

## THE ABROGATION AND RESTORATION OF THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN SOUTH AFRICA

By George Bizos\*

The *Universal Declaration of Human Rights*<sup>1</sup> has played an important role in the struggle for the liberation and constitutional development of South Africa. It inspired the adoption of the *Freedom Charter*<sup>2</sup> in 1955. In accepting the Nobel Peace Prize in 1961, Albert Luthuli, the president of the African National Congress (ANC), said:

No euphemistic naming [of apartheid] will ever hide their hideous nature. We reject these policies because they do not measure up to the best mankind has striven for throughout the ages; they do great offence to man's sublime aspirations that have remained true in a sea of flux and change down the ages, aspirations of which the United Nations Declaration of Human Rights is a culmination. This is what we stand for. This is what we fight for.<sup>3</sup>

White South Africans, mainly the descendants of Dutch, French and British settlers, valued the rule of law and judicial independence. Unhappily, this was only for themselves and not for the descendants of Malay slaves or Indian indentured labourers. Above all, it was not for the Africans whose land they seized. They were forced into reserves, later to be known as Bantustans, long before the adoption in 1948 of the *Universal Declaration*, the very year that Afrikaner Nationalists were voted into power in elections in which the vast majority could not participate. Unlike military dictatorships and other tyrannies, the white South African oligarchy was the mirage of democracy, judicial independence and legitimacy.<sup>4</sup>

The cosmetic difference was illustrated soon after the apartheid regime came to power. The limited right to vote granted to the coloured people (of mixed descent) in 1910<sup>5</sup> was inconsistent with the racist policies of the Government. The right had been entrenched and removal required a two-third majority,<sup>6</sup> which the Government did not have. Claiming that the entrenchment of coloured voting rights violated the supremacy of Parliament, they

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\* SC. Legal Resources Centre, Johannesburg, South Africa.

<sup>1</sup> *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

<sup>2</sup> G. Marcus, *The Freedom Charter - A Blueprint for a Democratic South Africa*, Occasional Papers, Centre for Applied Legal Studies (Johannesburg: University of Witwatersrand) at 9; T. Karis & G. Carter, eds., *From Protest to Challenge: A Documentary History of African Politics in South Africa 1882-1964*, vol. 3 (Hoover Institution Press, 1977) at 180.

<sup>3</sup> Karis & Carter, *ibid.* at 705-717.

<sup>4</sup> "Introduction" in *ibid.*, vol. 1 at 3-12.

<sup>5</sup> *South Africa Act* (U.K.), 1909.

<sup>6</sup> The rights were granted and effectively entrenched by subsections 35 and 152 from *ibid.* and the *Statute of Westminster* (U.K.), 1931.

abolished it.<sup>7</sup> The five judges of the Court of Appeal held that Parliament could not do this.<sup>8</sup> The white Parliamentarians thereupon declared their Parliament as a court of appeal, which reversed the Court's decision.<sup>9</sup> Again, the Court of Appeal unanimously set their *High Court of Parliament Act* aside.<sup>10</sup> They increased the size of the Senate by appointing loyal party members to give themselves the two thirds majority.<sup>11</sup> They appointed six new judges, in whose loyalty they had confidence.<sup>12</sup> Their objective of an all-white Parliament voted in, only by whites, was achieved.<sup>13</sup> Only one Judge, Oliver Schreiner, dissented.<sup>14</sup> He called the whole exercise a fraud.<sup>15</sup> By any standards, he was due to be appointed Chief Justice. He became known as the best Chief Justice the country ever had.<sup>16</sup> Consistent with his sense of duty, he served his time under a junior. Judicial independence suffered a near mortal blow.

