

## Civil Rights in Southern Africa: the Prospect for the Future

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## Commentary

### CIVIL RIGHTS IN SOUTHERN AFRICA: THE PROSPECT FOR THE FUTURE\*

SYDNEY KENTRIDGE\*\*

The future of Southern Africa is a dark and difficult subject. I have taken as the title for this lecture one relatively narrow aspect of it. What I intend to discuss is the prospect for the recognition and legal protection of civil rights. But in doing so I can hardly avoid some consideration of the political future of Southern Africa. One seldom does that without acquiring strong political opinions or prejudices. These will doubtless emerge. But I hope that they will be modified by a lawyer's objectivity and a present distance of 6,000 miles. I shall speak principally of the Republic of South Africa, where I have lived for most of my life, but I shall refer to other countries, especially Zimbabwe, where they provide comparisons or indicate what possibly might lie ahead.

The term "civil rights" is itself full of problems. Are the right to work and to freedom from poverty civil rights which should be legally protected? In the United States, Professor Charles Black has forcefully argued that the pursuit of happiness is a constitutionally protected right to a reasonable livelihood. I shall not enter into those realms. First things first, especially in Southern Africa. What I have in mind are rights which most of us would, without precise definition, accept as fundamental rights. These rights would include: the right not to be imprisoned, save after conviction on a

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\* The John Galway Foster Lecture was delivered to a group of judges, lawyers, and members of the general public on November 4, 1986, at the University College in London, England. The lecture took its name from a celebrated English lawyer who had a strong and early interest in the protection of human rights.

\*\* Mr. Kentridge is a leading Advocate in South Africa. He is also a Bencher of Lincoln's Inn in London and a practicing member of the English Bar. He has taught at Harvard Law School as a Visiting Scholar and has been published in several prominent journals. Because of the pressing demands of Mr. Kentridge's schedule, he was unable to provide annotations for his lecture. Nevertheless, the *Maryland Law Review* believes that his lecture represents a substantial contribution to the symposium as a complement to American constitutional thought. We are, therefore, privileged to publish Mr. Kentridge's lecture in its original form. The author gratefully acknowledges his indebtedness to the learning and insight of Professor Jack Spence of the University of Leicester, England.

defined charge and a fair trial; the right not to be inhumanly treated; the right not to be legally discriminated against on the grounds of colour or race; the right of free movement; the right to private property; freedom of speech; and the right to some form of representation in the government of one's country. For a large part of the population of the Republic of South Africa some of these rights do not exist at all, while others exist only in attenuated form. I take it as self-evident that respect for these rights, in the largest measure compatible with life in an organised society, is desirable. I know, of course, that this proposition is not really self-evident. But it is my starting point, and I shall assume that it is yours.

The protection of these rights by law does not necessarily depend upon constitutional entrenchment. The rights which I have mentioned have in some measure been protected in this country by the common law as applied by the courts. This is true of South Africa too. But in South Africa, as in the United Kingdom, the arguments for a constitutional bill of rights are gathering force. In South Africa the arguments have perhaps a sharper edge. For example, the question of whether whipping should be prohibited as a cruel and inhuman practice arises from circumstances more acute than the imposition of correction on a schoolboy by a school teacher.

When one talks of a foreign legal system, particularly in the field of civil rights, it may be understood as an exercise in comparative law. The experience of Southern Africa may indirectly tell you something about the need for a bill of rights in the United Kingdom or about what one should or should not reasonably expect a bill of rights to achieve. I undertake not to add to the debate on these matters. All that I shall allow myself to say, as a relative newcomer to the legal profession in this country, is that I find it strange that when issues of fundamental human rights do arise for decision by a court, you prefer to have them decided in Strasbourg.

It may seem surprising that the first John Foster lecture should deal with an area of the world which, in the field of civil rights, may be classed as underdeveloped. It is not for me to ask why I was invited to give this lecture, but there are, objectively, good reasons why South Africa is so often in the forefront of discussions on civil rights. It is not merely because of the historical connections between this country and South Africa, nor even this country's responsibility for having launched the Union of South Africa in 1910. The interest in South Africa is international and cuts across all conventional divisions of the east and west or north and south. "Why

should this be?" is the question so often and so plaintively asked in South Africa. I shall try to give a brief answer.

Human rights have become a major subject of international concern only since the end of the Second World War. This can be verified by a glance at the earlier editions of any of the standard textbooks on international law. Even the 1953 edition of Briggs' *Cases and Materials on International Law* has scarcely a mention of human rights, and then only in relation to the treatment of aliens. The change no doubt arose from the revulsion against the horrors perpetrated by the Nazis in Europe. It derived also, I believe, from the wartime experiences of colonial territories.

