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No Easy Talk: South Africa and the Suppression of Political Speech

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D.S.K. Culhane

Abstract

This article will examine the direct and indirect regulation of political speech in a chronological manner, concluding with the statutory and regulatory environment under State President Frederik W. de Klerk, the Interim Constitution and the events leading up to the watershed April elections. The direct regulation of political speech in post-1948 South Africa has been effected primarily through the Suppression of Communism Act and its successor, the Internal Security Act of 1982, the Publications and Entertainments Act and its successor, the Publications Act, a series of miscellaneous legislation imposing various substantive restrictions on private and public speech, and finally, executive emergency regulations promulgated pursuant to the Public Safety Act. These statutes imposed strict limitations on the dissemination of information and opinion. They are addressed, in turn, in Section I of this article.

NO EASY TALK: SOUTH AFRICA AND THE SUPPRESSION OF POLITICAL SPEECH

*D.S.K. Culhane**

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INTRODUCTION

On Wednesday, December 22, 1993, an era came to a close in South Africa. On that date, the Parliament of the Republic of South Africa voted to approve the nation's first non-racial constitution (the "Interim Constitution").¹ With this vote, the government of South Africa committed itself to multi-racial elections,² bringing an end to forty-five years of white rule under the watch-

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1. Constitution of the Republic of South Africa Act 200 of 1993, GOVERNMENT GAZETTE [GG] No. 15,466, Jan. 28, 1994, at 1.

2. See Independent Electoral Commission Act of 1993; Electoral Act of 1993. Unless otherwise stated, all acts passed by the South African government and cited in this article are published in the GOVERNMENT GAZETTE OF THE REPUBLIC OF SOUTH AFRICA

ful eyes of a jealous National Party. The Interim Constitution, the hard-fought result of years of negotiation between the African National Congress (the "ANC"), other black South African resistance organizations, and a plethora of competing social and political organizations, sets the stage for the drafting of a new South African Constitution to be created by the winners of elections held in April, 1994. The African National Congress, as expected, was the easy victor, garnering 62.65% of the vote.³ Although the ANC has a clear majority in the new South African government, it does not control the requisite two-thirds of Parliament necessary to control the drafting of the new constitution. This article will examine the legal and political history of apartheid in South Africa and will focus on the white government's efforts to manipulate and control the political agenda in a nation where whites have always constituted a fraction of the total population.

The history of the institution of apartheid began more than forty-five years prior to the recent elections which heralded its demise. On May 26, 1948, white and coloured South Africans⁴

and reprinted in STATUTES OF THE REPUBLIC OF SOUTH AFRICA: CLASSIFIED AND ANNOTATED FROM 1910 (Durban, Butterworth Publishers (PTY) Ltd. 1993).

On Friday, May 6, 1994, the Independent Electoral Commission declared the voting substantially free and fair, despite the logistical problems and accusations of vote tampering, particularly in the Kwa Zulu - Natal province. Tony Freemantle, *It's Final, Free and Fair: ANC Nets 62.6% of Vote*, HOUSTON CHRON., May 7, 1994, at A1.

3. John Carlin, *ANC Wins Seven Out of Nine Provinces to Complete Landslide; Mandela Claims 18 Cabinet Posts with 6 for National Party and 3 for Inkatha - Mbeki Beats Ramaphosa for Deputy President*, INDEP. (London), May 7, 1994, at 12. The National Party received 20.39% of the votes cast, and the Inkatha Freedom Party finished in third place with 10.54%. *Id.*

4. The Population Registration Act of 1950 formalized the division of South Africa's population into three main racial groups: white, black (African), and Coloured (a catch-all category including Indians, Asians [except Japanese, who are deemed honorary whites], and persons of mixed descent). John Dugard, a noted South African legal critic, stated:

Appearance, social acceptance, and descent are the criteria used to determine a person's racial identity. A white person is one who 'in appearance obviously is a white person and who is not generally accepted as a Coloured person; or is generally accepted as a white person and is not in appearance obviously not a white person' provided that 'a person shall not be classified as a white person if one of his natural parents has been classified as a Coloured person or black.' In deciding whether a person is in appearance obviously white, 'his habits, education, and speech and deportment and demeanor in general shall be taken into account.' A black (African) person is one 'who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa.' A Coloured person is one 'who is not a white person or a black.'

went to the polls to elect a new Parliament. Going into the elections, Jan C. Smuts and his United Party⁵ held a comfortable majority of over fifty seats. Nonetheless, in a dramatic upset generated by widespread defections from the Labour⁶ and United Parties, Dr. Daniel F. Malan,⁷ the leader of the Afrikaner-dominated Herenigde National Party (the "HNP"), which had campaigned under the banner of apartheid, emerged victorious with a five seat majority.⁸ Thus began the era generally known as "apartheid."

The National Party's apartheid platform was largely an inchoate one that sought to rally Afrikaner farmers and white urban workers disillusioned with the post-war Smuts government.⁹

JOHN DUGARD ET AL., *THE LAST YEARS OF APARTHEID: CIVIL LIBERTIES IN SOUTH AFRICA* 9-10 (1992) (citations omitted).

5. The United Party was formed in 1933 with the merger of the South African and National Parties. Although intended to deal primarily with the economic crisis, incident to the worldwide depression and South Africa's decision to retain the gold standard, the United Party's coalition government, headed by General J.M.B. Hertzog, passed a number of race-based statutes. These acts included the Representation of Natives Act of 1936 (removing black voters from the common rolls in the Cape Province) and the Native Trust and Land Act of 1936 (which laid the groundwork for the Bantustan policies of the 1950s).

In 1939, Hertzog was replaced by Smuts, an Afrikaner long active in South African politics. See T.R.H. DAVENPORT, *SOUTH AFRICA: A MODERN HISTORY* 298-324 (1991).

6. The Labour Party was organized around urban, English-speaking, working-class whites and, initially, was concerned with the impact of low cost black labor on its constituents. As early as 1912, it formally adopted a policy of segregation in order to preserve "European civilization [and] the permanent maintenance of the white community in a position of political and economic supremacy." K.L. ROSKAM, *APARTHEID AND DISCRIMINATION* 92 (1960). By the 1940s and '50s, however, the party was moving to the left, reflecting the continuing division between English and Afrikaner voters. During the early 1950s, the Labour Party ardently opposed the National Party ("NP") and its apartheid legislation. MARGARET BALLINGER, *FROM UNION TO APARTHEID: A TREK TO ISOLATION* 40, 44, 285 (1969).

7. Dr. Malan was an early advocate of Afrikaner nationalism. From his pulpit as editor of the first Afrikaner daily, *Die Burger*, he worked to promote the identity and interests of the Afrikaner population. He wrote in 1912, "[w]e recognize the existence of an Afrikaner nationalism with which we are in accord, and of which we hope to be a representative and interpreter." RICHARD POLLAK, *UP AGAINST APARTHEID* 12 (1981). Malan's early career as a journalist was followed by a leading role in Afrikaner politics, culminating in his six-year term as Prime Minister from 1948 to 1954.

8. Out of a total of 150 seats, the Herenigde (reunited) National Party won 70 seats and its ally, the Afrikaner Party, a further nine. The two parties merged in 1951, forming the National Party, the old HNP in all but name. ANTHONY LEMON, *APARTHEID IN TRANSITION* 46-47 (1987).

9. SHULA MARKS & STANLEY TRAPIDO, *SOUTH AFRICA SINCE 1976: AN HISTORICAL PERSPECTIVE* 6 (1988) (on file with Queen Elizabeth House, Lincoln College, University of Oxford).

The term apartheid was first used in Parliamentary debate in 1944 when Dr. Malan stated that the government should "ensure the safety of the white race and of Christian civilization by the honest maintenance of the principles of apartheid and guardianship."¹⁰ Although South African society had long been based on racially discriminatory laws and traditions, the electoral success of the National Party represented a significant turning point. Since the Boer War¹¹ in the early years of the twentieth century, the Union of South Africa had been ruled by an uneasy coalition of English and Afrikaner political groups in which the English-speaking forces held the upper hand.¹² However, with the election of Dr. Malan as Prime Minister in 1948, electoral dominance shifted abruptly to the Afrikaner segment of the white population.

The National Party moved rapidly to consolidate its control of the state institutions in order to advance the interests of the Afrikaners, Afrikaans-speaking whites of predominantly Dutch descent, over those of other groups within the South African population. Prior to the inauguration of Nelson Mandela as President on May 10, 1994, the National Party enjoyed an uninterrupted tenure in power for more than forty-five years. In the wake of the 1948 election, the National Party's initial priority was defending its majority. It embarked on a policy of entrenching itself in power by manipulating electoral boundaries, incorporating South West African seats, and eliminating the coloured vote, as well as implementing other legislation designed to isolate and divide the black population.¹³ The National Party's assault on

10. LEMON, *supra* note 8, at 47.

11. The Boer War (1899-1902), fought between the British and the descendants of Dutch settlers (known derogatively by the British as "Boers" [in Dutch, 'farmers']), was the culmination of British efforts to seize control of the rich gold and diamond reserves which had been discovered in the Afrikaner republics of the Transvaal and the Orange Free State. GEOFFREY WHEATCROFT, *THE RANDLORDS: MEN WHO MADE SOUTH AFRICA* 207-18 (1985).

12. Following the Boer War, the English sought to unify their control of the African sub-continent through the creation, in 1910, of the Union of South Africa. The Union had a unitary government headed by a Governor-General who represented the British crown. Domestic administrative power was vested in a bicameral Parliament. The Prime Minister was invariably an Afrikaner, reflecting the majority of Afrikaners among the electorate, which was limited to white (and, in the Cape Province, a limited number of Coloured) males. DAVENPORT, *supra* note 5, at 220-25.

13. The first of these measures was the Asiatic Laws Amendment Act of 1948, repealing the franchise of Indians in Natal. This law was soon followed by the Separate Representation of Voters Act of 1951 and the High Court of Parliament Act of 1951,

the structures of the South African state generated vociferous, continuing opposition that in turn prompted far-reaching measures to suppress dissenters.¹⁴ South African civil rights were severely circumscribed in 1948, and a vast majority of the new restrictions fell upon the legally oppressed segments of the population. The restriction and regulation of speech, both written and oral, played a central role in the National Party's domination of South Africa. Although purportedly race-neutral in form and application, the regulation of speech was in practice a critical component of the National Party's program of racial oppression. Regulations inevitably were applied more consistently, comprehensively, and harshly against blacks than whites,¹⁵ and the regu-

which removed some 47,000 coloured voters from the general voter rolls in the Cape Province to a separate voter roll entitled to elect four white members to the House of Assembly and two white or coloured representatives to the Cape Provincial Council. However, the validity of the Voters Act was successfully challenged in court. *Harris and Others v. Minister of the Interior and Another*, 1952 (2) S.A. 428 (A.D.).

The elimination of the franchise for coloured voters ultimately required two subsequent acts of Parliament, the Senate Act 53 of 1955 and the South Africa Amendment Act of 1956, which reconstituted the Senate in order to generate the necessary two-thirds bicameral vote in Parliament required to alter coloured franchise rights. *Collins v. Minister of the Interior and Another*, 1957 (1) S.A. 552 (A.D.).

Other important early legislation included the Prohibition of Mixed Marriages Act of 1949 (prohibiting marriages between whites and non-whites); the Immorality Amendment Act of 1950 (prohibiting interracial sexual relations); the Population Registration Act 30 of 1950 (one of the two central legislative bases for 'apartheid,' it required the categorizing and registering of all inhabitants of South Africa by race as 'white,' 'coloured,' or 'native,' as well as ethnicity and residence); the Group Areas Act 41 of 1950 (the second principal cornerstone, further enumerating racial and ethnic categories and allocating specified geographical areas for their exclusive residence); the Internal Security Act 44 of 1950 (known as the Suppression of Communism Act); the Reservation of Separate Amenities Act of 1953 (mandating separate public amenities); and the Abolition of Passes and Coordination of Documents Act of 1952 (streamlining the existing 'pass laws' and providing a new identification book to be carried by all blacks).

14. See *Rex v. Abdurahman*, 1950 (3) S.A. 136 (A.D.) (successful protest against segregated railway facilities).

15. The black community, Gilbert Marcus has noted, "is treated more severely than other groups in the freedom of expression. . . . [N]ewspapers and other publications which serve the black community are only allowed to operate within narrowly circumscribed limits. When opposition is pitched at the level that it may become effective, it is suppressed. The effective articulation of opposition is often branded as the irresponsible abuse of freedom of expression." Gilbert Marcus, *Blacks Treated More Harshly*, 13 INDEX ON CENSORSHIP 14 (1984); see JOHN BREWER, *AFTER SOWETO: AN UNFINISHED JOURNEY* (1986) (noting the "severe harassment suffered by Black authors and journalists and the injudicious use of banning orders on newspapers and literary works").

lation of speech quickly moved to the center of South Africa's repertoire of instruments of repression and control.

This article will examine the direct and indirect regulation of political speech¹⁶ in a chronological manner, concluding with the statutory and regulatory environment under State President Frederik W. de Klerk,¹⁷ the Interim Constitution and the events leading up to the watershed April elections. The direct regulation of political speech in post-1948 South Africa has been effected primarily through the Suppression of Communism Act¹⁸ and its successor, the Internal Security Act of 1982,¹⁹ the Publications and Entertainments Act²⁰ and its successor, the Publications Act,²¹ a series of miscellaneous legislation imposing various substantive restrictions on private and public speech,²² and finally, executive emergency regulations promulgated pursuant to the Public Safety Act.²³ These statutes imposed strict limitations on the dissemination of information and opinion. They are addressed, in turn, in Section I of this article.

16. It should be noted that in addition to the comprehensive curtailment of political speech, South Africa also imposes 'moral' restrictions. See, e.g., Indecent or Obscene Photographic Material Act 37 of 1967.

17. P.W. Botha (Prime Minister, September 28, 1978 to September 5, 1984; State President, September 5, 1984 to August 14, 1989) retired seven months after a stroke undermined NP confidence in his leadership. Botha was succeeded, on September 20, 1989, by de Klerk, the leader of the NP, following a brief struggle for succession.

De Klerk rapidly established a new, reformist political agenda. At his inauguration, he stressed his intention to tackle discriminatory legislation, release political prisoners, end the state of emergency, and provide for a negotiated transfer of power to a new multi-racial government. DAVENPORT, *supra* note 5, at 443-44. On November 29, he announced his decision to reduce the State Security Council to the level of a Cabinet sub-committee and put an end to decisions "forced down from the top." *Id.* at 444.

On the February 2, 1990, de Klerk announced the unbanning of 33 organizations, including the ANC, the Communist Party of South Africa (the "CPSA"), and the Pan Africanist Congress (the "PAC"). Persons serving prison sentences on account of their membership in those organizations were released. Some emergency regulations, including a few that governed the media, were lifted. On February 11, Nelson Mandela was released after 27 years as a political prisoner. Following his release, he was appointed Deputy President of the ANC and became its chief spokesman.

18. Internal Security Act 44 of 1950, *repealed by* Act No. 138 of 1991.

19. Internal Security Act 74 of 1982.

20. Publications and Entertainments Act 26 of 1963.

21. Publications Act 42 of 1974.

22. See, e.g., Criminal Law Amendment Act 8 of 1953; Defence Act 44 of 1957; the Police Act 7 of 1958; Correctional Services Act 8 of 1959; Publications and Entertainment Act 26 of 1963, *as amended by* the Publications Act 42 of 1974; Publications Amendment Act 44 of 1979; Newspaper and Imprint Registration Act 63 of 1971.

23. Public Safety Act 3 of 1953; Public Safety Amendment Act 67 of 1986.

The extensive, substantive limitations on political speech, highlighted in Section I, were further supplemented by laws and government activities that were designed to inhibit the ability of South African citizens to disseminate information and opinions deemed contrary to the interests of the South African state. These measures, although not specifically tailored to the regulation of speech, played an important role in the suppression of political opposition in South Africa. They are assessed in Section II of this article.