Discriminatory legislation which could not be challenged was enacted at a fast and furious pace, regulating where you could live<sup>17</sup>, work<sup>18</sup>, travel<sup>19</sup>, worship<sup>20</sup>, be taught<sup>21</sup>, marry<sup>22</sup>, make love<sup>23</sup> and even where you were to be buried.<sup>24</sup> All could be enforced by the courts by criminal sanctions. The disfranchised were neither silent nor compliant. In their thousands they peacefully defied the unjust laws.<sup>25</sup> More legislation was enacted increasing penalties for offences of a minor nature if they were committed in the company of others by way of protest. For example, up to three years imprisonment if you went into the railway station through the "Europeans Only" entrance, more if you incited others to do it. The courts did what was expected of them without adverse comment.

<sup>7</sup> *Separate Representation of Voters Act* (S.A.), 1951, Act No. 46.

<sup>8</sup> The unanimous judgment of Centevres C.J., Greenberg J.A., Schreiner J.A., Van DenHeever J.A., Hoexter in *Harris and Others v. Minister of the Interior and Another*, [1952] 2 S.A.L.R. 428 (AD).

<sup>9</sup> *High Court of Parliament Act* (S.A.), 1952, Act No. 35.

<sup>10</sup> *Minister of the Interior and Another v. Harris and Others*, [1952] 4 S.A.L.R. 769 (AD).

<sup>11</sup> *Senate Act* (S.A.), 1955, Act No. 53.

<sup>12</sup> *Appellate Division Quorum Act* (S.A.), 1955, Act No. 27.

<sup>13</sup> By virtue of the *South Africa Act Amendment*, 1956, Act No. 9.

<sup>14</sup> Dissenting judgment of Schreiner in *Collins v. Minister of the Interior*, [1957] 1 S.A.L.R. 552 (AD).

<sup>15</sup> «[...] the Senate Act was in truth legislation for the amendment of the Cape franchise which was disguised as legislation for the improvement of the upper House » : *ibid.* at 578.

<sup>16</sup> J. Dugard, *Human Rights and the South African Legal Order* (Princeton : Princeton University Press, 1978) at 286 : « From 1914 [...] the Chief Justiceship automatically went to the senior judge of appeal. This tradition was overlooked in 1957 when the Government appointed Mr. Justice Fagan to the office of Chief Justice and not Mr. Justice Schreiner, the senior judge of appeal ».

<sup>17</sup> *Group Areas Act* (S.A.), 1950, Act No. 41 and consolidated in Act No. 77 of 1957 and again in Act No. 36 of 1966.

<sup>18</sup> *Industrial Conciliation Act* (S.A.), 1937, Act No. 36.

<sup>19</sup> *Departure from the Union Regulation Act 1955* (S.A.), 1955, Act No. 34.

<sup>20</sup> *Bantu Natives (Urban Areas) Consolidation Act 1945* (S.A.), 1945, Act No. 25 (as amended) [hereinafter *Urban Areas Act*].

<sup>21</sup> *Bantu Education Act 1953* (S.A.), 1953, Act No. 47 and *Extension of University Education Act 1959* (S.A.), 1959, Act No. 45.

<sup>22</sup> *Prohibition of Mixed Marriages Act 1949* (S.A.), 1949, Act No. 55.

<sup>23</sup> *Immorality Act 1957* (S.A.), 1957, Act No. 23.

<sup>24</sup> *Urban Areas Act*, *supra* note 20.

<sup>25</sup> *R. v. Sisulu*, [1953] 3 S.A.L.R. 276 (AD).

The greatest challenge to the apartheid regime was the calling of the Congress of the People. This was a gathering of over 3,000 individuals representing all sections of the population, which adopted the *Freedom Charter* in June 1955. The *Freedom Charter* declared that "South Africa belongs to all who live in it, black and white and that no government can justly claim authority unless it is based on the will of the people." The *Freedom Charter's* claims were not much different from those of the *Universal Declaration*.<sup>26</sup> In December 1956 the Treason Trial began. One hundred and fifty-six leaders of the liberation movement, including Nelson Mandela, were arrested on a charge of high treason and brought before a special court of three white judges. The call in the *Freedom Charter* that "[t]he courts shall be representative of all the people" did not matter. Five years later, the court found that advocating the adoption of the claims in the *Freedom Charter* by peaceful means was neither treason, nor furthering the aims of communism as defined in the *Suppression of Communism Act*.<sup>27</sup>

