Judicial Review and the Problems of Southern Africa

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COMMENTARY

Judicial Review and the Problems of Southern Africa*

Honorable Michael M. Corbett**

On the 6th June 1966 an eminent American visitor addressed the academic staff and the student body of the University of Cape Town. The occasion was a Day of Affirmation organized by the students. The speaker commenced his address by saying:

I come here because of my deep interest and affection for a land settled by the Dutch in the mid-seventeenth century, then taken over by the British, and at last independent; a land in which the native inhabitants were at first subdued, but relations with whom remain a problem to this day; a land which defined itself on a hostile frontier; a land which has tamed rich natural resources through the energetic application of modern technology; a land which once imported slaves, and now must struggle to wipe out the last traces of that former bondage. I refer, of course, to the United States of America.

The speaker was the late Senator Robert Kennedy. The opening words of his address emphasize in dramatic fashion the historical coincidences and the common experience which link your country and mine. I have no doubt that this community of history and experience has contributed in no small measure to the interest and concern shown in recent years by you and your countrymen regarding the present state and future welfare of South Africa. The honour which I have been accorded in being invited to deliver this lecture is, I surmise, further evidence of this interest and concern.

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* Editor’s note: This is the unedited text of the Henry C. Morris Distinguished Lecture on International Law delivered by Judge Michael M. Corbett to the Chicago Bar Association on October 1, 1980, including the footnotes of the author. Additional footnotes containing further explanation and/or citation have been inserted by the editorial board. These footnotes are designated by the notation (ed. note) and are set off by brackets, to indicate that they are not those of the author.


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The comparison implicit in Senator Kennedy's words has much validity, but it also has its limitations, recognition of which is essential to a proper understanding of my country. Historically, South Africa and the United States of America have a great deal in common, but in certain respects their paths have diverged. The Cape, where the first Dutch settlers established themselves on the southwestern tip of Africa in the mid-seventeenth century, remained essentially a Dutch settlement, despite an influx of French Huguenots and the advent of numerous German-speakers, for more than 150 years before being finally taken over by the British. By 1815, when British suzerainty over the Cape was formally established, the frontiers of the settlement had been extended in a wide arc, and to the east reached as far as the Fish River, some 500 miles from Cape Town. History also shows that the British tried to make the Cape a British colony; that they introduced British settlers; that they sought to replace the Dutch language by English; that they emancipated the slaves.

Unlike America, at the Cape colonial resentment of British rule was largely confined to the Dutch community and their reaction was not to rebel but to trek away into the untamed, sparsely-populated hinterland and form their own settlements, the Boer republics of the Transvaal and the Orange Free State. But these republics did not remain independent for long. Gold was discovered and at the end of the nineteenth century they were overrun by British imperialism and eventually subjugated after a bloody and bitter three-year struggle. In this crucible of conflict the Afrikaner nation was born. Fortified by the bonds of church, language and culture, Afrikaner nationalism has grown in strength during the present century. Far-visioned endeavours to achieve a political reconciliation between Boer and Briton have largely failed. The most promising of these was ripped asunder when Hitler invaded Poland on 1 September 1939, and the South African Parliament three days later resolved by a majority of 80 votes to 67 to declare war on Nazi Germany. In 1948 Afrikaner nationalism triumphed, and the National Party has remained in office, with increasing electoral support, ever since. Afrikaner nationalism, for which there is no American parallel, remains one of two dominant political forces in South Africa today. The other is Black nationalism.

Another difference between our two countries is the obvious geographical fact that South Africa is situated on the African continent. Whereas Black Africans were imported into the United States as slaves, in South Africa they were part, and numerically
the most substantial part, of the indigenous population. The Cape settlers and the migrant Bantu-speaking peoples of Southern Africa first met on the Fish River. During the course of the nineteenth century, Black resistance to the trekkers and other white settlers was broken and the Bantu tribes settled the territories left to them. Until the Second World War the general pattern in South Africa was much the same as that to be found in the rest of colonial Africa. All was, for the most part, quiescent. The continent was often likened to a slumbering giant. But the war and its aftermath appeared to change this. The empires of the European imperial powers started to break up. The United Nations Organization was formed and its general assembly proclaimed the principle of self-determination for all peoples. A spirit of fierce nationalism overtook the world.

