THE NON - JUSTICEABLE CONSTITUTION -- THE DILEMMA OF THE DISFRANCHISED BLACK SOUTH AFRICAN - I9IO - I980.

Submitted to Professor Derrick A Bell Jr. in satisfaction of the requirements for the degree of LL.M.

Ernest Sipho Mchunu.

April 23, I98I.

TABLE OF CONTENTS.

MEMORANDUM

The constitutional history and the constitutional status quo in the Republic of South Africa have been written on, commented upon many times. But no Black man has ever committed to writing the legal impact of South Africa's laws from a Black perspective.

This paper does not seek to deal exhaustively with all the racial legislation of the Republic of South Africa. Such a task would require the writing of a 500 page work to be entitled, "The Theory and Practice of Racial Discrimination in S.A.". It is also clearly outside the scope of this paper.

What the writer has sought to do in this paper is to highlight those historical, legal, political and social forces that have shaped and spawned "Apartheid" in South Africa and to show how the Blacks have reacted to the enforcement of apartheid laws.

The writer has elected to discuss just a few pieces of legislation which, it seems to the writer, best reflect the interaction of the forces referred to above. The legislation referred to directly affects constitutional issues and it is for that reason that it is referred to. The choice of laws to be referred to has been somewhat arbitrary and coloured by the writer's perceptions but it is the firm view of the writer that the treatment of the subject has been fair in the circumstances.

A brief explanatory note is called for at this stage.

1. The terms "Black" or Bantu" or "Native" as they appear in the text refer to the people of African descent in South Africa. Although since the rise of the Black Power Movement in the Republic, the term "Black" has come to include "Coloured" or mixed race people and Indians, this is not the meaning attached to it in this treatise. The reason is obvious. The Indians and Coloureds have been treated differently and have reacted differently to racial discrimination in S.A. and it would require a paper about two or three times as long as this paper to examine their position legally. The motivation has not been to discriminate against other people of colour, but the choice has been dictated by academic requirements.

2. Many Acts of Parliament have been cited with their original titles such as "The Natives Lands Act 1913", the "Native Administration Act, No. 38, of 1927". However, the titles of many of these laws have been changed, e.g., the Native Administration Act 38 of 1927 is now called "The Black Administration Act, No. 38 of 1927." The "Suppression of Communism Act, No. 44 of 1950" is now called "The Internal Security Act No. 44 of 1950." The writer has decided to retain the original titles for in his view they reflect very fully the attitudes prevailing at the time of the passing of the statute and the new

titles more often than not are misleading euphemisms

3. The Suppression of Communism Act, No. 44 of 1950 which has been re-named the Internal Security Act, No. 44 of 1950 has not been specifically analysed in the paper. The reason for this is that it did not specifically discriminate on the basis of colour but on the basis of political belief and affiliation. However, many of its provisions were later incorporated by reference to other statutes which were obviously racial, e.g., the "Unlawful Organisations Act of 1960". A reading knowledge of this Act will be advantageous in any attempt to assess the last chapter of this paper.

THE NONJUSTICEABLE CONSTITUTION--THE DILEMMA OF THE DISFRANCHISED BLACK SOUTH AFRICAN - 1910-1980

I. INTRODUCTION

In the last quarter of the twentieth century, the Republic of South Africa is the only country in the world which withholds certain rights, known to the majority of civilized states as basic human rights, from the majority of its citizens as a matter of state and legal policy on the basis of colour and race. To the Western observer, it is one of the intractable mysteries of the South African situation that 1/5 of the population can so completely and effectively legally exclude 4/5 of the population from a meaningful share in the exercise of power and economic participation.[1] It is the aim of this paper to explain the paradox of the minority oppressing the majority in a "democratic" state and to show how the result came about through a combination of circumstances which seem unique to the Republic of South Africa.

II. HISTORICAL BACKGROUND

The year 1910 is used in this study as an arbitrary divide in the history of South Africa. It is so used because it signifies the actual constitution of the Republic of South Africa[2] as an entity in political and juridical terms.

The Republic of South Africa is a unitary State which consists of four provinces viz. Transvaal, Orange Free State

and Natal and the Cape Province.

Prior to 1899, Great Britain had established two colonies in Southern Africa, Natal and the Cape Colony. The Cape Colony had been a British colony since 1806 and Natal had been a British colony since 1843.

To the north of the two British colonies were two Republics which were controlled by white people of predominantly Dutch stock who were commonly called Boers. The Republics were named the South African Republic and the Orange Free State.

In 1899 a war had broken out between Great Britian and the two northern Boer Republics. The war came to an end in 1902 with the defeat of the Boer Republics and the signing of the Peace of Vereeniging between Great Britain and the two Republics.

Great Britain annexed the two Republics and henceforth they became British colonies and were named Transvaal (formerly called South African Republic) and Orange River Colony (formerly called the Orange Free State). At the turn of the century, therefore, Great Britain had four colonies in Southern Africa.

In all these colonies there were great numbers of Black people.[3] Prior to the amalgamation of the four colonies into a Union in 1910 each of the colonies including the two former Republics had adopted different policies with regard to the exercise of the franchise by the Black people in each colony.

Natal had adopted a fraudulent policy of appearing to grant the franchise to the Blacks and then imposing unattainable conditions to its grant. In fact it was discovered in 1905 that after 39 years of the existence of the possibility of a Black man attaining the franchise in Natal, only three Blacks had been able to comply with the conditions and register as voters.[4]

The Cape Colony had adopted a nonracial policy regarding the franchise. Provided a person measured up to the nonracial qualifications laid down and which were applicable to all and sundry, Black or White, such person could be registered as a voter.[5]

The Republic of the Orange Free State had excluded the Blacks from the franchise by providing in the constitution that citizens were to be White persons only and by providing that only citizens could vote.[6]

The Transvaal (or South African Republic) had adopted an unabashedly racial stance in excluding the Black people from the political life of the Transvaal.[7] Section 9 of the Grondwet of 1858 (i.e. the Constitution) specifically lay down that there would be no equality between Coloured and White people in church or State. No Black person ever even claimed the right to vote.

When Great Britain annexed the South African Republic and the Orange Free State after their defeat after the signing of the Peace of Vereeniging the Black franchise was swept under the carpet. During

the negotiations between the Boers and the British authorities which were conducted before the cessation of hostilities the Boers maintained that they would not agree to the franchise being granted to the Blacks in the Transvaal and Orange River Colony. Great Britain buckled to the demands of the Boers and agreed to the insertion of par. 8[8] in the text of the Peace of Vereeniging whereby it was agreed between Britain and the Boer Republics that the question of the Black franchise would not be determined finally before the conferment of self-government on the two colonies. "Britain thereby undertook not to admit any Africans to the franchise in the Transvaal or the Orange River Colony while she had the power to do so and she ignored the Coloured inhabitants of those colonies."[9] When Britain annexed the two Boer Republics and made them her colonies, she had clearly assumed legal responsibility for all the inhabitants of the two erstwhile Republics. When she failed to grant the franchise to all the inhabitants and pandered to the wishes of the Boers she made herself guilty of a colossal betrayal of the Blacks in those two territories. The betrayal has reverberated to the present day for, in time, the exclusionary policies of the Northern Boer Republics were extended to the whole Republic (see p.9 infra). The present state of disfranchisement of the Black people of South Africa is traceable to this betrayal by the British Government. It was a

betrayal that Lord Milner, the chief architect of British policy in South Africa at the time, was to regret.[10]

At the beginning of this century it became imperative that the four Southern African British colonies be united into one. The different policies followed by each of the four colonies regarding transportation, fiscal matters, customs, Black policy and control of Black labour, economic policy bedevilled the task of administration and rendered it prohibitively expensive.[11] A uniform policy in all four colonies in respect of the matters mentioned would undoubtedly be advantageous to the inhabitants of the colonies.

For Britain, too, the need to unite the colonies was urgent. Britain realised that war with Germany was imminent. A single South African British colony, united, strong and friendly to Britain would be of vital importance to the British war effort.[12]

In May 1908, representatives of the four South African colonies, encouraged by the representatives of the British government,[13] met at an Inter-Colonial Conference in Pretoria. The principle of union of the four colonies was agreed upon and it was agreed that each of the four colonial parliaments should appoint delegates to a National Convention which would be convened to draft a Union Constitution.[14]

Subsequently, all the colonial parliaments sent

delegates to the National Convention which met for the first time in Durban on 12th October 1908. The Convention had a mandate from the four colonial parliaments to draw a draft constitution for the new Union. Significantly, there was not a single man of colour among the delegates though in view of the fact that non-whites could vote in the Cape and in Natal one would expect them to be represented.[15]

At the time of the Convention, the Whites were undeniably on top in all spheres of South African life. The question of colour and domination of the Blacks by the Whites was so much in the minds of the delegates that of all the multitude of problems faced by the Convention, it was the only problem specifically referred to by the President of the Convention in his opening address.[16] The great problem of the National Convention was "How under closer union can the interests of the vast majority of the people of South Africa and through them, the interests of all be justly and efficiently safeguarded with due provision, at the same time, for the maintenance of white supremacy?"[17] If the Convention agreed upon the extension of the franchise to the Blacks, White supremacy could not endure long.

A deadlock ensued between the racist northern delegates who sought to exclude the Blacks from the franchise and the southern liberals who strove to extend the franchise to the Blacks.[18]

To the credit of some of the members of the Convention, they realised the vital importance of the franchise to the Black man who was not represented at the convention. Although nobody said it, those who championed the Black man's cause seem to have realised that the Black man's very absence at the Convention which was going to shape the future life of South Africa was unjustifiable discrimination.

Realizing that the Black franchise deadlock could wreck efforts at union which union was desired by all parties present, Mr. John X. Merriman, the Prime Minister of the Cape Colony suggested a compromise.[19] The effect of Mr. Merriman's resolution would have been that the franchise rights of the Blacks would have been frozen and no Black would thereafter ever be able to obtain the vote in the Transvaal and the Orange Free State.[20]

Colonel W.E.M. Stanford, a staunch champion of the disfranchised as few have been in South African history, moved an amendment to his Premier's motion to the effect that "All subjects of His Majesty, resident in South Africa shall be entitled to franchise rights irrespective of race or colour upon such qualifications as may be determined by this Convention."[21] In other words, Colonel Stanford not only wanted the Convention to decide the issue of the Black franchise there and then but also the qualifications of voters. These matters were to be embodied in the draft

constitution which was to be presented to the various colonial parliaments. (C.F. Lord de Villiers' introductory comments when he sought to sweep this problem under the carpet).

However the southern initiative met determined opposition. Sir Frederick Moor, who was the Prime Minister of Natal, expressed the views of the majority of the delegates when he said "The natives were incapable of civilisation because they were incapable of sustained effort." . . . he would protect the native interests, he would secure them justice and freedom but he was absolutely opposed to placing them in a position to legislate for White men."[22]

Mr. J. W. Sauer[23] supported Colonel Stanford saying that he advocated equal rights as such a policy had never been shown to have failed and it had worked in the Cape Colony. He was opposed to a differential franchise.[24]

General J. C. Smuts[25] spoke after Mr. Sauer and like a shyster lawyer he temporised.[26] He was however emphatic that if the Convention adopted the franchise policy of the Cape Colony, the people (meaning the Whites naturally) would not accept the constitution. In other words the Union of South Africa would be still-born.

General J.B.M. Hertzog who was a delegate from the Orange River Colony expressed himself against the extension of the franchise to the Blacks as he feared that the Blacks would swamp the Whites at the ballot box.[27]

General Louis Botha, the Prime Minister of the

Transvaal, then presented an ultimatum to the Convention. ". . . there was no hope of a final solution of this thorny question being reached by the Convention now . . . Their first duty as a Convention was to draw up a constitution for a united South Africa and Colonel Stanford's resolution, if passed would he feared ruin the object which the Convention had in view. Their first duty was to bring about the union of the white races in South Africa."[28]

General de Wet, from the Orange River Colony expressed the feelings of the delegation from that colony thus ". . . if the native franchise was embodied in the constitution, not five per cent of the electors of the Orange River Colony would support Union."[29]

General Burger of the Transvaal supported his leader, stating that ". . . the people of the Transvaal were not prepared at the present time to admit natives to the right to vote."[30]

Natal, Transvaal and the Orange River Colony therefore unequivocally indicated that notwithstanding their desire for economic advancement and unity, these were not attractive enough to offset their fear of political equality with the Black man. Whatever advantages may flow from union, they were not strong enough inducements to neutralise the White man's desire to dominate the Black man. The position in South Africa was a direct opposite of the position in the United States of America where the

White man was prepared to allow the political advancement of the Negro provided that it went hand in hand with a perceptible advantage to himself.[31]

The Cape Colony was left carrying the can of the Black franchise.

Since the Convention could not reach agreement on the Black franchise, the Convention appointed a committee to go into the matter in deail and to report to the Convention.[32] The committee submitted a report which formed the basis of Section 152 of the Union of South Africa Act.[33] (about which more will be said later).

The result was a compromise. "Membership of Parliament was limited to Europeans but, on the other hand, Botha met Merriman half way by agreeing that the Cape Native Franchise should be altered only by a two-thirds majority of both Houses sitting together."[34]

In effect, the sop given to Merriman by Botha had been worthless and had been intended only to placate Merriman. Both General Smuts and General Botha fully intended to abolish the Black Cape Franchise as soon as they had the power to do so.[35]

By 3rd February 1909 the Draft Union Bill was ready. It was then submitted to the four colonial parliaments for consideration. The National Convention again met in May 1909 to consider amendments to the Draft Union Bill which had been suggested by the parliaments of Natal,

Cape Colony and Orange River Colony. The final Draft Union Bill was then sent to the various parliaments for approval. Natal submitted the final Draft Union Bill to a referendum of its citizens (i.e. Whites) and it was approved. The other three parliaments approved the final draft. Delegates were appointed to take the South African drafted Union Bill to London to present it to the British Government for passage through the British Parliament.[36]

From the onset it was clear that the British Government would have no option but to pass the Union Bill notwithstanding the fact the Bill contained racial provisions which were unacceptable to the British Government viz. the exclusion of the Blacks from parliamentary membership and the franchise. "By 1909 indeed all responsible British statesmen realised that it was too late for Britain to determine the distribution of political power in South Africa. She had had her opportunity in 1902[37]--but then instead of using it, she had undertaken that "The question of granting the franchise to natives [in the Transvaal and Orange River Colony] will not be decided until after the introduction of self-government. The colour-bar provisions, first of the Transvaal and Orange River Colony constitutions, and now of the draft South Africa Act, were considered to flow logically from that commitment. Consequently the British Government regarded it as being outside the range of practical politics to insist on any

diminution of the colour-bar provisions of the draft Act; and it was a foregone conclusion that the Imperial Parliament would endorse the will of the South African parliaments."[38]

The British government clearly had the power to alter any provision in the Bill presented to it by the South Africans. It also bore a very grave constitutional responsibility to the Blacks in South Africa. It must have known the desire of the White South Africans to dominate the Blacks. It must surely have realised that the exclusion of the Blacks from parliamentary membership and the franchise would be final. It surely must have realised that even the entrenched rights of the Cape Blacks in Section 152 were at the mercy of the Whites once power was constitutionally transferred to them.

The Blacks and Coloureds in South Africa, apprehending the threat posed to their rights by the Draft Bill had also sent delegations to London to lobby against the passage of the Bill as it stood. They were led by W.P. Schreiner a former Prime Minister of the Cape Colony. This desperate last ditch attempt to block the passage of the South African Act was a dismal failure.[39]

Having been fully apprised by the Black and Coloured people of the danger to their rights posed by the Bill, the British Government deliberately elected to ignore their pleas. At a meeting with the official South African delegation, Lord Crewe, the Colonial Secretary expressed the

betrayal as follows: "It was the fixed conviction of His Majesty's Government that these matters must be settled in South Africa itself. It was of no use to express academic opinions, and His Majesty's Government were prepared to see the Bill through as it stands both as to franchise and as to representation."[40]

That speech must have elicited a smile of satisfaction from Botha and Smuts (in view of their determination to scrap the Black franchise).

The British Government as it was entitled to, made 53 amendments to the Bill which was presented to it by the South Africans.[41] However, not a single substantive amendment was made to the Draft Bill. Lord Crewe was at pains to assure the South Africans that "The amendments are inserted in part to adapt the form of the Bill to the Australian precedent . . . and in part to remove ambiguities or to give effect to what is understood to be the real intention of the Act."[42]

The final abdication of authority by the British government and assignment of the Black people to the tender mercies of the Whites was expressed by Lord Crewe in the House of Lords as the South Africa Bill was in the final stages of its passage through the British Parliament, "As a government we cannot take--and personally I am not prepared to take--the responsibility for the possible wrecking of this Union measure altogether by a provision of this

kind; and I am assured that such would be the result of any attempt to insert such a provision in the Bill. The cause of those who desire this change to be made has been pressed with deep feeling and much eloquence by some of the natives themselves and by those who specially represent their cause. But I do feel that if this change is to be made it must be made in South Africa by South Africans themselves, and that it is not possible for us, whatever we may consider to be the special merits of the case, to attempt to force it upon the great representative body which with absolute unanimity demands that it should not appear."[43]

What was being discussed here was the nonracial franchise. The British Government was being urged to amend the Bill to provide for a nonracial franchise.

The cynicism of Lord Crewe and the British Government is breathtaking. They were not ignorant enough to accept that the National Convention or the parliaments of the four Southern African British colonies were "representative." The colonial office must have been in possession of population statistics which would have shown clearly that the Whites were outnumbered by the Blacks. The British Government knew that the bona fides of General Botha was suspect when he "insisted that the question of political rights for non-Whites would 'have to be solved in South Africa by the South Africans' who had always 'shown a spirit of justice and fair play[44] towards the native races'

in the past and could be trusted to so so in the future."[45] The very insistence of the Whites that the Blacks be excluded from the vote would have clearly indicated the dishonourable intentions of the South Africans to anyone.

The British Government must have known about the racist remarks of the delegates to the National Convention and the reasons underlying the desire by the Whites to exclude the Blacks from the vote. Surely it appreciated that once it abdicated its authority and the problem was solved by "South Africans" themselves, the political and legal fate of all Black South Africans would be at the mercy of the Whites forever, unless the British Government stepped in at some future date.

The British Government was prepared to add another chapter to its betrayal of the Blacks. The South Africa Act was passed substantially without modification as requested by the White South Africans.

Thus the British Government deliberately handed 4,059,018 people of colour to the political and legal control of 1,116,806 Whites.[46]

In terms of a British Proclamation, the Union of South Africa came into being on 31st May 1910.[47]

The history of the Republic of South Africa has, since 1910, been an ongoing struggle by the White people to entrench their political and economic dominance over the people of colour. They have so far succeeded to do

so in a measure that has seldom been equalled in history. Their success can be attributed to one factor, i.e. their unabashed arrogation of the franchise to themselves and through such arrogation, their ruthless manipulation of the political processes and the law.

III. LEGISLATIVE SUPREMACY

It its trite law in South Africa that the legislative power of Parliament in unfettered. Parliament may make any law on any subject it chooses. ". . . Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will."[48] Provided that Parliament follows the correct procedure when enacting a law, the court will not look into the substance of the law in order to determine whether the substance of the law complies with the constitution or not.[49]

The most remarkable thing about the Supreme Court's dicta on the supremacy of Parliament and the denial of the Supreme Court's substantive testing right is that it is postulated with very insufficient supportive reasoning. Most of the judges seem to take it as self-evident that the Supreme Court cannot overturn an act of Parliament (C.F. Stratford A.C.J.'s dictum as quoted above, footnote 48).

Most of the cases in which the doctrine of

legislative supremacy was discussed, were decided under the South Africa Act. In most of the cases, a section of the South Africa Act, especially Section 152 is relied on for support and the matter rests there. No argument as to the true meaning of Section 152 has ever been advanced or any judicial interpretation made of Section 152 to explain why legislative supremacy is inferred therefrom.

In view of the point made in a previous paragraph about how the Whites in South Africa have manipulated the law to achieve their dominance, it is the view of the writer that the acceptance of the principle of legislative supremacy by the Supreme Court directly contributed to the success of the Whites in the domination of the Blacks. If the courts had rejected the principle, the Blacks would not be in the position they are in today.

It becomes necessary therefore to examine how the principle came to be accepted in South African law.

When the British conquered the Cape and Natal they introduced British parliamentary administrative and judicial institutions and processes including the principle of parliamentary supremacy.[50] However the British also introduced two of the underlying pillars of British justice, i.e. equality before the law, "Yet this certainly English (and Scottish) law does provide, that no man is penalised because he is a Jew, or poor, or without

political or social influence, or because he belongs to a party, or because he has unusual notions about a future life";[51] and the franchise for every British subject who complied with franchise conditions. "Democracy as we understand it, means that the people must be free, the free choose the rulers and the rulers govern according to the wishes of the people."[52]

It is submitted that the principle of legislative supremacy of the British constitutional law as imported to South Africa, had as one of its most fundamental assumptions that everybody had a vote (or had unrestricted opportunity to qualify as a voter) and could participate in the political process. The rights of each subject would be protected by his participation in Parliament through his elected representative. If a subject apprehended a proposed law as being inimical to his interests, he could (through his representative) canvass the support of other people (through their representatives) and attempt to defeat the proposed law. If the proposed law passed nonetheless, he could not complain as he was part of the political process that produced the law. Even after the law was passed he would still be entitled to agitate for its repeal. Logically, therefore, no voter could argue that his rights had been illegally infringed or curtailed by an act of Parliament, since they would have been curtailed only after he had had his say and his individual interests would have been overriden by

the greater interests of society which is the essence of democracy.

The second assumption was that everybody would be treated equally before the law, and if he was not so treated he could take his case to the highest court in the land.

It is submitted that if these conditions are not present, the British principle of parliamentary supremacy may, in the hands of determined practitioners of the art of government, become an instrument of oppression.

In South Africa, the conditions for the proper application of the principle of parliamentary supremacy to achieve a democratic society comparable to the society which existed in England at the time, did not exist. "While the Cape and Natal colonists adjusted easily to British parliamentary institutions, and less easily to British insistence on equality before the law, the Dutch emigrants, now known as Voortrekkers, established political institutions that were remarkable for their rejection of the two cardinal principles of English law--legislative supremacy (although this was not so certain in the case of the Transvaal) and equality before the law."[53]

As has been shown in a foregoing section, it was only in the Cape Colony and Natal that some attempt was made to extend the vote to the Blacks. It can be argued that in those two colonies the principle of parliamentary

supremacy was enforceable as the Blacks had a voice in Parliament.

In the Orange Free State, parliamentary supremacy was rejected and the Supreme Court's testing power was recognised.[54] It is submitted however that the testing right was accepted in the Orange Free State because the basic political questions of how equality of the races before the law and the exclusion of Blacks from the franchise had been settled and embodied in the constitution.[55]

However it is submitted that the testing right was adopted as a measure to protect the Trekkers from the overriding power of the Volksraad (i.e. Parliament). The Trekkers had a recent history of what they conceived as oppression by the British in the Cape Colony and wanted to avoid a similar occurrence in their own Republic.[56] The court was seen as a last bastion of freedom.

In the Transvaal, the British principle of legislative supremacy was first accepted by the court.[57] However in Brown vs Leyds N.O. (1897) 4 Off. Rep. 17. Chief Justice Kotze changed his mind. In this landmark decision Kotze C.J. held: "The people who have declared their independent existence in the Grondwet and who possess sovereign power in this Republic have entrusted this power in various measure to the Volksraad, the Executive and the Judiciary. Each of these bodies derives its authority from the Grondwet and must regulate itself, each within

its own sphere and scope in accordance with the terms thereof. None of these powers is above or independent of the constitution." (p. 27).

The Court referred to most of the authorities in Roman Dutch law and American cases and reviews and came to the conclusion that "Seeing that a law may be in conflict with the constitution not merely so far as its form is concerned, but also with respect to its matter, it seems clear to me that logically no such distinction can be drawn." (pp. 28-29).

The Court, exercising the testing right, then declared certain besluiten (resolutions of the Volksraad) which were in conflict with the constitution.

President Kruger was enraged. He quickly pushed through the Volksraad a law which abolished the testing right of the Court and empowered him to dismiss any member of the Judiciary who did not satisfy the President that he would not exercise the testing right.[58] In answer the judges adjourned the Court sine die and refused to conduct the business of the Court.

After some negotiation[59] between the President and Chief Justice Kotze conducted through the good offices of Sir Henry de Villiers, the Chief Judge of the Cape Colony, it became clear that none of the parties was prepared to give way. President Kruger, exercising his constitutional rights then dismissed Chief Justice Kotze.