Central to the government's indirect regulation of speech has been its power to ban and detain individuals without access to the press, its ability to legally harass and persecute individuals and organizations perceived as threats to the interests of the state, and the government's incalculable success at promoting self-censorship through the accumulation of laws and regulations discussed throughout this paper. Despite the seemingly monolithic distribution of power in South Africa over the years, the legal system has been far from static. However, earnest efforts to reconstitute the South African state have occurred only in the last four years, under the mutual stewardship of State President Frederik W. de Klerk and Nelson Mandela,²⁴ the head of the multi-racial African National Congress, the oldest and most powerful opposition group in South Africa.²⁵ The two parties conducted protracted, ongoing negotiations, which culminated in a *de facto* and, beginning in September 1993,²⁶ a *de jure* power-

24. Trained as an attorney, Mandela became active in the African National Congress Youth League in the late 1940s. Following the banning of the ANC in 1960, Mandela went underground and established a new, militant wing of the ANC, *Umkhonto we Sizwe* (the "MK") (translated as "Spear of the Nation"), aiming to sabotage strategic government installations while sparing human lives. See DAVENPORT, *supra* note 5, at 364.

Mandela was captured and imprisoned by the government in 1962, and freed in February of 1990. James Gerstenzang, *Bush Wants to Reward de Klerk Reforms*, L.A. TIMES, June 21, 1990, at A19. During his incarceration, he became a legendary figure in the opposition movement. Since his release, he has been the principle ANC spokesman and negotiator. On May 10th, 1994 Mandela was officially inaugurated as de Klerk's successor to the Presidency of the Republic of South Africa. Bashorun Abioka, *Time to Gun for the Military*, GUARDIAN, June 17, 1994, at 24.

25. Founded in 1912 by Western-educated black leaders as the South African Native National Congress ("SANNC"), the ANC marked the ascendancy of the opinion among middle class blacks that reform would be achieved best through acts of Africans rather than sympathetic whites. The SANNC became the African National Congress in 1923. The ANC is committed to a multi-racial vision of South Africa.

26. On September 7, 1993, the Nationalist Party agreed to enter into a formal

sharing arrangement. The government and the ANC endorsed the Interim Constitution, drafted during the constitutional negotiations at the World Trade Center in Kempton Park outside Johannesburg on November 18, 1993 and then ratified on December 22, 1993. The election of Nelson Mandela will lead to further constitutional change, as the new Members of Parliament strive to complete a new Constitution within the two-year framework implemented under the Interim Constitution. Section III will consider the positions of the ANC and the National Party and will examine the Interim Constitution and seek to achieve a tentative assessment of the post-election prospects for free speech in a democratic South Africa. Finally, this article will present general conclusions regarding South Africa's history of political repression and the impact of the state's suppression of political speech.

I. DIRECT REGULATION OF SPEECH

A. *The Suppression of Communism Act*

After assuming power, the National Party found it necessary to respond to widespread political opposition,²⁷ including, in particular, the nationwide Defiance Campaign²⁸ organized by the ANC, and a series of uprisings and unrest throughout the country.²⁹ The first major legislation introduced by the National Party, designed to suppress extra-parliamentary opposition, was

power sharing institution, the Transitional Executive Council ("TEC"). This development was formally approved by Parliament on September 23, 1993, and the TEC held its first meetings in early December.

27. In December 1951, the ANC and the South African Indian Congress established a Joint Planning Council to organize a civil disobedience campaign for the repeal of discriminatory legislation. Directed against pass laws, the Group Areas Act, the Separate Representation of Voters Act, the Suppression of Communism Act, and the Bantu Authorities Act, the Defiance Campaign was launched on June 26, 1952. BRIAN BUNTING, *THE RISE OF THE SOUTH AFRICAN REICH* 199-207 (1969).

28. The government responded to the Campaign by enacting the Criminal Laws Amendment Act (prohibiting the violation of any law by way of protest or as part of a campaign against any law, and subjecting violators to a R300 fine and/or three years imprisonment and/or ten lashes) and the Public Safety Act (giving the government the power to proclaim a state of emergency for a period of up to twelve months).

29. See GOVAN MBEKI, *SOUTH AFRICA: THE PEASANTS REVOLT* 116-18, (1964) (citing widespread rural as well as urban resistance to forced removals under Group Areas Act, to pass controls and new Bantu Authorities). In the Pondo revolt against the Bantu Authority's choice of an unpopular contender for Chief in early 1960, over 4,500 people were detained and more than 2,000 people were eventually brought to trial. *Id.*

the Suppression of Communism Act.³⁰ Presented as an effort to deter communism, this act was clearly applicable to any movement that sought to promote racial equality.³¹ Communism was defined loosely in the act to include any organization

which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder, by unlawful acts or omissions or by threats of such acts or omissions or by means which include the promotion, of disturbances or disorder, or such acts or omissions or threats.³²

Another definition provided that "if the Government passes a law which discriminates against non-Europeans and, therefore, causes a feeling of hostility between Europeans and non-Europeans, that is not 'communism,' but if anybody protests against that law in a manner which causes disorder, that is 'communism.'" ³³ The extensive reach of the Suppression of Communism Act was amply illustrated by the prolonged litigation, known as the South African Treason Trial, which started with the mass arrest of some 140 people in December 1956, extending into the 1960s.³⁴ In addition to banning the South African Communist Party,³⁵ this act conferred upon the President the power to declare other organizations unlawful if satisfied that the organization was

an organisation for the promotion of communism, or that one of its purposes is to promote communism, or that it en-

30. Internal Security Act 44 of 1950; *see* INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA: HUMAN RIGHTS AND THE RULE OF LAW 66 (1988) [hereinafter HUMAN RIGHTS AND THE RULE OF LAW].

31. Internal Security Act 44 of 1950.

32. *Id.*

33. HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 30, at 51 (citation omitted).

34. *Id.*

35. The CPSA was founded by whites, some of whom had attempted to organize urban black workers in 1921. A relatively small, but well organized body, the CPSA adhered to the doctrine that working class unity transcended racial divisions. The racist overtones of the 1924 general election, however, prompted the decision that "our main revolutionary task is among the natives." TOM LODGE, BLACK POLITICS IN SOUTH AFRICA SINCE 1945 7 (1983).

By 1928, three members of the central committee were black as were the majority of the party's 1,750 members. *Id.* at 9. Following the CPSA's commitment in 1928 to "an independent native republic as a stage towards a workers' and peasants' republic," the CPSA and the ANC entered into a close and long-lasting alliance. *Id.* The CPSA, while in exile, was able to maintain a small, albeit underground presence in South Africa, until being officially recognized in 1989. Members of the CPSA central committee are still prominent in the ANC and its new government leadership. *Id.*

gages in activities which are calculated to further the achievement of any of the objects referred to in the definition of communism, or that it is an organisation controlled by another which does any of the things already enumerated, or, finally, that its purpose is to carry on the activity of any banned organisation.³⁶

It soon became clear that the State President had wide discretion when applying the Suppression of Communism Act. The act, in a series of court cases, was interpreted as rendering a Presidential opinion conclusive if it stated that the requisite illicit purposes or activities existed.³⁷ Moreover, in *S.A. Defence and Aid Fund v. Minister of Justice*,³⁸ the Appellate Division held that an organization that had been declared unlawful did not have the right to appeal or otherwise oppose the President's decision.³⁹ Once an organization was declared unlawful, its property vested automatically in a liquidator appointed by the Minister of Justice, and its members, as well as non-members, were prohibited from acting in any way which might advance the aims of the proscribed organization. Acts, as circumscribed as bearing tokens of membership in such organizations, were illegal.⁴⁰ Citizens received prison sentences for displaying official photographs evincing membership in a banned organization⁴¹ or for merely being in possession of documents indicating prior membership.⁴² One of the tasks of the appointed liquidator was to compile a list of all former officers and active supporters of the organization. Although individuals were permitted to challenge their inclusion on this list, if that person remained on the list "[h]is right to participate in the public life of the country [was] abolished by a stroke of the ministerial pen and he [was] thereby condemned, without open trial, to a ghostly social existence."⁴³ It became a criminal offense to record, reproduce, print, publish, or disseminate any speech, writing, utterance, or statement made or pur-

36. Internal Security Act 44 of 1950 § 2(2).

37. See *Sachs v. Minister of Justice*, 1934 A.D. 11; *Jeewa v. Donges N.O.*, 1950 (3) S.A. 414 (A.D.); *Minister of the Interior v. Bechler*, 1948 (3) S.A. 409 (A.D.); *S.A. Defence and Aid Fund v. Minister of Justice*, 1967 (1) S.A. 31 (C), 35.

38. 1967 (1) S.A.L.R. 263 (A.D.).

39. *Id.* at 275.

40. Internal Security Act 44 of 1950 § 3(1)(a)(ii).

41. See, e.g., *State v. Calata*, 1961 (4) S.A. 303 (E).

42. *S. v. Myende*, 1962 (4) S.A. 426 (N).

43. ANTHONY S. MATHEWS, *LAW, ORDER AND LIBERTY IN SOUTH AFRICA* 66 (1972).

ported to have been made by the person who was listed.⁴⁴ In addition, the listed individual was required to notify the police of any change in residence or employment.⁴⁵

In conjunction with the Publications and Entertainments Act⁴⁶ and its successor, the Publications Act,⁴⁷ the Suppression of Communism Act was the principal mechanism for the restriction of political speech. The Suppression of Communism Act and its amending legislation were consolidated and updated in the Internal Security Act of 1982.

B. *The Internal Security Act of 1982*

The Internal Security Act of 1982,⁴⁸ the successor to the Suppression of Communism Act, consolidated most of the existing security legislation in South Africa. Section 5(1) set forth sweeping provisions for the prohibition of any periodical or publication that:

- (a) serves *inter alia* as a means for expressing views or conveying information . . . calculated to endanger the security of the State or the maintenance of law and order;
- (b) professes, by its name or otherwise, to be a publication for propagating the principles or promoting the spread of communism;
- (c) serves *inter alia* as a means for expressing views or conveying information . . . calculated to further the achievement of any of the objects of communism;
- (d) is published or disseminated by, or under the direction or guidance of, any organisation which has been declared an unlawful organisation . . .;
- (e) serves *inter alia* as a means for expressing views propagated by an organisation [declared unlawful];
- (f) serves *inter alia* as a means for expressing views or conveying information . . . calculated to cause, encourage or foment feelings of hostility between different population groups of the Republic; or

44. Internal Security Act 44 of 1950 § 11(g).

45. *Id.*; Criminal Procedure Act 56 of 1955, *repealed by* Act No. 51 of 1977.

46. Publications and Entertainments Act 26 of 1963.

47. Publications Act 44 of 1979.

48. Internal Security Act 74 of 1982.

- (g) is a continuation of, or substitution for, whether or not under another name, any periodical or other publication the printing, publication or dissemination of which has been prohibited in terms of this section.⁴⁹

Subsection (f), in particular, represented an extension of the traditional restrictions on political expression. In addition, section 66 authorized the responsible minister or the administrator of a province to restrict access to information if its production to a court or commission of enquiry would prejudice state security. Such a claim, if made in proper form, was conclusive and no court could order or permit the information to be given as evidence. The provisions of the Internal Security Act of 1982 were, in turn, supplemented by the State of Emergency declared in 1985, pursuant to the Public Safety Act,⁵⁰ which further enhanced the government's censorship powers.

C. *The Publications and Entertainment Act*

The Publications and Entertainments Act⁵¹ established the Publications Control Board (the "PCB"), a government agency charged with reviewing all publications and public entertainments. Distribution or possession of any document deemed "undesirable"⁵² by the PCB was a criminal offense. Section 5 of the Publications and Entertainments Act provided that a document was undesirable if it was blasphemous or offensive to the religious feelings of a section of the inhabitants of the Republic;⁵³ if it was indecent, obscene, or offensive or harmful to public morals;⁵⁴ or if it was harmful to relations between sections of the inhabitants of the Republic and prejudicial to the safety of the state, the peace or good order.⁵⁵ The language and criteria for determining the undesirability of a publication or object were retained by the Publications Act⁵⁶ and will be considered in more detail in the next section of this article.

49. *Id.* § 5(1).

50. Public Safety Act 3 of 1953.

51. Publications and Entertainments Act 26 of 1963.

52. *See* Buren Uitgewers (Edms.) Bpk. en'n Ander v. Raad van Beheer oor Publikasies, 1975 (1) S.A. 379 (C) (defining and discussing the term 'undesirable').

53. Publications and Entertainments Act § 5(2)(b).

54. *Id.* §§ 5(2)(a), 6.

55. *Id.* § 5(2)(d).

56. Publications Act 42 of 1974.

Section 8(1)(d) of the Publication and Entertainments Act provided that no person shall "possess any publication or object, if the possession of that publication or object has been prohibited under section 9(3) and that prohibition has been made known by notice in the [*Government*] *Gazette*."⁵⁷ Decisions by the PCB were reviewable by the courts and could be vacated by the Supreme Court. J.C.W. van Rooyen, the Director of the Publications Appeal Board in the 1980s, noted that the Supreme Court regularly set aside the decisions of the Publications Control Board.⁵⁸ However, the appeal process was costly, resulting in many books remaining banned.⁵⁹ In its ten years of existence, the Publications and Entertainments Act was responsible for the banning of more than 8,500 publications.⁶⁰

D. *The Publications Act*

According to the Publications Act,⁶¹ publication or distribution of any document⁶² (not including newspapers published by publishers who are members of the Newspaper Press Union of South Africa (the "NPU"),⁶³ or posters advertising such newspa-

57. Publications and Entertainments Act § 8(1)(d). For a definition of "publication or object," see Publications Control Board v. Central News Agency, Ltd., 1970 (3) S.A. 479, 483-88 (A.D.); Pillay v. Publications Control Board, 1971 (4) S.A. 208 (D).

58. J.C.W. VAN ROOYEN, CENSORSHIP IN SOUTH AFRICA: BEING A COMMENTARY ON THE APPLICATION OF THE PUBLICATIONS ACT 14 (1987).

59. *Id.* at 14.

60. Marcus, *supra* note 15, at 15.

61. Publications Act 42 of 1974.

62. See *S. v. Waldbaum*, 1973 (3) S.A. 181 (T) (prohibiting production of any material "intended to be exhibited in public"). Whether an object was "intended to be exhibited in public" depended "not upon the subjective intention of some particular person . . . but upon objective criteria" including "the nature and quality" of the object, its "public appeal," and "by whom it was produced and distributed." *Id.* at 182 (citing *S. v. Film Hire (Pty.) Ltd. and Others*, 1972 (3) S.A. 697, at 702).

63. All NPU member publications subscribed to the Media Council's Code of Conduct. The Media Council, the successor to the Press Council, was a "voluntary self-disciplinary tribunal." The South African Media Council was formed on September 1, 1983, in order to side-step the direct control of the press as advocated by the Steyn Commission (1980 and 1982). P.D. Diederichs, *The Printed Media in the Republic of South Africa*, in SOUTH AFRICAN CONSULATE GENERAL, SOUTH AFRICAN BRIEFING PAPER NO. 30 4 (1990). For a discussion of the Steyn Commission and the Media Council, see DAVENPORT, *supra* note 5, at 543, 545.

The Media Council adjudicated complaints that press reports or photographs were factually incorrect, contained unfair comment, endangered state security or law and order, were harmful to race relations, were obscene or lascivious, or violated an individual's privacy. *The Media: South Africa 1991-1992*, in PUBLICATIONS DIVISION OF THE SOUTH AFRICAN COMMUNICATION SERVICE, OFFICIAL YEARBOOK OF THE REPUBLIC OF

pers)⁶⁴ could be prohibited if the document was deemed "undesirable."⁶⁵ With the exception noted above, the Publications Act applied to all newspapers published by publishers who were not members of the Newspaper Press Union of South Africa,⁶⁶ as well as all books, periodicals, pamphlets, posters, and other printed matter; other writings which were duplicated or made available to the public; all drawings and photographs; figures, casts, carvings, or statues; and all records or other objects in or on which sounds were recorded for reproduction.⁶⁷

The Publications Act established extensive criteria for determining whether a publication or document⁶⁸ was "undesirable."⁶⁹ Under section 47(2), a publication or document was deemed to be "undesirable" if it or any part of it

- (a) is indecent or obscene or is offensive or harmful to public morals;
- (b) is blasphemous or is offensive to the religious convictions or feelings of any section of the inhabitants of the Republic;
- (c) brings any section of the inhabitants of the Republic into ridicule or contempt;
- (d) is harmful to the relations between any sections of the inhabitants of the Republic;
- (e) is prejudicial to the safety of the State, the general welfare or the peace and good order;

SOUTH AFRICA. The Council was empowered to reprimand publications and journalists, require published retractions, and impose fines not exceeding R10,000. Diederichs, *supra*, at 4.

