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Valley of the Mzimkulu*

*Honorable George N. Leighton***

To a visiting American, the South Africa that Mr. Justice Michael McGregor Corbett discusses in his Morris lecture on international law is both a beautiful place and a tragic country.¹ It is beautiful because it has been blessed with the grandeurs of nature: beautiful mountains, lovely valleys, rivers that meander to the sea, majestic beaches along both the Atlantic and Indian Oceans; it has beautiful modern cities like Pretoria and Capetown. It is a tragic country because in the midst of vast natural wealth it has one of the most oppressive forms of government in the modern world. A plethora of laws stifle individual liberties of the entire populace. By a recent count, some ninety statutes affect and restrict freedom of the press in South Africa.² Under its cruel security laws no citizen is safe from arbitrary arrest. It administers a political order that one South African lawyer has said "is more aptly described as a pigmentocracy in which all political power is vested in a white oligarchy, which in turn is controlled by an Afrikaner elite."³ The

* The Mzimkulu is a river in the eastern part of South Africa. Alan Paton in *CRY, THE BELOVED COUNTRY* tells us that "if there is no mist, you look down on one of the fairest valleys of Africa. About you there is grass and bracken and you may hear the forlorn crying of the titihoya, one of the birds of the veld. Below you is the Valley of the Umzimkulu [the English spelling], on its journey from the Drakensberg to the sea; . . ." The sea is the Indian Ocean; and where the Mzimkulu reaches it is near Port Saint Johns.

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Judge Leighton visited South Africa in the fall of 1980 as the result of an invitation extended to him by the United States-South African Leader Exchange Program, an organization known as USSALEP. Its membership is composed of men and women in the business, social and political life of the United States and South Africa. It is supported by private and foundation funds; it has no relation either to the government of the United States or that of South Africa. The occasion of Judge Leighton's visit was USSALEP's sponsorship of a visit by a team of lawyers and judges from the United States. Judge Leighton thanks the staff, directors, and members of USSALEP, particularly Mr. George M. Burditt, President of the Chicago Bar Association, for the invitation extended him. This commentary is based in part on the experiences of that visit, as well as Justice Corbett's lecture.

1. Corbett, *Judicial Review and Southern Africa*, 12 *LOY. CHI. L.J.* 175 (1981) [hereinafter cited as Corbett].

2. *The Star*, June 14, 1980.

3. J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 7 (1978).

moving force in this pigmentocracy is the ideology of apartheid, the policy that separates native South African blacks from whites in all phases of the country's social, economic and political life.

Justice Corbett tells us that changes are taking place in South Africa; but that prejudice, possessiveness and fear hold back Afrikaners who rule South Africa. He says:

Prejudice can be overcome, possessiveness can be subordinated to the necessities of the situation, but how to allay the fears? For these fears are very real. They are the fear that the whites, outnumbered 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 instability, perhaps inter-tribal conflict or even a military *coup d'etat*, resulting 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 corruption may become rife; the fear that the 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 authoritarianism will take over.⁴

This catalog of fears makes poignant the words of John W. Vandercook in his biography of Henri Christophe: "Blood is vintage wine to men in mortal fear." One sees the consequences of this mortal fear in the ordinary events in South Africa; one senses it in conversations with lawyers, barristers, judges; one feels it in the hushed tones with which some Afrikaners express doubts about their future.

During the week of October 19, 1980, when I was in Johannesburg, Arnold Geyer, a reporter for the Rand Daily Mail, disappeared while on an assignment in Welkom, where he was to cover a meeting of religious leaders. His superiors did not hear from him; his kinfolk, friends and neighbors did not know what had become of him. Several days after his disappearance, two fellow reporters went near his home to inquire. Quite by accident, they saw him handcuffed, being led back to his apartment by South African security police who were going to search his apartment without a warrant. Geyer could not tell his colleagues why he had been ar-

4. Corbett, *supra* note 1, at 179.

rested, since under the statute that authorized his arrest he did not have the right to know.⁵ The police could, without judicial warrant, indefinitely detain him and keep him in custody without giving him the opportunity to communicate either with friends, family or an attorney. He could not have bail; nor did he have the right to be brought before a judge or magistrate. When his employers asked the police for an explanation, they got none because under South Africa's laws the police did not have to answer.

