Annual Survey of International & Comparative Law

Volume 2
Issue 1 *01/01/1995*

Article 2

1995

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Cover Page Footnote
Columnist, The New York Times. Mr. Lewis delivered this lecture at Golden Gate University School of Law on March 1, 1995. His appearance was underwritten by the Helzel Family Foundation.

SOUTH AFRICA: BUILDING A CULTURE OF LAW

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I am going to speak to you today on a subject that is both straightforward and complicated. I say that for the following reason. My wife, who is a lawyer in Boston, comes originally from South Africa. Over the years, the apartheid years, Americans who were going to visit South Africa would come to her and seek advice about the trip. She would ask only one thing in return: "Don't come back and tell me the situation in South Africa is complicated. That is what the Government tells foreign visitors — that there are all kinds of problems you do not understand. In fact the problem there is extremely simple. A small minority, 15 percent, the whites, exercise all political and economic power, denying it to the vast majority of the population. When the Government tells you that you do not understand the complexity of the problem, it is just trying to obscure the stark reality that is its essence."

That South Africa is gone. The country is a democracy now. It has a parliament chosen at a non-racial election, the country's first, in which every adult could vote and astonishing millions stood in line for hours to do so. Inevitably life has become more complicated. One of the central tasks of those who lead the new South Africa is the creation of a legal culture. Or perhaps I should put it more bluntly: the creation, among ordinary people, of respect for law. To understand why

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that task is so necessary — so urgent — I have to take you back to what we have already begun to forget, the realities of life under apartheid for most South Africans.

I begin by reading you passages from a 1979 opinion by an outstanding South African Judge, John Didcott. The case is called *In re Dube*.[1] Jabulani Sydney Dube had been found by a Government commissioner to be an "idle person" and consigned to work at a farm colony for two years. What is, or rather was, an "idle person?" Justice Didcott described it as follows: "You are an idle person if you happen to be what the law calls a Bantu and you have had no lawful employment for 122 days or more during the past year."[2] "True," the judge said, "there are some exceptions. Your employment is not held against you if you are younger than 15 or as old as 65. . . . Otherwise it does not matter whether you actually need work and its rewards. An official who has reason to believe that you belong to the class of 'idle persons' may arrest you at any time and any place . . . and bring you before a commissioner. He calls on you to give a good and satisfactory account of yourself. Unless you manage to do so, he formally declares you to be an idle person. Nobody is required to prove that you match the definition. You must prove you do not. Once you are officially 'idle', all sorts of things can be done to you. Your removal to a host of places and your detention in a variety of institutions, can be ordered. You can be banned from returning to the area where you were found although you may have lived there all your life. When the commissioner has finished with you, the papers in your case go to a judge of the Supreme (trial) Court. He is expected, if everything is in order, to certify that what happened to you was 'in accordance with justice.' The trouble is that it was not. Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice."

"Dube is 24", Justice Didcott continued. "He is an epileptic who suffers from frequent fits. He needs constant medication.

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1. *In re* Dube, Natal Provincial Div., Didcott, J. and Milne, J. concurring (May 1, 1979). Judge Didcott is now a member of South Africa's new Constitutional Court (CC).

2. *Id.*.

The question is whether Dube is capable of being employed. If not, he falls outside the section of the law. That in my opinion is indeed the case. The proceedings were therefore contrary not only to justice but to the Act as well, with the result that, on this occasion at least, it is possible to apply the Act and to do justice simultaneously. The declaration stamping Dube an 'idle person' is set aside."[3]

The heavy irony of Justice Didcott's opinion tells us a good deal about what the law had become under the apartheid system. I say "become" because the legal system in South Africa had been in the great tradition, with its roots in Roman-Dutch law and the common law of England. But when the National Party won power in 1948, it quickly began to distort the system in order to formalize racial discrimination and entrench itself in power.

