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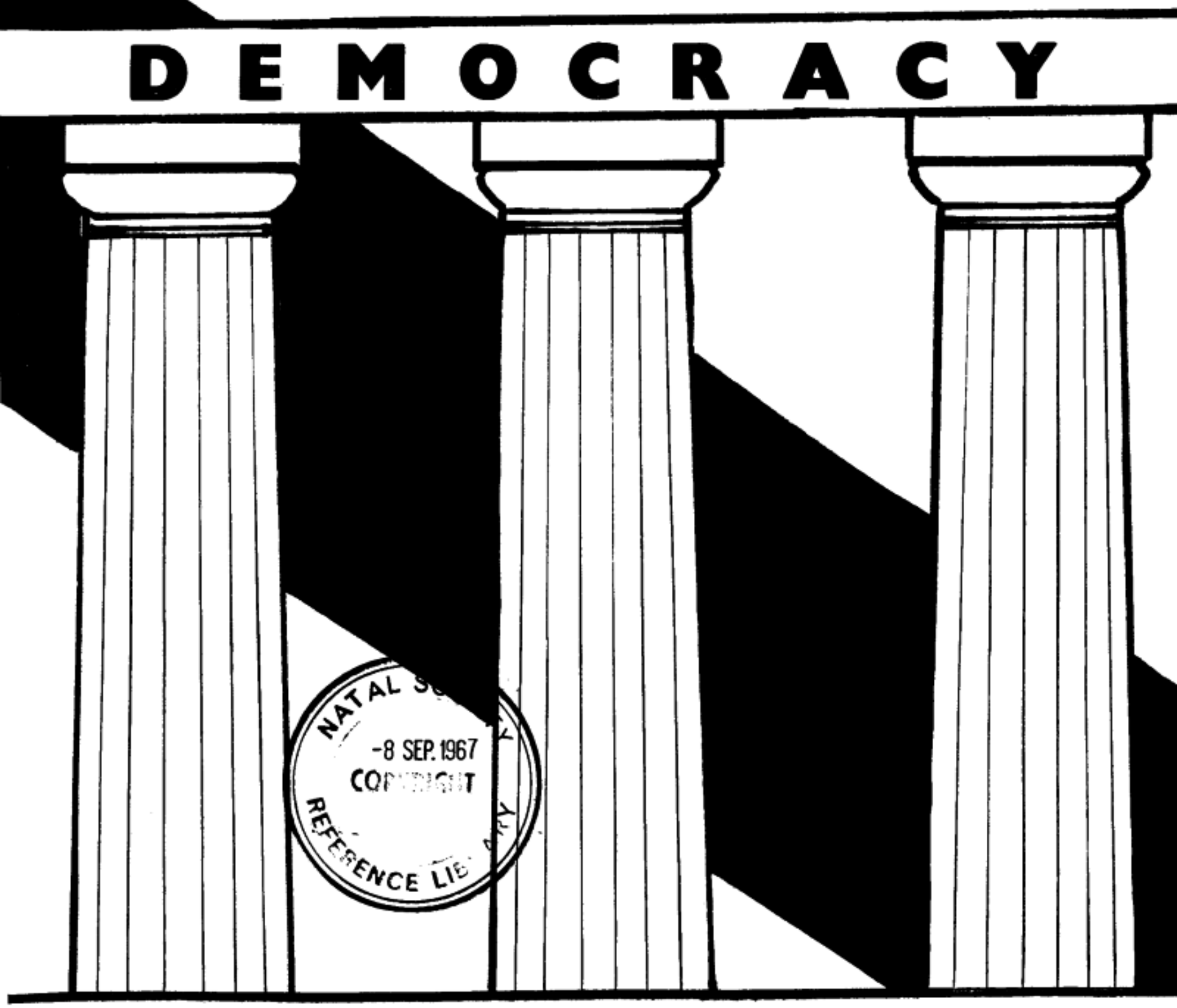
# THE BLACK SASH






# DIE SWART SERP

# CONTENTS

May/July 1967

# The Black Sash Die Swart Serp

It does very greatly matter that each individual should be both enabled and encouraged to make the best of all the good that is within him. It does very greatly matter that each individual should be free to form, hold and honour his own belief as to the meaning and value of human life and its relationship to a spiritual universe that lies beyond it. It does very greatly matter that any society should be so organised that these things are respected as its main purpose.

*Lord Radcliffe.*

"THE MOST FUNDAMENTAL MEANING OF JUSTICE is not the negative one of simply preventing anarchy and crime but the positive one of offering and securing benefits for the whole of society." Mr. Ian Thompson, a lecturer in Philosophy at the University of the Witwatersrand said this in an address to the Human Rights Society in Johannesburg.

In compiling this issue of The Black Sash we have been forcibly reminded of how much injustice is being done in South Africa in the name of "the maintenance of law and order."

We have come to accept an almost total removal of our rights without question because we have forgotten that we ever had them, and because it is easier to acquiese than to analyse and protest against our present condition.

We have tried in this magazine to present some aspects of Justice in the legal sense and to present the terrible picture of how far from Western principles of individual freedom South Africa has travelled. As we go to press the arbitrary banning of Dr. Hoffenberg, a leading medical authority and Professor at the University of Cape Town has been announced. This banning has been widely publicised and opposed because of the eminence of the banned person, but he is only one among hundreds of lesser known victims.

Our right of access to the Courts is being ever more severely restricted and this applies to everyone of us, not only to those who have been or will be arbitrarily punished without trial. We are all diminished as individuals and as citizens.

We have come to forget the positive meaning of Justice. As a Nation we no longer see the necessity of offering and securing justice for the whole of society. We have come to regard the State and its security as an end in itself and not as the means of safeguarding the freedom, welfare, happiness and security of the people who comprise it.

„DIE MEES FUNDAMENTELE BETEKENIS VAN GEREGTIGHEID behels nie net die negatiewe aksie om wanorde en misdaad te voorkom nie, maar sluit in die positiewe aksie wat voordele vir die hele gemeenskap aanbied en verkry." Mnr. Ian Thompson, lektor in Filosofie aan die Universiteit van die Witwatersrand, het hierdie verklaring gemaak in 'n toespraak aan die „Human Rights Society" in Johannesburg.

Met die opstel van hierdie uitgawe, word ons pertinent herinner aan die onreg wat in Suid-Afrika geskied in die naam van die „handhawing van reg en orde."

Ons het al daartoe gekom dat ons 'n amper algehele verwydering van ons regte sonder teenkanting aanneem, want ons het al vergeet dat ons ooit die regte gehad het, en dis makliker om in te stem dan in ons huidige posisie te ontbied en daarteen te protesteer.

In die uitgawe het ons probeer om sekere aspekte van Geregtigheid van die wetlike standpunt te stel, en daardeur die ontstellende prent weer te gee van hoe ver Suid-Afrika alreeds afgedwaal het van die Westerse begrip van persoonlike vryheid. Ten tyde van ons ter perse gaan, word die arbitrere verbanning van Dr. Hoffenberg, Lektor aan Universiteit van Kaapstad, aangekondig. Hierdie verbanning geniet groot publisiteit en teenkanting, tewyte aan die uitstaande gawes van die verbande. Maar hy is maar eën van die honderd minder prominente slagoffers.

Ons reg tot die beskerming van die howe word meer en meer ingekort, en dit tref ons almal, nie net die persone wat reeds arbitrêr gestraf is, of nog sal gestraf word nie, sonder verhoor. As individuë en as burghers word ons almal minder.

Ons het al vergeet wat positiewe Geregtigheid beteken. As 'n volk voel ons nie meer die behoefte om geregtigheid aan te bied en te beveilig vir die ganse gemeenskap nie. Ons beskou die Staat en sy sekuriteit as 'n doel op sigself, nè nie as 'n kanaal waardeur die vryheid, welvaart, geluk en sekuriteit van elke burgher beveilig moet word nie.

# LAW AND MORALITY

JOHN DUGARD

*Mr. Dugard is a lecturer in the Department of Law, University of the Witwatersrand. This article is a transcript of a talk he gave to the Black Sash in Johannesburg.*

**The title of my talk "LAW AND MORALITY" is sufficiently vague to be rather misleading. If any of you expected me to talk tonight on the separate disciplines of law and morality I am afraid you have been lured here under false pretences, because I intend speaking on the exact opposite subject. In fact I intend showing that law and morality are not separate disciplines but that law requires a certain moral content to qualify as law and that if it fails to comply with certain moral standards it does not deserve the name "law" at all. I have chosen this topic as I believe it to be highly relevant to the modern South African scene. In South Africa today we find that everyone, even the opponents of the National Party Government, have a tremendous respect for the word "law". The most immoral and unjust injunction, once given the name of "law" by Parliament is immediately accepted as representing legality and constitutionality and becomes almost sacrosanct. As soon as even the most despicable measure has been passed by both Houses of Parliament and has been signed by the State President, it seems to assume a new status in the eyes of both laymen and lawyers. It has now become law and may not be questioned. Indeed as a nation, we have reached the stage at which we are prepared to obey anything, any enactment, however evil it may be, provided that the evil enactment has been passed by both Houses of Parliament and has been printed at Government expense in the Government Gazette. It is in the light of this tendency in South Africa that I wish to talk to you tonight about the two major schools of thought in legal philosophy — or jurisprudence as it is usually called — namely the positive school and the natural school of law.**

The positive school of law sees law as the command of the sovereign. In the words of the founder of this school, John Austin, an Englishman who lived in the nineteenth century, law is the command of the uncommanded commander of society. As far as the positivists are concerned, an unjust proposition embodied in a statute emanating from Parliament is law, because it bears the formal stamp of validity, however immoral its content may be. In other words as far as the positivists are concerned, the order of King Herod to massacre the Innocents was law, despite the immoral nature of the order, simply because it was given by the proper legal authority, King Herod. As far as the positivists are concerned, morality has no part in the make-up of the law. Not unexpectedly, this school of thought was widely acclaimed in Nazi Germany. In fact, one legal philosopher, Professor Lon Fuller of Harvard University has gone further and has shown there was a causal connection between the German adherence to the philosophy of positivism and the rise to power of Hitler. He shows that in the late nineteenth century and early twentieth century it was a social disgrace for a lawyer to espouse the natural law theory. He states that "German legal positivism not only banned from legal science any consideration of the moral ends of law but it was also indifferent to the inner morality of law itself. The German lawyer was therefore particularly prepared to accept as 'law' anything that called itself by that name and was printed at Government expense." Today positivism is generally accepted by lawyers and politicians in South Africa as well. Even non-Nationalist lawyers tend to support the view that anything passed by Parliament is law and therefore must be obeyed:— one cannot query its moral content. The main reason for this is that the major developments in the world since the second World War, which tend to support the natural law view, have simply passed South Africa by. I should like to give one example in this respect. In the beginning of 1966, an article appeared in the South African Law Journal by Professor Mathews of the Natal

University Law Department and Professor Albino of the Department of Psychology at the University of Natal. In this article these two professors attacked the South African courts, particularly the South African Appellate Division, for not interpreting the 90-day law in such a way as to favour the individual detainee as much as possible. Professor Mathews did not ask the courts to re-write the enactments of Parliament, because courts are not able to do this, they may only interpret and apply the law. He simply argued, and he argued this most cogently, that where the provisions of a statute, in this case the 90-day law, were in any way ambiguous, the court should have interpreted any ambiguity in favour of the rights of the individual. Recently, this criticism brought forth a sharp rebuke, by no less a person than the Chief Justice, Mr. Justice L. C. Steyn, himself. At a dinner of the University of South Africa held in Johannesburg he took the opportunity to attack Professor Mathews for attacking him, and he stated that it was the duty of the courts to apply the law as expressed in the enactments of Parliament and not to enter into the political arena in the protection of the interests of the individual. On the face of it this dispute between Professor Mathews and the Chief Justice is one relating to methods of judicial interpretation, but underlying this is a more basic rift. The Chief Justice and most judges and lawyers today in South Africa are positivists in their outlook. They accept the law laid down by Parliament unquestioningly, without examining the moral content or the lack of moral content in such statutes. Professor Mathews, on the other hand, believes that the courts should lean as far as possible in the interests of the individual so as to extract the maximum moral content possible from a largely immoral enactment. The whole dispute really serves to illustrate my point that the judiciary is unduly influenced by positivism.