The Media Council effectively functioned as a civil counterpart to the Publications Act. The objectivity and independence of the Council were at best suspect. For example, in December of 1990, Professor van Rooyen, former chairman of the Publications Appeal Board, was elected chairman of the Council.

64. Publications Act § 47(2).

65. *Id.* § 8.

66. Although the majority of South African newspapers were members of the NPU, there were a number of important exceptions. The "alternative" newspapers, including *New Nation*, *Umsebenzi* (*The Worker*, newspaper of the CPSA), and the *Weekly Mail*, all refused to join.

67. KELSEY WILLIAM STUART, *THE NEWSPAPERMAN'S GUIDE TO THE LAW* 13 (1982). A "publication" is an object that is either "published or intended to be published." *S. v. Russell*, 1981 (2) S.A. 21 (C), 31.

68. *Id.*

69. The Cape Provincial Division has noted that once a party has been charged with possession of an undesirable publication, the undesirability of the publication is not subject to judicial inquiry. *Kahanowitz v. Regional Magistrate, Cape Town, and Another*, 1979 (2) S.A. 227 (C), 229-30.

- (f) discloses with reference to any judicial proceedings —
 - (i) any matter which is indecent or obscene or is offensive to public morals;
 - (ii) any indecent or obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals.⁷⁰

Studies indicated that “by far the majority of publications found to be undesirable each year were prohibited in terms of § 47(2)(e) of the Act.”⁷¹

The Publications Act clearly cast a wide net. The standards established by the Publications Act were subjective and easily triggered. If the publication or object was “undesirable,” then the party who produced or distributed⁷² that material was subject to the provisions of section 8, which provided that no person should:

- (i) produce an undesirable publication or object; or
- (ii) distribute a publication or object, if that publication or object is in terms of a decision of a committee appointed in terms of section 4 undesirable and that decision has been made known by notice in the *Government Gazette*; or
- (iii) distribute a publication or object in conflict with any condition imposed under the Act in respect of the distribution thereof, if such imposition has been made known by notice in the *Government Gazette*; or
- (iv) except on the authority of a permit issued under section 12(2), distribute any edition or publication or object, if the distribution of that edition has been prohibited under section 9(2) and that prohibition has been made known by notice in the *Government Gazette*; or
- (v) possess any publication or object, if the possession of that publication or object has been prohibited under section 9(3) and that prohibition has been made known by notice in the *Government Gazette*; or
- (vi) except on the authority of a permit issued under section 12(2), import any publication or object, if the importation of that publication or object has been prohibited under section 9(4) and that prohibition has been made known by notice in the *Government Gazette*.

The appropriate definition of “undesirable” was the focus of

70. Publications Act 42 of 1974 § 47(2).

71. Marcus, *supra* note 15, at 19.

72. Publications Act § 47(4).

considerable discussion. Kelsey Stuart commented that in practice "what is considered undesirable is certain political material particularly of a communistic nature, material which places an accent on violence, pictures and stories about the intermingling of Whites and members of other racial groups and material likely to cause disharmony amongst the various racial groups in the Republic."⁷³ John Dugard reached a similar conclusion:

[The Publications Board] has not hesitated to prohibit . . . works containing trenchant criticism of institutions of the State (particularly the police and the defence force), the administration of justice and the politico-legal apparatus of separate development; sympathetic treatment of black liberation movements and radical opponents of the *status quo*; and sensitive accounts of inter-racial sexual relations.⁷⁴

Application of the Publications Act was somewhat tempered by the judicial decision that the determination of undesirability should consider the reactions of the "probable reader."⁷⁵

The Publications Act provided for three autonomous bodies to police and enforce it. The Directorate of Publications, under the auspices and general supervision of the Minister of Home Affairs, was the administrative agency that applied the Publications Act.⁷⁶ The second body was made up of publications committees which reviewed controversial objects or publications.⁷⁷ Finally, the Publications Appeal Board (PAB), whose fourteen members were appointed by the State President, reviewed and adjudicated committee decisions subject to appeal.⁷⁸

Moreover, given the fact that the vast majority of queries regarding the desirability of an object or publication were initiated by persons with no vested interest in the desirability of the object or publication, appeals were greatly limited.⁷⁹ The Publi-

73. STUART, *supra* note 67, at 14-15.

74. JOHN DUGARD, WHAT HAPPENED TO BURGER'S DAUGHTER OR HOW SOUTH AFRICAN CENSORSHIP WORKS 72 (1980).

75. *Human en Rousseau Uitgewers (Edms.) Bpk. v. Snyman, N.O.*, 1978 (3) S.A. 836. It should be noted that this "probable reader" standard, welcomed by van Rooyen as a sign of moderate, sophisticated censorship, was inherently subjective. As in *Human*, it was generally applied to works by Afrikaners. In reality, therefore, the standard resulted in stricter enforcement against the works of non-Afrikaners.

76. Publications Act §§ 2-3.

77. *Id.* § 4.

78. *Id.* §§ 13, 35, 35(a)-(b).

79. Marcus, *supra* note 15, at 16.

cations Act provided for very limited post-PAB review.⁸⁰ Subsequent appeals were heard by a panel of three Supreme Court judges who could overrule the finding of the PAB only if they found that the PAB acted in bad faith. Only upon finding that the PAB acted in bad faith could the panel consider the undesirability of the publication or film.⁸¹

Objects or publications became subject to review in several ways. A private individual could urge the Publications Directorate to find a work undesirable and, thereby, subject the work to mandatory review.⁸² Moreover, if no private party challenged the desirability of a work, the Minister of Home Affairs or the Publications Directorate, on its own initiative, could require review. Any film or videocassette, by contrast, had to receive approval prior to screening.⁸³

Section 17 of the Publications Act conferred broad powers upon the state to "enter, examine and seize" where there were reasonable grounds to suspect that an undesirable publication or object was being produced, exhibited, or hired out to the public. The vast majority of challenges to the desirability of publications were commenced by the state. During the period between 1976 and 1982, five to nine percent of all annual challenges originated from the public, eight to ten percent were initiated by publishers, and seventy-eight to eighty-four percent were initiated by police and customs officials.⁸⁴

With regard to the specific criteria for undesirability, a "section of the population" was defined as "a substantial number of people who as a result of an inherent characteristic or characteristics regard themselves as a distinctive community and are accepted as such by the rest of the community."⁸⁵ Although the PAB regarded general religious denominations as sections of the population, a specific church denomination was not necessarily so distinct from others with similar religious convictions that it could be regarded as a section by itself.⁸⁶ In addition, the application of the terms "ridiculing" or "bringing into contempt"

80. Publications Act § 36.

81. *Id.* §§ 38, 38(a), 39.

82. VAN ROOYEN, *supra* note 57, at 90-91.

83. Publications Act §§ 19-22.

84. Marcus, *supra* note 15, at 16.

85. VAN ROOYEN, *supra* note 57, at 90-91.

86. *Id.* at 91.

were interpreted rather narrowly. The courts determined that ordinary scorn or political criticism was not sufficient for a finding of undesirability. The material had to rise to the level of degrading, humiliating, or ignominious.⁸⁷

It should be noted that the sanctions prescribed by the Publications Act were open-ended. The author or printer of a publication was subject to prosecution if a committee found the publication to be undesirable at some date after distribution had taken place.⁸⁸ It is significant, as one commentator noted, that "[a]lthough one might argue that this is an extremely strict provision, it must be borne in mind that the accused must at least foresee the possibility that what he is producing might be undesirable (*dolus eventualis*)."⁸⁹ It seems clear that Parliament welcomed the potential deterrent effect of this law: if it was able to induce self-censorship, the Parliament was saved the trouble of post-hoc censorship and banning. This deterrent effect was sufficient enough, in 1988, to prevent the screening of the film *Cry Freedom*.⁹⁰ Although the film was not explicitly banned, the government refused to assure cinemas and distributors that they would not be prosecuted under the Publications or Internal Security Acts.

Similarly, as a black-oriented, politically-progressive press evolved over the last twenty years,⁹¹ it was particularly susceptible to government pressures.⁹² For instance, the first issue of *Staf*

87. *S. v. Tanteli*, 1975 (2) S.A. 772 (T), 774 (E).

88. VAN ROOYEN, *supra* note 57, at 18.

89. *Id.* at 18.

90. *Cry Freedom* was a dramatization of the life of Steven Biko, a leader in Port Elizabeth. Biko was banned and eventually killed at the hands of the South African Police. See generally STEVEN BIKO, *I WRITE WHAT I LIKE* (1978); GAIL GERHART, *BLACK POWER IN SOUTH AFRICA* (1978); BARUCH WILSON, *YEAR OF FIRE, YEAR OF ASH: THE SOWETO REVOLT: ROOTS OF A REVOLUTION* (1979); JOHN KANE-BERMAN, *SOWETO: BLACK REVOLT, WHITE REACTION* (1978).

91. Members of this group include David Philip, Ravan Press, Ad Donker, Skotaville Press, and the newspapers, *New Nation* and *Weekly Mail*.

92. The *New Nation*, sponsored by the South African Catholic Bishop's Conference, is edited by Zwelakhe Sisulu, the son of Walter Sisulu, an ANC leader imprisoned with Nelson Mandela. The *New Nation*, under the 'apartheid' government, was given repeated warnings and bannings by the state. *Newspapers Protest at Reporting Restrictions*, ECONOMIST PUBLICATIONS LTD., May 7, 1987. In addition, banning restrictions were imposed on the newspaper's reporters. *Id.*

The *Weekly Mail* was founded by former editors of the liberal *Rand Daily Mail* after the latter was closed down by its owner, Anglo American Corporation. Gavin Bell, *Press Challenge in South Africa*, TIMES (London), June 21, 1990. The editors and reporters of

frider, published by Ravan Press, was banned for undermining the authority and image of the police, using "offensive language" calculated to harm "Black-White relations," and publishing material prejudicial to peace and good order. In contrast, the next four issues were not found to be undesirable due to voluntary censorship by the publishers.⁹³

Finally, sections 37 and 37A of the Publications Act dealt with "contempt of commission." The former provided that no person should insult, disparage, or belittle any member of the Publications Appeal Board, or prejudice, influence, or anticipate the proceedings or findings of the board, or do anything in relation to the appeal board which, if done in relation to a court of law, would constitute contempt of court.⁹⁴ Section 37A similarly proscribed influencing, prejudicing, or anticipating the decisions of the directorate or any committee. Conviction under either of these sections was punishable by six months imprisonment or a fine of up to R500, or both.⁹⁵ The application of these contempt provisions was defined by the court in *Erasmus v. S. A. Associated Newspapers*,⁹⁶ which was cited with approval in *S. v. Sparks N.O. and Others*.⁹⁷

E. Newspaper and Imprint Registration Act

The Newspaper and Imprint Registration Act⁹⁸ provided for the registration of newspapers and imprints and governed certain duties of printers in connection with printed matter other than newspapers. Newspapers were defined as "periodical publication[s] published at intervals not exceeding one month and consisting wholly or for the greater part of political or other news or of articles relating thereto or to other current topics,

the *Daily Mail* were prosecuted for exposés on prison conditions in the 1960s, its coverage of the Muldergate scandal in the 1970s, and its critiques of the government in the 1980s. The *Daily Mail's* editor, Allister Sparks, was particularly known for his opposition to apartheid. The *Weekly Mail*, like the *New Nation*, has endured frequent government warnings, prosecutions, and bannings, although its publication was interrupted less frequently than the *New Nation*.

93. BREWER, *supra* note 15, at 314-15.

94. Publications Act § 37(1)(a)-(c).

95. *Id.* § 43(2).

96. *Erasmus v. S.A. Associated Newspapers*, 1979 (3) S.A. 447 (W).

97. *S. v. Sparks N.O. and Others*, 1980 (3) S.A. 952 (T.P.D.); see Smalberger and Another v. Cape Times Ltd. and Others, 1979 (3) S.A. 457 (C).

98. Newspaper and Imprint Registration Act 63 of 1971, as amended by Act 98 of 1982 and Act 138 of 1991.

with or without illustrations, but did not include any publication not intended for public sale or public dissemination."⁹⁹ The act prohibited the publication of any unregistered newspaper, and prescribed procedures for registration.¹⁰⁰ Printers of other matter, not including newspapers, were required to print their name and address on such printed matter.¹⁰¹ Where there was any doubt as to whether printed matter was intended for distribution, the printer had the burden of proving that it was not.¹⁰²

Registering a newspaper required the payment of a fee, originally R20,000 and later increased to R40,000.¹⁰³ If a newspaper was subsequently prohibited under section 6, the deposit was forfeited at the discretion of the Minister of the Interior. Punishment for violations of the Act included six months imprisonment, a R500 fine, or both.¹⁰⁴ Writing in 1985, one author¹⁰⁵ noted how, even without formal newspaper censorship, the press was nevertheless subjected to an estimated 100 laws and regulations designed to curb their political activism.¹⁰⁶

F. Miscellaneous Substantive Restrictions

Literally dozens of statutes and regulations under apartheid contained procedural and substantive limitations on information that could be published or otherwise disseminated. Important among these many legislative acts were: the Correctional Services Act (the "Prisons Act");¹⁰⁷ the Police Act;¹⁰⁸ the Official Secrets Act;¹⁰⁹ the Terrorism Act;¹¹⁰ and acts governing military

99. *Id.* § 1(1). See *S. v. Griffiths (Pty) Ltd. and Another*, 1974 (1) S.A. 154 (N.P.D.) (printed matter); *S. v. Davidson and Bernhardt Promotions (Pty) Ltd. and Others*, 1983 (1) S.A. 676 (T.P.D.); *Ritch v. Jane Raphaely & Associates (Pty) Ltd. and Another*, 1984 (4) S.A. 334 (T.P.D.) (newspaper).

100. Newspaper and Imprint Registration Act §§ 2-8(a).

101. *Id.* § 9; see *S. v. Griffiths (Pty) Ltd. and Another*, 1974 (1) S.A. 154, 158 (N.P.D.).

102. Newspaper and Imprint Registration Act § 11 (2); see *S. v. Davidson and Bernhardt Promotions (Pty) Ltd. and Others*, 1983 (1) S.A. 676, 683 (T.P.D.).

103. Newspaper and Imprint Registration Act §§ 4, 13; Suppression of Communism Act § 6, as amended by Act 76 of 1962.

104. Newspaper and Imprint Registration Act § 11.

105. This commentator is Mr. Uys, a former political editor of the Johannesburg *Sunday Times* and South African correspondent of the *Guardian* and *Observer*.

106. Stanley Uys, *A Silenced Voice*, 14 INDEX ON CENSORSHIP 7 (1985).

107. Correctional Services Act 8 of 1959.

108. Police Act 7 of 1958.

109. Official Secrets Act 16 of 1956, repealed by Protection of Information Act 84 of 1982.

and energy production.

The Prisons Act proscribed making or publishing a sketch or photograph of any prison, prisoner, or group of prisoners without the written authority of the Commissioner of Correctional Services.¹¹¹ This restriction was clearly designed to deter the press from reporting the treatment of prisoners, the prevalence of political resistance, and the severity of the state's response to political opposition. A number of newspapers were prosecuted under the Prisons Act for publishing photographs of prisoners.¹¹²

These restrictions, in turn, prompted a number of publications to emphasize the comprehensive restrictions on the press. Alternative, opposition newspapers such as the *Weekly Mail* and the Afrikaans *Vrya Weekblad*, regularly printed blank spaces and blacked out copy in their editions.¹¹³ Furthermore, these newspapers frequently distributed photographs and posters of Mandela, Sisulu, and other imprisoned leaders with the word "banned" printed on them, and hence obscuring their faces in ostensible compliance with the Prisons Act. The Prisons Act similarly proscribed publishing or causing to be published, "any false information concerning the behavior or experience in prison of any prisoner or ex-prisoner or concerning the administration of any prison"¹¹⁴ or "any writing, statement, life story or biographical sketch of a prisoner unless the writing, statement, life story or biographical sketch was admitted in evidence at the trial of that prisoner."¹¹⁵ Violations of these provisions were punishable by a fine of up to R8,000 or two years imprisonment,

110. Terrorism Act 83 of 1967, *repealed by* Act 138 of 1991.

111. Correctional Services Act 8 of 1959 § 44(e); *see* S. v. Paterson, 1977 (1) S.A. 27 (E.C.D.); S. v. Bestall, 1986 (3) S.A. 761 (C.P.D.); Attorney-General, Cape v. Bestall, 1988 (3) S.A. 555 (A.D.).