However in any society the chair of the Chief Judge cannot remain vacant for long. It does not matter how lofty a principle which is at stake is, it will fall into insignificance when compared with the office of the Chief Judge.

Thus President Kruger was able to obtain a replacement for the courageous Kotze. "The final word on the judicial crisis belongs to President Kruger. At the swearing in ceremony of the new Chief Justice, R. Gregorowski, he enunciated a biblical-trekker legal philosophy which still haunts the minds of South African judges and lawyers. 'The testing right is the principle of the Devil', he warned. The Devil had introduced the testing right into Paradise and tested God's word. Judges accordingly were advised not to follow the Devil's way, as Kotze C.J. had done! There was of course, much to be gained politically from this biblical precedent. President Kruger had discovered the advantages of a flexible, British type constitution that placed sovereign power in the hands of an unrepresentative legislature--a legislature which could manipulate the law to ensure Afrikaner hegemony in a country in which few White foreigners (Uitlanders) and no Blacks participated in the legislative process. Judicial independence was permissible, even desirable, provided the judiciary was impotent against the Volksraad and its jurisdiction was limited. As Kruger characteristically remarked at the time of the Brown decision, "The Court

is free as it were, as a fish is free to swim in a net."[60]

In my respectful view, Gregorowski C.J. who succeeded Kotze did so as a matter of political expediency. He had seen how Kotze had been treated by the Executive Branch of the Government when he had tried "to assert the important principle that a government should itself be subject to law. By the 1890s that principle was not acceptable to the ruling group in the South African Republic for several reasons.[61] The most important of those reasons was the desire to concentrate power in the hands of the unrepresentative Afrikaner dominated Volksraad.

He knew that if he acquiesced to the exclusion of the testing right of the Court, the Volksraad could in the future pass laws that would discriminate against the Uitlanders (foreigners) and the Blacks and the Court would be in no position to protect those people. Since stringent conditions were imposed upon the acquisition of the vote by Uitlanders[62] and since the Blacks were excluded from the franchise Gregorowski C.J. knew that he was acquiescing to virtual enslavement of the disfranchised to the will of the Volksraad. By conceding the principle of legislative supremacy, Gregorowski C.J. had deliberately placed the Court in a subservient position vis-a-vis the Executive and the Legislative arms of government.[63] Irrespective of the correctness or otherwise in law of his decision, that decision of Gregorowski C.J. has

bedevilled South African constitutional law ever since.

One must ask one's self: why did Gregorowski make the choice that he did? An answer will be suggested later.

In the meantime Kotze C.J. had left behind a magnificent precedent. What were the courts going to do about it if the question of legislative supremacy was again canvassed?

When the British Crown annexed the Transvaal and Orange River Colony in 1902, new courts were brought into being by the British authorities in the erstwhile Republics. The courts of the new colonies did not consider themselves bound by the judgments of the preceding High Courts of the former Republics.[64]

Kotze C.J.'s decision was therefore consigned to the scrap-heap.

The Appellate Division, which, in terms of the Union of South Africa Act had been constituted the highest court in the Union of South Africa considered the question of legislative supremacy for the first time in 1912 in the case of R v McChlery.[65]

To understand the full impact of the judgment one must put it in its proper perspective in the legal and political conditions of the time.

As has been shown earlier, the Blacks had mounted a valiant but unsuccessful campaign against the franchise provisions of the Union of South Africa Act. They had not

stopped agitating against the Act after it was passed by the British Parliament. At the time the judgment in McChlery's case was handed down on 30th May 1912, there was before the Union Parliament, a measure which was called the Squatter's Bill. This Bill sought to entrench political and territorial racial segregation in South Africa.

The Blacks had already expressed themselves to be violently opposed to the Bill and had resolved to fight the Bill to the last.[66]

The Bill was in the event not passed.

But it is clear that at the time of the handing down of the judgment, the Union of South Africa was in an uproar with the Blacks up in arms against a measure which they considered gravely prejudicial to their interests.

A further point to be taken into consideration is the fact that the real point to be decided in the case related to a dispute which had arisen in Southern Rhodesia, not in South Africa.

All three appeal judges handed down separate judgments and in view of the fact that they raise separate issues they shall be dealt with separately.

Lord De Villiers C.J.'s judgment

"Cases were cited in which the American courts have claimed, and successfully exercised, the right of declaring taxes imposed for the purpose of benefitting

individuals to be unconstitutional and therefore illegal; but in the decision of the present case the Court must be guided by the principles of the English law and not of the American Constitution. Our courts have every right to enquire whether any statute has transgressed the limits of the subjects in regard to which the legislature is empowered to legislate, but they have no right to enquire whether, in dealing with subjects within its competence, the Legislature has acted wisely or unwisely, for the benefit of the public or for the benefit of private individuals."[67]

Lord de Villier's judgment raises a number of questions viz.

(1) Why did Chief Justice de Villiers expressly decide that English law was applicable and specifically exclude American interpretation of judicial power?

(2) Knowing the history of the judicial crisis which had ensued during the test of wills between President Kruger and Chief Justice Kotze[68] in the old South African Republic and knowing the reasons behind President Kruger's insistence on legislative supremacy, why did he deliberately emasculate the power of the fledgling Appellate Division?

(3) Knowing that the English principle of parliamentary supremacy was based on the twin pillars of equality before the law and an unrestricted franchise and knowing that these principles were inoperative in South

Africa why did he hold that an inappropriate rule applied in South Africa?

(4) Having been President of the National Convention and knowing that it was the desire of the Whites to keep the Blacks, who did not have the franchise, in perpetual subjection, did he not realise that the judgment would give the Court's imprimatur to the segregationist and racist tendencies of the Whites?

(5) Knowing that if things went badly with them as a result of legislative practices by Whites, the Blacks would approach the courts for relief, why did he slam the door prospectively in their faces by telling them that the Court would not inquire into whether the legislature had acted "wisely or unwisely or for the benefit of the public or for the benefit of private individuals" or in other words, that the Court would not enquire whether the Blacks were being discriminated against?

(6) Knowing that it was the firm intention of the majority of the Whites to exclude the Blacks from the political process and knowing that the Union of South Africa Act did not lay down specific topics on which the Union Parliament could legislate why did he give the Whites an express assurance that they could legislate on any matter they desired and the Court would not interfere? Was it not a deliberate conferment of a legislative carte blanche on the Whites?

The Judgment of Innes J.

". . . the language is that frequently employed in constitutions and charters by which full legislative powers are conferred upon local authorities. A recent example of such employment will be found in the case of our own Parliament, whose practically unrestricted legislative capacity is based upon the 59th section of the South Africa Act which in language practically identical with that of the Rhodesia Order in Council empowers it to make laws for the peace, order and good government of the Union . . .The second is that power given to a legislative authority to make Ordinances for peace, order and good government must mean a power to make such Ordinances as to that authority shall seem necessary in the interests of peace,order and good government. Always assuming that the restrictive limits of the empowering documents are observed, the discretion to judge what measures are conducive to peace, order and good government lies with the lawyers and not with the courts. Having regard to the fact that a Subordinate Legislature . . . is in a similar position to the British Parliament, it is impossible that the Colonial Courts should have an overriding authority to say when measures are, and when they are not, in the general interests of peace, order and good government. Such a task would be in the highest degree invidious and difficult and it is fortunate that the spirit of our constitution does not impose it upon Judges."[69]

Innes J.A.'s judgment also raises a number of troublesome questions viz.

(1) Why did the learned judge find it necessary to allude Section 59 of the South Africa Act when such a reference was completely unnecessary? Strict constructionist that he was,[70] why did he not confine himself to the point which was at issue instead of bringing within the compass of the decision the question of parliamentary competence of the Union Parliament which issue was completely irrelevant?

(2) Why did he decide that the phrase "for the peace, order and good government" meant "in the interests of peace, order and good government" or "conducive to the interests of peace, order and good government" when no argument had been addressed to him on the point of interpretation of that phrase in the light of the whole statute concerned?

(3) Was it proper for him to abdicate the authority of the Court by holding that the exercise of the testing right by the Court would be invidious and difficult? Was this a justifiable basis of a court's refusal to decide troublesome issues that came before it?

(4) Was it proper for the learned Judge of Appeal to hold that the spirit of the constitution did not demand of the judges to exercise the testing right without any argument being addressed to him on that point and without

him making any interpretation of the relevant legislative enactment to determine the absence or presence of such a spirit or intention on the part of the enactors of the enactment concerned?

(5) Why did the learned Judge of Appeal invest a subordinate legislative authority with the power to decide for itself when a measure was in the interests of peace, order and good government without any attempt whatsoever to justify such a decision?

The Judgment of Solomon J.A.

The relevant portion of Solomon J.A.'s judgment reads as follows: "To take the latest example, Section 59 of the Imperial South Africa Act 1909, enacts that the Parliament of the Union shall have 'full power to make laws for the peace, order and good government of the Union'. In my opinion, however, the words 'as he might deem necessary' are mere surplusage and must be implied in Section 35 of the Southern Rhodesian Order in Council as well as in Section 59 of the South Africa Act 1909. For it is the legislature and not the Courts of Law in Rhodesia as in the Union of South Africa who are the judges of whether any law is required for the peace, order, and good government. That is a matter entirely within the discretion of the legislature and no matter how strongly any judge may feel that a particular law is antagonistic

to good government he has no authority on that ground to declare the law invalid. All that the courts of law can do is to enquire whether the legislature has exceeded the powers conferred upon it by the Order in Council which created it and in that event declare the law invalid to the extent to which the powers have been exceeded."[71]

Like the other judgments in McChlery's case Solomon J.A.'s judgment raises difficult questions viz.

(1) Why did he, like Innes J.A. make reference to Section 59 of the South Africa Act when it was not necessary to do so at all in order to come to a decision in the matter before him?

(2) Why did he interpret the words "as he might deem necessary" as being implied in Section 59 of the South Africa Act when he made no attempt at all to interpret Section 59 in the light of the South Africa Act read as a whole, which it is submitted should have been the proper procedure to follow?

(3) Why did he hold that a judge was bound to enforce a law even if it was antagonistic to good government? Would a law which was antagonistic to peace, order and good government not be ultra vires the enabling enactment and therefore exceed the bounds of the authority conferred by the enabling statute?

(4) Why did he like Innes J.A. invest a subordinate legislature with the authority to decide whether a measure "is required for the peace, order and good government"?

(5) Why did Solomon J.A. conclude that "for the peace, order and good government" meant "required for the peace, order and good government" when he made no attempt to interpret that phrase by applying the applicable canons of interpretation?

What can be asked of all the judges is why not one of them made mention of the judgment of Kotze C.J. in Brown v. Leyds, even if to disapprove and criticize it? The question is especially pertinent to de Villiers C.J. as he was intimately concerned with the conflict between Kotze C.J. and President Kruger.[72] and had played a leading role in that conflict. Is their silence on that judgment not indicative of their acknowledgment that the judgment was correct in principle and theirs wrong?

It is important to note that Section 59 of the South Africa Act was mentioned in passing by both Innes and Solomon J.J.A. Any decision or comment by them flowing from such reference by them to Section 59 ought to be distinguished as obiter and ought not to bind any court.

It is also important to note that the judgments of the Learned Judges of Appeal predicate their inability to test parliamentary enactments without persuasive argument.

A further important point to notice is that the judges made no attempt to interpret and to fix the powers of Parliament in terms of Section 59 of the South Africa

Act. They seem to assume that "peace, order and good government" constitute the powers of parliament. As will be shown in the following section, this is a mistaken view of Section 59.

No attempt was made to justify the applicability of English law and the exclusion of the testing right of the Court.

It is submitted that the Court came to the decision to achieve three main objectives: (a) The Court wanted to inform the Union Parliament that it would not precipitate a constitutional crisis such as had occurred in the South African Republic. (b) The Court appreciated that the Union Parliament was just about to embark on a policy of systematic racial discrimination against the Blacks and wanted to inform the Blacks that it would not come to their aid and to inform the White Parliament that it would not interfere with Parliament's legislative programme. (c) It wanted to wash its hands off the projected racial programme so that criticism could fall on Parliament and not on itself.

The Court's attitude was well nigh inevitable for "[T]he Court does move with political trends, as the philosophy of newly appointed Justices commonly reflects a trend. And community attitudes are not without their effect. The Court is not isolated from life. Its members are very much part of the community and know the

fears, anxieties, cravings and wishes of their neighbours. That does not mean that community attitudes are necessarily translated by mysterious osmosis into new judicial doctrine. It does mean that the state of public opinion will often make the Court cautious when it should be bold. That is usually reflected in what the Court does not do, rather than in what it creates."[73]

Like Gregorowski C.J., fifteen years before, the Appellate Division made a political decision. The decision was not even required by the issues before it. From this decision has evolved the doctrine of parliamentary supremacy in South Africa with its attendant difficulties.

It is submitted that considerations such as those enumerated by Douglas motivated the actions of Gregorowski and the Appeal Court in McChlery's case.

Viewed in that light, the conclusion is obvious that a White court, adjudicating a totally unrelated matter, knowing that a racial law was before Parliament and knowing that if the law was passed, the Blacks would challenge it in court, took the opportunity to forestall Black resistance and handed a legislative carte blanche to the White Parliament. In so doing it unmistakably approved the racialism in law and politics which has been the curse of South Africa to date.

It is no wonder then that "upon sudden notice in late April 1913, the new Minister of Native Affairs,

J.W. Sauer, introduced a measure of far broader scope.[74] In less than two months, Sauer piloted the bill through Parliament. In June 1913 it became the law of the land and the main hallmark of the African policy of the Union Government."[75] The twin pillars of that policy have been political and territorial racial segregation with the great majority of Black people being reduced to a state little better than servitude.[76]

Can it fairly be argued that the Appeal Court intentionally desired this consequence? Considering the circumstances and Innes J.A.'s later joining of an organisation which fought for the Black franchise,[76(A)] one must fairly concede that this was not so. The Court's aim seems to have been to achieve a short term result. The Court did not conceive the legislative excesses that followed. Far from confining their oppressive legislation to Blacks, successive governments have since legislatively encroached upon virtually every sphere of human activity in South Africa and the courts have had to sit on the sidelines and watch impotently!

Yet it could have been so different!

IV. THE SUGGESTED INTERPRETATION OF SECTION 59 and SECTION 152 OF THE SOUTH AFRICA ACT WHICH IF ADOPTED WOULD HAVE AVOIDED THE UNTENABLE DOCTRINE OF LEGISLATIVE SUPREMACY

Since the decision in McChlery's case, the declaratory theory of judicial function in the legal process has been fairly strictly followed.

The approach of the courts seems to be based on the underlying assumption that Parliament is a sovereign, supreme body whose enactment ". . . when the constituent elements of Parliament have duly declared their will in an Act of Parliament, the authority of that act, no matter what it decrees cannot be questioned in the courts."[77]

Most of the decisions were delivered before South Africa became a Republic when the South Africa Act was still applicable. In my view the approach of the Court then was to use Section 152[78] as a starting point. Section 152, it was accepted, embodied the only restrictions to the sovereignty of Parliament. When deciding whether the act being challenged was valid or not, the Court scrutinised the challenged act in the light of Section 152. If the Act being challenged related to matters which were specifically mentioned in Section 152, then the act must, in its passage through Parliament, have followed the procedure prescribed by Section 152. If it did not, then it would be declared invalid by the courts on the simple point of procedure. If the Court decided that the challenged act related to a subject which was not mentioned

in Section 152 then the challenged act fell outside the ambit of the Court's testing right as Parliament's powers were supreme unless of course, evidence could be led to prove that the challenged act had not been passed in accordance with ordinary parliamentary procedure and was thus not a valid act at all.[79]

In other judgments[80] the Court postulated that Section 59 conferred supreme legislative authority on the Parliament of the Union of South Africa.

In my respectful view, both approaches were mistaken. Both approaches did not make critical interpretation of the sections in question to determine the true meaning of the sections in the light of the whole South Africa Act.

Simply because in terms of Section 152, the Union Parliament could repeal or alter any of the provisions of the South Africa Act, it did not follow that in terms of Section 152, Parliament could enact any law relating to any subject. Section 152 only conferred upon the Union Parliament enactive power to pass laws to repeal any section of the South Africa Act. Before a section was repealed under Section 152 it remained operative. Section 152 did not confer supreme or sovereign legislative authority on parliament. In a plain reading of Section 152 it is clear that no such supreme power was intended to be conferred.

The only section in the South Africa Act which

related to the substantive enactive power of Parliament was Section 59 which read: "Parliament shall have full power to make laws for the peace, order and good government of the Union."

This was the only section in the South Africa Act by means of which the British Parliament purported to confer legislative power upon the Union Parliament.

To the extent that the Union Parliament derived its authority from an enactment of the British Parliament, it was a subordinate body[81] and the intention to confer unrestricted legislative powers on the Union Parliament should have been clear from the provisions of the South Africa Act. The doctrine of the supremacy of the Union Parliament must of necessity therefore have had to be deducted or inferred from Section 59 of the South Africa Act.

It is significant to note that, in the constitutional cases decided by the courts in South Africa, no argument has ever been addressed to the Court regarding the true meaning of Section 59 and no Court has ever rought to affix the exact meaning thereof.

The closest that argument ever came to being made was in McChlery's case[82] where Innes J.A. said: "'The words, peace, order and good government' constitute the legislative powers of the Union Parliament." Ex facie the report, counsel clearly did not follow the drift of the Court's reasoning for he did not answer the judge's query and did not address the Court on the point raised by the Court.

The judgments of both Innes, J.A. and Solomon J.A. indicate that the point raised by Innes J.A. arguendo was ultimately accepted and adopted by them to be the correct interpretation of Section 59.

With all due respect to two very eminent judges, it is my submission that their interpretation of Section 59 was incorrect. In my view the legislative powers of the Union Parliament consisted in: "the full power to make laws." The words "peace, order and good government" most decidedly did not constitute the legislative powers of the Union Parliament. "Full power" was not defined, nor can it be read, in my view, in the context to mean unrestrained or unlimited or sovereign for the Union Parliament was still subordinate to the British Parliament. In my view "full power" is defined by what comes after it in the sentence.

The use of the conjunction "for" after the word "laws" has, in my view, a purposive effect. It has the meaning of the words "to achieve" or "for the purpose of achieving".

In my view the Union Parliament was given full power to make laws inasmuch as it exercised that power to make laws "to achieve" or "for the purpose of achieving" peace, order and good government in the Union of South Africa. If it exercised that power and passed laws for any other purpose other than the prescribed purpose, then

clearly the exercise of power would be ultra vires of Section 59 and an act passed under those circumstances would be invalid. It follows therefore that the words "for the peace, order and good government" constituted a limitation or restriction of the "full" power granted.

It is submitted that this is the correct interpretation of Section 59 of the South Africa Act and had the Court adopted it, the so-called doctrine of parliamentary sovereignty would not have arisen. Any oppressive or discriminatory law would have been struck down as not being for the peace, order and good government of the Union in the sense that it would create agitation and uproar in the Union. It is submitted that had the Court taken the opportunity and interpreted Section 59 in the manner indicated, many of the laws which have been enacted in South Africa would not be in the Statute book today.

Having ascertained the true meaning of Section 59, the next question to be determined is: who must judge whether any law is for the peace, order and good government of the Union?

Without any demonstrable justification, Innes J.A. postulated that the lawmakers must be the judge because "[S]uch a task would be in the highest degree invidious and difficult and it is fortunate that the spirit of our constitution does not impose it upon the judges."[84] There

is not a more explicit abdication of authority by the Court anywhere in the law of South Africa. As shown in a preceding section, the reasons therefor were more political than legal.

Solomon J.A. held that the words "as he might deem necessary" must be implied and read into Section 59. In my view Solomon J.A.'s formulation is a direct result of his acceptance, like Innes J.A. that "peace, order amd good government" constituted the legislative power of Parliament whereas, as has been shown, they in fact constituted a restriction of Parliament's "full power".

Unlike the bold Innes J.A., Solomon J.A. had to find some justification for conferring on Parliament the power to decide whether any law was for the peace, order and good government of the Union or not. The only way to do so was to import words into Section 59 which were clearly unnecessary to import as the section was clear and unambiguous and the Court's duty was to give effect to it as it stood and not to modify its meaning by adding unnecessary verbiage. Solomon J.A.'s piece of judicial draughtsmanship is particularly crude as his desire to abdicate his authority and thus avoid making an unpopular decision is made glaringly obvious thereby.

It is clear that in my view the Court ought not have abdicated its authority to test the laws enacted by Parliament. In law there was no reason to do so.

If the Court had adopted the meaning of "for the peace, order and good government" which has been suggested, the Court would have had no difficulty in asserting its testing right for even the conservative Innes J.A. declared "Now the duty of deciding whether those limits have in particular instances been exceeded is one which devolves upon the courts of law. This must of necessity be so. For every enactment of a subordinate legislature not warranted by the powers conferred by its charter is invalid; and the courts would not be administering the law of the land if they gave effect to it. Hence they are bound to enquire whether legislation challenged in the course of a particular dispute is, or is not, within the legal powers of the subordinate body from which it proceeded."[85] The Court would not have had to resort to so unsound a doctrine as that it would not test parliamentary enactments simply because such a task would be invidious and difficult.

The provisions of Section 152 of the South Africa Act would have given no difficulty in interpretation as they clearly embody procedural safeguards and not substantive safeguards which were, according to the argument herein advanced, embodied in Section 59 of the South Africa Act.

In my view the incorrect view of the unlimited power of Parliament and the impotence of the Court to clip Parliament's wings adopted by the Court and shared

by academics[86] is attributable to the fact that the interpreters were all white and the principle was applicable in their favour as it assured them power for always in the forum that mattered--Parliament. Moreover, in their case, the preconditions necessary for the equitable application of the principle of parliamentary supremacy i.e. the right to vote and equality before the law, were present and therefore they had no reason to think that Parliament could ever legislate prejudicially to their interests. It was therefore logical that they should have no qualms about adopting the British principle of parliamentary supremacy and working it into the fabric of South African constitutional law.

V. RACIAL LAWS PASSED BY THE UNION PARLIAMENT AND THE LEGAL CHALLENGE MOUNTED AGAINST SUCH LAWS BY THE BLACKS. A CRITICAL ANALYSIS OF THE ROLE PLAYED BY THE SUPREME COURT OF SOUTH AFRICA IN THE RESULTANT STRUGGLE.

As has been shown in a foregoing section of this paper, the British Government betrayed the Blacks by permitting the passage of the South Africa Act without removing the discriminatory franchise provisions thereof. After the passing of the South Africa Act, "[F]or most Whites, but not for non-Whites the question of the franchise was settled . . ."[87]

The struggle for the political rights of the Blacks within the Union was poised to begin.[88]

At that stage, the British Government still had a legal say in the politics and legal policy of the Union of South Africa.[89] Not only could the Parliament of the United Kingdom, at its pleasure, legislate for the Union of South Africa, a parliamentary enactment of the Union Parliament could still be declared invalid if it was in conflict with the provisions of the Colonial Laws Validity Act, 1865.[90] Even if a Union Parliamentary enactment was not in conflict with the Colonial Laws Validity Act, the Governor General, who was the English Monarch's representative in the Union, could still withhold his assent or reserve such enactment for the Monarch's pleasure.[91] In such a case, the enactment did not become a law until it was assented to either by the Governor General or the Monarch. If it was not assented to, it lapsed. There were thus real and substantive limitations to the power of the Union Parliament and Black protest initially was directed to influence the relevant authorities to exercise their constitutional rights to protect the Blacks.

As has been shown in a foregoing section of this paper, the first racial act which discriminated unfairly against the Blacks on the basis of their colour was the Natives Land Act, 1913. The Blacks mounted massive opposition to it. They sent a deputation to the Minister of Native Affairs. The Minister refused to accept the

deputation's recommendations. The deputation then wrote to Lord Gladstone[92] requesting him to withhold assent to the Act but he refused.

The African National Congress sent its President with a petition to the Prime Minister requesting amendments to the Native Lands Act.[94] The Prime Minister was unmoved.

A petition was sent to the British Government seeking relief[95] without results.

In 1914 the African National Congress sent a deputation to London with petitions to the British Monarch and to the British Parliament.[96] The mission was a complete failure as the British Government totally refused to come to the assistance of the Blacks although as has been shown, it had the constitutional authority to do so.[97]

In October 1916 the African Congress passed a resolution against the Natives Land Act 1913.[98]

In 1918 the African National Congress addressed a petition to the British Monarch wherein it again expressed the grievances of the Blacks and urged redress.[99] There was no response.

