
**METHODS OF JUDICIAL DECISION-MAKING
AND THE RULE OF LAW: THE CASE OF
APARTHEID SOUTH AFRICA**

ROBERT CONIGLIO*

I. INTRODUCTION: RULE OF LAW AND NORMATIVE JUDICIAL DECISION-MAKING	498
II. BACKGROUND: THE SOUTH AFRICAN JUDICIARY IN CONTEXT.....	501
A. <i>Judicial Tradition</i>	501
B. <i>Evaluating the Apartheid South African Judiciary using the ABA's JRI Index</i>	503
1. Quality, Education, Diversity	503
2. Judicial Powers	504
3. Structural Safeguards	505
4. Accountability and Transparency	506
5. Financial Resources and Efficiency	507
C. <i>Security Legislation in Authoritarian South Africa</i>	507
D. <i>Judicial Interpretative Doctrines</i>	510
III. DETENTION CASES IN AUTHORITARIAN SOUTH AFRICA ...	512
A. <i>The Foundation: Sachs v. Minister of Justice</i>	512
B. <i>Cases Challenging the Basis for a Detention</i>	515
C. <i>Cases Challenging the Conditions of Detention</i>	520
IV. THE TRUTH AND RECONCILIATION REPORT ON THE JUDICIARY	523
V. CONCLUSION: JUDGES AS THE STEEL BEHIND THE HAND OF THE STATE.....	526

ABSTRACT

Developing the rule of law is a popular endeavor among internationally-minded lawyers and the American Bar Association has committed itself to developing and evaluating the rule of law in various ways, including through the factors of its Judicial Reform Index (JRI). The JRI factors embody an institutional and procedural vision of the rule of law that fails to take into account substantive human rights

* J.D. Candidate, Boston University School of Law, 2012. Senior Articles Editor, *Boston University International Law Journal*. A.B., Cornell University, 2009. The author would like to thank Professor David Nersessian for his guidance and help throughout the writing process.

norms or the ideology backing judicial decisions. Such an oversight weakens the effectiveness of the JRI in actually measuring a judiciary's commitment to the rule of law. For example, the South African judiciary under apartheid fulfilled the institutional and procedural factors of the JRI; however, there is a broad consensus that apartheid South Africa did not follow the rule of law. The weakness of the judiciary's substantive commitment to individual human rights and government accountability is illustrated well through cases arising under the apartheid security laws. Such cases demonstrate the extent to which the apartheid judiciary eagerly abdicated its responsibilities and favored unfettered executive power. This case demonstrates that serious attempts to build a democratic rule of law must be based both in institutional and procedural reforms as well as the development of substantive commitments to human rights and government accountability.

I. INTRODUCTION: RULE OF LAW AND NORMATIVE JUDICIAL DECISION-MAKING

While rule of law has become a broad solution to the problems of development, it has particularly found favor among lawyers as a method with the perceived potential to tackle problems ranging from poverty to conflict to corruption to lack of human rights.² The meaning of rule of law is contested among academics and practitioners.³ It can be defined broadly with a focus on substantive human rights protections, or narrowly with a process and institutional focus.⁴

There are a number of competing definitions of the rule of law. Thomas Carothers defines the rule of law as a system where there is broad and deep knowledge of legal rules, where political and civil rights are embedded in those rules and where the government itself is accountable to the law.⁵ He conceives three types of rule of law reforms, the first being the reform of the actual laws and the second being development of

² The American Bar Association's Rule of Law Initiative identifies those problems as most sustainably solved through rule of law promotion. *About the ABA Rule of Law Initiative: Our Origins*, A.B.A. (Feb. 14, 2011, 5:55 PM), <http://apps.americanbar.org/rol/about/>.

³ Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 J. DEMOCRACY 32, 33 (2004).

⁴ Thomas Carothers, *Rule of Law Temptations*, 33 FLETCHER F. WORLD AFF. 49, 53-54 (2009). Carothers notes that contemporary authoritarian regimes use proceduralist notions of rule of law as a means of legitimation and that most countries in the world support, at least rhetorically, the notion of rule of law. *Id.* at 50, 54-55. For a general overview of some of the competing definitions of the rule of law, see RACHEL KLEINFELD BELTON, *COMPETING DEFINITIONS OF THE RULE OF LAW: IMPLICATIONS FOR PRACTITIONERS*, (Carnegie Endowment for Int'l Peace 2005).

⁵ Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96 (1998).

stronger legal institutions.⁶ The third is the development of norms within government institutions that compel adherence to the law.⁷ Guillermo O'Donnell offers a theory on democratic rule of law where the judiciary must enforce internationally recognized human rights, provide fair and equal access to all persons, as well as hold the police accountable for violations of basic and fair procedures.⁸

The American Bar Association (ABA) has developed its own program of rule of law promotion⁹ that embraces a procedural and institutional vision of the rule of law. One of the ABA pillars for rule of law promotion is judicial reform, which includes “establishing legal frameworks for judicial independence, building judicial associations, promoting education and training of judges, strengthening court administration, improving judicial ethics and accountability, and increasing public outreach and media skills.”¹⁰ To evaluate judicial reform and independence, the ABA developed the Judicial Reform Index (JRI), which is an index of thirty factors related to the selection of judges and their qualifications, judicial power, judicial financing, judicial structure, transparency, and efficiency.¹¹ Notably absent from the ABA's factors is a substantive valuation of how judges make their decisions. By trying to formulate universally applicable standards that are sufficiently culturally sensitive,¹² the ABA embraces a narrow procedural and institutional conception of the rule of law that fails to account for the protection of substantive human rights or the methods by which judges make decisions.

Ignoring the role played by judicial philosophy in providing an equitable judicial system is potentially disastrous. The South African judiciary under apartheid provides a warning for those who think that the establishment of the structures, functions, and even the tradition of a judiciary that objectively appears to be committed to the rule of law will automatically maintain a legal culture that is actually committed to justice. South Africa's judiciary incorporated much of the common law model and was

⁶ *Id.* at 99-100.

⁷ *Id.* at 100.

⁸ O'Donnell, *supra* note 3, at 44.

⁹ *The ABA Rule of Law Initiative*, A.B.A. (Feb. 24, 2011, 6:23 PM), <http://apps.americanbar.org/rol/>

¹⁰ *Judicial Reform Programs*, A.B.A. (Feb. 14, 2011, 5:55 PM), <http://apps.americanbar.org/rol/programs/judicial-reform.html>.

¹¹ *The Judicial Reform Index*, A.B.A. (Feb. 14, 2011, 5:55 PM), http://apps.americanbar.org/rol/publications/judicial_reform_index.shtml. For a full list and description of the factors see *The Judicial Reform Index: Factors*, A.B.A. (Feb. 14, 2011, 5:55 PM), http://apps.americanbar.org/rol/publications/judicial_reform_index_factors.shtml.

¹² *The Judicial Reform Index*, *supra* note 11.

structurally independent within the country's written constitutions.¹³ As this paper will demonstrate, under apartheid, the judiciary acquiesced and even actively supported the imposition and consolidation of authoritarian rule. After the fall of apartheid, the Truth and Reconciliation Commission scathingly criticized the failings of the judiciary.¹⁴

No area of law highlights the lengths that the judiciary went to support the authoritarian regime more than the cases concerning national security detentions. South Africa's legal traditions and legal structures (which tended to remain undisturbed under authoritarian rule) provided opportunities for the judiciary to make decisions constraining executive power, though disappointingly the courts tended to ratify executive action and legitimize the sweepingly broad powers granted to the government. Judges rarely used the common law remedies that were available to them¹⁵ and shared a formalistic view of the judicial role. They embraced a conservative judicial activism, leading to the judiciary strictly limiting itself to enabling broad executive power.¹⁶ Because the judiciary ratified the power of the authoritarian regime, it truly added "steel to the hand that crushed the people."¹⁷

¹³ For a discussion of South African legal history, including the independent role of the judiciary in the pre-authoritarian era before 1948, see W.J. HOSTEN ET AL., INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY 185-211 (1977).

¹⁴ 4 TRUTH & RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, at 103, 105 (1998), available at <http://www.justice.gov.za/trc/report/index.htm>.

¹⁵ In South Africa, *habeas corpus* and the Roman-Dutch equivalent, *de homine libero exhibendo*, were available to petitioners. Substantively, both doctrines concern the government holding individuals without charge and allowing the courts to force the government to present the person and the reasons for his detention. HOSTEN, *supra* note 13, at 594.

¹⁶ For a discussion of the judicial role as perceived in South Africa during apartheid, see DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER 152-70 (1998).

¹⁷ [T]he major problem that I have, and I say this as a lay person, is that the Judiciary stamped the respectability of their learning onto the oppressive system in this country. They, I think in many cases did far worse than the police, because they were one and all, they were so-called learned men, they came there with the robes of their office and the sanctity of their being and they were educated enough to understand that what they were doing was wrong, but they have managed even up till today, up till this hearing to preserve and propagate the absurdity that they were somehow impartial, that somehow they were above it all and the Judiciary's role in our country made them far more valuable to the fortification of apartheid than a thousand Vlakplaas farms could have done. It gave the system a veneer of respectability which the state could flaunt to the outside world and it added steel to the hand that crushed the people of this country.