Opposed to the school of positive law, is that of natural law. According to natural lawyers, law must have a certain minimum moral content before it qualifies as law at all. In other words, it must be good law, not simply law. According to natural lawyers, law is not law simply because it has passed through both Houses of Parliament and been signed by the State President. It must comply with an additional qualification rooted in morality and justice. An immoral rule, as far as this school of law is concerned, is not law at all but is simply an abomination, sanctioned by force. As I shall show, this natural school of law is part of our own Western heritage, more so than the positive school of law. Furthermore, this natural law theory has been accepted by most nations and most eminent lawyers in the last two decades.

To start at the beginning: the civilisations of Greece and of Rome accepted the natural law theory that an unjust law is not a law at all. Take for instance Sophocles "Antigone". In this play, King Creon orders that no one may bury the dead body of a warrior who raised arms against the City of Thebes; but according to Greek religion there was a duty incumbent upon members of the family of the dead to bury the dead. Antigone, the sister of the dead warrior, disobeys King Creon's law, or order. The King summons her and tells her that he is to be obeyed in all things just or unjust. She, however, chooses to obey the moral law and disobey the positive, man-made law and the play ends in Antigone's death but in triumph for the theory of natural law. Sophocles makes it clear that, as far as he was concerned, Antigone was right, that man-made laws cannot override divine or moral laws. The same line was taken by Aristotle and Cicero and other Greek and Roman philosophers and the idea is also taken up by the early Christian philosophers, notably Saint Augustine and Saint Thomas Aquinas. Saint Thomas Aquinas wrote, for instance, that "a tyrannical law is not a law, but rather a perversion of the law." This natural law tradition is not only philosophical and theological, however. Indeed the founder of Roman-Dutch law, the system of law which prevails in this country, the Dutchman Grotius, who lived in the seventeenth century, wrote in his book "The Jurisprudence of Holland" that "that which is forbidden by the law of nature (that is, moral law) may not be enjoined by positive law (statute law), nor that which is enjoined by the first forbidden by the second."

This natural law school of thought was very popular in the sixteenth and seventeenth and even the eighteenth centuries but fell into disfavour in the nineteenth century and the early twentieth century. But the evil nature of Hitler's laws resulted in a revival of this school of thought. As a result of Hitler's laws, legal philosophers and lawyers were brought face to face with the dangers of the positivist theory of law. Several legal philosophers have expressed the view that Hitler's enactments were so evil that they could not be described as law at all. The most notable philosopher in this respect is one Gustav Radbruch, a German, who, in the nineteen-twenties and nineteen-thirties endorsed the positive view that any enactment emanating from a lawful authority is law; but, as a result of Hitler's extravagances, Gustav Radbruch, after the second World War, endorsed the view that a large portion of Hitler's laws did not deserve to be called law at all. This view has also been supported by Professor Lon Fuller of Harvard whom I referred to a moment ago. He states in connection with the Nazi regime that "to me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself that it ceases to be a legal system at all." These are

some philosophical statements but the revival of natural law does not only take the form of learned academic pronouncements. In fact, it was transformed into a legal reality by the Nuremberg trials and the decisions of the German courts after the second World War. First of all, let us look at the Nuremberg trials. In 1945, the major victorious allied powers entered into a treaty known as the London Charter which laid down the law which the Nuremberg tribunal was to apply, and one of the crimes laid down by this Charter was the crime against humanity. This crime was defined as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecution on racial, political or religious grounds in the execution of or in connection with any crime within the jurisdiction of the tribunal, *whether or not in violation of the domestic law of the country in which it was perpetrated.*" In other words, persons were charged before the Nuremberg tribunal with committing acts which had been fully legal according to Hitler's laws. This has led to considerable criticism. Many people have contended that this resulted in the introduction of retro-active law, because it is argued that the crime against humanity had not existed before the days of the London Charter. The Nuremberg tribunal, however, rejected this argument and held that certain acts had always been crimes whether they were written down in statutory enactments or not. Certain acts are so morally reprehensible that everyone knows that they are illegal. The mere fact that Hitler's laws authorised these morally reprehensible acts did not make them "legal"; did not deprive them of their illegality. In one of the major trials, the von Lizt trial, the tribunal stated, in reply to this argument "that it is not essential that the crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty, if it is made a crime by international convention, recognised by the general principles of criminal justice common to civilised nations generally." This, of course, does tie up with Grotius' statement made in the seventeenth century that certain acts which are forbidden by the law of nature may not be permitted by man-made law, by positive law. In 1946, the General Assembly of the United Nations unanimously adopted and affirmed the principles of the Nuremberg trials and so consequently there can be little doubt that the Nuremberg principles do today form a part of public international law.

There may be some of you here tonight who choose to regard the Nuremberg trials rather as acts of retribution than as just acts. For those of you who take this view I would like to cite you the example of the decision of a German court given after the second World War. Let me sketch the facts of the decision. A statute of Hitler's in 1934 made it an offence for anyone to criticise the Nazi leaders. In 1944 a soldier returned home and told his wife exactly what he thought of Hitler. Inter alia he mentioned that he was sorry that Hitler had not been killed in the recent attempt on his life. His wife had managed to acquire several "boy-friends" during the course of the war and wished to get rid of him, so she reported him to the Nazi authorities, as a result of which he was tried under the 1934 Nazi statute and found guilty of insulting and cricising the Nazi leaders. He was sentenced to death but his sentence was later commuted to service on the Eastern Front, which was tantamount to death. He managed to survive this ordeal, however, and after the war he returned and laid a charge against his wife for unlawfully depriving him of his freedom. Naturally, when the wife was charged she raised the defence that her act had been "lawful" at the time when she had performed it. She had simply been acting in accordance with Hitler's law of 1934. A German court, the Bamberg court of appeal, however rejected this defence on the ground that she had used, out of free choice, a Nazi statute which was "contrary to the sound conscience and sense of justice of all decent human beings." She had done this simply to get rid of her husband, and she was therefore found guilty of unlawfully depriving her husband of his liberty. Incidentally, this approach was followed by the German courts in several other decisions.

This acceptance of the natural law philosophy, as fundamental to lawyers is evidenced by other post-war developments, particularly on the international front. The United Nations Charter which was signed in 1945 for instance contains Human Rights provisions which guarantee certain fundamental freedoms for individuals. Then in 1948, the universal Declaration of Human Rights, a resolution passed by the General Assembly, reaffirmed certain basic human rights. In 1950 the major Western European states entered into the European Convention for the Protection of Human Rights and Fundamental Freedoms which also guarantees these rights. And finally, on the 16th of December, last year, the General Assembly of the United Nations adopted certain draft treaties guaranteeing certain basic human rights which will be placed before member states of that organisation and once 35 member states have signed, these treaties will come into force. All these human rights treaties show the influence of natural law theories because natural lawyers are basically concerned with the protection of freedoms of the individual.

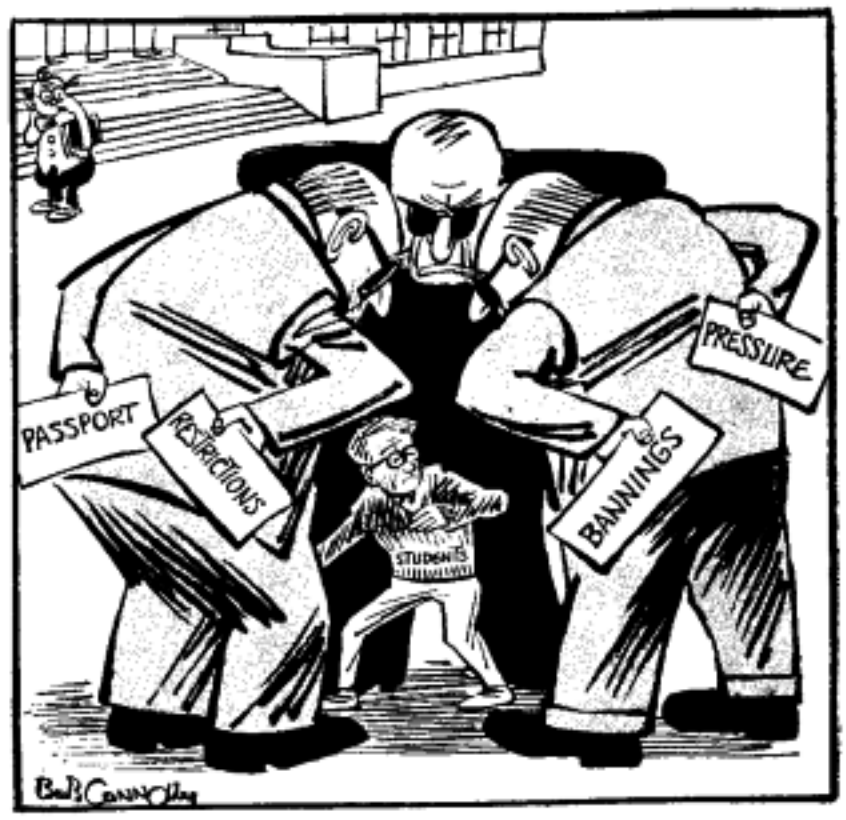
Unfortunately this revival of natural law has not been felt in South Africa at all, because our judiciary, our practising lawyers and our teaching lawyers are largely positivists. They adhere to the creed of positivism. The result is that our legislature has been able to pass a large number of statutory enactments which are obviously lacking in any moral content, without so much as a whimper, in most cases, from the legal

profession — and really it is the duty of lawyers to speak out in this respect because they must lead the laymen. The enactments which fall into the category of immoral laws or lawless laws on our statute books are too numerous to mention, one only has to think of the Mixed Marriages Act, and the numerous statutes which ensure that African families are continually separated and then, in addition there are the security enactments such as the 90-day law, the 180-day law and now the so-called Terrorism law, which enables a person to be detained indefinitely. (In passing, I must mention how unfortunate it is that no professional body of lawyers raised any objection to this most recent enactment.) The common feature of all these measures is that they permit arbitrary detention and they exclude the jurisdiction of the courts. In addition the terrorism act is retrospective; it dates back to 1962. It has so many objectionable features about it that I do not believe that any person who claims to support the natural theory of law would have any hesitation in saying that it does not deserve the term "law" at all; that it is simply an abomination sanctioned by force. These security laws may be enforced by the machinery of the state and undoubtedly they have all been printed in that awe-inspiring journal, the Government Gazette. Despite this I do not believe that they really qualify for the term "law."

Now what is the purpose of this talk, you will ask. What good is the knowledge that some laws are true laws and others are not true laws, provided that they are all enforced by the machinery of the state. This is, of course, true. The purpose of my talk has really been to draw attention to the dangers of the positivistic outlook and to emphasise the fact that a duty rests upon members of the legal profession to examine their basic philosophy in this respect, and if they are unable to accept the full tenets of positivism then surely there rests the duty upon these members of the legal profession to protest, and this applies particularly to attorneys. These attorneys have already shown their spinelessness by failing to protest over the banning of Miss Ruth Hayman and by failing to protest at the banning of listed communists from practising as attorneys. So they have much ground to make up and I think it is time attorneys in particular revised their legal philosophies if they are capable. Secondly, I have tried to show that laws which lack a certain minimum moral content do not bind the conscience of the individual. I am not suggesting that such laws must be disobeyed. I know as well as you do that there is a statute which makes it an offence to incite disobedience of the law. What I am suggesting is that where the individual does have a free choice, as in the example of the German woman, that the individual should not go out of his or her way to obey the lawless or immoral law. And thirdly and finally, the analogy of the Nuremberg trials is perhaps too obvious to require any further comment.



**CLAUSTROPHOBIA** **By Bob Connolly**




NOW JUSTICE in this sense of the word is complete virtue — not justice unqualified, but as it appears between one party and another. Hence we often find it regarded as the sovran virtue 'more wonderful than evening or morning star', and we have a proverb: *All virtue is summed up in dealing justly.* Justice is perfect virtue because it practises perfect virtue. But it is perfect in a special way, because the man who possesses justice is capable of practising it towards a second party and not merely in his own case. I say this because there are plenty of people who can behave uprightly in their own affairs, but not when they come to deal with others. So the saying of Bias, 'Office will prove the man' has found favour with the world. For to accept office is to enter into relations with others and to become one member of an association. And for just this reason—that a relation is established with others — justice is the only virtue which is regarded as benefiting someone else than its possessor. For it does what is to the advantage of another, whether he is in authority or just a partner. As it is the extreme of wickedness to practise villainy towards one's friends, so the highest virtue is shown not by the man who practises it in his own case but by the man who performs the difficult task of practising it towards another. Thus righteousness or justice, so understood, is not a part but the whole of virtue, while injustice, its opposite, is not a part but the whole of vice.

