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A New South Africa?: Prospects for an
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I. INTRODUCTION

The 1990s began in South Africa with some dramatic changes. In early February, State President F. W. De Klerk made a speech which many took as an indication that he was serious about transforming South Africa.¹ The measures announced included: ending the ban of the African National Congress ("ANC"), the Pan-Africanist Congress ("PAC"), the South African Communist Party, and other groups;² the lifting of restrictions on thirty-three other organizations including the powerful Congress of South African Trade Unions; the release of most political prisoners; the lifting of restrictions on 374 freed detainees; the limiting of detention without trial to six months, with provision for legal representation and medical treatment; and, a moratorium on hangings.³ De Klerk also indicated that he would free ANC leader Nelson Mandela, perhaps the world's most famous political prisoner, after twenty-seven years in jail.⁴ Mandela's release a few days later sparked jubilation from many of his compatri-

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1. Kraft, *Sweeping Reforms in South Africa*, L.A. Times, Feb. 3, 1990, at A1, col. 6.

2. The history of these groups is described in T. LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945* (1983).

3. L.A. Times, Feb. 3, 1990, at A10, col. 2.

4. *Id.* at A1, col. 6. On Mandela, see F. MEER, *HIGHER THAN HOPE: THE AUTHORIZED BIOGRAPHY OF NELSON MANDELA* (1990).

ots as millions watched worldwide. Mandela proceeded to tour numerous foreign countries where he was greeted by adoring crowds. At home, the ANC held meetings with the government on "talks about talks" and set up offices throughout South Africa. Organizing by other unbanned groups also went into high gear. In June, De Klerk announced the lifting of the four-year-old state of emergency for all of South Africa except Natal Province. In Natal, fighting between those loyal to Chief Mangosuthu Buthelezi's rural, Zulu Inkatha movement and supporters of the broad-based, anti-apartheid coalition known as the Mass Democratic Movement ("MDM") continued to claim numerous African lives.⁵

Many came to believe the promise of De Klerk's February speech that "[h]enceforth, everybody's political points of view will be tested against their realism, their workability and their fairness. The time for negotiation has arrived."⁶ Graffiti in some African townships even proclaimed, "Viva Comrade De Klerk!". Yet, the euphoria quickly evaporated as people recognized that despite the unprecedented occurrences, the main pillars of apartheid—the Natives Land Act, the Group Areas Act, and the Population Registration Act—remained intact.⁷ At the same time, the government was steadfast in its refusal to release prisoners sentenced for offenses such as murder, terrorism, and arson on behalf of political organizations. To make matters worse, by November, South Africa teetered perilously on the brink of collapsing in internecine convulsions as black South Africans, allegedly with police complicity, brutalized and murdered each other in areas throughout the country in conflicts fueled by urban-rural, class, and ethnic tensions.⁸ De Klerk ordered an investigation into the situation in response to ANC allegations of government involvement. Nevertheless, it was clear that any new system would have to provide sufficient human rights guarantees so as to prevent a new South Africa from being baptized in blood.

For both supporters of the government and anti-apartheid groups such as the ANC, this realization has led to an insistence that the future constitution of South Africa contain a bill of rights to be interpreted by an independent judiciary. However, that is where the

5. *Newsday*, June 11, 1990, at 40 (city ed.).

6. *N.Y. Times*, Feb. 3, 1990, § 1, at 6, col. 5.

7. *L.A. Times*, Feb. 3, 1990, at A12, col. 1. This legislation is described in L. THOMPSON, *A HISTORY OF SOUTH AFRICA* (1990) and L. THOMPSON & A. PRIOR, *SOUTH AFRICAN POLITICS* (1982).

8. *N.Y. Times*, Oct. 30, 1990.

agreement ends. Closer examination reveals two radically different conceptions of such a document. Black South Africans want a bill of rights which guarantees majority rule, as well as political, cultural, and economic rights. In contrast, white South Africans want the document to protect minority group rights and are concerned with potential loss of property due to forced redistribution.

Both sides are alike in their failure to give sufficient attention to South Africa's legal heritage, particularly the role of its all-white judiciary. All too often, this judiciary has behaved as the pawn of the executive. It is this legal heritage, including the failure of the white minority to create respect for the rule of law among blacks, that will inevitably play a decisive role in the fate of any bill of rights. Ultimately, the entire legal system will have to be transformed before any constitution can be successful.

This Article proposes that some progress can be made toward such a transformation if South Africa adopts a constitution with an Africanist bill of rights, and the judiciary interprets it in accordance with international human rights standards. First, this Article explores the bill of rights debate currently raging in South Africa. The next section offers suggestions for an Africanist bill of rights. Finally, the Article calls for the judiciary to adhere to international human rights standards in construing that bill of rights and analyzes the obstacles to the successful implementation of such an approach.

II. THE SOUTH AFRICAN BILL OF RIGHTS DEBATE

A. Background

When the British colonies of the Cape of Good Hope and Natal joined with the two former Afrikaner republics of the Orange Free State and the Transvaal in 1910 to form the Union of South Africa, the country adopted a system of parliamentary supremacy.⁹ This meant that, with the exception of certain entrenched constitutional clauses that had to be amended by a special procedure,¹⁰ all legislation that passed by a simple parliamentary majority became the supreme law of the land.¹¹ Unlike the United States, where judges are free to declare legislation unconstitutional, South Africa had nothing but custom to check parliamentary excesses. In the new polity, such cus-

9. The process of unification is described fully in L. THOMPSON, *THE UNIFICATION OF SOUTH AFRICA 1902-1910* (1960).

10. SOUTH AFRICA CONST. art. 99, § 3.

11. *Id.* art. 99, § 1.

tom was lacking with regard to blacks.¹² Accordingly, the Parliament passed many discriminatory and repressive laws after the formation of the Union.¹³ The number of such discriminatory laws grew prodigiously after 1948 when the National Party came to power with its "apartheid" slogan.¹⁴

Although the concept of the rule of law has generated countless pages of writing, four generalizations are apposite.¹⁵ First, there must be representative government, or to use Abraham Lincoln's phrase, the government must be "of the people, by the people, [and] for the people."¹⁶ Second, there must be acceptance of the notion of equality before the law. Third, there must be procedural and substantive limits on government action against the individual. Fourth, review by an independent judiciary must be a central mechanism for constitutional enforcement. Central to the viability of the rule of law concept is the assumption that the legislature will adhere to such principles in all its decision making. Thus, fundamental freedoms will not be abrogated arbitrarily by the state.

With regard to blacks, the South African legislature has never adhered to the rule of law. Only by abrogating black rights has the white-minority regime been able to ensure its survival. Particularly in the post-1948 years, the government has continually enlarged its arsenal of security legislation. Since 1983, the government has concentrated significantly greater powers in the hands of the executive.¹⁷ According to South African jurist J. D. van der Vyver,

[i]nstead of applying its supremacy, in accordance with the historical purpose of a sovereign parliament, to keep a tight rein on the

12. Custom has, however, been sufficient to restrain parliamentary actions in Britain, from which South Africa took its model. The distinguishing factors in Britain were: 1) the progressive extension of the franchise to incorporate all elements of society, in contrast to the South African case where the franchise became less inclusive in the years after Union, and 2) a tradition of respect for the notion of the rule of law. On parliamentary supremacy in Britain, see J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955).

13. See generally Berat, *Conscientious Objection in South Africa: Governmental Paranoia and the Law of Conscriptio*, 22 *VAND. J. TRANSNAT'L L.* 128, 131-35 (1989).

14. See generally *id.*; L. THOMPSON, *A HISTORY OF SOUTH AFRICA 190-95* (1990).

15. South African writings on this concept include Beinart, *The Rule of Law*, *ACTA JURIDICA* 101 (1962); Budlender, *Law and Lawlessness in South Africa*, 4 *S. AFR. J. HUM. RTS.* 139 (1988); Molteno, *The Rules Behind the Rule of Law*, *ACTA JURIDICA* 136-37 (1965-66).

16. Address by Abraham Lincoln, Gettysburg, Pennsylvania (Nov. 19, 1863), reprinted in A. LINCOLN, *SPEECHES AND WRITINGS, 1859-1865* 536 (1989).