Transcript of the Truth and Reconciliation Commission Legal Hearing at 28 (1997) (S. Afr.), available at <http://www.justice.gov.za/trc/special/index.htm>.

This Note demonstrates that a judicial system may have most of the institutional and procedural attributes listed in the ABA JRI, and yet it may still not produce a system that is commonly recognized to embrace the rule of law or protect fundamental individual rights. Section II puts the apartheid South African judiciary in context and evaluates it according to the ABA JRI factors. The background gives an overview of the history of the judiciary, the history of apartheid-era security legislation, and a discussion of traditional interpretative methodologies. When the ABA JRI is applied to the apartheid judiciary, it generally satisfies the JRI's institutional and procedural criteria. Section III analyzes several detention cases decided by the apartheid courts including several where the detainees challenged the basis of detention and several where they challenged the conditions of detention. Section IV considers the Truth and Reconciliation Report on the Judiciary and its analysis of the problems of the apartheid judiciary as well as the extent to which substantive human rights norms have been incorporated to South African law through the 1996 Constitution.

II. BACKGROUND: THE SOUTH AFRICAN JUDICIARY IN CONTEXT

This section puts the South African apartheid judiciary in context through a discussion of the country's judicial tradition. Then, by using the ABA JRI factors, this section will demonstrate that the judiciary is sufficient. This section will then go on to give an overview of apartheid security legislation, as well as specific examples of the detention powers given to the executive by Parliament. The section concludes with an overview of the dominant judicial interpretive doctrines that would be expressed in the detention cases.

A. *Judicial Tradition*

South Africa possesses what is termed a "hybrid" legal system.¹⁸ The "hybrid" is a result of South Africa's unique history, which includes the period of Dutch followed by British colonization.¹⁹ The Dutch period imposed what became the dominant legal structure, namely Roman-Dutch law, while the reception of English law during the British period made significant alterations to the legal system.²⁰ The Union of South Africa, formed in 1910 from the colonies of Orange River, Natal, Cape, and Transvaal, possessed a Westminster-style government modeled on that of Great Britain's, a governing structure prevalent in many parts of the British Empire.²¹ Power in the Union of South Africa's constitution was divided between an executive (the Governor-General and Cabi-

¹⁸ HOSTEN, *supra* note 13, at 131.

¹⁹ *Id.*

²⁰ *See id.* at 185-204.

²¹ *Id.* at 606, 608, 610.

net),²² legislature (a bicameral Parliament), and judiciary.²³ The legislature, the bicameral Union parliament, was not democratically representative as it was dominated primarily by white persons; however mixed-race persons were permitted to vote in the Cape.²⁴ As in the British tradition, the Parliament came to be viewed as supreme, with ultimate law-giving authority that severely restricted the power of the courts to pass judgment on duly enacted legislation.²⁵ Under the Union, judges were under the control of the central government; however, they could only be dismissed for incompetence or misbehavior through the action of both houses of Parliament acting in the same session and at the order of the Governor-General.²⁶ Historically, South Africa possessed a liberal legal tradition with a history of impartial judging and respect for the individual.²⁷

Both the legislature and judiciary attempted to provide a uniform system of laws for the new country. Modifying the Roman-Dutch law, the Union Parliament adopted a great deal of English legal doctrine through the use of legislation, in part to standardize laws throughout the Union.²⁸ However, the new country's judiciary first looked to Roman-Dutch law in an attempt to provide for a uniform system of laws.²⁹ The judiciary did realize the importance of future legal development and therefore did not want to be bound solely by Roman-Dutch law as it existed more than a hundred years earlier.³⁰ Recognizing changed conditions required that judges either modify the old rules or adopt new rules.³¹ Pre-Union, English law had already begun to supplement and modify Roman-Dutch law.³² The national Appellate Division, created in 1910 with the Union, took a leading role in creating a common law for the new country, promoting law reform, and encouraging the adoption of unaltered Roman-

²² The Governor-General was the constitutional head of state and represented the British Monarch in South Africa. *Id.* at 609. The Cabinet was headed by the Prime Minister, who acted as the head of government, and remained in power as long as Parliament continued to give the Prime Minister its confidence. HOSTEN, *supra* note 13, at 131.

²³ HOSTEN, *supra* note 13, at 609-10.

²⁴ *Id.* at 610.

²⁵ *Id.* at 244-50.

²⁶ *Id.* at 610.

²⁷ RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994*, at 12-13 (1995).

²⁸ HOSTEN, *supra* note 13, at 208-09.

²⁹ *Id.* at 204, 206.

³⁰ *Id.* at 206. Part of the issue with Roman-Dutch law is that it was no longer being developed outside of South Africa leaving the judges to decide whether the law to apply should be Roman-Dutch law as developed and studied in the Netherlands pre-codification or if it should only be that as it developed in South Africa. *Id.*

³¹ *Id.*

³² HOSTEN, *supra* note 13, at 206.

Dutch law rather than English common law legal doctrines (although the courts were bound to enforce the statutes enacted by Parliament).³³

Detention without charge could be judicially challenged under two different doctrines which reflected the country's "hybrid" legal heritage. First, detention could be challenged under the traditional English doctrine of *habeas corpus*, where a detainee alleged an illegal detention that then forced the government to present the detainee to a court and provide reasons for the continued detention.³⁴ Second, Roman-Dutch law provided for *de homine libero exhibendo*, which required a hearing substantially similar to that required for a *habeas corpus* hearing in order to show that there were legal reasons for the continued detention.³⁵

B. *Evaluating the Apartheid South African Judiciary using the ABA's JRI Index*

In order to get a sense of how important the *substantive* process of judicial decision-making is to the rule of law, it is important to analyze the apartheid judiciary using the ABA's JRI factors to show that it sufficiently fulfilled the procedural and institutional definition of the rule of law as embodied by those factors. Even though the apartheid judiciary offered the institutions and procedures required for a legal system that satisfied the rule of law, those things are not enough to ensure that a system was in place that ensured substantive protections for individual rights.

1. Quality, Education, Diversity³⁶

The first set of factors addresses both the qualifications that judges should possess and the proper method of appointment. Among these factors include the requirement that judges possess university-level training and have experience in practice, as well as experience taking courses "concerning basic substantive and procedural areas of the law, the role of the judge in society, and cultural sensitivity."³⁷ Beyond that, the JRI evaluates the appointment of judges, their degree of independence, and the use of objective criteria in selection with only some political influence.³⁸ Finally the JRI weighs the representation of minority and women in the courts.³⁹

Excepting the initial period of National Party rule, judges were generally appointed based upon objective factors that favored selections on

³³ *Id.* at 206-07.

³⁴ *Id.* at 594.

³⁵ *Id.*

³⁶ The categories and factors in this section are those listed in the ABA JRI. *The Judicial Reform Index: Factors*, *supra* note 11.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

merit.⁴⁰ Because judges could not be removed for political reasons they were therefore free to make independent decisions.⁴¹ In retrospect, judges that served under the apartheid order also believed that they were independent of the other political bodies.⁴² While the JRI focuses on minority representation, it might be more appropriate instead to ensure that the judiciary is representative of the population. Apartheid was of course about ensuring white minority rule over the black majority, so representation of the white minority on the bench was not an issue. At the same time the judiciary, like the rest of the government, was entirely unrepresentative of the actual makeup of the country. Overall, the judiciary, while not representative of the population, scores well in the section as they are objectively qualified and independent.

2. Judicial Powers

These factors focus on the powers of the judiciary. The JRI evaluates whether the judiciary possesses the power of judicial review, defined as the final authority to determine whether legislative acts are constitutional.⁴³ It also reviews the power of the judiciary to review administrative actions and the power of the courts to order the executive to act.⁴⁴ This section also considers the judicial power over civil liberties cases and the power of the appellate process to reverse lower court decisions.⁴⁵ Finally, the JRI evaluates the power of the courts to issue subpoenas and other enforcement orders and the willingness of other branches of government to respect those powers.⁴⁶

The South African courts during apartheid satisfied many of these factors. They did not possess the power of judicial review, which was blocked by the doctrine of parliamentary supremacy.⁴⁷ This doctrine bound the courts only through their own judicial philosophy and was only added to the text of 1983 Constitution, after most security legislation had already been passed.⁴⁸ Though there was strong normative pressure not to engage in judicial review, the courts technically could have invalidated parliamentary legislation prior to 1983. Even if the apartheid courts did not satisfy that one factor, they satisfied the remaining ones. The judiciary generally had the power to review administrative decisions⁴⁹ and to

⁴⁰ INT'L COMM'N JURISTS, SOUTH AFRICA: HUMAN RIGHTS AND THE RULE OF LAW 109 (Geoffrey Bindman ed., 1988).

⁴¹ *Id.* at 112.

⁴² DYZENHAUS, *supra* note 16, at 137-38, 151.

⁴³ *The Judicial Reform Index: Factors*, *supra* note 11.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ HOSTEN, *supra* note 13, at 245-48.

⁴⁸ S. AFR. CONST. § 34(3), 1983.