***Aristotle.***

# ANOTHER TWIST OF THE KNIFE

PROFESSOR A. S. MATHEWS

**IN MOVING THE SECOND READING debate in the House of Assembly, Mr. P. C. Pelser, the Minister of Justice, described the Suppression of Communism Amendment Bill as an "innocuous little Bill." There is only one sense in which this description has any meaning at all: The Bill, when it becomes law, need not be feared by Mr. Pelser or by any of his loyal supporters. People arbitrarily deprived of the right to professional practice or of the right to belong to lawful organisations on the Minister's *verboten* list, will not think the measure innocuous. It will not be thought innocuous by those who are un-South African enough to retain a respect for certain basic principles of justice which the Bill will destroy when it becomes law. In making his remark, Mr. Pelser showed no feeling for language, no awareness of the monstrous implications of his "little" legislative measure.**

His justification of the measure is equally open to attack on account of an absence of particularity which is the more surprising for having come from a lawyer. He claimed that communists had infiltrated the legal profession and had asserted themselves "particularly vigorously" in it. This charge will not send shudders down the spines of any except the pathologically gullible. The Minister is also reported to have said that persons charged under the Suppression of Communism Act preferred a certain type of legal representation and that if they could not get it, they preferred to go without. This cannot rank even as an excuse for depriving people of their professional livelihood because they hold unorthodox views. When the Minister and his colleagues did become precise in argument they were unconvincing. Some lawyers, he charged, had been the spearhead in subervise activities and had planned the downfall of South Africa. This may be true but it does not make Mr. Pelser's measure one whit more desirable. A lawyer who commits a crime may be convicted and imprisoned just like any other person and the courts have power under the present laws to debar him from practice. If his offence falls short of a crime, he can still be punished for unprofessional conduct. The machinery for dealing with the black sheep of the legal profession is impressively effective and does not require overhaul.

The Nationalist argument really boils down to the proposition that communists are *ipso facto* unfit to practise as lawyers. This proposition is refutable both in its general application and in its application to the specific facts. On the general level it is blatantly indefensible as a maxim for government in the Western tradition. Intellectual freedom is at the heart of that system and is violated by a law which deprives a man of the choice of his profession and means of livelihood on account of the beliefs to which he subscribes. It is precisely for a violation of this kind that the communist states are criticised by believers in the open society, and it would be a strange thing if we emulated those states in the heresy for which they are almost universally condemned in the West. It is often said that communists have forfeited any claim to intellectual freedom because they themselves value it only as a weakness in the democratic system to be exploited in the struggle for domination. This argument deserves short shrift. It demands that we surrender freedom in order to preserve it — a demand calculated to make the most ardent devotees of the paradox blanch. Those who make it are at best faint-hearted allies of freedom; at worst, they constitute an insidious threat to its maintenance. In taking up this position, one does not necessarily underrate the communist threat to freedom. The point is that in resisting communism we must not allow ourselves to become communists in all but the name. There is impressive evidence to show that communism can be kept at bay by vigilant and civilised rule.

In any event the argument that communists are unfit to be lawyers is only partially relevant in South Africa where communists are those whom the government chooses to name as such. The section of the Bill debarring lawyers from prac-

tice provides *inter alia* that the court shall not admit to practice, and shall remove from the roll if already admitted, any person who is a listed member of an organisation declared to be unlawful under the Suppression of Communism Act. It is well known that many listed members of unlawful organisations are not communists and that they never have been (or will be) communists. The fact that they are not communists will not constitute a ground for judicial removal from the list, since they will have to prove either that they were not members of the organisation concerned or that they neither knew nor could have known that the organisation was doing things which "might render it liable to be declared an unlawful organisation". It is quite conceivable that many listed non-communists will be unable to produce proof of this kind. Therefore the argument that communists are unfit to practice is not a fully honest argument since it will be possible to debar non-communists from practice. Significantly the courts have never been entrusted with the responsibility of deciding who are communists and what organisations are communist-directed.

A disturbing consequence of Mr. Pelser's Bill is the likelihood that the right of an accused to an adequate defence regardless of his beliefs or political convictions, a right so magnificently exemplified by Lord Erskine in his defence of Thomas Paine, will be weakened or perhaps even placed in jeopardy. Nationalist speeches identifying the defenders of unpopular clients with their heretical beliefs are likely to aggravate the position. This is a danger requiring the urgent attention of South African lawyers who must act through their official associations to guarantee a vigorous defence to all who require it.

The Minister's "innocent" Bill also extends his powers to cripple the opponents of apartheid by arbitrary decree. He may by notice in the Gazette prohibit all persons who were members (whether listed or not) of an organisation declared to be unlawful, or who have been restricted under the Suppression of Communism Act, from being members of or from participating in any organisation designated by him in the notice. Such persons will be debarred from making or receiving any contributions of any kind for the direct or indirect benefit of the designated organisations. By one stroke of the Ministerial pen he may virtually end the public life of any inhabitant who displeases him. Needless to say the Minister will not be under the control of the courts which are condemned by the Act to a role of near impotence. In taking this power, the Nationalist government has given another twist to the knife it has remorselessly driven into the heart of freedom. It may not be long before its feeble beat finally dies out.

## ALBERT LUTHULI

Ex-chief Albert Luthuli was given world-wide recognition as a man of stature and a man of peace by the award to him of the Nobel Peace Prize.

His public utterances left the world in no doubt of his peaceful intent and his desire to find a way of life in which all the people of this land could live in harmony.

In 1962 he was arbitrarily banned and denied the right to continue his work for South Africa. His great influence for good was thus lost to his country.

The Black Sash mourns his tragic death.

It is enervation of soul, an abdication of personal responsibility of judgement, that we have to fear. It does not come about because evil men set out to corrupt society: it comes about because the majority of members of society will always beg not to be required to keep themselves in training.

*Lord Radcliffe.*

# THE TERRORISM BILL

COLIN GARDNER

*This is a transcript of an address given at a meeting of the Natal Midlands Region of the Black Sash. Mr. Gardner is a lecturer at the University of Natal.*

**THE TERRORISM BILL, introduced towards the end of the Parliamentary Session, has made less of a stir than it ought to have done. There are, perhaps, three main reasons for this. Firstly and obviously, the number of people prepared to oppose the Government is smaller than it used to be and I think these people are apt to become somewhat disheartened. Secondly, and more mundane, the Bill has been overshadowed in the newspapers by the Middle East crisis and war. Thirdly and most important, the fact that the measure is called the Terrorism Bill (this is its official name) has had the effect of making people rather uncritical; and I am quite sure that this effect was fully intended by the Government. "After all", those people would say, "how can one dare to criticise an anti-terrorism bill? Besides, who would want to? We all disapprove of terrorism."**

Well, I am going to talk about this bill, and I am going to make some sternly critical comments on it. How can I justify myself? How can I escape the emotional trap so neatly prepared, it seems, by the drafters of the bill? Do I myself accept or approve of terrorism? By way of answer, I should like to make two points.

Firstly, I do not approve of terrorism at all. I believe it to be very wrong and I believe it is a foolish and ineffective method of trying to bring about political change. I also believe, obviously, that terrorism must be punished. But I believe that a terrorist is a human being, and has certain rights, especially when he is only *suspected* of being a terrorist, or a person who is suspected of knowing something about a terrorist or a suspected terrorist. And I believe, moreover, that an important aspect of what we call civilisation is a recognition that a criminal, even a dangerous criminal, has certain basic rights — especially, again, when he is only suspected of being a criminal. In so far as the Terrorism Bill denies these rights, I oppose it.

My second reason for being prepared to criticise a bill with so intimidating a title is simply the fact that the Bill is partly concerned with other things besides terrorism. In fact, it is yet another embodiment of the well-known Nationalist principle that it is always a good thing to kill three or four birds with one stone — and all the more so when the stone has a sort of sacred aura about it.

Now look at the contents of the Bill. Section 2(i) enumerates the types of action for which a person may be found guilty of participation in terrorist activities. Two of these actions are in a sense clearly of a terrorist nature, viz: the undergoing of training for subversion and the possession of explosives, ammunition and so on. But the third sort of action as defined (or rather, not defined) in the paragraph, reads like this—

> "Any person who, with intent to endanger the maintenance of law and order in the Republic or any portion thereof, in the Republic or elsewhere commits any act or attempts to commit or conspires with any person to aid or procure the commission of or to commit or incites, instigates, commands, aids, advises, encourages or procures any other person to commit, any act . . ."

After all that rigmarole, we are left simply with "any act" 'committed' with intent to endanger the maintenance of law and order in the Republic. Now that is extremely vague, and the drafters, to their credit, were well aware of this. For they provide a sub-section (ii) in which they explain what they mean; and their clarifying explanation reveals two remarkable things.

Firstly, when they said —

> ". . . with intent to endanger the maintenance of law and order . . ."

the drafters did not really mean "intent" at all. They meant that intent would be assumed to exist unless the accused could prove that there was no intent. This is a good illustration of the way in which a ruthless government can play about with the meaning of words. What could be more dangerous or improper than the assumption that a person is guilty of something, a certain intent,

unless he can prove himself to be innocent of it?

The second remarkable thing is this: when the drafters talked of ". . . any act . . .", they were thinking of all sorts of things no ordinary person would dream of describing as terrorism. The following are some of the culpable actions given in this sub-section (ii). Some of the actions are obviously of the sort that one would reasonably expect to see enumerated in a bill which purported to deal with terrorism; for example

> "to cause or promote general dislocation, disturbance or disorder";
> "to cause, encourage or further insurrection or forcible resistance to the Government or the administration of the territory",

("the territory" being South West Africa);

> "to cause serious bodily injury or to endanger the safety of any person";

(this is a little vague and undefined). But mingled with such clauses as these, we find clauses like this:

> "to further or encourage the achievement of any political aim including the bringing about of any social or economic change by violence or forceable means";

(well, that is all right)

> "or by the intervention of or in accordance with the direction or under the guidance of or in co-operation with or with the assistance of any foreign government or any foreign or international body or institution."

Now that is, I think, rather strange. A person who suggested, for example, that the United Nations might play some part or other in South Africa's political future would apparently be a terrorist. And then there is this one —

> "to cause, encourage or further feelings of hostility between the White and other inhabitants of the Republic".

That seems to me quite fantastic. Quite apart from the fact that most of the country's interracial hostility is the handiwork of the Nationalist Party, how can the encouragement of a feeling (other than terror) be termed "terrorism"? And, more important, who is to judge whether or not "feelings of hostility" have been created? This sort of provision is extremely ominous in a country where the ruling party solemnly informs us that cruelty leads to good race relations, and that friendship is the cause of friction. And then the last of this list of twelve items is simply this —

> "to embarrass the administration of the affairs of the State."

Now there, slipped in unobtrusively at the end, in the classical Nationalist manner, is the most disturbing clause of all. If one does anything or advises anything "to embarrass the administration of the affairs of the State" one may be deemed a terrorist. What exactly *are* the affairs of the State? What is meant by "embarrass"? Might not almost any political criticism be counted as an embarrassment to the administration of State affairs — say, criticism of Bantu education, or criticism of an official refusal to allow an African restauarant within Pietermaritzburg? Who knows — maybe a meeting such as this might some day be deemed to be an act of terrorism!

From that long and strange list we may make a number of deductions: Firstly, White South Africa is apparently far more prone to terror than it used to be. Secondly, the Government (as I have suggested) has found in the word "terrorist" a fine new propaganda slogan word that we can expect to hear a good deal of in the future. Thirdly, though the chances are that, at least to start with, the Government will use its Terrorism Act only on people who are or may be terrorists in the normal meaning of the word, the fact remains that the statute book now contains clauses in terms of which any political opposition can be defined as terrorism. And who can say when a government may decide to make use of such clauses? Who can say how such a law may be applied, for example, at a time of crisis?

The Terrorism Bill has many disturbing features. One is constantly aware, as one reads it, that the Government is prepared to allow the complex work of civilisation to be undone. In any subtle and sensitive legal system, a delicate equilibrium is preserved betwen the rights of the State and of justice on the one hand, and the rights of the accused individual on the other. But in this Bill, and indeed in a number of other bills and acts of the last few years, the Government has shown a frightening indifference to the rights of individuals. And such indifference is, quite simply, a lapse back in the direction of barbarity. Such indifference is precisely what civilisation has, over hundreds of years, moved slowly but surely away from. And in order to be indifferent to the rights of individuals, the Government has to be indifferent to the laws which guard such rights, or have guarded such rights until now; and, of course, it has to be indifferent to the courts.

