SOUTH AFRICA AND TERRORISM

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World attention has been drawn in recent years to the intensification of organized militant action by Africans against the white ruling powers of southern Africa. The incidents have been sporadic, inadequately organized and equipped, doomed to fail from the outset. Nevertheless the governments have responded with comprehensive legislative and executive action to maintain "law and order" — undoubtedly a legitimate responsibility of any government, but one presumably to be reached by means that accord with norms of justice and the rule of law. Thirty-six men from South West Africa are currently being tried in South Africa for some allegedly terrorist activities on the basis of a law reflective more of a government that intends to maintain power by any means than one that is cognizant of standards of justice with which it, as much as any individual, should comply.

This law of June 12, 1967, officially known as The Terrorism Act, has several features which minimize, if not ignore, these standards. The definition of the crime of terrorism is vague and broad enough to suit any prosecutor's needs. Any person who, with the intent of endangering the maintenance of law and order in the Republic, performs an act or aids others to perform acts likely to have any one of a number of possible results — for example, hampering any person in maintaining law and order, causing or encouraging feelings of hostility between white and other inhabitants of the Republic, or embarrassing the administration of the affairs of the State — is guilty of terrorism. The kinds of action that might produce such results are not identified in the statute; the law does not make clear what conduct can be indulged in only at the risk of being judged criminal. The Act, which carries a maximum sentence of death and a minimum sentence of five years, places the onus on the accused to prove he did not commit the crime, rather than on the prosecution to prove he did.

This clear rebuttal of presumption of innocence in a criminal offense was an innovation, even by South African standards. In 1962 the Sabotage Act, for the first time in a capital offense, had placed some burden on the accused. The wording in that statute was not clear; if the accused proved that the alleged offense "objectively regarded" would not have any of the illegal effects, conviction was not possible. The Terrorism Act, which is not precise on what constitutes the crime, achieves clarity on the issue of proof. "The accused shall be presumed to have committed . . . such act with intent to endanger the maintenance of law and order in the Republic unless it is proved beyond a reasonable doubt that he did not intend any of the results aforesaid."

As with the substantive definition of the crime, so too with procedures for enforcing the legislation, every benefit is given to the prosecution and none to the accused. The qualified police officer may arrest without warrant and detain *indefinitely* — that is until the questions have been satisfactorily answered — anyone he believes to be a terrorist or to be withholding from the police any information relating to terrorism. No person other than the interrogators, and a magistrate twice monthly, has access to anyone so detained. The statute specifically excludes courts from pronouncing on the validity of any action taken relative to the detentions. The isolation of the detainees from legal counsel and friends characterized the 1963 90-Day detention and the 1965 180-Day detention; the most notable difference was that in the Terrorism Act Parliament refused to specify a maximum time for possible detention.

True, a person held under the 90-Day provision could be rearrested and redetained successively, but the Terrorism Act did away with the formalities necessary for rearresting. There simply is no time limit; a person can be held as long as the prosecution wants, until he says what is wanted, or until the government decides to release him or bring him to trial. (During the eighteen months that the 90-Day detention was in effect, 1,095 persons were detained. Of these 287 were detained for less than 30 days; 300 for 30 to 59 days; 361 for 60-89 days; 134 for 90-179 days; 13 for 180 days or more. Of the 1095, 575 were charged with some crime and 272 of those so charged were convicted. 241 gave state evidence. Quotations from 1964 and '65 *Annual Survey of South African Law.*)

Another feature of the Terrorism Act which denies generally recognized standards of fairness is that it

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is retroactive. Passed in June 1967, the Act is made retroactive to June 27, 1962, thereby declaring criminal various actions which might not have been judged so at the time they were performed. Such legislation, even if passed, could not be validated in the United States because of the constitutional prohibition on *ex post facto* legislation and the enforceability of this provision by the Supreme Court. But it should not have happened in South Africa either, for there are, if not constitutional safeguards, at least customary restrictions evident in the legal tradition which holds that legislative enactments of this nature violate fundamental notions of justice. The rules on construction of statutes, at least, have required that criminal punishment be non-retroactive. But parliamentary supremacy precludes a judicial veto of such enactments, even if contrary to accepted standards of the country; the only check on parliament is parliament. Obviously, the check was ineffectual; parliamentary debates reveal too little dissent on this or any of the other critical provisions of the Bill. And only one negative vote was cast, that of Mrs. Helen Suzman, the single Progressive Party member of Parliament.

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The thirty-six men (originally thirty-seven; one died in prison) on trial for their lives on the basis of this statute are all members of the Ovambo tribe from the northern part of South West Africa. In age they range from the early twenties to sixty; the educational background and opportunities of the men also vary. Many of them had found sporadic employment as migratory workers in the territory; one is a peasant poet; others were teachers. Most of the men are Lutherans and retain strong religious convictions. What apparently they all have in common is a conviction that South West Africa should be free and independent of South Africa's dominance. Convinced of the historical justification for the separateness of the people of South West Africa, that they were not South African but a people entitled to their independence, the leaders devised various political strategies to achieve the freedom of South West Africa. The South West Africa's Peoples' Organization, SWAPO, one of the political action groups of the territory, has this as one of its primary purposes. And it was in SWAPO that these accused were most active, SWAPO that provided the organizing force for the ventures.