Arnold Geyer's plight, however, was neither unique nor isolated. On the last day I was in South Africa, Thursday, October 30, 1980, the major newspapers carried the story of Dr. Willem de Klerk, an Afrikaner, who is editor-in-chief of the *Die Transvaler*, a staunchly pro-nationalist morning newspaper with a wide daily circulation. Dr. de Klerk had been arrested and charged with violating a provision of the Internal Security Act of South Africa, which subjected him, on conviction, to a maximum penalty of three years in the penitentiary. His crime? In June 1980, his newspaper had published an item that quoted Thebo Mbeki, a vice chairman of the banned African National Congress. Mbeki had been listed in a banning order issued in April 1966.

The concept of banning is ancient; it has been closely associated with almost every form of human tyranny. But the government of South Africa has given it a modern twist that is a tribute to the ingeniousness of man's cruelty toward his fellow man. In South Africa there are three statutes under which a person can be the subject of a banning order.⁶ Ironically, on the authority of any of them, the Minister of Justice has the absolute power to issue a banning order anytime he is satisfied that a person is promoting feelings of hostility between Europeans in the Republic and other inhabitants of the country. The banning order is issued without a hearing; there is no judicial determination of guilt; the banned person is not entitled to know the source or kind of evidence on which the Minister acted. The Internal Security Act, under which Dr. de Klerk was charged, contains a provision which prohibits a newspaper from quoting anything a banned person said before he was subjected to an order. Dr. de Klerk and his newspaper associates claimed they had no knowledge of Mbeki's April 1966 banishment when *Die Transvaler* published the June 1980 article quoting

5. Terrorism Act No. 83 of 1967. See also S. Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa*, 128 U. PA. L. REV. 603 (1980).

6. *Id.*

Mbeki. This was no defense, however, because the law in question has been construed by the judges of South Africa as not requiring intent. It is enough for the government to prove that a newspaper has published an article quoting the banned individual. Based on such proof, the editor is criminally liable.

Happily for Dr. de Klerk, his status as an Afrikaner, as a white, and as the editor-in-chief of a major South African newspaper helped him. He was allowed to negotiate a plea and pay a fine of 75 rands, roughly equivalent to 100 U.S. dollars. The important point, however, is that in South Africa a newspaper editor can be arrested, charged, and perhaps convicted of a felony, merely because his newspaper publishes an article quoting a man who almost 15 years before had been banned by the Minister of Justice. Dr. de Klerk's case, and that of the Rand Daily Mail reporter, illustrate that in a country where oppression is supported by law, neither the oppressed nor the oppressor is free.

This reference to specific cases brings me back to Justice Corbett's Morris lecture. As a preface to his main focus, he reviews the history of the African continent since World War II and alludes to what many of his countrymen believe are the justifications for South Africa's oppressive laws. The factors, he tells us, are the dangers of Russian Communism, the nationalist liberation movements in colonial territories, the often violent overthrow of the colonial yoke, and success in the attainment of independence in many African countries in the 1950s and '60s. He refers to developments within Zimbabwe, Namibia, Angola, and Mozambique which affect South Africa's own internal and external stability. He points out that like other countries on the continent, South Africa has experienced the growth of nationalism among its native black peoples; but he warns it would be a mistake to compare his country with the former African colonial territories. South Africa, Justice Corbett tells us, is not a colonial possession; since 1961 it has been an independent republic. The whites of South Africa, particularly the Afrikaners, are not European expatriates; they are Africans, whose successive forebears have lived in South Africa as long as American whites have lived in North America.⁷

Having told us all this, however, Justice Corbett does not tell us what we should know about him so that we can understand and appreciate his views. This is understandable; therefore, those of us

7. Corbett, *supra* note 1, at 177-78.

who know him well, will speak for him. He is today, without question, one of South Africa's most distinguished judges. He sits on the highest court of that country. Because of his training, experience as an advocate, demonstrated excellence in performance, and intellect, he has earned the respect of the people of his country. The views he expresses, as a scholar and as a judge, are based on convictions that rest on a belief in the rule of law, and in fundamental human rights. From what he says, and does not say, we get the suggestion that he belongs to the group he describes as a substantial and growing number of white South Africans who believe that present policies of their government do not answer the challenges of the postwar years.