The apartheid government hailed the judgment as proof of the independence of their judges both within and outside the country. Many of us thought that the result would probably have been different if extra-parliamentary opposition had not in the meantime been crushed by executive action. The ANC and PAC were declared unlawful organizations.<sup>28</sup>

On March 21, 1960, sixty-nine were shot dead and hundreds were wounded in Sharpeville, at a peaceful gathering to protest against the enslaving pass laws.<sup>29</sup> Their leaders, including those on trial for treason, were locked up, while others went into exile to avoid arrest under the *Emergency Regulations*.<sup>30</sup> Compared with what was to follow, the Treason Trial was conducted with a semblance of fairness.

In December 1961, Nelson Mandela, who had in the meantime gone underground, and other leaders, had formed the ANC's military wing, Mkonto WeSizwe (MK), the Spear of the Nation. In its manifesto, the MK declared that there comes a time in the history of a nation when it has no option but to fight. The MK's sabotage would be directed only against symbols of apartheid and every effort would be made to avoid loss of life. Its purpose was to bring the government to the negotiating table at a national convention to draw up a democratic constitution.<sup>31</sup>

Mandela had gone to African and some European capitals to seek moral and material support. Shortly after his return, he was arrested for breaching the restrictions in his banning orders, leaving the country without a passport (which had been long denied to him), and inciting a strike in protest against the apartheid policy.<sup>32</sup>

<sup>26</sup> Marcus, *supra* note 2 and Karis & Carter, *supra* note 2, vol. 3 at 180.

<sup>27</sup> Karis & Carter, *ibid.* at 344-49.

<sup>28</sup> Proc. 119, G.G.E 6414 (1960) under *Unlawful Organisations Act 1960* (S.A.), 1960, Act No. 34.

<sup>29</sup> Marcus, *supra* note 2 at 332-44; Karis & Carter, *supra* note 2, vol. 3.

<sup>30</sup> *Emergency Regulations under the Public Safety Act 1953* (S.A.), 1953, Act No.3.

<sup>31</sup> N. Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela*, 1<sup>st</sup> ed. (Boston: Little Brown Publishers, 1994) at 325-27 and 338-40.

<sup>32</sup> *Ibid.* at 343-65 (his travels) & 372-78 (his arrest).

He was denied counsel of his choice, a man who had himself been restricted to Johannesburg. His trial was to be heard in Pretoria, in the very courtroom in which he had been acquitted of treason. He shocked the white magistrate, court officials, policemen, journalists and audience by appearing in traditional African attire, and not in the tailor-made suits he so often wore to represent his clients or as an accused in the treason trial. Worse still, he delivered a stinging address challenging the legitimacy of the white magistrate to try him, the white prosecutor to conduct his trial, the white clerk of the court, the white policemen to arrest him and the white warders who kept him captive. How dare he challenge the white man's right to reign over black lives?<sup>33</sup>

Even those whites who were sympathetic to him when the Law Society unsuccessfully sought to disbar him in the early fifties for being the volunteer-in-chief in the Defiance Campaign Trial<sup>34</sup> and the long Treason Trial of 1956 [...] felt that he had gone too far. There was nothing wrong with the white man's court. After all, had not a senior South African judge said so?<sup>35</sup>

At the end of the Rivonia Trial, Nelson Mandela ran the risk of being sentenced to death.<sup>36</sup> The UN and many others called for his release. He was sentenced to life imprisonment. There was an outcry throughout the world. The response of the Honourable Francis Napier Broome, Judge President of the Natal Provincial Division of the Supreme Court was: "It is high time that the world realised that the South African Judiciary is independent and its judges are not amenable to pressure from government, public or any other source."<sup>37</sup>

Broome JP did not realize that there could be no justice in an unjust society, that the laws they applied, with a few exceptions, were laws insulting to and not serving justice. Having regard from whence the judges came, they did not have to be amenable to pressure, they knew what was expected of them by the majority of whites. They were oblivious of the thirst for personal and political justice by the vast majority of the people of South Africa, including some whites.