The Charter of the United Nations states that the observance of fundamental rights and freedoms is one of the objects of the organisation. In 1948 the members of the United Nations were called upon to express their commitment to human rights by approving the Universal Declaration of Human Rights. This Declaration was followed by the European Convention on Human Rights and since then by many other international instruments. These declarations cover a wide range of rights. But in the post-war world the one human right which has internationally become the dominating right is the right to freedom from racial discrimination and, in particular, from discrimination on the grounds of colour. It was not always so. After the Great War the Covenant of the League of Nations required religious equality to be observed in the Mandated Territories. Japan, an ally in good standing at that time, proposed a clause providing also for racial equality. The Japanese proposal was contemptuously brushed aside. Article 55 of the United Nations Charter and article 2 of the Universal Declaration embody what was refused in 1919.

South Africa has stood alone in refusing to accept racial equality as a fundamental right. I do not for a moment mean that racial discrimination is practised only in South Africa. For all I know, there may be worse forms of it elsewhere. But South Africa is peculiar in that discrimination on the ground of race in both private and public life has been not only legally permissible but legislatively imposed. Notwithstanding recent reforms, that is so even today. Only a few weeks ago President Botha repeated that residential segregation, school segregation, and the exclusion of blacks from the central political process were not negotiable. And that is the core of apartheid.

South Africa was a founding member of the United Nations—General Smuts was one of the draftsmen of the Charter. But the

Nationalist government which came into power in 1948 refused to adhere to the Universal Declaration—joined as well by Saudi Arabia and the Soviet Union and its satellites. One may see in this refusal a refreshing absence of hypocrisy, especially when one recalls some of the countries that did adhere to the Universal Declaration. But, commendable as it may be to abstain from hypocrisy, it did not save South Africa from incurring a special opprobrium, intensified further by the fact that the people discriminated against in South Africa were and are still a voteless majority ruled by a minority of another race and colour.

There is another factor too. The black population of South Africa has not exactly acquiesced in its subservient status. Consequently, in order to maintain the status quo, it has been necessary for the South African government to assume powers of a type regarded as extraordinary in Western countries. These powers include the power to ban political organisations, the power to place individuals under house arrest, and, above all, the power to detain persons for the purpose of interrogation, without judicial warrant, without limit of time, and without the right of access to a lawyer or anyone else. In an exchange of letters with one of her own backbenchers in 1983, Mrs. Thatcher summed up the current state of South African affairs by saying that “South Africa, by its institutionalised separation of the races, and the repressive measures used to enforce this policy, is a unique case, and one which arouses particular emotion in the international community.”

There is another aspect of South Africa which is of peculiar interest. It is the paradox of the co-existence with discrimination and repression of a large degree of freedom of speech; of a press which, save in a state of emergency, is comparatively free and critical; and, above all, of an independent Supreme Court to which an individual may resort—not infrequently with success—for protection against state action. This is a paradox because the South African government, despite its complete parliamentary power and its lack of enthusiasm for any of these institutions, chooses to reluctantly tolerate them.

There are historical reasons for this degree of toleration which are too complex to examine here. But it undoubtedly owes much to the desire of the South African government to be seen as part of the Western World. This desire also accounts for that “double standard” of which the South African government so often complains. Why pick on South Africa in a world which includes (to take a random choice among the lesser powers) Uganda, Chile, and Poland?

A trenchant answer was given by Mrs. Thatcher: "Since the South Africans assert that they belong to the Western World, they must be expected to be judged by Western standards."

Let me at this point say a word about the South African legal system. The following applies not only to the Republic of South Africa, but to Zimbabwe and the other surrounding states of Botswana, Lesotho, and Swaziland. In these countries two great systems of law are found, both of which place a high value on the liberty of the individual. The common law of these countries is the Roman-Dutch law. It is not always understood that equality under the law is one of the fundamental precepts of that system. After the Dutch, the British brought with them to Southern Africa the inestimable benefit of English civil and criminal procedure, including the basic concept of a fair trial. An independent judiciary also came from Britain. As early as 1832 in the Cape Colony, judges were appointed to hold office *quamdiu se bene gesserit* (during good behaviour) and not merely *durante bene placito* (at the King's pleasure).

Under these two systems of law the courts have often been able to protect individuals, both black and white, against the excesses of executive power. The need to do so, I may add, was there long before the present South African government came to power. How did the courts accomplish this in the absence of a bill of rights? They did it much as the courts have done it in England—by scrutinising the exercise of power to ensure that it was within statutory or prerogative authority; by a narrow construction of statutes impairing the liberty of the subject; by a presumption of equality before the law; and by applying the rules of natural justice, in particular, the maxim *audi alteram partem* (hear both sides).