112. For example, the newspapers, the *Star* and *Sowetan*, were prosecuted in 1989 for publishing pictures of anti-apartheid leaders two days before they left prison. *South Africa: Media Restrictions in South Africa Are Expected to be Lifted*, UK PRESS GAZETTE, Dec. 11, 1989, at 18.

113. *South Africa: Censors Crack Down on Weekly Mail and Vrya Weekblad Newspapers*, UK PRESS GAZETTE, May 25, 1992, at 17.

114. Correctional Services Act § 44(f), *repealed by* the Correctional Services Amendment Act 80 of 1992; *see* S. v. Kiley, 1962 (3) S.A. 318 (T.P.D.); S. v. van Schalkwyk, 1966 (1) S.A. 172 (T.P.D.); S. v. Theron, 1968 (4) S.A. 61 (T.P.D.); S. v. SA Associated Newspapers Ltd and Others, 1970 (1) S.A. 469 (W.L.D.).

115. Correctional Services Act § 44(g).

or both.¹¹⁶

The restrictions set forth in the Police Act¹¹⁷ closely paralleled those in the Prisons Act. The Police Act prohibited the making or publishing of sketches or photographs of any person "detained in lawful custody or who is a fugitive after he has escaped from such custody."¹¹⁸ This act also forbade the publishing of any untrue matter about the police force or about any member of the force in relation to the performance of their functions without having reasonable grounds for believing the statement to be true.¹¹⁹ The onus of establishing reasonable grounds fell on the publisher. If the publisher failed to discharge it, the party was liable for R10,000 or imprisonment not exceeding five years, or both.¹²⁰ Because the Police Act prohibited publication of "untrue matter," as opposed to the prohibition of publishing "false information" under the Prison Act, the Police Act cast a wider net.¹²¹ Nevertheless, restrictive interpretation would confine the disparity to allegations of fact.¹²² Section 35 of the Police Act prohibited all members of the Security Force, including the Reserve Police Force, from membership in any political organization.¹²³ This act did not prohibit attending public meetings or voting. In 1992, this prohibition was expanded to bar such individuals from standing for elective office.¹²⁴

The Official Secrets Act¹²⁵ made it an offense to publish or communicate any material or information relating to "any military or police matter" or to any other person "in any manner or for any purpose prejudicial to the safety or interests of the Re-

116. *Id.*

117. Police Act 7 of 1958.

118. *Id.* § 27(a), as amended by Police Amendment Act 90 of 1977 § 8.

119. The Police Act incorporated the Railway Police in the regular police force and repealed the South African Transport Services Act 65 of 1981, which prohibited the publication of any untrue matter in regard to the actions of the Railway Police. See Police Amendment Act 83 of 1986.

120. Police Act 7 of 1958 § 27(b)(1), as amended by Police Amendment Act 64 of 1979, as repealed by Police Amendment Act 23 of 1992 § 4.

121. See ANTHONY S. MATHEWS, FREEDOM STATE SECURITY AND THE RULE OF LAW 154 (1986) (citation omitted).

122. *Id.*

123. Police Act 7 of 1958 § 35(1).

124. Police Second Amendment Act 118 of 1992 § 1.

125. Official Secrets Act 16 of 1956.

public."¹²⁶ This act defined "police matter" as "any matter relating to the preservation of the internal security of the Republic or the maintenance of law and order by the South African police."¹²⁷

The Terrorism Act¹²⁸ was similarly used to suppress political expression. In 1974, black theater groups in Johannesburg were banned for participating in "terroristic activities" in contravention of sections 2, 4, and 5.¹²⁹ In the 1980s, a confidential memorandum issued by the Chief of the South African Defence Force, entitled "Guidelines on Statements in Respect of Sabotage and Terrorism," noted that "while the need exists for the general public to be informed and reassured concerning acts of terrorism . . . keeping the public informed must be weighed against providing the enemy with intelligence. . . . As a general rule, 'the least said, the better.'"¹³⁰ This directive appeared to operate on an ideological level. Following the uprising in the black township of Soweto in 1976, the South African government attempted to suppress all information about the political demands of its opponents. The rationale of the Minister of Law and Order, Louis le Grange, was simple: "Terrorists want publicity for their demands in order to inspire their followers."¹³¹

The National Supplies Procurement Act¹³² allowed the Minister of Industries, Commerce and Tourism to prohibit the disclosure of information regarding goods or services provided to or requisitioned by the State.¹³³ The Petroleum Products Act¹³⁴ prescribed expansive limitations with regard to information about petroleum products¹³⁵ and was paralleled by the Atomic

126. *Id.* § 3.

127. *Id.*

128. Terrorism Act 83 of 1967.

129. BREWER, *supra* note 15, at 306.

130. Julie Frederikse, *South Africa's Media: The Commercial Press and the Seedlings of the Future*, 9 THIRD WORLD Q. 638, 639 (1987).

131. *Id.* at 640.

132. National Supplies Procurement Act 89 of 1970.

133. *See id.* § 8A (prohibiting the disclosure of certain information); *id.* § 8B (empowering the Minister from time to time to prohibit disclosure of specified information); *id.* § 8C (allowing the Minister to enter into self-regulatory agreements with publishers, or associations such as the National Press Union, in order to exempt their publications from direct criminal sanctions).

134. Petroleum Products Act 120 of 1977, *as amended by* Petroleum Products Amendment Act 72 of 1979.

135. *Id.* Section 4A(1) declares:

Energy Act.¹³⁶ The Armaments Development and Production Act¹³⁷ provided that the publication of any information that might be construed as an instigation or incitement to strike was prohibited.¹³⁸

G. *Emergency Law*

In broad terms, the Public Safety Act¹³⁹ empowered the State President to declare a state of emergency if he was of the opinion that public order was seriously threatened¹⁴⁰ and that the ordinary law of the land was incapable of allowing the government to control the situation.¹⁴¹ The opinion of the State President, that public order was seriously threatened, was presumptively valid unless the party seeking to appeal it could establish bad faith.¹⁴² A state of emergency, which could antedate the proclamation by up to four days, could remain in force for up to one year, though capable of indefinite renewal.¹⁴³

Emergency regulations promulgated by the State President under the Public Safety Act needed to be tabled within fourteen days of promulgation, or if Parliament was not in session, within fourteen days of the next ordinary session.¹⁴⁴ The tabling provision, however, did not apply to legislation made under authority delegated to some person or body by the State President,¹⁴⁵ thus providing for the circumvention of Parliamentary review. By notice in the *Government Gazette*, the Minister of Law and Order could exercise any of the powers afforded the President, if the

No person shall publish in any newspaper, periodical, book or pamphlet or by radio, television or any other means —

- (i) the source, manufacture, transportation, destination, storage, quantity or stock level of any petroleum products acquired or manufactured or being acquired or manufactured for or in the Republic.

Petroleum Products Act § 4A(1). This act similarly prohibits statements, comments, or rumors calculated directly or indirectly to convey such information. *Id.* § 4A(1)(b).

136. Atomic Energy Act 90 of 1967, as amended by Act 46 of 1978 and Act 7 of 1981.

137. Armaments Development and Production Act 57 of 1968, as amended by Act 86 of 1980.

138. STUART, *supra* note 67, at 181-82.

139. Public Safety Act 3 of 1953.

140. *Id.* § 2.

141. *Id.* § 2(c).

142. *Stanton v. Minister of Justice*, 1960 (3) S.A. 353 (T.P.D.) at 357.

143. Public Safety Act 3 of 1953 § 2.

144. *Id.* § 3(5); see MATHEWS, *supra* note 43, at 223.

145. MATHEWS, *supra* note 43, at 223.

Minister was of the opinion that it was urgent.¹⁴⁶ Ministerial proclamations, however, expired after ten days time.¹⁴⁷

The State President exercised this authority on two noteworthy occasions: once for five months in 1960 following the Sharpeville massacre,¹⁴⁸ and a second time on July 21, 1985, following widespread protests and unrest precipitated by the Constitution Act¹⁴⁹ and a severe recession. More recently, the government declared a state of emergency in selected areas of Kwa Zulu-Natal, preceding the April elections, in response to widespread fighting in the province between supporters of the ANC and the Inkatha Freedom Party.

When the Public Safety Act was originally introduced, it was considered a radical measure, giving powers to the Executive usually reserved for times of war. As such, it bore a striking resemblance to the War Measures Act of 1940, which authorized the governor-general to make regulations that appeared necessary or expedient for the defense of the Union, the safety of the public, the maintenance of public order, and the effective execution of war.¹⁵⁰ In conjunction with the Criminal Law Amendment Act,¹⁵¹ the Public Safety Act was intended to bring a quick end to the Defiance Campaign being conducted by the ANC.¹⁵²

146. *Id.*

147. Public Safety Act 3 of 1953 § 4.

148. During the Sharpeville massacre, which occurred on March 21, 1960, security forces fired into crowds protesting pass controls, killing 69 people and injuring another 180. This massacre was followed by nationwide protests and unrest. On March 30th, the ANC and PAC were banned and a state of emergency was declared. The state of emergency, which was declared in 80 districts of the country, lasted until August 31, 1960.

149. Republic of South Africa Constitution Act 110 of 1983. The Constitution Act created a tricameral Parliament of separately elected White, Coloured, and Indian houses. Each was responsible for limited "own affairs" while the President and the White House of Assembly retained control over "general affairs." "General affairs" were defined as matters affecting more than one of the country's ethnic groups, foreign affairs, defense, the police, and commerce. "Own affairs," by contrast, included education, culture, housing, and welfare, although fiscal authority remained the province of the White House of Assembly. *Id.*

150. DUGARD ET AL., *THE LAST YEARS OF APARTHEID* 33 (1992).

151. Criminal Law Amendment Act 8 of 1953, as repealed by Internal Security Act 74 of 1982.

152. The Criminal Law Amendment Act was credited with making "any repetition of the Defiance Campaign impractical: civil disobedience would only be encouraged again by ANC leaders in 1958 with the women's pass protests in Johannesburg and even here there was disagreement over this within the leadership of the ANC." LODGE, *supra* note 35, at 68.

Although never used during the 1950's, its deterrent effect was clear. The Defiance Campaign ground to a halt in late 1952, paralyzed by rioting in Port Elizabeth and East London,¹⁵³ and harsh nationwide police crackdowns.

Despite the fact that the Public Safety Act was intended merely as a deterrent to unrest, it was nevertheless used within ten years of its adoption, as noted above. Following the Sharpeville massacre, the government declared a state of emergency and issued Proclamation 400,¹⁵⁴ which prohibited a wide range of meetings, imposed strict controls on the entry and exit from affected areas, restricted political expression, and allowed the government to ban political activists. The 1960 state of emergency was marked by widespread arrest and detention, with over 11,000 detained in the course of five months.¹⁵⁵ The state of emergency was declared in eighty-two magisterial districts on March 30, 1960. On April 1, the emergency was extended to another thirty-one districts, with eight more added on April 11, 1960. Beginning in mid-May, the emergency was slowly lifted, and was finally withdrawn on August 31, 1960.¹⁵⁶ A large number of the state of emergency regulations, issued in 1960, affected political speech.¹⁵⁷ Magistrates or commissioned police or defense officers were authorized to prohibit any or all gatherings or processions, with the exception of certain religious, legal, or educational functions.¹⁵⁸ Government officials were further authorized to arrest and detain, without trial, individuals suspected of representing any threat to the public welfare.¹⁵⁹ Finally, the Minister of Justice was empowered (a) to investigate any organization suspected of being "connected with any matter

153. *Id.* at 52.

154. Proclamation 400, GG No. 11, 1960. This regulation remained in effect through 1964. GOVAN MBEKI, *SOUTH AFRICA: THE PEASANTS' REVOLT* 128 (1972).

155. SOUTH AFRICA INSTITUTE OF RACE RELATIONS, *A SURVEY OF RACE RELATIONS IN SOUTH AFRICA* 52 (1961).

156. *Id.*

157. See Proclamation 91, GG No. 6403, Mar. 30, 1960, as amended by Proclamation 97, GG No. 6407, Apr. 2, 1960; Proclamation 127, GG No. 6425, Apr. 22, 1960; Proclamation 139, GG No. 6432, Apr. 28, 1960; Proclamation 151, GG No. 6439, May 3, 1960; Proclamation 167, GG No. 6452, May 17, 1960.

158. MATHEWS, *supra* note 121, at 224-25. These regulations undoubtedly contributed to the later politicization of black churches and funerals. Funerals, in particular, often served as the pretext for large, semi-spontaneous, anti-government political rallies. *Id.*

159. Regulation 4, Government Notice 551, GG No. 6416, Apr. 11, 1960.

relating to the state of emergency;" and, by notice in the *Government Gazette*, (b) to direct any association, corporated or unincorporated, to discontinue its activities;¹⁶⁰ and (c) to ban publications or to prohibit any person or association of persons from publishing material deemed by him to be subversive.¹⁶¹ Again, the Minister's determination was deemed presumptively valid.¹⁶² Pursuant to these regulations, the ANC and the Pan Africanist Congress (the "PAC") were banned,¹⁶³ and the unrest was rapidly suppressed.

On July 21, 1985, State President P.W. Botha proclaimed a second state of emergency over certain areas of the country, this time in response to the continuing unrest arising from the deepening recession and protests against the 1983 Constitution. This state of emergency was lifted on March 7, 1986, only to be replaced by a nationwide state of emergency proclaimed on June 12, 1986, imposed in anticipation of nationwide protests to commemorate the tenth anniversary of the Soweto uprising.¹⁶⁴ This state of emergency was renewed on June 11, 1987, and remained in effect until June 1990, except in Natal where it remained in force until October 1990. In addition, a series of emergency-type restrictions were imposed by the Minister of Law and Order by declaring trouble spots "unrest areas."¹⁶⁵

It has been noted that "the extra powers which the govern-

160. MATHEWS, *supra* note 121, at 227.

161. *Id.* at 227-28.

162. *See* R. v. Maphumulo, 1960 (3) S.A. 793 (N.P.D.); *Stanton v. Minister of Justice*, 1960 (3) S.A. 353 (T.P.D.).

163. Proclamation 119, GG No. 6414, Apr. 8, 1960. This proclamation was renewed annually until 1963 when, by amendment to the Unlawful Organisations Act, the need for annual renewal was removed. MATHEWS, *supra* note 43, at 69.

164. HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 30, at 44. The Soweto uprising began on June 16, 1976, following the killing of numerous students engaged in a peaceful rally against the use of Afrikaans teachers in black schools. *Id.*

165. Public Safety Amendment Act 67 of 1986, *supra* note 23. "Unrest areas" were recently declared in Natal following incidents of ANC-Inkatha violence and in townships across the country following the assassination of Chris Hani, the popular leader of the CPSA and member of the ANC's executive committee. The former government was not shy about declaring unrest areas. In February 1993, the city of Johannesburg was declared an "unrest area" following protests by black taxi drivers over harassment by traffic officials. David Beresford, *Pretoria Suggests Bill of Rights But With Qualifications*, GUARDIAN, Feb. 3, 1993, at 10.