17. See generally Berat, *supra* note 13, at 158-76; Berat, *Doctors, Detainees and Torture: Medical Ethics v. the Law in South Africa*, 25 *STAN. J. INT'L L.* 499, 528-31 (1989).

powers of government, the South African legislature on the contrary utilized its dominant authority to confer on the bureaucracy extensive, and in many instances excessive or even arbitrary, competencies—thereby converting the *de iure* institution of parliamentary sovereignty into a *de facto* state of executive supremacy. . . .¹⁸

Underlying this executive-minded behavior has been an obsession with legalism among the Nationalists. There is a law for everything, and, in the Nationalists' view, such laws, no matter how draconian, are lawful simply because they are the law.

Reinforcing this obsession with legalism has been the all-white, and nearly all-male, South African judiciary, which has been loath to challenge the executive. Supporters of the judiciary have argued that the judges have merely been acting in accordance with their proper role in a system of parliamentary supremacy (i.e., to declare the law and not to make it).¹⁹ The judges' task is only to see that the manner of promulgation is procedurally correct and that executive action is taken in accordance with the legislation.

In practice, however, this positivist justification has been an excuse for the generally conservative judges, many of whom are National Party supporters, to lend approval to the underlying moral assumptions of the legislation that they are called upon to construe. South African jurist M. G. Cowling has argued that "within the framework of legislative supremacy, the positivistic approach to judicial decision-making provides an extremely convenient cloak behind which judges can hide their 'inarticulate major premisses' by attributing inequitable results to the legislator."²⁰ According to Cowling, these premisses are the "underlying motives, perceptions, [and] political outlook[s]"²¹ that mold a judge's interpretation of the law as it is envisioned by the legislature. In the South African case, it is not implausible to suggest that, for many judges, such premisses include beliefs in white domination and continued hegemony, the need to preserve state security, and fear of communism.

The unhappy result of the judiciary's captivity to such premisses

18. Van der Vyver, *Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights*, 99 S. AFR. L.J. 557, 575 (1982).

19. Basson, *Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts*, 3 S. AFR. J. HUM. RTS. 28, 42-43 (1987).

20. Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss*, 3 S. AFR. J. HUM. RTS. 177, 189 (1987); see also Dugard, *The Judicial Process, Positivism, and Civil Liberty*, 88 S. AFR. L.J. 181 (1971).

21. Cowling, *supra* note 20, at 189.

has been that, instead of protecting human rights, the courts—especially the Appellate Division—have routinely upheld the draconian will of the executive. In many cases involving security legislation, most recently in *Omar v. Minister of Law and Order*, *Fani v. Minister of Law and Order*, and *Bill v. State President*,²² the courts have deferred to the executive's authority in matters concerning state security. Such cases reveal that the judiciary, in its refusal to protect even the most basic civil liberties, is largely a rubber stamp for executive decisions. Indeed, some South African scholars have even suggested that more liberal judges should resign in an effort to underscore the proposition that it is inappropriate to speak of an independent judiciary under present conditions.²³

Views such as these have led to calls for a redefinition of the role of the South African judiciary so that it can become an effective guardian of human rights. There have been demands for the introduction of a bill of rights to effectuate such a change which would give the judiciary standards for protecting human rights by "restricting the competence of persons in authority to curtail those rights and freedoms by means of legislative or administrative interference."²⁴ Consequently, some scholars have argued that a South African bill of rights would free judges from the constraints of legislative supremacy, providing a "recourse to a positive human rights standard that operates independently of the legislative will and to which the latter [would] be subordinated."²⁵ Without a bill of rights, there would be a penumbra surrounding the institutional jurisdiction for the protection of civil liberties. Thus, the argument goes, the entrenchment of a bill of rights not only would protect individual rights and freedoms, but also would serve to promote the institutional integrity of the judiciary.²⁶

Even as progressive scholars have sought a bill of rights, conservative members of the politico-legal establishment have also turned their attention in that direction. However, their interest springs not from their desire to nurture the rule of law in a nonracial democratic

22. 1987(3) S.A. 859 (App. Div.) (S. Afr.) (*Omar*, *Fani*, and *Bill* were consolidated on appeal).

23. See generally Wacks, *Judges and Injustice*, 101 S. AFR. L.J. 266 (1984); Dugard, *Should Judges Resign?—A Reply to Professor Wacks*, 101 S. AFR. L.J. 286 (1984).

24. Weeramantry, *The Constitutional Reconstruction of South Africa: Some Essential Safeguards*, 3 LESOTHO L.J. 1, 16 (1987); Van der Vyver, *supra* note 18, at 582-83.

25. Cowling, *supra* note 20, at 196.

26. Weeramantry, *supra* note 24, at 15.

state, but from their perception that the days of white-minority rule are numbered and that a bill of rights is the best way of safeguarding property and minority rights.²⁷ With such disparate views, it is not surprising that disagreements over what form such a document should take are profound.

B. Substantive Content of a New Bill of Rights

A bill of rights can incorporate three types of rights.²⁸ First, procedural rights guarantee that the individual is subject to a judicial process that ensures equal treatment under the law, impartiality, and fairness. Second, substantive rights protect fundamental freedoms such as freedom of expression, movement, assembly, association, and franchise, and may also include group rights. Procedural and substantive rights appear almost universally in bills of rights. Third, economic rights guarantee the individual's basic material needs such as employment and housing. These frequently include freedom from hunger, access to free medical care, and free education (in some cases even tertiary education).

1. Economic Rights

This last category of rights can be described as the right to expect. Though they were not historically part of Western constitutions, economic rights are increasingly being incorporated into the constitutions of many social democracies in third world states.²⁹ Economic rights differ from procedural and substantive rights because, as South African historian T. R. H. Davenport has written, they reflect

a departure from the strictly individualist view of society to which the more basic civil liberties seem logically to belong, by laying down social and economic standards which must be realized if the individual is to be able to exercise his basic freedoms with profit to himself and the community.³⁰

The South African debate surrounding a bill of rights centers on the concepts of economic and minority rights. Many aligned with the MDM believe that any proposed bill of rights must ensure, or at least

27. See, e.g., S. AFR. L. COMM'N, PROJECT 58: GROUP AND HUMAN RIGHTS (1989) [hereinafter S. AFR. L. COMM'N REP.].

28. Davis, *Human Rights—A Re-Examination*, 97 S. AFR. L.J. 94, 95 (1980).

29. See, e.g., REPUBLIC OF INDIA CONST. part IV, reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 14-15 (1986); see also REPUBLIC OF IRELAND CONST. art. 45, reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 72 (1988).

30. Davenport, *Civil Rights in South Africa, 1910-1960*, ACTA JURIDICA 11, 12 (1960).

must not obstruct, the economic redistribution that must follow the abolition of the apartheid state. If there is no state-directed economic redress, the argument goes, the members of the white community will simply substitute their current racially-defined supremacy with an economically-defined one reflecting their already superior economic status, a status acquired at the expense of blacks.³¹ Moreover, the guarantee of certain minimal economic standards will be the only way of infusing meaning into the blacks' newly-secured political rights. As black advocate Ernest Moseneke contends, "[t]he right to development . . . is probably more crucial than the right to vote; not as a favour which somebody hands out, but a right that you can claim and enforce . . . anything less than that is going to in effect perpetuate the present system."³²

For many blacks, capitalism, as practiced in South Africa, and civil liberty, as propounded by the government and judiciary, are wedded in a conspiracy of oppression aimed at preserving and perpetuating inequality in economic relations. In this context, the concern of the ANC is not so much with individual property rights as it is with the enormous concentration of capital in a few huge, white-controlled corporations and holding companies. Drawing from the 1955 Freedom Charter,³³ the ANC's draft constitutional guidelines proposed in 1989 emphasized the need to vest the state with "the right to determine the general context in which economic life takes place and define and limit the rights and obligations attaching to the ownership and use of productive capacity."³⁴ The document distinguished between individual property owners and the collective wealth of the corporations. Accordingly, it envisioned that "[p]roperty for personal use and consumption shall be constitutionally protected,"³⁵ while privately-owned companies and transnational corporations "shall be obliged to co-operate with the state in realising the objectives of the

31. Davis, *Legality and Struggle: Towards a View of a Bill of Rights for South Africa*, in A BILL OF RIGHTS FOR SOUTH AFRICA 179 (J. van der Westhuizen & H. Viljoen 1988).

