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## Emerging from Emergency: Human Rights in South Africa

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# EMERGING FROM EMERGENCY: HUMAN RIGHTS IN SOUTH AFRICA

*Etienne Mureinik\**

IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY. By *Stephen Ellmann*. Oxford: Clarendon Press. 1992. Pp. xi, 283. \$59.

Why was it no worse? That is the central question asked by Stephen Ellmann<sup>1</sup> in his thoughtful analysis of the record of the Appellate Division<sup>2</sup> — South Africa's highest court — under the nationwide state of emergency between 1985 and 1990, which we now know to have been the dying convulsion of white minority rule and apartheid.

Ellmann's study spans the tenure of office of two chief justices: Pieter Rabie, who vacated office in 1989, and Michael Corbett, who is still chief justice. Ellmann's study of this period begins with an analysis of the composition of the Appellate Division during Rabie's tenure, while hearing emergency cases (pp. 57-67). The Appellate Division sits not en banc but in panels. Civil appeals — all the cases forming the main focus of Ellmann's study are civil appeals — are ordinarily heard by a panel of five, chosen from a membership that varied in size across the high teens during the relevant period. Ellmann shows that the panels selected to hear emergency cases under Rabie's chief justiceship were dominated by merely five judges — a group that included Rabie himself (pp. 61-65). This group Ellmann calls the "emergency team" (p. 64). Ellmann notes that the emergency team commanded a majority of votes in every emergency case decided under Rabie and wrote all the principal judgments. When a nonmember of the team sat on an emergency case and dissented, he never again sat on an emergency case during Rabie's tenure (pp. 64-65). Ellmann's study of the performance of the Rabie court is largely a study of the performance of the emergency team.

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1. Professor of Law, New York Law School.

2. The Appellate Division was the senior division of the Supreme Court of South Africa. *The Supreme Court* in this context is not the name of a court but a generic expression that encompasses several superior courts: the Provincial, Local, and Appellate Divisions of the Supreme Court. When *In a Time of Trouble* was published, the Appellate Division was the highest court in South Africa. Under the interim constitution, CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (Act 200 of 1993) [hereinafter S. AFR. CONST.] — South Africa's first universal franchise constitution — which came fully into operation on April 27, 1994, S. AFR. CONST. § 251, the new Constitutional Court is to supplant the Appellate Division as the highest court on questions of constitutional law. S. AFR. CONST. ch. 7.

Rabie's retirement spelled the demise of the emergency team. Under Corbett, panels to decide emergency cases were drawn from the Appellate Division as a whole (pp. 159-60). The result was a distinctly different jurisprudence.

Three judgments, as Ellmann shows, typify the work of Rabie's emergency team (pp. 71-114). The first is *Minister of Law & Order v. Dempsey*,<sup>3</sup> in which habeas corpus was sought to obtain the release of a nun detained under the emergency regulations for attempting forcibly to restrain a policeman who, in the course of dispersing a funeral gathering, was assaulting one of the mourners. South African law had long accepted that every invasion of personal liberty is prima facie unlawful and calls for justification and, consequently, that the burden of justifying a detention rests on the detainer. Despite that, the court ruled that the burden of proving that the detainer had abused his discretion — a discretion the proper exercise of which was essential to the validity of the detention — lay on the applicant for habeas corpus.<sup>4</sup>

The second judgment is *Omar v. Minister of Law & Order*.<sup>5</sup> South African law contains authority for a doctrine conferring special protection on fundamental rights against invasion by delegated legislation. The doctrine generates a rule that vitiates any exercise of a delegated legislative competence if it destroys a fundamental right, unless the destruction is specifically envisaged and authorized by the empowering provision.<sup>6</sup> Despite that, in *Omar* the Appellate Division upheld regulations, enacted under general emergency powers and without specific authority, that deprived emergency detainees of their right of access to counsel and their right to be heard before a decision to prolong the detention. Both of these rights had often, and in various contexts, been characterized as fundamental.

The third judgment is *Staatspresident v. United Democratic Front*,<sup>7</sup> which departed from precedent to interpret the emergency legislation as ousting the jurisdiction of the courts to review emergency regulations for vagueness. The effect was to insulate regulations profoundly invasive of basic liberties from judicial review.

