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South Africa in Transition: Human Rights, Ethnicity and Law in the 1990s

Winston P. Nagan

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SOUTH AFRICA IN TRANSITION: HUMAN RIGHTS, ETHNICITY AND LAW IN THE 1990S†

WINSTON P. NAGAN*

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I. INTRODUCTION

DEAN Frankino, Professor Dowd, Distinguished Faculty, members of the family of the late Professor Giannella, friends, permit me to thank you all for the invitation, and the honor given me to be your 14th Giannella Memorial lecturer. In the short time I have been in your lovely campus I have been impressed by the current of intellectually exciting activity I have experienced here. It is obvious that Villanova takes seriously the principle that small is not only beautiful, it is frequently better.

My inquiries into Donald Giannella's life disclosed very quickly three things: He was a brilliant law professor, he was a man of integrity and courage, and he was a man with—to quote Dean J. Willard O'Brien—"an incredible sense of responsibility." While I myself fall far short of these qualities, I yield to none in my veneration of them. Moreover, Professor Giannella's work on Religion and Public Order touches a theme that unifies all the

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* Professor of Law, University of Florida College of Law.

scholarship and activism that I have been involved in, viz., the nature and quality of the public order that *law* defends and *promotes*. My speech tonight has much to do with the public order of South Africa in the 1990s.

Nelson Mandela, the most famous political prisoner in the world, was released from a South African jail in February, 1990. The release of Mandela was preceded by a speech to the South African Parliament by Prime Minister deKlerk. That speech was unprecedented in South African history. It marked the first clear, unequivocal admission by the highest ranking South African official that Apartheid was indefensible and that South Africa's future must be decided by all South Africans, not simply by the white elite and its hand-picked acolyte of cronies. Since the proclamation of Apartheid as the official ideology of South Africa in 1948 by Dr. F. S. Malan, South Africa had traversed a long and tragic path, projecting it into the position of a notorious violator of human rights and a state having the dubious distinction of near renegade status in contemporary international society.

II. WHAT IS APARTHEID?

Human rights scholars reviewing the nature of Apartheid during the early 1980s described Apartheid as "a complex set of practices of domination and subjugation, intensely hierarchized and sustained by the whole apparatus of the state which affects the distribution of all values."[1] It is a process which has meant for those fortunate enough to be classified white, a bountiful share of the goods, services, life opportunities, honors and security. It has meant for those not classified white, a process of scarcity and deprivation, a lack of opportunity and experience of both psychological and physical impoverishment. In many ways, the system by which the benefits and burdens of a modern state were allocated on the basis of race is reminiscent of the kind of political process generated by Nazi Germany, about which a major war had been fought with South Africans of all races participating on the side of the Allies.

III. IDEOLOGICAL PARADIGMS AND WORLD ORDER

Ideologies perform two basic functions. First, they provide normative guidance for those who wish to partake of political ac-

1. M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 523 (1980) [hereinafter M. MCDOUGAL].

tion. Second, they are frequently seen and used as justifications rather than conditions of politically-motivated action. If the twentieth century is at all remembered, and there are many memorable things about it—two world wars, the Holocaust, the thermo-nuclear age, the space age, the age of human rights—among the most visible of remembrances will be the elevation of simple myths into large-scale, all-consuming ideological systems whose reach has been nothing short of global.

One has only to recall the ideologies of capitalism, fascism, communism and various forms of imperialism to appreciate the ease with which global conflicts could so easily be viewed, in their essentials, as global-ideological conflicts. For example, World War II pitted a three-way ideological conflict among the democracies of the West, fascism and communism. Responsible theorists of law and politics have viewed the post-World War II scene as reflecting a close relationship between ideology and power.[2] Indeed, several reputable international relations theorists conceptualize "World Order" in essentially bi-polar terms, namely, the free world of the social democracies and the unfree world of communist totalitarianism.[3]

It may be that the dramatic changes that have taken place in eastern Europe and South Africa reflect to an important degree the ascendence of pragmatism over excessively extended ideological perspectives. It is of course too premature to predict a kind of "end of ideology" scenario for world order, at least with respect to ideological frames that have dominated politics for a large part of the twentieth century. The issue I want to address is how does South Africa fit into the global ideological picture?

IV. IDEOLOGICAL PARADIGMS AND THE APARTHEID PROCESS

Apartheid did not start with a set of ideological preconceptions about the proper role of race relations in a society. The roots of segregation, racial discrimination, slavery, involuntary servitude and the policies that permitted the physical extermination of the aboriginal peoples of South Africa have been an intrin-

2. *See, e.g.*, McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 8-9 (1959) (conduct of participants in power process depends on their values and group identification).

3. *See generally* M. MCDOUGAL AND W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY (1981) (course book examining moral and intellectual responsibilities in international law).

sic part of the history of South Africa.[4] In setting out some of these unfortunate historical experiences, it must be kept in mind that South African history also has produced a vision of human relations that is the antithesis of the apartheid heritage. This history includes the heritage of the philanthropic movement of the early nineteenth century, which focused explicitly on the well-being of the blacks and was part of the movement that led to the abolition of slavery throughout the British Empire.[5] There was also the libertarian tradition of the free press, the importance, historically, of the Rule of Law and the independence of the courts, and the limited but important democratic rights for blacks in the nineteenth century Cape.[6] Most important was the development of powerful institutions committed to black educational advancement, such as the modern educational institutions at Lovedale College, HealdTown College, Adams College and, most famous of all, the University College of Fort Hare, the alma mater of almost every major black nationalist figure in South Africa and numerous black leaders in other parts of Africa.

These traditions must be seen in light of the development of the principles of moral order as an indispensible part of the struggle for freedom and dignity of the black people of South Africa. These principles were informed by the intellectual heritage of Thoreau[7] and the practical sensibility of Mohandas Gandhi. It was Gandhi who gave the world the principle that the struggle for freedom itself must be a part of the moral experience of the political actor, and part of the moral transformation of the interlocutor.[8]

From these principles, black South Africa developed the concept of nonviolent passive resistance to unjust laws. This concept, introduced by Gandhi, has been a major part of the struggle against Apartheid and has produced two Nobel Peace Prize winners—the late chief Albert Luthuli and the legendary Bishop Desmond Tutu. Moreover, although armed struggle was a major part of the strategy of the liberation movement in South Africa, the tactics of the United Democratic Front (U.D.F.), the trade unions, churches and civic organizations have reasserted the impor-

4. *See* THE OXFORD HISTORY OF SOUTH AFRICA: SOUTH AFRICA TO 1870, at 40-63 (M. Wilson & L. Thompson eds. 1969).

5. *Id.*

6. *Id.* at 297-333.

7. H. THOREAU, WALDEN (J. Shanley ed. 1970).

8. M. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (M. Desai trans. 12th ed. 1971).

tance of mass democratic, non-violent action to secure liberation.[9]

The struggle between the ascendance of the value system associated with discrimination and racial exploitation, and an alternative perspective of governance based on democratic, non-racial values, has generated alternative ideological visions for the future of South Africa. In a sense, these visions could not in the long run have remained immune from the ideological currents characteristic of the larger world arena. Indeed, what made Apartheid so distinctive a phenomenon were the ideological assumptions implicit in the rhetoric used to justify it. The key architect of the ideology of Apartheid was Dr. H.F. Verwoerd. It was Verwoerd who coined the phrase "separate development" to justify and rationalize the apartheid process.[10]

In order to have separate development, one needed a clean classification of human typologies into separate groups or "races." Hence, the institutional cornerstone of Apartheid became the Population Registration Act of 1950.[11] Law as an element of social control, and an instrument of socio-political engineering, would become an indispensible strut for the realization of the Apartheid vision. To further maintain the integrity of the system of ethnic or racial classifications, racial endogamy was decreed by the Immorality Act[12] and the Prohibition of Mixed Marriages Act.[13] The Group Areas Act[14] and various acts establishing statal Apartheid (the creation of black, ethnic homelands) were enacted to further entrench the racial purity of ethnic groups. Finally, the Separate Amenities Act[15] was enacted to regulate and control the patterns of racial interaction on a day-to-day basis (separate toilets, public transport, sports, culture, education, etc.). These laws were in many ways the institutional cornerstones of Apartheid, and to some degree stimulated thinking

9. *See* Nagan, *Law and Post-Apartheid South Africa*, 12 FORDHAM INT'L L.J. 399, 414 (1988-89).