⁴⁹ HOSTEN, *supra* note 13, at 636-40.

hold the state liable for actions taken by its agents.⁵⁰ The Supreme Court Appellate Division heard appeals from the lower courts and had the power to reverse lower court decisions.⁵¹ Also, during the apartheid era, the civil courts retained the power to hear cases involving civil rights and detentions under the various acts of security legislation.⁵² In all of the above situations, the courts could potentially be limited by “ouster clauses,” which removed issues from judicial review; however, these clauses could never remove the jurisdiction of the courts over claims of excess power or bad faith.⁵³ Finally, courts could order appearances before them⁵⁴ and other branches of government did respect judicial orders, even releasing detainees when so required by judicial order.⁵⁵

Overall, the judiciary possessed broad powers and received high marks in this section. While there was a strong normative bias against judicial review of legislation, there was no explicit ban until the 1983 Constitution.⁵⁶ Beyond that, the default position was in favor of judicial review of government action and could only be limited in some situations through an explicit act of Parliament.

3. Structural Safeguards

An important indicator of a judiciary committed to the rule of law is the degree of independence that it possesses from outside interference. This section considers the guaranteed tenure of judges, official immunity, the existence of a professional association for judges, and whether there is an objective method of case assignment.⁵⁷ The JRI also contemplates

⁵⁰ *Id.* at 645-46.

⁵¹ *Id.* at 729; *see also* 4 JOHN DUGARD, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE* 60 (1977).

⁵² ANTHONY S. MATHEWS, *FREEDOM, STATE SECURITY AND THE RULE OF LAW* 200-01, 203, 236-37 (1986).

⁵³ HOSTEN, *supra* note 13, at 636.

⁵⁴ The court in some cases chose to divest itself of the power to compel the appearance of a person held in detention under the security laws. *See, e.g., Schermbrucker v. Klindt, N.O.* 1965 (4) AD 606 (A) at 619.

⁵⁵ *See, e.g., Gumede v. Minister of Law and Order* 1984 (4) SA 915 (Natal Provincial Div.).

⁵⁶ Judicial review of legislation is not the only means of constitutional control. F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 *AM. J. COMP. L.* 89, 110 (1988). Judicial review of legislation is a relatively recent development in France and takes a different form than in the United States. *Id.* at 98-101. The United Kingdom, a country widely recognized to have a deep commitment to the rule of law, provides for practically no judicial review of legislation. Rafael La Porta et al., *Judicial Checks and Balances* app. B (Nat'l Bureau of Econ. Research, Working Paper No. 9775, 2003). Similarly, New Zealand, Finland, and Switzerland do not provide for judicial review of legislation and are widely recognized for a commitment to rule of law. *Id.*

⁵⁷ *The Judicial Reform Index: Factors, supra* note 11.

objective advancement criteria, including the use of ability, integrity, and experience to determine promotions.⁵⁸ Further, it evaluates the removal and discipline process, determining whether judges are only removed for specific official misconduct and whether they are only disciplined through a transparent process with objective criteria.⁵⁹

Judges in apartheid South Africa were well insulated from political pressures. Barring misconduct, judges could not be removed and therefore had relative freedom of action and opinion on the bench.⁶⁰ It is true that the promotion process was tinged with politics, with judges that towed the apartheid line being appointed ahead of others.⁶¹ In 1951, at the beginning of the National Party government there was a crisis related to the disenfranchisement of mixed race voters in Cape Province, which resulted in court-packing.⁶² However, after that period the judiciary functioned normally and independently of political control.⁶³ This set of factors is less favorable for the apartheid judiciary, but does not tilt the scale against it.

4. Accountability and Transparency

The JRI also evaluates the process of the judicial system. Several factors account for the reporting of decisions, public access to judicial proceedings, and maintenance of trial records.⁶⁴ It also reviews the existence of a process for complaining about judicial conduct as well as the existence of a code of ethics to judge that conduct by and that deals with problems related to a number of issues, including conflict of interest and inappropriate political activity.⁶⁵ Another important factor considered is the extent to which judicial decisions are made without any outside influence and allowed to turn on the facts of the case and the law to be applied.⁶⁶ This set of factors, although important do not weigh heavily on this Note's analysis as most of the factors in this section are met by South Africa's apartheid judiciary.⁶⁷

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ INT'L COMM'N OF JURISTS", *supra* note 40, at 112.

⁶¹ DYZENHAUS, *supra* note 16, at 89.

⁶² Hosten, *supra* note 13, at 626-30.

⁶³ INT'L COMM'N OF JURISTS, *supra* note 40, at 109, 113.

⁶⁴ *The Judicial Reform Index: Factors*, *supra* note 11.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ For a review of the case decisions see the South African Reports. For updated statutory and regulatory law see the Government Gazette and for the collected statutes see the Statutes of South Africa.

5. Financial Resources and Efficiency

The JRI provides separate sections for financial resources and efficiency. The JRI's financial resources section focuses on the stability and integrity of the judiciary, by means of its financial support. These factors are not as relevant for the purposes of this Note, although the power of the judiciary to be financially stable is extremely relevant to a well-ordered judiciary.⁶⁸ Rather, it is not relevant because none of the commentators of the time have implied that the South African judiciary was underfunded or otherwise deficient in this area.

Finally, the JRI considers factors leading to judicial efficiency. Among these, it weighs the number of support staff, the filing system, the sufficiency of office equipment, and the availability of current legal sources.⁶⁹ It also considers the extent to which new judicial positions are created as they are needed.⁷⁰ Once again, these factors while important, do not weigh into the analysis contained in this Note.

C. Security Legislation in Authoritarian South Africa

Following the 1948 election, the National Party came to power and began the implementation of a strict policy of racial segregation, referred to as apartheid.⁷¹ The ideology of the National Party, and of the government that would rule South Africa during apartheid, was a racial-ethnic nationalism of Afrikaners⁷² which viewed with suspicion any perceived threats to the traditional privileged position of whites and guarded against any threat to the Afrikaner "nation."⁷³ As apartheid was implemented, the government acted as a "pragmatic oligarchy," embracing social controls that best served its ideological interests so that it repressed dissent while simultaneously avoiding repression beyond its interests.⁷⁴

Under the National Party, South Africa adopted two new constitutions. The first in 1961 declared the country a Republic.⁷⁵ The second in 1983 explicitly established parliamentary supremacy⁷⁶ and provided for a tri-

⁶⁸ *The Judicial Reform Index: Factors*, *supra* note 11.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ DAVID DYZENHAUS, *Preface to the First Edition of HARD CASES IN WICKED LEGAL SYSTEMS*, at xi (2d ed. 2010).

⁷² Afrikaners are the descendants of the Europeans who settled in South Africa during the period of Dutch rule.

⁷³ PIERRE L. VAN DEN BERGHE, *THE ETHNIC PHENOMENON* 171 (1981).

⁷⁴ *Id.*

⁷⁵ S. AFR. CONST., pt. I, 1961; *see also* HOSTEN, *supra* note 13, at 611-12.

⁷⁶ S. AFR. CONST., §§ 30, 34(3), 1983. Specifically, for the vast majority of laws, "no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament." *Id.* at §34(3). Parliamentary supremacy had been fundamental to South African law before the constitution made it explicit. ABEL, *supra* note 27, at 17; *see also* INT'L COMM'N OF JURISTS, *supra* note 40, at 7.

cameral Parliament incorporating whites, mixed race persons, and Indians.⁷⁷ Under the 1983 Constitution, the judiciary remained more or less unchanged, with the Supreme Court of South Africa divided into two divisions: the Appellate Division (which remained the highest court of appeal) and the General Division (which was both an appeals court for the magistrate courts and a court of first instance).⁷⁸ Although the National Party Parliament ceded much discretion to the Executive for the enforcement of national security laws, the government remained committed to reinforcing the façade of a legalistic society, in part by actually providing for an institutionally strong judiciary.⁷⁹

As part of this policy of racial separation and exclusion, the National Party government enacted wide-ranging security legislation.⁸⁰ By the end of the 1960's the security apparatus had been constructed and the legality of indefinite detention introduced.⁸¹ An example of the security legislation introduced by the National Party is the 1982 Internal Security Act (ISA)⁸² that provided for two types of detention: preventative and pre-trial.⁸³

The ISA provides a good example of the breadth of power and discretion that the Parliament ceded to the Executive and illustrates the choices that such legislation provided the judiciary. There are three potential bases for preventative detention under the ISA: (i) "if in his [the Minister's] opinion there is reason to apprehend that a particular person will

⁷⁷ S. AFR. CONST., §52, 1983. The 1983 Constitution continued to exclude the majority black population from the political life of the country and, in spite of the tricameral system, power remained solidly in the hands of the white-backed National Party. INT'L COMM'N OF JURISTS, *supra* note 40, at 6.

⁷⁸ Supreme Court Act 59 of 1959 (S. Afr.); INT'L COMM'N OF JURISTS, *supra* note 40, at 7-8.

⁷⁹ ABEL, *supra* note 27, at 12-13.