An example was the Terrorism Act passed by Parliament in 1967.[4] It imposed a maximum sentence of death for terrorism, and a minimum of five years in prison. It defined terrorism as any act intended to endanger the maintenance of law and order, or likely — I quote —: "to cause substantial financial loss to any person or the State."[5] A strike or economic boycott would cause financial loss and hence become terrorism.[6] The burden of proof was shifted so that the accused had to prove he or she did not intend to cause, for example, financial loss.[7] Terrorism was also defined to include any act calculated to create feelings of hostility between black and white South Africans.[8] How kind, one may think, that the Government was so solicitous of the feelings of blacks, protecting them from hostility. But of course the intention was the opposite, to punish the oppressed black majority for any expression of hostility to whites. Thus a young black man was guilty of terrorism, and sentenced to five years in prison, for writing an anti-white poem and showing it to one person, his 17 year old girlfriend. He could not prove beyond a reasonable doubt that

3. *Id.*.
4. Terrorism Act 83 of 1967.
5. *Id.* § 2(2)(h).
6. *Id.*.
7. *Id.* § 2(2).
8. *Id.* § 2(2)(i).

he did not intend her to have hostile feelings.[9]

I should add that the Terrorism Act eliminated the rule against double jeopardy. In the unlikely event that someone charged with terrorism was found not guilty, he could be tried again for the same offense. The Act was also made retroactive. It came into effect in June, 1967, but was deemed to have been the law since June, 1962.[10]

The features of the Terrorism Act that I have mentioned show an important characteristic of the successive Ministers of Justice and other legal politicians of the apartheid years: their ingenuity. They had an exquisite skill for turning the classic elements of the law inside out so they could put down, legally, all opposition to a state based on organized racism. I emphasize the word "legally," and I use it having in mind the distinction Justice Didcott made between law and justice. Since South Africa had no written constitution or bill of rights, judges were bound to administer as law whatever a parliament, under the absolute control of the National Party, enacted. Under those circumstances it was a painful question for a judge of conscience whether he should remain on the bench: the same question that judges faced in Nazi Germany but mostly brushed aside. In South Africa there were a few judges who, like Justice Didcott, did what they could to point out the injustice of apartheid laws and mitigate their effects when possible. But too many accepted what a great South African lawyer, Sydney Kentridge, called "a position of unprotesting powerlessness."[11]

It was not only through the criminal law, ingeniously broadened, that the apartheid system sought to maintain itself. In 1963, the Government pushed through a statute that allowed any police officer to detain anyone, without warrant, without charge, without trial, on suspicion of a political crime.[12] The act forbade detained persons access to a lawyer,

9. State v. Motsau, Witwatersrand Local Div. (Apr. 1974) (unreported).

10. Terrorism Act 83 of 1967, § 9(1).

11. *See* Sydney Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa*, 128 UNIV. OF Penn. L. REV. 603, 621 (1980).

12. General Law Amendment Act 37 of 1963, § 17.

or to the courts through an application for *habeas corpus*, the established way to test the lawfulness of an imprisonment.[13] It removed the protection against compelled self-incrimination.[14] The law allowed such detention for up to 90 days.[15] But after that, officials could extend any prisoner's detention until, as Minister of Justice B. J. Vorster explained, "this side of eternity."[16] Detainees were customarily held in solitary confinement, with nothing to read but the Bible, and were often subjected to mental and physical torture. Steven Biko, the greatest young anti-apartheid leader of his time, died of massive brain injuries suffered while under detention by the security police in 1977.[17] When they could not bring him back to consciousness, they threw him naked into the back of a truck and drove him hundreds of miles to a hospital where he was pronounced dead.[18] The enforcers of apartheid were not always insistent on the forms of law, however hollow — not always ingenious or subtle. Dozens of prisoners less notable than Steve Biko were said to have fallen to their death from the eleventh story of police headquarters or slipped in their cells.[19]

I must mention one more ingenious device invented by the Government to suppress those who disagreed with it: suppress and torment them. That was the banning order. A person who was banned was forbidden to attend "gatherings" of any kind, and a gathering was defined as a meeting with more than one other person. Banned people were usually forbidden to enter any school or university or newspaper. He or she could not be quoted in the press. Often banned people were taken hundreds of miles from their homes and dumped in remote villages where they were forced to live.