After a rigorous analysis of these three judgments, Ellmann concludes that the Rabie court "responded to human rights issues in ways that fell painfully short of carefully reasoned adjudication: with ill-explained doctrinal interpretation or development, with abrupt or even deaf responses to opposing arguments, and on occasion with startling

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3. 1988 (3) S.A. 19.

4. 1988 (3) S.A. at 39.

5. 1987 (3) S.A. 859.

6. See, for instance, *Mandela v. Minister of Prisons*, 1983 (1) S.A. 938, as explained in *Katofa v. Administrator-General*, 1985 (4) S.A. 211, 217, 225 (S.W.A.); *Regina v. Slabbert*, 1956 (4) S.A. 18 (T.P.D.); and Etienne Mureinik, *Fundamental Rights and Delegated Legislation*, 1 S. AFR. J. HUM. RTS. 111 (1985).

7. 1988 (4) S.A. 830.

recasting of existing doctrine" (p. 113). But against these judgments and their ilk — which were responsible for the reputation for deference to the security forces that the Rabie court earned during the emergency — Ellmann sets other features of the record of the court. One is the court's punctilious insistence, admittedly largely at the level of dictum, on preserving the nominal jurisdiction of the court to review emergency action (pp. 90-91, 116). Another is the effort of the Rabie court, made in the teeth of hostile emergency regulations, to preserve the rights of emergency detainees to testify in court in support of applications for relief from the authorities (pp. 120-28). Both features entailed a departure from existing doctrine in order to protect the subjects of emergency rule.

The less-than-monolithic character of the record of the Rabie court drives Ellmann to conclude that, although the court accepted the genuineness of the emergency, trusted the good faith of the state and its senior officials, and had a sympathetic attitude toward the burdens carried by law enforcement officers (p. 131), it genuinely disapproved of abuse and remained committed to preserving both a legal order and its own institutional role (p. 135).

Even given these qualifications to the record of Rabie's emergency team, however, the Corbett court's record is palpably better. The Corbett court was willing to strike down restrictions imposed on an emergency detainee's freedom of speech, movement, and association as a condition of his release,<sup>8</sup> to set aside a press censorship order,<sup>9</sup> to uphold habeas corpus,<sup>10</sup> and to overrule *Dempsey*.<sup>11</sup> Perhaps more significantly, the court took important steps to shift the burden of justifying a detention back onto the authorities<sup>12</sup> and substantially to widen the class of administrative decisions that cannot be taken without a prior hearing.<sup>13</sup> But the Corbett court was unwilling to overrule *United Democratic Front*,<sup>14</sup> and it did not go as far in restoring the authorities' burden of justifying a detention as principle required.<sup>15</sup> Generally, Ellmann detects a "reluctance to alter too visibly or too quickly the work of the Rabie court" (p. 157). Fidelity to precedent, says Ellmann, retarded the flowering under Corbett of human rights

8. *Visagie v. State President*, 1989 (3) S.A. 859, 870-71.

9. *Minister of Law & Order v. Argus Printing & Publishing Co.*, 1990 (1) S.A. 1058, 1067.

10. *Minister van Wet en Orde v. Matshoba*, 1990 (1) S.A. 280; *Minister of Law & Order, KwaNdebele v. Mathebe*, 1990 (1) S.A. 114, 117.

11. P. 142; see *During NO v. Boesak*, 1990 (3) S.A. 661, 663.

12. *Matshoba*, 1990 (1) S.A. at 280; *Boesak*, 1990 (3) S.A. at 663-66.

13. *Administrator, Transvaal v. Traub*, 1989 (4) S.A. 731. This judgment was not given in an emergency case, but it had substantial implications for emergency law and contributed to a climate of closer scrutiny of emergency action.

14. *Catholic Bishops Publishing Co. v. State President*, 1990 (1) S.A. 849, 866.

15. See Evadné Grant & Etienne Mureinik, *Administrative Law*, in 1990 ANN. SURV. S. AFR. L. 587, 607.

claims (p. 158). Despite that, Ellmann concludes that the Corbett court worked, "not a velvet revolution, but surely a velvet reform" (p. 141).