32. *Panel Discussion*, in A BILL OF RIGHTS FOR SOUTH AFRICA 149 (J. van der Westhuizen & H. Viljoen 1988) (quoting E. Moseneke).

33. On June 26, 1955, three thousand delegates of all racial groups met at Kliptown, near Johannesburg, and adopted a Freedom Charter which, among other things, stipulated that "South Africa belongs to all who live in it, black and white. . . ." FREEDOM CHARTER, preamble, reprinted in 3 FROM PROTEST TO CHALLENGE 205 (T. Karis & G. Carter 1977).

34. AFRICAN NATIONAL CONGRESS, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA, cl. o (1989) [hereinafter ANC CONST. GUIDELINES].

35. *Id.* cl. t.

Freedom Charter in promoting social well-being."³⁶

The inclusion of provisions such as this in a new bill of rights will, no doubt, fail to calm white fears of expropriation and, at the same time, will anger blacks, whose societies have been destroyed by the government's policy of forced removals. Failure to deal with the land question will not win the confidence of the black constituents. Yet, if Namibia, which is confronted with a similar problem, is any indication, the new government may not be able to develop a policy acceptable to both sides for some time after independence; and, perhaps, it never will.

The government has not offered any solutions capable of satisfying both whites and blacks, and has favored maintaining the status quo with regard to the protection of existing property rights. This preference manifested itself in the South African Law Commission's 1989 *Working Paper on Group and Human Rights*.³⁷ The Commission, established in 1973 by an Act of Parliament, consisted of members of the judiciary, the legal profession (including academic lawyers), the magistrates' bench, and officials of the Department of Justice. Its mandate was "to investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-up and the possible extension of the existing protection of individual rights as well as the role the courts play or should play."³⁸ The Commission stressed that economic rights should be protected only "in the negative sense that legislation and executive acts shall not infringe them. A bill of rights is not the place for enforcing positive obligations against the state."³⁹

A number of white legal scholars have justified this resistance to any constitutional guarantees of economic redistribution with arguments that revolve around the judiciary's lack of competence to deal with such matters. Legal scholar Cowling and Natal Judge John Didcott both contend that the judiciary is ill-equipped to deal with issues of economic policy.⁴⁰ Therefore, they believe that a bill of rights should be free of economic standards to which the central government would be bound and the judiciary obliged to review. As to property rights, they insist that the judges be neither spoilers of eco-

36. *Id.* cl. p.

37. See generally S. AFR. L. COMM'N REP., *supra* note 27.

38. *Id.* introduction, ¶ 4.

39. *Id.* ¶ 9.1.

40. Didcott, *Practical Workings of a Bill of Rights*, in A BILL OF RIGHTS FOR SOUTH AFRICA 60 (J. van der Westhuizen & H. Viljoen 1988); Cowling, *supra* note 20, at 179.

conomic redistribution nor rubber stamps for arbitrary expropriation. They are determined that there be a "neutral" bill of rights to act as a "shield" and not a "sword."⁴¹ Both scholars maintain that this neutrality is crucial because South African judges are neither qualified nor in possession of the resources and enforcement capabilities necessary to adjudicate issues arising out of economic restructuring.⁴² Such questions are "political" problems and are not germane to jurisdictional deliberation.

Unfortunately, these observers fail to explain why the judges would be ill-equipped to pass on such matters. An explanation can be found in the Law Commission's report, which distinguishes between positive and negative rights.⁴³ Substantive rights seek to prevent the state from infringing upon individual liberties, while economic rights seek to compel the state to fulfill an obligation. Thus, it is for the judges to determine that the state has acted arbitrarily and not that it has failed to comply with minimal economic guarantees.

This argument, however, is unpersuasive. If the judges can ascertain whether the state has abrogated fundamental freedoms, such as freedom of the press or speech, they certainly ought to be able to determine whether the government has failed to strive for the minimum economic standards enshrined in the Constitution. To suggest that these are political problems inappropriate for adjudication is to engage in perpetuating the positivist myth upon which the South African judiciary has relied for decades.

South African legal scholar John Dugard has taken the middle ground. He contends that property rights are not the *sine qua non* of a bill of rights.⁴⁴ Rather, rights of expropriation, with delayed or reduced compensation, can furnish the means of obtaining economic redress. While many black Africans may feel that compensation is unnecessary because the whites stole the land from them, the new government will still have to recognize international economic realities. If there is no adequate compensation, international corporations and banks will undoubtedly consider the country a poor risk, and the massive investment required to improve the South African people's standard of living will never materialize.⁴⁵ Even accepting Dugard's

41. Didcott, *supra* note 40, at 58-60.

42. Cowling, *supra* note 20, at 179.

43. S. AFR. L. COMM'N REP., *supra* note 27, at summary, ¶ 9.1.

44. Dugard, *The Quest for a Liberal Democracy in South Africa*, ACTA JURIDICA 237, 252-53 (1987).

45. See generally Berat, *Namibia: The Road to Independence and the Problem of Success-*

suggestion about compensation, there is still no reason why property rights cannot be incorporated into a bill of rights as well.

2. Conflict Between Minority and Group Rights

With regard to minority rights, the South African government has insisted that these be protected in any bill of rights. The Law Commission's report drew a distinction between political group rights and other group values, such as culture, religion, and language.⁴⁶ It determined that the latter should be protected as individual rights in the bill of rights and that the former should be protected in the body of the constitution. The ANC's Constitutional Guidelines also recognize the freedom of culture, religion, and language as individual rights.⁴⁷

The idea of group political guarantees, however, is at odds with a document that provides for "a system of universal suffrage based on the principle of one person, one vote."⁴⁸ Perhaps this explains why, in October of 1990, the government appeared to back away from its insistence on group political rights. The Deputy Constitutional Minister, Roelf Meyer, stated that the government had abandoned the "notion of demanding recognition of 'group rights' based on race or color 'in any form whatsoever.'"⁴⁹ Despite his rejection of the group rights approach, however, Meyer indicated that the government was looking at various constitutional mechanisms established elsewhere to protect the white minority, primarily a bill of rights.⁵⁰

It seems that no constitution will ever receive black acceptance unless it creates the perception that it is bias free. The protection of minority interests will perpetuate existing inequalities and diminish or destroy the new government's credibility. If a new government is truly committed to the rule of law by protecting individual rights, there will be no need for minority rights.

Whites are not easily persuaded by such statements. After all, they well know that their representatives have long used the law as an instrument of oppression. What would prevent a black-dominated

sion of States, in GOVERNMENTS-IN-EXILE (Y. Shain 1991) (forthcoming), reprinted in 18 J. POL. SCI. 33 (1990) (discussing the compensation dilemma in the Namibian context).

46. S. AFR. L. COMM'N REP., *supra* note 27, at summary, ¶ 8.

47. ANC CONST. GUIDELINES, *supra* note 34, at cls. g, h, l.

48. *Id.* cl. e.

49. Ottaway, *South Africa Drops "Group Rights" Idea as Shield for Whites*, Wash. Post, Oct. 5, 1990, at A29.

50. *Id.*

government from behaving in a similar fashion? Moreover, life under apartheid has made it impossible for many whites to conceive of a unitary, nonracial state. Their world view is one of ever-competing black and white nationalisms. For them, as historian T. R. H. Davenport has noted,

[t]he frontiers of nationalism tend to stop short with the frontiers of the in-group, to which the rights of out-groups are really irrelevant since they are presumed to be antagonistic. The nationalist, moreover, tends not to think in universals, for the very concept of universality makes nonsense of nationalist group particularism.⁵¹

Accordingly, the challenge for drafters of a bill of rights is to create a document acceptable to both sides. One possible way of doing so is to create a document that is both Africanist and internationalist at the same time. Such a document should adhere to international standards of human rights, particularly those which enjoy broad acceptance in the rest of Africa.