Like all tyrannies, the apartheid Government did its best to prevent the publication of anything that might challenge its power. Officials often said that South Africa had a free press.

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13. *Id.*.
14. *Id.*.
15. *Id.*.
16. *See* DONALD WOODS, BIKO (Vintage Books, 3d ed. 1991).
17. *Id.*.
18. *Id.*.
19. *Id.*.

It was true that there were privately-owned newspapers, and some of them printed editorials critical of the Government. What was missing in those papers was the facts. For the regime had enacted laws that made it extremely dangerous for newspapers to publish what Government officials did to people. It was a crime, for example — a serious crime — to publish anything about what went on inside prisons that had not first been read and approved by the prison authorities. When the *Rand Daily Mail* printed stories that disclosed horrifying cruelties in prison, the reporter and editor were prosecuted. A similar law inhibited reporting on the police and another protected the military from unwanted press attention.

Television and radio were run by a Government-controlled monopoly, the South African Broadcasting Corporation, and of course they never said anything critical or even remotely embarrassing to the regime. Through those means the Government kept the public from knowing the cruelties and abuses that necessarily accompanied the apartheid system. I should say the white public, or most of it, because of course blacks knew what was being done to them. But most whites did not know. They did not want to know, for a simple reason. To know would have been to confront their consciences. A South African Anglican bishop once said to me that the people of his country suffered from "existential blindness": they blinded themselves to the reality around them in order to exist, without qualms, in the extraordinarily privileged lives they lead.

But blacks, as I say, could not be blind to reality. Nelson Mandela went into practice as a lawyer in Johannesburg with Oliver Tambo. In his recently-published autobiography he describes why their clients came to see them. "It was a crime for Africans to use a Whites Only drinking fountain," he writes, "a crime to walk on a Whites Only beach, a crime to be on the street past 11, a crime not to have a pass book and a crime to have the wrong signature in that book. . . . Every week we interviewed old men from the countryside who told us that generation after generation of their family had worked a scraggly piece of land from which they were now being evicted. Every week we interviewed people who had lived in the same house for decades only to find that it was now declared a white area and they had to leave without any recompense at all.

Every day we heard and saw the thousands of humiliations that ordinary Africans confronted every day of their lives."[20]

With laws of that character on the book, grinding out small tyrannies and large, one could not expect the majority of South Africans to see law as we Americans see it: as a protection of our individual dignity, laying down rules that bind governors and governed alike. Law was seen, rather, as an instrument of state oppression. One passage in Nelson Mandela's book puts it beautifully, and I must quote it in full:

> As a student, I had been taught that South Africa was a place where the rule of law was paramount and applied to all persons, regardless of their social status or official position. I sincerely believed this and planned my life based on that assumption. But my career as a lawyer and activist removed the scales from my eyes. I saw that there was a wide difference between what I had been taught in the lecture room and what I learned in the courtroom. I went from having an idealistic view of the law as a sword of justice to a perception of the law as a tool used by the ruling class to shape society in a way favorable to itself. I never expected justice in court, however much I fought for it, and though I sometimes received it.[21]

In 1979, Sydney Kentridge, the great South African lawyer whom I mentioned earlier, delivered the Owen J. Roberts Lecture at the University of Pennsylvania. He discussed what had become of law in South Africa, calling his lecture "The Pathology of a Legal System."[22] At the end he gave his somber warning:

> One day there will be change in South Africa. Those who then come to rule may have seen the process of law in their country not as a protection against power but as no more than its convenient instrument, to be manipulated at will. It

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20. NELSON A. MANDELA, LONG WALK TO FREEDOM 130 (Little, Brown, 1st ed. 1994).

