

**EROSION OF THE
RULE OF LAW
IN
SOUTH AFRICA**

Staff Study

LEGISLATION AND THE COURTS

Professor Richard A. Falk

**OBSERVER'S REPORT ON
THE STATE v. TUHADELENI AND OTHERS**

INTERNATIONAL COMMISSION OF JURISTS

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INTRODUCTION

The Government of the Republic of South Africa has recently put forward the claim that the Rule of Law is fully operative within its territory.¹ In doing so it defines the Rule of Law as follows:

The rule of law may mean different things to different people, but there is general agreement that it requires that a person on trial be accused in open court; be given an opportunity of denying the charge and of defending himself and that he be given the choice of a counsel.²

This, of course, is but one aspect of the Rule of Law, and it is not an aspect that is alleged to have been seriously infringed in South Africa. The Report of Professor Falk on the trial of *Tuhadeleni and others*, reproduced in Part II of this Study, illustrates both the procedure at a trial in a case of a political nature in South Africa and the limited extent to which such a trial, however fair in itself, protects the individual in a state where other aspects of the Rule of Law are neglected or overridden.

It is the object of Part I of this Study to illustrate, by giving a number of examples, the erosion of the Rule of Law in South Africa in a number of fields other than the actual conduct of trials.

An essential element of the Rule of Law is the independence of the judiciary and the guarantee of its impartiality. This has been affirmed again and again by the congresses and conferences of the International Commission of Jurists. The Congress of Delhi, for example, states that:

An independent judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the executive or legislature with the judicial function but does not mean that the judge is entitled to act in an arbitrary manner.³

¹ *South Africa and the Rule of Law* (Department of Foreign Affairs of the Republic of South Africa) April 1968.

² At. p. 47.

³ *The Rule of Law and Human Rights* (ICJ, Geneva, 1966) p. 30. See also p. 6 (Congress of Athens) and p. 31 (Conference of Lagos).

In relation to the independence of the judiciary, the statutes and cases cited in Part I illustrate two things: first, a steady and increasing interference with the judiciary by the legislature: more and more frequently legislative enactments provide that the exercise of its powers over the lives of individuals and organisations by the executive shall not be challenged or questioned in a court of law. This is so particularly in the fields of African Affairs and Security Legislation. The independence of the judiciary becomes less and less meaningful as its powers of intervention are curtailed. This is particularly so in a system such as that of South Africa, in which the legislature is supreme and its acts cannot be challenged as unconstitutional.

Secondly, the cases cited, in which the judiciary is called on to interpret and apply a number of statutes which clearly violate basic principles of the Rule of Law, indicate that it is not sufficient that judges should remain formally independent and free from direct pressure or influence by the executive. It is essential too that they should maintain their spiritual independence; their devotion to the Rule of Law and the liberty of the subject should take precedence over their support for a political or social system. Unfortunately, the decisions cited illustrate that this is no longer generally the case in South Africa. In spite of a number of courageous decisions at first instance, the overall impression is of a judiciary as "establishment-minded" as the Executive, prepared to adopt an interpretation that will facilitate the executive's task rather than defend the liberty of the subject and uphold the Rule of Law. That some jurists in South Africa are aware of this unhappy situation is illustrated by the quotations in the section "Some dissenting voices".

The statutes cited illustrate further erosions of the Rule of Law: unlimited power of legislation, in respect of the African reserves, is placed in the hands of the Executive; Africans are subject to a large number of administrative prohibitions and control and deprived of access to the courts to challenge their exercise; under the security legislation, detention without trial and without any form of access to the courts has been introduced in a number of forms. These are merely some illustrations of the trend away from the Rule of Law in South Africa and do not pretend to be comprehensive.

Part II of this study, as already indicated, consists of the report of Professor Richard A. Falk, who was sent as an observer on behalf of the International Commission of Jurists to attend the latter stages of the trial of *The State v. Eliaser Tuhadeleni and others*.

All the accused in the trial—which was held in Pretoria, the capital of the Republic of South Africa—were South West Africans charged on the basis of acts committed in South West Africa or abroad, and this was one of the reasons why the trial attracted such widespread international attention. It will be recalled that on 27 October 1966 the General Assembly of the United Nations had

terminated South Africa's mandate over South West Africa,¹ so that the international basis for South Africa's jurisdiction over South West Africa and its inhabitants had gone.

South Africa's action in holding the trial in defiance of the United Nations resolution was condemned by the General Assembly on 16 December 1967² and by two resolutions adopted by the Security Council in 1968.³ All these resolutions called upon the Government of South Africa to release and repatriate the South West Africans concerned in the trial. They went unheeded.

The second reason why the trial attracted attention was the nature of the Terrorism Act under which the accused were charged. It was the first—and so far the only—trial under the Act, the provisions of which have become notorious; the most important of them are reproduced in Part I of this study.⁴ While other persons are being held in custody under the Act, and the South African authorities have stated that further trials will be held, no details, as to time, place, names of accused or the precise nature of the charges, have yet been announced.

¹ By General Assembly Resolution 2145 (XXI).

² By General Assembly Resolution 2324 (XXII).

³ S/RES/245 (1968) of 26 January 1968 and S/RES/246 (1968) of March 14, 1968.

⁴ See pages 27-30.

PART ONE

LEGISLATION AND THE COURTS

SOUTH AFRICAN LEGISLATION AS INTERPRETED BY THE COURTS

Legislative Authority in the Republic of South Africa

The Republic of South Africa Constitution Act No. 32 of 1961 provides in Section 59:

- (1) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.
- (2) No court of law shall be competent to enquire into or pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of section *one hundred and eight* or *one hundred and eighteen*.

The exemptions in sub-section (2) relate to the equality of the English and Afrikaans languages and the voting rights of the Coloured people in the Cape, which have however just been abolished by the Separate Representation of Voters Amendment Act, 1968.

While the all-white Parliament is thus the supreme legislative authority, legislation in respect of African areas may be enacted by presidential proclamation by virtue of *Section 25 (1) of the Bantu¹ Administration Act No. 38 of 1927 as amended* which provides:

From and after the commencement of this Act, any law then in force or subsequently coming into force within the areas, included in the Schedule to the Bantu Land Act, 1913 (Act 27 of 1913), or any

¹ The term "Bantu" was substituted for the term "native" in all legislation relating to black Africans by the Bantu Laws Amendment Act, 1964. To avoid confusion, the term "Bantu" is used throughout when legislation is cited. Otherwise the term "African" is used.

amendment thereof, or such areas as may by resolution of both Houses of Parliament be designated as native areas for the purposes of this section, may be repealed or amended, and new laws applicable to the said areas may be made, amended and repealed by the State President by proclamation in the *Gazette*.

The section is of limited application in that it relates only to approximately 13% of South Africa, that is to say the portions reserved for the Africans. The section has been interpreted by the Appellate Division of the Supreme Court in *R v. Maharaj*:¹

"It authorises the Governor-General² to repeal or amend 'any law then in force or subsequently coming into force within the areas' mentioned in the sub-section and to make 'new laws applicable to the said areas'. The words 'any law' include any 'law' as defined in sec. 3 of the Interpretation of Laws Act, 5 of 1910, but, even if this definition does not include the common law, the fact that under sec. 25 (1) new laws applicable to the area may be made, shows that the legislative power conferred by the sub-section covers the right to repeal both common and statute law. This is the effect of giving the words I have quoted their ordinary meaning and there is nothing either in the long title of the Act 'To provide for the better control and management of Native affairs' or in any other part of the Act, to justify any limitation of this meaning. It appears to me that, subject to the provisions of sec. 26 (1), the Governor-General² is given powers of legislation, within the area concerned, equal to those of Parliament, that it is competent for him to repeal the Common Law or any Statute Law issue and sec. 24 (1) of Act 18 of 1936, the Proclamation, being the later provision, must prevail."

Control over Africans and African Areas

The power to legislate for African areas by presidential proclamation is paralleled by a large number of provisions giving the State President, the Minister for Bantu Administration and Development or government officials wide administrative powers of a discretionary nature in relation to Africans. The following are merely examples.

Section 5 (1) (b) of the Bantu Administration Act, 1927 as amended provides:

The State President may, whenever he deems it expedient in the general public interest, without prior notice to any person concerned, order that, subject to such conditions as he may determine, any tribe, portion of a tribe or Bantu shall withdraw from any place to any other place or to any district or Province within the Union...

¹ 1950 (3) S.A.L.R. 187, at 194 per Greenberg J.A.

² The State President replaced the Governor-General when South Africa became a republic in 1961.

The section was interpreted in *Mabe v. Minister for Native Affairs*:¹

"That there may be a ground for interference has been accepted in the case of *Union Government (Minister of Mines and Industries) v. Union Steel Corporation (South Africa Ltd.)* 1928 A.D. 220, but it was there pointed out by the learned Judge of Appeal that there is no ground for interference with an unlimited discretion of this nature purely on the ground of unreasonableness. If the discretion has, as a matter of fact, not been exercised at all, obviously then the section has not been complied with and therefore this Court might have occasion to interfere. Also where the method of exercising the discretion bears, on the face of it, indications that it is improperly exercised, in the sense that there has not been good faith in the exercise of that discretion, then clearly that would be a ground, because the discretion may once more be said not to have been exercised."

And later on the learned Judge said:

"The words of the section are unequivocal and clearly indicate, to my mind, that save for the remarks I have referred to of the Appellate Division, this discretion is unrestricted. And the more so is that the case when we consider the circumstances attendant on cases that are dealt with under this section, where we find that the Governor-General is empowered to exercise this discretion when he deems it expedient in the general public interest. We must assume that, in the exercise of that discretion, he has taken into consideration the very important matter of the general public interest and ordered the removal not only from a place in the general public interest but to a place. In the absence of evidence to the contrary, we would certainly not assume that the matter had not been taken into consideration; and that, in the exercise of his discretion, he has deemed it expedient to send them to the place where he has sent them."

The power of the courts to interfere with orders made against Africans, whether under this provision or other provisions, was severely limited by the *Bantu (Prohibition of Interdicts) Act No. 64 of 1956*, section 2 of which provides:

2. Whenever any Bantu is or has at any time prior to the commencement of this Act been required by any order—

- (a) to vacate, to depart or withdraw from, to be ejected or removed from, not to return to, not to be in or not to enter, any place or area; or
- (b) to be removed from any place or area to any other place or area; or
- (c) to be arrested or detained for the purpose of his removal or ejection from any place or area,

no interdict or other legal process shall issue for the stay or suspension of the execution of such order or the removal of the

¹ 1958 (2) S.A.L.R. 506 (Transvaal) per Ramsbottom J.

property of such Bantu in pursuance of such order, and no appeal against, or review proceedings in respect of, such order or any conviction or finding upon which such order is based, shall have the effect of staying or suspending the execution of such order or such removal in pursuance thereof.

No reported case on this provision has been found. It may be because of its clear terms excluding the intervention of the courts.

The Bantu Trust and Land Act, No. 18 of 1936 deals with the administration of the African reserves. Section 24 (1) reads as follows:

Save with the written permission of any person acting under the authority of the Trustee¹ or in accordance with the regulations, no person other than a Bantu shall reside or be, or carry on any profession, business, trade or calling, upon land in any scheduled Bantu area...

In *Laubscher v. Native Commissioner Piet Retief*², Laubscher, an attorney who wished to consult his clients in an African reserve, appealed against refusal of permission. On the nature of the power granted by the section, the Court held:

"Per Schreiner, J.A. (Fagan C.J., and Steyn, J.A., concurring): Act 18 of 1936 does not make provision for any enquiry by a native commissioner before issuing a permit in terms of section 24 (1) of the Act, and he is not obliged to hold any. If he has anything against the applicant, or if he has nothing, he is equally empowered, having duly considered what was put before him, to refuse the permit in his discretion.

"Per Hall, A.J.A. (Reynolds, A.J.A., concurring): The granting of permission in terms of section 24 (1) of Act 18 of 1936 by an official in whom the discretion of issuing permits is vested, is a purely administrative act, in the performance of which he is free to exercise an absolute discretion.

"Where an official is required by statute to exercise a purely administrative discretion, he is under no obligation whatsoever to acquaint an applicant for permission with any information upon which that decision may have been based."

The Bantu (Urban Areas) Consolidation Act, No. 25 of 1945 provides for the regulation and control of Africans in urban areas. It imposes a whole host of restrictions upon Africans in such areas, among them the following:

(i) No Bantu may acquire any right to any land in an urban area without the permission of the State President. (S. 6).

(ii) The Minister of Bantu Administration and Development may by notice in the Government Gazette, after consultation with the (white) local authority concerned, prohibit:

(a) Attendance by any Bantu at any church or other religious service or church function (S. 9(7)(b)).

(b) the conducting of any school, hospital, club or similar institution which "is attended by a Bantu or to which a Bantu is admitted, other than a Bantu attending in the capacity of an employee thereof..." (S. 9(7)(c)).

(c) the attendance by any Bantu at any school, hospital, club or similar institution (S. 9(7)(d)) (except in an emergency in the case of a hospital).

(d) the attendance by any Bantu at any place of entertainment in an urban area outside a Bantu residential area. (S. 9(7) (e)).

(e) the holding of any meeting, assembly or gathering (including any social gathering), which is attended by any Bantu. The Minister may similarly prohibit any person from holding, organizing or arranging any such meeting, assembly or gathering

if in the opinion of the Minister the holding of such meeting, assembly or gathering is likely to cause a nuisance to persons resident in the vicinity where such meeting, assembly or gathering will be held or in any area likely to be traversed by Bantu proceeding to such meeting, assembly or gathering, or will be undesirable having regard to the locality in which the premises are situated or the number of Bantu likely to attend such meeting, assembly or gathering, and any person who holds, organizes or arranges any meeting, assembly or gathering in contravention of a prohibition imposed under this paragraph, and any Bantu who attends any meeting, assembly or gathering held in contravention of a prohibition imposed under this paragraph by notice in the *Gazette*, shall be guilty of an offence. (S. 9 (7) (f) as amended by Act 36 of 1957).

(iii) No Bantu may remain in an urban area for more than 72 hours (with a few exceptions affecting a comparatively small number of persons) unless permission to remain has been given by the local labour officer. Refusals of permission cannot be challenged in the Courts but there is an appeal to the Bantu affairs commissioner whose decision is final (S. 10 as substituted by Act No. 54 of 1952 and as later amended).

(iv) The Minister may order the removal from an urban area of "redundant Bantu", i.e. "the number of Bantu within that area... in excess of the reasonable labour requirements of that area". (S. 28)

(v) The Bantu affairs commissioner may order the removal from an urban area of "idle or undesirable" Bantu after conducting an inquiry into their circumstances. Unlike other orders, such an order may be reviewed by the courts. (S. 29 as substituted by Act No. 42 of 1964).

¹ I.e. the State President.

² 1958 (1) S.A.L.R. 546 (Appellate Division).

- (vi) If in the opinion of an urban local authority the presence of any Bantu in the area under its jurisdiction ... is detrimental to the maintenance of peace and order in any such area or any part thereof, the urban local authority may order such Bantu to depart from any such area within a specified period and thereafter not to return to or to be in such area without the permission of the urban local authority. (S. 29 *bis* as inserted by Act 69 of 1956.)

This last provision was considered in *R. v. Rampai*¹. In the course of his judgment, Bekker J. said:

"Counsel submitted (and I think correctly so) that the question whether or not the presence of an individual is detrimental to the interests of other persons is entirely subjective to the urban local authority; if in its opinion he is such a person then it may act in terms of the provisions of the section. It is common cause that as long as it acts *bona fide* even though it may be incorrect in its ultimate conclusion, an interference with its decision would not be warranted; nor is any provision made for an appeal from the decision arrived at by the urban local authority."

Similar principles would presumably apply in respect of the other provisions of the Bantu (Urban Areas) Consolidation Act referred to above, and the courts would in no case be able to assist the individual concerned unless *mala fides* was proved.

Group Areas

The Group Areas Act, first passed in 1950 but re-enacted after numerous amendments as Act No. 36 of 1966, provides for the division of the territory of South Africa (apart from the African reserves which are dealt with separately) into areas for the exclusive occupation of a single racial group. It is by the declaration of group areas that it is proposed to bring about the physical segregation of whites, coloured persons and Indians.