10. A. HEPPLE, VERWOERD 114 (1967).

11. Population Registration Act, No. 30 of 1950, 3 STAT. REPUBLIC S. AFR., CENSUS AND STATISTICS, at 71 (1973).

12. Immorality Act, No. 23 of 1957, 7 STAT. REPUBLIC S. AFR., CRIMINAL LAW AND PROCEDURE, at 611 (1973).

13. Prohibition of Mixed Marriages Act, No. 55 of 1949, 11 STAT. REPUBLIC S. AFR., HUSBAND AND WIFE, at 91 (1973).

14. Group Areas Act, No. 36 of 1966, 10 STAT. REPUBLIC S. AFR., GROUP AREAS, at 141 (1973). *See generally* T. VANREENEN, LAND—ITS OWNERSHIP AND OCCUPATION IN SOUTH AFRICA (1962) (treatise on Group Areas Act).

15. Reservation of Separate Amenities Act, No. 49 of 1953, 6 STAT. REPUBLIC S. AFR., CONSTITUTIONAL LAW, AT 311 (1973).

along the lines of an ambitious neo-idealism, an idealism that would prescribe the normative framework of all human relations for persons of divergent racial pedigrees. It was in many ways a radical vision of human relations, a radical right-wing vision of the nature of humanity as conditioned by fixed laws of ethnic impermeability.

The philosophic roots of Verwoerd's rationalization of Apartheid, as indicated, lay in the principles of so-called separate development. In his view, society is composed of groups—more precisely, ethnic and racial groups. Each racial group has implicit the possibility of a national identity that needs to be self-realized or self-actualized.[16] In the context of South Africa, the diverse groups or races could in reality be viewed as national "*Geists*" located at different points on the ideal evolutionary continuum. This formulation has Hegelian roots and, in effect, might be seen as the Afrikaner's version of neo-idealism as ideology.[17]

The basic premise is the contention that all the nations—races—of South Africa are involved in the historical progression toward freedom and civilization; that some groups, the whites, have been more advanced in historical progression and, indeed, have been given a head-start by the ontological universal spirit. From this premise, it is "logical" or "axiomatic" that the individual is a means and not an end; that the individual, in fulfilling his historical mission, is circumscribed by that which the *Geist* or spirit of his race or group has preordained. Moreover, these actualities will differ from group to group because, as we have indicated, some groups had been given a head-start by providence.[18]

Freedom of choice for the individual can exist only insofar as freedom is reconcilable with the "historic" position of the group to which the individual is assigned. It follows that individuals must interact only within their own *Geist* or "race."[19] Family or marital arrangements across group lines would be irreconcilable with the "destiny," *i.e.*, the historical unfolding of the group. Such arrangements are inappropriate and accordingly proscribed. Racial endogamy would thus be an important institution for maintaining the ethnic purity as well as the discrete evolution of groups.

16. C. WEERAMANTRY, APARTHEID, THE CLOSING PHASES? (1980).

17. *Id.*

18. For a discussion of the development of positive law, see F. VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24-31 (A. Hayward trans. 2nd ed. 1831).

19. *Id.*

Ideology as justification is different from ideology as operational reality. For example, Prime Minister Strijdom stated the justification for Apartheid in terms that were far from prosaic: "I am being as blunt as I can. I am making no excuses. Either the white man dominates or the black man takes over. . . . The only way in which the Europeans can maintain supremacy is by domination."[20] And Dr. Verwoerd, the arch-ideologist, put it this way, "Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White. . . 'Keeping it White' can only mean one thing, namely, White domination, not 'leadership' not 'guidance,' but 'control,' 'supremacy.' "[21] John Vorster, a recent Prime Minister of South Africa, explained that "[i]n this Parliament, whose business it is to decide the destiny of the Republic of South Africa, whites, and whites only, will have the right to sit."[22]

The ideological justifications for Apartheid have tended to focus on an idealist vision of the South African political landscape and on the issue of groups and power. I do not wish to understate the economic stakes masked by ideological discourse. Indeed, one of the obvious features of statal Apartheid—the "homelands" policy—was the economic structure of the migratory labor system. By depriving "urban" blacks of "citizenship," and by permitting residence in South Africa's industrial heartland to be based primarily on tenuous employment status (the infamous section 10 rights), the state sought to control the emergence of a black industrialized class whose core identifications would be defined by class rather than tribal factors. The system failed, as we now know, because it was unable to prevent the emergence of black trade unionism—one of the key anti-Apartheid players inside South Africa. Apartheid also fostered the insidious idea of using the homelands as a residuary labor pool, while at the same time freeing the state of any social responsibility for black families whose breadwinners were recruited for urban labor, placed in all-male barracks, and separated from their families for long periods.[23] In other words, political power, economic exploitation, and social irresponsibility went hand-in-hand.

20. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 [hereinafter Legal Consequences].

21. *See* South West Africa Cases, 1966 I.C.J. Pleadings 264.

22. Legal Consequences, *supra* note 20, at 18.

23. *See* M. MCDOUGAL, *supra* note 1, at 547-50.

V. APARTHEID, RACISM AND SOCIAL PROCESS

As we consider the impact of ideological justification and the expression of "real" reasons for the Apartheid process, it becomes important to understand the nature of Apartheid as an aspect of racial prejudice.

A sharper understanding of the problems of race-relations, and more specifically the problems of racial-discrimination and Apartheid, is important not only for an understanding of the social problems of Apartheid. It is important because Afrikaner-dominated models of constitutionalism have assumed, with varying degrees of explicitness, the group nature of politics, and the impermeable nature of "ethnic" groups as instruments of actual or potential power. The 1961 South African Constitution made a fairly crude division in the framework of constitutionalism and ethnicity. There were, for power purposes, whites and non-whites. The whites were constitutionally entitled to the franchise; the blacks, which included the colored and the indians, were not. The constitution of 1983 refined this framework: colored and indians were included in a complicated tricameral parliament, blacks (Africans) were excluded.[24]

Since the promulgation of the 1983 constitution, Afrikaner intellectuals have sought other consitutional models that accommodate strong ethnic affiliations in segmented societies while honoring the principles of democracy, individual civil and political rights, and the rule of law. At the other end of the political spectrum, the African National Congress (ANC) has built on its own traditions, influenced by the principles contained in the Atlantic Charter, and refined by the famous Freedom Charter of 1955[25] and its new consitutional guidelines for a non-racial democratic South Africa.[26] The ANC has stood firm on the principles of non-racialism, majority rule democracy and universal franchise. The critical question is whether the Afrikaner paradigm overstates the central importance of impermeable group identities based on race or ethnicity, or whether the ANC's vision of a non-racial South Africa overstates the capacity of South African society to transform exclusive ethnic-racial identities into

24. REP. S. AFR. CONST. Act 110 of 1983, Proc. 119 GG 9308, July 6, 1984, pt. 6, § 67.

25. THE FREEDOM CHARTER OF SOUTH AFRICA (U.N. Centre Against Apartheid pub. 1979).

26. THE FREEDOM CHARTER OF SOUTH AFRICA (1988 version), *reprinted in ANC's Post-Apartheid 'Guidelines'*—A-Y, Front File, Aug. 1988, at 1.

more inclusive non-racial identities as the core organizing condition of political society. In partial response to these challenges, it may be useful to explore more intensively the nature of racial discrimination and Apartheid and its relation to the problem of racial and ethnic group identity.

It requires no massive documentation to acknowledge that racial prejudice, ethnic discrimination and similar social practices are by no means unique to South Africa. Indeed, if we could put the impacts of racial prejudice on a continuum, we would find the social process of genocide at one extreme and affirmative action at the other. For convenience, we may locate racial discrimination in the middle of the continuum, viewing Apartheid as an especially virulent form of racial discrimination, extending toward genocide but obviously not as vile as the practice of genocide itself. Thus, while racial discrimination is *outlawed* internationally by the International Convention, the Conventions against genocide and Apartheid single out these practices as international "*crimes against humanity.*"[27]

The concept of "racial discrimination," like the concept of Apartheid or "racism," is an elusive notion. One need only remember how voluably many American thinkers, some of great professional eminence, declared without hesitation that affirmative action is institutionalized racism. Indeed, one eminent jurist of the political right made the charge in the bluntest of terms when he wrote, after the Supreme Court's decision in *Regents of University of California v. Bakke*,[28] that those who favored affirmative action were "racist."[29] Now it is hardly worth refuting the notion that four Justices supported the principle of affirmative action in *Bakke*. These Justices could hardly be labelled as racist with any measure of credibility. With this measure of public confusion about the notion of racial discrimination itself, it may be worthwhile exploring more precisely what we mean by racial discrimination since an appreciation of its etiology may be useful in understanding the "what" and "why" of Apartheid, and how an Apartheid-conditioned society may transform itself in the direction of a more just social order that honors the human rights of all its citizens.