21. *Id.* at 226.

22. Kentridge, *supra* note 11, at 603.

> would then not be surprising if they failed to appreciate the value of an independent judiciary and of due process of law. If so, then it may be said of those who now govern that they destroyed better than they knew.[23]

That vision of the future was a logical one. After all that the overwhelming black majority of South Africans had suffered at the hands of what was called law, why would they use the law differently if and when they had power? Nor was there any reason at that time, 1979, to foresee abandonment by the Afrikaner Nationalists of their stubborn resistance to change in the racial system — to foresee amelioration of the legal machinery that crushed hopes for change. The parties seemed to be on course for violent conflict that would grow ever worse, ending in the ruin of the most productive economy in Africa.

But the grim vision has not come to pass. What has happened instead can be summed up by a vignette from a conversation I recently had with a lawyer in Cape Town. In 1985, he said, a client of his was taken into detention without trial. He had a heart condition; when he asked for the heart pills that had been taken from him, the guards gave him pills that looked different. He did not take them, and he survived. The lawyer, meanwhile, was trying to get the prisoner out. He retained senior counsel to go to court, but the efforts were unsuccessful. Having told me all that, my lawyer friend smiled and said: "Today my client is the country's Minister of Justice. And the senior counsel who tried to get him out of detention is the President of the Constitutional Court."[24]

That story indicates why a visit to South Africa today is an adventure in disbelief. Every day, perhaps every hour, a visitor who knew the country in the bad old days is likely to rub his or her eyes in amazement. That a onetime detainee, Dullah Omar, should now be the country's Minister of Justice is not really extraordinary in today's South Africa. After all, someone who was a prisoner for 27 years, for much of that time breaking rocks in a quarry on Robben Island, is the Presi-

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23. *Id.* at 621.

24. Interview conducted by the author with Michael Richman, Esq., at Betty's Bay, Cape, South Africa (Dec. 29, 1994).

dent of the country. But the fact that Dullah Omar is where he is now, and that his counsel, Arthur Chaskalson, is President of the Constitutional Court, tells us something important about the revolution that has occurred. It indicates what an important part law has played in the change.

While I was in South Africa, a judge remarked to me: "The National Party carried out a revolution by law. Now we have had another revolution by law." Facing the bankruptcy of their racial system and economic ruin for the country, the National Party rulers agreed to end apartheid and negotiate a new Constitution. At the very brink of the future that Sydney Kentridge foresaw, when the weapon of oppressive law would be turned against them, the Nationalists put their faith in our ideal of law and said they were ready to accept a Bill of Rights, enforceable in the courts, that would bind governments and protect citizens. And they had the great good fortune — an astonishing accident of history, really — to be able to negotiate with a lawyer who was prepared to put his faith in that ideal despite all that had happened to him and to his people in the past.

Nelson Mandela was released from prison in February, 1990. Two months later I had the opportunity to interview him. I asked whether he favored prosecution, in the future, of security policemen and others who had killed and maimed opponents of apartheid. He replied: "No, no, no. The whole spirit of negotiations would be against taking revenge on any particular individual. You think of a settlement as involving the entire community in support of the settlement. Otherwise it will be an intolerable situation."[25]

How was it possible, I asked, for him and others to show so little bitterness? He replied: "I don't think we are in any way unique. I think political prisoners throughout the world are very tolerant. They know that the people in government differ as individuals. We draw a distinction between the human beings who make the system work, and the system."[26]

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25. Interview of Nelson Mandela by author, conducted in Johannesburg, South Africa (Mar. 30, 1990).

26. *Id.*.