All of which propels Ellmann to his central question: Why was it not all so much worse (p. 163)? Why was the Rabie court not unremittingly hostile to human rights, and what was it about South African legal culture that left room for the Corbett court at all? What kept some legal protection for human rights alive during the dismal days of emergency rule? Why was the performance of the Appellate Division so much better than that of the German courts under Nazi rule? Why did it never degenerate, as it has under other autocratic regimes, into "justice by phone," with courts taking instructions directly from the executive (p. 171 & n.45)?

Ellmann's answer is that despite the pervasive injustice of apartheid and the routine resort to extralegal methods in its defense, South African whites continued, for a mixture of admirable and less-than-admirable reasons, to value and adhere to law. Ellmann identifies three reasons for that adherence: law's utility as a method of control, whites' belief in law as a means of legitimizing their rule, and whites' sincere belief in the value of law. Each of these reasons, says Ellmann, contributed to a climate in which the courts were likely to impose, and the government likely to endure, some legal limits on emergency powers (pp. 174-93).

To account for the superior performance of the Corbett court, Ellmann adds to this explanation an analysis of the role of South African lawyers and judges as "carriers of a human rights tradition even in the long years when dominant white opinion gave that tradition short shrift" (p. 205). In Ellmann's view, three forces at work in the South African legal community helped to sustain the human rights tradition during Nationalist rule: the personal prestige of many of the lawyers and judges committed to the tradition, the independence of the bar,<sup>16</sup> and the — somewhat unevenly observed — tradition of judicial independence (pp. 226-30). These forces were aided, so Ellmann argues,

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16. Here Ellmann mainly uses *the bar*, not in the American sense, but in the English and South African sense, to mean the advocates (barristers), who enjoy unrestricted rights of audience in all the courts, as opposed to the attorneys (solicitors), who do not generally enjoy rights of appearance in the Supreme Court and have to instruct advocates when a case is litigated there. The bar in this narrow sense represents a mere fraction of the legal profession — a group that stands somewhat aloof from society and prides itself on its elite status. Supreme Court judges are at present drawn from the ranks of the senior bar.

It is the traditions of the bar in this narrow sense with which Ellmann primarily credits support for the South African human rights tradition. Pp. 214-25. This conclusion drives Ellmann to argue that "[t]he spirit of independence of bench and bar in South Africa seems linked to a sense of membership in a prestigious élite, charged with the special duty, and seen as graced with the special ability, to stand somewhat apart from society," and that "[i]f we want to structure a legal profession for the worst of times . . . then we may well need to grant some degree of inegalitarian status and authority to the legal profession." P. 246. Many of Ellmann's readers may find these conclusions controversial and disturbing.

by the fact that "the human rights tradition in South Africa fitted quite comfortably with the positivist jurisprudence which has long held sway, and with the principle of parliamentary supremacy which is its central dictate."<sup>17</sup>

Ellmann's analysis is based on an encyclopedic reading of the South African literature, legal and other, and his perceptions weave a rich fabric of subtle insight. South African lawyers will learn much about their legal traditions from Ellmann's delicate account; indeed, they will learn much about their country. Most South Africans will be startled to discover that Ellmann has spent weeks rather than years in South Africa itself. *In a Time of Trouble* is consequently a book that deserves to be read, not summarized, and the outline here of Ellmann's argument reveals little of its depth.

Some of Ellmann's conclusions will of course be controversial. Possibly the most controversial, because of what it teaches about the future of South African law and culture, is Ellmann's suggestion that South African jurisprudence, because of what he considers its "positivist" character, made South African law amenable to human rights arguments.