Discrimination is practiced by individuals, some of whom exercise the formal and/or effective power of a community to enact

27. L. KUPER, GENOCIDE 197-204 (1981).
28. 438 U.S. 265 (1978).
29. Wall St. J., Oct. 28, 1977, at 16, col. 6.

policies that institutionalize discrimination. By focusing on individuals, I do not mean to undervalue the most significant element of the notion of racial discrimination, viz., that when it becomes institutionalized it exhibits its most destructive impacts on society. Indeed, when racial discrimination is institutionalized it is sometimes the most important element of human interaction in its particular context. However, what I am trying to get at are the conditions of racial discrimination, to show that it may be more ubiquitous than what is observed even in its institutional manifestation, and that it therefore requires more sustained and thorough strategies of action to eliminate or contain it. Discrimination can be, and is, practiced by individuals at every level of social organization. This makes the interplay of personality on the one hand, and culture on the other, important interdetermining variables in establishing the relative salience of racial discrimination in any community.

To begin to understand the social process of discrimination one must account for the conditions that shape personality formation in early childhood. Innocuous child rearing and nurturing practices may in sum amount to "deprivations" from the perspective of the child, but may be viewed as "normal" from the adult vantage point. Early years are crucial in the individual becoming conscious of the self, i.e., becoming aware that the self is an "I." A vital part of early child development is the emergence of an awareness of individuals other than one's self (non-self others). Some of these "selves" are internalized as a "we" and some as the "other" or the "they." It is often thought that anxiety, insecurity and allied deprivations influence or condition the individual's conception of the self as an "I" and more broadly on how "I" will be defined to include "others" in the sense of the "we."[30]

In other words,

> early years shape fundamental identification patterns and determine the essential "I" and contingent "we." Patterns of nurturance and early socialization do not

30. Nagan, *Conflict of Laws: Group Discrimination and the Freedom to Marry—A Policy Science Prologue to Human Rights Decisions*, 21 How. L.J. 1, 7 (1978). For a discussion of the influence of oppression and exploitation on the development of a group identity and the translation of ethnicity consciousness into social protest and resistance against oppression, see Nagengast & Kearney, *Mixtec Ethnicity: Social Identity, Political Consciousness, and Political Activism*, 25 LATIN AM. RES. REV., No. 2 61, 61-91 (1990). *See also* D. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY (1989) (lecture delivered under auspices of Maurice Webb Memorial Trust in association with University of Natal, Durban and Pietermaritzburg, July-Aug. 1989).

> take place in a vacuum. Children are born into contexts in which the facts of social differentiation are ubiquitous. The patterns of social stratification (including a consciousness of social differentiation) represent a culture-context that is transmitted intergenerationally in varying degrees of symbolic intensity to every personality system. The etiology of social differentiation is much disputed. That it exists is undisputed. That it has been accentuated in contemporary society by the division of labor and specializations that attend it is also commonplace. When patterns of social stratification emerge more concretely from the social process, and when these patterns have a close alignment with the distribution of power, wealth, and indeed all other base values which sustain and modify these class and caste divisions, powerful symbol-events (generated from these interactions) create the conditions under which the "I" defines the "self" by including within the "we", groups most closely identified with the "class," "caste" or "ethnic" position of the kinship [or family] unit of primary affiliation. The key factor which lays the foundation for the exclusivist identity, lies ultimately in the seemingly innocuous patterns of child rearing and nurturance.
>
> The ability of the self to identify with an in-group and to identify and exclude an out-group appears to derive from the communication of events relating to identification patterns that are accorded a symbolic character. Thus, such facts as sex, color, race, group affiliation, age, birth, language, religion, political belief, appearance, class, and intellect, are the ubiquitous symbolic pegs that [the individual internalizes as part of the "we"].[31]

Alternatively, they may in context be sufficiently alien and thus serve to identify and isolate targets for invidious prejudice and discrimination. "However, the most important of these indicia for the social process of discrimination has undoubtedly been race, color, and [ethnicity]."[32]

> The event sequence that might be deemed to constitute an act of invidious prejudice or discrimination (irrelevant to the merits or the capabilities of particular

31. *Id.*
32. Nagan, *supra* note 30, at 7-8.

> individuals or groups) may be set out as follows: (1) locating the target of one's hostility, (2) subjective communication of signs for the transmission of negative drives or impulses toward the identifiable target, (3) the physical events (resources) used by the communicator to reinforce predispositions about the pattern of dominance and subordination in communicators and targets.[33]

Patterns of inter-group hostility are clearly part of a recurring pattern of social dynamics. Genocide is the result of a process that is triggered by "seemingly innocent and mundane attitudes and behavior."[34] It is tied to the process of psycho-social identification in which the self is distinguished from the "other." "But once the 'other,' an alien group, is identified, the precondition of genocide has been fulfilled; for genocide cannot [scarcely] be conceived without a cultural definition of the target group."[35]

Assuredly, this identification is the precondition for inter-group hostility, and particularly the manifestation of various forms of discrimination against diverse social groups. From this perspective, it takes little imagination to see that various forms of discrimination manifested along tribal, religious, racial or caste lines are recurring social phenomena.

This description of the social process of racial discrimination gives neither an optimistic sense of an understanding of the conditions of this social pathology, nor a quick fix in the prescription of its cure. The abolition of all the "laws" sanctioning discrimination, or Apartheid, will not necessarily result in a level of good race-relations practice. As a result, there should be no great cause for public relief at the end of legal discrimination or Apartheid. The eradication of the law on the books may attack the official myth system that has legitimized discrimination, but the operational code—what happens in fact on the ground—may be quite different. The first sound principle to keep in mind is that good race-relations do not just happen.

Accordingly, good race-relations in a post-Apartheid South Africa, in my view, will not just happen. Why? Because even if the Apartheid laws are abrogated and prohibited in the new, post-Apartheid constitution, that is to say even when the new, official myth prescribes a non-racial society, the operative code may still

33. *Id.* at 9.

34. M. MCDOUGAL & W. REISMAN, *supra* note 3, at 41.

35. *Id.*

endure, keeping the practical reality, or a significant part of it, intact. Under the conditions that might once more legitimize racial discrimination or Apartheid—this "rough beast," its "hour" once more come round, might be "slouching" toward Pretoria to be born.[36]

In my view, the psychodynamics that produce the predispositional elements of personal identity, making it inevitable that fundamental identity must distinguish between the *I*, the *we* and the *other*, also give us an essential precondition for racial discrimination, Apartheid, and ultimately genocide. This is not to say that these social pathologies are an inevitable outcome of a society's social and psychological processes. The capacity to identify the *other* as a non-self-other, a non-*we*, so-to-speak, does not without further cultural conditioning and socialization produce the full-fledged prejudice-prone personality we identify with the Afrikaanse Weerstand Beweging (AWB) or analogously, the Ku Klux Klan. From this it would appear that there are few, if any of us, who are not possible candidates, at least psychologically, for an AWB or KKK membership. In my view that is the bad news, and the reason why race-relations matters are one of the most important public policy issues that confront our own society, certainly South Africa, and in a larger sense the entire planetary community.

As we proceed to tease out the implications of this analysis, let me enter a caution. It may plausibly, be assumed that what I am suggesting is that ethnic or racial identities are impermeable conditions of being, that as a matter of public policy nothing effective can in the long term be done about them. Certainly, the transgenerational continuity of ethnic conflict is significant cause for concern and possible despair. My note of caution is this: I do not accept the thesis of ethnic or racial impermeability, at least to the extent that it would justify the existence or continuation of racially discriminating practices.

As I see it, the structure of conventional culture and socialization, indeed the political culture itself, must be constantly appraised and evaluated to determine whether we are either reproducing or reinforcing the culture of discrimination, Apartheid, or even genocide. What confronts us is not inevitable determinism, but a challenge—from the local and personal to the planetary community as a whole. An aspect of this challenge may

36. Yeats, *The Second Coming*, in THE LITERATURE OF ENGLAND 1147 (G. Anderson, W. Buckler & M. Veeder 3d ed. 1979).

be observed by considering the following question: Are we producing personality types that in general are capable of identifying—ultimately—with *all* of our species? More broadly, we must ask whether we are reproducing a culture, an operative ideology, that is universally committed to the principle of human dignity or indignity, that honors the principle of respect for all human beings, and that abhors racism, sexism, and any *ism* that denigrates the dignity of all people.