The Bar knew our judges better than they knew themselves. When we learned before whom we were to appear we said "Oh God" or "Thank God." The "Oh God" was more frequently whispered.

The Truth and Reconciliation Commission (TRC) called on judges and magistrates to answer questions and to come and explain their conduct during the apartheid years.<sup>38</sup> Hardly any of the "Oh God" judges, and no magistrates answered the questions.

<sup>33</sup> *Ibid.* at 384-86 (Black Man in White Man's Court).

<sup>34</sup> *Incorporated Law Society of Transvaal v. Mandela*, [1954] 3 S.A.L.R. 102 (TD).

<sup>35</sup> Mr. Justice Classen, "Retain the Bar and Side-Bar" (1970) 87 S.A.L.J. 25: "Our Supreme Court and the members of the Bench enjoy a very high reputation both in this country and beyond our borders [...] I am told on good authority that the erstwhile judges, who are undoubtedly the most eminent judges, consider only the South African judges as their equals".

<sup>36</sup> J. Joffe, *The Rivonia Story* (Mayibuye Books).

<sup>37</sup> Judge President F.N. Bloome, "Foreword" in Judge H.H.W. De Villiers, *Rivonia: Operation Mayibuye Trial* (Johannesburg: Afrikaanse Pers-Boekhandel, 1964).

<sup>38</sup> E. Kahn, "The Truth and Reconciliation Commission and the Bench, Legal Practitioners and Legal

They claimed that to do so would be interference with their independence. About ten of our good judges responded in writing.

The erstwhile Chief Justice Michael Corbett wrote to the TRC:

It was very rare to find a judicial officer remarking on the racist and unacceptable character of apartheid law. Some judicial officers will not have considered the law unacceptable. For those who did consider it unacceptable, it appears that generally they did not consider it their function to comment on its character.<sup>39</sup>

He also said

In *R v Pitje* the Appellate Division upheld a conviction for contempt of a black lawyer who had protested at a magistrate's ruling that he use a table set aside for black practitioners. An opportunity for the courts to affirm a commitment to human dignity and equality before the law was lost.<sup>40</sup>

And further, he stated: "There was a widespread perception that those judges who were known to oppose apartheid were often not selected to sit on the Bench when security or apartheid matters were to be traversed."<sup>41</sup> And finally from the erstwhile Chief Justice: "Even where legislation could not, as a matter of law, be ignored, judges should have acknowledged situations where law and justice diverged."<sup>42</sup>

Deputy President of the constitutional Court Pius Langa wrote: "There have been glaring instances where white litigants and accused persons would be treated with courtesy, only for the same presiding officer to adopt a very different attitude towards black litigants and accused persons."<sup>43</sup>

Justice Laurence Ackermann, now of the Constitutional Court, and whose conscience led him to resign as a judge of the Provincial Supreme Court said: "The conservative institutional culture was such that the great majority of judges [...] saw nothing wrong with the system or felt that it was not in the function of the judiciary to do anything about it."<sup>44</sup>

The General Council of the Bar of South Africa submitted to the TRC:

The perception of the judicial role was excessively mechanical and its avoidance of controversy extreme, combined in many instances with innate conservatism or even general support for the policy of the day, the result was a judiciary which

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Academics - Written Presentations: Preparatory Remarks by the Editor" (1998) 115 S.A.L.J. 15 at 15 [hereinafter *Preparatory Remarks*].

<sup>39</sup> Chief Justice M. M. Corbett *et al.*, "The Legal System in South Africa 1960-1994. Representations to the Truth and Reconciliation Commission" (1998) 115 S.A.L.J. 21 at 25.