Reflecting his grasp of the social and political factors that have shaped recent South African history, Justice Corbett displays the sweep of his mind when he takes into consideration the economic force South Africa represents not only to contiguous African countries, but also to the western world and particularly to our country. South Africa, he reminds us, "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 favorable 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 incidentally black African countries. The United States is its largest trading partner."⁸

The last point is a telling one. South Africa is of strategic economic importance to the United States. I am told that there are metals crucial to modern industry which can be obtained only from that country. Geo-politically, what happens in South Africa affects all of southern Africa, and hence the economic interests of the United States. For these reasons, the cries for disinvestment in South Africa, the demands that United States corporations remain only if there are changes in governmental policies that comport with civil rights laws in this country, are simplistic and superficial. The plain truth is that neither American investors nor American corporate executives can force or cause the Parliament of South Africa to act in ways consistent with these popular American cries and demands. In fact, there are serious doubts about who can do this. One of the interesting aspects of South African life today is

8. Corbett, *supra* note 1, at 178.

the distance that exists between the present South African government and the people. Even a casual visitor can sense that some members of the Afrikaner elite refer to their government as if they are taking about a foreign power.

This chasm between the government and the governed appears to have led to some sober thinking in South Africa. There are those like Justice Corbett who are beginning to see that there has to be a way to harness the government of their country. They look into the future and see the day when the ideology of apartheid will be abolished by legislative action, collapse of its own weight, or be destroyed by violence. They evaluate the demographic factors represented by the wide disparity in numbers between the whites and native blacks of the country; they look across their borders to the north and east and see potential enemies in Zimbabwe, Mozambique, Botswana, Namibia. They begin to see from experience that to maintain the nation's economy, to develop it and make it grow, the native blacks of South Africa are essential. In fact, in matters of daily living, the whites of the country need the native blacks more than the blacks need them. Therefore, in the face of strict separation of the races, native blacks have to be educated and trained; and when they are, questions are asked about the rights of citizens, rights which blacks do not have in their native land. Finally, from their reading of the scriptures, the Afrikaners of South Africa are beginning to see that if the God they worship wanted to keep the races of this earth absolutely separated, He would have found a better way than delegation of this awesome responsibility to weak and sinful Man.

One of the obvious manifestations of the new thinking in South Africa is the series of official statements now being issued for public consumption. An August 1980 governmental newsletter supplement stated that "[u]nderlying the new constitutional proposals recently debated in Parliament is the conviction by the Government that the time has come for the Coloured and Indian communities to be given real authority in running their own affairs and a genuine and equitable say in the administration of the country as a whole."⁹ This information included the claim that "a new South Africa is being fashioned encompassing the lives of all citizens. The aim is a society, or rather a constellation of societies, in which all citizens will have an equal opportunity to enrich their lives without

9. Information Newsletter, A New South Africa (August 1980) (available through Dept. of Foreign Affairs and Information, Pretoria).

hindrance, . . .”¹⁰ The South African public, indeed the whole world, was told that during the 1979 session of Parliament a major proposal was made for the creation of “a President’s Council of 60 nominated White, Coloured, Indian and Chinese members. . . .”¹¹ There is respectable authority among constitutional lawyers in South Africa that all of this points to a general consensus on the need for constitutional reform; and that one of the main functions of the President’s Council will be to consider and debate proposals for constitutional changes. This must be the basis of Justice Corbett’s statement: “Already substantial 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.”¹²

The main point of Justice Corbett’s lecture is the belief he expresses “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.”¹³ Then he turned to a discussion of the historical development of the concept in our country; he shared his knowledge of this development and concluded with the hope 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 favorable circumstances, do much to ease the problems of Southern Africa.”¹⁴

I believe that many Americans join Justice Corbett in this hope. Those of us who have visited his country, know its history, seen some of its beauty, and believe in its potential, treasure the day when we export to South Africa our most valuable social and political product: a written constitution with a Bill of Rights which experience shows can guarantee a truly representative form of government, secure individual liberty and freedom protected by law, and set forth the bounds and limits of what the government can do to an individual. It is a constitution construed by the judges of the land through concepts that underlie the power of judicial review, a

10. *Id.*

11. *Id.*

12. Corbett, *supra* note 1, at 179.

13. Corbett, *supra* note 1, at 179-80.

14. Corbett, *supra* note 1, at 192.

force which makes constitutional rights the essence of Democracy.

When the day comes that the people of South Africa import our constitutional principles, plant and nurture them in the fertile country that is theirs, the whites will no longer have to fear the native blacks; nor will a reporter like Arnold Geyer disappear from among family, friends and fellow workers; and no newspaper editor like Dr. Willem de Klerk will have to face a felony charge only because he publishes a news item quoting a man who was once banned by his country's Minister of Justice.