Again and again in this Bill one can see and *feel* the courts and traditional law being slighted. For example, there is once again the provision of a minimum sentence of five years. (This is one of the few clauses the United Party was prepared to oppose.) The Government is not willing to allow the courts the chance of coming to their own decisions. In cases of murder, no minimum penalty is laid down; but for terrorism (or what the Bill chooses to call terrorism) there is this minimum penalty.

Several times in the Bill we come across this formulation, coming at the beginning of a clause: "Notwithstanding anything to the contrary in any law or the common law contained . . ." Now

I think (I am not a legal man) that statements of that sort are necessary when new laws are to cut through old ones, but I think in no Western democracy would one find that the laws that are being cut to pieces are laws which safeguard the fundamental civilised rights of individuals.

Another provision that one would find in no Western democracy, but which is becoming the sort of thing we have to accept in South Africa, is this:

> "9(i) — This Act, except sections 3, 6, and 7, shall be deemed to have come into operation on the 27th day of June, 1962, and shall, notwithstanding anything to the contrary in any law or the common law contained, apply also in respect of or with reference to any act committed (including the undergoing of any training or the possession of anything) at any time on or after the said date."

That would be comic — if it weren't tragic: that a Government should presume to legislate not only for the future but for the past too. And how unjust. A man can be convicted in terms that were not formulated until five years after he committed his allegedly illegal act, whatever it was. This could mean, perhaps, that all of us here may be judged not only to be terrorists in the future, or now, but to have been terrorists for the last five years.

But undoubtedly the worst part of the Bill is section 6; and this I propose to read, and to comment on as I read it.

> "6(i) — Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in section 1 of the Police Act, 1958, of or above the rank of Lieutenant-Colonel may, if he has reason to believe that any person who happens to be at any place in the Republic, is a terrorist or is withholding from the South African Police any information relating to terrorists or to offences under this Act, arrest such person or cause him to be arrested without warrant and detain or cause such person to be detained for interrogation at such place in the Republic and subject to such conditions as the Commissioner may, subject to the directions of the Minister, from time to time determine, until the Commissioner orders his release when satisfied that he has satisfactorily replied to all questions at the said interrogation, or that no useful purpose will be served by his further detention, until his release is ordered in terms of sub-section (i)."

Well, there it is at last. We have had 90-days. We have 180-days. Now we have indefinite detention. A police officer of or above the rank of Lieutenant-Colonel may detain a person whom he suspects of knowing something about terrorism (as defined in this Bill) for as long as he wishes to, or as long as the Minister deems fit.

This is another clause that was opposed by the United Party. In the debates on both the second and third readings of this Bill, Mrs. Suzman asked the Minister of Justice, Mr. Pelser, for an assurance that at least the next-of-kin would be informed. Mr. Pelser refused to give such assurance.

> "6(ii) — The Commissioner shall, as soon as possible after the arrest of any detainee, advise the Minister of his name and the place where he is being detained, and shall furnish the Minister once a month with the reason why any detainee should not be released."

This is clearly meant to be a safeguard, a consolation to the public, but of course it is not a safeguard at all, since it concerns only the inner life of the Police Force and of the Department of Justice. Justice must be not merely done but seen to be done — not that the mere conveying of information to the Minister can be called justice, anyhow. As far as the public is concerned, a person suspected of terrorism simply disappears, and that is all there is to it. The knowledge that the Commissioner and the Minister of Justice are exchanging messages behind the scenes is valueless, and meaningless.

> "6(iii) — Any detainee may at any time make representation in writing to the Minister relating to his detention or release."

Another consolation that does not console. A man who has been imprisoned without trial, and perhaps for a reason that he is not aware of, may write to the Minister as often as he likes, asking to be released! The law says nothing at all about the Minister's obligation even to read his letters. The one small consolation this clause perhaps contains is the knowledge that a detainee may, from time to time, get access to pen and paper . . . With a provision like this we have returned, it seems to me, almost to the law of the jungle. A man is imprisoned by the Minister of Justice, and his only hope of getting released is to ask the Minister, please, to let him go. No one else can do anything to help him.

> "6(iv) — The Minister may, at any time, order the release of any detainee."

That is not very illuminating. I suppose it is nice to know that *someone* has the power to release detainees. But to people who aren't in the habit of thinking of the Minister as a man of divine wisdom or divine mercy, the provision is not a very impressive one.

> "6(v) — No court of law shall pronounce upon the validity of any action taken under this section, or order the release of any detainee."

There, I think, one can sense the tiger showing his teeth. What a lot of trouble the Department of Justice has had from the meddlesome courts! What a nuisance they have been, asking awkward questions, wanting to know why people have been detained and where they have been detained, and under what conditions they have been detained. Well, all that is past. Now the courts can ask nothing, demand nothing, achieve nothing. The Minister of Justice and the Police have the whole field to themselves. In this respect, at any rate, South Africa is now formally and officially a Police State.

> "6(vi) — No person, other than the Minister or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee or shall be entitled to any official information relating to or obtained from any detainee."

The public, then, is to know nothing. Even Parliament is not allowed to know anything. (Parliament too, of course, has been something of a difficulty to the Department of Justice in the past.

And finally, 6(vii) — rather a touching one —

> "6(vii) — If circumstances so permit, a detainee shall be visited in private by a magistrate at least once a fortnight."

Now that is an incredible law. A detainee shall be visited in private by a magistrate at least once a fortnight — if circumstances so permit. So — "You must do this; but if, on the other hand, you prefer not to, then you needn't." Do our legislators think we are mad? How can any person consent to such a law as that? "Justice shall be done, if circumstances so permit!"

There are several other things in the Bill I might mention, but I have spoken too long already. The only resolute and full opposition to the Terrorism Bill in Parliament came, needless to say, from Mrs. Suzman. Mr. Pelser's comment on her various speeches and remarks, the tenor of which was somewhat similar to what I have said, was what one might have predicted. He said that he knew his views were diametrically opposed to those of Mrs. Suzman, but he had not thought she would go so far as to be an intercessor for terrorists. So there you are. To uphold civilised standards and practices, to believe in the rule of law, is half-way to being a terrorist!

# THE THIRD PILLAR

## JOYCE HARRIS

A STRANGE AND INEXPLICABLE PHENOMENON has made its appearance in the life of the people of South Africa, which no doubt will sooner or later come to be accepted as part of the "traditional way of life." I refer to the constant and continual undermining of that third pillar of democracy, namely the Judiciary. Quite apart from philosophical interpretations of the true meaning and content of democracy, the process of democratic government has "traditionally" come to rest upon three departments of government, those of legislation, execution or administration, and justice, and stable government upon an equitable balance between the three.

The Legislature makes the laws, the Executive administers them, and the Judiciary ensures that they are correctly and justly interpreted and that the rights of the individual are protected. It is customary that the officers of the Judiciary, particularly its highest officers, its judges, be men of education, ability and integrity, and that they be accorded that respect to which the dignity of their office and their standing as individuals entitles them.

Judges are appointed by the Minister of Justice, yet in recent years those who have held the position of Minister of Justice have seen fit to steer through the Legislature laws which have been specifically designed to bypass the courts of the land and their custodians, the judges. While not actually passing a vote of no confidence in the Judiciary, many of the laws introduced by the Minister of Justice can well be interpreted as doing just that, and as showing disrespect for his own appointees.

There have been laws, and amendments to laws, which provide for an assortment of punishments without trial — house arrest, banishment, 90-day detention, 180-day detention, and now indefinite detention on suspicion with absolutely no recourse to the courts of law unless the authorities see fit actually to charge the individuals so detained. These are all exceedingly severe forms of punishment, and represent a gross infringement of the rights of the individual in a demo-

cratic society, but in this instance I am not so much concerned with this inroad into personal liberty as I am with the apparent insult administered to the Judiciary by the contempt for its services and its standing which these laws imply.

Viewed in this light the actions of the Minister of Justice become inexplicable. He would appear to be creating a schism within his own Department. As a member of both the Legislature and the Executive, he is responsible for the formulation and passage of the laws concerning justice and also for the just interpretation of these laws, yet the laws he promulgates deliberately undermine the accepted machinery for their interpretation — the courts and their officers. This is logically irreconciliable. Justice cannot be done when laws concerned with justice themselves exclude the best qualified interpreters of justice.

"Justice" has been variously defined. It is "the quality of being morally just or righteous; the principle of just dealing; the state of being 'just before God'." This aspect of "Justice" is dealt with by the Legislature under the leadership of the Minister of Justice, who thus becomes responsible for the principle of just dealing in Government, just dealing being "Upright, impartial and equitable dealing, consonant with the principles of moral right." But "Justice" is also "The exercise of authority or power in maintenance of right; the administration of law, or the forms and processes attending it." The Minister of Justice is thus also responsible for the administration of the law, yet so many of his laws strip of their powers those administrators of the law whom he himself has appointed. Laws which exclude the courts of law make nonsense of the accepted forms of justice, and imply either that the laws submitted by the Department of Justice to the Legislature cannot bear scrutiny by the impartial interpretors of the law or that these interpreters are incompetent to administer them. Either way it would appear that "all is not well" with the Judiciary.

And the Judiciary is but one of the three pillars of Democracy, the remaining two pillars making their considerable contribution to this unhappy state of affairs and making it intentionally. They are promulgating and passing the laws which are splitting the Judiciary apart and making it impotent in respect of far too many laws. The equitable balance between these three pillars of good government upon which a stable democratic society rests is being upset, and when the foundation of one become threatened the entire edifice is endangered. A strong Judiciary is as fundamental and essential as is a strong Legislature and an efficient Executive, and although it is part of the whole process of Government it can only fulfil its basic function effectively if it is independent and free to exercise its full powers. Any infringement of these powers threatens its efficacy, and this threat may well boomerang upon that whole of which it is a part. It is incomprehensible that the Government as a whole can itself so seriously impair the functioning of what is in fact an integral part of its own efficiency.

The Minister of Justice is already somewhat precariously balanced between the two aspects of his own Department, the law making and the just administration and interpretation of the law, which are ever more frequently contradictory instead of being complementary. He must sometimes find it difficult to reconcile his one hand with his other and to rationalise the anachronisms in his portfolio. The Government, in allowing and even encouraging this defect in one of its mainstays is going to find it increasingly difficult to balance on the remaining two, for equilibrium is far easier to retain on a tricycle than a bicycle. An unencumbered Judiciary safeguards the Government itself as well as the individuals constituting the society it is governing. It would therefore be in the interests of everyone if the former, truly "traditional" significance of the Judiciary were restored by restoring to it its full powers and ceasing to bypass it in the execution of one of its fundamental duties, the just "administration of the law." This in turn would help to ensure the "principle of just dealing" in the laws its promulgates.

## Banned

675 people were subject to restrictions in terms of the Suppression of Communism Act as at 31st December 1966.

125 of them left the Republic before that date.

63 restriction orders were issued between 30th August 1966 and 31st December 1967.

During the same period 8 orders were withdrawn altogether and 7 partly.

*Hansard 3rd Feb., 1967.*

**This is the task of a liberal education: to give a sense of the value of things other than domination, to help to create wise citizens of a free community, and through the combination of citizenship with liberty in individual creativeness to enable men to give to human life that splendour which some few have shown that it can achieve.**

***Bertrand Russell.***

# THE BANNING
## OF
# DR. RAYMOND HOFFENBERG

## STATEMENT MADE FOR THE PRESS ON
## 1st AUGUST, 1967

By J. F. BROCK, D.M., F.R.C.P.,

*Professor of Medicine, University of Cape Town*

**I MUST CONDEMN forthrightly with all the authority I can command the undemocratic and unjustified action of the Department of Justice in issuing a banning order to Dr. R. Hoffenberg, a senior, responsible and invaluable colleague and member of my staff, and a physician and research worker of internationally accepted merit.**

Dr. Raymond Hoffenberg is 44 years of age, South African born and a graduate of our medical school. He is at present a member of the Joint Medical Staff at the Groote Schuur Hospital. This means that he is in the joint employment of the Cape Provincial Administration through its hospitals department, and of the University of Cape Town through its Department of Medicine. The Administration is his primary employer and he is subject, through the Medical Superintendent of Groote Schuur Hospital, to the Administration in matters of hospital policy and discipline. The University is his secondary employer. In matters affecting hospital duties he is responsible to the Medical Superintendent, through me as Head of the department of Medicine of the Hospital (or chief physician). In matters relating to medical teaching and research he is responsible to me in my capacity as professor of medicine and head of the University's Department of Medicine in the Faculty of Medicine. These details are given because similar dichotomy exists in the case of the great majority of members of the Joint Medical Staff at Groote Schuur and associated hospitals used by the university for medical teaching. Because of their relationship to the Provincial Administration the majority of that staff are not free to make public statements on matters affecting controversial political policies.

