LAW, JUSTICE AND SOCIETY

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LAW, JUSTICE AND SOCIETY

Editor
Peter Randall

REPORT OF THE LEGAL COMMISSION
OF THE STUDY PROJECT ON CHRISTIANITY
IN APARTHEID SOCIETY

JOHANNESBURG 1972

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ABBREVIATIONS

GG	Government Gazette
SA	South African Law Reports
SALJ	South African Law Journal
THR-HR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg.

INTRODUCTION

THE SPRO-CAS Legal Commission was one of six study commissions established under the sponsorship of the South African Council of Churches and the Christian Institute of Southern Africa in mid-1969 to examine South African society, its laws and its institutions in the light of Christian principles, as expressed in the Message to the People of South Africa. The other fields of study were politics, education, society, economics and the church.

Members of the Commission prepared background papers on a number of subjects dealing with the effect of apartheid on the South African legal system and profession and these papers were considered by a full meeting of the Commission in Johannesburg in May 1970.

Recommendations and suggestions were made to the authors of the background papers at this meeting and a number of papers were consequently revised in accordance with these comments. Originally it was planned to revise and edit these papers until they reflected the consensus of the full Commission. Later, however, it was decided that the quality of the papers might suffer if this course were adopted. Consequently it was agreed that the papers should be published under the names of the individual authors in a collection of essays, prefaced with a joint statement endorsed by all the members of the Commission.

These essays are directed at the public in general, and the legal profession in particular. Their common theme is the debasing effect apartheid has upon the law, the courts, the legal profession and the officers of the law. They are concerned not with the detailed description and analysis of legal rules, as is customary with law journal articles, but with the operation of law in society and with law as order designed to reflect the values of a supposedly Christian

society. Their aim is to create an awareness on the part of the legal profession and lay public of the incompatibility of apartheid's legal order with the ethical principles upon which Western legal systems are based.

Several papers make detailed recommendations concerning desirable reforms to the constitution, the courts, administrative tribunals and the police force. Others seek to show how desirable changes might be implemented. Generally, however, the essays concentrate on a restatement of the traditional values upon which our legal order is based and on a discussion of deviant laws and practices. The law is essentially a mechanism and procedure for giving effect to the values of a society. While the other Spro-cas Commissions have enunciated detailed reforms which they regard as desirable for a just society in South Africa, the essays in this volume are concerned mainly with the quality of the existing legal order and the type of legal order which would be required to implement the proposals made by the other Commissions.

Johannesburg
1 November 1972.

John Dugard,
Secretary of the Commission.

Peter Randall,
Director of Spro-cas.

Chapter One

STATEMENT BY THE MEMBERS OF THE COMMISSION

THE SOUTH AFRICAN common law consists of a blend of principles of Roman-Dutch law, developed by the jurists of Rome and Europe and the courts and jurists of the Netherlands during the seventeenth and eighteenth centuries, and principles of the English common law which have been absorbed into the Roman-Dutch system. It is not merely a product of the legal genius of Rome and the Netherlands and the experience of the English law: it is also the product of Judaeo-Christian philosophy, the legal manifestation of Western Christian civilisation. The South African common law reflects the ethical values of Western society in its detailed body of laws and customs, promoting, through the instrument of the law, respect for the individual - his liberty, life, family and basic freedoms - and equality before the law.

The 'law of apartheid' is not part of the fabric of the common law, but is a creature of statute. It consists of a host of legislative enactments of a sovereign Parliament, most (but certainly not all) of which have been passed since 1948 when the National Party government came into office. Apartheid legislation inevitably undermines the twin foundations of the common law, respect for the individual and equality before the law, in pursuit of its ideology of racial separation. The extent to which this occurs is discussed in detail in the accompanying essays.

Equality before the law is negated by those laws which fix the social, economic, political and educational status of the individual in society and allocate rights and obligations according to race. Claims that this legislation separates races on the basis of equality and thereby eliminates friction and discontent are shown to be false by a detailed study of these laws and their im-

plementation. Similarly, claims that the aim is to provide opportunities for each race to develop its full potential are meaningless unless there is an urgent acceleration of the opportunities for individuals of all races to participate to the full in the legislative, administrative and judicial processes of the country.

The rights of the individual to personal liberty, family life, freedom of movement, speech and association have also suffered through apartheid legislation. Moreover, in order to entrench the status quo, the legislature has enacted a number of so-called security laws which, in permitting the police to detain a person indefinitely without trial, build upon an authoritarian legal tradition quite foreign to modern western societies.

The members of the legal commission whose individual views are expressed in the accompanying essays would urge all those who cherish our Christian-Western legal heritage, to guard against and oppose any undermining and erosion of this heritage.

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Chapter Two

THE IMAGE OF THE LAW IN THE MINDS OF WHITE SOUTH AFRICANS

J.F. Coaker

ANY ATTEMPT to define the image of the law in the minds of a section of the population is really guess-work unless it is the result of detailed research and investigation of a kind for which I do not possess the facilities. Hence my views of the effects upon that image of certain institutions are speculative and not established.

I suppose that a broad distinction can be drawn between the image of the law in well-educated minds, and that which probably exists in the less educated minds of the general mass of people.

But even to the educated lay person the law, in general, means the criminal law, and that twilight area where law merges with administrative discretion, concerning innumerable matters such as import permits, passports, reference books of servants, and the duty on whisky.

Educated persons do not generally have a high respect for the law; they tend to consider that it is so full of anomalies that it is demonstrably asinine, and that the various sorts of uncivil civil servants and jacks-in-office who have to administer most of the law with which they have contact, are all parts of a very creaky and clumsy machinery. Nevertheless, they retain an exaggerated respect for judges and the Supreme Court's workings, and tend to accept that only the guilty are charged, and that nobody is ever wrongly found guilty.

The most glaringly obvious accompaniments to the apartheid society in the field of law have been those enactments which have eroded individual freedom and personal rights, placing the citizen more and more at the mercy of the political party in office, and diminishing rights of protest, association, occupation, freedom of employment, freedom of movement, and many more.

The impact of these enactments over the years has depended largely upon the political convictions of the individuals concerned. I think the ordinary supporter of the government and of its policies has seen each step away from traditional Afrikaner independence and freedom as a necessary move, essential to solve the problem of the racial threat and to curb the 'foreign' elements tending to resist the apartheid solution to the problem. The need for a 'big brother' to protect the true interests of all the whites has been seen as a justification of strong-arm police methods, arbitrary bans and arrests and detentions, the liquidation by law of some political opposition, and the introduction of new offences and new machinery for 'security' which are wholly incompatible with the constitutional theory of a Western democracy, even one for 'whites only'.

And I think that the supporters of the government have hardly been aware of the impact of 'petty apartheid' upon the black citizens of the country. Even the educated supporters of apartheid regard much of this apparatus as 'traditional', and efforts to show them instances of families divided by law, of people 'endorsed out' of earning their living, of people 'endorsed out' of home and shelter, are regarded as agitation and unfair exaggeration of a few hard cases on the fringe of the apartheid eldorado.

A few of the best-educated and most humane supporters of the policy are concerned at the friction generated by 'petty apartheid', and at the high prison population caused by these laws; but they, like all of us, become in time hardened to facts of daily occurrence, and their attempts to secure improvements are usually short-lived and not very energetic.

The better-educated whites who are not supporters of the government or its policy on racial matters are largely, in the political sense, mere spectators. They are not actively engaged in political opposition, and they are content that society should continue to function to their economic benefit for as long as may be possible. This type of person is often quite indignant at instances of 'petty apartheid' which come to his notice, and has a vague desire that 'even the blacks should be treated as human beings'.

But as for the major legal instruments of apartheid, and the erosion of freedom by law, this class of whites has virtually attained the condition of being punch-drunk. They do not actively approve the rising authority of the organs of central government, nor the diminishing residual rights of the individual, but they tend to see this apparatus of the law as being designed for terrorists, communists, agitators and other special and dangerous people, and do not see any real danger to themselves. There was far more indignation, shock and dismay among such people over the early and fairly mild provisions of the Suppression of Communism Act in 1950 than there was at the far-reaching 90-day and 180-day lock-up laws, or the presumptions against the accused if he is charged with terrorism under the Terrorism Act 83 of 1967.

Their image of the law has moved far since 1948, and instead of being seen as a rather asinine but fair and equal system of justice, it is seen as a powerful machine for the prevention of rocking the boat, which is not exactly approved of, but which after all the government says it needs, and which arouses no special indignation.

A small number of highly articulate radicals, active political opponents of apartheid, constitutional theorists, clergy, lawyers and students is shocked by this legal apparatus, and sees the law now as a direct threat to the personal freedom and independence of conscience of everyone, but this view is not widely entertained even amongst educated whites.

Less educated and less privileged whites are probably more accustomed than their more fortunate fellows to regard the law as arbitrary and often unfair in its nature. They know it as a means of enforcing claims for rent, ejecting tenants who cannot pay, re-taking goods sold on hire-purchase, or taking away part of the wages of the defaulting debtor. The criminal courts, including judges of the supreme court, are probably seen with less awe and less belief in their infallibility, but the machinery of criminal justice is fairly highly regarded.

Among this group too the political bias of the beholder conditions his attitudes. Supporters of the government seem to see any criticism of the system as akin to blasphemy, and are ready to turn out and hurl eggs or bicycle chains at protesters. They seem easily affected by propaganda and rhetoric and the whole system of apartheid, with all its attendant consequences, is seen as the only way to hold down the kaffir in his place and to keep the koelie and the coloured respectful and submissive. The baasskap side of petty apartheid is seen as necessary and desirable, for without bullets and whippings and blows and cuffs the tenuous superiority purely based on colour tends to vanish into thin air.

Hence the laws which keep apartheid in force are readily accepted and praised, and the image of the law is very much than of a uniformed, armed protector of the status quo, backed by churchmen and cabinet ministers and editors, standing firm against terrorist impis, communist threats, liberalist lies and Anglican bishops.

People in this category who are not supporters of the government tend to fear the advancement of the blacks as a threat to their own standard of living, and tend to picture the apparatus of apartheid as a bulwark against that threat. They are not surprised or shocked at the existence or use of arbitrary and unchecked powers. They believe that the events in the Congo could be repeated here, were it not for a 'strong' government. They have always seen the law as somewhat arbitrary and oppressive, and they do not find it alarming that it should be so towards people whom they regard as a threat.

By and large, people who left the United Kingdom to come here did not do

so in search of religious or political freedom (unlike many who went to America) but in search of economic advancement. And in the main this is also true of settlers from other European countries, with the exception of the Huguenots. I think this is reflected in their attitudes, *inter alia,* to the law, as it is and as it should be.

It will be seen that I think it is a rarity in South Africa today to find a white person who believes that the law should be an equal protector to all people; that no person should be made to suffer any penalty without a fair and public trial; that no person should be deprived of liberty without due process of law, open to public scrutiny and to the equivalent of *habeas corpus* on the order of a court; and that the basic freedoms which are the norms of Western democratic states should be preserved by law and not ousted by law.

Even amongst those who think that this should be the proper image of the law, there are many who say that the South African state is virtually at war, beset by formidable enemies, and that the voice of law is silent amid the clash of arms. These see nothing sinister or wrong in the fact that it is not emergency or temporary powers that the government is assuming, but permanent changes in the law that are being put upon the statute-book, at session after parliamentary session.

The hallmarks of respected systems of law have usually been the incorruptibility of tribunals; equality before the law of rich and poor, noble and commoner, gentile and Jew, black and white; protection of personal freedom against arbitrary arrest and incarceration; protection of personal property against arbitrary imposts and exactions; judging the sovereign or monarch or government by the same rules and before the same tribunals as the private citizen, especially in any dispute between a private citizen and a department of state; and making law publicly known so that all can tell what they can safely do and what they must refrain from doing.

This was not true of the laws of antiquity, for the code of Hammurabi, the laws of Solon, the most enlightened laws of the Athenian high-watermark of civilization, the Twelve Tables of Rome and Byzantine codification of Roman law at its highest under Justinian all based society upon slavery, giving full legal protection only to non-slaves. But even in the legal systems of antiquity principles of justice, equality, and fairness were recognised as fundamental, though slaves were excluded from the full protection of those principles, albeit not without some protection.

In a study of the image of the law in the minds of people one should not forget that there were many highly regarded legal systems in which there was apartheid between the slave and the free.

This demonstrates how, by the use of a word, it is possible to close the human mind to any claim of rights or equality for people falling within the boundaries of that word.

The fact that slavery was respectably ensconced within the bounds of many legal systems of antiquity is no warrant for contending that any comparable degree of inequality is tolerable in the modern world.

After the French Revolution, after the American Civil War, and after the anti-slavery movement in Britain, headed by Bishop Wilberforce, and the immense expenditures and efforts put forth by the British for the suppression of the slave-trade, there is no room in any respectable legal or social system for any equivalent institution, however carefully veiled. Hence the apartheid legislation is carefully framed in terms of separateness and not of subjection, for not even its intellectual advocates can stomach the idea of a new slavery.

Although the new laws which protect and embody apartheid in our society have no overt content amounting to slavery, they diverge widely from the ordinary norms of free Western democracies, and they create a vast population of prisoners whose situation is not very far off that of slaves of antiquity, while they remain in prison. The policy of our Prisons Department is that prisoners shall be a productive labour-force, and hence the apartheid legislation, which creates so many technical crimes resulting in prisoners who have done nothing that is a crime in most free countries, almost parallels the institution of slavery in antiquity. Of course, the term of imprisonment is usually short; but every day there are in prisons tens of thousands of workers under compulsion with no freedom to choose their work or to refuse to do it. Refusal could result in a sentence by a prison officer of whipping or of deprivation of meals and solitary confinement.

The daily occurrence of prison sentences upon a vast scale has a blunting effect on the consciences of the whites. They see this as a part of the law and feel it is inevitable, and are eventually not troubled at all about the daily trooping of hundreds into gaols and farm prisons and lock-ups and police-cells and the many other places of incarceration that exist. Yet one of the most agonising human aspects of these laws is the mounting prison populace, with the diminishing effect of prison as a sanction, the rising feeling that it is normal for all Africans. This affects whites as well as blacks, and in the end it produces a diminished respect for the sentence of imprisonment as a sanction. It brings the law to that extent into contempt.

Any discussion of the image of the law in the light of the *Message to the People of South Africa* raises the question of what the image of the law ought to be for a Christian. The *Message* is itself a controversial document. When the Chief Priest and the Scribes wanted to trap Jesus into some rebellion against the Roman state, they asked him if it was lawful to give tribute to Caesar, and he sent for a penny (or denarius) and asked whose were the image and the superscription, and the tempters answered that they were Caesar's. So he said: 'Render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's'. Of course, this is an extremely controversial

text, and some contend that this was merely a rhetorical way of outmanoeuvring the tempters, more dexterous than their question. But most Christians, I think, treat it more seriously and consider that it imposes upon the Christian conscience a limit upon rebellion or wildness or incitement to the overthrow of lawfully established authority by revolt. The conquered Jews did not regard the Roman hegemony as just, but it was there. In this reply Jesus deprecated forlorn hopes, wild rebellion against the established political authority, and, equally, complete surrender to a hostile political overlordship; enjoined adherence to principle without rebellion for its own sake. I believe that the Christian must not lightly disturb established law and order, and must therefore resort to every measure of protest before resorting to defiance or breach of the law. This means that he should be able to have a substantial respect for the image of the law which exists in his own mind, and that every element in contemporary apartheid institutions which reduces that respect makes it harder to adhere to Christian principles of being law-abiding and not defiant and makes it harder to avoid what Jesus deprecated, which is blind defiance.

There can be no possible doubt or question that the laws which create and protect apartheid, and hedge it about with protection from criticism, protection from protest, protection from effective political organised opposition and protection from the Courts and judges, are laws which detract from a proper attitude to the law, and which make the public image of the law in the minds of the whites cheaper, less noble and further from Western norms than it ought to be.

Chapter Three

APARTHEID LEGISLATION AND OUR INHERITED UNDERSTANDING OF THE LAW

Jack Unterhalter

TO OUTLINE BRIEFLY our inherited understanding of the law, I shall state certain definitions as these have come down to us and as they are accepted today. I shall then apply these criteria to apartheid legislation to see if such legislation is truly law as understood in the modern world.

It seems to me that it is implicit that any narrow considerations of the meaning of law are excluded. One of the definitions of law is that it is the command of the sovereign as lawmaker. In modern terms this equates law with Parliamentary enactments. And as apartheid legislation is clearly such, nothing useful can come from a discussion along these lines. What must be examined is the relationship of law and justice, and an assessment of apartheid legislation in the light of the concept developed from this.

Speculation as to law and justice has been engaged in by man for thousands of years, and our inheritance draws upon recorded thought from the Greeks and earlier. This gives the ordinary man his ideas today on the subject, as also the scholar his material for analysis. Over the centuries the ideas are also found in literature, and as a preface I give some quotations to convey some general notions.

In the Epistle of Paul to the Romans, 13.10, it is said:

> 'Love is the fulfilling of the law';

and in 13.7:

> '... for he that loveth another hath fulfilled the law'.

Sir Edward Coke in his *Institutes* says:

> 'Reason is the light of the law, nay the common law itself is nothing else but reason ... The law, which is perfection of reason'.

Again, Dryden in *The Hind and the Panther:*

> 'Reason to rule, but mercy to forgive:
> The first is law, the last prerogative'.

Burke, *Impeachment of Warren Hastings:*

> 'There is but one law for all, namely, that law which governs all law, the law of our Creator, the law of humanity, justice, equity - the law of nature and of nations'.

Gilbert, from *Iolanthe:*

> The law is the true embodiment of everything that is excellent. It has no kind of fault or flaw ...'

Bacon, *Of Revenge:*

> 'Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out'.

Much of this will be found distilled in the analyses of jurists who have considered the present problem.

The history of thought on the subject suggests that there are no absolutes, but that in each generation the law is expected by and large to express the views of that generation. Thus for Plato every thing or person had its proper sphere. It is easy to see that with this thought as touchstone, there was no difficulty in reconciling slavery and justice in Athenian society.

For Justinian, in stating the Roman law, justice was the set and constant purpose which gives to every man his due. Here, too, if it were accepted that the slave's due be less than that of a free man, his treatment in Roman society would not be unjust.

These notions were carried forward into the feudal age. The king gave protection to his subjects, and they rendered service. If each one knew his position and kept it, the law within that context would serve all adequately.

Later, with the age of discovery and the encouragement of initiative and

enterprise, there came the ideas of freedom of expression and the emphasis upon development by the individual. This brings nearer the liberal thought as we know it today, much of which finds its classical expression in the American Bill of Rights.

Going still further, one finds an emphasis on law as serving social needs, expressed today in legislation concerned with welfare, social insurance and so on.

It is from this mixture that we must gather our present understanding of the law, and it is not at all easy. In particular, in my view, it does not permit of a bland criticism of apartheid legislation without the most careful analysis of the law as we understand it.

One of the best definitions that I have found is the statement of the Roman-Dutch jurist, Johannes Voet:

> *The law ought to be just and reasonable, both in regard to the subject matter, directing what is honourable, forbidding what is base; and as to its form, preserving equality and binding the citizens equally* (Commentarius ad Pandectas, *1.3.5.).*

The merit of the definition is its reference both to the subject matter of the law and to its procedure. The difficulty, of course, is to determine what is just and what is reasonable.

In an admirable analysis of the problem by Hahlo and Kahn *(The South African Legal System and its Background,* pp. 31 to 64), the following criteria are set out as those with which law must comply, if it is not to be unjust in the formal sense of the second part of Voet's passage. These are reasonableness, generality, equality, certainty and fair process.

As regards the first portion of Voet's passage, the writers say that it may not be possible to define positively what concrete justice is, but they remark:

> *One could take almost any jurist of the last hundred years, and one would find a different theory as to what justice is and how it is to be accomplished. Some have tried to define the term, others have studiously avoided definition. A modern jurist concludes that possibly only a religious basis can give a genuine foundation for the absolute ideals of justice (Friedmann,* Legal Theory, *p. 306); and religion is based on revelation and faith (p. 30).*

Definitions must be left at this point, and the broadly stated ideas used as the basis for examining apartheid legislation.

In regard to the *element of fair process* referred to above, this is, *generally,* part of the law of South Africa, in the sense that the same procedures apply in the Courts whatever the race of the accused or the parties to litigation.

There is, however, an especially significant exception, and that is the Bantu (Prohibition of Interdicts) Act No. 64 of 1956, as amended by Act No. 42 of 1964. The Act provides that if any African is required by any order to vacate any area or to be arrested or detained for the purpose of his removal therefrom, no interdict or other legal process shall issue for the stay or suspension of the execution of such order, the orders being of a class to be specified by the State President by Proclamation. Thus if it is sought to remove an African from an area in terms of the Bantu Trust and Land Act No. 18 of 1936, or in terms of the Bantu Urban Areas Consolidation Act No. 25 of 1945, the Court cannot interfere by way of interdict. The African must obey the order, and if it is later found to be invalid, he may be compensated for the actual loss sustained by him as a result of compliance with the order. This Act is concerned solely with Africans, and it takes away from them, by reason of their race, the right to invoke the protection of the Courts, while such right is still enjoyed by members of other races. There is thus clearly a conflict in apartheid legislation of this type with one of the elements of the law, namely fair process.

All apartheid legislation will, in the view of many people, conflict with what is considered to be substantive justice, in the sense of the first portion of the passage quoted above from Voet. The Electoral Consolidation Act No. 46 of 1946 and its amendments does not permit people other than white to vote for representatives for the House of Assembly, notwithstanding the fact that it is these representatives who play the principal part in enacting the laws that affect members of all races in South Africa. Similarly, the law does not permit anyone other than a white person to become a member of the House of Assembly or of the Senate.

The Natives (Abolition of Passes and Co-ordination of Documents) Act No. 67 of 1952 requires an African to carry his reference book on his person, in the sense that if he does not produce it on demand by an authorised officer, he commits an offence and may be arrested immediately. The Population Registration Act No. 30 of 1950, on the other hand, requires that the identity card issued to a non-African must, on the request of a police officer or other authorised person, be produced within seven days.