In 1879 a great case came before the Cape Supreme Court. There had been an uprising of the Griquas in territory bordering the eastern Cape Colony, which had been annexed by Britain. Two captured Griquas had been brought to Cape Town, ostensibly as prisoners of war. They were held in a military prison without warrant and on no criminal charge. Sir Henry de Villiers, Chief Justice, issued a writ of habeas corpus and on the return day ordered their release. The Crown had argued that the prisoners were dangerous, and the country was in an unsettled state. But Sir Henry de Villiers said:

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 . . . . The Civil Courts have

but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences which ensue.

These words have often been quoted in South African courts, and sometimes they have been applied. They have been especially apposite in 1985 and 1986 when, notwithstanding the enormous powers vested in the executive under the statutory states of emergency, there have been numerous cases in which the courts, by applying common-law principles and well-known canons of statutory interpretation, have been able to order the release of detained persons or to set aside emergency regulations as *ultra vires*.

These are all good examples of the protection of civil rights, notwithstanding the absence of a bill of rights. But that, of course, is not the whole story. The grounds on which executive acts or regulations can be invalidated are limited. In South Africa, as in other countries, there are some judges who are, in Lord Atkin's phrase, "more executive-minded than the executive," or those for whom "state security" are the magic words which close all doors.

There is also that other part of the British legacy, namely, the supremacy of Parliament—which is to say the supremacy of the majority party in Parliament. Since 1948 the government has not hesitated to use its parliamentary power to reverse inconvenient decisions of the courts, particularly those decisions which have struck down racially discriminatory measures. For example, in 1953 Parliament passed a statute known as the Reservation of Separate Amenities Act which provided that public premises or public vehicles could be racially segregated, and that there need be no damned nonsense about equality. It expressly stated that inequality of treatment was not a ground for invalidity. Finally, numerous statutes have, as direct reactions to court decisions, expressly excluded the rules of natural justice for purposes of detention, banning orders and other administrative actions.

This is surely enough to demonstrate that, as valuable as the judicial process has been, in the absence of an entrenched bill of rights the judiciary is an inadequate bulwark against a determined and immoderate government. What difference would a bill of rights have made in South Africa? It would have invalidated the laws permitting indefinite detention without trial and, at least, the grosser measures of discrimination in relation to education, residence, and employment. It would have prevented the forced deprivation of citizenship which followed the creation of the so-called independent homeland states for blacks. And it would surely have prevented the

cruellest manifestation of apartheid—the forcible removal of over four million people from their homes to distant and forlorn resettlement areas.

I have said “surely.” But this assumes, of course, a bill of rights that was not merely on the statute book, but was fully enforced by the courts and obeyed by the government. However, constitutions and bills of rights, like other statutes, are subject to changing modes of interpretation and, in particular, to changing concepts of constitutional purpose. The United States provides sufficient evidence of this reality.

This is far from denying the value of a bill of rights. It is simply a suggestion that one should not expect too much from even an entrenched bill of rights. Certainly, we should avoid the fallacy that freedom is necessarily broader and better protected in a country with a bill of rights than in a country without a bill of rights. The late Hedley Bull pointed out that while one could discuss human rights in both the moral sense and the legal sense, one should not overlook a third sense, namely, rights in the empirical sense, that is to say, “rights that we know from experience and observation to be observed and implemented.” I would add, “or not implemented, as the case may be.” In order to assess the real state of human rights in any particular country, one may get more enlightenment from the annals of Amnesty International than from the high-sounding professions of national constitutions. Theodore Roosevelt once said that there is a lot of law at the end of a nightstick. In South Africa one might say that there is a lot of law at the end of a *jambok*.

I referred earlier to a “determined and immoderate government.” In a unitary state, as distinct from a state with an elaborate federal structure, a government with enough at stake politically may find the means, whether parliamentary or extra-parliamentary, to overcome the limitations of an entrenched bill of rights. South Africa’s close neighbours of Botswana, Lesotho, and Swaziland obtained independence under a standard British post-colonial constitution, with elaborately entrenched provisions for the protection of parliamentary democracy and of individual rights. It stands firm in Botswana, but in both Swaziland and Lesotho the constitutions were simply done away with by the parties in power. South Africa itself, and what was once Southern Rhodesia, also provide instructive examples.

In the 1950s the South African government attempted to remove the entrenched political rights of the Coloured people of the Cape without the two-thirds majority of both Houses of Parliament



as required by the South Africa Act of 1909. This attempt was frustrated by the unanimous judgment of the Appellate Division of the Supreme Court. But both the entrenched provisions of the South Africa Act and the judgment of the Appellate Division were overcome by the expedient of packing not only the upper house (the Senate) but, to make doubly sure, the Appellate Division as well.