What is certainly true, as Ellmann points out, is that South African human rights lawyers are skilled at framing human rights arguments in the language of prevailing doctrine. "[P]rinciples which the powerful insist on for their own protection may begin to creep into the law of the powerless," says Ellmann (p. 245). He continues:

Doctrines shaped in decisions about the ordinary lives of whites inevitably are capable of application in other contexts as well. Not to apply these rules more generally may be hard to justify logically, and if such doctrines are generally applied, then courts cannot rework them too sharply in any one context without risking injury to other aspects of the social order that powerful interests protect. [pp. 175-76]

South African human rights lawyers have become astute at exploiting the protective potential of general doctrines — at demanding that the courts acknowledge the entailments and implications for human rights of doctrines first adopted for very different purposes.<sup>18</sup>

All this may, as Ellmann suggests, distinguish contemporary South African human rights lawyers from the antebellum lawyers who sought to protect slaves from the fugitive laws. Ellmann seems to say that the sharpness of the challenge that antebellum lawyers offered to prevailing doctrine made it more difficult than it might have been for judges hostile to slavery to accept that that doctrine permitted pro-slave decisions (pp. 236-38). Most South African human rights law-

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17. P. 205; see also pp. 231-44.

18. South African human rights lawyers have become astute, in other words, at realizing the power of the idea Dworkin calls "integrity." See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

yers eschewed this kind of approach. Instead, they took principles already judicially recognized and tried to develop them and reorient them in service of human rights. Before the Corbett court — and, for that matter, the lower superior courts — they were often successful.

It is one thing, however, to say that “South African lawyers have chosen to speak in their courts in terms of the dominant jurisprudence, and to use respectful tones when they do so,”<sup>19</sup> or even to commend them for that strategy;<sup>20</sup> it is quite another to say that “the resources available within South African law for benign decisions can readily be fitted into a positivist framework.”<sup>21</sup> It is yet another to say that

widespread adherence to positivist argumentation in South African courts has also made a contribution to the rise of more rights-minded decisions. It has done so by providing an agreed-upon framework for argument, within which a considerable range of human rights contentions can be presented as legitimate grounds for decision. And it has been able to offer this opportunity in good part because the central positivist dictate of South African law, the supremacy of Parliament, has proved to be a relatively unconfining doctrinal constraint. [p. 233]

These conclusions will puzzle many South Africans. Most South African human rights lawyers would say that the human rights tradition survives in their country despite positivism, not because of it. They would also suggest that parliamentary supremacy is only as flexible a principle as it is because human rights lawyers have fought the older conception of that principle with doctrines designed to hold Parliament to its democratic responsibilities. It is true that the challenge posed by human rights lawyers has made the principle of parliamentary supremacy contested terrain and has consequently made it amenable to a wider range of interpretations than it used to be. It is true also that the principle's amenability to new interpretations has in turn prised open the prevailing jurisprudence and made it more “supple” than it used to be (pp. 246-47). But South African human rights lawyers would no doubt question whether that makes it instructive to give credit for their work to parliamentary supremacy and positivist jurisprudence.

All of which makes one wonder exactly which of the many senses of positivism Ellmann means to employ here and whether it is very helpful to employ any. It may be that what is at stake in the judicial record that Ellmann studies is not so much a contest between positivism — or one of the various positivisms — and any of its Anglo-American theoretical rivals but a perhaps cruder struggle: one between lawyers who believe that law is about authority and lawyers

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19. P. 247; *see also* p. 238.

20. Ellmann concludes: “When courtroom victories seem possible and worth seeking . . . South African experience suggests that lawyers' hoary strategy of staying within the shelter of established doctrine and precedent is a wise one.” P. 247.

21. P. 238; *see also* p. 244.

who believe that law should strive to foster the justification of decisions.

Such a struggle does seem to be visible in the record that Ellmann studies. Take, for instance, the three cases that typify the *oeuvre* of the Rabie court.<sup>22</sup> In *Dempsey*, the applicant for habeas corpus sought to establish that it was for the authorities to justify an emergency detention by showing that their discretion had been exercised properly. The court ruled that it was for the applicant to show abuse of discretion. In *United Democratic Front*, the applicants tried to bring emergency regulations under judicial scrutiny for vagueness. The court held that the governing legislation ousted judicial review. In *Omar*, the applicants asserted two procedural rights on behalf of emergency detainees: the right to be heard before the detention was prolonged and the right of access to counsel. Both those rights would have drawn the authorities into the exercise of justifying their decisions about detainees. The court denied both rights asserted.

In all these cases, the applicants were trying to establish principles that would have required of the authorities closer justification of their decisions than the court was willing to countenance. In each case the court steered a path through doctrine supportive of the principles advanced and reached a decision that had the effect of putting the authorities in a position to decide without justifying.