It is necessary therefore for the medical professors to speak on their behalf in the undoubted duty of the university to uphold freedom of thought and speech among its teaching and research staff. I, as one of the professors in the medical faculty, am primarily responsible to the university and have both the freedom and the obligation to speak publicly on matters affecting medical teaching and research and the world-wide principles underlying university life and thought. I am speaking therefore on behalf of some 76 specialist physicians and some 50 non-specialised doctors of the Division and Department of Medicine who are directly responsible to me for their hospital and university duties.

Dr. Hoffenberg has the rank of full-time Physician and Senior Lecturer in my department. He is responsible to me for the organisation and much of the allocation, supervision and marking of the work of our medical students in the wards of the Department of Medicine. He has done this with distinction and to my entire satisfaction. He is an outstanding consultant physician and a considerable part of the ward work for which I am responsible has been delegated to him. It is carried out with the greatest efficiency and devoted care. He is responsible for all the diagnostic isotype work of the Department of Medicine in hospital diagnosis and research and is a highly respected consultant to other departments in the same matters. He is an expert on endocrinology and metabolism and is consulted by all departments of the hospital in his expert field. His researches in the same field have won him acclaim and high regard throughout the world.

Only recently, before the banning order became operative, I wrote to the Minister asking on behalf of the hospital and the university that he should be allowed a temporary travel document to attend a meeting of a committee of the International Atomic Energy Agency in Vienna to which

he had been invited. His expert knowledge, wisdom and judgment would take many years to replace if he were to leave South Africa.

Dr. Hoffenberg reported to me in October 1965 that his passport had been confiscated. Although I know Dr. Hoffenberg to be a man of liberal, humane and unambiguous opinions I have never had any reason, directly or indirectly, to believe that he had ever indulged in illegal activities. He gave me his assurance on the latter point and I undertook to explore the reasons for the apparently unjustifiable withdrawal of his passport which must, if continued, impair his efficiency in research and in services to the sick public. No modern physician, much less a research worker, in South Africa, can remain efficient in his work if he cannot widen his experience abroad.

By correspondence and interview I sought reasons from the top administrative officials of the Republic's research and hospital structure in Cape Town and Pretoria, and from members of the Cabinet. Everywhere I was met by sympathetic understanding (for which I was grateful), but I gained no information. The highest administrative officials of the Republic and Province were unable to get information for me about the nature of Dr. Hoffenberg's alleged misdemeanours.

It appears that the highest among them cannot get even confidential information about members of their own staff who have been similarly treated.

This is indeed an extraordinary situation in a democratic country. The Minister is given information by officials, the accuracy of whose information cannot be checked by the highest officials outside the Minister's immediate pyramid, nor by the duly constituted Courts of the country.

The Minister has the sole discretion for deciding whether the information given to him is correct. He then has to decide in terms of the Suppression of Communism Act, 1950 (Act. No. 44 of 1950) whether he is satisfied that the individual "engages in activities which are furthering or may further the achievement of the objects of Communism." Most authorities would regard this as a highly subjective decision.

I abhor Communism as much as does the Minister but I presume we would have to allow that one of the objects of communism is the welfare of the people of a given State. The Minister, Dr. Hoffenberg and myself must surely all be guilty on this count. The Minister's subjective judgement cannot be challeneged by anybody except presumably the Prime Minister and the Cabinet. This subjective opinion cannot be tested even in the highest Courts of the land. The Minister does not inform the individual of the sources or nature of the information on which he has arrived at his subjective conclusion. The accused cannot reply because he has no charges to which to make reply. More specifically, he is prohibited from making a reply.


**" 'No man shall be punished unless he has been charged and found guilty by his peers' . . . Ag, man, that was 750 years ago!"**

These highly irregular and undemocratic procedures might conceivably be justified in a given case for a limited period of time while further enquiries are being instituted and particularly in a state of emergency. I am prepared to believe and accept that our Republic is at present in a state of emergency. The further enquiries should even in those circumstances, have limited duration and should then be tested in the duly constituted Courts of the country.

Dr. Hoffenberg's passport was withdrawn nearly two years ago and he has frequently been visited by Security officials but apparently in this time the Security officials and the Minister have been unable to elicit any information which could be made public or tested in the Courts to substantiate the implied charge of illegal activity. I can only conclude that the Minister and his security are either inefficient or they are wrong; I should prefer to believe the latter. I suspect that the banning is based upon nothing more than dislike of Dr. Hoffenberg's opinions which he has never hidden. I hope the Minister will accept the challenge and test his subjective judgment through the highest Courts of the land. If I am wrong in my subjective opinion I shall be the first to apologise to the Minister. I am criticising him only because he will not give me information on which to base the more objective opinions which I should like to form and hold.

I believe that the Minister and myself are both devoted and loyal South Africans; I know that I am and I believe that he is. I myself believe a number of things which I think the Minister would fully agree with. I believe that South Africa is passing through difficult and perilous times, if not an emergency; I believe that South Africans should close their ranks and labour for the welfare and progress of our Republic provided they do not have to sacrifice points of deeply

held principle such as freedom of thought. I personallly would prefer firm government to anarchy, and I believe that we could easily have anarchy in South Africa if we did not have firm government. I believe however, and I hope that the Minister might agree with me, that firm government is not inconsistent with freedom of opinion and ordinary justice.

In the matter of this banning I am less concerned with Dr. Hoffenberg than with the reputation of my country. Dr. Hoffenberg's reputation in the international field of science and medicine is quite secure and will not be adversely affected by the subjective judgment of one of our Ministers. If he were to leave South Africa he would be snapped up immediately for high position in medical research and/or education in one of several countries and would lose nothing but his love of and devotion to the Republic of South Africa. It is we who would be the losers and I am astonished that the circumstances of this banning order appear to be aimed at achieving just this loss. It is difficult not to feel resentful at the apparent folly of cutting off our nose to spite our face. It makes me deeply sad for the country which I love.

Among the very bad principles involved in this banning order the most heinous is the apparent immediate ban on the publication of scientific articles and the implied ban after the end of the 1967 academic year on the ordinary professional and academic activities of Dr. Hoffenberg. The first would appear to be inconceivable in a democratic state. The second would be conceivable in a sane community only after formal charges of illegal action have been sustained by the highest Courts in the land. I will not comment further until the impression has been confirmed. I understand that the Council of my University is seeking legal interpretation of these obscurities.

I should like to make it clear that I am making this statement on my own responsibility as Professor of Medicine and Head of the Division and Department of Medicine at Groote Schuur Hospital. I have informed my University and the Medical Superintendent of the hospital that I am making a statement but have not consulted either the University or the Hospital about its terms for which I take full responsibility. I hold, for a period of three years, the responsible position of President of the College of Physicians, Surgeons and Gynaecologists of South Africa, but this important medical body is not implicated in my opinions. That College, together with the South African Medical and Dental Council, and the Medical Association of South Africa, will be asked to consider and report upon the propriety of the action taken by the Minister against a respected member of our profession. For the moment I am speaking on my sole responsibility. My good faith in this matter should, I think ,be apparent. I am South African born, and bilingual. I have held my present position for nearly 30 years. I have known Dr. Hoffenberg first as a student, and now for many years as a devoted and highly respected colleague. I have worked in the Groote Schuur Hospital and in the laboratories in the Medical School in almost daily contact with Dr. Hoffenberg for many years.

Some of my views on the very difficult circumstances in which we have to act in South Africa have been put on record in public addresses, and I quote briefly from two of them:

> "On the positive side I must reiterate what I have already said. We should believe in the sincerity and integrity of those who oppose academic freedom in this country while clearly, persistently and unequivocally stating, in public, our own convictions on the subject. From the Afrikaans-speaking universities we should expect similar courtesy, as I believe we usually do have.
>
> In particular, we should appeal to them to raise their voice as academics in protest against the deeply revolting habit of politicians in this country of decrying liberalism and equating it with Communism. I am referring, of course, not to the liberal party as a political organisation, but to what is accepted all over the world as "liberal academic thought". I would define this as the application of critical rationality to every problem which is the subject of academic study. In this I believe profoundly. With it, however, must go a clear recognition of the fallibility of human judgment and the need to respect the opinions of other people, however misguided they may appear to be."[1]


"Your security's slipping, Van den Bergh. This is obviously the work of a bunch of Liberals."

[1] *(Extract from Address given at the Graduation Ceremony of the University of the Witwatersrand in December* 1965. *Ref: Gazette of the University of the Witwatersrand, Johannesburg,* 26 *June,* 1966, *Vol.* 8, *No.* 1.)


**"Tell him he didn't read the small type."**

"In these troubled times in South Africa, a fixed objective for me is that we in the University of Cape Town, and especially in its medical school, should build something of permanent value in the southern end of the African continent. It is my hope that in 1000 years' time, when our present inter-racial problems will have been solved, doubtless to be replaced by other problems, history will pass on us a favourable judgment. May part of that judgment be that the proud heritage of Aristotle and Hippocrates, inherited through Alexandria, Salerno, Padua, Cordoba, Paris and the latters' daughters in north-west Europe, of which Oxford is the eldest, has led to a great centre of learning and professional service in Cape Town of which South Africa and the whole African continent can be proud."[2]

Although I disagree profoundly with the present government of my country, I respect most of the members of the Cabinet as able and sincere people and I am profoundly grateful to them for the zeal and success with which they have built up the material progress and guarded the security of the State in very difficult times. I am glad I do not have the responsibility of making the decisions they have to make on our behalf. I must be frank however, in my view that they have allowed themselves to be panicked into legislation which they and all of us should be ashamed of, and which can, inter alia, allow such undemocratic procedures as have occasioned the circumstances of this and some other banning orders.

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[2]*(Extract from Presidential Address delivered to the Medical History Club, University of Cape Town, August* 1965. *Ref: S.A. Medical Journal, Vol.* 40, 14 *May* 1966, *pps.* 406-415.)

## BIC FRIELINGHAUS

Bic Frielinghaus died in July after months of illness. She was a foundation member of the Black Sash and devoted a great deal of her time over the last twelve years to working for the Sash. She was instrumental in establishing and maintaining the North Eastern branch in Johannesburg and later devoted time and energy, when she was already feeling ill, to making our contact system work. She served for years on the Transvaal regional committee where the sum of her contribution was too great to be told. She was always a quiet person at meetings and her sound common sense often brought us firmly back to the realms of the possible and her great organising ability made for the success of many projects.

She was one of those people who give of themselves unstintingly, volunteering for the dreary, time-consuming jobs that have to be done but that no-one wants to take responsibility for. She was a faithful committee member, unflaggingly attending meetings, contributing to decisions, and carrying out the work involved. She is greatly missed by all of us in the Transvaal and by members all over the country who worked with her over the years.

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**Left on Exit permits during 1966:-**

26 Whites; 15 Coloureds; 8 Asiatics; 10 Africans.

*Hansard 14th Feb., 1967.*

**Detained as Witnesses:-**

282 people.

**Called as Witnesses:-**

75 people.

*Hansard 23rd Feb., 1967.*

**Detained under Proclamation 400:-**

1965 — 137 people
1966 — 109 people

Of these 100 people were brought to trial, 48 were convicted, 52 were acquitted and the rest were released without charge. Some of them had been held for as long as 210 days before being released or charged.

*Hansard 25th April, 1967.*

# A MATTER FOR CONBERN

By J. A. SINCLAIR

**In a country where 543,916 people, about one person in every thirty two of the population, were admitted to prison in one year the relationship between the public and the police force is of more than ordinary importance. Where this relationship is one of a minimum of co-operation and even antagonism it is necessary to try to find and understand the causes of this situation. Much is obviously wrong in South Africa, none of it caused by irremediable factors.**

Four of the principles which govern, or should govern the activities of the police in a democratic state are:—

1. To prevent crime and disorder as an alternative to their repression by military force and severity of legal punishment.
2. To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their actions and behaviour, and on their ability to secure and maintain public respect.
3. To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of the law.
4. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to restore order; and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.

The analysis which follows will show how very far short of the principles here enumerated have fallen both the police and the public in South Africa. The fault is not by any means all on the side of the police. Their task presents enormous difficulties, as must always be the case in a heterogeneous society and they do not always receive the co-operation of the public which is necessary for the maintenance of good order.