III. FORMING AN AFRICANIST BILL OF RIGHTS

International human rights norms are contained in many documents. In the African context, the most relevant is the African Charter on Human and Peoples' Rights, popularly known as the Banjul Charter.⁵² Adopted in 1981 as a regional treaty by the Organization of African Unity ("OAU"), the Banjul Charter entered into force only five years later in October 1986, contrary to most expectations. Thus far, it has been ratified or acceded to by thirty-five African states—some two-thirds of the OAU members.⁵³ This makes it the largest regional human rights agreement in existence.⁵⁴ While most of the states that are party to the charter have failed to actualize its lofty

51. Davenport, *supra* note 30, at 25.

52. African Charter on Human and Peoples' Rights, Organization of African Unity, (1981), *reprinted in* 21 I.L.M. 58 (1982) [hereinafter Banjul Charter].

53. OAU member states party to the charter are: Algeria, Benin, Botswana, Burkina Faso, Cape Verde, Central African Republic, Chad, Comoros, Congo, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Liberia, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, São Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia, and Zimbabwe.

54. For example, twenty-one states are parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (popularly known as the European Convention for the Protection of Human Rights and Fundamental Freedoms) [hereinafter European Convention]. Nineteen states are parties to the American Convention on Human Rights, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/ser. L/V/11.23, doc. 21, rev. 2 (1969), *reprinted in* R. LILlich, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 190.1 [hereinafter American Convention].

ideals, the document is still significant because it reflects the African affirmation of international human rights standards.⁵⁵ It also furnishes the African viewpoint regarding possible solutions to the issues of economic and group rights.

For South Africa, use of many of the charter's tenets in a bill of rights would enable the country to create a truly Africanist jurisprudence and, at the same time, express solidarity with the rest of the international community on key human rights issues. Adherence to such principles could make South Africa a role model for its respect of human rights not only in Africa, but throughout the world. This is a rather lofty goal, but one certainly worth striving for.

The Banjul Charter enumerates various individual rights and freedoms, many of which are recognized in other African constitutions. Among them are the rights to: nondiscriminatory treatment;⁵⁶ equality and equal protection under the law;⁵⁷ life;⁵⁸ the respect of human dignity;⁵⁹ liberty;⁶⁰ to have one's cause heard, i.e., the right to certain minimum standards during legal proceedings;⁶¹ freedom of conscience and religion;⁶² freedom of expression and dissemination of opinion;⁶³ freedom of association;⁶⁴ freedom of assembly;⁶⁵ freedom of movement;⁶⁶ participation in government;⁶⁷ and access to public services and public property.⁶⁸ In this respect the charter has much in common with other international human rights instruments such as the United Nations Charter⁶⁹ and regional instruments such as the

55. Banjul Charter, *supra* note 52, preamble.

56. *Id.* art. 2.

57. *Id.* art. 3.

58. *Id.* art. 4.

59. *Id.* art. 5.

60. *Id.* art. 6.

61. *Id.* art. 7.

62. *Id.* art. 8.

63. *Id.* art. 9.

64. *Id.* art. 10.

65. *Id.* art. 11.

66. *Id.* art. 12.

67. *Id.* art. 13.

68. *Id.*

69. U.N. CHARTER. The U.N. Charter was signed on June 26, 1945 and entered into force on October 24, 1945. To date the charter has been amended on three occasions: arts. 23, 27, and 61, G.A. Res. 1991 A & B, 18 U.N. GAOR Supp. (No. 15) at 21, U.N. Doc. A/5515 (1963); art. 109, G.A. Res. 2101, 20 U.N. GAOR Supp. (No. 14) at 90, U.N. Doc. A/6014 (1965); and art. 61, G.A. Res. 2847, 26 U.N. GAOR Supp. (No. 29) at 67, U.N. Doc. A/8429 (1971).

European⁷⁰ and American⁷¹ Conventions. Though the impetus for the charter was to reflect an African conception of human rights, the drafters recognized that it would be imprudent to deviate too much from norms established in other international human rights instruments. Thus, the charter not only reflects an African conception of human rights, but additionally demonstrates an acceptance of the concept that human rights are universal and "transcend the boundaries of nation, race, and belief."⁷²

At the same time, the charter is unique among international and human rights treaties in that it enumerates both civil and political rights as well as economic, social, and cultural rights. The inclusion of all these various rights indicates that the two basic categories of rights are fundamentally important and intertwined. It also reflects the drafters' rejection of the argument by some South African jurists that the second category of rights is not justiciable.⁷³ Nowhere does the charter suggest that civil and political rights are inferior to, or capable of suspension by, the government in order to promote economic, social, and cultural rights, or vice versa.

The economic, social, and cultural rights guaranteed to individuals include the right to: work, and to receive equal pay for equal work;⁷⁴ enjoy the best attainable physical and mental health;⁷⁵ and receive an education.⁷⁶ However, from a practical standpoint, most African countries—and a majority-ruled South Africa would be no exception—are not in a position to guarantee such rights since their economies are not sufficiently developed (e.g., the right to work) and the necessary infrastructure is absent (e.g., the rights to health and education). Nevertheless, even though it may take many years before the state can ensure full implementation of these rights, inclusion of the rights will mandate that existing public facilities be made available to all persons on a nondiscriminatory basis⁷⁷ and will provide minimum standards by which state actions can be judged. For example, the charter requires nondiscrimination in the allocation of govern-

70. European Convention, *supra* note 54.

71. American Convention, *supra* note 54.

72. South West Africa Case, Second Phase, 1966 I.C.J. 6, 296 (dissenting opinion of Judge Tanaka).

73. See generally Addo, *The Justiciability of Economic, Social and Cultural Rights*, 14 COMMONWEALTH L. BULL. 1425 (1988).

74. Banjul Charter, *supra* note 52, art. 15.

75. *Id.* art. 16.

76. *Id.* art. 17.

77. *Id.* arts. 2, 19.

ment economic resources.⁷⁸ Thus, any government allocation of resources depriving community members of essential services for reasons unrelated to economic feasibility or general principles of proportionality could be declared unconstitutional by the courts. The judiciary's role in enforcing such economic rights has been demonstrated in recent years by the Indian Supreme Court which, guided by specific directives contained in the Indian Constitution, has freely developed the common law.⁷⁹

The charter also includes the right to own property.⁸⁰ This right appears in the First Protocol to the European Convention, but is notably absent from both United Nations Covenants on Human Rights.⁸¹ This right is also consistent with Dugard's middle path on expropriation with just compensation.⁸² Under the charter, the right to property may be encroached upon only for public purposes or "in the general interest of the community and in accordance with the provisions of appropriate laws."⁸³ At the same time, the state has an obligation of "promoting international economic cooperation based on mutual respect, equitable exchange, and the principles of international law."⁸⁴ This implies that the nationalization of property or business assets owned by foreigners, such as multinational corporations, is lawful only if the government complies with the appropriate international legal standards, including the payment of just compensation. In cases of expropriation or nationalization, courts would be free to ascertain whether the state has overstepped its bounds in taking property. Thus, a bill of rights based on the Banjul Charter would satisfy the economic concerns of both sides in South Africa.

The charter also provides guidance on the issue of group rights. A unique aspect of the Banjul Charter is its inclusion of rights attributable to "peoples." These rights, which appear even in the title, distinguish it from the European and American Conventions. The

78. *Id.* art. 13.

79. See generally Bhagwati, *Fundamental Rights in Their Economic, Social, and Cultural Context*, in COMMONWEALTH SECRETARIAT, REPORT OF THE JUDICIAL COLLOQUIUM IN BANGALORE (Feb. 24-26, 1988).