The Act empowers the State President, after an enquiry and report by the Group Areas Board established under the Act, to proclaim any area a group area for a particular racial group.

In *Minister of the Interior v. Lockhat and others*² nineteen Indians applied to the court for an order setting aside the proclamation of a group area for whites in Durban. They alleged, *inter alia*, that there was a striking disparity between the accommodation, housing and amenities available in the white and non-white group areas and that there was no reasonable prospect in the foreseeable future of suitable accommodation or amenities being made available in the non-white group areas. They complained that

there was thus a partial and unequal treatment to a substantial degree between members of the white and of the Indian groups and contended that the Act did not authorise such a degree of discrimination. On this point Holmes J.A. said¹:

"The most important question raised... is whether the Act empowers the Governor-General-in-Council to discriminate to the extent of partial and unequal treatment to a substantial degree between members of the different groups as defined in or under the Act. According to the decision of this Court in *Rex v. Abdurahman*, 1950 (3) S.A. 136, such a power will not be attributed by the Court unless it is given expressly or by necessary implication in the statute concerned. No such power is expressly given in the Group Areas Act; but it seems to me 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, sec. 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 and foreseeable discriminatory results complained of in this case. In my view, for the reason which I have given, it manifestly does."

Security Legislation

SUPPRESSION OF COMMUNISM ACT

The Suppression of Communism Act No. 44 of 1950 as amended by Acts Nos. 50 of 1951, 15 of 1954, 76 of 1962, 37 of 1963, 80 of 1964, 97 of 1965, 8 of 1966, 62 of 1966, 24 of 1967.

The definitions of "Communism" and "Communist" are:

"Communism" means the doctrine of Marxian socialism as expounded by Lenin or Trotsky, the Third Communist International (the Comintern) or the Communist Information Bureau (the Cominform) or any related form of that doctrine expounded or advocated in the Republic for the promotion of the fundamental principles of that doctrine and includes, in particular, any doctrine or scheme—

- (a) which aims at the establishment of a despotic system of government based on the dictatorship of the proletariat under which one political organization only is recognised and all other political organizations are suppressed or eliminated; or

¹ 1957 (4) S.A.L.R. 561 at p. 564.

² 1961 (2) S.A.L.R. 587.

¹ At p. 602.

- (b) which aims at bringing about any political, industrial, social or economic change within the Republic by the promotion of disturbance or disorder, by unlawful acts or omissions or by the threat of such acts or omissions or by means which include the promotion of disturbance or disorder, or such acts or omissions or threats; or
- (c) which aims at bringing about any political, industrial, social or economic change within the Republic in accordance with the directions or under the guidance of or in cooperation with any foreign government or any foreign or international institution whose purpose or one of whose purposes (professed or otherwise) is to promote the establishment within the Republic of any political, industrial, social or economic system identical with or similar to any system in operation in any country which has adopted a system of government such as is described in paragraph (a); or
- (d) which aims at the encouragement of feelings of hostility between the European and non-European races of the Republic the consequences of which are calculated to further the achievement of any object referred to in paragraph (a) or (b);

"Communist" means a person who professes or has at any time before or after the commencement of this Act professed to be a communist or who, after having been given a reasonable opportunity of making such representations as he may consider necessary, is deemed by the State President or, in the case of an inhabitant of the territory of South-West Africa, by the Administrator of the said territory, to be a communist on the ground that he is advocating, advising, defending or encouraging or has at any time before or after the commencement of this Act, whether within or outside the Republic, advocated, advised, defended or encouraged the achievement of any such object, or that he has at any time before or after the commencement of this Act been a member or active supporter of any organization outside the Republic which professed, by its name or otherwise, to be an organization for propagating the principles or promoting the spread of communism, or whose purpose or one of whose purposes was to propagate the principles or promote the spread of communism, or which engaged in activities which were calculated to further the achievement of any of the objects of communism.¹

In *R v. Sisulu & Others*² the accused had taken part in the organisation of the Defiance Campaign against unjust laws and were convicted of furthering the objects of communism. In analysing the definitions and disposing of the Appellants' argument that their acts had nothing to do with communism as such Greenberg A.C.J. said:³

"In support of the contention that the sections involved in this case should not be construed as covering the acts of the appellants, a

number of instances, which it was said would fall within the paragraph as construed by the Crown, were put before us in argument to show that such a construction could not possibly have been contemplated by the law-giver. One of these hypothetical instances was that the National Council of Women, in order to cause Parliament to change the law in regard to marriage in community or the guardianship of children, had initiated a campaign in furtherance of this object, in the course of which the supporters of the campaign were to march in procession in the streets of a town and placard the town with posters, both of these classes of act being in breach of municipal by-laws. Another instance was where a group of farmers, or a farmers' association, feeling the injustice of certain laws or regulations e.g. in regard to a levy on wool or the fencing of farms, decided that, in order to call attention to the injustice of the legislation and the need for its repeal, they would commit breaches of the legislation. It was not contended, on behalf of the Crown, that these acts would not fall within para. (b)¹ and thus within sec. 11 (a) or (b),² which would consequently expose the perpetrators to a sentence of imprisonment not exceeding 10 years, and I shall assume that the instances come within the provisions mentioned.

"It may well be that the law-giver did not realise that the language used in these provisions would cover the acts involved in the hypothetical instances cited, and it may also be that, if the language used in the sections with which I have been dealing was equally susceptible of the respective constructions contended for by the Crown and the appellants or if the balance was not substantially in favour of the Crown's contention, this factor might have been sufficient to induce a refusal to accept the Crown's contention. But in the present case, for the reasons that I have given, I see no ground for doubting that the language of the legislation leads to the conclusion that the acts of the appellants fall within the provisions to which I have referred and I know of no principle which justifies a Court in such circumstances in allowing the factor of unforeseen results to outweigh the conclusion at which it has arrived."

The Suppression of Communism Act gives the State President and the Minister of Justice a number of important discretionary powers the exercise of which cannot be challenged in a court of law. The principle followed by the courts in relation to such discretionary powers was laid down in 1934, in relation to another statute, in *Sachs v. Minister of Justice*,³ in the following terms:

"There is no doubt the Act gives the Minister a discretion of a wide and drastic kind and one which, in its exercise, must necessarily make a serious inroad upon the ordinary liberty of the subject. Its object is clear, it is to stop at the earliest possible stage the fomentation of feelings of hostility between the European and non-European sections

¹ Section 1 (i), (ii) and (iii).

² 1953 (3) S.A.L.R. 276 (Appellate Division).

³ At p. 290.

¹ Of the definition of "communism" above.

² Which make it an offence to perform any act calculated to further the achievement of any of the objects of "communism" as defined.

³ 1934 S.A.L.R. 11 (Appellate Division), per Stratford A.C.J. at p. 36.

of the community. Prompt and unfettered action is manifestly necessary for that purpose, and Parliament has thought fit to confer upon the Minister the power to act in the public interest so soon as he is satisfied that certain conditions exist. Bearing in mind the kind of situation and the nature of the apprehended danger, which the Legislature clearly has in contemplation, it will readily be seen that if the Minister's discretion is hampered by the obligation to submit his decision to approval of a court of law, the delay involved would defeat the whole object of the particular provision we are discussing. One further general observation I would make is this: that once we are satisfied on a construction of the Act, that it gives to the Minister an unfettered discretion, it is no function of a court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will."

This case has been followed ever since and no cognisance has been given to the words of Lord Atkin in *Liversidge v. Anderson*:¹

"I view with apprehension the attitude of Judges, who on a mere question of construction when face to face with claims involving the liberty of the subject, show themselves more executive minded than the executive! Their function is to give words their natural meaning, not, perhaps, in wartime leaning towards liberty, but following the dictum of Pollock, C.B. in *Bowditch v. Balchun*, (1850) 5 Ex. 378... In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law."

The discretionary powers under the Suppression of Communism Act, the exercise of which cannot be challenged in a court of law, include the following:

Outlawing of organisations under section 2

By section 2 (1) the Communist Party of South Africa was declared an unlawful organisation. Section 2 (2) empowers the State President to declare other organisations unlawful if he is satisfied:

- (a) that any other organisation professes or has on or after the fifth day of May 1950, and before the commencement of this Act,

professed by its name or otherwise, to be an organisation for propagating the principles or promoting the spread of communism; or

- (b) that the purpose or one of the purposes of any organisation is to propagate the principles or promote the spread of communism or to further the achievement of any of the objects of communism; or
- (c) that any organisation engages in activities which are calculated to further the achievement of any of the objects referred to in paragraph (a) (b) (c) or (d) of the definition of "communism" in section 1; or
- (d) that any organisation is controlled, directly or indirectly, by an organisation referred to in sub-section (1) or paragraph (a) (b) (c) or (d) of this subsection; or
- (e) that any organisation carries on or has been established for the purpose of carrying on directly or indirectly any of the activities of an unlawful organisation.

Among organisations which have been declared unlawful are the principal African political parties, the African National Congress and the Pan African Congress (in respect of which a special Act, the Unlawful Organisations Act, No. 34 of 1960, was passed) and most recently the Defence and Aid Fund of South Africa.

An attempt by the latter organisation to challenge the declaration that it was unlawful was unsuccessful. In *South African Defence and Aid Fund and another v. Minister of Justice*¹ the plaintiffs sought to rely on section 17 of the Act which provides that, before the State President can declare an organisation unlawful, the Minister of Justice must appoint a committee to prepare a factual report in relation to the organisation and must consider its report. The plaintiffs contended that they were entitled to a hearing by either the committee or the Minister. The headnote summarises the decision of the court as follows:

"It is only by the exercise by the State President of his powers under section 2 (2) of the Suppression of Communism Act 44 of 1950, as amended, by declaring an organisation to be an unlawful organisation for the purposes of that Act, that an organisation's rights are in law prejudicially affected. Its rights are not affected by the exercise, under section 17 of the Act, as substituted by section 7 of Act 97 of 1965, of their functions by the Minister or a committee appointed under that section. Accordingly the organisation is not entitled to a hearing by either of them. And, because of the words 'without notice to the organisation concerned' in section 2 (2) of the Act, the organisation is not entitled to an opportunity of controverting the prejudicial allegations against it before the issue of the proclamation. Consequently Proclamation 77 of 1966, declaring the organisation known as the Defence and Aid Fund an unlawful organisation, is not invalid on the ground that the organisation had not had an opportunity to be heard."

¹ (1942) A.C. 206 at p. 244.

¹ 1967 (1) S.A.L.R. 263 (Appellate Division).

The declaration has far-reaching consequences for the organisation itself in that no person may:

- (a) perform any act for and on behalf of the organisation;
- (b) carry anything indicating that he was an office bearer or member of the organisation;
- (c) contribute or solicit any funds for the organisation;
- (d) carry on any activity in which the unlawful organisation could have engaged before it was declared unlawful. (Section 3(1)(a)).
- (e) the property of the organisation vests in a liquidator (3 (1)(b)).

It has also far reaching effects on the persons who were members of the organisation concerned before it was declared an unlawful organisation. The liquidator may put the name of any person who was an office bearer, member or active supporter of such organisation on a list (Section 5). Once a person's name has been placed upon such a list the Minister may by notice to him and without giving him an opportunity of being heard prohibit him:

- (a) From holding any public office (Section 5 (1)(b));
- (b) From becoming an office bearer or member of or taking part in any of the activities of any organisation (Section 5 (1)(c) and (d)).
- (c) From attending any gathering (Section 5 (1)(d)).

The Courts granted relief to an individual subjected to such a prohibition in the case of *R v. Ngwela*¹ but the Act was immediately amended by S. 6 of Act No. 15 of 1954 so that the Courts no longer had power to interfere.

Imposition of restrictions on individuals

It is not only members of organisations which have been declared unlawful who may be dealt with in terms of the Act but *any person* may be prohibited from:

- (a) attending any gathering (S. 9 (1)(a));
- (b) doing any of the things set out in S. 10(1) (a), which reads as follows:

If the name of any person appears on any list in the custody of the officer referred to in section eight or the Minister is satisfied that any person—

- (i) advocates, advises, defends or encourages the achievement of any of the objects of communism or any act or omission which is calculated to further the achievement of any such objects; or
- (ii) is likely to advocate, advise, defend or encourage the achievement of any such object or any such act or omission; or

¹ 1954 (1) S.A. 123 (Appellate Division).

- (iii) engages in activities which are furthering or may further the achievement of any such object, the Minister may by notice under his hand addressed and delivered or tendered to any such person and subject to such exceptions as may be specified in the notice or as the Minister or a magistrate acting in pursuance of his general or special instructions may at any time authorize in writing, prohibit him, during a period so specified, from being within or absenting himself from any place or area mentioned in such notice, or, while the prohibition is in force, communicating with any person or receiving any visitor or performing any act so specified: Provided that no such prohibition shall debar any person from communicating with or receiving as a visitor any advocate or attorney managing his affairs whose name does not appear on any list in the custody of the officer referred to in section eight and in respect of whom no prohibition under this Act by way of a notice addressed and delivered or tendered to him is in force.

These sections have been used for the issue of so-called banning orders and house arrest orders.

A gathering is defined as:

"gathering" means any gathering, concourse, or procession in, through or along any place of any number of persons having... a common purpose, whether such purpose be lawful or unlawful.¹

There have been prosecutions for failure to comply with orders prohibiting attendance at gatherings, and some of the cases have found their way into the law reports. There have not always been convictions. The acts which have formed the subject-matter of a prosecution have included:

Addressing a meeting (*R v. Sachs* 1953 (1) S.A.L.R. 392 (A.D.)).

Going to a special gathering (*R v. Kohn* 1955 (3) S.A.L.R. 177).

Arranging a meeting of a trade union (*R v. Lan* 1956 (2) S.A.L.R. 246).

Attending a concert organised by the Congress of Mothers (*R v. Ntonja* 1956 (3) S.A.L.R. 370).

Addressing workmen in the presence of their employer about the advantages of a benefit fund (*R v. Mpeta* 1956 (4) S.A.L.R. 257).

Attending a meeting of the City Council to which the applicant was elected (*Desai v. Attorney General Cape & Ano.* 1964 (4) S.A.L.R. 90).

Meeting for tea in a tearoom (*S v. Arenstein* 1964 (4) S.A.L.R. 697).

Drinking with others in a private house (*S v. Bennie* 1964 (4) S.A.L.R. 192).

Attending a meeting to arrange a meeting of the Natal Indian Congress (*S v. Moonsammy* 1963 (4) S.A.L.R. 334).

¹ Section (I) (1) (V).

Playing snooker with one other (*S v. Hjiil* 1964 (2) S.A.L.R. 635).
Going on a picnic with others (*S v. Tobias* 1967 (2) S.A.L.R. 165).

No hearing is afforded to the person concerned before the issue of a notice imposing restrictions. The Minister may be asked for reasons after the notice has been served but even then he does not have to give them. The matter was discussed in the case of *Kloppenburgh v. Minister of Justice*¹ in which the court said:

"As I see it, the whole purpose of the enactment of the 1954 amendment was to limit and circumscribe the affected person's common law rights under the *audi alteram partem* rule. In the first place, it is a necessary inference from the provisions of the subsections that the affected person is not to be entitled to be given any information or any hearing before the issue of a notice under sec. 9 (1) or 10 (1) (a) (see the 1934 *Sachs* case at pp. 18-19 and 38-39). In the second place he is also to be deprived of his right to be told any information upon which the Minister has acted even after the issue of the notice, if the disclosure of that information would in the Minister's opinion be detrimental to public policy. The amendments were introduced not, as at one stage Mr. Naidoo contended, to confer rights upon the affected person. They were intended to limit his rights in the manner indicated. If that is appreciated, there must follow I think the inevitable implication, from the words of the sub-sections, that the statement which the Minister has to furnish in reply to the request made by the affected person must be one which does not disclose the type of information referred to (cf. per De Waal, J.P., at p. 20 in the 1934 *Sachs* case, *supra*). The powers which as a result of this amendment are conferred upon the Executive, through the Minister, are indeed extensive, and in particular cases a refusal by the Minister to give reasons and/or information may render it almost impossible for an affected person to be able to make representations which have any bearing upon the matters which were decisive when the Minister was considering the question as to whether he would issue notices under the statute. The importance to the person affected of the disclosure to him of the case against him was pointed out by Tindall, J., in the 1934 *Sachs* case at p. 29. Parliament, however, must be taken to have appreciated this and to have decided that in the extreme cases the public good must take precedence over the rights of the individual affected person. Parliament has conferred upon the Minister the sole discretion as to whether the disclosure of information will be detrimental to public policy. So long as that decision is made *bona fide* and in strict accordance with the provisions of the statute, the Courts have no jurisdiction to interfere (see the 1934 *Sachs* case at p. 37)."