<sup>40</sup> *Ibid.* at 29. The reference to the *Pitje* case is [1960] 4 S.A.L.R. 709 (AD).

<sup>41</sup> Corbett, *ibid.* at 32.

<sup>42</sup> *Ibid.*

<sup>43</sup> Justice P.N. Langa, "Submission to the Truth and Reconciliation Commission on the Role of the Judiciary" (1998) 115 S.A.L.J. 36 at 41.

<sup>44</sup> Justice L.W.H. Ackerman, "Submission to the Truth and Reconciliation Commission - Re: The Role of the Judiciary" (1998) 115 S.A.L.J. 51 at 53.

exhibited greater concern for the technicalities of the law than for issues of human rights.<sup>45</sup>

Justice Richard Goldstone, now on the Constitutional Court, previously on the Provincial and Appellate Division, and the first Prosecutor General in the court investigating genocide in Bosnia wrote: "I deeply regret that I did not use my position as a judge more frequently to speak out, both on and off the Bench, against the iniquities of the system and to draw attention to the divergence between law and justice."<sup>46</sup>

The jurisdiction of magistrates was increased from imposing a maximum of three years imprisonment for each offence in the fifties to 10 years.<sup>47</sup> Our prisons were full of people sentenced by them for political offences, particularly for widely defined statutory terrorism with a compulsory sentence of five years, even for a youth who wrote an angry poem and sent it to his girlfriend or for another, throwing a single stone at policemen who were about to throw a tear gas canister in his direction. Furthermore, our magistrates had, until recently, exclusive jurisdiction to enquire into unnatural deaths, and visit the hundreds who were kept in solitary confinement for an indefinite period without trial. Sydney Kentridge SC wrote:

[...] in the face of circumstantial and medical evidence pointing plainly to security police culpability the magistrates would time after time exonerate the police. In case after case where, to a disinterested observer, the untruthfulness of the police witnesses would have been evident, the magistrates refused to make any finding against them.

Why was this so? Why did the magistrates so readily accept the unconvincing police excuses? There may be many explanations for this apparent credibility.

The background and training of the magistrates (in nearly all cases promoted from the ranks of public prosecutory) may have made them reluctant to disbelieve police witnesses, especially when the witnesses were senior officers.

In many cases, however, one is driven to conclude that the magistrates had no real desire to reach a true verdict. Consciously or unconsciously they seem to have seen it as their duty to protect the organs of the state at all costs.<sup>48</sup>

Magistrates declined to make a submission to the TRC. They said they did not know what they had to deal with and did not understand the questions. Some judges had no such problems.

The Magistrates Commission said that it could not decide whether participation in an investigation would be of any benefit, as there was no clarity on the exact allegations, the identity of the accused, and which section of the legal system was accused.<sup>49</sup> A pity it

<sup>45</sup> E. Kahn, "The General Council of the Bar of South Africa Submissions to the Truth and Reconciliation Commission, October 1997" (1998) 115 S.A.L.J. 67 at 70-71.

<sup>46</sup> Justice R.J. Goldstone, "Submission to the Truth and Reconciliation Commission" (1998) 115 S.A.L.J. 55 at 55.

<sup>47</sup> *Magistrates' Court Act 1944*, (S.A.), 1944, Act No. 32, s. 92 (as amended).

<sup>48</sup> S. Kentridge, "Foreword" in G. Bizos, ed., *No One to Blame? In Pursuit of Justice in South Africa* (David Phillips – Mayibuye Books).

<sup>49</sup> *Preparatory Remarks*, *supra* note 38 at 16.

is that they did not ask for clarification. It was not difficult to identify who had exonerated the police in the Timol, Biko, Aggett and other high profile cases.