In other words, the culture of human rights must be an important part of the perspective (the myth system), or more conventionally, the ideological system, and must be confirmed by a level of institutionalization that goes beyond governmental initiatives of affirmative action and equal opportunity to a level or ubiquity that touches every culturally relevant level of social organization. Harold Lasswell, in a thoughtful piece which was the product of a lifetime of grappling with the problems of violence, personality and culture, presented the kind of possibility modern culture provides as a challenge to world order. This was articulated in his famous futuristic vision of world public order and the importance of a "future system of identity" in the global culture of human rights and human dignity.[37] Lasswell wrote:

> Clearly the sharing of a common set of identifying symbols makes it possible for larger numbers of people to act together more quickly than if common cues are missing. Differences of local culture, class, interest and personality were partially overcome by invoking established predispositions to accept a degree of common leadership.[38]

Ultimately the fiend here, or the limiting condition, is the cultural-psychological reproduction of chauvinism, nativism and parochialism—all of which are essential elements of an exclusive kind of identity system.

The challenge to world order is the respect for cultural distinctiveness, and for cultural pluralism that adds to the richness of the experience of being human, but which is fully compatible with the capacity to identify with *others*, with *aliens*, so-to-speak, with all

37. Lasswell, *Future Systems of Identity in the World Community*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER VOLUME IV: THE STRUCTURE OF THE INTERNATIONAL ENVIRONMENT 3-31 (C. Black & R. Falk eds. 1972)

38. *Id.* at 13.

of humanity in a universal sense. That is to say, a system of identity that is *inclusive*.

The 1990s will directly challenge South Africa, Europe and the rest of us about whether we can make a new paradigm of public order that is both psychologically and culturally embedded in the principle of human dignity and whether we can make human rights, in the comprehensive sense, an indispensible element of a global new deal. A brief view of the political trends in South Africa illuminates the factors important to the process of transition in the 1990s.

VI. TRENDS IN TRANSITION TO A NEW SOUTH AFRICA: STRATEGIES OF CHANGE AND THE PUBLIC ORDER

In 1948 the Nationalist Party came into power in South Africa. It came to power in an election that largely precluded the non-white, black sections of the population. Its program and policy were encapsuled in a word, a neologism, which was to gain international notoriety: Apartheid.

The ruling Nationalist Party began to institutionalize a radical program of policies whose roots were concededly found in the National Socialist policies of Nazi Germany, and the fascist policies of Mussolini's Italy. The fundamental idea behind the Apartheid scheme was the idea of white supremacy.[39] The critical policy problem was how to secure and enhance it for the indefinite future. The critical solution lay in the policies and programs of white control and racial separatism.

Implementation of the Apartheid program began with a vast edifice of legislation and an enormous bureaucratic structure to man the pumps of the Apartheid administrative state. To organize the population based on rigid racial lines, the state enacted the Population Registration Act,[40] which mandated that every human being in South Africa be assigned a racial identity from which all rights, powers, privileges, immunities and disabilities would flow. To ensure compliance with the dictates of the Apartheid machine, the state took direct control of education for blacks. It instituted a massive arsenal of security laws and policies to secure the extinction and repression of those who disagreed with its policies, especially those who had the temerity to voice their disagreement

39. For a discussion of the influence of the Nazi movement on the Nationalist Party leaders and Afrikaner people, see generally B. BUNTING, THE RISE OF THE SOUTH AFRICAN REICH 54-68 (1964).

40. Population Registration Act, *supra* note 11.

and more so those who attempted to do something about it. The evolution of a national security garrison state logically,[41] almost inexorably, followed from the radical nature of Apartheid. The Apartheid process generated sustained patterns of resistance. This naturally led to an outcry from other nation states who would openly object to the Apartheid state.

The government of India, one of the first major third world powers to become a full-fledged member of the United Nations, took the issue of Apartheid to the U.N.[42] The basis for India's action was that these policies were targeted, inter alia, at the Indian minority in South Africa. Starting out as a matter of international concern about human rights violations against Indian South Africans, the U.N. broadened its interests to include the whole problem of Apartheid since the entire edifice was designed to violate the human rights of all non-white people.

Initially, the U.N. sought to promote dialogue and conciliation between interested countries and South Africa. These consultative efforts came to naught as South Africa steadfastly maintained that the treatment of its black population was a matter of domestic internal sovereignty and not an international matter. As the state began to close off all avenues for dissent and political expression among the Apartheid victims, the strategies of the now banned black political parties began to change. The historical legacy had been the legacy of Gandhi. The core strategy was that of passive, non-violent resistance to unjust laws and governmental oppression.

With the outlawing of the African National Congress (ANC) and the Pan Africanist Congress (PAC) in the early 1960s, together with a level of state violence never before experienced by black resisters, the black political parties sought to model themselves on the movements of revolutionary violence that sought the overthrow of colonialism.[43] Thus, the ANC became a move-

41. *See* CHANGING PATTERNS OF MILITARY POLITICS 51-68 (S. Huntington ed. 1962) (chapter by H. Lasswell entitled "The Garrison-State Hypothesis Today").

42. J. HEUNIS, UNITED NATIONS VERSUS SOUTH AFRICA 250 (1986) (government of India made application to United Nations regarding treatment of Indians in South Africa); M. MCDOUGAL, *supra* note 1, at 521.

43. M. MBEKI, PROFILE OF POLITICAL CONFLICTS IN SOUTHERN AFRICA 28 (1987) (in late 1950s and early 1960s, black nationalist parties in South Africa concluded that only way to dislodge white minority regime was through armed struggle); P. WALSHE, THE RISE OF AFRICAN NATIONALISM IN SOUTH AFRICA: THE AFRICAN NATIONAL CONGRESS 339-40 (1971) (noting frequent tendency to view Negro struggle for civil rights in America as precedent for African emancipation in South Africa).

ment of national liberation seeking to mobilize all coercive and diplomatic strategies, including strategies of violence to secure the demise of the Apartheid regime.

At the international level, the complex interplay between the elites and counter-elites in South Africa, the agencies of formal international decision (the U.N., the O.A.U., the World Court) and the major power-players in the international system such as the U.S.S.R. and the U.S.A., all are decisional factors in the complex unfolding drama of South Africa.[44] These core players have responded with a cautious process of delegitimatizing the Pretoria authorities, and an even more cautious enhancing of the legitimacy of the struggle against South Africa. While much of this response has occurred through the U.N., major players have somewhat hedged the bet. With a more circumscribed role for the Soviet Union in some international arenas of conflict and the greater watch-dog policies over executive adventures in the foreign policy domain of the United States, the superpowers themselves seem to have receded from the idea that revolutionary violence (left or right) will necessarily lead to beneficent outcomes. South Africa had exasperated both the Russians and the Americans.

When we view the South African scene in its regional context, some sobering facts emerge. The status quo, white elite, has constructed an entity close to a renegade state—the Apartheid state. This state has been unrestrained in its use of violence inside South Africa and the region. The death toll is itself staggering, and the evidence of human rights abuse is of epidemic proportions.[45]

The reaction of the South African liberation movement is harder to appraise. Its political inheritance is the tradition of passive, non-violent resistant to unjust laws and governmental oppression. Yet the liberation movements are frequent targets of criticism for using tactics of insurrectionary violence. In the face of extreme status quo violence and human rights abuse (the Sharpeville massacre of 1960 is a major example), and the ban-

44. *See* Stead, *Moscow's Call to De Beers*, N.Y. Times, Aug. 2, 1990, at D2, col. 1; Burns, *Soviets, in Shift, Press for Accord in South Africa*, N.Y. Times, Mar. 16, 1989, at A1, col. 1.

45. *See* AMERICAN POLICY IN SOUTHERN AFRICA: THE STAKES AND THE STANCE 218-20 (R. Lemarchand ed. 1978) [hereinafter AMERICAN POLICY] (discussing social process of deprivations for non-white individuals); K. GRUNDY, THE MILITARIZATION OF SOUTH AFRICAN POLITICS (1986); A. SEIDMAN, THE ROOTS OF CRISIS IN SOUTHERN AFRICA (1984).

ning of the prime black political organizations, black leadership, the liberation movement made the decision to go underground and to model themselves as a movement committed to the use of both coercive and persuasive strategies to advance the cause of "liberation."

Few, if any, articulate segments of the international community have challenged the "legality" of armed struggle to achieve liberation in South Africa. The issue is not "law" in the strict sense. International law "operationally" seems to tolerate a grey area of coercion by elites and counter-elites. Responsibility for the results of violence may indeed at the point of negotiation, be "negotiated" away. But the existential question remains: Has violence in defense of the status quo, and violence to eradicate it, enhanced the prospect of a regional or international public order of human dignity?