"In the face of White South Africa's unconcern for African grievances, and despite the hazards involved a wave of protests spread through the African community."[100] After the war the first direct confrontations between the authorities and the Blacks occurred. They assumed the

form of strikes and demonstrations.[101]

The thrust of Black agitation was the franchise which they perceived as their only means to redress the wrongs perpetrated on them by the Whites. "Without political equality, there is no hope of our attaining justice in our territorial problems . . ."[102]

Thus "Throughout the first decade of Union, Africans had striven for a hearing in South Africa by all peaceful means at their disposal: petitions, deputations, appearances before government bodies, pamphleteering and ultimately, civil disobedience."[103] Yet the sum effect in terms of results of all these efforts was zero. "By 1920, the situation of the Africans of South Africa seemed immeasurably worse than it had been in 1910."[104]

It was against this background that the Appellate Division, the highest court in the Union, decided the first case wherein a Black person challenged the validity of an act of the Union Parliament and based the challenge on the provisions of the South Africa Act.[105]

The appellant was a Black voter whose voting rights were entrenched in terms of Section 35 of the South Africa Act. The appellant had been charged with contravention of Section 48(2) of Act No. 32 of 1917 read with Section 8(4) of Act 38 of 1927 in that having been subpoenaed to produce to the Commissioner title deeds and diagrams of his two properties he had declined to do

so. He had been convicted by a Magistrate's Court and fined. He had appealed to the Eastern Districts Local Division of the Supreme Court but his appeal had been unsuccessful.

It must be mentioned that Section 48(2) of Act 32 of 1917 made it a criminal offence for any person inter alia to fail to produce any books, papers or documents in his possession in the Magistrate's Court if he had been subpoenaed to produce such books, papers or documents. Section 8(4) of Act 38 of 1927 provided that a witness called by the Native Commissioner was subject to all the duties and liabilities of a witness called to give evidence before a Magistrate. The appellant's refusal to produce the title deeds and diagrams of his properties was clearly hit by the aforegoing provisions.

The appellant argued that the whole of Act 38 of 1927 was invalid on the basis that it was violative of Section 35 of the South Africa Act, 1909 in that certain sections of Act 38 of 1927 sought to disqualify him as a voter on the basis of his race or colour but that the said Act had not been passed by Parliament in accordance with the procedure laid down in Section 35. On appeal the appellant argued that Section 5(1)(b), Section 7, Section 23(2) and Section 25(1) were violative of Section 35 of the South Africa Act and the whole Act 38 of 1927 must be declared null and void. Failure to produce the

title deeds and diagrams was therefore not a criminal offence as the penal provision, Section 8(4) of Act 38 of 1927 was void.

The government's reply was simply that the provisions complained of in Act 38 of 1927 did not seek to disenfranchise the appellant and therefore were not violative of Section 35 of the South Africa Act. Act 38 of 1927 was valid and the appellant was guilty of contravening Section 48(2) of Act 32 of 1917 read with Section 8(4) of the Native Administration Act No. 38 of 1927.

The Court postulated that the Union Parliament possessed supreme legislative powers.[106] The Court also held that: "No act passed by virtue of that section (i.e. Section 59) is to be construed as treading upon the matters dealt with in sec. 35 of the South Africa Act, unless any of its provisions do so either in express terms or by necessary implication."[107]

Section 7(1) of Act 38 of 1927 authorised the Governor General to revoke a grant of land made to a Black person on individual tenure subject to quitrent conditions and then to issue a substitute title deed. The Governor General was authorised in terms of Section 7(2) of the same Act to prescribe the form and conditions applicable to such substitute grants and such forms and conditions were to be published by proclamation.

At the time the appellant was convicted, no

proclamation in terms of Section 7(2) had been promulgated but appellant had obtained a draft proclamation. In terms of Section 10 of the draft proclamation a duty was being imposed on the registered holder of an allotment to occupy such allotment beneficially. In terms of Section 13 of the draft proclamation, provision was made for the forfeiture of the allotment in cases of rebellion or nonbeneficial occupation of the allotment by the occupier for three years. In terms of Section 36 of the draft proclamation all land in the Glen Grey district in the Cape Province granted or held under the provisions of the draft proclamation would for the purposes of Section 17 of Act No. 14 of 1887 be deemed to be held under communal tenure.

No such restrictions had been imposed on the original title of appellant.

Section 35 of the South Africa Act forbade the Union Parliament to disquality any person on the basis of race or colour who under the laws applicable in the Cape of Good Hope at the time of Union was or was capable of being registered as a voter unless the procedure laid down in Section 35 was followed in the passage of a Bill which did so.

The laws which governed the franchise in the Cape of Good Hope at the time of establishment of the Union of South Africa were the Constitution Ordinance (1853), Act 14

of 1887, Act 9 of 1892 and Act 48 of 1899. The effect of these laws as set out in Rex v Ndobe was: "Every male British subject of twenty-one years and over, who is not subject to any legal incapacity, and is able to sign his name and to write his address and occupation, is entitled to be registered as a voter provided that he possesses one or other of the following qualifications: (1) He should have occupied, within the colony for the space of twelve months next before the day on which any registration of voters commences; and for the last three months within the Electoral Division for which he claims to be registered, a house, warehouse, shop or other building being, either separately or jointly with any land occupied thereon, of the value of £75 sterling; or (2) . . ."[108]

Section 17 of Act 14 of 1887 provided that the holding of land by a person under communal tenure or tribal title did not confer the right to vote on the holder of land under such title.[109]

Section 36 of the Draft Proclamation would have converted individual tenure of land held by Blacks in the Glen Grey district into communal tenure. It is crystal clear that Section 36 of the Draft Proclamation would have disfranchised all the Black voters who occupied land in the Glen Grey District on individual tenure and relied on such occupation for their franchise. It is clear too that the Court would have found such a provision in a proclamation ultra vires of Section 35 of the South Africa Act.[110]

In my view, Section 10 and Section 13 of the Draft Proclamation would have had the effect of amending the appellant's title deeds in such a way as to render them liable to cancellation. The effect of such liability would be to put appellant's voting rights at risk which risk had not existed in terms of the laws applicable to the Cape of Good Hope at the time of establishment of union. Such amendment of the appellant's title deeds would definitely have amounted to a disqualification of the appellant and would clearly have been hit by Section 35 of the South Africa Act. I therefore respectfully disagree with the Court that clause 10 and 13 do not fall within the ambit of matters governed by Section 35 of the South Africa Act.[111]

In so far as the Court found that the Draft Proclamation had not been issued (and presumably did not yet have the force of law) I agree with the Court but I disagree that the appellant had no cause of complaint[112] simply because the proclamation had not been issued. In my view, the appellant had shown conclusively that the Union Parliament intended to disfranchise him and to do so by circumventing Section 35 of the South Africa Act simply by passing a law in the ordinary way which ostensibly had

nothing to do with the Black franchise but which authorised the Governor General in very wide terms to issue proclamations whose effect would be to disfranchise the Blacks. What did the Court expect him to do? Wait until his rights were curtailed instead of exercising them before they were curtailed?

In any event, if the Court would have been prepared to declare a proclamation of the Governor General as being invalid on the basis of its being violative of the South Africa Act, what about the Union Parliamentary enactment which enabled the issue of such a proclamation? If the proclamation fell within the enabling act and if the proclamation issued thereunder was ultra vires the South Africa Act, was the enabling act itself not ultra vires? It is submitted that if the terms of the enabling act which was passed by Parliament following ordinary procedure, were so wide that they authorised the Governor General to do by proclamation what Parliament itself could not do except if it followed the procedure laid down in Section 35 of the South Africa Act, the enabling act itself would be ultra vires.

In answer to the foregoing argument the Court held that "[T]here is nothing in Section 7 which gives the Governor-General the power to issue a proclamation in conflict with Sec. 35." But the Court was clearly wrong. It is well nigh impossible to imagine an enabling

statute whose terms could be wider than Section 7(1) and Section 7(2) of the Native Administration Act 38 of 1927 on the subject of revocation and substitution of grants of land to Blacks. A proclamation indirectly disfranchising Blacks would be within the powers conferred on the Governor-General by Section 7(1) and Section 7(2).

It is submitted that the Court itself clearly recognised that its logic was faulty for after holding that there was nothing in Section 7 of the Act 38 of 1927 which was in conflict with Section 35 of the South Africa Act it then held: "At the same time it would have been better if a saving clause such as is contained in Act 27 of 1913, Sec. 8(2) had been expressly inserted in the Act. Its absence however does not affect the matter for such a saving clause is implied."[113] One asks one's self: But why is a saving clause implied into a provision which is clear and unambiguous? Merely to sustain a statute which in the absence of such an implied clause is invalid?

In my respectful view Section 7(1) and 7(2) of Act 38 of 1927 were clearly ultra vires of Section 35 of the South Africa Act.

Furthermore the Court's reasoning was faulty when it rejected the appellant's argument that Section 25(1) of Act 38 of 1927 was violative of Section 35 of the South Africa Act.

The Court held that no proclamation under Section

25(1) had been promulgated so no one could complain that his Section 35 rights had been infringed. With due respect to the Court, the Court missed the point completely.

Appellant's property was situated within a Black area as provided for in the Natives Land Act, 1913.[114] In terms of the laws applicable to that area[115] at the time of establishment of the Union of South Africa, appellant could vote.

In terms of Section 25(1) of Act 38 of 1927 any law then in force in the areas included in the schedule to the Natives Land Act 1913 may be repealed or amended and new laws applicable to the said areas may be made, amended and repealed by the Governor General by proclamation published in the Gazette. Very obviously "any laws" included the Constitution Ordinance (1853) Cape, Act 14 of 1887, Act 9 of 1892 and Act 48 of 1899 and even the South Africa Act itself.

In terms of the laws applicable to the Cape Colony and in terms of which the appellant claimed his voting rights, the Governor General did not have the power to legislate by proclamation. By conferring such power upon the Governor General, the Union Parliament was in fact amending the laws which were applicable in the Cape Colony at the time of Union and was conferring upon the Governor General power to pass laws which infringed on Section 35 of the South Africa Act.

The same arguments advanced in this paper regarding

Section 7 of Act 38 of 1927 apply in the case of Section 25(1). The section ought also to have been declared ultra vires in that it empowered the Governor General to make and repeal any law clearly including the laws relating to the franchise of the Blacks only.

The appellant's further argument that Section 23(2) was ultra vires was also rejected by the Court. But in coming to that conclusion, the Court ignored Section 23(3) which makes it obvious that Section 23(2) abolished the grantee's right to devise his landed property by will. In terms of Section 23(2) there could be only one heir to land held in individual tenure on quitrent conditions. The heir thereto would be determined by law. Even if the grantee wished to leave his landed property to his three sons by will he could not do so. Upon the death of the grantee the son who was pronounced by the law to be the heir could then evict his brothers from the allotment and unless they were able to secure individual tenure quitrent land, his two brothers would not be able to qualify as voters on the basis of land ownership or occupation. Clearly, but for the enactment of Section 23(2) each of the sons of the appellant would qualify as voters if they all occupied appellant's property jointly. Section 23(2) altered the laws of inheritance and by so doing, disqualified at least two of the appellant's sons from becoming capable of being registered as voters. Such disqualification was based wholly on their race as Act 38 of 1927

was applicable to nobody else but the Blacks.

It is submitted that Section 23(2) fell foul of the proviso in Section 35 of the South Africa Act. that ". . . no such law shall disqualify any person in the province of the Cape of Good Hope who . . . is or may become capable of being registered as a voter . . ." The Court realised that the change of the law of inheritance would disqualify some Blacks[116] from acquiring property which acquisition was an important qualification for the franchise but failed to follow logic to its conclusion by omitting to refer to the phrase "or may become capable of being registered as a voter" in Section 35 of the South Africa Act. Clearly the Court either failed to realise that Section 23(2) abolished the future capability of two of appellant's sons to be registered as voters or refrained from making such a finding.

It is submitted that on this ground too the appellant ought to have succeeded as the relevant section was in violation of Section 35 of the South Africa Act.

The only vexing problem in my view would have been: whether to declare the whole Act 38 of 1927 invalid or only those sections which were ultra vires Section 35 of the South Africa Act.

It is interesting to note that at the time this judgment was delivered, the Government had recently won an election on a platform "which made the abolition of the Cape African franchise a major issue."[117]

It is further interesting to note that the Government had in 1929 lost a vote in a joint sitting of both Houses of Parliament convened in terms of Section 35 of the South Africa Act, in its attempt to reduce the effect of the vote of the Blacks in the Cape.[118]

It was therefore against a background of acrimonious parliamentary and public debate about the franchise of the Black people in the constitutional set up of the Union that the judgment in Rex v Ndobe was delivered. It is submitted that the refusal of the Court to declare Act 38 of 1927 ultra vires reflects the influence of the times. Most of the White voters wanted the Blacks who had the vote deprived of the vote and it would not do for the Court to thwart the wishes of the White voting majority.

After the decisions in McChlery and Ndobe's Case, it was clear that the Blacks could not expect relief from the courts.[119] The position of the Blacks had been stated very succinctly by Clements Kadalie in 1927, "The South African Act of 1909 robbed the natives of political power, the Native Land Act of 1913 robbed them of whatever land still remained to them and the Colour Bar Act of 1926 forbade them the use of machinery and robbed them of the opportunity for any economic advancement."[120]

Yet the Blacks were not yet ready to abandon the employment of litigation and other democratic procedures of protest. After a concerted but hopeless attempt by the Blacks to block its enactment,[121] the Union Parliament

passed the Representation of Natives Act No. 12 of 1936 which sounded the death knell of the Black franchise.

The Act was passed with the necessary 2/3 majority of both Houses sitting jointly and therefore complied with the procedural requirements of Section 35 of the South Africa Act.

In terms of the provisions of the Native Representation Act, the Cape Black voters were removed from the common voter's roll and placed on a different voter's roll.[122] The Cape Black voters who were now on a separate voter's roll could elect 3 White members of Parliament and 2 White members of the Cape Provincial Council.[123] The Act also provided for the election of 4 White Senators to represent all the Blacks in the Union.[124]

The Act also constituted a new advisory council for the Blacks called the Natives Representative Council.[125]

The All-African Convention met in June 1936 and passed resolutions which showed its implacable opposition to the Representation of Natives Act.[126] The White government proceeded merrily on its way and paid scant heed to Black peaceful protest. It was left to Selby Msimang, the Secretary of the All African Convention, to express the bitter outrage felt by the Blacks at this rape of Black rights. ". . . let us now admit, both publicly and in all conscience, that Parliament and the White people have disowned us, flirted and trifled with our loyalty.

They have treated us as rebels, nay they have declared that we are not part of the South African community . . ."[127]

Thus the stage was set for the last great legal challenge of the all pervading power of the White Union Parliament by Blacks in Ndlwana vs Hofmeyr NO and others.[128]

In Ndlwana's Case, the issue to be decided was whether the Representation of Natives Act No. 12 of 1936 was ultra vires of Section 35 of the Union of South Africa Act and therefore invalid.

The contention of the appellant was that Act 12 of 1936 contained provisions which related to other matters other than those referred to in Section 35 of the South Africa Act. Since it had been passed with a 2/3 majority of both Houses of Parliament sitting together, vis-a-vis those matters not mentioned in Section 35 of the South Africa Act but which Act 12 of 1936 had provided for, the procedure adopted in passing Act 12 of 1936 had been incorrect as the ordinary bicameral procedure was mandated regarding the passing of a law relating to those matters not mentioned in Section 35 of the South Africa Act. The appellant further argued that the Act did not disfranchise the Black voters but merely removed their names from the one voter's roll to ther other and therefore the Act was not such a law as envisaged in Section 35. The adoption of the procedure mandated by

Section 35 in the passing of Act 12 of 1936 was incorrect and thus Act 12 of 1936 was not a valid Act. The appellant further argued that his rights were permanently entrenched in terms of Section 35(2) of the South Africa Act and could not be affected in any manner whatsoever.

Appellant's action was dismissed by the Court of first instance and appellant appealed to the Appellate Division.

It is to be noted that in both the Court of first instance, the Cape Provincial Division and the Appellate Division, the "supreme" or "sovereign" power of the Union Parliament was assumed. It seems both Courts accepted that the Union Parliament possessed unlimited law-making capacity. No attempt was made to interpret Sections 59 and 152 of the South Africa Act to determine the Union Parliament's power.

Although the Cape Provincial Division had delivered a carefully reasoned and fully motivated judgment when dismissing the appellant's action, the Appellate Division ignored the judgment. It chose to ignore the issues raised in the action and chose to ground its judgment on a single point: Could the Court overturn an enactment of the only sovereign law-making authority in the Union?

The Court then gave its answer in no uncertain terms: "Parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country, as it

cannot in England be questioned by a Court of law whose function is to enforce that will not to question it . . . It is obviously senseless to speak of an act of a sovereign law making body as ultra vires. There can be no exceeding of power when that power is limitless."[129] The Court gave short shrift to any argument mounted by the appellant that the "sovereignty" of Parliament was limited.[130]

The Court then declared in ringing terms that: "The answer is that Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is, so far as courts of law are concerned, at the mercy of Parliament like everything else."[131]

The important propositions of law contained in these dicta were:

(1) Parliament is above the law. No rules are applicable to Parliament even rules constituting Parliament itself or rules governing the procedure to be adopted in executing parliamentary business.

(2) The Court is nothing else but a servant of Parliament and is absolutely subservient to Parliament.

The first proposition has been severely criticised[132] and was finally rejected by the Appellate Division in Harris and Others v Minister of the Interior and Another.[133]

The second proposition remains the law of South Africa.

Whatever the constitutional niceties of the Ndlwana decision the message to the Blacks was very clear: Had the Blacks not understood the clear message of McChlery's case? Had they not understood that they were at the mercy of the White Parliament "like everything else"?

There is no doubt whatsoever that in this judgment, the White Appeal Court aligned itself unmistakably with the Government and lent its weight to the solution by White South Africa of the problem of the Black franchise otherwise why did it chose to ignore the substantive issues of the case and elect to decide the case on the single issue in respect of which the Blacks had no say?

The die was cast. Thereafter no Black man has ever challenged the White Government's power in a court of law on constitutional grounds. Legally the judgment signalled the end of the Black challenge through the courts.

Thereafter the Government used the voting juggernaut in Parliament to remove all vestiges of the Black franchise. By passing Act 12 of 1936 at a joint sitting of the Assembly and the Senate, Parliament had purported to "entrench African representation in the Senate and the Assembly."[134] In terms of Section 3 of the South Africa Act Amendment Act, No. 9 of 1956 the entrenchment

of Black voters' rights was removed forever by the deletion of the relevant clauses in Section 35 of the South Africa Act. In terms of Section 15(1) of the Promotion of Bantu Self Government Act, No. 46 of 1959, the Representation of Natives Act No. 12 of 1936 was repealed. By these means, quite legally, the total exclusion of the Blacks from Parliament and the Provincial Councils was achieved.[135] "Each step in the process has been justified on the ground that it represented a reasonable compromise that would endure indefinitely. In fact each such step has ushered in an era in which White demands to reduce the African to even lower levels of political dependence and helotry have become more strident and have finally prevailed. The Africans, on their side, have faced each new crisis forced upon them with moderation and appeals to reason, nor have they at any stage sought to rely on force. But moderation, reasonableness and nonviolence have been rewarded by even heavier blows at their few rights and liberties on the part of their White rulers. . ."[136]

VI. THE ATTEMPTS TO COAT THE BITTER PILL--CONSTITUTIONAL INNOVATIONS BY SUCCESSIVE GOVERNMENTS SINCE 1910

Although the majority of the Blacks had been effectively barred from the franchise by the provisions of the South Africa Act, they had unceasingly agitated

for the amelioration of their lot although they had no direct say in Parliament and could not press their claims there.

It was the oft-repeated complaint of the Blacks that laws affecting them were often passed in Parliament without consultation with them.[137] The Blacks had even addressed the complaint of nonconsultation to the British Crown.[138]

The White Government decided to meet this demand for consultation not by enfranchisement and negotiation inter pares, but by the initiation of the first of the advisory forums. In terms of the Native Affairs Act No. 23 of 1920, the Government created the Native Affairs Commission whose members were to be appointed by the Government and whose function was to consider any matter relating to the administration of native affairs or legislation which affected native interests and to make recommendations to the Minister of Native Affairs on such matters.[139] To the knowledge of the writer, no Black man was ever appointed to this Commission.

The Act also created local councils for Blacks and invested them with clearly defined and negligible powers such as "the destruction of noxious weeds."[140]

The Act also authorised the Governor General, from time to time, to convene conferences of chiefs, members of native councils or local councils or prominent

natives to ascertain the sentiments of the native population with regard to any measure which affected natives.[141]

Since the Governor General was, by convention, required to act in accordance with the wishes and recommendations of the Cabinet, it is clear that this act was no advance for the Blacks at all but merely confirmed their state of subservience to the Government because the Government, through the Governor General, would consult with the Blacks only when and if it suited the Government.

This Act, it is submitted was but a complement of the Natives Land Act 1913. Whilst the Natives Land Act had achieved territorial segregation between Black and White, albeit, temporarily, the Native Affairs Act 1920 laid down political separation as the law of the land.

Faced with a constitutional Hobson's choice, the Blacks participated in this limited constitutional forum. The Government on its part made an attempt to canvass the opinions of representative Blacks by inviting to the conferences even sworn opponents such as D.D.T. Jabavn, Sol T. Plaatje and Mrs. Charlotte Maxeke[142]

However with the best will in the world, the conferences were doomed to fail since they performed only an advisory function. The government invariably came to the conferences with its mind made up and merely presented the conferences with fait accompli with regard

to policy or law and asked conference to rubber-stamp such prior decisions. Inevitably conference baulked.[143] When the Black members of conference put specific questions to ministers or made concrete recommendations they received temporising answers and their suggestions were not followed.[144]

Viewed as a substitute for the Black franchise the native conferences were an unqualified disaster. However the Government did not see it that way and pressed ahead with its policy of setting up powerless advisory bodies for Blacks. In 1936 the Union Parliament passed the Representation of Natives Act which has been referred to in a previous section in this paper.

In terms of Section 20 of the 1936 Act, a Natives Representative Council was constituted with power to consider:

(a) proposed legislation insofar as it may affect the native population

(b) any matter especially affecting the interests of the natives in general

(c) any matter referred to it by the Minister.[145]

The powers of the Natives Representative Council in relation to legislation, was confined to "recommending" to Parliament or to any Provincial Council, as the case may be, legislation which it considered necessary in the interests of natives.[146]

The fact that meetings of the Natives Representative Council could be convened only by the Minister of

Native Affairs to be held at places and times determined by him;[147] the fact that the government could nominate 10 of the twenty-two members and 6 of whom would be White officials of the Department of Native Affairs[148] and the fact that it had no power beyond making recommendations, discredited the Natives Representative Council in Black eyes.[149]

Again the Blacks participated in this new constitutional arrangement in the clear understanding that they had no alternative and that it was merely a temporary phase in their struggle for full political participation.[150]

However the Whites regarded the system as the final solution of the problem of the Black franchise.[151]

The Blacks who were in the Natives Representative Council tried their best to utilise their opportunities to the full but the loaded dice were built into the system. At the end of the first five years of the existence of the Council Dr. A.B. Xuma wrote despondently: "It is fallacious to imagine that a community can get adequate land, economic benefits and any other rights and maintain them when they have no direct vote. They may receive crumbs grudgingly from the table of the rulers but not rights."[152]

As will happen with organisations invested only with recommendative power, the resolutions and recomendations of the Natives Representative Council were ignored by Parliament.[153]

The Natives Representative Council continued to meet regularly although relations between it and the Government were becoming increasingly chilly. In May 1945 a special meeting of the Council was called to consider recommendations on two measures which were shortly to be laid before Parliament and which affected the interests of the Blacks. There were sharp exchanges between the Black members of the Council and the White chairman who in the heat of debate averred that consultation of the Council by the Government about proposed legislation was merely a courtesy.[154]

The Council retorted by saying that if consultation with the Council was a governmental courtesy then consultation was a farce.

With the Natives Representative Council being increasingly aware of its impotence and chafing at the bit, the stage was being set for the final destruction of the Natives Representative Council and the Government's carefully laid plans for Black exclusion from the citadels of power.

In August 1946 the Natives Representatives Council was summoned to Pretoria against the background of the Witwatersrand Mine strike, where the police had taken strong action against the striking Black mineworkers and shot several of them. There had also been riots at Lovedale Institution which at the time was a respected Black educational institution.