Against this backdrop the African giant stirred from his slumbers. Nationalist liberation movements in colonial territories campaigned actively, and often violently, to throw off the colonial yoke, to attain independence; and in the end they were all successful. The 1950's and the 1960's saw the emancipation of Africa. By the end of the 1960's, indigenous Black governments had been installed in all the former colonial territories in Africa, save for South Africa's immediate neighbours: viz., Southern Rhodesia, now Zimbabwe; the administered territory of South West Africa, now called Namibia; and the two Portuguese colonies of Angola and Mozambique. But the status quo in these territories was not long maintained. The Portuguese colonies were the first to go, abandoned to Black and so-called Marxist regimes. The recent history of Zimbabwe is fresh in our recollections. Namibia is, hopefully, in the process of a peaceful evolution to independence.¹ That leaves the focus on South Africa.

Like the rest of Africa, South Africa has also experienced the growth of nationalism among its indigenous Black peoples, and to the outside observer it might be tempting to conclude that the pattern of development in the rest of Africa will, and should, be repeated to the south of the Limpopo. But it would be wrong, in my view, to equate South Africa with the former colonial territories of Africa. South Africa is not a colonial possession: it is, and has been since 1961, a legally-constituted, independent republic, outside the British Commonwealth. The whites of South Africa, particularly

the Afrikaners, are not European expatriates: they are Africans, whose successive forebears have, in many instances, lived in South Africa for almost as long as there have been white people living in North America. The situation cannot be resolved merely by cutting the colonial umbilical cord and handing over [the country] to the Blacks.

There is another factor as well. Like the USA, South Africa is a country which, to use Senator Kennedy’s words, “has tamed rich natural resources through the energetic application of modern technology.” It has become the most developed industrial state in Africa and, for its size, probably the wealthiest. It produces food in abundance. It enjoys a very favourable trade balance. It exports minerals (including some which are of great strategic value to the West), coal, diamonds, agricultural products, food and manufactured goods to countries all over the world, including incidently Black African countries. The United States is its largest trading partner. It provides a communications network and efficiently-run ports which serve a number of southern and central African countries. Many thousands from other African countries come to work in South Africa.

In the last decade or so the Eastern-bloc countries, led by the Soviet Union, have shown increasing interest in Africa. This has taken the form, mainly, of intervention in conflict situations with a view to securing Marxist regimes installed wherever possible. Weaponry, advisers, training and political indoctrination have been supplied on a liberal scale. In recent years Cuban surrogates have been provided as well. The events of the past year or so should have dispelled all doubts about Soviet expansionism. Many South Africans believe that South Africa is regarded by Russia as the richest prize on the African continent.

The manner in which successive South African governments have sought to meet the challenges of these post-war years is, I presume, well known to you, and I do not propose to dwell thereon. All I wish to say is that there is a substantial and growing number of white South Africans who believe that present Government policies do not provide the answer; that the mainstream of Black nationalism, much like Afrikaner nationalism before it, aims broadly at achieving the fulfilment of Black aspirations for equality of treatment and opportunity, for the recognition of the dignity of man, and for due participation in the political processes whereby the country is run; that the challenge of Black nationalism can only be met by a comprehensive settlement negotiated with re-
sponsible and acknowledged Black leaders; that in such a settle-
ment process necessary parties would include the other minority
groups, viz., the Coloured peoples and the Asians; and that the
longer this process of negotiation is put off, the more likely it is
that attitudes will polarize, that the Black leaders will become
more militant, more extremist, and that the bargaining position of
the whites will worsen.

I am hopeful that in time this view will prevail. Already substan-
tial changes have taken place. Constitution-making is in the air.
There is more fluidity in white attitudes than there has ever been
before. The lesson of Zimbabwe is recent and clear. At the same
time prejudice, possessiveness and fear hold the whites back.
Prejudice can be overcome, possessiveness can be subordinated to
the necessaries of the situation, but how to allay the fears? For
these fears are very real. They are the fear that the whites, out-
numbered by more than four to one, will be completely submerged
in a Black state; the fear that there may be discrimination against
whites because they are white; the fear that under the banner of a
more equitable distribution of wealth, whites will be deprived of
their property and that there will be a movement away from the
free enterprise system; the fear that there will be political instabil-
ity, perhaps inter-tribal conflict or even a military coup d'etat, re-
sulting in the establishment of a one-party state; the fear that the
economy of the country will be mismanaged, that South Africa's
great resources and rich potential will be dissipated, that corrup-
tion may become rife; the fear that standards may drop; the fear
that personal freedom, particularly freedom of speech and of the
press, curtailed as they are today, will disappear; the fear that au-
thoritarianism will take over. And can anyone who has followed
the post-independence history of the emergent African states dis-
miss these fears as being groundless?