80. Banjul Charter, *supra* note 52, art. 14.

81. Compare *id.* and Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 221 with International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 1 and International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

82. Dugard, *supra* note 44, at 252-53.

83. Banjul Charter, *supra* note 52, art. 14.

84. *Id.* art. 21(3).

charter drafters believed that peoples' rights were central to the African conception of human rights. These rights reflect the importance of the community in African culture, particularly because collective agricultural and other efforts have often proven to be essential to ensuring survival. In African customary law, individuals took their identity from the group. Thus, expulsion from the group was one of the most serious punishments that could be inflicted on an individual.⁸⁵

In actuality, peoples' rights under the charter are the rights of the individual.⁸⁶ No new rights have been created, and accordingly no new rights have arisen for adjudication. However, given the legacy of apartheid with its deliberate attempt to classify everyone as a member of a racially or ethnically-defined group, a reference to peoples' rights in a South African bill of rights might appear to furnish a means of perpetuating divisions. Thus, to guard against the rise of vocal minorities clamoring for special treatment based on a misinterpretation of the phrase, it would be best to incorporate only individual rights with no special provisions protecting group rights. As long as individual freedoms are guaranteed, people will be free to band together as they please. Certainly, this has been the case elsewhere in the decolonized world, most notably in Zimbabwe and Namibia, where little has changed in the exclusivist world of social relations.

The horrors of apartheid, particularly within the migrant labor system, have all but destroyed the family unit in South Africa. The charter attempts to rectify this situation by providing that the family "shall be the natural unit and basis of society."⁸⁷ It charges the state with the duty to: safeguard the physical, health, and moral welfare of the family;⁸⁸ assist the family, which is the custodian of moral and traditional values recognized by the community;⁸⁹ eliminate discrimination against women;⁹⁰ and protect internationally recognized wo-

85. INTERNATIONAL COMMITTEE OF JURISTS, SEMINAR ON HUMAN RIGHTS IN A ONE-PARTY STATE 65 (1978).

86. On the concept of peoples' rights, see generally Report of the Secretary-General on the draft African Charter on Human and Peoples' Rights, June 1981, CAB/LEG Draft Rpt. Rpt (II) Rev. 4, at 4; Kiwanuka, *The Meaning of "People" in the African Charter on Human Rights and Peoples' Rights*, 32 AM. J. INT'L L. 8 (1988); Mumba, *Prospects for Regional Projection for Human Rights in Africa*, HOLDSWORTH L. REV. 101, 106 (1982).

87. Banjul Charter, *supra* note 52, art. 18.

88. *Id.* art. 18(1).

89. *Id.* art. 18(2).

90. *Id.* art. 18(3).

men's and children's rights.⁹¹ This family-oriented approach, framed in terms of positive obligations, differs from that taken in the European⁹² and American⁹³ Conventions, which merely provide for the absence of interference in family life. The charter reflects the drafters' belief in the family—including the extended family—as central to African values.⁹⁴ This approach would find wide acceptance among black South Africans who have witnessed the crumbling of family life under white domination. It would also satisfy whites, particularly Afrikaners who often stress their commitment to family life. Finally, family guarantees in a South African bill of rights can provide guiding principles for judges called upon to assess the government's compliance with social legislation and to formulate social policies.

The Banjul Charter has an unparalleled approach, placing obligations and requirements on the individual as well as the state. In South Africa, these duties would demand the commitment of all to reconciliation. It is not enough for individuals merely to expect protection from the state. Rather, they should participate actively in the creation of a more just social order. The charter stands alone among regional human rights instruments in its stipulation that "[e]very individual shall have duties towards his family and society, the State and other legally recognized communities and the international community."⁹⁵ This differs from the European Convention, which is silent on the matter, and the American Convention, which recognizes only enumerated obligations to the family and the community.⁹⁶ The Banjul Charter, however, imposes a broader duty on the individual to regard fellow human beings without discrimination.⁹⁷ It then lists specific duties such as respect for the family, the maintenance of parents in case of need, and the preservation of the family's harmonious development.⁹⁸

91. *Id.* art. 18(4).

92. European Convention, *supra* note 54, art. 8.

93. American Convention, *supra* note 54, art. 5.

94. See generally Marasinghe, *Traditional Conceptions of Human Rights in Africa*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 32 (Welch & Meltzer 1984); Nwabueze, *Family Law in Nigeria*, in LE DROIT DE LA FAMILLE EN AFRIQUE NOIRE ET A MADAGASCAR 117 (Milbave 1968).

95. Banjul Charter, *supra* note 52, art. 27(1).

96. American Convention, *supra* note 54, art. 32.

97. Banjul Charter, *supra* note 52, art. 28.

98. *Id.* art. 29. The charter's broader social obligations include the duty to place one's intellectual and physical abilities at the service of the community, to work to the best of one's ability and competence, to preserve positive cultural values in one's relations with other mem-

If incorporated into a South African bill of rights, these moral obligations would serve to set a tone of morality in a country where their denial has caused immeasurable suffering. The specific duties, such as the duty to support one's parents, could properly be regarded as legal obligations enforceable in courts of law. The interpretation of these obligations and duties would present quite a challenge to South African judges, and could possibly be one of the most vexing problems facing the new country.

IV. AN INTERNATIONAL HUMAN RIGHTS APPROACH

A. *The Role of the Judiciary*

Ideally, a majority-ruled South Africa will have a constitution drafted with the participation of the people, containing both an Africanist bill of rights and the guarantee of an independent judiciary. Yet, even if South Africa experiences the smoothest of all possible transitions, many problems will remain. The most important issue is which law the judges should interpret.

Little in the South African legal heritage supports respect for equality before the law and primacy of individual rights. Dugard has argued that judges, even under the present system, could appeal to the Roman-Dutch common law heritage, which favors human rights and social justice, as well as to the English common law tradition.⁹⁹ Application of Roman-Dutch jurisprudence, however, is limited because it is essentially a dead body of law.¹⁰⁰ Furthermore, in South Africa, Roman-Dutch jurisprudence is tainted by association with the ultra-nationalist Afrikaner judges. These jurists tried to use such jurisprudence to "purify" and purge South African law of British influence,

bers of the society in a spirit of tolerance, to preserve national unity and the territorial integrity of the country, and to contribute to national defense in accordance with the law. *Id.*

99. Dugard, *supra* note 44, at 197.

100. Roman-Dutch law is usually defined as the system of law which prevailed in the Netherlands (specifically the province of Holland) from the middle of the fifteenth century until the age of codification. See R. LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 2 (1953). The substantive private law of the Netherlands was codified in 1838. However, in those overseas territories which the Dutch lost prior to 1838 (including the former Dutch possessions of the Cape of Good Hope, Ceylon (now Sri Lanka), and British Guiana (now Guyana)), these nineteenth-century Dutch codes were never introduced. To the extent that the new sovereign retained the prior law in those territories, it was preserved in the form of uncodified Roman-Dutch law. Today, in Sri Lanka and to a greater extent in Guyana, the common law has widely replaced the former Roman-Dutch system. See generally M. SHAHABUDEEN, THE LEGAL SYSTEM OF GUYANA (1973); Cooray, *The Reception of Roman-Dutch Law in Sri Lanka*, 7 COMP. & INT'L L.J. S. AFR. 295 (1974).

even as they supported the worst abuses of apartheid legislation.¹⁰¹ Reliance on English jurisprudence would be more helpful, but many British decisions are too narrow to satisfy human rights concerns that will confront South African judges.

Routine reference to international human rights norms as bases for judicial decision could offer a viable alternative. If judges rigorously adhere to these norms, South Africa could develop an international jurisprudence of human rights and social justice, and perhaps establish itself in the vanguard of legal culture. In the modern global village, where high technology increasingly shrinks distances between people, it is desirable to harmonize legal practices as much as possible while recognizing the uniqueness of individual situations. Accordingly, it behooves judges, and the lawyers who appear before them in domestic courts, to familiarize themselves with the growing body of international human rights jurisprudence.¹⁰² South Africa can achieve this familiarity by implementing continuing legal education courses for judges and lawyers modelled on the programs currently in place in many United States jurisdictions and by transforming the law school curriculum to emphasize the new orientation.

This approach does not undercut judicial obligation to abide by a country's constitution, statutes, and common law. Rather, it recognizes that judges, particularly in common law jurisdictions, not only declare what the law is, but establish the law. Accordingly, judges should be forthcoming about the nature of their choices and fully cognizant of the duties and responsibilities that result. Unlike other areas of domestic law, where international law has little or no bearing, human rights issues require the judge to make choices with reference to the growing international legal corpus.