When the meeting of the Natives Representative Council was opened, the Council requested the chairman to make a statement on behalf of the Government on the Witwatersrand strike. The chairman was in no position to do so as he had been drafted only that morning to deputise for the official who would have officiated on that day and did not even know the agenda![155]

The miners' strike was regarded by the Council as so serious an issue for the Blacks that it refused to proceed with any of its business until the Government had issued a statement on the strike. When the chairman refused to accept a motion which was critical of the Government, the Council adopted its final resolution on that day: "The Council therefore in protest against this breach of faith towards the African people in particular and the cause of world freedom in general, resolves to adjourn this session and calls upon the Government forthwith to abolish all discriminatory legislation affecting non-Europeans in this country." [156] The Council was then adjourned sine die.

The great Government experiment with quasi-representative, toothless, Black advisory bodies failed.[157]

The Government tried to negotiate to break the deadlock and made several proposals (which bear striking similarity to the present system of homeland governments).[158] By then, however, the Natives Representative Council had become militant and the Black people were no longer

prepared to cooperate to give effect to "a policy with whose fundamental principles they were in total disagreement."[159]

The impasse was broken by the defeat of the Smuts Government at the polls in 1948 and the Nationalist Government of Dr. D. F. Malan took over.

With the advent of the Nationalist Government, a new policy evolved--apartheid.

Apartheid meant the re-tribalisation of the Blacks and their repatriation to the so-called homelands. This policy necessitated the total removal of any vestige of the Black franchise. Only when totally emasculated would the Blacks be expected to submit to this new policy. It also necessitated the fragmentation of South Africa.[160]

To put the policy into effect, the Nationalist Government first had to abolish the Natives Representative Council which had proved so troublesome to the Smuts Government. This it achieved by enacting the Bantu Authorities Act No. 68 of 1951. In terms of this Act the Natives Representative Council was abolished.[161]

A new system of Black administration was ushered in by this enactment. The lynch-pin of the new system was the tribe. A three tiered system was provided for. The Governor General (which in practice meant the Cabinet as the Governor General by that time was just a rubber stamp) could establish a tribal authority. For any two or more Tribal Authorities he could establish a Regional

Authority and for any two or more Regional Authorities he could establish a Territorial Authority.[162]

It is to be noted that the decision to establish these bodies rested with the Government. No provision was made for the people to make any request or demand for the establishment of such bodies although provision is made for consultation with the Minister of Native Affairs. However the value of statutory provisions for consultation was not worth much judging by the experience of the Natives Representative Council. The reason for this absence of a statutory right of the people to demand the establishment of the authorities was, it is submitted that the Blacks were opposed to this new system and the Government was deliberately imposing it.[163]

One needs to do no better than read Sections 3(1), 3(2), 3(3) and 3(4) to realise just how impotent the Black people were under this Act. Under Section 3(2) regulations have been promulgated in terms of which the "Governor General (the State President since South Africa's withdrawal from the Commonwealth) decides the maximum and minimum number of members of a Tribal Authority. The minimum numbers are appointed in accordance with local law and custom (or failing this, as the Bantu Affairs Commissioner may direct) and up to one third of the difference between the maximum and minimum numbers

by the chief. The Bantu Affairs Commissioner may appoint up to two thirds of the difference and may veto any appointment made by the chief."[154]

The Bantu Affairs Commissioner is a Government official whose main function is to watch over tribal affairs in his area of jurisdiction on behalf of the Government. It is clear that not only does the Government lay down the method of selecting Councillors for the Tribal Council but it has overriding power through the Bantu Affairs Commissioner to pack the Tribal Council with its own henchmen and if that is not enough it has the power through the Commissioner to veto any appointment to the Tribal Council made by the chief. Since the Government dominates the first tier of Black tribal government it follows that it dominates the day to day tribal life of Blacks.[165]

Since it has absolute power to control the appointment of chiefs, the Government also has compelte control over the visible symbols of tribal government.[166]

The Government also exercised absolute control over the second and third tiers of tribal government established by Act 68 of 1951 by virtue of its power to appoint the chairmen and members of the Regional and Territorial Authorities as well as its powers to dismiss any member of the Regional or Territorial Authorities.[167]

The main function of these three bodies was to

advise the Government[168] although they had certain negligible powers which they could exercise only with the consent either of the Minister of Native Affairs or the Governor General.[169]

A clause of vital importance was Section 5(4) which provided that the Minister of Native Affairs could order a Regional Authority to make a by-law and if it failed to do so the Minister himself could make such a by-law. Apparently he could exercise this power without reference to any other body. Such a by-law would have the same effect as any by-law made by a Regional Authority.

Thus all the so called powers were subject to governmental control. The system was in fact a gigantic farce and as was to be expected the system was rejected by the Blacks[170] as ridiculous. The chiefs were coerced into the system with threats of dismissal and mainly old men in the homelands became reluctant participants.

From the foregoing remarks, it is clear that the Bantu Authorities system was a failure from the start but it is also clear that it was coercively imposed on the Blacks and they inevitably learned to endure it.

It is also clear that it was nothing but an up-dated version of the "advisory board" system which had proved futile.

Having decided that territorial and political racial segregation between Black and White was imperative,

the Government then decided that ethnic segretion among the various Black groups in the country was desirable. As usual, Parliament was the willing instrument which was used to achieve this aim. The intention of the Promotion of Bantu Self-Government Act No. 46 of 1959 is apparent from the Preamble.[171]

The Act divided the Black people into eight separate "units".[172]

The Governor General was mandated to appoint a Commissioner General for each of the "units".[173] A Commissioner General was to be a pseudo-ambassador whose functions were set out in Section 3 and which included enlightening "the population in regard to government policy and legislation."[174]

Additional powers were granted to the Territorial Authorities. The powers granted were of a trivial local nature.[175] The Act however provided that the Governor General could, by proclamation assign further powers, functions and duties to Territorial Authorities.[176] However such assigned powers, duties and functions could be withdrawn at the discretion of the Governor General or the Minister of Native Affairs.[177]

As in all previous legislative efforts by the Government of South Africa pertaining to the Blacks, the powers conferred were merely illusory. The final legislator was the Government of South Africa. The

Bantu authorities system was another "toy telephone" given to the Blacks by the Government. The only two innovations under this Act were:-

(a) The division and categorisation of Blacks into identifiable ethnic groups.

(b) Conferment of powers on the Territorial Authority (power exercised in consultation with and with the approval of the Minister and the Governor General) to appoint an urban representative to represent such authority in an area controlled by a White urban local authority.[178]

In 1971 having decided to embark on a policy of "leading" the homelands to "independence" the Government passed the Bantu Homelands Constitution Act, No. 21 of 1971.

It is under the system ushered in by this Act that the Government has decreed that Blacks exercise their political rights. The full implications of the system are discussed in the following chapter.

VII MODERN TRENDS UNDER THE BANTU HOMELANDS CONSTITUTION ACT, 21 of 1971 - A CRITICAL ANALYSIS

In terms of the Act, the State President may, by proclamation, and without reference whatsoever to Parliament, establish a Legislative Assembly for a Black area for which a Territorial Authority has been established.[179] The area over which such assembly is to exercise is authority is determined by the State President and may be amended from time to time by the State President by proclamation.[180]

The State President is authorised, by proclamation, to determine the manner in which the Legislative Assembly shall be constituted. Such proclamation may prescribe the election and the designation of members of the Legislative Assembly, the manner of filling of vacancies in the Assembly, the qualifications of voters and candidates, the periods of office and conditions of service of members of such assemblies and attendance of sessions of the Legislative Assembly by representatives of the Government of the Republic of South Africa.[81]

It is to be noted that:

(1) The term "Legislative Assembly" is used without definition. The definition laid down in the Act is a circular one in that in that definition a legislative assembly is defined as "a legislative assembly established under Section 1." Legally it appears that it is left to the State President to determine what a legislative assembly is. Since the State President also determines the manner of election and qualifications of voters, it follows that if he decides to declare that a high school class is a legislative assembly, no one may contradict him.

(2) The foregoing crucial constitutional provisions will emanate from the State President and not from Parliament. Since the State President (for reasons explained somewhere else in relation to the Governor

General) is a mere figurehead who rubberstamps the wishes of the Cabinet, it follows that the Cabinet is given a carte blanche to tinker at will with the constitutional life of the Blacks.

(3) The area over which a Legislative Assembly wields its authority is not defined but it is provided that the State President shall determine it by proclamation and then may amend its boundaries from time to time by proclamation. In effect the Government of the Republic has absolute power to extend or to restrict the boundaries of a homeland at will. This power to extend or to reduce the "lebenstraum" of the homeland people places a homeland government at the mercy of the Republican Government. A mere threat of reduction of the land surface of a Bantustan would quickly bring a Bantustan government to heel.

(4) In terms of Section 2(2)(a) and Section 2(2)(b) power is conferred on the State President (i.e. the Government) to determine matters by proclamation, which for the Whites are so important that they are provided for specifically in the Constitution.[182]

(5) No provision whatsoever is made for the delimitation of electoral divisions, the number of members of the Legislative Assembly, the constitution and powers of delimitation commissions, duration of each Assembly, the procedure to be followed in the Assembly, determination

of when a quorum of members is available. These are all matters which are provided for in the Constitution Act, 32 of 1961, but in the Bantu Homelands Constitution Act no provision is made for them. There is no provision even for the State President to issue proclamations regarding these matters.

All the so-called self-governing homelands have functioning Legislative Assemblies. How they manage to function is not clear to the writer since any proclamation by the State President relating to the matters mentioned in the foregoing paragraph is ultra vires the enabling Act.

(6) The Government of South Africa retains its power of amendment or repeal of the Bantu Homelands Act. If the Republican Government felt itself moved to do so, it would repeal Sections 1, 2 and 3 of the Bantu Homelands Act and any proclamation issued by the State President thereunder and all so called self-governing homelands would disappear from the map of the Republic of South Africa.

Powers of the Legislative Assemblies

The Legislative Assembly may make laws for the area for which it has been established with regard to a long list of subjects which are set out in Schedule I to the Act. On the face of it, the freedom to legislate

seems impressive but there are serious limitations to that power viz.

(1) The laws which are made must not be inconsistent with the Bantu Homelands Act.[183]

(2) No law which is made under Section 3(1) has any force or effect until it has been assented to by the State President and promulgated in the Gazette.[184] In effect, any law passed by a Legislative Assembly and construed by the Republican Government as being inimical to its interests will be killed simply by the withholding of the State President's assent.

(3) In terms of Section 37A the State President may, by proclamation, amend Schedule I and for the purpose of giving effect to such amendment, he may amend any other provision of the Act itself. The Cabinet of the Republic thus can emasculate a Legislative Assembly at will simply by withdrawing Schedule I which would leave such Assembly without any authority whatsoever.

But to make double sure, the Act then empowers the Cabinet, through the State President of course, to repeal the entire Bantu Homelands Act by proclamation without recourse to Parliament.

(4) In terms of Section 3(3) any Act of Parliament of the Republic of South Africa or any law made by the State President is applicable to any homeland citizen or to any homeland area. However no reciprocal provision is made for the applicability of homeland laws to the

Republic. The effect of this provision is that the Republican Parliament can legislate freely for the whole of South Africa (excluding the independent homelands of Transkie, Venda and Bophutha-Tswana). It may legislate even in respect of matters referred to in the First Schedule as there is no provision which bars that course of action.

(5) In terms of Section 4, a homeland assembly is barred from making laws with regard to a long list of subjects such as the establishment and control of military organizations, establishment of armaments factories, appointment of diplomats, communications, transportation, fiscal affairs, customs, etc.

It is submitted that the excluded powers are in fact the true test of statehood and their absence makes a mockery of the claim of "self-government" by such homeland governments or their apologists.

(6) Section 4(j) provides that such homeland assembly may not amend, repeal or substitute Act 21 of 1971.

From the foregoing, it is clear that all homeland assemblies (i.e. of those homelands that have not taken independence) are at best, lawmaking chambers with limited powers which have taken over some of the legislative functions of their master, the Cabinet of the Republic of South Africa.

The citizens of the Bantu Homelands which have Legislative Assemblies are as much at the mercy of the Republican Government now as they have always been. The difference is simply that another potentially tyrannical ruler has been created for such citizens.[185]

In terms of Section 26 of Act 21 of 1971, the Cabinet, through the State President, may, by proclamation declare that an area for which a Legislative Assembly has been established, to be a self-governing territory. A self-governing territory is defined circularly as an area declared under Section 26 to be a self governing territory. It is therefore clear that a self-governing territory is a territorial authority to which limited legislative powers have been granted and which as shown above does essentially the wish of the Government of the Republic of South Africa. It is also significant to note that in terms of Section 26 of Act 21 of 1971 the Minister (of Plural Relations) is mandated merely to consult with the Legislative Assembly before the area over which the Legislative Assembly wields authority is declared a self-governing territory. The consent of the Legislative Assembly to such declaration is not necessary. The State President may therefore declare a territory self-governing even if the Legislative Assembly of such territory is against such declaration.

Between 1972 and 1976 the State President issued proclamations creating Legislative Assemblies for

Bophutha-Tswana, Lebowa, Venda, Gazankulu Kwazulu Owaqwa, Kwangwane and declaring such homelands as self-governing territories.

Three homelands have taken their "independence" from the Republic of South Africa and have been recognised to be independent countries by South Africa. Transkei became independent on 26th October, 1976, Bophutha-Tswana became independent on 6th December 1977 and Venda became independent on 13th September 1979.

The struggle of the Black people since 1912 has been for the attainment of political rights, to participate in the democratic electoral process and through it to participate in the economic life of South Africa.

It therefore becomes necessary to examine the position of the Black people in Transkei, Bophutha-Tswana abd Venda to determine whether their political and economic conditions have become any better by their attainment of independence.

Transkei

Transkei, before it became independent in 1976, had been a self-governing territory in terms of the Transkei Constitution Act No. 48 of 1963. Under Act 48 of 1963, the Legislative Assembly of Transkei had consisted of 64 chiefs and paramount chiefs and 45 elected members.[186]

The Act provided for the election of the Chief Minister and the Cabinet from among the members of the Legislative Assembly.[187]

It is clear that the largest bloc of votes in the Assembly were the chiefs and paramount chiefs who were ex officio members and who owed their positions to their appointment as chiefs to the South African Government. Since the government of the Republic controlled the chiefs,[188] it is obvious that they would support the election to the Chief Ministership and Cabinet of those politicians who were supported by the Government of South Africa and the Government of South Africa would naturally support those politicians who supported apartheid. It was no wonder that the apartheid apostle, Kaizer Matanzima was elected Chief Minister.[189]

Just before Transkei became independent in 1976, the Republican Parliament passed the Transkei Constitution Amendment Act No. 3 of 1976 whereby the membership of the Transkei Assembly was enlarged to 75 nominated chiefs and 75 elected members.

At the time of Transkei's independence, therefore, the value of the vote was halved, and for reasons stated above[190] the parliamentary system was weighted in favour of the party that was favoured by the Government of the Republic of South Africa. Another factor which gave Matanzima an unfair advantage was the operation of Proclamation R400 of 1960 in the Transkei. This proclamation had been imposed on the Transkei by the South African Government in 1960. "Inter alia, this empowered a

magistrate or commissioned officer of the police to prohibit the holding of gatherings in any particular place. It was rendered an offence to make a statement calculated or likely to have the effect of subverting the authority of the Government. Persons could be detained without trial if this were deeemed to be in the public interest."[191] The proclamation made it impossible for any opposition party to campaign freely.

During the runup to the pre-independence election of 1976 the Matanzima government detained the leader of the Transkei opposition and other leaders of the opposition party indefinitely in terms of Proclamation R400.[192]

The detentions terrified the oppostion and intimidated the Transkei people and Matanzima's party cruised to a massive election win, taking 71 elective seats and was supported by 72 nominated chiefs.[193]

The democratic process had been legally subverted. Behind all this the guiding hand of the Republican Government could be discerned as the South African Government had refused to rescind Proclamation R400[194] when it was fully entitled to do so and had handed to Kaizer Matanzima the means to subvert the electoral process and entrench himself in power.

At the very first sitting of the Transkei Legislative Assembly after independence, the Matanzima Government bulldozed through the Assembly the Transkei

Public Security Act in terms of which it was inter alia rendered a criminal offence to belong to certain organisations. It was provided in terms of that Act that the Minister of Justice may bar certain meetings or prevent individuals from attending meetings. Provision is made for banning of persons, for detention without trial and for the trial without warrant any person for purposes of interrogation. A person so arrested cannot be released by order of any court.[195] Harassment and detention of democratic opponents by the Matanzima Government continued unabated.[196]

In May 1978 the Matanzima Government passed the Undesirable Organizations Act and in June 1978 used the provisions of that Act to bar the Methodist Church of South Africa from operating in the Transkei.[197] Journalists have been harassed and detained and newspapers have been banned.[198]

On 27th July 1979, the Matanzima Government mounted its greatest offensive against its political opponents by detaining Paramount Chief Sabata Dalindyebo[199] (a relative of the imprisoned Nationalist leader, Nelson Mandela). There were widespread protests but the Transkei Government responded by banning 34 organisations including the African National Congress, the Pan Africanist Congress, Swapo.[100]

In the economic sphere, the picture could hardly be bleal

Transkei has been bankrolled by the South African Government since its inception, e.g. in 1977 after its independence, the Transkei's budget was for R239,021,000. South Africa granted the Transkei R165 million and also gave to Transkei its share of the indirect taxes which are shared among members of the Customs Union of South Africa.[201] Transkei could only contribute R31 million of its budget. For the 1978-/79 financial year the South Africa Government provided a sum of R120,188,000 towards the Transkei budget.[202]

Mismanagement of the economy has been rife.[203] In September 1979, the South African Government averted the grinding to a halt of official state Transkei business by granting Transkei R73 million to pay official salaries. This was over and above the R113.5 million grant that the Republican Government had granted Transkei for the 1979/80 financial year.[204]

It is clear that in the politico/legal sphere, the great majority of the Transkei people have not profited by independence. For the great majority of Transkeians the sham of independence has meant subjugation and repression of a savage kind.

Bophuthatswana

Bophuthatswana became an independent country on 6th December 1977. It consists of 5 pieces of land

scattered amidst the Republic of South Africa.[205]

As in the Transkei, the pre-independence election was a charade. In terms of the Constitution, 48 members were to be elected and 48 members were to be nominated by chiefs and headmen.[206] As in the Transkei the value of a vote was therefore halved. The chiefs and headmen who are all employees of the Government naturally nominated supporters of the Government. Even before the election votes were cast, the Government of Chief Lucas Mangope was already assured of 47 of the nominative seats.[207] During the pre-independence electioneering the opposition claimed that chiefs were refusing to grant permission to opposition candidates to hold meetings in their tribal areas. The Government not unnaturally won 43 of the elective seats. The Government consequently has an overwhelming if rigged majority in the Assembly.[208]

It is further interesting to note that before independence, only 375,000 Bophuthatswana citizens registered as voters out of a de jure population of 2,103,000 people and only 50% of the registered voters cast their votes.[209] The government is therefore governing on the basis of consent of about 18% of the population. That is democracy Bantustan style!

During the first sitting of the National Assembly after independence, the Government moved fast to entrench itself. It passed the Riotous Assemblies Amendment Act

which amended the infamous South African Riotous Assemblies Act. In terms of the amended Bophuthatswana Act "The power vested in magistrates to approve or prohibit the holding of meetings was extended to chiefs and headmen."[210] As the chiefs and headmen are in the employ of the Bophuthatswana Government, it is clear that the right to organise politically in opposition to the Mangope Government has been as good as withdrawn.

In 1979, although there was no present need for it, the Mangope Government passed the Internal Security Act No. 22 of 1979. The legislation re-enacted some of the objectionable clauses found in South African legislation. This new Act amends the Constitution by providing that a citizen may now be detained without trial "in the interests of national security or public safety."[21] This amendment subverts the guarantee against arrest and detention which was formerly embodied in Chapter 2 of the Constitution.[212] The Act provides for the declaration by the Minister of Justice of any organisation except employers' organisations and trade unions, as unlawful; forfeiture of property belonging to such organisation to the state; imposition of restrictions on office bearers, members or supporters of such organisations; prohibition of dissemination of publications; the listing of people; banning of people; imposition of capital punishment for terrorism which is defined as in the South AFrican Act; detention of persons without

trial for 90 days; prohibition of gatherings.[213]

Like in the Transkei, it did not take the Mangope Government long to realise that the principles of democratic government were opposed to its continued existence and it has acted accordingly. The Internal Security Act does nothing more than intimidate the people and drive opposition underground. Like in the Transkei, the independence has meant the entrenchment of the Mangope Government in power and very little else.

Like the Transkei, Bophuthatswana is financed by the South African Government to a very large extent.[214]

Venda

Venda is the smallest of the independent homelands and comprises a block of land of 639,000 hectares.[215]

Political manipulation and corruption of the democratic process have been very pronounced in Venda.

There were two elections in Venda in the period before independence. In terms of the pre-independence constitution, a legislative assembly of 60 members was provided for. Eighteen members were elected and 42 were nominated by the South African Government in terms of the Bantu Homelands Constitution Act No. 21 of 1971 whose effects have been referred to.

In the first election held in 1973, the South African Government backed by Chief Patrict Mphephu had won only 5 of the elective seats but because he was

backed by 41 of the South African Government nominated members he was elected Chief Minister. His election was under a cloud however as there were fairly substantiated allegations of bribery of the nominated members of the Legislative Assembly by Chief Mphephu.[216]

The pre-independence election held on 5th July 1978 was fought under the shadow of Proclamation R276 of 1977 which permitted the Venda Government to detain anyone without trial.[217] The election resulted in a sweeping victory at the polls for the opposition which won 31 of the 42 elective seats.[218]

The first session of the new Assembly was scheduled for 12th September 1978 but in August 1978, the Venda police mounted a massive crackdown on the opposition in terms of Proclamation R276 which, as has been mentioned, authorised the Venda Government to detain anyone without trial. The South African Government seems to have connived with Chief Mphephu.[219] "Chief Mphephu, however, won the election for Chief Minister again, having detained twelve opposition members and nominated a sufficient number of supporters to seats in the Assembly to obtain a majority, provided the traditional chiefs supported him."[220]

Chief Mphephu had no mandate from the Venda people to seek independence[221] and his loss at the polls in two elections, it is submitted, proves this assertion.

Like the other independent homelands, Venda is financed by the South African Government.[222]

The aforegoing brief critique of the forms of government which govern the Blacks in the Republic of South Africa at the present time clearly demonstrates the cynical exercise of power by the Whites by the manipulation of carefully selected stool-pigeons in the Bantu homelands;[223] the rigging of constitutions by overloading them with nominative seats whose incumbents invariably support the South African Government's stooge as their livelihood depends on it; the imposition of draconian legislation by the South African Government just before independence and their permitting the puppets who are invariably in power to misuse such legislation during the election to manipulate or muzzle the genuine wishes of the people;[224] the dispossession of Blacks of their birthright of citizenship in an undivided South Africa (see the Bantu Homeland Citizenship Act No. 26 of 1970) in exchange for worthless homeland citizenship.

"Far from being independent states, the Bantustans would be no more than racial group areas subject to nationalist race laws, but administered by self-seeking members of each particular group."[225] By and large Mbeki's diagnosis, at the present time cannot be rejected as not reflecting the true state of affairs in the Homelands.[226]

VIII. THE DIRECT EXTRA-CONSTITUTIONAL CHALLENGE BY THE BLACKS AND THE WHITE GOVERNMENT'S REACTION THERETO.

"After four decades of seeking change through petitions, deputations and public meetings, the African National Congress in 1952 moved to challenge White supremacy in South Africa in a campaign of civil disobedience."[227]

The ground for such action was carefully prepared. In December 1951 the Congress sent a letter to the Prime Minister, Dr. Malan, pleading for representation of the Black people in Government and for the repeal of all discriminatory laws which were specified.[228] Congress laid down an ultimatum that if the Government took no action until 29th February 1952, Congress would take "mass action". On 29th January 1952 the Prime Minister replied to Congress stating that the Government was not prepared to accord political equality to Blacks and threatened dire consequences if Congress carried out its plans.[229] On 11th February 1952 Congress replied to the Prime Minister stating its resolve to proceed with the campaign.[230]

On June 26th 1952 the Defiance Campaign began with thousands of Blacks breaking minor discriminatory laws and courting arrest. They refused to pay fines and chose to go to jail. Prisons became so overcrowded that magistrates were compelled to invoke a clause under the Criminal Procedure and Evidence Act 1917 to authorise

prison officials to seize any money found on the resisters and to use this money to pay resisters' fines and then turn them loose.[231]

On 30th July 1952 the Government cracked down on the organisations that were participating in the Defiance Campaign. The President of the African National Congress and the President of the South African Indian Congress were arrested on charges of contravening Section 11(b) of the Suppression of Communism Act, No. 44 of 1950.[232]

At the beginning of 1953 the Campaign was beginning to bite and it was election year. The Government determined to use the "swart gevaar" (black danger) tactic to stampede the White voters and just before the election passed through Parliament two savage acts.