It must immediately be conceded that there is no ready answer
to all these problems, no ready method whereby these fears may be
allayed. If there were, it would have been found by now. It does,
however, lie within the power of the constitution-maker to devise a
political and social framework within which the danger of these
fears being realised may, at least, be substantially diminished. And
it is my belief that a most important instrument in the hands of
the constitution-maker is the concept of judicial review, coupled
with a constitutionally-entrenched bill of rights. This brings me back to the United States of America.

When, in 1803, the United States Supreme Court declared in *Marbury v. Madison* that the Constitution of the United States of America was a "superior, paramount law, unchangeable by ordinary means," and held that a federal statute repugnant to the Constitution was invalid and should be disregarded, the Court established authoritatively that American courts enjoyed a power of judicial review over legislation. Of course, the concept of such a power of judicial review was not a wholly novel one. As Professor Cappelletti has put it, "... the idea did not spring new and fully developed from the head of John Marshall." It was very much on the minds of the delegates to the Constitutional Convention in Philadelphia in 1787 and was widely debated by them, although they failed to spell it out clearly in the Constitution itself. Indeed, as you all well know, the Bill of Rights, comprised in the first ten amendments, was a later addition. Prior to 1803, American courts had displayed what Professor Abraham has described as an "incipient concern with judicial review." The concept of a superior or natural law with which man-made laws should conform may be traced back to classical times. Even in England, in the well-known *Bonham's Case*, Chief Justice Coke had in 1610 asserted the power of the courts to adjudge void an act of Parliament which was "against common right and reason, or repugnant, or impossible to be performed." Though it must be added that in that instance, the English Parliament simply re-enacted the statute, and that was about the last that was heard of judicial review over parliamentary legislation in England.

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3. 5 U.S. (1 Cranch) 137 (1803).
4. Mauro Cappelletti, Judicial Review in the Contemporary World 25 (1971) [hereinafter cited as Cappelletti].
6. Id. at 308; see also Cappelletti, supra note 4, at 41.
But although judicial review was thus, in a sense, the product of an evolutionary process of thought, the especial contribution of *Marbury v. Madison* and the subsequent decisions of the Supreme Court entrenching and diversifying the system of judicial review in America is that they first established it as a working reality, and rendered possible and effective the protection of rights granted by a written constitution against not only executive and administrative acts, but also against parliamentary legislation. Since then, in many instances inspired no doubt by the American example, about 60 countries throughout the world have adopted some form of judicial review. Professor Cappelletti has summed up the position thus:

Our own time has seen the burgeoning of "constitutional justice", which has in a sense combined the forms of legal justice and the substance of natural justice. Desirous of protecting the permanent will, rather than the temporary whims of the people, modern states have re-asserted higher law principles through written constitutions. Thus there has been a synthesis of three separate concepts: the supremacy of certain higher principles, the need to put even the higher law in written form, and the employment of the judiciary as a tool for enforcing the constitution against ordinary legislation. This union of concepts first occurred in the United States, but it has since come to be considered by many as essential to the rule of law (Rechtsstaat) anywhere.

Perhaps one of the most interesting and instructive systems of judicial review is that to be found today in West Germany.

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11. Cappelletti, supra note 4 at 42.

I should perhaps interpolate that I have no first-hand knowledge of that country, but have relied mainly on Professor Kommers' most interesting work, *Judicial Politics in West Germany*, published in 1976. Unlike certain other countries, notably Australia and Japan, West Germany has not copied the United States model. It has adopted what is termed the "centralized" type of judicial control over the constitutionality of, *inter alia*, legislation. In other words, in contrast to the American system, whereunder the power of control is given to all judicial organs of the ordinary legal systems, state and federal, in West Germany the power is vested solely in a special Constitutional Court (*Bundesverfassungsgericht*), which stands outside the German legal system. Although the members of the Court must possess the qualifications for high judicial office and some of the appointees are former federal judges, the Court is regarded as a political rather than a legal institution.