House arrest orders have also been dealt with by the courts in two cases of so-called 24-hour house arrest. In the case of *Bunting v. Minister of Justice*² Beyers J.P. said:

¹ 1964 (4) S.A.L.R. 31 at 35, per Fannin J.

² 1963 (4) S.A.L.R. 531 at 533-4.

"Mr. Molteno's arguments, if I understood them at all—and I am not sure that I did, because as I understood them they seem to me to be devoid of any merit whatever—come down in the first place to saying that the Minister's notice should be set aside because it is unreasonable, because, he says, it is so unreasonable that no reasonable man would couch the notice in the terms in which it is done. I find myself in no position even to test that. I do not know the background of the applicant, I do not know what she has done, and I do not know what she is capable of doing. These things are not put before me, I do not know, sitting as a Judge in a Court of law, what the exigencies are that require the Minister's action. But even if I did—even if I knew everything that the Minister does, which I certainly do not—then the discretion as to whether to apply these powers, and the discretion as to the extent to which they should be applied, is not entrusted to me as a Court of law but entrusted to the Minister. And if he exercises that discretion, as I understand the law, I can only interfere on two grounds—which in some ways is really only one ground—the first being that if the Minister has misconstrued the powers under which he has acted, if he has misinterpreted what the law allows him to do, if he has *bona fide* or otherwise exercised powers beyond those which have been entrusted to him by Parliament, then a Court of law could interfere and ask him to confine himself to the statutory powers which he has. A Court of law could also interfere if it is demonstrated or shown that the Minister has used these powers in a *mala fide* manner, that he did not exercise his discretion, but that he acted with malice or caprice. In those cases, too, the law would allow this Court to say to him: 'Go out and exercise your discretion properly.' But the *onus* of showing that the Minister has not exercised his discretion properly is upon whoever alleges that. It must be presumed that the Minister acted responsibly and properly until the contrary is shown.

"In the papers before me there is nothing which, in my view, even merits consideration as showing either that the Minister has gone outside the wide powers entrusted to him or misconstrued his statutory powers or that he has exercised his discretion in a *mala fide* manner. There is nothing whatever to show that.

"The first point raised by Mr. Molteno, namely, that the Minister has exercised his discretion unreasonably, is therefore in my view devoid of any merit whatever.

"The second point raised by Mr. Molteno is in my view no more meritorious than the first. The relevant portion of the Act says that the Minister may prohibit any person from absenting himself from any place or area mentioned. The place or area in this case is in the notice described as 'the residential premises situate at 'Middelberg', Kloof Road, Clifton, Cape Town.' If I understand Mr. Molteno's argument—if I understand it at all—he says 'any place' does not include the residential premises referred to in the notice. I am afraid I have not followed the argument. It seems to me that 'any place' is about as wide as words could be. I have not followed the argument that 'any place' does not mean the residence described in this notice. It seems to me in the nature of things it must be a place, and it is any

place, and the argument that it must be wider than this has in my view no merit at all.

"The third argument which is used is that, by confining the applicant to a private residence, the rights of the owner of that residence, and the bondholder in this case, are affected in such a way that Parliament could never have contemplated, in passing this Act, that it should apply to private property. Here again, in my view this point has no merit at all. If confining a person to any place does in any way affect the private rights of whoever has an interest in that place, then it follows necessarily from what the Act says the Minister can do.

"If I were to read the Act subject to the limitations suggested by Mr. *Molteno*, it would reduce the effect of the Act to a nullity."

In *Hodgson v. Minister of Justice*¹, the court of first instance took a different view, as is indicated by the following passage from the judgment:

"If 'place' does include a person's own residence, dwelling or house it would mean that the Minister could prohibit him 'from absenting' himself from his home for some appreciable time, which could be for the remainder of his life. The parties have assumed, and the respondent has acted upon the assumption, that 'absenting' has the same meaning as 'being away from' and in construing the subsection I must accept that 'absenting' bears that connotation. The effect of such a notice would therefore be to confine a person to his home for that period. Hence, as I was informed from the Bar, the label 'house arrest' has been used colloquially to designate a ministerial direction of that kind. I have difficulty in understanding why, if the Legislature had intended that a person could be so arrested or confined to his home, with all its severe consequences on his ordinary mode of living and earning a livelihood, it did not say so clearly, explicitly and positively, instead of using the negative and somewhat equivocal language of 'prohibit him from absenting himself from any place'. The fact that the Legislature did not use such specific and positive language, when the need therefor was so apparent, and which it could so easily have done (at least by including the word 'premises' or 'residence' in addition to 'place'), does create a doubt at the outset whether it really did intend the Minister to have the power to effect a 'house arrest' of so drastic a nature. Indeed, the language actually used tends to suggest the contrary... In other words, both views on the meaning of 'place' are equally feasible and reasonable. Having regard particularly to the nature of the powers that the Legislature was conferring upon the Minister, I think that it behoved it to specify those powers with greater precision than it did. As it failed to do so, the ambiguity in the powers in sec. 10 (1) must be resolved against it and in favour of the liberty of the subject in accordance with the aforementioned authorities. It follows that I must hold that a 'place' does not include a person's residence, dwelling or house. Save for

saying that a 'place' means a unit of space more extensive than or different from a person's residence, dwelling or house, I need not define it further."

The house arrest order was set aside. Trollip J. had given effect to the remarks of Centlivres C.J. in *R v. Sachs*,¹

"Before dealing with the merits, the appellant in an able and admirably objective argument discussed the manner in which courts of law should approach the interpretation of statutes which give the Executive the power to invade the liberty of the individual. He submitted that such statutes should be subjected to the closest scrutiny of courts of law whose function it is to protect the rights and liberty of the individual. Courts of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the Executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute. Where, however, the statute is reasonably capable of more than one meaning a court of law will give it the meaning which least interferes with the liberty of the individual."

His decision was, however, reversed on appeal in spite of the following findings by the appeal court, whose decision is reported as *Minister of Justice v. Hodgson*²:

"The appellant's residence is a three-roomed flat on the fourth floor of a block of flats which the applicant was occupying at the date of the order together with his wife and fifteen-year-old son. Confinement to his flat must undoubtedly cause much hardship and inconvenience if not misery to the applicant. The hardships flowing from the order are set out in the original petition for the setting aside of the order. It was stressed by Mr. *Kentridge* for the applicant that in some respects the applicant was worse off than a person serving an ordinary prison sentence. *Inter alia* provision is made under the prison regulations for adequate exercise for the prisoner, adequate feeding, bathing and so on. Nowhere in the legislation, it is claimed on behalf of the applicant, is express authority given for personal confinement to premises. The main argument on behalf of the applicant has been that the Legislature could not in the absence of express authority have intended to authorise this hardship visitation."

In conclusion the Court said:³

"It was contended further in the alternative that the Minister did not apply his mind to the particular facts of this case. It was pointed out that the Minister admitted that he was not aware of the dimensions of the respondent's flat or of the fact that he was a disabled military pensioner or how he made his living. In my opinion the Act lays no duty upon the Minister to enquire into the facts peculiar to a

¹ 1953 (1) S.A.L.R. 392 at 399.

² 1963 (4) S.A.L.R. 535 at 535-6. (Appellate Division, Dowling A.J.P.).

³ At pp. 541-2.

¹ Application No. 1756/1962; Witwatersrand Division of the Supreme Court, (Trollip J.) 31st December, 1962.

proposed prohibited person. The Act, as I have said, is draconic in its nature. All that is required in relation to the respondent is that respondent's name should appear on a list referred to in sec. 10 (1) (a) as amended. No further enquiry is prescribed. At this point it is worth mentioning that the provision entitling the Minister to prohibit a person whose name is on such a list is a new provision added by the amending Act—a further illustration of the intensification of anti-communism measures compared with the original Act.”

After the expiration of the first five years, house arrest and other banning orders may be renewed.

Detention of prisoners on completion of sentence

The Act also enables the Minister to extend the period of imprisonment of any person whose term of imprisonment has lapsed. Section 10 (1)(a) *bis* provides:

Notwithstanding anything to the contrary in any law contained, the Minister may, if he is satisfied that any person serving any sentence of imprisonment imposed under the provisions of this Act or this Act as applied by any other law or the Public Safety Act, 1953 (Act No. 3 of 1953), or the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953), or the Riotous Assemblies Act, 1956 (Act No. 17 of 1956), or section *twenty-one* of the General Law Amendment Act, 1962 (Act No. 76 of 1962), is likely to advocate, advise, defend or encourage the achievement of any of the objects of communism, by notice under paragraph (a) prohibit such person from absenting himself, after serving such sentence, from any place or area which is or is within a prison as defined in section *one* of the Prisons Act, 1959 (Act No. 8 of 1959)... and the person to whom the notice applies shall, subject to such conditions as the Minister may from time to time determine, be detained in custody in such place or area for such period as the notice may be in force.

Section 10 (1)(a) *bis* has to be renewed by Parliament every twelve months in order to remain valid, and this has been done annually. This power has only been used so far in respect of Robert Sobukwe, President of the Pan-African Congress.

Offences under the Act

There are over 20 offences created by the Act, which affect individuals, owners of property, newspaper men and others. The penalties include:

(a) The death penalty as a maximum with a minimum sentence of five years imprisonment for any person who:

is or was resident in the Republic and at any time after the commencement of this Act, advocated, advised, defended or encouraged the achievement by violence or forcible means of any object directed at bringing about any political, industrial, social or economic

change within the Republic by the intervention of or in accordance with the directions or under the guidance of or in co-operation with or with the assistance of any foreign government or any foreign or international body or institution, or the achievement of any of the objects referred to in paragraphs (a) to (d), inclusive, of the definition of ‘communism’.

is or was resident in the Republic and has at any time after the commencement of this Act and in the Republic or elsewhere undergone, or attempted, consented or taken any steps to undergo, or incited, instigated, commanded, aided, advised, encouraged or procured any other person to undergo any training, or obtained any information which could be of use in furthering the achievement of any of the objects of communism or of any body or organisation which has been declared to be an unlawful organisation under the Unlawful Organisations Act, 1960, and who fails to prove beyond a reasonable doubt that he did not undergo or attempt, consent or take any steps to undergo, or incite, instigate, command, aid, advise, encourage or procure such other person to undergo, any such training or obtain any such information for the purpose of using it or causing it to be used in furthering the achievement of any such object. (S. 11 (b) *bis* and *ter*.)

These provisions were introduced by Act No. 80 of 1964, but were made retrospective to 1950. Although many persons have been convicted under them, no-one has yet been sentenced to death.

(b) A maximum of ten years’ imprisonment with a minimum of one year for, *inter alia*:

advocating any of the objects of communism as defined by the Act;

or, being a member of an unlawful organisation;

or, attending a meeting of an unlawful organisation;

or, failing to notify a change of address or employment if one has been restricted or one’s name appears on a list of members of an unlawful organisation;

or, failing to give one’s name and address if called upon to do so;

or, failing to comply with any of the requirements in any notice served on him, (i.e. a banning or house arrest order) such as not entering a university, a factory, an educational institution, leaving a “place” as interpreted by the Courts above etc. (S.11 (a),(b),(c),(d),(d)*bis*, (d)*ter*, (d)*quat*).

(c) Three years’ imprisonment for numerous other offences and more particularly for any person who

without the consent of the Minister or except for the purposes of any proceedings in any court of law records or reproduces by mechanical or other means or prints, publishes or disseminates any speech, utterance, writing or statement or any extract from or recording or

reproduction of any speech, utterance, writing or statement made or produced or purporting to have been made or produced anywhere at any time by any person in respect of whom the provisions of this paragraph are applicable by virtue of a notice issued under section *ten quin*, or whose name appears on any list in the custody of the officer referred to in section *eight*, or in respect of whom a prohibition to attend any gathering has, at any time before or after the commencement of the Suppression of Communism Amendment Act, 1965, been issued under section *five* or *nine*. (S. 11 (g) *bis*).

This provision prevents newspapers, periodicals, writers, publishers, booksellers etc. from publishing or disseminating the writings or words of persons subject to banning orders or listed as members of an unlawful organisation.

(d) One year's imprisonment or a fine not exceeding £200 or both for a number of minor offences.

"NINETY DAY DETENTION LAW"

Section 17 of the General Law Amendment Act No. 37 of 1963 provided for what became known as "90-day detention" in the following terms:

- (1) Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in section *one* of the Police Act, 1958 (Act No. 7 of 1958) may from time to time without warrant arrest or cause to be arrested any person whom he suspects upon reasonable grounds of having committed or intending or having intended to commit any offence under the Suppression of Communism Act, 1950 (Act No. 44 of 1950), or under the last-mentioned Act as applied by the Unlawful Organizations Act, 1960 (Act No. 34 of 1960), or the offence of sabotage, or who in his opinion is in possession of any information relating to the commission of any such offence or the intention to commit any such offence, and detain such person or cause him to be detained in custody for interrogation in connection with the commission of or intention to commit such offence, at any place he may think fit, until such person has in the opinion of the Commissioner of the South African police replied satisfactorily to all questions at the said interrogation, but no such person shall be so detained for more than ninety days on any particular occasion when he is so arrested;
- (2) No person shall, except with the consent of the Minister of Justice or a commissioned officer as aforesaid, have access to any person detained under sub-section (1): Provided that not less than once during each week such person shall be visited in private by the magistrate or an additional or assistant magistrate of the district in which he is detained.
- (3) No court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody.

A number of questions arose under this section for decision by the Courts. The first was whether or not the subject could be detained for successive periods of 90 days. In *Mbele v. Minister of Justice & Ors*,¹ Warner J. said on this point:

"I proceed to analyse the section. The first part gives power to arrest where the officer suspects a person, upon reasonable grounds, of having committed, intending to commit or having intended to commit an offence under the statutes referred to, or the offence of sabotage. I will refer to this part as 'personal involvement'. The second part deals with the case where a police officer is of the opinion that a person is in possession of information relating to the commission of or the intention to commit one of those offences. Here there need be no personal involvement and, in both parts, a distinction is drawn between sabotage and offences under the two acts mentioned. The section goes on to lay down that the purpose of the arrest and detention is to question the detainee about the matter on which he was arrested until he gives satisfactory answers, or until 90 days have elapsed, whichever is the shorter. He cannot be detained for more than 90 days—'on any particular occasion when he is so arrested,' and he may be arrested 'from time to time'."

But in *Loza v. Police Station Commander Durbanville*,² Rumpff J. said:

"I find myself unable to agree with the passage cited (from *Mbele's* case) or to accept the argument of counsel. In my view the foundation of the arrest and detention in terms of sec. 17 (1) consists of two elements, namely the specified offence with which the suspect is thought to be linked, as set out in the section, and the suspicion entertained or opinion held by the commissioned officer. The reference in sec. 17 (1) to the words 'on any particular occasion when he is so arrested' refers, in my opinion, to an arrest effected on that foundation. It follows that either a change in respect of the particular offence or a change in the situation upon which the suspicion or opinion is based, would create a new foundation and, in the event of an arrest, a new 'occasion'. In other words, not only would a new 'occasion' be created by the introduction of a new offence but also by further information being placed before the commissioned officer affecting his suspicion or opinion, resulting in the appraisal by him of a new situation."

The other judges sitting in the Court of Appeal concurred with Rumpff J. and Warner's J. dictum on this point was therefore overruled.