The Industrial Conciliation Act No. 28 of 1956 does not permit Africans to take part in the proceedings in Industrial Councils, where industrial agreements regarding wages and conditions of employment are negotiated between the representatives of employers and workers. The result is a woeful gap between the wages earned by those who are represented and the Africans, who are not. The Natives Land Act No. 27 of 1913, and the Natives Trust and Land Act No. 18 of 1936, prohibit the acquisition of land outside certain

scheduled areas, this meaning in effect that most land in South Africa cannot be bought by an African. It must be added that in the scheduled and released areas established by these Acts, no White, Coloured or Indian person may acquire land. The Bantu Urban Areas Consolidation Act No. 25 of 1945 does not permit entry into or sojourn within urban areas of Africans, save for limited classes, and then subject to stringent rules. The Group Areas Act No. 36 of 1966 likewise prohibits the acquisition of land by disqualified persons. In a Group Area proclaimed for ownership by members of the white group, no members of any other group may purchase land, save by permit; and in Group Areas proclaimed for ownership by members of other groups, no member of the white group may acquire such land other than by permit.

The Reservation of Separate Amenities Act No. 49 of 1953 provides for the reservation of public premises and vehicles for the exclusive use of persons of a particular race or tribe. The effect of this is to abolish the old rule that if there were separate amenities, they could be separate provided they were equal. The Native Administration Act No. 38 of 1927, as amended, permits the State President to order an African tribe or an African to withdraw from any place to any other place, and not to return without written permission. If the tribe should refuse, both Houses of Parliament must approve of the order, but when this is done, there is nothing for it but that the tribe must obey.

There are great differences in the provision made by law for the education of white and of black. Education is compulsory for white children and is well endowed. It is not compulsory for black children and is poorly endowed. (See *Education Beyond Apartheid,* the report of the Spro-cas Education Commission, for a full statement of the position).

If one regards all people as being entitled to the same treatment and the same respect by reason of the dignity that they enjoy as human beings, then it cannot be said that this legislation satisfies the requirements of reasonableness in Voet's sense of honourable; or the requirements of generality or of equality. All that can be said in regard to the criteria mentioned above, is that the legislation satisfies the requirement of certainty, but this gives it no moral enhancement.

What then is the effect of this legislation on our inherited understanding of the law? It seems to suggest, as did the Greek, Roman and medieval theories, that a view can be taken of the law such as to make it consistent with prevailing social conditions. Just as the fine-sounding definitions of Plato and Justinian could be reconciled with slavery, so is it possible to attempt a reconciliation of law and justice with separate development as a South African doctrine. This could be done by saying that apartheid legislation only affects the stranger within the gates, this being the African in those parts of South Africa outside his homelands; because he is an alien in the white man's land he must suffer discrimination as an alien, just as aliens do in other parts

of the world. The purpose of the law is then to ensure the fullest development of each group according to its culture and traditions within its own area, without interference from other groups.

Is this an adequate defence? I do not think so. It is true that different social conditions have led to different understandings of the law in different ages. But it must be remembered that in early times especially, the inheritance was not as full as it is today. In Greece the concepts of chivalry and benevolence had no place. In Rome the concept of equity was long in developing, and it lived side by side with slavery. Christianity brought the teachings of forgiveness, mercy and pity, and developed the creed from Leviticus that 'Thou shalt love thy neighbour as thyself'. Mediaeval Europe was Christian, but its law was greatly influenced by Aristotle. The noblest developments in the law, in their blend of the old heritage with modern freedoms, are of recent date. They are precious, and cannot be dismissed by the theory of separate development.

The Roman-Dutch law of which we are the legatees and custodians protects those interests of personality 'which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation' (Melius deVilliers, *The Roman and Roman-Dutch Law of Injuries,* p. 24). If the development of a group according to its culture and traditions within its own area means an invasion of the rights of personality of members of that group outside that area then the heritage of the law is betrayed.

And the betrayal is patent. The denial of the right to share effectively in the making of the law in the land of one's birth is as much an impairment of an interest of personality as is the denial by one person of another's right to decide for himself what his way of life shall be - his vocation, his residence, his marriage. The rule that a black person must produce his identity document on demand whereas a white person may produce his within seven days implies a difference in status between black and white and is an affront to the dignity of the black person. Similarly this is implicit in the denial of the right to participate in collective bargaining for wages, of the right to purchase land, of the right to enter an urban area.

It was this notion of the sanctity of the personality that destroyed the institutions of slavery and serfdom. The institution and apparatus of the apartheid state cannot stand against this notion if its meaning and effect is to invade that sanctity.

And the invasion is patent. It is seen in the arrests of tens of thousands of persons for pass offences. It is seen in the poverty and malnutrition of countless persons who have not the right to acquire skills and incomes to permit them to live a full life. See *Power, Privilege and Poverty,* the report of the Spro-cas Economics Commission, especially Chapters 3 and 4. It is seen in the failure and frustration of family life in the towns, where wife may not always

live with husband nor child with parent.

Not only is the treasure of the law and of our values thus wasted. There has developed with this apartheid legislation, and to reinforce it, a trend that is counter to our modern understanding of due process of law - a fair investigation by an impartial tribunal of evidence openly given and tested in regard to any matter affecting the liberty or other interest of a person concerned. Thus persons prohibited from attending gatherings in terms of the Suppression of Communism Act and confined to magisterial districts or house arrested, are proscribed by the Minister of Justice without being told the facts for his decision, nor being able to test the credibility of the informant, nor to offer evidence to deny what the informer has said.

There has developed too, a trend away from our acknowledgement of the courts of law as our guardians. Ordinarily a person may not be arrested or detained save in regard to a suspected offence, and he must be brought before a court within forty-eight hours of such arrest. Section 6 of the Terrorism Act No. 83 of 1967 permits the arrest and detention of a person for interrogation in regard to what that person may know of acts of 'terrorism' (as these are defined in the statute), and this detention may continue until the interrogator is satisfied that all questions have been satisfactorily answered or until the Minister of Justice orders release. The courts have no powers to direct such release.

Likewise Section 215 *(bis)* of the Criminal Procedure Act No. 56 of 1955 permits the Attorney General to detain a person as a witness in criminal proceedings in respect of certain offences, for a period terminating on the day on which the criminal proceedings are concluded or for a period of six months after the arrest, whichever may be the shorter. A court has no jurisdiction to order the release of such person.

It cannot be said that all these consequences can be reconciled with the purpose of the law to ensure the fullest development of each group according to its own culture and traditions within its own area. To speak only of that area set aside for the white group: the discriminatory practices I have described will not develop our culture and tradition; but they will and do degrade them as cruelty, selfishness and indifference always do. They will and do accustom us to suffering by, and neglect of others, and thus undermine the social values that support the social order; and in due course this will cause the collapse of that order. If we do not honour our heritage of the law we will lose, by our own making, the civilization that it represents.

As to the areas set aside for other groups, their culture should be enriched by contact, not separation, but may well be impoverished by isolation and the bitterness created by the treatment their members receive in the territory of the rich white neighbour.

Professor Friedmann in *Legal Theory,* says: '... the values of human dignity

and the development of the individual personality do not present us with ready-made solutions. They cannot give the safety provided, either by infallible and absolute tests of Good or Evil, or the absorption of the individual in a totally conditioned society directed by a pseudo-godlike master. The agony of the decision, the conscious choice between values which - like the claim to security from treason of the organised community and the claim to individual freedom of conscience and opinion, - have equal intrinsic value, but have to be adjusted in a concrete situation - is the noblest heritage of *homo sapiens'* (5th edition, p. 364).

In the present South African apartheid situation there is no choice between values which have equal intrinsic value. It is sought to impose a system of 'separate development' upon a majority without its consent, and to exclude it from the opportunities and benefits of the largest, best developed and richest areas of the country. This is done to protect the privilege and interest of a minority group and has its origin in fear. The protection is fragile because it is a small step from the racial groupings we know to groupings within those groups. Thus groups could be further fragmented and discrimination practised against members of one of the fragmented groups. This process could continue, and in the end the notions of law, as they are accepted in the civilized world, would disappear entirely.

It has been said that there are no absolutes, although even if one discards all else one is tempted to believe that a standard can be sought in mercy, compassion and love.

But this is in a province where the lawyer must work with others.

Chapter Four

SOUTH AFRICAN LAWYERS AND THE LIBERAL HERITAGE OF THE LAW

John Dugard

LIBERALISM MEANS different things to different people. To the economist it is a policy of laissez faire, to the politician a policy of democratic reform. To the lawyer it is a philosophy which views law as a system designed to protect the liberties and freedoms of the individual and to promote the equality of all before the law. In the eyes of the liberal lawyer the State exists for the individual, not the individual for the State. This thesis is accepted as fundamental by most lawyers and governments of the Western world. An eminent legal philosopher, Professor Wolfgang Friedmann, has written that:

> *The evolution of the individual as the ultimate measure of things, and the consideration of government and authority not as a divine right or an end in itself but as a means to achieve the development of the individual, can be described as the basic political and legal ideal of modern Western society, and as a universally accepted standard of democratic society* (Legal Theory, *5th edition, 1967, p. 398).*

Our system of law in South Africa, whether one calls it 'South African law' or 'contemporary Roman-Dutch law', is of mixed origin. It derives largely from Roman law as received and developed in Holland in the fifteenth to eighteenth centuries. But it entered into a mixed marriage with the English common law after the annexation of the Cape in 1806, a union which still exists today despite the attempts of Roman-Dutch purists to eliminate

English law from our system. English law is of particular importance to the present study as it is generally accepted - even by purists - that our constitutional law and criminal procedure, in which the guarantees of individual liberty are to be found, are of English origin (verLoren van Themaat, *Staatsreg,* 2nd edition (1967), p. 62; J.W. Wessels, *History of the Roman-Dutch Law* (1908), p. 394). Our law therefore has its roots in the legal systems of Rome, Holland and England, with still deeper roots stretching down into the fertile soil of Western philosophy.

The South African legal system has a liberal heritage which places individual liberty and equality before the law above the interests of the State. This is not to suggest that the individual enjoyed greater freedom from arbitrary State interference in ancient Greece or Rome, in fifteenth to eighteenth century Holland, or in England before the nineteenth century, than he does today in modern South Africa. What is claimed is that the philosophers and jurists, who were responsible for the creation of our legal tradition, advocated the ideals of individual liberty and equality before the law; that their idealism, which is part of our Western heritage, has been realised in those Western European countries which share a common background; that a similar realisation of these ideals was gradually taking place in South Africa; and that recent developments have blighted the evolution of our law in this direction.

On the philosophical side our law owes much to the precepts of natural law. Changes in political and social conditions have necessarily led to changes in the formulation of natural law theories, but running through these theories is one golden thread of thought - namely that there is an ideal standard of law and justice with which all man-made law ought to conform. Supporters of natural law are diametrically opposed to the positivists who accept every pronouncement of the legislature as 'law', however far short of the ideal standard of law it may fall. The ideal standard of the natural lawyers, like the idea of natural law itself, has not remained static, but, as Professor Friedmann points out, 'the most important and lasting theories of natural law have undoubtedly been inspired by the two ideas of a universal order governing all men, and of the inalienable rights of the individual' *(op cit* p. 96).

The conflict between positive law and natural justice is emphasised by Sophocles in his play *Antigone* in which Antigone is faced with the choice of obeying the positive law of the State or the moral law. Her choice to obey the latter is endorsed by Graeco-Roman philosophers, notably by Aristotle *(Rhetoric,* 1.15, paragraph 6) and Cicero *(De Republica* 111, 22). In the same vein, St Thomas Aquinas declared that 'a tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law' *(Summa Theologica,* Prima Secundae Q. 92, Art. 1). It was this natural law philosophy, in a new secular form, which inspired the most

famous commentators on Roman-Dutch Law, namely Grotius and Johannes Voet (Wessels, *op cit* pp. 282 and 322). In his *Inleiding tot de Hollandsche Rechtsgeleertheyd*, Grotius wrote: 'that which is forbidden by the law of nature may not be enjoined by positive law, nor that which is enjoined by the first forbidden by the second' (R.W. Lee's Translation, 1.2.6). Furthermore Grotius' work *De Jure Belli ac Pacis Libri Tres*, which won for him the title of the Founder of International Law, gave to public international law a natural law foundation which has existed ever since. It is worth mentioning in passing that it was Grotius who first enunciated the doctrine of humanitarian intervention which permits one State to intervene in the domestic affairs of another State to protect the citizens of the latter State from maltreatment by their own government *(De Jure Belli ac Pacis Libri Tres*, 2.25.8).

In the past two centuries natural law has evolved into a philosophy whose prime concern is with the inalienable rights of the individual. In this form it motivated the American Declaration of Independence and the French Declaration of the Rights of Man towards the end of the eighteenth century, while in the twentieth century this philosophy has resulted in the United Nations Charter, the Universal Declaration of Human Rights of 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Significantly the Preamble to the United Nations Charter in which nations of the world 'reaffirm faith in fundamental human rights and in the dignity and worth of the human person' was proposed by Field Marshal Smuts (L.M. Goodrich and E. Hambro, *Charter of the United Nations*, 2nd edition (1949), p. 88).

Objection may be raised to the relevance of natural law on the ground that, despite the pleas of the philosophers, Roman law, Roman-Dutch law and English law were rigid systems which showed little respect for individual liberties. This is not, however, a valid objection. While all these systems were initially distinguished by their severity, they all evolved in accordance with equity and justice into systems which afforded greater protection for the individual. In Rome the rigours of the chauvinistic *jus civile*, which conferred rights upon Roman citizens alone, were mitigated by the introduction of the *jus gentium*, an enlightened system based on reason and applicable to Roman citizens and foreigners alike (see H.F. Jolowicz, *Historical Introduction to the Study of Roman Law*, Chapter 6). Roman-Dutch Law, apart from certain exceptions in the field of criminal procedure, was a model system for its time. The enlightened approach of Roman-Dutch lawyers is illustrated by the statement by Johannes Voet in his *Commentarius ad Pandectas* of 1698 that a law 'ought to be just and reasonable - both in its matter, for it prescribes what is honourable and forbids what is base; and in its form, for it preserves equality and binds the citizens equally' (Gane's Translation, 1.3.5.). Similarly, in England the extravagances of the Star Chamber gave way to the 'Rule of

Law'; and the rigours of the common law to the principles of equity.

Western European countries with a philosophical and legal background similar to our own have built upon this foundation. Not only have they guaranteed the fundamental liberties of the individual in their own municipal systems of law but they have accepted international supervision of the treatment of their own citizens. At present fifteen Western European States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms which came into force in 1953. In terms of this treaty States guarantee the most fundamental liberties, such as the right to life and liberty, the right to freedom of thought, conscience and religion and the right to freedom of expression and assembly without discrimination on grounds of race, colour or political opinion. Failure on the part of a member State to ensure these freedoms permits any other member State to invoke the jurisdiction of the European Commission of Human Rights, which is charged with the enforcement of these rights, on behalf of the injured individual. Or the individual may himself apply to the Commission for the protection of his rights against his own government.

South Africa too trod the road of equity and justice. Shortly after the annexation of the Cape, the primitive Dutch system of criminal procedure, based largely on a statute of Philip II of Spain of 1570, was replaced by the more humane English system of procedure. This was an important advance in the field of the protection of individual liberties for, as Mr Justice Frankfurter of the United States Supreme Court once remarked, 'the history of liberty has largely been the history of observance of procedural safeguards' *(McNabb* v *United States* 318 U.S. 332 at 247 (1943)). Roman-Dutch law, which accepted the view that the sovereign was bound by the law (see C.P. Joubert in (1952) 15 *Tydskrif vir Hedendaagse Romeins-Hollands Reg* 7), was strengthened by the English concept of the 'Rule of Law' which, in its most basic form, means:

(i) that in a decent society it is unthinkable that a government possesses arbitrary power over the person or interests of the individual;

(ii) that all members of society, private persons and government officials alike, must be equally responsible before the law (Harry W. Jones, 'The Rule of Law and the Welfare State' (1958) 58 *Columbia Law Review* 143 at 149; see, further, A.S. Mathews, *Law, Order and Liberty in South Africa* (1971), Part I).

This concept serves to give further content to the ideal standard with which law in a decent society ought to conform.

The Roman-Dutch remedy against unlawful detention of an individual, the *interdictum de homine libero exhibendo,* was so extended as almost to cover the field of the English order of *habeas corpus.* Although individual liberties were not enshrined in a Bill of Rights, as in the United States, they were recognised as a fundamental part of our legal system and one of our greatest Chief Justices, A. van de Sandt Centlivres, once stated that the principles embodied in the American Bill of Rights 'may be regarded as constitutional conventions in South Africa' (1956 *Butterworth's South African Law Review* 12). Our courts have recognised as common-law rights the right of personal liberty *(Mpanza* v *Minister of Native Affairs,* 1946 W.L.D. 225 at 229) and freedom of speech *(R* v *Sutherland,* 1950 (4) S.A. 66 (T) at 75). In an early decision of the Appellate Division, Innes J. (as he then was) declared that 'however reprehensible a man's views may be he is entitled to have his personal liberty adequately protected' *(Whittaker* v *Roos and Bateman,* 1912 A.D. 92 at 125).

Our courts refused to distinguish between racial groups in the sphere of individual liberties and in 1904 Lord de Villiers stated that 'It is the primary function of the court to protect the rights of individuals which may be infringed and it makes no difference whether the individual occupies a palace or a hut' *(Zgili* v *McCleod* (1904) 21 S.C. 150 at 152). Although they were obliged to accept the validity of discriminatory laws, the courts insisted that racial discrimination must be coupled with equality of treatment in accordance with Johannes Voet's dictum that the 'law preserves equality and binds the citizens equally' *(Minister of Posts and Telegraphs* v *Rasool* 1934 A.D. 167). Thus in the 1950's the Appellate Division declared subordinate legislation which established separate but unequal facilities for different racial groups to be unreasonable and therefore unconstitutional *(R* v *Abdurahman* 1950 (3) S.A. 136 (A.D.) and *R* v *Lusu* 1953 (2) S.A. 484 (A.D.)). By interpreting statutes in a liberal manner in the interests of equality and individual freedom, the courts were able to see that justice was substantially done. The extent to which this was done is illustrated by a 1926 decision of the Appellate Division in which the court decided that a statute requiring every African *person* to carry a pass at night did not refer to African women, but only to African men *(R* v *Detody* 1926 A.D. 198). Undoubtedly these advances fell short of full liberty and equality. In particular our courts have never taken the American view that separate facilities for different racial groups could never be equal (as in *Brown* v *Board of Education of Topeka* 347 U.S. 483 (1954)).

However unspectacular these decisions might have been, compared with recent decisions of the American Supreme Court, they were at least advances in the right direction and accorded with the liberal principles of our law. Furthermore our courts acquired a world-wide reputation for their impartiality and our legal profession was able to boast of the important role it played in the maintenance of the Rule of Law in South Africa.

The South African legislature, unlike the courts, ignored our liberal tradition in many important respects well before the advent to power of the National Party Government in 1948. But compared with the inroads which have been made upon the Rule of Law since 1948 these were trivial. Since 1948 arbitrary interference with the liberty of the individual has increased alarmingly, detention without trial has become a permanent feature of our law, and the requirement of equality of treatment for our different racial groups has been legislated almost out of existence by a host of 'apartheid laws'. Our legislature, particularly in the case of those statutes authorising detention without trial, has built upon a totalitarian foundation which has more in common with the Communist regimes of Eastern Europe or the Fascist system of Nazi Germany than with our own liberal Roman-Dutch heritage. This legislative policy was, to some extent, mitigated by the firm stand taken by our judiciary and legal profession. The judiciary was able to alleviate some of the hardships of the legislature's will by interpreting statutes invading individual liberty in favour of the individual where the statute was ambiguous. The legal profession, comprising advocates, attorneys and academics, supported this judicial approach and showed special concern for the maintenance of the Rule of Law and the protection of individual liberties. The Bar, in particular, acted as a constant watchdog over our liberal legal traditions and protested vigorously when these were undermined by the legislature.

Unfortunately events of the past decade have given rise to doubts as to whether these bulwarks of freedom still remain. With certain notable exceptions, judges, advocates, attorneys and academics have shown little public concern about the legislative programme of recent years which has so seriously eroded the foundation of our legal system. With a few exceptions they have failed to enter the public, extra-curial arena in order to promote and to protect the two basic values upon which South African law is built, respect for individual liberty and equality before the law. The opportunities open to the judiciary and the legal profession to protect these values and their response to these opportunities will be examined separately.

The Judiciary

South African judges have less power than their American counterparts. They have no competence to declare invalid acts of Parliament which offend the basic freedoms of the individual despite the fact that these may be regarded as common law rights or constitutional conventions. Section 59 (2) of Republic of South Africa Constitution Act places this beyond all doubt in providing that: 'No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament ...'.

Although South African judges are denied the direct and open creative

powers of the American judiciary, there are other methods by which they may assert their office and develop the law. In the field of the common law this is widely accepted. In choosing between conflicting Roman-Dutch authorities and modern precedents judges undoubtedly create new law, a fact which is not denied, except by the most ardent supporters of judicial passiveness. Where the law is governed by statute the scope for judicial creativity is greatly reduced, but it is not totally suppressed. In interpreting an act of Parliament a court must give effect to the 'intention of the legislature', but where this intention is unclear or unexpressed, as is not infrequently the case, the court is in effect called upon to give its own version of what Parliament intended. In short, the intention of the legislature is often a fiction, a fiction used to conceal the subjective judicial elements in the interpretative process. In interpreting a statute a court is to be guided by recognised rules of interpretation, designed to reflect the values of our legal system. Notable among these rules are those which require a court to interpret an ambiguous piece of legislation in favour of the liberty of the individual or equality before the law. A court may therefore quite legitimately interpret a statute in favour of these values. (See further on this subject, John Dugard, 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181; cf. Steyn C.J. 'Regsbank en Regsfakulteit' (1967) 30 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 101 at 106-7, and Ogilvie Thompson C.J. In (1972) 89 *South African Law Journal* 30 at 33).

