

Michigan Law Review

Volume 77 | Issue 3

1979

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Recommended Citation

Rex S. Heinke, *South Africa: Using the Law to Establish and Maintain a Pigmentocracy*, 77 MICH. L. REV. 384 (1979).

Available at: <https://repository.law.umich.edu/mlr/vol77/iss3/9>

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SOUTH AFRICA: USING THE LAW TO ESTABLISH AND MAINTAIN A PIGMENTOCRACY

*Rex S. Heinke**

HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER. By *John Dugard*. Princeton, New Jersey: Princeton University Press. 1978. Pp. xix, 470. Cloth, \$27.50; paper, \$12.50.

John Dugard, Professor of Law at the University of the Witwatersrand, Johannesburg, South Africa, has written an excellent critical analysis of the South African legal system. His discussion traces its development, beginning with the importation of Roman-Dutch law in 1652 by the Dutch East India Company, through the present day's uneasy synthesis of Roman-Dutch and English legal principles. Yet, this is not simply an historical overview; rather it is an examination of the development of Western legal theories and institutions in a non-Western setting. In particular, Professor Dugard discusses the conflict between parliamentary sovereignty and a judiciary's power to declare laws unconstitutional.

Professor Dugard also examines in detail South Africa's racial laws, which make the immutable characteristic of race the primary determinant of legal, social, and political status. South Africa prides itself on being an esteemed member of the community of Western nations and often refers to itself as the last bastion of Western civilization in Africa. In actuality, it is "a pigmentocracy in which all political power is vested in a white oligarchy, which in turn is controlled by an Afrikaner elite" (p.7). Professor Dugard also analyzes the repressive political laws which South Africa has devised to maintain this system.

With regard to judicial review, Professor Dugard extensively discusses the battle to deprive colored (*i.e.*, of mixed racial ancestry) voters in the Cape Province of their right to elect members of their own race to Parliament. The South African Constitution was written primarily by the British after their victory in the Anglo-Boer War of 1899-1902. The Constitution provided voting rights for "coloreds" in the Cape Province (section 35) and equal

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status for the English and Afrikaans languages (section 137). Section 152 forbade the amendment of sections 35, 137, and 152 "unless the Bill be passed by both Houses of Parliament sitting together, and at the reading be agreed to by not less than two-thirds of the total members of both Houses of Parliament." Other than these clauses, commonly referred to as the "entrenched clauses," South Africa's Constitution contained no Bill of Rights.

In 1948, having coined the word "apartheid" as its slogan, the National Party ("Nats") came to power and has ruled South Africa ever since. In 1951, the Nats stripped colored voters of their right to elect members of their own race to Parliament by enacting the Separate Representation of Voters Act. The Appellate Division, South Africa's highest court, promptly invalidated that act in the *Vote* case on the grounds that each House had passed the act *separately* rather than sitting together as the entrenched clauses required.

The Nats quickly responded by passing the High Court of Parliament Act, which provided that if the Appellate Division invalidated an Act of Parliament, then Parliament, sitting as the High Court of Parliament, could review the Appellate Division's decision. The newly established High Court of Parliament immediately reversed the Appellate Division's decision in the *Vote* case. The Appellate Division then invalidated the High Court of Parliament Act, on the ground that the entrenched clauses provided for judicial review by a real court, not by Parliament disguised as a court.

Lacking the votes in Parliament to eliminate the colored franchise by the necessary two-thirds majority of both Houses, the Nats decided to pack both the Appellate Division and the Senate (the upper house of Parliament). By a scheme reminiscent of President Roosevelt's plan to pack the U.S. Supreme Court, the Appellate Division was increased from five to eleven members for any case where the constitutionality of an Act of Parliament was at issue. The size of the Senate was almost doubled and the methods for selecting the new Senators ensured the Nats a two-thirds majority of both Houses sitting together. This done, section 35 was removed from the Constitution, colored voters were only allowed to elect token whites to represent them in Parliament, and the courts were barred from ruling on the validity of any Act of Parliament other than one affecting the remaining two entrenched clauses. By a ten-to-one vote, the newly reconstituted Appellate Division sustained these laws.

Professor Dugard's description of these events conveys their

drama and their importance for the future of South Africa. Unrestrained by a Bill of Rights and a judiciary to enforce it, the Nats moved vigorously to implement *apartheid*. The domestic political opposition proved no match for the Nats. The black political opposition, primarily the African National Congress and the Pan-African Congress, was crushed with a series of politically repressive laws, discussed below. The white political opposition was either substantially in agreement with white control of South Africa, *e.g.*, the United Party, or too weak to do more than delay for a short time the establishment of *apartheid*, *e.g.*, the National Union of South African Students.

Through a series of sweeping laws, the Nats legalized a four-tier racial caste system. At the top are 4,300,000 whites, followed by 2,400,000 coloreds, then 746,000 Asians, and finally 18,600,000 Africans. What distinguishes *apartheid* from other forms of racism is its explicit endorsement of skin color as the basis for the application of laws.