The right of the detainee to reading matter and other comforts was dealt with in the case of *Sachs v. Rossouw* in which at first instance³ an order was made to the following effect:

¹ 1963 (4) S.A.L.R. 606 at 608.

² 1964 (2) S.A.L.R. 545 at 550. (Appellate Division).

³ Cape Provincial Division of the Supreme Court.

"The Court:

1. Declares the appellant entitled, while detained under the provisions of sec. 17 of Act 37 of 1963, to be accorded reasonable periods of daily exercise, to be supplied with, or to be permitted to receive and use a reasonable supply of reading matter and writing material."

In *Rossouw v. Sachs*,¹ the Appellate Division overruled this decision. Ogilvie Thomson J.A. said:²

"When due regard is had to the purpose of sec. 17 as determined above—viz. to induce the detainee to speak—and to the circumstance that, in order to achieve that object, the Legislature has by the express terms of the section run counter, as explained earlier in this judgment, to some of the most radical principles of our criminal law, I find myself unable to support the order made by the Provincial Division. That Court expressed the view that an individual has the right to an adequate supply of reading matter and writing materials, and that to deprive a detainee of that right 'amounts in effect to punishment'. 'It would be surprising'—so the reasons in the Court below continued—'to find that the Legislature intended punishment to be meted out to an unconvicted prisoner'. For the reasons appearing earlier in this judgment, a detainee cannot, in my view, rightly be equated with an unconvicted prisoner. No doubt a detainee is, after his release, entitled to bring an action in respect of any wrong treatment during detention: but the concept—implicit in the judgment of the Court below—that, during the period of his detention, the detainee still enjoys all his pre-detention rights save in so far as the detention itself impairs those rights is not readily reconcilable with the detainee's ordinarily being precluded—*via* the express prohibition of access made by sec. 17 (2)—from being able to confer with his legal adviser to enforce those rights. Moreover, where is the line to be drawn? In the present case we are concerned only with reading matter and writing materials; but is the detainee who in happier days habitually enjoyed champagne and cigars entitled, as of right, to continue to enjoy them during his detention? That example is no doubt, extreme; but it serves to underline the difficulties attendant upon the view taken by the Court below."

In the case of *Schermbrucker v. Klindt*, N.O.³, the Appellate Division was again called upon to interpret Section 17. Schermbrucker had smuggled a note to his wife that he was being ill-treated. She applied for an interdict and an order that her husband be brought to court to give evidence about his ill-treatment. The court refused to grant the relief requested. Botha J. said⁴

"Now it seems to me that, if a detainee were to be required to comply with an order by a Court requiring his personal attendance

before it, the manner of his detention as prescribed by sec. 17 would be interfered with in more ways than one, and the purposes of the section may be defeated. In the first place, the detainee would be required to depart, albeit temporarily, from the place of his detention, for during the period during which he is complying with the order, he is clearly not being detained at the place determined by the commissioned officer of police as required by sec. 17. In the second place, the detainee would be brought out of isolation and into contact with the outside world, where access to him could not be effectively controlled or prohibited. The prohibition against access to the detainee can, having regard to the provisions of sec. 17(2), be effectively enforced only while he is being detained in isolation from contact with the outside world at the place deemed fit by a commissioned officer of police, for no other effective machinery is provided for its enforcement and no sanction is prescribed for a contravention thereof. The absence of any such provision in sec. 17 is, in my view, a clear indication that the Legislature did not contemplate the possibility of any temporary absence of a detainee from the place of his detention. Such a possibility could in any event hardly have been contemplated having regard to the fact that the detention, though temporary, was clearly intended to be continuous in order to induce the detainee to speak. Such interruptions, especially lengthy interruptions, may therefore clearly defeat the purpose of the section. The purpose of the detention, though it temporarily deprives the detainee of his liberty, is intended to induce him to speak, and any interference with that detention which may negative the inducement to speak is likely to defeat the purpose of the Legislature."

"180-DAY DETENTION LAW"

Section 215 bis of the Criminal Procedure Act No. 56 of 1955, enacted by Section 7 of the Criminal Procedure Amendment Act No. 96 of 1965, provides for what has become known as "180-day detention" in the following terms:

- (1) Whenever in the opinion of the attorney-general there is any danger of tampering with or intimidation of any person likely to give material evidence for the State in any criminal proceedings in respect of an offence referred to in Part II bis of the Second Schedule¹ or that any such person may abscond, or whenever he deems it to be in the interests of such person or of the administration of justice, he may issue a warrant for the arrest and detention of such person.
- (2) Notwithstanding anything in sub-section (3) of section twenty-nine contained, any person arrested by virtue of a warrant under sub-section (1) of this section shall, as soon as may be, be taken to the place mentioned in the warrant and detained there or at

¹ 1964 (2) S.A.L.R. 551 (Appellate Division).

² At p. 564.

³ 1965 (4) S.A.L.R. 606 (Appellate Division).

⁴ At p. 619.

¹ The offences referred to include all serious criminal offences as well as offences under the Suppression of Communism Act, the "sabotage" provision of the General Law Amendment Act, 1962 and other security legislation.

any other place determined by the attorney-general from time to time, in accordance with regulations which the Minister is hereby authorized to make.

- (3) Unless the attorney-general orders that a person detained under sub-section (1) be released earlier, such person shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded or for a period of six months after his arrest, whichever may be the shorter period.
- (4) No person, other than an officer in the service of the State acting in the performance of his official duties, shall have access to a person detained under sub-section (1), except with the consent of and subject to the conditions determined by the attorney-general or an officer in the service of the state delegated by him.
- (5) Any person detained under subsection (1) shall be visited in private not less than once during each week by the magistrate or an additional or assistant magistrate of the district in which he is detained.
- (6) For the purposes of section *two hundred and eighteen* any person detained under sub-section (1) shall be deemed to have attended the criminal proceedings in question as a witness for the State during the whole of the period of his detention.
- (7) No court shall have jurisdiction to order the release from custody of any person detained under sub-section (1) or to pronounce upon the validity of any regulation made under sub-section (2) or the refusal of the consent required under sub-section (4) or any condition referred to in sub-section (4).

The manner in which this provision came into force is indicated by the case of *Heyman v. The Attorney General for Transvaal and Others*,¹

“ABSTRACT: Where the court had ordered the release of a detainee on 9th September, 1965, because he had been detained in accordance with the provisions of section 215 *bis* as introduced into Act 56 of 1955 by section 7 of Act 96 of 1965, because the regulations required by this legislation had not been promulgated, and thereafter despite due service of this order upon the proper authorities the detainee had been released under circumstances which enabled the police immediately to re-arrest the detainee (i.e., after the necessary regulations had been promulgated), the court commented adversely on the matter when it came before it again on 13th September, 1965.

“The applicant was the wife of a certain H. whose release she had obtained through an order of court issued on 9th September, 1965, for the reason set out above in the Abstract. Although service was effected on the relevant prison authorities on 9th September, due to the conduct of the prison authorities and of the police the applicant was not able to give effect to the court's order of 9th September, 1965. When the said H. was eventually released within five minutes he

was re-arrested because by the time he was released the necessary regulations had been promulgated. Because of the way in which the applicant had not been properly informed as to the whereabouts of her husband, the said H., the court held that she was fully justified in coming to court again on 13th September and ordered one of the respondents, namely the officer commanding the security police, who was cited as the third respondent in the matter, to pay the applicant's costs in his official capacity. It seemed a reasonable inference from all the facts before the court that in the normal course of events the said H. would have been released under circumstances which would not have made his immediate re-arrest by the police possible. As, however, the necessary regulations had been promulgated, it was not possible for the said H. to be released again and the court was unable to make an order to that effect. Apart from ordering the third respondent to pay the costs of the application as aforesaid the court made the following further observations:

“*per Bresler, J.*: ‘I wish, however, to emphasise the following. Although it cannot be decided on the case as it now stands whether there was a contumacious disregard of the order of my brother *Kotze*, the effect was nevertheless to frustrate all the enquiries which were made to ascertain the whereabouts of Mr. H., and such conduct, whatever the underlying motives may have been, and we were not taken into the confidence of respondents, such conduct does in my view, render a disservice not merely to the Police Force but to the country itself, and to that extent at least it merits the censure of the court, which is after all the bastion of the liberty of the subject’.”

Regulations were promulgated in Government Gazette No. 1223 of the 10th September, 1965 in G.N. No. R. 1396. These regulations have been analysed in the article by Mathews and Albino “*The Permanence of the Temporary*”, 1966 S.A.L.J. 16 at p. 29 in the following words:

“Under section 215 *bis* of the Criminal Procedure Act, the Courts will have a much more restricted opportunity to pronounce upon the conditions of detention; according to subsection (2) these will be prescribed by regulations made by the Minister. This provision of subsection (2) is presumably the result of the suggestion made by Ogilvie Thompson J.A. in *Rossouw v. Sachs* that conditions of detention should be prescribed and that Parliament should not leave it to the courts to deduce them from not very helpful statutory language. If this surmise is correct, the legislature appears to have interpreted his remarks as a plea for depriving the court of all responsibility whatsoever. Sub-section (7) provides that no court shall have jurisdiction to pronounce upon the validity of any regulations made under subsection (2), thus apparently giving the Minister *carte blanche*. The precise effect of this exclusion of jurisdiction is not clear. The court might have some remnant of authority, because, presumably, its jurisdiction can be ousted only by regulations which are, in fact, regulations under subsection (2). One may also presume that the court will have power to correct the Minister if the regulations are contrary to the provisions of section 215 *bis* itself or contrary to other

¹ 1965 (2) P.H. K 95.

provisions of the Act; if not, the Minister will have a power equal to that of Parliament. Putting aside these doubts, it is clear that the Minister may in terms of regulations made under subsection (2) deprive the detainee of reading matter and writing materials and the deprivation will not be challengeable before a court of law. This he has now done, or made possible, under regulations framed under subsection (2).

"Regulation 2 creates the initial impression that the detainee is on the same footing as an awaiting-trial prisoner, but this is quickly dispelled by a reading of all the regulations. The right to purchase or receive stationery or literature is dependent upon the discretion of the officer in command of the place of detention and, if approval is given, it may be withdrawn at any time. The regulations, read with section 215 *bis*, make it possible for the 180-day detainee to be held in solitary confinement, without reading and writing material; in this respect he may be no better off than his statutory relation, the 90-day detainee. The regulations also raise the sinister possibility that reading matter and writing materials may be withheld from those who are not 'co-operating' with the investigating authorities and granted to those who are. If this did happen, there would surely be 'tampering' or 'intimidation' on the other side. This is a matter for deep concern."

In *Singh v. Attorney General for Transvaal*¹ the words in section 215 *bis* "Whenever in the opinion of the attorney general there is any danger of tampering with or intimidation of any person *likely to give material evidence...*" fell to be interpreted by the court. The point at issue was whether they were governed by the phrase "in the opinion of the attorney general" or whether they imported an objective test which could be re-examined by the courts.

Marais J. accepted the former interpretation and held that "likely to give material evidence" must be interpreted as meaning "likely to be called as a witness for the prosecution" and that the question thus fell exclusively within the discretion of the attorney general. He said:

"In explicit terms Parliament excluded interference by the courts in transactions under the section. In view of this it would certainly be most surprising if Parliament intended that, on a relatively minor issue, namely the question whether the person detained is likely to be a material witness, the court would be entitled to interfere."²

He refused to apply the principle that in interpreting statutes the court should prefer that reading which least invades the liberty of the subject, on the following grounds:

"In the present case the policy of the section is clear beyond any doubt: Parliament wished to oust the jurisdiction of the courts at all

stages. If the words used by it can, without undue grammatical or semantic strain, be so interpreted as to give effect to the wishes of Parliament it should in my opinion be done. The question whether two readings are possible does not seem to arise, no matter what the subject-matter dealt with."¹

The court also had to interpret the words "in any criminal proceedings". The applicant had not been detained as a potential witness in relation to any particular criminal proceedings, and argued that this rendered his detention unlawful. Marais J. held, however, that no actual proceedings against a particular accused need be pending:

"It is sufficient compliance if such proceedings are *bona fide* contemplated by the attorney-general as being likely to be instituted."²

THE TERRORISM ACT

The Terrorism Act No. 83 of 1967 creates the offence of terrorism in the following terms:

2. (1) Subject to the provisions of subsection (4), any person who—
 - (a) with intent to endanger the maintenance of law and order in the Republic or any portion thereof, in the Republic or elsewhere commits any act or attempts to commit, or conspires with any other person to aid or procure the commission of or to commit, or incites, instigates, commands, aids, advises, encourages or procures any other person to commit, any act; or
 - (b) in the Republic or elsewhere undergoes, or attempts, consents or takes any steps to undergo, or incites, instigates, commands, aids, advises, encourages or procures any other person to undergo any training which could be of use to any person intending to endanger the maintenance of law and order, and who fails to prove beyond a reasonable doubt that he did not undergo or attempt, consent or take any steps to undergo, or incite, instigate, command, aid, advise, encourage or procure such other person to undergo such training for the purpose of using it, or causing it to be used to commit any act likely to have any of the results referred to in subsection (2) in the Republic or any portion thereof; or
 - (c) possesses any explosives, ammunition, fire-arm or weapon and who fails to prove beyond a reasonable doubt that he did not intend using such explosives, ammunition, firearm or weapon to commit any act likely to have any of the results referred to in subsection (2) in the Republic or any portion thereof

¹ 1967 (2) S.A.L.R. 1.

² At p. 3.

¹ At p. 5.

² At p. 7.

shall be guilty of the offence of participation in terroristic activities and liable on conviction to the penalties provided for by law for the offence of treason: provided, that, except where the death penalty is imposed, the imposition of a sentence of imprisonment for a period of not less than five years shall be compulsory, whether or not any other penalty is also imposed.

(2) If in any prosecution for an offence contemplated in subsection (1) (a) it is proved that the accused has committed or attempted to commit, or conspired with any other person to aid or procure the commission of or to commit, or incited, instigated, commanded, aided, advised, encouraged or procured any other person to commit the act alleged in the charge, and that the commission of such act, had or was likely to have had any of the following results in the Republic or any portion thereof, namely

- (a) to hamper or to deter any person from assisting in the maintenance of law and order;
- (b) to promote, by intimidation, the achievement of any object;
- (c) to cause or promote general dislocation, disturbance or disorder;
- (d) to cripple or prejudice any industry or undertaking or industries or undertakings generally or the production or distribution of commodities or foodstuffs at any place;
- (e) to cause, encourage or further an insurrection or forcible resistance to the Government or the Administration of the territory;
- (f) to further or encourage the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means or by the intervention of or in accordance with the direction or under the guidance of or in co-operation with or with the assistance of any foreign government or any foreign or international body or institution;
- (g) to cause serious bodily injury to or endanger the safety of any person;
- (h) to cause substantial financial loss to any person or the State;
- (i) to cause, encourage or further feelings of hostility between the White and other inhabitants of the Republic;
- (j) to damage, destroy, endanger, interrupt, render useless or unserviceable or put out of action the supply or distribution at any place of light, power, fuel, foodstuffs or water, or of sanitary, medical, fire extinguishing, postal, telephone or telegraph services or installations, or radio transmitting, broadcasting or receiving services or installations;
- (k) to obstruct or endanger the free movement of any traffic on land, at sea or in the air;
- (l) to embarrass the administration of the affairs of the State,

the accused shall be presumed to have committed or attempted to commit, or conspired with such other person to aid or procure the commission of or to commit, or incited, instigated,

commanded, aided, advised, encouraged or procured such other person to commit, such act with intent to endanger the maintenance of law and order in the Republic, unless it is proved beyond a reasonable doubt that he did not intend any of the results aforesaid.

3. Any person who harbours or conceals or directly or indirectly renders any assistance to any other person whom he has reason to believe to be a terrorist, shall be guilty of an offence and liable on conviction to the penalties provided by law for the offence of treason: provided that, except where the death penalty is imposed, the imposition of a sentence of imprisonment for a period of not less than five years shall be compulsory, whether or not any other penalty is imposed.

The interpretation of section 2 in particular may well lead to the sort of unforeseen results mentioned above in connection with the Suppression of Communism Act in *R. v. Sisulu*¹.