Where the statute is clear and there is no room for a judicial interpretation which will accord more fully with accepted legal values, that need not be the end of the matter as far as our judges are concerned. As custodians of our law there are a number of courses open to them when they are faced with legislation which they find incompatible with Western legal standards. First, they may make private and confidential representations to the government. One can only speculate as to what the government would do if it was faced with representations from a considerable number of judges relating to, say, the detention-without-trial provision of the Terrorism Act No. 83 of 1967. It might reject such representations as an improper interference in the affairs of the legislature on the grounds that they undermine the doctrine of the 'separation of powers', but if the representations were made in private and the government was not compelled to capitulate publicly it is possible that a reform of the law might result. Secondly, judges may comment critically on legislation in their curial statements. Thirdly, in the final resort, and in very extreme cases, they may condemn legislation from a public platform. These courses open to the judiciary in time of great stress do not find authoritative support amongst the old Roman-Dutch writers or the legal tradition of England. The judge who chooses one of these courses must be guided by modern history, by the experience of those countries in which the judiciary by

adopting a passive, positivist stance has unconsciously acquiesced in the debasement of a legal system.

Although it is clear that the judiciary has acted with integrity and impartiality, their performance sometimes has been disappointing to natural lawyers in the interpretation of those laws which most seriously offend the foundation of our legal order, the detention-without-trial laws. Judicial interpretation of section 17 of the General Law Amendment Act, No. 37 of 1963 (the 90-day detention law) in such cases as *Loza* v *Police Station Commander Durbanville,* 1964 (2) S.A. 545 (A.D.), *Rossouw* v *Sachs,* 1964 (2) S.A. 551 (A.D.), *Schermbrucker* v *Klindt* 1965 (4) S.A. 606 (A.D.) and *S* v *Hlekani* 1964 (4) S.A. 429 (E), according to some jurists, did not fully reflect the liberal basis of our law in the field of individual liberties and brought forth a penetrating criticism from Professors Mathews and Albino, of the University of Natal, in an article in the *South African Law Journal* ('The Permanence of the Temporary - An Examination of the 90- and 180-day Detention Laws' (1966) 83 *SALJ* 16). After analysing the abovementioned cases the learned authors declared:

> *'We have to face the fact that some South Africans may have lost faith in the courts. The line of cases already discussed in this article does not present a picture of judges fired by ideas of individual liberty or personal sanctity. There is no assertion that the judges are partial or that they lack integrity. What does seem to have been lacking in the cases analysed above is an imaginative grasp of the implications of solitary confinement and of Western ideals of individual freedom. It may be argued that it would be wrong for judges to have regard for what appear to be political values. The answer to such an argument is plain. The ideal of which we speak is part of the woof and warp of Roman-Dutch law and it can surely never be wrong for a judge to give effect to the very spirit of that great legal system unless Parliament forbids him to do so in clear and unambiguous terms. In recent years the courts have interpreted laws which have cried out for one of those resounding defences of individual liberty in the dignified and majestic language in which judges sometimes speak, but the opportunity has been passed by' (37-38).*

Although the 180-day detention law, section 215 *bis* of the Criminal Procedure Act, No. 56 of 1955, has been more generously interpreted in favour of individual liberty (see, in particular, *S* v *Heyman* 1966 (4) S.A. 598 (A.D.) at 605, and 1966 *Annual Survey of South African Law 355-357;* cf. *Singh* v

Attorney-General of the Transvaal 1967 (2) S A 1), the courts returned to their stricter approach in the early decisions on the interpretation and implementation of section 6 of the Terrorism Act No. 83 of 1967, which permits indefinite detention in solitary confinement without access to a court of law. (See *Shityuwete* v *Commissioner of Police,* unreported judgment in the Transvaal Provincial Division of 23 January 1968, and *Madikizela* v *Minister of Justice and Minister of Police,* reported in (1970) 87 *South African Law Journal* 289). Recent decisions on this section suggest a more activist approach on the part of the judiciary and it is to be hoped that the present trend continues.

There are other cases in which statutes have been interpreted in favour of the executive and in which inadequate consideration has been given to those basic rights which, according to Centlivres C.J., are to be regarded as 'constitutional conventions'. In *South African Defence and Aid Fund* v *Minister of Justice* 1967 (1) S.A. 263 (A.D.) the *audi alteram partem* (hear the other side) rule was too readily excluded (see the criticism of M.Wiechers in (1967) 30 *THR-HR* 56, and A.S. Mathews in *Law Order and Liberty in South Africa* pp. 55-57); in *Mustapha* v *Receiver of Revenue, Lichtenburg* 1958 (3) S.A. 343 (A.D.) and *Minister of the Interior* v *Lockhat* 1961 (2) S.A. 587 (A.D.), the Appellate Division declined to apply the 'separate but equal doctrine' where the contract and statute in question did not expressly permit unequal treatment; and in *S* v *South African Associated Newspapers Ltd.* 1970 (1) S.A. 469 (W) it may be argued that the principle of the freedom of the press was given insufficient attention. These cases are simply a random sample which suggest that the basic values of our system do not always receive adequate consideration in the interpretative process. They cannot be viewed as a thorough survey. For a survey of judicial behaviour in respect of the interpretation of the 'security laws' the reader is referred to A.S. Mathews' *Law, Order and Liberty in South Africa* from which it appears that there are at least fifteen important decisions in which the author believes that the courts could have exercised their discretion more generously in favour of individual liberty.

The judges have failed to use their interpretative powers to the full in respect of discriminatory legislation and harsh security laws. Furthermore they have not used the avenues of public protest which it has been suggested are open to them. Obviously it is impossible to say to what extent, if at all, private representations have been made to the government in connection with repressive laws such as the Terrorism Act. But no judge has expressly condemned this law or any other detention-without-trial law from the bench. On the contrary, judges have strongly repudiated suggestions that they should do so. In 1967 Chief Justice L.C. Steyn stated in connection with the failure of the courts to censure interrogation under solitary confinement that:

> *It would be an evil day for the administration of justice if our courts should deviate from the well recognised tradition of giving politics as wide a berth as their work permits ... it is not our function to write an indignant codicil to the will of Parliament' ((1967) 30 THR-HR 101 at 107).*

In 1971, Ogilvie Thompson C.J. rejected the notion that judges should criticise legislation when he declared, at the centenary celebrations of the Northern Cape Division, that 'the expression in public and in particular in the press or other media, by judges of opinions on controversial issues, whether or not such issues have political overtones, is to be deprecated' ((1972) 89 *SALJ* 32). More recently, in the prosecution of Professor Barend van Niekerk, the courts voiced their disapproval of calls made upon judges to censure legislation from the bench. Although Professor van Niekerk was acquitted on a charge of contempt of court arising out of a call to judges to 'make their voices heard about an institution (detention-without-trial) which they must surely know to be an abdication of decency and justice', both the trial court and the Appellate Division rejected the propriety of such 'calls'. Ogilvie Thompson C.J. (with whom Botha and Holmes J.J.A. concurred) declared that he 'disagreed' with 'the concept of the duty of a judge' as reflected in Professor van Niekerk's speech *(S* v *van Niekerk* 1972 (3) S.A. 711 (A.D.) at 720), while, in the trial court, Fannin J. declared that the words of Professor van Niekerk calling upon judges to publicly condemn legislation

> *express a point of view with which I, as a judge ... profoundly disagree and which ... exhibits a misunderstanding of the functions of a judge in a society such as ours' (unreported judgment: for the full statement of Fannin J. on this subject see the note by the present writer in (1972) 89* SALJ *271 at 282).*

The learned judge then stated that where a judge was confronted with 'monstrous legislation' the proper course was for him to resign and not to throw his office into public controversy. (In passing it should be mentioned that Professor van Niekerk was convicted on another count of contempt of court and of attempting to obstruct the course of justice for calling upon judges to 'kill' the usefulness of the Terrorism Act by denying 'practically all creditworthiness to evidence procured under those detention provisions'. See the criticism of this decision by the present writer in 'Judges, Academics and Unjust Laws: The van Niekerk Contempt Case' (1972) 89 *SALJ* 271.)

On only one occasion in recent years has a judge publicly condemned security legislation. In 1969, when the government introduced the General Law Amendment Bill which, *inter alia,* conferred wide powers on the executive to exclude evidence from a court of law, Mr Justice Marais of the Transvaal Provincial Division vigorously condemned the measure at a public meeting. His protest was later endorsed by several other judges and although the measure became law (section 29 of Act 101 of 1969), the government shortly afterwards appointed a commission of enquiry into this measure and other issues concerning the security of the State. Ultimately, following the report of the commission, the section was amended to accord more fully with the common law (section 25 of the General Law Amendment Act No. 102 of 1972). This incident pertinently illustrates the power of the judiciary.

It is interesting to compare the approach of the judiciary towards security legislation with its stance on the 1971 'Drugs Law' (Abuse of Dependence-producing Substances and Rehabilitation Centres Act No. 41 of 1971). In several decisions judges have found themselves able to restrict the scope of the punishment provisions of this Act in order to bring them into line with accepted principles of punishment despite the fact that this would not seem to accord fully with the actual (as opposed to legal) intention of the legislature (see *S* v *Shangane* 1972 (2) S.A. 410 (N) and *S* v *Nokosi* 1972 (2) S.A. 753 (T) This is a laudable approach and illustrates the extent to which judges may invoke traditional principles in the interpretation of statutes.

Advocates and Attorneys

The judiciary's passive attitude towards legislation contrary to the South African legal tradition is largely shared by the practising legal profession. This is apparent from its lack of organised opposition to racial legislation which offends the principle of equality before the law or to the detention-without-trial laws. Universal and unequivocal condemnation of such abhorrent measures as section 6 of the Terrorism Act was surely to be expected from a profession proud of its legal heritage. Yet, with certain exceptions, this has not been forthcoming. The most notable exception is the Johannesburg Bar which condemned both the 90-day and 180-day detention law when they were first introduced. Although it failed to respond to the Terrorism Act when it was passed in 1967 it did later condemn it in the most vigorous terms when its full horrors became apparent (see (1970) 87 *SALJ* at 289). The Incorporated Law Society of Natal, too, has made its attitude clear and in 1970 it re-affirmed its 'abhorrence' of any statute denying due process of law, interfering with the presumption of innocence of an accused person or permitting interference with personal liberty without access to a court of law (1971 *De Rebus Procuratoriis* 117). Other branches of the organised profession have 'spoken

out' on several occasions but their public protests in recent years have dwindled. If the General Council of the Bar and the Association of Law Societies had together protested when the 90-day law was first enacted and insisted on its withdrawal, it might not have had an immediate effect, but such a stand might have prevented subsequent legislation of this kind. In fairness it should be mentioned that the General Council of the Bar has made private representations to the Minister of Justice about security legislation. Whether these private representations are as effective as public protests is, however, doubtful in the light of the failure of the government to modify the severity of the detention-without-trial laws.

The present writer is well aware of the difficulties facing the organised legal profession. The General Council of the Bar is a loose federation of the various Bar Councils and can act only where there is total unanimity, which has not been forthcoming. The Association of Law Societies is faced with a similar problem. Party political differences among lawyers are mainly responsible for the failure of the organised legal profession to act along the lines suggested. But surely the survival of a decent legal order premised on Western legal standards should transcend party political differences?

The legal profession has also been disappointing in its attitude towards the politically unpopular client and the indigent who runs foul of the multitude of discriminatory laws. It is disturbing that many attorneys have steered clear of the defence of the politically unpopular and left their legal defence to a small group of attorneys some of whom have, in consequence, been labelled as political opponents of the government rather than as attorneys with a correct understanding of their professional responsibilities. The present writer is aware of the excuse raised by some of the larger firms, namely that they specialise in commercial work and not criminal work. This excuse is not, however, completely convincing as even these firms frequently do criminal work for their normal clients. They have a responsibility in this matter to ensure that no political opponent suffers at the hands of the State for want of a proper defence. It is a responsibility recognised by many of the most eminent and 'respectable' firms of lawyers in the United States. This criticism is directed mainly at the attorneys of the Republic; advocates, as far as the writer is aware, have not avoided their responsibilities in this respect.

There are many loopholes in the complicated network of apartheid laws which might profitably be discovered by lawyers in order to assist Africans and there are many defences open to Africans charged under the influx control laws. Unfortunately, with a few notable exceptions, this unlucrative field of law does not appeal to legal practitioners with the result that injustices often go unnoticed in the implementation of these laws. While it is not suggested that lawyers should 'specialise' full-time in this field of the law they could be more helpful to the existing advice bureaux (e.g. Black Sash advice

bureaux) than they are at present. If only fifty lawyers in Johannesburg were to assist these advice bureaux once a fortnight this would constitute a major help to the indigents in question and serve to destroy the widely held view that law has become more of a commerical enterprise than a profession charged with the maintenance of proper standards of justice.

Christian lawyers have a special responsibility towards the politically unpopular client and the indigent. They have a special duty to speak out in defence of Western legal values as they accord closely with Christian values.

Legal Academics

Like his colleague in legal practice, the legal academic is called upon to preserve the true South African legal tradition. This may be achieved, in the first instance, by instilling in students an awareness of the importance of civil liberties and of the Rule of Law. Secondly, the academic is freer than his colleague in practice to comment upon deviant practices in the administration of justice. The practising lawyer has less time available for such utterances and is moreover precluded from publicly commenting on matters of a legal nature by rules of professional conduct, although there is no such restriction on comments by him in scholarly journals. The academic is therefore summoned to speak out clearly, in legal journals and, if necessary, in the press, when he believes that the government is tampering with the tenets of justice.

The record of academics is by no means perfect. Although most law school courses do include reference to the Rule of Law and civil liberties, the liberal nature of our legal heritage is often insufficiently stressed. Moreover, many academics, like the jurists of Imperial Rome and authoritarian Holland before them, have sought sanctuary from public controversy in the quiet waters of private and commercial law and have refused to be drawn into controversial issues on the ground that they fall outside their field of specialisation. These academics have not only declined to associate themselves with the public pronouncements of their colleagues on matters such as the Rule of Law but they have poured scorn on those academics who do make such statements for 'meddling in politics'. Like other members of the legal profession, they have forgotten our legal tradition and have equated a concern for civil liberties with an interest in party politics. These academics must show a wider concern for the administration of justice than they do at present and should, wherever possible, associate themselves in public declarations so that these do not appear to be the utterances of a few isolated cranks.

Conclusion

Our South African legal heritage is a liberal one. Every lawyer, whatever his party political affiliation, is called upon to concern himself more deeply

with the twin principles of equality before the law and the protection of the individual from arbitrary interference by the State. Refusal to do so constitutes a rejection of our Roman-Dutch-English legal traditions and is to be seen as a dereliction of duty at a time when the foundations of our legal order are under attack from a government which is bent upon remodelling our law along authoritarian lines. As has been pointed out above, there is much that judges, advocates, attorneys and legal academics can do to prevent this process. The main obstacle to legal activism appears to be an allegiance to the creed of positivism.

Legal positivism is based on two cardinal beliefs: first, that law is a command and, secondly, that law and morals (values) should be strictly separated. The high-priest of positivism, the English jurist John Austin, defined law as the command of a political superior to a political inferior and insisted that a strict division be maintained between law as it is and law as it ought to be. This philosophy has been seized upon by South African lawyers as it allocates to the lawyer a purely passive role and provides a jurisprudential basis for his failure to concern himself with matters which are not strict law, such as legal values and the concept of the Rule of Law.

The failure of the organised legal profession and academics to criticise legislation contrary to the Rule of Law may be attributed to the fact that many lawyers draw a strict distinction between the law that is (legal rules) and the law that ought to be (legal values) and unquestioningly accept the will of the legislature as soon as it appears in a statute. Positivism, too, is to blame for the narrow technical approach to legal education adopted by some law schools when what is needed in modern South Africa is a sociological, value-oriented approach to legal education.

There are several objections to this strict form of legal positivism which at present guides the thinking of the lawyers of the Republic.

First, it is not part of the true South African legal heritage which is premised upon natural law and not legal positivism. As has already been shown, both Roman law and Roman-Dutch law were founded on the philosophy of natural law. Although English legal theorists have shown a preference for positivism since the days of Jeremy Bentham and John Austin, development of the English common law owes much to the precepts of natural law. (See Friedmann, *Legal Theory,* pp. 132-136.) Moreover modern English positivists, such as H.L.A. Hart and Dennis Lloyd, have moved away from the full rigours of Austinian theory and do not endorse the total subservience to the sovereign implicit in Austin's teachings. European and Anglo-American legal systems with which we share a common background have, with isolated exceptions such as Spain and Portugal, constructed legal orders which give full recognition to the liberty of the individual and to equality before the the law. The South African legislature on the other hand has con-

structed a legal order designed to entrench the privilege of a small white élite which shows little concern for the Western legal heritage.

Secondly, the strict legal positivism of South African lawyers has no place in an unrepresentative political order. Courts exercising a largely declaratory function, and a quiescent legal profession are probably well-suited to a country like Britain where the people participate fully in the electoral process. The British Parliament is truly representative and it would be contrary to the tenets of democracy for the courts to adopt an activist approach which ran counter to the properly expressed will of a parliament composed of duly elected representatives of the people. Where this is not the case the courts and legal profession are called upon to adopt a more active role.

Thirdly, positivism encourages legal passiveness and this may add respectability to an increasingly evil legislative order. Those South African lawyers who have accepted without question the inroads made upon civil liberties and the Rule of Law in recent years must shift their historical attention from the antiquarian glories of eighteenth century Holland and the dignified conservatism of nineteenth century England, to the most relevant legal precedent of the present time, the demise of a decent legal order in Germany of the 1930's. I close with a quotation from Professor Lon Fuller of the Harvard Law School on the effect of positivism on the German legal system:

> *Positivism was the only theory of law (in Germany) that could claim to be 'scientific' in an Age of Science. Dissenters from this view were characterised by positivists with that epithet modern man fears above all others: 'naive'. The result was that it could be reported by 1927 that 'to be found guilty of adherence to natural law theories is a kind of social disgrace ...*
> *The German lawyer was therefore peculiarly prepared to accept as 'law' anything that called itself by that name, was printed at government expense and seemed to come 'von oben herab'.*
> *In the light of these considerations I cannot see either absurdity or perversity in the suggestion that the attitudes prevailing in the German legal profession were helpful to the Nazis. Hitler did not come to power by violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned at all, were manned by lawyers ... These ramparts fell almost without a struggle ('Positivism and Fidelity to Law' (1958) 71* Harvard Law Review 630 at 659).

Chapter Five

APARTHEID, THE COURTS AND THE LEGAL PROFESSION

N.M. MacArthur

THE TERM 'apartheid' may be new in that it has only been used in comparatively recent times but the concept of racial separation has been part of the South African political scene for many years. There have also been laws to promote this political policy since at least the beginning of the 19th century. (H.R. Hahlo and E. Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) pp. 793 ff.). It is important to bear this in mind because in assessing what effect apartheid has on the courts and the legal profession it is necessary to know in what sense the term is being used.

In the *Encyclopaedia Britannica,* under the heading 'apartheid', it is said that:

> *In general two forms of apartheid might be distinguished. The first, more moderate form was the idealistic policy of 'separate development' as advocated by the Dutch Reformed churches and organisations such as the South African Bureau of Racial Affairs (SABRA), among others. The advocates of this policy were opposed to any policy based on racial superiority and racial domination. They believed that the non-white peoples are not inherently inferior to the whites and that a permanent policy of racial domination is impractical and immoral. They also believed that the white group would never be prepared voluntarily to grant to the African people equal political rights in an integrated society, because of the disparity in numbers (blacks outnumbering whites*

by more than three to one) and that the white nation had a just claim to political self-determination. It was their contention that the process of economic and territorial integration of black and white would lead to increased racial tension and strife and make the peaceful co-existence of the two groups impossible. They were convinced, therefore, that the only way of reducing, and of possibly solving, the conflict, was to provide for the geographical division of South Africa into black and white states. The black states would eventually govern themselves. The National Party government intimated that it accepted the policy of geographical division as its long-term objective.

The other, extreme form of apartheid accepted a policy of discrimination as being essential to the survival of the white group. The adherents of this line of thought did not think in terms of the eventual geographical division of the country into black and white states, but believed that discriminatory action and legislation could effectively safeguard the interests of the white group and that the differences in culture, level of development, etc., between the two groups justified such a policy.

In practice the official governmental policy of apartheid was based on both these principles. Some of the measures adopted were mainly in the interests of the Bantu (reservation of Bantu areas; recognition of African law). Others tended to reconcile the interests of the two groups in one way or another, while still others aimed chiefly at preserving the privileged position of the white group and resisting the increasing demands of the African population. The policy was applied in a modified form to other non-white groups (the Coloured and Indian groups) (Vol. 2, p. 103).

In this paper I shall limit myself to an examination of a number of legislative enactments which in my view are directed towards the policy of apartheid, and, if it is relevant, the manner in which the powers of the court have been cut. I do not propose to consider apartheid in relation to the Bantustans created by the government, nor in the sense of discriminatory action against the non-white.

The corner-stone of all laws dealing with racial segregation must be those laws which deal with the identification of the various races. The legislature has provided a somewhat varied set of definitions of the racial groups in a number of different statutes such as the Prohibition of Mixed Marriages Act, No. 55 of 1949, the Immorality Act No. 23 of 1957, the Group Areas Act, No. 36 of 1966, and the Population Registration Act, No. 30 of 1950. In the first of

these, the terms used are 'European' and 'Non-European', whilst in the other Acts there are definitions for 'white person', 'coloured person', 'Bantu', 'white group', 'coloured group' and 'Bantu group'. It will be seen that the determination of a person's race really depends on the particular statute in question and the tests in each case are not necessarily the same.