Modern international human rights law derives from the United Nations Charter which expresses "faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women."¹⁰³ The charter also provides that international cooperation in promoting and encouraging "respect for human rights and for fundamental freedoms for all without distinction as to race"¹⁰⁴ is one of the purposes of the United Nations. Under Chapter

101. On the purification movement, see generally Van Blerk, *The "Purists" in South African Legal Literature and Their Influence on the Judgments of the Appellate Division in Selected Areas*, LL.M. Thesis, University of Natal, South Africa (1981).

102. S. LEE, *JUDGING JUDGES* (1981).

103. U.N. CHARTER, *supra* note 69, preamble.

104. *Id.* art. 1, para. 3.

IX of the charter, member states pledge to act in cooperation with the international body to realize its aims. The charter's special emphasis on the international recognition of human rights stands in stark contrast to the Covenant of the League of Nations' silence on the matter.¹⁰⁵

Leading jurists have long agreed that these provisions have restricted the right of United Nations member states to treat the observance of human rights as a purely domestic matter.¹⁰⁶ The International Court of Justice affirmed this view in its 1971 *Namibia Advisory Opinion*, where it indicated that human rights had

by virtue of the Charter . . . become at international law a proper subject for international action. There followed in 1958 the Universal Declaration of Human Rights and thereafter many General Assembly resolutions on human rights and racial discrimination There have also been various regional agreements on human rights, perhaps the leading example being the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.¹⁰⁷

Today, the court could have added the Banjul Charter to this list of regional agreements. Thus, as International Court Judge de Aréchaga has noted, state human rights obligations have become a "legitimate subject of international concern."¹⁰⁸

The international human rights approach to judicial decision-making proposed here will certainly encounter opposition in South Africa. Existing legal culture holds the widespread belief that international law is not part of domestic law.¹⁰⁹ Had this view not prevailed, more liberal judges would have drawn upon the corpus of

105. Compare U.N. CHARTER, *supra* note 69, with LEAGUE OF NATIONS COVENANT.

106. See, e.g., WALDOCK, 106 RECUEIL DES COURS 200 (1962); E. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 177-78 (1950); OPPENHEIM, 1 INTERNATIONAL LAW 740 (1958).

107. *Namibia (Advisory) Opinion*, 1971 I.C.J. 51.

108. E. J. de Aréchaga, *International Law in the Past Third of a Century*, in 159 (I) RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 177 (1979). His view was echoed most recently in February 1988 in Bangalore, India at a meeting attended by high judicial officers of various commonwealth countries, as well as the United States and Pakistan. Bangalore Principles issued by the Judicial Colloquium on the Domestic Application of International Human Rights Norms at Bangalore, India, Feb. 26, 1988 (on file with the Loyola of Los Angeles International and Comparative Law Journal).

109. S. AFR. L. COMM'N REP., *supra* note 27, at summary, ¶ 3(D). The section indicates that "[t]he only 'human rights' document to which the South African government is a signatory is the Charter of the United Nations, but these provisions have never been promulgated as law." *Id.*

internationally established norms when dealing with the government's human rights abuses.

The prevailing South African view is in accord with the conservative approach found in common law countries other than the United States. Jurists of this persuasion are quick to caution against the indiscriminate adoption and application of provisions contained in international legal instruments as if they had the authority of domestic law. These jurists present a three-pronged argument for their position. First, the international norms are not part of domestic law unless lawmakers specifically implement them. Second, the international instrument may not be part of the domestic law because the executive branch did not have the legislature's support to obtain passage of a domestic law on the subject, even if it approved of the instrument. In a federal state, the executive may not necessarily have the authority or the desire to translate the norms of the international instrument into domestic rules. Third, the subject matter of an international instrument may arouse such deep divisions in the society that a judge should leave the domestic implementation of the international norm to the legislative branch.

These reasons do not justify rejecting an international human rights-based approach. International law commonly provides a source for domestic law. Jurist J. L. Brierly articulated this position as early as 1935.¹¹⁰ Four years later, in *Chung Chi Cheung v. The King*,¹¹¹ the Privy Council similarly recognized that domestic courts could bring the common law into step with international law principles in certain instances.¹¹² In that case, Lord Atkin wrote that

[t]he Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.¹¹³

More recently, the courts in many other countries have referred to international law standards, particularly with regard to human rights. English courts represent the forefront in this trend. In 1987, courts in the United Kingdom, Australia, and other jurisdictions con-

110. Brierly, *International Law in England*, 51 L.Q. REV. 24, 31 (1935).

111. [1939] 1 A.C. 160 (P.C. 1938) (Scot.).

112. *Id.* at 168.

113. *Id.*

sidered proceedings brought by the Attorney General of England and Wales to restrain the publication of the book *Spycatcher*.¹¹⁴ In *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, the fundamental principles of the European Convention figured prominently in both the arguments of counsel and the judges' decision.¹¹⁵ Both the trial and appellate court judges were careful to demonstrate that their decisions were consistent with the United Kingdom's obligations under the European Convention and in accord with the decisions of the European Court of Human Rights.¹¹⁶ The Attorney General argued that European Court judgments did not bind an English court construing the relevant provisions of the convention. The trial judge rejected this argument, declaring that the government's treaty obligation had to be "given a meaning and effect consistent with the rulings of the court established by the treaty to supervise its application."¹¹⁷

The court of appeal also recognized the importance of harmonizing domestic English law with that of the convention.¹¹⁸ This deference to the European Convention may stem from the fact that any English citizen with standing to challenge the inconsistency between English law and the obligations of the convention may bring a claim against the United Kingdom in the European Court of Human Rights. Moreover, the European Court of Human Rights has frequently found the United Kingdom in breach of the convention. These facts taken together help to explain the English court's mounting eagerness to defer to the convention and the growing body of jurisprudence surrounding it.¹¹⁹ This does not mean, however, that the convention and the European Court of Human Rights' jurisprudence have actually become part of domestic law. Instead, they remain sources to which courts show increasing willingness to turn for guidance in decisions on the content of domestic law.

Another English decision underlining this point is *In re K. D.*¹²⁰

114. *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, [1988] 2 W.L.R. 805, 812 (C.A. 1987).

115. *Id.* at 841-51.

116. *Id.*

117. *Id.* at 851.

118. *Id.* at 869.

119. Foster, *The European Court of Justice and the European Convention for the Protection of Human Rights*, 8 E.C.J. & E.C.H.R. 245 (1987); Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 AM. J. COMP. L. 229, 247 (1986).

120. [1988] 2 W.L.R. 398 (C.A. 1987).

In that 1988 case, the House of Lords reviewed the issue of an order terminating parental access to a ward of the court. The mother argued against the order on the ground that, unless the court affirmed access as a parental right, English law would deny a fundamental human right recognized by the European Convention. The judges dismissed the mother's appeal, but did not suggest that the European Convention was not part of English law or that its requirements were irrelevant. Instead, the judges carefully explained that they did not intend their decision to be inconsistent with the convention and the European Court of Human Rights' view of its requirements. They stated that

[s]uch conflict as exists, is . . . semantic only and lies only in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not to be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it.¹²¹

These cases illustrate the care English courts are taking to ensure that the domestic law is brought into line with the international human rights norms of the European Convention. A similar judicial appeal to international standards is occurring in many other jurisdictions. For example, the Australian case of *Jago v. District Court of New South Wales*¹²² raised the issue of whether, under the common law, a person accused of a criminal offense has a legally enforceable right to a speedy trial.¹²³ There was a delay of many years in bringing the accused to trial and he sought a permanent stay of the proceedings. The court held that while the defendant did have a right to a fair trial, he did not have a right to a speedy trial under common law. Nevertheless, the judges concluded that speed was an attribute of fairness by referring to the International Covenant on Civil and Political Rights,¹²⁴ which Australia had ratified. This covenant guarantees an accused the right to be "informed promptly . . . of the charge against him . . . [and] tried without undue delay."¹²⁵

Similarly, *Rangarajan v. Jagjivan Ram*¹²⁶ required the Indian Supreme Court to consider the validity of film censorship in the con-

121. *Id.* at 412.

