'HARD' CASES IN 'WICKED' LEGAL SYSTEMS

Submitted for the degee D.Phil.
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A central debate in jurisprudence concerns the nature of the judicial obligation in 'hard' cases--ones that turn on contested points of law. The legal positivists hold that judges have to exercise a discretionary power, not ultimately constrained by law, to decide such cases. Ronald Dworkin has argued that the decision of such cases is determined by law: judges must apply a 'soundest theory' which explains and morally justifies the existing law. Positivists respond that 'wicked' legal systems--ones which are the instrument of a repugnant moral ideology--are a counterexample to Dworkin. I set out this debate and then evaluate these rival positions in a case study of judicial interpretation in the South African legal system, which is the standard example of a wicked one.

I argue that, in the historical and political context of a the South African legal system (Ch.2), the first part of the study (Chs.3,4,5) shows that positivist ideas not only fail to assist judges in a wicked legal system, but make things worse. I argue that the rest of the study (Chs.6,7,) shows how judges do better who adopt the advice that Dworkin gives. I also suggest that their approach can only be stopped at the cost of great damage to a legal system and that this should lead us to take seriously ideas put forward by Lon Fuller.

To my father

Potuit

Qui rerum cognoscere causas

In memory of my mother

And her search for justice in South Africa

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Preface

The white minority in South Africa has oppressed the black majority ever since white settlers first arrived at the Cape in 1652. But systematic racial discrimination dates from the turn of this century when South Africa became one political entity under the control of an exclusively white Parliament. Whatever the differences between the governments which followed, they have agreed that racial segregation had to be enforced in order to ensure the material, political and social domination of white over black.

In the general election of 1948, a government of Afrikaner Nationalists came to power. After a period of consolidation, they began to implement the most radical policy of racial segregation the century had seen. In addition, they brutally suppressed the mounting but non-violent resistance which took place outside the white domain of parliamentary politics. The Nationalists called their policy 'apartheid' and the statutes they enacted in the cause of its implementation and the suppression of political opposition are known as the 'apartheid laws'.

Apartheid laws usually state their objectives in very general terms and give extensive powers of implementation to executive officials. In the early 1950s, the Appellate Division (AD), the supreme appellate court in South Africa, handed down decisions on the interpretation of apartheid laws which the government saw as an unjustified interference with executive action to implement apartheid policy. The

government's reaction was to enact new statutes and amend the old to make its intention clear that the courts were not to interfere. In addition, by 1958 the character of the AD had changed. The court, now staffed by judges appointed by the Nationalist government, started to show itself more than merely ready to recognize explicit indications that it was not to interfere. It sought to find implicit support in apartheid laws for reasoning that the courts should not interfere with executive action.

Such a situation might seem inevitable in a country where there is an entrenched and determined government and where the courts accept a strict doctrine of legislative supremacy so that judges cannot declare statutes invalid for want of compliance with moral standards. The sense of inevitability is compounded when one observes that the South African courts follow a strict doctrine of precedent, so that the inferior courts in the judicial hierarchy are legally required to follow the decisions of the superior courts. It would seem, that is, that in a nation ruled by a government determined to implement a morally repugnant policy, where there is no check of a constitution which gives the courts the right to test the validity of statutes against substantive moral standards, there is no alternative but for the legal system and its officials to become the instrument of that policy.

However, since the mid-1960s, liberal lawyers in South Africa have tried to persuade South African judges that they should not share in this sense of inevitability. The law-

yers have argued that the true tradition of the South African legal system is a liberal one and they call on judges to decide cases on the interpretation of apartheid laws in accordance with this tradition. The call has provoked discussions about how to characterize judicial obligation in 'hard cases'--ones that turn on contested points of law--and about the role of judges in seeing to it that official action is lawful--that it complies with the 'rule of law'.

These issues are precisely the ones which have occupied centre stage in jurisprudential debate over the last thirty years. Indeed, within this debate South Africa now provides the standard example of a wicked legal system, one which has been made the instrument of a morally repugnant ideology. Each of the two main rival positions in this debate claims that its characterization of judicial obligation in hard cases will be conducive to morally better results than the other. Moreover, the proponents of one of these positions hold that the existence of wicked legal systems such as the South African supports their own position and is a counter-example to the other.

Recently, a small minority of South African judges, in courts inferior to the AD, have taken to interpreting apartheid laws in accordance with what they claim is the true liberal tradition of their legal system. In this thesis, I explore and contrast the judgments given by the judges whose decisions in effect implemented apartheid policy and the judgments of the small minority whose decisions resisted that policy. I ask how judges were able to respond to a call

for a liberal construal of their tradition when the statutes they had to interpret seemed to require the opposite and when the AD seemed to require a different approach.

My case study thus provides a detailed account of judicial reasoning during an important period in South African legal and political history. It shows how of two interpretive approaches adopted by the judges, one provided a resource which enabled the judges to resist a morally repugnant ideology, while the other not only failed to stand in the way of the ideology but seemed to encourage it. It also reveals significant links between the judges' interpretive approaches and their views of judicial obligation and the rule of law. I argue that the judges adopted different interpretive approaches to statutes and precedent because they held different views of the judicial obligation in hard cases and the judicial role in enforcing the rule of law. These views have a great deal in common with those advocated by the rival jurisprudential positions. And since only one of the interpretive approaches adopted by the judges did conduce to morally better results, the case study provides us with a basis for evaluating the rival jurisprudential positions.

In chapter one, I outline the issues in the jurisprudential debate and in chapter two I set the historical and political stage for the study. Chapters three through to seven contain the detailed exposition and analysis of the judgments as well as my argument about what the case study can tell us about the jurisprudential debate.

Reference Policy

In the case study, I shall use extensive quotation in order, so far as possible, to let the judges speak for themselves. Page references in the context of the discussion of a particular judgment will, when convenient, be given in the text. Emphasis is, unless otherwise indicated, my own. In general, I adopt the following convention for referring to a decision. After its first citation, I shall refer to it by the first proper name that occurs in its title. Usually the date given in the text is that of the report of the decision. But I shall sometimes give the date the decision was actually given rather than the date of the report; for example, when a judge relies on an unreported decision which is then reported later than his own. In discussing particular judgments, I shall use the judicial titles, or rather their abbreviations, employed at the time the decision was given. But no title will be used in discussions out of the immediate context of a particular judgment. I shall only report the names of judges who concurred in the majority judgment in the case when this is of some interest. I shall generally use the past tense to indicate that I am reporting a judge's reasoning and the present to indicate that I am elucidating or commenting on his reasoning. I have used ordinary brackets in place of (the usual) square brackets in citing English Law Reports.

The Supreme Court of South Africa consists of an Appellate Division, seven provincial divisions, (the Cape,

the Eastern Cape, the Northern Cape, Natal, Orange Free State, Transvaal and South West Africa) and three local divisions (Durban and Coast Local Division, the Witwatersrand Local Division, and the South-Eastern Cape Local Division).

I discuss and refer to some decisions given by judges in the 'National States', the nominally independent 'homeland' areas set aside for Africans (Transkei, Bophutaswana, Venda and Ciskei). These courts are staffed by South African judges seconded from the South African Supreme Court and the judges regard themselves as bound by South African precedent. In some cases, appeals from these courts lie to the Appellate Division of South Africa.

Abbreviations

1. Courts

AD	Appellate Division
CPD	Cape Provincial Division
DCLD	Durban and Local Coast Division
ECD	Eastern Cape Division
NCD	Northern Cape Division
NPD	Natal Provincial Division
SECLD	South-Eastern Cape Division
SWA	South West Africa
TkSC	Transkei Supreme Court
TPD	Transvaal Provincial Division
WLD	Witwatersrand Local Division

2 South African Law Reports

Between 1910 and 1946 the cases are generally cited using the abbreviations above. After 1947, generally only the first letter of the abbreviation appears in parantheses; for example, '(A)' instead of 'AD'. In addition, '(SA)' appears in the citation to indicate 'South Africa'.

3 Judges

CJ	Chief Justice
JA	Judge of Appeal
JJA	Judges of Appeal
J	Judge of the Supreme Court
JJ	Judges of the Supreme Court
AJA	Acting Judge of Appeal
AJ	Acting Judge
JP	Judge President

Chapter 1

Judicial Obligation and the Rule of Law

1.1 The Positivist Distinction

A debate about judicial obligation in hard cases has occupied centre stage in jurisprudence since 1967. In that year, Ronald Dworkin published the essay "Is Law a System of Rules?"[1] in which he criticized the account of judicial obligation given by legal positivists, principally that of HLA Hart, and offered an alternative.

The debate can usefully be seen as one about a general problem which occupies anyone who offers an account of judicial obligation. In common law jurisdictions, those in which some judicial decisions are a source of law, over time the law of the jurisdiction will change at the hands of its judges and yet the judges see themselves as bound by law. The problem is to reconcile this apparent tension between judicial constraint and creativity.

The positivists and Dworkin each claim that their particular reconciliation not only correctly describes law but leads in practice to morally superior judicial decisions. The positivists argue that the moral superiority of their solution is due to the fact that they uphold a distinction between law and morality which Dworkin rejects. Briefly, the positivists accept, while Dworkin rejects, a view of law according to which moral claims do not count among the truth

conditions of propositions of law.

The positivists[2] stand with Hart in a certain tradition, which Joseph Raz, himself such a positivist, describes in the following way.[3] Hart is the "heir and torchbearer" of the legal theory founded by Jeremy Bentham, a "great tradition in the philosophy of law which is both realist and unromantic in outlook". For Hart shares the "Benthamite sense" of the "deleterious moral consequences" of an "excessive veneration in which the law is held in Common Law countries". Raz claims that "evident" in Hart's recent work is his "fear" that legal theory has "lurched back" in the direction of excessive veneration instead of continuing Hart's project--the laying of the "foundation for a cool and potentially critical assessment of the law".

Raz is alluding to the fact that positivism was founded by Bentham in the last years of the eighteenth century in reaction to what he regarded as the moral dangers of the Common Law theory dominant at that time, the most famous exposition of which is William Blackstone's **Commentaries on the Laws of England** (1765-69).[4] Whatever the changes in positivism during Bentham's lifetime and after, the sense of these dangers has remained, as Raz suggests, a constant with contemporary positivists. They see Dworkin's critique of positivism as the 'lurch' which attempts to revive Common Law theory in a modern guise.

Gerald Postema has pointed out that the organizing idea of Common Law theory is that law is neither something made by a king, Parliament or judges, nor a set of universal ra-

tional principles.[5] Rather law is the expression of standards of reason embedded in historically evidenced national custom. The theory can be seen as a response to political absolutism, as an attempt to justify a measure of control over centralized power. The theory holds that judges exercise this control by interpreting statutes as if they were enacted in order to comply with standards of reason embodied in the common law. Among the most important of the standards are those protective of the liberty of the individual.[6]

According to Common Law theory, while the reason of the common law is embedded in historically evidenced national custom, it is not arbitrary. Standards of reason are embedded in the law because they have stood the tests of time, popular experience and judicial wisdom. That is, the standards are the coherent product of a process of reasoning by lawyers and judges over time, which express certain commonly shared values and conceptions of reasonableness and common good. As such, the standards provide a measure for the reasonableness or unreasonableness of actions. It follows for the Common Law theorists that a correct solution to a legal question is not rational, just and fair merely because it is in accordance with the law. It is rational, just and fair because it is in accordance with legal standards that embody rationality, justice and fairness.[7]

In his **Comment on the Commentaries** (1774-76) and **A Fragment on Government** (1776),[8] Bentham argues that two great moral dangers inhere in the morally charged view of law put forward by Common Law theorists. First, he argues

that their view that what is in accordance with law is also in accordance with morality will encourage people to conclude from the mere fact that L is the law that L should be obeyed. Hence the danger is that people might be seduced into an "obsequious quietism".[9] They will unthinkingly obey bad laws instead of doing what Bentham thinks to be morally required--criticizing the law with a view to its reform.

The second danger arises from two further claims made by the Common Law theorists. They argue that judges in deciding hard cases do not make new law, because their decisions, if correct, are correct by virtue of the reason already embedded in the law. They also argue that because standards of reason provide the criteria for correctness, judges are not obliged to follow decisions that are, in Blackstone's words, "flatly absurd or unjust". As he puts it, such decisions are "most evidently contrary to reason" or, even worse, to "divine law".[10]

Bentham argues that these claims license an official elite taking power over morality as well as law. Judges can claim that their own views as to what the law should be are both in accordance with law and with morality.[11] Common Law theory, that is, seems to give judges a license to declare the law invalid because it does not accord with right reason. But 'right reason', according to Bentham, means 'What I like'.[12] So the second danger is the opposite of obsequious quietism. It is the danger of moral anarchy.

Bentham thinks that the danger of moral anarchy is compounded by the explanation offered by Blackstone of how the

law can exercise a control over an executive eager to be free from all constraint. Blackstone argues that the separation of powers between Parliament, with its supreme power of legislation,[13] and the executive provides a check on a government eager to be free of the constraints of law. He says that if ever the distinction between the executive and Parliament is lost, or if one becomes subservient to the other, the constitution will be damaged with serious consequences for liberty.[14]

Bentham scoffs at such faith in the separation of powers. Both he and John Austin, his distinguished disciple, point out that Parliament is for the most part under the effective control of the government.[15] But Bentham also sees implicit in Blackstone an argument, which we should note is explicitly put forward by other Common Law theorists.[16]

The argument focuses on the separation of powers between the courts, the executive and Parliament, and the courts, rather than Parliament, are seen as the guardian of liberty against the executive. It holds that judges who interpret statutes in accordance with the moral standards embedded in the common law will see to it that statutes, and therefore executive action under statutory powers, measure up to what they take the moral standards of the common law to require. As Sir Edward Coke puts it:

> The surest construction of a statute is by the rule and reason of the common law.[17]

This focus on the courts as the guardians of liberty was taken up by AV Dicey in his famous lectures on the British constitution published in 1885.[18]

Both Bentham and Austin would have thought with Dicey's twentieth century critics that Dicey is caught in an "irreducible contradiction" between a claim, on the one hand, that the courts can be effective guardians of liberty and an acknowledgement, on the other, that parliaments have supreme power and are under the effective control of governments.[19] But Bentham sees in the faith placed in the courts an invitation to judges to disregard or misinterpret the law. In his view, this faith encourages judges to become part of a "power-stealing system"--to use a device or "fiction" to conceal what amounts to a

> wilful falsehood, having for its object the stealing legislative power, by and for hands, which could not, or durst not, openly claim it,--and, but for the delusion thus produced, could not exercise it.[20]

It is not that Bentham finds it impossible to conceive that a "portion of supreme power" can be transferred to the courts. However, in accordance with his views on the way in which political power is best distributed, he puts forward a doctrine of judicial responsibility which rules out giving legislative power to unelected officials. That is, he thinks that it is politically inappropriate for judges to have power over laws passed by an assembly in which the popular will has at least some influence. In addition, he points out that these officials are appointed by the same body, the executive, whose "partial and occasional influence" the Common Law theorists seek to curtail.[21] He also argues that it is more realistic and morally better to acknowledge that the only real safeguard of liberty lies in having a political system in which the government is subject to the check of

free and frequent elections.[22] In sum, he argues that the only real checks on legislative power are and should be moral and external to the legal system.

The alternative theory of law which Bentham and Austin developed observes a rigid distinction between what law is and what morality requires. It reduces the idea of law to social facts about human behaviour. It holds, first, that law exists when the population of a country habitually obeys the commands, backed by sanctions, of the sovereign. The sovereign is the particular person or body who does not obey the commands of any other--he is legally unlimited. Secondly, the command theory holds that the content of the law, of the sovereign's commands, is that which can be identified by tests which rely on factual considerations alone. Because the theory requires one to view law as a system of commands it is known today as the 'command theory of law'.[23]

Notice that if the law of a legal system is composed of laws publicly knowable because their content can be ascertained by tests that rely on factual considerations alone, the moral dangers of Common Law theory are avoided. Citizens will not be tempted into obsequious quietism because they will know that L is the law merely because L complies with certain factual considerations and not because it is in accordance with morality. And if the law is publicly knowable by factual tests, the law will not be determined by whatever judges happen to like.

The common law is difficult to fit into the mould of a command with a factual content just because its basis is

both the judicial decisions on the facts between the parties to a matter and the reasoned justifications for the decisions. But Bentham and Austin argue that the common law has to be seen as composed of the rules for which judicial decisions stand. In their view, the rules have the status of law, not because they are in accordance with right reason, but because they have not been repealed by the legislature. Their legal status is by virtue of what Bentham calls a tacit or quasi-command.[24]

Bentham and Austin do not, however, think that a legal system composed of such factually knowable commands and quasi-commands will resolve all legal questions. Judges will still be required to settle contested points of law. So they have to show how judicial constraint and creativity can be reconciled in order to provide an account of judicial obligation in hard cases.

Their reconciliation rejects what Austin calls the "childish fiction"[25] of the Common Law theorists that judges merely enforce and declare the law that already exists on a matter. They argue that in many of the cases which come up for adjudication, judges have to decide the matter as between the parties by exercising a discretionary power in a manner not dictated by law. It follows that in common law jurisdictions, where judicial decisions have a legal force that goes beyond the decision between the parties, one has to recognize that the judges, in exercising their discretion, are exercising a law-making power. The checks or constraints on this power, are in fact, as in the case of su-

preme legislative power, moral and external to the legal system--the opinion of the judge's colleagues, public opinion and the likely reaction of legislators.[26] The appropriate constraints, in Bentham and Austin's view, are the dictates of the utilitarian moral theory they espouse.

It is important to note that Bentham was always rather doubtful about whether the common law could be fitted into the mould of factually knowable commands. He says of the common law that it is

> but an assemblage of fictitious regulations feigned after the images of these real ones that compose the Statute Law.[27]

Because, in addition, he is averse to the idea of judges having law-making power, he eventually suggested that the common law should be eradicated as a form of law. Thus his view came to be that judges should be stripped of their power to make law so that judicial decisions would not have any force except as between the parties to the case.[28]

Austin thought that Bentham was wrong on this point and he gives an extended treatment of the common law.[29] In addition, he does not follow Bentham in putting forward a doctrine of judicial responsibility rooted in a nascent democratic theory. His arguments are designed to show that law is in its nature factually knowable rather than that the law should be made to be factually knowable. Thus he does not think it a problem that the law might in large part be knowable only by an official elite--the judges--and not by the public.[30]

In a famous essay in the 1958 **Harvard Law Review,** Hart

firmly disengaged positivism from utilitarian moral theory and from the command theory of law.[31] He rejects the command theory, first, because he thinks it evident that there is more to legal order than the compulsion of a command backed by a threatened sanction. Law, he says, is surely not a "gunman situation writ large".[32] Secondly, he points out that the command theory of law seems to put the sovereign outside the law which does not account for the fact that "nothing which legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making procedures".[33]

His own claim is that the key to understanding a legal system lies not in the notion of a command, but in the notion of certain fundamental rules accepted by legal officials as specifying law-making procedures. In later work, he develops the idea of fundamental acceptance into an account of the "rule of recognition".[34] The rule is the most fundamental constitutional rule of a legal system, accepted by at least the officials who administer the law of the system as specifying the criteria of validity which certify whether or not a suggested rule is a rule of the legal system. In terms of this account, legislatures are not legally unlimited even in jurisdictions where there is a strict doctrine of legislative supremacy. For there the courts will recognize as valid only those legislative acts which conform to the criteria of validity in fact embodied in their practice.

In Hart's view, there are two aspects to official acceptance. First, there is the normative aspect--the offi-

cials accept that they are under an obligation to follow the rule and they manifest this acceptance both by following the rule and by criticizing deviations from it. Secondly, there is the factual aspect--the content of the rule is what was in fact accepted in the past by officials as constituting its content.

It might seem that an account which relies on a notion of official acceptance must involve some moral component. But through his emphasis on the factual aspect of the rule of recognition, Hart resists introducing a moral component into the account. He follows Austin in taking over a framework for understanding law which relies on claims about what law in its nature is and not on any political doctrine of judicial responsibility. He remains adamant that positivism should retain the central idea in the positivist reaction to Common Law theory: the insistence on

> the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be.[35]

He also thinks that Bentham's and Austin's reason for making the distinction holds good. It will

> enable men to see steadily the precise issues posed by the existence of morally bad laws, and to understand the specific character of the authority of a legal order.[36]

I do not deal with the issue whether Hart's account of acceptance succeeds in not threatening the distinction between law as it is and law as it ought to be.[37] I merely aim to show, first, how the notion of factual official acceptance can reconcile judicial constraint and creativity and, secondly, how the positivists end up claiming that the

their theory of law is conducive to morally superior results over rivals which blur the distinction between law and morality.

1.2 Hart on Judicial Obligation

In his 1958 essay, Hart points out that Bentham and Austin, in insisting on the distinction between law and morality, had in mind the best way to deal with laws the meaning of which are settled. He sees the need for positivism to consider the additional problem of the characterization of legal duty in cases where the law is unsettled. For positivism must, in his view, respond to a claim that

> an essential connection between law and morals emerges if we examine how laws, the meanings of which are in dispute, are interpreted and applied in particular cases.[38]

The threat Hart perceives to the positivist distinction is as follows. Judges are the officials charged with deciding disputes over legal meaning. In doing so, they have to take moral considerations, for example, arguments about social policy, into account. Because their decisions turn on moral considerations, it may seem to follow that the distinction between law and morality becomes blurred.

Hart, in countering this threat, sets out the positivist view on why disputes over legal meaning arise and on what the judicial obligation is in settling the disputes. He first dismisses critics of positivism who claim that it advocates a mechanical and formal kind of decision procedure for settling disputes about legal meaning. He points out

that the positivists, because they are aware of a certain feature of language, are also aware that judges have to make intelligent judgments about social policy in order to reach their decisions in hard cases.[39]

Communication, Hart suggests, is possible because words have a "core of settled meaning", of "standard instances", where there is no doubt about the meaning of the communication. But there is also a "penumbra"--the area where what the words mean is "debatable". If rules are seen as communications across time, as legislation for the future, they too will have a core of settled meaning and a penumbra of uncertainty. Hart also points out that the aims with which rules are enacted are both general and indeterminate and that human invention and natural processes throw up facts not foreseen by the draftsmen of statutes. It follows that the penumbra of uncertainty would exist in a world where rules were drafted perfectly. So the positivists think that uncertainty arises because it is inherent in the language in which rules are expressed and it is ineliminable because of problems inherent in legislating for the future.[40]

Thus Hart's claim is that the positivists recognize that adjudication to a large extent involves deciding problems in the legal penumbra where the law is unsettled. They also recognize, he says, that in these penumbral or hard cases the decision is always the result of an intelligent judgment. This leaves two questions, 'Why does the charge of formalism arise?' and 'How is one to characterize the intelligent judgment which decides a hard case?'

In answer to the first question, Hart says that formalism is more a vice of theory than of judges; and then it is more appropriately laid at the door of theorists such as Blackstone, who, as he puts it, are preoccupied with the separation of powers and who adopt the "childish fiction" that judges do not make but merely enforce the law that already exists.[41] Hart thinks that when the charge of formalism is made against judges this is really a way of stigmatizing the policy which the judgment in fact advances; for example, when the judge takes the policy-based decision of adopting the meaning which "would jump to the mind of the ordinary man" or when he decides according to a conservative social policy.[42]

As a prelude to answering the second question, Hart rejects an argument that the distinction between what law is and what law ought to be is blurred because a judge, in deciding a hard case by an exercise of intelligent judgment, draws on social policies and aims already existing in the law. He points out that the contrast between an automatic and an intelligent decision can be "reproduced inside a system dedicated to the pursuit of the most evil aims". A decision, for example, can be intelligent if it is guided "exclusively by consideration of what was needed to maintain the state's tyranny effectively".[43] That is, because in such systems the intelligent judgment might advance some morally repugnant policy, the systems serve to show that an intelligent judicial decision as to what law ought to be need not be in accordance with what morality requires. Hart

also warns against the tendency to think that because in retrospect an interpretation of a rule seems its natural elaboration, the decision as to that interpretation is at the time the natural or rational one.[44]

But Hart is clear that his main claim is that the correct characterization of judicial obligation in hard cases is one that respects the positivist distinction. Like Bentham and Austin, he holds that judges often or even usually do not decide hard cases in accordance with what law is. Rather they make a ruling which is not dictated by law. Hart acknowledges that he cannot "refute" an argument that the aims and policies of the penumbra are as much law as the "core of legal rules whose meaning was settled". But he wants to "refuse" an "invitation" to accept the argument.[45]

In his view, a vocabulary which blurs the distinction between what law is and what law ought to be is mysterious and there is an unmysterious one available. The unmysterious vocabulary is one that observes the distinction by adopting the language of judicial discretion, "the language of choice between alternatives".[46] In addition, he charges the mysterious vocabulary with neglecting the fact that the

> hard core of settled meaning of a law is law in some centrally important sense and that even if there are border lines, there must first be lines.[47]

The mysterious vocabulary, he claims, abandon the notion that rules have authority and that there is any "force or even meaning to an argument that a case falls clearly within a rule and the scope of a precedent".[48] So he can point out that positivism, in avoiding formalism, does not

succumb to a scepticism which holds that all legal questions lack determinate answers. Rather it shows where the authority of law lies.[49]

Notice the direction of Hart's argument. His premise is the positivist view that law is settled law and his conclusion is that judges have a discretionary power in the decision of hard cases. If we amplify the premise in line with Hart's account of the rule of recognition, we can see how Hart and other positivists think that a theory of adjudication based on the notion of (factual) official acceptance reconciles judicial constraint and creativity. We can see, that is, why Hart thinks that the distinction between law and morality explains both the authority of law over judges and the fact that the judicial decision of hard cases is not determined by rules.

The positivists hold that in order to determine the law of a legal system we find out first what legal officials in fact recognize as the sources of law of that system. We then determine the laws which stem from those sources by using the very tests which the same legal officials would be required to use; the ones which legal officials have made a practice of using in the past. Hence the legal constraints on judges are constraints of established practice. Judges regard the fact that certain tests have been used in the past as legally compelling, what Hart has recently called "peremptory" reasons to use them.[50]

But there is more to these reasons than their peremptory quality. They are, as Hart terms it, "content-independ-

ent". Such a reason requires the person to whom it is addressed to act as the reason requires independently of the nature and or character of the actions it requires.[51] For the positivist, the primary judicial obligation is to apply the law as it is determined to exist in this content-independent way. It follows that where judges have to base their decisions on reasons which are not content-independent, the judges are no longer engaged in legal reasoning. Rather they are exercising a law-making discretionary power, the checks on which are moral and external to the legal system.

Judges will be required to exercise such a power, first, as a result of the uncertainty inherent in legislating for the future. The tests which the judge is required to use might show, that is, that there is no law in fact on the matter. Secondly, discretion might arise because judicial practice is itself indeterminate. For example, in determining the meaning of a statute, a judge might find that two different presumptions of statutory interpretation are considered appropriate in this kind of case, and that they lead to different results. Notice that if judges make a practice of applying one presumption rather than the other, at some point they will be required to apply that one because practice is no longer indeterminate. As Hart puts it, in the case of indeterminacy within the rule of recognition "all that succeeds is success".[52]

If there is a doctrine of precedent in the jurisdiction, the judge's decision as to what a statute should be taken to mean may do more than settle the matter between the

parties. It may be taken by future judges to have authoritatively settled the issue of what the statute means.

The same applies to the law whose source is other judicial decisions--the judge-made or common law. Contemporary positivists adopt much the same view of the common law as that put forward by Bentham and Austin. The common law exists where some judicial decisions are viewed by judges as validly laying down rules for the future: the rules constrain judges because the judges take them to stand for rules or propositions of law. Indeed, the main difference is that contemporary positivists hold that judges are under an obligation to regard precedent as binding, not because the legislature has failed to repeal the rules for which the precedent stands, but because the judges are required by established practice to regard the precedent as binding.[53]

As the positivists see it, a doctrine of precedent will generally both bind judges and give them power to change the law. A judge may narrow down the rule for which the previous decision stands by distinguishing the matter before him from the previous one, as long as the rule for which he takes the previous decision to stand still justifies that decision. Or judges may discard a restriction in the previous decision and extend the rule to cover new matters as long as the extended rule still justifies the previous decision. In both these situations judges alter the rule, but it continues to exercise a constraint on them because the changed rule still has to be a justification for the past decision. Finally, judges may sometimes have the power to overrule past deci-

sions, on the positivist view, by discarding the rule for which a past decision stands.[54] Here the only constraint on judges is the moral and external one which is the ultimate consideration on which any exercise of discretion is based.

This solution to reconciling judicial constraint and creativity also indicates the positivist view of the status of judicial mistakes about what practice requires or about what law is. Judicial mistakes as to what practice requires may create controversy about what it requires and this will unsettle previously settled law.[55] Here the judges exercise a discretion which they do not in fact have, and I shall refer to this legally unpermitted exercise of discretion as the 'arrogation of a discretion'. Such a mistake, as well as mistakes as to what settled law is, may in fact become the law, depending on the status of the court that makes the mistake and the attitude of future courts.[56]

In sum, the positivist reconciliation of constraint and creativity involves a claim about constraint: judicial obligation coincides with the judge's duty to apply the tests which judicial practice recognizes as appropriate and the law which the tests picks out in a content-independent way. It also involves a claim that judges have to exercise a law-making discretion when there is no settled law on a matter either because judicial practice is equivocal on what tests a judge should use to determine what law is, or because of the uncertainty inherent in legislating for the future. Finally, it involves a claim that in systems where there is a

doctrine of precedent, judges may have a discretionary power in certain circumstances to change, extend or overrule judge-made law.

I pointed out above that this reconciliation arises from the premise that the law of a legal system is confined to its settled law. I also pointed out that Hart thinks that one would go astray in looking for the nature of law in the penumbra where law is unsettled, not least because one would not then be able to explain the authority of law. The positivist claim about the locus of the nature and authority of law is meant among other things to alert us to the fact that positivism is not a theory of adjudication but a theory of law.

Positivism does not, that is, put forward a doctrine of judicial responsibility which tells judges how they ought to go about the morally charged business of deciding hard cases. Positivism merely tells us that a sound theory of adjudication would be one which addressed itself to such questions as how discretion should be exercised and how much discretionary power judges should have. Put another way, the positivists do not provide a solution to the problem of reconciling constraint and creativity for particular jurisdictions, but only the structure within which particular solutions should work. To fill in the structure would require, amongst other things, a doctrine of judicial responsibility which would tell judges what they ought, morally speaking, to do.

I shall not at this point go into the various and com-

plex arguments which different positivists think justify the premise that law is settled law.[57] My sole concern is with the positivist reconciliation of judicial constraint and creativity. As I have indicated, in 1958 Hart claimed that the merits of positivism are that it avoids the mysteries of positions which blur the distinction between law and morality. But he was, at that time, also concerned to rebut a charge that it is positivism that promotes obsequious quietism because it is

> not only intellectually misleading but corrupting in practice, at its worst apt to weaken resistance to state tyranny or absolutism, and at its best apt to bring the law into disrespect.[58]

1.3 The Truly Liberal Answer

This charge was born of the horrors of the second world war. It was put forward by German lawyers, most notably Gustav Radbruch, who had rejected positivism because they thought that their experience showed that it had contributed to the subservience of the German legal profession to Nazism. As Hart sees it, Radbruch's argument is that the positivist distinction between law and morality corrupts practice precisely because it insists on a distinction between what law is and what law ought to be. That is, positivism encourages people to believe that the certification of a law as valid is not affected by the fact that it grossly offends moral standards, and this will encourage them to obey bad laws.[59]

Hart portrays Radbruch's argument as follows. There

are fundamental principles of humanitarian morality which are part of the very concept of **Recht** or Legality. Laws which transgress these principles for that reason lack legal character and should be denounced as such by judges and lawyers. Moreover, the laws should not count in "working out the legal position of any given individual in particular circumstances".[60]

Hart, despite his sympathy for the motives of these German lawyers, accuses them of "extraordinary naivety" for thinking that the view that laws are laws whatever their moral character had contributed to subservience to state power in Nazi Germany. Rather, Hart says, this "terrible history" prompts inquiry into why emphasis on the slogan 'law is law' and the distinction between law and morality acquired a sinister character in Germany, but elsewhere are associated with the most enlightened liberalism. In his view, the "truly liberal answer" to any sinister use of the slogan 'law is law' is:

> Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.[61]

He goes on to argue that the road to the answer lies in acknowledging that laws may be too evil to be obeyed. He uses the example of a decision whether to punish a person now for doing something grossly immoral but legal at an earlier time. In his view, Radbruch's position would deal with the situation by stripping the old law of its legality and then punishing the person for having transgressed whatever law made the immoral offence illegal. But, Hart argues, this solution hides the fact that the situation is a moral

quandary--one has to choose between the evil of retrospectivity and the evil of leaving unpunished the person who had obeyed a law too evil to be obeyed. The vice in Radbruch's solution is that it would

> serve to cloak the true nature of the problems with which we are faced and encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accomodate another.[62]

In the last section, I showed how Hart deals with the question of how to characterize legal duty when the law is unsettled. Here the problem is how to characterize moral duty when the law is settled but evil. But notice that Hart's answer here is similar to his answer to the first problem. He thinks that the vocabulary which positivism adopts can get the situation right while the alternative vocabulary, which would blur the distinction between the law as it is and the law as it ought to be, distorts the situation.