The first was the Public Safety Act, No. 3 of 1953. The Act provided that if in the opinion of the Governor General any action or threatened action by any person was of such a nature and of such extent that the safety of the public or the maintenance of public order was seriously threatened or if circumstances arose which seriously threatened the maintenance of public order or of the ordinary law of the land was inadequate to ensure the safety of the public or to maintain public order, he could declare a state of emergency in the Union of South Africa.[233] In terms of Section 3(1) the Governor General was given wide powers to govern by regulations for as long as the state of emergency lasted. As explained earlier

on, this in fact meant that the Cabinet was arrogating upon itself the power to govern by regulation since the Governor General was a mere figurehead. In terms of Section 4(1) even the Minister of Justice could exercise the powers of the Governor General and declare a state of emergency and govern by regulation. The aim of the Act was obvious--to break the Defiance Campaign.[234]

The Second Act was the Criminal Law Amendment Act No. 8 of 1953.

In terms of Section 1 of the Act if any person was convicted of an offence committed as a protest or in support of any protest against any law or for the repeal or modification of any law he could be sentenced to a fine not exceeding 300 pounds or imprisonment for three years or a whipping of ten strokes.

In terms of Section 2 any person who procured another to commit an offence such as provided for in Section 1 was guilty of an offence and could be sentenced to a fine not exceeding 500 pounds, or imprisonment of five years or a whipping of ten strokes.

In terms of Section 3 it was made a criminal offence for any person to solicit or to receive any money or other article from any person in or outside the Republic or to give any money or article to any person with the purpose of assisting any campaign against any law or enabling any person to commit any offence by way

of protest against any law. Such a person, when convicted, was liable to the same penalties as prescribed in Section 2. In addition, such money or article found in posession of such person could be confiscated by the State.

In terms of Section 6 of the Act, if a person was convicted and a fine imposed and was not paid within 48 hours, the Court could issue a warrant (of execution) authorising the seizure of such person's property and its sale in execution and any amount realised in such sale could be used to pay the fine. What is more, the costs of issuing and executing the warrant would be borne by the accused himself.

In terms of Section 9(1) the Minister of Justice was empowered to prohibit any person convicted under Section 1, 2 or 3 from being in any area and if such person did not comply with such prohibition, he was guilty of an offence and subject to a fine of 200 pounds or one year imprisonment or to both fine and imprisonment.

Section 10 provided for the seizure of articles sent through the post which were believed to be intended for the purposes of assisting a campaign or a person to disobey laws, and for their forfeiture by the State.

With the passage of these laws, especially the latter, the Defiance Campaign was broken. Dr. Malan's threat had been realised with a vengeance. The power of the State as wielded by the White minority had prevailed.

It is submitted that the deliberate defiance of

a law by a subject in a democratic state is the ultimate form of action that a subject may take to show his dissatisfaction with the law whilst still accepting the legitimacy of the authorities that make the law. If such defiance is resorted to by the majority of the subjects, a government which professes to be democratic, must negotiate with the majority to rectify grievances. Failure to do so is an incitement to revolution as the aggrieved majority then has no avenue open for redress except rejection of the legitimacy of government.[235] Any action taken by the government against the subject in such circumstances is nothing but war waged by the government on the subject, using the organs of state which ought to be used to protect the subject not to wage war on him.

However Congress did not opt for revolution. It continued to organise political action under almost impossible conditions[236]--conditions made impossible by the wielding of constitutional power from which the Blacks were excluded. In December 1953 Congress decided to work towards the drawing up of a Freedom Charter to embody the demands of the disfranchised and to mount a boycott of shops whose service was unsatisfactory to the Blacks.[237]

In April 1954, the Government showed its determination not to accede to Black demands by passing the Riotous Assemblies and Suppression of Communism Amendment Act

No. 15 of 1954. The Act provided that the Minister of Justice could prohibit named Communists or persons convicted under the provisions of the Suppression of Communism Act No. 44 of 1950 from attending meetings or gatherings of any description. He was, in terms of the Act, entitled to do so without giving the affected persons any opportunity to make representations to him and without furnishing his reasons for taking action against such people.[238] The principle of audi alteram partem was therefore excluded whilst very basic rights of citizenship were put in jeopardy of ministerial discretion. In terms of the Act, the Minister was authorised to prohibit persons who were not listed as Communists from attending meetings if he had in his possession information which showed that such persons were disseminating Communist propaganda. Again such persons were not to be given a hearing before such prohibition would come into effect, but such persons could "request" the Minister of Justice for the Minister's reasons for the action taken against such a person and for information which the Minister had in his possession. The Minister was enjoined to furnish such persons with the Minister's reasons and so much of the information as could in the opinion of the Minister be disclosed without detriment to public policy.[239]

The Minister of Justice's power to prohibit meetings under the Riotous Assemblies Act 1914, was also widened.[240]

Notwithstanding harassment by police and the banning of most of the Black leadership[241] 1955 was a busy year. The Congress of the People was busy organizing the drawing up of the Freedom Charter which was intended to be an expression of the wishes of the majority of South Africa's citizens regarding the participation of all South African citizens in the Government of South Africa. On 26th June 1955, at a huge multi-racial rally at Kliptown, Transvaal, the Freedom Charter was adopted. No clearer expression of democratic hope has come out of South Africa before or since.[242] It is a sad commentary of the state of the law in South Africa that dissemination of the Freedom Charter is a criminal offence.

In 1956 the Government passed the Riotous Assemblies Act No. 17 of 1956 which consolidated the law relating to the holding of public gatherings. It also passed the General Law Amendment Act No. 50 of 1956. Section 26 and 27 of Act No. 50 of 1956 effectively removed the right of a person charged with contravening Section 11(a) and Section 11(b) of the Suppression of Communism Act No. 44 of 1950 to a trial by judge and jury which he could have demanded under Section 113 of Act 56 of 1955. In such cases the Minister could now order a trial by judge and assessors or constitute a special criminal court to try such a person.

In December 1956 the Government moved against

most of its opponents. 156 people were arrested and charged with treason. Naturally all the Black leadership was netted. Eventually only thirty of the arrested leaders were actually tried. All were acquitted.[243] It would appear that when the Government passed Act No. 50 of 1956 it had expected to charge the people who were arrested in December 1956 with contravening Section 1(a) and 11(b) of Act 44 of 1950 and intended to have them tried by a Special Court. In the event the power granted to the Minister in terms of Section 26 or to the Governor General in terms of Section 27 of Act No. 50 of 1956 had not been necessary to use since the crime they were eventually charged with was one whose prosecution before a Special Court was already provided for in Section 112 of Act 56 of 1955.

The Government's intention in proceeding with the case of treason against its opponents was clearly to intimidate its extra-parliamentary opposition by holding the sword of Damocles of the death penalty over its head should it continue its resistance to government policies.[244]

The relative calm coerced by the Treason Trial was not fated to last.

During 1958-1959 there was an ideological split in the Transvaal ANC between the Pan Africanist wing and the non-racial wing. The split came to a head in November 1958 and in April 1959 the Pan Africanist

(P.A.C.) Congress formally came into being. Robert Sobukwe became its first President.[245]

In 1960 the PAC organized a national defiance campaign against the Pass Laws. In tandem with this campaign was a stay at home campaign aimed at disrupting the South African economy. The campaign was to begin on 21st March 1960 with PAC supporters throughout the country presenting themselves at police stations requesting arrest for omitting to carry their passes or for destroying their passes. Before the campaign started, the PAC leadership issued strict instructions to their followers to keep the demonstrations peaceful.[246] The PAC also called upon the police to exercise restraint.

As in many centers around the country a large Black crowd gathered at Sharpeville on 21st March 1960 demanding to be arrested. There was a confrontation between the crowd and the police. The police, by all accounts, panicked and shot indiscriminately into the crowd which scattered in panic. 67 Blacks were killed and 186 were wounded. Not a single policeman was killed or injured.[247]

A wave of disturbances swept the country and the President of the ANC called for a general strike by Blacks on 28th March 1960.[248] South Africa was slowly being brought to a standstill. Then the Government acted.

On 30th March 1960 the Government, invoking the powers granted to the Governor General under the Public

Safety Act of 1953, declared a state of emergency and unleashed the full might of the State against the Blacks.[249] Emergency regulations were promulgated and pursuant to these regulations hundreds of people were arrested and detained.[250]

The government then moved to ban the ANC and the PAC by hastily piloting through Parliament the Unlawful Organizations Act No. 34 of 1960. The Act was signed on 7th April 1960 and provided that if the Governor General was satisfied that the safety of the public or the maintenance of public order was seriously threatened or was likely to be seriously threatened by the activities of the ANC or the PAC, he could by proclamation in the Gazette, without notice to the body concerned, declare such body to be an unlawful organisation.[251] The Act also conferred power on the Governor General to declare any surrogate organisation established to carry out the activities of the ANC or PAC, unlawful.[252] The Act incorporated by reference many sections of the Suppression of Communism Act, No. 44 of 1950.[253] The effect of such incorporation meant that any organisation declared unlawful under Sections 1 and 2 of Act No. 34 of 1960 could be retrospectively declared unlawful.[254] The drastic consequences attendant upon an organisation being declared a Communist organisation in terms of Act 44 of 1950 were visited upon any organisation that was declared unlawful

in terms of Act No. 34 of 1960.[255] On 8th April 1960 the Governor General issued a proclamation declaring the ANC and the PAC unlawful organisations in terms of Section 1 of Act 34 of 1960.

In terms of Section 1(3) of Act 34 of 1960 a proclamation banning the PAC and ANC had to be reviewed yearly. This provision was however repealed in 1962 and the ban became permanent.[256]

The Unlawful Organisations Act also amended the Riotous Assemblies Act No. 17 by increasing the sentences of people found guilty of intimidating others to stay away from work or to join any association or society, or of jeering at people or blacklisting them for working or of breaking a contract of employment in an essential service. Previously the sentence for such crimes had been a fine of 50 pounds or six months imprisonment or both but under the amendment the sentences were increased to 500 pounds or five years imprisonment or to both fine and imprisonment or to a whipping of 10 strokes and in the case of a second conviction a fine could not be imposed except in conjunction with shipping or imprisonment.[257]

Lawful demands by the PAC and the ANC for a change in the laws of the country became impossible and the two organisations had no alternative but to go underground.[258] Unlike in the United States, protest had engendered more repression.[259]

Understandably organised protest against Government

policies was in tatters during 1960 and 1961. In June 1961 Nelson Mandela and other members of the ANC (whom Mandela refused to name at his trial) decided to embark on an armed struggle against the government.[260] In November 1961 Umkonto wesizwe (The Spear of the Nation), the military arm of the National Liberation Movement was formed.[261] In December 1961 Umkonto carried out a series of sabotage attacks against selected targets.[262] The Government retaliated by passing the General Law Amendment Act No. 76 of 1962 which achieved notoriety as the "Sabotage Act."

This was a dragnet enactment whose terms could be interpreted to include any human activity. "Just as it can easily be demonstrated that the sabotage provision embraces activities of an entirely non-subversive nature, so too can it be shown that the measure is incredibly broad and vague in its sweep . . . An almost limitless range of activities is comprehended within these terms. Moreover any action which obstructs the supply or distribution of light, foodstuffs or water and any damage to or destruction of property (of any kind) is prima facie an act of sabotage. One may obstruct the maintenance of law and order by tripping up a policeman or interfere with the supply of light by knocking out a light bulb! Clearly the ways in which such acts may be committed are innumerable; and many of the actions covered are trivial."[263]

Trivial or not any action adjudicated to be

sabotage was punishable by death or a minimum sentence of five years imprisonment, no portion of which could be suspended. Furthermore, even if the accused should be acquitted on a charge of sabotage (which is extremely unlikely in view of the wide language of the Statute) he could still be arraigned on the same facts on any other charge.[264] Double jeopardy was therefore specifically enacted.

Nelson Mandela had in the meantime illegally left South Africa in January 1962.[265] Less than a month after the passing of the "Sabotage Act" Mandela returned to South Africa on 30th July 1962 and 5th August 1962 he was arrested.

By this time Mandela had captured the imagination of the Blacks and was the pre-eminent Nationalist leader. In October 1962 Mandela appeared in the Magistrate's Court, Pretoria on two charges of inciting workers to stay away from work and of leaving the country illegally. Mandela was convicted on both counts and as was his right as a convicted criminal, he addressed the Court at length in mitigation of sentence. In beautiful, carefully constructed prose he set out the philosophy of his and the Black people's struggle;[266] of the decision to break the law;[267] on his aims in calling the strike;[268] on the failure of negotiation;[269] on possible penalties for him;[270] on what he would do on his release;[271] on his criminality.[272]

Mandela was then sentenced to five years imprisonment without the option of a fine.

At the time of Mandela's trial, pro-Mandela rallies had been organised in various centers in the Republic. Realising that the rallies would harden Black attitudes into defiance of the laws that made the trial possible, the Government on October 20, 1962 used its powers to prohibit "all gatherings held to protest the arrest or trial of anyone for any offence" until 30th April 1963.[273]

The breaking of the backs of the Black political organizations did not redress the grievances of the Blacks. Grievances intensified and the Black people lacking coherent leadership, reacted spontaneously. Hence the rise of the terrorist organisation, Poqo[274] which was responsible for many acts of brutality whose apparent motivation was simply revenge or hatred of Whites.[275]

In the meantime sporadic acts of sabotage occurred in various parts of South Africa; some were very serious indeed and Umkonto weSizwe claimed responsibility for them.[276] The underground resistance movement was clearly active and powerful, but so were the South African Police. ". . . [B]y early June 1963, 126 persons had been convicted under the Sabotage Act, the highest sentence being eight years, and 511 were awaiting trial."[277]

Faced with this armed challenge, the Government

once again resorted to legislative action. Parliament passed the General Law Amendment Act No. 37 of 1963.[278] The Act provided that any commissioned officer of the South African Police could, without warrant, cause to be arrested any person whom he suspected on reasonable grounds of having committed or intending or having intended to commit an offence under the Suppression of Communism Act, No. 44 of 1950 or sabotage or who in his opinion was in possession of any information relating to the commission of any such offence or the intention to commit such an offence, and detain such person or cause him to be detained in custody for interrogation at any place he may think fit until such a person had in the opinion of the Commissioner of the South African Police replied satisfactorily to all questions. Such person could be detained for 90 days at a time, but there was no limit to the periods of 90 days such a person could be detained.[279]

No person would have access to the detained person except a person permitted by the Minister of Justice or the officer who had commanded the arrest and detention. However such a detained person would be visited once a week by a magistrate.[280]

The authority of the Court to release a person detained under this Act was specifically excluded.[281]

In terms of Section 5 of the Act, Section 11 of

the Suppression of Communism Act 44 of 1950 was amended by making the provisions of paragraph b(bis) and b (ter) extraterritorial in application and making it an offence for a resident or former resident of the Republic, at any place outside the Republic to have advocated the achievement by violent means of political or industrial, social or economic change, under the guidance of a foreign government or international body.

In terms of Section b (ter) it was made an offence for any person who was or had been a resident of the Republic to have undergone training outside the Republic or obtained information from outside the Republic which could be of use in furthering the achievement of the objects of Communism or anybody which had been declared an unlawful organisation if that person failed to prove beyond a reasonable doubt that he had not undergone such training or obtained such information with the object of using it or causing it to be used to further the aims of Communism.

The death penalty was provided for and a minimum sentence of five years no portion of which could be suspended was provided for for contravention of Sections 11(b) (bis) and 11(b) (ter) of Act 44 of 1950.

These provisions were retrospective to 1950.

In terms of these provisions, anyone who appealed to the United Nations for help against the South African

Government could be sentenced to death.

To receive training to overturn the status quo was made a capital offence.

Clearly the intention of the Act was to limit the struggle to the borders of South Africa and to resources available in South Africa where the Government would be at enormous advantage as it was in control of all resources.

The Act also contained the "Sobukwe Clause". Robert Sobukwe, the leader of the PAC had been convicted in 1960 after the PAC led Defiance Campaign of that year and sentenced to undergo imprisonment for three years. At the time of passing of this Act, Sobukwe's sentence was just about to be completed. The Sobukwe Clause provided for the continued detention of any convicted person after such convicted person had served his sentence if the Minister of Justice was satisfied that such a person was likely to advocate, advise, defend or encourage the achievement of any of the objects of Communism. This provision was to lapse on 30th June 1964.[282] Robert Sobukwe was held under this clause until 1969. He had completed his sentence in May 1963. The reason for continuing to hold him after he had served his sentence was that, as the Minister of Justice said, he "had undergone no change of heart."[283]

The effect of the Act was clearly to place any and every South African citizen at the mercy of the

police without recourse to any court of law. The Act also indirectly abolished the privilege against self-incrimination. Nor were the police squeamish in the use of their power.[284] The overwhelming majority of those detained under this Act were Blacks. Out of 1095 people held, 857 were Blacks.[285] There were outcries of ill-treatment of detainees.[286] Fortunately the Government suspended Sections 17(1), 17(2), and 17(3) in 1965 although it threatened to revive them if the need arose.[287]

On 11th July 1963 the police raided Liliesleaf Farm outside Johannesburg and found hundreds of documents which implicated many of the Black leaders in a plot to overthrow the government by force. The raid also netted some Black Nationalist leaders.[288] The recently passed 90 day detention clause was used ruthlessly "For nearly ninety days, the men arrested in the Rivonia Cottage had been interrogated and detained in solitary confinement.[289]

Nelson Mandela was brought from prison and joined as an accused. The accused were charged with four charges under the General Law Amendment Act No. 76 of 1962, the Suppression of Communism Act NO. 44 of 1950 and the Criminal Law Amendment Act No. 8 of 1953.[290]

The accused were on trial for their very lives as sabotage was a capital offence under the General Law Amendment Act No. 76 of 1962. One of the accused was found guilty on one count and the remaining seven were

were found guilty on all four counts. All eight were sentenced to life imprisonment.[291]

Knowing that he could be sentenced to death, Nelson Mandela had again expressed his ideas and of his People on the decision to turn to violence;[292] on the gradual but inexorable diminution of Black rights,[293] on Black and White confrontation;[294] on Black political rights;[295] and on his determination.[296]

Mandela's speeches have been quoted in extenso in this paper for they, in the opinion of the writer, accurately express the feelings of the Blacks at the time and in the context in which they were delivered, reflect the effect of the law on the Black people at the time.

The sentencing of Mandela closed a chapter in the confrontation between Black and White in South Africa. It was left to Chief A.J. Luthuli, the former President of the ANC to deliver the judgment of the Black people: "To this end they used every accepted method: propaganda, public meetings and rallies, petitions, stay-at-home strikes, appeals, boycotts. So carefully did they educate the people that in the four-year-long treason trial, one police witness after another voluntarily testified to this emphasis on non-violent methods of struggle in all aspects of their activities.

But finally all avenues of resistance were closed. The African National Congress and other organizations

were made illegal; their leaders jailed, exiled or forced underground. The Government sharpened its oppression of the peoples of South Africa, using its all White Parliament as the vehicle for making repression legal, and utilizing every weapon of the highly industrialized and modern state to enforce that 'legality'. The stage was even reached where a White spokesman for the disenfranchised Africans was regarded by the Government as a traitor.

The African Congress never abandoned its method of a militant, nonviolent struggle, and of creating in the process a spirit of militancy in the people. However, in the face of the uncompromising White refusal to abandon a policy which denies the African and other oppressed South Africans their rightful heritage--freedom--no one can blame brave just men for seeking justice by the use of violent methods; nor could they be blamed if they tried to create an organized force in order ultimately to establish peace and racial harmony.

For this, they are sentenced to be shut away for long years in the brutal and degrading prisons of South Africa. With them will be interred this country's hopes for racial co-operation. They will leave a vacuum in leadership that may only be filled by bitter hate and racial strife.

They represent the highest in morality and ethics in the South African political struggle; this morality

and ethics has been sentenced to an imprisonment it may never survive. Their policies are in accordance with the deepest international principles of brotherhood and humanity; without their leadership, brotherhood and humanity may be blasted out of existence in South Africa for long decades to come. They believe profoundly in justice and reason; when they are locked away, justice and reason will have departed from the South African scene.[297]

Political action had been suppressed by the Government and so guerrilla activity was the only means left to the Blacks. During 1964, notwithstanding the Draconian laws which had been passed by the Government, sabotage attacks continued.[298] The Government found it necessary to refine its security legislation. It passed the General Law Amendment Act, No. 80 of 1964.

Apparently the Government was having difficulty in securing convictions against its opponents because accomplice witnesses were not willing to testify.[299] Previously accomplices who voluntarily gave evidence to the satisfaction of the Court against their fellow accused could be discharged from prosecution. In terms of Act No. 80 of 1964 an accomplice could be compelled to give evidence even if it might incriminate him.[300] If he refused to give evidence, the accomplice could be sentenced to a maximum of 12 months imprisonment.[301]

Section 11(b) (ter) enacted only the previous

year was amended to make it an offense not only to have undergone training or obtained information which could be used to further the aims of Communism but also to have ". . . undergone or attempted, consented or taken any steps to undergo, or incited, instigated, commanded, aided, advised, encouraged or procured any other person to undergo any training or obtained any information."[302]

It is clear that the intention of the Act was to outlaw the recruitment of people for military training with the purpose of fighting against the South African Government.

The Sobukwe Clause was extended for a year.[303]

No acts of sabotage or overt political defiance occurred in 1965 but the Government was not happy with the powers it had. It then passed the Suppression of Communism Amendment Act No. 97 of 1965 which extended the scope of the ban on printing, publishing, dissemination of speeches, utterances or writings of the Government's opponents.[304] It also became an offence to be in possession of anything whatsoever which indicated that one had been or was a member or office-bearer or in any way associated with an unlawful organization.[305] The Government's powers to ban publications was extended by the enactment of a section which provided that the State President could in his discretion ban any publication or periodical which was deemed to be a continuation or substitution of a periodical or publication already banned.[306] The Sobukwe clause was extended to remain in operation for another year.[307]

The Government also passed the Criminal Procedure Amendment Act 96 of 1965. The most important provision

of the Act was Section 7 which provided for the issue of a warrant for the arrest and detention of a witness for the State if there was any danger of tampering with or intimidation of the witness or if he considered it in the interests of such witness or of the administration of justice. The witness would be held at a place determined by the Attorney General. The witness would be held until the trial in respect of which he had to give evidence was terminated or for six months whatever period would be the shorter. Nobody would have access to the witness except with the consent of the Attorney General or any other officer delegated by the Attorney General. A magistrate would visit such detained witness once a week. No court of law could order the release of such a witness.[308] The power could be used only if the offence charged was one which fell under Part II BIS of the Second Schedule to the Criminal Procedure Act No. 56 of 1955 (which included any offence under the Suppression of Communism Act, No. 44 of 1950).

The need for such an Act was that: "Saboteurs were beginning to return from five training camps in territories to the North, the Minister said. To date 133 persons had been arrested while on their way to undergo training and 85 after having returned. One of a group arrested might weaken and offer to turn State witness but unless he was detained he might disappear.

Cases where witnesses had been intimidated or had absconded were cited."[309]

The obvious intention of the Government was to keep those of its opponents who had broken down under interrogation and given information to the police in gaol so that they would remain amenable to giving evidence for the State.[310] The Government was battening the hatches down against guerrilla infiltration and trying to equip itself with every conceivable legal weapon against the insurgents.

In 1965, armed insurgents began to infiltrate the border of South West Africa and Angola. The majority were members of Swapo but some were en route to South Africa.[311] A number of skirmishes between the insurgents and South African Government forces occurred. The Government reacted by passing the General Law Amendment Act No. 62 of 1966.

The Act added a further presumption in favour of the State to those contained in Section 12 of the Suppression of Communism Act No. 44 of 1950. It was provided that if in any criminal prosecution under Section 11(b)ter it is alleged that the accused has at any time and place outside the Republic undergone or attempted to undergo any training, it is proved that the accused had left the Republic without valid travel documents, then it would be presumed until the contrary was proved beyond

a reasonable doubt that the accused had undergone or attempted or consented or taken such steps to undergo training.[312] The provision lightened the evidential burden of the State considerably but commensurately saddled an accused person with a very onerous burden. The standard of proof beyond a reasonable doubt in adjective law is a very high one which very few accused persons are able to satisfy in view of their limited resources. The offence in relation to which the presumption was applicable was a capital one. It is clear that the Government wanted to have its captured opponents hanged with as little fuss as possible.