⁸⁰ See MATHEWS, *supra* note 52, at 292. See also, e.g., Suppression of Communism Act 44 of 1950 (banning communist organizations); Unlawful Organizations Act 34 of 1960 (allowing for the banning of the African National Congress, Pan-Africanist Congress, and other organizations); General Law Amendment Act 39 of 1961 § 4(1) (allowing certain arrested persons to be held without bail for twelve days); General Law Amendment Act 37 of 1963 § 17 (allowing ninety days detention in solitary confinement without trial); Criminal Procedure Amendment Act 96 of 1965 § 7 (allowing 180-day detention without trial); General Law Amendment Act 62 of 1966 § 22 (allowing fourteen day detention without trial); Terrorism Act 83 of 1967 § 6 (allowing for indefinite detention without trial); Criminal Procedure Act 51 of 1977; Internal Security Act 74 of 1982 (allowing for indefinite and 48 hours preventative detention and pre-trial detention); Internal Security Amendment Act 66 of 1986 (authorizing 180 day preventative detention).

⁸¹ A S Mathews, *The South African Judiciary and the Security System*, 1 SAJHR. 199, 200 (1985).

⁸² Internal Security Act 74 of 1982.

⁸³ MATHEWS, *supra* note 52, at 62.

commit” the crimes of terrorism, sabotage, or subversion;⁸⁴ (ii) “if he [the Minister] is satisfied that a particular person engages in activities which endanger or are calculated to endanger the security of the State or the maintenance of law and order or that he propagates or promotes or is likely to propagate or promote such activities;”⁸⁵ or (iii):

[I]f he [the Minister] has reason to suspect that a particular person who has been convicted of an offense specified in Schedule 2 [a list of political and security crimes], engages or is likely to engage in activities which endanger or are calculated to endanger the security of the State or the maintenance of law and order, or propagates or promotes or is likely to propagate or promote such activities.⁸⁶

A 1986 amendment allowed for detention for however long the Minister of Law and Order saw fit.⁸⁷ Because there were no limits in the statute, it essentially gave the Minister the power to detain a person for his or her entire life.⁸⁸ The ISA thus conferred broad discretion to the government both to define dangerous activity and provided only subjective standards as a basis of preventative detention.⁸⁹ It also provided for shorter periods of preventative detention that similarly conferred broad discretion to police officers to hold persons who they viewed to be a threat to public order.⁹⁰

The ISA also incorporated three types of pre-trial detention whose primary objective was to obtain information from detainees, rather than simply separate allegedly dangerous persons from society.⁹¹ Section 29 provided for indefinite detention⁹² for interrogation of two types of persons, those who the police believed committed certain crimes (including terrorism and subversion) and those who the police believed were withholding information about potential national security-related crimes.⁹³ The Act also provided for the detention of potential witnesses, if the Attorney General believed that they might be tampered with, for as long as the proceedings remained open.⁹⁴ Police were authorized to detain

⁸⁴ Internal Security Act 74 of 1982 § 28(1)(a).

⁸⁵ *Id.* at § 28(1)(b).

⁸⁶ *Id.* at § 28(1)(c).

⁸⁷ Internal Security Amendment Act 66 of 1986§1.

⁸⁸ MATHEWS, *supra* note 52, at 63.

⁸⁹ *Id.*

⁹⁰ Internal Security Act 74 of 1982§50.

⁹¹ MATHEWS, *supra* note 52, at 79.

⁹² It provided for detention until the Commissioner of Police is “satisfied that the said person has satisfactorily replied to all questions at the interrogation or that no useful purpose will be served by his further detention” Internal Security Act 74 of 1982§29(1)(b)(i).

⁹³ *Id.* §29(1).

⁹⁴ *Id.* §31(1).

witnesses and interrogate them as if they were potential criminals.⁹⁵ The ISA also gave the Attorney General the power to deny bail to a person charged with a national security offense if he or she believed that continued detention was in the interest of State security.⁹⁶ Parliament, through this provision, thus stripped the courts of their power to release persons on bail in certain cases.⁹⁷ The ISA is typical of apartheid-era security legislation and is a good model for understanding Parliament's enabling of the executive during apartheid.

D. *Judicial Interpretative Doctrines*

Faced with statutes that granted the government broad security powers, judges were given a stark choice. They could make the politically expedient decision to uphold (and even extend) the power of the government or they could base decisions upon the background moral norms that serve as the foundation for law.⁹⁸ In many ways, this conflicting choice created what has been characterized as a "schizophrenic approach" to decision-making, requiring the courts to both be "instrument(s) of justice" and "instrument(s) of oppression."⁹⁹ By limiting and restricting individual rights, and even sometimes access to the courts, Parliament essentially authorized the government to act outside the law by limiting the power of the courts.¹⁰⁰

The doctrine of Parliamentary supremacy, implicit before the 1983 Constitution and explicit in that document, restricted the ability of the judiciary to overturn statutes but it did not prevent the courts from limiting the application and scope of the government's powers.¹⁰¹ There is an argument that principles of legality¹⁰² should have compelled the courts to find that Parliament could not have intended to authorize the government to act illegally, thereby limiting the power of the government.¹⁰³ The court had the power, under both the traditional doctrines of *habeas corpus* and *de homine libero exhibendo*, in addition to other common law principles to facilitate challenges to draconian detention procedures. Customary international law was incorporated into the law of South Africa via the common law, but such principles were drowned under-

⁹⁵ MATHEWS, *supra* note 52, at 95-96.

⁹⁶ Internal Security Act 74 of 1982 §30(1).

⁹⁷ MATHEWS, *supra* note 52, at 99.

⁹⁸ For a discussion of both methods and the role of judges in legitimizing the apartheid government, see DYZENHAUS, *supra* note 16, at 152-70.

⁹⁹ A Chaskalson, *Law in a Changing Society*, 5 SAJHR. 293, 294 (1989).

¹⁰⁰ DYZENHAUS, *supra* note 16, at 151-52.

¹⁰¹ HOSTEN, *supra* note 13, at 245-48; S. AFR. CONST. §34(3), 1983.

¹⁰² In order to operate under the principles of legality the government is subject to constraints on its power based on "fairness, reasonableness, and equality of treatment." DYZENHAUS, *supra* note 16, at 152.

¹⁰³ *Id.*

neath the dominant deferential interpretive doctrines.¹⁰⁴ The general equitable principles of common law also could have provided tools for the judiciary in limiting the reach of the detention laws.¹⁰⁵ Not only could South African courts appeal to universal human rights principles, they had the tools at their disposal to check the abuses of the apartheid system.

Unfortunately, the South African judiciary embraced a type of interpretive approach focused exclusively on implementing parliamentary intent.¹⁰⁶ South African Supreme Court Chief Justice Steyn argued in a 1946 book on statutory interpretation that in cases where it is clear that Parliament intended to implement a broad policy scheme that judges must apply the law by analogy in order to find the intent of the legislature and therefore extend the reach of the legislation to cases covered by the spirit of the legislation, not only its words.¹⁰⁷

Under apartheid, the judiciary tended to give the executive nearly unchecked power.¹⁰⁸ Such a judicial strategy rejected the “[f]idelity to the conception of justice . . . [that] requires an uncompromising commitment to the principle that no one should be condemned to incarceration unheard”¹⁰⁹ and thus betrayed the “principles to which [the judiciary] owes its own existence.”¹¹⁰ In reference to one decision,¹¹¹ commentators argued that a particular pro-government judgment was “judicial self-mutilation” in that it limited the judiciary’s supervisory power over the executive, reduced the prestige of the courts, and tampered with traditional legal principles.¹¹² Another commentator in reference to judicial supervision of the state security apparatus argued that the judiciary could be charged with dereliction of duty.¹¹³ This charge was based upon the court’s refusal to rule in favor of detainees even when, as there often was, a legal basis for the court to rule in favor of detainees and that Parliamen-

¹⁰⁴ PROF GE DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION 325-26 (1998).

¹⁰⁵ Chaskalson, *supra* note 99, at 296.

¹⁰⁶ ABEL, *supra* note 27, at 18. This philosophy is best expressed in the words of Justice Ogilvie Thompson: “once a judge has determined what he conceives to be the intention of the legislature, he must perforce give effect to the intention so determined.” *Id.*

¹⁰⁷ DYZENHAUS, *supra* note 16, at 156, 157.

¹⁰⁸ Nicholas Haysom & Clive Plasket, *The War Against Law: Judicial Activism and the Appellate Division*, 4 SAJHR 303, 303 (1988).

¹⁰⁹ Etienne Mureinik, *Pursuing Principle: The Appellate Division and Review Under the State of Emergency*, 5 SAJHR. 60, 63 (1989).

¹¹⁰ *Id.* at 63-64.

¹¹¹ *Staatspresident v. United Democratic Front* 1988 (4) SA 830 (A) (where the court affirmed emergency regulations as within the power of the State President and that judicial review had been precluded through an “ouster” clause).

¹¹² Haysom & Plasket, *supra* note 107, at 304-05.

¹¹³ DYZENHAUS, *supra* note 15, at 30-31, 159-63.

tary limiting of judicial review never eliminated the power of the courts entirely.¹¹⁴ In addition, the power of the courts depended on judicial philosophy and that even where the statute totally foreclosed judicial review judges had a responsibility to educate society because of their responsibility for “civilized values.”¹¹⁵

III. DETENTION CASES IN AUTHORITARIAN SOUTH AFRICA

Following the end of apartheid, the Truth and Reconciliation Commission, the institution created in order to investigate apartheid-era human rights abuses, roundly criticized the role that the judiciary played in reinforcing the security apparatus.¹¹⁶ The following cases will provide for an overview of the judicial philosophy that reinforced the apartheid regime and security system.¹¹⁷ Detention cases, more so than other cases, provided the courts with the opportunity to affirm the basic moral values underpinning the law, especially because of the stark reality of possible indefinite detention.