When looking at the Population Registration Act, one notices from the definition of a 'white person' read with the provisions of Section 1 (2) that it is possible for a person who is generally accepted as a white person and is not in appearance obviously not a white person to be classified today as a non-white person. Such a stiuation could arise if he made a voluntary admission in say, the census form of 1951, that he was a Bantu or a coloured person, or even if he had described himself as 'mixed'. The legislature has also made most of the later amendments retrospective and they are deemed to have come into operation on 7 July, 1950. (See, *Pinkey* v *Race Classification Board and Another* 1968 (4) S A 625 (A.D.) *Brown and Another* v *Secretary for the Interior* 1969 (4) S A 278 (A.D.)).

The race classification of any person is normally done by an official under the control of the Secretary for the Interior and an appeal within the prescribed time limits against this classification can be made to a specially constituted Board. (See Section 11).

A further appeal may be made to any division of the Supreme Court but it is quite plain that the effect of the retrospective legislation is to limit severely the inherent discretion of the courts. For example, they would not be able to assist a 'coloured person' who has for years been living as a 'white person' in a white area, where he made a damning admission in 1951. Even the minor children, who in the circumstances would probably have gone to a 'white' school, would be classified as coloured. See *Pinkey's* case (supra). In some cases where third parties have intervened and objected to the classification of any person, the Board and Supreme Court are specifically precluded from hearing the matter. (See Section 21 A (3) and Brown's case (supra)).

The provincial or local division of the Supreme Court has jurisdiction over all persons residing in its area of jurisdiction and this covers both civil as well as criminal cases (section 19 of the Supreme Court Act, No. 59 of 1959). Nevertheless the race classification of a person may well determine the particular inferior court which is used for resolving a dispute between the parties or before which an accused person will be required to appear. For example, under the Bantu Administration Act, No. 38 of 1927, a Bantu commissioner is deemed to be a magistrate with the powers and jurisdiction of a magistrate conferred on him and within those limits he can under the provisions of Section 9 (1) of that Act, try *any* offence committed by a Bantu within the area for which the commissioner has been appointed. The powers and jurisdiction thus conferred on the commissioner and the court do not

affect the powers of any magistrate or the jurisdiction of any Magistrate's Court. An appeal will lie from this court to a provincial division. (See section 103 (1) of the Magistrates' Courts Act, No. 32 of 1944, and cases referred to in *Swift's Law of Criminal Procedure,* 2nd Ed., p. 802).

The Bantu Commissioner also has jurisdiction to hear all civil causes and matters between African persons only. His jurisdiction does not include such matters as those affecting a person's status in respect of his mental capacity or in regard to the interpretation of wills or matters dealing with divorces. Nevertheless, in the Commissioner's Court, he can in his *discretion* apply Bantu law on all matters involving questions of custom (sections 10 and 11 of the Bantu Administration Act). These provisions do not exclude a Supreme Court from determining any dispute between Africans, but if this matter is not complex, the Supreme Court will probably award costs on the scale provided in the Commissioner's Court.

Some appointed Bantu chiefs or headmen are also empowered to handle civil claims and to try certain criminal offences. Their powers of punishment are limited and they are not allowed, *inter alia,* to impose a fine exceeding R40,00 or impose corporal punishment save in the case of unmarried males below the apparent age of 30 years. (Sections 12 and 20 of the above Act). Appeals from the judgments of the chiefs or headmen lie to the Bantu Commissioner.

There is a right of appeal in civil cases from the Commissioner's Court which is heard exclusively by the Bantu Appeal Court except where that Court itself agrees to the matter being heard by the Appellate Division (section 18). A decision by the Bantu Appeal Court is final and conclusive. (See also the regulations setting out the manner in which the appeal has to be prosecuted, in *Government Gazette* dated 29 December, 1967, Regulation 2084). The Natal Native High Court, which dealt with criminal offences committed by Africans, was abolished in 1954.

In 1929, Bantu Divorce Courts were established to deal with matrimonial suits between Africans domiciled within their areas of jurisdiction. Appeals from these courts lie directly to the Supreme Court. (Section 10 (5) of the Native Administration Act, 1927, Amendment Act, No. 9 of 1929). The presiding officer at these Divorce Courts is in general an experienced white official employed by the Public Service, who is appointed to this office by the State President. In term time in a place like Johannesburg such an official, who in all probability will be a senior Bantu Commissioner, will handle something like 30 unopposed divorces in a day. These Courts are only concerned with recognised civil marriages and they do not deal with customary unions which are handled by the Bantu Commissioner, who may dissolve such unions where the mutual consent of the two families is not obtained. *(H.R. Hahlo, South African Law of Husband and Wife,* 3rd edition, p. 27).

Whilst considering these customary unions, it should be pointed out that up to 1963 an ordinary court was unable to assist the surviving partner of such a union where some person had unlawfully caused the death of the other partner. *(S.A. Nasionale Trust en Assuransie Maatskappy Beperk* v *Fondo,* 1960 (2) S A 467 (A.D.)). The Bantu Appeal Court was, however, able to distinguish the Supreme Court's approach and always gave the necessary relief. (S.M. Seymour *Bantu Law in South Africa,* 3rd Ed., p. 360). The position has now been changed by section 31 of the Bantu Laws Amendment Act, No. 76 of 1963, so that where the partner of a customary union has been killed by the negligence of another, the surviving partner has a cause of action in the ordinary courts against that person for loss of support.

The courts will not recognise an Indian marriage as valid unless it was solemnised by an appointed marriage officer. There is provision, however, for those monogamous unions which were celebrated according to Muslim or Hindu rites to be given validity if registered under the Indian Relief Act, No. 22 of 1914. The Supreme Court tries all matters relating to the dissolution of these valid Indian marriages although in earlier years magistrate's courts were empowered to do this. *(Hahlo,* supra, p. 23, note 30).

Up to this point in the analysis, one can see therefore that with some Acts, such as the Population Registration Act, the powers of the Supreme Court are severely limited. Furthermore, a judgment by the Bantu Commissioner's Court is only heard on appeal by a Supreme Court in exceptional circumstances. The argument advanced in support of the Commissioner's Court is that matters are heard by persons who have an expert and intimate knowledge of the African people (Seymour *op. cit.* p. 34). This may be so, but are the Commissioners the right persons to try all the civil disputes?

In Hahlo and Kahn, the following statement appears:

> *On appointment the magistrate will normally have obtained experience in a fair range of administrative work and a sound knowledge of the working of the criminal law - though solely from the vantage point of a public prosecutor. But his practical knowledge of the civil law will be sketchy indeed - and yet the vast bulk of civil matters comes before the magistrates' courts. In two cases out of three his sole academic qualification will be the lowest acceptable one, gained through painstaking self-study over a number of years, without systematic teaching. The burden of the criticism is that the Union has one of the least desirable forms of lower judiciary, one composed of public servants without adequate training (op cit. p. 274).*

This viewpoint is equally apposite to Bantu Commissioners who may and probably do handle fewer court cases than a magistrate: certainly fewer than in the large urban areas where magistrates are delegated to do court work alone to the exclusion of administrative duties.

No one will dispute their integrity or their desire to see that justice is done, but when it is borne in mind that the Commissioner's Court is entitled to adjudicate upon a civil dispute between African persons which may involve a great deal of money or a matter of some complexity, it is surprising to find that there is no jurisdictional limit placed upon the amount as is in the case of a magistrate. Perhaps the answer to this problem lies in the fact that the Supreme Court is not excluded from hearing such matters and that litigants will go to these courts where the amount in dispute is large. (See Hahlo and Kahn *op. cit.* p. 332).

Nevertheless the overall picture that emerges is that the legislature is genuinely trying to reduce the cost of litigation where Africans are involved. It may not always be achieved but this does not detract from the principle behind it. Commercial matters apart, the same goodwill on the part of the legislature is not always apparent.

Consider the position with the Bantu (Prohibition of Interdicts) Act, No. 64 of 1956, which was enacted primarily to prevent the further frustration of housing schemes and removal of squatters by dilatory stays and suspensions (see *Annual Survey of South African Law,* 1956, p. 46). The effect of this law is to prevent any court staying or suspending by interdict or other legal process or appeal or review proceedings any order made by a competent authority which requires an African to vacate or be removed from any place.

A similar situation arises in the case of the Reservation of Separate Amenities Act, No. 49 of 1953. Prior to this Act being passed, the Courts had frequently invalidated regulations affecting facilities provided for separate sections of the community where those facilities were not the same for all racial groups. In *R.* v *Lusu,* 1953 (2) S A (A.D.), the accused, an African, had entered a waiting room at a railway station which was reserved for 'Europeans' only. There was a finding of fact that the waiting rooms for 'non-Europeans' were substantially inferior to those provided for 'Europeans', resulting in partial and unequal treatment, to a substantial degree, between the races. The Court held that the Railway Administration was not entitled to exercise such unfettered discretionary rights and powers, and the accused was acquitted. The aforesaid Act now avoids this situation and public premises or vehicles which have been set apart for the exclusive use of a particular race do not have to be the same or substantially similar to those provided for other races. (See, *Alfred Avins,* 'Racial Separation and Public Accommodations: Some comparative Notes between South African and American Law' (1969) 86 *SALJ* 53).

There are some legislative enactments embracing all members of the community which deal with the preservation of the *status quo*. Their connection with apartheid may be somewhat indirect but they are of interest in the present context. Examples of these laws are to be found in section 215 *(bis)* of the Criminal Procedure Act, No. 56 of 1955, which deals with the 180-day detention clause. The Attorney-General under that section is given a wide discretion to issue a warrant for the arrest and detention of a person and no court has jurisdiction to order the release of that person or pronounce upon the refusal or consent of the Attorney-General to permit access to him. *(Singh* v *Attorney-General and Another* 1967 (2) S A (T)). Similar provisions also occur in section 6 of the Terrorism Act, No. 83 of 1967, where a person can be detained for an indefinite period for interrogation on the orders of a police officer of or above the rank of Lieutenant Colonel. Here again the Court is unable to pronounce upon the validity of the detention, or order the release of the detainee.

Again, under the Riotous Assemblies Act, No. 17 of 1956, the Minister of Justice may prohibit any person from attending a public gathering where he believes feelings of hostility may be engendered between whites and any other section of the inhabitants. Only after the notice of such prohibition has been served on the person, is the Minister, if requested to do so, required to furnish the reasons for such prohibition but then only such information as will not be detrimental to public policy. (Section 4 of the Act). The *audi alteram partem* rule is completely excluded before the order is made and the courts are unable to assist. (See Hahlo and Kahn *op. cit.* p. 193).

A situation involving apartheid arose in 1968 under the Copyright Act, No. 63 of 1965. Provision exists there for an application to be made to the Copyright Tribunal to obtain a licence for any work which is being *reasonably* withheld by a licensing scheme or person. (Section 28 (3) (a)). The Johannesburg Operatic and Dramatic Society sought to obtain a licence from the owners of the copyright in three musical plays. The American owners refused to give a licence because it was alleged, *inter alia,* that the plays would be presented to segregated audiences. The Copyright Tribunal found that

> *their attitude as Americans* (was) *not unreasonable. That, however, is not the test. This tribunal is a South African tribunal which must apply the laws of the land. Moreover, it is not merely that the laws of this land provide for segregation, nor that it is the policy of the Government, but as far back as one can remember, social integration has not been the way of South African life. The Act with which I am dealing has been passed by the South African Parliament. It can hardly be suggested that Parliament would re-*

> *gard its laws which provide for segregation as unreasonable. The section in the Copyright Act of 1965 which I have to interpret requires that if 'in the circumstances it is unreasonable that the licence should not be granted' the tribunal should grant the licence. It is not a question of whether the authors' attitude is reasonable. It is whether in all the circumstances to refuse the grant of a licence would be unreasonable. One of the circumstances which must be considered in deciding this question is the attitude of the authors and their reasons. This I have done. However, because of what has been said above in relation to South African laws, policies and customs, and bearing in mind that the test is an objective test in South Africa, it would be unreasonable to refuse a licence on the ground that the play concerned can only be played to a segregated audience.*

Under the provision of section 77 of the Industrial Conciliation Act, No. 28 of 1956, a new apartheid concept was introduced. The section is headed 'Safeguard against inter-racial competition' and its effect is to enable the Minister, after a recommendation has been made by the Industrial Tribunal, to reserve any particular work either wholly or partially for persons of a specified race.

A determination of this sort may be declared null and void by a Supreme Court if it is vague or oppressive of persons. An attack based on these grounds failed in *Garment Workers Union (Western Province) and Others* v *Industrial Tribunal and Minister of Labour* 1963 (4) S A 775 (A.D.) at 784.

Job reservation is also provided for in other forms of legislation. See Bantu Building Workers Act, No. 27 of 1951; section 3 of the Motor Carrier Transportation Amendment Act, No. 42 of 1959, and section 20 A of the Bantu Labour Act, No. 67 of 1964.

Finally, in dealing with the legal profession itself, there are provisions in the Group Areas Act, No. 36 of 1966, which restrict the occupation of land or premises in certain areas to particular specified racial groups. For example, if an area is proclaimed white, then all disqualified persons such as Indian or Coloured legal practitioners are prohibited from occupying land in that area. Even if they have practised in that area for years, they will be required to leave and find accommodation elsewhere. In practice, exemptions are given where the situation demands it, but nevertheless these provisions exist and can lead to hardship. For example, African attorneys who are required to practise in the townships are far from the Supreme Court as well as counsel and the telephone situation in the townships is by no means as satisfactory as it could be.

A white practitioner who has to appear in a Magistrate's Court situated in an African township may be affected by the provision of section 9 of the Bantu (Urban Areas) Consolidation Act, No. 25 of 1945, which prevents any person other than an African entering or remaining in any location or African

village *without permission* from the authorised official. Clearly the prudent practitioner will always obtain a permit.

Apart from these difficulties there are no real restrictions imposed upon a legal practitioner by reason of the colour of his skin. It may be asked of course whether a black practitioner has ever been briefed by the Attorney-General or the State Attorney and, if not, what the reasons are for this. That question can only be answered properly by the appropriate officials.

Summing up, it would seem that the legislature has not really interfered with the powers of the court in matters where Africans litigate amongst themselves. In other matters where administrative decisions are taken, the powers of the court have been drastically cut. This is a tendency in most modern States but in dealing with apartheid it is particularly disturbing that it should apply when a person's liberty has been restricted. I should like to conclude with a statement made by the Hon. O.D. Schreiner in the Hamlyn Lectures delivered in 1967:

> *The real case against apartheid at the present day is not that there is inequality in the administration of the law, for in general there is not, but that it is harsh, unfair, and increasingly difficult to support in the light of the growing industrial development of our country and in the light of modern views on the treatment of other races.* (The Contribution of English Law to South African Law; and the Rule of Law in South Africa, p. 96).

Chapter Six

DIFFICULTIES FACING BLACK SOUTH AFRICANS IN EXERCISING THEIR LEGAL RIGHTS

W. Lane and A.P.F. Williamson

THROUGHOUT THE WORLD it is acknowledged that there is a great deal of ignorance among lay people about the law and the manner in which they should enforce their legal rights. Every man comes into contact with the law each day, as an employer or an employee, an owner or a tenant of property, the buyer or seller of goods, a witness to some incident of legal importance or perhaps as the victim of some accident either at work or in the street. It is often of vital importance to him that, following an incident of some legal significance, he should have recourse to proper legal advice and, if this advice is not readily available to him or if he is, through ignorance or lack of money, deterred from taking this legal advice, he can suffer serious loss. In the more advanced countries in Europe and America, this problem has received serious consideration and, even in South Africa, the Legal Aid Act of 1969 indicates that there is a growing awareness of the need to provide legal assistance. It frequently happens that by the time a client takes legal advice he has taken, or failed to take some step which vitally affects his legal rights.

Accepting, therefore, that the question of the enforcement of the rights of the ordinary citizen is a universal problem, the purpose of this paper is to consider the particular difficulties which black South Africans face.

Vast progress has been made since 1797 when the Heemraden of Stellenbosch doubted whether it was permissible for a Hottentot man to summon a white woman to appear before the court *(The Oxford History of South Africa* (1969) p. 224). It has long been recognised that blacks are to be treated on an equal footing with whites in the South African courts and the rolls of the various Supreme Courts and the reported decisions of these courts bear ample testimony of the many cases in which blacks have been successful in enforcing

their rights against employers, insurance companies, municipalities, the government and other powerful interests. That their rights exist and are in numerous instances enforced admits of no doubt, but the fact that these rights are so often enforced does not mean that blacks are not at a particularly serious disadvantage.

It is a fundamental juristic proposition that a right has no meaning unless there is a remedy for its invasion. It is submitted that it is implicit in this statement that the remedy must be effective and readily accessible to all holders of the right and that unless the remedy is so available it will lose much of its significance, thereby rendering the right itself of doubtful value. It is suggested that before it can be said that a person has effective remedies for enforcing his legal rights, whether against a fellow citizen or against authority, he must enjoy:

1. Sufficient freedom of movement to enable him to seek assistance in the proper quarters and reach persons who have it in their power to assist him.

2. Unfettered access to professional and other advisers who are best able to act on his behalf, to espouse his cause and to provide the necessary professional assistance.

3. Ready access to courts.

As will be seen later, the traditional attitudes of the white South African and his laws which enforce the system of segregation or apartheid place considerable difficulties in the path of blacks seeking to enforce their legal rights.

To deal firstly with freedom of movement, it is known only too well what difficulties the pass laws present to an African who has to travel about the country. There must be few litigious matters where a litigant is not required for the purposes of his case to travel, whether for the purpose of interviewing a witness or obtaining a document. Insofar as the right of Africans to travel freely without first complying with various formalities and seeking necessary consents exposes them to the risk of arrest, their rights in this regard are seriously curtailed.

It is, however, in the restriction of the black South African's access to those who can assist him that the curtailment of his rights most significantly appears. Numerous instances can be quoted, more particularly:

(a) Lawyers, of necessity, usually have their offices in the vicinity of the

courts and the courts, in turn, are normally in the centres of the cities and towns. The black communities are invariably compelled by law to live on the fringes of urban centres with the result that, with the exception of their access to the limited number of lawyers who may practise in the black areas, they have to travel far greater distances than the average white in order to consult a lawyer.

(b) There is a scarcity of black legal practitioners and they are compelled by Group Areas legislation to have their offices in the separate Group Areas which are almost always at a distance from the courts. Indeed, this fact is recognised by the Rules of Court which provide special indulgences for litigants and their representatives who by law are prohibited from occupying premises within the distances from the courts which are normally applicable.

(c) Government policy limits the number of African professional men in urban areas and professional men who do not qualify for residence in the African townships are expected to practise in the homelands, thus forcing the African residents of the townships to consult white lawyers whose offices are far from their homes and possibly also far from their places of work.

(d) Such black lawyers as there are, being forced to set up their offices outside the central areas, face the acute inconvenience caused by the distances of their offices from the principal scene of their activities which are the courts, the law libraries available at the courts and the centrally situated government offices with which they have to deal in the course of their practice. The fact that permits can be obtained and that exceptions from the rule do exist, does not derogate from the fundamental hardship caused by this situation.

(e) The average white man, when faced with a legal difficulty, is frequently able to resolve that difficulty in direct dealing with the appropriate government authority. Such access to the government authority is not as readily available to the black who will frequently have difficulty in obtaining access to the appropriate official.

(f) Experience of the legal aid system in England has shown that many laymen are hesitant to approach lawyers' offices and it is to overcome this fear that the English Law Society has embarked on a campaign of advertising to bring home to the citizen that he will re-

ceive a courteous and friendly reception from lawyers who are permitted to advertise that they take legal aid work. If this diffidence exists in an all-white society, it is self-evident that a far greater diffidence must exist amongst blacks in South Africa all of whom must, on occasion, have encountered lack of courtesy and discrimination on the part of whites.

(g) Because of the economics of legal practice, most lawyers tend to pay more attention to clients who are able to bring remunerative work and the black therefore fears that he may not be welcome in the reception office of a substantial legal firm. Even such elementary matters as telephoning to make appointments present considerable difficulty. Not only is the telephone service in his residential area likely to be inferior, but he will have to overcome a fear of possible lack of understanding or even discourtesy on the part of the telephonist in the legal office. And, having gained access to a lawyer, however sympathetic and helpful, cultural and language differences frequently present serious obstacles in the way of reaching that accord between lawyer and client which is so essential to the proper conduct of any case.

Once he reaches the courts, the problems of the black are not over. While judicial officers will normally take great pains to afford him a proper hearing, they face, in the discharge of their task, no small difficulty in dealing with people of a vastly different background who normally have to address the court through interpreters. The extent of these difficulties is well illustrated by the sympathetic and understanding discussion by a Magistrate, Mr J.C. Ferreira, in his authoritative work on Criminal Procedure in the Magistrates' Courts. But the courts themselves are bound by Statute and by various Acts which seriously curtail their right to question administrative decisions. A gross example of the inequity brought about by the legislature is the Natives (Prohibition of Interdicts) Act, 1956 which, as its name implies, prevents the courts from intervening against certain orders made in regard to the removal or arrest of Africans. This type of legislation is, moreover, aggravated by the petty administrative arrangements (which are so much a part of the fabric of apartheid) made in the court and administration buildings. It is self-evident that a person attempting to deal with a personal problem, however minor, in unfamiliar surroundings, is gravely harrassed by having to take care not to risk using the wrong entrance to a court building or the wrong counter in a court office.

It may be argued that few of the problems to which we have drawn

attention are insuperable but, when regard is had to the cumulative effect of all the difficulties placed in the way of blacks by the few instances of the law and practice of segregation or apartheid enumerated here, it is manifest that the rights which are accorded them in law are in many instances not enforced or readily enforceable. Compared with their white fellow citizens, they are at a grave disadvantage.