The use of passive resistance, non-violent or less violent techniques of struggle on the West Bank and Gaza have, I suspect, restored a moral credibility and strength to the plight of the dispossessed Palestinians. It may also be suggested that the non-violent methods of protest of the U.D.F. and the mass Democratic Movement in South Africa have had a restorative, mass appeal to South Africa's oppressed people inside that country, and have had a moral impact on the policies and practices of at least some elements of the white ruling caste. Perhaps the cruelest dilemma facing those who struggle for human rights in a context where a state is a notorious human rights abuser, and where that state is unrestrained in its use of violence against its opponents, posits the following questions: Do human rights proponents have a *legal* and a *moral* obligation to use that proportion of violence necessary to defend themselves, *i.e.*, do the oppressed have a right of self-defense from state human rights abuse? To what extent should counter-elites forgo the right of self-defense for the even higher moral precept that the oppressed are themselves transformed by the suffering of struggle, that "true" struggle against injustice transforms both victim and interlocutor? Did Gandhi, Luthuli and King set a standard too lofty in their protest, to man's conscience, that violent solutions to human problems are obscene and degrading? Or as we make an inventory of the cost of reactionary and revolutionary violence do we discover somewhat cynically that leopards only change their spots when they move from one spot to another? In other words, were the Kings, the Luthulis, the Gandhis and the Tutus of the world the "real" realists

because they saw more clearly than most that violence is generally a high cost non-solution to difficult problems of coexistence, peace and justice?

Implicit in the message of Gandhi, Luthuli, Tutu and King is the integrity of the struggle as well as the integrity of the objectives of the struggle for justice, respect and dignity. A further implication in this perspective is a message of restoration and hope in the capacity for moral growth in the human species, and a pervasive optimism that a public order committed to the dignity of man is not a far-fetched idea.

As we survey the decisional challenges, we may with the benefit of hindsight and the wisdom of historical experience suggest some basic, but I hope provocative, issues to this presentation.

(1) Does human rights law as well as general international law place some limits on a state's use of power and violence against its own people?
(2) Has the use of revolutionary violence at the end of the day generated the promise of a better world or a better South Africa?
(3) In a world of changing conditions and trends, is it the height of folly to demand "no change" and to counter the demand for "immediate change," whatever the price to humanitarian values?
(4) Does the evolution of passive resistance, and mass democratic nonviolent resistance restore the moral character of the very process of struggle for dignity and respect?
(5) May modern human rights processes provide normative guidance to revolutionary change by posing the interplay of both revolutionary means and ends as a dynamic but vital challenge to the very human agents of decision who hold our well-being and respect in their hands?

While there are structural forces in the social process that make change difficult to achieve by decisional interventions, a great deal of change or non-change is indeed a function of decisional intervention. An awareness of this issue may enhance the sense of responsibility on the part of those who welcome change and work for a public order of human dignity. The case of South Africa represents the twin issues of human rights abuses and the rights of those victims to use extra-constitutional methods to

change the system. That is to say, the victims of human rights violations claim a right to revolution. Complex issues of law, including international law and policy are implicated here. Also, decisional responses to the claims of the Pretoria authorities and their antagonists leave little room for a value-free neutrality.

VII. TRENDS TOWARD A NEW CONSTITUTIONAL ORDER

In our analysis, let us first look to the trends leading to the undermining of Apartheid. A review of these trends must take into account several events that have had a decisive impact on the relevant historical events that have moved in the direction of undermining the credibility of the Apartheid state, and thus the possibility of its long term viability.

By the mid 1970s, the key institutions of Apartheid were substantially in place. These institutions included the balkanization of South Africa as the homelands policies began to be put into practical effect. The homelands policy meant mass population removals.[46] These removals—a form of forced transmigration—resulted in the mass deportation of millions of black South Africans in one of the most far-reaching instances of the mass displacement of a people since the Nazi activities during World War II. In "white" South Africa itself, the Group Areas Act had created a virtual new kind of urban environment as population groups were coerced into their exclusive racial group areas. Again, this was a phenomenon almost unique in the context of comparative urban demography. The framework was designed to be sustained by the policy of Kragdadigheid (brute force), and the full arsenal of repressive institutions characteristic of a modern garrison state.

The near perfect blueprint of Apartheid received its first clear initial jolt from an event far beyond the borders of South Africa, let alone southern Africa. A group of Portuguese officers executed a *coup d' état* in Portugal. The coup was not predicted by the major intelligence agencies, but it had major implications for the *cordon sanitaire* around southern Africa. The coup led to a Portuguese pullout from Angola and Mozambique, and radically changed the conditions of power in the southern Africa region. Specifically, Smith's Rhodesia became vulnerable, and South Africa itself began to feel a level of anxiety never felt before.[47]

Liberation in Angola and Mozambique made Rhodesia vul-

46. *See generally* M. MBEKI, *supra* note 43 (discussion of repressive tactics of white minority regime).

47. For a discussion of American concern regarding African issues in Rho-

nerable, made the defense of Namibia's borders far more expensive and, ultimately, embroiled South Africa in regional aggression with both overt military and covert intelligence operations. These activities resulted in a destabilization policy in South Africa that has caused untold suffering and arrested economic and social development in the region at enormous human cost. These events also brought Cuba into southern Africa as a major player, and more pertinently, brought United States and Soviet Union concerns to the region with all the potentials of regional conflicts having global possibilities.[48]

Celebrations were held in the black township of South Africa, honoring the liberation struggles and successes in the former Portuguese colonies. But the event that shook the foundations of Apartheid occurred inside South Africa and was led by the children of a blandly named ghetto outside of South Africa, the South West Township—known the world over by the acronym: Soweto. The events that occurred in Soweto in 1976 are a special, almost unique example of Apartheid resistance. It was triggered and sustained by school children, a vast number of whom were not even past the primary school years. The students of Soweto started by protesting the inferior education they were allocated; they protested the fact that they were required to learn Afrikaans, the language, as they saw it, of the oppressor. Finally, they protested the impotence of their parents, leaders and elders, who, as they saw it, had absorbed the indignities of Apartheid in far too passive a manner. The Soweto revolt spread throughout South Africa. In every major center, children boycotted classes, marched, protested and sought to disrupt the smooth efficiency of the Apartheid state machine.[49] The 1976 events of Soweto put an indelible stamp of horror on what Apartheid could do to its children. There were appalling tales of children who had been killed, wounded, teargassed, detained, tortured, imprisoned, and for the lucky ones, exiled.

Fast on the heels of Soweto another unlikely event shook the foundations of the Apartheid state. Following the notoriety of the Watergate scandal, this event was aptly named the Muldergate

desia, including racial discrimination, United Nations' sanctions, economic interest and the use of violence, see AMERICAN POLICY, *supra* note 45, at 173-201.

48. *Id.* at 203-46, (discussing various strategies by United States and Soviet Union to peacefully bring about changes in South Africa while protecting their economic and other interests in the process).

49. *Id.* at 220-24 (discussing revolt of school children in South Africa's Black ghettos and potential ultimate effect of these events).

scandal—after Connie Mulder, a minister under whose jurisdiction much of the scandal took place.[50] Muldergate put to rest the notion of the incorruptible Afrikaner politician. The Afrikaner, too, came at a price, and could be seduced by the temptations of the good life. But the scandal reached into the highest levels of the Afrikaner elite as both Prime Minister Vorster, the architect of the police state, and his henchman General Van der Berg, Chief of the security police, were sent out to pasture. P.W. Botha assumed the reins of white power. It was Botha who proclaimed for all the world that the Afrikaner would have to "adapt or die," signaling that he would retreat form the rigor of ideological Apartheid and move public policy in the direction of "reform," in what became known as the neo-Apartheid alternative.[51]

The relevance of fortuitous circumstances in the transformation of South Africa increased when the Reagan Administration, which sought to legitimate the neo-Apartheid reform program of Mr. Botha, instead had to implement the most comprehensive anti-Apartheid legislation ever enacted by any United States government. I refer of course to the sanctions under the Comprehensive Anti-Apartheid Act of 1986.[52] Indeed, Mr. Botha is in

50. The Muldergate scandal involved the use of state funds to wage a propaganda war on behalf of South Africa. For a further discussion of the Muldergate scandal, see AMERICAN POLICY IN SOUTHERN AFRICA: THE STAKES AND THE STANCE, SECOND EDITION 245-48 (R. Lemarchand 2d ed. 1981).

51. For a review of the Botha regime's "changes" promised in this "adapt or die" speech, see *South Africa: Positive Developments Continue* in BACKGROUNDER Spring, 1983 [hereinafter *Positive Developments*].