The detention of persons suspected of connections with terroristic activities for an indefinite period without trial is provided for by section 6 which reads as follows:

- 6. (1) Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in section 1 of the Police Act, 1958 (Act No. 7 of 1958), of or above the rank of Lieutenant-Colonel may, if he has reason to believe that any person who happens to be at any place in the Republic, is a terrorist or is withholding from the South African Police any information relating to terrorists or to offences under this Act, arrest such person or cause him to be arrested, without warrant and detain or cause such person to be detained for interrogation at such place in the Republic and subject to such conditions as the Commissioner may, subject to the directions of the Minister, from time to time determine, until the Commissioner orders his release when satisfied that he has satisfactorily replied to all questions at the said interrogation or that no useful purpose will be served by his further detention, or until his release is ordered in terms of subsection (4).
- (2) The commissioner shall, as soon as possible after the arrest of any detainee, advise the Minister of his name and the place where he is being detained, and shall furnish the Minister once a month with the reasons why any detainee shall not be released.
- (3) Any detainee may at any time make representations in writing to the Minister relating to his detention or release.
- (4) The Minister may at any time order the release of any detainee.
- (5) No court of law shall pronounce upon the validity of any action taken under this section, or order the release of any detainee.

¹ See above p. 8.

- (6) No person, other than the Minister or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee, or shall be entitled to any official information relating to or obtained from any detainee.
- (7) If circumstances so permit, a detainee shall be visited in private by a magistrate at least once a fortnight.

The Act is retrospective in operation. Section 9 (1) provides:

This Act, except sections 3, 6 and 7, shall be deemed to have come into operation on the twenty-seventh day of June, 1962, and shall, notwithstanding anything to the contrary in any law or the common law contained, apply also in respect of or with reference to any act committed (including the undergoing of any training or the possession of anything) at any time on or after the said date.

DEPARTURES FROM THE NORMAL RULES OF PROCEDURE IN POLITICAL TRIALS

Joinder of Charges

The general rules relating to the joinder of charges against a number of accused are to be found in the Criminal Procedure Act, No. 56 of 1955, the relevant sections of which read as follows:

S. 327 (1) Any number of persons charged with committing or with procuring the commission of the same offence, although at different times, or with having, after the commission of the offence, harboured or assisted the offender... may be charged with substantive offences in the same charge and may be tried together.

S. 328 Whenever any person in taking part or being concerned in any transaction commits an offence and any other person in taking part or being concerned in the same transaction commits a different offence, both such persons may be charged with such offence in the same charge and may be tried thereon jointly.

Under the Suppression of Communism Act and the Terrorism Act, however, the prosecution has greater latitude and may join in the same indictment a number of charges, not necessarily relating to the same offence or arising out of the same transaction, against a number of persons.

Section 12 (6)(a) of the Suppression of Communism Act, as inserted by Act No. 37 of 1963, provides:

Whenever two or more persons are in any indictment, summons or charge alleged to have committed at the same time and place, or at the

same place and at approximately the same time, offences under this Act or under this Act as applied by any other law, such persons may be tried jointly for such offences on that indictment, summons or charge.

Section 5 (c) of the Terrorism Act provides:

Whenever two or more persons are in any indictment, summons or charge alleged to have committed, whether jointly or severally, offences under this Act, such persons may be tried jointly for such offences on that indictment, summons or charge.

Jurisdiction

The general rule is that an accused person can only be tried by the court having jurisdiction over the area in which the crime was committed.¹

The Suppression of Communism Act and the Terrorism Act introduced certain modifications of this principle.

Section 12 (6)(b) of the Suppression of Communism Act provides:

- (b) any offence under this Act or under this Act as applied by any other law shall, for the purposes of determining the jurisdiction of a court to try the offence, be deemed to have been committed at the place where it actually was committed and also at any place where the accused happens to be.

Section 4 (1) and (2) of the Terrorism Act No. 83 of 1967 provides:

- (1) Notwithstanding anything to the contrary in any law or the common law contained any superior court or attorney-general in the Republic shall have jurisdiction in respect of any offence under this Act committed outside the area of jurisdiction of such court or attorney-general, as if it had been committed within such area.
- (2) If the Minister so directs the trial of any person for an offence under this Act, shall take place at such place in the Republic as the Minister may determine.

The Right to Bail

Under the Criminal Procedure Act, No. 56 of 1955, an accused person has the right to apply to the court to be released on bail pending the trial of the charges against him. This right has been taken away from certain categories of accused persons.

¹ See Gardiner and Lansdown: "The South African Criminal Law and Procedure", Vol. I, 6th edition, pages 26 *et seq.*

Section 108 *bis* of the Criminal Procedure Act, as inserted by Act No. 96 of 1965, provides:

Whenever any person has been arrested on a charge of having committed any offence referred to in Part II *bis* of the Second Schedule, the attorney-general may, if he considers it necessary in the interest of the safety of the public or the maintenance of public order, issue an order that such person shall not be released on bail or otherwise before sentence has been passed or he has been discharged: Provided that if no evidence has been led against such person, at a preparatory examination or trial, within a period of ninety days after his arrest, he may at any time after that period on notice to the attorney-general apply to a judge of the Supreme Court to be released on bail and the judge sitting in Chambers may on the merits of the application order the release of such person on bail on such terms and conditions as he may direct, or he may dismiss the application or otherwise deal with it as he deems fit.

The offences covered by this section include, as well as a number of offences of a non-political nature, offences under the Suppression of Communism Act and contravention of the sabotage provisions of the General Law Amendment Act, 1962.

Section 5 (f) of the Terrorism Act is even more draconian, in that no time limit is imposed on the power of detention without the right to apply for bail. It reads as follows:

No person detained in custody on a charge of having committed an offence under this Act shall be released on bail or otherwise, before sentence has been passed or he has been discharged, unless the attorney-general consents to his release.

Summary Procedure

The normal rule is for trial in the Supreme Court to be preceded by a preparatory examination in a magistrate's court, in the course of which the evidence relied upon by the prosecution is presented so that the accused knows the case he will have to meet. It is only if a *prima facie* case is made out before the magistrate's court that an accused is committed for trial by the Supreme Court.

This rule has been modified in two respects. The Criminal Procedure Act gives the prosecution a discretionary power to demand a summary trial, while the Terrorism Act makes summary trial mandatory in respect of offences under that Act.

Section 152 *bis* of the Criminal Procedure Act, 1955, as inserted by Act No. 37 of 1963, provides:

Whenever in the opinion of the attorney-general any danger of interference with or intimidation of witnesses exists or whenever he deems it to be in the interest of the safety of the State or in the public interest, he may direct that any person accused of having committed any offence shall be tried summarily in a superior court without a preparatory examination having been instituted against him.

Section 5 (d) of the Terrorism Act, 1967, provides:

Any person accused of having committed an offence under this Act shall be tried summarily without a preparatory examination having been instituted against him.

Evidence

The law of evidence is substantially altered by Section 2 (3) of the Terrorism Act:

In any prosecution for an offence under this section, any document, book, record, pamphlet, publication or written instrument

- (a) which has been found in or removed from the possession, custody, or control of the accused or of any person who was at any time before or after the commencement of this Act an office-bearer, officer, member or active supporter of an organisation of which the accused is or was an office-bearer, officer, member or active supporter;
- (b) which has been found in or removed from any office or other premises occupied or used at any time before or after the commencement of this Act by an organisation of which the accused is or was an office-bearer, officer, member or active supporter or by any person in his capacity as office-bearer or officer of such organisation; or
- (c) which on the face thereof has been compiled, kept, maintained, used, issued or published by or on behalf of an organisation of which the accused is or was an office-bearer, officer, member or active supporter *or by or on behalf of any person having a name corresponding substantially to that of the accused,*

and any photostatic copy of any such document, book, record, pamphlet, publication or written instrument, shall be admissible in evidence against the accused as *prima facie* proof of the contents thereof.

Section 12 of the Suppression of Communism Act 1950 is in substantially similar terms, and relates to prosecutions or civil proceedings under that Act. It does not however include the words italicised (by the editor) in sub-paragraph (c) above.

RESTRICTIONS ON THE RIGHT TO PRACTISE LAW

Section 5 *quat* of the Suppression of Communism Act as inserted by Section 2 of Act No. 24 of 1967 provides:

- (1) Notwithstanding anything to the contrary in any law contained
 - (a) no person shall be admitted by the court of any division of the Supreme Court of South Africa to practise as an advocate, attorney, notary or conveyancer, unless such person satisfies such court that his name does not appear on any list in the custody of the officer referred to in section 8 and that he has not before or after the commencement of this section been convicted of an offence under section 11 (a), (b), (b) *bis*, (b) *ter* or (c);
 - (b) the court of any division of the Supreme Court of South Africa shall, on an application made by the Secretary for Justice, order that the name of any person be struck off the roll or list of advocates, attorneys, notaries or conveyancers to be kept in terms of the relevant law relating to the admission of advocates, attorneys, notaries or conveyancers, if the court is satisfied that such person's name appears on any list referred to in paragraph (a) or that he has before or after the commencement of this section been convicted of an offence referred to in paragraph (a).
- (2) Notwithstanding the provisions of paragraph (a) of subsection (1), the court may admit any person convicted of an offence referred to in that paragraph if he produces a certificate signed by the Minister to the effect that the Minister has no objection to the admission of such person on account of his having been so convicted.

The history and some of the effects of this section may be gathered from the following passage in the *1965 Annual Survey of South African Law*¹

"The Suppression of Communism Amendment Bill, which had its First Reading on 4th June, contained provisions prohibiting 'listed' communists from practising as advocates or attorneys. In moving the Second Reading, however, the Minister of Justice announced that he had decided to allow these provisions to stand over because of the late stage of the session at which the Bill was introduced. He said that, whereas the General Bar Council was divided on the issue, he had 'not received a single objection to this measure from any law society as far as the attorneys are concerned'. The Minister made it clear, however, that the matter was 'one of principle' for the Government and that he would proceed with the measure 'at the very

first opportunity next year' (*House of Assembly Debates*, vol. 15, vols. 7982-3 (12th June, 1965)). Protests against this clause had been made by the Johannesburg, Cape and Natal Bars. A joint statement by the Natal and Cape Bars declared: 'We consider it to be in the public interest that decisions as to fitness to practise the legal profession should be left to the courts and not to the unchallengeable decision of the Minister or of any other person however bona fide they may be... We believe that the effect of the Bill, if passed into law, may be to inhibit the proper performance by members of the legal profession of their duty fearlessly to present the interests of their clients no matter how unpopular their clients' cause and no matter how powerful or influential the opposition may be' (*House of Assembly Debates*, vol. 15, cols 8004-5 (12th June, 1965)).

"It is generally accepted that it is necessary to control admissions to the legal profession and to remove from practice those who have shown themselves to be unsuitable, but it is doubtful whether the power to exercise such control is best vested in the Minister of Justice. Clause IX of the Conclusions of the International Congress of Jurists, held at Rio de Janeiro in 1962, states:

"The rule of law requires an authority which has the power to, and does in fact, exact proper standards for admission to the legal profession and enforces discipline in cases of failure to abide by a high standard of ethics. Those functions are best performed by self-governing democratically organized lawyers' associations, but in the absence of such associations the judiciary should act instead. Discipline for violations of ethics must be administered in substantially the same manner as courts administer justice' (*Bulletin of the International Commission of Jurists*, No. 24, December 1965, pp. 43-4).

"The profession's own disciplinary bodies and the courts have vigorously protected the reputation of the South African legal profession. Indeed, the Minister of Justice himself admitted this when introducing the Attorneys, Notaries and Conveyancers Admission Amendment Act, No. 26 of 1965 (*House of Assembly Debates*, vol. 13 vol. 1382 (18th February, 1965)). It therefore appears that there is no need for the proposed legislation in order to control the professional conduct of legal practitioners."

The legislation was nevertheless proceeded with.

It means that persons who were members or active supporters of the Communist Party of South Africa, the African National Congress, the Pan African Congress, the Congress of Democrats, the Defence and Aid Fund and any other organisations that may be declared unlawful in the future, may in the discretion of the Executive be barred from practice. The court has no discretion in the matter.

¹ At pages 502-3.

SOME DISSENTING VOICES

Professor A.S. Mathews and Professor R.C. Albino, Professors of Law and Psychology respectively at the University of Natal, Durban, published a valuable article in *The South African Law Journal*,¹ entitled "The Permanence of the Temporary". They start with a quotation from Thucydides:

"And we should recognise that the proper basis for our security is in good administration rather than in fear of legal penalties."

After reviewing a number of judicial decisions, they say:²

"One of the central weaknesses in the judgment in *Rossouw v. Sachs*³ is that it fails to define with necessary legal precision the nature of an emergency which will authorise the courts to disregard the rights of individuals. Unless 'emergency' is confined to open and widespread disorder and lawlessness, or to conditions of war, it is a term of no real meaning. Parliament has the power to enact a peace-time and permanent emergency; the courts need not do this for Parliament. If the Court had given effect to its own words 'in times of extreme emergency, such as war', then the conclusion in *Rossouw v. Sachs* must have been different. Instead, the Court appears to have authorised the neglect of individual rights for as long as one can foresee. In making our second observation about permanent emergencies, we refer once again to the quotation with which we opened this article and in doing so we assume, perhaps pretentiously, the mantle of the jurist rather than that of the lawyer or psychologist. With his eye for essentials, Thucydides shows that it is the *neglect of rights* (the absence of good administration) which is productive of disorder. With profound insight he saw that law, order and justice are interdependent. It is true that if a State neglects order there can be no justice, but it is equally true that if the State denies justice it undermines the foundations of order. It is our firm conviction that the latent disorder in South Africa has its roots in a denial of elementary rights and essential human needs. This denial, exemplified by *Raboroko's* case, we believe to be a denial of justice in the sense that the human wants and aspirations which are inherent in the Western tradition and, in fact, constitute it, are defeated or frustrated. The permanent emergency is necessary because of this denial and its function is to control the reaction to it. Our final comment about the permanent emergency is that it has brought about a situation in which it is no longer possible to distinguish between the preservation of order and the preservation of the power of the ruling party and between opposition and subversion. The judicial and extrajudicial punishment of people for activities which a democracy should not merely allow, but encourage, makes it difficult, if not impossible, to

draw this line. It is not denied that there has been genuine subversion in South Africa; it is the absence of differentiation which is troubling and which may be productive of more insecurity. And this lack of differentiation means that the measures under discussion are *not* simply security measures and that they should not be uncritically accepted as such. Another factor which may be productive of insecurity, in the long run, is the employment of punishments with inhuman potentialities, like solitary confinement. One of the most important differences between Communist and Western practices of government is the absence of such punishments in the latter. We must not eliminate this difference. Another passage from Thucydides may be apposite here:

'Indeed it is true that in these acts of revenge on others men take it upon themselves to begin the process of repealing these general laws of humanity which are here to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection.'

The words 'acts of revenge' may be left out as inappropriate but the general moral of his words is unexceptionable."

Jean Davids, Lecturer in Law at the University of the Witwatersrand, in "The Courts and 180-Day Detention"¹ takes as her text the dictum of Frankfurter J. in *McNabb v. United States* that, "The history of liberty has largely been the history of observance of procedural safeguards" and severely criticizes Marais J. for deciding in *Singh v. Attorney General for Transvaal*², that he could not interfere with the Attorney General's discretion in issuing a warrant for the detention of the applicant, an attorney, under section 215 *bis* of the Criminal Procedure Act (180-day detention). She criticised in particular his reliance on the policy underlying the section in arriving at its meaning:

"Whatever the policy of the section, therefore, this was surely irrelevant except in so far as it has been expressed in the words used. Nor was it necessary to adopt Marais J's interpretation to avoid a glaring absurdity since even on his reasoning only inconvenience to the police investigations would result..."

"To argue from the policy to the words, rather than to infer the policy from the words, clearly led to the fallacy formulated in a slightly different context by Professors A.S. Mathews and R.C. Albino as 'the greater the expressed restrictions the greater the implied restrictions.' This argument the learned authors conclusively counter by pointing out that 'it is surely a stronger possibility that, having expressly deprived the detainee of several fundamental rights, Parliament could not have intended to deprive him of other fundamental rights by mere implication.'"³

¹ Volume 83 (1966) p. 16.