In Southern Rhodesia the story was different, but the outcome was similarly depressing. The Constitution of Southern Rhodesia of 1961 included an elaborate and entrenched bill of rights. The Unilateral Declaration of Independence in November 1965 was a bloodless coup. It was obviously and unashamedly unconstitutional. Two persons detained by the Smith regime challenged their detention on the ground of the illegality of Ian Smith's government and all its measures. The Rhodesian judges held office under the Constitution of Southern Rhodesia of 1961 and had taken oaths of allegiance to the Queen. Yet the Rhodesian Appellate Division, early in 1968, by a majority of four to one, "recognised" the Smith government as the *de facto* government of Rhodesia and held that its acts must be accorded validity. Only Justice Fieldsend dissented. He held, not surprisingly, but courageously in the circumstances, that the court appointed under the Constitution of Southern Rhodesia of 1961 could not recognise the existence of a rebel *de facto* government within the territory of its own jurisdiction. In the end all the Rhodesian judges but two went over to Mr. Smith and took office under his new constitution. The Privy Council entertained an appeal from the Rhodesian judgment and reversed it, but the Smith government refused to recognise the Privy Council. All in all, this was hardly a victory for the judicial protection of civil rights in Southern Africa, but I should perhaps disclose that I was the unsuccessful counsel before the Rhodesian courts.

This does not mean that the existence of entrenched constitutional protection is meaningless. In Rhodesia an early and firm reaction by the courts might have changed the unhappy course of that country's history. Certainly, the Smith government waited on the final judgment of the Rhodesian court before asserting what it regarded as the ultimate power of government, namely, the power to hang people. Justice Fieldsend said in his dissent in the *UDI* case:

Judges appointed to office under a written constitution, which provides certain fundamental laws and restricts the manner in which those laws can be altered, must not allow rights under that constitution to be violated. This is a lasting duty for so long as they hold office, whether the viola-

tion be by peaceful or revolutionary means. . . . Nothing can encourage instability more than for any revolutionary movement to know that, if it succeeds in snatching power, it will be entitled ipso facto to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality. It may be that the court's mere presence exercises some check on a usurper who prefers to avoid a confrontation with it.

So much for the past. What of the future? I have already indicated that I have no particular qualification for predicting the future course of events in South Africa, but that is not ordinarily a deterrent to prophecy. My own predictions, for what they are worth, are cautious enough. First, I do not see revolution around the corner. The South African government is powerful and is determined to maintain its rule by all necessary use of force. It will, I believe, remain in control for many years to come. But, secondly, the ever-increasing numbers, and the growing militancy and economic power of the black population, must, in due course, end the present state of affairs. The result will be the existence of a new form of government in which blacks will have a dominant position in accordance with their numbers, whether as a parliamentary majority or otherwise. My own guess is that this is likely to come about by the end of the century.

What are the prospects for the judicial protection of civil rights, both before and after the inevitable changeover? Self-evidently, the answer must depend on what happens in the interim. If there is a protracted civil war, South Africa, as a single political entity, might no longer exist. But I am optimistic enough to believe that, although it is unlikely that change will be entirely nonviolent, events in South Africa could well lead to a negotiated settlement. This settlement in turn will lead to a government with a black majority that will take the form of a constitutional government and not a mere dictatorship. This is a large conclusion. But I must add yet another large statement—the African National Congress is bound to have an important part in that government. This means, as I see it, that there is likely to be a strong, and possibly dominant, socialist element in a future South African government. What is this likely to mean in relation to civil rights?

First, some general observations. The civil rights which I have been discussing are rights that we usually think of in terms of the

individuals whose freedom they protect. This, on the whole, is the Western way of thinking about civil rights. It is not the only way. The Third World, especially in Africa, has perhaps concentrated more on the collective rights of peoples. The right of racial equality has been seen not so much as the right of an individual not to be discriminated against on the basis of his race, but rather as the right of a black population to be liberated as a people from colonialism or white rule. Protection from arbitrary executive action may in this context be thought of as attainable merely by throwing off the yoke of an unelected government, rather than by entrenching rights which are enforceable by the individual against an elected government. Further, many black political thinkers (and not merely Marxists) regard the major problems of South Africa to be poverty and economic inequality, and believe these problems could best be redressed not by a bill of rights, but by means of a redistribution of wealth, possibly in the form of a nationalisation of major industries. However unpromising that may seem as a route to economic prosperity, we would be wrong to ignore this view. It is a powerful element in black political thought in Southern Africa and, in view of the political and economic history of the region, it is a wholly understandable one.