It is instructive to note, as Hart acknowledged later,[63] that his example, which he had thought to be that of an actual case decided in 1949, was inaccurate. The statute in question made it an offence, punishable by death, to insult Hitler. A German woman had rid herself of her husband by denouncing him to the authorities for having made insulting remarks about Hitler. The 1949 court had held, not that the statute lacked the character of legality, but that it did not impose a duty on the wife to do what she did, and that, therefore, she had illegally deprived her husband of his liberty.

But despite this acknowledgment, Hart nowhere adverts to the possibility that the German court in 1949 had, in order to get to what it considered the just result in the case, based its reasoning on a view of law imbued with ideals that blur the distinction between what law is and what law ought to be.[64] Nor does Hart take up the point that, on his own portrayal of Radbruch's position, it seems that he was not much concerned with the naive claim that the German people had been misled by legal positivism. Rather he seems concerned with the more interesting claim that German lawyers and judges had been misled by legal positivism in determining what their legal duty involved, including the judicial obligation in the decision of hard cases.

Indeed, this was Radbruch's concern. He says that the positivist belief that "a law is a law" had made "German jurists defenceless in the face of laws that were tyrannical and in fact criminal".[65] He does advert to the possibility that what he called the "contradiction between positive law and justice" could become so "intolerable that the law, being an 'unjust law', has to give way to justice".[66]

But his main argument is not that a morally charged view of law requires one to decide that laws are too unjust to be worthy of the status of law. Rather he argues that at a certain stage of injustice, laws will lose all the attributes, including the formal or positive ones, which we associate with the very idea of law:

> It is impossible to draw a sharper line between cases of legal injustice and laws that are valid despite

> their inherent injustice. But an alternative sharp definition is possible: where justice is not even aimed at, where equity, this nucleus of justice, is knowingly refused entry in the process of the creation of a positive law, then the law is not simply unjust, it is outright devoid of all legality. For one cannot define law, not even the positive law otherwise than by saying that it is a rule or statute which by its meaning is intended to serve the cause of justice.[67]

But it is likely that Hart did not take up this point because he thought that the notion of a morality inherent in the very idea of law is empty. For he argues against a claim that all legal systems have to comply with certain principles of legality which imbue the legal systems with a minimum moral content; for example, the principle of fairness observed in treating like cases alike.[68]

In Hart's view, wicked legal systems are a sufficient counterexample to such a claim. For

> a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive.[69]

Thus he says that even if there are principles which amount to minimum requirements for legality, they would not imbue a legal system with a minimum content of morality and hence their existence would not threaten the distinction between law and morality.

1.4 Lon Fuller on the Rule of Law

Lon Fuller thought that Hart had acknowledged that one of the chief issues in the debate between positivists and others was how best to "define and serve the ideal of fidelity to law".[70] However, he accuses Hart of not accepting the

implications of this acknowledgment. This fault, Fuller thinks, stems from a positivist reluctance to infuse morality into the law which is based in the fear that bad moral values might in fact be infused. In his view, this fear betrays an assumption that "evil aims may have as much coherence and inner logic as good ones".[71] Fuller's own starting point, on the other hand, is a faith in the moral resources of law and in particular that when people

> are compelled to **explain and justify** their decisions, the effect will generally be to pull those decisions towards goodness, by whatever standards of ultimate goodness there are.[72]

Fuller's main argument is that there are eight principles of legality which are inherent in the idea of law: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and, the one which he took to be the most important, congruence between official action and declared rule.[73] A system which fails completely to meet one of these requirements, or fails substantially to meet several, would not, in his view, be a legal system. It would not qualify as government under law--as government subject to the rule of law.

He claims that compliance with the eight principles imbues law with a moral content, an "inner morality". He thus claims that that compliance with the eight principles would make a positive moral difference to all legal systems, even wicked ones. Even a tyrant who wanted to govern through the medium of law would have to comply with the eight principles, and this would preclude rule by arbitrary decree and secret terror, which, Fuller says, is the most effective

medium for tyranny.[74] Hence his argument, like Blackstone's, is one which emphasizes legislative limits on government power.

However, Dworkin pointed out that if tyrants preferred not to rule through law this would be because they feared publicity and not because there was any constraining inner morality of law.[75] He rejected Fuller's claim that laws enacted to achieve evil ends are necessarily vague and therefore lacking in the quality of legality, saying that a "perfectly evil statute could be drafted with exquisite precision". The only substance in Fuller's position, Dworkin thought, was that if we have to interpret a law whose fundamental purpose is obnoxious to our sense of morality, we might have difficulty in understanding the law because we would "gain no help from our sense of fairness in making discriminations under it".[76]

In addition, it is not easy to see what ideal of fidelity to law Fuller can pin on contemporary positivists, given that they expressly refrain from putting forward a doctrine of judicial responsibility. In later work, he contrasts his view of the authority of law--the "product of an interplay of purposive orientations between citizens and government" with that of the positivists, which he takes to be a "one-way projection of authority, originating with government and imposing itself upon the citizen".[77] But, as we have seen, while the positivists think that the primary duty of a judge is to apply settled law, they also think that the authority of law runs out in hard cases. In such cases a judge has to

exercise his discretion and make an intelligent judgment about social policy. His decision, as Hart suggests, might be conservative. But then we should criticize the judge on these grounds and not attribute his political convictions to positivism.

Indeed, the positivists have not responded to Fuller by denying that there are principles of legality, very much like Fuller's list, necessary to the existence of law. Rather, in line with their view of law as settled law, they respond by taking the function of law to be the authoritative provision of standards to guide behaviour. It follows, as Raz argues, that the principles of legality which make up the idea of the rule of law, of government within a fixed framework of rules, enhance the ability of law to guide behaviour.[78]

But while Raz concedes that law which lives up to this virtue may serve morally valuable ends, he also stresses that whether morally valuable ends are served depends on the factual content of the rules in the fixed framework. Judges, in seeing that official action is congruent with declared rules, do no more than apply the law with the content it in fact has. It follows, Raz says, that the principles of legality are mere principles of efficacy which make the law into a better or worse instrument for the achievement of the ends of the powerful. While the rule of law might be the virtue or "specific excellence" of law, it the virtue of law in the sense that sharpness is the virtue of knives.[79]

As a result, the positivists think that moral argu-

ments about the rule of law, for example, arguments about whether it serves democratic ideals for judges to have a supervisory power over legislation, are not appropriately put forward as arguments about the rule of law. For on their account of the rule of law, the rule of law has to do with considerations about the effectiveness of law. And moral arguments like those about what serves democratic ideals best are more appropriately addressed to such issues as how much discretion judges should have and how they should exercise it.[80]

> In the end, Fuller admitted that there was no logical contradiction in the notion of achieving evil, at least some kinds of evil, through means that respect all the demands of legality.[81]

So he is generally thought to have had the worst of the debate about the rule of law. But he does make some suggestive remarks as to how he thought the debate could productively be continued.

First, he claims that the key to understanding the rule of law is the eighth principle--congruence between official action and declared rule.[82] Secondly, he suggests that the workings of the principles of legality, especially the eighth, will be revealed if one pays attention to their operation in answering practical questions of legal interpretation.[83] Thirdly, he rejects as unhelpful both the positivist vocabulary of judicial legislation and the distinction between law and morality it observes. A judge, in his opinion, can only resolve hard cases if

> he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it

ought to be.[84]

Finally, Fuller criticizes the positivists for not seeing that interpretation in law is purposive. He argues that fidelity to law is served when judges interpret particular laws in accordance with the principles of legality and that these principles will then inform their understanding and interpretations of the law.[85] And he makes it clear in his last major work (1968) that, in his view, in common law jurisdictions, the principles of the common law provide the resource on which judges draw in enforcing the eighth requirement.[86] As he sees it, the common law provides this resource, not because it consists, as the positivists maintain, in discrete rules of law. Rather the common law provides a context of legal and moral standards in which the legal data, including statutes, are to be interpreted and which thus give some sense to the notion that law can "pre-exist its declaration".[87] So Fuller was moving from a Blackstone-like emphasis on legislative constraints on executive power to the argument which Bentham and Austin thought lurked in Blackstone. For he was beginning to suggest that judges can exercise a constraint on the executive by interpreting statutes in accordance with the "rule and reason of the common law".

1.5 **Dworkin's Logic of Legal Standards**

In his critique of Fuller, Dworkin suggested that positivism was best attacked by exposing its "unacceptable

account of the logic of legal standards".[88] He challenges the positivist claim that the law of a legal system is confined to its settled law--the rules whose content can be determined by purely factual tests. Dworkin's main line of attack is on the idea that the law of a legal system is exhausted by the content-independent rules determined by one master rule--the rule of recognition.[89]

Dworkin argues that if we look to the way judges decide hard cases, we can see that they do appeal, not only to such content-independent rules, but to other sorts of standards which he calls principles. The difference between the two sorts of standards is that rules decide issues in an all-or-nothing fashion while principles support a decision. Principles figure in the rationales or reasoned justifications for rules and, in Dworkin's view, hard cases arise when two principles dictate different results. For example, the judge might have to decide between two different principles of tort law or whether the principle of fairness, which requires him to follow precedent, is outweighed by the fact that the rationale for the precedent decision is a bad one.

Such determinations of weight will often, Dworkin says, be controversial and will require a judge to exercise his moral judgment. In addition, Dworkin suggests that the very determination of what the different principles at stake are might require an exercise of moral judgment. So it is no part of his argument that the principles must have been recognized as legal standards in the past. Indeed, his account requires judges to distinguish between "principles"

which are "requirements of justice, fairness or some other dimension of morality" and "policies" which set out "some goal to be reached, generally an improvement in some economic, political or social feature of the community".[90] Only the former can, in Dworkin's view, form a basis for the judgment that a decision is in fact justified in law.

Dworkin also claims that his account of the role of principles fits legal practice. He points out that judges usually justify their decisions by an argument which appeals to both rules and principles and that they seem to suppose that their argument justifies one unique answer which it is their legal duty to give. In addition, the parties to a case suppose that one of them has a right to the decision which the judge is legally required to give. Thus Dworkin claims that positivism's view of law is counterintuitive because it entails the conclusion that judges in deciding hard cases retrospectively decide the rights of parties in an exercise of discretion not determined by law.[91]

On Dworkin's account of the logic of legal standards, judges do not have a discretionary power in the decision of hard cases. For his account suggests both that the reach of law is much more extensive than the positivist view of law as settled law supposes and that the law provides resources which support one party's claim to have a legal right to a particular decision. Of course the decision of such cases will be as controversial as the moral and political considerations which determine weight. But Dworkin says that to deny that hard cases have one unique answer because the an-

swer is a matter of moral controversy is to deny that controversial moral questions have right answers. And he supposes that the positivists do not rest their case for their view of law on that sort of scepticism.

In response, Hart admits that his early work did not sufficiently bring out the importance attached by courts

> when deciding cases left unregulated by the existing law, to proceeding by analogy so as to ensure that the new law they make is in accordance with principles or under-pinning reasons which can be recognized as already having a footing in existing law.[92]

And Raz emphasizes that as far back as Austin, positivists have recognized that rules of law can expressly or by implication incorporate moral principles, so that it is the judicial obligation in hard cases to which these principles are relevant to decide the cases in accordance with the principles.[93]

But Hart and Raz remain undaunted by Dworkin's account of the logic of legal standards. For them, because law is determined by factual considerations alone, it follows that the evidence for discretion is stronger, the more principles are shown to intrude on the decision of hard cases. As Hart puts it:

> For though the search for and use of principles underlying the law defers the moment, it cannot eliminate the need for judicial law-making, since in any hard case different principles supporting competing analogies may present themselves and the judge will have to choose between them, relying like a conscientious legislator on his sense of what is best and not on any already established order of priorities among principles already prescribed for him by the law.[94]

Some followers of Hart offer a different response. They hold that if a moral principle is legally relevant to the

decision of a legal question, and answers the question in the morally best way, then that answer is also correct in law.[95] Thus they hold that moral claims can count among the truth conditions of propositions of law. But they argue that it is a contingent matter whether such moral principles are incorporated into the law of any particular legal system.

On their view, if moral principles are in fact incorporated, then adjudication might be much as Dworkin describes it. But if such principles are not incorporated, then adjudication will be different. They think that a **caveat** as to the contingency of the presence of morality in a legal system binds them to the positivist tradition in which Hart stands and avoids the dangers that usually attend blurring the distinction between law as it is and law as it ought to be. Because I take Hart to be committed to rejecting this off-shoot of his theory,[96] I shall reserve the label 'positivist' for Bentham, Austin, Hart and Raz and refer to the proponents of the off-shoot as 'incorporationists'.

To a large extent, the debate between Dworkin, on the one hand, and positivists and incorporationists on the other, has been stalemated on the issue of who has the logic of legal standards right. But it is important to see that one reason for the stalemate is that the positivists and the incorporationists find implausible a substantive claim which is implicit in Dworkin's distinction between principle and policy.

The substantive claim is that there is no sharp distinction between legal duty and moral duty--something ex-

posed by the fact that judges, in deciding hard cases, have to show how the legal principles which justify those decisions in law also provide a moral justification for the decisions. In S1.6, I shall set out the substantive claim and then in, S1.7 I shall show why positivists think that wicked legal systems are a counterexample to it.

1.6 The Soundest Theory of Law

The view of law which a legal theorist holds will tell us, **inter alia**, what it is that makes a standard or principle a legal one. For example, positivism distinguishes the legal from the moral because it holds that moral claims do not count among the truth conditions of propositions of law. I showed in the last section that Dworkin argues for a logic of legal standards in which legal considerations which are also moral determine the answers to the questions posed by hard cases. Hence his own theory of law and of adjudication must be one which does not establish the sharp distinction between law and morality upon which the positivists insist. As a result, he has to answer the question what, on his view of law, distinguishes the legal from the moral?

Dworkin's answer is that a moral principle, in addition to being a moral principle, is also a principle of law if it figures in a particular way in a judgment in a hard case.[97] He recognizes that in any hard case there will be a mass of legal materials--explicit law--which affects the answer to the legal question in the case in the following way. A judge

who had to decide the question would be under a legal duty to base his decision on the materials. So Dworkin claims, first, that the decision must be the conclusion of an argument which makes sense of or explains the explicit law. It must, as he puts it, pass a "threshold test" of "fit".

Secondly, the judge's argument must show why the decision should be preferred to any other which passes or is argued to pass the threshold. Dworkin says that the judge should prefer the argument which provides the best moral justification of the relevant legal materials, even if this one does not fit the relevant material as well as another. This is the test of "soundness". The correct decision in a hard case is, then, one which is correct across two dimensions--the explanatory dimension of fit and the moral dimension of soundness. And it is clear that soundness is the conclusive consideration, something emphasized in his most recent work where he argues that decisions about fit and soundness occur within an overarching context of soundness.[98]

He calls the set of principles which explain and justify the correct propositions of law of a legal system "the soundest theory of law". For him

> a principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question.[99]

As he sees it then, the principles of morality are not coextensive with legal principles: only the moral principles which figure in the soundest theory of the law of a particular jurisdiction are also legal principles.

For Dworkin, the judicial obligation in a hard case is to apply the soundest theory of law. He captures this duty in the slogan which makes his label 'constructivism' apt--judges are required to make of the laws of their jurisdiction 'the best they can be'. Because he supposes that there will in nearly all hard cases be a soundest theory which determines only one answer, he denies that judges generally have discretion.

It also follows that, in his view, legal meaning is put in dispute not because there is no settled law on the question, nor because judges have the power to change settled law. Rather legal meaning is put in dispute when people disagree about the moral and political justification for the decisions of the past--about the soundest theory of law. For him, uncertainty in law is the result rather than the occasion of interpretation.[100] What the positivists call settled law is merely the set of rules that are justified by almost all the different political and moral theories which are at play in legal practice. There is no distinction in principle between hard and easy cases--the correct decision of hard cases is that which accords with the theory which best justifies the decision of easy cases.

Dworkin focuses on judges and adjudication because he claims that we can see best in judicial decisions how legal argument relies on and brings to the surface the soundest theory of law and because, as he puts it, judicial reasoning has an influence over other forms of legal discourse that is not "fully reciprocal".[101] Jurisprudence, for him, is the

"general part of adjudication, silent prologue to any decision at law".[102]

His reconciliation of judicial constraint and creativity in a sense denies that there is a problem to be resolved. He claims that when the law changes at the hands of judges this is not because judges are legislating. Rather they are "working the law pure"--bringing it into line with the requirements of the soundest theory of law, which might have changed with the passage of time or have been wrongly perceived in the past.[103]

The upshot for his theory of statutory interpretation and precedent is that these activities have to be seen within a context of judges attempting to ascertain and enforce the soundest theory of law. Thus, for Dworkin, in a jurisdiction where judges follow a strict doctrine of legislative supremacy, judges should regard statutes as having this standing because they think it fair that they should be bound to the interpretation of statutes. But the conviction about fairness should itself be part of a system of ideas that also includes the assumption that legislatures should strive for justice. In his view, courts, even in a jurisdiction where there is a strict doctrine of legislative supremacy, pay only a "qualified deference to the acts of the legislature".[104]

In short, the principles which justify the standing that statutes have for judges will figure importantly in interpreting their meaning. The limits of such interpretation will be set by what is reasonably consistent with the words

of the statute in question, a requirement which is based on the value of fairness. Judges should regard statutes as historical events which are intended to make the legal system into the best it can be, and to make sense of statutes as such events is to make sense of the words used in the text.

This theory of statutory interpretation allows one to take seriously judges' claims in all cases on statutory interpretation to be interpreting in accordance with a legislative intention; that is, even in those cases where positivists would argue that an appeal to a notion of an intention is a fiction to conceal the judge's discretionary activity. For, on Dworkin's approach, the intention is not to be attributed to any actual person or set of persons. It does not matter in a sense that the intention was never actually held by any legislator, nor that some or even all of the legislators had different or contrary intentions. All that really matters is that the intention attributed to the legislature shows that the statute is a datum which coheres with the principled basis underpinning other relevant explicit law.

When a statute is a datum which cannot without difficulty be accounted for in this principled fashion, it is, Dworkin says, a "mistake". A statute which is mistaken will be confined to its "specific authority" which has the effect that it will be confined to as narrow a class of situations as possible. Further, it will not figure in a decision about the soundest theory of law in cases not directly affected by the statute because it lacks the principled basis required to figure in such a decision. The statute has no

"gravitational force".[105]

Similarly, Dworkin sees the doctrine of precedent not as as set of rules, but rather as a set of principles which judges must somehow weigh in the general balance of principles when deciding hard cases.[106] Judges adopt the doctrine because they think that it is fair that the decisions of the past should count in deciding what the soundest theory of law is. But since the duty of the judge is to decide the case in accordance with the soundest theory of law, he cannot be under a duty to decide the case in accordance with reasoning that is fundamentally mistaken about the soundest theory of law.

The judge deciding the case may, depending on his own status in the hierarchy, be able to overrule the past judge. If he cannot, he can still deny the past decision gravitational force by confining it to its "specific authority". He denies, that is, that the decision exposes a theory of law capable of forming the principled basis for future decisions. Such a decision is an "embedded mistake", but because it is a mistake it is taken to affect the narrowest possible class of situations, which, because of the wider reach of a statute, will be narrower than the class to which a mistaken statute can be confined.[107]

For Dworkin, then, the question of what law is should always be answered by resort to the principled basis of the law. Indeed, it may be rather misleading to say that for him law is both explicit legal materials and the principled basis of the materials. Rather the explicit legal materials

are the legal data which have to be accounted for in deciding what law is. His claim is both that moral principles such as justice and fairness are embodied in the explicit legal materials and that what law is is determined by an argument about what impact these principles have in particular cases. His theory of adjudication is thus firmly within the Common Law tradition.

Dworkin argues that because law embodies moral principles in this way it also embodies an ideal of justice which he says constitutes the rule of law.

> It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced **upon the demand of individual citizens** through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law ... is the ideal of rule by an accurate public conception of individual rights.[108]

He claims that if judges adopt his view of law, then morally superior legal practice will emerge. Law will in fact approximate more to the substantive standards of morality already embodied in the law. In particular, law, in approximating to these standards, approximates to the democratic ideal that minorities have political rights against the majority. Judges will see to it that the decisions of majoritarian legislatures are subject to moral constraints which protect these rights.[109] Thus he focuses on the judicial control of executive power.

Finally, in line with his argument that disputes about legal meaning are disputes about the soundest theory of law, he argues that disputes about the correct view of law are

interpretive disputes about what political ideal of justice should inform that view. In his opinion, the positivist view that law is settled law serves the following (conservative) ideal. Judges should, as far as possible, apply rules whose content is settled by factual and public tests because this protects the legitimate expectations that surround those rules. Judges should thus strive to decide hard cases by answering the question 'How did the people responsible for handing down the legal decisions relevant to the cases want them decided?'. And if there is no answer to that question, then the judges must do the best they can by legislating for the future.[110]

1.7 An Historical Inquiry

Positivists see in Dworkin's account of adjudication the two dangers which Bentham and Austin think inhere in Common Law theory. First is the danger of obsequious quietism, which will be most vicious in a wicked legal system. For it seems that in such a system the theory which best explains the law will be the official wicked one. It follows that a Dworkinian judge would believe that he was legally and morally required to apply the repugnant moral ideas underpinning the wicked laws. Thus Raz suggests that Dworkin's theory would "require a South African judge to use his power to extend Apartheid."[111]

Because positivists think that Dworkin is forced to the conclusion that a judge's legal and moral duty in a wicked

legal system is to extend the official wicked ideology, they argue that his claims about the role of morality in deciding questions of law are mysterious. Hart finds significant Dworkin's recognition that a judge in a wicked legal system could, "in spite of the influence that morality must have on the right answer in a hard case", decide that his moral duty lay in not deciding a hard case in accordance with the soundest theory. Dworkin suggests that such a judge might decide to resolve the issue either by resigning or by taking "the difficult moral decision" to lie about what the law is.[112] But if, in a wicked legal system, the soundest theory of law is composed of repugnant moral principles, then explanation and justification should part company. Thus Hart thinks that wicked legal systems raise "insuperable difficulties" for Dworkin's claim that a judge always has a moral reason to apply the soundest theory of law.[113]

Dworkin has suggested in reply that it is a mistake to take wicked legal systems as a crucial test for his theory.[114] In addition, he has suggested, as we saw Fuller and Radbruch did, that there might be a pitch of wickedness such that a legal system ceases to be capable of being a source of legal rights and duties.[115]

But his main argument on this score appears to be twofold. First, he says that he needs to distinguish more sharply than he had in his earlier work between 'explanation' and 'justification'.[116] In his view, an explanation does not

> provide a justification of a series of political decisions if it presents, as justificatory principles, pro-

> positions that offend our ideas of what even a bad moral principle must be like.[117]

He says that he has more confidence than he had in earlier work in what he calls the "screening power of the concept of a moral principle".[118] He claims that the requirement which his theory imposes on judges--that they provide an argument which shows the legal record in its best moral light--will screen out or exclude morally unacceptable principles.[119]

Secondly, he takes the positivists to suppose that it is the principles that figure in the soundest theory itself which transmit moral weight to the judge's legal duty to apply the soundest theory of law. But, Dworkin claims, there is another source of moral weight. This is the "general political situation"

> that the central power of the community has been administered through an articulate constitutional structure the citizens have been encouraged to obey and treat as a source of rights and duties, and that the citizens have in fact done so.[120]

But positivists have not found these arguments convincing. They continue to treat the idea that repugnant moral principles will not figure in a soundest theory of law as the expression of an unsupported and romantic ideal. And they can point out that that the claim that the source of moral weight lies in a "general political situation" is a claim about why judges might have a **prima facie** moral obligation to enforce the law of even a wicked legal system. Even if that claim is warranted it does not start to show why one should take seriously Dworkin's claim that there is a soundest theory which justifies as well as explains the law.[121]

Thus the positivists argue that judges in a wicked legal system like South Africa would be better advised to see law in accordance with the view which positivism takes. The judges would then see that in hard cases on the interpretation of apartheid laws there is a range of legal solutions, none of which was required by law. They would then be able, in an exercise of law-making discretionary power, to choose the solution which best resists apartheid ideology and so they would take a reformist role. As Raz has put it, positivism, in providing such a vocabulary,

> makes room for a theory of adjudication calling on the courts to counter rather than to propogate the ideology which underlies unsatisfactory source-based law.[122]

Moreover, the positivists think that Dworkin's denial of discretion invites the danger of moral anarchy. It is, they think, an invitation to judges to be power-stealers. For it invites judges to conceal the fact that they are really exercising a discretionary law-making power in the decision of hard cases. Thus Hart suggests that Dworkin's theory provides a fiction which would enable a judge

> in the misleading guise of finding what the law behind the positive law really is, to invest his own personal, moral or political views with a spurious objectivity as already law.[123]

So the positivists claim that the description of a hard case as one requiring the exercise of discretion will elicit the right moral response. Alternative descriptions, which blur the distinction between what law is and what law ought to be, seek to achieve what is better achieved by directing one's arguments to the issue of how much discretionary power judges should have and how they should exercise it. And this

point, they would think, applies with equal force to Dworkin's claim about a democratic ideal in the rule of law. That claim, they would say, is a mere revival of Blackstone's preoccupation with the separation of powers.[124]

Finally, the positivists would argue that Dworkin's charge that positivist view of law involves a conservative conception of the rule of law is a mere revival of the charge of formalism which Hart rebutted in 1958. The conservative judges who Dworkin takes to be positivists are judges who have exercised their discretion in accordance with conservative values.

My aim in this thesis is to see what light an historical inquiry into the decision of hard cases in the South African legal system, which is now the standard example of a wicked one, can shed on these issues.

ENDNOTES TO CHAPTER 1

1. Dworkin (1978a).

2. Legal positivism is also associated with philosophers who make no moral claim at all and I do not deal with them. For example, Hans Kelsen focused on the issue of what makes legal knowledge possible and did not deal with the moral merits of his theory. (Although see Fuller (1958) at 632, pointing out that Kelsen once suggested that his whole system might well rest on an emotional preference for the ideal of order over that of justice.)

3. Raz (1985a) 295.

4. Blackstone (1979).

5. Postema (1986) chapter one. See also Simpson (1973a).

6. Blackstone (1979), Volume I, 130-32.

7. See Simpson (1973a) 79.

8. Bentham (1977).

9. Bentham (1977) 498.

10. Blackstone (1979), Volume I, 69-70.

11. Bentham (1977) 194-95.

12. Bentham (1977) 197-98.

13. Blackstone (1979), Volume I, 48-49.

14. Blackstone (1977), Volume I, 51-52. Blackstone in fact saw the separation of powers as being between three parties--the King, the Lords and the Commons.

15. Bentham, (1977) 463-64; Austin (1885), Volume I, Lecture VI, especially 248-251.

16. Most notably Sir Mathew Hale. For an account of his views, see Postema (1986) 19-27.

17. Quoted in Allen (1978) 456.

18. Dicey (1987).

19. Harvey (1960-61) 493.

20. Bentham (1977) 509-10.

21. Bentham (1977) 474-92, especially at 487-88.

22. Bentham (1977) 485. Cf Austin (1885), Volume I, 276-78. Austin, as I shall point out below, was less enthusiastic about the merits of democracy than Bentham.

23. Recent scholarship has shown that Bentham's and Austin's legal theories were much more sophisticated than either this crude picture or the more complex ones given by contemporary positivists allow; see, for example, Postema (1986) on Bentham and Moles (1987) on Austin. I do not go into this issue because here, as elsewhere in this thesis my concern is mainly with the view of the command theory as it is received by the contemporary bearers of the positivist tradition.

24. Bentham (1977) 429-30; Austin (1885), Volume II, 642.

25. Austin (1885), Volume II, 634.

26. For Austin's detailed treatment of these issues, see (1885) Volume II, Lectures XXXVII and XXXVIII.

27. Bentham (1977) 120.

28. Bentham (1970). For a discussion, see Postema (1986), chapters 12 and 13.

29. See the references in endnote 26 above.

30. For a discussion of this issue, see Friedman (1968).

31. Hart (1983a).

32. Hart (1983a) 59.

33. Hart (1983a) 59.

34. Hart (1961) 89-96 and chapter VI.

35. Hart (1983a) 50; and see Hart (1982) chapters VI and X.

36. Hart (1983a) 53.

37.For relevant discussions, see Hart (1961) chapters V and VI; Hart (1982) chapters VI and X; Raz (1983) chapters 7 and 8; MacCormick (1978) 275-92.

38. Hart (1983a) 56-57.

39. Hart (1983a) 63-70. For a critical discussion of Hart's semantics, see Brink (1988).

40. Hart (1983a) 63-64; and see Hart (1961) chapter VII.

41. Hart (1983a) 66, quoting Austin.

42. Hart (1983a) 67-68 at 68.

43. Hart (1983a) 69-70.

44. Hart (1983a) 87.

45. Hart (1983a) 71.

46. Hart (1983a) 71-72; the quotation is from the conclusion at 87.

47. Hart (1983a) 71-72 at 71.

48. Hart (1983a) 72.

49. Hart (1983a) 71-72 and see below. For a detailed account of the pitfalls of 'rule scepticism' and Hart's argument that positivism avoids them, see Hart (1961) chapter VII.

50. Hart (1982) 252-54.

51. Hart (1982) 254-55. Joseph Raz has the most developed account of such reasons, which he calls exclusionary reasons because they exclude certain considerations as a basis for action; see, especially, Raz (1975).

52. Hart (1961) 149.

53. Hart (1961) chapter VII, especially at 121-23 and 130-32. The description of the positivist attitude to precedent offered here relies on Cross (1979) chapter VII and, especially, Raz (1983) chapter 10. I have found Perry (1987) of great assistance to an understanding of the positivist account of precedent.

54. See, especially, Raz (1983) chapter 10.

55. See Raz (1983) footnote 16 at 69, where he points out that it is only in the case of controversy between legal officials about what the rule of recognition requires that controversy is proof that the law is unsettled; that is, because there is then no fact of the matter about what practice requires.

56. Raz points out that the fact of controversy about what the correct answer to a legal question is is not proof that there is no settled law. All that this goes to show is that experts can be wrong about matters of fact; (1985a) 319. See Waluchow (1985) 203-04 for a discussion of the distinction between a judge having a discretion and exercising a discretion which he does not have.