Many of these recent impositions of localized states of emergency were enforced with the approval and support of the ANC, acting under the auspices of the National Peace Committee (the "NPC"), one of the many multi-party committees to emerge from the 1990 Peace Accord. Telephone interview with Pieter Rousseau, Vice-Consul

ment has been able to give itself under the state of emergency have added enormously to its ability to mount an all-out assault on those who oppose its policies. Most importantly, it has been able to use those powers to bypass both Parliament and the courts."¹⁶⁶ In early 1986, the government appeared reluctant to maintain its nationwide state of emergency and introduced the Public Safety Amendment Act 67 of 1986 in order to secure the same emergency powers with fewer parliamentary controls.¹⁶⁷ This act provided " 'no hassle' emergency power."¹⁶⁸ It allowed the Minister of Law and Order to declare areas as 'unrest areas' and to apply the appropriate regulations to control the situation.¹⁶⁹ Unless withdrawn by the Minister, the declaration of an unrest area was effective for three months, although it could be renewed. In order to limit court jurisdiction, the Public Safety Amendment Act denied jurisdiction over declarations of emergencies, states of unrest, or the regulations pursuant thereto.¹⁷⁰

On June 12, 1986, Botha renewed the nationwide state of emergency, which remained in effect for four years.¹⁷¹ Under these regulations, even the most junior soldiers and police officers were empowered to arrest and detain, without charge, individuals for up to fourteen days.¹⁷² The Minister of Law and Order was authorized to extend detentions indefinitely.

Furthermore, the regulations prohibited the making, possession, or dissemination of "subversive statements." Not surprisingly, this term was broadly defined in order to cover virtually any criticism of the status quo. Any object or publication

for Political Affairs, South African Consulate, New York [hereinafter Rousseau Interview].

166. HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 30, at 88.

167. *Id.* at 89.

168. MATHEWS, *supra* note 121, at 214.

169. Public Safety Act 3 of 1953 § 5A. This act was introduced by the Public Safety Amendment Act 67 of 1986.

170. The Eastern Cape court, however, asserted that this 'ouster clause' did not prevent it from determining the legality of regulations enacted in terms of the Public Safety Act. MATHEWS, *supra* note 121, at 214 (citing *United Democratic Front v. State President*, unreported decision of the Eastern Cape District).

171. The Amendment Act was opposed by the coloured and Indian houses of Parliament, which forced Botha to circumvent Parliament by passing the law via the President's Council. This action further undermined the credibility of the tricameral Parliament. Nevertheless, the ensuing delay is credited with forcing Botha to reimpose the nationwide emergency. HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 30, at 89.

172. Public Safety Act 3 of 1953 § 5A(8).

deemed by the State President to threaten the interests of the state was prohibited. The definition of "subversive statement," under the regulations issued June 12, 1986, was described as encompassing

many statements which advocated or encouraged actions which were entirely lawful. For example, it included any statement likely to have the effect of inciting any member of the public to take part in any protest procession (regardless, apparently, of the object of the protest), or which could incite a person to oppose the government or any Minister or official in connections with any measure relating to the maintenance of public order or in connection with the administration of justice.

The December 11th regulations expanded the definition of "subversive statement" even more widely, to cover a statement inciting the public to take part in any boycott or unrest or civil disobedience or to take part in any illegal strike or to take part in any informal administrative or judicial structure or procedures.¹⁷³

Publication of information regarding police activities was also prohibited, and members of the security forces were immune from civil or criminal liability arising out of their work, so long as they did not act in bad faith. These national powers were further supplemented by local regulations effected under delegated authority. Such regulations included, *inter alia*,

detailed restrictions on funerals; banning possession of T-shirts and emblems of forty-seven named organisations in the Eastern Cape; imposing curfews; prohibiting pupils from being outside their classrooms in school hours; prohibiting the dissemination of statements made by 119 named organisations in the Western Cape; prohibition of gatherings by named organisations in Witwatersrand; [and] prohibition of loitering anywhere in Kwandebele.¹⁷⁴

In November of 1985, the use of audio-video equipment for recording disturbances or situations of unrest, in designated emergency areas, was prohibited except under official permission, and then only under police supervision.¹⁷⁵ This regulation prompted Reverend Alan Boesak to decry that "the purpose of

173. HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 30, at 91.

174. *Id.* at 90.

175. Frederikse, *supra* note 130, at 644.

keeping reporters out of the townships is so that our children can be murdered in circumstances where there will be no witnesses and no record."¹⁷⁶ Meanwhile, academics at the University of Witwatersrand in Johannesburg argued that the restrictions merely presaged a new township police and army strategy that would be highly unacceptable to foreign television viewers.¹⁷⁷

Although the 1986 restrictions were successfully challenged on the grounds of uncertainty,¹⁷⁸ the government largely reinstated the prior proscriptions in the emergency regulations promulgated on December 11, 1986.¹⁷⁹ A similar process occurred in 1987 following a court decision to set aside certain prohibitions regarding the reporting of security actions and the deployment of security forces.¹⁸⁰ Ultimately, the emergency law restrictions barred the reporting of "virtually any form of activity by the security forces—or indeed any matter connected with any form of public protest. The reporting of any reference to alternative structures was likewise prohibited. Even the presence of journalists at scenes of unrest, restricted gatherings or security action was banned—and likewise the taking of pictures at such events."¹⁸¹

II. INDIRECT REGULATION OF SPEECH

In addition to the extensive measures designed to discourage and hamper political speech critical of apartheid and the South African status quo, a number of laws and regulations further undermined citizens' freedom of expression. The former government's ability to ban or detain organizations and individuals clearly deprived those parties of a political voice. Moreover, the government had extensive powers to intimidate and harass parties in an effort to limit the volume of their opposition. Indeed, the South African government repeatedly recognized the benefits of self-censorship and other forms of censorship which were less than patently visible. A Director of the Publications

176. *Id.* at 644.

177. *Id.* at 647 (citation omitted).

178. *Metal and Allied Workers Union v. State President*, 1986 (4) S.A. 385 (D).

179. *HUMAN RIGHTS AND THE RULE OF LAW*, *supra* note 30, at 92.

180. *United Democratic Front & Release Mandela Campaign v. State President*, 1987 (3) S.A. 296 (N).

181. *HUMAN RIGHTS AND THE RULE OF LAW*, *supra* note 30, at 92.

Appeal Board even went so far as to comment that "self-control is, of course, the ideal form of control."¹⁸²

A. *Detention and Banning*

The government's power to detain or ban individuals derived primarily from the Internal Security Act of 1982.¹⁸³ This act provided for "six forms of detention that [were] classifiable into the categories of preventive detention and pre-trial detention."¹⁸⁴ Preventive detention included: potentially indefinite preventive detention that could be imposed by the Minister of Law and Order;¹⁸⁵ short-term preventive detention that could be ordered by a police officer for forty-eight hours and extended by magisterial warrant to a maximum of fourteen days;¹⁸⁶ and a 180-day detention provision enacted in 1986.¹⁸⁷

The power of the Minister of Law and Order to impose indefinite preventive detention was "part of permanent law and [could] be used even in times of peace without any need for the declaration of an emergency."¹⁸⁸ Detention could be ordered on any of three grounds, if the Minister: (a) had "reason to believe" that the person in question would commit terrorism, subversion, or sabotage;¹⁸⁹ (b) was "satisfied" that the party would endanger the security of the state or the maintenance of law and order; or (c) had "reason to suspect" that a person who had committed a specified offense¹⁹⁰ was likely to endanger state security or the maintenance of law and order.¹⁹¹

The Minister's detention power was doubly broad. The crimes of subversion and sabotage and the notion of a threat to state security or law and order were wide-ranging and inclu-

182. VAN ROOYEN, *supra* note 57, at 4.

183. Internal Security Act 74 of 1982; *see* discussion *supra* section I(b). In addition, detentions may be ordered under section 185 of the Criminal Procedure Act 51 of 1977 and section 13 of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971.

184. MATHEWS, *supra* note 121, at 62.

185. Internal Security Act 74 of 1982 § 28.

186. *Id.* § 50.

187. *Id.* § 50A. This section was introduced by section one of the Internal Security Amendment Act 66 of 1986.

188. MATHEWS, *supra* note 121, at 63.

189. Internal Security Act 74 of 1982 § 54(1)-(3).

190. *Id.*

191. *Id.* § 28(1).

sive.¹⁹² Furthermore, the statute applied the subjective discretion clauses where the Minister “[was] satisfied” and “[had] reason to believe.” All of these phrases were subjected to deferential judicial review.¹⁹³ In general, the courts would review only whether the specified governmental authority in fact entertained the suspicion or apprehension or held the necessary opinion.¹⁹⁴ The courts would not examine the grounds for the suspicion, opinion, or apprehension.¹⁹⁵

Short-term preventive detention was based on similarly broad discretionary grounds. Arrest and detention were authorized if a police officer was “of the opinion” that: (a) the actions of the party in question were contributing to the continuation of a state of public disturbance, disorder, riot, or public violence and that detention would help combat such a situation, or (b) that the detention of the party would assist in the prevention or resumption of such a state of affairs.¹⁹⁶ The relevant officer’s determination was not reviewable on objective grounds by the magistrate or by a court.¹⁹⁷

Under the third form of preventive detention, a police officer, who was of the opinion that the arrest and detention of any person would help to combat, prevent, or terminate various forms of unrest (including public disturbances, disorder, riots, or public violence) at any place in the Republic, could arrest such person without warrant and cause that person to be detained in prison for a period not exceeding forty-eight hours.¹⁹⁸ A commissioned officer of the rank of lieutenant-colonel or above could order the further detention of the party for a period not exceeding 180 days if he was “of the opinion” that such action would be in the best interests of the state. As one might expect, an official “opinion” was determinative, and the courts

192. MATHEWS, *supra* note 121, at 38-44.

193. *Id.* at 63.

194. *Id.* at 64.

195. *See, e.g.*, London Estates (Pty.) Ltd. v. Nair, 1957 (3) S.A. 591, 592 (D) (“Reason to believe is, in my opinion, constituted by facts giving rise to such belief”); *see also* Watson v. Commissioner of Customs and Excise, 1960 (3) S.A. 212, 217-18, (N); Hurley v. Minister of Law and Order, 1985 (4) S.A. 709, 716-17 (D); Minister of Law and Order v. Hurley, 1986 (3) S.A. 568, 570 (A).

196. Internal Security Act 74 of 1982 § 50(1).

197. Groenewald v. Minister van Justisie, 1973 (3) S.A. 877 (A).

198. Internal Security Act 74 of 1982 § 50A(1).

would not inquire into the conduct of the detainee.¹⁹⁹

The second category of detention was pre-trial detention. This category included: (1) the indefinite detention, without warrant, of any party the state had reason to believe: (a) committed (or intended to commit, or have aided and abetted someone who has committed or intended to commit) the offense of terrorism or subversion, or (b) was withholding information relating to the commission or intended commission of such act; (2) the detention of witnesses;²⁰⁰ and (3) the selective, discretionary prohibition of bail for parties charged with, *inter alia*, sedition, terrorism, subversion, the promotion of illegal activities, or activities on behalf of an unlawful organization.²⁰¹

The net result of these three types of preventive, pre-trial detentions was that the police could indiscriminately imprison, without charge, anyone resident in South Africa. The impact on speech in South Africa was commensurately extensive. Critics of the establishment could be lawfully detained virtually indefinitely, thereby eliminating any opportunity for these persons to voice or disseminate their political opinion. Furthermore, as one would expect, detention was a frequent weapon in the state's war against non-conforming, particularly black, political activity.

The power to ban organizations was conferred on the Minister of Law and Order by the Internal Security Act and was supplemented by the Unlawful Organisations Act.²⁰² In language similar to that governing detentions, the Minister of Law and Order could ban an organization that he determined was engaged in activities which threatened state security or the maintenance of law and order, propagated or otherwise promoted the spread of communism, or carried on the activities of an unlawful organization.²⁰³ Once more, the discretionary clause was held to preclude judicial investigation into whether objective grounds existed for an official to rely upon.²⁰⁴

199. *Minister of Law and Order v. Hurley*, 1986 (3) S.A. 568, 570-71 (A); *Stanton v. Minister of Justice*, 1960 (3) S.A. 353, 355 (T).

200. Internal Security Act 74 of 1982 § 36.

201. *Id.* § 30; *see id.* sched. 3 (enumerated activities).

202. Unlawful Organisations Act 34 of 1960, *repealed by* Internal Security Act 74 of 1982.

203. Internal Security Act 74 of 1982 § 4(1).

204. *South Africa Defence and Aid Fund v. Minister of Justice*, 1967 (1) S.A. 31, 35 (C).

Section 1 of the Unlawful Organisations Act²⁰⁵ enabled the State President to declare, by proclamation in the *Government Gazette*,²⁰⁶ any body, organization, group, or association of persons, institution, society, or movement, an unlawful organization.²⁰⁷ As opposed to the Suppression of Communism Act, there was no requirement that these unlawful organizations be communist in any manner. The Unlawful Organisations Act was promptly used to ban the PAC²⁰⁸ and ANC following the Sharpeville Massacre.²⁰⁹

Section 2 of the Act incorporated many of the restrictions and prohibitions of the Internal Security Act, as discussed above. It prevented the recording, reproduction, publication, or dissemination of any speech, utterance, writing, or statement made or produced at any time by any person to whom the banning provisions were applied. A related statute, the Affected Organisations Act²¹⁰ prohibited the receipt of funds from non-South African sources by any organization declared, again by proclamation in the *Government Gazette*, 'affected.'²¹¹ One commentator suggested that "newspapers should maintain lists of organisations declared affected so that they . . . guard against unwittingly associating themselves with appeals for funds through the medium of advertisements, letters to the editor, news reports, stories and articles."²¹²

205. Unlawful Organisations Act 34 of 1960.

206. The *Government Gazette* is an official publication of the government of the Republic of South Africa. Executive orders, proclamations, regulations, and notices are deemed effective (subject, under certain circumstances, to Parliamentary or judicial review) following publication in the *Government Gazette*.

207. Unlawful Organizations Act 34 of 1960 § 1.

208. The Pan Africanist Congress was founded in 1959 by former members of the ANC Youth League, who were convinced that the other racial Congresses (i.e., the South African Indian Congress, the South African Coloured People's Congress, and the South African Congress of Democrats) had acquired excessive influence over the ANC. Like the ANC, the PAC survived in exile and maintained an underground presence in South Africa.

The ban on the PAC was lifted in 1989. It remains a more radical, albeit much smaller, organization than the ANC and advocates a vehemently black, (in contrast to the ANC's multi-racial) nationalist ideology. The PAC is often identified with one of its more notorious slogans, "one settler, one bullet." *Whose Standards?*, in *ECONOMIST, THE FINAL LAP: A SURVEY OF SOUTH AFRICA* 25 (1993).

209. See *supra* note 148 (discussing Sharpeville Massacre).

210. Affected Organisations Act 31 of 1974.

211. *Id.* §§ 1-2.

212. STUART, *supra* note 67, at 178.

A number of important opposition groups were declared, at one time or another, "affected" organizations. These included: the Christian Institute, labeled affected on May 30, 1975, before being banned in 1977; the National Union of South African Students, declared affected on September 13, 1984, and; the United Democratic Front, which was declared affected on October 9, 1986.²¹³ After an organization was deemed affected, any foreign funds in its possession were confiscated. These funds could not be disposed of except by donation to a charitable or other organization designated by the Minister of Law and Order.²¹⁴

The impact of banning an organization was not limited to the legal entity banned, but also encompassed a range of restrictions on the officers and members of the proscribed organization. A person on the consolidated list of members and officers was barred from elective office,²¹⁵ certain professions,²¹⁶ participation in organizations comparable to the banned organization,²¹⁷ as well as numerous other activities.²¹⁸ "[T]he guiding principle of government action in the sphere of internal security [was] 'if it moves, ban it.'"²¹⁹ Furthermore, "in the eighties the banning of individuals [became] less common and [was] virtually replaced by the rule 'if it moves, detain it.'"²²⁰ Once again, the result was broad discretionary state power to preclude the political activity of individuals opposed to the South African regime. More often than not, the banned organizations were black, although during the last two years the activities of right-wing, white organizations were increasingly subject to legal restraints.

B. *Government Harassment*

The myriad of legal instruments for the suppression of political speech were supplemented by a range of extra-legal and quasi-legal activities. The former government resorted repeatedly to erratic enforcement, the threat of criminal and civil liti-

213. HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 30, at 55.

214. Affected Organisations Act § 4.

215. Internal Security Act 74 of 1982 § 33(2).

216. *Id.* § 34(1).