Section 17 of Act 17 of 1963 which had been suspended in 1963 was partly revived by the provision in Act 62 of 1966 that any commissioned officer in the SAP above the rank of Lieutenant-Colonel, if he had reason to believe that any person who was at any place, was a terrorist or had committed sabotage or received training for Communistic purposes or intended to commit such offences, could arrest or cause such person to be arrested without warrant and detain or cause that person to be detained for purposes of interrogation for a period not exceeding fourteen days or for such further periods as the Supreme Court could determine.[313] However unlike under Section 17 of Act 1963, a judge could order the release of a detained person.

The Criminal Procedure Act No. 56 of 1955 was amended to make all witnesses compellable to be sworn and to testify even if such testimony incriminated such witness.[314] The aim of this provision is obvious. Any person could be detained as a witness and then produced in court and sworn to give evidence by compulsion on pain of being sentenced. This provision would be of inestimable value to the Government in proving its case in political trials.

The Sobukwe Clause was extended for a further period of one year.[315]

In 1967 there was increased infiltration of guerrillas through Rhodesia (as it was then called). ANC and PAC guerrillas were fighting side by side with ZANU and ZAPU guerrillas who were engaging the Rhodesian security forces in the field. Realising the threat to it, posed by guerrillas infiltrating South Africa, the South African Government again resorted to legislative action. The result was the *Terrorism Act No. 83 of 1967.*

The Act created the new crime of "participation in terroristic activities." The provisions creating this offence were so wide and so complicated that the definition thereof defied rational legal formulation.[316] "It is almost superfluous to state that the crime of terrorism is both broadly and vaguely defined. The fact that any act, whether lawful in itself or not, may be the foundation

for a prosecution means that any human activity including speech or writing, could be a terroristic act. The scope of the Act would be considerably narrowed down if only those acts which are committed with intent to endanger law and order or to injure the safety of the State were punishable as terrorism. Instead the provisions of the Act dealing with intent employ phrases which not only do not narrow down the unlimited sweep of the Act but increases its vagueness . . . The cloudiness and all embracing nature of the concepts used to define the crime of terrorism are themselves terrifying aspects of the law."[317] "The definition of terrorism incorporates speech, writing and physical actions, and it applies to lawful and unlawful acts. One may say without exaggeration, that the crime is so broad that there is hardly a person who has not at some time committed it. With the enactment of this crime we have arrived at the position that the authorities, if they are determined, can bring home a charge of terrorism against anyone who is persona non grata to them."[318]

The Act was made retrospective to 27th June 1962.[319] It was made a capital offence.[320] This aspect has made Mathews exclaim: "The retrospective enactment of a capital offence must be unprecedented in advanced western societies."[321]

The minimum sentence was five years imprisonment without the option of a fine. No portion of the sentence

could be suspended. A convicted juvenile could not be treated as such. If a 12 year old was convicted, he had to be hanged or sentenced to five years imprisonment. The defence of autrefois acquit was excluded and a person who was acquitted on a charge of terrorism could be charged for another crime arising from the same set of facts.[321(A)]

It is submitted that the enactment of the Terrorism Act marked the highpoint in political legislative drafting. The rule of law was finally replaced by the rule of men. "When laws are stripped of their normative quality, as they are in the case of sabotage and terrorism, we have the shifting haphazard rule of men instead of the objective, impartial standards of general rules."[322] All this was done legally!

The rationale for the enactment of this law was that: "The stage of an ideological struggle against Communism had passed: the authorities were no longer dealing with Red ideology, but with Red arms."[323] At no stage did the Minister offer to talk with his adversaries.

Not only was the principal participant in terroristic activities punishable, "any person who harbours or conceals or directly or indirectly renders any assistance to any other person whom he has reason to believe to be a terrorist, shall be guilty of an

offence."[324] The offence committed by the harbourer carried the death penalty or a minimum of five years imprisonment.

The Act provided for the arrest, without warrant of any person whom a police officer had reason to believe was a terrorist, or was withholding from the police any information relating to terrorists or to offences under this Act and detain that person for interrogation until the Commissioner was satisfied that he had satisfactorily replied to all questions or that no useful purpose would be served by his further detention. The person can in terms of the law be held indefinitely under this section. No court of law can pronounce on the validity of any action taken under this section or order the release of a detainee. No person other than the Minister of Justice or an officer in State service (obviously the wardens) has access to the detainee or is entitled to any information relating to or obtained from the detainee. If circumstances permit, the detainee is to be visited by a magistrate once every fortnight.[325]

Thus in terms of this Act, a person may simply vanish from the face of the earth and no one will be the wiser for it. If the authorities do not wish to release information relating to a detained person they will not do so and that will be the end of the story.

The Government also passed the Suppression of

Communism Amendment Act No. 24 of 1967. In terms of this Act, all persons who were listed (as Communists) or banned or were former office bearers, officers, members or active of any organization which had been declared unlawful, could, by notice in the Gazette, be prohibited by the Minister of Justice from being or becoming office bearers, officers, members or active supporters of any organization, or from making or receiving any contribution for the direct or indirect benefit of any organisation or of participating in any way in the activity of any organisation.[326]

If there had been any doubt about the political rights of free assembly and organization of the Government's opponents, this Act clarified the issue. Opponents had no such political rights![327]

In terms of Section 11(i) of the Suppression of Communism Act No. 44, 1950 it was an offence for a banned or listed person to communicate with another banned or listed person. It was often very difficult for the Government to prove that the accused knew that the person he was communicating with was a banned or listed person. This Act provided that if the name of the person communicated with appeared on a list in the custody of an officer in terms of Section 8 of Act 44 of 1950 or if the person communicated with was under any prohibition under the Suppression of Communism Act or the Riotous

Assemblies Act, and if the name of the person communicated with corresponded substantially with a name appearing on a list published in the Gazette in terms of Section 8(4) or 10(ter) of Act 44 of 1950 or Section 2(3)bis of Act 17 of 1956 then it would be presumed that the accused knew that he was communicating with a banned or listed person at the time of such communication unless the contrary was proved beyond a reasonable doubt.

In terms of this Act no person could be admitted as an advocate, attorney, notary or conveyancer unless he satisfied the Supreme Court that he was not a listed Communist and that he had never been convicted of being a member of an unlawful organization, performed any act to achieve the objects of Communism, advised or encouraged any act calculated to achieve the aims of Communism or received military training or advocated the use of force to overthrow the Government.[328] Furthermore the Government could apply for the striking off or disbarment of any person who was listed or convicted for the offences mentioned. If a person had been convicted of the offences mentioned, he could be admitted as an advocate, an attorney, notary or conveyancer only if the Minister of Justice had no objection to such admission. Clearly the intention was to cow the legal profession as in the past resistance to the Government had tended to solidify around legal personalities like Mandela and Oliver Tambo and Duma Nokwe.

The Act also extended the Sobukwe Clause for one more year and Mr. Sobukwe entered his fifth year of detention by Parliamentary order.[329]

In 1968 the Government's legislative programme was well nigh complete and effective. There were no guerrilla activities or unrest within the country. The only law of note for the Blacks, passed in 1968, was the General Law Amendment Act No. 70 of 1968 which extended the Sobukwe Clause for another year.[330] However the security apparatus and the courts continued to churn out convicts at a satisfying rate in terms of the laws already on the Statute Book.[331]

1969 was a peaceful year for the Government. Its power was absolute and unquestioned. It continued banning people in terms of the Suppression of Communism Act.[332]

Having won the battle in Parliament and in the courts and silenced all meaningful Black dissent, the Government then set about creating a mammoth spy organisation. Under the Public Service Amendment Act No. 86 of 1969, the Government created the Bureau of State Security. "According to the Deputy Minister of Justice, the Bureau will co-ordinate and complement the security activities of the Security Branch of the police and the military intelligence division of the Defence Force but these organizations will retain their identities. It will not be subject to the authority of the Public Service Commission

and, except during the annual budget debate, Parliament will be unable to question its activities."[334] It was obvious that this organisation was to be an organ of general surveillance of the population and was to be directed by the governing party exclusively. Big Brother had arrived in South Africa.

The Government also passed the General Law Amendment Act No. 101 of 1969. This Act made the provisions of Section 3 of the Official Secrets Act, 1956 applicable to security matters. "A 'security matter" was defined as any matter relating to the security of the Republic, including any matter dealt with or relating to the Bureau of State Security or relating to the relationship existing between any person and the said Bureau."[335] In other words, if a citizen discovered that he was under surveillance from his neighbor who was an agent of the Bureau of State Security, publication of those facts would make such citizen liable to a fine of R1500,00 or to imprisonment for seven years or to both fine and imprisonment. Section 29 of the Act provided that an officer of the Bureau could not be subpoenaed to give evidence in any court of law if the Minister of Justice or a surrogate issued a certificate to the effect that the matter concerned affected the interests of the State or public security and that disclosure of it would be prejudicial to the interests of the State or public security. The

Bureau was placed above the law as it were. It can be imagined what the effect of this Bureau was on the Blacks. Everybody suspected his neighbour of being a spy and concerted action against the Government became absolutely impossible. One imagines that that was exactly the result that the Government desired.

At the end of the Parliamentary session in 1969 the Sobukwe Clause was not renewed and the Blacks sighed with relief. Mr. Sobukwe was released from prison but was promptly banned and banished to Kimberly. He was placed under 12 hours house arrest and prohibited from attending gatherings.[336]

In July 1969 with very little fuss, Black students founded the South African Students Organisation (SASO).

By the beginning of 1970 the Government's legislation had had its desired effect. There was no overt Black political organisation in South Africa. However, Black frustration and discontent was seething just below the surface but was tightly controlled by police action, the activities of informers and the agents of the Bureau for State Security. The intellectuals realised that Black solidarity was a conditio sine qua now if they were to generate the power to shake themselves free.[337]

There was a political vacuum in Black society. The Black students moved into the gap. At the 1970 conference of SASO ". . . the general feeling was that

Black students must unite in order to face the problems they have encountered, first as students and then as members of an oppressed community. They must promote community awareness, capability, achievement and pride."[338] Thus was born the concept of Black Power in South Africa and a new challenge to the South African Government appeared on the horizon.

Notwithstanding unabated detentions, arrests, convictions and severe sentences, there was a resurgence of the demand for Black rights in 1971. However, this time the demand was made by the youth.[339]

In 1972 a new Black political movement, the Black People's Convention was founded.[340] However the movement was intimidated by the arrest and conviction under the Terrorism Act of its national organiser as well as the banning of the leadership.[341]

In 1974, the Government passed the Affected Organisations Act 31 of 1974. The Act authorised the State President to declare any organization, without notice to the organisation, to be an affected organisation, if the State President was satisfied that politics were being engaged in by or through an organisation with the aid or in co-operation with or in consultation with or under the influence of an organisation or person abroad.[342] Once an organisation was declared affected it became an offence for any person to solicit foreign aid for such organisation or to receive or in any way deal with such

money or to bring or cause to be brought into the Republic such money.[343] Sentences for contravention of the provisions of this Act were very stiff being R10,000,00 or five years imprisonment or both on a first conviction and R20,000,00 or ten years imprisonment or both on a second or subsequent conviction.

The instruments of repression were being honed and refined. Because the Black people had been so cowed and were so fearful of the police and the all pervasive Bureau for State Security, they were unwilling to contribute funds to any political organisation for fear of Government reprisals. The only hope of any organisation was to solicit for funds overseas. This Act closed that avenue for good.

The Government also passed the Riotous Assemblies Amendment Act No. 30 of 1974. The most important sections of the Act were Section 1 which deleted the definitions of "public gathering" and "public place" and Section 2 which substituted a new Section 2 in the principal Act, the Riotous Assemblies Act No. 17 of 1956. The effect of these amendments was that the Minister of Justice or the magistrate in a particular area could ban any gathering from taking place at any place. There was no longer any need for the gathering to be a "public gathering" at a "public place" in order to fall within the category of gatherings which could be banned. The Act therefore

made it possible for the Minister or the Magistrate to ban a proposed gathering in a citizen's own home. There is therefore no longer any freedom of assembly in South Africa.

The Government also passed the Second Bantu Laws Amendment Act No. 71 of 1974 to amend the Transkei Constitution Act No. 48 of 1963 and the Bantu Homelands Constitution Act No. 21 of 1971. In terms of this Act, the powers of Homeland Assemblies were increased by the insertion of paragraph 21A in Schedule I of Act 21 of 1971 and the powers of the Transkei Legislative Assembly were increased by the insertion of paragraph 6A in Schedule I of Act 48 of 1963. In terms of the provisions of Act No. 71 of 1974 the Transkei[344] and other Homeland Assemblies[345] could within their areas of authority, ban organizations, prohibit the furtherance of the aims of organizations, restrict or place prohibitions on any Black who was an office bearer of such organization, restrict any Black person to a particular area, prohibit the publication or dissemination of the contents of any writing, speech, utterance or statement of any Black person. These powers were, of course, to be exercised under the general supervision of the Government of South Africa.[346]

It is obvious that by means of this enactment, the Homeland Governments received a major portion of the repressive powers that the South African Government had,

by trial and error, developed and perfected over two decades of concerted activity. "On 21 October during the second reading debate on the Bill, the Minister of Bantu Administration and Development said that the Transkei and Ciskie had asked for a measure of this nature. The other Homeland Governments, all of which had received copies of the draft Bill had made no adverse comment . . ."[347]

In September 1974 SASO and the Black People's Convention scheduled meetings to express solidarity with the Frelimo movement which was then engaged in an anti-colonial war with the Portuguese in Mozambique. Using its vast array of powers, the South African Government banned all meetings anywhere in the country by or on behalf of SASO or the BPC. The two organisations nevertheless defied the bans and held their meetings. The meetings were broken up by police and numbers of persons were arrested.[348]

By 1975, the Government's security legislative programme was to all intents and purposes complete.

In 1976 the Government passed the Internal Security Amendment Act No. 79 of 1976 whose main purpose was to re-entitle the Suppression of Communism Act No. 44 of 1950 to the Internal Security Act, No. 44 of 1950. Most of the provisions of the Act merely refined provisions which already existed in the previous legislation. But the most far-reaching clause was Section 4 which amended

Section 10 of the original Act and conferred far-reaching powers on the Minister of Justice to order the preventive detention of persons if he was satisfied that such persons engaged ". . . in activities which endanger or are calculated to endanger the security of the State or the maintenance of public order."[349]

Section 4 of the Internal Security Act No. 79 of 1976 was, it is submitted, the final triumph of the Government for it provided for the final subversion of law and substitution therefor of rule by the Minister of Justice. Since Black political activity has always been aimed at changing the status quo, it is clear that "State security" and "maintenance of public order" constitute the very laws that the Blacks wish to change. Agitation to change the law therefore amounts to "activities which endanger or are calculated to endanger the security of the State or the maintenance of public order." Blacks who press for legal change through constitutional means are therefore faced with the threat of detention on the orders of the Minister of Justice should the Minister at any stage decide that it is politic to order such detention.

The purpose of the Act was explained by the Minister of Justice thus ". . . the Minister of Justice said that he would continue to flush out Communists, but that the legislation was aimed at people other than

Communists. There were the young Black Power leaders who were being polarised and were allowing themselves to be misled by the Christian Institute. There were people who in spirit were trying to besmirch South Africa's name."[350]

The Act was not passed too soon. On 16th June 1976 the same day that it was scheduled to become operative, Soweto exploded.[351] Disturbances spread to many parts of the country and on 16th July 1976, the Government issued Proclamation R133 in terms of the Internal Security Act which brought into force in the Transvaal for one year the preventive detention provisions of the Act. In the wake of further disturbances in the rest of the country, the Government issued Proclamation R159 on 11th August 1976 which enforced the preventive detention provisions of the Internal Security Act over the rest of the country for one year.[352] All Black activists were at the mercy of the Government for the periods specified.

The Government also used the extensive armoury of laws at its disposal to ban and detain people and to prohibit gatherings.[353] By November 1976 it was believed that 434 people had been detained during 1976.[354] Thousands of Blacks fled South Africa, many of them to receive military training in other countries.

A low intensity urban guerrilla war began in 1977.[355]

The Government banned all outdoor meetings except sports meetings.[356] Large numbers of persons were arrested and detained under the blanket of Security Laws.[357]

Since 1976 a number of people had died whilst in detention. Some had died in extremely suspicious circumstances.[358] On 12th September 1977, the death in detention of Steve Biko, a former President of SASO and a major figure in the Black Consciousness Movement broke around the heads of the Government.[359] A storm of protest broke out. Although the Government had prohibited meetings, protest meetings were held in various parts of the country.

On 19th October the Government retaliated. In a massive crackdown, it banned most of the activist organisations and placed most of their leaders in preventive detention under the Internal Security Act.[360] The Black newspapers, the World and Week-End World were banned and their editors were placed in preventive detention.[361]

In 1978, political violence escalated. The youths who had fled from South Africa in 1976 to receive military training in other countries were returning to attempt to wrest power by force. The situation which had been forecast by the ANC leadership in the '60's had finally come to pass. Armed revolutionaries were now operating within the midst of the body politic. The government did not take the shift of tactics lying down. Its

formidable powers which have been reviewed in this paper were used to the full.[362]

By 1979 South Africa was in a state of low intensity civil war. "The level and intensity of the conflict had grown enormously since the 1976 rebellion. It could no longer be seen as a temporary phenomenon but was a built-in part of the structure of society and only a restructuring of that society could remove its cause."[363] Armed guerrillas clashed with the police in various parts of the country. Bombs were planted and exploded. Black policemen were executed. Large caches of arms and explosives were discovered by the police. Right wing violence also escalated.[364]

It is against this background that the dilemma of the Black people in South Africa must be viewed.

When Chief A.J. Luthuli wrote in 1964 that "The government sharpened its oppression of the peoples of South Africa, using its all-white parliament as the vehicle for making repression and using every weapon of this highly industrialized and modern state to enforce that 'legality'"[365] he obviously did not anticipate the ingenuity of the drafters of the enactments which have been passed since 1964 and which have been reviewed in this paper nor the determination of the Government to legislate to oblivion every semblance of opposition to it.

The total effect of the security laws which

have been passed over the last two decades is to reduce the level of those of the disfranchised who are peaceful and law abiding, to mere zombies whose every action, whose very existence in South Africa may in terms of the law be construed as a danger to the state.

They are now faced with civil war in their country. On the one hand there is an intransigent government whose laws have reduced them to chattels and on the other hand are the militants and revolutionaries who have chosen active resistance and death. The peaceful disfranchised are caught in the middle. Must they opt for the way of apartheid, which is ". . . a comprehensive and technologically sophisticated system seeking continuing political and economic mastery of one race and class by another";[366] a life of " . . . doing nothing, of saying nothing, of not reacting to injustice, of not protesting against oppression, of not striving for the good society and the good life in the ways they see it"[367] if that means working against the government?

Do they have a choice?

ANNEXURE A

"Freedom Charter," adopted by the Congress of the People, June 26, 1955.

PREAMBLE

We, the people of South Africa, declare for all our country and the world to know:—

That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people;

That our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;

That our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities;

That only a democratic state, based on the will of the people can secure to all their birthright without distinction of colour, race, sex or belief;

And therefore, we, the people of South Africa, black and white, together—equals, countrymen and brothers—adopt this FREEDOM CHARTER. And we pledge ourselves to strive together, sparing nothing of our strength and courage, until the democratic changes here set out have been won.

THE PEOPLE SHALL GOVERN!

Every man and woman shall have the right to vote for and stand as a candidate for all bodies which make laws.

All the people shall be entitled to take part in the administration of the country.

The rights of the people shall be the same regardless of race, colour or sex.

All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government.

ALL NATIONAL GROUPS SHALL HAVE EQUAL RIGHTS!

There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races;

All national groups shall be protected by law against insults to their race and national pride;

All people shall have equal rights to use their own language and to develop their own folk culture and customs;

The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime;

All apartheid laws and practices shall be set aside.

THE PEOPLE SHALL SHARE IN THE COUNTRY'S WEALTH!

The national wealth of our country, the heritage of all South Africans, shall be restored to the people;

The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole;

All other industries and trade shall be controlled to assist the well-being of the people;

All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

THE LAND SHALL BE SHARED AMONG THOSE WHO WORK IT!

Restriction of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it, to banish famine and land hunger;

The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers;

Freedom of movement shall be guaranteed to all who work on the land;

All shall have the right to occupy land wherever they choose;

People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.

ALL SHALL BE EQUAL BEFORE THE LAW!

No one shall be imprisoned, deported or restricted without a fair trial;

No one shall be condemned by the order of any Government official.

The courts shall be representative of all the people;

Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance;

The police force and army shall be open to all on an equal basis and shall be the helpers and protectors of the people;

All laws which discriminate on grounds of race, colour or belief shall be repealed.

ALL SHALL ENJOY EQUAL 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;

The privacy of the house from police raids shall be protected by law;

All shall be free to travel without restriction from countryside to town, from province to province, and from South Africa abroad;

A preventive health scheme shall be run by the state;

Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children;

Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, crèches and social centres;

The aged, the orphans, the disabled and the sick shall be cared for by the state;

Rest, leisure and recreation shall be the right of all;

Fenced locations and ghettoes shall be abolished, and laws which break up families shall be repealed.

THERE SHALL BE PEACE AND FRIENDSHIP!

South Africa shall be a fully independent state, which respects the rights and sovereignty of all nations;

South Africa shall strive to maintain world peace and the settlement of all international disputes by negotiation—not war;

Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and status of all;

The people of the protectorates—Basutoland, Bechuanaland and Swaziland—shall be free to decide for themselves their own future;

The right of all the peoples of Africa to independence and self-government shall be recognised, and shall be the basis of close cooperation.

****

Let all who love their people and their country now say, as we say here: "THESE FREEDOMS WE WILL FIGHT FOR, SIDE BY SIDE, THROUGHOUT OUR LIVES, UNTIL WE HAVE WON OUR LIBERTY."*

****

Pass laws, permits and all other laws restricting these freedoms shall be abolished.

THERE SHALL BE WORK AND SECURITY!

All who work shall be free to form trade unions, to elect their officers and to make wage agreements with their employers;

The state shall recognise the right and duty of all to work, and to draw full unemployment benefits;

Men and women of all races shall receive equal pay for equal work;

There shall be a forty-hour working week, a national minimum wage, paid annual leave, and sick leave for all workers, and maternity leave on full pay for all working mothers;

Miners, domestic workers, farm workers and civil servants shall have the same rights as all others who work;

Child labour, compound labour, the tot system and contract labour shall be abolished.

THE DOORS OF LEARNING AND OF CULTURE SHALL BE OPENED!

The government shall discover, develop and encourage national talent for the enhancement of our cultural life;

All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands;

The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace;

Education shall be free, compulsory, universal and equal for all children;

Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit;

Adult illiteracy shall be ended by a mass state education plan;

Teachers shall have all the rights of other citizens;

The colour bar in cultural life, in sport and in education shall be abolished.

THERE SHALL BE HOUSES, SECURITY AND COMFORT!

All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security;

Unused housing space to be made available to the people;

Rent and prices shall be lowered, food plentiful and no one shall go hungry;

ANNEXURE B

"*Umkonto We Sizwe*" (Spear of the Nation). Flyer "issued by command of *Umkonto We Sizwe*" and appearing on December 16, 1961

Units of Umkonto We Sizwe today carried out planned attacks against Government installations, particularly those connected with the policy of apartheid and race discrimination.

Umkonto We Sizwe is a new, independent body, formed by Africans. It includes in its ranks South Africans of all races. It is not connected in any way with a so-called "Committee for National Liberation" whose existence has been announced in the press. Umkonto We Sizwe will carry on the struggle for freedom and democracy by new methods, which are necessary to complement the actions of the established national liberation organizations. Umkonto We Sizwe fully supports the national liberation movement, and our members, jointly and individually, place themselves under the overall political guidance of that movement.

It is, however, well known that the main national liberation organizations in this country have consistently followed a policy of non-violence. They have conducted themselves peaceably at all times, regardless of Government attacks and persecutions upon them, and despite all Government-inspired attempts to provoke them to violence. They have done so because the people prefer peaceful methods of change to achieve their aspirations without the suffering and bitterness of civil war. But the people's patience is not endless.

The time comes in the life of any nation when there remain only two choices: submit or fight. That time has now come to South Africa. We shall not submit and we have no choice but to hit back by all means within our power in defence of our people, our future and our freedom.

The Government has interpreted the peacefulness of the movement as weakness: the people's non-violent policies have been taken as a green light for Government violence. Refusal to resort to force has been interpreted by the Government as an invitation to use armed force against the people without any fear of reprisals. The methods of Umkonto We Sizwe mark a break with that past.