Chapter Seven

THE POLICE IN THE APARTHEID SOCIETY

Barend van Niekerk

THERE OUGHT to be as little need to speak of the role of the police in our apartheid society as there is to speak of the role of weather forecasting in our political system. Although the police in any political system have the role of ultimately applying that system and of enforcing compliance with it, there is a general acceptance in enlightened Western countries that to some extent at least the police ought to keep their distance from the conflicts of ideology and political opinion which necessarily characterise all mature societies. In short, despite the fact that the police force in any country has to follow the dictates of those in power, there is an expectation in mature societies that the police will nevertheless constitute the one official agency which will retain the image of independence and impartiality in relation to the individuals and ideas vying with each other for supremacy in a free society. According to this expectation the role of the police will be that of the prevention and investigation of crimes - crimes which are regarded as such by the overwhelming majority of mature citizens.

The maintenance of order and of decent standards of justice is an ideal which finds ready and general support in South Africa. It is, however, when discussion turns to the attainment of this ideal and to methods which may justifiably be used towards it, that opinions not only vary but vary widely in South Africa.

The maintenance of law and order in any society is chiefly the task of the police force which constitutes one of the most important executive departments in any government. Since the police are under the direct control of the government of the day there is and must always be a close connection between

the government and the police. This is true in any society and it is true in ours. In many societies - and one which immediately springs to mind is Great Britain - this interlinkage between the concepts of government and of police administration does not appear to be as close in the minds of the public at large. No doubt every man of intelligence in, say, England knows that ultimately every aspect of police administration is in the hands of the Executive; yet the police force is not completely identified with government policies and, sometimes, government follies of the day. The role of the police is chiefly seen in its protection of rights, guaranteeing of liberties and prevention of crimes. The police, quite erroneously perhaps if regard is had to the strict legal position, are regarded chiefly by the man in the street as the enforcer of rights and duties and not of policies. When, however, the identification between government measures of the day and the police becomes too pronounced, as recently happened for instance in Northern Ireland where the police, in the opinion of a large section of the community, became completely identified with the government policies of the day, there was a loss of confidence in the integrity and independence of the police, with a resultant difficulty of law enforcement and even breakdown of law and order.

It seems superfluous in a contribution such as this to speculate on the need for an identity, or at least a close approximation, between the expectations of society at large and the policies and methods of the police force. Whenever a discrepancy arises between them there is an attendant loss of confidence on the part of the public in the efficacy and impartiality of the police, a situation which inevitably leads to a gradual breakdown of good public administration. To the vast majority of ordinary people the concept of 'law' only has meaning when seen against the backdrop of a police helmet. Not for them the erudite definitions which have warmed the scholarly hearts of Friedrick von Savigny, Roscoe Pound or Jerome Frank. Law is what leads to the appearance of a policeman when it is not heeded! If this concept of law, simplistic and partly erroneous as it certainly is, tallies with what the citizenry at large expect of the law - if it is in other words generally supported by their moral beliefs - one has the situation sketched above in relation to the United Kingdom where the law enforcement agencies (chief of which is the police) will earn the respect and the support of society at large. In brief terms it simply means that the law adds up to the expectations of society and so also do the police, and hence there is a general willingness to co-operate with the police in the combating of real crime. We shall return again to the concept of real crime.

In South Africa it is also of course the primary function of the police to protect the interests of society. Inasmuch as this protection relates to the life, bodily integrity and property of individuals generally, there will on the part of fair-minded people of all races be few qualms. Indeed, as will be pointed out in due course, the only severe and genuine qualm in this respect emanates

from black South Africans and concerns the lack of adequate protection of their interests in certain areas. Concerning the protection of the general interests of the State there will also, I submit, be fairly universal support, provided the methods used are not excessive and provided, especially, that the interests relate to the well-being of society as a whole as understood by society as a whole. It is in this sphere that the police cannot claim to have the support and the sympathy of the vast majority of black South Africans.

The policy of separate development or of apartheid need not, in the ambit of this paper, be described and elucidated. The serious and humane protagonists of that policy believe in all sincerity that the policy represents the most sensible and fair solution to the ills besetting our society. This may indeed be the case. The truth of the matter is that it would be the summit of impertinence to suggest that blacks as a whole, or even generally, see the situation that way. What they see and receive of apartheid as it affects them daily they do not like. This is probably true of all blacks, but that it is true of sophisticated, westernised and urbanised blacks, is hardly subject to any doubt and thus hardly worth debating. For these blacks apartheid means discrimination, low wages, bad schooling, bad transport, inadequate protection, inadequate methods of redressing wrongs, and general harassment of a kind to which no group of whites is ever subjected. In short, the 'law' which ought to be the black man's protection is seen by him largely as the chief method of harassment. Symbolising the law, because they enforce it, are the police.

The police force to blacks, in a very direct and real sense, represents the personification of the State and moreover of some of the latter's policies which they regard, to a greater or lesser extent, as being repugnant to their interests and essentially repressive in nature. Because the police force implements policies about which the black population have not been consulted and which work such profound hardships upon it, a large part of the black population of South Africa inevitably, albeit sometimes unfairly, sees in the police force the epitome of their political and social ills. It is with this problem, i.e. the lack of respect on the part of blacks for the onerous work of the police force, that I now wish to deal. Let it be said at the outset and with emphasis, that in a great number of respects our police fulfil with distinction a task which would be difficult under any circumstances. In this regard one thinks of their effectiveness in the detection of certain crimes, and of the many instances where they act without any regard for race or station in life in emergencies. However, all this is to be expected as of right from any police force.

It is today accepted by almost all groups of citizens in South Africa - this includes the police itself and government - that the police force plays a major part in the establishment of better race relations since it constitutes by and large the most direct link blacks have with the government. The basic tenor of

this thought was expressed in the following way once by Brigadier C.W. Louw, District Commandant of Police of Central Johannesburg, at a parade of young police officers. The distinguished speaker urged the policemen never to forget 'that the African wants to be treated as a human being' and he urged his audience to wield correctly the great influence they have in race matters *(The Star,* 10 December 1968). Strange as it may ring in the ears of those uninitiated into the realities of life in South Africa that there should ever be a need to remind policemen to regard the greater part of the public they serve as 'human beings', any informed observer knows that such exhortations are not at all uncalled for.

Because of the close identity in the minds of blacks between the police and the State it is appropriate to look briefly into the basis for this identity. To the sophisticated black the entire structure of our State is built on discrimination and discriminatory treatment. Genuine efforts by the police and government to eliminate this are largely dispelled by what is actually experienced by blacks.

It is generally accepted that the wage structure of the blacks in South Africa carries a revolutionary potential which should be defused as soon as possible in the interests of all, including the whites. However, whenever the least rumbling of labour unrest appears amongst the black workers, legitimate as such unrest may be, there is an immediate call for repressive measures. The police dogs, the armoured vehicles, the swarms of policemen around the factories are to black workers the visible signs that bargaining levers available to workers in all non-communist states are not available to them. Pious declarations of peace in the field of labour are drowned by the snarls and the barks of police dogs. The recent labour unrest in South-West Africa affords as good an example as any of the way in which the police are identified with basic state policy as it affects blacks. Will it be at all surprising if in the eyes of the blacks the police are identified with policies which so clearly contradict their economic and political interests? Reluctant as the police may be in the enforcement of measures such as these, it can simply not be denied that their role in such enforcement brands them as being essentially opposed to the basic interests of the blacks.

The example just mentioned - one example amongst many - can still be described perhaps as an unfortunate instance where the police were unavoidably the agents of government policy for which no blame can conceivably attach to them. The situation is very different in cases where police are the enforcers of discriminatory practices not sanctioned by government policy. In this respect reference must be made to allegations of misconduct with racial overtones made from time to time in the course of criminal cases. Given the social and political realities of our race-conscious society there is, unfortunately, every reason to assume that these allegations, whenever proven, must constitute but

the tip of the proverbial iceberg.

The very important point has to be made in this context that improper treatment meted out to blacks *qua* blacks does not necessarily stem only from whites. A great part of the reference book control system is carried out by black police officers under the control of whites. According to one report, corruption in the execution of pass control is rife:

> *Corruption occurs, everyone talks about it. A rand or two, as much as one can afford, but always in the form of a bank note, is placed in the reference book. Some constable takes it when they ask for the reference book to be shown'.* (Rapport, *25 June 1972).*

In the nature of things most of the corruption described in this newspaper report is perpetrated by black policemen, a situation which contributes acutely towards alienating them from their fellow blacks. An important part of the blame for this kind of misconduct is no doubt caused by the poor salaries paid to black policemen.

Miscondust of course also takes on more vicious forms. In this context reference must be made to allegations which are made with regular frequency of third degree treatment meted out by policemen to people, especially blacks, in their charge. Policemen who stand towards the public in a fiduciary relationship should be expected to have a greater awareness of the peculiarly important role they play within the social fabric of our state and especially within the field of better race relations. In these circumstances, the leniency sometimes shown by the Courts to attacks by policemen on defenceless blacks in their custody is disturbing. One instance, which received considerable publicity, illustrates a situation which can only alarm anyone with concern for race relations in South Africa. Delivering judgment in an automatic review case, Eksteen, J. of the Eastern Cape Division, severely reprimanded a magistrate for imposing an excessively lenient sentence on a white policeman for a 'sadistic and brutal assault' on a fifteen year old Coloured prisoner. The policeman had been sentenced to a fine of R40,00 or forty days and a suspended prison sentence of eighty days for beating the handcuffed boy with a 'kierie' (baton) till it broke while the boy was suspended by a rope with only his toes touching the ground. An African worker was then ordered to twist the boy's genitals. The light punishment, Eksteen, J. said, outraged the sense of justice but there was nothing he could do about the sentence *(The Star,* 7 December 1968).

Misconduct on the part of individual policemen is a phenomenon which must obviously occur in any police force. Two aspects at least make this

phenomenon rather different in South Africa. On the one hand, there is the possibility of misconduct being directed at a particular racial group within the ambit of discriminatory state policies and measures which are predominantly only applicable to that particular group. This situation, as I have already indicated, helps to undermine the prestige and the image of our police force in the eyes of the greater part of our population. The other aspect is the disturbing degree of official indifference to such misconduct. During 1970, for instance, no fewer than 205 out of 230 police officers convicted of crimes involving violence (assault, assault with intent to do grievous bodily harm, culpable homicide and attempted murder) continued with their services in the police force. This figure, one has to emphasise, related to actual convictions during one single year. What is more, of those convicted of assault or assault with intent to do grievous bodily harm during 1969 and 1970, no fewer than 79 had previous convictions. Of this number 21 had one previous conviction for assault, 5 had two previous convictions for assault and one had a single previous conviction for culpable homicide. (Figures from Hansard, quoted in (1971) *Survey of Race Relations in South Africa).* Although the figures furnished do not permit any deductions pertaining to race relations, they do seem to display a sense of unconcern on the part of our authorities for the image of our police force.

One well-documented incident of misconduct which had clear racial overtones involved the prison van deaths in 1969 which, had they occurred in most countries, would have led to government resignations. Instead there were protracted official investigations, secret reports and official whitewashing. The basic facts were that three African prisoners died of suffocation and heat in an overcrowded prison van which had been stationary for a long period during which the prisoners had repeatedly cried for help (cf. (1969) *Annual Survey of South African Law* p. 457 and *ibid* (1970) p. 459). The prisoners were all technical offenders under the pass laws. When the matter was raised by the Opposition in Parliament, it was accused of being unpatriotic. Stranger still was the reasoning of the Minister of Police when he declared on 13 February 1970 (Hansard, col. 950) that it was not in the public interest to table the report of the commission of enquiry in Parliament. This statement was made about ten months after the incident. Not a single policeman or prison officer was dismissed (Hansard, 16 February 1970 col. 1148). On 11 September 1970 (Hansard, col. 3910-1) the Minister of Police announced that no compensation was paid to the dependents of the deceased but that *ex gratia* payments would be considered. Will it be seriously contended by anyone with knowledge of the realities of South African life that this official unconcern would have been tolerated if, say, white bus commuters had been involved? And what 'public interest', we may ask, demands that details should be kept secret about an incident which touches on one of the raw spots of our national conscience?

Of much greater import than instances of brutality are the consequences of the direct application of some of the aspects of the government's ideology by the police. One of the salient landmarks of our social landscape today is undoubtedly the strange phenomenon that statistically speaking, something like one out of every four adult Africans is arrested each year by the police on some offence or another which can be described as 'technical' and which do not apply to whites. This figure is arrived at in the following way: during the statistical year 1965-1966 the number of statutory offences reaching trial stage and which apply only to blacks and more particularly Africans, totalled 658 969. This did not include payments of admission of guilt. The total number of such payments is not known and the Minister of Bantu Administration and Development declined to furnish any statistics of these in Parliament. (cf. House of Assembly Debates, 27 February 1969, col. 1190). However, it does not seem unreasonable to assume that for every person charged with such a 'technical' offence at least three pay 'spot fines'. If this deduction be true - and errors will probably be on the side of an underestimate - and if the total number of 'spot fines' (normally paid after the initial arrest) and the number of persons charged are combined and related to the total of 8 000 000 adults (out of a total population of 12 500 000 Africans at the time), the picture that emerges is that one of every four African adults is, statistically speaking, subjected to arrest each year.

Potent penological and social considerations argue against exposing 'ordinary' (as opposed to 'criminal') members of the citizenry to arrests, interrogations, detentions, admissions of guilt fines, etc. The main burden of imposing the law falls upon the police who have in actual fact little discretion in the matter and it is only human and natural to expect that the cumulative effect of these massive numbers of arrests is a harrowing one; on the one hand, it must certainly result in the erosion of respect for government and for authority in general and for the police in particular on the part of the Africans; on the other hand, it must also tend to degrade the victims of these laws in the eyes of those called upon to enforce them. That this may be so is implicit in the words of the officer already quoted to the effect that policemen should not fail to treat blacks as 'human beings'.

During the statistical year 1970-1971, the last full year for which statistics are available (Annual Report of the Commissioner of South African Police for the period 1 July 1970 to 30 June 1971, p. 4), the following picture emerges as regards prosecutions for crimes which apply only to blacks, mostly Africans:

Curfew regulations	136 118
Foreign Bantu entering urban areas	15 240
Bantu documentation offences	282 684
Bantu influx control offences	159 122
Bantu tax	105 576
Illegal possession of Bantu liquor	35 868
Trespassing	178 085
Master and Servants Act	21 911
Total	934 604

Can it be seriously disputed that the prosecution of almost one million blacks, mostly Africans, does not have the most serious effect on race relations in South Africa? This leaves still completely unaccounted for the far greater number of persons who are arrested but who are not prosecuted. It is conceivable and in fact it is to be hoped that the creation of aid centres for Africans in urban areas will bring some relief but in the writer's respectful opinion it seems more than doubtful whether their palliative effect can have more than marginal significance. It will be a long time before such measures can counter the harm done to the respect in which the police ought to be held in the community by their role in enforcing apartheid.

In a racially compartmentalised society such as ours the comparative strength of each racial contingent in the police force and its relative standing (especially economically and status-wise) is also of some relevance. According to the latest available Report of the Commissioner of Police, that of 1970-1971, the total actual establishment for whites and blacks in the police force was respectively 16 776 and 15 333. Whereas until recently a white officer could rise from being a student officer to the Commissioner, with twelve other ranks in between, a black officer could at most aspire to become a Chief Sergeant of whom there were only 44 in 1965 (4 Indians; 11 Coloureds and 29 Africans). At present the situation is slightly - but only very slightly - better and blacks can rise to the rank of Lieutenant of which there were 21 in 1971 (11 Africans, 7 Coloureds and 3 Indians). In 1971 there were only 16 black Chief Sergeants in the Force.

The inferior status is also underlined by information supplied in Parliament by the Minister of Police on 14 March 1967 (House of Assembly Debates, cols. 2883-86). The annual salary scale for whites from constable to the rank of Lieutenant, is R840 x 90 - 1 020 x 180 - 1 560 x 120 - 3 000. Coloured and Indians are on the scale R576 x 42 - R600 x 60 - R1 320. The scale for Africans is R450 x 42 - 660 x 60 - 960. These scales have no doubt been improved since

this information has been furnished but in view of the fact that we are concerned here with the overall effect of discriminatory practices these figures are still relevant. The retention of widely differential salary scales for police officers of the various races has remained a permanent feature of the salary structure for the police force. The need for efficient policing and crime prevention is greatest amongst Africans and it is disturbing that little effort is made by way of financial inducement (not even to mention possibilities of promotion in rank) to train and retain a body of educated, efficient and proud policemen who could be leaders in their own communities. If the salary discrimination, both between whites and blacks on the one hand, and between blacks *inter se* on the other, occurred within an overall high salary structure the picture would not be so gloomy, but the structure of police salaries as a whole is exceedingly low and that for Africans in particular is below a civilised bread line. (By comparison, e.g. the average African female domestic servant in Cape Town earns R462,24 per annum in wages and 'extras' - see (1967) *Survey of Race Relations in South Africa,* p. 136). Whatever may be said in *abstracto* about the sky being the limit for the advancement of blacks, in the police force they certainly have difficulty in getting to the top. The ultimate result of these discriminatory practices and salary structures unfortunately goes far beyond the plight of the individual black policeman concerned and directly influences also crime detection and, especially, crime prevention, as well as the maintenance of social stability.

Within the context of the government's racial policies opportunities have been created for blacks in many spheres where few or none existed before. The police force is no exception. According to the 1970-1971 Report of the Commissioner of the South African Police there were 42 police stations on 30 June 1971 manned exclusively by blacks. Of these 34 were manned by Africans, 7 by Coloureds and one by Indians. This is a move which can only be warmly welcomed since it not only creates new opportunities for black policemen which will ultimately result in an improved status for blacks in the police force but it will also in time tend to remove points of racial friction between the police and members of the black public. Welcome as this move is, it must not be thought that merely by putting blacks in control of certain police stations some of the unsatisfactory aspects previously discussed will automatically be removed. For instance, the mere fact that influx control and pass-book measures are administered by fellow blacks instead of by whites, will not make an iota of difference to those at the receiving end.

One of South Africa's biggest social problems is the incidence of crime. A full discussion of this problem would be inappropriate here but it cannot be completely ignored in a paper dealing with the police force in South Africa. I propose therefore to deal merely with two aspects of crime as they affect the role and status of police within our social structure. First, it must be assumed

that the activities of the police in combating 'technical' as opposed to 'real offences' must constitute a real limitation on their ability to come to grips with the rising incidence of serious and, especially, violent crime in South Africa. One must assume that the processing and prosecution of a great number of blacks for these 'technical' offences seriously hampers the ordinary activities of the police in regard to 'real' offences. The rising crime rate may at least be partly explained by the millions of working hours spent on offences which have no real relationship to crime. (Parenthetically a brief comment on one such offence seems appropriate at this juncture: master and servant crimes. It is surely repugnant to modern ideas of labour relationships that the police should become involved at all in the enforcement of labour contracts to the extent that in the statistical year 1970-1971 no fewer than 21 911 prosecutions reached trial stage. The situation is starkly reminiscent of certain mediaeval practices of servitude).

The second aspect of the rising crime rate which merits mention is the incidence of violence in the black townships or ghettos in South Africa. It is probably the highest in the world. In merely one African urban complex, Soweto, near Johannesburg, there is an average of about 80 murders a month and nearby Baragwanath hospital for Africans treats about 2 000 stabbing cases per month *(Survey of Race Relations* (1971) p. 74). The insecurity under which blacks have to live is apparent from the following figures culled from an article in *The Star* of 18 October 1969: During the year from March 1966 to February 1967 within the Johannesburg Municipal area alone, there were 891 cases of murder, 1 156 cases of rape, 7 747 cases of assault with intent to do grievous bodily harm, 8 075 cases of common assault and 33 489 cases of theft. The vast majority of these crimes took place in the African townships, especially in Soweto. In a survey reported in *The Star* of 19 April 1969, two opinion poll firms from Johannesburg queried a scientifically selected group of Soweto citizens and it was established that a third of them had been the victims of a street attack, 22% had been the victims of a street robbery, 15% had been robbed on the train and 14% had been the victims of a robbery or burglary at home.

I cannot imagine a similar situation being tolerated by the whites in power if the victims were white. It is generally accepted and correctly so in my opinion, that this situation (which is also to be found in other black townships in South Africa) is largely the consequence of insufficient police protection, which tends to reinforce the impression amongst blacks that the police force serves primarily the interests of the whites in South Africa. It is with a great amount of *schadenfreude* that some whites read about the crime-situation in certain U.S.A. cities; how ineffably strange it is that they are almost completely ignorant of the far worse conditions prevalent in South Africa.

Hitherto we have largely dealt with what one may call the 'ordinary' role of

the policeman in South African society. South Africa is of course no ordinary country in the Western sense of the word and hence it is only natural that the police force should also be given some 'extraordinary' duties. I am referring here of course to the security situation, a matter which veers away somewhat from the racial problems of our society. In a sense, however, the security situation is also intimately linked to the racial set-up since it is no doubt the aim - substantive if not formal - of the entire security machine to preserve the racial and social *status quo* in our land. It is in this subtle sense that the role of the security arm of the police is of immediate concern in an evaluation of the role of the police in our society.

The question of the security system in South Africa is one which cannot, for all its inherent relevance, be dealt with in the ambit of this paper. It is extremely difficult even to select from the mass of material a few salient aspects. Nevertheless, a few topics will be mentioned to illuminate the outlines of a situation of which few people can ever hope to know the full details but which intimately concerns the evolution of our political system. First there is the range of powers available to the police to deal with persons regarded as security risks or who could be helpful in security investigations. The powers are potentially as wide as the security police wish them to be. For instance, in terms of these powers persons suspected of the crime of 'terrorism' (which is so widely defined that it is potentially limitless in its scope) or of being able to furnish information on the commission of acts of terrorism, can be held indefinitely in solitary confinement and the power of the courts to exercise some control over the police is excluded.