These considerations help to explain why the current debate on a bill of rights for South Africa has taken what may seem to be a curious turn. Over the last fifteen or twenty years an increasing number of lawyers, and even some judges, have pointed out the need for a bill of rights in South Africa. This call was taken up by white opposition parties, other than those to the far right, and by some black leaders as well. It obtained no response at all from the government. This was not strange. Most of the government's cherished racial laws and many of its security laws could obviously not stand against any Western concept of a bill of rights. In 1978 a leading South African writer on the subject said that "both an entrenched bill of rights in a federal setting and the less powerful unentrenched Canadian-type bill of rights must appear a Utopian dream to South African libertarians at this time." The South African public, he said, required education on the advantages of a bill of rights.

Since then the South African public has indeed had an education, although not an academic one. What has educated it has been the manifest and disastrous failure of the government's racial legislation and of its security legislation as well. There is the growing realisation that apartheid has brought only violence and economic

decline, that unbridled police powers not only do not bring peace but are self-defeating because of the resentment that they create among those subject to them.

So, the call for a bill of rights has broadened. It now comes even from academics at Afrikaans language universities (hitherto not in the forefront of the fight for civil rights) and from newspapers which support the government. Justice Kotze, a recently retired judge of the Appellate Division, said at a congress in Pretoria this year that the security legislation of the country had done irreparable damage. Pardonably exaggerating, he said he believed that every member of the Bench regretted that there was so strong a tendency to give executive authorities unbridled discretion to assail human rights. The answer, he said, lay in the granting of power to the country's highest court to test contraventions of human rights.

Now the government itself has begun to take notice. In April of 1986, the South African Minister of Justice instructed the South African Law Commission to investigate the desirability of the introduction of a bill of rights and the protection of group rights. In September at the Transvaal Congress of the Nationalist Party, the Minister of Justice said of the introduction of a bill of rights that "the question was not when, but how." But he added that human rights are to be dealt with "not on a universal basis in every respect . . . but also against the socio-economic background that prevails in a particular country"—words which one is ordinarily more accustomed to hearing from thinkers rather more to the left than Mr. Coetsee.

His speech, if I may say so, was a sensible one—quite out of place at a Transvaal Congress of the Nationalist Party. But the new popularity of a bill of rights among sections of the white population has unfortunately produced a negative reaction from some black leaders. They interpret this belated concern with a bill of rights as the reaction of a governing group which sees that its time is running out and wants a bill of rights to protect its existing privileges. There is also a feeling that the new interest in a bill of rights places undue emphasis on the protection of property—which in practical terms means the property of whites.

Why, many blacks ask, this sudden enthusiasm for the legal protection of minority rights when, over all the years, the rights of the majority have had little protection from the law. It is not easy to answer this pointed question. But I do not believe that these suspicions are to be equated with a firm rejection of a bill of rights. Although we may be years from real negotiation, most political

forces in South Africa (including the African National Congress) speak in terms of an ultimate negotiated settlement albeit, naturally enough, subject to differing conditions precedent. If an entrenched bill of rights would make majority rule more palatable to minorities, it may well have to be accepted by the majority.

This may sound foolishly sanguine. But there is good reason to believe that the African National Congress, notwithstanding the Marxist element in its ranks, does not exclude a bill of rights from its thinking. Possibly the most important single document in black political history in South Africa is a document called the Freedom Charter. It was adopted by the African National Congress in 1955 and is now supported by many black political groups inside the country. It is a document based largely on the Universal Declaration of Human Rights with the admixture of some basic socialist prescriptions. Among the latter is the statement that "the mineral wealth beneath the soil, the banks and monopoly industry, shall be transferred to the ownership of the people as a whole." On the other hand, it also states that "[a]ll people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions." In part the Freedom Charter expresses what can only be called general aspirations. For example, it demands that "[r]ent and prices shall be lowered, food plentiful and no one shall go hungry." Among the provisions which would not be out of place in a constitutional bill of rights are others such as these:

Every man and woman shall have the right to vote for and stand as candidate for all bodies which make laws; the rights of the people shall be the same regardless of race, colour or sex. No one shall be imprisoned, deported or restricted without fair trial. No one shall be condemned by the order of any government official. The privacy of the house from police raids shall be protected by law.

This is not a sophisticated document, but it is not one to be ignored or despised. The clauses about nationalisation should certainly be taken seriously. A writer who does not speak for the African National Congress but who, I believe, shares a lot of its thinking has recently written in favour of a bill of rights in a democratic (*i.e.*, in his terms a black-ruled) South African state. But this is what he had to say about the right of property:

What would be quite inappropriate for a bill of rights [in South Africa] would be a property clause which had the effect of ensuring that 87% of land and 95% of the productive capacity of the country continued to remain in the

hands of the white minority. It is one thing to have a guaranteed right to personal property. . . . It is quite another to say that one should have a constitutional right to own a gold mine or a farm of 100,000 hectares.