The Court was created in 1951 in pursuance of the 1945 agreement at Potsdam, to the effect that the German judicial system should be re-organized. Since then, the Court has undergone structural modifications. Today it consists of sixteen justices, who sit in two distinct panels, or "senates", as they are known, one presided over by the president of the Court and the other by the vice-president. Half of the members of the Court are elected by the

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*STATE L.J. 503 (1960). See generally F. Friauf, Techniques for the Interpretation of Constitutions in German Law, in PROCEEDINGS OF THE FIFTH INTERNATIONAL SYMPOSIUM ON COMPARATIVE LAW (1968) [hereinafter cited as Friauf]. (ed. note)]


[16. Cappelletti, supra note 4, at 46, 49-50.]

[17. KOMMERS, supra note 13, at 129-31; but see Murphy & Tanenhaus, supra note 12, at 30-31. See also D. Kommers, The Socialization and Recruitment of West German Constitutional Court Judges, in FRONTIERS OF JUDICIAL RESEARCH (J. Grossman and J. Tanenhaus ed. 1989); Bachof, WEST GERMAN CONSTITUTIONAL JUDGE BETWEEN LAW AND POLITICS, 11 TEX. INT'L L.J. 403 (1976). (ed. note)]

[18. See KOMMERS, supra note 13, at 70-82. (ed. note)]
Bundestag,¹⁹ and half by the Bundesrat.²⁰ All appointees must be at least 40 years of age and must possess the qualifications for judicial office stipulated by German law. Six of them, three in each senate, must come from the ranks of sitting federal judges. They are appointed for twelve-year, non-renewable periods of office and must retire at the age of 68 years. They are not subject to impeachment by Parliament and can be removed from office only by the President of the Federal Republic, acting pursuant to a motion filed by the Court itself.

Essentially the function of the Court is to enforce the Basic Law (Grundgesetz), the first twenty articles of which contain an elaborate bill of rights.²¹ Its jurisdiction is divided between the two senates. The first senate deals mainly with judicial review of legislation and with the substantive rights of persons, while the second senate is concerned primarily with the procedural rights of persons and with constitutional disputes between governmental agencies. Unlike the United States Supreme Court, the German Constitutional Court decides constitutional issues not in the ordinary course of litigation, but as separate, self-contained questions submitted to the Court. The bulk of the Court's work is concerned with "concrete judicial review" and "constitutional complaints." "Concrete judicial review" arises out of an ordinary lawsuit proceeding in a state or federal court. If the court in question is convinced that a federal or state law under which the case has arisen is unconstitutional, it must certify the constitutional question for determination by the Constitutional Court before the case can be decided. Where this is done, the Constitutional Court is obliged to allow the federal or state organ involved to enter the case and be heard. The Constitutional Court then decides the constitutional

¹⁹. The Bundestag is the lower house of parliament in West Germany, elected through a modified form of proportional representation. Art. 38, Basic Law of the Federal Republic of West Germany. See Murphy & Tanenhaus, supra note 12, at 23. The Bundestag elects its one-half of the Court through a 12-man selection committee. Party representation on this committee is directly proportionate to each party's relative strength in the Bundestag. Kimmers, supra note 13, at 89-90. (ed. note)

²⁰. The Bundesrat is the upper house of the West German parliament, comprised of Laender (states), cabinet officers and a limited number of representatives selected by the individual states. Murphy & Tanenhaus, supra note 12, at 24. The Bundesrat selects as a whole its one-half of the Court, with a two-thirds majority required for selection. Kimmers, supra note 13, at 89-90. (ed. note)

²¹. For the Federal Constitutional Court's jurisdiction, duties, and responsibilities relating to the Basic Law, see Article 93 of the Basic Law of the Federal Republic of West Germany. See also Friauf, supra note 12, at 9-11; Kimmers, supra note 13, at 100-08; Murphy & Tanenhaus, supra note 12, at 25, 29-30. (ed. note)
question and the court hearing the lawsuit is obliged to accept and apply this decision. "Constitutional complaints," on the other hand, comprise complaints lodged by individuals or corporate institutions who claim that their basic rights have been violated by public authority. The process is quite informal. The majority of complaints are handwritten and sent to the Court through the post.