The International Court decision of July 1966, provided the turning point in strategy to bring about an independent South West Africa. Typical of many movements demanding political change, division of opinion existed among these men as to the role and effects of violent tactics. The World Court decision ended any hope the proponents of nonviolence had of their strategy being accepted, for the strongest argument that justified nonviolence was that the United Nations was going to help South West Africa and violence would not be necessary. But the International Court, by the closest possible margin, refused on July 18, 1966, to rule on the merits of Ethiopia and Liberia's claim that South Africa had violated the terms of the mandate. This ended the legal conflict over the status of South West Africa that had been before the Court since 1950, a conflict which the earlier decisions had indicated would be resolved to the benefit of South West Africa. That was not the result; a technicality kept the legal organ of the United Nations from helping South West Africa, and there was no longer any answer to those who advocated violence.

Violence began thereupon in August 1966, with the all too foreseeable result of failure and arrest. It is not known how many men were apprehended in August and September of 1966, nor is it certain what the legal basis for the detention was, since the Terrorism Act was not law and did not become law until ten months after the arrests. What is certain is that the defense counsel had no access to the accused until the prosecution opened the case against them on the basis of the newly enacted Terrorism Act. A comparison of these procedures with recent developments in American law is inevitable and painful.

The United States Supreme Court in *Miranda v. Arizona* 384 U.S. 436 (1966) and other decisions has required that legal counsel be available to the accused for all of the pre-trial interrogation process; the South African Parliament, on the other hand, is making it increasingly difficult for the accused, particularly in political offenses, to have access to legal counsel until —and if—he is brought to trial. Not until the prosecution was ready to commence the open trial was counsel able to see the accused and begin construction of a defense. Many of those arrested had by that time "chosen" not to avail themselves of the privilege against self-incrimination. What means the prosecution had used to persuade them not to exercise their right to remain silent is not a part of the public record; but whatever the methods the result was that testimony by participants in the "terrorist" activities was used against those who were finally brought to trial. By the time it began before Mr. Justice Ludorf of the South African Supreme Court the government had its case.

When the trial commenced in September 1967, the points at issue between the prosecution and the defense could not therefore revolve around disputes as to actions of the accused. It is not denied that some

of the accused were training and arming themselves to fight the South African government, and the government witnesses corroborate this. Distinctions were made, however, as to the degree of involvement in the conspiracy. Some men had gone out of the country for training; others had helped supply those who left and had received them on their return; three had been involved chiefly with SWAPO as a political organization and had been writing for its publications and to the United Nations about conditions in the territory. The defense was able to prove the non-complicity of one man and the judge ordered the dismissal of all charges against him.

A primary disputed point between prosecution and defense was a preliminary constitutional question of some importance. What was the extent of the South African Parliament's power to legislate for South West Africa, particularly since the termination of the mandate by the General Assembly on October 27, 1966 predated the passage of the Terrorism Act in June 1967? Arguing that Parliament's power to legislate derived from the mandate, which had been incorporated into South African law, defense urged on the Court that it had the power to review such legislation. The South African Constitutional Act of 1961 was *not* constitution for South West Africa; the Constitution of South Africa accorded Parliament supremacy; the South West Africa constitution was based on the mandate and subsequent legislation; therefore the Court must examine legislation for South West Africa from the perspective of its Constitution, that is, the mandate and related documents. It was argued, in other words, that the South African courts possessed for South West Africa a power they did not have for South Africa, a power of judicial review parallel to that the United States Supreme Court has over acts of Congress.

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If the Court had accepted this initial point, the Terrorism Act would have been examined from the perspective of the mandate and the effect on South Africa of the General Assembly's termination of the mandate would have to be decided. But the Court, not unexpectedly, rejected the defense's argument. Justice Ludorf ruled that even if Parliament had passed legislation for South West Africa clearly contrary to the terms of the treaty, the Courts would be required to enforce it. "Parliament was supreme and no Court has the power to test any legislation or to approve or disapprove thereof. . . . I have no power to enquire into the propriety or validity of this legislation. I must simply enforce it."

Defense and prosecution also disagree on the extent to which conditions in South West Africa should be a mitigating factor in sentencing. The expectations of the people, the historical separateness of South West Africa, the social and political deprivations under South African administration, all partially account for, if not justify, the resort to organized violence. The Court should take cognizance of these factors and not impose the death penalty or lengthy prison terms, the defense argues; failure to grant consideration to these mitigating factors would deny South Africa's responsibilities for the actions of the accused.

Perhaps, but only perhaps, the Court will respond favorably to this argument. It is generally felt in South Africa that the death penalty had not been imposed in an earlier political trial, the Rivonia trial of 1964, because of the national and international renown of Nelson Mandela, the chief accused. That trial was widely covered by the international press. In contrast, this courtroom in Pretoria is deserted most of the time except for the accused and the police (in about equal numbers) and an occasional diplomatic visitor. For this trial does not have the personage of a Nelson Mandela; these men are not known outside South West Africa and the international coverage has been minimal. And the trials that are expected to follow this one, based on the same law, will probably also have as the accused men unknown to the outside world. Yet the issues of justice and fairness, coupled with South Africa's doubtful title to South West Africa, merit more concern from other members of the international community.

For there is no question about it, South Africa's efforts to deal with "terrorism" by this law and trial have seriously compromised its commitment to the values of a rule of law. South African governmental institutions must recognize their prime importance in developing respect for law by accepting the limitations on governmental power that the rule of law implies. The so-called terrorist trial in Pretoria which is being prosecuted in terms of a statute constituting a negation of the rule of law is a far more serious threat to the maintenance of law and order in the Republic than any pathetically futile and ineffective actions of a handful of so-called "terrorists."

As this article was going to press, Justice Joseph Ludorf rendered a 79-page verdict in which thirty of the group were found guilty of terrorism, but he did not impose the death sentence because, as he noted, the crimes of which the accused were found guilty were committed before the Terrorism Act. Nevertheless, the penalties the South-West Africans received were excessive: nineteen were given life sentences and twenty-year sentences were imposed on nine others.