I suspect that a black government of South Africa is likely to think very much on these lines, although it may be influenced by the examples of Zimbabwe and Mozambique, which show that even governments with strong socialist pretensions are compelled to recognise the value of private enterprise and to seek Western aid and investment.

Allowing for all its deficiencies, the growth of support for the Freedom Charter seems to me a good augury. Of course, it may be that its professions are no more than the easy promises of a party in opposition. It may be that, if that party did come to power, the promises will be forgotten. Or they might be incorporated in a constitution with no machinery to make them effective. Or they may be so hedged with exceptions as to be valueless. Perhaps at this stage it would be useful to look at the experience of Zimbabwe.

It is common in South Africa for politicians to point to Zimbabwe as either a dreadful or a shining example of what a black-ruled South Africa might be like. In Zimbabwe whites have no political power, but, as a group, their lives and property are secure. This is not so because of Zimbabwe's bill of rights, but because such is the policy of Mr. Mugabe's government. The Constitution of Zimbabwe, which was founded upon a negotiated political and military settlement, includes a comprehensive declaration of rights on the standard British post-colonial model. It protects personal liberty, freedom of speech, the right to trial by due process of law, and rights of private property. It also, however, contains the common exception found in these constitutions—that in periods of public emergency certain rights, including the right to freedom from arbitrary arrest, may be suspended.

This provision has enabled Mr. Mugabe's government simply to take over and renew Mr. Smith's emergency regulations. The state of emergency declared by Mr. Smith in 1965, shortly before UDI, has been regularly renewed every six months, originally by Mr. Smith's Parliament and, since 1980, by Mr. Mugabe's Parliament. This means that the intervention of the courts with respect to persons held under preventive detention is possible only when the action taken by the state is in conflict with its own regulations or goes beyond the terms of the constitutional exception for states of public emergency. Within these limits the High Court and Supreme Court

of Zimbabwe have done what they could to protect individuals against abuses of power. In so doing, they have come under strong and intemperate attack by individual Zimbabwe Cabinet ministers. Yet, Mr. Mugabe has distanced himself from these criticisms and has shown a commitment to the independence of the judiciary. In particular, the three judges whom he has appointed in succession to the office of Chief Justice have all been men of great distinction and independence—Justice Fieldsend (who resigned from the High Court of Southern Rhodesia after UDI), Justice Telford Georges (now Chief Justice of the Bahamas), and the present Chief Justice, Justice Enoch Dumbutshena, the first black Zimbabwean to hold this office.

But notwithstanding the standards set by the judiciary, Zimbabwe is an example of the conflict between the legal and the empirical in the field of human rights. The exception for public emergencies does not derogate from section 15 of the Constitution, which provides that no person shall be subjected to torture or to inhuman or degrading punishment. Yet investigation by, among others, Amnesty International and the American Lawyers' Committee on Human Rights (neither of which organisations is unsympathetic to Zimbabwe) shows that assault upon and torture of detainees by the security police are rife. The fact that the practices described in their reports were inherited from the previous regime is hardly an excuse. In practice the treatment of political detainees in Zimbabwe, a country with a bill of rights, is not very different from the treatment of political detainees in South Africa, a country with no bill of rights. If I may speak from my professional experience, as well as from the study of other evidence, I would say that for sheer nastiness there is little to choose between the security police of the two countries.

Once again, this raises the question of whether a bill of rights is of any real value in the face of a government of autocratic tendencies which believes, rightly or wrongly, that it is faced with a state of emergency. I should say that the experience of Zimbabwe is yet another lesson that one must not expect too much from a bill of rights. But a reading of the Zimbabwe Law Reports shows that a bill of rights is by no means futile. Let me take one recent example. An attorney who was taking photographs of the scene of an accident involving his client was arrested by members of the Central Intelligence Organisation on suspicion of a breach of the Official Secrets Act. He alleged that he had been assaulted and sued for damages. One of the emergency regulations in Zimbabwe provides for indem-

nity to any member of the security forces with respect to anything done in good faith for the purposes of the preservation of the security of Zimbabwe. The regulation further empowers the responsible minister to issue a certificate to that effect. Such a certificate is *prima facie* proof of what it says. In this case, the minister issued just such a certificate. But five justices of the Supreme Court held that insofar as the regulation left the question of good faith to the subjective determination of the minister, it was unconstitutional and invalid. The certificate was therefore a nullity and the case could proceed on its merits.

The Zimbabwe example contrasted with a similar case which arose in South West Africa, a territory still subject to the laws of the Republic of South Africa. Under the South African Defence Act any proceeding, whether civil or criminal, instituted against a member of the South African Defence Force is barred if the State President issues a certificate stating that in his opinion the defendant had acted in good faith for the purpose of the prevention of terrorism. Earlier this year, the Attorney General of South West Africa saw fit to indict four members of the South West African Territorial Defence Force on charges of murder. They were alleged to have beaten and kicked their victim to death. The State President, Mr. Botha, caused the requisite certificate to be issued, whereupon the criminal prosecution lapsed and the accused persons went free. Unlike the Zimbabwe case, there was no bill of rights against which the certificate could be tested.