On the 9th January, 1957, a statement by Captain, L. L. Solm, Senior Staff Officer to the Deputy Commissioner, Eastern Transvaal Police Division, was printed in the "Cape Times". He said that there was no other place in the world where the police get so little co-operation from the public as in South Africa. He suggested that one of the reasons for the lack of co-operation was that the public was inclined to identify the police with the Government. "When the Government passes unpopular laws the public are inclined to blame the police. We have no say whatever in the making of the law. Whether we like them or not we have to carry them out."

The general attitude of the public in this country, appears to be that the police form a separate entity within the community. The community as a whole does not identify with the police in their responsibilities.

In a speech in Parliament Mr. H. G. Lawrence, Q.C., then the member for Salt River referred to these difficulties.

He said, referring to his term of office as Minister of Justice: "Many a time the Commissioner of Police said to me 'Why do you ask me to use the police to do this work? These laws are not popular, they are not liked by the African community'." But laws of course have to be maintained and it is the duty of the police to maintain them.

Mr. Lawrence went on to point out that in the past ten or twelve years a multiplicity of new laws had been placed on the Statute Book many of which, although their contravention involved no moral stigma, resulted in the arrest of tens of thousands of Africans and great distress. Mr. Lawrence concluded: "And so inevitably there has grown up a feeling of hostility between the African community and the police. The African community equates the police with those bad laws, and that is unfair to the police."

So far as the position of the African is concerned, his attitude to the police, and the attitude of the police to him, cannot be separated from the general conditions in which he lives. Undoubtedly today the average African in the urban area exists in a perpetual state of frustration and sullen resentment which frequently finds an outlet in belligerence and outright violence. It is not intended in this article to discuss the merits of otherwise of the manifold laws and regulations affecting the daily life of the average African. Merely suffice it to say that certain of them constitute for him a persistent and intolerable irritation from which he has no escape by legitimate means. Great emphasis is placed by all sections of the European population on the goodness of heart of what is termed "the law-abiding African". In actual fact there is no such thing as a law-abiding African. There are Africans who

would like to be able to remain within the law, and those forming a small minority, who have opted to live outside it. Those who wish to abide by the law are subject, either through ignorance or non-culpable negligence to summary arrest and in certain cases criminal proceedings. The distinction between punishment for genuine guilt, and punishment for ignorance is not apparent.

The African in South Africa cannot be expected to consider, in reviewing his day to day existence, the complicated economic and sociological questions, such as the supposed necessity for influx control, which have been made the excuse of so much restrictive legislation. For him these impedimenta constitute the instruments of a studied persecution of which he feels himself to be the unhappy victim.

The condition of mind in which we find the urban African today can be attributed generally to four main factors.

## 1. Economic Considerations

Surveys of the wages and salaries structure among the Africans are extremely difficult to conduct, and consequently very few statistics are available. However various surveys have been undertaken from time to time and the results can be said to be fairly indicative of the conditions existing in the urban areas.

In 1966 the South African Institute of Race Relations conducted an investigation into the cost of living for Africans in Soweto, near Johannesburg. The estimated essential minimum family expenditure per month for a family of five was R55.57. This did not include such items as medical fees, luxury articles such as cigarettes, or the replacement of household effects. It covered only food, rent, transport, fuel and light, clothing, cleaning material and tax. In the same investigation it was found that the average family income in Johannesburg for the month was R46.31. This means that there was a deficit of R9.26 per month, every month, in the family budget. It becomes apparent that a large percentage of African families live below the bread line. The constant anxiety which this must occasion in the mind of an African with a family to support can well be imagined.

## 2. Contentious Legislation

This is perhaps the greatest source of African dissatisfaction and anxiety. Such feelings are country-wide and have been expressed in a variety of ways, both official and unofficial. Complaints are made against the many laws which control every aspect of the African individual's life. Further legislation is constantly being placed on the Statute Book, new regulations are constantly being enforced, and the source of grievance is constantly aggravated rather than diminished. Undoubtedly the most deeply felt irritations result from the effects of the laws relating to passes and influx control and numerous protests have been made throughout the country over the years. The very real hardship which the African suffers as a result of these laws can be seen from statistics of prosecutions and convictions over the years.

In 1936 there were 71,052 convicttions for offences against the pass laws.[1] In 1955 there were 206,414 convictions. In 1957 the Bureau of Census of Statistics revealed that the number of convictions against laws and regulations relating to the supervision and control of African movement were 365,911. This represents just over 1,000 Africans per day for every day of the year. It must also be remembered that a number pay admissions of guilt fines and do not appear in Court. The number given above for the year 1957 represents 34% of the total number of convictions of Africans for all offences.

In the year ending 30th June 1964 there were 373,284 prosecutions for offences relating to the registration and production of documents by Africans, regulations relating to curfew, reception depots, control of townships and Reserves, and under the Bantu Urban Areas Act.[2]

In April 1957, at a conference held by the South African Bureau of Racial Affairs the Assistant Commissioner of the Criminal Investigation Department, speaking in his personal capacity, said "It goes without saying that the actions of the police against so many Natives for offences created by European laws must stir up feelings against the police."

In September, 1957, the Secretary for Native Affairs, addressing the Institute of Administrators of Non-European Affairs said:

"A society in which such a large percentage of its members are prosecuted, convicted and fined or imprisoned, must necessarily suffer irreparable harm as the punitive system ceases to have any educative and remedial effect. The people implicated are no longer subject to any social stigma and therefore these sanctions lose their deterrent value. It is consequently of the utmost importance to have this process reversed so that contravention of laws and regulations will once more become the exception rather than the rule."

So much for the effect on the society as a whole. What is equally important is the effect which constant threat of arrest has on the attitude of mind of the average African. There are innumerable recorded cases of hardship endured and more often than not with extreme injustice owing to the practical impossibility of administering these laws in their extraordinary complexity.

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1 *Police Commission of Enquiry* 1937.
2 *Survey of Race Relations* 1965.

## 3. Criminal and Gangster elements in the community

This is another source of the gravest anxiety to the average African. It appears that he exists in the No-man's-land between fear of arrest by the police and fear of attack by thugs. Many law-abiding members of the African population live in terror. They are assaulted, their reference books are stolen from them, their homes are broken into and their money is taken from them. This type of gangsterism goes on continually in the trains, in the streets of the townships, and even in their homes. In the Johannesburg area alone in the year March 1966 to February 1967 there were 8,075 cases of common assault, 7,747 cases of assault with intent to do grievous bodily harm, 598 cases of resisting, obstructing or assaulting policemen in the execution of their duty, 33,489 cases of theft, 891 murders and 1,156 cases of rape which were brought to the attention of the police.[3] It must be remembered that although these statistics of reported cases are horrifying, a large number of cases which do not cause death do not come to the notice of the police.

The report of the Commission appointed by the City Council of Johannesburg to enquire into the disturbances in the South Western Native Townships on the 14th and 15th September, 1957, stated: "There is considerable evidence that as a whole the residents in the townships are unwilling to assist the police by giving information directed towards the arrest of wrongdoers." Various reasons were advanced for this, but it seems that the main cause is the fear of reprisals by the criminals concerned or their friends and associates, there being no guarantee of police protection of the informants.

Owing to this situation which has been in existence for a great many years, the Africans themselves have from time to time suggested the formation of their own civic guards which will operate in the townships by night under the direction of the police. The report of the Police Commission of Enquiry, 1937, suggested that one way in which the relations between the police and Africans might be improved, and which should yield increasingly fruitful results, would be for the police as frequently as possible to invoke the aid of the Africans themselves in maintaining order and enforcing the law. The Commission gave as their opinion that the African is a natural and traditionally law-abiding person, respectful of and obedient to authority, whether emanating from Europeans or those of his own race. The debate on the question of civic guards has gone on for many years and in 1966 regulations were published for the establishment and control of community guards in African townships.

[3] *Hansard* 21st *April* 1967.

## 4. The treatment of Africans by police

We have noted in the preceding sections the excessively large number of arrests of Africans only for trivial offences. This means that the whole urban population must continually come into direct contact with the police themselves, and the treatment which they receive in doing so is one of the gravest sources of dissatisfaction among them.

In paragraph 121 of the Report of the Penal and Prison Reform Commission, 1947, it is stated: "The Commission is compelled by the mass of statements on the matter to the conclusion that there are many policemen who consider it not beyond their function to speak discourteously and often abusively to Non-European persons whether witnesses or accused in a charge office or on police premises, and to rough-handle those whom they are required to take in charge."

The same story is revealed in the report of the Police Commission of Enquiry, 1937, parafraph 282.

"Native policemen are often accused of assaults on natives either just before or just after arrest. A tendency must here be noted of the Native police to consider arrest in itself as a punitive measure justifying the application to the arrested person to some measure of unnecessary force if not assault."

This tendency to discourtesy and abuse of authority is as prevalent today as it was in 1937 and not only among the African members of the police. 273 members of the police force were convicted of assault during 1965 and 74 during the first six months of 1966.[4] One of the basic reasons for African dissatisfaction is the treatment they receive and the manner used in addressing them when they are stopped by the police.

The African in the cities of South Africa today lives in a state of permanent anxiety caused by perpetual economic worry, sullen resentment against the discriminatory laws by which he is governed, fear of summary arrest whether or not he is aware of having committed an offence, and fear of attack and robbery of possessions and money which he can ill afford to lose, and anger towards the only palpable entity at whose door he can lay the blame for all his grievances. As he has no representation in Parliament nor other means of expressing his discontent through his own people, this entity of course centres on the South African Police.

In this respect the Police are placed in an impossible position. As has been said before, whether they like it or not their duty is to enforce the laws of the State. In doing so they meet with this hostility and sometimes violence on the part of the African which renders the proper execution of their duty extremely difficult and unpleasant if not impossible.

[4] *Survey of Race Relations* 1966.

In the words of the report of the Police Commission of Enquiry 1937:

"The comprehensive powers of the policeman, which can so easily be abused, tend to beget in him a spirit of arrogance towards the Native, while the submissiveness imposed upon the latter, and the reflection that he is treated differently from others induce in him a sullen and resentful attitude. It is not surprising that these conflicting moods should develop a feeling of hostility which sometimes finds expression in acts of violence."

Again in paragraph 303 the following.

". . . . that the relations between Natives and police are marked by a suppressed hostility which excludes wholehearted co-operation and which does harm both to the Force and to the Natives themselves. This is due partly to the odium incurred by the police in enforcing unpopular legislation, but is contributed to by the manner in which such enforcement is carried out and the general attitude of some individual policemen to the Native population."

The Commission found an attitude on the part of both parties, which admitted of no doubt whatever of mutual distrust, suspicion and dislike. The majority of Africans and a number of Europeans who testified before them said that the Africans regard the police as enemies and persecutors rather than protectors and friends. As one African expressed it in 1950. "The police are regarded as instruments of oppression and not as officials concerned with the preservation of law and order." Another African said "If a European sees a policeman walking through the streets of Parktown he does not regard him uneasily and with fear. We do."

The African feels himself powerless to do anything to protect himself against the actions of the police. He is completely at their mercy. Even in the case of direct assault by policemen on Africans they are often paralysed by fear of reprisals if they report the matter, and there are often difficulties in identifying the policeman concerned, as the police no longer wear identification numbers, should they have the courage to take proceedings.

In an address which was read at the Sixth Annual Conference of the Institute for Administrators of Non-European Affairs in September,

## SOUTH AFRICA'S PRISON POPULATION

**People admitted to prison between 1st July 1965 and 30th June 1966.**

| | |
|---|---|
| Whites: | 12,913 |
| Coloureds: | 68,570 |
| Asiatics: | 3,490 |
| Africans: | 458,943 |
| Total: | 543,916 |

**They were sentenced to terms of imprisonment of:—**

| | White | Coloured | Asiatic | African |
|---|---|---|---|---|
| Up to and including one month | 2,452 | 25,098 | 940 | 133,982 |
| More than one month up to six months | 2,034 | 14,884 | 731 | 124,340 |
| More than six months up to two years | 971 | 2,117 | 145 | 16,288 |
| Two years and longer | 394 | 786 | 28 | 5,725 |
| Corrective Training | 248 | 975 | 17 | 3,272 |
| For Prevention of Crime | 125 | 488 | 7 | 1,406 |
| Indeterminate sentences | 93 | 239 | 2 | 718 |
| Life sentences | 1 | Nil | Nil | 4 |

**The daily average number of prisoners in custody during this period:—**

| | |
|---|---|
| Whites: | 2,887 |
| Coloureds: | 12,444 |
| Asiatics: | 425 |
| Africans: | 58,277 |
| Total: | 74,028 |

*Hansard 4th April, 1967.*

1957, the Secretary for Native Affairs, Dr. W. W. M. Eiselen said: "The heads of responsible State departments (including the police) and heads of Municipal Administrations have been particularly exercised about this conflict and antagonism that exists vis-a-vis authorities and attempts have been made and are continuously being made to prevent actions by Government and other officials that may cause friction because of irritating or petty methods employed in implementing the law, when by the exercise of more tact or circumspection or regard for individual rights all this could to a large extent have been avoided."