We are striking out along a new road for the liberation of the people of this country. The Government policy of force, repression and violence will no longer be met with nonviolent resistance only! The choice is not ours: it has been made by the Nationalist Government which has rejected every peaceable demand by the people for rights and freedom and answered every such demand with force and yet more force! Twice in the past 18 months, virtual martial law has been imposed in order to beat down peaceful, non-violent strike action of the people in support of their rights. It is now preparing its forces—enlarging and rearming its armed forces and drawing white civilian population into commandos and pistol clubs—for full-scale military actions against the people. The Nationalist Government

has chosen the course of force and massacre, now, deliberately, as it did at Sharpeville.

Umkonto We Size will be at the front line of the people's defence. It will be the fighting arm of the people against the Government and its policies of race oppression. It will be the striking force of the people for liberty, for rights and for their final liberation! Let the Government, its supporters who put it into power, and those whose passive toleration of reaction keeps it in power, take note of where the Nationalist Government is leading the country!

We of Umkonto We Sizwe have always sought—as the liberation movement has sought—to achieve liberation, without bloodshed and civil clash. We do so still. We hope—even at this late hour—that our first actions will awaken everyone to a realization of the disastrous situation to which the Nationalist policy is leading. We hope that we will bring the Government and its supporters to their senses before it is too late, so that both Government and its policies can be changed before matters reach the desperate stage of civil war. We believe our actions to be a blow against the Nationalist preparations for civil war and military rule.

In these actions, we are working in the best interests of all the people of this country—black, brown and white—whose future happiness and well-being cannot be attained without the overthrow of the Nationalist Government, the abolition of white supremacy and the winning of liberty, democracy and full national rights and equality for all the people of this country.

We appeal for the support and encouragement of all those South Africans who seek the happiness and freedom of the people of this country.

Afrika Mayibuye!

Issued by command of Umkonto We Sizwe.

FOOTNOTES

[1]See Survey of Race Relations in South Africa, 1979, p. 70.

[2]Or the Union of South Africa as it was then known.

[3]Thompson, L.M., The Unification of South Africa 1902-1910. Oxford Press, 1960, p. 486. The Blacks in fact outnumbered all other population groups and constituted 67.45% of the total population of the four colonies.

[4]Brookes, Edgar H., The History of Native Policy in South Africa from 1830 to the Present Day, Van Schaik, Pretoria, 1927, pp. 59-60. "The unkindest explanation of the Natal franchise law--and probably the true one--is that it was a skilfull and disingenious attempt to maintain a political colour bar without saying so." p. 60. Also see Tatz, C.M., Shadow and Substance in South Africa, Putermaritzburg,University of Natal Press, 1962, pp. 5-6.

[5]Shadow and Substance, ibid., pp. 1-3.

[6]See Chapters 1 and 3 of Part I of the Constitution of the Orange River Colony as set out in Botha, C.L., The Statute Law of the Orange River Colony, 1901, pp. 1-3.

[7]See Jeppe, Fred, De Locale Wetten der Zuid Afrikaansche Republick, 1887. Section 9 of the Grondwet of 1858 at p. 36 and Section 31(3) of the same Grondwet at p. 38; see also Law 2 of 1896 especially Sec. 9 and 43, as reflected in Barber, S.H. & others, The Statute Law of the Transvaal, p. 727 et seq.

[8]"The question of granting the franchise to natives will not be decided until after the introduction of self-government." p. 52 - Grant, Maurice Harold: History of the War in South Africa, vol. IV.

[9]Thomson, ibid p. 12.

[10]"If I had known, as well as I know now the extravagance of the prejudice on the part of almost all

the Whites--not the Boers only--against any concession to any Coloured man, however civilized, I should never have agreed to so absolute an exclusion, not only of the raw native, but of the whole Coloured population from any rights of citizenship, even in municipal affairs." Lord Milner, High Commissioner for South Africa and Governor of the Transvaal and the Orange River Colony quoted by Thompson, ibid. at p. 12, footnote 34.

[11]See Brand, R.H., The Union of South Africa, 1909 Clarendon Press, pp. 14-31.

See also, Newton, A.P., The Unification of South Africa, 1924, vol. II, pp. 73-146.

[12]Thompson, ibid., pp. 398-399. "Furthermore, the international situation made the consummation of the South African Union a matter of some urgency. In time of war, the Suez Canal might be closed to the shipping of Britain and her allies, in which case the Cape route would reassume its former commercial and strategic importance and a friendly, self-sufficient, united South Africa would be a vital asset.", p. 398.

[13]See Thompson, ibid., pp. 61-64.

[14]See Thompson, ibid., pp. 90-93.

[15]See Walton, E.H., The Inner History of the National Convention of South Africa, pp. 28-30. See also, South African National Convention 1908-1909 - Minutes of Proceedings and Annexures pp. xi-xiii.

[16]See South African National Convention 1908-1908, p. 1. "There appears to be an impression abroad that this Convention is going to lay down the lines to be followed upon such questions as the future native policy of South Africa . . ." See also, Walton, Sir Edgar, The Inner History of the National Convention, p. 39.

[17]Orpen, J.M. The Native Question in Connection with the South Africa Bill or Union Constitution Act.

[18]Dold, G.W.F. and Joubert, C.P., The British Commonwealth - The Development of Its Laws and Constitutions, 5 South Africa, 1955, Stevens, p. 41. "There

were certain questions which gave the Convention a great deal of trouble. Undoubtedly, the most difficult was the problem of the native franchise."

[19]Walton, Sir Edgar, ibid., p. 118.

[20]Walker, Eric A., Lord de Villiers and His Times, 1925, p. 447.

[21]See Walton, ibid., p. 118.

[22]Paraphrased by Walton, ibid., p. 124.

[23]Later he would become a Minister of Native Affairs in the post-Union Cabinet of Louis Botha and he would be the one to pilot through Parliament the infamous Native Land Act, 1913, about which more will be said infra.

[24]Walton, ibid., pp. 126-127

[25]The same who later achieved world fame as a leading light in the founding of the League of Nations.

[26]See Walton, ibid., pp. 129-130.

[27]The fear of being swamped by Blacks was to last throughout his long political career and it was during his premiership in 1936 that the residual Black franchise was erased from the Statute Book.

[28]Walton, ibid., pp. 135-136.

[29]Walton, ibid., p. 138.

[30]Walton, ibid., p. 139.

[31]See Bell, Derrick, Race, Racism and American Law, 2nd ed., pp. 7-8.

32. Walton, ibid., p. 144.

[33]Walton, ibid., pp. 150-152.

[34]Walker, ibid., p. 452.

[35]Orpen, ibid., p. 9.

[36]Dold, Gilbert F. and Joubert, C.P., ibid., p. 46

[37]The foregoing criticism of Britain's agreeing to the inclusion of paragraph 8 of the Peace of Vereeniging.

[38]Thompson, ibid., pp. 400-401.

[39]See Thompson, ibid., pp. 402-407

[40]Quoted by Thompson, ibid., p. 408.

[41]Dold & Joubert, ibid., p. 47.

[42]Quoted by Thompson, ibid., p. 407.

[43]Quoted by Thompson, ibid., p. 417.

[44]The justice and fair play that Botha was talking about was to be seen later in the passing by his government of the infamous Native Land Act 1913 which consigned the Blacks to about 13% of the land surface of South Africa.

[45]Thompson, ibid., p. 404.

[46]Thompson, ibid., p. 486. Also see Karis, T. and Carter, Gwendolen, M., From Protest to Challenge, vol. I, p. 120.

[47]Dold & Joubert, ibid., p. 47.

[48]Sachs v. Minister of Justice, 1934 A.D., p. 11 at p. 37. See also R v. Ndobe, 1930 A.D. 484 at 495., Noble and Barbour v. S.A.R. & H, 1922 A.D. 527, Freeman v. Union Govt., 1926 A.D. 651, Ndlwana v. Hofmeyr, N.O. and Others, 1937, A.D. 229 at 237. S v. Tuhadeleni and Others, 1967 (4) S.A. 511 and 1969(1) S.A. 153, Ndlwana v. Hofmeyr N.O. & Others 1937 CPD as reported in Ndlawana v. Hofmeyr, N.O. and Others, 1937 A.D., pp. 229-235.

[49]State v. Tuhadeleni and Others, 1969(1) S.A. 153 at 172-173.

[50]Dugard, John, Human Rights and the South African Legal Order, Princeton, p. 16.

[51]Jennings, Sir Ivor, The British Constitution, 5th Edition, p. 208.

[52]Jennings, ibid., p. 211.

[53]Dugard, ibid., p. 18. In fact, the Voortrekkers had emigrated from the Cape Colony as they could not tolerate British insistence on the two principles. They saw themselves as a race apart and superior to the indigenous peoples whom they considered perpetual vassals." " Ordinance 50 of 1828 gave free Coloured people legal equality with the Whites and in 1834 all slaves were freed. These egalitarian reforms precipitated, in part, the departure of several thousands of Dutch settlers from the Cape Colony for the interior in a mass exodus now known as the Great Trek." Dugard, p. 17.

[54]See Dugard, ibid., pp. 18-19. See also Eybers, Select Constitutional Documents Illustrating South African History, 1795-1910, pp. 286-297. See also Butterworths South African Law Review 1954, pp. 55-57.

[55]See Section I and LVIII of the Grondwet of 1854.

[56]See Butterworths South African Law Review 1954, p. 56 for the views of the Chief Justice of the Orange Free State.

[57]Nabal v. Bok N.O. (1883) 1 SAR 60. McCorkindale's Exors v. Bok N.O. (1884) 1 SAR 202.

[58]Dugard, ibid., p. 22. See also Butterworths South Africa Law Review 1954, p. 65.

[59]Butterworths South African Law Review 1954, pp. 66-67.

[60]Dugard, ibid., p. 24.

[61]Butterworths South African Law Review 1954, p. 70.

[62]Butterworths South African Law Review 1954, p. 70 ". . . under law 4, 1890, an immigrant could not obtain the vote for presidential and Volksraad elections until he had resided in the Republic for fourteen years."

[63]See Barber & others, The Statutes Law of the Transvaal, p. 800 for the text of Sections 1, 2, 3, 4, 5 and 6 of Law No. 1 of 1897 which brought the judiciary to heel.

[64]Hahlo, H.R. and Kahn, E., The South African Legal System and its Background, 1968, p. 241. Habib Motan v. Transvaal Government, 1904 T.S. 404 at p. 413 and p. 420.

[65]1912 A.D. 199.

[66]Karis, T., Carter, Gwendolen M., From Protest to Challenge, vol. I, p. 63, p. 82-83. See the remarks of Mr. T. Zini, President of the Cape Peninsula Native Association, ". . . he would ask them to bear in mind that they were commencing a campaign which would be a strenuous one. The harder the struggle, the better they should fight. . . . It was a most iniquitous measure, and they should oppose it to the very last."

[67]McChlery's case, pp. 215-217.

[68]He had acted as go-between the two.

[69]McChlery's case, pp. 221-222.

[70]See Middleburg Municipality v. Gertzen, 1914 A.D. 544, at p. 555.

[71]McChlery's case, pp. 225-226.

[72]See Voetnote 59.

[73]Douglas, W.O., The Court Years, 1980, p. 38.

[74]Than the measure called the "Squatter's Bill" which had not been passed in 1912.

[75]Karis & Carter, ibid., vol. I, pp. 62-63.

[76]For details on how the Act affected the Blacks, see Karis & Carter, ibid., vol. 2, pp. 82-142.

[76a]Molteno, Donald, B., The Betrayal of Native Representation, 1959, p. 6.

[77]Cowen, D.V., Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act, 1951, p. 42.

[78](a) See Middelberg Municipality v. Gertzten, 1914 A.D. p. 544 at p. 555.

(b) Krause v. Commissioner of Inland Revenue, 192 A.D. 286 at pp. 290-291.

(c) Freeman v. Union Government, 1926 T.P.D. 638 at pp. 650-651.

(d) Noble and Barbour v. South African Railways and Harbours, 1922 A.D. 527 at p. 537.

(e) However in R v Ndobe, 1930 A.D. 484 the Court did refer to Section 59 as the basis of Parliament's sovereignty. It is submitted that the reference was correct but the conclusion was incorrect inasmuch as the Court did not interpret Section 59 but merely postulated sovereignty in the British sense with Section 59 as the basis of such postulate.

(f) Harris & Others v. Minister of the Interior & Ano., 1952 (2) S.A. 428 at p. 461.

[79]But this would be very difficult to prove. There is also a presumption of validity operating in favour of the government.

[80]For example Rex v. Ndobe, 1930 A.D. 484.

[81]See Dold & Joubert, ibid., p. 51.

[82]At p. 13.

[84]Compare Llewelyn's dictum that "The Court must decide the dispute that is before it. It cannot refuse because the job is hard, or dubious or dangerous."

[85]McChlery's case, p. 219.

[86]See Cowen, D.V., ibid., p. 3. "I would emphasize that I accept fully and unreservedly that South Africa is today a sovereign State and that the Union Parliament possesses sovereign legislative power in and over the Union." See also Dold & Joubert, ibid., p. 51. See also van Themaat Jerloren, J.P. - Staatsreg, 1956, pp. 33-34

[87]Karis & Carter, ibid., vol. 1, p. 61.

[88]Karis & Carter, ibid., vol. 1., "Immediately following Union, the vital issue of land relationship between Black and White became the focus of attention. Around this question the government spelled out its philosophy of unequal racial co-existence in all spheres of life. Debate over this policy and over the franchise was to be a chronic pre-occupation of African politics." p. 61.

[89]Dold & Joubert, ibid., "When the United Kingdom Parliament by virtue of the South Africa Act, 1909 (9 Edw. 7, C.9) welded these colonies into a single unitary state--the Union of South Africa with Responsible Parliamentary Government--the latter likewise became subject to the legislative authority of the United Kingdom Parliament, which could legislate for the Union without the consent of the Union Parliament.", p. 51.

[90]For the text of the Colonial Laws Validity Act, 1865 (28 & 29 Vict., C 63) see Wheare, K.C., The Statute of Westminster and Dominion Status, 5th Ed., pp. 311-314.

[91]See Section 64 of the South Africa Act.

[92]He was the Governor General and could by withholding his assent cause the Bill to lapse

[93]Shadow and Substance in South Africa, ibid., p. 23.

[94]For the text of the Petition, see Karis and Carter, ibid., vol. I, pp. 84-86.

95. See Shadow & Substance, ibid., p. 22.

[96]For the texts of the two petitions see Karis & Carter, ibid., vol. I, pp. 125-133. See especially paragraphs 17, 19(c), 20, 21 of the petition to the King.

[97]For details of how the mission failed, see Shadow and Substance in South Africa, ibid., p. 24.

[98]For the text of the Resolution, see Karis & Carter, ibid., vol. I, pp. 86-88.

[99]For the text of the petition see Karis & Carter, ibid., vol. I, pp. 137-142. See especially paragraph 7 and 8.

[100]Karis & Carter, ibid., Vol. I, p. 65.

[101]As in footnote 100.

[102]Jabavu, D.D.T., The Segregation Fallacy and Other Papers, 1928, p. 40.

[103]Karis & Carter, ibid., Vol. I, p. 67.

[104]Karis & Carter, ibid., Vol. I, p. 68.

[105]Rex v. Ndobe, 1930, A.D. 484.

[106]At p. 495. This was a mistake as has been demonstrated in an earlier section.

[107]At p. 494.

[108]At p. 490.

[109]For the text of the Act, see Cape of Good Hope Statutes, vol. II, 1880-1893, p. 2459.

[110]At p. 495.

[111]At p. 495.

[112]At p. 494.

[113]At p. 495

[114]See the schedule attached to the Natives Land Act, 1913.

[115]The Glen Grey District was situated in the Cape of Good Hope.

[116]Page 496.

[117]Molteno, Donald B., The Betrayal of Natives Representation, 1959, p. 6.

118. See Molteno, ibid. p. 6. "The Bill therefore lapsed, but public controversy persisted--indeed intensified."

[119]Karis & Carter, ibid., vol. I, p. 274. "Mr. Ballinger advised Conference . . . Thirdly, no emancipation of the Black people would ever be obtained by going to the Law Courts".

[120]Quoted in Karis & Carter, ibid., vol. I, p. 329.

[121]Molteno, ibid., pp. 9-12.

[122]Section 7 of the Act.

[123]Sections 6(1)(a) and 6(1)(b).

[124]Section 2(1).

[125]Section 20.

[126]Shadow and Substance in South Africa, ibid., p. 89.

[127]Shadow and Substance, ibid., p. 89.

[128]1937 A.D. 229.

[129]At p. 237.

[130]At p. 237.

[131]At p. 238.

[132]See Cowen, ibid., p. 45.

[133]1952(2) S.A. 428 at pp. 469-470.

[134]Molteno, ibid., p. 14.

[135]Rogers, Barbara, Divide and Rule, 1976, p. 21.

[136]Moltena, ibid., p. 14.

[137]Plaatje, Sol T., Some of the Legal Disabilities Suffered by the Native Population on the Union of South Africa and Imperial Responsibility", p. 2, "The root of the evil involved in the legislative tendencies of the Union Parliament lies in the Act of Union which excluded Coloured taxpayers from the exercise of the franchise. The result is that no matter how loudly they protest against an accumulation of wrongs, the legislature is not obliged to take any notice of their protests."

[138]See par. 19 of the 1914 Petition of the African National Congress addressed to the King. For the text of the petition see Karis & Carter, ibid., Vol. I, pp. 124-130. See also Paragraph 10 of the 1918 Petition of the African National Congress to the King. For the text of the petition, see Karis and Carter, pp. 137-142.

[139]See Section 1 & 2.

[140]See Section 5 and 6(1).

[141]See Section 16(1).

[142]See Sechaba, August 1980, pp. 23-26.

[143]Karis and Carter, ibid., vol. I, pp. 158-195.

[144]See Karis & Carter, ibid., vol. I, pp. 193-196 for details of Deputy Prime Minister T.J. de V Roos answers to questions put to him during a conference held on 3rd November 1926.

[145]Section 27(1).

[146]Section 27(2).

[147]See Section 26(1).

[148]See Section 29(2) and 20(3).

[149]See Dr. A.B. Xuma's remarks in Political Representation of Africans in the Union--Pamphlet issued by the South African Institute of Race Relations, 1942, p. 24. "However the representatives have no such power. They can talk and have talked eloquently; but hardly any matters of fundamental policy have been altered during the five years of their term of office by reason of their representations."

[150]See Political Representation, ibid. "They only agreed to give it a trial in view of the fact that their forces of opposition were not well and effectively organised, otherwise they would have inaugurated a policy of no-cooperation." R.V. Selope, Thema. See also R.H. Godlo's article at p. 33-36 of Political Representation. ibid.

[151]Robertson, T.C. writing in Political Representation of Africans in the Union, ibid. "The natives would be given some representation (enough to keep them quiet) in such a way that they would never be able to dominate European politics as a result of their superior numbers. All the emphasis was on the never. The aged politician visualised his 'solution of the native problem' as an arrangement which would persist until doomsday." p. 37

[152]Political Representation of Africans in the Union, ibid. p. 24.

[153]Robertson, T.C. writing in Political Representation of Africans in the Union, "While the Natives Representative Council has done good work, it has not even had an "influence' in Parliament. Indeed the tabling of the report of its proceedings, as far as the majority of members of Parliament is concerned, is no more significant than the addition of yet another blue book to the growing pile." p. 38.

[154]Tatz, C.M., Shadow & Substance, ibid., pp. 113-114.

[155]Tatz, C.M., Shadow & Substance, ibid., p. 115.

[156]See Tatz, Shadow & Substance, ibid., p. 115.

[157]". . . The experiment has failed, because the government, which is the author of segregation, and therefore the author of this Natives Representative Council never intended to honour its pledge--it has never bothered itself for one single moment about the Council . . . We have been fooled. We have been asked to co-operate with a toy telephone. We have been speaking into an apparatus which cannot transmit sound and at the end of which there is nobody to receive the message. Like children we have taken pleasure at the echo of our own voices . . ." Councillor Mosaka as quoted at p. 116 of Shadow and Substance.

[158]Tatz, C.m., ibid., p. 117.

[159]Tatz, C.M., ibid., p. 118.

[160]Hill, Christopher R., Bantustans: The Fragmentation of South Africa. 1964, pp. 1-6.

See also, Sandor, Psend, The Coming Struggle for South Africa. "The only answer, as far as the Afrikaner is concerned, is the division of the country into 'black' and 'white' areas"., p. 7. Also at pp. 10-11, "If South Africa is to be divided into 'black' and white' areas the problem must be tackled on two fronts. One is the removal of the Africans from the 'white' areas. In practice, since this cannot be achieved immediately without destroying the 'white' economy, it means denying the African any permanent stake in the 'white' areas and making him a migrant worker until his labour is no longer needed. In the government's own words, the African must be regarded as a 'temporary sojourner' in 'white' South Africa . . . The other leg of the apartheid policy is the development of the reserves so that they can support an even larger African population. There is no intention of increasing the amount of land held by Africans."

Since the above was written, Soweto has exploded and there is now a grudging acceptance of the permanence of the urban Black. This change is evidenced by the extension of the 99 year lease system to Black housing in Soweto and the belated feverish activity to make conditions in that township tolerable.

There has also been some talk by the Prime Minister that the 1936 Land Act which pegged land for

Black occupation at 13% of the land surface of South Africa is not inviolate and that he probably would be prepared to make more land available to the Blacks.

[161]Section 18.

[162]Section 2.

[163]Hill, Christopher R., ibid., p. 8. "They enjoy extremely limited powers and particularly at the tribal level have been strenuously opposed by Africans".

See also, Rogers, Barbara, Divide and Rule, ibid., p. 21. "Verwoerd, in the debate, made no pretense that Africans agreed to these steps: 'These proposals were not very warmly welcomed by the Bantu leaders, for they had but one desire--they repeatedly said so--and that was equality and representaiton in the Union Parliament together with the Europeans. They very expressly said that this was their sole aim in their constitutional development . . .'", p. 21.

See also p. 11, "The new Bantustan structures are being imposed upon tiny and badly eroded reserves designed to force the Africans there into migrant labour in the town."

[164]Rogers, op. cit., p. 8.

[165]Hill, op. cit., p. 10.

[166]Section 2(7). Also see Hill, op. cit., p. 11.

[167]Sections 3(1), 3(2), 3(3), 3(4) of Act. 68 of 1951.

[168]See Section 4(1)(c), 5(1)(a), 7(1).

[169]See Section 4(1)(d), 5(1)(b), 5(3), 5(6), 6(1), 7(1).

[170]Hill, Christopher R., op. cit., p. 11.

Karis, T. and Carter, Gwendolen, R., From Protest to Challenge, vol. 3.

[171]Whereas the Bantu People of the Union of South Africa do not constitute a homogenous people, but form

separate national units on the basis of language and culture:

And whereas it is desirable for the welfare and progress of the said peoples to afford recognition to the various national units and to provide for their gradual development within their own areas to self-governing units on the basis of Bantu systems of government:

And whereas it is therefore expedient to develop and extend the Bantu system of government for which provision has been made in the Bantu Authorities Act, 1951, with due regard to prevailing requirements, and to assign further powers, functions and duties to regional and territorial authorities:

And whereas the development of self-government is stimulated by the grant to territorial authorities of control over the land in their areas, and it is therefore expedient to provide for the ultimate assignment to territorial authorities of certain rights and powers conferred or assigned to the Governor General or the Minister or Trustee referred to in the Native Trust Land Act 1936 in terms of any law:

And whereas it is expedient to provide for direct consultation between the various Bantu national units and the Government of the Union:

And whereas it is expedient to repeal the Representation of Natives Act 1936:

And whereas it is expedient to provide for other incidental matters.

[172]Section 2. This is a curious indication that the Whites do not think of the Blacks as people but as units in the White conceived structures.

[173]Section 2(2).

[174]Section 3(d).

[175]Section 12. See substituted Section 7(1)(f).

[176]See Section 12. Substituted Section 7(1)(g).

[177]Section 12. See Substituted Section 7(5).

[178]Section 4(1).

[179]Section 1(1).

[180]Section 1(2).

[181]Section 2(2).

[182]See Section 2(2)(a) and Section 2(2)(b) and compare them with Section 40-51 of the Constitution Act No. 32 of 1961.

[183]Section 3(1).

[184]Section 3(2).

[185]See the provision in Section 30, ". . . and may make different such laws for different regions or places and different categories or groups of persons."

[186]See Section 23(b) and Section 25 and Section 23(c).

[187]Section 12.