A. *The Foundation: Sachs v. Minister of Justice*

The South African courts’ dominant hyper-deferential ideology of interpretation led to decisions that kept people in detention without charge and without trial under the security laws.¹¹⁸ The common law foundation for much of the decision-making structure underlying the later detention decisions was formulated in the 1933 decision, *Sachs v. Minister of Justice*.¹¹⁹ In this case, the Appellate Division considered the Riotous Assemblies Act, which empowered the Minister of Justice to prohibit a certain person from particular municipalities when he was satisfied that the particular person is encouraging hostility between whites and non-whites.¹²⁰ The petitioner, Sachs, challenged the notice for his exclusion from certain municipalities because the Minister refused to disclose the source of the information leading to Sachs’ detention as “detrimental

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Promotion of National Unity and Reconciliation Act 34 of 1995 § 3(1)(a); See Truth and Reconciliation Commission, *supra* note 14, at 24; 4 TRUTH & RECONCILIATION COMM’N, *supra* note 14, at 103. It should be noted that both judges and magistrates refused to provide submissions to the Truth and Reconciliation Commission regarding their role under apartheid. *Id.* at 93.

¹¹⁷ The Truth and Reconciliation Commission found that apartheid proved to be so long-lasting because of the National Party’s concern for creating an aura of the rule of law. *Id.* at 101.

¹¹⁸ See *Ngqumba v. State President* 1988 (4) SA 224 (A); *Omar v. Minister of Law and Order* 1987 (3) SA 859 (A); *Gumede v. Minister of Law and Order* 1985 (2) TPD 529 (Natal Provincial Div.) [hereinafter *Gumede II*].

¹¹⁹ 1934 AD 11 (A) (S. Afr.).

¹²⁰ *Id.* at 12.

to public policy.”¹²¹ In response to the judicial challenge to the order, the Minister provided more detailed reasons for excluding Sachs and a more detailed explanation as to why disclosure of sources would be detrimental to public policy: that the “information was acquired . . . through diplomatic channels from highly confidential sources [overseas], as well as by means of police investigations of a secret and confidential nature”¹²²

Narrowly drawn, the issue for the court to decide was the scope and nature of notice required under the Act. More broadly, the court could have challenged the validity of the Act itself as unnecessarily impinging on a natural law right to travel within the country.¹²³ The Transvaal Provincial Division affirmed the Act, ruling that:

[T]he Minister has very wide powers indeed. Those, almost autocratic powers Parliament, in its wisdom, has conferred on the Minister, a matter of policy with which the Courts . . . are not concerned. Our sole concern is to see that the Minister, in issuing his notice has in every respect complied with the provisions of the Act . . . and whether he has acted strictly within the four corners of the powers conferred.¹²⁴

The Provincial Division concluded that the Minister must:

[S]atisfy himself under [the Act]. He must bring his mind to bear on the information supplied to him, so as to satisfy himself. If requested thereto, he must then give his reasons which induced him to come to his conclusion; and, if he refuses to disclose the information . . . such refusal must be *bona fide* and not arbitrary and capricious.¹²⁵

In judging whether the refusal is *bona fide* the courts should defer to the Minister’s judgment and assume that there has been no abuse of authority without evidence to the contrary,¹²⁶ as the “Minister is the sole judge, and the Court cannot go behind his opinion and judgment.”¹²⁷ The Provincial Division rejected the Appeal.¹²⁸

The Appellate Division affirmed the Provincial Division and also rejected the appeal.¹²⁹ Not only did the court affirm the lower court’s logic in holding that the Minister had “a discretion of a wide and drastic

¹²¹ *Id.* at 13.

¹²² *Id.* at 16.

¹²³ From the reported case it does not appear that Sachs challenged the Act itself on natural law grounds. However, the court could have come to the conclusion that giving purpose to the Act would be a miscarriage of justice in and of itself and not see the procedural problem as a barrier to affirming human rights.

¹²⁴ *Sachs v. Minister of Justice* 1934 AD at 17.at 17.

¹²⁵ *Id.* at 18.

¹²⁶ *Id.* at 21.

¹²⁷ *Id.* at 20.

¹²⁸ *Id.* at 21.

¹²⁹ *Sachs v. Minister of Justice* 1934 AD at 40.

kind,”¹³⁰ it went further in justifying the power. The court weighed the danger of social unrest and opined that:

Bearing in mind the kind of situation and the nature of the apprehended danger, which the Legislature clearly has in contemplation, it will be readily seen that if the Minister’s discretion is hampered by the obligation to submit his decision to approval of a Court of law, the delay involved would defeat the whole object of the particular provision we are discussing.¹³¹

The court followed by divesting the judiciary of any review power in this case because the Act “gives to the Minister an unfettered discretion [and therefore] it is no function of a court of law to curtail its scope in the least degree, indeed it would be quite improper to do so.”¹³² The Court also reinforced the doctrine of Parliamentary supremacy, holding that “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 the courts of law to enforce its will.”¹³³ The court determined that the only inquiry under the Act was into the genuineness of the Minister’s mental attitude.¹³⁴ As to the sufficiency of the reasons for acting, they needed only be “[j]udged by the light of reason [that] they appear sufficient to induce the action he took,” with no objective component read into the inquiry.¹³⁵

Sachs v. Minister of Justice gave the courts and the government a strong foundation for judicial abdication of responsibility under apartheid era security laws. The principles of a subjective test for official government action, a narrow textual reading of statutes, and strong deference to broad executive power under delegated statutes would become important in subsequent cases. The decision repudiated natural law as a source of individual rights.¹³⁶

After the National Party came to power in 1948 and formally adopted apartheid as its government policy, the necessity for broad ranging and increasingly repressive government power became more necessary to the maintenance of white-minority rule. With the implementation of draconian security laws, the courts fell back upon an interpretation of those statutes in the context of the goals of apartheid, rather than embracing an interpretation based upon a “‘strict construction’ in favour of the individual . . . nor . . . the ‘strained construction’ in favour of the Executive.”¹³⁷ With that perspective the outcomes almost always resulted in the contin-

¹³⁰ *Id.* at 36.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 37.

¹³⁴ *Sachs v. Minister of Justice* 1934 AD at 38.

¹³⁵ *Id.* at 40.

¹³⁶ *Id.* at 38.

¹³⁷ *Rossouw v. Sachs* 1964 (2) AD 551 (A) at 563-64.

ued deprivation of individual rights and deference to the broad power of the government. One court went so far as to hold that a person detained under the security statutes “places that person as effectively beyond the reach of the Court as his absence from its jurisdiction would.”¹³⁸

In the detainee cases, two large groups emerge - those challenging the basis of the detention and those challenging conditions and other events that occurred while in detention. Both illustrate the hyper-deference of the South African judiciary to Executive power and the wholesale rejection of an international, natural and common law basis for individual rights.

B. *Cases Challenging the Basis for a Detention*

One of the methods for challenging detention under apartheid legislation was a challenge to the notice provided to the detainee.¹³⁹ The judicial saga of Archibald Jacob Gumede is illustrative of the challenge faced by detainees in challenging their detention before a judiciary that was more than willing to reaffirm broad grants of executive power. Mr. Gumede and others were detained under the ISA with the following explanation:

(a) Reasons for the detention . . . in accordance with a notice issued in terms of s 28 (1) of the Internal Security Act 1982;¹⁴⁰

I am satisfied that the said Archibald Jacob Gumede engages in activities which endanger the maintenance of law and order.

(b) Information which induced me to issue the said notice:

By acts and utterances the said Archibald Jacob Gumede did himself and in collaboration with other persons attempt to create a revolutionary climate in the Republic of South Africa, thereby causing a situation endangering the maintenance of law and order.¹⁴¹

Gumede and the other detainees challenged the sufficiency of the notice provided by the Minister under the Act.¹⁴² The Minister, in replying to the court challenge said that providing any further information would be detrimental to the public interest.¹⁴³ Judge Law of the Natal Provincial Division, applying the reasoning of *Sachs v. Minister of Justice*, held that the notice was insufficient as the Minister only gave his conclusion rather

¹³⁸ *Scherbrucker v. Klindt, N.O.* 1965 (4) AD 606 (A) at 619 (holding that detention prevented the court from compelling a person to testify and it was as if the person was outside the court’s jurisdiction.).

¹³⁹ See, e.g., *Ngqumba v. State President* 1988 (4) SA at 228-29; *Omar v. Minister of Law and Order* 1987 (3) SA 859; *Gumede II* 1985 (2) TPD 529; *Gumede v. Minister of Law and Order* 1984 (4) NPD 915 (Natal Provincial Div.) [hereinafter *Gumede I*].

¹⁴⁰ Internal Security Act 74 of 1982.

¹⁴¹ *Gumede I* 1984 (4) NPD at 918.

¹⁴² *Id.* at 916.