It is precisely because the Corbett court did the opposite that its jurisprudence is superior. That court took important steps to shift the burden of justifying a detention back onto the authorities, and it substantially widened the class of administrative decisions that cannot be made without a prior hearing. These are the Corbett court's central contributions, and they both conduce to the better justification of decisions. Nor does this essential difference between the Corbett court and the Rabie court stop at outcome: it is palpable also in the method of adjudication. The emergency judgments of the Corbett court were generally fully and usually persuasively reasoned. The judgments of the emergency team, as Ellmann notes, were characterized by method that "fell painfully short of carefully reasoned adjudication: with ill-explained doctrinal interpretation or development, with abrupt or even deaf responses to opposing arguments" (p. 113).

These are not accidental features of the contrast between the Rabie court and the Corbett court. Perhaps the deepest struggle in contemporary South African jurisprudence is between lawyers who think that the job of law is done when decisions are made by officials wielding authority and lawyers who think that the law should strive for decisions that are justified. Indeed, the deepest divide in South African

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22. For a discussion of these cases, see *supra* notes 3-7 and accompanying text.

culture generally may well be between people who are content with authority and people who aspire to justification.

It is natural that it should be so, for this is a divide close to the fault line between friends of apartheid and its enemies; it helps explain what has been most offensive about apartheid and why South Africans expect their new constitution to cure the offensiveness.

Practitioners of apartheid over the years were often surprised, or often professed to be surprised, by the intensity of the reaction, especially the international reaction, that their practices excited. They pointed to other governments that practiced systematic and dire injustice, and they asked what made apartheid special and why its practitioners merited being singled out for censure and sanction. The answer was usually that apartheid was unique in systematically embodying racial discrimination in institutional form, and especially in legal form, and that that made it peculiarly detestable. I believe this answer to be correct, but I think that it is useful to develop it.

When we ask why racial discrimination is repellent, we frequently note that differentiation by criteria other than race is often acceptable, desirable, or necessary. That requires us to ask how we may distinguish between tolerable discrimination and intolerable discrimination — or, since the word *discrimination* has come itself to connote the intolerable, between discrimination and differentiation. The answer, it seems, we can state with no greater precision than this: intolerable discrimination is differentiation that is not justified, and tolerable discrimination is differentiation that is justified. By *justified* I mean simply that the arguments for differentiation, taken together, are better than the arguments against differentiation, taken together; and by *unjustified* I mean that the arguments against are better than those for.<sup>23</sup>

It may be, then, that the most objectionable feature of apartheid was the systematic use of the law to treat people differently without justification. For lawyers who believe that the central aspiration of law is to strive for the ever better justification of decisions,<sup>24</sup> this characteristic put apartheid into mortal conflict with law itself. That aspiration, for such lawyers, is why judges, in contrast to officers of the other organs of government, invest so much effort in reasoning their judgments. It is also why the law, in court, insists upon the right to be heard and the right to proper consideration and why, in South Africa

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23. As some people think that discrimination on the ground of race is never justified, racial discrimination is sometimes said to be intolerable in any circumstance. This latter proposition, however, is crude, because it depends upon the relatively recent linguistic development by which *racial discrimination* has come to connote only that racial discrimination that is unjustified. The truth is that some racial discrimination — namely, appropriate affirmative action — is justified. Indeed, the distinction between *racial discrimination*, as that term is most commonly used, and *affirmative action*, properly so called, is the distinction between racial differentiation that is unjustified and racial differentiation that is justified. Thus, intolerable discrimination — or racial discrimination in the pejorative sense — is unjustified differentiation.

24. See DWORKIN, *supra* note 18, at 229.

and elsewhere, the law has for some time been engaged in extending these rights to new spheres of extracurial governmental decisionmaking, for they are rights in service of the better justification of decisions. The aspiration to better justification, for those lawyers, is the reason for the international trend toward review of administrative decision-making for unreasonableness, for an unreasonable decision is one without a plausible justification. The aspiration to better justification is the reason, too, why trial by ordeal, an irrational procedure, was abandoned in favor of trial by jury, a more rational one. It is perhaps also the reason why trial by a jury, which offers no reasons for its decisions, has yielded in many places to trial by a judge, who can be made to give reasons. The whole trend of progressive legal development is toward the better justification of decisions and toward procedures that conduce to the better justification of decisions. How, then, lawyers who share this aspiration might ask, could racial discrimination, the defining feature of which is that it is not justified, have flourished in a system that prided itself, as Ellmann shows, on its adherence to law?