217. MATHEWS, *supra* note 43, at 65-67.

218. *Id.* at 112-15.

219. *Id.* at 101 (citation omitted).

220. *Id.* (citation omitted).

gation,²²¹ and covert activities to curb political speech deemed adverse to the interests of the state.²²² Throughout the late 1980s, the government issued warnings to the alternative press,²²³ as well as labor, social, and political organizations, which threatened these groups with criminal prosecution under the Internal Security Act, the Publications Act, and other statutes that constrained the expression and dissemination of information and opinion.

C. *Self-Censorship*

Finally, the labyrinthine legal restrictions on political speech, compounded by the extra-legal activities of government supporters, had a dramatic impact on individuals' willingness to engage in political speech. The Publications Appeal Board strongly encouraged the exercise of self-control. Similarly, the activities of the Media Council hampered the dissemination of opinions and information potentially harmful to the government. One editor, commenting on the adverse impact of "creeping self-censorship" stated that "[i]f you're covering the townships, for example, and you know you're not going to publish the story anyway, you say: 'Well, why risk my staff?' That means that your sources of information dry up and you cease to know what's going on."²²⁴

Economic pressures only intensified the tendency toward self-censorship. Black publications,²²⁵ in particular, oftentimes

221. Proponents of these methods, described them as "harassment by due process." "It is common for prosecutions to be launched for which there is little of no evidence; whether or not a conviction is achieved, the accused may suffer deprivation of liberty and other serious damage over a long period of time." HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 30, at 81. The women's group, Black Sash, documented a campaign of legal harassment against Cape Town youth in 1986. *Id.* at 82.

222. Shaun Johnson, an editor of the *Weekly Mail*, noted that the sanctions directed against the *Weekly Mail* and its staff, under the Publications Act, were supplemented by official intimidation, the disappearance of issues, and the fire-bombing of its printer. Interview with Shaun Johnson, Editor, WEEKLY MAIL (July 1988).

223. In late 1987, the *New Nation*, *South*, *Sowetan*, *Weekly Mail*, and *Work in Progress*, all received formal warnings from the government under the state of emergency regulations. *There was Little Joy Over the Festive Season*, UK PRESS GAZETTE, Jan. 4, 1988, at 3.

224. *Observer Editor Donald Trelford Was Among Those Criticised for Attending the Centennial Conference of the Star in Johannesburg*, UK PRESS GAZETTE, Nov. 9, 1987, at 11.

225. The majority of white, South African newspapers and magazines are held by large corporate entities, such as Argus Printing and Publishing Company (owner of the *Star* and *Sowetan*, the largest South African daily and the largest black daily respectively); Times Media Ltd. (*Sunday Times*); Nasionale Pers (*Huisgenoot*); and Perskor

had limited resources and were severely constrained by the bonding requirements of the Newspaper and Imprint Registration Act.²²⁶

III. TOWARDS THE FUTURE

Following the release of Nelson Mandela on February 11, 1990, the South African government engaged in extensive negotiations with the ANC and other political organizations regarding the structure and timing of a democratic, post-apartheid state. Although the negotiations ultimately resulted in the adoption of the Interim Constitution, the April elections, and the inauguration of South Africa's first multi-racial government, discussions were suspended repeatedly on account of violence²²⁷ and the intransigence of one or more of the participating parties.²²⁸ Despite the on-again, off-again nature of talks, tremendous progress was achieved, radically transforming South African society. During the time leading up to the elections, the NP government significantly relaxed its control over the government broadcasting agency, the South African Broadcasting Corporation ("SABC"),²²⁹ as part of what the government described as one of a series of steps to create a "fair and free climate" in South Africa prior to the multi-racial elections.²³⁰ Led by Ivy

(*Rapport and Citizen*). Argus Printing and Publishing Company, a subsidiary of Anglo American, is currently scheduled to sell 31% of its operations to Independent Newspapers Ltd., a large international publishing conglomerate headed by Tony O'Reilly, the Irish chairman of the Heinz Corporation.

226. See *supra* section I(e).

227. For example, discussions were called off in 1992 following acute violence throughout the country, including, most notably, the massacre of blacks in Boipatong in June 1992. See David Beresford, *Mandela Calls a Halt to Talks*, *GUARDIAN*, June 22, 1992, at 1. The assassination of Chris Hani, the secretary general of the CPSA, the leader of *Umkhonto we Sizwe*, and a member of the ANC executive, also disrupted talks, although the subsequent national unrest added a note of urgency to discussions. Similarly, the mass detention of PAC leaders on May 25, 1993, led to a temporary suspension of talks. See Bill Keller, *Police Detain Black Radicals, Imperiling South Africa Talks*, *N.Y. TIMES*, May 26, 1993, at A1.

228. David Beresford, *SA Constitutional Talks Near Collapse Over Minority Veto*, *GUARDIAN*, May 16, 1992, at 1.

229. In 1987, the senior news controller of the SABC informed his staff that the Bureau of Information was in control of the news programs and broadcasts. *Newspapers Protest at Reporting Restrictions*, in *ECONOMIST PUBLICATIONS, LTD., SOUTH AFRICA COUNTRY REPORT (1987)*.

230. Rousseau Interview, *supra* note 165.

Matsepe-Casseburi, a participant in the black resistance,²³¹ the SABC, under a new governing board, broadcast numerous interviews with black political leaders and adopted a distinctly racially inclusive attitude towards South African affairs. At the same time, the government granted temporary radio licenses to, and refused to enforce bans against unlicensed transmissions by right-wing, white organizations, including the notorious Radio Pretoria.²³²

In addition to the reform of the SABC, the government reduced its active control of the press, and—in a significant development since the nationwide state of emergency in the 1980's—no visa applications from foreign correspondents have been refused in the last two and one half years.²³³ Moreover, despite the many obstacles to consensual reform it appears clear that a number of legislative acts, including in particular the Internal Security Act,²³⁴ will be subject to prompt revision by the new, multi-racial government.²³⁵ As noted, however, the status of the Publications Act is less clear.²³⁶

On September 14, 1991, an early watershed event and a harbinger of the following three years occurred when a National Peace Accord was signed by the government, the ANC, and other South African political organizations.²³⁷ The Peace Ac-

231. Leonard Sussman, *Press Freedom is Set Back Worldwide*, EDITOR & PUBLISHER 28 (1994).

232. See, e.g., Rex Merrifield, *Right-Wing South African Radio Pumps Up Volume*, REUTERS, Jan. 25, 1994, available in LEXIS, Nexis Library, CURNWS File.

233. Rousseau Interview, *supra* note 165. The government had repeatedly exercised its control over work visas as a mechanism for censoring, at least indirectly, the reports of foreign journalists. *Id.*

234. The Internal Security Act is already subject to amendment by sections 25 and 34 of the Interim Constitution. See Constitution of the Republic of South Africa Act 200 of 1993, §§ 25, 34, GG No. 15,466, Jan. 28, 1994, at 14, 20. These sections greatly reduce the state's ability to arrest, detain, and otherwise silence its opposition.

235. Rousseau Interview, *supra* note 165.

236. *Id.*

237. The signatories, in order of signing, were: the Ciskei Government, the United Workers Union of South Africa, Solidarity Party, the Qua Government, the National People's Party, the National Forum, the People's Party, the Lebowa Government, the Labor Party, the KwaNdebele Government, the KanGwane Government, the Gazankulu Government, the Federation of Independent Trade Unions, the Democratic Party, the Congress of Traditional Leaders (Contralesa), the Confederation of Metal and Building Unions, the Amalgamated Union of Building Trader Workers of South Africa, the CPSA, the Congress of South African Trade Unions, the KwaZulu Government, Inkatha, the ANC, the South African Government, and the National Party (represented jointly by de Klerk). SOUTH AFRICAN CONSULATE GENERAL, NATIONAL PEACE AC-

cord established a series of general principles designed to guide and facilitate discussions of constitutional reform. As such, it laid the ground work for the Convention for a Democratic South Africa ("CODESA"),²³⁸ which was adopted by a multi-party platform. More importantly, a significant number of multi-party discussions were conducted at the World Trade Centre in Kempton Park. The principles established by the Peace Accord included: "freedom of conscience and belief," "freedom of speech and expression," "freedom of association," the right to "peaceful assembly," "freedom of movement," and the right to "free participation in peaceful political activity."²³⁹ However, these principles were not embraced without the traditional, apartheid gloss.

Chapter Two of the Accord set forth a code of conduct for political parties and organizations. Signatory parties were prohibited from attempting "to force anyone to join a political organisation or resign from any post or office, boycott any occasion or commercial activity, or withhold his or her labor or fail to perform a lawful obligation."²⁴⁰ Further, political parties were barred from "inciting violence and hatred," and required to "inform appropriate authorities about the place, date, and routing of public meetings, rallies and marches."²⁴¹ The Peace Accord attempted to ensure a degree of calm throughout South Africa during the negotiating process. This goal, however, proved impossible to achieve as violence and unrest continued to embroil South Africa and marred the already strained relations between the ANC and Inkatha. More than 11,000 people have been killed in the "black-on-black" (as it is generally described in South Africa) violence as black political groups and their respective military wings struggle for regional, township, or neighborhood hegemony.²⁴²

CORD, SOUTH AFRICAN BRIEFING PAPER NO. 18 (1991) [hereinafter NATIONAL PEACE ACCORD]. The PAC did not participate in this process.

238. The official constitutional negotiations have not yet been named, although the CODESA appellation has been proposed.

239. NATIONAL PEACE ACCORD, *supra* note 237.

240. *Id.* at 3.

241. *Id.*

242. The relationship between the ANC and the Inkatha Freedom Party ("IFP") has been one of particularly protracted violence. With the support of the government, Gatsha Buthelezi, the leader of the (non-independent) KwaZulu homeland, has spearheaded black opposition to the ANC. From its KwaZulu powerbase and appeal to Zulu 'tradition,' the IFP has been able to garner the support of large numbers of Zulus

The negotiations towards constitutional reform proved slow and laborious. Group and individual rights, in particular, posed significant roadblocks to constitutional change, and still remain a source of great disquiet. President de Klerk insisted upon a federal form of government, with entrenched group rights, designed to ensure a continuing voice in government for the white minority.²⁴³ The ANC, in turn, fought for a unitary interim government which would leave the drafting of a future constitution to the representatives of a democratically elected legislative body.

Despite the apparently insuperable gulf between the ANC and the government and the seeming intransigence of many of the parties to the Kempton Park negotiations, profound progress was achieved. In early September 1993, the Nationalist Party and the ANC reached a final agreement on the form of the Transitional Executive Council (the "TEC"), which was ratified by the South African Parliament on September 23. In November 1993, ANC and government negotiators agreed to repeal the Prohibition of Foreign Financing of Political Parties and the Affected Organizations Act. Simultaneously, the Internal Security Act was amended to limit the government's authority to detain suspects without trial and eliminate the police's power to arrest without warrants.²⁴⁴ The Transitional Executive Council was designed as an interim governing body intended to supervise South African governance in the months leading up to the elections. The TEC included one representative from each of the major political parties and jurisdictions, and was entitled, with the agreement of seventy-five to eighty percent of the TEC membership, to override a wide range of Government decisions. The TEC was authorized to supervise government management of

in Natal. See GERHARD MARÉ & GEORGINA HAMILTON, *AN APPETITE FOR POWER: BUTHELEZI'S INKATHA AND SOUTH AFRICA* 145 (1987).

243. On May 25, 1993 de Klerk was described as having "in effect rejected black majority rule . . . insisting that the white-led National Party should play a central role in a coalition government lasting into the next century." Andrew Gowers & Michael Holman, *De Klerk Resists Rule of Black Majority in S. Africa*, *FIN. TIMES*, May 26, 1993, at 1. De Klerk further stated that "power-sharing should be entrenched as a permanent principle in any constitution adopted after next year's elections. We definitely believe that a final constitution must include the principle of power-sharing. . . . A winner-takes-all model is the worst possible model there can be for South Africa." *Id.*

244. SOUTH AFRICAN CONSULATE GENERAL, *THIS WEEK IN SOUTH AFRICA* (Nov. 9, 1993).

the Police and Defence Forces and to organize a new peacekeeping force, drawn from existing police and the guerilla armies of anti-apartheid organizations,²⁴⁵ to ensure stability and security. The TEC further exercised executive powers over regional and local government, finance, defense, and the organization of the nationwide elections. The TEC's overarching mandate was to establish the conditions for free and fair multi-racial elections and to ensure a "levelling of the political playing field and free fair elections."²⁴⁶

On Tuesday, December 7, 1993, the Transitional Executive Council was officially inaugurated, although the Council was marked by the absence of the Inkatha Freedom Party and a number of black and white, right-wing organizations.²⁴⁷ However, the TEC was not without significant influence. Early actions by the TEC included delaying financing to the Bophuthatswana homeland and challenging Inkatha Freedom Party activities in the Natal Province. In addition, the TEC similarly played an important role in the restructuring of the Police and Defence Force. More importantly, the TEC enhanced the perception that the elections were legitimate.

The South African political landscape has been profoundly transformed by the recent elections. Mandela's ANC is by far the largest party in Parliament.²⁴⁸ Although the ANC does not have enough votes to unilaterally alter or enact entrenched legislation, it clearly has the upper hand in parliamentary negotiations. Much of the future of South Africa will depend on how the ANC exercises its newly entrenched power. While it remains too early to judge how the ANC will react to its new role as the majority party, analysts have pored over the first acts of the ANC government.

Many of Mandela's cabinet choices have been the subject of discreet, but widespread, criticism. While Mandela's reappointment of Derek Keys as Finance Minister was generally applauded

245. Bill Keller, *South Africa's Parliament Votes for a Black Role in Government*, N.Y. TIMES, Sept. 24, 1993, at A1.

246. AFRICAN NATIONAL CONGRESS, ANC SCENARIO FOR TRANSITION TO DEMOCRACY.

247. Kenneth B. Noble, *Joint South African Council Takes Over*, N.Y. TIMES, Dec. 8, 1993.

248. The ANC holds 252 seats in the 400 member House of Parliament, 18 of 27 cabinet portfolios, and controls the legislatures in seven of South Africa's nine provincial governments. Liz Sly, *ANC's New Challenge: Governing; Once Revolutionary, Party Must Now Rule S. Africa*, CHI. TRIB., May 8, 1994, at 1.

and his selection of de Klerk as Second Deputy President was essentially mandated by the Interim Constitution, other appointments have been questioned. The selection of Alfred Nzo as Foreign Minister, in particular, has been criticized.²⁴⁹

Mandela's cabinet reflects a number of the fault lines marking the ANC and indeed the nation as a whole. His appointments from within the ANC appear to "favor his organization's old guard and exiled wing over its younger members who led the mass democratic movement of the 1970's and 1980's."²⁵⁰ Mandela's selection of First Deputy President, Thabo Mbeki, the son of Govan Mbeki, a resistance leader of the 1950's and early 1960's, who was imprisoned with Mandela at Robben Island, also came as a surprise. The position of First Deputy President had been expected to be given to Cyril Ramaphosa, the ANC's chief negotiator at the Kempton Park discussions. After failing to obtain the second position in the ANC administration, Ramaphosa withdrew his name from consideration for another cabinet position. Although he indicated publicly that he was happy to serve under Mbeki, Ramaphosa's exclusion from the cabinet has been widely interpreted as emphasizing Mandela's "inability to pull the ANC leadership together at the moment of transition."²⁵¹

The conduct of the elections similarly provokes concern regarding the future of South Africa. Evidence indicates extensive electoral fraud. Members of the Independent Electoral Commission cited numerous stuffed ballot boxes, under age voting, ballot boxes "coming from polling stations that didn't officially exist," computer sabotage, and other irregularities affecting voting.²⁵² There were reports of electoral fraud from KwaZulu-Natal, where, in one of the biggest upsets of the election, the In-

249. Nzo has been described as having "a reputation as a tired party hack." David Beresford & Chris McGreal, *South Africa: Mandela Cabinet Choices Stir Quiet Grumbling*, OTTAWA CITIZEN, May 9, 1994, at A7. Nzo, age 69, "had virtually disappeared after Mr. Ramaphosa replaced him as ANC secretary general in 1991, and it had been assumed that he had retired. His political resurrection was unexpected and could only be explained in terms of a sentimental attachment on the part of the president-elect. One of Mr. Nzo's new fellow ministers described him . . . as 'singularly lacking in vim.'" John Carlin, *ANC Wins Seven Out of Nine Provinces to Complete Landslide*, INDEP., May 7, 1994, at 12.