52. 22 U.S.C. §§ 5001-5116 (1988). For a summary of the factors leading to passage of the Anti-Apartheid Act, see *Sanctions: The Time Has Come!*, in WASHINGTON NOTES ON AFRICA (Summer 1985).

In 1985, the "issue of South African apartheid finally emerged as a dominant legislative agenda item." *Id.* at 1. The proposed Anti-Apartheid Act of 1985 was overwhelmingly approved in the House, 295 to 127, on June 4, 1984. *Id.* The broad support for the bill in the House was the "direct" result of the agitation against Apartheid generated by the Free South Africa movement. *Id.* The 1985 bill contained a laundry-list of sanctions including: a ban on new corporate investment in South Africa; a ban on United States bank loans to the South African government; a ban on the importation of gold coins; a ban on computer sales to the South African government and a ban on nuclear collaboration with South Africa.

There were several Republican efforts to weaken the bill including an amendment that sanctions not take effect unless the African National Congress (ANC) unilaterally renounced violence or if a referendum among South African blacks disapproved of sanctions. *Id.* The most vociferous defender in the United States Congress of the Apartheid regime is Senator Jesse Helms of North Carolina. Helms led a filibuster against the bill and was supported by several conservative Senators, including: Jeremiah Denton (R-AL); John East (R-NC); Jake Garn (R-UT); Orrin Hatch (R-UT); Chic Hecht (R-NV); Gordon Humphrey (R-NH); Paul Laxalt (R-NV); James McClure (R-ID); Steven Symms (R-ID);

part blamed for the passage of the bill because of his crude intransigence, lack of diplomatic sophistication and poor media presence. But it was hardly to be expected that the Reagan administration, one of South Africa's "friendliest," would be the bearer of the sanctions dagger. A further element of fortuity came when P.W. Botha suffered a stroke last year, as South Africa grappled with internal unrest and international sanctions became more and more effective. Botha was reluctant to give up power and had to be virtually coerced from office. The new leader was deKlerk, who proceeded this year to legalize the principal black opposition groups and who, of course, released Nelson Mandela. As we complete our trend analysis we are provided with a paradox as a result of these fortuitous events. The current trends, yet undeveloped, illustrate the paradox.

South Africa is a bastion of anti-communism—for what this is worth in this day and age. One of the unpredictable elements in the transition process is the evolution of South Africa's relatively cozy ties with the Soviet Union. Let me add at once that the U.S.S.R. was, and is, a long-time ally of the ANC, and one of its staunch backers on the international scene. The brokering of the Namibia accords and the exodus of the Cubans from Angola could not have been done without Soviet cooperation. High level diplomatic talks have been held between Soviet and South African foreign service functionaries. The U.S.S.R. intervened to prevent South Africa's expulsion from the international Atomic Energy Agency. Very importantly, the Soviet-South African cooperation on the marketing of gold and diamonds has been to the mutual benefit of both parties.[53] Indeed, since the imposition of sanctions by the United States, many South Africans have viewed the Soviet Union differently. And with the policies of *glasnost* and *per-*

Strom Thurmond (R-SC); and Malcolm Wallop (R-WY). The bill died in the Senate. *Id.* at 2.

By 1985, the European Economic Community and other United States allies were no longer willing to tolerate a "business-as-usual" posture regarding South Africa. *Id.* at 3. Moreover, the UN Security Council, with the United States and Great Britain abstaining, passed a resolution to encourage the adoption of voluntary economic sanctions against South Africa. *Id.*

For relevant background on the debate over United States sanctions, see Lewis, *House Panel Backs New South Africa Sanctions*, N.Y. Times, June 11, 1986, at A6, col. 1. On the efforts of the Reagan Administration to derail congressional sanctions, see Gwertzman, *Buying Time on Sanctions*, N.Y. Times, July 16, 1986, at A1, col. 5. One administrative measure designed to mollify Congress was the appointment of a black ambassador to South Africa. *See* Gwertzman, *U.S. Said to Pick Black Diplomat To be Ambassador to South Africa*, N.Y. Times, Aug 30, 1986, at A4, col. 5.

53. Burns, *supra*, note 44.

estroika, and the sense that there must be flexibility on the part of the liberation movement, Soviet influence has clearly improved the security picture for white South Africa and generated conditions that favor a negotiated solution to the South African crisis.

VIII. SOUTH AFRICA'S CONSTITUTIVE PROCESS: THE LEGACY OF THE PAST AND THE CHALLENGE OF THE FUTURE

South Africa has a turbulent constitutional history. Indeed, the founding of South Africa and the possible constitutional models that were considered for unifying the South African state were themselves controversial, particularly from the point of view of black South Africans who feared the fate of black political rights in a unionized South Africa that might be dominated by an electorate majority of white Afrikaners. The model that eventually did emerge was associated with Westminster majoritarian politics, with the locus of power substantially allocated to the Cabinet comprised of responsible ministers.[54] The concept of majoritarianism must, of course, be qualified. The only blacks permitted to vote were those who met certain basic franchise qualifications and who were citizen domiciliaries of the Cape Province. This meant that blacks in Natal, the Orange Free state and the Transvaal were not given voting rights under the South Africa Act of 1910. No black could be a member of Parliament or hold a position in governance where parliamentary membership was a prerequisite. The role of the courts under the South Africa Act appears to be modeled on the judicial role as defined by the English experience of constitutional governance. This kind of constitutional system, of course, operates on the mandate of the voting majority, and the role of the court in the protection of political and civil rights of individuals, minorities and the disenfranchised was accordingly limited.

The framework of electoral politics in South Africa was defined by the demographic reality of the electoral college. What this meant was the within the framework of this modified Westminster model, the balance of power within white politics maintained a reasonable equilibrium with black and colored voters often being an important part of the balance of power. It became clear to Afrikan strategists that Afrikaner dominance of South African politics would depend in the first instance on removing

54. For a discussion of the evolution of the constitution, see L. BOULLE, CONSTITUTIONAL REFORM AND THE APARTHEID STATE 149-70 (1984); Nagan, *supra* note 9.

black and colored voters from the common voters' role. In the 1930s the Cape blacks were removed from the common voters' role by a procedure that appeared to be facially at variance with the South African Constitution. The South African Constitution held that the constitutional rights of blacks could not be terminated except by the use of a special parliamentary procedure. This procedure required both the Senate and the House of Assembly to convene unicamerally and secure the constitutional change of black rights by a two-thirds vote. These sections of the constitution were known as the entrenched sections of the South Africa Act. In the 1930s the South African Parliament sitting bicamerally terminated the voting rights of the Cape Africans. This action was challenged in the appellate division of the South African Supreme Court in *Ndlwana v. Hofmeyr*.[55] The Supreme Court held that in the South African constitutional system, the principle of parliamentary sovereignty is paramount. Since parliament had acted and parliament was legislatively supreme, parliament could change the constitution as it saw fit. The Africans in the Cape were disenfranchised.

In 1948, the Nationalist Party came into power with a bare majority and a radical policy of Apartheid that it sought to enact and implement. Once more, it sought to enhance and secure its electoral standing by terminating the voting rights of the Cape coloreds. It followed the procedure sanctioned in the *Ndlwana* case. This time the South African Supreme Court had a change of heart. In *Harris v. Minister of the Interior*[56] the Supreme Court ruled that the separate representation of Voters Act was enacted in a manner incompatible with the fundamental precept of the South African Constitution. Indeed, the court ruled that parliament sitting bicamerally was by definition not a parliament as understood by the constitutional definition of Parliament and envisioned in the entrenched sections of the South African act. The opinion was an extraordinary example of the independence of the South African judiciary and the importance of law and legal institutions in balancing the framework of power in a complex society.

The South African government, however, was intent on

55. Ndlwana v. Hofmeyr, NO & Others 1937 A.D. 229; H. CORDER, JUDGES AT WORK: THE ROLE AND ATTITUDES OF THE SOUTH AFRICAN APPELLATE JUDICIARY, 1910-50, at 154-55 (1984). For a discussion of racial legislation in South Africa, see A. MATHEWS, LAW, ORDER AND LIBERTY IN SOUTH AFRICA (1972); A. SACHS, JUSTICE IN SOUTH AFRICA 164-166 (1973).

56. Harris v. Minister of the Interior, 1952 (2) S.A. 428 (AD).

pressing the issue and decided to do so by a direct attack on the jurisdiction of the court. It enacted the High Court of Parliament Act, an act designed to make Parliament itself the supreme constitutional tribunal of South Africa.[57] Once more, Harris, the plaintiff in the voting rights case, challenged the constitutionality of the Act in the South African Supreme Court. And once more, the South Africa Supreme Court upheld Harris's claim.[58] The court held that Parliament was simply not a court and the effort to collapse both the legislative and juridical competence of governance into parliament itself was unconstitutional. The Court showed extraordinary statesmanship and courage in standing up to the Pretoria government. This story, however, does not have a happy ending.