¹⁴³ *Id.* at 918.

than “any of the information which induced him to issue the notice.”¹⁴⁴ The court held that the Minister must provide reasons for not providing information to the detainees and must do so at the time of the original detention; otherwise, he had not sufficiently applied his mind to the question.¹⁴⁵ The court ordered for the release of the detainees.¹⁴⁶

However, this opinion did not end the government’s attempts to detain Mr. Gumede and the others. Following the decision, the Minister issued fresh notice for each detainee, identical except for the addition of the line: “No other information can in my opinion be disclosed without detriment to the public interest.”¹⁴⁷ The detainees challenged the information and reasons provided by the Minister as overlapping and insufficient in light of the interest in providing the detainee with the actual grounds of his detention so that he could refute the government’s claims.¹⁴⁸

In a second court challenge, a different panel of the Natal Provincial Division upheld the sufficiency of the notice and the legality of the detentions.¹⁴⁹ In deciding the issue, the court interpreted the purpose of the ISA by using the interpretive ideology espoused by *Sachs v. Minister of Justice* as having provided wide reaching executive authority to interfere with individual liberty and to “achieve this object, prompt and unfettered action is manifestly necessary.”¹⁵⁰ The court held in reviewing the requirements for the notice of detention that “[t]he Minister is required to set forth the reasons for the detention of the person concerned; he is not called upon to give the reasons why he is of the opinion or is satisfied or has reason to suspect that certain conditions exist.”¹⁵¹ In narrowly reading the requirements of the statute, the court upheld the reasons as not a mere reiterating of the Act, but instead allowed for the reasons to satisfy the particular statutory basis for the detention of Gumede and the others.¹⁵²

In this case, like in *Sachs v. Minister of Justice*, the court viewed the Minister’s decision to withhold information based upon a declared public interest as one of the prerogatives granted to him by Parliament under the ISA.¹⁵³ However, here the court went beyond the holding in *Sachs v.*

¹⁴⁴ *Id.* at 921.

¹⁴⁵ *Id.* at 921-22.

¹⁴⁶ *Gumede I* 1984 (4) NPD at 922.

¹⁴⁷ *Gumede II* 1985 (2) TPD at 532.

¹⁴⁸ *Id.* at 535.

¹⁴⁹ *Id.* at 544.

¹⁵⁰ *Id.* at 534.

¹⁵¹ *Id.* at 536.

¹⁵² *Gumede II* 1985 (2) TPD at 536-37. The court ruled that the notice demonstrated that Gumede and the others were being detained because of activities that threatened to endanger and did endanger the maintenance of law and order rather than threatening the security of the state, another acceptable rationale for detention under the Act. *Id.*

¹⁵³ *Id.* at 537.

Minister of Justice and explicitly stated that there was no requirement that the Minister provide the reasons why the disclosure of such information would injure the public interest.¹⁵⁴ In fact, “[t]he discretion as to what information to disclose is vested in the [Minister] and is his alone. If in ‘his opinion nothing can be disclosed, he is enjoined not to disclose any.’”¹⁵⁵

In issuing the new notices, the Minister did not exceed his power or act capriciously, as the court held that “there seems to be no valid reason why the applicants concerned could not be detained . . . nor is there any provision in the Act prohibiting them from being detained thereunder.”¹⁵⁶ Because detention under the Act was preventative, it was logical that Parliament left it to the Minister’s discretion whether behaviors endangered the security of the state or the maintenance of law and order, such that a vagueness challenge was near impossible.¹⁵⁷ The second *Gumede* court managed to embrace the letter, if not the spirit, of the decision in *Gumede I*, and essentially gave the government a failsafe way to ensure that detention notices were upheld even when no information or reasons were disclosed.

Under the Public Safety Act of 1953, the State President was authorized to declare a twelve-month state of emergency and to make regulations regarding that state of emergency.¹⁵⁸ Under the Act, for several years in the 1980’s the State President declared states of emergency and subsequently promulgated regulations authorizing the detention of persons for up to the entire period of the state of emergency.¹⁵⁹ In addition to challenging the adequacy of the notice and the grounds for the detention, in these cases detainees challenged the emergency regulations themselves as void for vagueness.¹⁶⁰

In *Omar v. Minister of Law and Order*, a person detained under the emergency regulations challenged his detention on a number of grounds, including that the regulation authorizing detention was outside the powers of the State President,¹⁶¹ that the regulation improperly denied the detainee a right to a hearing,¹⁶² and that the detainees were denied access to counsel.¹⁶³ The Appellate Division upheld the detentions.¹⁶⁴

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 543.

¹⁵⁶ *Gumede II* 1985 (2) TPD at 542.

¹⁵⁷ *Id.* at 543.

¹⁵⁸ *Omar v. Minister of Law and Order* 1987 (3) SA at 888-89 (quoting the Public Safety Act 3 of 1953 §§ 2(1), 3(1)(a)).

¹⁵⁹ *Id.* at 889-90; Ngqumba, *supra* note 118, at 228.

¹⁶⁰ *See Ngqumba v. State President* 1988 (4) SA at 227-28; *see also Omar v. Minister of Law and Order* 1987 (3) SA 859.

¹⁶¹ *Omar v. Minister of Law and Order* 1987 (3) SA at 866.

¹⁶² *Id.* at 866-67.

¹⁶³ *Id.* at 867.

¹⁶⁴ *Id.* at 904.

The lower court upheld the broad power of the State President to declare a state of emergency and confined that power solely to his own discretion.¹⁶⁵ Parliament specifically contemplated the possibility that extraordinary measures might be necessary to ensure law and order and therefore “drastic inroads into the rights and privileges normally enjoyed by individuals” might be necessary.¹⁶⁶ Similarly, the State President’s power to make regulations after declaring a state of emergency is broad and authorizes him to “prescribe the methods or means to be employed for the achievement of the purposes stated in the section.”¹⁶⁷ The State President’s ability to make both necessary and expedient regulations illustrated his breadth of power.¹⁶⁸ Since the Act authorized him to choose the methods for achieving the ends of the Act, the court held that the emergency regulations in this case were not beyond that power.¹⁶⁹ Such a regulation was not beyond the consideration of Parliament and was not grossly unreasonable in light of the purposes of the Act.¹⁷⁰

The Appellate Division was similarly unsympathetic towards the applicant’s argument that the regulation was invalid because it did not provide for a hearing and that the right to a hearing is a fundamental right that the State President cannot unilaterally restrict.¹⁷¹ The court instead only interpreted the regulations through the act and the considerations underlying the act. Among those considerations was the assumption that a state of emergency would be only be declared when normal process was unable to provide for public order.¹⁷² That assumption justified restrictions on the right to a hearing on the detention.¹⁷³

The Appellate Division was no more favorably disposed to the applicant’s argument that detainees had a right to make written representations to the Minister concerning their detentions.¹⁷⁴ In the holding, the court instead looked solely within the confines of the act. Within the text of the act, it would be illogical to require the Minister to consider a detainee’s written arguments opposing extended detention when the Minister had the power to extend the detention indefinitely without notice to anyone.¹⁷⁵

The applicants also argued that the regulation, which limited the access to detainees to only those persons that received government permission,

¹⁶⁵ *Id.* at 891.

¹⁶⁶ *Omar v. Minister of Law and Order* 1987 (3) SA at 892.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 893.

¹⁷¹ *Omar v. Minister of Law and Order* 1987 (3) SA at 893.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 891.

¹⁷⁵ *Id.*

was impermissible because it could be read to ban a detainee's lawyer from freely meeting with the detainee.¹⁷⁶ Applicants argued that the right to access an attorney is fundamental, and therefore the State President cannot restrict it without explicit authorization by Parliament.¹⁷⁷ The applicants argued that the regulation must be read for its plain meaning, which included lawyers, and therefore the entire regulation failed for being an impermissible restriction of fundamental rights outside of the scope of the State President's power.¹⁷⁸

The Appellate Division disagreed with applicants. It ruled that the restriction on access was sufficiently related to the purposes of the Act and that the State President gave sufficient consideration to the amount of access that detainees should have to outside persons, including attorneys, so that the regulation was not outside the scope of his power.¹⁷⁹ Such restrictions were also not unreasonable in light of other prison regulations which allowed for detainees to access lawyers upon request.¹⁸⁰ The court's construction of the regulation held that the interaction between prison and the state of emergency regulations implied that any refusal for attorney access must be based upon reasons related to the state of emergency.¹⁸¹ Essentially the lesson from this case is that this particular "Act empowers the State President to make such regulations as appear to him to be necessary or expedient to combat the emergency situation, and that the Court cannot substitute its view of what measures would be necessary or expedient for that of the State President."¹⁸²

In the consolidated appeals, the court came to the same outcome as it came to in *Omar*.¹⁸³ In Bill's case, the Minister ordered Bill to be held for the rest of the state of emergency without holding a hearing beforehand.¹⁸⁴ The right of the detainee to submit written reasons opposing his continued detention did not translate into a duty for the Minister to provide reasons for continued detention after the issuance of the final order.¹⁸⁵ According to the court, the decision to deprive the detainee of a hearing could be reasonably grounded in a concern over the danger of disclosing sensitive information or intelligence.¹⁸⁶ The court also distinguished *Hurley v. Minister of Law and Order*,¹⁸⁷ which was an anomaly among the cases of the time and held that an objective standard of rea-

¹⁷⁶ *Omar v. Minister of Law and Order* 1987 (3) SA at 894.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 894-95.