² At pp. 42-3.

³ See p. 22 above.

¹ *South African Law Journal*, Volume 84 (1967) p. 262.

² 1967 (2) S.A.L.R. 1. And see above at p. 26.

³ At pp. 263-4.

C.J.R. Dugard in "The Liberal Heritage of the Law", a public lecture, said:¹

"This discussion of judicial attitudes is not intended to suggest that our judicial bulwark of freedom has fallen. This would be a gross untruth. Decisions of the Cape and Natal Courts in respect of the 90-day law and later decisions of the Appellate Division on the 180-day law are in full accordance with our liberal tradition in the sphere of the protection of individual liberties. The purpose of this discussion has been to show that a positivist approach to such problems, which has been adopted in certain cases, is not in keeping with our Roman-Dutch heritage.

"And, finally, do the three divisions of the legal profession in South Africa, the Side-Bar, the Bar and the Academics, act fearlessly in the interests of justice? Do they speak out against legislative measures which impair individual liberties? Do they oppose detention without trial and arbitrary deprivation of personal freedom?

"The Bar, particularly in Johannesburg, the Cape and Natal, has spoken out in protest on numerous occasions. One thinks, for instance, of the Johannesburg Bar Council's statement issued at the time of the introduction of the 90-day detention law and the joint statement of the Johannesburg, Cape and Natal Bars opposing legislation preventing listed 'Communists' from practising as advocates and attorneys. On the other hand no protests were raised by the Bar when the new 'Terrorist Act', introducing indefinite detention without trial, was introduced.

"As far as academics are concerned: individual teachers of law, such as Professor Mathews, have publicly protested against objectionable legislation on occasions, although concerted protest has rarely been forthcoming. On the other hand, most law schools in this country do teach their students the legal principles and values which are the basis of our system.

"This brings me to the Side-Bar, the attorneys of the Republic. This branch of the profession has shown little interest in the values upon which Roman-Dutch Law is based. This is not intended as an attack on individual attorneys but rather as a criticism of bodies such as the Association of Law Societies of South Africa and the various provincial law societies. These bodies have accepted without protest those statutes interfering with individual liberties; with the exception of the Natal Law Society, they accepted the prohibition imposed on listed 'Communists' from practising as attorneys, and recently lawyers were subjected to the degrading experience of finding that the Transvaal Law Society was not prepared to protest at the arbitrary banning of one of its own members, Miss Ruth Hayman, under the Suppression of Communism Act—a banning order which effectively put an end to her career as an attorney. Generally these bodies give one the impression that their sole concern is the Trust accounts of their members and that they are completely unconcerned about the

maintenance of a decent legal system in South Africa. These representative societies have declined to pass judgment on so many statutes that one can only conclude that they accept unquestioningly any enactment of Parliament—that is, that they are positivists in the worst sense. And, as Professor Fuller and the German philosopher Gustav Radbruch have pointed out, such an unquestioning attitude contributed to Hitler's rise to power (1957-8) 71 *Harvard Law Review* at 617 and 657-61).

"Our law has a liberal tradition. In the light of legislative policy it is clear that this tradition cannot, at present, be enlarged. Our main concern therefore should be the maintenance of what we already possess. This places a tremendous burden upon the judiciary and upon the Bar, the Side-Bar and the teachers of law in our universities. But it is a challenge which must be met."

¹ At pp. 9-10.

PART TWO

THE OBSERVER'S REPORT

THE STATE v. ELIASER TUHADELENI AND OTHERS

BY RICHARD A. FALK *

INTRODUCTION

What follows is a report on my experience in South Africa on behalf of the International Commission of Jurists as an Official Observer of the trial of thirty-five (originally thirty-seven) South West Africans charged with engaging in various terrorist activities. I was in South Africa between February 1 and 8, 1968. During this period the court was in session only twice, once to hear evidence and argument in mitigation of guilt and once to sentence the convicted defendants. I have received assurances from several regular attenders at court that the proceedings that I observed were characteristic of the trial as a whole. I took the opportunity during my eight days in South Africa to talk about the trial with many people of diverse outlook.

First of all, I made a successful effort to discuss the trial with each member of the Defence Team. They were very helpful to me. Secondly, I requested and received permission to see Judge Joseph Ludorf, the presiding judge. Judge Ludorf received me in his chambers for tea on Friday, February 1, 1968. We did not have the opportunity to discuss the trial in any great detail. Thirdly, I made an effort to discuss the litigation with the chief prosecuting attorney, Mr. Oosthuizen. He was pleasant in casual conversation, but suggested that it would be more appropriate if I were to discuss the case itself with the Attorney General for the Transvaal, Mr. R. W. Rein. Accordingly, I called Mr. Rein for an appointment and we agreed to meet on Friday, February 8, after the trial session at

* Professor of International Law at the University of Princeton, U.S.A.

which the defendants were scheduled to be sentenced. In court on February 8, Mr. Oosthuizen informed me that Mr. Rein had decided that he should not meet with me, but that the Minister of Justice, Mr. J. Pelser, would be glad to receive me. Mr. Pelser was in Cape Town as the South African Parliament had opened during the week of January 29. I attempted to reach Mr. Pelser by telephone, but was unable to do so, although I did leave a message saying that I was sorry not to have known earlier of his willingness to meet with me to discuss the case. I was, of course, prepared to go to Cape Town to talk with Minister Pelser but I did not receive word of his willingness to receive me until the last day I was able to remain in South Africa.

Fourthly, I requested and was refused permission to visit the defendants in prison or elsewhere. In the courtroom I was not permitted to talk with the defendants, although it appeared evident that, upon being told who I was, they were eager to talk with me.

During my period of observation in South Africa I was not molested in carrying out my activities in any way. I was left entirely free and was not subject to any special surveillance when entering or leaving the country. I remained in Johannesburg during my period in South Africa except for the two days when I went by car to Pretoria because the court was in session.

My report will be confined mainly to the results of my observations. However, it will include a brief narrative of the overall trial proceedings and it will also try to put the proceedings observed in open court in a larger setting bearing on whether and in what respects the requirements of the rule of law were abridged. I wish to call the attention of readers of this report especially to the Statement by Toivo Herman Ja Toivo,¹ delivered under oath in court on February 1, 1968; it expressed in very direct form what I was told by several to be the sentiments of the defendants as a group. The statement by Mr. Ja Toivo was given wide publicity in both the English-speaking and the Afrikaans press of South Africa, and many South Africans with whom I talked regard it as a statement of historic importance.

A SUMMARY NARRATIVE OUTLINE OF THE TRIAL

South African police have evidently made numerous arrests (estimates range from 100 to 250) since 1966 of South West Africans accused of participating in or alleged to have information about guerrilla activity in Ovamboland, South West Africa. These South West Africans have been detained incommunicado, in prisons evidently located in South Africa, often being held for many months, without access to family or lawyer and without being charged or

¹ See Appendix 1, p. 55 below.

brought to trial. It is uncertain how many South Africans are presently detained in South African prisons on this basis. The defendants in the Terrorist Trial at Pretoria were all held for long periods on this basis.

On June 22, 1967 Mr. R. W. Rein, the Attorney-General of the Transvaal, announced that thirty-seven South West Africans were to be charged with terrorist activities and would be tried in the Pretoria Magistrate's Court in a summary trial without a jury. Among the thirty-seven men arrested were several leaders of the South West Africa People's Organization (SWAPO), including its Acting President, Mr. Nathaniel Maxuiuri, the Acting Secretary-General, Mr. John Otto, the Secretary for Foreign Affairs, Mr. Jason Mutumbulua, and Mr. Toivo Ja Toivo, the Regional Secretary for the North. The defendants had various occupations, although most of them were ordinary labourers.

The defendants were charged with conspiracy to overthrow the existing government of South West Africa and to replace it with a government constituted by SWAPO members. Eighteen of the defendants were accused of leaving South West Africa to receive guerrilla training in various foreign countries, including Tanzania, Ghana, the United Arab Republic, Algeria, and the Soviet Union. It was also alleged that most of the defendants had participated in guerrilla training activities in a camp set up at Umgulumbashe in South West Africa and that fire-arms had been procured abroad and illegally brought into the country. Furthermore, the conspirators were charged and held responsible for some isolated incidents of violence, such as an attack on a small administrative settlement at Oshikango, an attack on an Ovambo headman friendly to the present South West African government in which one of his bodyguards was killed and two others were wounded, an armed assault against a farm, and resistance to arrest that resulted in wounding two policemen. These incidents were alleged to result in some property damage and injury, which evidently led to the death of at least one man, a bodyguard of the chief. The Prosecution had in its possession elaborate documentary proof of its charges, some of which was said to be captured at the time when these and other defendants were arrested. There was also presented to the Court oral testimony by thirteen witnesses who were treated as accomplices and whose testimony was confirmed by documentary evidence and exhibits, including some expert witnesses. In addition, many of the accused after prolonged periods of solitary confinement in jail signed written confessions. The overall conspiracy was alleged to involve at least eighty-two individuals additional to the original thirty-seven defendants, and it was never made very clear in the prosecution or judgment as to which defendants were guilty of which overt acts.

The defendants were charged under the Terrorism Act, No. 83 of 1967, promulgated officially on June 21, 1967, the day before the

charges were officially made.¹ Conviction under the Terrorism Act requires the sentencing judge to impose a minimum sentence of five years; death by hanging is the maximum sentence. The defendants were also charged, in the alternative, with violating two provisions of the Suppression of Communism Act of 1950 (as amended by the General Law Amendment Act, No. 62 of 1966), conviction carrying prison sentences of one to ten years. After the State had closed its case, the three political leaders of SWAPO (Maxuiuri, Otto, and Mutumbulua) withdrew their pleas of not guilty and elected to plead guilty under the Suppression of Communism Act to avoid the higher sentences of the Terrorism Act. The Prosecution had agreed to withdraw the latter charges in exchange for entry of pleas of guilty to the alternative charges proffered under the Suppression of Communism Act.

The Terrorism Act provides that any person who commits certain specified acts shall be guilty of the offence of participation in terrorist activities.²

On June 27, 1967 the thirty-seven South West Africans were arraigned before a magistrate's court in Pretoria and were asked about their arrangements for legal defence. Jason Mutumbulua emphasized, on behalf of all of the accused, that the defendants were thousands of miles from their homes and asked that the trial be held at Windhoek, South West Africa. The Magistrate is reported to have said that the Government order to hold the trial in Pretoria could not be challenged or changed. Mr. Mutumbulua said that the defendants were not prepared to conduct their own defence, but wanted the benefit of *pro deo* counsel. At considerable difficulty, non-state appointed counsel was secured for the defence. It is very difficult to fund the defence of individuals accused of political crimes in South Africa. South African sources are intimidated and the receipt of external funds is regulated very stringently. For instance, the Defence and Aid Fund, an organization that had been effective during the 1950s and early 1960s in raising funds for legal defence in political trials has been a "banned organization" in recent years. One effect of banning is to make it illegal to receive funds from such a tainted source.

In the *Tuhadeleni* trial, at an early stage, the pro-Government press hinted that, in fact, the defence was being paid with Defence and Aid money being transmitted in disguised form. Mr. Phillips, the head of the Defence Team, felt obliged by these rumours to volunteer that the legal fees were being borne by a single wealthy British benefactor who preferred to remain anonymous.

¹ See *Bulletin of the International Commission of Jurists*, No. 34 (June 1968) p. 28 for a commentary on the Act. See also pp. 27-30 above.

² The nature of the offence is discussed in the article referred to in footnote above. The text of the section creating the offence is given at pp. 27-28 above.

Because the atmosphere in South Africa is so hostile to the alleged perpetrators of political crime, lawyers cannot undertake to provide legal defence in trials of this sort unless paid according to a schedule of maximum counsel fees. That is, the decision to participate in the legal defence must appear to represent a purely professional involvement, and be purged of any element of possible sympathy with the cause or situation of the defendants.

South Africa has a divided bar consisting of attorneys and barristers. Mr. J. Carlson acted as the instructing attorney who selected the barristers and kept direct contact with the accused in prison throughout the trial. Mr. N. Phillips, a respected barrister of the highest rank, Senior Counsel (formerly Queen's Counsel), acted as head of the Defence Team. In addition to Mr. Phillips, there were several well-regarded Junior Counsel who participated throughout on the Defence Team, G. Bizos, E. M. Wentzel, and D. Kuny. The Defence Team was also aided by Mr. John Dugard, Senior Lecturer at the Law School of the University of Witwatersrand, who served as an adviser, especially with reference to the international law points raised by the challenge directed at the jurisdiction of a South African court to hear a criminal case involving the administration of South West Africa.

The trial started in Pretoria on August 7, 1967. Mr. Phillips raised the jurisdictional issue at once in application to the court for a postponement. In particular, Mr. Phillips suggested to the court that he would argue that the South African Parliament lacked the legislative competence to apply the Terrorism Act to South West Africa, especially in light of the fact that the Act was promulgated after the Mandate had been terminated by the United Nations General Assembly in resolution 2145 (XXI) of October 27, 1966. Mr. Phillips also argued at this preliminary stage that the Terrorism Act did not apply to South West Africa because the Territory had not been included as part of the Republic of South Africa in the constitution. Mr. Phillips also asked for more particulars as to the alleged role of SWAPO in directing "the conspiracy" and stressed the difficulty of obtaining evidence on behalf of the defendants given the complexity and geographical remoteness of the relevant conduct. The activity complained about in the indictment stretched over a five-year period, it included occurrences in several countries, and it involved quite different allegations of participation for the various defendants.

Judge Ludorf granted the defence an application for postponement and scheduled resumption of the trial for September 11, 1967. At that time written and oral arguments were presented on the jurisdictional issues involving the competence of the South African Parliament to legislate with respect to South West Africa and of a South African court to adjudicate with respect to alleged offences under the Terrorism Act. On September 12, 1967 Judge Ludorf

adjourned the trial for three more days to allow himself time to come to a decision on the jurisdictional plea *ad limine*.

On September 15, 1967 Mr. Justice Ludorf handed down an opinion upholding the jurisdiction of the court to proceed. In essence, Justice Ludorf held that a court in South Africa possessed no competence to question legislation validly enacted by Parliament and, therefore, could not consider the merits of the defence plea. Furthermore, the alleged termination of the Mandate by action of the General Assembly had no internal legal effect in South Africa until the South African Parliament had accepted it. Without such an acceptance the contention that the termination of the Mandate precluded Parliament from legislating for South West Africa could not be judicially entertained. Finally, Justice Ludorf suggested that there was no conflict between the Terrorism Act and the entrenched clauses of the South African Constitution (which bear only on the character of official languages).

At this point the defendants were formally charged and pleaded not guilty to all charges. On September 18, 1967 the Court began to receive documentary evidence and to hear witnesses. The prosecution, in effect, contended that the terroristic activities of these defendants were part of an overall effort to wage "war" in South West Africa on the white population and on the existing system of political administration. During the trial, on October 12, 1967, one of the defendants, Ephraim Kaporu, died of natural causes in hospital. While in hospital he evidently pleaded guilty to receiving military training in South West Africa and to possessing weapons. Mr. Justice Ludorf formally found Mr. Kaporu to be guilty, but decided to postpone any sentence until the trial was over.

On November 17, 1967 the prosecution completed its presentation of evidence. At that time one of the defendants, Mr. Mateus Joseph, was found not guilty and discharged. On that day also Messrs. Maxuiuri, Otto, and Mutumbulua changed their plea to "guilty" under the second alternative charge, violating the Suppression of Communism Act. The Prosecutor at this time asked that these three defendants be acquitted of the charges brought under the Terrorism Act.

The defence produced no evidence to rebut the basic charges of the prosecution. Another adjournment was granted until December 12, 1967. At this time Mr. Phillips advised the court that the thirty-two remaining defendants would have to be convicted under the main charge of "terrorism", as each had done something that clearly contravened the Terrorism Act. However, Mr. Phillips argued that not each of the defendants should be held responsible for what the others had done, but should be punished in terms of the extent of individual participation. Mr. Phillips invoked precedent to argue that, for instance, the defendants who had received military training

in South West Africa should not be held responsible for the separate violation of the Act entailed by leaving South West Africa to receive military training abroad.