Secondly, the scope of the powers available to the security arm of the police, either *de facto* or *de iure,* has the effect of removing all real controls over the exercise of such powers. Possibilities exist of an abuse of such power. The persistent denial by the government that these powers are capable of being abused is not reinforced by the fact that no fewer than seventeen persons have died while being detained in terms of the Terrorism Act and other detention-without-trial laws. The exclusion of any kind of judicial control over the exercise of some of the powers of the security police has created a situation in which they have in many ways become a law unto themselves. There is even, it seems, a strange reluctance on the part of the government to exercise ministerial control as would seem clear from the fact that the Anglican Dean of Johannesburg was arrested and detained for the crime of terrorism without the knowledge of the Minister of Justice.

Thirdly, the quality of the kind of agent used to conduct investigations on which the freedom of individuals may depend is, if recent indications are any guide, disturbingly low. The sort of witness used to obtain information about the Dean of Johannesburg was criticised by the Appellate Division in strong terms. If one considers, however, that information obtained by similar agents

is usually the basis for ministerial banning orders or for detentions in terms of the security laws, the ominous possibilities of abuse and of miscarriages of justice become only too clear.

Fourthly, during the past few years there has been a progressive dilution of the concept of *state* security. Instances have been reported where the security police have involved themselves in matters which can hardly be concerned with the security of the State, such as the selection of a black beauty queen, student protests and meetings of the Black Sash. Even the rightwing Herstigte Nasionale Party has made serious allegations of security police intimidation.

Fifthly, as a result of all these factors, there is a deep-seated belief on the part of many South Africans - and certainly on the part of the overwhelming majority of black leaders - that their political and social activities are carefully watched by the security police. The fact that most kinds of interracial meetings automatically attract police attention has resulted in a genuine belief that such meetings or even just ordinary interracial contacts are illegal. Few people involved in para-political activities, including newspaper men and churchmen involved in interracial activities, believe that their telephones are not tapped at times. Whether fears and suspicions such as these are well founded or not is perhaps ultimately less important than the fact that for many South Africans of all races and political persuasions a stage has been reached when they no longer regard themselves as free to speak their minds openly on a variety of matters, which, in any Western society but ours, would never be the subject of the slightest interest in official quarters. Ultimately the effect of this intimidation is that freedom of dissent and freedom of opinion die not only because they are suppressed but also because they are not used.

CONCLUSION

The picture presented in this paper of the role of the police within the political fabric of our State may appear to be overdrawn on the negative side. No doubt this is true, but it is also inevitable since a paper of this kind must primarily seek to concentrate on matters which call for remedy. There has also been a growing awareness in recent years of the important role which the police play in race relations and great strides forward have been made. A case in point is the seriousness which police authorities now attach to allegations of misconduct across the racial line by white police officers. However, as long as a political system prevails which exposes masses of the black population to arrest for 'technical' offences, the prospects for establishing good relations between the police and the black population are materially poor. As long also as vast numbers of our population are treated as inferiors - and this must naturally be for as long as these people are denied an effective say in their own affairs - there will not be the same sort of protection given to them as to the

whites, and this will result in hardship and bitterness. These and many other problems facing the police force are built into our social system and they will endure for as long as that system endures.

Even within the present social system there are nevertheless certain fields where improvements can be made and it should be the object of our public institutions, notably the press, to stress them at every opportunity. A few such improvements, hardly an exhaustive list, are enumerated by way of conclusion:

1. Improvement of the salaries of all policemen and ultimately the elimination of all forms of racial discrimination in salary scales. This has indeed become part of government policy and ought to be attainable.

2. More advancement possibilities for black policemen and greater responsibility for well-trained and well-educated black police officers. This also is ostensibly government policy.

3. Immensely improved protection in black townships by the establishment of more police stations and the greater use of patrol cars.

4. Gradual phasing out of those influx control measures which lead to arrests of Africans. The standing order issued after Sharpeville not to arrest *only* for suspected pass offences should be renewed and applied.

5. Arrests should be made only in the last possible resort for any 'technical' offence and then all care should be taken to avoid the present dehumanising treatment of offenders.

6. Discontinuation of prosecutions for labour (master and servant) offences.

7. Conscious efforts should be made by high-ranking police officers - of whom a growing number ought to be blacks - to establish cordial relations with inhabitants of black townships and black homelands.

8. Stricter enforcement of the instructions to treat the public - the *whole* public - with the utmost courtesy and the conscious training of recruits in that direction.

9. Less overt identification by high-ranking officials with the interests of the party in power, and a complete ban on the making of political statements by such officers.

10. Improvements which are needed in the security police system which would instil public confidence in this branch of the police force are, in practical terms, of such a radical nature that there is little hope in the present climate of adducing any meaningful change. The problem of state security is, in any event, better dealt with elsewhere. All that the public and its institutions can do in this respect in order to prepare the avenues of change is to maintain and to step up their vigilance over the use and abuse of our security legislation.

Chapter Eight

APARTHEID AND ADMINISTRATIVE BODIES

Colin Kinghorn

F.W. MAITLAND, in lectures delivered in Cambridge in 1887-1888, said:

> *Year by year the subordinate government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832: it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes'* (1).

As Maitland predicted, the 'new movement' has gone farther in England; and throughout the world citizens are increasingly governed by all manner of councils and boards and officers exercising powers which have been delegated to them by the central legislature. South Africa is no exception to the general trend.

The delegated powers, which we shall refer to as 'administrative powers', are part of the whole fabric of government of the modern state. They:

> *vary in degree between, at one extreme, the discretion of a public official having complete freedom of choice whether, when and how he will act and exercising what approaches an arbitrary power, and, at the other extreme, acts to be performed by officials in strict compliance with statutory discretions imposing a definite duty to act*

> *and how to act, and where the official has no choice but to execute the precise command of the statute. The one extreme of arbitrary power or absolute discretion, if it may be exercised so as to affect persons, is a danger to the liberty of the citizen. The other extreme of rigidly defined duty, sometimes termed ministerial duty, is inappropriate for the performance of many administrative tasks where some latitude of choice must necessarily be left to the authorised public official' (2).*

Such administrative powers may be delegated to individual officials or to particular boards or councils. We shall refer to the individuals or boards or councils in general as 'administrative bodies'.

In all democratic countries it is generally recognised that the exercise of administrative powers by administrative bodies is one aspect of government that must be carefully watched and controlled. For the exercise of the powers almost invariably regulates what citizens or a class of them may or may not do, and frequently adversely affects the interests of the citizens or a class of them. If the administrative body misconceives its powers or adopts a wrong approach, a citizen may be deprived of his rights. A simple illustration may be given. In *Tayob* v *Ermelo Local Road Transportation Board, (3)* the Chairman of the National Transport Commission had suggested that the granting of an exemption to carry on a taxi business was in the gift of the Commission or a local road transportation board. Centlivres, C.J. said:

> *This is a wrong approach to adopt by a statutory board which is empowered by Parliament to grant permission to carry on a trade. It is not an exceptional privilege or a monopoly which depends on the issuing of the permission. Even the humblest citizen has the right to approach such a board and he is entitled to get the permission he requires, unless there are sound reasons to the contrary.*

If the exercise of the powers is uncontrolled it is obvious that there is a considerable likelihood of abuse of the powers and the perpetration of serious injustice. Two main kinds of problems arise in controlling the exercise of administrative powers. The first is to ensure that the bodies and persons do not exercise powers outside or beyond the powers given to them. The second is to ensure that in exercising the powers, the bodies do not do so for some improper purpose or with some arbitrary or malicious intention, *mala fide,* while nevertheless acting within the letter of the delegation.

Different ways have been tried in different countries of attempting to meet

these problems and the various aspects of them that arise. Different answers are given to the question *quis custodiet ipsos custodies?* - who will govern the governors? The exercise of administrative powers may be controlled by political means: the government may be called upon to explain injustices and questions may be asked in the legislative assembly about why particular powers have been exercised in particular ways. The normal institutions of the democratic process, including the press, public meetings, petitions, etc. all play their part in exposing injustices and building up political pressure for redress. The exercise of administrative powers may also be controlled by the Courts: the Courts generally have power to test the legality of the exercise of administrative powers and to protect the individual against the actions of administrative bodies which exceed or abuse their powers.

However, these methods of control have not always proved adequate to prevent or redress injustice, and other methods must be considered, in particular the 'ombudsman'. The ombudsman was created by the Swedish Constitution of 1809. He was to be a person of 'known legal ability and outstanding integrity', and his duty was to supervise the observance of laws and statutes as they might be applied by the Court, and by public officials and employees. He was given power to investigate complaints against public officials and to prosecute officials whom he believed to be guilty of a crime or breach of duty. Other Scandinavian countries have since established ombudsmen with broadly similar powers and duties, and in 1962 the New Zealand Parliament created the office of Ombudsman, giving him power 'to investigate any decision or recommendation made ... or an act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or her or its personal capacity'. The British Parliamentary Commissioner Act in 1967 created the officie of Parliamentary Commissioner. His powers are to investigate actions taken by or on behalf of certain bodies in the exercise of administrative functions where a member of Parliament requests him to conduct the investigation as a result of a written complaint made to the member by a member of the public who claims to have sustained injustice in consequence of maladministration *(4)*.

It is significant that these countries have found it necessary to create such officials in an attempt to control the exercise of administrative powers, and it is apparent that they perform an important function in investigating the injustices which may result from administrative maladministration. The purpose of this chapter is to investigate the problems of controlling the exercise of administrative powers as they arise in South Africa, and in particular to consider whether the system of 'apartheid' affects the problems in any way.

ADMINISTRATIVE BODIES IN SOUTH AFRICA

An analysis of administrative bodies in South Africa immediately reveals a distinction between those bodies which regulate a certain aspect of the administration of the country and its population as a whole, and those bodies which are essential to and exist primarily as part of the machinery of apartheid.

Thus on the one hand the liquor licensing boards established under the Liquor Act, the local road transportation boards established in terms of the Motor Carrier Transportation Act, and the Publications Control Board appointed in terms of the Publications and Entertainments Act, *(5)* regulate the sale of liquor, motor carrier transportation, and censorship, in respect of the population as a whole, and have their counterpart bodies in other countries in the world. On the other hand a board constituted in terms of the Population Registration Act, the Group Areas Board established by the Group Areas Act, and a labour bureau established in terms of the Bantu Labour Act, *(6)* are concerned with the particular racial group to which an individual must belong, where members of a certain racial group may live, and where members of a certain racial group may work. These bodies are essential to and exist primarily as and part of the machinery of apartheid.

The distinction is not, of course, without qualification: the system of apartheid impinges on the administration of the country and its population as a whole. For example, a liquor licensing board may not grant a grocer's wine licence to a disqualified person in relation to the premises in respect of which the licence is sought; and a disqualified person in relation to such premises means a person who is not a member of the group which is entitled to occupy the premises in terms of the Group Areas Act *(7)*. Any motor carrier certificate issued by a local road transportation board shall specify 'the class or classes of persons which may be conveyed under such certificate', and 'class' is defined as including 'race' *(8)*. No person who is a member of one racial group shall occupy land or premises in an area which is reserved for members of another racial group except under the authority of a permit *(9)*.

Further analysis of administrative bodies in South Africa reveals that even where there is no specific statutory requirement to this effect, administrative bodies are almost invariably exclusively white, whatever the race of the people with which the body is concerned. Moreover the whites who constitute the administrative bodies concerned with the enforcement of apartheid will almost invariably be people dedicated to the policy. It has been publicly stated that 'No one who is not a Nationalist will ever serve on the Group Areas Board'.

CONTROL OF ADMINISTRATIVE BODIES IN SOUTH AFRICA

1. In any normal democracy one of the most satisfactory means of controlling the exercise of administrative powers by administrative bodies is by direct political means. Where there has been an improper use of an administrative power questions may be asked in Parliament, the whole issue may be discussed and if the improper use is indefensible the responsible minister of state may even be compelled to resign (cf. The *Crichel Down* case in England). Where, however, a large section of the population is not directly represented in Parliament and an issue has no immediate electoral value, it may be difficult to persuade a member of Parliament to raise any issue of the improper use of an administrative power in relation to a member or members of that section of the population which is not represented. Even if the issue is raised, there may not be an effective discussion of it, because without an impartial investigation the true facts may not be known. Moreover, there is no direct means of ensuring that any action is taken to redress any injustice done.

2. South Africa has no ombudsman or parliamentary commissioner. There are strong arguments for the creation of the office of ombudsman in South Africa, or at least for a Commission of Enquiry into the desirability of creating such an office *(10)*. Professor Wiechers has stated that an enquiry in South Africa into administrative action which falls outside the sphere of the law has become urgently necessary. He points in this regard to the power and extent of administrative action in South Africa, and in particular to the enormous extent of administrative powers in 'Bantu' administration, and to the fact that the power of judicial review is often excluded by statute *(11)*. It is interesting to note that the Aid Centres set up under the Bantu Laws Amendment Act may carry out in a very limited way some of the functions of an ombudsman by reducing 'the burden on the technical offender' *(12)*.

3. The most important means in South Africa of controlling the exercise of administrative powers by administrative bodies is by judicial review. It is not possible in this chapter to give a detailed discusion of the law of judicial review, which is a complex and lengthy subject more aptly discussed in a specialised book *(13)*. However, it is necessary to discuss the issues considered in the paragraphs that follow.

4. At common law no appeal on fact lies against the decision of an administrative body *(14)*. When one considers how often an appeal court interferes with the findings of fact of the court *a quo*, one appreciates what the likelihood is that an administrative body will make incorrect findings of fact. More particularly is this so where the administrative body's methods and procedures for investigating and determing facts are almost certainly less efficient

and precise than those of a court of law.

5. The principal ground on which the Courts will interfere with the exercise of an administrative power by an administrative body is that the exercise was *ultra vires,* outside the powers of the body. The exercise may be *ultra vires* in a narrow sense that the body was simply not expressly or impliedly given power to act in the manner in question, or in a wider sense which includes the fact that an administrative body, at any rate where it is acting quasi-judicially, must act in accordance with the principles of natural justice *(15).*

6. The two main principles of natural justice are firstly *audi alteram partem,* that the body must disclose to the person affected the substance of the information at its disposal and give him a fair opportunity to controvert it and state his case; and secondly, that the body must discharge its duties impartially and without bias. It must be noted that 'bias' in this context does not mean

> *the total absence of preconceptions in the mind of the tribunal. Every man has his predispositions, attitudes and opinions derived from experience and education. To that extent every man is prejudiced, but it is not partiality when a judge is guided by the fruits of his experience in arriving at a decision. It becomes bias and partiality only when he approaches the case not with an open mind nor conceding that his predispositions, attitudes and opinions may not apply to the particular case, or if they do apply, that he is open to persuasion that they are wrong or that an exception should be made in the particular circumstances of the case (16).*

It must be noted further in this regard that

> *The interest or enthusiasm which an official or tribunal may have for the discharge of their functions and for the object or purpose at which those functions are directed is not bias (17).*

It is difficult for a judicial officer independent of the executive and 'schooled in the objective approach to evidence' *(18)* to approach cases with an open mind. How much more difficult it must be for an administrative body, intent on carrying out the policy of the executive, to keep an open mind.

7. In determing whether an administrative body has acted *ultra vires* in the narrow sense, a court must determine firstly whether the body has observed

the limits imposed by the enabling legislation. In numbers of cases it has been held that enabling legislation will not in the absence of express wording or necessary intendment be read so as to permit oppression, partiality or inequality.

8. This principle has been applied in a line of cases dealing with the amenities which must be provided for different racial groups. The 'separate but equal' doctrine evolved by the Courts in accordance with this principle and the legislative departures from the principle provide an apt illustration of the effects of apartheid on administrative bodies and the exercise of administrative powers.

In *Rex* v *Abdurahman (19)* it was held that certain Railway Regulations which authorised the reservation of portion of a train for the exclusive use of a particular race without restricting members of that race to the use of that portion were not *ultra vires,* because they could be applied equally to all races. But the Appellate Division also held that as the manner in which the Regulations had in fact been applied had resulted in partial and unequal treatment to a substantial degree as between Europeans and non-Europeans, any action taken under the Regulations was void. Centlivres, J.A. said that

> *it is the duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community (20).*

The legislation in terms of which the Regulations had been made was amended in 1949 to give the Railway Administration power to reserve any portion of railway premises or any train or portion of it to the exclusive use of persons of any particular race *(21).* In *R.* v *Lusu (22)* the Appellate Division again held that the Railway Administration did not have an unfettered discretion to apply the regulations in such a way as to result in partial and unequal treatment to a substantial degree as between races. In 1953 the Reservation of Separate Amenities Act, No. 49 of 1953, was passed, brushing aside these judicial niceties and providing that it is unnecessary when a separate amenity is provided for a particular class or race in any public premises, or vehicle, to provide any or a substantially similar amenity for any other class or race.

In 1961, in *Minister of the Interior* v *Lockhat and Other (23),* the question came before the Appellate Division whether the Group Areas Act empowered the Governor-General-in-Council to discriminate to the extent of partial and

unequal treatment to a substantial degree between the members of the different groups as defined under the Act. Holmes J.A. said:

> *No such power is expressly given in the Group Areas Act, but it seems to be clearly implied. The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will ultimately prove to be for the common weal of all the inhabitants, is not for the Court to decide. But in that connection reference might perhaps be made to the Group Areas Development Act, 69 of 1955, section 12 of which empowers the Board to develop group areas and to assist persons to acquire or hire immovable property in such areas. The question before this Court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate foreseeable discriminatory results complained of in this case. In my view, for the reasons which I have given, it manifestly does.*

9. It is interesting to compare the legislative erosion of the 'separate but equal' doctrine in South Africa with the distinguishing of the doctrine by the American Supreme Court. Whereas in South Africa Parliament has made discrimination which is separate and unequal lawful, in America the Supreme Court in cases such as *Brown* v *Board of Education (24)* has held that separate facilities are inherently unequal and that separate treatment of the races is unlawful because it violates the equal protection provisions of the 14th Amendment to the U.S. Constitution *(25)*.

10. The question of the 'unreasonable' exercise of administrative powers arose also in the case of *Tayob* v *Ermelo Local Road Transportation Board (26)*. In that case the appellant, an Asian, had since 1940 carried on a first class taxi business in the Transvaal town of Piet Retief, a first class taxi being one exclusively for the use of Europeans *(sic)*. When he applied in 1950 to the local road transportation board for a renewal of his exemption under the Motor Carrier Transportation Act, the board refused to grant the renewal, granted the renewal of three other taxi owners (who were Europeans) and offered to grant the appellant an exemption in respect of a second class taxi. The National Transport Commission, on appeal from the decision of the local

board, stated that its general policy, as between applicants competing for an exemption certificate, was, where all other things were equal, to grant exemptions to Europeans for the conveyance of Europeans and to non-Europeans for the conveyance of non-Europeans. The Appellate Division held that to apply the policy enunciated by the Commission generally and without any qualification might result in very great hardship to non-Europeans; that the admitted facts showed that the application had been refused on the ground that the appellant was a non-European; that to decline to grant an exemption on the ground that the appellant was a member of a particular race or class was unreasonable, and that the Motor Carrier Transportation Act did not empower the board or the Commission to do unreasonable things. The Appellate Division also disagreed with the reasoning of the judge of first instance that 'unjust discrimination is something which has to be decided on the facts of the particular case and it is by no means certain that what the Courts in one country regard as unjust discrimination would be so regarded in another country. Conditions may be different and public opinion is not necessarily the same in all countries'. Centlivres, C.J. failed 'to see how public opinion is relevant to the subject under enquiry' *(27)*. As might have been expected, the Act was amended in 1955 to define 'class' in relation to persons as meaning also 'race', so that the authorities were empowered to issue certificates or exemptions restricting the race of persons who could be conveyed under that certificate or exemption. Legislative sanction was thus given again to administrative bodies to apply the policy of apartheid to the exclusion of common law principles of reasonableness.

11. Many cases have been decided in the South African courts on the control of the exercise of administrative powers by the application of the principles of natural justice, the *ultra vires* doctrine in the wider sense. Thus in *Minister van Naturellesake* v *Monnakgotla (28)* it was held that the rules of natural justice must be applied to the power of the Governor-General to dismiss a Chief under section 2 (7) of the Native Administration Act *(29)* and that the respondent had a good cause of action against the appellant for the setting aside of an order dismissing him as acting chief where the appellant failed to give him a fair opportunity to make any relevant statement as to the propriety of deposing him and to controvert any statement made to his prejudice in connection therewith. It is important to note, however, that the courts' power of controlling administrative bodies on this ground may be limited by the legislature in particular statutes, and the principle of *audi alteram partem* may be excluded where this is expressly stated in or is a necessary implication of the legislation *(30)*.

12. The importance of observing an irreproachable fairness and correctness in the exercise of administrative powers was stressed by Marais, J. in *The State* v *Nkabinde (31)* in relation to enquiries under section 29 of the Bantu

(Urban Areas) Consolidation Act, No. 25 of 1945 *(32)*. This provision, which deals with the 'Manner of dealing with idle or undesirable Bantu', empowers a Bantu affairs commissioner to enquire into allegations that a Bantu is an idle or undesirable person, and if he so finds, to order *inter alia* that such Bantu be sent to a rehabilitation centre or farm colony. Marais, J. considered that it was part of the established policy of the state strictly to regulate the influx of the unskilled and semi-skilled labour force into urban areas, and accepted that a provision such as section 29 was socio-economically indispensable. He recognised that the commissioners who were burdened with this type of enquiry were extremely busy; but stressed that the commonness of this type of case must never be permitted to affect the importance of each case, for the freedom of a free man was at stake, just as in a criminal case. One of the disturbing features of the records of such enquiries which daily came before the judges on review was the apparent silence of the persons brought before such enquires: this might indicate a realisation of 'guilt', but could also mean ignorance or confusion. The presiding official should make every effort to record an explanation by the person in question of the allegations against him *(33)*.