One must add, however, that according to the reports of the organisations I have referred to, it sometimes happens that judgments against the Zimbabwe government are simply ignored. Indeed, the Zimbabwean Minister of Justice recently said openly that it was "an impossible dream" for the state to abide by all judgments. It was for the state to decide which judgments it would abide by. No such thing has happened in the Republic of South Africa.

The example of Zimbabwe, if I may sum up, shows that a bill of rights in such a society is not a dead letter. As long as there is an independent judiciary, it gives a protection which would not otherwise be available. But in the face of a government which shows no great commitment to individual liberty in its executive actions a bill of rights is no guarantee for freedom and justice.

Mr. Mugabe has recently announced that the Roman-Dutch criminal law, which he sees as a link with the system of apartheid, is to be supplanted by a socialist system of penal law which will "replace punishment with rehabilitation and reorientation," not only of



criminals but also, in his reported words, "of other social deviants." What this will mean in practice and how it is to co-exist with the Declaration of Rights can at present only be a matter for more or less gloomy speculation.

What does this tell us of the prospects for the Republic of South Africa? On the negative side, even if there were a bill of rights, it would be easy enough for a new government, under colour of a real or imagined emergency, simply to apply existing security legislation against its opponents. There are, however, reasons why one may not unrealistically hope for something better.

In the first place, as I have pointed out, the Freedom Charter gives ground for believing that respect for individual rights has some place in the policies of the black opposition. Secondly, the varied racial and social elements in South Africa make it unlikely that in any future constitutional arrangement any one group would be able to take over the monopoly of power which the present South African government enjoys. There is no group in South Africa which has the same dominant position as the Shona-speaking people of Zimbabwe, who make up about three-quarters of that country's population. Whereas Zimbabwe's white population was never above a quarter of a million, which is less than five percent of the total Zimbabwean population, South Africa's whites are between four and five million, or about fifteen percent of the total South African population. There are also the considerable Coloured and Asian communities. As far as I know, no major black opposition group in South Africa seeks the exclusion of these millions of citizens from the political process. Finally, the tribal divisions among the black population itself, although much exaggerated by the South African government, are not without significance.

Above all, the conflict is one which both sides must ultimately realise cannot be won outright. A military victory against the formidable South African armed forces by black insurgents or a successful violent revolution in the near future are hardly realistic possibilities. But the government's policy of "pacification" by a mixture of force and peripheral reforms is just as unlikely to succeed. If the conflict is to continue unresolved, the prospect is thus one of limited but ceaseless violence against the forces of the state and, eventually, the white population. This violence will be reinforced by industrial action and internal boycotts, and will in turn be met by repression of an increasingly violent and unpleasant nature—repression which will have only temporary and local success. This process is likely to entail a lengthening of the present two-year period of conscription

for all young white men, many of whom are already unhappy about serving in what they see as the defence of apartheid. In addition, the violence and the unrest would be accompanied by foreign divestment on both economic and political grounds, leading to a decline in the economy and the quality of life for nearly everyone. This prospect, however appalling, is not likely to lead either side to an unconditional surrender. Reason therefore suggests that both sides can be convinced that a negotiated settlement is preferable to an endless conflict. A negotiated settlement would rationally include an agreed upon constitutional structure containing some restraint on absolute parliamentary or executive power.

This optimistic vision may prove to be entirely wrong. It may be argued that the path of rationality is not obvious. Young black militants have introduced two new and fearful terms into South Africa's political vocabulary: the "necklace" and the bomb in the crowded shopping centre, killing both blacks and whites, are regarded as legitimate revolutionary operations. On the other side, the police resort to tactics of terror—the whip and the shotgun are used against black children without discernible compunction. Some black leaders talk as though victory were around the corner. On the other side, the government, while disavowing the word "apartheid," clings to its essential doctrines and practices. Those on the right of the government wish to go back to the pure doctrine of apartheid as practiced by Dr. Verwoerd. One is tempted to say, both of the government and of the right wing, what Gibbon said of another people, that they "yield a stronger and more ready assent to the traditions of their remote ancestors than to the evidence of their own senses."