57. Hart (1961) 204-07 suggests that the premise should be adopted because it is theoretically more fruitful and will lead to good moral consequences. However, in Hart (1987) he seems to take up the suggestion in Finnis (1980) 21 that positivism adopts the premise for the sake of theoretical fruitfulness alone. MacCormick believes both that Hart's

view of law is justified by moral reasons, MacCormick (1981) chapter 12, and that this is the only way to go about justifying that view; see MacCormick (1985) 10-11. Raz seems to think that the positivist view of law is correct because it is in fact the view adopted by participants in a legal practice, but his argument is not one which depends on appeals to actual practice. It hinges on the claim that only his positivist view of authority can explain how it is that authority is "servicable"; see, especially, Raz (1985a). But compare Raz (1985) 27 where he calls his account of authority "partisan" though without elucidating his reasons for choosing it above others. In seminars given in Oxford in Hilary Term of 1988, Raz has clarified this point by saying that the reasons for preferring his view of authority depend ultimately on a philosophical argument about the correct view of right reason.

58. Hart (1983) 50.

59. Hart relied, **inter alia**, on translations prepared by Lon Fuller of Radbruch (1950a); Hart (1983a) note 42 at 74.

60. Hart (1983a) 72-78 at 74.

61. Hart (1983a) 74-75.

62. Hart (1983a) 77.

63. Hart (1983a) note 43 at 75. That Hart and others had got the facts of the case wrong was pointed out in Pappe (1960).

64. Pappe (1960) argues that this was the case.

65. Radbruch (1950a) 352-53.

66. Radbruch (1950a) 352-53.

67. Radbruch (1950a) 353.

68. He also considered another argument--that there are certain facts about human nature with which any system of rules regulating human behaviour has to deal, and that this requirement ensures a certain moral content to legal systems. For a developed exposition of his counterargument, see Hart (1961) chapter IX.

69. Hart (1983a) 78-82 at 81.

70. Fuller (1958) 632.

71. Fuller (1958) 634-36 at 636.

72. Fuller (1958) 636, my emphasis.

73. These are set out in detail in Fuller (1969) 38-39.

74. See, especially, Fuller (1969) chapter II.

75. Dworkin (1965) 672.

76. Dworkin (1965) 672.

77. (1969) 204.

78. The account which follows is a summary of Raz (1983) chapter 11.

79. Raz (1983) 225-26. Or as Hart puts it, to claim that the principles of legality amount to an inner morality of law is tantamount to saying that principles of effective poisoning amount to an inner morality of poisoning; Hart (1983) 350.

80. See Raz (1983) 216.

81. Fuller (1965) 664.

82. Fuller (1969) 209.

83. Fuller (1969) 91 and 232.

84. Fuller (1958) 646-48 at 647.

85. For example, Fuller (1958) 661-69.

86. Fuller (1968), especially 84-112.

87. Fuller (1968) 96-98.

88. Dworkin (1965) 687.

89. See especially, Dworkin (1978a). I shall describe the argument as it came to be clarified in later work and I rely heavily on Dworkin's own summary in Dworkin (1984) 260-63. It is worth noting Fuller's approval of Dworkin (1978a)-- Fuller (1969) 224 note 34.

90. Dworkin (1978a) 22.

91. For a recent statement of this point, see Dworkin (1986) 39-43.

92. Hart (1983) 7.

93. Raz (1972) 845.

94. Hart (1983) 7, and see Raz (1972) at 846.

95. For example, Soper (1977), Lyons (1977), Coleman (1982), Waluchow (1985).

96. Evidence of this can be found in Hart's remarks about discretion, just cited, and in his adoption of Raz's notion of exclusionary reason, Hart (1982) chapter X. That is, the notion of law as an exclusionary or content-independent reason entails that moral claims do not count among the truth conditions of propositions of law.

97. I rely here on Dworkin (1978) chapter 4.

98. Dworkin (1986).

99. Dworkin (1978) 66.

100. Dworkin (1986) 352.

101. Dworkin (1986) 14-15.

102. Dworkin (1986) 90.

103. See Dworkin (1986) chapter eleven.

104. Dworkin (1978a) 33.

105. Dworkin (1978) 121.

106. Here and in the rest of this paragraph, I rely extensively on Perry (1987), especially 224-25.

107. Dworkin (1978) 110 ff.

108. Dworkin (1985) chapter 1, at 11-12, his emphasis.

109. Dworkin (1985) chapter 1.

110. For the general point about legal theories being political, see Dworkin (1986) 108-13. For the argument about positivism or "strict conventionalism" see, ibid, chapter four. See also Dworkin (1985) chapter 1.

111. Raz (1985a) 309-09 at 309.

112. Dworkin (1978) 326-27.

113. Hart (1983) 9. For his extended argument on this point, see Hart (1982) 150-53.

114. Dworkin (1984) 260.

115. Dworkin (1984) 260.

116. Dworkin (1984) endnote 4 at 299. This reply is to be found in embryonic form in Dworkin (1978) 340-41.

117. Dworkin (1984) endnote 4 at 299.

118. He is referring to Dworkin (1978) 343.

119. Dworkin (1984) endnote 4 at 299.

120. Dworkin (1984) 258.

121. See Hart (1987). See also Soper (1987).

122. Raz (1986) 1111.

123. Hart (1983) 157. Raz makes the same criticism about Dworkin's theory of statutory interpretation and precedent; see, respectively, Raz (1972) 850-51 and (1983) footnote 19 at 205-06.

Mackie (1977) revives the further claim which we saw that Bentham made against Blackstone. He suggests that the danger of power-stealing is compounded in Dworkin because his theory encourages judges to decide what law is in accordance with abstract principles of justice, which will encourage them to unsettle what would otherwise appear to be settled law. Hart seems to make a similar claim when he takes it to be an objection to Dworkin that, on Dworkin's approach, there is no "public test" to which a judge can appeal to show that he is right; Hart (1982) 149-50.

124. See, for example, Raz's comment about such arguments in his essay on the rule of law; Raz (1983) 216.

Chapter 2

Politics and History

2.1 Introduction: Pre-Twentieth Century South Africa

In this chapter, I set the historical and political stage for the study of hard cases in a wicked legal system. The study focuses on the period in South Africa after 1948, the year in which a government of Afrikaner Nationalists to power, but a sketch of what came before is essential to an appreciation of this period.

The oppression by a white (originally settler) minority of the black African majority dominates South African history.[1] However, the oppressed majority in South Africa also includes groups with settler roots, the people of mixed descent--'Coloureds'--and descendants of indentured labourers from the Indian sub-continent--the 'Asians' or 'Indians' who were brought to South Africa in the 1860s to work on the sugar farms of Natal.[2] These two groups have over the years come to identify increasingly with African political aspirations and a popular practice has developed of using 'black' to refer to all racial groups other than the whites. But since the oppression of the three groups has been different in quality and intensity and since legislation applicable to one group often does not affect another, I shall often use the racial labels 'African', 'Coloured' and 'Indian' to distinguish them. It is also useful to keep in mind that different labels have over the years been used for a particular

race. Whites used to be referred to as 'Europeans' while Africans have been labelled 'Natives', 'non-Europeans,' and 'Bantus'. In addition, race groups other than whites have been referred to collectively as 'non-Europeans' or 'non-whites'.

There are also divisions within the white population between Afrikaans speakers, the descendants of the original (predominantly) Dutch settlers, and English speakers. The divisions date back to the first occupation by the British of the Cape, at that time under the control of the Netherlands, in 1795. A second British occupation in 1806 led to the 'Great Trek', when many of the Dutch inhabitants, their resentment of the British fuelled by the emancipation of slaves and a better dispensation for the black inhabitants of the Cape, journeyed into the interior.

By the late nineteenth century, control of the country was divided between two Dutch farmer or Boer Republics in the interior--the Transvaal and the Orange Free State--and the British self-governing Colonies in the Cape and Natal. While discrimination against blacks was a feature of the racial policies of all these entities, there were significant differences.

The racial policies of the Boer Republics were always racially exclusive. For example, Article 9 of the Transvaal Constitution read:

> The people are not prepared to allow any equality of the non-white with the white inhabitants, either in the Church or State.[3]

In the Cape, politicians followed a tradition of par-

liamentary democracy and observance of the rule of law based on the Westminster model. The racial policy was one of gradual assimilation designed to include Africans, Coloureds and the lower class of Dutch speakers. A policy of Anglicization was adopted which included the abolition of Dutch as a medium of instruction in government schools. Resentment to the policy led to the start of the 'Cape Language Movement' and the formal birth of Afrikaans as a language.

All races had the franchise from 1853, although it was qualified in a way that ensured white domination while assimilation was in progress. But while the assimilationist policy was shaped by political and economic expedience, and while traditional liberal virtues like equality before the law were often not honoured in practice, 'Cape Liberalism' was a genuine and important political force.[4]

In Natal the franchise had been denied to Africans after 1865 and to Indians after 1896 and the racial policies fell somewhere in between the Cape and the Boer Republics. But whatever the differences between the areas of white control, Africans were seen as pool of exploitable labour. To this end, they were progressively stripped of land, the asset which gave them economic independence, and forced by law and economic necessity into providing cheap labour. At first their labour was employed predominantly on white farms. But after the discovery of diamonds in the Cape in 1868, and gold in the Transvaal in 1886, mine owners and the industries that serviced the mines began to compete with farmers for labour.

The fact that the gold mines were in an area under Boer control intensified tensions between the British and the Boers. Eventually a full-scale war broke out between Britain and the Boer Republics, fought to determine which white authority would control South Africa. After a long and bitter struggle, the Boers were defeated by a scorched earth policy that included confining Boer women and children into concentration camps where close to 30,000 died of disease. Africans were confined in separate camps under even worse conditions and the official death toll was put at 14,154.[5] The war ended in 1902 with the British in control of the whole country.

2.2 Setting up Segregation--1902-1948

After the war, the Cape and Natal retained their status as self-governing colonies but the Transvaal and the Orange Free State were put under the governorship of Lord Alfred Milner, who had been appointed High Commisssioner of South Africa. Until his recall in 1905, Milner presided over an ambitious plan to reconstruct war-ravaged South Africa as one economic and political unit favourably disposed towards Britian. His plan was to set up a 'rational' economic structure that would exploit South Africa's mineral resources efficiently and establish an industrial base for the country. Milner thought that if his plan were implemented, the old divisions between the different white political units would disappear.

Cheap black labour was the vital ingredient in the plan. Milner said in 1897 that he had "only to sacrifice the 'nigger' absolutely" to win over the Dutch without offending the English.[6] He was determined to keep Africans from access to full citizenship and to streamline the labour supply to the mines and to industry. He appointed the 'Lagden Commission'--a commission into 'Native Affairs'. It recommended that Africans and whites be separated in political life, that they be segregated in the towns, and that African ownership of land be legally confined to 'reserves' (which would achieve segregation in the rural areas).

All the basic principles which to this day form the policy basis of statutes dealing with the position of urban Africans were given legal expression before 1910 in the ordinances of the legislatures in the different political entities. They included the provision of separate residential areas for Africans (to which they were forced to move); the compulsory registration of services of contract between employers and African employees; the obligation on Africans to carry 'passes' producible on demand; the imposition of curfews regulating the presence of Africans at night in streets and other places in white towns.

At the same time a creed was being forged which gradually replaced the assimilationist liberalism of the Cape. Milner expressed this creed as follows:

> The white man must rule because he is elevated by many, many steps above the black man ... which it will take the latter centuries to climb and which it is quite possible that the vast bulk of the black population may never be able to climb at all .... One of the strongest arguments why the white man must rule is because that

> is the only possible means of gradually raising the black man, not to our level of civilization--which it is doubtful whether he would ever attain--but to a much higher level than that which he at present occupies.[7]

The hallmark of the creed, which eventually became known as 'segregationism', is the uneasy conjunction of its two leading ideas. Africans are not inferior or subhuman--they are fit for civilizing. However, they are not the same as whites--they are not fit to be equal partners in civilization. But whatever its internal tensions, the creed could accomodate what became and remain to this day the twin imperatives of the South African polity. The exclusion of Africans from participation in central politics and the regulation, in accordance with the requirements of the economy, of both the influx of Africans from the rural areas to the urban centres and of life within their dormitory townships.

Milner hoped to ensure a political unit friendly to Britain by seeing that Britain remained effectively in control of South Africa until English-speaking whites outnumbered Dutch speakers. His policy was to encourage immigration from Britain and to Anglicize the Dutch by excluding them from senior educational and administrative positions. But both the English and the Dutch resisted this aspect of Milner's plan.

Local English politicians, while enthusiastic about the idea of South Africa as one economic and political unit, wanted the direction of the plan to be in local hands. Dutch speakers, with the memory of the concentration camps and defeat still fresh, resented their political subjugation and the steps taken to promote Anglicization. A revival of the

Cape Language Movement took place in the Transvaal. Dutch speakers began to conceive of themselves as Afrikaners, people with a language and culture distinct from Dutch, born largely during the trials of the Great Trek. Moreover, because the countryside had been ravaged by the scorched earth policy, young Dutch men had flocked to the cities in search of work. As members of a white working class in competition with Africans for jobs in the gold mines and the industries that serviced them, they proved a fertile ground for anti-British agitation. A political and cultural revival took place which ended in self-government being granted to the Transvaal and the Orange Free State in 1907 and 1908.

In 1908, a National Convention gathered to consider proposals for the formation of a single national political authority. Exclusively white delegations debated and decided the issue of the appropriate political dispensation for South Africa, thus establishing a pattern of South African political discourse which persists to this day. The convention ended in 1909 with an agreement that the different political entities should be merged into one 'Union', and the agreement was ratified by the Imperial Parliament in the South Africa Act.[8]

The Union was made up of four provinces--the Transvaal, the Orange Free State, Natal and the Cape--each with a measure of control over certain non-political areas of public life. For the rest, the national political structure explicitly followed the Westminster model. Parliament was composed of two chambers--the second and weaker being the Senate. It

was designed to put into practice the English doctrine of parliamentary sovereignty. This meant that the executive branch would be subordinate to the legislative, and, subject to the qualification set out below, the legislative branch would able to pass, by bare majorities in both Houses, laws on any subject, including laws amending the constitution.[9]

The South Africa Act also brought into being the Supreme Court of South Africa--the superior courts of the former colonies, made up of various Provincial and Local Divisions, and the court of appeal--the AD.[10] We can note at this point that the legal tradition of the Cape, which closely followed the English legal tradition, shaped the early practice of the Supreme Court. The Cape had been the dominant centre in terms of legal practice prior to Union, and its Bar supplied most of the judicial personnel to the other centres. In addition, Lord De Villiers, who had been Chief Justice of the Cape for more than a generation, was the first Chief Justice of the Union and had been the unanimous choice as chairman of the Convention.

As a result of the influence of the English tradition, a strict doctrine of precedent and the notion that the courts had an inherent jurisdiction to try any matter at common law where there was no statute to the contrary, became part of the practice of the Supreme Court of South Africa.[11] A distinctive South African common law was developed by the courts, drawing in many areas on both Roman-Dutch authorities and English common law. In some areas there was a large-scale reception of English principles, one

being constitutional and administrative law.[12]

At the time of the Convention, whites in the Cape formed 23 percent of the population and had 80 percent of the votes, while in Natal whites formed 8 percent of the population and had 99 percent of the votes.[13] One of the hotly debated issues at the Convention was the question whether voting rights should be given to these enfranchised Africans and Coloureds.

In the end, the Union Constitution contained a colour bar which confined the franchise to whites with exceptions made for the already enfranchised Africans and Coloureds in the Cape and the tiny percentage of enfranchised Africans in Natal. These voting rights of the enfranchised Africans and Coloureds were protected by a clause requiring a two-thirds majority of a joint sitting of both Houses of Parliament to remove the rights.[14] Parliamentary representatives had to be of 'European descent'.

Africans and Coloureds had protested strongly when it became clear that they were effectively to be excluded from the political dispensation. Most of the parties to the convention, as well as the British authorities, were impervious to the protest, but it did have have one important result. It led in 1912 to the founding of the African Native Congress, which later became the African National Congress.

The period after Union was dominated by shifting political alliances as those in power tied to juggle the conflicting interests of the white population. The English-dominated mining and industrial sector wanted a cheap but

stable labour supply close to the urban centres. The predominantly Afrikaans agricultural sector could not compete with the wages offered by the mining and industrial sector, and so required legislation compelling Africans to supply their labour to farmers. The white working class in the urban centres wanted legislation excluding Africans from competition for the better jobs.

While the outcomes of the conflicts between these different interests were often dramatic,[15] the unifying theme of South African political life remained a determination to 'sacrifice the nigger absolutely' in the cause of white unity and prosperity. The Natives Land Act 27 of 1913 in effect reserved ownership of 87 percent of South Africa to whites and consigned Africans to 'reserves'. The wretched conditions there ensured that the mines and agriculture had a convenient source of cheap labour, which could be closely policed in company-controlled compounds.

The Native Affairs Act 23 of 1920 and the Bantu Administration Act 38 of 1927 were part of a process of transferring power over the regulation of African life from Parliament to the executive. A series of Urban Areas Acts were passed designed to control the influx of Africans into urban areas and to control their conduct there. The statutes enforced the segregation of African and white, so that Africans were moved out of the white areas to the locations or townships close enough for workers to commute to work under conditions carefully regulated and controlled by urban local authorities.[16] A series of statutes instituted the

'colour bar' in the mines and in industry, so that skilled trades were increasingly reserved for whites.[17] Africans were stripped of the right to take part in collective bargaining procedures.[18]

In 1936, a double blow was dealt to Africans. Bills were proposed and enacted which set the seal on the 1913 Land Act[19] and took the enfranchised Africans in the Cape off the common electoral roll.[20] As 'compensation' for the last measure, a 'Native Representative Council' with purely advisory functions was created, and Africans who had been enfranchised became entitled to vote directly for three special white parliamentary representatives in the House of Assembly and indirectly for four white Senators.

The measure was passed, as the South Africa Act required, by a joint sitting of both Houses of Parliament which secured a majority of 169 votes to 11. Jan Hofmeyr, the most prominent of the 11 dissenters, said in Parliament that the "central feature" of the Bill was

> to give to the Natives an inferior, a qualified citizenship which has the marks of inferiority in clause after clause ... and which bears the added stigma that whatever may be the advance of the Native in civilisation and education, to all intents and purposes he is limited for all time to three members in a house of 153. That surely is a qualified, an inferior citizenship.[21]

Hofmeyr's point was that the Bill removed even the pretence that segregationist policies were ultimately aimed at uplifting Africans. The political heirs of the assimilationist ideals of Cape liberals were left with little more than their commitment to civil liberties, a paternalistic concern that Africans in the urban areas be more justly treated and

the hope of the benefits of a revival of traditional culture in the reserves.[22] Those whites who still adhered to ideals which envisaged the creation of a non-racial society were mostly academics who had little influence on mainstream politics.[23]

During this time black political opposition was dominated by the African National Congress[24] and the South African Indian Congress, which had its origins in the Natal Indian Congress formed by Mahatma Gandhi in 1894. Until the early 1920s, the activities of such groups were to a large extent confined to undramatic attempts to further the interests of the small professional black 'middle class'.[25] Things changed under the influence of the South African Communist Party and of the Industrial and Commercial Workers Union, a labour union founded by white socialists. Members of the African National Congress became more aware of the need to organize among the broad mass of blacks and to develop modes of political action that went beyond appeals and delegations to the whites in power.

In this process can be seen the beginnings of a rift between blacks and those whites who were regarded as 'friends of the natives', as the former began to perceive a need to transcend the categories for politics marked out by segregationism. At this time, the new categories were formulated within a discourse of fundamental change brought about through rational persuasion and appeals to the staples of liberal theory--equality before the law, civil and political rights, and so on.

Another discourse, impervious to such appeals, was in the process of formation. The 1920s and 1930s saw the forging of a new identity for Afrikaners as Afrikaner Nationalists sought to unite their people by an ideologically complex mixture of the old anti-British antagonism, a mythology of racial purity, and the promise of a greater share in the country's assets. One of the main rallying cries of Afrikaner nationalism was 'mother tongue education' and this was coupled with the bitter memories of British imperialism and the resentment of English economic and political domination.

During the 1930s, the Nationalist movement was strongly influenced by the development of National Socialism in Germany and there developed an idea of the **volk** as an organic body held together by a common historical culture. Because Afrikaner Nationalists viewed racial segregation as a good in itself, their political programme involved a commitment to racism rather different from the pragmatic segregationism of English capitalists. Its ideal was a radical division between white and black so that the white, especially the Afrikaner, could take his rightful place above the black in the natural scheme of things.

The outbreak of the second world war created great tension between the white political groups. Under the leadership of Jan Smuts, Parliament was manoeuvred into actively supporting the Allies. This move caused great resentment among the Afrikaner Nationalists, many of whom were pro-Nazi. Some resorted to sabotage with the result that a number of prominent Nationalists were interned for the duration

of the war.

The war was a period of economic expansion. Hofmeyr, now Minister of Finance, presided over the relaxation of influx control and tentative moves towards bringing urban Africans into the economic infrastructure in place of treating them as a mere supply of labour. But the end of the war brought recession and a retreat from this policy which resulted in resentment among Africans, but which did not go far enough to satisfy Afrikaner Nationalists.

Power within the African National Congress began to shift to a more radical Youth League and, against the background of a strike by 70,000 African miners, the Native Representative Council demanded that the government abolish all discriminatory legislation. The African National Congress began to adopt a more aggressive political stance based on the emerging ideals of African Nationalism. In its 1949 'Programme of Action', the Congress called for a struggle for rights of national freedom, political independence, self-determination, and the rejection of white leadership and all forms of segregation.

In the meantime, Afrikaner Nationalists mounted an effective attack on the United Party. The leaders, especially Hofmeyr, were portrayed as liberals who, in alliance with British imperialism, were determined to hand South Africa over to the black, communist-inspired majority. The Nationalist policy of radical racial segregation or 'apartheid' appealed to Afrikaans farmers, worried about their labourers leaving for the more lucrative work in the cities; to white

workers apprehensive about African competition for jobs; and to Afrikaner capitalists whose interests were more firmly wedded to agriculture than to the English-dominated mining sector. In 1948 the United Party was defeated against all odds by an alliance of Afrikaner Nationalists after an election fought on the basis of the 'black peril' 'swamping' the cities.

2.3 Setting up Apartheid--1948-1978

The key to apartheid policy lay in three statutes. The Population Registration Act 30 of 1950 provided for the compilation of a register of the entire South African population designed to reflect the classification of every individual in South Africa as a "white person, a coloured person or a Bantu, as the case may be...." The Abolition of Passes and Coordination of Documents Act 67 of 1952, contrary to the suggestion in its title, required all African men carry passes. In 1956 its provisions were extended to cover African women. Section 10 of the Natives Laws Amendment Act 50 of 1952 limited Africans with the right to live permanently in the white urban areas to those who were born there, those who had lived there continuously for fifteen years, and those who had worked continuously for the same employer for ten years. Together these Acts facilitated setting up a system of labour bureaux to rule both the influx of blacks into the urban centres and the lives of those already there by regulation and official **fiat.**

From the mid-1950s there was a growing awareness on the part of Nationalists that they would have to provide some kind of political dispensation for Africans. Their plan was to revitalize traditional forms of political control in the reserves in the hope that that the focus of black political and other aspirations would shift there. As Dr Verwoerd, then Minister of Native Affairs, Prime Minister from 1958, and the architect of 'grand' apartheid, put it:

> It is the policy of my department that education should have its roots entirely in the native areas and should be based on the native community and spirit. There Bantu education must be able to give itself complete expression and there it will have to perform its real service. The Bantu must be guided to serve his own community in all respects. There is no place for him in the European community above the level of certain forms of labor. Within his own community, however, all doors are open.[26]

However, the economy continued to require a relatively stable African work force close to the urban centres, for skilled as well as semi-skilled tasks. The government solution, as it manifested itself over time, had three main aspects. First, the government sought to set up an institutional structure in the reserves which would absorb 'economically superfluous' Africans. The culmination of this strand was the granting of a nominal form of self-government and then, beginning in the 1970s, a nominal form of political independence to the 'homelands', as the government came to call the reserves. As an integral part of this process, millions of blacks were stripped of their South African citizenship.[27] But the poverty of these areas, their lack of any economic infrastructure, and the unwillingness of African leaders who enjoy popular support to participate in the

government 'solution' have dashed its ambitions.

Secondly, the government sought to maintain black urban dwellers in a twilight zone of powerlessness and rightlessness. The colour bar in industry was made even more rigid than before and African trade union activity was proscribed.[28] All education for Africans was put under control of a government body mandated to implement the policy that Verwoerd outlined. In addition, the government enacted statutes which proscribed contact between white and black in education, marriage, sexual relations and many sorts of ordinary social contact.[29] The Group Areas Act 41 of 1950 was used to parcel up all the areas not set aside for Africans into racially exclusive areas and it has been implemented in a manner that has forced Coloureds and Indians into wretched, overcrowded locations.[30]

Thirdly, the government was determined to stamp out all forms of extraparliamentary opposition and confine politics to a debate between whites about how, and not whether, racial differentiation should be implemented. One of its priorities was to remove Coloureds who still had the vote from the common electoral roll although it was and remained unclear what place there would be for Coloureds (and Indians) in the design of grand apartheid.

The government could not muster the two-thirds majority of both Houses of Parliament required by the South Africa Act. It attempted to circumvent the provision by simply ignoring the requirement, so that the statute was passed by a simple majority. The AD declared the resulting statute in-

valid and did the same when a statute was enacted purporting to make Parliament the ultimate court of appeal in constitutional matters. Finally, the majority of the court, with one dissentient, upheld the validity of a statute that inflated the Senate to provide the required majority.[31] The South Africa Act Amendment Act 9 of 1956 was then passed which disenfranchised the Coloureds and gave them as 'compensation' a separate roll which elected four members to the House of Assembly and one to the Senate.[32]

The Communist Party of South Africa, one of the bastions of resistance to racism, had dissolved itself in 1950 and gone underground in anticipation of the passing of the Suppression of Communism Act 44 of 1950. In 1951 the African National Congress, together with the South African Indian Congress and other political organizations, initiated a 'Defiance Campaign' after a challenge to the government to repeal various apartheid statutes had been ignored.

Blacks embarked on a campaign of massive infringement of the laws and regulations that discriminated against them and hampered their lives. 8000 people were arrested and by the end of 1952 the the campaign was crushed. The government brought about the enactment of the Public Safety Act 8 of 1953, which gave wide ranging powers to the Governor-General if he were satisfied that a state of emergency existed, and the Criminal Law Amendment Act 8 of 1953 which made it an offence to violate any law by way of protest against any law. In a general election in that year, the Nationalists were returned to power with an increased majority in Parlia-

ment.

In retrospect, 1952 is the real turning point in this period. African Nationalism put itself on the political agenda as a force in South Africa. Parliamentary opposition to the Afrikaner Nationalists became gradually more ineffective as politicians tried in vain to find some middle ground between the racial policies of the government and the increasing militance of black politicians. The United Party was, on the one hand, the victim of its desire not to lose further votes by seeming to be too soft on blacks. On the other hand, it was never able to formulate a racial policy sufficiently distinct from apartheid to stop a steady drift of its support to the government. Its main critique of the government was that apartheid imposed a form of racial division on South Africa that hindered economic growth. But this critique failed to bite home as whites continued to make money out of apartheid, most notably in a boom period in the 1960s.

Moreover, rifts within the ranks of white opposition had developed. A coalition between various white opposition groups fell apart after the 1953 election. The Liberal Party was formed on a platform which included a commitment to a qualified franchise and nonracialism. But its members rejected the extraparliamentary forms of activity which were forced on blacks. They thus defined themselves against the Congress of Democrats, an organization formed by whites in 1952 to work in parallel with the African National Congress.

Although it took the Liberal Party until 1960 to advo-

cate an unqualified franchise for all South Africans, its platform never won support among whites.[33] Because it firmly rejected extraparliamentary action as a means to change, it had little support among blacks. It disbanded when the Prohibition of Political Interference Act 51 of 1968 precluded members of different racial groups from belonging to the same political organization or participating in the same political campaign, a step which has been called the "death-blow" of the "liberal ideal of equal political rights".[34]

In 1959, eleven members of Parliament left the United Party to form the Progressive Party with a programme of common citizenship for all, though on the basis of a franchise weighted in favour of the educated and the wealthy which would ensure that political power was kept in the hands of whites. In the next general election (1961), only one Progressive, Helen Suzman, was returned to Parliament and during the 1960s her's was the only strong voice of opposition within Parliament.

In the 1970s, the Progressive Party became stronger as the right and left within the United Party quarrelled. In 1977, the Progressives became the official opposition after the United Party finally split and collapsed, an event of some significance since in 1974 the Progressives had adopted a platform advocating an unqualified franchise.

But, as I have suggested, the political battle lines were drawn between the extraparliamentary opposition and the government. In 1955, the different extraparliamentary oppo-

sition groups came together at Kliptown, near Johannesburg. There, at a gathering of some 3000 people, the 'Freedom Charter' was drawn up to serve as a rallying point for opposition to apartheid. The Charter, which calls for the establishment of a nonracial democracy and a social democratic state, was to become the most significant single document in South African politics.

The government's answer was the arrest in December 1956 of 156 leading activists of all races committed to extraparliamentary action as the means to bring about a nonracial democracy. This mass arrest heralded the start of the mammoth 'Treason Trial', in which the government sought to break political opposition in South Africa by convicting the leaders of extraparliamentary, peaceful opposition of treason.[35]

In this respect the trial was a miserable failure. In 1958, charges against 65 of the accused were withdrawn and the remaining accused were divided into two groups--one of 61 and one of 30. In 1959, the indictment against the 61 was quashed and in 1961 the remaining 31 were found not guilty. But the implications of the trial for the political and legal development of South Africa were immense.[36]

The prosecution sought to prove a treasonable conspiracy by placing the Freedom Charter in a context of "the world-wide communist movement and the history of the extraparliamentary opposition in South Africa".[37] Its argument can be summarized as follows. The Freedom Charter was radically incompatible with the existing political set up. The

government would never be moved by non-violent and lawful political action. Therefore those who supported the Freedom Charter must be committed to, and engaged in a conspiracy to promote, violent and illegal political action with the objective of overthrowing the State.

The Defence, as Thomas Karis put it, "denied the Prosecution's assumption that no middle ground existed between the ballot box and treason".[38] Their argument was that the activities of the accused were characteristic of extraparliamentary and non-violent movements in countries that excluded a large selection of the population from the political process. This argument won the day. But, as Karis perceptively commented at the time, the trial posed two important questions:

> For unenfranchised and dissatisfied non-whites, the question is: does the breadth of the Prosecution's argument leave open any extraparliamentary outlets for free speech or agitation? For whites seeking contact with these non-whites, the question: does the involvement in the trial of men like ex-Chief Luthuli and Professor Mathews mean that contact is possible only with the Africans who are in basic agreement with official policy?[39]

These questions were to be answered against the background of the decolonization of Africa and increasing unease within the Commonwealth about South Africa's racial policies and general record. Verwoerd, Prime Minister since 1958, called a referendum confined to whites which favoured the establishment of a Republic. In 1961 the Republic of South African Constitution Act[40] was enacted which declared a Republic and because of hostility within the Commonwealth to this move, South Africa ceased to be a member of that

body.

Events came to a head during a campaign for countrywide protests focusing on a planned burning of passes. The campaign was initiated by the African National Congress and joined by the Pan Africanist Congress. The latter had been established in 1959, when 'Africanists' within the African National Congress left the organization disgruntled partly because of the growing influence of whites and Indians.

At Sharpeville, an African township not far from Johannesburg, a crowd of 5000 people gathered in peaceful protest at the local police station on 31st March 1961. The police panicked and opened fire, leaving 69 dead and 180 wounded. Later that day, two people were killed in a similar protest in Langa, an African township near Cape Town. Protest accompanied by more civilian deaths soon spread to other parts of South Africa and the government reacted by declaring a state of emergency in terms of the Public Safety Act.