Magistrates, who too readily believed the falsehoods of the security police, may have done better than refuse to appear before the Truth and Reconciliation Commission to explain themselves. The judiciary, the Attorneys-General and the practising and academic legal professions accepted the Commission's invitation to make submissions on their role during the apartheid years.

Twelve judges, including the Chief Justice, the President of the Constitutional Court, judges of the Constitutional Court and the Supreme Court of Appeals and some Judges President of various Provincial High courts had no difficulty in answering the questions posed by the Truth and Reconciliation Commission. The Magistrates' Commission and the magistrates may have been better served if they did not side with an idiosyncratic judge who dismissed the request as "*three pages waffle*" and refused to take part.<sup>50</sup>

Chief Justice Pieter Rabie was responsible for the creation of an "emergency team."<sup>51</sup> He and Judge Hefer sat on 10 out of the 12 leading human rights cases, another 3 judges sat in 8 of the 12, one in 4, 2 in 3 out of the 12, 6 only in one case out of the twelve and 8 in none at all of the 12 cases. The selection was not based on seniority nor other factors such as long leave arrangements.<sup>52</sup> Ellman calculated that the chance selection by Chief Justice Rabie of the other four of his "emergency team" would be 244,000,000 to 1.<sup>53</sup> Packing the court for political reasons was commonplace from top to bottom. Ellman writes that "[w]hen some members of the country's highest court were effectively disfranchised, however, while others were given amplified voice the tacit message is that even the discipline of the judicial tradition is not enough to produce proper judging."<sup>54</sup>

He could not have been more generous. The ten cases dealt primarily with deprivation of fundamental rights from isolated and helpless detainees, and the validity of proclamations and notices issued in terms of the draconian powers given to President P.W. Botha. The "emergency team" of Rabie CJ held in favour of the executive almost invariably. They did not want apartheid's laws and practices to be hindered by legal niceties. It did not occur to them that there is a difference between Rule by Law – just or not – and the Rule of Law. Only a very small number of academic lawyers regularly spoke against what was happening. They courted contempt proceedings against themselves.<sup>55</sup>

<sup>50</sup> *Ibid.* See also C. Rickard in *Sunday Times* (2 November 1997) 16.

<sup>51</sup> S. Ellmann, *In a Time of Trouble -- Law and Liberty in South Africa's State of Emergency* (Oxford: Clarendon Press, 1992) at 64-65.

<sup>52</sup> *Ibid.* at 66-69.

<sup>53</sup> *Ibid.* at 66.

<sup>54</sup> *Ibid.* at 68-69.

<sup>55</sup> *S. v. Van Niekerk*, [1970] 3 S.A.L.R. 655 (TD) where the Professor of Law was acquitted by the Transvaal Provincial Division and *S. v. Van Niekerk*, [1972] 3 S.A.L.R. 711 (AD) where his conviction in the Durban and Coast Local Division was confirmed by the Appellate Division.

And then a revolution by consent came about. A new Constitution was written by a democratically elected Parliament. It was certified as complying with the 34 democratic principles agreed upon by over twenty political parties<sup>56</sup>, and passed by an overwhelming majority of the National Assembly and the Senate, democratically elected in 1994. These principles are not much different than those of the *Canadian Charter*<sup>57</sup> and the *Universal Declaration*.

The independence, impartiality, dignity, accessibility and effectiveness of the courts are guaranteed.<sup>58</sup> The appointment of judges, representative of the racial and gender composition of the population, is now made by the Judicial Service Commission after a public hearing.<sup>59</sup> Continued judicial training, their security of tenure, the proposed introduction of a code of conduct and transparency are expected to enhance the judiciary's image, and particularly its independence.

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<sup>56</sup> *Ex Parte Chairperson of the Constitutional Assembly : In Re Certification of the Constitution of South Africa*, [1996] 4 S.A.L.R. 744 (CC).

<sup>57</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>58</sup> *Constitution of the Republic of South Africa*, 1996, c. 8.

<sup>59</sup> *Ibid.* at s. 174 (2).