With all respect, as the British say when they are about to disagree, I think that Mr. Mandela was quite wrong in his modest dismissal of any special quality of forgiveness. I think he is unique. He has a belief in redemption of the human spirit that goes beyond anything I have seen elsewhere. In his book he describes a particularly brutal guard on Robben Island, noting several episodes of his cruelty. Then, at the end of the chapter, he mentions one time when this guard behaved in a normal human way — and Mandela comments that this showed there is good in everyone.[27] Or again, in discussing his first trial for treason, when he and the other defendants were acquitted by the three judges who presided, he says: "They rose above their prejudices, their education and their background. There is a streak of goodness in men that can be buried or hidden and then emerge unexpectedly."[28] So Nelson Mandela was prepared to negotiate a revolution by law and under law. Moreover, he was really devoted to the legal ideal despite the bitter experience he had had as a lawyer. When he was found guilty at the Rivonia Trial,[29] and was in prison waiting to see whether he would be sentenced to death, he used those days writing examination papers for an advanced law degree from London University.

In the talks that finally produced the new South Africa, Mr. Mandela's African National Congress was represented by a talented and imaginative lawyer, Cyril Ramaphosa. On the other side was the most sympathetic figure in the National Party leadership, Roelf Meyer. They negotiated a Constitution buttressed with a Bill of Rights and exceptionally detailed protections of individual liberty and equal treatment under the law. It is a total reversal of the old system: the law as servant instead of master. And the Constitution created, to enforce its terms, the new Constitutional Court. In addition to Arthur Chaskalson, who had specialized in civil liberties issues as a lawyer, two other of the eleven judges were practicing lawyers, six were judges on other courts and two were academics. Two of the eleven are women. Seven are white: a disparity inevitable because so few blacks had advanced to leading status in

27. Mandela autobiography, *supra* note 20, at 402-403.
28. *Id.*.
29. *Id.* at 305-330.

the law under apartheid. One seat on the court is vacant now, because Justice Richard Gold-stone is acting as chief prosecutor for the International War Crimes Tribunal for the former Yugoslavia. The Constitution provides for a temporary substitute, and he is the lawyer I have quoted, Sydney Kentridge. The first cases heard by the court, starting in February, 1995,[30] raised issues familiar to Americans: capital punishment,[31] for example, and the right of poor criminal defendants to have lawyers provided for their defense. What the Constitutional Court does will have considerable influence on what I think is a crucial set of questions: Will ordinary South Africans accept the idea of a legal culture? Will they see law not as an instrument of state oppression but as an independent force that can sometimes indeed be a shield against the state? Will they regard respect for law as a value important to their lives and their future?

Those questions are in the balance now. And no one knows that better than President Mandela. Opening the new session of Parliament, he warned against what he called "the forces of anarchy and chaos." He said, disruptive groups pushing their own objectives had "misread freedom to mean license." Among his targets were squatters who swoop down on planned housing developments just as the ground is prepared, put up shacks and claim the area as their own. Squatter camps are all too visible in South Africa now, some of them built right up against new apartment buildings. They are the result of decades of neglect and discrimination by the old regime, as hardly needs saying, but to build tin-and-cardboard shacks without water or sewage can hardly be the right solution for the new South Africa. Another phenomenon that fueled President Mandela's tough speech is the refusal of many residents in the black townships to pay rent and electricity bills. That tactic was adopted in the apartheid years as a weapon of defiance against discrimination. Today it is purely disruptive — unless people really believe what Mr. Mandela called "the wrong

30. The Court's first session opened on Feb. 16, 1995.

31. On June 6, 1995, the Constitutional Court unanimously held the death penalty unconstitutional. State v. T. Makwanyane and M. Mchunu, Case No. CCT/3/94 (6/6/95); *See*, Anthony Lewis, *A Culture of Rights*, N.Y. Times, June 9, 1995, at 29.

notion that the Government has a big bag full of money."

An even more worrying situation is conflict between black and white policemen. Change has come slowly to the command structure of police forces that were the enforcement arm of apartheid, and black policemen are resentful of what they say is disrespect on the part of white officers. The tension has broken out in several instances of physical confrontation: mutinies by blacks, the taking of white superior officers as hostages and one killing of a black warrant officer by white riot policemen who stormed a police station to put down a protest.