What was crucial was the doctrine of the supremacy of Parliament — and crucial despite its relative permeability, to which Ellmann draws attention. It was that doctrine that immunized the apartheid statutes, and the bulk of what was done under them, from judicial challenge. But the first instinct of a lawyer, those who aspire to justified decisions would say, should be to ask what justified the doctrine of parliamentary supremacy itself. In another country the answer would have been that Parliament represented the people and that its representativeness brought into play some version of democracy. We may consider the version of democracy thus invoked an austere one, but it would have been something by way of a defensible theory to justify the doctrine.

In South Africa, however, Parliament was manifestly unrepresentative, and it was plain to all reasonable and honest people that no plausible version of democracy could be adduced to support the doctrine of parliamentary supremacy. Despite that, the doctrine of parliamentary supremacy remained the ultimate legal justification. Racial discrimination — that is, differentiation distinguished by its unjustifiability — was perpetrated systematically under color of a constitutional doctrine itself incapable of justification. Racial discrimination flourished in law because the legal system plainly declared its own ultimate foundation to be beyond the need for justification, and it consequently announced that the enterprise of justification itself was unimportant.

This result was possible because lawyers, collectively, suspended inquiry into the justification of parliamentary supremacy. Judges, even those who abhorred racism and acknowledged the illegitimacy of

the constitution, took parliamentary supremacy for granted. Practicing lawyers, even radical ones, assumed parliamentary supremacy to be beyond legal challenge. Law teachers, even those whose lives were dedicated to denouncing injustice and teaching the virtues of constitutionalism, reared graduates who entered the profession entirely reconciled to living and working and thinking in a system of justification whose ultimate justification could not be justified.

So the South African legal system rested upon the negation of what might be considered the central aspiration of law: the pursuit of ever-better justification for decisions. In a flourishing legal culture, so lawyers who aspire to foster an ethic of justification might say, the doctrine of parliamentary supremacy, and a great deal done under it, would routinely have been challenged at law for want of justification. What is more, the challenge would have been repeated until it became clear to all that this doctrine and its consequences were incompatible with the enterprise of law. In fact, most South African lawyers took the doctrine as beyond challenge just because it was upheld by authoritative bodies. The citation of authority supplanted the pursuit of justification. Authority triumphed over justification.<sup>25</sup>

All this explains why South African human rights lawyers have long been looking to a bill of rights to drive apartheid out, or at least to succeed it. They have been hoping to find, in a bill of rights, not just the quietus to parliamentary supremacy, but also a set of principles against which to test the justification of laws and decisions. And they have been hoping that the necessity of justifying any law or decision challenged under a bill of rights would invigorate the enterprise itself of seeking justification. They have been looking to a bill of rights, not merely to annul the kinds of statutes that made iniquity possible, but to rid the legal system of the authoritarian ways of mind that made apartheid possible. They have been looking to it, not only for its explicit content, but also to enrich law by fostering justification-thinking, because it was the poverty of law, in the shape of pervasive authority-thinking, that made apartheid possible. A bill of rights, they have been hoping, would restore discipline to a legal system grown slothful about justification.

So the story of recent South African law is largely the story of a struggle between a culture of authority and a culture of justification. Under the Rabie court the culture of authority held sway; under Corbett the culture of justification achieved a substantial recovery. The latest victory for the culture of justification was the adoption, as part

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25. Because the ethic of justification was so weak, other manifestly unjustified practices, such as discrimination against women and gays, also often passed without effective challenge.

of the interim constitution,<sup>26</sup> of the new Bill of Rights.<sup>27</sup> The victory, however, was not a decisive one. Indeed, the struggle continued during the drafting of the Bill of Rights, and each side won ground in the final text. Supporters of a culture of justification won constitutional guarantees of diversity of opinion in the state-controlled media,<sup>28</sup> of judicial review,<sup>29</sup> of written reasons for administrative action,<sup>30</sup> of "justifiable"<sup>31</sup> and procedurally fair administrative action,<sup>32</sup> and of access to official information.<sup>33</sup> But opponents of justification succeeded in imposing important limitations on the right to official information<sup>34</sup> and in deleting wording that would have made it clear that common law rules governing private relations are in principle amenable to constitutional review.<sup>35</sup> They succeeded also in winning special immuni-

26. It is only an interim constitution because it gives the two houses of Parliament elected under it, sitting together as the Constitutional Assembly, the function of writing the final constitution. S. AFR. CONST. ch. 5.