The authorities continue to state that the reference book system must be administered in such a way that people must not be arrested for purely technical contraventions of a minor character.

Unfortunately these admirable sentiments have not been translated into action. It will take more than official pronouncements and encouragements from the Government to eradicate the attitude of mind at present existing among many members of the police force. Furthermore however benevolent the administration of African affairs generally can be made, no improvements in the attitude of the African will be effected until the basic grievances in connection with these laws which they have have been stressing for many years have been eradicated.

Obviously, owing to the extremely unpleasant nature of the policeman's duties, added to the fact that the rates of pay are hopelessly inadequate for the responsibility of the task, the South African Police force is understaffed and must suffer from the competition of industry for new recruits. There is no reason, however why this situation should not be remedied. But to improve the standards, behaviour and conditions of the police is not enough. In a heterogeneous society such as our own the maintenance of good race relations is quite the most important aspect of the maintenance of good government and good order. It is not enough to attempt to improve relations between the citizen and the police, indeed it is impossible in present circumstances. Until our citizens are no longer plagued in everything they do by discriminatory and harsh regulations, until the economic condition of all our people is raised to an equitable level, until social conditions are such as to discourage criminal actions so long will the conflict continue.

For Justice, though she's painted blind,
Is to the weaker side inclin'd.

*Samuel Butler.*

Justice is truth in action.

*Benjamin Disraeli.*

There is but one law for all, namely, that law which governs all law, the law of our Creator, the law of humanity, justice, equity — the law of nature, and of nations.

*Edmund Burke.*

Bad laws are the worst sort of tyranny.

*Edmund Burke.*

## MY RIGHTS AND PRIVILEGES AS A CITIZEN

**I have the right to freedom of speech and of conscience provided I do not injure my country and its inhabitants.**

**I have the right to vote and thus to have a say in the conduct of public affairs. My right to the franchise entitles me not only to vote according to my convictions but carries with it the privilege to be elected to any governing body.**

**I have the right to invoke the protection of an impartial court when my rights are placed in jeopardy.**

**I have the right to freedom of worship in the religion of my choice.**

**I have the right to improve my position provided I do not transgress the laws, traditions and customs of my country.**

**I have the right to demand respect for my personal dignity.**

**I have the privilege to share in my country's natural resources.**

**I have the privilege to contribute to the cultural development of my country.**

*(From the commemorative booklet presented to new South African citizens when they take the oath of allegiance.)*

There are in nature certain fountains of justice, whence all civil laws are derived but as streams.

*Francis Bacon.*

Every man and woman in a democracy should be neither a slave nor a rebel, but a citizen, that is, a person who has, and allows to others, a due proportion, but no more, of the governmental mentality. Where democracy does not exist, the governmental mentality is that of masters towards dependents; but where there is democracy it is that of equal co-operation, which involves the assertion of one's own opinion up to a certain point, but no further. *Bertrand Russell.*

# HERE COMES THE HANGMAN

"And naked to the hangman's noose
The morning clock will ring
A neck God made for other
Use than strangling in a string."

*(A Shropshire Lad.)*

**There are of course three main elements in punishment: there is the element of retribution; there is the element of self-protection; and there is the element of deterrence. I am speaking of course, from the point of view of Society, which is represented in these matters by the State; and I propose to examine each of these three elements in turn, in relation to hanging, and see how far each can validly be said to apply to a punishment which is brutal and irreversible.***

Retribution seems to me to be the principle with least applicability. These are, after all, civilized times we live in, and hanging, which is only slightly less brutal than burning alive or garrotting, is basically out of keeping with the direction Society pretends it is moving in. We hear much these days of the civilized and Christian standards that the State is so anxious to protect, amongst which one of the foremost is the principle of the inviolability of human life, and there is something abhorrent in the State's deliberately and coldly violating one of its own fundamental standards. The maxim "An eye for an eye, and a tooth for a tooth" has surely no real application in modern sophisticated life. Indeed if retribution is to be considered as a valid element in a punishment of this nature, there is nothing illogical or to be decried in the attitude of the person observed by Richard Braithwaite, who in the 17th century wrote:

"To Banbury came I, O Profane One!
Where I saw a Puritane-One
Hanging of his cat on Monday
For killing a mouse on Sunday."

Of course the notion of revenge, which is the same thing as retribution, is in any event in certain circumstances excluded entirely as a reason for hanging. If a person committing a crime for which he may be hanged, can show that at the time he committed the crime he was insane (within certain rules), then he is not executed for what he did, but is detained. Logically, why should it make any difference that the person was not mentally responsible for what he did if retribution is to be a reason for hanging? — it is the act and not the motive that is being punished. Once one concedes that retribution must be excluded entirely in some cases as a reason for hanging, then it must be excluded in all cases. Instead of exacting retribution, would Society not be better advised to devote its efforts to putting right, in so far as this is possible, the wrong that has been done? Where the crime is murder would Society not be serving its own interests better by seeing that the dependents of the victim are cared for, rather than by disposing of the murderer? It is cold comfort for the family of the murder-victim to be told that society has dicharged its duty to them by hanging the wrong-doer, and so placing some other innocent family in the same position as themselves.

Society is under a duty to protect itself against the repeated commission of crimes, and particularly serious crimes, by the same person; and self-protection is obviously a valid element in punishment. Equally clearly Society must strike a just balance between the necessity to protect itself and the manner in which this is to be achieved. To hang traffic offenders would ,of course, protect Society against the further commission of such offences by the guilty (and indeed against the commission of any further crimes by them at all), but hanging traffic offenders obviously would not be tolerated. Where then is the line to be drawn? Society does not find it necessary to protect itself from repetitious traffic offenders by hanging them; and the question really is whether it is necessary for Society to protect itself in this way, against a repetition of serious offences by capital offenders. The difficulty in assessing this is that one has to rely to some extent on statistics, and these are notoriously unreliable. I think it was Sir Winston Churchill who said: "There are lies, damned lies, and statistics." Nevertheless, in this particular respect it is possible to see how people who have elsewhere been convicted of what would amount to capital crimes in this country, who have been

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* *Reform, which is so important an element in every other punishment, naturally has no part in this one.*

detained and subsequently released, have thereafter conducted themselves with rectitude. The percentage of such persons who again commit crimes of violence or serious crimes is very small. The overwhelming majority of such people, once they are released from prison, behave themselves in exemplary fashion. The irony of the situation in this country, of course, is that the person most likely to repeat a serious crime is the person who commits the crime for pathological reasons: as I have already said, if it shown that the criminal was insane within the meaning of certain rules, then he is not hanged, but detained at the State President's pleasure. Society then puts itself in the position that it detains the people most likely to commit serious crimes again, and hangs those least likely to do so.

Before Society resorts to barbarity itself, it must be shown that there is no reasonable alternative open to it. So far as the element of self-protection is concerned, all the available facts negative the suggestion that it is essential. It is a trite saying that things are arranged at a criminal trial so that ninety-nine guilty people are acquitted rather than one innocent person be convicted — is the same principle not to be applied to the punishment? Surely one is not to hang the ninety-nine because the one man may again commit a serious crime.

The argument that the protagonists of hanging really rely on is, of course, that hanging deters. It cannot be disputed that all punishment deters, and there can be no doubt that hanging deters more than any other punishment. However the matter must be considered on the basis whether hanging deters so much more than the punishment which would be substituted for it, that it is justified. Historically deterrence has always been the great cry. In England in the 19th century, when efforts were being made by the reformers to reduce the number of crimes for which a person might be hanged, the argument always was that if hanging were to be abolished no person would sleep safe in his bed. This ignores the reasons for which capital crimes are committed. Crimes can today be divided into the common-law crimes (such as treason, murder, and rape) and the statutory crimes. These latter encompass a very wide variety of activities and include "terrorist" activities. If one has regard to the case histories of common-law capital crimes, one finds that very few of them are, in any sense, premeditated. Almost all of them are committed on the spur of the moment, and certainly before the criminal has time to think, in any sense, of the punishment that waits him. It is true that one finds crimes in which a person coldly and deliberately murders another, but it can surely, hardly be suggested that such a person is in any real sense normal. In any event the rules relating to criminal insanity are archaic and illogical, as a comparison of particular case histories will show. A person will be hanged if he unlawuflly and intentionally (in the sense that a person is presumed to intend the natural and probable consequences of his act) kills another, unless it can be shown either that he did not appreciate the nature of his act, or if he did, that he did not know that what he was doing was wrong. Thus in England a man with a history of abnormality and mental illness from the age of 4, who murdered (at the age of 26) both his parents by battering them with an iron pipe, to get some money and his father's car in order to see his girl-friend in London, was duly hanged; because it could not be shown that he did not know that what he was doing was wrong. To argue that the prospect of being hanged deters such a person from committing his crime is absurd.

"Political" and "Terrorist" crimes (depending on your viewpoint) are, of course, in a different category. History does not show that the most Draconian measures will be effective in deterring people from committing these sorts of crimes. People were freely executed at the times of both the French and the Russian Revolutions (to give just two examples), and there is nothing to suggest that the punishment deterred them from acting in the way in which they did. However we do not have to rely on ancient history to see the invalidity of this argument demonstrated. Legislation was introduced in Rhodesia a few years ago, in which it was made compulsory for the Judge convicting a person of particular offences to pass the death sentence. Now even in the common-law crime of murder there exists a loophope with regard to hanging: if it is found that there are "extenuating circumstances" then the Judge has a discretion whether to pass the death sentence or not. Protests against the new legislation were made by appropriate bodies, but the answer smugly given was that unless criminals knew that on conviction they would be executed the type of crime would not cease. The crimes encompassed were those that might broadly be termed "terrorist crimes" — carrying explosives, bottles of inflammable liquid, etc. However, owing to Rhodesia's peculiar constitutional situation, no person convicted under the so-called "Hanging Clauses" has in fact been executed;

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**It is axiomatic that Love should be the predominant Christian impulse, and that the primary form of love in social organization is Justice.**

***William Temple.***

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and yet the State has effectively put an end (by and large) to the type of crime the punishment was designed to prevent. This of course makes nonsense of the idea that this type of crime can only be stopped if you deter the criminals by threatening to hang them. I always feel that one of the weaknesses inherent in the arguments of the protagonists of the abolition of the death sentence however, is their reliance on statistics. They are anxious to point out that in Sweden, for instance, after the abolition of the death sentence, the number of capital offences committed dropped. The statistics quoted are, of course, correct, but are, I feel, of no more applicability than the fact that no lawyer has ever been taken in a shark attack on the South Coast of Natal is to an advocate disporting himself in the Durban surf. However even without statistics there is nothing to suggest that hanging deters in the sense that it was intended to deter; that is, it deters where no other punishment would do so.

I have throughout referred to hanging and not to capital punishment. I have done this quite deliberately because the phrase "capital punishment", is a euphemistic one. One can talk about capital punishment in general terms, as though it were merely a debating point, and not something that directly concerns the individual. Nobody discussing capital punishment is obliged to think of the mechanics of the matter, which is wrong; because the mechanics are at least as objectionable as the whole concept of Society taking another person's life. Most capital crimes are committed swiftly; but the criminal when apprehended can expect to be kept waiting for a period of many months before he is hanged. He is initially detained while the Police conduct their investigations. There is then a preliminary examination before a Magistrate. Thereafter the accused is brought before the Supreme Court and is tried. There may well then be an appeal, and subsequent thereto the State President has to decide whether to exercise his prerogative of mercy or not. At the end of it all there is the hanging itself. Few of us have ever witnessed a hanging, but those that have, say that it is not an experience that one can ever forget. It is not correct to assume that the person to be hanged treats the whole matter as though it were no more than a visit to the dentist — something to be bravely borne and soon over. In many cases the person to be hanged has to be dragged screaming to the gallows. He has his arms pinioned behind his back, and is efficiently, if not always speedily dispatched. It is always assumed amongst what I will term the English-speaking world, that hanging is a humane and quick means of killing a person; but there is reason to suspect that this is not in all cases, true. Doctors have on many occasions found it difficult to certify when the hanged person was, in fact, dead, and it has been known for a person's heart to beat for as long as twenty minutes after he has been hanged. There are, indeed, other and more revolting details attached to hanging a person into which I need not go to make the point that hanging is cruel and barbaric.