¹⁷⁹ *Id.* at 895-96.

¹⁸⁰ *Id.* at 896.

¹⁸¹ *Omar v. Minister of Law and Order* 1987 (3) SA at 896.

¹⁸² *Id.* at 897.

¹⁸³ *Id.* at 904.

¹⁸⁴ *Id.* at 898.

¹⁸⁵ *Id.* at 900.

¹⁸⁶ *Omar v. Minister of Law and Order* 1987 (3) SA at 901.

¹⁸⁷ 1986 (3) SA 568 (A).

sonable belief applied to detention under the ISA.¹⁸⁸ The opinion in *Omar* included a dissent that would have entitled detainees to access to counsel, that would not totally eliminate the right to a hearing, and that would require the Minister to consider information submitted by a detainee against his continued detention.¹⁸⁹

The Appellate Division in *Ngqumba v. Staatspresident* upheld several detentions under emergency regulations adopted pursuant to the Public Safety Act of 1953, even though the government acted contrary to the regulations and the Act.¹⁹⁰ The court upheld the emergency regulations authorizing detentions as sufficiently specific.¹⁹¹ It also held that the Minister was not required to say that he considered alternatives to detention, that the subjective test applied for determining the necessity of detention, and that the Minister had applied himself to the issue when he determined that each detainee should be held for the entire period of the state of emergency.¹⁹² The court did hold that the Minister must provide notice as the reasons for the detention as soon as practicable and that the specificity of information provided was a fact-specific inquiry.¹⁹³ Even though the Minister delayed in providing proper notice, the court held that this did not invalidate the detentions and that the claim should be dismissed.¹⁹⁴

C. Cases Challenging the Conditions of Detention

Detainees under the apartheid security laws attempted to challenge the conditions of their confinement in a number of ways. In *Rossouw v. Sachs*, the detainee challenged regulations preventing detainees under one of the security laws from accessing reading or writing materials.¹⁹⁵ The basis for this challenge was that “all rights, including proprietary rights, remain except in so far as those rights may be affected by the arrest and subsequent detention of the person concerned or in so far as they are ‘necessarily inconsistent’ with the circumstances in which the person is placed.”¹⁹⁶ The person detained under this Act had no right against self-incrimination, and could remain in detention until the Commissioner of Police was satisfied his answers.¹⁹⁷

¹⁸⁸ *Omar v. Minister of Law and Order* 1987 (3) SA at 903-04.

¹⁸⁹ *Id.* at 905. However, it is interesting to note that the dissent would not have challenged the ability of the government to actually detain persons without trial and did not challenge the broad swath of executive power.

¹⁹⁰ *Ngqumba v. State President* 1988 (4) SA at 229.

¹⁹¹ *Id.* at 228-29.

¹⁹² *Id.* at 228-29.

¹⁹³ *Id.* at 229.

¹⁹⁴ *Id.*

¹⁹⁵ *Rossouw v. Sachs* 1964 (2) AD 551 (A) at 553.

¹⁹⁶ *Id.* at 551.

¹⁹⁷ *Id.* at 559.

The court distinguished detention under this Act from pre-trial detention or from imprisonment generally, based upon the differences in police power and the greater limiting of detainee rights (for example, depriving him of counsel.)¹⁹⁸ Explicitly, the court held that a detainee is not a prisoner under the prison regulations and that although typically courts interpreted rights limiting statutes narrowly, the “interests of the individual must sometimes yield to the public interest.”¹⁹⁹ And the court found that it must apply what it views as an equal balancing between individual and public interests, adopting neither the “‘strict construction’ in favour of the individual . . . nor . . . the ‘strained construction’ in favour of the Executive.”²⁰⁰ Applying this interpretive method to the Act at issue, the court viewed the intent of Parliament as inducing a detained person to speak about what they know and that Parliament authorized the Executive to use means that “run counter . . . to some of the most radical principles of our criminal law.”²⁰¹ There was no intent on the part of Parliament to provide detainees under the Act with anything but the basic essentials of life and therefore they were not entitled to any sort of reading or writing materials unless the government approves.²⁰²

The Appellate Division also heard a similar case some years later on the scope of rights of persons convicted under the apartheid era security laws. In that case, the prisoners challenged regulations prohibiting them from accessing news of a non-personal nature.²⁰³ The court held that the prisoners did not possess a basic right to the news and agreed with the logic in *Rossouw* that the basic rights provided in prison must be necessary to providing a minimum standard of living.²⁰⁴ It was also noted that Parliament conferred broad power on the Prison Service to manage the prisons and that the regulations provide for many compulsory duties for prison officials in providing for the minimum standard of living but do provide for the exercise of discretionary power in other matters.²⁰⁵ For matters under the discretion of the government, “a Court of law is not . . . empowered to enter upon a review of his conduct, provided it is not inconsistent with the provisions of the Act” and that granting of privileges is under the “exclusive discretion of the Commissioner.”²⁰⁶ The prisoners then did not have access to news as a matter of right.²⁰⁷ The court also found that there was no evidence that the Commissioner did

¹⁹⁸ *Id.* at 558-59.

¹⁹⁹ *Id.* at 562.

²⁰⁰ *Rossouw v. Sachs* 1964 (2) AD at 563-64.

²⁰¹ *Id.* at 564.

²⁰² *Id.* at 564-65.

²⁰³ *Goldberg v. Minister of Prisons* 1979 (1) AD14 (A) at 21.

²⁰⁴ *Id.* at 31.

²⁰⁵ *Id.* at 33.

²⁰⁶ *Id.* at 34.

²⁰⁷ *Id.*

not apply his mind to the question of whether or not to provide news to prisoners.²⁰⁸ In addition, as a matter of policy, the Commissioner's decision should have been read in the context of the imprisonment and the crimes committed by the prisoners. As the court said,

"Appellants describe themselves as 'political prisoners.' I understand this to mean that they have sought to achieve political objectives by resorting to criminal conduct. Would it be unreasonable for the Commissioner . . . (to deny them) access to news of a political nature . . . ? I do not think so."²⁰⁹

The decision did come with a dissent that drew an important distinction between detainees and prisoners. Judge Corbett affirmed the common law rule that prisoners retained the rights of regular citizens except for those that the law took away as a result of their conviction.²¹⁰ He distinguished *Rossouw* because that case discussed those held under special detention while this case discussed the "ordinary rights of sentenced prisoners."²¹¹ Corbett doubted the stated rationales for the rule offered by the government.²¹² The rule depriving "political prisoners" of access to news did not appear to be within the purposes of the prison rules and therefore the prison was not entitled to create such a "no-news" rule.²¹³

In *S v. Christie*, the Appellate Division considered the veracity of confessions given under one of the indefinite detention provisions of the security laws.²¹⁴ The government admitted that in this case, the confession was the basis for the entire prosecution.²¹⁵ Christie was detained by police on suspicion of certain activities (though the parties disagreed over what statutory authority he was being detained under) and stood for approximately a ten-hour confession.²¹⁶ After the interrogation he wrote out a statement and then repeated the statement subsequently in the presence of another police officer.²¹⁷

One of the central issues in the appeal was whether Christie made the statements under duress.²¹⁸ In analyzing this question, the court considered the facts presented and the conflicting accounts of the interrogation.²¹⁹ Importantly, the second, oral statement, was found not to be implicated by the interrogation conditions which led to the first written statement, so that any irregularities in the first would not be imputed on

²⁰⁸ *Goldberg v. Minister of Prisons* 1979 (1) AD at 36.

²⁰⁹ *Id.* at 38.

²¹⁰ *Id.* at 39.

²¹¹ *Id.* at 42.

²¹² *Id.* at 47.

²¹³ *Goldberg v. Minister of Prisons* 1979 (1) AD at 49-50.

²¹⁴ *S v. Christie* 1982 (1) AD 464 (A).

²¹⁵ *Id.* at 471.

²¹⁶ *Id.* at 472.

²¹⁷ *Id.*

²¹⁸ *Id.* at 476.

²¹⁹ *S v. Christie* 1982 (1) AD at 476-77.

the second.²²⁰ The court came to this conclusion because new policemen met with Christie, he cooperated with police, he did not say that he feared further abuse when questioned as to why he made the second statement, that he affirmatively and cooperatively dictated the statement, and that the statement implied his pride in helping to attack the apartheid state.²²¹ The court then pondered why he would make a confession freely and concluded that he became aware of and thought about the fact that police had intercepted his mail and found some incriminatory evidence.²²² He then knew that he would be found guilty but was more concerned in protecting the people around him from police detention and arrest.²²³ As a more general rule, the court held that the relevant detention statute did not create an affirmative duty to speak and that a court should not then assume that statements made are not freely and voluntarily given.²²⁴ However, the court should engage in a case-by-case factual analysis to see if there was coercion.²²⁵ The court found that in Christie's case there was no such coercion.²²⁶

IV. THE TRUTH AND RECONCILIATION REPORT ON THE JUDICIARY

So why did the judiciary choose to embrace broad delegations of power to the executive, narrow readings of individual rights, and a subjective test for judging official action under the security laws? It is clear that such a path was not predetermined by the historical context of South Africa, as the anomalous decision in *Hurley*²²⁷, and the summarized dissents in *Omar*²²⁸ and *Goldberg v. Minister of Prisons*²²⁹ point to alternative interpretations of the security legislation that preserved more individual rights, while not invalidating the statute. Instead the answer can be found in the role that the judges cast for themselves and the way in which they chose to make decisions. In the South African case, the judicial philosophy determined outcomes so as to reinforce the apartheid state. Judicial adherence to Chief Justice Steyn's deferential textualism²³⁰ made it so that no amount of structural reform would have changed outcomes. After the fall of apartheid, the Truth and Reconciliation Commission (TRC) considered the failures of the apartheid judiciary.