The South African government, undaunted by these legal rebuffs, found a loophole in the constitution. The loophole related to the provisions defining the composition of the senate. The constitution provided that Parliament determines the composition of the senate. A new bill was passed—the Extension of the Senate Act.[59] This bill authorized the enlargement of the senate and permitted the state to appoint senators. Enough senators were appointed to give the senate the requisite two-thirds majority to disenfranchise the Cape coloreds. This provision was challenged, but the plaintiff was not as fortunate as Harris. The South African Supreme Court was simply not able to find a way around the government's corruption of the constitution in its drive to consolidate its hold over the South African power process. With its extinction of colored voting rights, the state moved aggressively to legislate and implement its Apartheid program. One of the symbolic cornerstones of the new age was the promulgation of a new, white's only constitution—the republican constitution of 1961.[60] Increased resistance to Apartheid as a consequence of the new constitution and other issues resulted in wide-spread civil disobedience and the banning of the major black political parties. Most importantly, for civil rights, security laws were enacted which permitted the detention and frequent torture of detainees, censorship and a wide variety of limitations on freedom that made South Africa the paradigm case of a post-World War II police state.

57. *Id.*

58. Minister of the Interior v. Harris, 1952(4) S.A. 769 (AD).

59. Collins v. Minister of the Interior, 1957(1) S.A. 552 (AD).

60. L. BOULLE, *supra* note 54.

After the fall of Vorster, renewed discussions were had inside South Africa about a new dispensation encouraged by Prime Minister Botha's "adapt or die" speech.[61] This resulted in a new constitution of 1983. Although the constitution seemed to liberalize and open up the South African political process, it did nothing of the sort. The constitution did not contain a Bill of Rights. Although the preamble spoke of the protection of human rights, dignity and liberty of the individual, the substantive part of the constitution discloses that the individual is not given an effective part in the system's power arrangements. It focuses on the group rights of the whites, the coloreds and the Indians and does not include any group rights for Africans in its dispensation.

The constitution establishes a close relationship between the executive, the armed forces and the security police. In fact, the 1983 constitution made it easier to rule South Africa by emergency decree, which has substantially been the case since 1986. Although the constitution provides for indian and colored participation, the framework of effective power remains with the Afrikaner elite, and the framework of authoritarian control is structurally legitimized by the constitution, giving the South African president dictatorial powers whenever he chooses to exercise them.

This constitutional arrangement was acknowledged to be flawed even in governmental circles and it was widely acknowledged that a Bill of Rights was sorely needed in South Africa.[62] The problem is that a Bill of Rights is a statement about power relations and unlimited executive power cannot coexist comfortably with a commitment to individual political and civil rights. And this is where another improbable political event has significantly influenced South Africa's constitutional landscape of the future. The imposition of economic sanctions by the U.S. set up an explicit framework of conditions that had to be met before sanctions could be lifted. Those conditions include respect for civil and political rights of the opponents of Apartheid and others.

It is now widely conceded by many that sanctions do work, if what is meant by "work" is a serious, realistic reappraisal of what can be done to reshape the legal political landscape of South Africa in ways that honor the human rights of all its citizens. The emergence of Mr. F. W. deKlerk represented the first unequivocal

61. *Positive Developments*, *supra* note 51.

62. Sussens, *Bill Seen as Change to Authoritarianism*, Eastern Province Herald, May 24, 1983.

rejection by a major Afrikaner leader of key tenets of the Apartheid state and especially those parts of state policy which institutionalize repression and human rights violations.[63] In Mr. deKlerk's much publicized speech before parliament this year, Mr. deKlerk suspended executions, pledged the release of political prisoners other than those convicted of offenses such as murder, terrorism and arson, pledged to scrap curbs on the media in their entirety, pledged to terminate the state of emergency "as soon as circumstances warrant it," and pledged to scrap the Separate Amenities Act of 1953.[64] Mr. deKlerk also declared that "the time for negotiations has arrived." Mr. deKlerk indicated that the unbanning of major black organizations was designed to place "everybody in a position to pursue politics freely."

Just as Mr. deKlerk was contemplating "Pretoriastroika," he was faced with a crisis of critical importance. As early as October and November of 1989, three former South African security policemen asserted in separate versions that they had been involved in the "death squad" murders of political opponents of apartheid.[65] The first disclosure in October 1989 came from a death row inmate, Butana Almond Nofomela. Mr. Nofomela's execution was stayed pending an investigation. Subsequently his story was corroborated by his former commanding officer, Captain Dirk Johannus Coetzee, and another ex-security police functionary, David Tshikalange. Amnesty International has documented approximately sixty (plus) of these unsolved killings and over the years has repeatedly asked the Pretoria authorities to carry out thorough independent investigations after individual inquiries were repeatedly inconclusive.[66] In December 1989, Amnesty International and others asked President deKlerk to conduct an independent judicial investigation into the possible existence of death squads.[67] President deKlerk declined to order an investigation on the basis of Nofomela's disclosures. As evi-

63. For an examination of the attitudes of South Africans toward the law, see A. MATHEWS, FREEDOM, STATE SECURITY AND THE RULE OF LAW: DILEMMAS OF THE APARTHEID SOCIETY (1988).

64. Heard, *Fewer South African Executions Likely as Government Reviews Death Penalty*, Atlanta Constitution, Dec. 1989. For an overview of the key issues in deKlerk's announcement, see *Pretoriastroika: President de Klerk's Historic Statement to Parliament*, FOCUS ON SOUTH AFRICA, Feb. 1990, at 1.

65. *Hit Squad Probe*, FOCUS ON SOUTH AFRICA, Feb. 1990, at 16; Powell, *Guilt Is a Matter of Innocence in the Upside-Down World of Harms*, Weekly Mail, Mar. 16-22, 1990, at 4.

66. *South Africa: Political Killings by Security Force 'Death Squads'*, Amnesty International Doc. AFR 53/01/90 (Jan. 1990) [hereinafter *Political Killings*].

67. *Id.*

dence mounted, however, he was compelled to call for in impartial investigation, and has appointed a respected South African judge to undertake the assignment. How that judge's revelations will impact on the proposed negotiations framework will have to await further developments. But the findings collected in Amnesty International files suggest that the investigations/hearings, if thoroughly conducted, could be politically explosive.[68]

As revealed in his speech, deKlerk's thinking is also reflective of a considerable level of fertile and imaginative thinking about South Africa's constitutional possibilities by both black and white intellectuals and organizations. Most recently, for example, the ANC, although still in exile and disbanded inside South Africa, published its constitutional guidelines for a free and democratic South Africa. Afrikaners themselves have been scouring the international landscape for constitutional models that are responsive to the concepts of ethnic diversity and group power.[69] There seems to me to be two dimensions to the problem. The first is the definition and scope of the practical framework for negotiations. Second, how far can constitution-making be from the framework of actual power relations and how far can it move prescriptively in shaping a new paradigm of governance in South Africa? In part, the problem may be viewed as understanding the problems of group or ethnic identification in the here and now and looking at the strategies of transformation in a framework of identity that is more inclusive, i.e., one that embraces all South Africans and the principles of universal justice, social and economic equity and human dignity.

The evolution of Afrikaner thinking about constitutional reform since the promulgation of the 1983 constitution, and more pertinently since the fall of P.W. Botha and the rise of F.W. deKlerk, has become refined and may well provide a useful basis for negotiations in light of the ANC's published constitutional guidelines. In an interview with Anthony Lewis of the *New York Times*, Dr. Gerrit Viljoen[70] suggested that a two chamber Parliament, one elected on the basis of a universal franchise and the other representative of ethnic and possibly geographic factors, might be more acceptable than a single house of Parliament based on majoritarian politics. The idea of a second house carries the implication that it would serve as a check on unbridled majori-

68. *Id.*

69. *See* Nagan, *supra* note 9, at 410-12.

70. Lewis, *The New South Africa*, N.Y. Times, Mar. 27, 1990 at A27, col. 1.

tarianism and would presumably have some "blocking" competence.[71]

It is a case of historical irony that the Afrikaners who fought so tirelessly for unbridled Afrikaner majoritarianism, without the hated "testing" right, now seek as a cornerstone of their negotiating posture the institutionalization of "checks and balances" to protect all minorities, including the whites.[72] The basic idea is that specific blocking competence should be allocated to the second parliamentary house to cover legislation that would impact minority groups on "important" political issues. Three main areas have been isolated:

(i) The mandate of regular elections
(ii) The protection of the economic system
(iii) That the first house have its law-making competence limited from tampering or otherwise compromising the integrity of an assumed bill of rights.