13. An important aspect of the control by the Courts of the use of their powers by administrative bodies is the procedural remedies which the law makes available to persons whose rights may have been invaded by administrative action. One of the most important of these procedural remedies is the interdict. By means of this remedy a person whose rights are invaded or threatened by administrative action (or inaction) may obtain an order of court compelling the administrative body to desist from (or take) the necessary steps to prevent the infringement of that person's rights. Where the remedy was persistently invoked by persons who were being compulsorily removed or ejected from their homes, the Natives (Prohibition of Interdicts) Act *(34)* was passed 'to prevent the further frustration of housing schemes and removal of squatters by dilatory stays and suspensions' *(35)*. The Illegal Squatting Act *(36)* empowers a magistrate who has convicted an accused of illegal squatting to make an order for the summary ejectment of the accused from the land and to order the demolition and removal of all buildings erected by him upon it. Section 2 of the Prohibition of Interdicts Act provides *inter alia* that whenever a 'native' is required by any order to be ejected from any place, no interdict or other legal process shall issue for the stay or suspension of the execution of such order.

CONCLUSIONS AND COMMENTS

1. The exercise of administrative powers by administrative bodies frequently affects the liberties, rights and duties of citizens. There is a constant danger

that the citizen will be adversely, unreasonably or unjustly affected because the exercise of administrative powers is almost invariably arbitrary to a greater or lesser degree, and because administrative bodies, which are primarily instruments of general policy, are imperfect instruments when it comes to achieving justice for the individual. The risk of injustice to the individual may be diminished by political and judicial control of administrative bodies.

2. The system of apartheid, as a 'colossal social experiment', is implemented very largely through administrative bodies. The effectiveness of the usual political control of such bodies is limited. The effectiveness of judicial control has in numbers of instances been limited by the legislature itself. Thus where the courts have intervened betwen administrative bodies and the individual in order to prevent unreasonableness, discrimination and inequality of treatment, or to insist that the principles of natural justice be observed, the legislature has subsequently intervened to authorise unreasonableness, discrimination and inequality of treatment and expressly or impliedly to authorise departures from the principles of natural justice *(37)*.

3. If those who are most directly affected by the system of apartheid and in particular by the administrative bodies set up to enforce the system were directly represented in the central legislature, political control of such bodies, even assuming that they continued to exist, would be different. It also seems obvious that if those who are most directly affected by the system of apartheid were directly represented on the various administrative bodies, those bodies would exercise their powers in different ways. To give but one example, if Africans sat on the Publications Control Board, it can hardly be doubted that the range of films which would be authorised for showing to Africans would be very different *(38)*. It is interesting to speculate about whether if the judiciary were not exclusively white, the courts would have been less inclined to hold that the legislature had impliedly authorised unequal treatment *(39)*.

4. A Commission of Enquiry should be appointed into the exercise of administrative powers by administrative bodies in South Africa and the proper control of such exercise. The terms of reference of the Commission should include an enquiry into the office of Ombudsman and Parliamentary Commissioner in other countries and into the question of whether such an office should not be created and a person with similar powers and duties should not be appointed in South Africa.

FOOTNOTES

1. F.W. Maitland, *Constitutional History of England,* (1908), pp. 500-501.
2. L.A. Rose-Innes, *Judicial Review of Administrative Tribunals in South Africa (1963),* p. 41.
3. 1951 (4) S A 440 (A.D.).
4. On the ombudsman, see, for example, G.N. Barrie. 'The Ombudsman: Governor of the Government', (1970) 87 *S.A.L.J.* 224.
5. Acts No. 30 of 1928, No. 30 of 1930 and No. 26 of 1963 respectively.
6. Acts No. 30 of 1950, No. 36 of 1966, and No. 67 of 1964 respectively.
7. Section 53 *bis,* of Act No. 30 of 1928.
8. Section 7 of Act No. 39 of 1930.
9. Section 26 of Act No. 36 of 1966.
10. See e.g. G.C. Kachelhoffer, 'Die Ombudsman' (1967) 30 *T.H.R.-H.R.* 339; G.N. Barrie, 'The Ombudsman: Governor of the Government' (1970) 87 *S.A.L.J.* 224; but cf. J.D.B. Mitchell, 'Ombudsman is the Wrong Answer', *The Star,* 10th April, 1967, where the author briefly puts the case for special administrative courts, arguing that 'the power of a court is needed against the power of government'.
11. M. Wiechers, 'Die Legaliteitsbeginsel in die Administratiefreg', (1967) 30 *T.H.R.-H.R.* 309 at p. 325.
12. See Act No. 30 of 1972. See also *The Star,* 15 March, 1972.
13. See Rose-Innes: *Judicial Review of Administrative Tribunals.*
14. *Shidiack* v *Union Government,* 1912 A.D. 642 at p. 652.
15. H.R. Hahlo and E. Kahn: *South Africa: The Development of its Law and Constitution,* pp. 190-191.
16. Rose-Innes, *op. cit.,* p. 176.
17. Rose-Innes, *op. cit.,* p. 177.
18. *M. and Others* v. *Race Classification Board,* 1962 (1) S A 715 (T) at pp. 723 B, 724.
19. 1950 (3) S A 136 (A.D.).
20. *Ibid,* at p. 145.
21. Act No. 49 of 1949, amending Act No. 22 of 1916.
22. 1953 (2) S A 484 (A.D.).
23. 1961 (2) S A 587 (A.D.).
24. 347 U.S. 483, 349 U.S. 294.
25. See e.g. L. Oppenheim, 'Judicial Review in the United States' (1961) 78 *S.A.L.J.* 392 at pp. 408-420. See also *City of Salisbury* v *Mehta,* 1962 (1) S.A. 675 (F.C.) at pp. 677 to 679. The case was about whether the Municipality of Salisbury was entitled by resolution to maintain separate swimming baths for the use of the European section of the population. Beadle C.J. in his judgment in the High Court of Southern Rhodesia referred to the American cases as 'of persuasive force as indicating the modern trends in this field of juris-prudence'.
    'I think the reasons in the instant case for this segregation require examination. It seems clear that the prime reason is the prejudice of certain Europeans against bathing with Asians. Where an Asian is forbidden to associate with Europeans in a swimming bath on this ground alone, it must, ... induce amongst Asians feelings of humiliation, insult and of inferiority'.
26. 1951 (4) S.A. 440 (A.D.).
27. 1951 (4) S.A. 440 (A.D.) at p. 446.
28. 1959 (3) S A 517 (A.D.).
29. No. 38 of 1927.
30. *R.* v *Ngwevela,* 1954 (1) S A 123 (A.D.). Hahlo and Kahn, *op. cit.* p. 193.
31. 1967 (2) S A 157 (T) at p. 159.
32. Act No. 25 of 1945.

33. See also *R* v *Sinjane,* 1949 (2) S A 879 (T).
34. Act No. 64 of 1956.
35. 1956 *Annual Survey of South African Law,* p. 46.
36. Act No. 52 of 1951.
37. See L.E. Caney, *Statute Law and Subordinate Legislation* (Prentice Hall, 1957), in which the learned author, a Judge of the Supreme Court of South Africa, Natal Provincial Division, wrote (at p. 106):
'In our country ... where racial conflicts and colour consciousness abound and where by far the majority of the population is not only illiterate, but also has the most meagre, and often no, part in the process of government ... the Courts should be ready to bear the full measure of the burden of deciding upon the reasonableness ... of subordinate legislation, for the protection of minorities and also of the politically inarticulate, and in the interests of justice ...'
38. See *Rand Daily Mail,* Saturday, 18 October, 1969. The terminology used by administrative bodies, e.g. a distinction between first and second class taxis based purely on race, might be different.
39. In his Inaugural Lecture, 'The Judicial Process, Positivism and Civil Liberty' published in (1971) 88 *S.A.L.J.* 180, Professor Dugard discusses *inter alia* the 'inarticulate' premises of the judges in the group of cases in which were considered the powers of the Minister of the Interior to prohibit as immigrants 'any person or class of persons deemed by the Minister on economic grounds ... to be unsuited to the requirements of the Union or any particular province thereof'. The Minister issued regulations declaring every Asian person to be unsuited on economic grounds to the Union and to every province in which he was not already domiciled.

Chapter Nine

CHANGE AND METHODS OF CHANGE

D.B. Molteno

IT DOES NOT seem to me to be appropriate to attempt either a blueprint of a method for securing reform of existing constitutional arrangements or to predict the course of future events, as rendering any given plan of constitutional reform possible or otherwise. For contemporary South African conditions would seem to render the possibility of a constitutional reform promoting a greater measure of approximation of our system of government to Christian values, as we have been taught to understand them, mainly contingent on the achievement of a spirit of goodwill and mutual confidence between the major ethnic groups, engendering, in turn, a desire for co-operation within the framework of a common fatherland. The logistics of such an enterprise can hardly be planned in advance. Too much depends on the objective influence of unforeseeable future events, alike upon the power balance between groups and the psychological climate pervading each. Hence definition of the long term objectives to be aimed at, as far as these can be formulated without knowledge of the shape of the long term future, to be worked for by whatever appropriate means are available from time to time by a political movement organised for this purpose, would seem to mark out the limits of practicable political activity.

If there is substance in this latter consideration, the main function of this paper would seem to be the auxilliary one of recommending such of the long term objectives to be worked for as involve reform of the existing law. And the aspect of this task with which this study is concerned is that involving the functions, powers and duties of the legislative, executive and judicial organs of government, or, in other words, the constitutional aspect.

The Constitution as an Instrument for the Promotion of Human Welfare

Since a constitution is essentially an instrument determining the structure of the organs of government of a State and the functions of such organs, it necessarily also determines the relationship between the individual and the public authorities. The constitution of a polity is thus the ultimate determinant of the status of individuals, or classes of individuals, members of such polity, as legally equal or legally unequal, free or servile, privileged or legally handicapped, etc. In view of the widely different social purposes a constitution, and the government that it established, may promote, the essence of the constitutional aspect of this inquiry must surely be directed towards providing some guidance in answering the following questions:

1. What are the essential purposes that any system of civil government must be designed to provide consistently with the social values implicit in Western Christianity?

2. What models or precedents of attempts to construct a framework of government for the promotion of such purposes are available in the past history or contemporary practice of Western communities elsewhere?

3. To what extent is the contemporary South African system of government, functioning in terms of the existing Constitution, achieving, in comparative terms, the promotion of the purposes in question?

4. What reforms (if any) of our system of government - or, at least, the minimal ones - are best calculated to promote those purposes more effectively, having regard, of course, to the special circumstances and conditions of South Africa?

These are, of course, very large questions, necessarily admitting only of general treatment and of tentative conclusions.

The Ends of Civil Government

'*Political* or *civil power* is the power vested in any person or body of persons of exercising any function of the State' *(1)*. A State, in turn, is definable with reference to its essential functions *(2)*. 'To distinguish a State from other human associations it is probably enough to say simply that the State is an association for maintaining order and justice, within its boundaries' *(3)*. And this implies 'a permanent and definite organisation' of

the society concerned, such organisation being known as its constitution *(4)*. 'There can be no law unless there is already a State whose law it is, and there can be no State without a constitution' *(5)*.

It is to be noted that Sir John Salmond, the eminent jurist referred to and quoted in the last paragraph, while regarding the securing of order and justice as the essential function of a State, regards the application and formulation of law as secondary to this, related to it, that is, as a means to an end. This seems to follow from his definition of law as 'the body of principles recognised and applied by the State in the administration of justice' *(6)*. It is, of course, clear from the context that Salmond is referring to principles in the sense of normative principles, i.e., rules prescribing conduct.

If, then, the administration of justice is an essential function of a State, some analysis of the concept of justice seems requisite, as also of the concept of law. For only thus can the validity of Salmond's apparent view of the relationship between law and justice be tested.

The Concept of Justice

The clearest but most comprehensive short description of the concept of justice that I have been able to find is that of Professor Hart:

> *The general principle latent in ... the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality. This is something to be respected in the vicissitudes of social life when burdens or benefits fall to be distributed .... Hence justice is traditionally thought of as maintaining .... a* balance *or* proportion, *and its leading precept is often formulated as 'Treat like cases alike'; though we need to add ... 'and treat different cases differently' (7).*

The writer adds, however, that this precept requires, for the purposes of its application, to be supplemented by some indication of the criteria of similarity or dissimilarity of cases. For individuals resemble one another in some respects and differ in others, and hence 'we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant' *(8)*.

It is at this point that the relation between law and justice becomes partially manifest. For, although the idea of law has not yet been examined, it has already been noted that law is normative and consists of a body of rules. Rules laying down standards of conduct of general application are surely necessary over a considerable portion of the field to be covered by the administration of justice if like cases are to be treated alike. And in the social field, therefore,

rules prescribing the qualifications for benefits or liability to burdens should not discriminate between individuals who equally possess the prescribed qualifications or the prescribed criteria of liability, as the case may be. Thus a rule entitling the poor to pecuniary relief from public funds would, to avoid the stigma of injustice, require to lay down the degree of need entitling an applicant to such relief. To exclude any special class therefrom by reference to criteria other than individual need would clearly justify criticism of the rule as unjust.

But apart from such obvious cases of overt discrimination, a rule may be discriminatory in its incidence having regard to the circumstances of different individuals to whom its terms equally apply. For instance, a rule imposing a flat rate of poll tax of general application for the finance of necessary public services would, in form, impose an equal levy on all, but, while its incidence on the wealthy might be felt as an inconsiderable burden, on the very poor it might be felt as a severe hardship, possibly supportable only at the expense of necessities. On the other hand, to raise an equal sum by means of a graduated income tax might virtually exempt the poor from contribution, but, while not involving physical hardship for those in the upper income brackets, might be tenable only at the expense to an undue degree of the volume of national savings available to sustain the rate of over-all investment required for a high and stable level of employment. And, of course, various devices intermediate between these two extremes might be possible for securing the same revenue return. But the point is that these various alternatives are necessarily discriminatory in incidence, and burden or benefit some disproportionately to others. How, then, can a decision be arrived at which can fairly be said to be objectively just, and by whom? Clearly the questions raised by an attempt to arrive at a just decision of issues thus postulated are inappropriate for settlement by the judiciary, the organ of government normally charged with the administration of justice. For such questions are largely ones of estimation of the probable effects of alternative legislative measures and of balancing one form of social ill or advantage against another. Issues such as these, therefore, necessarily involve decisions of policy, to be decided by the legislature with the assistance of the appropriate department of the executive - in the example postulated, the treasury. Clearly the just decision is that most conforming to the general welfare. But although in some instances this test may be easy to apply, certainly in a great many it would be very difficult, owing to the absence of general objective criteria of conformity thereto.

However, it is surely clear that in situations such as this a decision to legislate without prior impartial consideration of the various interests that will be affected would be arbitrary, probably partisan, and, however motivated, unjust. Where, then, a legislative issue involves the balancing of competing interests or claims, its decision in the public interest would appear to come

nearest to satisfaction if preceded by honest and impartial survey of such claims or interests. And it is in this sense that the requirements of justice may be met.

Indeed it is a matter of common knowledge that, to a greater or less degree, such surveys have as a matter of practice, become preliminary steps in the legislative process. In the United Kingdom, for instance, it has become common form to consult interests prospectively affected by proposed legislation, through the department of the minister in charge of the bill, by inviting evidence before a Parliamentary committee, a Royal Commission, etc. In the U.S.A., corresponding practice seems to have become more standard and formalised still, and hearings of prospectively affected interests before Congressional committees are a regular preliminary to the consideration of bills by Congress.

The Concept of Law

The nature of law, in the sense of a body of rules, or normative standards, has already been touched on in its relationship to justice. The whole subject is, of course, a complex and disputed one, and cannot be dealt with here save to the minimal, but essential, extent required to elaborate somewhat further on the role of law in promoting social justice.

Some jurists, it is true, deny any necessary connection between law and justice. Notable, indeed probably pre-eminent, among these is John Austin. For him a law is 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him' *(10)*. It is, therefore, the command of a sovereign addressed to a subject, backed by a threat implicit in power. Since the relationship of sovereign and subject is a postulate of Austin's analytical approach, the justice or injustice of the former's rules as a factor in maintaining the relationship in question is, for Austin, an irrelevant consideration. His system, therefore, may be logical or illogical in relation to its premises, but it it unnecessary to consider it further since its avowed scope is too limited to assist this inquiry.

But it is far otherwise with Austin's foremost critic, Professor Hart. For the latter, laws are essentially rules, but rules falling into two distinct classes. The first class, which he regards as primary, are rules requiring human beings to perform or abstain from certain actions. The second, which he describes as secondary, confer authority to alter, add to or apply the primary rules. The primary rules create duties or obligations, the secondary confer powers *(11)*.

A primary legal rule imposing an obligation involves a general demand for conformity, backed by social pressure against deviation, including, usually or prominently, physical sanctions *(12)*.

Secondary legal rules conferring powers include rules constituting the public authorities, equipping them with powers to alter, add to or apply the

primary rules, and prescribing 'rules of recognition', defining the criteria of validity whereby such authorities may identify any given or suggested rule as a rule of the legal system *(13)*. These secondary rules, then, include, besides the rules of recognition, a rule prescribing which one will be decisive, or ultimate in the event of conflict between them, rules of adjudication and, within the limits (if any) prescribed by the ultimate rule of recognition, legislation.

Hart, unlike Austin, does not regard his basic elements of a system of laws as mere postulates to be assumed as established as the starting point of analysis. For he proceeds to state the social conditions indispensable to the existence of each class of rules, and hence of the system as a whole.

> *There are ... two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change (legislation) and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens* need *satisfy: they may obey each 'for his part only' and from whatever motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge and obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution (14).*

The Minimum Moral Content of Law

Justice is surely an important segment of morality, although the latter is the wider concept. It is evident also that, although legal rules and moral rules may correspond, indeed often do, this is not necessarily so. A legal rule, for instance, may be morally neutral, e.g. it is of no moral moment whether vehicles should be compelled to proceed on the left or the right side of a public road. Conversely, some immoral conduct is not illegal *per se,* e.g. lying, hypocrisy, inordinate vanity in its various manifestations, etc. But unless the law possessed a minimum moral content organised human society, indeed law itself, could scarcely exist.

It has just been observed that it is a condition for the existence of a legal system that its rules of obligation should be generally obeyed. This surely must be so on the basis of the not very large assumptions that association of human beings is necessary to human survival and that such association requires a system of rules prescribing at least a minimum measure of mutual forbearance

between individuals in the exercise of the liberty of action made possible, though in unequal degree, by the endowment of nature. In the absence of such minimum, protecting the individual and his family in their lives and bodily inviolability generally, in their freedom to supply their minimum material needs by their own labour and in their property accumulated as the result of such labour, coupled with an obligation on that individual to respect the corresponding bodily security, constructive liberty and acquired property of others, no one would have reason voluntarily to obey any rules, and without voluntary obedience by some, enforcement against any would obviously be impossible.

Since, then, forbearance towards others in pursuance of one's own aims is a common factor in both legal and moral obligation, legal rules, if they are to serve their minimal purposes, must include at least a minimum moral content as a condition of their efficacy. 'Human nature cannot by any means subsist', wrote Hume, 'without the association of individuals: and that association could not have taken place were not regard paid to the laws of equity and justice' *(15)*.

But although a sufficient measure of voluntary general obedience is an essential of a legal system, it does not follow that coercive sanctions against law breakers are dispensable. For if most men are apt to sacrifice, at all events within limits, their own immediate and selfish aims for the advantages, and probably, in many cases, for the rightness, of a system of mutual forbearances, common experience demonstrates that there will always be a minority who yield to the temptation of law-breaking. Without a sanction imposed by public authority not only would their numbers increase but would leave the law-abiding unprotected. 'Sanctions are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not ... Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system' *(16)*.

Natural Law

Insofar as law postulates a minimum moral content, as the essential condition of organised human society, in turn dictated by necessity in order to survive, it may be regarded as a derivative of 'natural law'. The doctrine of natural law, systematised originally by the classical Stoic philosophers, has appeared in various guises and forms over centuries of history. It can be touched on here merely insofar as it is relevant to the relationship of law to Christian values. And in this regard it seems impossible to overlook the significance and influence of the scholastic system expounded in the 13th century by St. Thomas Aquinas.

For St. Thomas a law is 'an ordinance of reason for the common good

made by him who has the care of the community and promulgated' *(17)*. 'Natural law' he regards as part of 'external law', which latter he describes thus:

> *It is clear ... supposing the world to be governed by the divine providence ... that the whole community of the Universe is governed by the divine reason. Thus the rational guidance of created things on the part of God, as the Prince of the Universe, has the quality of law ... (18).*

On this basis he proceeds a little later:

> *But, of all others, rational creatures are subject to divine providence in a very special way: being themselves made participators in providence itself, in that they control their own actions and those of others. So they have a share in the divine reason itself, deriving therefrom a natural inclination to such actions and ends as are fitting. This participation in the eternal law by rational creatures is called natural law' (19).*

The writer proceeds to relate natural law to human law thus:

> *Just as ... we proceed from indemonstrable principles, naturally known, to the conclusions of the various sciences, such conclusions, ... arrived at by the use of reason; so also the human reason has to proceed from the precepts of the natural law, as though from certain common and indemonstrable principles, to other more particular dispositions. And such particular dispositions, arrived at by an effort of reason, are called human laws ... (20).*

St. Thomas describes these precepts of natural law, wherefrom he regards human law to be a derivative, in these terms:

> *The order of the precepts of the natural law corresponds to the order of our natural inclinations. For there is in man a natural and initial inclination to good which he has in common with all substances; insofar as every substance seeks its own preservation according to its own nature. Corresponding to this inclination, the natural law contains all that makes for the preservation of human life, and all that is opposed to its dissolution (21).*

St. Thomas then proceeds to class among his natural law precepts those founded on natural inclinations that man shares with other animals, such as those for sexual relations, the rearing of offspring etc. *(22).* And:

> *Thirdly, there is in man a certain inclination to good, corresponding to his rational nature; and this inclination is proper to man alone. So man has a natural inclination to know the truth about God and to live in society. In this respect there come under natural law all actions connected with such inclinations: namely, that man should avoid ignorance, that he must not give offence to others with whom he must associate and all actions of like nature (23).*

It is suggested that the elements of Thomist doctrine, as just expounded in the words of the 'Divine Doctor' himself, fully accord with the thesis, outlined herein, that at least a 'minimum' moral (including of course, just) content of human law is rationally required as an essential of human association, and hence of human survival. But, of course, that doctrine goes a great deal further. Not only is an unjust human law immoral, but it offends against eternal law, the guidance whereof is available to man through the use of his reason, which in itself represents his share in a transcendant divine reason allotted to him by divine providence. Moreover, human law being derivative from natural law, it follows that St. Thomas would deny to an unjust law the quality of 'law' at all.