122. 12 N.S.W.L.R. 558 (Austl. C.A. 1988).

123. *Id.*

124. 999 U.N.T.S. 171.

125. *Jago*, 12 N.S.W.L.R. at 569-70.

126. [1989] 1 S.C.J. 128 (S. Ct. India).

text of freedom of expression.¹²⁷ In allowing an appeal from a decision to revoke a film's certificate, the Supreme Court relied upon the European Court's decision in the *Handyside Case*,¹²⁸ and declared that the right to freedom of expression applied not only to inoffensive information but also to that which "offend[s], shock[s], or disturb[s] the State or any sector of the population."¹²⁹

Courts in Zimbabwe and Botswana have also illustrated the persuasive value and substantial impact of an international human rights approach. In *Stephen Ncube v. The State*,¹³⁰ the Zimbabwe Supreme Court unanimously declared judicial corporal punishment unconstitutional.¹³¹ The *Ncube* court interpreted section 15(l) of the Zimbabwe Constitution in making its decision. Its terms are very similar to article 3 of the European Convention, which prohibits torture or inhuman or degrading punishment or treatment.¹³² The court relied heavily upon the European Court of Human Rights' holding in *Tyrer v. United Kingdom*,¹³³ as well as on decisions from many other jurisdictions. Accordingly, the Zimbabwe court castigated whipping as "contrary to the traditional humanity practiced by almost the whole of the civilized world, being incompatible with the evolving standards of decency."¹³⁴

In *State v. Petrus*,¹³⁵ the Botswana Court of Appeals considered whether corporal punishment authorized by the Criminal Procedure and Evidence Act conflicted with section 7 of the Botswana Constitution, which prohibits inhuman or degrading punishment.¹³⁶ The five-judge bench concluded unanimously that the law authorizing the punishment was *ultra vires* to the constitution.¹³⁷ In reaching its decision, the court relied upon judgments of the European Court of Human Rights, the United States Supreme Court, and a dissenting opinion in a Privy Council case.¹³⁸

127. *Id.*

128. 24-2 Eur. Ct. H.R. (ser. A) (1976).

129. [1989] 1 S.C.J. at 149.

130. Judgment of Dec. 14, 1987, Supreme Court of Zimbabwe.

131. *Id.*

132. European Convention, *supra* note 54, art. 3.

133. 26-2 Eur. Ct. H.R. (ser. A) (1978).

134. Judgment of Dec. 14, 1987, Supreme Court of Zimbabwe.

135. [1985] L.R.C. 699.

136. *Id.*

137. *Id.*

138. The opinion by Justice Maisels even thanked the counsel for the accused for providing photocopies of judgments, articles, and conventions relied upon by them in their argument and which the court drew upon in its decision. Maisels wrote "[b]ut for this many would have

The South African courts should follow five rules which can be distilled from the behavior of the courts in these jurisdictions. First, international law is not part of the domestic law in most common law countries. Second, it does not become internalized until either lawmakers incorporate it into domestic law, or the judges, in their lawmaking capacity, so declare it. Third, judges will not automatically incorporate these international norms even though their country is a party to the treaty or convention which establishes them. Fourth, if an issue of uncertainty arises, such as an ambiguity in the common law or relevant statute, judges may look to international law standards. Fifth, if the judges use international law standards to determine what the relevant rule of law is, by virtue of their action, the standard may be incorporated into domestic law. Unfortunately, this international human rights-based approach will fail if South African judges, like their predecessors throughout South African history, are hesitant to deliver controversial or unpopular decisions as the new state struggles to overcome its many difficulties.

B. Executive Adherence to the Will of the Judiciary

Even if South African judges are brave enough to adopt the proposed model of interpretation, their success will depend upon the willingness of the executive and the people to adhere to the courts' decisions. The South African tradition of executive supremacy furnishes no model of appropriate behavior. In a country beset by myriad and seemingly insurmountable social ills, there is great temptation for the executive to whittle away constitutional human rights guarantees and judicial freedom. Many otherwise enlightened South African lawyers, who know the horrors of detention without trial and other restraints on individual freedom, display a frightening willingness to accept these restrictions.¹³⁹ Of course, there is no way for an activist judiciary alone to stop abuses of executive power. Nevertheless, instead of caving in to repeated executive onslaughts, as demonstrated by some of the judges in the last of the Coloured Vote cases,¹⁴⁰ South

been inaccessible to the Court; and, speaking for myself, the existence of many of them was quite unknown." *Id.* at 702.

139. Suggestions to this effect appear in various papers from the Conference on Human Rights in the Post-Apartheid South African Constitution, Columbia University Center for Human Rights, New York (Sept. 25-28, 1990).

140. The Coloured Vote cases involved the government's removal of black voters from the common roll in the Cape Province in the 1950s. The attendant legal brouhaha is described in Dlamini, *The Senate Case Revisited*, 105 S. AFR. L.J. 470 (1988).

African judges can insist on voicing their opinions in ways that seek to control abuses of executive discretion.

For example, judicial review in Britain has become an important, although not complete, protection for the individual in his dealings with the executive government. In following a more activist approach, British courts have overruled the World War II case of *Liversidge v. Anderson*.¹⁴¹ The *Liversidge* majority held that no court could examine the reasonableness of the Secretary of State's actions.¹⁴² Under the Defence (General) Regulations of 1939, if the Secretary had issued in good faith an order indicating reasonable cause to believe that an individual had hostile associations, that individual could therefore be detained. The court held that the matter was one for the Secretary's exclusive discretion.¹⁴³

There has since developed a large body of opinion contrary to the *Liversidge* decision. In *Ex parte Rossminster Ltd.*, the House of Lords expressly overruled *Liversidge* in its entirety, not just in the narrow context of that particular case.¹⁴⁴ In recent years, this reasoning has pervaded decisions of British courts on matters as diverse as preventive detention, prerogative powers, and administrative action. In the 1983 case of *Khawaja v. Secretary of State*,¹⁴⁵ Lord Scarman wrote that

[t]he classic dissent of Lord Atkin in *Liversidge v. Anderson* . . . is now accepted as correct not only on the point of construction . . . but in its declaration of English legal principle . . . Lord Atkin put it thus . . . "that in English law every imprisonment is *prima facie* unlawful, and that it is for the person directing imprisonment to justify his act."¹⁴⁶

The following year, the House of Lords overturned long-established barriers to the review of prerogative powers. In *Council of Civil*

141. [1941] 3 All E.R. 338 (H.L.).

142. *Id.*

143. *Id.*

144. [1980] A.C. 952 (H.L. 1979). Lord Diplock wrote that "the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* was expediently and at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was correct." *Id.* at 1011. In still stronger wording, Lord Scarman argued that

[t]he ghost of *Liversidge v. Anderson* . . . therefore casts no shadow . . . [a]nd I would think it need no longer haunt the law. It was laid to rest by Lord Radcliffe in *Nakkuda Ali v. Jayaratne* . . . and no one in this case has sought to revive it. It is now beyond recall.

Id. at 1024-25.

145. [1983] 1 All E.R. 765 (H.L.).

146. *Id.* at 781.

Service Unions v. Minister for the Civil Service,¹⁴⁷ Lord Roskill accepted that certain prerogative powers were not susceptible to judicial review.¹⁴⁸ These were the making of treaties, the defense of the realm, the prerogative of mercy, the appointment of ministers, the grant of honor, and the dissolution of Parliament.¹⁴⁹ However, he also declared himself

unable to see . . . that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory.¹⁵⁰

Lord Scarman echoed these sentiments and expressed the majority view that "if the subject matter in respect of which prerogative power is exercised is . . . a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power."¹⁵¹ These views on judicial review have been expressed in other commonwealth jurisdictions as diverse as Singapore and Zimbabwe and also in international bodies such as the Inter-American Court.¹⁵²

The efficacy of safeguards for the protection of fundamental human rights, particularly in times of national crisis, depends upon the courts' willingness to scrutinize rigorously the exercise of executive discretion and to impose legal limits on the scope of that power. Without such independent judicial scrutiny and control, societies are, as Lord Shaw wrote in his dissenting opinion in *R. v. Halliday*,¹⁵³ in peril of experiencing a swift "transition to arbitrary government."¹⁵⁴ However, a courageous judiciary cannot single-handedly guard against such arbitrary government. Governments must display a readiness to respect judicial decisions and the rule of law. Otherwise, as former Chief Justice Dumbutshena of Zimbabwe has written, there

147. [1984] 3 All E.R. 935 (H.L.).