A full description of how the Constitutional Court handles its workload would unduly protract this address, but a few details might be of interest to American lawyers. The vast majority of cases are disposed of without hearing legal argument by the representatives of the parties. In fact, according to Professor Kommers, in the period from 1951 (when the Court commenced its work) to July 1971, only 151 cases were decided after oral argument, which is an average of about four cases annually per senate.22 The Court is a busy one. During the period from September 1951 to December 1972 (a period of just over 21 years) 1379 cases of concrete judicial review and 25,040 constitutional complaints were filed.23 In addition, there were some 473 cases of other categories.24 For various reasons, a number of these cases were terminated without a decision, but the volume is nevertheless impressive. Decisions of each senate are taken by a majority vote when unanimity cannot be achieved. However, much importance is attached to the achievement of unanimity and considerable effort is expended to this end. American lawyers will perhaps be surprised to hear that only in 1971 was the writing and publication of dissenting opinions permitted.

As a practical institution the Court can be regarded as an enormous success. It is greatly respected. According to Professor Kommers, "... no other judicial tribunal in German history has achieved the status or measure of independence that the Federal Constitutional Court currently enjoys."25 It is freely resorted to. The size of its workload has already been referred to. (The Germans are, of course, litigious people: even more so, it would seem than the Americans—if that be possible! To illustrate this, Professor Kommers points out that West Germany, with one-

22. KOMMERS, supra note 13, at 180.
23. Id. at 163 (Table 8—Workload of Federal Constitutional Court from September 1, 1951 to December 31, 1972). (ed. note)]
24. Id. (ed. note)]
25. Id. at 86.
fourth of the population of the USA, has in its state and federal judicial systems over twice as many judges!) The Court has operated actively and fearlessly. Here is Professor Kommers' assessment:

... the Constitutional Court has invalidated scores of statutory provisions on equal protection grounds, cutting a fearless swath through federal and state legislation that makes the U.S. Supreme Court look timid by comparison.26

Considering the unhappy political history of Germany during the thirty years or so prior to the establishment of the Court, this is a remarkable achievement.

Well, so much for West Germany. Let us come back to Africa, to South Africa in particular, and to the problems which will confront those seeking a new political and constitutional dispensation in that country. In this connection the critical questions which people will ask are: what are the chances that a bill of rights, fortified by a system of judicial review which would seek to render such rights inviolate even at the hands of the legislature, would be acceptable to the majority of South Africans? Can such a system be effective? Will Parliament, when the conflict of wills comes, submit to the supremacy of the courts?

Obstacles to the acceptability of judicial review there will undoubtedly be. Blacks may possibly feel that the system is antidemocratic, that it will place an unwarranted clog upon the popular will. They may ask, with some justification, why it is only when they acquire a share of political power that the system is considered necessary. They may feel that, since in the beginning such a court would necessarily be composed largely of white judges, it would be unsympathetic to their point of view. But these obstacles need not be insurmountable. In any event, judicial review would, I visualize, be an integral part of a comprehensive package deal between the negotiating parties.

The effectiveness of a system of judicial review as a protector of basic rights, in the South African scenario which I have postulated, is a far more imponderable question. The history since independence of the Black states of Africa, unfortunately, does not provide grounds for ready optimism. Most of the former British colonies in Africa set off down the path of independence with constitutions containing a justiciable bill of rights, modelled on the European

26. Id. at 244.
Convention on Human Rights. The first of these was Nigeria; the most recent was Zimbabwe. Tanzania rejected a bill of rights in 1961 at the time of independence and again in 1965 when it converted to a one-party state. In certain other states, e.g., Zambia and Sierra Leone, the entrenched bill of rights has, interestingly enough, survived the change-over to a one-party state. Among Commonwealth African states, only in Malawi has a bill of rights actually been abandoned. Nevertheless, as an effective protector of human rights the justiciable bill of rights does not have a particularly impressive record in Africa. There is not the time to particularize this assertion in much detail, but I would in this connection refer to the view expressed at an international conference on human rights held at the University of Cape Town last year by an expert on the subject, Professor James S. Read, of the University of London. He stated:

Thus in these early years of independence in black Africa the legal protection of human rights has not flourished; perhaps it is surprising that it has been attempted at all, and persisted in, when the fragility of constitutions generally has been demonstrated by military coups and civil war; when the economic problems faced by governments have been well-nigh insurmountable and accentuated for many of them by natural calamities like drought and famine.