> *Saint Augustine says ...: 'There is no law unless it be just ...' So the validity of law depends on its justice. But in human affairs a thing is said to be just when it accords aright with the rule of reason: and ... the first rule of reason is the natural law ... And if a human law is at variance ... with the natural law, it is no longer legal, but rather a corruption of law (24).*

It is important, however, in regard to this last aspect of an unjust law, to appreciate the sense in which St. Thomas used the expression, 'validity of law'. He wrote, it must be recalled, in the thirteenth century, and his terminology must be understood in the framework of mediaeval institutions and ideas. This framework, I think, cannot be better described than in the matchless language of Maitland in his celebrated lectures to students reading for the Cambridge Law Tripos during the Michaelmas Term of 1887 and the Lent Term of 1888:

> *And now what was the king's position? I think we may ... say ... that against him the law had no coercive process ... On the contrary, from Henry III's reign (1216-1272) we get ... from Bracton ... that the king cannot be sued or punished ... If the king breaks the law then the only remedy is a petition ... praying him that he will give redress. On the other hand, it is by no means admitted that the king is above the law. Bracton ... repeats this very positively:*
>
> *The king is below no man, but he is below God and the law; law makes the king; the king is bound to obey the law, though if he breaks it, his punishment must be left to God. Now ... the men of the thirteenth century had no ... notion of sovereignty, had not clearly marked off legal as distinct from moral and religious duties, had not therefore conceived that in every State there must be some man or some body of men above all law ... Now, we have to remember that when in the ... seventeenth century Hobbes put forward a theory of sovereignty which was substantially that of Bentham and of Austin, this was a new thing, and it shocked mankind. Law had been conceived as existing independently of the will of any ruler ... While we are speaking of this matter of sovereignty, it will be well to remember that our modern theories run counter to the deepest convictions of the Middle Ages - to their whole manner of regarding the relation between Church and State. Though ... every man may have his place in both organisms, these two bodies are distinct. The State has its king or emperor, its laws, its legislative assemblies, its courts, its judges: the Church has its pope, its prelates, its councils, its laws, its courts ...; the two are independent, ... neither derives its authority from the other. Obviously while men ... act upon this theory, they have no sovereign in Austin's sense; before the Reformation Austin's doctrine was impossible (25).*

The relationships, in mediaeval terms, between positive and natural law, resulting from the theory thus elaborated, has been further clarified as follows:

> *Adler points out that St. Thomas's theory has been misread, even by some of his followers, and that modern misunderstandings arise from the assumption that the term law is used in exactly the same sense in the phrases positive law and natural law ... Natural law is not directive in the same sense as positive law. The former provides the ultimate end, the latter directs a certain course of action after considering all the circumstances here and now. Natural law binds*

> *the conscience: positive law binds because of a sanction, though if it is just it will also bind the conscience ... Much confusion would have been avoided if the term law had been confined to positive law and another term used for the* ius naturale, *which essentially lays down general principles rather than detailed rules. The* principles of natural justice *is a phrase that expresses better the mediaeval notion (26).*

Friedmann's analysis alike of the Thomistic proper relation of positive to natural law and the consequences of departure therefrom introduces another important aspect of the philosophy of St. Thomas.

> *The State, the worldly authority, has a legitimate function and sphere: to regulate social life justly, that is to the common good, within the limits of the authority of the law-giver (27).*

Such limits I take to be, apart from those imposed by the requirements of justice, regulation of matters properly pertaining to Caesar, not God. The writer continues:

> *When a law is unjust either in respect of the end (that is, laws conducive not to the common good but to the cupidity and vainglory of the law-giver), or in respect of the author (as when a law is made that exceeds the power given to him), or in respect of the form (as when burdens are imposed unequally on the community) such law is unjust and therefore in contradiction to natural and divine law. It is consequently invalid (28).*

But the consequences should be noted. They do not include relief by a judicial tribunal against loss and prejudice caused by enforcement of such an invalid decree, according to the modern concept of invalidity. Indeed, for mediaeval man the separation of the judicial power from the legislative function was imperfectly conceived, even to the somewhat uncertain extent it is conceived by modern juristic thought. The mediaeval king was alike the 'fountain of justice', and the source of the exposition and modification of positive law, in both cases in his royal *Curia.* And, in England at all events, the King's dual function thus conceived survived the dissolution of feudal society and remains the theoretical position to this day, the King in Parliament being both a legislature and, through the House of Lords, the ultimate tribunal of appeal. But the theory of today is, of course, based on the practice of the now remote past. To a thirteenth century Englishman the idea of the King in his highest court deciding that a law enrolled of record as a statute of

that same highest court was invalid must surely have verged on the absurd. Nor, in any event, could the King's lower courts even consider the validity of a statute, not because Parliament was regarded as a 'sovereign' legislature, in the modern sense, a concept which no one at that time could ever have heard, but because the record of the King's highest court was binding on, and could hence not be questioned by, all lower courts. How, then, could the court of ultimate resort wield a jurisdiction in error which the courts *a quo* lacked? For if they lacked such jurisdiction there could be no error. No, the consequences of invalidity for St. Thomas varied, apparently, with what he regarded as the gravity of the ground thereof, and, according to Professor Friedmann, were these:

> *In regard to the first two requisites* - i.e. in regard to the justice of the end and the authority of the law-giver - *St. Thomas is adamant. They are invalid because: 'We ought to obey God rather than man'. In regard to the last* - i.e. unjust class discrimination - *he recommends obedience despite injustice. For, in order to avoid scandal and disturbance ... a man should even yield his right! Thus St. Thomas's system clearly upholds the supreme authority of the Church, gives the ... Emperor his due share and at the same time discourages civil revolution by opposing to the injustice of oppressive laws the beneficial effect of order as against disturbance (29).*

The end result, then, of the scholastic version of the concept of law, as the present writer understands it, is that positive laws that are promotive of corruption or blasphemous usurpation should not be regarded as binding and should be disobeyed. Laws, however, that are unjustly discriminating against classes of persons should nevertheless be obeyed as a lesser evil than disruption of order through revolutionary upheaval.

Furthermore, it is suggested that the scholastic philosophy is of greater value to an inquiry such as the present than to a purely juristic inquiry. St. Thomas was one of the really great thinkers of all time, his ideas being of the deepest significance not merely for his day and the conditions thereof, but for mankind living in any age and under any social order. But, of course, he was a great deal more. He was a Christian saint. As a source of guidance therefore, in relation to the regulation of society by law in a manner informed by Christian values, it is suggested that we could look far for his equal.

Constitutional Safeguards of Justice

It is, of course, trite that the true and effective safeguard of just government of men is adherence in such government to the rule of law as Dicey ex-

pounded it as an institution of the British constitution. It involves, according to such exposition, the immunity of the individual in person and property, save for a distinct breach of law, established before the ordinary courts *(30)*. It involves further the accountability of all before such courts for like conduct, irrespective of official rank or social status *(31)*. And finally the rights and duties of the individual, in relation to the public officers, are determined by the principles of the ordinary law, as expounded by judicial precedent *(32)*.

The rule of law, then, consists of certain procedural safeguards for the individual's person and property. It therefore presupposes his rights in these. What are they? Clearly they must include the right to life, indeed of personal security generally against unlawful violence. Included also must be the right to personal freedom, primarily from physical restraint, but including also the full use of the individual's faculties in any manner not injurious to others. Similarly the right to own private property, lawfully acquired by labour or otherwise, would seem to flow naturally from the right to personal liberty in the wide sense just mentioned. Those rights to life (including to personal security generally), liberty and property are, of course, recognised and protected by the English common law, and are distinguished by Blackstone as 'absolute' rights, since they would 'belong to ... persons merely in a state of nature', and do not, like other rights owe their origin to the state. Indeed he accepts as the 'principal aim of society the protection of these rights of the individuals which were vested in them by the immutable laws of nature' *(33)*. It is to be observed, therefore, that Blackstone's 'absolute' rights constitute a human endowment by 'laws of nature', in that the natural liberty from which they derive is 'a right inherent by birth, and one of the gifts of God to man at his creation'. Hence some writers of the same school of thought call them 'natural' rights. Also we see here a further and later development of the natural law vesting on the same philosophic basis as did the natural law of St. Thomas, namely, the inherent nature of man as a rational being.

The next concept to be observed is that of a 'civil' right and its relation to a 'natural' one. Blackstone expresses it thus:

> *But every man, when he enters into society, gives up a part of his natural liberty, ... and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish ... Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public (34).*

Entrenchment of the Rule of Law

In Britain the rule of law, as expounded by Dicey is, of course, binding on the executive organ of government, but not formally on the legislative, in that no court has jurisdiction to relieve against the enforcement of a statute that denies fair judicial process, or is discriminatory, or abridges natural rights to an extent, and in a manner, unrelated to the public welfare. Nevertheless, from 1215 down to the present day, custom and convention have consistently protected the rights and liberties of Englishmen, that have periodically been reaffirmed by such great constitutional instruments as *Magna Carta,* the Petition of Right and the Bill of Rights. Historically threats to English civil liberties emanated from the Crown, not from Parliament and no occasion, therefore, arose to limit the powers of the latter. Today the theory is that such powers could not effectively be limited, as a matter of law, but this is highly questionable. It does not, however, arise for discussion here.

American experience was different. Imperial oppression, as the colonists regarded it, emanated from Parliament as well as the Crown, chiefly in the form of imposition of taxation without their being represented therein. This undoubtedly amounted to violation of the traditional and ancient rights of Englishmen. In mediaeval times direct taxation took the form of a contribution from each estate of the realm voted by itself. And later, when taxation by Parliament was substituted, each such estate was represented therein. In the American colonies, therefore, the colonists justified their resort to arms by invoking their 'natural rights'.

The source of this idea was mainly the writings of the celebrated John Locke. According to his version of the doctrine of natural law there was no room for the concept of sovereignty, in the sense of unlimited official discretion of any organ of the state to abridge civil rights derived from natural law. Broadly, his reasoning was that the legislature must be regarded as the repository of the sum total of the powers that each individual would have possessed, according to natural law, had there been no organised government. Natural law gave the individual no power over the life, liberty or property of others, save to the extent required to preserve his own, or those of his fellows. Since no individual could surrender to the state wider powers than he himself possessed, it followed that legislative power was 'limited to the public good of society', i.e., regulation of the civil rights of each individual to the extent only as could fairly be regarded as necessary to protect, or promote the protection of each of his fellows in the enjoyment of his civil rights.

It should specially be observed that Locke's doctrine in this respect was by no means dependent on the terms of a written constitution. The basic limitation upon the powers of any organ of government, including the legislature, was *inherent* so far as the abridgement of the fundamentals of civil

liberty was concerned. Written constitutions for the former colonies were required merely to set up, by act of the sovereign people, their own framework of government including the organs of government authorised to exercise governmental powers on their behalf. Thus, following on the Declaration of Independence, the people of each state 'through their state constitutions ... committed to their respectives states' the general governmental powers comprised in the popular sovereignty, 'unless in express terms or by implication reserved to themselves', i.e. as rights vested in each individual, entrenched against state abridgement *(35)*. Similarly, thereafter, in terms of the compact concluded at the Philadelphia Convention, the people of each state set up the organs of the United States and vested certain of their own powers and those of the states in such organs.

It is true that both the state constitutions and that of the United States embodied (in the latter case in the form of the first eight Amendments) bills of rights. But these would appear to have been legally necessary only to the extent either that civil liberties were not involved, or that, as a matter of precaution or clarity, particular aspects of civil liberty were singled out for special mention. But the general civil rights of life, liberty and property were not, in terms, entrenched, although they have become so through judicial interpretation based on the same reasoning as that of Locke. This, I think, is clear both from the Fifth and Fourteenth Amendments, the latter added in implementation of Southern 'Reconstruction' after the Civil War in order to confer jurisdiction on the U.S. Supreme Court to protect civil liberties against State encroachment, just as it possessed jurisdiction so to protect, in the federal sphere, such encroachment by the United States. Neither of these Amendments in terms guarantee civil rights. The relevant clause of the Fifth simply reads: 'No person shall be deprived of life, liberty or property without due process of law'.

The Fourteenth, in the corresponding provision, repeats this language, save that it is addressed to the states.

Now, as a matter of language, these clauses, so far from guaranteeing the substantive rights to life, liberty and property, would seem merely to stipulate that a law authorising deprivation of any of these may do so only by way of penalty imposed as a result of a finding arrived at by fair judicial process. And such, indeed, was the assumption of the courts and the legal profession generally for a number of decades after the adoption of the Fifth Amendment. But for the last century the Supreme Court has extended the scope of the due process clause to guarantee the common law rights to life, liberty, and property *(36)*. The extent of the guarantee is that legislative power to abridge such rights is limited to a legitimate exertion of the 'police power', namely, legislation protecting or promoting public safety, health, morals or welfare, objectives to which, as already indicated, such writers as Locke and Black-

stone conceded that 'natural' rights must give way. It is the function of the Legislature, not of the Court, to determine what legislation is required for any such purposes. But if the Court concludes that, in substance, a statute impugned before it has no real relation, as a means to an end, to any such objective, its duty, as a matter of law, not policy, is to treat it as invalid *(37)*.

It is true that, in laying down this principle, the Supreme Court has purported to do so as a matter of interpretation of the words 'due process of law'. But the due exercise of the police power bears no relation to the process of a court but to the legitimate objectives of legislation. Hence, for this purpose, the Court could surely have come to the conclusion in question by refusing to regard an arbitrary or discriminatory statute as 'law'. But the better view perhaps is that the principle under discussion is in truth deduced not from particular expressions in the Constitution but rather from nature and purposes of the instrument as a whole, whereby justice, as an essential attribute of a valid law, is implicit in the system of a government that instrument envisages. Thus, according to the celebrated jurist, Roscoe Pound:

> *In the United States since the natural law of the 18th Century publicists had become classical, we relied largely upon an American variant of natural law. It was not that natural law expressed the nature of man. Rather it expressed the nature of government ... The attempt to put this doctrine philosophically ... takes natural law to be a body of deductions from or implications of American institutions or the nature of our polity ... Generally ... the American variant of natural law grew out of an attempt at philosophical statement of the power of our Courts with respect to unconstitutional legislation. The Constitution was declaratory of principles of natural constitutional law which were deduced from the nature of free government. Hence constitutional questions were ... only in terms questions of constitutional interpretation. They were questions of the meaning of the document, as such, only in form. In substance they were questions of general constitutional law which transcended the text; of whether the enactment before the Court conformed to principles of natural law --- inherent in the very idea of a government of limited powers set up by a free people (38).*

Invalidity of Discriminatory Statutes

It follows from this extract and the principles of justice examined earlier that legislation arbitrarily discriminating on class grounds, e.g. race, religion, etc., would be invalid under the due process clause of the Fifth and

Fourteenth Amendments, if it abridged rights to life, liberty or property *(39)*. The Fourteenth Amendment, however, goes further and prohibits the states from denying 'equal protection of the laws'. The effect of this appears to be that even statutes dealing with matters other than civil rights, e.g. social or economic matters, must extend benefits to or impose burdens on all classes equally. Historically, indeed, it was expressly to protect the Negro freedmen against discrimination in laws of this nature that the Amendment was adopted.

The South African System of Government

The whole burden of this paper thus far is that respect for principles of justice, as systematised in a social context by a great scholar and Christian, St. Thomas Aquinas, do indeed permeate the social values of Western Christianity.

It is surely evident that a great many of the laws on our statute book today radically infringe those principles. In this regard, I do not intend to add to what other members of the Commission have stated save to the extent of one or two general observations.

One of these is to emphasise that although in terms of the Citizenship Act all races alike are South African citizens, many laws, especially those curtailing freedom of movement, residence, labour and acquisition of property, deny to our black compatriots, especially Africans, the fundamental rights of citizens in a free society, their 'privileges and immunities', in the words of the U.S. Constitution. A century and a half ago they were thus expounded in a U.S. Federal Court by Washington, J.:

> *The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong of right to the citizens of all free governments ... They may ... be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind ..., subject to such restraints as the government may justly prescribe for the general good of the whole (40).*

I bear in mind, of course, the contention of *apartheid* doctrinaires that these fundamental rights are denied to no class, and that black citizens enjoy the same in their homelands, group areas, etc. Apart from the specious character of this argument, revealed by even a superficial comparison of the nature and extent of these areas and the rest of the country, it is surely quite

clear on the basis of the above-quoted judgment of Washington, J., that if the fundamental rights he mentions are inherent in citizenship of a free state, they are exercisable, as of right, throughout the whole extent of the territory of such state by each individual citizen thereof.

Methods and Objectives of South African Constitutional Reform

As to methods of reform of our Constitution, I would suggest that even if a practical choice were open under present conditions to the would-be reformer, he would be wise to adhere in principle to the advice, of St. Thomas. The respects in which the system of government practised in South Africa, and permitted by our Constitution, are unjust, belong to the third class specified by St. Thomas, namely, unjust distribution of burdens and benefits among classes. These, it will be recalled, where embodied in positive laws, should be obeyed, owing to the evils and hazards of social disruption and disorder implicit in revolutionary methods. It follows that the only method for achievement of reform left open by this advice are those of lawful persuasion.

This may fail, even in the long run. Any method may fail. If it does, it will demonstrate tragically that a State composed of such disparate cultural and ethnic communities is not viable consistently with the social values of Western Christianity. Presumably no Christian could, consistently with his faith, accept the latter proposition. The danger, of course, lies in recourse to disingenuous subterfuges, capable even of deception of him who resorts to them. The most important aspect of the method of reform by persuasion is, therefore, the ruthlessly honest exposure of the strategems of disingenuous thinking.

But even if Christianity, as we traditionally understand its tenets in the relevant respects, has no message for South Africa, and conformity thereto is a social impossibility, that tragic result can hardly be countered by resort to attempts at disruption of the present framework of government. Ultimately violence could alone result. And means have a way of perverting and corrupting ends, as the history of the Soviet Union perhaps illustrates.

Objectives of Reform

I favour a rigid constitution with an entrenched bill of rights. In many states of Europe, and latterly of Africa, this form of constitutional safeguard has suffered shipwreck as a result of attempts at detailed draftsmanship specifying precise rights to be guaranteed and qualifications to such guarantees. Surely every lawyer should realise that such an attempt is inherently incapable of success. The impossibility of visualising every case that can arise in relation to the most ordinary workaday legal instruments is the most familiar cause of litigation in our courts in cases raising issues of law.

How much more impossible is it for the draftsman of an instrument of government, designed for permanence, to visualise the changing pattern of social and economic conditions that future generations may witness.

The answer here is not to abandon the attempt at safeguarding ordered liberty, but to adapt, on the basis of local conditions, the American expedient, which amounts, in essence, to entrenchment of the rule of law against legislative, as well as executive, infringement. The fundamental rights thereby safeguarded are defined by the common law, their qualifications are likewise deducible from the latter, and these, as also the limits of the police power of the state, are left to exposition and, where changing conditions so warrant, to adaptation by an impartial and independent judiciary, which South Africa fortunately traditionally possesses.

FOOTNOTES

1. Salmond, *Jurisprudence,* 10th ed., p. 142.
2. *Ibid.,* p. 129.
3. *Ibid.,* p. 130.
4. *Ibid.,* p. 138.
5. *Ibid.,* p. 139.
6. *Ibid.,* p. 141.
7. Hart, *The Concept of Law,* p. 155.
8. *Ibid.*
9. Cf. *Ibid.,* pp. 162-163.
10. *Lectures on Jurisprudence* 4th ed., vol. I, p. 86.
11. Hart, *op. cit.* pp. 78-79.
12. *Ibid.* p. 84.
13. *Ibid.* pp. 89-95.
14. *Ibid.* p. 113.
15. *Treatise of Human Nature,* IV, ii, quoted by Hart, ibid. p. 187.
16. Hart, *ibid.* p. 193.
17. *Summa Theologica* part 2 (English ed., 1927) vol. 3, p. 8 quoted by Friedmann, *Legal Theory* 4th ed., p. 58.
18. *Summa Theologica* (Qu. 91) quoted in selected extracts in Lloyd, *Introduction to Jurisprudence,* p. 76.
19. *Ibid.* Art. 2, concl.
20. *Ibid.* Art 3, concl. quoted by Lloyd, *op. cit.,* pp. 76-77.
21. *Ibid.* Qu. 94, Art. 2 concl. quoted by Loyd, *op. cit.* p. 77.
22. *Ibid.*
23. *Ibid.*
24. *Ibid.* Qu. 95, Art. 2, concl., quoted by Lloyd, *op. cit.* pp. 78-79.
25. *Constitutional History* pp. 100-102.
26. *Jurisprudence* 2nd ed., pp. 83-84, referring to Adler, *Essays in Thomism,* p. 205.
27. *Op. cit.,* see note 17 supra p. 59.

28. *Ibid.*
29. *Ibid.*
30. Dicey, *Law of the Constitution* 10th ed., p. 188.
31. *Ibid.*, p. 192
32. *Ibid.*, p. 195.
33. 1 *Commentaries*, 119-121, 125.
34. *Ibid.*, 121.
35. *Munn* v *Illinois*, 94 U.S. 118 (1877), as quoted in R. Forrester's Case book *Constitutional Law* (1958), p. 103.
36. *Ibid.*
37. *Mugler* v *Kansas*, 123 U.S. 625; *Nebbic* v *New York*, 291 U.S. 502.
38. *An Introduction to the Philosophy of Law*, rev. ed., pp. 19-20.
39. *Bolling* v *Sharpe*.
40. *Corfield* v *Coryell*, 5 Wash. C.C. Rep. 380 (1823).

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