Notwithstanding the foregoing, I believe that South Africa still has time in hand. Although there is already endemic unrest in South Africa, with horrifying violence on both sides, this violence is well short of civil war. Moreover, a significant number of whites, including influential members of the business community and others who were previously at least tacit supporters of the government, are joining with blacks in calling not merely for reform but for the complete dismantling of apartheid, as well as the recognition of and negotiation with the African National Congress. They accept what only a few years ago would have been unthinkable, namely, the extension of political rights to blacks on a one person, one vote basis. If the time left is not to be squandered, I have no doubt that one of the most positive acts which the South African government can be urged to do is to enact at once an effective bill of rights.

By an effective bill of rights I mean a statute which would pro-

vide a real restraint on arbitrary executive action; which would preclude indefinite detention without trial; which would prevent forced removals of communities; which would undo bans on political organisations and individuals, so as to allow them to carry on open political activity; and which would dismantle apartheid by making discrimination on the grounds of race or colour actually illegal. Why, it may be asked, should this statute be enacted at this late stage?

I have spoken of the government of Zimbabwe as a government with no real commitment to the protection of individual rights. The same is still basically true of the South African government, notwithstanding its new openness to a bill of rights. Why should any future South African government have a greater commitment? If individual rights are to be protected, it is the people of the country who must feel that commitment. That commitment may come, I believe, from the experience of a bill of rights in effective operation. In its report on Zimbabwe, the American Lawyers' Committee for Human Rights quotes a Zimbabwean lawyer of long experience who spoke of the operation of law in Southern Rhodesia under the Rhodesian Front government. He said: "Most blacks grew up thinking the law was the enemy. It never occurred to them to seek redress of their grievances in the courts. It was absurd. They knew it would be fruitless, that the deck was always stacked against them."

The attitude of the black population concerning the law in South Africa is, in my experience, very similar. The instances of judicial protection of individual rights which I have given are not representative of a black person's experience of the law in South Africa. In general, a black person in South Africa is on the receiving end of the law. His ordinary experience of the operation of the innumerable apartheid laws and regulations has taught him that the process of law is merely an instrument of government, there to enforce the dictates of apartheid. If South Africa is to have a government of laws in the future, whatever time is left must be used to ensure that the popular perception of law changes radically—that it is seen as a protector of the individual, especially the black individual.

This brings me back to the factor of international concern. Over the past twenty or twenty-five years international law and practise have rapidly developed in the direction of recognising the right of the international community to intervene, by any means short of force, to prevent or redress domestic violations of human rights. The existence of the system of apartheid has been central to this

departure from the traditional concept of a domestic jurisdiction beyond the reach of international law.

The Declaration on Non-Intervention of the General Assembly of the United Nations in 1965 proclaimed that every state has "an inalienable right to choose its political, economic, social and cultural systems without interference in any form by another state." But even this inalienable right is overridden by the superior principle, stated in the same Declaration, that "[a]ll states should contribute to the complete elimination of racial discrimination in all its forms and manifestations." In the early 1950s states such as Sweden took the position, in relation to the issue of apartheid, that the United Nations Assembly had no right to request alterations in the domestic laws of a member state. The United Kingdom's view at that time was that the Assembly was not entitled even to discuss the matter.

Now, in 1986, most Western countries consider it legitimate, and indeed a matter of duty, not only to express strong views on apartheid but to assist in bringing it down. Even the governments of the United Kingdom and the United States, which in this sphere prefer restraint to radicalism, have adopted economic measures to that end. In her first address to the United Nations the President of the Philippines, Mrs. Aquino, felt it right to speak of the need for all members to play their part in bringing about change in South Africa. Those governments who do not favour economic sanctions against South Africa are not necessarily opposed to other forms of intervention. As Sir Geoffrey Howe has explained, the dispute is one of method—what is the most effective way of bringing about the ending of apartheid? This attitude assumes that the ending of apartheid will be a good in itself. That is surely right. The wickedness and cruelty of that system are incapable of any defence.

But one hopes that the effort of ending apartheid would be rewarded by the emergence of a society in which basic civil rights are respected and enforced. I would say that the best contribution which Western governments could make to this long-term objective is to persuade the South African government, by all appropriate means, to adopt a genuine and effective bill of rights now.

I am conscious that underlying everything that I have said is an acceptance of the Western view of civil and human rights. Hedley Bull, whom I have already quoted, has said that there is a tendency in Western countries to believe that the human rights problem is essentially the problem of how Western countries are to use their influence to bring the socialist countries and the countries of the Third World into line on human rights. He said, perhaps somewhat

scornfully, that the public appeal of human rights as an object of a foreign policy derives in large measure from the belief that the guardianship of human rights in the world is the special vocation of the Western countries. But that seems to me an entirely admirable vocation. It is surely right that Western countries, if their professions are sincere, should use what influence and power they have to persuade other countries of the value of these rights and to induce them to recognise and protect them. In the case of South Africa the Western nations have a real opportunity to do so. I hope that they will not let it go by default.