²²⁰ *Id.* at 478.

²²¹ *Id.* at 480-81.

²²² *Id.* at 483.

²²³ *Id.*

²²⁴ *S v. Christie* 1982 (1) AD at 485.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Hurley v. Minister of Law and Order* 1986 (3) SA 568 (A).

²²⁸ *Omar v. Minister of Law and Order* 1987 (3) SA at 905.

²²⁹ *Goldberg v. Minister of Prisons* 1979 (1) AD at 39.

²³⁰ *See supra* Part II(D).

The post-apartheid government created the Truth and Reconciliation Commission (TRC) in order to investigate the conditions that enabled apartheid and specific human rights violations committed under apartheid between 1960 and 1994.²³¹ As part of its investigation of the context of apartheid under the Act, the TRC engaged in institutional hearings, which attempted to answer the following: “how, over the years, people who considered themselves ordinary (and) decent . . . found themselves turning a blind eye to a system which impoverished, oppressed and violated the lives . . .” of the South African people.²³² As part of the hearing on the judiciary, the TRC wished to determine the basis for judicial policy, the independence of the judiciary, the exercise of judicial discretion, and wanted to craft recommendations for judicial reform.²³³ No sitting judge or magistrate participated in the hearings and only a few made written submissions to the TRC.²³⁴ The judiciary argued that appearing in front of the TRC would have exerted improper pressure and influence over them.²³⁵

The establishment lawyers and the few judges that submitted writings to the TRC inevitably made several arguments. Overall, the establishment viewed the record of impartiality and pursuit of justice in the courts as satisfactory, not excepting certain cases not listed in the final report.²³⁶ They argued that Parliamentary supremacy dictated that they defer to the will of the lawgiver and that the courts were deprived of the opportunity to fashion justice “in the face of legislated injustice.”²³⁷ Similarly they argued that when the opportunity presented itself in the face of statutory ambiguity, courts tended to adopt limiting constructions of the statutes.²³⁸ They also argued that aggressive actions to undermine apartheid would have elicited a severe Parliamentary action and might have even led to a “packing of the bench.”²³⁹

The submissions of the legal profession do not match with the previous review of decisions by the courts in security detention cases, where often the courts worked hard to interpret the statutes in such a way as to enhance executive power. Other submissions to the TRC argued that the courts, with some exceptions, operated to “servic[e] and enforc[e] a diabolically unjust political order.”²⁴⁰ Engaging the parliamentary

²³¹ Promotion of National Unity and Reconciliation Act 34 of 1995 § 3(1)(a); See Truth and Reconciliation Commission, *supra* note 14, at 24.

²³² Truth and Reconciliation Commission, *supra* note 14, at 1.

²³³ *Id.* at 94.

²³⁴ *Id.* at 93.

²³⁵ *Id.* at 96

²³⁶ *Id.*

²³⁷ Truth and Reconciliation Commission, *supra* note 14, at 95.

²³⁸ *Id.* at 96.

²³⁹ *Id.* at 96.

²⁴⁰ *Id.* at 97.

supremacy argument, these other submitters said that the doctrine depended upon both the “degree of democracy in the political order” and the level of respect for legal rules.²⁴¹ And while the judiciary may formally have been independent, in actuality decisions favored the executive and legislature.²⁴² Apartheid undermined any common law sense of justice so that the entire system was corrupted.²⁴³

After considering the submissions, the TRC made certain findings regarding the legal system under apartheid. They found that judges were complicit in the system of apartheid and “too easily made sense of the illogical and the unjust in legislative language, and who too quickly accepted the word of the police of official witness in preference to that of the accused.”²⁴⁴ More than complicit, the judiciary was invested in protecting the status quo²⁴⁵ and provided the National Party government legitimacy in the form of an apparently independent legal system.²⁴⁶ The TRC recognized the contribution of a minority of lawyers and judges in speaking out and working against the draconian policies of apartheid and concluded that the good of their contributions outweighed the harm of their participation (and therefore legitimation) of the judicial system.²⁴⁷

The TRC also addressed the doctrine of Parliamentary supremacy. They rejected the argument of the establishment lawyers and concluded that Parliamentary supremacy is premised on having a truly representative political system, which prior to 1994 South Africa did not.²⁴⁸ So the judiciary may have had a duty to intervene in the face of a partially representative government that passed laws imposing unfair conditions on the majority of the population.²⁴⁹ The TRC also argued that in spite of the judicial passivity that developed in the first half of the 20th century, the violence and repression represented by apartheid policies should have responded with common law fairness arguments.²⁵⁰ The TRC essentially blames judicial passivity in the face of apartheid on the self-conception of the judicial role and the lack of awareness as to the true conditions of South African society.

The TRC report embraced a substantive conception of the rule of law, focused on protecting human rights, rather than the procedural/institutional conception. The establishment submissions emphasized the powerlessness of the judicial order in the face of the National Party’s

²⁴¹ *Id.*

²⁴² Truth and Reconciliation Commission, *supra* note 14.

²⁴³ *Id.*

²⁴⁴ *Id.* at 103.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 104.

²⁴⁷ Truth and Reconciliation Commission, *supra* note 14, at 105.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 106.

political agenda and especially emphasized the institutional constraints that limited the legal establishment. In that conception, judges and lawyers were bound by the legal structure and the rule of law was embodied by those structures. The TRC and apartheid's opponents offered a competing conception of rule and law, one based in the failure of the apartheid judiciary to defend substantive rights protections. That failure to defend substantive rights demonstrated that the apartheid judiciary had failed in its duty to uphold of the rule of law and was essentially lawless. The competing interpretations of the scope of the judiciary's role led to differing interpretations of the success and flexibility of the courts in applying the law and defending individual rights during apartheid.

These competing conceptions of the appropriateness of the actions taken by the South African judiciary during apartheid starkly illustrate the inadequacy of an institutional and procedural approach to rule of law as embodied by the ABA JRI. No one would argue that South Africa during apartheid embraced the rule of law, so it must be more than the institutions and procedures of the judiciary. Instead, the judges must be committed to the values of human rights. Such a commitment is embraced in the post-apartheid South African Constitution, which commands the judiciary to interpret legislation consistent with international law- including international customary law.²⁵¹ These Constitutional provisions place customary and other international law in an important position and require that the judiciary at least keep it in the forefront when discussing issues of individual rights.²⁵² In the new South Africa, international substantive human rights norms have an important place in the judicial mind, thereby enshrining the rule of law.²⁵³

V. CONCLUSION: JUDGES AS THE STEEL BEHIND THE HAND OF THE STATE

The judiciary is not above politics. The ABA JRI treats judicial decision-making as mechanical, with the view that if all the working parts are in order (in the form of judicial structures and procedures) then the outcome will necessarily be a legal system dominated by the rule of law. This procedural and institutional conception of the rule of the law is fundamentally inadequate for ensuring a legal system that embraces international norms of human rights. This is because, in part, this framework ignores an absolutely vital influence on judicial outcomes, the philosophy behind judicial decision-making. A substantive approach to rule of law is

²⁵¹ S. AFR. CONST., 1996 § 232-33.

²⁵² Prof GE Devenish, *supra* note 104, 328-29.

²⁵³ For examples of cases where the Constitutional Court of South Africa uses international law as part of its substantive rights analysis, see *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC); *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC); *S v. Makwanyane* 1995 (3) SA 391 (CC).

necessary in order for legal reforms to truly lead to democratic and human rights-oriented outcomes.

As the example of the apartheid-era South African judiciary illustrates, the ideology behind the decisions defines the outcomes of cases, which then determines the extent that the legal system even contemplates fulfilling its responsibilities. Although apartheid South Africa's judiciary did not fulfill all of the JRI factors - including the lack of judicial review power, it had a reputation for independence and did fulfill many of the important structural and other factors key for the JRI. The detention cases show that not only did the judiciary not act to constrain the apartheid state and affirm individual liberty, but also that judges worked aggressively to empower the executive to act with near impunity. This in spite of the judiciary's structural protections and the potential interpretive tools from South Africa's judicial heritage and those featured in the dissenting opinions that would have provided the means and opportunity to limit government power. The lesson of South Africa is that not only do judiciaries require the means and opportunity to reinforce the rule of law they must actually believe in and want to protect legality. In that spirit, it is not only necessary for judiciaries to provide adequate procedures and institutions, but it is necessary for the judiciary and other legal institutions to embrace the substantive human rights values in order to ensure democratic legal reform.