After the hearings ended an application was made to the Pretoria Supreme Court on behalf of Gabriel Mbindi, a prisoner detained on suspicion of terrorism, aged sixty-eight, alleging that Mbindi had been a victim of physical mistreatment and assault by the police, especially in the course of interrogations conducted by the South African Security Police known as the Special Branch. It is worth stressing that Mbindi as a detainee under the Terrorism Act had no means of access to court or counsel. Even the application on his behalf had to be narrowly drafted to enjoin mistreatment and torture without adding any claim of being entitled to release from detention. Section 6 of The Terrorism Act makes a detainee ineligible for release regardless of abusive circumstances, or arbitrary basis of detention. The Mbindi application sought protection from further assault and was supported by affidavits drawn by four of the accused in the Terrorist Trial, two of which included indications that they too were victims of similar assault. Hearings on the Mbindi application were postponed by the court on the surprising ground of their non-urgency. Mbindi was subsequently released without public notice and secretly returned by the police to South West Africa. Since his release Mbindi has himself filed a complaint about his experience of torture in a South African prison. The status of this proceeding remains uncertain at this time.

In January 1968 Mr. Justice Ludorf delivered the judgment of the Court. At that time he found thirty defendants guilty as charged of violating the Terrorism Act. Certain general findings were made that accepted the main allegations, including the finding that SWAPO "had gone over to the planning of a violent revolution in the territory of South West Africa with the purpose of overthrowing the sovereign authority of the Republic in that territory, and that in order to further this aim they had proceeded to have persons trained for a Communist political view and also trained in the art of armed and violent terrorism." The judgment went on to say of the defendants' conduct that "It has also been proved that these conspirators afterwards committed violent, although mostly cowardly, actions in the territory to further their aim. Their actions were feeble and without the slightest hope of success, but probably inspired with the hope that powers from abroad would rush to their aid, because in the United Nations Organization there are so many people who incite to violence against the Republic and who make themselves heard in such a loud manner."

Subsequent to the Judgment Mr. Justice Ludorf made a statement in open court outlining his conception of the crime and indicating his decision not to impose the death sentence. The main paragraphs of this statement are as follows:

In my view, it has been proved that the accused, because of the level of their civilisation, became the easily misguided dupes of communist indoctrination. Had it not been for the active financial and practical assistance which the accused receive from the Governments of Moscow, Peking and other countries, they would never have found themselves in their present predicament. I also think that had it not been for the loud-mouthed support and incitement by representatives of foreign countries and the persons who published SWAPO newsletters, who have absolutely no respect for the truth, the accused would never have embarked on their futile and ill-conceived exploits.

It also weighs with me that all the crimes whereof the accused have been convicted on the main count were committed before the Act was passed by Parliament, and that this is the first Trial in which persons are charged with contravention of the Act because of the retrospective effect thereof.

For these reasons I have decided not to impose the death penalty in the case of any one of the accused. I will, however, take into account the common law offences which the accused have been proved to have committed in the assessment of the appropriate sentence, although they were not so charged.

Hearings were resumed at the end of January 1968 and consisted mainly of statements and arguments in mitigation of the prospective sentences. Mr. Ja Toivo's Statement was made at this time.¹ In essence, Mr. Phillips for the Defence tried to draw attention to the lower degree of involvement of some of the defendants, as a consequence of their action being confined to receiving small amounts of training and not including involvement in violence. Mr. Phillips also asked the Court to take into consideration the fact that these defendants were largely uneducated and that they were hence easily vulnerable to propaganda and manipulation, especially by the simple teachings of allegedly Communist agitators abroad. Mr. Phillips also tried to show that the three political defendants were men who had learned their lesson, had endured enough punishment, and, in any event, always had severe misgivings about violent opposition to South African rule in South West Africa.

Mr. Oosthuizen, for the Prosecution, emphasized the defiant character of Mr. Ja Toivo's statement, which he contended displayed no proper sense of remorse and which maintained a spirit of opposition to existing arrangements for governing South West Africa. Mr. Oosthuizen also contended that the defendants were hypocritical as they now denied their advocacy of violence or their encouragement of racial enmity.

On February 8, 1968 Mr. Justice Ludorf imposed sentences upon the convicted defendants. Nineteen of the defendants were sentenced to imprisonment for "the rest of their natural life" (i.e.

¹ See Appendix 1 at page 55 below for the text of the statement.

not eligible for parole), nine were sentenced to twenty-year prison terms, and two received a minimum sentence of five years. Subsequent to the mass sentencing of February 9, Michael Ifingilwa Moses, who became ill during the trial proceedings, was convicted as a "terrorist" and sentenced to life imprisonment. In addition, the three leaders of SWAPO who had entered pleas of guilty to charges of violating the Suppression of Communism Act were given five-year sentences, of which four years and eleven months were suspended provided there was no further conviction within three years. Mr. Justice Ludorf reiterated his conclusion contained in the verdict that the proof clearly demonstrated that each of the convicted men was a willing and active party in a plan to wage war against South African administration of South West Africa and that these individuals had acted in a cowardly fashion, attacking innocent people at night and doing unprovable damage to the property of others. Mr. Justice Ludorf also appeared to endorse Mr. Oosthuizen's response to the statement of Mr. Ja Toivo, describing it as directed toward "the outside world" and not of any importance in clarifying those considerations that might warrant a reduced sentence. Furthermore Mr. Justice Ludorf indicated that he would not take into account considerations bearing on the age, health, or family responsibilities of those defendants being sentenced. In passing, Mr. Justice Ludorf also indicated that in the future South African courts would not shrink from imposing the death penalty and that potential defendants should heed this warning.

Mr. Phillips for the Defence indicated that he wished to enter notice of appeal on the jurisdictional phases of the judgment. At present writing leave to appeal on the jurisdictional issues has been granted, but leave to appeal the harshness of the sentences has been denied. Argument on the appeal is expected to take place in Bloemfontein before the Appellate Division of the Supreme Court of South Africa, the highest court of appeal, starting on August 20, 1968.

A second terrorist trial against an additional eight South West African defendants was announced on February 28, 1968. As of July 1968, however, nothing has been done to initiate formally the proceedings. The South African police continue to hold an indeterminate number of South West Africans in secret detention as potential witnesses or defendants.

Throughout the *Tuhadeleni* trial organs of the United Nations have issued various kinds of protests and objections. These activities of the United Nations are summarized in a letter from the President of the UN Council for South West Africa to the President of the Security Council.¹ Various private organizations also issued resolu-

tions in opposition to the statutory and jurisdictional terms of reference. It is especially impressive that the distinguished organization of lawyers, The Association of the Bar of the City of New York, issued a strongly phrased resolution in protest and objection.¹ The City Bar Association rarely takes an active position on controversial legal matters and it is indicative of the depth of indignation produced by these trials that such criticism was forthcoming from such a conservative source.

It may be of interest that the Prime Minister of South Africa, John Vorster, was reported as having responded to US and UN objections to the trial in a public address by stating that "South Africa will not allow anything or anybody to interfere with this trial." Mr. Vorster also said at that time that South Africa had the sole responsibility to maintain order in South West Africa and that it would never abandon that responsibility.

OBSERVATIONS ON THE TRIAL

It is difficult to assess the *Tuhadeleni* "terrorist" trial from the perspective of the Rule of Law. What took place in open court was only a small, visible fraction of the overall relationship between the South African Government and those who oppose South African rule in South West Africa. It is essential to understand that the South African Government denies black inhabitants of South West Africa any opportunity for personal development or meaningful participation in planning their personal and collective destiny. There are no realistic possibilities to work for peaceful change in South West Africa; any political activity, especially if it includes challenging prevailing racial policies, is soon branded as "Communist" and subject to suppression as criminal conduct. The three so-called "political prisoners" (Maxuiuri, Otto, and Mutumbulua) are clear examples of African opponents of South Africa's racist rule being treated as "Communists" and as criminals. Opposition to *apartheid* in any politically serious way is treated by the South African Government as a crime.

In South Africa the *Tuhadeleni* trial was generally referred to as "The Terrorist Trial". The statute, too, is called The Terrorism Act. In application and intention, however, the statute seeks to punish severely any political action that is designed to change either white domination or the system of *apartheid* in South Africa or South West Africa. In light of this reality, it seems questionable to adopt the South African official rhetoric labelling defendants such as these as "terrorists." In contrast, of course, is the mode of description accorded these defendants by external liberation groups concerned with promoting political change in South Africa. For these groups the defendants are "freedom-fighters" rather than

¹ Cf memorandum prepared by the UN Council for South West Africa concerning the trial of 35 South West African for alleged "terrorist" activities: S/8353/Add. 1.

¹ For the text of the resolution see Appendix 2 at page 61 below.

"terrorists" and their activity is "liberation" rather than "terrorism." Naturally, both sets of terms prejudice the legal and moral quality of the conduct, and are best avoided in analysis that aims above all at objective reporting.

The extra-legal environment is also relevant. The policies of the South African Government seem designed to demoralize totally the African inhabitants. An elaborate system of African informers is relied upon both to cripple political action and to humiliate Africans in the eyes of each other. The daily administration of so-called Bantu regulations, involving "pass books", and "influx control", and "trespass" assures the humiliation of most Africans, and virtually makes a criminal class of the entire African population. Those South West Africans unresigned to South African domination exist in a condition of virtual hopelessness. South Africa has both refused to cooperate with the United Nations in any serious way and has refused to make any voluntary adjustments in its racial policies as a consequence of the repeated condemnations of *apartheid* as a social, economic, and political basis for the administration of South West Africa.

The judgment in *The South West Africa Cases* by the International Court of Justice in June 1966 deciding that Ethiopia and Liberia failed to possess the requisite legal interest to complain about South African administration of the mandated South West Africa extinguished the final glimmer of hope for the defendants later prosecuted in the Pretoria trial. Evidence was presented while I was in the court suggesting that several of the defendants turned toward insurrectionary violence in 1966 soon after discovering that the International Court of Justice would not provide them with any prospect for redress of their grievances. Several of the defendants were actually listening to the judgment "in the bush" and were evidently led to pursue "illegal" and violent remedies after this last prospect for international relief was brought to an end. Many white South Africans agreed that the judgment of the World Court was both unexpected and "the biggest break South Africa has had in years". I mention this part of the setting because it bears strongly on the motivation of the defendants and on an assessment of the reasonableness of their willingness to receive guerrilla training inside and outside of South West Africa.

The conduct of the trial itself appeared to conform with procedural standards suitable for criminal litigation in many respects. The judge was polite to the Defence Team and appeared to be diligent about conducting the trial in accordance with normal and fair rules of criminal procedure. Even the prosecutor was friendly toward the Defence Team, cooperative in working out compromise arrangements—such as dropping the indictment for terrorism against the political prisoners in exchange for their entry of pleas of guilty to the charges of violating the Suppression of Communism Act.

Despite this facade of legal propriety there were several disturbing features that I observed during my period in court. For one thing, the defendants were referred to by number rather than by name, each was assigned a number that was pinned to his shirt or jacket. I was told that this impersonal mode of reference would not have been used if the defendants had been white people. The use of numbers rather than names is consistent with the general depersonalization and dehumanization of Africans that pervades every aspect of *apartheid* as an operative system of racial administration. It was disturbing in the courtroom context that even the lawyers for the defence acceded to this unfortunate practice and did not, so far as I know, object to it.

Each trial day the prisoners were taken back and forth from the Pretoria Jail in a large van. This van delivered the defendants to a cage that had been placed in a small enclosed courtyard next to the court, a converted old Jewish synagogue. The defendants were brought to this cage about thirty minutes before the court was scheduled to begin its session. They were crowded into the cage. It was mid-summer in Pretoria, very humid and uncomfortably hot. Outside the cage were a large number of uniformed policemen carrying sten guns or holding onto aggressive police dogs. These dogs were trained to bark furiously at the smell or sight of Africans. The prisoners were led through a gauntlet of police and barking dogs from their cage to the courtroom about ten minutes before Justice Ludorf was due in court. The lawyers for the defence told me that many (if not all) of the defendants were terrified by this daily experience. I stood in the yard and was very frightened by the generally menacing quality of the scene.

In the courtroom very elaborate security arrangements prevailed. There were between twelve and fifteen uniformed police carrying sten guns. In addition, several of the prominent members of the Special Branch were in attendance, including those officers who had used brutal means to carry out the interrogations during the periods when the prisoners had been confined to prolonged solitary detention. The atmosphere of the court was very much dominated by these security features which appeared to have some intimidating effect on the defendants and even on their counsel.

During the trial itself the defendants, or most of them, had no sense of what was taking place. The trial was conducted in English and Afrikaans, whereas the defendants only spoke native languages. There was an interpreter present but he translated what was being said in court only if evidence in the form of testimony was being presented or the defendants were themselves being addressed. The legal argument and procedural exchanges were not translated. The failure to provide defendants on trial for their lives with a continuous translation of the full proceedings seems to be a cruel and scornful ingredient of such a prosecution; an incomplete

rendering of the proceeding might also produce substantive injustice to the extent that the opportunity for a defendant to react to accusation, evidence, and testimony is seriously hampered. The full consequence is to limit seriously the advantages to a defendant of an open trial.

From an observer's perspective, a final element of the trial that is notable concerns the degree to which the Defence Team felt obliged to accept the major premises of the prosecution. These major premises included their acknowledgment of the legality and legitimacy of *apartheid* and of South Africa's right to administer and govern South West Africa. This central acknowledgment also led the Defence to accept the legal, moral, and political propriety of punishing anyone who challenged the legitimacy of South African rule. The Defence stressed the low education and the consequent vulnerability to Communist propaganda of the defendants as a basis for mitigation of sentence. In so many words, the Defence told the court that the defendants had "learned their lesson" and, hence, as repentant and misguided individuals, deserved lenient treatment at the hands of the court.

As an observer, I found this narrow framework of argument and defence very disturbing as it conceded the validity of the state's basic legal position (the Defence did not seriously dispute allegations of fact against the defendants). It was quite plain, as indicated by Mr. Justice Ludorf's emotional language in the judgment condemning the course of conduct of the defendants, that any more direct effort to question the basis of the prosecution might have produced harsher sentences. And, in fact, it was generally speculated that Mr. Ja Toivo's statement from the box—supposedly in mitigation—caused him to receive a more severe prison sentence because it failed to adopt a conciliatory tone of remorse, but maintained strongly his sense of righteous opposition to the wisdom and decency of South Africa's administration of South West Africa. The tactical limits of effective defence, then, were defined by arguments that were designed to show either a relatively low degree of involvement and complicity on the part of a particular defendant or that emphasized a present sense of remorse and repentance. These limits are much narrower than their potential legal case which rested on the jurisdictional incompetence of a South African court to prosecute South West Africans and on the substantive injustices associated with white minority domination and its implementing strategy of *apartheid*.

CONCLUSION

I would like to hazard some general concluding comments. These comments are made in the spirit of tentativeness. My visit was short, the political setting intricate, and the perceptions of South Africans often contradictory. These comments will concentrate upon inferences drawn from my experience as an observer at the trial.

1. I am convinced for several reasons that a large number, if not all, of these defendants were tortured in prison. An extended period in solitary confinement itself approaches torture, but the Special Branch used interrogation methods that involved active forms of torture including beating and frightening the defendants in horrible ways. My conclusion is reached by talking with several people who had contact with prisoners. It is also confirmed by the *Mbindi* proceeding in which an application for an injunction was filed on behalf of a South West African detainee in the Pretoria prison. This application was supported by the depositions of several defendants in the *Tuhadeleni* proceedings submitted in response to police denials of torture. These affidavits indicated, as well, the routine character of torture in the prisons of Pretoria. I also spoke at length to Mr. Laurence Gandar, Editor, The Rand Daily Mail, who has been criminally indicted because he exposed the practice of torture in South African prisons. In addition, I spoke with an African who described to me the torture—involving beating and electric shock—that he experienced in a South African jail; according to this friend this poor man was "broken" in spirit permanently by the horror of his prison experience.