It is especially in regard to primary, as opposed to subsidiary,

[27. See YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1970). (ed. note)]
[33. HUMAN RIGHTS: THE CAPE TOWN CONFERENCE 172 (Juta 1979).]
legislation that, according to Professor Read, the courts of Commonwealth African states have shown an unwillingness to hold that the legislation in question was contrary to the Constitution.\textsuperscript{44} The case of Akar v. Attorney-General of Sierra Leone\textsuperscript{45} is, nevertheless, an instance of a contrary trend. In that case the appellant, Akar, had lived in Sierra Leone for 56 years prior to that territory being granted independence in 1961. He was the son of a Lebanese father and an indigenous mother. In accordance with the new Constitution of Sierra Leone, he acquired citizenship of the new state on independence.\textsuperscript{46} About a year later, legislation was passed, with retrospective effect, purporting to amend the Constitution so as to limit citizenship to persons of negro African descent, which was defined to mean a person whose father and father's father were negroes of African origin.\textsuperscript{47} This excluded the appellant. The amending legislation was not passed in the manner required for an appropriate amendment of the Constitution. The Constitution contained a bill of rights protecting fundamental rights and freedoms,

\begin{itemize}
\item [34.] Id. at 164.
\item [35.] [1969] 3 All E.R. 384 (P.C.).
\item [36.] Section 1(1) of the new Constitution of Sierra Leone provided:
\begin{quote}
Every person who, having been born in the former Colony or Protectorate of Sierra Leone, was on the twenty-sixth day of April, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961:
Provided that a person shall not become a citizen of Sierra Leone by virtue of this subsection if neither of his parents nor any of his grandparents was born in the former Colony or Protectorate of Sierra Leone. (ed. note)]
\end{quote}
\item [37.] Section 2 of Act No. 12 of 1962, Constitution (Amendment) (No. 2) Act 1962, entitled “An Act to Provide for the Amendment of Certain Sections of the Constitution,” provides:
\begin{quote}
2. Section 1 of the Constitution is hereby amended—
\begin{enumerate}
\item[(a)] by the insertion immediately after the words “Every person” in the first line of subsection (1) thereof of the words “of negro African descent”; and
\item[(b)] by the addition at the end thereof of the following new subsections—
\begin{quote}
"(3) For the purpose of this Constitution the expression ‘person of negro African descent’ means a person whose father and his father’s father are or were negroes of African origin.
(4) Any person, either of whose parents is a negro of African descent and would, but for the provisions of subsection (3), have been a Sierra Leone citizen, may, on making application in such manner as may be prescribed, be registered as a citizen of Sierra Leone, but such person shall not be qualified to become a member of the House of Representatives or of any District Council or other local authority unless he shall have resided continuously in Sierra Leone for twenty-five years after such registration or shall have served in the Civil or regular Armed Services of Sierra Leone for a continuous period of twenty-five years.”
\end{quote}
\end{enumerate}
\end{quote}

The provisions of the Act would deprive appellant of the citizenship granted him by the new Constitution which came into operation immediately before April 27, 1961. (ed. note)]
including the freedom from discrimination on the grounds of race. A proviso stated in effect that this did not apply to any law in so far as it made provision for discrimination which was, "having regard to its nature and to special circumstances pertaining . . . [to the persons affected] . . . reasonably justifiable in a democratic society." 

Akar approached the Supreme Court of Sierra Leone for a declaration that the amendment was ultra vires the Constitution and void. His claim was heard by the Chief Justice and succeeded. This decision was reversed by the Sierra Leone Court of Appeal. A further appeal to the Privy Council in England was, however, successful (by a majority of 4 to 1, Lord Guest dissenting), and in substance the decision of the Chief Justice was restored. The majority of the Privy Council held that the amendment was clearly a discrimination on grounds of race; that it was doubtful whether it was one which was "reasonably justifiable in a democratic society"; but that, in any event, no special circumstances justifying the law existed. But in the end, the Government of Sierra Leone had the last word. It had, in the meanwhile, amended the constitutional protection retrospectively to permit such discrimination in citizenship laws.