18,000 people were detained and the Unlawful Organizations Act 24 of 1960 was introduced to enable the banning of the African National Congress and the Pan African Congress. After the state of emergency was lifted, the government turned its attention to harassing the activists of the now illegal organizations, many of whom were engaged in setting up underground structures. In a significant change of tactics, the leadership of the African National and Pan African Congresses started to consider seriously, and to take steps to implement, setting up leadership in exile and starting a sabotage campaign within South Africa.

The main acts of sabotage were undertaken by Umkhonto We Sizwe, the newly established military wing of the African National Congress and Poqo, the Pan Africanist equivalent. But although many attacks were mounted by Umkhonto, they had little impact on the white population, due to scanty press coverage and the usually superficial damage that resulted from the bombings. Poqo was responsible for much more fear among whites since its members resorted in some cases to attacking and killing white civilians.[41] The General Law Amendment Act 37 of 1963, better known as the 90-day law because it permitted senior police officers to arrest and detain for up to ninety days people suspected on various grounds, was enacted to break Umkhonto and Poqo.

In 1963 and 1964, the bulk of the political leadership of the underground organizations, including Nelson Mandela, President of the African National Congress, were arrested. They were tried, and found guilty of sabotage under a statute known as the Sabotage Act.[42] They were sentenced to heavy terms of imprisonment, some, including Mandela, to life terms.

By the mid-1960s, the sabotage campaign had peetered out and Poqo had been crushed. Acts of sabotage and armed resistance became rare until the mid to late 1970s, when the African National Congress, which had been more successful in organizing in exile than the Pan African Congress, initiated acts of armed resistance within South Africa.

The process of crushing the underground political opposition was overseen by JB Vorster, who was appointed

Minister of Justice in 1962. Vorster was largely responsible for the creation of the statutory armoury of the South African security system. As we will see in the case study, this armoury consists mainly of wide executive powers to detain opponents without trial and to ban or restrict individuals and organizations.

In the 1970s another political crisis hit South Africa. Important signals of growing unrest among blacks had been a wave of strikes among black workers in 1973 and the formation of the Black Consciousness Movement, whose members argued that blacks should seize the political initiative for themselves and not look to any help from white liberals.

In 1976 the 'Soweto uprising' occurred. Soweto is the biggest of all black townships, lying just outside Johannesburg. The uprising started when growing protest about 'Bantu Education' and, in particular, the imposition of Afrikaans as a medium of instruction in black schools went unheeded by the government. Eventually, the police, by firing on a peaceful demonstration of school pupils in Soweto, sparked off a country-wide protest against apartheid and a period of repression that dwarfed Sharpeville in brutality, destruction and death-toll.[43]

One consequence was that thousands of black teenagers left South Africa illegally, most of them to become recruits to the African National Congress. Another consequence was a general resurgence in political activity by black community organizations. But in 1977 the government took severe action against a wide range of extraparliamentary groups which

crushed the Black Consciousness Movement and had the notorious and tragic result of the death in police detention of its most prominent member, Steven Biko.

2.4 The Crisis of Apartheid--1978 to the Present

During the surge of activism in the 1970s, the Nationalists had been rethinking some aspects of their policy towards blacks Africans in urban areas. In response to pressure from the large corporations, significant reforms took place in labour relations which permitted blacks to form unions and to take part in all forms of collective bargaining.[44] The result was a rapid growth of black trade unions. Black membership of registered trade unions rose from 56,700 in 1980 to 260,000 in 1981.[45] In 1987 the black National Union of Mineworkers had over 360,000 members. The unions merged into powerful federations which have shown their ability to stage disciplined confrontations of employer and State.

In addition, under the guidance of PW Botha, Prime Minister since 1978, and President since 1984, the 'Riekert Commission' recommended that Africans already settled in urban areas be fully integrated into urban life, although it also made it plain that the influx of migrant workers from the homelands was to be even more closely supervised.[46] At the same time, the government planned to allocate more resources both to black townships and to the homelands. In 1985, the Prohibition of Political Interference Act of 1968

was abolished.[47] In addition, many of the statutes which enforced 'petty apartheid'--the prohibition on social contact between different racial groups--have been repealed.[48]

But besides some concessions made at municipal level to the black townships, the rethinking of politics has focused on Coloureds and Indians who had never fitted neatly into the design of grand apartheid. In 1983 a referendum was held among whites on a constitutional dispensation which would include Coloureds and Indians in central government. Although similar referenda had been promised for the Indians and Coloureds, it was decided to test their opinion in the first national elections.[49]

The Republic of South Africa Constitution Act 110 of 1983 formally set up a tri-cameral Parliament. While this step created a significant chink in the ideology of grand apartheid, it also concentrated power in the hands of the executive in an unprecedented way. While nominally the different chambers are of equal status, in cases of deadlock the 'President's Council' (a body controlled by the majority in the white chamber) and the State President have effective power. This new dispensation gives the executive, in the person of the State President, more power than ever before.

These reforms can fruitfully be seen as a culmination of a process which had begun in the 1970s when, at a time when Botha was the Minister of Defence, the military developed a doctrine of 'total onslaught' as a policy-shaping device. The doctrine holds that the Soviet Union orchestrates all activity hostile to South Africa according to one

overall design. 'Total control' is the method needed to resist total onslaught and 'hostile activity' includes the activity of most organizations and individuals who reject the legitimacy of this way of looking at things. Botha oversaw the formation of the 'State Security Council', a shadowy body of politicians and top military and security men, which is thought to control all major policy initiatives.

During this time the extraparliamentary opposition was regrouping in the wake of the crackdown of 1977. In 1983, in direct reaction to the constitutional proposals, the United Democratic Front was formed to provide a focus for opposition to apartheid for hundreds of community groups. Together with the trade unions, it played an important role in the unrest that followed the referendum decision to go ahead with the constitutional proposals.

Strikes and school and trade boycotts led to the proclamation of a state of emergency in July 1985. The police and the army moved into the townships in a massive show of force and have stayed there. At the beginning of 1986, Frederick van Zyl Slabbert, leader of the Progressives, resigned, claiming that parliamentary politics had become futile.

The state of emergency was reproclaimed in June of 1986, 1987, and again in 1988. Thousands of people have died, many as a result of action taken by the security forces, but also in what the government calls 'black on black violence'. This category includes the killing of suspected collaborators by political activists, the killing of

activists by unknown assassins, and the casualties of violence between opposition groups, mainly between supporters of the United Democratic Front and the followers of the more conservative 'Inkatha'.

To a large extent. it seems that the government has again succeeded in crushing opposition. 26,000 people were detained in 1986, including nearly all leading black activists many of whom are facing charges in a spate of treason trials. The United Democratic Front and sixteen other anti-apartheid organisations were effectively proscribed in 1988. At the same time, the activities of COSATU, the major black trade union federation, were severely curtailed. These events were hailed by black church leaders, one of the few voices left to extraparliamentary opposition, and themselves under threat, as the death of the hope of liberal democracy in South Africa. At the same time there has been a swing by the white electorate to an increasingly powerful rightwing coalition, which now forms the official opposition in the white parliament and which has links with the overtly neo-Nazi 'Afrikaans Resistance Movement'.

2.5 The Judges and their Critics

On taking office, South African judges swear to

> administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa.[50]

Since all judges and nearly all lawyers in South Africa are white, it is not surprising that the judiciary and the

legal profession pride themselves on embodying all the virtues associated with their equivalents in Western democracies.[51] In addition, the South African government prides itself on its adherence to the rule of law.[52]

However, since the 1960s some South African lawyers have done much to dent the self-image of their profession and the judiciary. They have pointed out that South African lawyers have reacted to the apartheid laws with the silence which Bentham called obsequious quietism. They have also pointed out that South African judges have been influenced by race in sentencing and have a record of deciding hard cases on the interpretation of the apartheid laws in a way that accords with the executive's desires and with the racial prejudices of the white population.[53] Since these lawyers have an unswerving commitment to ideals of democracy and civil and political rights for all South Africans, I shall refer to them from now on as 'liberal lawyers'.

These lawyers recognize that circumstances were such as to make it almost inevitable that the majority of their profession and the judges would respond in this manner. One may ask what else could be expected of judges who, as Hugh Corder portrays them,

> while formally independent of political influence, manifestly incorrupt, and consciously impartial, were integral parts of the very structure which had created and now maintained injustice ...[54]

However, there is is also a sense in the liberal critique that things could have been different. For example, Corder says of most of the cases he discusses in his study of the AD during the segregationist era that "either of two deci-

sions could have been defended as legally proper".[55]

In this respect, liberal lawyers regard as especially significant the flurry of hostility which took place between the government and the AD in the period when the court invalidated the government's first two attempts to remove the Coloureds from the common electoral roll. The government was determined to have its way and thought that the court was acting inappropriately, as the Prime Minister of that time, Dr DF Malan, made clear in 1952.

> Neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legal sovereignty of the lawfully and democratically elected representatives of the people is denied, and where appointed judicial authority assumes the testing right, namely, the right to pass judgment on the exercise of its legislative powers by the elected representatives of the people .... It is imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty.[56]

In addition, the court saw itself as under direct attack by the government in the Appellate Division Quorum Act 25 of 1955 which enlarged the AD from six to eleven judges and provided that all eleven had to sit in cases to determine the validity of a statute. In defending the bill in Parliament, the Minister of Justice argued that the government intended to "reinstate the sovereignty of Parliament".[57] LC Steyn, a recent appointment to the AD, was the only judge who refused to participate in a letter to the Minister of Justice expressing the judges' concern about the failure to consult the court before announcing that such a statute would be enacted.

Steyn had been elevated to the bench in 1951 after a career in the civil service during which, in a book on stat-

utory interpretation, he made plain his hostility to the English elements of South African common law.[58] His appointment was a highly unusual step in South Africa, where the tradition is that judges are appointed from the ranks of senior advocates, and the Johannesburg Bar had protested. Again unusually, Steyn was appointed to the AD after only three and a half years.

Steyn was made Chief Justice in 1959, over the heads of two more senior judges, one being OD Schreiner who had delivered the only dissent in the final case on the removal of the Coloureds from the common electoral roll. Steyn's appointment as Chief Justice marked the start of what Christopher Forsyth describes as the court's "cordial relationship with the executive authorities".[59] It also, as Forsyth notes, marked the start of a progressive increase in the proportion of appointments to the AD from the ranks of judges who had practiced at the deeply conservative Bar in Pretoria or who had been civil servants there.[60]

Such events might seem fully to determine the character of subsequent judgments. But in the case study that follows, I shall explore the part played by different judicial views of judicial obligation and the rule of law.

ENDNOTES TO CHAPTER 2

1. The general works on which I rely most heavily in what follows are Davenport (1987), Wilson (1969), Marks (1980) and (1987). The 1984 and 1988 issues of **Acta Juridica** and Rycroft (1987) contain useful articles on the apartheid laws. For the history of Afrikaner Nationalism, I have used Moodie (1975) and O'Meara (1983). For works which focus on race, I have used Fredrickson (1981), Greenberg (1980) and Simons (1983). Hindson (1987) is a thorough study of pass controls. For the history of black resistance, I have used Lodge (1983) and Karis (1987). Legassick (1982) and (1982a), Everatt (1988), Robertson (1971), Rich (1984) and Butler (1987) contain useful material on white liberalism. The history of the supreme appeal court--the AD--is covered from 1910-1950 by Corder (1984) and from 1950-1980 by Forsyth (1985). For general works on the South African courts and human rights, see Sachs (1973) and Dugard (1978).

2. A census in 1970 put the Africans at 70.2 percent, the whites at percent, the Coloureds at 9.4 percent, and the Asians at 2.9 percent. See the tables reproduced in Davenport (1987) 408.

3. Quoted in Wilson (1969), Volume I, 430-31.

4. Contrast on this topic Trapido (1980) and Davenport (1987).

5. Davenport (1987) 216-21.

6. Quoted in Robertson (1971) 1.

7. Extracted from a speech delivered in 1903, quoted in Marks (1987) 7.

8. 9 Edward 7 of 1909.

9. Thompson (1969) 352-53.

10. Appeals lay from the AD to the Privy Council until 1950.

11. Corder (1984) chapter 1; Taitz (1985); Hahlo (1960).

12. Hahlo (1960) 42.

13. Thompson (1969) 338.

14. The same protection was extended to English and Dutch as the official languages.

15. Most notably, the 1922 strike by white mine workers in the Transvaal.

16. Most notably the Natives (Urban Areas) Act 21 of 1923. The culmination of this process was the Bantu (Urban Areas) Consolidation Act 25 of 1945.

17. For example, in terms of the Mines and Works Act 12 of 1911, certificates of competency for a number of skilled occupations were reserved for whites and Coloureds.

18. For example, by the Industrial Conciliation Act 11 of 1924.

19. The Native Land and Trust Act 18 of 1936.

20. The Representation of Natives Act 12 of 1936.

21. Quoted in Paton (1964) 226.

22. See Trapido (1980), Rich (1984) and Dubow (1987).

23. See Butler (1987a) and Lewsen (1987).

24. It changed its name in 1923.

25. See Lodge (1983) chapter 1.

26. Quoted in Moodie (1975) at 276, the author's translation. Verwoerd was speaking in 1954.

27. The Black Homelands Constitution Act 21 of 1971 gave the government the power to grant and extend self-government or increased powers to the regimes it set up to rule the reserves. The Black Homelands Citizenship Act 26 of 1970 provided that every black person in the Republic was to be a citizen of one or other designated black area. This Act made possible a series of statutes from the mid-1970s onwards, which stripped some ten million blacks of their South African citizenship and designated them as citizens of places with which many had no ties: Status of the Transkei Act 100 of 1976, Status of Bophuthatswana Act 89 of 1977, and so on.

28. By the Bantu Labour (Settlements of Disputes) Act 48 of 1953.

29. For example, the Reservation of Separate Amenities Act 49 of 1953 enabled the proclamation of public amenities as reserved for one racial group. The Immorality Act 23 of 1957 prohibited sexual contact; the Extension of University Education Act 45 of 1959 enforced the racial segregation of the universities; the Prohibition of Mixed Marriages Act 55 of 1959 prohibited interracial marriage.

30. Its differential enforcement can be seen from the fact that, according to official figures, while by 1972 only 1513 white families had been moved, 44,885 Coloured and 27,694 Indian families had been moved; Davenport (1987) 420.

31. The Separate Representation of Voters Act 46 of 1951 was invalidated in **Harris v Minister of the Interior** 1952 (2) SA 428 (A). The High Court of Parliament Act 35 of 1952 was invalidated in **Minister of the Interior v Harris** 1953 (4) SA 769 (A). The validity of the Senate Act 53 of 1955 was upheld in **Collins v Minister of the Interior** 1957 (1) SA 552 (A).

32. In 1968 this representation was abolished by the Separate Representation of Voters Amendment Act 50 of 1968. A Coloured Persons Representative Council was set up (the Coloured Persons Representative Council Amendment Act 52 of 1968) which was, however, to be sabotaged from within.

33. The only parliamentary representation the Party had was through the four 'Native' representatives. They ceased to sit in Parliament after 1960, as a result of the Promotion of Bantu Self-Government Act 46 of 1959.

34. Robertson (1971) 230.

35. Two alternative charges under the Suppresssion of Communism Act were quickly withdrawn.

36. In what follows, I rely mainly on Karis (1961). See also the excerpts from the trial record reproduced in Karis (1977), Volume III, 579-626.

37. Quoted in Karis (1961) 227.

38. Karis (1961) 231-32.

39. Karis (1961) at 234-35. Luthuli, for a long time the leader of the African National Congress, was regarded as a moderate man committed to non-violent change. He was awarded the Nobel Peace Prize in recognition of his efforts to bring about peaceful change in South Africa. Mathews, an educated and articulate politician, was one of the leading intellectual figures in the extraparliamentary opposition.

40. 32 of 1961.

41. Lodge (1983) 235-36.

42. The General Law Amendment Act 76 of 1962.

43. Davenport (1987) 434 quotes figures which estimate the death toll as between 575 and 700. For a general account of the uprising, see Hirson (1979).

44. The Industrial Conciliation Amendment Act 94 of 1979 and the Labour Relations Amendment Act 57 of 1981 made it possible for blacks to participate in the legal machinery set up for collective bargaining.

45. Davenport (1987) 445.

46. Influx control was formally abolished by the Abolition of Influx Control Act 68 of 1985. But this dispensation applies only to blacks who already have urban rights and so are entitled to remain in white urban areas despite the citizenship-stripping statutes of the 1970s. In addition, the descendants of blacks who have urban rights are not entitled to this dispensation. Finally, influx can be effectively controlled and has been by 'informal' means; for example, by proclamations which make it a condition precedent to lawful residence that the person has accomodation in the area. It remains to be seen whether the effects of the citizenship-stripping statutes of the 1970s will be mitigated by the Restoration of South African Citizenship Act 73 of 1986.

47. By the Constitutional Affairs Amendment Act 104 of 1985.

48. For example, the Prohibition of Mixed Marriages Amendment Act 72 of 1985.

49. A test which showed that there was little enthusiasm for the new dispensation. The Indian poll was 24 percent and the Coloured 30 percent; Davenport (1987) 471.

50. Supreme Court Act 59 of 1959, section 10(2)(a).

51. See Claasen (1970) for an example of fulsome praise bestowed on South African judges by a member of the bench.

52. See Dugard (1978) chapter three and 288-90, and Dugard (1987a) for an up to date account.

53. See Dugard (1978), especially part four.

54. Corder (1984) 240.

55. Corder (1984) 237.

56. 1952 House of Assembly Debates col 3124.

57. 1955 House of Assembly Debates 4425-27.

58. Steyn (1974). See Cameron (1982) for a discussion of Steyn's hostility to the English elements in South African law.

59. Forsyth (1985) 57.

60. Forsyth (1985) 41-45.

Chapter 3

Setting the Stage

3.1 Separate but Equal

The case study deals with administrative law issues. For the cases mostly concern the validity or legality of the decisions and actions of executive officials purporting to act by virtue of powers conferred on them by statute. As we will see, South African judges ask the question whether Parliament intended the officials to act reasonably and fairly in using the powers it conferred on them. They usually presume that Parliament did so intend, unless it expresses itself to the contrary. In particular, the judges have adopted Lord Russell's formulation of the principle of reasonableness in the English (1898) case **Kruse v Johnson**, which I shall call the '**Kruse** formula'.[1]

> I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws ... as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and **ultra vires**.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought not to be there.

The judgments discussed in this chapter concern the

legal implications of executive action to segregate the different races. One common law principle expressed in the **Kruse** formula is that all people are equal before the law. On the basis of this principle, the courts will ask whether executive acts are invalid or illegal because they are "partial and unequal in their operation as between different classes" when such partiality and inequality have not been authorized by the statute.

Of central importance is the 1934 AD case, **Minister of Posts and Telegraphs v Rasool**,[2] in which the majority decided that there was sufficient compliance with the principle of equality if separate but not unequal facilities were provided to different racial groups. At issue was the validity of an instruction by the Postmaster-General dividing a post office in the Transvaal into two sections, one for 'Europeans' and one for 'non-Europeans'. He had acted in terms of Act 10 of 1911, which empowered him to issue the instructions he "deemed necessary" for the carrying out of official duties. Rasool admitted that the division did not result in inequality of service. He contended that the mere fact of division amounted to substantial inequality of treatment.

In a full bench decision of the Transvaal Provincial Division, Tindall J had upheld the decision of the court **a quo** in favour of Rasool. He referred with approval to the 'partial and unequal' test in the **Kruse** formula, and said that decisions in his court had laid down that "a discrimination based purely on race or colour is a discrimination of that kind ...".[3]

On appeal, however, the majority of the AD held that the mere fact of division did not amount to inequality of treatment. Two of the majority judges were reluctant to acknowledge the racial motivation for the Postmaster-General's instruction. Consequently, they made a rather vague attempt to suggest more palatable reasons.

De Villiers JA, citing **Kruse**, said that if the instruction was "gratuitous", the court would strike it down. But he also said that he was unable to find a **ratio decidendi** in the precedent cited in support of Rasool. He claimed that the judges had failed to appreciate the "vital distinction" between a discrimination coupled with equality of rights, facilities, duties etc, and a discrimination "coupled with inequality" (181). Even if the cases were authority for the principle that discrimination on the grounds of race, coupled with equality, was **per se** unreasonable, he did not agree. He said that it was not **per se** unreasonable to discriminate on grounds of race or colour, which he equated with discrimination on "grounds of initial letters of names", because

> many reasons may be conceived upon which such discriminations might justly and reasonably be made (182).

There had to be shown, he concluded, that the division, in addition to the mere fact of discrimination, involved an "oppressive or gratuitous interference with rights" or that it possessed some "other unreasonable feature" (182).

Stratford ACJ, after affirming the correctness of **Kruse**, said that in all the decisions cited in support of Rasool there had been something more than discrimination on

the ground of race, that is, some inequality of treatment. In addition, if one of the decisions cited[4] was authority for the principle that

> a bye-law is invalid on the sole ground that it divides the community for the purpose of its operation into White and Coloured, I cannot agree with it, for such conclusion runs counter to accepted principle and good sense (175).

Unlike De Villiers JA, he did suggest a reason for the division. He said that

> a division of the community on differences of race or language for the purpose of postal service seems, **prima facie**, to be sensible and make for the convenience and comfort of the public as a whole since appropriate officials conversant with the customs, requirements and language of each section will conceivably serve the respective sections (175).

But he said that he did not have to "speculate" about the purpose of the classification because the burden of showing that the instruction was unreasonable lay on Rasool (ibid).

Beyers JA, who gave the third majority judgment in **Rasool**, was not so coy. He makes it clear precisely what the principle is and who the people of 'good sense' are who 'accepted' it. He remarked that the principle that all are equal in the eyes of the law is doubtless subject to qualifications and that, as far as the Transvaal was concerned, it was clear that Europeans and non-Europeans were never in important respects equal in the eyes of the law (177).[5] He quoted the following extract from a 1930 Orange Free State Provincial Division decision, **Pitout v Rosenstein**,[6] where it was held that it was defamatory to say of a white man that he is a 'Hottentot' (a native inhabitant of the Cape).

> That can hardly be doubted when one bears in mind the position of the races in this country. Thus, to mention only a few features, there are pass laws, colour bars, franchise distinctions, liquor law distinctions, locations and other residential segregations, discriminations in clubs and societies, in social life, in the Church, in schools, in public conveyances, and there are differences in the intellectual development and in degree of civilisation, there are different habits and different standards (177).

Beyers JA also referred approvingly to a dictum of Lord De Villiers, the first Chief Justice of South Africa (not to be confused with the judge of the same name in **Rasool**), in an AD decision of 1911, **Moller v Keimoes School Committee and Another.**[7] The dictum is worth quoting in full because, at the very outset of Union, it sets out the Chief Justice's views on how the official racial policy should influence judicial reasoning.

Moller was a white man married to a Coloured woman. The Keimoes school excluded his children on the basis of a Cape School Board Act, 35 of 1905, which provided that separate schools could be established for children of "European parentage or extraction". Moller had applied for a court order to compel the school to admit his children on the basis that they were of European extraction and the statute did not mention colour as a criterion. He failed in the court **a quo** and in two subsequent appeals. In the last of these, the Chief Justice said that the court, in order to ascertain the meaning of "European",

> should endeavour to ascertain its popular sense and place itself as far as possible in the position **of the authors of the enactment.** As a matter of **public history** we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of this country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to

rule over, and whom they refused to admit to social or political equality. We know also that, while slavery existed, the slaves were blacks and that their descendants, who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites. Believing, as these whites did, that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilization, they condemned intermarriage or illicit intercourse between persons of the two races. Unfortunately the practice of many white men has often been inconsistent with that belief, but the vast majority of Europeans have always condemned such unions, and have regarded the offspring of such unions as being in the same racial condition as their black parents. These prepossessions, or, as many might term them, these prejudices, have never died out, and are not less deeply rooted at the present day among the Europeans in South Africa, whether of Dutch or English or French descent. We may not from a **philosophical or humanitarian point of view** be able to approve this prevalent sentiment, but we cannot **as judges, who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature** to adopt the policy of separate education for European and non-European children.

Lord De Villiers's point is that, when there is uncertainty about the meaning of a statute, judges have a responsibility to decide the matter in accordance with the intentions of a particular group--the authors of the enactment. In the case before him, these intentions are known to the judges, because they are an obvious part of the public record. They are part of what Hart in a famous lecture calls a "positive morality"--"the morality actually accepted and shared by a given social group".[8] Lord De Villiers is also pointing out that judges have to fulfil this responsibility no matter what the divergence is between the appropriate positive morality and what Hart calls "critical morality"--the principles which figure in moral argument when one's concern is the criticism of positive morality.[9]

Lord De Villiers and Beyers JA thus adopt the following interpretive approach to statutes that might be argued to empower officials to make decisions affecting the racial order. If one looks at the history of such statutes, it is clear that they form part of a pattern of segregation of whites from blacks. The pattern is such that the best historical explanation of any statute that seems to belong to this class is that it forms part of an overall design initiated by whites because they consider blacks inferior and want to avoid all social contact with them. In addition, it is clearly part of the public record that the actual authors of the enactments in question intended that the statutes be used to extend segregation. So in any case where the meaning of such a statute is in doubt, the judge should resolve the doubt by fitting the statute into the overall design.

I shall call this method of interpretation the 'historical design test' because it looks to a pattern that exists as a matter of historical fact in the legal acts and decisions of the past, mainly those of legislators. The pattern is not accidental. It is the product of an intentional design on the part of the actual authors of the acts and decisions and thus legitimates invoking a particular intention as the legislative intention.

In using the historical design test, the judges interpret the statute in question in the light of what they take to be the appropriate set of intentions--the actual moral ideas of the authors of the enactment. But notice that the morality was one oppressive to and resented by most South

Africans and one which Lord De Villiers implied failed to meet the standards of critical morality. The intentions can be appropriate only because they are to be found in the ideology of those who hold political power in Parliament and who are responsible for enacting the statute.

Because the test clears up legal uncertainty by appeal to starkly evident matters of fact in the public record, I shall call the interpretive approach which uses this test the 'plain fact approach'.[10] The approach will be fleshed out as more material is introduced. But we can already see that the judges who adopt it look to certain bits of the public record because they hold a particular political doctrine of judicial responsibility.

Plain fact judges hold, that is, that the judicial role is not to make law in accordance with their views on what critical morality requires, but to apply the law as it in fact exists. It follows for them that when the law is a statute, they should, in deference to the supreme law-giver, attribute to the statute the meaning which Parliament in fact intended it to have. If there is uncertainty about what Parliament intended, they must resolve this uncertainty in accordance with the same doctrine of judicial responsibility. They must look not to what they think the law should be, but to sources of fact which legitimate an attribution of actual intention to Parliament. If it so happens that it is obvious from the public record--a matter of fact--how those responsible for enacting the statute would have wanted it interpreted, this doctrine of judicial responsibility

compels them--a matter of legal duty--to decide the case in accordance with that want. In short, the judges hold what I shall call the 'apolitical doctrine of judicial responsibility'.

The emphasis which these judges place on the factual nature of law is reminiscent of legal positivism. But Hart and Raz will be quick to point out that the judges are not positivists. As contemporary positivists see it, tests such as the historical design test do not determine what law is. The tests come into play when there is in fact no intention that can be attributed to Parliament on a matter and are at most one way in which a judge may exercise his discretionary law-making power. It will seem then that positivists can hark back to Hart's point about the charge of formalism or mechanism. Hart, as we saw (S1.2), said that when this charge is made against judges what is really meant is that the judge has decided the case in accordance with the meaning which "would jump to the mind of the ordinary man" or with a conservative social policy. In **Rasool** the majority combines these options by deciding the case in accordance with what would jump to the minds of most white South Africans, especially to the mind of, as Lord De Villiers put it in **Rasool**, the "average legislator".[11]

It follows for positivists that if the judges thought that they were under a legal duty to decide the case in this way, they were mistaken. Even worse, the judges might have known that they had a discretionary power, but pretended not to in order to conceal the fact that they were making a le-

gally unforced choice in favour of the **status quo.** But whatever their thoughts on the matter, they decided the case in accordance with a doctrine of judicial responsibility which has nothing to do with contemporary positivism. For, since Austin's day, positivists have not advocated any doctrine of judicial responsibility, but merely a theory of law. Hence positivists can point out that judges who use tests like the historical design test do so because they hold a conservative doctrine of judicial responsibility and not because they are positivists.

Gardiner AJA dissented vigorously in **Rasool.** He said that it was a fundamental principle of the law that, in the eyes of the law, all men are equal (185). And it was clear to him that the cases cited in support of Rasool were authority for the principle that a by-law which discriminated on the grounds of race was invalid (191). In his view, the principle of equality was one

> to which Courts of law must give effect, save where the Legislature has made provision to the contrary. And in my opinion it is a principle which officials of the State must observe to the same extent (187).

Gardiner AJA did recognize that the Legislatures of the different parts of pre-Union South Africa had made "fundamental inroads" on this principle. He listed statutes of the Union Parliament and decisions, including **Moller** and **Pitout,** which had contributed to this process. The result was, he said, that "coloured" people and "natives" were put upon a "definitely lower scale" (187-90). However, he strongly resists any temptation to participate in a scheme of inflicting further inroads on the principle.

He said he could not see any reason which would justify the instruction dividing the post office. He noted that the Chief Justice in **Moller** had "declined to ignore" the colour prejudice "of a large number of Europeans" which existed in South Africa. And he could not "shut his eyes" to the fact that it was this same prejudice, one which regarded "non-Europeans" as belonging to a "lower-order of civilization", which had "actuated" the instruction whose validity was in question. He rejected the supposition that convenience of service was the reason behind the instruction. As he pointed out, Rasool was an Indian and there was nothing in common between African languages and the languages of India. In his view,

> this relegation of Indians to a non-European counter is humiliating treatment. .... In view of the prevalent feeling as to colour, in view of the numerous statutes treating non-Europeans as belonging to an inferior order of civilisation, any fresh classification on colour lines, can, to my mind, be interpreted only as a fresh instance of relegation of Asiatics and natives to a lower order, and this I consider humiliating treatment. Such treatment is an impairment of the **dignitas** of the person affected, and it is the Legislature only that can cause that impairment (190-91).

So Gardiner AJA's dissent in **Rasool** contrasts starkly with the approach adopted by De Villiers and Stratford. He recognizes both that racism motivated the instruction and that the division imposed by it would humiliate blacks by showing that judges and officials accepted the ideology of black inferiority which was accepted generally by whites. In effect, these two majority judgments discount any psychological aspect to inequality and so seem to license future official humiliation as long as this does not affect the

actual service to blacks.

His approach also differs radically from that of Beyers. Gardiner AJA is fully aware of the historical pattern, the overall design and the presence of racist intentions on the part of the Postmaster and the authors of the statutes he listed. But in his view the racial ideology which makes that pattern into an intentional design conflicts with principles already embedded in the law and so cannot justify a judicial or any official decision.

Because the judge ignores certain obvious explanations of a pattern of statutes and decisions, his reasoning might seem to put him in the company of what Bentham calls Blackstone's "fellow dealers" in the pernicious fictions used by judges to conceal their exercise of a discretionary power.[12] This charge entails that there is a plain fact of the matter which Gardiner AJA is under a legal duty to take into account, even if he has a discretionary power not to decide the case in accordance with the plain fact. That is, if we assume that Gardiner AJA's choice is a legally unforced one, it is a choice between at least two legal options, one being the plain fact discerned by the historical design test.

But notice that Gardiner AJA goes out of his way to make it clear what he is doing. As Fuller points out, such a fiction is "distinguished from a lie by the fact that it is not intended to deceive".[13] Notice also that Gardiner AJA does not exclude the plain fact intentions solely because they are morally repugnant. It is true that he holds that the reasons actuating the instruction, as well as a whole

host of statutes and social practices, are repugnant from the standpoint of critical morality. But the principle of equality which he takes to be constitutive of intention is a principle of critical morality which, as the majority judgments showed by acknowledging the relevance of **Kruse**, is also a principle of South African common law.