The reality of prison torture contrasts with the unadvisability of registering such a complaint. It was generally agreed that to complain about torture in the setting of the terrorism trial would inflame the prosecution and the judge. It was not in the best interest of the defendants—on trial for their lives—to assume this risk in an atmosphere of oppression such as prevails in South Africa.

2. There are widespread reports that as many as 250 additional South West Africans are being held in secret detention under the provisions of the Terrorism Act. These individuals are held incommunicado. As far as the outside world (including their own family) is concerned they have disappeared unless their arrest was observed by others. The reliance on unlimited detention in solitary confinement—without being charged with an offence—is a flagrant violation of the Rule of Law, even without torture.

3. Of course, this violation is aggravated by the fact that South Africa is exercising its authority to arrest in South West Africa, an internationally safeguarded territory which from the standpoint of the international community has been permanently withdrawn from South African jurisdiction. The United Nations, not South Africa, has the legal basis for regulating the life of the territory. Therefore, from an international point of view South Africa must be viewed as extending its objectionable security legislation to a foreign country over which it is no longer empowered even to erect legal authority for the benefit of the inhabitants.

4. The *Tuhadeleni* trial and the expectation of additional so-called terrorist trials appear to be part of an overall drift toward totalitarianism in South African society. The role of the Special

Branch in staging the trial is especially ominous in this regard, as is the holding of the proceedings in Pretoria, rather than in South West Africa. The role and reputation for brutality and ruthlessness of the Special Branch may possibly have had an effect on the gathering and presentation of evidence by the defence. It is also impossible to assess whether the involvement of the Special Branch in a trial of this sort might make it difficult to obtain defence witnesses or to assure their freedom from some kind of reprisal. Rumours abound in South Africa about the vindictiveness of the Special Branch, as well as about its police methods and totalitarian affinities. Naturally, it is hard for an outsider to assess such rumours, but it did seem clear from my observations in court that prominent members of the Special Branch behaved in a rather sinister fashion and evoked the fear of white South Africans of liberal persuasion. The most reasonable interpretation of these obviously deliberate choices appears to be an effort to convince the majority of the white population that a state of war exists in South Africa between the regime and its enemies; and that, as a consequence, a condition of emergency prevails such as to vindicate extreme police methods to stifle opposition of all varieties. The trials with their fanfare, then, must be understood as efforts by the Government of South Africa to consolidate still further its claims of dictatorial powers.

APPENDIX 1

STATEMENT BY TOIVO HERMAN JA TOIVO

DELIVERED IN OPEN COURT ON FEBRUARY 1, 1968

My Lord,

We find ourselves here in a foreign country, convicted under laws made by people whom we have always considered as foreigners. We find ourselves tried by a Judge who is not our countryman and who has not shared our background.

When this case started, Counsel tried to show that this Court had no jurisdiction to try us. What they had to say was of a technical and legal nature. The reasons may mean little to some of us, but it is the deep feeling of all of us that we should not be tried here in Pretoria.

You, my Lord, decided that you had the right to try us, because your Parliament gave you that right. That ruling has not and could not have changed our feelings. We are Namibians and not South Africans. We do not now, and will not in the future recognise your right to govern us; to make laws for us in which we had no say; to treat our country as if it were your property and us as if you were our masters. We have always regarded South Africa as an intruder in our country. This is how we have always felt and this is how we feel now, and it is on this basis that we have faced this trial.

I speak of "we" because I am trying to speak not only for myself, but for others as well, and especially for those of my fellow accused who have not had the benefit of any education. I think also that when I say "we", the overwhelming majority of non-White people in South West Africa would like to be included.

We are far away from our homes; not a single member of our families has come to visit us, never mind be present at our trial. The Pretoria Gaol, the Police Headquarters at Compol, where we were interrogated and where statements were extracted from us, and this Court is all we have seen of Pretoria. We have been cut off from our people and the world. We all wondered whether the headmen would have repeated some of their lies if our people had been present in Court to hear them.

The South African Government has again shown its strength by detaining us for as long as it pleased; keeping some of us in solitary confinement for 300 to 400 days and bringing us to its Capital to try

us. It has shown its strength by passing an Act especially for us and having it made retrospective. It has even chosen an ugly name to call us by. One's own are called patriots; or at least rebels; your opponents are called Terrorists.

A Court can only do justice in political cases if it understands the position of those that it has in front of it. The State has not only wanted to convict us, but also to justify the policy of the South African Government. We will not even try to present the other side of the picture, because we know that a Court that has not suffered in the same way as we have, can not understand us. This is perhaps why it is said that one should be tried by one's equals. We have felt from the very time of our arrest that we were not being tried by our equals but by our masters, and that those who have brought us to trial very often do not even do us the courtesy of calling us by our surnames. Had we been tried by our equals, it would not have been necessary to have any discussion about our grievances. They would have been known to those set to judge us.

It suits the Government of South Africa to say that it is ruling South West Africa with the consent of its people. This is not true. Our organisation, S.W.A.P.O., is the largest political organisation in South West Africa. We considered ourselves a political party. We know that Whites do not think of Blacks as politicians—only as agitators. Many of our people, through no fault of their own, have had no education at all. This does not mean that they do not know what they want. A man does not have to be formally educated to know that he wants to live with his family where he wants to live, and not where an official chooses to tell him to live; to move about freely and not require a pass; to earn a decent wage; to be free to work for the person of his choice for as long as he wants; and finally, to be ruled by the people that he wants to be ruled by, and not those who rule him because they have more guns than he has.

Our grievances are called "so-called" grievances. We do not believe South Africa is in South West Africa in order to provide facilities and work for non-Whites. It is there for its own selfish reasons. For the first forty years it did practically nothing to fulfil its "sacred trust". It only concerned itself with the welfare of the Whites.

Since 1962 because of the pressure from inside by the non-Whites and especially my organisation, and because of the limelight placed on our country by the world, South Africa has been trying to do a bit more. It rushed the Bantustan Report so that it would at least have something to say at the World Court.

Only one who is not White and has suffered the way we have can say whether our grievances are real or "so-called."

Those of us who have some education, together with our uneducated brethren, have always struggled to get freedom. The idea of our freedom is not liked by South Africa. It has tried in this

Court to prove through the mouths of a couple of its paid Chiefs and a paid official that S.W.A.P.O. does not represent the people of South West Africa. If the Government of South Africa were sure that S.W.A.P.O. did not represent the innermost feelings of the people in South West Africa, it would not have taken the trouble to make it impossible for S.W.A.P.O. to advocate its peaceful policy.

South African officials want to believe that S.W.A.P.O. is an irresponsible organisation and that it is an organisation that resorts to the level of telling people not to get vaccinated. As much as White South Africans may want to believe this, this is not S.W.A.P.O. We sometimes feel that it is what the Government would like S.W.A.P.O. to be. It may be true that some member or even members of S.W.A.P.O. somewhere refused to do this. The reason for such refusal is that some people in our part of the world have lost confidence in the governors of our country and they are not prepared to accept even the good that they are trying to do.

Your Government, my Lord, undertook a very special responsibility when it was awarded the mandate over us after the First World War. It assumed a sacred trust to guide us towards independence and to prepare us to take our place among the nations of the world. We believe that South Africa has abused that trust because of its belief in racial supremacy (that White people have been chosen by God to rule the world) and apartheid. We believe that for fifty years South Africa has failed to promote the development of our people. Where are our trained men? The wealth of our country has been used to train your people for leadership and the sacred duty of preparing the indigenous people to take their place among the nations of the world has been ignored.

I know of no case in the last twenty years of a parent who did not want his child to go to school if the facilities were available, but even if, as it was said, a small percentage of parents wanted their children to look after cattle, I am sure that South Africa was strong enough to impose its will on this, as it has done in so many other respects. To us it has always seemed that our rulers wanted to keep us backward for their benefit.

1963 for us was to be the year of our freedom. From 1960 it looked as if South Africa could not oppose the world for ever. The world is important to us. In the same way as all laughed in Court when they heard that an old man tried to bring down a helicopter with a bow and arrow, we laughed when South Africa said that it would oppose the world. We knew that the world was divided, but as time went on it at least agreed that South Africa had no right to rule us.

I do not claim that it is easy for men of different races to live at peace with one another. I myself had no experience of this in my youth, and at first it surprised me that men of different races could live together in peace. But now I know it to be true and to be something for which we must strive. The South African Government

creates hostility by separating people and emphasising their differences. We believe that by living together, people will learn to lose their fear of each other. We also believe that this fear which some of the Whites have of Africans is based on their desire to be superior and privileged and that when Whites see themselves as part of South West Africa, sharing with us all its hopes and troubles, then that fear will disappear. Separation is said to be a natural process. But why, then, is it imposed by force, and why then is it that Whites have the superiority?

Headmen are used to oppress us. This is not the first time that foreigners have tried to rule indirectly—we know that only those who are prepared to do what their masters tell them become headmen. Most of those who had some feeling for their people and who wanted independence have been intimidated into accepting the policy from above. Their guns and sticks are used to make people say they support them.

I have come to know that our people cannot expect progress as a gift from anyone, be it the United Nations or South Africa. Progress is something we shall have to struggle and work for. And I believe that the only way in which we shall be able and fit to secure that progress is to learn from our own experience and mistakes.

Your Lordship emphasised in your Judgment the fact that our arms came from communist countries, and also that words commonly used by communists were to be found in our documents. But, my Lord, in the documents produced by the State there is another type of language. It appears even more often than the former. Many documents finish up with an appeal to the Almighty to guide us in our struggle for freedom. It is the wish of the South African Government that we should be discredited in the Western world. That is why it calls our struggle a communist plot; but this will not be believed by the world. The world knows that we are not interested in ideologies. We feel that the world as a whole has a special responsibility towards us. This is because the land of our fathers was handed over to South Africa by a world body. It is a divided world, but it is a matter of hope for us that it at least agrees about one thing—that we are entitled to freedom and justice.

Other mandated territories have received their freedom. The judgment of the World Court was a bitter disappointment to us. We felt betrayed and we believed that South Africa would never fulfil its trust. Some felt that we would secure our freedom only by fighting for it. We knew that the power of South Africa is overwhelming, but we also knew that our case is a just one and our situation intolerable—why should we not also receive our freedom?

We are sure that the world's efforts to help us in our plight will continue, whatever South Africans may call us.

We do not expect that independence will end our troubles, but we do believe that our people are entitled—as are all peoples—to

rule themselves. It is not really a question of whether South Africa treats us well or badly, but that South West Africa is our country and we wish to be our own masters.

There are some who will say that they are sympathetic with our aims, but that they condemn violence. I would answer that I am not by nature a man of violence and I believe that violence is a sin against God and my fellow men. S.W.A.P.O. itself was a non-violent organisation, but the South African Government is not truly interested in whether opposition is violent or non-violent. It does not wish to hear any opposition to apartheid. Since 1963, S.W.A.P.O. meetings have been banned. It is true that it is the Tribal Authorities who have done so, but they work with the South African Government, which has never lifted a finger in favour of political freedom. We have found ourselves voteless in our own country and deprived of the right to meet and state our own political opinions.

Is it surprising that in such times my countrymen have taken up arms? Violence is truly fearsome, but who would not defend his property and himself against a robber? And we believe that South Africa has robbed us of our country.

I have spent my life working in S.W.A.P.O., which is an ordinary political party like any other. Suddenly we in S.W.A.P.O. found that a war situation had risen and that our colleagues and South Africa were facing each other on the field of battle. Although I had not been responsible for organising my people militarily and although I believed we were unwise to fight the might of South Africa while we were so weak, I could not refuse to help them when the time came.

My Lord, you found it necessary to brand me a coward. During the Second World War, when it became evident that both my country and your country were threatened by the dark clouds of Nazism, I risked my life to defend both of them, wearing a uniform with orange bands on it.

But some of your countrymen when called to battle to defend civilisation resorted to sabotage against their own fatherland. I volunteered to face German bullets, and as a guard of military installations, both in South West Africa and the Republic, was prepared to be the victim of their sabotage. Today they are our masters and are considered the heroes, and I am called the coward.

When I consider my country, I am proud that my countrymen have taken up arms for their people and I believe that anyone who calls himself a man would not despise them.

In 1964 the A.N.C. and P.A.C. in South Africa were suppressed. This convinced me that we were too weak to face South Africa's force by waging battle. When some of my country's soldiers came back I foresaw the trouble there would be for S.W.A.P.O., my people and me personally. I tried to do what I could to prevent my people from going into the bush. In my attempts I became

unpopular with some of my people, but this, too, I was prepared to endure. Decisions of this kind are not easy to make. My loyalty is to my country. My organisation could not work properly—it could not even hold meetings. I had no answer to the question “Where has your non-violence got us?” Whilst the World Court judgment was pending, I at least had that to fall back on. When we failed, after years of waiting, I had no answer to give to my people.

Even though I did not agree that people should go into the bush, I could not refuse to help them when I knew that they were hungry. I even passed on the request for dynamite. It was not an easy decision. Another man might have been able to say “I will have nothing to do with that sort of thing.” I was not, and I could not remain a spectator in the struggle of my people for their freedom.

I am a loyal Namibian and I could not betray my people to their enemies. I admit that I decided to assist those who had taken up arms. I know that the struggle will be long and bitter. I also know that my people will wage that struggle, whatever the cost.

Only when we are granted our independence will the struggle stop. Only when our human dignity is restored to us, as equals of the Whites, will there be peace between us.

We believe that South Africa has a choice—either to live at peace with us or to subdue us by force. If you choose to crush us and impose your will on us then you not only betray your trust, but you will live in security for only so long as your power is greater than ours. No South African will live at peace in South West Africa, for each will know that his security is based on force and that without force he will face rejection by the people of South West Africa.

My co-accused and I have suffered. We are not looking forward to our imprisonment. We do not, however, feel that our efforts and sacrifice have been wasted. We believe that human suffering has its effect even on those who impose it. We hope that what has happened will persuade the Whites of South Africa that we and the world may be right and they may be wrong. Only when White South Africans realise this and act on it, will it be possible for us to stop our struggle for freedom and justice in the land of our birth.

APPENDIX 2

RESOLUTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, DECEMBER 20, 1967

RESOLVED, that The Association of the Bar of the City of New York hereby records its deep concern and its protest over the actions of the Republic of South Africa in applying its own law and judicial process extraterritorially to inhabitants of South West Africa by prosecuting thirty-five South West Africans under South Africa's Terrorism Act of 1967, in that:

1. The Terrorism Act of 1967 offends basic concepts of justice, due process, and the rule of law accepted by civilized nations and violates the Universal Declaration of Human Rights, particularly:

(a) by reason of the vague and sweeping definition of the crime of “terrorism” punishable by death so as to include an act which “had or was likely to have had” the result of embarrassing “the administration of the affairs of the state” or furthering or encouraging “the achievement of any political aim, including the bringing about of any social or economic change . . . in cooperation with or with the assistance of any foreign or international body or institution”; and

(b) by its enactment after the South West Africans had been taken into custody, in order to apply it retroactively to acts allegedly performed in South West Africa and elsewhere, but not in the Republic of South Africa, up to five years prior to its enactment.

2. The detention of the defendants and the conduct of the trial further offends basic concepts of justice, due process and the rule of law accepted by civilized nations, particularly in that they have been imprisoned, virtually incommunicado, and stripped of rights essential for proper defense and a fair trial, and are being tried more than 1,000 miles from their homes in South West Africa.

3. The prosecutions by the Republic of South Africa completely ignore the special international status of South West Africa in view of the revocation of South Africa's mandate over South West Africa by resolution of the General Assembly of the United Nations and, indeed, even under the terms of the Mandate Agreement as previously in effect.

RESOLVED, that the Association, recognizing the heritage and traditions of the legal profession and of the judiciary in the Republic of South Africa, calls upon the members of the legal profession of South Africa to weigh the serious issues raised by this Association and the concern of their fellow lawyers in the United States, and to join with us and all others concerned with the rule of law to speak out and protest this trial.

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* "Bantu" was later substituted for "Native". See footnote on p. 1.

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