In many ways the difficulties encountered in Black African states are understandable. Professor Abraham has stated that:

Experience has demonstrated that those countries that have exhibited stable or moderately stable traditions of judicial review

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[39. Appellee argued that the exception set forth in subsection (4)(f) of Section 23 of the Constitution applied to this case. The excepting subsection provides:

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

* * * 

(f) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

3 All E.R. 384, 388 (P.C.). (ed. note)]

[40. The order of the Court of Appeal of Sierra Leone was dated April 5, 1968. Id. at 385. (ed. note)]

[41. Id. (ed. note)]

[42. Id. (ed. note)]

[43. See Constitution of Sierra Leone, Ch. II, § 17, reprinted in Blaustein & Flanz, XIII, supra note 28. (ed. note)]
are generally characterized by: (1) regime stability; (2) a competitive political party system; (3) significant horizontal power distribution; (4) a strong tradition of judicial independence; and (5) a high degree of political freedom.\textsuperscript{44}

Post-independence Africa has been plagued, as Professor Read says, by regime instability, and the rule of the emergent African states has been characterized by suppression of opposition political parties and the curtailment of political freedom. Generally, it has not been favourable climate for the establishment of a strong tradition of judicial independence.

It must readily be conceded that South Africa's own record is not an encouraging one. While the independence of the South African judiciary is, I think, above reproach, and while South African judges over the years have not hesitated to strike down executive or administrative acts found to be unlawful and subordinate legislation found to be unauthorized, parliamentary legislation has in general remained sacrosanct.\textsuperscript{45} This is mainly due to the fact that South African constitutions, with one exception (the pre-Union constitution of the Orange Free State), have not contained a bill of rights and have not conferred on the courts plenary powers to review the validity of acts of parliament. Nevertheless, in two famous instances, \textit{Brown v. Leyds NO},\textsuperscript{46} decided by the Supreme Court of the Transvaal Republic in 1897, and \textit{Harris and Others v. The Minister of the Interior and Another}\textsuperscript{47} (popularly known as "The Coloured Vote Case"), decided by the Appellate Division of the Supreme Court of South Africa in 1952, the courts did declare laws passed by parliament to be invalid on the ground that they had not been properly and constitutionally enacted.\textsuperscript{48} But in each case

\begin{itemize}
  \item \textsuperscript{44} H. J. ABRAHAM, THE JUDICIAL PROCESS 279-80 (3d ed. 1975).
  \item \textsuperscript{45} See generally Hahlo & Maisels, The Rule of Law in South Africa, 52 VA. L. REV. 1 (1966) (ed. note))
  \item \textsuperscript{46} 4 Off. Rep. 17, 14 C.L.J. 71 (1897).
  \item \textsuperscript{47} 1952(2) SA428 (AD).
  \item \textsuperscript{48} In \textit{Brown v. Leyds NO}, the Volksraad of the South African Republic attempted to void a previous proclamation by a resolution. The Court held that the resolution had no effect on the grounds that a law properly passed could not be repealed, altered or interpreted by a mere resolution introduced in form of a law. 14 C.L.J. 71, 94. (ed. note))
  \item In "The Coloured Vote Case," the South African Parliament passed a law disallowing Coloureds, who were previously entitled to vote, to vote in the same constituency as a white person. The law was declared invalid. In so doing, "The Court . . . [is] exercising a duty which it owes to persons whose rights are entrenched by Statute; its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging, is controlling the Legislature." 1952(2) SA428 (AD). (citing to Bryces' AMERICAN CONSTITUTION 456, 582 Vol. I (3d ed.). The Court further held that the courts have the power to declare an
the government of the day refused to accept either the court's decision or the concept of judicial review of parliamentary legislation. A struggle for constitutional supremacy ensued; in the end, parliament and the executive triumphed. In each case, though in different ways, the decision of the court involved was eventually stultified.