148. *Id.* at 956.

149. *Id.*

150. *Id.*

151. *Id.* at 948.

152. See, e.g., *Teo Soh Lung v. Minister of Home Affairs*, (Civil Appeal No. 81 of 1988, Judgment of Dec. 8, 1988); *Minister of Home Affairs v. Austin*, Supreme Court of Zimbabwe; Inter-American Court, Advisory Opinion, OC-8/87 of Jan. 30, 1987, reprinted in 27 I.L.M. 512 (1988).

153. [1917] A.C. 260 (H.L.).

154. *Id.* at 287.

will be "the inevitable breakdown of law and order, resulting in uncivilized chaos because the Courts cannot enforce their own orders."¹⁵⁵ While judicial activism may not stop the executive from carrying out nefarious deeds, it can at least serve to keep alive for the masses notions of human rights and social justice. Indeed, it is with the people that the greatest challenges for any new order lie.

C. *Popular Support*

For decades, South Africa's black masses have endured a system which has relegated them to lives of perpetual servitude, subject to the harshness of discriminatory and often brutal legislation, and in which they share none of the power, wealth, or privilege of their white compatriots. For them, the all-white executive which promulgates laws made without their consent, the white judges who interpret the laws to their disadvantage, and the security forces and Afrikaner-dominated bureaucracy that claim to carry out the laws are all part of an illegitimate system.

It would be naive to assume that simply because a new South Africa is majority-ruled, black people would automatically believe that the new government is just. The white authorities have long found willing black collaborators driven by poverty, greed, or lust for power. Such collaborators include homeland leaders, members of the Coloured and Asian Houses of the tricameral parliament, and police informers.¹⁵⁶ Blacks have no reason to think that those ready to trade morality for personal gain will disappear with a transformed South Africa. Moreover, they have no cause to believe that just because the government is black-dominated, its leaders, even if democratically elected, will be incorruptible.

Many black South Africans have a carefully cultivated cynicism with which they view political wheeling and dealing. While such cynicism may aid in the creation of a vibrant democratic order, it may also threaten a fragile government whose members feel that the abrogation of civil liberties is justified to ensure economic development. Compounding the danger of the government's departure from human rights principles is the threat posed by urban youths who have known only the brutalization of apartheid. Uneducated, unemployed, and embittered, they will undoubtedly form an impatient, vocal, and po-

155. Minister of Home Affairs v. Austin, Zimbabwe Supreme Court at 572.

156. On black collaborators, see generally L. THOMPSON & A. PRIOR, SOUTH AFRICAN POLITICS (1982).

tentially violent urban proletariat demanding a pace of change to which no government can adhere.¹⁵⁷ These youths will have no reason to believe in any notion of the rule of law.

If blacks view a new government with suspicion, the suspicion with which they view the judiciary will be all the greater. Generations of black South Africans have seen the judiciary as the coy handmaiden of the executive. Why should blacks suddenly believe that with a new government and constitution, judges will become bold defenders of individual rights and liberties? This is especially so if the judges, for an initial period at least, remain the same white males now in office. What effect will that have on black conceptions of the rule of law? If the same judges who one day defend white domination, the next day proclaim themselves guardians of freedom and equal rights for all, the blacks' view of the judiciary will be unchanged. They will continue to believe that the rule of law is really the rule of legalism, merely a front for the interests of whomever happens to be in power. Even as there are more and more black judges, why should citizens believe that these unelected officials are anything but the government's puppets?

Some South African legal scholars feel that if the judiciary is to disassociate itself from the executive behavior it condoned under supremacy gone haywire, South Africa must adopt an American-style model of judicial review.¹⁵⁸ However, that is a particularly weak argument which fails to consider the nature of judicial review in the United States.¹⁵⁹ First, the doctrine of judicial review developed neither overnight nor in the crucible of profound social upheavals such as South Africa will experience before a stable order emerges. Second, Americans, for whom judicial positivism has little appeal, clearly recognize that the unelected judges make political decisions that have far-reaching consequences. Witness, for example, the controversy surrounding every nomination of a United States Supreme Court justice, and the brouhaha that precedes and follows every major Supreme Court decision. Third, the system survives in the United States because, although the people are often deeply divided over the political views of the Justices and the content of their opinions, with rare exceptions, they agree on the sanctity of the institution and the

157. See Wash. Post, Oct. 5, 1990, at A29.

158. See generally Cameron, *Judicial Accountability in South Africa*, 6 S. AFR. J. HUM. RTS. 251 (1990).

159. On the development of judicial review in the United States, see generally A. COX, *THE COURT AND THE CONSTITUTION* (1987).

desirability of its continued existence. Thus, they are prepared to abide by the Court's decisions, however unpalatable in some quarters.

The South African situation is radically different. In the transition from one system to another, there will be no time to develop a new legal culture. In some sense, providing for judicial review in the new order will be like building in shifting desert sands. Black South Africans have no cause to believe in the inviolability of the institution of judicial review, regardless of their sentiments about the individual justices. They have no depth of feeling about the necessity for such review as a check on the power of other branches of government.

How then will a new government be able to establish a culture of respect for the rule of law among the masses? Such respect cannot be achieved through nationalistic propaganda. Rather, its creation requires an executive that is both benevolent and benign and a judiciary unafraid to castigate deviations from internationally accepted standards of human rights. Its maintenance demands vigilance. Such desires are difficult to realize even in the most stable societies. Regrettably, a transformed South Africa will be saddled with innumerable social and economic ills, including rampant poverty, unemployment, disease, and violence. At the same time, it will inherit a particularly sordid legacy of executive megalomania and judicial collusion. Should these obstacles prove insurmountable, South African history may repeat itself in tragic fashion.

V. CONCLUSION

In recent years, threats to the South African government's domination increased from without and within. Internal black protests and political organizing have reached unprecedented levels. Pressure from anti-apartheid groups around the world has persuaded many members of the international community to bring pressure on the government through economic sanctions and diplomatic moves. With the advent of an independent Namibia, South Africa has become the only country in Africa still ruled by a white minority government. Already, the eyes of the international community are focussed on South Africa as the next target for change.

Recognizing and fearing the inevitability of black majority rule, the white politico-legal establishment which rules South Africa has recently emphasized the introduction of a bill of rights for the country. As discussion of this issue has raged in white political circles, the ANC has also turned its attention to the issue, while it grapples with

the question of a post-apartheid legal order. Both sides are in particular disagreement over the issues of economic and minority rights.

One way to harmonize these differences is for drafters to adopt a South African bill of rights that draws upon the Banjul Charter. Reliance on the charter would result in the creation of a document that is both Africanist and internationalist in orientation by appealing to international standards of human rights, particularly those which are widely recognized in the rest of Africa. However, such a document alone would not free the new country from abuses by the judiciary and the executive. Historically, the South African judiciary has supported the executive to the detriment of blacks. One way that noble-minded judges in a new South Africa could shed this sorry legacy would be through the regular appeal to international standards of human rights as bases for decision. Such an approach would enable South Africa to develop an international jurisprudence of human rights and social justice, placing itself at the forefront of legal culture. This approach also comports with that taken evermore frequently by commonwealth courts as well as by the European Court of Human Rights and the Inter-American Court.

Even if the judges follow an internationalist path, obstacles will remain which may prove to be a new South Africa's undoing. First, there is the problem of executive adherence to judicial will. If the executive refuses to abide by judicial decisions, the effectiveness of the entire legal system will be undermined. Second, blacks may not respect the rule of law, as they have known law only as an instrument for the denial of their legitimate right to self-determination in their homeland. Blacks have little cause to believe that under a new system, judges (even black judges) will be defenders of equality and social justice. Nevertheless, people of good will in South Africa must strive to overcome these difficulties. If they fail, the result may be too horrific to contemplate.