In Gardiner AJA's view, it is his legal duty to interpret statutes in accordance with this principle because his duty is to continue a history of judges seeking to do justice in accordance with the common law. For him, the presumption of equality is fundamental in the sense that he is required to presume that the Legislature, and all the officials who implement its statutes, are engaged in the same enterprise and so should be assumed to intend to respect the principle of equality.

On this approach, the principle is constitutive of an interpretive context--a background against which statutes are to be interpreted--and so is not merely a rule of law. If there is uncertainty about what a statute requires, it is the judicial duty to try to resolve that uncertainty in accordance with an intention which is attributable to a Legislature presumed to intend to respect the principle of equality. The context in which such an attribution is required is presumed to be in place prior to interpretation and the repugnant intention is excluded because it cannot compete as an intention in such a context. Gardiner AJA's interpretive approach has what we can call, following Dworkin (**S**1.7), 'screening power'.

So it is not that Gardiner AJA screens out an intention which is already in place as a fact about the law. The intention which is screened out is one which is argued to be in competition with the intention constructed in the common law context, but which, because it is so morally repugnant, cannot compete in that context. The intention is not, that is, screened out because of its factual nature but because of the kind of fact that it is. The screening power is inherent in Gardiner AJA's very conception of legislative intention, because that conception is formed out of what, in his view, are fundamental principles of critical morality embedded in the law.

Notice that Gardiner AJA, in screening out this intention, fails to follow the judges in **Pitout** and **Moller** who had held that such intentions were legally compelling considerations. I suggest that there is a rather subtle distinction in the screening out process, which will become clearer in the course of the case study. Morally repugnant intentions of the sort identified in this case are not, as Gardiner AJA sees it, legal data because they are fundamentally inconsistent with the kind of intention a judge is under a duty to, and in this case can, attribute to the Legislature.

But if a judge in the past has mistakenly relied on such morally repugnant intentions, his decision might be a legal datum for other judges. It might, that is, pass what we saw Dworkin calls a "threshold test of fit" (S1.6) just because other judges are bound by the decisions of that

court. But because the reasoned justification for the decision is based on data that would otherwise be screened out altogether, these other judges are legally required to confine the decision to as narrow a basis as possible. They should, as Dworkin puts it, confine the decision to its "enactment force"--what it decided on the facts--and not concede it any "gravitational force"--the power to influence the reasoned basis for decisions in the future. In this situation, the morally repugnant intentions are screened out at a second stage, when the decision which is based on them is confined to its enactment force.

Gardiner AJA's approach is thus firmly within the Common Law tradition. Like the bearers of that tradition, he does not see the common law as a mere collection of rules. Rather it is the principles which both explain and justify the explicit law and which make up the context in which the the judge must try to interpret the data relevant to the question raised by the case. Statutes are, as Coke put it (S1.1), to be interpreted in "accordance with the rule and reason of the common law" and past judicial decisions will be severely curtailed if they fail to comply with this maxim. Hence I shall call the interpretive approach used by Gardiner AJA the 'common law approach'.

Although Gardiner AJA's approach differs radically from that adopted by the majority judges, he does have something in common with them. They all give the impression that they think that their legal duty is to enforce the law that already exists. As we shall see, all the judges in the cases

which I examine seem to agree on the point that their legal duty is to resolve the case by enforcing the law that already exists on a matter. They thus share a doctrine of judicial responsibility to the extent that they think it is their duty to enforce the law that in some sense, as we saw Fuller puts it (S1.4), preexists their decision, and not to make law. I shall call this general doctrine the 'reigning doctrine of judicial responsibility'.

Of course, Gardiner AJA's conception of what the reigning doctrine requires of a judge differs from that of the plain fact judges. On his view, the law that already exists makes up a context, partly constituted by the principles of critical morality embedded in the common law. On the majority view, what law is is matter of fact and they found that, as a matter of fact, the legislative intention was that the statute not be interpreted subject to common law principles.

Gardiner AJA was not alone in his interpretation of what was required of him by legal tradition. In a speech in 1930, Dr AB Xuma, at that time a member of the executive of the African National Congress, and the President of that organization 1940-49, said:

> By their impartiality, by their 'blind justice', by their disregard for colour even in cases between White and Black, our judges have kept faith with the African. To the African our Judges are the final hope and safety valve especially as they have more than once upset judgments of lower Courts and declared certain differential and preferential legislation **ultra vires.** May they always uphold the high standards and ethics of their esteemed profession for the preservation of the best in the world-civilisation namely, justice.[14]

However, his approach was set out in a dissent. As a

result it might seem that the majority judgments, if they were not doing what the law already required in South Africa, had incorporated the following interpretive principle into South African law. Official differentiation between the races not specifically authorized by statute is valid unless it involves some tangible inequality. That principle is extracted from a particular ideology or positive morality which the judges thought was the legally appropriate one to be used in interpreting statutes. And this is how South African lawyers have interpreted the decision.[15] In addition, as Gardiner AJA noted, an explicit legislative statement that the presumption of equality is not relevant to the interpretation of a statute will preclude a judge from interpreting the statute in accordance with the principle of equality.

This first section of the case study leaves us with two questions. First, is there a link between the positivist view of law as fact and the plain fact approach given that positivists disavow a doctrine of judicial responsibility and claim that judges have to exercise a discretionary power in hard cases? Secondly, even if what I have called the common law approach is firmly in the Common Law tradition, is it not dependent, first, on judges maintaining a practice of using it and, secondly, on legislators failing to make their morally repugnant intentions plainer?

Notice that there are three distinct types of provision which could be used to make such an intention plainer. The first merely states that a division on racial lines is per-

missible. The second adds that the division may be coupled with inequality of treatment. The third adds that the object of the treatment is to achieve the institutional inferiority of one race to another. The next important AD judgment on the principle of equality concerned a provision of the first type.

3.2 **Separate but not Substantially Unequal?**

The AD decided **R v Abdurahman**[16] in 1950, two years after the Nationalists came to power. Act 22 of 1916 empowered the Administration to control, manage and superintend railways, and, in particular, to reserve coaches for the use of different races. A regulation had been made conferring the power on officials to make such reservations and it made it a criminal offence not to heed them. Officials acting by virtue of the regulation had reserved first class coaches on suburban trains in Cape Town for "Europeans Only" while the remainder of the train was not segregated. Abdurahman was a Cape Malay doctor, who occupied a prominent role in political opposition from the turn of the century until his death in 1940. As a member of a 'Train Apartheid Resistance Committee', he had been convicted of inciting blacks to enter railway coaches reserved for the exclusive use of 'Europeans'. The AD set aside his conviction.

Centlivres JA gave the unanimous judgment of the court. Because the statute expressly enabled discriminatory regulations to be made, he could not decide the case on the

ground that the regulation was invalid. He decided the case on the ground that the particular practice which had been established was illegal.

He rejected the argument, accepted in the court **a quo**, that because the regulation was valid any actual practice of reservation which complied with its letter was legal (144). He also said that the judge in a 1943 Cape Provincial Division decision had put the test too high when he required that the inequality be "manifestly unjust and oppressive".[17] One had, Centlivres JA said, to bear in mind the

> duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a **substantial** degree between different sections of the community .... (145)

He reasoned that the practice imposed substantial partial and unequal treatment on blacks, because while whites could escape the company of blacks, blacks were not given an equal facility and, in addition, were exposed to a criminal penalty from which whites were in the nature of the reservation exempt. In his view, the **Kruse** formula applied to the case because the partial and unequal treatment was "substantial" and not explicitly authorized by the statute.

He distinguished the case from **Rasool** on the basis that, on the facts in **Rasool**, each section of the post office was reserved for the exclusive use of one race group while, in the case before him, there were no first class coaches set aside for blacks (148). It was, he said, "one thing to authorise discrimination and quite another thing to authorise discrimination coupled with partiality and

inequality in treatment". He found it

> **impossible** to assume that the Legislature ... intended that one section of the community could be treated unfairly as compared with another section. The State has provided a railway service for all its citizens irrespective of race and it is unlikely that the Legislature intended that users of the railways should, according to their race, have partial or unequal treatment meted out to them (149).

Notice the echo here of Gardiner's claim in **Rasool** that judges should assume that the Legislature and executive officials are engaged with the judges in the pursuit of justice within the law.

Centlivres was appointed Chief Justice shortly after his decision in **Abdurahman.** He followed that decision in two others--**Tayob v Ermelo Local Road Transportation Board and Another**[18] (1951), and **R v Lusu**[19] (1953). In **Tayob,** the validity of a decision by the Road Transportation Board, constituted by virtue of a statute which did not authorise discrimination, was in issue.[20] In an unanimous judgment, Centlivres CJ overruled the decision of the court **a quo** which had upheld the validity of the Board's decision to withold a 'first class' taxi-cab license or exemption (one to carry whites exclusively) from an Asian on the grounds of his race.

The court **a quo** had considered that white public opinion was a relevant factor in deciding such cases. But, Centlivres CJ said, the reference to 'public opinion' was "not understood". If public opinion were relevant, he did not see how it would be possible to ascertain the opinion of the public which "consists of both Europeans and non-Europeans" (446). He cited his decision in **Abdurahman** as authority for

this proposition:

> To decline to grant an exemption ... on the ground that the applicant is a member of a particular race or class would be unreasonable (447).

It is important to note that he did not mention **Rasool** in his judgment, even though that decision had been relied upon in argument on behalf of the Board.[21]

Lusu concerned an appeal against the conviction of a black man who had, during the Defiance Campaign, entered a 'European waiting room' at a railway station. In this case the statute[22] was one passed soon after the Nationalists came to power in 1948. It empowered the Railways Administration to set aside facilities for different races in the manner that it deemed "expedient". Regulations had been made empowering railway officials to set aside waiting rooms for the exclusive use of a particular race and making it a criminal offence to contravene such a reservation. A magistrate had declined to convict Lusu because the facility provided for blacks was substantially unequal. The government appealed on a question of law, claiming that the statute gave the Administration an "unfettered discretion" to act, even when the action resulted in partial and unequal treatment.

Centlivres CJ, Van Den Heever JA dissenting, upheld the decision of the court **a quo** against the government. He reasoned that the question in the case was not whether the court's jurisdiction to test the official's action for unreasonableness had been excluded by the statute, but whether the statute authorized the official to act unreasonably.

In holding that the statute did not authorize unreasonable action, he cited his decision in **Abdurahman** as authority for this proposition:

> when a statute confers a power, the statute must not be construed to permit partial and unequal treatment of members of different races, unless such power is specifically given either in express terms or by necessary implication (490).

These three cases are usually taken to show that the AD had, following **Rasool**, adopted a principle that differentiation on the grounds of race is valid as long as it is not coupled with 'substantial inequality'.[23] The interpretation supposes that Centlivres, in using the word 'substantial', is suggesting the sort of a test that gives content to the principle, taken over from **Rasool**, that separate but not unequal discrimination is permissible. The interpretation is plausible because the facts in **Abdurahman**, as Centlivres had pointed out, involve substantial inequality, while those of **Rasool** do not. In other words, a principle of 'separate but not substantially unequal' can justify the decision in both cases and also in **Lusu**.

But notice that the court in **Abdurahman** and **Lusu** did not in fact deal with the question whether differentiation on the ground of race is in itself unreasonable. For the question which faced the court was the interpretation of original legislation expressly permitting such differentiation. Moreover, **Tayob** differs from the other two cases because the statute in question did not expressly authorize racial differentiation. And in **Tayob**, Centlivres did not mention **Rasool** and cited his decision in **Abdurahman** as

authority for the proposition that unauthorized racial differentiation is in itself unreasonable.

These observations suggest that the three decisions do not establish as a principle that discrimination on the ground of race is reasonable as long as it is not substantially unequal. **Abdurahman** and **Lusu** are authority for the proposition that when differentiation on the grounds of race is expressly authorized, the principle of equality requires that the differentiation not be implemented in a tangibly or substantially unequal way. But **Tayob**, like Gardiner's dissent in **Rasool**, is authority for the proposition that unauthorized racial differentiation should be struck down as illegal. And both of these propositions are explicable only if Centlivres is interpreting the law within a context in which the common law principle of equality plays a constitutive and fundamental role. It seems, then, that the interpretive principle which the majority judges had employed in **Rasool** did not, in virtue of its employment, become part of the interpretive context. It is screened out in the same way that the reasoned justifications offered in **Pitout** and **Moller** are screened out by Gardiner in his dissent. In effect, Centlivres confines the decision in **Rasool** to its facts and vindicates the approach adopted by Gardiner.

Notice in this regard that Centlivres's approach in **Abdurahman** and **Lusu** implicitly rejects the historical design test for statutory intention. For that test would latch on to the fact that the statutes in question in these cases did expressly say that a division on racial lines was per-

missible. Moreover, the rejection in **Tayob** of the contention that white public opinion has a special status is, I suggest, explicit evidence of Centlivres's attitude to the historical design test.

Interestingly, Van Den Heever JA, in his dissent in **Lusu**, expressed a view similar to mine concerning the approach towards which the AD was tending. The judge complained that the way in which the majority invoked the

> presumption of equality promoted a tendency to elevate what properly used is only a guide in ascertaining the intention of the Legislature into **a rule of substantive law to be used as a general touch-stone of validity.** It is only one of the many **pointers** considered in the interpretation of statutes. .... However, other considerations arising out of the same statute may overbear this presumption and ... the nature and objects of the power conferred may often be incompatible with the operation of the presumption (495-96).

He laid particular stress on the fact that the Railways Administration was authorized to engage in a "multitude of activities" on "business principles". Moreover, given the "diverse objects to which railway premises could be devoted", he could not "possibly imagine" that it was the intention of Parliament that the Administration should exercise its power in a way that satisfied the "reasonable requirements of all sections of the community" (498).

So Van Den Heever JA takes the complex nature of the administrative process envisaged by the statute, and the fact that the Administration is empowered to make its decisions by virtue of the statute on grounds of economic or business policy, as legislative indications that the statute is not to be interpreted in the common law context.

I shall adopt a neologism, suggested by Van Den Heever

JA, and call such indications 'contrapointers' because they are interpreted by the judge to point away from the common law context. But notice that the indications have to be interpreted as contrapointers only if a judge, as Van Den Heever JA tells us, does not take the relevant common law principle to be fundamental--if he does not take it to be a "touch-stone of validity". For if the principle is fundamental, the common law context is assumed to be in place prior to interpretation. As a result, the interpretation that the indications are contrapointers might be susceptible to being screened out altogether or given very little weight.

On my argument so far, it may seem that **Rasool** was implicitly overruled by the decisions discussed in this section, something which Centlivres may have been reluctant to acknowledge. If this is so, a positivist description might seem apt. The positivists would say that the judge was concealing, wittingly or unwittingly, the fact that he was exercising a discretionary power in overruling the decision in **Rasool**. But there is another, more charitable description available, one which employs the Dworkinian vocabulary which I used to describe Gardiner's approach to past judicial decisions.

As I have shown, Centlivres distinguished the cases before him from **Rasool** when he could and ignored **Rasool** when he could not distinguish it. He thus confines the decision in **Rasool** to its enactment force--what it decided between the parties to the case. He also implicitly accords gravitational force--the authority to influence decisions in the

futur--to Gardiner's dissent. The upshot is that Centlivres does not reject **Rasool** as part of the legal record. It remains part of the data with which a common law approach can fit, although it has to be radically reinterpreted to remain there. Notice an interesting feature of this description. To deny **Rasool** gravitational force is to confine its enactment force severely. But since the decision to deny gravitational force is morally loaded, the decision as to the ambit of enactment force is also morally loaded.

Edward McWhinney, a Canadian public lawyer, commented in 1956 that the effect of these three decisions was as dramatic as the decisions in which the AD pronounced invalid the statutes which attempted to remove the Coloureds from the common voters roll (S2.5). But McWhinney also said that if Van Den Heever was right about the "real intention" behind the statute in issue in **Lusu**, the courts were proceeding on "something of a fiction".[24] It would seem to follow that a plain fact approach was legally speaking more appropriate than a common law one.

Clearly this is what the government thought. The decisions in **Lusu** caused a furore in the Afrikaans press and senior cabinet ministers made speeches at political meetings accusing the AD of subverting the age-old traditions without which the very fabric of South African society would crumble.[25] The Minister of Justice, CR Swart, introduced the second reading of a bill to scuttle the court's approach by waving a photograph which had recently appeared in the newspapers of a wedding which had taken place in London between

the daughter of a former minister in a British Labour government (i.e. a white) and a "native". Such "horrible" scenes he said would have happened in South Africa "if we did not have the traditional policy that there should be separation between Europeans and non-Europeans". The disruption of the tradition which had led to the AD decisions had been instigated by "renegade Europeans", Communists, neo-Communists, and "liberalists".[26]

He referred to **Lusu** as that "strange decision". His attitude was that the AD's interpretation in **Lusu** of Parliament's intention was "totally unreasonable" while Van Den Heever's dissent was correct. It was, he indicated, a matter of regret that Parliament was now forced to make its intentions plainer.[27] These remarks prompted a senior United Party member of Parliament, Harry Lawrence, to ask whether the Minister of Justice realized that it was the judicial duty to interpret legislation in accordance with what Parliament, and not individual members, said.[28]

The Nationalists did not dispute that there was this distinction in principle. But they seemed to think that the judges had failed to see that in this case actual and legislative intention coincided. And they were going to make sure that the judges did not get out of hand again.

One senior Nationalist member of Parliament[29] said that it was the duty of the House, as in any "democratic country", "to put matters right", that is, in accordance with legal tradition and with public opinion. As evidence of this legal tradition he quoted the passages reproduced above from

Moller and **Pitout** and stated his approval of Beyers's judgment in **Rasool.** He also rejected Centlivres's colour-blind notion of public opinion in **Tayob,** saying that after the 1948 election there could be "no doubt about what public opinion in this country was".[30]

Parliament eventually enacted the Reservation of Separate Amenities Act 49 of 1953 which used the second type of clause mentioned in the last section; one which expressly says that division may result in substantially unequal treatment. The Act provided for the reservation of public premises and vehicles by the person in charge for the exclusive use thereof and stated expressly that no equal provision, or indeed any provision for all races was required, and that it would be a criminal offence to fail to heed the reservation. In addition, the statute in question in **Tayob** was amended so as to permit transportation boards to refuse a licence on the grounds of race.[31]

3.3 The Contrapointer Test

In 1959 the AD, now under the Chief Justiceship of LC Steyn, decided a case in the manner suggested by Van Den Heever in his dissent in **Lusu.** As we shall see, this decision was to have a serious impact on South African administrative law. **Cassem en 'n Ander v Oos-Kaapse Kommittee van die Groepsgebiedraad en Andere**[32] (Eastern Cape Committee of the Group Areas Board and Others) dealt with the interpretation of the Group Areas Act 41 of 1950. The Act makes it a

criminal offence for a member of one racial group to reside on or own land in an area set aside by proclamation for another race.

The procedure the Act sets up is roughly this. A board, and committees appointed by it, consider the desirability of proclaiming an area a group area. The board submits a report to the relevant cabinet minister, who then considers the report and makes a recommendation to the "Governor-General-in-Council" (the Cabinet). The Cabinet proclaims the area a group area if this is deemed "expedient".

In **Cassem** an order was sought by persons who would be affected by a proclamation of a group area to compel such a a committee to grant them access to its reports. The legal question was whether the Act should be interpreted subject to a principle of fairness or 'natural justice'--that parties affected by executive decisions have a right to a fair hearing--**audi alteram partem.** The right sought in this case was to examine the reports of the committee and to contest the information and proposals contained in them. The appellants conceded that they had no right of access at the executive level but they contended that they did have a right at the committee stage.

This contention was complicated by the fact that it had to be squeezed into an English administrative law category of the 'quasi-judicial'. Briefly, judges in England had established an 'antecedents rights test' for cases in which the right to a fair hearing was in issue. That is, they required that the procedure leading up to an administrative

decision have some judicial trappings before they would recognize a procedural right to a fair hearing. In addition, they required that the decisions affected an 'existing' or 'antecedent' right of the individual. This test had been taken over by South African judges.[33]

The appellants in **Cassem** contended that a recommendation by the board to the minister that the proclamation of a group area was desirable would gravely affect their rights, interests and property. In addition, they contended that the board exercised quasi-judicial functions because the Act required it to advertise its meetings and to allow affected parties to address it. It followed, they claimed, that elementary principles of natural justice should be observed by the board and that they should have access to the reports.

Their application had been refused in the court **a quo** and Steyn CJ, in giving the unanimous decision of the AD, upheld this refusal. He said that the question was whether there was a right to a fair hearing and the answer to that question was to be found in the Act (658-59). He acknowledged that the Legislature had imposed certain duties on the board of a quasi-judicial nature. But, he said, it plainly intended to keep the rights conferred on interested parties within limits (661-62). He then reasoned that the limits were such that Cassem had no right of access. He pointed out that the executive authorities were not bound by or confined to the report of the board. The board's recommendations were merely advisory, even though they were "necessary and important steps" in the process which could lead to a proclama-

tion. Hence there was not a sufficient causal link between them and the proclamation. In short, the proclamation, made at cabinet level, and not the board's recommendations affected 'antecedent' rights, and Cassem had no right of access to the reports of the board (658-60).

Lawyers have argued that Steyn CJ's reasoning is vitiated by a fault inherent in the view that an official decision has to affect existing rights before a party affected by the decision has a right to a fair hearing. The criticism is that the court is not being asked to decide the question whether the party has a substantive right to a particular official decision. Rather the issue is whether the party has the procedural right to be heard in the process leading up to the official decision. The reasoning thus seems to miss the crucial question in the circumstances when the category of the quasi-judicial becomes relevant.[34]

But if one reads further in Steyn CJ's judgment, it is clear that he does not so much miss that question as think that there is a different question which has to be answered at the outset of interpreting a statute such as the Group Areas Act. The different question is, 'Was it in fact intended that parties affected by the statute have a right to a fair hearing?' For Steyn CJ said that if the appeal were to succeed, so that people in the position of the appellants had a right of access to reports,

> it could easily lead to this, that such an investigation, both as regards ambit and time, could assume dimensions which would be barely manageable and which would impede the implementation of the Act in such a way that **it can hardly be supposed that the legislator implicitly wished** to ordain such quasi-procedural lim-

itations of the Board's freedom of action (663).[35] The judge finds, that is, there is an implicit legislative wish that the board not be hampered by being subjected to a requirements of fairness. Consequently, one can infer an intention that the parties who would be affected by the ultimate proclamation of a group area had no, or very limited, procedural rights.

Hence Steyn CJ's reasoning on intention is much the same as Van Den Heever's in **Lusu.** An implicit legislative intention to exclude the requirements of natural justice is found in a contrapointer, in the fact that the Act envisages a complex procedure leading up to a decision which will be based on policy considerations and that the machinery which the Act sets up would be clogged if boards had to observe the requirements of natural justice. Moreover, there is no express indication in the Act that principles of natural justice were intended to apply. First, the judicial functions conferred on the board are limited. Secondly, its recommendations are merely advisory and so not causally linked with any proclamation which might result.

Because judges like Van Den Heever and Steyn CJ are quick to search out contrapointers, I shall call the test they use in that search the 'contrapointer test'. I suggest that when judges are charged with 'executive-mindedness', with construing statutes in the way the executive wants, it is because they use this sort of test. But I am not charging such judges with a craven subservience to the executive. On my explanation, the fact that the executive is given a more

or less free hand is a mere by-product of using the test. The judges accept that the presence of contrapointers in a statute signifies a specific legislative intention that the statute should not be interpreted subject to common law principles. The effect is that the executive is given a more or less free hand to choose the methods appropriate to implement the statute.

However, as I suggested in the last section, these considerations will be recognized as contrapointers only if the judge does not take the relevant common law presumption to be fundamental. This point is brought home by constrasting **Cassem** with a 1958 full bench decision of the Eastern Cape Provincial Division,[36] overruled by Steyn CJ in **Cassem**, in which the majority had granted similar applications by parties who would be affected by a group areas proclamation.

The judge who gave the majority judgment said that the right to a fair hearing is the most important of the principles of natural justice. He also said that there was a "general principle from a variety of decided cases" that a body vested with authority to make a decision calculated to affect the rights of, or involving legal consequences to, a person had to observe this principle (70). He went on to reason that the affected parties had to be heard by the only body capable of hearing them precisely because the machinery the Act set up, and its consequences for people who were uprooted from their homes, were so drastic.

Since he takes the drastic effects of a proclamation as

all the more reason to find that parties who will be affected by it have the right to heard, the drastic nature of the Act is for him what I shall call a 'propointer'. On the judge's view, that is, the drastic nature of the Act is an implicit indication that the common law context is appropriate. The judge also reasoned that the fact that the Act did provide for a hearing before the board was a sign that the drastic nature of the Act was meant to be mitigated by standards of fairness. The provision, that is, is an explicit propointer.

In his view, therefore, it was a "fallacy" that the board could act in any way it liked; its activities had to be viewed as if the minister himself was carrying out the investigation (72). Moreover, he said that if the board did not allow access to the reports, the minister would be influenced by being fully informed by only one side, which meant that, besides the "grave injustice" to the members of one racial group, the board would be failing in its duty to the minister in that it would "prevent itself from being fully and properly equipped to render the report and advice to him which is their duty under the Act" (75). In sum, because the judge takes the principle that there is a right to a fair hearing to be fundamental, that principle constitutes the context in which the statute is to be to be interpreted. Parliament's intention, interpreted within that context, is that justice be done and the rest of his reasoning follows naturally.

The contrast between this decision and **Cassem** also

shows the significance of Steyn CJ's remark, reported above, that the answer to the question in the case is to be "found in the Act". Steyn CJ's view is that the primary source of authority is the statute and that common law is a source of authority only in so far as the Act either does not implicitly exclude the common law and/or expressly indicates its inclusion. Indeed, because of his attitude to the provision which did seem to give the board some judicial trappings, it seems fair to say that he requires an express indication before common law principles would apply.

This suggests a point of similarity between the judge's approach and Bentham's and Austin's command theory of law. As we saw in S1.1, Bentham and Austin think that statutes are the primary legal data because they most clearly fit the mould of authoritative commands. As a result, they explain the legal status of common law principles by pointing out these principles could have, but have not, been repealed by the sovereign. The legal status of the principles is conditional on the sovereign failing to indicate that they are not to apply; what Bentham terms a "tacit" or "quasi-command". And contrapointers are on a continuum of indications, ranging from the implicit to the express, that common law principles are not relevant to the interpretation of the statute.

The contrapointer test has much in common with the historical design test, so much so that I suggest that they are both part of the plain fact interpretive approach. Both tests focus on the statute as the bearer of legal meaning,

and so common law principles come into play only after the judge decides that there is a question of statutory interpretation to be resolved. Secondly, the way in which common law principles become relevant at this stage means that they are rather easily overborne. That is, in circumstances where the historical design test will seem appropriate, the intentions which the test invokes will not favour the common law. And, if the very nature of the statute is taken as a contrapointer, then that more general intention and all the specific provisions which can be interpreted as contrapointers are likely to outweigh an interpretation of other specific provisions as propointers.

Finally, recall my suggestion in S3.2 that the historical design tests clears up legal uncertainty by looking in effect to the intentions which legislators had in enacting the statute, because this seems particularly appropriate given that judges are required not to make law but to defer to what the law-giver in fact requires. This same apolitical doctrine of judicial responsibility is apt to justify the contrapointer test. For it takes the legislative intention to be made up of what can plausibly be said to be the actual intentions of important legislators.

Notice that the government can, because of the control it exercises in Parliament over the form and content of statutes, try to ensure the results it wants by inserting provisions in statutes which it anticipates the courts will recognize as contrapointers. Or it can try to find forms of expression which force the courts willy-nilly to recognize

the contrapointers as such. And in a legal system like the South African, where judicial appointments and promotions are in government hands, the government can try to ensure that judges who adopt an interpretive approach most sensitive to contrapointers will be the judges who interpret the statutes it wants interpreted in a particular way. We should also recall at this point (S1.1) that Bentham and Austin, because they recognize such facts of political reality, suggest that there is no moral worth in making any sharp distinction between legislative assemblies and the governments which control them.

3.4 Analogical Reasoning

Steyn CJ decided **R v Pitje**[37] in 1960. A magistrate had set aside a table for 'non-European' practitioners. Oliver Tambo, at that time an attorney in Johannesburg (now the leader in exile of the African National Congress) had withdrawn from a case after the magistrate had ordered him to address the court from the table set aside by the magistrate for blacks. Pitje, a law clerk at Tambo's and Nelson Mandela's firm of attorneys, appeared in the same case at a later date. He insisted on addressing the court from the table set aside for whites--the 'European' one--in order to give his reasons for refusing to use the 'non-European' table. The magistrate convicted him of contempt for refusing to comply with his order and eventually the decision went to the AD on appeal.

Steyn CJ, delivering the unanimous judgment of the court, cited this statement from an affidavit of Pitje.

> I had good reason to believe that the special treatment meted out to me was because I am an African. If the magistrate had told me that that was the reason, it was my intention to tell the magistrate that neither I nor my client would feel that he had been defended in his best possible interests if he was to be defended by me and for that reason I was going to withdraw (711).

On the basis of this statement, Steyn CJ found that Pitje had gone to court that day in the expectation of being ordered to address the court from the non-European table and with the intention of refusing to comply with the order. He also found that Pitje had the intention of then withdrawing from the case after making a statement implying that the accused would have a fairer trial if he were not defended by a black lawyer. As a result, Steyn CJ held that Pitje was motivated by an intention to insult the magistrate, even though he had not had the opportunity to do so. Pitje was therefore guilty of contempt and Steyn CJ upheld his conviction (711-12).

However, if the order had been invalid or incompetent, Pitje would have been entitled to disregard it. So Steyn CJ, **en route** to his finding, had to deal with the competency or validity of the magistrate's order that the tables be segregated. Steyn CJ pointed out that the magistrate was in control of his own court-room and of the proceedings therein. The only ground, he said, on which the order could be attacked was unreasonablenesss, arising from alleged inequality in the treatment of practitioners equally entitled to practice in the magistrate's court.

At this point, Steyn CJ referred without discussion to **Rasool** and **Abdurahman** but did not mention **Kruse, Lusu** or **Tayob.** He upheld the validity of the order for the reason that the practitioner would not in any way be hampered in the performance of his professional duties.

This decision is surprising even if one abstracts from the trio of **Abdurahman, Tayob** and **Lusu,** and takes **Rasool** as the only relevant authority. It has an extra significance just because it licences racial discrimination in the court room, the likely result of which would probably be that a black lawyer or client might doubt that the court perceived him as equal before the law.

Steyn CJ's readiness to come to his conclusion is explained by the remark which follows immediately after his decision on validity. He said that, although no action had been taken under the Reservation of Separation of Amenities Act,

> the fact that such action could have been taken is not entirely irrelevant. It shows that the distinction drawn by the provision of separate tables in this magistrate's court is of a nature sanctioned by the Legislature, and makes it more difficult to attack the validity of the magistrate's order on the ground of unreasonableness (710).

A commentator observed at the time that Steyn CJ's approach in **Pitje** seems to suggest that an official act which would otherwise amount to unlawful discrimination can be validated because "of a kind of empathy" between the Legislature and the official.[38] And I shall show how this comment hits the mark.