Despite all this and despite the fact that South Africa has hitherto been nurtured on the British concept of parliamentary supremacy, conditions for the importation of a form of judicial review to buttress a bill of rights are not altogether unfavourable. Until now, there has been in South Africa regime stability, a long tradition of parliamentary government based on the Westminster model, and a competitive political party system. There is also a strong tradition of judicial independence. Pressures, both internal and external, and their interaction with doctrinaire policy-making, have in recent years resulted in political freedom being to some extent curtailed, but, it is hoped, a comprehensive settlement would eliminate most, if not all, of these pressures. The potential for tribal rivalry and friction, a major problem in Black Africa, undoubtedly exists, but urbanization and a cultural development which has proceeded further in South Africa than in the former colonies of Africa would tend to counter this. South Africa is economically prosperous and stable.

Unquestionably South Africans, whatever their views, will watch with anxious interest developments in Zimbabwe. The Zimbabwean Constitution of 1980 contains a comprehensive bill of rights, called "the Declaration of Rights" (apparently based on the European Convention on Human Rights), and also machinery for its enforcement. The provisions for judicial review contain elements of both the American and West German systems. The relevant section, section 24, constitutes the Appellate Division of the High Court of Zimbabwe as a special tribunal for the enforcement of the Declaration of Rights. The court may be approached in two ways. Firstly, any person alleging that the Declaration is being, or is likely to be, contravened in relation to himself may apply to the Appellate Division for redress. Secondly, if in any proceedings in

Act invalid upon the ground that it was not passed in conformity with the law. Id. (ed. note)

the General Division of the High Court or any other subordinate court any question arises as to the contravention of the Declaration, the question may be referred to the Appellate Division for determination. It is clear from section 24 that the constitutional jurisdiction of the Appellate Division includes the power to declare laws to be in contravention of the Declaration. It would seem, too, that any other Court may in any proceedings hold a law to be in contravention of the Declaration. This finding is subject to the usual right of appeal.

The Declaration of Rights proclaims in resounding terms the rights of the individual to life, to personal liberty, to protection from slavery and forced labour, to protection from torture and inhuman or degrading punishment, to protection from deprivation of property, to freedom from arbitrary search or entry upon his premises, to the protection of the law, to freedom of conscience and expression, to freedom of assembly, association and movement, and to protection from discrimination on grounds of race, colour, political opinions or creed. Many of these freedoms, however, are hedged in with qualifications. Thus, for example, the section providing for freedom of assembly and association contains a savings provision, to the effect that nothing contained in or done under any law shall be held to be in contravention of the section, to the extent that the law or action, inter alia, is in the interests of defence, public safety, public order, public morality or public health, except so far as the provision or action is shown "not to be reasonably justifiable in a democratic society" (by now a familiar phrase). This formula recurs with regard to many of the protected freedoms, and puts the onus ultimately on the court to decide what is reasonably justifiable in a democratic society. A general provision permits derogations from the Declaration in a period of public emergency.

This general formulation is an intriguing one, and constitutional lawyers and others in South Africa will be interested to see whether judicial review is permitted to become a significant force for the preservation of human rights and individual freedoms in Zimbabwe, and whether it effectively protects the position of minorities in that country. If it does, then it may well serve as an


[51. Zimbabwe Constitution Order (SI 1979/1600), section 21.]

[52. Id., section 25.]
inspiration and guide for future constitutional development in South Africa.

In discussing all these constitutional safeguards, one is ever conscious of the sentiment so well expressed by Justice Learned Hand:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; and when it dies there, no constitution, no law, no court can save it.53

Nevertheless, constitutions, laws, and courts do provide a framework for the preservation of liberty and the protection of minority rights.54 A constitutionally-entrenched bill of rights gives substance to the framework, sets a standard which must inevitably have its impact on politicians, bureaucrats, legislators and others, and places upon those who wish to violate unlawfully the freedom of others the onus of acting unconstitutionally. The power of judicial review, properly exercised, can strike down unconstitutional action and, even though the court is possessed of neither the purse nor the sword, it is not easy for those affected by its decrees to ignore them. In the course of time, the court may gain the confidence of the community and the power of legitimacy. Liberty is thus encouraged to lie in the hearts of men and women.

So it is possible that sometime in the future there may be transported across the ocean that divides your country and mine something of great value, namely a workable and working system of judicial review; a fragile institution, no doubt, particularly vulnerable to the buffets of authoritarianism and instability, but an institution which could, in favourable circumstances, do much to ease the problems of Southern Africa.