[188]See Section 2(7) of Act 38 of 1927. See also Rogers, Barbara, Divide and Rule, 1976, pp. 49-50. ". . . the Supreme Chief of all Africans in the country is the head of State, now the State President; all the African chiefs are arranged in a hierarchical structure, answerable to the White person who holds this post. He is empowered to legislate by proclamation in all African areas, subject to modification or repeal by the all White House of Assembly . . . As a Transkei politician has described the system, 'The chiefs have the whip hand all the time--and the government controls the chiefs.' This is a complete reversal of the position of chiefs in traditional administrative structures. While keeping, or restoring the form of chieftainship, the South African ethnologists twisted its meaning in terms of responsibility to the people. By retaining the right to recognise chiefs, and by paying those recognised a regular salary and giving them specific though limited powers, the central government in South Africa--as in many colonial situations--removed the chiefs from their accountability to the people and created an institution of petty tyranny. Democracy in traditional life was destroyed; the chiefs no longer depended for

their livelihood on the approval of their own people."

See also Mbeki, Govan, The Peasant's Revolt, p. 137.

[189]Mbeki, Govan, The Peasant's Revolt, pp. 137-138.

[190]See footnote 188.

[191]South Africa Race Relations Survey, 1976, p. 228.

[192]South Africa Race Relations Survey, 1976, pp. 119-121.

[193]South Africa Race Relations Survey, 1976, pp. 242-244.

[194]South Africa Race Relations Survey, 1976, pp. 228-229.

[195]For further provisions see South Africa Race Relations Survey, 1977, pp. 335-336.

[196]South Africa Race Relations Survey, 1977, pp. 338-339.

[197]South Africa Race Relations Survey, 1978, p. 283.

[198]South Africa Race Relations Survey, 1978, p. 282.

[199]"The little support that Chief Sabata musters in the Council Chamber of the Transkei Territorial Authority is no indication at all of popular feeling in the Transkei which is right behind Sabata and, indeed, would wish his opposition to go even further. Commoners, the two million peasants of the Transkei, have long stopped expecting chiefs to speak for them representing their grievances and demands, but Sabata is one of the few chiefs who have not betrayed the tradition of speaking for their tribes, even when they know what they say must earn them the disapproval of the government, even the threat of deposal or banishment." Mbeki, Govan, op. cit., p. 137. No wonder the Matanzima decided to act against Chief Sabata.

[200]South Africa Race Relations Survey, 1979, pp. 340-341.

[201]South Africa Race Relations Survey, 1977, p. 337.

[202]South AFrica Race Relations Survey, 1978, p. 303.

[203]South Africa Race Relations Survey, 1979, p. 337.

[204]South Africa Race Relations Survey, 1979, p. 337.

[205]See the cover of Rodgers, Barbara, Divide and Rule, ibid.

[206]See South Africa Race Relations Survey, 1977, p. 328.

[207]South Africa Race Relations Survey, 1977, p. 334.

[208]South Africa Race Relations Survey, 1977, p. 334

[209]South Africa Race Relations Survey, 1977, p. 311 and p. 334.

[210]South Africa Race Relations Survey, 1978, p. 274.

[211]South Africa Race Relations Survey, 1979, p. 308

[212]South Africa Race Relations Survey, 1977, pp. 328-29.

[213]South Africa Race Relations Survey, 1979, pp. 308-311.

[214]R97 million in 1978 and R22 million in 1979.

See South Africa Race Relations Survey, 1978, at p. 275 and 1979, at p. 349.

[215]South Africa Race Relations Survey, 1979, p. 328.

[216]South Africa Race Relations Survey, 1978, p. 297.

[217]South Africa Race Relations Survey, 1978, p. 328.

[218]South Africa Race Relations Survey, 1979, p. 328.

[219]McClellan, Grant S., South Africa, 1979, p. 29. "Chief Mphephu detained more than 50 members of the opposition without charges or trials . . . Pretoria seems to have agreed. The Venda detainees were picked up by South African Police and held in South African cells. And

throughout the uproar that followed the jailings, South African government officials continued to describe Mphephu's move toward independence as 'the kind of democratic, peaceful change, that should serve as an example for the rest of Black Africa.'"

[220]Survey of Race Relations in South Africa, 1979, p. 3

[221]Survey of Race Relations in South Africa, 1979, p. 3

[222]Survey of Race Relations in South Africa, 1979, pp. 248-349.

[223]See Mbeki, Govan, The Peasant's Revolt, ibid., pp. 49-64.

There are however certain homeland leaders who refuse to be blatantly used, most notably Chief Gatsha Buthelezi of Kwazula. See Buthelezi, Gatsha M., The Power Is Ours, pp. 4-6, 19-28, pp. 145-158

[224]McClellan, Grant S., South Africa, ibid., p. 28. "The men who have accepted independence for their bantustans are fairly unsavory characters, and are widely hated by South African blacks. . . . Chief Mangope, like Chief Kaiser Matanzima in Transkei, is a ruthless opportunist; in both Bophuthatswana and Transkei, the opposition has been disbanded or jailed, and government officials are free to use their positions for personal gain. In both countries, too, about half the legislature is directly appointed by the chief, making a farce of the democratic process in the only parts of South Africa where blacks can vote for their national government."

[225]Mbeki, Govan, The Peasant's Revolt, p. 46, quoting a Nationalist M.P.

[226]Refer to the shenanigans of Chief Mphephu and the brazen use of State farms by the Matanzima brothers for their own profit. See South Africa Race Relations Survey 1976, p. 339-340.

[227]Karis, Thomas and Carter, Gwendolen, From Protest to Challenge, vol. 3, p. 3.

[228]Survey of Race Relations in South Africa, 1951-52, p. 11.

[229]Survey of Race Relations in South Africa, 1951-52, pp. 11-12.

"While the Government is not prepared to grant the Bantu political equality within the European community . . . Should you adhere to your expressed intention of embarking on a campaign of defiance and disobedience to the Government and should you in the implementation theory incite the Bantu population to defy law and order, the Government will make full use of the machinery at its disposal to quell any disturbances, and, thereafter, deal adequately with those responsible for initiating subversive activities".

[230]"They had no other alternative they said, but to embark on a mass campaign of defiance of unjust laws. As a defenceless and voteless people, they had explored other channels without success." Survey, ibid., 1951-52, p. 11.

[231]Survey of Race Relations, ibid., 1951-52, p. 15.

[232]Survey, ibid., 1951-52, p. 14.

[233]Section 2(1).

[234]"In March this year, the Government passed the so-called Public Safety Act which empowered it to declare a state of emergency and to create conditions which would permit of the most ruthless and pitiless methods of suppressing our movement." No Easy Walk to Freedom, Presidential Address by Nelson Mandela, Transvaal ANC., September 21, 1953, quoted by Karis & Carter, vol. 3, ibid., p. 107.

[235]Cohen, Carl, Civil Disobedience, pp. 44-45, ". . . the civil disobedient does, while the revolutionary does not, accept the general legitimacy of the established authorities. While the civil disobedient may vigorously condemn some law or policy those authorities institute, and may even refuse to comply with, he does not by any means intend to reject the larger system of laws of which that one is a very small part. In accepting that system he accepts even the technical legitimacy of the law he breaks; he recognises that in one very important sense that law does claim obedience from him, and he knows that his defiance of that claim--while he accepts the general legitimacy of the system--requires some special justification.

In short, the civil disobedient acts deliberately within the framework of established political authority; the revolutionary seeks to demolish that framework or to capture it."

[236]"The Defiance Campaign together with its thrills and adventures has receded. The old methods of bringing about mass action through public meetings, press statements, and leaflets calling upon the people to go to action have become extremely dangerous and difficult to use effectively . . . . These developments require the evolution of new forms of political struggle which will make it reasonable for us to strive for action on a higher level than the Defiance Campaign." Mandela, Nelson, No Easy Walk to Freedom, Karis & Carter, ibid., p. 107.

[237]Survey of Race Relations in South Africa, 1953/1954, pp. 11-12.

[238]See Section 5(1)(e) of Act 44 of 1950 and Section 3(b) of Act 15 of 1954.

[239]See Section 10 of Act 44 of 1950 and Section 7 of Act 15 of 1954.

[240]Survey of Race Relations in South Africa, 1953-54, p. 36, "Under the Riotous Assemblies Act of 1914, the Minister has been empowered to prohibit all public gatherings in places to which the public had access in specified areas for specified periods. In terms of the new Act, his powers were widened: he may now prohibit any particular public gathering, or all such gatherings, in any public place for a specified period or certain days of the week." Also see Section 1(4)a) and Section 2 of Act 14 of 1954.

[241]ANC President A.J. Luthuli, Walter Sisulu, Nelson Mandela, Joe Mathews were all banned.

See also Survey of Race Relations in South Africa 1955/56, p. 40.

[242]A copy of the Freedom Charter is annexed hereto marked Annexure A:

"These principles have been embedded in the Freedom Charter, which no one in this country will dare challenge for its place as the most democratic programme

of political principles ever enunciated by any political party or organisation in this country." Nelson Mandela, pleading in mitigation in Court. See Karis and Carter, Vol. 3, ibid., p. 735.

[243]Survey of Race Relations in South Africa, 1958-1959, pp. 44-47.

Survey of Race Relations in South Africa, 1961, pp. 62-63.

[244]"The Government's control of the extra-parliamentary opposition and its restrictions on the leaders were so pervasive and its unused statutory powers so extensive that invocation of the law of treason seemed superfluous unless the intention was to hang the accused. Speaking privately in January, 1959, however, Oswald Pirow the Chief Prosecutor, provided a different view of Government intentions . . . More important to Pirow than five year jail terms, however, was the desirable effect of the trial itself, which he considered to be largely responsible for a rapid decline in agitation after December 1956 and a generally quiet period during 1957-58. However Piron noted bluntly, if any serious threat to White rule were to arise, the shooting of 5000 natives by machine guns would provide quiet for a long time to come." Karis and Carter, ibid, vol. 3, pp. 274-275. Oswald Pirow's forecast was to come true just the following year with the Massacre of Sharpeville.

[245]Karis & Carter, vol. 3, ibid., pp. 307-320. See also, pp. 524-530 for the Constitution of the PAC.

[246]Karis & Carter, vol. 3, ibid., pp. 560-572.

[247]Karis & Carter, vol. 3, ibid., pp. 333-334.
Survey of Race Relations, 1959-1960, pp. 577-58.

[248]Survey of Race Relations, 1959-1960, pp. 59-68.

[249]Karis & Carter, vol. 3, ibid., pp. 337-339. "Between 30 March and 2 April the entire citizen force, Permanent Force Reserve, Citizen Force Reserve and Reserve of Officers and the whole of the commandos were placed on standby, the regiments, squardrons and other units being mobilised as their services were required." Survey of Race Relations in South Africa 1959-60, p. 73.

[250]Karis & Carter, vol. 3, ibid., pp. 577-579.

Survey of Race Relations in South Africa, 1959-60, p. 84. "According to the Minister of Justice, by 6 May, 18011 arrests had been made (excluding the persons detained under Section 4, as described above). Large numbers were released after screening. The Minister gave further information on 16 May stating that:

(a) 689 persons had so far been detained under Section four bis. Of these 316 had been committed to institutions designated by the Commissioner of Prisons, and 284 had still to be interrogated. (The remaining 89 had presumably been released.)

(b) 8,454 other persons had been detained in urban areas since the commencement of the emergency. The charges against 176 had been withdrawn, 987 had been discharged, 1022 had been sent home or to institutions or deported, 5351 had been found guilty and their cases disposed of, and action was pending against 987 (the remaining 21 were no accounted for)."

See the same publication, pp. 73-82 for an outline of the Draconian emergency regulations.

[251]Section 1(1) of Act 34 of 1960.

[252]Section 1(2) of Act 34 of 1960.

[253]Section 2 of Act 34 of 1960 read with Sections 1, 2(2), 2(3), 3-15 of Act 44 of 1950.

[254]The same as in footnote 253.

[255]See A Survey of Race Relations in South Africa, 1959-60, p. 70.

[256]Section 20 of Act 76 of 1962.

[257]Section 4 of Act 34 of 1960 read with Section 15 of Act 17 of 1956 read with Section 2 of Act No. 8 of 1953.

[258]See Mathews, A.S., Law, Order and Liberty in South Africa, 1971, pp. 58-108. See especially pp. 69-72 for a critical assessment of the Unlawful Organisations Act.

[259]Cohen, Carl, Civil Disobedience, ibid., p. 65. "Massive protests have often taken this deliberately disobedient form--in sit-ins, freedom rides and the like. The injustice protested being genuine and severe, the forcing of it upon the nation's attention was an effective device in promoting some remedies."

[260]At the beginning of June, 1961, after a long and anxious assessment of the South African situation, I, and some colleagues, came to the conclusion that as violence in this country was inevitable, it would be unrealistic and wrong for African leaders to continue practicing peace and nonviolence at a time when the Government met our peaceful demands with force." Nelson Mandela quoted by Karis and Carter, vol. 3, ibid. p. 777.

[261]See Annexure "B". Note that Umkonto's Manifesto did not allude to any particular political movement but only to the National liberation movement. It appears that Umkonto embraced all those elements of all the organisations which felt that further peaceful demands would be useless. Further note that the justification for the adoption of revolutionary tactics was self defense against government violence. See also Karis and Carter, vol. 3, p. 785. "Umkonto remained a small organisation recruiting its members from different races and organizations and trying to achieve its own particular object." Nelson Mandela.

[262]Karis & Carter, vol. 3, ibid., p. 659.

[263]Mathews, A.S., ibid., p. 166.

[264]Section 21(4)(g). See also Mathews, A.S., ibid, p. 169.

[265]Karis & Carter, vol. 3, ibid., p. 666.

[266]"Your Worship, I would say that the whole life of any thinking African in this country drives continuously to a conflict between his conscience on the one hand and the law on the other. . . . For him, his duty to the public, his belief in the essential rightness of the cause for which he stood, rose superior to this high respect for the law. He could do no other then to oppose the law and to suffer the consequences for it. Nor can I. Nor can many Africans in this country. The law as it is applied, the law

as it has been developed over a long period of history, and especially the law as it is written and designed by the Nationalist Government is a law which, in our view, is imporal, unjust and intolerable. Our consciences dictate that we must protest against it, that we must oppose it and that we must attempt to alter it." Quoted by Karis & Carter, vol. 3, ibid., p. 737.

[267] "In the fact of the complete failure of the Government to heed, to consider, or even to respond to our seriously proposed objections and proposals for solution to our objections to the forthcoming Republic (sic), what were we to do? Were we to allow the law which states that you shall not commit an offence by way of protest, to take the course and thus betray our conscience and our belief? Were we to uphold our conscience and our beliefs to strive for what we believe is right, not just for us, but for all the people who live in this country, both the present generation and for generations to come, and thus transgress against the law? This is the dilemma which faced us and in such a dilemma, men of honesty, men of purpose and men of public morality and of conscience can only have one answer. They must follow the dictates of their conscience irrespective of the consequences which might overtake them for it. We of the Action Council, and I particularly as Secretary, followed by conscience.", p. 738.

[268] "We were inspired by the idea of bringing into being a democratic republic where all South Africans will enjoy human rights without the slightest discrimination; where African and non-African would be able to live together in peace, sharing a common nationality and a common loyalty to this country, which is our homeland." P. 739.

[269] "Representations have been made, by people who have gone before me, time and again. Representations were made in this case by me; I do not want again to repeat the experience of those representations. The Court cannot expect a respect for the processes of representation and negotiation to grow among the African people, the Government shows every day, by its conduct, that it despises such processes and frowns upon them and will not indulge in them. Nor, will the Court, I believe, say that, under the circumstances, my people are condemned forever to say nothing and to do nothing. If the Court says that, or believes it, I think it is

mistaken and deceiving itself. Men are not capable of doing nothing, of saying nothing, of not reacting to injustice, of not protesting against oppression, of not striving for the good society and the good life in the ways they see it. Nor will they do so in this country.' ibid, p. 741.

[270]"I do not believe, your Worship, that this Court, in inflicting penalties on me for the crimes for which I am convicted should be moved by the belief that penalties will deter men from the course that they believe is right. History shows that penalties do not deter men when their conscience is aroused, nor will they deter my people or the colleagues with whom I have worked before . . . . For to men, freedom in their own land is the pinnacle of their ambitions, from which nothing can turn men of conviction aside. More powerful than my fear of the dreadful conditions to which I might be subjected in prison is my hatred for the dreadful conditions to which my people are subject outside prison throughout this country." Ibid., p. 744.

[271]"Whatever sentence Your Worship sees fit to impose upon me for the crime for which I have been convicted by this Court, may it rest assured that when my sentence has been completed I will still be moved, as men are always moved, by their conscience; I will still be moved by my dislike of the race discrimination against my people when I come out from serving my sengence, to take up again, as best as I can, the struggle for the removal of those injustices until they are finally abolished once and for all." Ibid., p. 745.

[272]"I have done my duty to my people and to South Africa. I have no doubt that posterity will pronounce that I was innocent and that the criminals that should have been brought before this Court are the members of the Verwoerd Government." Ibid., p. 746.

[273]Karis & Carter, vol. 3, ibid., p. 667.

Survey of Race Relations in South Africa, 1962, p. 50.

[274]Karis & Carter, vol. 3, ibid., p. 669.

[275]Survey of Race Relations in South Africa, 1963, pp. 13-21.

[276]Survey of Race Relations in South Africa, 1962, pp. 53-54.

Survey of Race Relations in South Africa, 1963, pp. 12-13.

[277]Karis & Carter, vol. 3, ibid., p. 672.

[278]Karis & Carter, vol. 3, ibid., p. 672. "On May 1, 1963, legislation was enacted to 'break the back' of Umkonto and Poqo, as Vorster later put it. The General Law Amendment Act or '90 Day Act' which virtually abrogated habeas corpus, was a landmark in the transformation of South Africa into a police state."

[279]Section 17(1).

[280]Section 17(2). Take note that a Magistrate is a government appointee who owes his office to the Department of Justice.

[281]Section 17(3)

[282]Section 4.

[283]Survey of Race Relations, 1963, p. 24.

[283]Karis & Carter, vol. 3, ibid., p. 674.

[284]Karis & Carter, vol. 3, ibid., p. 674.

[285]South Africa Race Relations Survey, 1965, p. 49.

[286]Survey of Race Relations in South Africa, 1964, pp. 62-72.

[287]A Survey of Race Relations, 1965, p. 49. In fact in terms of Section 17(4) of the Act, the provisions of Section 17(1), 17(2), 17(3) are merely held in reserve and may be imposed at any time by simple proclamation in the Gazette.

[288]Karis & Carter, vol. 3., ibid., p. 673.

[289]Karis & Carter, vol. 3, ibid., p. 674.

[290]Survey of Race Relations in South Africa, 1963, pp. 54-57.

Survey of Race Relations in South Africa, 1964, pp. 87-89.

[291]Survey of Race Relations in South Africa, 1964, p. 89.

[292]Karis & Carter, vol. 3, ibid., p. 772. ". . . we felt that without violence there would be no way open to the African people to succeed in their struggle against the principle of White supremacy. All lawful modes of expressing opposition to this principle had been closed by legislation, and we were placed in a position in which we had either to accept a permanent state of inferiority or to defy the Government."

[293]Karis & Carter, vol. 3, ibid., p. 776. "But the hard facts were that fifty years of non-violence had brought the African people nothing but more and more repressive legislation, and fewer and fewer rights."

[294]Karis & Carter, vol. 3., ibid. "How many more Sharpevilles would there be in the history of our country? And how many more Sharpevilles could the country stand without violence and terror becoming the order of the day?", p. 780.

[296]Karis & Carter, vol. 3, ibid. "During my lifetime I have dedicated myself to this struggle of the African people. I have fought against White domination and I have fought against Black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die." P. 796.

[297]A.J. Luthuli, quoted in Karis & Carter, vol. 3, ibid., pp. 798.

[298]A Survey of Race Relations in South Africa, 1964 pp. 31-33.

[299]A Survey of Race Relations in South America, 1964, p. 37

[300]A Survey of Race Relations in South America, 1964, p. 37.

See also Section 29 of Act 80 of 1964.

[301]See Section 27 of Act 80 of 1964.

[302]Section 15 of the Act.

[303]Section 14 of the Act.

[304]Section 5(b) of the Act.

[305]Section 1 of the Act.

[306]Section 2(b) of the Act.

[307]Section 3 of the Act.

[308]Section 7 of the Act.

[309]A Survey of Race Relations in South Africa, 1965, p. 36.

[310]See Annual Survey of Race Relations, 1965 for conditions under which witnesses were kept in detention. Note that the witness is at the mercy of the prison officials regarding his receipt of stationery, literature and newspapers. If the witness did not co-operate with the police, those privileges could be withdrawn at any time and he would be no better than a convicted prisoner.

See survey of Race Relations in South Africa, 1965, pp. 46-47 for a good example of contemptuous and obviously intimidatory use of the section by the police.

[311]South Africa Race Relations Survey, 1966, pp. 53-54. South Africa Race Relations Survey 1967, pp. 59061.

[312]Section 3 of the Act.

[313]Section 22 of the Act.

[314]Section 8 of the Act.

[315]Suppression of Communism Amendment Act No. 8 of 1966.

[316]Mathews, A.S., Law, Order and Liberty in South Africa, p. 169-180.

See Section 2(1), 2(2) and 2(3) of the Act.

[317]Mathews, A.S., ibid., p. 174.

[318]Mathews, A.S., ibid., p. 176.

[319]See Section 9(1) of the Act.

[320]See Section 2(1) of the Act.

[321]Mathews, A.S., ibid., p. 169.

[321A]Section 5 of the Act.

[322]Mathews, A.S., ibid., p. 177.

[323]Survey of Race Relations, 1967, p. 61.

[324]Section 3.

[325]Section 6.

[326]Section 1.

[327]See Survey of Race Relations, S.A., 1967, pp. 33-34 for notices issued by the Government under this section.

[328]See Section 2.

[329]See Section 6 of the Act.

[330]The exact section is not available in all materials available at Harvard University.

[331]A Survey of Race Relations, 1968, pp. 57-62.

[332]A Survey of Race Relations, 1969, pp. 40-41. The great majority were Blacks.

[334]A Survey of Race Relations, 1969, p. 34.

[335]A Survey of Race Relations, 1969, p. 35.

[336]A Survey of Race Relations, 1969, p. 43.

[337]A Survey of Race Relations, 1970, p. 13.

[338]A Survey of Race Relations, 1970, p. 246.

[339]A Survey of Race Relations, 1971, p. 42.

[340]A Survey of Race Relations, 1972, p. 28.

[341]A Survey of Race Relations, 1973, p. 22. See also p. 82.

[342]See Section 2(1) of the Act.

[343]See Section 2(2).

[344]Section 1 of the Act.

[345]Section 10 of the Act.

[346]See Section 1(2) and 10(2) of Act 71 of 1974.

See also: Black Review, 1974-75, pp. 4-5

[347]A Survey of Race Relations, 1974, pp. 69-70. See also the sentiments expressed by the wroter in a foregoing chapter on the role of the homeland governments in the repression of Blacks.

[348]A Survey of Race Relations, 1974, p. 66, p. 92. Black Review, 1974-75, pp. 77-81.

[349]See Section 10(1)(a), 10(1)(a) bis.

[350]As paraphrased in Annual Survey of Race Relations 1976, p. 49. The actual speech as reported in Hansard was not available to the writer at the time of writing.

[351]See Annual Survey of Race Relations, 1976, pp. 51-87. See also Kane-Berman, John - Soweto-Black Revolt-White Reaction, pp. 1-25.

[352]Annual Survey of Race Relations in South Africa, 1976, p. 50.

[353]Annual Survey of Race Relations in South Africa, 1976, pp. 102-119.

[354]Annual Survey of Race Relations in South Africa, 1976, p. 113.

[355]Annual Survey of Race Relations in South Africa, 1977, pp. 170-172.

[356]Annual Survey of Race Relations in South Africa, 1977, p. 123.

[357]Annual Survey of Race Relations in South Africa, 1977, p. 144.

[358]For example, Joseph Mdluli and Nanoaoth Ntshuntsha. See Annual Survey of Race Relations in South Africa, 1977, pp. 150-151, pp. 154-156.

[359]See Annual Survey of Race Relations, 1977, pp. 159-164.

[360]See Annual Survey of Race Relations in South Africa, 1966, pp. 33-34.

[361]See Annual Survey of Race Relations in South Africa, 1977, p. 179.

[362]See Annual Survey of Race Relations in South Africa, 1978, pp. 90-99, 101-102.

[363]See Survey of Race Relations in South Africa, 1979, p. 152, quoting Glen Moss, Political Trials, 1976-79.

[364]South Africa Race Relations Survey, 1979, pp. 152-153.

[365]See Karis & Carter, vol. 3, ibid., pp. 798-799.

[366]Kane-Berman, John, Soweto, ibid., p. 232.

[367]See footnote 269.