Steyn had in 1946 published a book on statutory inter-

pretation, which became the standard South African work.[39] In it he recommends 'analogical interpretation' as the method for resolving doubts about legislative intention. Here is his description:

> When a law applies to certain cases, and the legislator's intention, undoubtedly present in those cases, is also present in another case, then the requirements of the law must be extended to that other case.[40]

He cited as an example of the correct use of such analogical interpretation De Villiers JA's lone dissent in the 1920 AD case **Dadoo, Ltd and Others v Krugerdorp Municipal Council.**[41] There the issue was whether an Indian could evade a statutory prohibition, in an 1885 law of the Transvaal Legislature, on people of his race owning property in the Transvaal. The majority of the AD held that Dadoo's device for evading the prohibition, forming a private company to own the land, was legitimate. The case is famous for this dictum of Innes CJ:

> It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but **in ascertaining the intent of the law as a whole.**[42]

But De Villiers JA held that the Legislature had not aimed merely at prohibiting ownership of land by Indians in these areas, but intended to prevent Indians from doing "what they pleased" with the land.[43]

In his book, Steyn quoted these words with approval and described De Villier JA's method as follows:

> First the **ratio** or **mens legis** is determined in order to apply it subsequently by virtue of the legislator's will from an identity of rationale to the unexpressed case of Asiatic companies. This result is surely more

acceptable to **our sense of justice.**[44]

However, the disagreement between the majority and De Villiers in **Dadoo**, like that between Gardiner and Beyers in **Rasool**, is about whether intention should be determined by an historical design test or by one that resorts to a notion of fundamental common law principles determining the 'intent of the law as a whole'. So Steyn is not simply recommending reasoning by analogy, he is recommending reasoning by analogy from intentions discovered in the public record in the way considered appropriate by the historical design test. The same reasoning, I suggest, lies behind his remark in **Pitje** about the relevance of the Reservation of Separate Amenities Act. Steyn CJ holds, that is, that the magistrate's order is valid because it accords with the spirit of a certain historical design, which had been given legal expression in the Separate Amenities Act.[45]

Notice that Steyn says that the kind of analogical method he recommends is required by "our sense of justice". Unfortunately, the juristic flavour of the original **regsgevoel** or its German equivalent **Rechtsgefuhl** is lost in translation. A more accurate rendering would be 'innate sense of legal justice'. Steyn, I suggest, is making a deeply moral point about legality. He thinks that when judges have to clear up legal uncertainty by reasoning by analogy, they are morally required to reason from the appropriate bits of the public record. He thinks, that is, that the apolitical doctrine of judicial responsibility is morally justified.

It is important to see that this sense of what justice

required was not uncontroversial. At roughly the same time, the Judge President of the Cape Provincial Division prohibited segregation notices in the Cape Supreme Court.[46] However, Steyn could have found support two years later in an unlikely source, which represents the culmination of a sea change in the thinking of the African National Congress since Xuma had praised South African judges for their impartiality.

Mandela, arraigned in 1962 on charges of inciting workers to act illegally by staying at work and of having left the country without a valid permit, argued unsuccessfully that the presiding judicial officer should recuse himself because the standards of justice institutionalized in the South African legal system required him to be unjust. His argument was that that there was a "rigid colour bar" built into the administration of justice which was meant to ensure that the

> justice dispensed by the courts should conform to the policy of the country, however much that policy might be in conflict with the norms of justice accepted in judiciaries throughout the civilised world.[47]

3.5 **The Death of a Principle?**

The principle of equality was invoked again in a context not covered by the Separate Amenities Act in a challenge to the validity of a proclamation by virtue of the Group Areas Act 77 of 1957, which replaced the Act of 1950. It is important to note that while the Act clearly contemplates differentiation between groups in the sense

that it provides that areas will be reserved for the exclusive ownership and/or occupation of a particular group, there is no statement of its object which indicates or implies that the differentiation can be unequal.

In **Minister of the Interior v Lockhat and Others**[48] (1961), the AD was faced with a challenge to the validity of a proclamation dividing the city of Durban into group areas on the ground that whites had been given the best areas while only the poorer areas were available to Indians and that suitable accomodation in this areas would not be available for some time. Lockhat, an Indian, argued that the effect of the division was to discriminate to a substantial, and therefore, unreasonable degree against Indians and such unreasonable discrimination had to be expressly authorized by the enabling legislation to be valid. The minister had 'excepted' or objected on various grounds to Lockhat's claim as being bad in law.

Most of the argument in the court **a quo**[49] turned on the issue whether the proclamation could be declared invalid because the board had not properly considered the question of accomodation, as it was required to by section 5(7) of the statute. The minister argued, on the basis of **Cassem**, that because the executive was not bound by the report of a board, the validity of the proclamation could not be affected by the propriety or otherwise of a board's inquiry into accomodation.

In the court **a quo**, Henochsberg J rejected this argument. He said that **Cassem** dealt with the exclusion of **audi**

alteram partem, while he was concerned with the issue whether there had been compliance with the necessary and important steps laid down in the Act. He laid particular stress on section 5(7), taking it to be what I have called a propointer or indication that he should interpret the statute in the common law context. He held that the executive, in deciding whether a proclamation was "expedient", had to decide whether it was "advantageous, proper or suitable to the circumstances of the case, judicious". Thus he held that the executive was required to pay regard to the question whether the proclamation would produce an equitable or inequitable result (785).

His reasoning on the other important exception shows that the propointer is only evidence for what he assumes is in any case appropriate. The government had argued that the Act implicitly gave the executive the power to proclaim group areas in an unreasonable way. Henochsberg J dismissed this exception largely on the basis of Centlivres's judgment in **Abdurahman**. He acknowledged that the Act did contemplate some degree of "differentiation", but he could find no express authorization in the statute of discrimination coupled with partiality and inequality to a substantial degree. On his view, in the absence of specific authority in the statute to the contrary,

> the exercise of a power to proclaim group areas can and should ... be exercised without the inevitable result that members of different races are treated on a footing of partiality and inequality to a substantial degree (786).

Holmes JA, in delivering the unanimous decision of the

AD, upheld both exceptions.[50] He reasoned on the first that, whether or not this was "satisfactory", the executive decision was "pointedly left by this Act to the good sense and faith" of the executive. Here he emphasized the contrapointers that the executive was not bound to the recommendation in the report and could issue the proclamation when it deemed this "expedient" (599-60).

He also acknowledged that the most important question was raised by the other exception. For if the executive decision were subject to a test of reasonableness, it would follow **a fortiori** that the executive had to take the question of accomodation into account. On the basis of **Abdurahman**, Holmes JA held that the power to discriminate unreasonably had to be given expressly or by necessary implication. He recognized that the power to discriminate unreasonably was not expressly given in the Act, but he thought that it was "clearly implied".

> The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will prove to be for the common weal of all the inhabitants is not for the Court to decide. .... The question before this Court is the **purely legal** one whether this piece of legislation **impliedly authorises**, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view, for the reason which I have given, it manifestly does (602).

It is a rule of South African judicial practice that judges must not look to the parliamentary record for evidence of legislative intention. But had Holmes JA looked

there he would have found that in the debates leading up to the enactment of the statute Nationalist politicians had emphasized that it was not to apply unequally.[51] So the question is, given the fact that he does not attempt to show that any part of the Act indicates this necessarily implicit authorization, and given that Henochsberg could find no such indications, where did he find it?

I suggest that the implicit authorization is clearly the general design and implementation of apartheid policy. Whatever was said in parliamentary debates in 1950, no adult South African would have doubted in 1960 that the Nationalist government and its executive administration intended to implement what Albert Luthuli, former president of the African National Congress, described in his Nobel Peace Prize Address in 1961 as "surely the most terrible dream in the world"[52]--a policy of total racial segregation designed to leave whites in a vastly superior position to blacks in every possible dimension of social and political life, including the ownership and occupation of land. Nor could there be any doubt that this policy was going to be implemented whatever the cost in suffering and humiliation to blacks.

Because Holmes JA discerns an intention to discriminate unreasonably by using an historical design test, his approach constrasts strongly with Centlivres's in **Abdurahman.** Its employment in **Lockhat,** in a context untouched by the Separate Amenities Act, raises the question whether at least one common law principle had been eradicated from

South African law by dint of legislative and judicial decisions, to be replaced by a principle which made an exception for apartheid statutes.

Notice that Holmes JA is anxious to point out both that the question he faces is a "purely legal one", to be resolved by statutory interpretation, and that it is not the court's role to decide on whether the statute serves the "common weal". This particular conjunction of claims echoes the dictum from **Moller**, quoted in S3.1 above. For Lord De Villiers asserted that he had to interpret the statute in question in the light of the sentiment which had in fact brought about its enactment, even though it might be difficult to approve of that sentiment from a "philosophical or humanitarian point of view".

In conjoining these two theses, the judges are alerting us to the fact that they think that they have to decide the cases in accordance with what the law requires, which might diverge from the assessment of critical morality. Robert Cover, in his study of judges interpreting the wicked laws of another jurisdiction, argues that judicial statements like this are evidence of what he calls "dissonance". They indicate, he says,

> a pervasive, but more or less latent, conflict between two potentially inconsistent prescriptive systems: law and (anti-segregationist) morality.[53]

Cover suggests that such dissonance is a psychological phenomenenon. It is evidence of the fact that the judges, while faced with alternatives, are unwilling to take personal responsibility for their choices and thus retreat into

an impersonal and mechanistic formalism.[54] However, there is no hint in any of the judgments so far discussed that the judges thought that they had a choice in the positivist sense of a discretionary power between equally permissible legal options.

That is, the judges did not seem to think that they were faced with two legally permissible solutions the choice between which was not ultimately determined by law. The plain fact judges thought, or gave the impression of thinking, that there was a correct answer in law to the questions they had to decide. It so happened, that is, that in each case, there was in fact a legislative intention that statutes had to be interpreted free of common law constraints. And the judges who used the common law approach thought, or gave the impression of thinking, that, in these cases, they would be failing in their legal duty if they did not interpret statutes in the common law context in which standards of critical morality were embedded. Indeed, the phrase "purely legal" in Holmes's judgment suggests that he has to give that decision because he does not think that he has discretion in the positivist sense.

I suggest that we should take the judges' dissonant remarks at face value, as indicating that they thought that they were legally required to decide hard cases on statutory interpretation in accordance with the intentions which had in fact 'actuated' the statute, whatever the assessment critical morality would make of those intentions.

Notice in this regard that my suggestion fits better

with the fact that dissonance only occurs in some judgments. There is no hint of it in the common law judgments. And presumably it would not be found when judges happen to think that segregationism or apartheid is a morally respectable ideology. There is then at least the possibility that the judges who experience dissonance are expressing a wish that principles of critical morality could have played a part denied them by what law required in that case.

Notice also that such judges might think that their decision is still morally speaking the best one all things considered. For example, if plain fact judges hold the apolitical doctrine of judicial responsibility because, as I have suggested, they regard that doctrine as itself morally justified, then they will think that they are morally justified in excluding principles of critical morality. I shall use the notion of dissonance in the strictly limited sense that the judges think that there is a divergence between what is required by law and what critical morality would require were it not for their political responsibility as judges.

In the next chapter, I shall explore these issues further in an analysis of a decision in the House of Lords which had a tremendous impact on South African law.

ENDNOTES TO CHAPTER 3

1. (1898) QB 91 at 99-100.

2. 1934 AD 167.

3. The decisions of the judge sitting alone in the court **a quo** and of the full bench of the Transvaal Provincial Division are unreported. This extract is quoted at 172 of **Rasool.** The cases upon which the judge relied included **Williams and Adendorff v Johannesburg Municipality** 1915 TPD 106.

4. **Williams and Adendorff,** endnote 3 above.

5. My translation. His judgment is one of the first AD judgments to be given in Afrikaans.

6. 1930 OPD 112 at 117.

7. 1911 AD 635 at 643-44.

8. Hart (1981) 20.

9. Hart (1981) 20.

10. This phrase is used by Dworkin to describe judges whose political inspiration he takes to be positivism; Dworkin (1986) 6-11.

11. At 644.

12. Bentham (1977) 45.

13. Fuller (1967) 6.

14. Speech to the Conference of European and Bantu Christian Student Associations at Fort Hare; reproduced in Karis (1987) Volume I, 218-27 at 226. See also the piece critical of the majority judgments in **Rasool** in the **South African Law Journal** of 1936 by Kovalsky.

15. For example, Kahn (1958) 114; Dugard (1978) 316; Corder (1984) 144-47.

16. 1950 (3) SA 136 (A).

17. Davis J in **R v Carelse** 1943 CPD 242 at 253. The case concerned beach segregation and the judge, in deciding that the segregation was valid, placed great reliance on Beyers's judgment in **Rasool.**

18. 1951 (4) SA 440 (A).

19. 1953 (2) SA 484 (A).

20. Act 44 of 1948, amending the Motor Carrier Transportation Act 39 of 1930.

21. See the heads of argument at 442-43.

22. Section 4 of Act 49 of 1949 amending Act 22 of 1916.

23. See, for example, Kahn (1958) 114, Dugard (1978) 318, Corder (1984) 150 and Forsyth (1985) 96.

24. McWhinney (1956) 19 and 119-20.

25. See the speech by H Lawrence which gives details of the Nationalist reaction in 1953 House of Assembly Debates cols 2025-2031.

26. 1953 House of Assembly Debates cols 1052-53.

27. 1953 House of Assembly Debates cols 1054-56.

28. 1953 House of Assembly Debates cols 2025-31.

29. MR GF van L Froneman.

30. 1953 House of Assembly Debates cols 2045-52.

31. Motor Carrier Transport Amendment Act 44 of 1955.

32. 1959 (3) SA 651 (A).

33. Most notably in **Laubscher v Native Commissioner, Piet Retief** 1958 (1) SA 546 (A), endorsed by Steyn CJ in **Cassem** (at 660). The judicial story is told in full by Baxter (1984) in the footnotes to 574-80. See also Wade (1986) 447 ff and 554 ff.

34. See Baxter (1984) 578.

35. I rely here on Cameron's translation of the passage; Cameron (1982) 56.

36. **Ramjee v Eastern Cape Committee, Group Areas Board,** 1958 (2) SA 67 (E). The majority judgment was given by De Villiers JP, Van der Riet J concurring and Jennett J dissenting.

37. 1960 (4) SA 709 (A).

38. Jordan (1961) 152.

39. Steyn (1974). The remarks of Steyn's discussed below do not vary from edition to edition. It is worth noting that none of the editions subsequent to **Pitje** mention the decision.

40. Steyn (1974) 39.

41. 1920 AD 530.

42. At 552.

43. At 566.

44. Steyn (1974) at 45, my emphasis. I rely on Cameron's translation; (1982) 64.

45. Steyn CJ's allegiance to this method is made even clearer in his dissent in **Minister of the Interior v Machadadorp Investments (PTY) LTD and Another** 1957 (2) SA 395 (A).

46. Dugard (1978) 322.

47. Karis (1987), Volume III, 725-32, at 728. Mandela was convicted and sentenced to five years imprisonment. In 1963 he was brought back to court to stand trial in the case which was to end with a sentence of life imprisonment.

48. 1961 (2) SA 587 (A).

49. **Lockhat and Others v Minister of the Interior** 1960 (3) SA 765 (D).

50. Forsyth (1985) 99 points out that none of the judges who heard **Abdurahman, Tayob,** and **Lusu**, were on the bench; indeed only one member of the court presided over by Centlivres was still a member of the AD.

51. 1950 House of Assembly Debates cols 7810 and 7827.

52. Karis (1987), Volume III, 705-15, at 710.

53. Cover (1975) 226. I have substituted "antisegregationist" for the original "antislavery"; Cover's study focuses on abolitionist judges in antebellum America, who had to decide cases on the 'Fugitive Slave' laws.

54. Cover (1975) 235.

Chapter 4

Ambiguity and Presumptions

4.1 Introduction

In 1939, on the eve of the second world war, the British Parliament passed the Emergency Powers (Defence) Act. Section 1(1) provided that his Majesty by Order in Council could make regulations as appeared to him to be "necessary and expedient for securing public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war ...". Section 1(2) expressly gave the Secretary of State the power to make regulations, including those for the detention of persons whose detention appeared to him to be "expedient" in the service of these interests.

One of these regulations, Defence Regulation 18B, read as follows:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

The only protection expressly afforded to someone detained under 18B was that he could make representations to an 'advisory committee', whose chairman had to inform him of the grounds on which he was detained, so that he could present his case to the committee. In addition, the minister had to report to Parliament at least once in every month as to the action which he had taken under the regulations and

as to the number of cases, if any, in which he had declined to follow the advice of the committee. It is important to note that the original regulation permitted the minister to detain if he "was satisfied that ...". This permissive form of words had caused a "commons revolt" with the result that the phrase "has reasonable cause to believe ..." was substituted.[1]

Liversidge v Anderson[2] (1941), the famous decision of the House of Lords at the height of the second world war, concerned a detention under 18B. The order authorizing Liversidge's detention simply repeated the relevant phrases of 18B--that the minister had "reason to believe ... Liversidge to be a person of hostile associations" and that, therefore, it was "necessary to exercise control over him". His lawyers had brought an action seeking a declaration that his detention was invalid and claiming damages for false imprisonment. In the course of this action, Liversidge's request for the "particulars" on which the minister had based his belief had been refused.

The question before the House of Lords was whether Liversidge was entitled to particulars and the majority held that he was not.[3] This decision turned on the answer to a prior question. Was the correct interpretation of 18B that the minister's belief was subject to an objective test; a test, that is, in terms of a standard of reasonableness justiciable (capable of being challenged) in a court of law?

The majority, Lord Atkin dissenting, held that reasonable cause should be construed 'subjectively', so that the

minister was required merely to think that he had reasonable cause. It followed that the production of an authenticated detention order was, as Lord MacMillan put it, a "peremptory defence to any action for false imprisonment" and that the onus was placed on a detainee of establishing that the order was invalid or defective (258). It also followed, in effect, that no appeal lay from the decision of the minister, provided he acted in good faith. Since, as his counsel admitted, Liversidge could not discharge the onus of showing that the minister had not acted in good faith, the decision as to the interpretation of 18B disposed of the question whether he was entitled to particulars.

The reasoning of the majority has exercised a pervasive influence on the way South African judges have interpreted apartheid statutes which curtail and suppress opposition to the racial policies of the Nationalist government. And so it is important to see just what was at stake in the division in the House of Lords.

4.2 **The Majority in Liversidge**

All the majority judges thought that **R v Halliday, ex p Zadig**[4] (1917), a decision of the House of Lords during the first world war, was most relevant to the matter before them. The Law Lords had to decide the validity of a regulation which empowered the Home Secretary to intern persons suspected of hostile origins or activities. The regulation was made by virtue of the Defence of the Realm Act, 1914,

which gave a general power to the executive to make regulations for the defence of the realm. It was argued that the regulation was **ultra vires** because the Act did not contemplate the making of regulations authorizing the deprivation of liberty without trial of British subjects. The Law Lords, Lord Shaw dissenting, rejected this argument. Lord Finlay had said that the presumption in favour of the liberty of the individual, which would normally require a strict interpretation in favour of the subject and against the Crown, had

> no relevance in dealing with an executive measure by way of preventing a public danger (270).

He had also asserted that it seemed

> obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law (269).

Lord Atkinson had expressed the view that, in times of war, liberty could be sacrificed to what he called "preventive justice" (273).

In **Liversidge**, the majority judges recognized that in cases in which the question of law concerned the liberty of an individual, there is a common law presumption in favour of liberty. But for them **Halliday** was authority for a principle that common law presumptions had little or no relevance to the interpretation of statutes enacted to deal with emergency situations. For example, Lord Maugham quoted Lord Finlay's dictum in **Halliday** about the presumption of liberty as the basis for this assertion.

> There can plainly be no presumption applicable to a regulation made under this extraordinary power that

> the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend (as the terms of the Act indeed suggest) on the unchallengeable opinion of the Secretary of State (219).

That is, he takes the very fact that the statute is enacted in the cause of 'preventive justice'--to deal with security at a time of public danger--as a contrapointer or legislative indication that common law presumptions are suspended.

Once the presumptions are suspended, the only context left for interpretation is the one made up of indications in the statute and regulations as to how far the court's normal jurisdiction is excluded. The interpretive context is both constituted and populated by contrapointers. Lord Maugham, for instance, pointed out that the decision to detain was so clearly a matter for "executive discretion" that those responsible for the regulation could not have contemplated the possibility of the minister's action being subject to the control of a court of law. In his view, it followed necessarily from this fact that the same was true of all the facts which the minister must have reasonable cause to believe, including the decision as to whether there were reasonable grounds for the opinion that the person was of hostile origins or associations (220-21).

Secondly, he pointed out that the minister was not required to act judicially, that is, to obtain legal evidence, to summon the person he proposed to detain and to hear his objections to the proposed order; and so it would be anomalous if his decision could be questioned in a court of law (220-21). So he takes the fact that the minister is not ex-

pressly required to be 'court-like' (S3.3) as an indication of a legislative intention that the court's jurisdiction over the minister's decisions has, by and large, been ousted.

Thirdly, Lord Maugham pointed out that the information which had to be disclosed in a contest over the reasonableness of the minister's belief would in most cases be of a confidential character. This, he thought, indicated that the question of reasonableness was not intended to be disputed in a court of law (221-22). Fourthly, he stressed the high office of the person who made the detention order. The minister concerned was a member of government responsible to Parliament. He was not in the same position as, say, a police constable. In addition it was not "wholly immaterial" that the minister had to report to Parliament on the order he had made and on whether he had declined to follow the advice of the advisory committee. Lord Maugham emphasized that the minister's duties were of a "very important and confidential nature" and not intended to be investigated by an ordinary tribunal (222).

The other majority judges took a rather different view of the fact that the minister was expressly required to report to Parliament and that Parliament has expressly provided for the machinery of an advisory committee. They considered this fact a separate indication of a legislative intention to oust the jurisdiction of the courts because it showed that safeguards had been provided. In fairness to these judges, they did not see the safeguards as very effec-

tive, but what mattered, as Lord MacMillan said of the advisory committee, was the "significance of its presence in the regulation" (254-55).[5]

The majority had to deal with one problem--how to reconcile the word "reasonable" in the phrase "reasonable cause to believe" with their reasoning, especially since the legislative history showed that the phrase had been introduced by way of an amendment to words which seemed to impose a weaker test. Each majority judge took care to stress that the issue on which the decision turned was not the actual formulation but the context in which the phrase had to be read. Lord Maugham said that he was not "disposed to deny" that the **prima facie** meaning of "reasonable cause" is that "there is in fact reasonable cause". But he held that the words can have more than one meaning (219-20). In his view, there was a "probable" meaning to "reasonable cause" which distinguished it from "if satisfied" without making it subject to judicial review. This probable meaning was simply that the minister, in view of the serious nature of the detention, had to give his personal attention to each case, while on other matters he could be "satisfied" with the report of a subordinate (223-24).[6]

It is important to note that two of the majority judges made remarks indicating that they experienced what I have called dissonance (**S**3.5). That is, they indicate that they are legally required to exclude principles of critical morality on which they themselves set great store. Lord MacMillan said that he yielded

> to no-one in my recognition of the value of the jealous scrutiny which our courts have always rightly exercised in considering any invasion of the liberty of the subject.

But he followed this with Lord Atkinson's dictum in **Halliday** and said,

> The liberty which we so justly extol is the gift of the law and as Magna Carta recognizes may by the law be forfeited or abridged (257).

Most notably, Lord Wright said,

> All the courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, **whether common law or statute.** It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. .... the only question is as to the precise nature of the powers given. The answer to that question is only to be found by scrutinizing the **language of the enactment** in the light of the surrounding circumstances and the general policy and object of the measure (260-61).

It had been suggested to the court, he said, that it was being asked to "countenance arbitrary, despotic or tyrannous conduct". But there were no guaranteed or absolute rights in the British constitution.

> The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved (261).

He came to his conclusion "notwithstanding all my prejudices in favour of upholding the liberty of the subject" (ibid).

We saw in S3.5 that Cover suggests that such remarks indicate that a judge is distancing himself from personal responsibility for the choice between the alternatives before him. Judges, Cover thinks, will often retreat into a mechanical and impersonal formalism when faced with difficult choices.

But notice that Lords Wright and MacMillan are not trying to evade personal responsibility in making their dissonant remarks. Rather they are pointing out that they hold the apolitical doctrine of judicial responsibility. They are legally required to determine what law is an impersonal fashion--in accordance with what has in fact been decided by the supreme legal authority. Thus, when there is a question about what the Legislature in fact decided, that question should be resolved by discerning how legislators in fact wanted the question decided. The majority in **Liversidge** reason as they do because of a conviction that this is required of them by a particular view of law, itself nested in a political doctrine about the place of judges in the constitutional order.

On this doctrine, if Parliament, the people's representative, enacts a statute which infringes liberty, it is the judge's duty to bow to the popular will embodied in the statute. For judges are not the guardians of liberty but the servants of the popular will expressed in the statutes of the elected assembly. The dissonance is, in sum, evidence of what a distinguished British judge recently called the "helplessness of the law in the face of the legislative sovereignty of Parliament".[7]

Notice that Lord Wright moves from saying that liberty is confined and controlled by common law and statute to the claim that the question of law has to be decided by a scrutiny of the statute. I suggested in S3.3 that a blinkered focus on the provisions of the statute--the hall-mark of the

plain fact approach--goes with the apolitical doctrine of judicial responsibility. For that doctrine requires judges to decide questions about the meaning of statutes as legislators would have wanted them decided. It follows that common law principles are relevant to statutory interpretation only if Parliament fails to indicate that they are not to apply. In Fuller's words, the judges have an "ideal of fidelity to law" which requires them to see statutes as "one-way projections of authority" (S1.4); as entities bearing the meaning which legislators actually intended them to have, rather than as interventions in an interpretive context constituted before legal reasoning begins.

Once again we are in a position to see how the view of law as fact, when it is combined with the apolitical doctrine of judicial responsibility, triggers the plain fact approach. At least at the outset of his inquiry into what the law requires in the case, a plain fact judge will narrow the scope of his inquiry to fact-like entities that are legally appropriate. This is not a laboratory inquiry. Its data are presented in argument and in the nature of these cases the government counsel will argue that the court should take notice of certain plain facts. And, as AL Goodhart put it in a comment on **Liversidge** which appeared soon after the case was decided, the facts are about the intentions of those "immediately responsible" for the enactment.[8]

Now given that the judge also holds to a doctrine of judicial responsibility which requires him to defer to the factually established intentions of elected legislators,

these facts are irresistible, as he sees it, because they are **legally** compelling. They are both plain facts and facts about intention which his doctrine of judicial responsibility makes pivotal.

Thus the apolitical doctrine of judicial responsibility is not something which comes into play at a second stage of interpretation. It does not come into play after the judge has discovered that there has been no past legislative decision on the question facing him. Rather the doctrine informs the judge's view of what law is from the outset. He comes to statutory interpretation armed with an 'anticipation of meaning'.[9] And the anticipation is that he will find a legal answer to the question of law raised by the case and that answer will represent what the legislators in fact decided. When that anticipation hits, or is argued to hit an obstacle,[10] the judge still endeavours to find an answer which will meet his anticipation of a factual legal meaning. The set of constitutive considerations which go into the construction of interpretive context also settle doubt when it arises in context.

This double role of constitutive considerations is neatly captured in a dictum of Lord Maugham. He said that, in the circumstances of the enactment of 18B, the court should approach the question of the construction of the enactment

> without any general presumption as to its meaning except the universal presumption ... that, if there is **a reasonable doubt** as to the meaning of the words used, we should prefer a construction which will carry into effect **the plain intention** of those responsible for the Order in Council rather than one which will defeat that

intention (219).

In sum, the majority judges reason, first, that their interpretation of 18B is the legally appropriate one and, secondly, that the interpretation is consistent with the range of meanings which "reasonable cause" could sensibly be given.[11] Words such as as 'ambiguity' and 'doubt' are used not so much to indicate that there is doubt inherent in the enactment, as that there is a problem to be solved.

4.3 **Lord Atkin's Dissent**

In his dissent, Lord Atkin held that the correct interpretation of 18B was that the minister's belief had to be reasonable according to a standard capable of being challenged in a court of law; that the onus of establishing this lay with the minister, and, hence, that Liversidge was entitled to particulars.

He began by noting that the issue was the "nature and limits of the authority" of the minister to make detention orders. The matter, he said, was one of great importance because the power to make orders was for the defence of the realm and because the liberty of the subject was "seriously infringed". As he pointed out, the order was not for a criminal offence and it was made by an executive minister, not by a judicial officer in the course of a court-like proceeding (225-26).

In his view, "reasonable cause" for a belief was

> just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right

(227-28).

He asserted that this was the "plain and natural meaning of the words". He pointed to the common law authority on the power of arrest and statutes which dealt with the same power, both of which which recognized this meaning. He concluded that the subjective meaning of "reasonable cause" contended for by the minister was "fantastic"--one which had never occurred to the minds of judges or counsel (228-32).

But, as we have seen, the subjective meaning had been argued for before the court and the majority had accepted that it was the correct construal of 18B. What clearly divides Lord Atkin from the majority is that the very features they take to be the initial contrapointer, he takes as an implicit propointer--an indication that, because the regulation is a drastic measure, the common law context is appropriate.

Lord Atkin's dissent is most famous for this complaint about the attitude of his fellow judges.

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves **more executive minded than the executive.** Their function is to give words their natural meaning .... In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are **no respecters of persons** and stand between the subject and any attempted encroachments on his liberty by the executive, **alert to see that any coercive action is justified in law.** In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I (244) .

He protested, he said, even if he did it alone, against a

"strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister" (244).

The remarks about the King's Bench of Charles I are designed to evoke the image of the period of political history when the courts of King's Bench and Common Pleas were struggling to assert and extend a jurisdiction to check arbitrary arrest by the King or King's Council. At that time, both the power to detain and the decision as to the legality of detention was the King's. It was thus a peremptory defence to an application for **habeas corpus** that the detainee had been 'committed by special command' of the King. It was only after the civil war between the forces of King and Parliament that the court's jurisdiction to issue writs of **habeas corpus** was affirmed in the hard-won constitutional victory achieved in the Habeas Corpus Act of 1679. This statute laid a firm basis for developing the common law remedies against arbitrary arrest,[12] prompting Blackstone to call it "another **magna carta** of the kingdom".[13]

Lord Atkin is reminding his colleagues and the government that the liberty of the British people lies partly in the hands of judges, ready to interpret all laws in the common law context in which important principles of critical morality are embedded. As he sees it, the common law context is not changed because it includes the Emergency Powers Act and the Defence Regulations, including 18B. What has changed is that these particular laws or enactments have

been inserted into the context for judges, if the need arises, to interpret. Moreover, it is the duty of the court to interpret the statutes in that context without regard to the status of the executive official whose action threatens liberty.

Notice that Lord Atkin is combining both arguments which in chapter one I showed to be part of the Common Law tradition. He assumes that judges can control the executive by interpreting statutes in accordance with the 'rule and reason of the common law', because he assumes that there are principles of critical morality protective of such liberty already embedded in the law and that it is the judicial duty to try to interpret statutes in accordance with those principles. But this argument also involves the idea that Parliament itself is a check on the executive, even when the executive as a matter of fact controls Parliament.

The only indication of actual intention which Lord Atkin took seriously was the incorporation of "reasonable cause" into 18B by way of substitution for the original "if satisfied" provision. He laid great stress on the actual words used, reasoning that his interpretation was supported by legislative history, by the fact that the original regulation, which required an apparently less well-grounded belief, had been replaced (232-37).

In a sense the judge is at this point using an historical design test--one which looks to a pattern in the past which supports an attribution of an intentional design to parliament. But there is a crucial difference between the

appeal to history here and that made by plain fact judges, and it is captured by Lord Atkin in another remark for which his dissent is famous. He said that he knew of only one authority which would justify the government's argument about the construction of 18B.

> 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,'said Alice, 'whether you can make words mean so many different things.' 'The question is, 'said Humpty Dumpty, 'which is to be master--that's all.'.... After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has.' I am of the opinion that they cannot, and that the case should be decided accordingly (245).

These caustic comments point out to the majority that their decision in effect substitutes the intentions of certain legislators for those of Parliament as the master over legal meaning. On Lord Atkin's approach, Parliament's intentions are best seen as a construct of reasoning in accordance with common law principles and in this case he finds that such an interpretation is available to him. In this case, that is, the common law interpretive context is the master over legal meaning and it screens out certain facts which the majority found legally compelling.

Lord Atkin took a completely different view of **Halliday** than that taken by the majority. **Halliday**, in his view, was not evidence for or against his interpretation. He noted that the court in **Halliday** had affirmed a decision of a court of which he was a member. But **Halliday** was for him a mere example of the power of the Legislature to override common law principles by express enactment, while the issue in **Liversidge** was the correct construal of unexpressed

intention (238-39).