250. Paul Taylor, *Vote Certified as Fair; Mandela Names Team; ANC Will Hold Decisive Power but Cannot Dictate Constitution*, INT'L HERALD TRIB., May 7, 1994, at 1.

251. Beresford & McGreal, *supra* note 249, at A7.

252. Bob Drogin, *Ballot Fraud Casts Shadow on S. Africa Vote*, L.A. TIMES, May 6, 1994, at A1; see Patti Waldmeir & Michael Holman, *South African Elections: Spirit of Con-*

katha Freedom Party received 50.8% of the votes counted.²⁵³ Overruling the local election monitors, Judge Johann Kriegler, the chairman of the Independent Electoral Commission stated that the election process was "admittedly flawed," although he sought to downplay the irregularities by stating that "the heart of the matter . . . was that we were able to establish the will of the people."²⁵⁴

The ANC's national leadership endorsed the Independent Electoral Commission's determination that the KwaZulu-Natal elections had been fundamentally representative, apparently overruling the provincial leadership.²⁵⁵ The decision of the ANC, not to dispute the election results of the KwaZulu-Natal, encouraged the prospects of peaceful relations with Buthelezi and advanced an institutional role for the Inkatha Freedom Party.²⁵⁶

While it is unclear whether the ANC's attempts to promote a peaceful and consensual transition will be successful,²⁵⁷ the overall election results have been hailed as serendipitous:

[T]he country's three major centers are shared between three parties: the Johannesburg/Pretoria regions to the ANC, KwaZulu/Natal to Inkatha, and the Western Cape to the NP. The ANC also failed to get a two-thirds majority, which would have enabled it to call the shots in the constitution-writing process. 'This will help promote power-sharing and consensus decisionmaking and should boost the concept of a government of national unity,' says a Western diplomat. 'You could say it's a dream result because it will reassure whites and the business community and has defused the ethnic conflicts, which often threatened to wreck the transition.'²⁵⁸

Regardless of how the vote was achieved, the results have been

citation Sweeps Aside Letter of Vote - the Election was Deeply Flawed, but Nearly Everyone Likes the Outcome, FIN. TIMES, May 7, 1994, at 3.

253. *Id.* The ANC received 31.6% of the votes in the province, despite pre-election polls giving it a majority of the vote. In fact, the IFP only agreed to participate in the election one week prior to the voting.

254. Taylor, *supra* note 252, at 1.

255. Bob Drogin, *First Blacks Take Oaths as S. African Legislators; Government: New Lawmakers Also Elect Provincial Premiers. Mandela Attends Services of Various Faiths*, L.A. TIMES, May 8, 1994, at A1.

256. *Id.*

257. John Battersby, *Mandela Shapes New Leadership*, CHRISTIAN SCI. MONITOR, May 9, 1994, at 2.

258. *Id.* (citations omitted).

accepted on a national level. The ANC, the NP, and Inkatha, the principal parties in the new Parliament, are now faced with the responsibility of forging a new political regime.

As South Africa enters the second phase of its constitutional negotiations, the drafting of a new constitution pursuant to the terms and framework of the Interim Constitution,²⁵⁹ the voices and demands of the heading political forces in contemporary South Africa, will once again rise to the forefront. In the end, the ability of the ANC, the NP, Inkatha, and the other, smaller political parties, will be determinative.

A. *Freedom of Speech and the African National Congress*

The 1955 Freedom Charter,²⁶⁰ an aspirational document adopted at the Congress of the People in June 1955,²⁶¹ asserts that "[a]ll shall enjoy human rights! The law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children."²⁶² Simi-

259. Constitution of the Republic of South Africa Act 200 of 1993, GG No. 15,466, Jan. 28, 1994, at 1.

260. 1955 Freedom Charter, June 26, 1955, reprinted in M. HAMALENGWA ET AL., *THE INTERNATIONAL LAW OF HUMAN RIGHTS IN AFRICA: BASIC DOCUMENTS AND ANNOTATED BIBLIOGRAPHY* 99 (1988).

261. The Freedom Charter was adopted at the Congress of the People, a two-day conference held in Kliptown, a coloured township near Johannesburg. Three thousand delegates from across the country attended; including, 320 Indians, 230 coloureds, and 112 whites. The Congress was organized primarily by the ANC, SAIC, SACOD, and the South African Coloured People's Organization (later the Coloured People's Congress). Organizations in attendance also included the Liberal Party (an English-speaking white Parliamentary party), six trade unions, the Federation of South African Women, the Cape Peace Council and a number of local vigilance organizations. LODGE, *supra* note 35, at 69-70. The Congress came to an end when the proceedings were stormed by armed policemen who seized the podium, confiscated all the documents they could find, announced that they had reason to believe that treason was being contemplated, recorded the names and addresses of all the delegates, and then sent everyone home. *Id.* at 71.

The Freedom Charter, consisting of a list of basic rights and freedoms, begins by affirming the multiracial character of South African society: "South Africa belongs to all who live in it, black and white." 1955 Freedom Charter, *supra* note 260. In addition, the Charter promised equal status for "all national groups;" limited nationalization (of mines, banks, and monopoly industries); equal opportunities to all who wished to trade and manufacture; land redistribution; free compulsory education; an end to restrictions on labor and labor organizations; and a range of welfare provisions concerning working conditions, unemployment, health, housing, the aged, and the disabled. *Id.*

262. 1955 Freedom Charter, *supra* note 260. It should be noted, however, that the Freedom Charter simultaneously mandated the protection of all national groups "against insults to their race and national pride." *Id.* While the implications of this

larly, Article 4 of the ANC's 1990 draft Bill of Rights, "Freedom of Speech, Assembly and Information" declares that "[t]here shall be freedom of thought, speech, expression and opinion, including a free press which shall respect the right to reply."²⁶³ These affirmations of an entrenched freedom of expression, prompted by the mechanisms of political repression, provide only a general suggestion of rights in post-apartheid South Africa.

The Freedom Charter and the ANC's 1990 draft Bill of Rights strongly suggest that the ANC is committed to a constitutionally entrenched doctrine of free speech, comparable, in broad terms, to the freedoms that currently exist in the United States. Moreover, the ANC's 1993 publication, *Ready to Govern*,²⁶⁴ emphasizes the role of an entrenched Bill of Rights enumerating "certain basic rights and freedoms as universally understood which no future government will normally be able to take away except by special majority."²⁶⁵ The ANC document further asserts that "the Bill of Rights will guarantee that South Africa is a multi-party democracy in which people enjoy freedom of association, speech and assembly and the right to change their government. Furthermore, the public have a right to know what is being done in their name — we believe in a strong right to information and a firm guarantee regarding the free circulation of ideas and opinions."²⁶⁶

In section N, "Media," *Ready to Govern* sets forth the ANC's policy guidelines regarding the regulation of print and broadcast media. Once again, the ANC asserts, "[t]he basic principle around which our Media Charter should revolve is maximum openness within the context of a democratic constitution and Bill of Rights."²⁶⁷ This goal, however, is qualified to the extent that "[t]he citizens' right to privacy, dignity and any other freedoms entrenched in the Bill of Rights shall not be violated in

prohibition are unclear, it does suggest the possibility of restrictions akin to section 47(2)(d) of the Publications Act. See *supra* note 70 and accompanying text.

263. ANC CONSTITUTIONAL COMMITTEE, A BILL OF RIGHTS FOR A NEW SOUTH AFRICA: A WORKING DOCUMENT (1990).

264. AFRICAN NATIONAL CONGRESS, POLICY UNIT, READY TO GOVERN: ANC POLICY GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA 6 (1993) [hereinafter *READY TO GOVERN*].

265. *Id.* at 6.

266. *Id.* at 6-7.

267. *Id.* at 60.

favour of the free flow of information."²⁶⁸

In order to achieve some sort of balance between perceived social goals and the unfettered flow of information, the ANC provides:

All people shall have the right of access to information held or collected by the state or other social institutions subject to any limitations provided for in a constitution and Bill of Rights.

There shall be no institutional or legislative measures restricting the free flow of information or imposing censorship over the media and other information agencies.

All people shall have the right freely to publish, broadcast and otherwise disseminate information and opinion, and shall have the right of free access to information and opinion.

All media should subscribe to a Standard of Practice and/or Code of Conduct agreed upon among the producers and distributors of public information, communications and advertising.

There shall be no restrictions on private broadcasting initiatives beyond the accepted constitutional constraints and technical regulations arising out of legislation governing media.²⁶⁹

Despite ANC affirmations of the ideal of free speech, the ANC's post-election commitment and ability to implement such an ideal is far from clear. The ANC is in many ways a diverse coalition beholden to many conflicting ideals and interest groups, as Mandela's difficulties in selecting his cabinet amply demonstrated. In the fractious, divided South African polity, the ANC attempts to cover the spectrum of opposition groups. First, it is multi-racial. Second, it attempts to attract the support of all tribal groups, as well as progressive English and Afrikaner whites. Third, it relies on the support and cooperation of the Communist Party of South Africa (the "CPSA"). Finally, it reaches out to corporate South Africa.²⁷⁰

268. *Id.*

269. *Id.* at 61.

270. The late secretary general of the CPSA, Chris Hani (also a member of the ANC executive) embodied the contradictions inherent in the ANC's economic platform. Although a self-avowed communist, he favored multi-party elections and an economy under a "variety of ownerships." *The Flawed Inheritance*, in *ECONOMIST, THE FINAL LAP: A SURVEY OF SOUTH AFRICA* 20 (1993). His colleague, Joe Slovo, confirmed this position by stating, "[w]e have all accepted the need for a mixed economy, and that

The ANC's ability to generate and maintain political consensus is already strained to the limits, and the responsibility of governing will only strain this ability further. The ANC's pre-election platform embraced the contradictory goals of lowering black expectations of an immediate increase in employment, wealth and opportunity, while simultaneously promising comprehensive land reform, economic growth, improved social services, and general improvement in the welfare and opportunities of the hitherto oppressed black population. David Beresford comments that:

[T]he ANC's approach, appropriate for a liberation movement but questionable for a political party, verges on the utopian. 'Peace, Freedom and a better life for all,' its campaign literature offers through, for example, public works programmes, a near miraculous "solution" to the massive housing shortage and a commitment to stamp out illiteracy within five years.

Several ANC promises smack of fantasy. A guaranteed minimum of 10 years of "compulsory, free and equal education" may be justifiably ambitious, but transferring 30 per cent of agricultural land to blacks within five years is hardly viable without confiscation.²⁷¹

Only time will tell whether the ANC (either independently or with the support of other political groups) will be able to generate a society capable of respecting individual rights, even with an entrenched constitution and bill of rights.²⁷²

Early indications of the ANC's commitment to free political speech remain mixed. Black journalists, especially, have come

foreign investment is not charity." *Id.* at 23. Nevertheless, populist pressure for large scale nationalization and the redistribution of wealth will be pronounced: "that such a tidal wave is gathering is beyond reasonable doubt." *Id.*

271. David Beresford, *The Wily Old Brawler Takes on the Nervous Newcomer*, *GUARDIAN*, Jan. 26, 1994, at 12.

272. There are acute economic (and political) pressures facing post-apartheid South Africa:

A post-apartheid government will certainly cut real spending on whites; the present government is doing so already. But the racial arithmetic (5m whites, 29m blacks, with the black population growing at more than 2.5% a year) means that these cuts will produce sadly little extra for blacks. They will stay poor until South Africa finds a way to expand its economy. Sooner or later they will vent their disappointment on the government in office, no matter what colour it is.

Between Two Worlds, in *ECONOMIST*, *THE FINAL LAP: A SURVEY OF SOUTH AFRICA* 4 (1993).

under attack in the townships for either not reporting events (when publication is legally barred) or for depicting events in a 'biased' or 'unfavorable' light. Nomavenda Mathiane, an assistant editor of *Frontline*, an independent monthly founded in 1979, has written on "censorship from the liberation movements."²⁷³ He notes that "there was a time when the press had one enemy and that was the law. Falling foul of this meant detention or whatever the system deemed fit. Today we would rather face a hostile government than cross paths with the movements."²⁷⁴ Liberation movement sanctions against journalists, he comments, range from "ostracisation or the gutting of the journalist's house to necklacing."²⁷⁵

Mathiane's comments indicate the pervasive difficulties facing the post-election, ANC-dominated government. The struggle against apartheid has been an all-encompassing battle for blacks in South Africa. To many, defeating the opposition takes priority over notions of individual rights. "It is seen as right to expose the atrocities of the system," Mathiane cautions, "and condone those done in the name of the struggle. Black journalists are doing good work if they expose Afrikaner farmers who exploit black workers, but become bad guys when they write about black traders in Soweto working fellow blacks as slaves in their shops."²⁷⁶

Until a social consensus recognizing the importance and priority of civil rights takes hold, it is unlikely that rights, such as free speech, will be secure. Recent studies indicate that such a consensus remains in the distant future. Those "who have been most thoroughly denied the luxury of free expression, are most likely to view it with suspicion. For example, one recent poll found that a majority of blacks do not believe white parties have a right to conduct election campaigns in black townships."²⁷⁷ As the campaign so powerfully illustrated,²⁷⁸ ongoing ethnic and

273. *South Africa: Black Journalists Experiencing Grave Problems*, GUARDIAN, May 7, 1990 [hereinafter *Grave Problems*].

274. *Id.*

275. *Id.*

276. *Id.*

277. Bill Keller, *The Urge to Suppress Persists in South Africa*, N.Y. TIMES, Aug. 1, 1993, at A16.

278. Bill Keller, *De Klerk Turns a Campaign Fiasco to Advantage*, N.Y. TIMES, Feb. 25, 1994, at A2.

tribal conflict (such as that between Inkatha and the ANC) will continue to impede the path to free speech in South Africa.

B. *Freedom of Speech and the National Party*

The de Klerk administration's road to constitutional reform was a complicated and contentious one, as de Klerk sought to consolidate white, coloured, and Indian support through an often reactionary, rear-guard "law and order" policy while simultaneously claiming for himself the cloak of reform and liberation.²⁷⁹ Throughout the period leading up to the adoption of the Interim Constitution, de Klerk called for the rapid transfer of power to a democratically-elected multi-racial government while persistently seeking to preserve the role and status of whites in South Africa. In February of 1993, the former government attempted to take the initiative in the constitutional discussions by publishing the Government's Proposals on a Charter of Fundamental Rights (the "Draft Charter" or "Charter").²⁸⁰

The introduction to the Charter conceded the status of Parliamentary sovereignty in South Africa:

In the past rights have been infringed and unless the system is adjusted fundamentally, there can be no guarantees against future infringements. For this reason the Government is totally committed to a new constitutional dispensation in which the powers of the various branches of state authority, including those of Parliament, will be limited by and subject to certain basic, universally accepted legal norms. A Charter of Fundamental Rights must and shall be one of the most important elements of the new system. A Charter is essential to protect the rights of the citizen against the arbitrary and discriminatory use of Parliamentary and political power. In the new system the Law must reign supreme.²⁸¹

On its face, this statement represented a significant concession by the state regarding the future South African society. Nonetheless, it remained a self-serving one. The white-elected govern-

279. The NP's racially driven campaign was largely successful. Although approximately 85% of the black population, and few whites, voted for the ANC, the majority of the white, Indian, and coloured population voted for the NP. Waldmeir & Holman, *supra* note 252, at 3.

280. REPUBLIC OF SOUTH AFRICA, GOVERNMENT'S PROPOSALS ON A CHARTER OF FUNDAMENTAL RIGHTS (1993) [hereinafter DRAFT CHARTER OF FUNDAMENTAL RIGHTS].

281. *Id.* at 1.

ment struggled against the accession to significant, substantive reform.