27. S. AFR. CONST. ch. 3.

28. Section 15(2) of the Constitution reads: "All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion." S. AFR. CONST. § 15(2).

29. Section 24(a) is particularly important, because it seems to outlaw ouster clauses of the kind upheld in *United Democratic Front*. It reads: "Every person shall have the right to lawful administrative action where any of his or her rights or interests is affected or threatened." S. AFR. CONST. § 24(a); see also S. AFR. CONST. §§ 4, 7, 22.

30. Section 24(c) reads: "Every person shall have the right to be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public." S. AFR. CONST. § 24(c).

31. Section 24(d) reads: "Every person shall have the right to administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened." S. AFR. CONST. § 24(d).

32. Section 24(b) reads: "Every person shall have the right to procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened." S. AFR. CONST. § 24(b).

33. See S. AFR. CONST. § 23.

34. Section 23 reads: "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights." S. AFR. CONST. § 23. The force of the qualification in the last part of the section is unclear. The fear is that it may be read as reducing the right to something little more than a right ancillary to litigation — little more, perhaps, than a constitutional guarantee of discovery.

35. The committee that drafted the Bill of Rights proposed the following wording:

The provisions of this Chapter shall —

(a) bind the legislative, executive and, where appropriate, the judicial branches of government at all levels as well as all statutory bodies and functionaries;

(b) bind, where just and equitable, other bodies and persons . . . .

Technical Comm. on Fundamental Rights During the Transition, Seventh Progress Report 1 (July 29, 1993) (on file with author). In the final version, § 7(1) replaced this formulation, so that the provision now reads, "This Chapter shall bind all legislative and executive organs of state at all levels of government." S. AFR. CONST. § 7(1).

The new wording invites South African courts to follow the reasoning of the Canadian Supreme Court in *Retail, Wholesale & Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. There the court, construing a similar provision in the Canadian Charter of Rights and Freedoms, reasoned, in effect, that that provision requires the presence of a legislative or an executive element and, consequently, that common law rules governing private relations are not amenable to constitutional review unless one of the private parties relies on allegedly

ties from review to protect cherished institutions.<sup>36</sup>

The struggle between authority and justification will certainly be carried forward into the interpretation of South Africa's new constitution and, for that matter, into the reconstruction of the social order. The culture of authority has sunk deep roots into South African thinking, and it will not be easy to dig them out. Contributions such as Ellmann's *In a Time of Trouble*, because of their penetrating analysis and perceptive insight, are of invaluable assistance to South Africans who are trying to cultivate a vigorous ethic of justification.

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unconstitutional legislation. The South African courts are of course not bound by Canadian jurisprudence, and there are other provisions in the South African Constitution that bear on the question. See, e.g., S. AFR. CONST. §§ 4(2), 7(2), 33(2). It is less clear now, however, than it would have been under the Technical Committee's formulation, which was rejected deliberately, that common law rules governing private relations can be brought under constitutional scrutiny.

36. Section 33(5)(a) reads: "The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature." S. AFR. CONST. § 33(5)(a). This provision was intended to insulate existing labor legislation from constitutional review. How successfully it captures that intention is controversial.

Section 14(3) reads:

Nothing in this Chapter [the Bill of Rights] shall preclude legislation recognising —

- (a) a system of personal and family law adhered to by persons professing a particular religion; and
- (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

S. AFR. CONST. § 14(3). These provisions apparently envisage putting practices authorized by religious law which discriminate on the ground of gender — such as polygynous marriages and discriminatory rules of succession — beyond challenge under the equality clause. S. AFR. CONST. § 8.