Thus Lord Atkin screens out a reasoned justification for a judicial decision because the justification is based on a fundamentally wrong view of what law requires. As I suggested in S3.1, on the common law approach, the result of a fundamental mistake in a reasoned justification for a decision is that it is a datum to which the judge need not give much weight. On Lord Atkin's approach, if **Halliday** stands for any principle, it is that the courts must defer to clear legislative intention. The principle for which the majority took it to stand is that common law presumptions have little or no relevance to the interpretation of statutes enacted to deal with emergency situations. This second principle is not one which Lord Atkin, at the time he has to decide **Liversidge**, finds morally attractive or legally compelling because it presupposes a wrong and unattractive view of the legal order.

Finally, while Lord Atkin denied there was any ambiguity, he indicated that if there were ambiguity, it would be settled by common law principles (239). If doubt is not preempted from arising because the statute gets its meaning in the common law context, the doubt still arises within that context. And so the principles which would normally preempt doubt, also settle it when it is not preempted. Like the majority, Lord Atkin uses one set of considerations both to construct the interpretive context and to settle ambiguity when it arises, or is argued to arise, in that context.

Lord Atkin thus gave very little weight to the majority

interpretation of various provisions as specific contra-pointers. He pointed out, first, that the court was not substituting its decision for that of the minister. The minister could be wrong as long as he was wrong on reasonable grounds. And he pointed out that the advisory committee was the safeguard for detainees who wanted to contest the minister's decision to detain, on the ground that the decision was reasonable but wrong (239). He also pointed out that sufficient information could and had been supplied in other instances without a breach of the confidentiality required to protect the public interest (240-42).[14]

He concluded that Liversidge had a right to particulars based on a broader ground than that he was not bound to rely on the reiteration of 18B in the detention order. This, he said, was the principle, itself one of the "pillars of liberty", that in English law every imprisonment is **prima facie** unlawful and that it is for a person directing imprisonment to justify his act (245).

4.4 Understanding Liversidge

Partly because of the vehemence with which Lord Atkin expressed his deep concern about the majority's reasoning, the decision provoked a debate, virtually unprecedented in England, in the Commons, in the national press, and in private correspondence between judges and senior executive officials.[15] Many of the participants shared Lord Atkin's worries about the majority judgments. One judge, Stable J,

wrote to him complaining that the House of Lords had reduced the courts to "mice squeaking under a chair in the Home Office".[16] But others were worried about both the tone and the effect of Lord Atkin's dissent.

The decision still provokes controversy. RVF Heuston, the distinguished constitutional lawyer, says of **Liversidge** that it has "given rise to more misunderstanding than almost any case of modern times".[17] My argument so far is that the difference between the majority approach and that taken by Lord Atkin is one between different views of law and the role of judges in the constitutional order. The 'hardness' of the case was not solely due to something inherent in the statute. It arose because two arguments were put to the court each of which presupposed a different and morally charged view of the legal order.

But even if one were to find Lord Atkin's view of the legal order morally preferable, one would still be left with the question whether his view was legally speaking the correct one. In this regard, Heuston, writing in 1970, asserts that 18B was drafted in "ambiguous language" and asks whether one can say in any "meaningful sense" that either side was 'right' or 'correct'. Nevertheless, he argues that the reasoning of the majority is preferable, despite some rather dismissive comments about the majority by the Law Lords in 1951 and 1964.[18] Heuston thinks that such comments should be taken merely to assert, with the majority judges, that statutes must be interpreted within their appropriate context. And Francis Bennion has recently put forward the same argu-

ment despite further and outright rejections of the majority judgments by the English courts.[19]

At one level, Heuston's and Bennion's claim is trivially true. It is merely that judges should interpret statutes in the appropriate context. But Heuston asserts that Lord Atkin is wrong because his reasoning is based on

> the heresy of supposing that the construction of words in a statute is a matter of law and not of fact.[20]

Similarly, Bennion argues that in **Liversidge** the Law Lords were legally required to give more weight to a legal principle favouring the safety of the State than to the one favouring individual liberty.[21]

In addition, AWB Simpson has recently suggested that it is a mistake to see the decision in **Liversidge** as indicative of a judicial attitude confined to wartime. Rather it is indicative of a trend which had worried a Lord Chief Justice of England, Lord Hewart, sufficiently to prompt him to write in 1929 a book entitled **The New Despotism.**[22] Simpson argues that Lord Atkin was concerned to show that the courts remained, "at least at a theoretical level", the "superior partner in government" when it came to issues of civil liberties.[23] But Simpson is also anxious to stress that this did not amount too much. He thinks that Lord Atkin's judgment was more an exercise in rhetoric than in any "practical reality" because he sees it as a hopeless rearguard stand against the trend to "despotism". A cynic might say, he suggests, the "mouse roared but remained a mouse".[24]

We are also left with the question about the part, if any, that legal positivism played in the majority judg-

ments. In the last chapter, I suggested that the force, or rather lack thereof, of common law principles is for plain fact judges much the same as for Bentham and Austin and that the judges share a doctrine of judicial responsibility with Bentham. Moreover, Lord Wright's dissonant remarks could have been penned by Bentham for they fit perfectly into his argument against Blackstone. For we saw (S1.1) that Bentham is averse to the idea that judges should use the common law as a check on actual legislative intention because he holds that this is politically inappropriate. He thus argues that the only moral checks on legislative power are and should be external to the legal system.

It is worth noting that Goodhart was clearly troubled by what he saw as the potential danger in Atkin's approach of judicial attempts to usurp legislative power.[25] Bennion puts much the same argument forward. Although he is generally sympathetic to Hart's positivism,[26] he also firmly rejects the now conventional claims in books on statutory interpretation, which are in accordance with the positivist view of statutory interpretation in hard cases, that the notion of legislative intent is a fiction. Such an idea, he says, is "anti-democratic".[27] The invocation of 'democracy' indicates that he and Lord Wright share the view that democratic principle requires that the judges not set themselves up as the guardians of democracy but should rather bow to the will of the majority. Hence we can fairly suppose from his comments on the case that he thinks that the majority solved the legal question by discerning what the legislative in-

tent was in accordance with a legal duty, nested in the apolitical doctrine of judicial responsibility.

Hart and Raz would again point out that their view of law as a fact does not require a judge to adopt any view of judicial responsibility. All it entails for judges is that the judicial duty is to do what legal practice in fact requires judges to do. It follows, for the positivists, that it is an open question whether all that the majority judges were doing was exercising a discretionary law-making power, or in fact applying the law. The answer to this question would depend on the place that common law principles in fact had in English law at the time.

In other words, judges who take the view of law which Hart and Raz advocate would not be disposed one way or the other as to whether they should interpret in a common law context or in the kind of context employed by the plain fact judges. However, we must also recall that, on the positivist view, no principle of positive morality, however repugnant it is, is in its nature precluded from being a legal principle. It follows that judges in a common law jurisdiction can as a matter of fact incorporate any principle of positive morality as part of the law. Moreover, if there is a strict doctrine of precedent, the judges of the highest court can establish a practice, also as a matter of fact, of applying one set of principles rather than another so that judges in the future are under a legal duty to apply that set in a particular class of cases. I shall now turn to deal with the AD decision which expressly declared that the plain fact

approach of the majority judgments in **Liversidge** is the appropriate one for South African judges to use in interpreting security statutes.

4.5 The Reception of Liversidge

The '90-day detention law' was the name given to section 17 of Act 37 of 1963, which as we saw in S2.3 was enacted to assist the government in countering the underground activities of the African National Congress and the Pan African Congress. Section 17(1) provided that

> Notwithstanding anything to the contrary in any law contained, any commissioned officer ... may ... without warrant arrest ... any person whom he suspects upon reasonable grounds of having commmitted or intending ... to commit any offence under the Suppression of Communism Act ..., or the Unlawful Organizations Act ..., or the offence of sabotage, or who in his opinion is in possession of information relating to the commission of such offence ..., and detain such person ... for interrogation ..., until such person has in the opinion of the Commissioner of Police replied satisfactorily to all questions at the said interrogation, but no such person shall be so detained for more than ninety days on any particular occasion when he is so arrested.

Section 17(2) provided that no person was to have access to the detainee except with the consent of the Minister of Justice or a commissioned officer, though the person had to be visited not less than once a week by a magistrate. Section 17(3) provided that no court had jurisdiction to order the release of a detainee. The section was effective for twelve months and thereafter was subject to annual renewal by proclamation of the State President.

Rossouw v Sachs[28] (1964) arose out of the detention in

terms of the 90-day law of Albie Sachs, an advocate deeply involved in the extraparliamentary opposition.[29] His lawyers asked for a declaratory order against Rossouw, a senior security policeman, who was responsible for Sach's arrest and detention. The order sought declared, first, that Rossouw was not entitled to deprive Sachs of "any of his rights and liberties save to detain him for interrogation and save to deprive him of access to other per sons". Secondly, it declared that Sachs was "entitled to at least the same rights and liberties while in custody as are enjoyed by awaiting-trial prisoners or other non-convicted persons who are being detained under the provisions of some other law". More particularly, he was to be allowed out of his cell for reasonable and adequate exercise and recreation and to be permitted to receive an adequate supply of reading and writing materials, subject to the scrutiny of those detaining him. The statute did not deal with these issues.

Two judges of the Cape Provincial Division had granted the order in an unreported judgment. They held that a detainee had the right both to exercise and to an adequate supply of reading matter and writing materials. The judges had said that to deprive a detainee of that right amounted "in effect to punishment" and that it would be "surprising to find that the Legislature intended punishment to be meted out to an unconvicted prisoner". They had held further that they were not able to determine **a priori** what reasonably adequate exercise, reading and writing materials amounted to. This had to be decided in the first instance by the of-

ficial in charge of the detainee and he would have to have regard in his decisions to, **inter alia**, the purpose of the detention, the place of the detention, the mental and physical health of the detainee, and the suitability of the literature. They had concluded that the decision of the official

> is not come to in the exercise of any discretion conferred on him in law. His decision is at all times subject to correction in a court of law.[30]

Ogilvie Thompson JA, one of the judges appointed in 1958 to the refashioned AD, overruled this decision in giving the unanimous judgment of the court.[31] For reasons unimportant here, he found that the only issue the court had to decide was that of the right to reading and writing materials.[32]

He started his reasoning with the hall-mark of the plain fact approach. He claimed that the question posed by the case had to be answered by focusing on the terms of the statute.

> The problem thus posed is easier stated than solved: it essentially derives from the **failure** of the Legislature to make either directly in sec. 17 itself, or indirectly by way of incorporating therein an enabling power to make regulations, any express provision (save such as is disclosed in the words of the section itself) prescribing conditions whereunder detainees are to be held. The interests of clarity would have been better served had such conditions--for which there is ample precedent--been prescribed, instead of leaving, in a matter so vitally concerning the liberty of the individual, the intention of the Legislature to be determined by the Court from the **relatively brief, though manifestly stringent, terms of the section itself** (557-58).

He then went on to draw attention to what he took to be significant contrapointers. First, he pointed out that

the offences covered by the statute were predominantly designed to dislocate the public order or directed against the safety of the State itself. Secondly, section 17 introduced a procedure which, in at least two respects, was both "novel and drastic". A person was expected in its terms to incriminate himself under interrogation, which ran counter to the general principles of South African criminal law. Thirdly, the detainee was precluded from having access to his legal adviser which was also contrary to the "generally accepted principles of law". For although the section

> in terms only excludes the jurisdiction of the Court in relation to ordering the release of the detainee, the inability of the latter to have access (save with the consent of the Minister or a commissioned officer) to his legal adviser is likely in practice effectively to preclude any resort to the Court during the period of his detention (558-59).

He was clearly unwilling, in determining what he called the "true purpose" of section 17, to attribute an intention to Parliament of authorizing a form of "psychological compulsion". In his view, Parliament could not have intended that the detainee should be subjected to any form of assault, and that his health or resistance could not be impaired by inadequate food or living conditions. "Third degree methods" were clearly not authorized.

The government had in fact conceded all of this but submitted that the purpose of detention was to imprison or "punish" the detainee while he declined to speak. Sachs submitted that detention was merely for the purposes of "recurrent interrogation". Ogilvie Thompson JA held that neither submission was "entirely correct". The purpose was "to

induce the detainee to speak"--to reply satisfactorily, in the opinion of the Commissioner, to all questions. But the judge was still left, as he saw it, with a choice between two options as to the purpose of the statute. First, Parliament, in authorizing such a detention, could have intended that the detainee should continue to enjoy all his ordinary rights and privileges, saving only such as were necessarily impaired either by the very fact of detention itself or by the other express provisions of the section. Or Parliament could have intended that, in the furtherance of the object of inducing the detainee to speak, the continued detention should be as effective as possible, "subject only to considerations of humanity as generally accepted in a civilised country" (560-61).

After examining the relevant legal data, Ogilvie Thompson JA came to the conclusion that the second was the true purpose despite his own acknowledgment that

> for detainees who may broadly be classed as intellectuals, the deprivation of reading matter or writing materials during their detention may approximate to the application of a form of that very 'psychological compulsion' so emphatically repudiated by counsel for appellant (565).

The fact that he recognizes that his interpretation might lead to what he was unwilling to attribute as an intention was a focus of the first article strongly critical of the judiciary to appear in the **South African Law Journal.**[33] AS Mathews, a professor of law, and RC Albino, a professor of psychology, set little store by Ogilvie Thompson JA's remarks about "considerations of humanity" and the duty to preserve the mental and physical health of the de-

tainee.[34] They pointed out that studies of the effects of solitary confinement show that people undergo a process of severe mental deterioration and that, at the time of writing, two 90-day detainees had committed suicide in detention and a number of others had been committed to mental institutions.[35]

However, their most scathing criticism is directed at the reliance placed by Ogilvie Thompson JA on **Liversidge.** He had acknowledged that, ordinarily speaking, it was a principle of South African law that a statute depriving an individual of his rights should be restrictively interpreted. As he formulated this principle, if a statute is couched in ambiguous language, the court will give it the meaning which least interferes with the liberty of the individual. He quoted at this point Innes's dictum in **Dadoo** which, as we saw in S3.4, requires that "a strict construction ... be placed upon statutory provisions which interfere with elementary rights"; and that this should be done "not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole" (562).

But Ogilvie Thompson JA claimed that "the principle that the interests of the individual must sometimes yield to the public interest was not unknown to our law". As authority he quoted a dictum from a 1915 AD decision--**Krohn v Minister for Defence and the Special Court under Martial Law Regulations, Pretoria.**[36] Innes CJ, at a time when martial law regulations had been promulgated in some areas of South Africa, had said that the State may, in times of extreme

emergency,

> be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger (562).

Ogilvie Thompson JA then commented that it was "of interest" that a strict interpretation against the Crown and in favour of the liberty of the individual had failed to obtain the general approval of the House of Lords in **Liversidge.** He cited the passages from the majority judgments in which it was stated that the presumption in favour of liberty has no application in certain contexts. He acknowledged that the regulation considered in **Liversidge** was a wartime measure and that South Africa was not at war nor in a state of war emergency. But, nevertheless,

> as the Acts[37] mentioned in sec.17 and as various cases both in the Provincial Courts and in this Court bear witness, subversive activities of various kinds directed against public order and the safety of the State are by no means unknown, and sec. 17 is plainly designed to combat such activities. Such being the circumstances whereunder sec. 17 was placed upon the Statute Book, this Court should, while bearing in mind the enduring importance of the liberty of the individual, in my judgment, approach the construction of sec. 17 with due regard to the objects which that section is designed to attain (563).

He said that he found "very apposite", although he was "sufficiently heedful" of Lord Atkin's stricture against "strained constructions" in favour of the executive, Lord Wright's comments about context, which he quoted in full. "Much of the same concept", he said, underlay Curlewis J's statement in **R v Bunting**[38] (1916), a Transvaal Provincial decision on martial law regulations:

> The Court, though ever anxious to maintain the liberty

> of the subject and to guard his freedom of speech can only to do so **to the extent and limit placed thereon by the legislature** (563).

It followed, in Ogilvie Thompson JA's view, that he

> should accord preference neither to the 'strict construction' in favour of the individual indicated in **Dadoo's** case ... nor to the 'strained construction' in favour of the Executive referred to by Lord Atkin in **Liversidge.**

Rather, following the approach advocated by Lord Wright, he should determine

> the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and object (563-64).

Mathews and Albino argue that this middle path between strict and strained construction is illusory. The effect for the detainee is just as if the court applies a strained construction in favour of the executive. They accuse Ogilvie Thompson JA of engaging in "circuitous reasoning" because he suggests that his interpretation is required by a middle path approach which requires looking to the circumstances of enactment of the statute.[39] Their argument on this point is that the question of circumstances is a 'fact' not a 'law' question. Since there was no emergency in South Africa in the sense of "open and widespread disorder and lawlessness" or "conditions of war", the judge himself enacts the emergency situation which requires the strained construction. While the judgment "ostensibly" reaches its conclusions by a "process of pure logical deduction", the judge has, they claim, been swayed by an "inarticulate, extra-legal assumption":

> the Court's unexpressed (or, at least not fully expres-

> sed) conviction that the political circumstances prevailing at the time of the enactment of section 17 required it to align itself with authority rather than the individual. The ascertainment of the meaning of the section was in fact an interpretation of, and pronouncement upon, those political circumstances.[40]

They conclude that the court had authorized "the neglect of individual rights for as long as one can foresee".[41]

In my view, this argument goes wrong in presupposing that the judge reaches his conclusion because he adopts a strained construction **in order** to implement the executive's view of what is required. Rather he reaches this conclusion because, as a matter of judicial responsibility, he adopts the plain fact approach. He is, in his view, required to align himself with "authority rather than the individual" because the apolitical doctrine of judicial responsibility points him to a legally authoritative answer to the question raised in this case.

This point is emphasized when, at the end of his judgment, he said that the concept, implicit in the judgment of the court **a quo**, that the detainee enjoyed all his pre-detention rights save in so far as the detention itself excludes the rights was not "readily reconcilable" with the detainee ordinarily being precluded from being able to confer with his adviser to enforce those rights (564). He asked at this point,

> Moreover, **where is the line to be drawn?** In the present case we are concerned only with reading and writing materials; but is the detainee who in happier days habitually enjoyed champagne and cigars entitled, as of right, to continue to enjoy them during his detention? That example is, no doubt, extreme; but it serves to underline the difficulties attendant upon the view taken by the Court below (ibid).

This passage is, in my view, just one manifestation of the sense of powerlessness and dissonance caused by, on the one hand, the judge's sense of the result to which his view of the law is leading him, and, on the other, his sense of how far this result diverges from 'civilized standards'. But, as I suggested in the last section, the dissonance is evidence not of the fact that he thinks that he has a discretionary power, but, as he sees it, that he has none.

It is his duty as a judge to decide the case by reasoning which relies on appropriate factual considerations, and not, as his rhetorical question indicates, to get engaged in the value-laden business of drawing lines. This reasoning leads him inexorably to the conclusion that the Legislature did not intend him to have jurisdiction to review official decisions as to detention conditions.

In view of the practice of the executive revealed in the case before him, it follows that it is only honest of the judge to point out that his interpretation allows a form of psychological compulsion which the Legislature has not countenanced. There is no inconsistency here. He concludes that the legislative intention is to deprive the courts of the power to supervise detention and so, if things are going on in detention which are inconsistent with the standards of a civilized society, it is up to Parliament to intervene. Indeed, his acknowledgment that psychological compulsion will result is clearly a call for legislative intervention when it is read together with his opening remark that a matter so "vitally concerning the liberty of the individual"

should be expressly regulated by Parliament.[42]

He also exhibits the feature that accompanies the hall-mark of the plain fact approach--the idea that the legal force of common law principles is subordinate to the supreme power of the Legislature. His attitude in this regard is clearly illustrated by the way he dealt with the AD decision in **Whittaker and Morant v Roos and Bateman**[43] (1912). Innes JA, in deciding the question of the rights of awaiting-trial-prisoners, had made this powerful statement, which Ogilvie Thompson JA quoted in full:

> True, the plaintiffs' freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. **Mr Esselen**[44] contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. **But the directly opposite view is surely the correct one.** They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration (560).

Ogilvie Thompson JA reasoned that the circumstances of security detainees were different from those of awaiting-trial prisoners because the detainee could be detained "at any place" and the only protection afforded to him was the visit of the magistrate and the Minister's power to release him once he had given satisfactory replies. An accused person was entitled both before and during his trial to refuse to answer incriminating questions. The detainee, on the other hand, was presumed to be in possession of information

which he refuses to disclose. The adjudication of this matter was, "on reasonable grounds", in the hands of the commissioned officer, and the refusal was the cause of the (continued) detention (559-60). Thus, instead of assuming that the Legislature had enacted section 17 against a common law background which includes Innes's dictum, he reasons that section 17 contains contrapointers which indicate that the common law background is not relevant.

Ogilvie Thompson JA's attitude to the common law is also illustrated by the way he dealt with other decisions relevant to the case, especially **Dadoo.** On his view the principles of common law protective of the individual only apply when there is ambiguity and there is, on his approach, no ambiguity in section 17. What preempts ambiguity from arising is an interpretive principle that "the interests of the individual must sometimes yield to the public interest"--the translation of the Latin maxim **salus reipublicae suprema lex.** As we saw, Ogilvie Thompson JA claimed that Innes had in **Krohn** asserted that this was a legal principle.

But it is worth noting that Schreiner, who had retired after Steyn was leapfrogged over him into the Chief Justiceship, thought differently. Commenting on **Rossouw** in his 1967 **Hamlyn Lectures,** he said that the maxim

> has no doubt a proper role to play as a substantive defence in certain cases, but it is not a rule of interpretation.[45]

This view stretches back through Dicey to Blackstone.[46] Interpreted in its light, decisions such as **Krohn** merely re-

cognize that the State has an inherent right to defend itself and so, when action has been taken pursuant to martial law regulations, the court will accept as a defence negativing unlawfulness that the State acted to defend that inherent right.

Of course, judges sometimes express the maxim as if it were a rule of interpretation, or, as I prefer to put it, an interpretive principle and this is what the majorities in **Halliday** and **Liversidge**, as well as Curlewis in **Bunting**, had done. But Ogilvie Thompson JA failed to mention that the passage he quoted from **Bunting** is to be found in the dissenting judgment in the case; and he cited, but did not see fit to quote, this statement in one of the majority judgments in that case:

> If the legislature intends to suppress political or social views of a certain type, **it must say so plainly** and not hope to find a complacent Court which will interpret its acts in the widest possible sense so as effectually to suppress the liberty of the subject. If the liberty of the subject is to be suppressed, **it is to be suppressed by the legislature and not by the Court.**[47]

Moreover, the approach Innes advocated in **Dadoo** is one which, like Lord Atkin's, gives common law principles a constitutive role in constructing the context for interpreting statutes. As I pointed out in my discussion of **Liversidge**, the upshot of this approach is that a common law judge will try to show either that ambiguity is preempted or that its resolution is strongly weighted in favour of the individual. And **Dadoo**, **Whittaker** and **Bunting** are all authority for the principle that a judge should decide that the interests of the State override individual interests only when the stat-

ute in question expressly requires this.

It follows that if a judge thinks that the plain fact approach is the correct one, it does not help in cases such as **Rossouw** to appeal, as Mathews and Albino did, to "ideals of individual freedom ... part of the woof and warp of Roman-Dutch law".[48] On the plain fact approach, these ideals are, perhaps to the judge's regret, likely not to be relevant to the construction of security statutes.

I suggest that, as Ogilvie Thompson JA saw things, he did not have a choice between two equally justified legal solutions.[49] As in **Liversidge**, the two solutions were such only within the context of approaches to law which do not see the other solution as a legally permissible one. These approaches involve what I shall call 'complete theories of law'. That is, each puts forward a view of what law is, a doctrine of judicial responsibility underpinning that view, and a way of resolving hard cases in accordance with that doctrine of judicial responsibility. In other words, the approach takes up all the space available to an interpretive approach. The choice is not between particular legal solutions but between different views of legal order and the role of judges in that order. This leaves us with the question posed at the end of the last chapter and again at the end of **S4.4**: Did Ogilvie Thompson JA's decision in **Rossouw**, establish the maxim **salus reipublicae suprema lex** as an interpretive principle of South African law which courts were, because of the doctrine of precedent, required to apply?

ENDNOTES TO CHAPTER 4

1. Simpson (1987) 8-9.

2. (1942) AC 206.

3. Simpson (1987) 18-19 points out that Liversidge had been given particulars but wanted further and better ones. He shows that the Law Lords were confused about the machinery of detention and consequently about the facts. But I shall proceed with the judges on the assumption that the issue in the case was whether Liversidge was entitled to any particulars.

4. (1917) AC 260.

5. See also Lord Wright at 270 and Lord Romer at 282.

6. See Lord MacMillan at 255-57, Lord Wright at 270-72 and Lord Romer at 281-83.

7. Sir Leslie Scarman (as he then was) (1974) 15.

8. (1942) 4-5.

9. As Hans-Georg Gadamer puts it, (1975) Part II, especially at 236-37.

10. What Gadamer (1975) calls being "pulled up short by the text".

11. See Lord MacMillan at 251, Lord Wright at 268, and Lord Romer at 281.

12. See Duker (1980) chapter 1.

13. Blackstone (1979), Volume I, 133.

14. Simpson (1987) thinks that the fact that Lord Atkin was content in another case--**Greene v Secretary of State for Home Affairs** (1942) AC 284--to accept the particulars given as constituting "reasonable grounds" shows that the dissent does not in practice "amount to very much". That is, the information which the minister would have been forced to disclose was "so meagre as to be quite inadequate" (32 and see Lord Atkin on Greene's position at 240-41 and 246-47 of **Liversidge**).

But I suggest that Simpson underestimates Lord Atkin's judgment. Simpson does not advert to the fact that the particulars supplied to Greene did actually list his hostile associations and activities (Lord Atkin's judgment at 241) while those supplied to Liversidge (listed in Simpson at 18-19) did not. Moreover, the further particulars requested by Liversidge pertained to the bare allegation that he had

'hostile associations'. Thus the fact that Lord Atkin accepted the particulars in Greene's case as showing reasonable cause does not show that he would have accepted the particulars Simpson lists for just the reasons that Simpson advances in his article. Simpson, that is, comments on the total inadequacy of the particulars supplied to Liversidge and suggests that the real reason for detaining Liversidge might have had nothing to do with hostile associations.

15. For a full account, see Heuston (1970).

16. Quoted in Heuston (1970) at 51. Stable J had been responsible for a dissent similar to Lord Atkin's on the interpretation of 18B, which went unnoticed in **Liversidge: R v Home Secretary, ex parte Budd** 1941 2 AER 749.

17. Heuston (1964) 171.

18. Heuston (1970) 63-64. In 1951 Lord Radcliffe had said that it would be a "very unfortunate thing" if the majority decision was to be regarded as "laying down any general rule" as to the construction of clauses of the kind in issue--**Nakkuda Ali v MF De S Jayaratne** (1951) AC 66 at 76. In 1964 Lord Reid had called the decision "very peculiar"--**Ridge v Baldwin** (1964) AC 40 at 73.

19. Bennion (1984) at 221-22. In 1977 Lord Denning rejected the majority reasoning "as not applying today"--**Secretary of State for Education and Science v Tameside Metropolitan Borough Council** (1977) AC 1014 at 1024-25. In 1980, in a case on the interpretation of an "if satisfied" provision, Lord Diplock said that the time had come to acknowledge openly that the majority in **Liversidge** were wrong and that Lord Atkin's dissent was right; and Lord Scarman said that the "ghost of Liversidge ... casts no shadow upon this statute. And I would think it need no longer haunt the law"--**Inland Revenue Commissioners and Another v Rossminster Ltd. and Others** (1980) AC 952, at 1011 and 1025.

20. Heuston (1970) at 65.

21. Bennion (1984) 221-22.

22. Hewart (1929).

23. Simpson (1987) 31.

24. Simpson (1987) 31-32.

25. Goodhart (1942) 6-7.

26. See Bennion (1984) and Bennion (1983) at 146-48.

27. Bennion (1984) 226-27.

28. 1964 (2) SA 551 (A).

29. After his release from detention Sachs left South Africa and wrote the first detailed account of law and justice in South Africa: Sachs (1973).

30. I rely here on the account in **Rossouw** at 564 and 556-57.

31. It is worth noting that prior to this decision the AD had in **Loza v Police Commander, Durbanville** 1964 (2) SA 545 (A) overruled a decision of the Natal Provincial Division--**Mbele v Minister of Justice**--1964 (4) SA 606 (N) in which it had been held that a person could not be arrested more than once in terms of section 17, because this would render the limit of 90 days illusory.

32. At 557 the judge pointed out that the government had in fact conceded that Sachs should be allowed a reasonable period of daily exercise and thus he held that the court **a quo** had erred in making any order in relation to exercise. However, the judge's failure to consider whether there was a right to exercise left the question open whether his finding that there was no right to reading and writing material meant that there was no right to exercise.

33. Mathews (1966).

34. Mathews (1966) 25-27.

35. Mathews (1966) 25-27.

36. 1915 AD 191 at 197.

37. The judge is referring to the Suppression of Communism Act and the Unlawful Organizations Act which, as we have seen, are both mentioned in section 17(1).

38. 1916 TPD 578 at 589.

39. Mathews (1966) 28.

40. Mathews (1966) 28-29.

41. Mathews (1966) 42.

42. It is worth noting that, subsequent to the decision in **Rossouw,** Parliament enacted section 215 **bis** of the Criminal Procedure Amendment Act 96 of 1965. This section was known as the '180-day law' because it doubled the time of detention. It also gave the executive the power to make regulations governing the conditions of detention and expressly deprived the courts of the jurisdiction to pronounce upon the validity of such regulations. Regulations were then made which gave the officer in command of the place of detention a discretion over access to reading and writing material.

43. 1912 AD 92. The passage cited below is at 122-23 of the judgment.

44. Counsel for the respondent, emphasis in the original.

45. Schreiner (1967) 25.

46. Dicey (1987) 412-13; Blackstone (1977), Volume I, 243-44.

47. Wessels J at 584.

48. Mathews (1966) 37.

49. I do not mean to suggest that one should accept Ogilvie Thompson JA's view of the law or his approach to statutory interpretation. Although Mathews and Albino do not see just what drove Ogilvie Thompson JA's reasoning, they were right that his view of the role of the courts would promote a virtual abdication of the judicial role in protecting the well-being of people in security detention. Given the fact that he opted for the plain fact approach rather than the (apparently) common law one adopted by the court below, it seems fair to say that he should shoulder some responsibility for the fact that South African security policemen feel unconstrained by law when dealing with detainees and that torture is a feature of security detentions in South Africa.

We can note in this regard that at the inquest into Biko's death (S2.3), Colonel PJ Goosen said that the security police did not regard themselves as bound in their work by any statutory authority; see the transcript in Woods (1978) 199. Research shows that 83 percent of detainees are tortured; Foster (1987).

Chapter 5

Entrenchment and Dissent

5.1 Rossouw as 'Authority'

The contrast between two provincial division decisions, one given shortly before **Rossouw** and the other shortly after, indicates the impact which Ogilvie Thompson's judgment in **Rossouw** was to have on adjudication. Both cases concerned the common law presumption that self-incriminatory statements made by an accused as a result of threats or inducements are not admissible in evidence against him. More particularly, they concerned the question whether the psychological pressure which detention under section 17 of the 90-day law exerted on a detainee was sufficient to render a confession made in detention involuntary and, as a result, inadmissible in subsequent court proceedings.

In **S v Ismail and Others**[1] (1964), a case in the Natal Provincial Division, Milne JP had, in the course of a sabotage trial, to decide whether a confession made by a detainee after he had been arrested under section 17 was admissible when it was made in order to avoid detention. In Milne JP's view, the confession was not admissible because of the pressures of solitary confinement under section 17, which he described thus:

> To contemplate being detained for 90 days in solitary confinement, without being able to see one's relatives or friends, is in its nature a grievous thing. And it is perhaps even more so if the person who contemplates his detention has a family dependent upon him.