Indeed, these proposals bore a striking resemblance to the former South African legal system, and appeared to offer at best only incremental progress. The draft charter was based on four principles. The first was the principle of "verticality," which meant that "the charter primarily regulate[d] legal relations between the State and the subject."²⁸² Furthermore, the Charter stated that it did not "directly regulate legal relations among subjects themselves," although the charter would have "an 'overflow' effect on such horizontal legal relations."²⁸³ This principle greatly reduced the application of the Charter, due to its removal of private action from the scope of constitutionally limited activity.

Section Two of the Charter asserted that "no provision of this Charter shall be construed so as to create or regulate legal relations other than those between the State and a person."²⁸⁴ The commentary elaborated that it was not "intended as a direct source of rights or obligations among individuals themselves, for example, to enable a dissatisfied employee to sue his employer on the ground of alleged infringement of his fundamental rights."²⁸⁵ Ultimately, this principle of verticality bore a striking (and surely not coincidental) resemblance to the U.S. Supreme Court's application of the Thirteenth and Fourteenth Amendments of the U.S. Constitution, as interpreted in the *Slaughter-House*²⁸⁶ and *Civil Rights Cases*.²⁸⁷

The second guiding principle identified by the government was the principle of "negative enforcement."²⁸⁸ The drafters noted that "this has the effect that the Charter will apply to the State in a prohibitive rather than mandatory sense. That is to say, the state is primarily prohibited from infringing fundamental rights. In certain specified cases the state is, however, required to fulfill particular needs."²⁸⁹ Once again, the resem-

282. *Id.*

283. *Id.*

284. *Id.* § 2(1), at 4.

285. *Id.* § 2, at 5. This qualification would appear to materially undercut and circumscribe section 6, "Equality before the law." *See id.* § 6, at 6.

286. *Slaughter-House Cases*, 83 U.S. 36 (1872).

287. *Civil Rights Cases*, 109 U.S. 3 (1883).

288. *See* DRAFT CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 280, at 1.

289. *Id.*

blance to racially-biased American jurisprudence was striking. The notion of "negative enforcement" recalls aspects of the American "state action" doctrine with its often permissive attitudes towards discrimination by private, i.e., non-governmental actors. Accordingly, negative enforcement seemed to indicate a willingness or intention on the part of the government to tolerate or otherwise ignore racially biased conduct in the (white-dominated) private economy.

The third principle encompassed the ability of a post-apartheid state to "curtail or limit rights." This principle sought to preserve the South African state's overriding interest in, and ability to enforce, "state security," and "law and order." The curtailment or limitation of rights would have ensured that "the State is authorized to curtail rights within reasonable limits."²⁹⁰ Ominously, the government warned that "chaos will follow if the rights of persons should prevail absolutely. In order to regulate society in the general interest, the State must have the power to delimit such rights in accordance with specific democratic values and norms."²⁹¹ Section 1 of the Charter reiterated the state's power to limit or suspend fundamental rights under the common law, through a competent legislature, and to the extent provided for by sections 35 and 36 of the Charter.²⁹² Finally, the Charter was predicated on the principle of "justiciability."²⁹³ The least offensive of the government's four principles, justiciability was described as ensuring the protection and enforcement of fundamental rights through a "strong and independent judiciary."²⁹⁴

With regard to specific provisions concerning speech and political activity, the Charter declared that "every person shall have the right to freedom of speech and other forms of expression, and the right to obtain and disseminate information."²⁹⁵ Subsection 2, however, noted that subsection 1 "shall not preclude the registration and licensing of newspapers and other forms of communication."²⁹⁶ The commentary further observed

290. *Id.*

291. *Id.* at 2.

292. *Id.* § 1(a)-(b), at 4; *see id.* §§ 35-36, at 21-22.

293. *Id.* at 2.

294. *Id.*

295. *Id.* § 9(1), at 8.

296. *Id.* § 9(2), at 8.

that "as in the case of most other rights this right may sometimes have to be limited."²⁹⁷ The affirmation in section 10 of the "freedom of meeting" contained a similar qualification, which stated that "it is only recognised in so far as it is exercised peacefully and unarmed. Violent meetings and demonstrations are not protected by the Charter."²⁹⁸

These explicit provisions governing speech appeared to reaffirm the National Party's commitment to the principal instruments of media regulation: the Publications Act and the Newspaper and Imprint Registration Act. Moreover, as proposed, the Draft Charter would have authorized the full panoply of restrictive measures then in force. Section 35 authorized the limitation of fundamental rights, "to the extent in which such limitation is reasonably necessary—

- (a) by virtue of state security, the safety of the public, the public order and interest, good morals, public health, the administration of justice or public information;
- (b) to uphold the rights and freedoms of others;
- (c) to prevent or combat disorder, violence, intimidation or crime."²⁹⁹

Echoing the Internal Security Act on which it appears to have been based, Section 35 afforded vast discretion to the government's vision of a future, democratic state. The commentary to section 35 noted that "the purpose of Section 35 is to prescribe standards against which it can be determined if a particular limitation of a fundamental right is permissible. The legislature is strictly bound inasmuch as any limitation must be REASONABLY NECESSARY on the ground of one or more of the considerations mentioned in paragraphs (a) to (d)."³⁰⁰ As noted throughout this article, subjective discretionary clauses have had a pronounced history of deferential application in the Republic of South Africa.

Section 36 of the Charter provided for the "suspension of fundamental rights" during states of emergency. A state of emergency existed under the Draft Charter when "the continued existence of the State or the safety of the public in the Re-

297. *Id.*

298. *Id.* § 10, at 8.

299. *Id.* § 35(1)(a)-(c), at 21.

300. *Id.* § 35 (commentary), at 21.

public or in a part of the Republic [was] threatened by an actual or threaten[ed] war or invasion, an insurrection or general riotousness,"³⁰¹ and "the suspension of that fundamental right [was] reasonably necessary to ensure the continued existence of the State or the safety of the public."³⁰²

The Charter further provided for the continuing power of state detention, although this authority would be subject to judicial review. Section 23, "Personal Freedom," states that a person "may be deprived of his or her freedom" in any of a series of enumerated circumstances, if in accordance with the detention procedures prescribed by a law of a competent legislature.³⁰³ The enumerated circumstances authorize a wide range of pre-trial detentions of suspects and witnesses, including the "detention of a person for investigation and trial on the ground of a reasonable suspicion that he or she has committed an offence."³⁰⁴ Although the Charter purported to limit the application of detention provisions,³⁰⁵ the Charter, nonetheless, would have afforded a wide range of discretionary detention. Upon court approval, detentions would have been both legal and free from the ten day limitation imposed by section 37. Moreover, section 37(d) also allowed for detention in excess of ten days following an indeterminate authorization or leave.

The government's Charter, therefore, did not represent a great deviation from the status quo, and was not incompatible with the existing legal structure, prompting doubts about the de Klerk government's commitment to substantive reform, as well as its sincerity in the continuing multi-party negotiations. De Klerk's willingness to engage in fundamental change was questioned in one commentary, which stated that "[f]or the past three years at a high cost in lives and much else, Mr. de Klerk has fought a stubborn rearguard action designed to ensure that whites would have a strong residual influence over the incoming black-dominated government. And since the ANC was clearly

301. *Id.* § 36(a), at 22.

302. *Id.* § 36(b), at 22.

303. *Id.* § 23(2), at 14.

304. *Id.* § 23(2)(a)-(n), at 14-15.

305. Section 37(d) prohibits "the detention of any person in circumstances other than those authorized in the specific instances set out in section 23 for a period longer than 10 days without leave or an order of a court of law." *Id.* § 37(d), at 22. Sections 23 and 37 continue to apply during states of emergency. *See id.* §§ 23, 37, at 15, 22.

going to be the strongest black party in that government, the main aim of the rearguard action was to weaken it."³⁰⁶

C. *The Interim Constitution*

On December 22, 1993, apartheid's last Parliament voted to approve the Interim Constitution.³⁰⁷ The Interim Constitution, which came into effect automatically following the South African elections held in April, 1994, serves two roles. It provides for a nationwide system of governance ranging from a series of entrenched individual rights to the allocation of taxing and police powers. The Interim Constitution also establishes the guidelines of the post-election Constitutional Assembly.

The Interim Constitution provides for a bicameral legislative body elected for a term of up to five years consisting of a larger lower house, the National Assembly, and a smaller Senate.³⁰⁸ Sitting together, both houses constitute the Constitutional Assembly and must be convened by the President of the Senate within seven days of the first sitting of the Senate under the Constitution.³⁰⁹ The Constitutional Assembly is obligated to draft and adopt a new constitutional text "within two years as from the date of the first sitting of the National Assembly under this Constitution."³¹⁰ In order for a constitutional text to be adopted, it must be approved by "at least two-thirds of all the members of the Constitutional Assembly."³¹¹ Section 73 of the Interim Constitution goes on to establish the mechanisms for adopting the future constitution.

Any constitutional text drafted by the Constitutional Assembly is required to comply with the terms of schedule 4 to the Interim Constitution. Schedule 4, "Constitutional Principles" states, *inter alia*, that:

306. *Three-Card Trick*, in THE ECONOMIST, THE FINAL LAP: A SURVEY OF SOUTH AFRICA 11 (1993).

307. Constitution of the Republic of South Africa Act 200 of 1993, GG No. 15,466, Jan. 28, 1994, at 1.

308. The Interim Constitution states that "[t]he Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999." Constitution Act 200 of 1993, sched. 4, princ. XXXIII, GG No. 15,466, Jan. 28, 1994, at 216.

309. Constitution Act 200 of 1993, § 68 (1)-(3)(a), GG No. 15,466, Jan. 28, 1994, at 40.

310. Constitution Act 200 of 1993, § 73(1), GG No. 15,466, Jan. 28, 1994, at 42.

311. *Id.* § 73(2).

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX

Provisions shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

These principles, ultimately, remain rather vague. The phrase "universally accepted fundamental rights, freedoms and civil liberties" verges on the tautological, particularly within a society like South Africa's where national societal norms have been notoriously difficult to achieve. The ostensibly consensus-promoting requirements, that the future Constitution comply with the Constitutional Principles and be approved by no less than two-thirds of the Constitutional Assembly, are reassuring only in light of the final election results.³¹²

Although the Constitutional Principles provide little detailed evidence with regard to individual civil rights and the freedom of speech, the Interim Constitution itself, in Chapter 3, (entitled "Fundamental Rights") does provide a clearer indication of the direction of the World Trade Center negotiators (a group which, given the proportional representation electoral system and the mandated National Unity coalition³¹³ cabinet structure, broadly resembles the Mandela Cabinet, at least with regard to ANC and NP representatives). Several sections of Chapter 3 affect freedom of speech: section 15, "Freedom of Expression,"³¹⁴

312. The ANC failed to obtain the two-thirds majority required to control debate in the Constitutional Assembly. Perhaps fortuitously, one commentary noted that "the manifold irregularities experienced in polling and counting truly canceled each other out; perhaps more overt manipulation was applied to the result. . . . [T]here is such a neat parallel between what was supposed to happen, and what did happen, that one can be forgiven for wondering whether it is not the result of a serious intervention." Waldmeir & Holman, *supra* note 252, at 3.

313. Constitution Act 200 of 1993, § 88, GG No. 15,466, Jan. 28, 1994, at 50. The Interim Constitution mandates that any party that receives five percent or more of the vote must be represented in the Cabinet, a mechanism which ensures a significant continued white role in the next government de Klerk has insisted during the Kempton Park negotiations that "power-sharing . . . should be entrenched as a permanent principle in any final constitution adopted after next year's elections. 'We definitely believe that a final constitution must include the principle of power-sharing,' he said. 'A winner-takes-all model is the worst possible model there can be for South Africa.'" Gowers & Holman, *supra* note 244, at 1 (citations omitted). Mandela's cabinet consists of eighteen representatives of the ANC, six from the NP, and three from Inkatha.

314. FREEDOM OF EXPRESSION

15. (1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

provides for the broad protection of free speech. This section is further supplemented by the right to free assembly, demonstration and petition;³¹⁵ freedom of association;³¹⁶ freedom of movement;³¹⁷ residence;³¹⁸ and extensive political rights.³¹⁹ As seen elsewhere in South African law, however, these rights are tempered by the coextensive right to "human dignity." Section 10 declares, in terms highly reminiscent of section 47 of the Publications Act, that "every person shall have the right to respect for and protection of his or her dignity." The potential consequences of such protective legislation are by now well known in South Africa. Literature, films, articles, photographs, or even oral statements may run the risk of offending someone, or some group's sense of dignity. The door to censorship remains firmly open.

CONCLUSION

Despite the profound and seemingly irreversible progress of

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

Constitution Act 200 of 1993, § 15, GG No. 15,466, Jan. 28, 1994, at 12.

315. ASSEMBLY, DEMONSTRATION AND PETITION

16. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

Constitution Act 200 of 1993, § 16, GG No. 15,466, Jan. 28, 1994, at 12.

316. FREEDOM OF ASSOCIATION

17. Every person shall have the right to freedom of association.

Constitution Act 200 of 1993, § 17, GG No. 15,466, Jan. 28, 1994, at 12.

317. FREEDOM OF MOVEMENT

18. Every person shall have the right to freedom of movement anywhere within the national territory.

Constitution Act 200 of 1993, § 18, GG No. 15,466, Jan. 28, 1994, at 12.

318. RESIDENCE

19. Every person shall have the right freely to choose his or her place of residence anywhere in the national territory.

Constitution Act 200 of 1993, § 19, GG No. 15,466, Jan. 28, 1994, at 12.

319. POLITICAL RIGHTS

21. (1) Every citizen shall have the right—

- (a) to form, to participate in the activities of and to recruit members for a political party;
- (b) to campaign for a political party or cause; and
- (c) freely to make political choices.

(2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

Constitution Act 200 of 1993, § 21, GG No. 15,466, Jan. 28, 1994, at 12.

the past five years, South Africa's history of political abuse bodes ill for the long-term prospects for political reform and the forging of a democratic consensus. Albie Sachs, a leading ANC spokesman has noted that the country's history of oppression greatly complicates constitutional negotiations: "[I]t is a sad tribute to the way law has impinged on the life of the majority of South Africans that a Bill of Rights is seen essentially as a means of using juridical techniques to restrict rather than enlarge the area of human freedom."³²⁰ Sachs notes that a Bill of Rights is suspect to many in the black community, in large part, due to the (not unfounded) fears that such a document will merely serve to protect the privileges of the white population.³²¹ For instance, the Azanian People's Organization ("AZAPO"), a black consciousness organization affiliated with the PAC, refused to participate in the Kempton Park negotiations on the grounds that they were "undemocratic and incapable of delivering a lasting political solution for the country and its people."³²²

The history of the regulation of speech in South Africa in the years under apartheid evinces an over-arching desire to suppress opposition to the government's social policies. These efforts have involved the explicit regulation of the content and context of political expression; security measures which afford wide latitude to detain or ban individuals, thereby preventing them from voicing or otherwise expressing their opposition to the legal regime; and strict limitations on the ability of the media to report events within the country. Although these measures are *prima facie* race neutral, they have been applied in a highly arbitrary, race-specific manner. Furthermore, the measures regulating speech have always had a disproportionate impact on the black population.

320. Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa*, 6 S. AFR. J. HUM. RTS. 1, 3 (1990).

321. *Id.* at 4-13. For example, Constitutional Principle 12 states that "[c]ollective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free-association, be recognized and protected." Constitution Act 200 of 1993, sched. 4, princ. XII, GG No. 15,466, Jan. 28, 1994, at 212. In addition, Principle 14 provides that "[p]rovision shall be made for participation of minority political parties in a manner consistent with democracy." Constitution Act 200 of 1993, sched. 4, princ. XIV, GG No. 15,466, Jan. 28, 1994, at 212. Both Principles are designed to preserve the political independence and influence of white South Africa.

322. *AZAPO Against Current Negotiations*, SOUTH AFRICAN PRESS ASSOCIATION (1993).

South Africa remains on a perilous path to a society of entrenched individual rights. The Interim Constitution has been designed to promote a consensual, democratic polity and the official election results appear to encourage the parliamentary involvement of the country's principal ethnic groups. Mandela, too, has been careful to espouse conciliatory, reformist language. Much, however, will depend on the ability of Mandela and his Deputy Presidents, Mbeki and de Klerk, to sustain the new coalition government and Constitutional Assembly. In South Africa today, there remains no easy talk on the road to freedom.