. *See* Nqumba v. State President, 1987 (1) S.A. 456 (E.); Bill v. State President, 1987 (1) S.A. 265 (W.L.D.); Mathale v. Secretary for Education, Gazankulu, 1986 (4) S.A. 427 (T.); Buthelezi v. Attorney-General, Natal, 1986 (4) S.A. 377 (D.C.L.D.); Nkwinti v. Commissioner of Police, 1986 (2) S.A. 421 (E.); Momoniat v. Minister of Law and Order, 1986 (2) S.A. 264 (W.L.D.).

45. *See, e.g.*, Ebrahim v. Minister of Law and Order, T.P.D. (unreported) (*see* The Weekly Mail, Mar. 20-26, 1987, at 3); Bill v. State President, 1987 (1) S.A. 265 (W.L.D.); Metal and Allied Workers Union v. State President of the Republic of South Africa, 1986 (4) S.A. 358 (D.C.L.D.); Katofa v. Administrator-General for South West Africa, 1985 (4) S.A. 211 (S.W.A.), *confirmed* 1986 (1) S.A. 80 (S.W.A.); Nqulunga v. Minister of Law and Order, 1983 (2) S.A. 696 (N.).

46. *See* Buthelezi v. Attorney-General, Natal, 1986 (4) S.A. 377 (D.C.L.D.); State v. Baleka, 1986 (1) S.A. 361 (T.); State v. Ramgobin, 1985 (3) S.A. 587 (N.).

47. *See* Cheadle, Thompson & Haysom v. Minister of Law and Order, 1986 (2) S.A. 279 (W.).

48. *See* 2 S. AFR. J. HUM. RIGHTS 259 (1986) (where it is reported that the banning orders imposed on five leading activists were set aside in the wake of the decision in Nkondo v. Minister of Law and Order, 1986 (2) S.A. 756 (A.D.)).

49. *See, e.g.*, United Democratic Front v. Acting Chief Magistrate, Johannesburg, 1987 (1) S.A. 413 (W.L.D.); State v. Mahlangu, 1986 (1) S. A. 135 (T.); Metal and Allied Workers Union v. Castell N.O., 1985 (2) S.A. 286 (D.C.L.D.); United Democratic Front (Western Cape Region) v. Theron N.O., 1984 (1) S.A. 315 (C.) (*rescinded* Theron N.O. v. United Democratic Front (Western Cape Region), 1984 (2) S.A. 532 (C.)).

50. *See* Mbeka v. Nell N.O., E.P.D. Nov. 14, 1985, unreported (*see* 2 S. AFR. J. HUM. RIGHTS 128 (1986)).

51. *See* State v. Ramgobin, 1986 (4) S.A. 117 (N.); State v. Ramgobin, 1986 (1) S.A. 68 (N.). *See generally*, 2 S. AFR. J. HUM. R. 120, 261 (1986). *See also* State v. Leepile, 1986 (4) S.A. 187 (W.L.D.) (court refusal to permit the state to withhold the identity of one of its witnesses from the defense); *but c.f.* State v. Harber, *in re* State v. Baleka, 1986 (4) S.A. 214 (T.); State v. Baleka (2), 1986 (4) S.A. 200 (T.).

52. *C.f., e.g.*, Mokoena v. Minister of Law and Order, 1986 (4) S.A. 42 (W.L.D.); State v. Ntshiwa, 1985 (3) S.A. 495 (T.); Ndabeni v. Minister of Law and Order, 1984 (3) S.A. 500 (D.C.L.D.).

53. *See e.g.* State v. Ratshitanga, 1986 (4) S.A. 949 (Venda Sup. Ct.) (mere bearing of arms insufficient to constitute 'act of terrorism', unless accompanied by an intent to commit a specified offense); State v. Ndlovu, 1986 (1) S.A. 510 (N.) (knowledge of unlawfulness required).

54. *See generally*, 2 S. AFR. J. HUM. R. 384-85 (1986); 1 S. AFR. J. HUM. R. 304-07 (1985).

55. *See id. See also* The Weekly Mail, Sept. 27-Oct. 3, 1985, at 4 (report of the *Shirish Soni* case, in which the security police were ordered to cease their interrogation of the detainee). For subsequent developments, see Morarjee v. Minister of Law and Order, 1986 (3) S.A. 823 (D.C.L.D.) (court refused to impose a reasons requirement on the minister but stated that if the detainee was medically unfit to be interrogated his continued detention would be unlawful). *See also* Mkhize v. Minister of Law and Order,

1985 (4) S.A. 147 (N.) (order to district surgeon to examine detainee and report to court).

56. As in the *Billy Nair* case, N.P.D. (unreported). *See* The Weekly Mail, Oct. 11-17, 1985, at 3.

57. *See* 1 S. AFR. J. HUM. R. 307 (1985); *cf.* SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, RACE RELATIONS SURVEY 1985, 495-496 (1986). *Cf. also* Dlamini v. Minister of Law and Order, 1986 (4) S.A. 342 (D.C.L.D.) (where the government tried to repudiate its settlement); Mda v. Minister of Justice, Police and Prisons, 1986 (3) S.A. 500 (Ciskei Sup. Ct.).

58. *See Ex parte* Matshini, 1986 (3) S.A. 591 (E.); *see* 2 S. AFR. J. HUM. R. 262 (1986).

59. *See e.g.* Metal and Allied Workers Union v. State President of the Republic of South Africa, 1986 (4) S.A. 358 (D.C.L.D.); Nkwinti v. Commissioner of Police, 1986 (2) S.A. 421 (E.); Thabata v. Minister of Law and Order, *supra* note 41; Itsweng v. Minister of Law and Order, T.P.D. Case No. 12714/86 (unreported) (*see* 1 Afr. L. Rev. 19 (1987); 2 S. AFR. J. HUM. R. 382-383 (1986)).

60. *See* Natal Newspapers (Pty.) (Ltd.) v. State President of the Republic of South Africa, 1986 (4) S.A. 1109 (N.); Argus Printing and Publishing Co Ltd. v. Minister of Law and Order, W.L.D., Jan. 29, 1987 (*see* 3 S. AFR. J. HUM. R. 131 (1987). Most recently the more extensive restrictions imposed in response to the *Argus* decision were struck down by a judge in Natal. *See* Washington Post, Apr. 29, 1987, at A1, A24.

61. In April a full court of the Natal Provincial Division struck down emergency regulations purporting to prohibit expressions of support for, or calls for the release of, detainees. *See* N.Y. Times, Apr. 25, 1987, at 3.

62. *See* United Democratic Front v. The State President, E.C.D. July 30, 1986 (unreported); United Democratic Front v. State President, W.L.D. July 28, 1986 (unreported) (*see* 2 S. AFR. J. HUM. R. 379 (1986)).

It is unrealistic to assume that the judiciary can be an important agent for the abolition of apartheid itself. The most the judges can do is serve to reduce the oppression, help to protect the agents of political change, and display the virtue of an independent judiciary to South Africa's future rulers.

63. *See* 2 S. AFR. J. HUM. R. 377 (1986).

64. It has been speculated that the inability to obtain the cooperation of all three houses of parliament was the reason for the lifting of the first state of emergency on Mar. 7, 1986. *See* 2 S. AFR. J. HUM. R. 252 (1986).

65. Wacks, *supra* note 6, at 281.

66. It was reported on the CBS Morning News, May 5, 1987, that the police were ignoring, pending their appeals, the recent decisions of two Natal courts (*cited supra* notes 60, 61) that had lifted restrictions on public protest and press coverage thereof.