There are myriad racial laws which make up this system: the Group Areas Act, which is the legal authority for the forced removal of blacks from their homes in order to increase segregation; the ironically entitled Extension of University Education Act, which segregated the previously "open" universities of the Witwatersrand and Cape Town; and the infamous pass law system, that requires all Africans to carry passports in their own country. These are only a few of the many *apartheid* laws Professor Dugard examines.

The centerpiece of *apartheid* is the "homeland" policy, which is also analyzed by Professor Dugard. Pursuant to this policy, South Africa is being balkanized into a number of "homelands" for black tribal groups, including the Northern Sotho, Southern Sotho, Swazi, Tsonga, Tsevana, Venda, Xhosa, and Zulu. In theory, these homelands are to become independent nations; two have already been granted nominal "independence," although all nations but South Africa have ignored them diplomatically. In practice, important matters, such as defense, foreign affairs, and, to a considerable extent, internal security, will not be under the control of the homelands, and all important decisions must be approved by the white government in South Africa. *Apartheid's* theory is that all members of each tribe, whether or not born in their homeland, are citizens of a prescribed homeland and not citizens of the Republic of South Africa, even if they were born and have always lived in the Republic. The most developed of the homelands, the Transkei, has 1.5 million such

citizens, and there are another 7.5 million similarly situated Africans whose homelands are being or have yet to be created. In addition, there are almost two and one-half million colored people and three quarters of a million Asians who have no homeland and have no prospect of meaningful political rights in white South Africa.

A central failure of the homelands policy is its inability to acknowledge that South Africa depends absolutely upon black labor whose claim to fair treatment cannot be avoided by creating fictional countries. Moreover, the allotment of only thirteen percent of South Africa's land for the "homelands" of approximately seventy percent of its population emphasizes that the "homelands" are no solution to black demands for political power.

To maintain its pigmentocracy, South Africa has erected an enormous set of legal restrictions that severely limit civil rights. Possibly the most widely used method of silencing opposition to *apartheid* is the "banning order." By issuing a banning order, the Minister of Justice may without a hearing impose a combination of the following restrictions: that the banned person may not leave a certain area, *e.g.*, a suburb or even his home; that he must periodically, often daily, report to a police station; that he can only visit with a specified number of persons at a time, sometimes only one family member at a time; and that he may not enter certain areas, *e.g.*, a union organizer is often banned from all factories, or a student from all universities, thus preventing him from carrying on his normal occupation. Moreover, the writings or statements of such persons may not be quoted or published anywhere in South Africa. Banning orders are usually imposed for five years and are often successively reimposed. Since no banning order has ever been overturned by the South African courts, there is, as a practical matter, no relief from such orders.

The Terrorism Act is probably the clearest example of how far South Africa has veered from the basic precepts of Western legal systems. It reverses the normal presumption of innocence in criminal cases so that those charged with its violation, which is a capital offense, are presumed guilty unless they can prove their innocence *beyond a reasonable doubt*. The Act's terms are so vague that it is difficult to know when they are being violated. For example, the Terrorism Act makes it an offense to commit any act "with intent to endanger the maintenance of law and order." The requisite intent is presumed if the act is deemed likely to "embarrass the State in the administration of its af-

fairs." Such uncertainty is a hallmark of South African law and discourages most people from engaging in any activity that might even arguably be illegal.

The Terrorism Act also provides for indefinite periods of detention for people charged with its violation. Only government officials are entitled to information "relating to or obtained from any detainee." On this legal authority, the police refuse to identify those detained, and the Minister of Justice has even refused to tell members of Parliament who is being held. Thus, when people disappear without trace, it is often assumed that they have been arrested by the Bureau of State Security (B.O.S.S.) or some other police agency. This secret detention process frequently leads to the torturing and even the death of detainees. The recent torture and death of Steve Biko, while under such detention, is one of the few such incidents that has been widely publicized in the United States.

Professor Dugard traces the history and effects of these and many other South African political laws. He also analyzes such laws in terms of the philosophical conflict between natural law and legal positivism. Those who wish to understand South Africa and its legal system will benefit greatly by reading Professor Dugard's book which discusses these and numerous other issues.

This book, then, inevitably raises the question of South Africa's future. With Namibia and Rhodesia slowly but inexorably slipping out of its orbit, South Africa will soon confront black-ruled countries on all of its borders. This situation will surely lead to increasingly violent attempts to alter the South African status quo.

Afrikaaners consider themselves as much a part of Africa as Americans consider themselves a part of the United States of America. They would no more leave Africa than Americans would leave the United States. Thus, even if many of the English-speaking white South Africans leave South Africa when it has to fight guerillas, a bloody race war seems inevitable. One must hope that the people of South Africa will awaken to their mutual dependence before relations are so poisoned that no compromise can be reached. But one must wonder whether that point has not already been reached.