Why then does Society continue to employ a punishment which is revolting and unnecessary? The answer is twofold? It is retained as a punishment because it has always been the traditional punishment for certain types of crimes, and in a Society where the State assumes that the individual exists for the State, and not the State for the individual, the very element of

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It is significant that we in South Africa tend to think of justice primarily in its negative, external and legal aspects: that is insofar as the State acts to defend the status quo in society, maintaining law and order, and punishing those who by crime or subversion seek to undermine society.

The most fundamental meaning of justice is not the negative one of simply preventing anarchy and crime, but the positive one of offering and securing benefits for the whole of society. Justice means the securing of a form of social equality — namely equal opportunities for all men to realise their potential humanity to the full. Justice means establishing in individual life and society those structures of power which will guarantee to all men the fullest possible freedom to exercise their rights and so become more fully human.

*Ian Thompson.*

brutality and horror is one that the State wishes to preserve. It is always extraordinarily difficult to get change in anything which has become traditional. I am sure that everyone at school recalls certain "traditions" which have no foundation in logic, but which are, nevertheless, firmly entrenched. I recall at my own school that it was a "tradition" that no person was entitled to put so much as a foot on certain lawns. The transgressors of this "tradition" was beaten to remind him of the error of his ways. Anyone suggesting abolishing such a tradition faces great obstacles. There are always a number of protagonists who come forward to say, not only that the tradition should be preserved, but that there are good reasons for its preservation. This is particularly true where the tradition reserves certain rights for a small section — again to give the example of school, the abolition of a tradition giving certain unjustified rights to the Sixth Form will be bitterly opposed. If no good reason exists then some will be found, and the performance of many of the Judges, Bishops and others, when the abolition of hanging was debated recently in England, shows that logic plays a small part in their opposition.

Although the second reason I have given above for the retention of hanging appears to have no obvious relationship to the argument based on tradition, further examination will demonstrate that there is a close relationship between the two. "Society" here means a white society, and the equation is between this society and the State. No advocate of abolition in this country will meet with any success by demonstrating its ineffectiveness or cruelty. It is not only traditional, but is thought to be an essential part of the apparatus employed to preserve for the minority, rights which should be shared with the majority. Society is, and is intended to be, unjust, and until this is changed there does not seem to be any prospect that Capital Punishment will be abolished, however far along its Christian path the State treads. People, however, should think about something which is such a facet of life; and I am sure that no thinking person can condone something which has its true place beside the slave-galley and the rack.

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**In the six months period 1st July 1966 to 31st December 1966, 79 people were sentenced to death in South Africa, 66 people were executed during the same period.**

*Hansard 3rd March, 1967.*

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# Traditional Way of Life?

A rape! a rape! . . . Yes, you have ravish'd
justice;
Forced her to do your pleasure.

*John Webster.*

**When one attempts to list the legal measures available to the Government for silencing legitimate opposition one realises how far South Africa has strayed from the Western concept of Justice.**

Restrictions are so numerous that the ordinary man in the street is not aware of the loss of his rights, nor does he know which rights remain; He can no longer distinguish justice from injustice, and accepts governmental edict without question.

The latest repressive measures, the Suppression of Communism Amendment Act and the Terrorism Act, both of which are dealt with fully elsewhere in this magazine, have been adopted as law in this last session with hardly any question at all, and these are only the latest additions to an already unbelievable number of unjust laws.

Six hundred and seventy five people were suffering under Banning orders at the end of 1966. Six hundred and seventy five people cannot meet

with more than one person at a time; many of them may not enter factories or places of education even if they previously earned their living there; their movement is confined within specific areas and their lives are completely disrupted.

Under the law permitting the Department of Justice to detain possible witnesses in Court actions for up to 180 days two hundred and eighty two people have been held in custody. Detention of witnesses cannot be justified and in any case by May this year only seventy five of these people had actually been called as witnesses.

Every year, for yet another year, legislation is extended to ensure that Robert Sobukwe, who was originally sentenced by a court to two years imprisonment is kept incarcerated on Robben Island. He is now arbitrarily held without trial.

Most White South Africans know of all these measures and justify their application because they are on the Statute Book, despite their obvious injustice. But what of the less publicised forms of persecution? What of house arrest? What of banishment? How many of us know how many and which people have been given Magisterial warnings? This method of silencing opposition is not well known and receives little attention. The victim is called before a magistrate and is "warned" to cease his (unspecified) activities. This "warning" is not publicised by the State nor, naturally, by the person warned. In the great majority of cases the victim ceases to take any active part in legitimate pursuits—and another opposition voice is lost.

Only the Minister can tell us how many applications for passports have been refused, and how many passports withdrawn. The normal right of a law-abiding citizen to the protection of his country's passport is no longer assured. Either a citizen stays within the confines of South Africa's frontiers or he is forced to apply for an Exit permit which prohibits his ever returning to his own country. Passports have been refused to people who wished to study or travel overseas as well as to those who wish to escape from the half life they are leading under restriction orders. How many valuable people have been lost to us by the granting of Exit permits?

This type of legislation puts so much power into the hands of the Department of Justice and the Police that the administration of the law is seriously affected. There have been far too many instances of questionable action by the Police in their dealings with both the Courts and the public. They who should set the example often appear to consider themselves above the law. Prisoners have been moved from one place of custody to another without record; spectators in the Supreme Court in Johannesburg have been interrogated by police who were reprimanded by the Judge; and so it continues.

Mass raids and mass arrests have become habitual. In 1966, in the Johannesburg area alone, seven thousand eight hundred and twenty people were arrested in the course of these "special operations." These people are tried with incredible speed in various courts, large numbers of them being in the dock at the same time. It is difficult to retain respect for law which operates on a conveyor-belt system. In a surprising number of cases no defence is offered and one can only assume that remand in custody is avoided at the cost of a plea of guilty.

During the year July 1965 to June 1966 five hundred and forty three thousand, nine hundred and sixteen (543,916) people were admitted to prisons in South Africa. Of these one hundred and sixty two thousand, four hundred and seventy two (162,472) were sentenced to terms of up to and including one month. There is no need to elaborate on these figures but it is obvious that our laws create astronomical numbers of petty offenders. Is it becoming part of our traditional way of life to go to prison when more than one in thirty two of our citizens are jailed each year.

Legal Aid for persons charged is minimal and is only provided by the State in capital offences. Since the banning of the Defence and Aid Fund people accused of political offences have often not been defended. There is as yet no substitute for the services rendered by this fund although there has been talk of this.

The Government, to illustrate its policy of separate development, continually cites the Transkei as a model of peaceful progress. Yet the people of the Transkei are subject to the severity of Proclamation 400. In 1965, one hundred and thirty seven people were detained under this proclamation, and in 1966 one hundred and nine people. Twenty three of these were detained for 180 days before being released without charge. Eleven were held for more than 200 days and then released without charge. The others were held for periods ranging between 3 days and 150 days. Of all the people detained, only one hundred were charged and of these fifty two were acquitted and forty eight convicted. Four of those charged had been held for up to more than 200 days before being charged.

South Africa presents a frightening picture to those who value the Western concept of Justice.

*(All figures in this article are taken from answers to Parliamentary questions published in Hansard.)*

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The use of force alone is but temporary. It may subdue for a moment; but it does not remove the necessity of subduing again: and a nation is not governed, which is perpetually to be conquered.

*Edmund Burke.*

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# MASS RAIDS IN JOHANNESBURG AREA DURING 1966

| Date | Area | Police engaged | Persons arrested | Convictions |
|---|---|---|---|---|
| 7.1.66 | Johannesburg Central | 673 | 201 | 201 |
| 13.1.66 | Dube Hostel | 350 | 90 | 90 |
| 21.1.66 | Johannesburg Jeppe | 123 | 95 | 95 |
| 4.2.66 | Johannesburg Jeppe | 605 | 381 | 381 |
| 17.2.66 | Johannesburg Jeppe | 409 | 168 | 168 |
| 2.3.66 | Johannesburg Jeppe | 404 | 162 | 162 |
| 3.3.66 | Hospital Hill | 1,087 | 993 | 990 |
| 4.3.66 | Johannesburg Jeppe | 638 | 175 | 175 |
| 11.3.66 | Johannesburg | 669 | 136 | 136 |
| 18.3.66 | Johannesburg Jeppe | 570 | 240 | 240 |
| 24.3.66 | Booysens | 974 | 380 | 380 |
| 14.4.66 | Jeppe | 105 | 76 | 76 |
| 25.4.66 | Johannesburg | 276 | 81 | 81 |
| 29.4.66 | Jeppe | 113 | 95 | 95 |
| 6.5.66 | Johannesburg | 470 | 102 | 102 |
| 12.5.66 | Johannesburg | 102 | 85 | 85 |
| 16.5.66 | Johannesburg | 190 | 70 | 70 |
| 27.5.66 | Jeppe | 510 | 130 | 130 |
| 30.5.66 | Fordsburg | 75 | 80 | 80 |
| 10.6.66 | Johannesburg | 337 | 105 | 105 |
| 24.6.66 | Soweto | 350 | 103 | 90 |
| 1.7.66 | Soweto | 400 | 51 | 39 |
| 4.7.66 | Pimville | 320 | 51 | 48 |
| 15.7.66 | Soweto | 400 | 92 | 61 |
| 22.7.66 | Johannesburg | 427 | 291 | 291 |
| 28.7.66 | Jeppe | 931 | 205 | 205 |
| 5.8.66 | Jeppe | 390 | 240 | 240 |
| 5.8.66 | Soweto | 365 | 97 | 93 |
| 13.8.66 | Alexandra | 600 | 1,050 | 684 |
| 19.8.66 | Soweto | 320 | 77 | 73 |
| 26.8.66 | Hospital Hill/Norwood | 974 | 690 | 690 |
| 7.10.66 | Johannesburg | 436 | 1,021 | 1,021 |
| 15.10.66 | Wemmer-pan Hostel | 717 | 307 | 307 |

*Hansard 28th February, 1967.*

It is difficult for those who have not themselves lived through the gradual establishment of a tyranny to understand the subtle dangers of the 'softening-up' process, the effect on all but very strong personalities of intimidation. Laws which would have aroused the fiercest opposition in 1947 meet with sullen aquiescence in 1957. Men feel frustrated and disheartened: opposition seems to be uniformly unsuccessful. They take for granted interventions in private life which they still dislike but to which they are becoming conditioned. And added to this is the intimidation exercised by so many laws and made more real by practical experience. — — — — — — — —

It is not always easy to see what course should be followed by friends of freedom in these circumstances. But at least they must keep their own minds clear, speak the truth boldly, and protest in every constitutional way open to them. To do less would be rank disloyalty to South Africa, who needs the honesty and courage of all her sons.

*(From "Civil Liberty in South Africa" by Edgar H. Brookes and J. B. Macaulay.)*

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This Magazine, as the official organ of the Black Sash, carries authoritative articles on the activities of the Black Sash. The leading articles adhere broadly to the policies of the organization, which does not, however, necessarily endorse the opinions expressed by the contributors.

All political comment in this issue, except when otherwise stated, by R. M. Johnston and S. Duncan, both of 37 Harvard Bldgs., Joubert Street, Johanesburg.

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# Dedication . . .

IN pride and humbleness we declare our devotion to the land of South Africa, we dedicate ourselves to the service of our country. We pledge ourselves to uphold the ideals of mutual trust and forbearance, of sanctity of word, of courage for the future, and of peace and justice for all persons and peoples. We pledge ourselves to resist any diminishment of these, confident that this duty is required of us, and that history and our children will defend us.

So help us God, in Whose strength we trust.

# Toewydingsrede . . .

MET trots en nederigheid verklaar ons ons gehegtigheid aan die land van Suid-Afrika, ons wy ons aan die diens van ons land. Ons belowe plegtig die ideale te handhaaf van onderlinge vertroue en verdraagsaamheid, van die onskendbaarheid van beloftes, van moed vir die toekoms, van vrede en regverdigheid teenoor alle persone en rasse. Ons beloof plegtig om ons te verset teen enige vermindering hiervan, oortuig dat hierdie plig ons opgelê is en dat die geskiedenis en ons kinders ons sal regverdig.

Mag God ons help, op Wie se krag ons ons verlaat.