It is obvious that the second house, if accepted, will be one of the more interesting institutional challenges for South Africa's constitution drafters. One suggested approach is to follow the U.S. practice and elect senators (possibly two) from each geographic region, however defined. This approach may be further supplemented by some form of representation from different ethnic groups. But the notion of ethnic or racial here, rather than be dependent on the Population Registration Act and the odious system of racial classifications, will in fact be based on volitional affiliation; Viljoen even envisages a category for those who reject any racial or ethnic label, whether imposed or freely chosen. According to Viljoen, "Freedom of Association will be the dominant factor."[73]

The new proposals leaked to the press have come on the heels of intense activity about the constitutional challenges posed by the ANC's published guidelines, which caught many by surprise because of its liberal, social democratic tenor, as well as by the rise of deKlerk, the fall of Botha, the freeing of Mandela and other prisoners, as mandated by the American Sanctions bill, and the impact of sanctions itself.

I have elsewhere examined the importance of the ANC for-

71. *Id.*

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

73. Lewis, *supra* note 52.

mulation for a post-Apartheid South Africa. I recap here only the broad outline of what the ANC's proposals entail, and some of the more obvious shortcomings. The introductory part of the guidelines states what the ANC's commitment is to a future South Africa:

(1) The establishment of a non-racial democracy.
(2) To eradicate apartheid and outlaw racial discrimination.
(3) To promote economic equity with the state playing an active role.
(4) To promote sex equality.
(5) To protect religious, language and cultural rights.
(6) Institute policies to reconstruct black society because of heritage of exploitation and discrimination.

There are of course several important questions raised by the ANC's guidelines. I list for convenience some of the more obvious ones.

(1) Is majoritarianism the best form of democracy?
(2) Are consociational models of pluralistic democracy more ethnic-sensitive and flexible as constitutional alternatives?
(3) Since blacks in 1910 advocated a federal alternative to the white dominated Westminster model, does federalism hold promise as a possible model?
(4) What is the juridical status of a bill of rights and an independent judiciary? The ANC guidelines are not clear here.
(5) Are there *any* group rights that merit constitutional protection?[74]

The process of negotiations envisioned by the leading players in the South African drama must come to grips with several different but interrelated challenges if they can be productive. First, a continuance of the spiral of revolutionary and reactionary violence will make negotiations indescribably difficult and will in all probability continue the state of emergency. This is a datum well known to the white chauvinists associated with the AWB and the black chauvinists associated with Inkatha, and other extreme black consciousness groups.[75] Second, even without the interven-

74. *Political Killings*, *supra* note 66.
75. Irvine, *Violence in Natal: Political Implications*, in IDASA 59-66 (1990).

tion of polarized racial chauvinism, there remains a large reservoir of insecurity on the part of white South Africa. Many white South Africans believe that, in the crunch, black control may mean the implementation of Apartheid in reverse. The degree of distrust on the part of black South Africa also represents an enormous gulf when the historical legacy of three hundred years of colonial oppression is capped by forty-two years of unremitting Apartheid repression.

I believe that negotiations can and must realistically strive for two key policies in the immediate future. First, a conscious policy of contained tension. Since the negotiating parties will be communicating the language of political demand, it must be acknowledged that that language comes freighted with a vast reservoir of emotion, feeling, anxiety and distrust. A system of contained tension which secures the minimum order will secure the first principle of constitutionalism—the management of power as an element of the containment of conflict. The minimum order therefore is essential for realistic constitutional progress. Second, concurrent with the negotiation process, the Pretoria authorities should take the initiative in planning for the economic reconstruction of black South Africa with a particular emphasis on urban development. What might be envisioned here would be something of a Marshall Plan combined with an economic and social New Deal. Such an exercise in enlightened economic self interest would speed the negotiations process and possibly generate symbols of good faith and trust such that matters of common advantage may be more clearly seen by the relevant actors. Such a policy may also speed the demise of international economic sanctions against South Africa.

In my view the business of constitution-making must inevitably accept some levels of imperfection. We know the fate of many idealistic, near perfect constitutions in many parts of Africa and indeed the Eastern Europe of yesteryear. Cynical intellectuals in Eastern Europe used to talk of their constitutions as "posters." In Africa many leading scholars are so disenchanted with the state of constitutional law based as they see it on paper constitutions, that they openly talk of states having constitutions without constitutional law. A part of the problem is the lack of correspondence between constitutive process and the process of effective power. Constitutive process when they function realistically restrain the abuse of power. As Karl Llwewllyn once implied it, a constitution is not a scrap of paper with a set of frozen, reified, mummified

meanings.[76] The constitution he said was an institution, a living dynamic institution.

The relationship between law and power or more precisely constitutional law and power must ultimately be seen as an imperfect incomplete evolving process and the negotiating process envisioned in South Africa is, in itself, in reality only a part of a more comprehensive but continuing constitutive process in South Africa. Even more importantly, the negotiating process may mask a vital operational reality, namely, that South Africa's own constitutive process has already generated expectations about the allocation of basic decisional authority in the 1990s. Additionally, the international community acting through the U.N. and acting through major international players like the United States have been in the business of recommending, sanctioning and even prescribing standards for South Africa's constitutional future.

If the negotiators are successful in emerging with a document or representative symbol, the meaning and relevance of that symbol or myth will doubtless be shaped, nurtured and defined in ways that are reminiscent of the difficulties that characterize our own volatile experience with constitutional law. There will always be hard issues of constitutional governance that require responses. In South Africa some of the hard issues have been dwelt upon. The core idea of constitutionalism of the Afrikaner remains very much the idea that constitutionalism must be group dominated. In extreme form this suggests that individual identity has no constitutional relevance apart from group identity. The theory assumes that the group is the basis of all social organization and especially of power relations in society. On the other hand the popular appeal of majority rule with a weak commitment to individual rights serves only to erode the credibility of democracy when individual rights are sacrificed at the alter of majority rule.

A heavy focus of constitutionalism on individual rights makes assumptions that the principle of autonomy is both psychologically and normatively appropriate—individual autonomy in extreme form being independent of group identity. While the notion of individual autonomy is attractive, it is sometimes seen as denying the social reality that the individual's relation to the community involves complex levels of interdependence and in-

76. *See* Llwellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); *see also* M. MCDOUGAL, THE APPLICATION OF CONSTITUTIVE PRESCRIPTIONS: AN ADDENDUM TO JUSTICE CARDOZO 15 (1978).

terdetermination. A more sophisticated approach to the problem of the individual and the group observes that in fact individuals have multiple lives and multiple identities in society with myriad groups and alignments. Indeed, it is part of the genius of the ideology of social democracy to underline the fact that human beings can have multiple group lives and identities within and across group lines and that these identities co-exist simultaneously. Hence, the same person could be:

Individual Identity	*Group Identity*
artist	artistic guild
wife) husband) child)	member of family, kinship unit
voter	party member
parishioner	church affiliation
university graduate	alumnis
worker	trade union
lawyer	bar association
doctor	medical association
etc.	

For this reason I suspect that the concern for the protection of minority group rights must start with the individual's right to associate, and second any consideration of the bewildering forms of association that individuals experience and which impact on their systems of identity should indicate that while race and ethnicity are important they are not exclusive indicators of identity.

One of the most effective ways to protect minority rights is to protect individual rights. The protection of individual rights in the political, economic, cultural and social spheres, insures the freedom to participate and to associate as are compatible with the like rights of others. In other words, the core principal of human dignity implied in maximizing the freedom of choice, the fairness of social and economic equity, is the principle of mutual, reciprocal respect. The key to the protection of the minority from the tyranny of the majority is to put core civil and political, some cultural and economic rights beyond the reach of ephemeral majorities and guarantee them as core individual rights. This framework is the one that more than any other, we know of as the

grantor of minority rights—the right to be different, diverse—plural if you will. In short, respect for the known human rights agenda provides the most legitimate and probably in the long term, the best known paradigm of law and politics for the protection of minority group rights.

The philosophic question of the constitutional future of South Africa therefore leaves open many questions about an ancient but persistent problem: the dualism between the individual identity and the collective identity. After 300 years of unremitting darkness in a very long tunnel, there are glimmers of hope that the tunnel may have an exit, and that the exit is within reach. At present a few candles have been lit to permit the travellers to catch a faint glimpse of who they are, and why they are there. At least as we say in Amnesty, they have lit candles to point the way forward rather than incessantly cursing the darkness.