Not everyone in the black majority is as forgiving as President Mandela. Nor are all the whites who enjoyed a system where they were demigods as prepared as Roelf Meyer to work with blacks as equals. And the issue of how to treat the past remains a prickly one. A.N.C. members of the National Unity Government, set up as a transitional measure, agree with Mr. Mandela in not wanting to seek prosecutions for the crimes of apartheid. Instead, Minister of Justice Omar has brought in legislation to create a Truth and Reconciliation Commission that would try to find out what happened — how Steve Biko was killed, for example — and would grant amnesty to all who were prepared to tell the truth about what they did.[32] The idea is noble, but carrying it out will raise difficult problems. Lower-level agents who committed murders and the like have begun to express resentment at the fact that the higher-ups who gave the orders have so far not been named. Some prosecutions have begun, including one of a police colonel charged with ten political murders.

Then it was disclosed that 3,500 policemen and several high officials had applied for and been given amnesty en masse by the old Government just before the election that brought in the new. That aroused great outrage among the A.N.C. leaders. President Mandela himself spoke so harshly of the episode that the National Party Leader, F.W. de Klerk, threatened to resign from the Unity Cabinet. The dispute was patched over, but the question of how to deal with the horrors of the past

32. President Mandela signed the bill into law on July 19, 1995. *See* Boston Globe, July 20, 1995 at 6.

remains highly sensitive. The families of those who were killed want at least to know what happened. Dullah Omar, like President Mandela, believes that will be enough. The *Economist* of London came to the same conclusion, saying: "South Africans have only a limited appetite for prosecution."[33] But without doubt there are some difficult shoals to navigate. The *Economist* summed up the dilemma as follows:

> Too many questions about the apartheid years remain unanswered. Probing for the answers might create a vengefulness that South Africa has so far, by and large, avoided. But if the country does not now put on public record the brutalities of its past, it might store up for the future a racial resentment that might unravel the political settlement so painstakingly won.[34]

In addition to lost lives there is a tricky question of property. Over the years of National Party power, the Government removed millions of blacks from their homes because they were in what had been declared to be white areas. Those who were removed have been promised, within limits, that they will get their land back. But what of the innocent third party who may have purchased the property in the meantime? And where will the Government get the necessary funds for this ambitious act of justice?

In the areas I have mentioned, as in so many others, time is a critical factor. Will those who have suffered so much be willing to wait for the homes and jobs and land that nearly everyone now agrees they should have? Will they be patient? On the answer to that question may depend South Africa's chances for a prosperous and stable future. Prosperity and stability go together, for investors are reluctant to invest when they foresee or fear instability. And to speak of stability is to speak of law. The basis of confidence in the future of any society is the existence of a functioning legal system that commands public respect.

That is why President Mandela's speech at the opening of

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33. *Opening up South Africa's Past*, THE ECONOMIST, Feb. 4, 1995, at 35.
34. *Id.* at 36.

Parliament was so significant. A wise commentator, Sampie Terreblanche of Stellenbosch University, said of that event:

> We had so many law-and-order speeches in the past from the National Party that the term got a bad meaning. Now it is a completely new ball game — law and order to consolidate a legitimate system.

I think that comment goes to the heart of South Africa's condition today. At last it has a Government that commands legitimacy. Now legitimacy is in a race with unfulfilled expectations. I believe that South Africans will be patient: far more patient than we would be under like circumstances. But the Government will have to produce results for some people before long.

Those of us who care about South Africa, who regard it as "The Beloved Country" almost as if it were our own, cannot help thinking and worrying about its future. But we should not do that without pausing to recognize the miracle that has been achieved. Miracle is not too strong a word. For the first time anywhere, to my knowledge, a population group that exercised power in a country has given up that power peacefully, through law, for the larger good of the nation as a whole. That is reason enough for celebration, and for hope.