He then asked the following rhetorical question:

> Does the fact that the procedure was authorised by Parliament make it necessary to say that as long as there was no violence or other unlawful inducement, any statement made by a person under 90-day detention was made freely and voluntarily, especially when regard is had to the consideration which I think is manifest here, that the police would not regard a statement by him as satisfactory unless it included an admission of his own complicity (448-49)?

He concluded that the mere authorization of this machinery by Parliament for obtaining the desired information could not be treated as rendering the making of a statement free and voluntary when it is made in order to avoid the 90-day detention.

In **S v Hlekani**[2] (1964), a case heard by a full bench of the Eastern Cape Division just after **Rossouw**, the issue of the admissibility of a confession under section 17 arose in the course of another security trial. Wynne J, giving the judgment of the court, distinguished the decision in **Ismail**, on the basis that Milne JP had relied on the decision in the court **a quo** in **Rossouw**, which Ogilvie Thompson had on appeal overruled. He found the decision in **Rossouw** "authoritative" for the problem before him. He went on to hold that the pressure to which the detainee was subjected was no more than an

> explanation of the enactment ... and a warning to the appellant of the consequences which, in point of law, would arise from his refusing to give satisfactory answers (439-40).

He thought there was an analogy between section 17 and other forms of statutory pressure which had been held by the AD in two decisions not to render a confession inadmissible.[3]

However, Wynne J's reason for distinguishing **Ismail** on

the basis of the occurrence of the AD decision in **Rossouw** is far from being a caste-iron one. Milne JP, while he mentioned the judgment of the court **a quo** in **Rossouw**, did so in dealing with a point made by counsel and expressly did not rely on it in his main argument. Secondly, his own judgment is compatible with the AD decision in **Rossouw** if that decision is not taken to stand for any legally compelling interpretive principle, but is confined to its enactment force as a decision about some specific rights of detainees. Thirdly, the fact that Ogilvie Thompson had recognized that detainees might well be subject to psychological compulsion in detention would be all the more reason for Milne JP to reason as he did. For then he would have been alerted by the AD to the kind of psychological pressure exerted by detention.

Finally, the two AD decisions on which Wynne J relied, are easily distinguishable if one adopts a line of reasoning already implicit in Milne JP's judgment. One points out that the AD decisions are authority for the following principle: If a statute clearly contemplates that a confession elicited as a result of the form of pressure which it licenses is to be admissible in subsequent court proceedings, the court must defer to the legislative intention. One then refuses to contemplate ascribing an intention to the Legislature to make a confession admissible when it is elicited during 90-day detention.

Hence the real force in **Hlekani**, as Wynne J indicated, is the authority of **Rossouw.** On his view, the authority of

Rossouw is contained in the reasoned justification for the decision. He thinks that the reasoned justification has gravitational force. As such, the decision stands for the following principle: A court should, when interpreting a statute dealing with security matters, itself a contrapointer, in which other contrapointers are to be found, conclude that Parliament intends that common law principles which would impede the executive in implementing the statute are suspended. In short, **Rossouw** is taken as an authority for the proposition that the courts are not to interfere in security matters. I shall show in the next section that this proposition is inherently problematic because it seems to strip judges of their power to enforce the law.

5.2 The Question of Jurisdiction

In **Schermbrucker v Klindt**[4] (1964) the AD had to determine the extent to which the court's jurisdiction had been ousted or excluded by subsections (2) and (3) of section 17. Subsection (2) read:

> No person shall, except with the consent of the Minister of Justice or a commissioned officer ... have access to any person detained under sub-section (1): Provided that not less than once during each week such person shall be visited in private by the magistrate ... of the district in which he is detained.

Subsection (3) read:

> No court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody.

Schermbrucker had been detained under section 17. His

wife applied for an order restraining the security police from using unlawful methods of interrogation on her husband. She relied on a note, smuggled out of prison, containing allegations of unlawful interrogation which the police had denied. To resolve the factual dispute, she applied for an order in terms of rule 9(a) of the Transvaal Rules of Court. Such rules are drawn up by the supreme courts of the different divisions to regulate their own inherent common law jurisdiction and they have been given statutory force by the Supreme Court Act 59 of 1959.[5] Rule 9(a) gave the court the power to "order any person to appear personally to be examined and cross-examined". If invoked, it would require the detainee to appear personally before the court to give evidence. The question which the court faced was whether there was a conflict between section 17 and 9(a), and, if there were, how it should be resolved.

The appeal arose out of the refusal of a court of the Transvaal Provincial Division to grant the order. Botha JA, Steyn CJ and Trollip AJA concurring, held that there was a conflict and that Parliament intended the conflict to be resolved in favour of section 17. Rumpff and Williamson JJA dissented.

Recall that in **Rossouw** Ogilvie Thompson had held that the fact that a legal adviser could not have access to a detainee without official permission had a legal significance beyond the practical obstacle of getting the official to consent to access. In his view, the fact pertained to the very meaning of section 17. The bar on access was a contra-

pointer or legislative indication that the conditions of detention were to be unsupervised by the courts and he recognized, with regret, that this might result in psychological compulsion. However, he claimed that the compulsion was not the result of a legislative intention to subject detainees to psychological compulsion. Rather the intention was that the courts not have jurisdiction over the conditions of detention.

In **Schermbrucker** the unlikely had happened. The court had before it evidence that the detainee was being tortured and the question was whether it could take steps to evaluate the evidence. Botha JA noted that the appellant had urged upon the court that it should have regard to the well-recognized rule of statutory interpretation that, in the absence of an express or clear implication to the contrary, a curtailment of the powers of a court of law is not to be presumed. But he accepted both that the decision in **Rossouw** was correct and that the interpretive approach which Ogilvie Thompson had recommended should be followed when deciding questions about the interpretation of the 90-day law (617-18). His own decision might seem more drastic than **Rossouw** in its implications for detainees. But I suggest that it is only more drastic because Botha JA applied the rationale of **Rossouw** to the more dramatic circumstances in the case before him.

Following **Rossouw,** he thought that Parliament's intention was that subsection (3) covered any interruption of the detention not expressly allowed for in section 17. As he saw

it, the detention authorized by section 17 was "continuous detention in isolation from all contact with the outside world" until the detainee had replied satisfactorily to all questions. It was clear to him that

> no Court has power to order anything to be done which would be in conflict with an Act of Parliament. It follows that no Court can issue any order or process the effect of which would be to require or authorise an interference in any manner whatsoever with the kind of detention prescribed by sec. 17, or which would be likely to defeat the purposes of that section (619).

He said that if the detainee were brought before a court, the manner of his detention as prescribed by the section would be interfered with in "more ways than one". He would have to depart from his place of detention. He would be brought into the outside world where access to him could not be effectively controlled and no control machinery was provided for in the Act. Finally,

> compliance by a detainee with an order requiring his personal attendance in a Court would result in an interruption of his detention and interrogation designed to induce him to speak. Such interruptions, especially lengthy interruptions, may therefore clearly defeat the purpose of the section. The purpose of the detention, though it temporarily deprives the detainee of his liberty, is intended to induce him to speak, **and any interference with that detention which may negative the inducement to speak is likely to defeat the purpose of the Legislature** (ibid).

It is worth noting that Botha JA does not seem to experience any dissonance about the implications of his decision for detainees. There is no sign, that is, of a perceived divergence between the requirements of law and the requirements of critical morality. There are, however, signs of a different kind of disquiet in his discussion of jurisdiction.

He thought that it was

> clear from the provisions of sec. 17 that it is only the Court's jurisdiction to order the release from custody of any person detained under the provisions of that section which is by sub-sec. 3 expressly excluded. Further than that the section does not go in ousting the jurisdiction of Courts of law, either expressly or by necessary implication. Indeed it was not contended on behalf of the respondent that the provisions of sec. 17 preclude a Court from granting relief in a case where a detainee is unlawfully treated or interrogated during his detention ... (618).

However, he also noted that Ogilvie Thompson had said in **Rossouw** that the inability of the detainee to have access to his legal adviser without official consent was "likely in practice effectively to preclude any resort to the Court during the period of his detention". Botha JA thought that this fact put "serious obstacles" in the way of the execution of an order made in terms of rule 9(a) (618).

Thus from the fact that there can be no access to a detainee in normal circumstances without executive consent, Botha JA comes close to the conclusion that a court order requiring access would be conditional on consent, which would not in this case be forthcoming. His reasoning is that if he gives an order compelling the production of the detainee in court, the order cannot be enforced without the consent of the minister or a commissioned officer. And it is clear from the argument put forward by the government that it is unwilling to consent.

This is startling reasoning. Even if a court would get the law wrong in granting the order sought, the executive, although it could not be forced to comply with the order, would be under a legal duty to comply. The judge anticipates

that the executive will not accept the decision of the court as to what the law is and in so doing he seems to succumb to what William E Connolly calls the "power of anticipatory reaction".[6]

I suggest that this reasoning is the outward manifestation of the judge's sense that his normal authority has been deeply undercut. He has jurisdiction to interpret the (statutory) law but lacks jurisdiction to do what is necessary to enforce the (common) law which protects people in custody from assault.

Botha JA's reasoning is difficult to follow on this point. He asserts both that the court has its full and normal jurisdiction over the detainee, except in so far as it cannot order his release, and that the detainee is beyond the jurisdiction of the court because it cannot make an effective order compelling the detainee to appear without the consent of the minister or a commissioned officer. In his view, the detention of a person under the provisions of section 17 placed that person as "effectively beyond the reach of the Court as his absence from its jurisdiction would" (618-19).

HWR Wade, perhaps the leading British administrative lawyer, says that the objection to 'ouster clauses'--statutory provisions that might be interpreted as intended to oust the court's jurisdiction on a matter--is that they are

> repugnant to a coherent legal system. The courts rightly regard it as their task to keep the system coherent.[7]

But he also says that

> it can hardly be doubted that they do this by looking at what the intention of Parliament ought to be rather than at what it was.[8]

Because Botha JA adopts the plain fact approach, he looks to plain facts about what intention was, rather than at what it ought to be. As a result, he is on his way to concluding that in security matters the court lacks jurisdiction altogether. However, he balks at this conclusion and asserts that the court has jurisdiction. But the jurisdiction he asserts is a purely formal one. It relegates the court to a position of impotence where it has jurisdiction in security matters but to no avail.

His reasoning thus turns the clock back over three centuries, as Lord Atkin accused the majority in **Liversidge** of doing, to a time when the courts could not contest the legality of the king's actions since he was the sole arbiter of justice. As I pointed out in my discussion of **Liversidge,** in England the power of the court to issue writs of **habeas corpus** was intimately bound up with a struggle to assert and extend its jurisdiction.

And IH Jacobs points out that the very idea of the inherent jurisdiction of superior courts

> necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused .... Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.[9]

In his dissent, Rumpff JA[10] also anticipated the possibility of the executive acting in contempt of court, but

he did not allow this to influence his reasoning. He and the other dissentient, Williamson JA, begin with the assumption that the court has its normal jurisdiction unless it or some aspect of it is expressly taken away. In addition, they both link this assumption with the view that the aim of the institutions they serve is to maintain a just and civilized society, founded, as Rumpff JA put it, on Western democratic norms (621). In other words, they take the constitutive principles of the common law context in which they reason to be the same as those that inform their conception of the political institutions of their society, including the Legislature.

In their view, there is no conflict between section 17 and rule 9(a), because the rule is just a canonical formulation of the inherent power which the court has in virtue of the common law context, and section 17 is to be interpreted within that context. As Williamson JA put it, the detained person was not in the same position as a witness beyond the jurisdiction of the court. He was a person within the jurisdiction of the court, whose freedom of movement had been temporarily removed by law and placed in the hands of officials, within and subject to the jurisdiction of the court. To bring the detainee to court would not be "access" within the meaning of the section (621-22).

In making the assumption, the judges recognize that if the court is to have the power to do anything about a detention which may be illegal or in which the detainee is being illegally treated, it must be able to have access to the

detainee. In order to find that the court does have this power, they try to reconcile enactments with each other and with other relevant law in so far as is possible rather than seek out conflict. Further, they think that the criteria for relevance are provided by the common law assumption that the court can enforce the law in order to protect detainees from ill-treatment or unlawful detention. Their interpretation of the statute thus accords with CK Allen's explanation of Coke's maxim that the "surest construction of a statute is by the rule and reason of the common law" (S1.1):

> the Common Law is wider and more fundamental than statute, and ... wherever possible, legislative enactments should be construed in harmony with established Common Law principles rather than in antagonism to them.[11]

I shall call such an assumption a 'regulative assumption' because it does more than play a role in constituting the context in which interpretation takes place. It also regulates and makes sense of the practice of interpretation. It endeavours to keep together what we saw Botha's judgment cleaves--the jurisdiction to interpret and the purposes for which courts have that jurisdiction, which include the enforcment of the ideals that are seen as the special creation of the common law. As a result, the assumption imposes a substantive coherence requirement on judges: they must make statutes cohere with the fundamental purposes or ideals of their legal system, which are expressed in the common law. In contrast to the purely formal jurisdiction asserted by Botha, the jurisdiction they assert is substantive.

As I shall now show, the upshot was that the dissenting

judges did not find, as Wade suggests, that there were two intentions which they had to decide between--one plain fact intention and one intention that Parliament ought to have had. Although the dissentients differ as to how they reach their conclusion on this point, they agree that the only intention that can be attributed to Parliament is one to preserve the substantive coherence of their legal system. Any contrary intention is screened out altogether.

Williamson JA found unnecessary and repugnant the very imputation of an intention to the Legislature of wanting to induce detainees to speak. The intention he was willing to impute to the Legislature in enacting section 17 was merely to promote conditions for effective investigation. He recognized that to adopt this interpretation would require overruling **Rossouw**. But he claimed that his interpretation was "equally consistent" with section 17. Moreover, with such an aim "clearly inferrable", it was

> unnecessary and ... manifestly wrong **in modern times to impute the extraordinary and unprecedented intention to Parliament of legalising a system of compelling persons to speak.** There is nothing to prevent Parliament from doing that if it decides to do so; but at least one would expect to find such intention disclosed with far greater clarity.
>
> Assuming my view to be correct, it would be the Court's duty to interpret the section, **if reasonably possible,** in a manner which would give effect to such an intention of Parliament. It would however not be its duty unnecessarily **to extend by interpretation** the operation of the section to effects which are not required for the proper fulfilment of the purposes of the section (621).

It may be tempting to conclude from Williamson JA's remark that his interpretation is "equally consistent" with the words of the section that he thinks that he has a choice

between two interpretations which were equally good in law. One could then argue that, in reasoning as he did, he is by his own admission exercising a discretionary law-making power in accordance with his perception of what is morally required.

But, if my account of how he saw things is right, this positivist description of his view about the logic of his reasoning is wrong. For, on my account, both dissenting judges regard it as their legal duty to interpret as the regulative assumption requires because the assumption, by enabling them to enforce the law that already exists, also enables them to make sense of the law.

Of course, Williamson JA still had to account for the datum out of which the question in the case arose--section 17. He ackowledged that section 17 made a difference to the power of the court. But he said that the difference the section made to the legal situation was that the court had to consider it "absolutely necessary" for the administration of justice that it have access to a detainee before it would summon a detainee to court (622); and such a matter is, of course, one that only a court can decide. In sum, he thinks that his interpretation is to be preferred to the majority's because it is in accordance with the correct and morally charged view of law.

Rumpff JA did accept that detention under section 17 was designed to create a pressured environment. But he reasoned in a way that shows that he did not accept any identity of interest between the government of the day and the

Legislature.[12] He said that the State and all its organs have a fundamental interest in seeing that its laws are properly applied and the courts are the guardians of that interest. It followed, in his view, that if, in the absence of an express provision in a statute to this effect, the court concludes that it does not have this guardianship role, it is imputing an intention to the State which denies this fundamental interest. And one should not, he thought, lightly attribute such circular reasoning to the Legislature (613-14).

Rumpff JA was not therefore impressed by the 'interruption' argument which had led to Botha's conclusion. He pointed out that the government had not contested that the court had authority to summon a detainee if the very validity of the arrest and detention were in issue. In his view, there was no difference in principle between the situations where the detention order was unlawful, or no longer 'for interrogation', or if the interrogation method was unlawful (614-15).

He reasoned that a court, in order to decide on the matter before it, had to be able to summon a detainee to give evidence. Here he quoted **Wigmore:**[13]

> From the point of view of society's right to our testimony, it has to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole--from justice as an institution, and from law and order as indispensable elements of civilized life (615).

If this right were not given effect to, the quote goes on, the "vital process of justice" is obstructed.

Rumpff JA noted that the right to testimony could be

taken away by the Legislature or temporarily truncated. Section 17 was a case of temporary truncation and there was a presumption that this was effective only so far as was necessarily implied by the section. But it was, in his view, clear that the Legislature had deliberately maintained the jurisdiction of the court in section 17 to ensure that the section was lawfully applied (615-16).

He clearly sees the right to testimony as a crucial aspect of the fundamental interest in things being done according to law, which means in accordance with civilized standards. He assumes at the outset of reasoning, as we saw Gardiner did in **Rasool** (S3.1) and Centlivres in **Abduraman** (S3.2), that the State and all its officials are involved in the administration of justice, which means the pursuit of justice within the framework of the law, and that the courts are the arbiters of what that justice is.

The effect is that he confines **Rossouw** to its facts and ignores the plain fact approach which led to the decision in that case because it is legally and morally unattractive. It lacks gravitational force. I suggest that the difference between the dissents can be fairly captured by saying that Rumpff JA gave a judgment which is better along the dimension of fit because it does not entail that a recent decision of his own court is overruled.

It is important to note that Trollip AJA, while he expressed his concurrence in Botha JA's judgment, gave reasons of his own which complicate the assessment of **Schermbrucker**. For, as I shall now show, his approach is closer in

rationale to the dissenting judgments. Moreover, to compound this difficulty, Steyn CJ merely expresed his concurrence in both majority judgments.

Trollip AJA emphasized his view that the court retained full jurisdiction except to the extent mentioned in the section. It could, therefore, order the release of the detainee if "he has been unlawfully arrested or is being unlawfully detained, and it can restrain any unlawful conduct which is being committed upon him during his detention" (623). But he thought that the appeal should fail because Schermbrucker had applied for the wrong remedy.

In his view, rule 9(a) had no application in the case because it applied to witnesses who were free agents. He noted that in other jurisdictions, where the witness was in some sort of custody, the writ of **habeas corpus ad testificandum** had been developed which would call upon the custodian to produce the witness in court. However, no argument had been presented as to whether the South African courts had such a power at common law and the rule did not endow the court with this extraordinary power (625).

He reasoned further that even if the issue was correctly characterized as a conflict between section 17 and rule 9(a), section 17 had to prevail. For the section provided that its provisions would apply "notwithstanding anything to the contrary in any law contained" (625-26). Finally, he reiterated that the court would be able to summon the detainee before it if the unlawfulness of his arrest and detention were in issue, because then the very point of the

case would be the legality of the arrest. And he claimed that his decision did not frustrate the "vital process of justice". For he said that it allowed the possibility of a magistrate being ordered to take evidence from the detainee on commission, since, as we have seen, the Act provided for a mandatory weekly visit by a magistrate (627).

But on Botha's reasoning, even if such remedies were available in South African law, they would seem to be an 'interruption' of detention excluded by the interpretation of section 17 which follows from taking **Rossouw** as an authority. Thus Trollip AJA's approach seems inconsistent with the reasoned basis of **Rossouw** and of Botha's judgment. Moreover, he must have thought that the common law remedy did not conflict with section 17 in the way that rule 9(a) did.

His judgment is rather puzzling on the issue of conflict. If I am right that his interpretive approach is closer to that of the dissentients than to Botha's, he should have been disposed not to find that there was a conflict between subsection 4(a) and rule 9(a). For I have argued that the dissenting judges' view is that rule 9(a) is just a canonical expression of the court's inherent power at common law to safeguard the State's fundamental interest in having its laws properly applied. And their fundamental concern is to reconcile the statute with common law principle. Perhaps Trollip AJA was influenced by the fact that Schermbrucker had been released before the case reached the AD, so that the sole practical effect of the decision was that Mrs

Schermbrucker had to bear the costs. It followed that, as he put it, the 'vital process of justice' was not frustrated because applicants in the future would rely on either of the two remedies he considered appropriate.

5.3 **The Status of Audi Alteram Partem**

South African Defence and Aid and Another v Minister of Justice[14] (1967) is "one of the most criticized decisions in South African administrative law"[15] because of the attitude the majority took to the status of the common law presumption that there is a right to be heard. The Fund was an organization set up for the purpose of funding the defence and maintaining the families of people who had fallen foul of the security laws. The issue was whether the maxim was excluded by implication from section 2(1) of the Suppression of Communism Act 44 of 1950. In terms of the Act, the State President could, "without notice", declare an organization to be unlawful if he was "satisfied", **inter alia**, that it engaged in activities calculated to further the objects of communism. The effects of the declaration were to make it unlawful to be a part of the organization in question or to carry on its activities. The organization's assets were then confiscated to be disposed of by the Minister of Justice. Before the State President could take such action, he had to consider facts placed before him by the minister. This stage was preceded by the appointment by the minister of a fact-finding committee, whose factual report he had to consider

together with other information he might have. So there were three stages in all. The Fund claimed the right to be heard at the first stage, before the fact-finding committee.

It is important to have a sense of two AD judgments concerning the right to be heard which were relevant to the question raised in this case. Stratford ACJ in **Sachs v Minister of Justice,**[16] a 1934 AD decision, had this to say about the maxim:

> Sacred though the maxim is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has been invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the true interpretation of the Act, the implication is excluded, there is an end of the matter (38).

The appellant in the case was Solly Sachs, a prominent trade unionist and the father of the respondent in **Rossouw.** He had been issued with a notice in terms of Act 27 of 1914 (as amended by Act 19 of 1930) which prohibited him from being in a certain area. The minister was entitled to issue such a notice if he was "satisfied" that the person was "promoting feelings of hostility" between white and black people. The person was entitled, after the notice had been issued, to get the "reasons" and "information" from the minister which had been thought to warrant the notice and which could, in the opinion of the minister, be disclosed "without detriment to public policy".

Sachs had challenged the validity of the notice on the ground, **inter alia,** that the minister, before issuing the notice in order to comply with the requirements of the **audi alteram partem** rule, was obliged to hold an inquiry. Strat-

ford ACJ, after his statement as to the status of the rule, went on to hold that in this case the implication was clearly against the maxim. Relying on **Halliday** (S4.2), he held that an inquiry would "defeat the cardinal purpose of prompt and preventive action" (36-38). In addition, he held both that it was absurd to suggest that the person could advance a defence before the basis for such a defence had been given to him and that, because the basis would be given to him, the right to a fair hearing had not been entirely ignored (38-39).

The other AD decision directly in point was **R v Ngwevela,**[17] decided by Centlivres CJ in 1954. The case concerned the interpretation of the Suppression of Communism Act 44 of 1950. Ngwevela had been served with a 'banning order' which required him, **inter alia,** to cease contact with certain organizations, prohibited him from attending gatherings of other than a **bona fide** "religious, recreational or social nature", and confined him to the Cape Province. The notice was issued in terms of section 9 of the Act which enabled the minister to issue such a notice if, "in his opinion", there was "reason to believe that the achievement of any of the objects of communism would be furthered". The validity of the order was challenged on the ground that Ngwevela should have been given a fair hearing to defend himself against the charge that he was furthering the objects of communism.

Centlivres CJ decided that the notice was invalid for want of compliance with the right to a fair hearing or **audi**

alteram partem.[18] He said that Stratford's reference to "implied incorporation" should be interpreted to mean that the maxim applies "unless the statute expressly or by necessary implication indicates the contrary" (127). His own statement of the status of the maxim was that it

> should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it (131).

The attitude here is the opposite of that in **Sachs.** Centlivres CJ distinguished the case before him from **Sachs** because of the absence from the statute with which he was concerned of the right to make representations after the banning order had been issued. He held that the maxim was included by implication. He also said that the argument about preventive justice accepted in **Sachs** was inapplicable to the Suppression of Communism Act. For he thought that the delay of a few days would not matter (131-32).

The Act was subsequently amended[19] to include the right to request reasons for the banning after the order had been issued, clearly an attempt to bring the applications to have orders set aside within the scope of the decision in **Sachs.** The amendment did not affect the section to do with banning organizations, but it was a sign to a judge who favoured the historical design or contrapointer tests what the (plain fact) legislative intention was.[20]

Botha JA, in delivering the majority judgment in **South African Defence and Aid,** agreed that the declaration of the organization as unlawful prejudicially affected the rights

of the organization. The organization would, therefore, in the absence of clear indications to the contrary, have the right to be heard before being declared unlawful. He expressed his approval of the formulation of the status of the right in **Sachs** and gave **Ng wevela** a cursory mention without adverting to Centlivres's comments about the **Sachs** formulation. Indeed, he seemed to think that **Ng wevela** should be read in the light of **Sachs**, rather than vice versa (268).

His attitude to **Ngwevela** is clearly the product of his conviction that the fact that the statute deals with security matters is a contrapointer. He did not, as it happens mention **Rossouw** or **Liversidge.** But he invoked **Halliday**--the decision which we saw played a big part in the reasoning of the majority in **Liversidge** (S4.2)--in a way which provides a genealogical link with these decisions. For he cited **Halliday** and **Sachs** in support of the proposition that the purposes of the Act were

> clearly the maintenance of order and the protection of the safety of the State. These purposes are best achieved by prompt preventive action, and could be defeated by affording to an organization ... an opportunity of being heard before submitting its report to the Minister (273-74).

He went on to find a host of other contrapointers. He relied heavily on Steyn's approach in **Cassem** (S3.3), which we saw endorsed an antecedent rights test as a prerequisite to the right to be heard. As Botha JA saw it, the test proposed by Steyn was whether there was a causal relationship between the report of the board and the issue of a proclamation such as to justify the conclusion that the rights of persons were affected by the board's report. He said that if

there were a causal relationship, the maxim would be implied. If there were not, it could not be said that Parliament intended the maxim to apply (271).

He thought that it was significant that neither the minister nor the State President was limited to the facts in the committee's report. Indeed, a decision could be taken on the basis of facts not contained in the report. In addition, the committee was not required to decide anything. Thus while the committee's factual report and the consideration of the report by the minister were "essential and important steps" in the process leading to a proclamation, he did not think there was a "causal relationship" of the kind required (271).

He distinguished the cases which seemed to point the other way on the basis that the reports of the tribunals they concerned were intended to form the basis of the deciding authority's decision (272-73). There was, he said, a "marked contrast" between these cases and **South African Defence and Aid.** For the report of the committee and the State President's decision did not form part of "one single proceeding". But, even if they did, the question could arise whether the words "without notice to the organization concerned" were not intended to relate to the whole and therefore to every part of the proceeding.

Nor did he think that the fact that the committee had to be presided over by a senior magistrate pointed to the conclusion that the Fund was entitled to make representations. There was nothing in the section setting the require-

ments for the constitution of the committee which indicated an intention to incorporate the maxim. If anything, the "kind of legislation" before him seemed to indicate a "contrary intention" as did the express exclusion of the right to be heard at the only stage where the rights of an organization would be affected.[21]

Finally, Botha JA reasoned that the principles of natural justice could not be satisfied by affording an organization a hearing. The committee was not aware before it began its investigations of any prejudicial allegations of fact. And, even if such allegations were disclosed to the organization, these might not be the allegations on which the decision of the State President was based (274-75).

Botha JA's own formulation of the status of the right to be heard has deeply troubled liberal lawyers.[22] He suggested, as we saw Steyn did in **Cassem**, that there must be some indication favourable to the principle in question before it will be applied.

> The question whether Parliament has in any particular case either expressly or by clear implication excluded the incorporation of the maxim **audi alteram partem** can only arise where, upon the true construction of the enactment concerned, the incorporation of the maxim is implied, for, where it cannot be implied, there is obviously no need to exclude it. The first question to be determined must, therefore, always be whether the enactment concerned impliedly incorporates the maxim. The answer to that question must ... primarily depend upon whether the enactment is one empowering a statutory official or body to give a decision affecting the rights of another (270).

Laurence Baxter points out that if this formulation is taken literally, principles of natural justice such as the right to be heard are reduced to the status of a

> privilege, rather than a fundamental right, to be granted when Parliament has sufficient time to think about it.[23]

In other words, the right is made conditional on there not being a command or quasi-command to the contrary.

In his dissent, Williamson JA made it clear that he thought that Botha's approach is misconceived. He quoted Centlivres's formulation of the right to be heard in **Ngewevela** and said that it is a "principle which is probably inherent in the legal systems of most modern civilized communities". He also quoted Stratford's comments in **Sachs** but, he said, these remarks did not mean that, before the maxim is applicable, the court must find an express or implied incorporation of the maxim in the statute in question (276-77).

Williamson JA said that the comments in **Sachs** had to be interpreted in the light of **Ngwevela.** And Trollip AJA, who concurred in Williamson JA's dissent, pointed out that it does not follow from the fact that a decision outlawing the organization is dictated by reasons of state security that a hearing is excluded. If this were the case, he said, the decision in **Ngwevela** would have "gone the other way" (285). In his view, if the Legislature had been concerned about such factors, "it would probably have expressly excluded the right of hearing" as it had done in the section relating to the final stage of the procedure (284-85).

The dissentients' starting point is that the right to be heard is too important to have the lowly status given it by the majority. Williamson JA made this clear in the fol-

lowing comment about the status of the principle.

> If a deprivation of rights or of liberty is provided for, the enquiry commences, in my view, **from the opposite angle;** has there been expressly or by necessary implication a removal of the basic right to know that a penalty is proposed and to make representations thereanent (277)?

In other words, the principle of fairness on which the right is based is rooted in practice and it is required in order to regulate and make sense of practice. Judges should therefore start from the "opposite angle"--one that assumes that the right is in place until that assumption is shattered by express words or by necessary implication. The dissentients' starting point is thus provided by what I called in the last section the regulative assumption.

It follows, as we have seen, that the considerations which plain fact judges take to be contrapointers are given a different interpretation. Alternatively, if the considerations threaten a fundamental common law principle, the common law judges will attempt to screen them out altogether. They are taken as propointers--indications of the need to interpret in the common law context just because the statute has drastic effects. Thus Williamson JA expressed his concern about the rigidity of classifying actions into categories such as the 'quasi-judicial'. He relied heavily on **Ridge v Baldwin,**[24] a 1964 House of Lords decision, in which Lord Reid had argued that the antecedent rights test was an aberration which should be jettisoned from administrative law.

The concern which Williamson JA shared with the Law Lords was that, in the case of a "basic principle" like that

of **audi alteram partem**, an undue limitation could be placed on its scope by an antecedent rights test. The test might, that is, obscure the essential feature of the statutory provision in question: the true meaning and effect, in the surrounding circumstances, of the enabling statutory provision. The judge noted that, under the complex conditions of a modern state, there are different stages involved in the whole process of decision-making by Ministers of State and by senior administrative officials (277-78). But, in his view,

> the mere fact by itself that the procedure for the making of any such decision has been divided up or departmentalised does not give rise, in my view, to any necessary implication that a denial of such a right was intended by the Legislature (279-80).

As he saw it, the consideration by the minister of the factual report was an "essential part" of the whole composite procedure for the declaration of an organization as unlawful. The fact that different steps had to be taken by different persons or bodies did not alter the essential nature of that procedure, regarded as one for the attainment of that particular object. Because of the "essential nature of the proceedings as a whole" he thought that it was to be expected that at some stage there would be an opportunity for the "prospective victim" to put forward a case as to why it should not be liquidated. The only express provision which took away this right was the one relating to the decision by the State President. And it seemed "particularly convenient" that representations would be made during the compilation of the report rather than during the ministerial

phase (282). **Cassem**, in his view, dealt with such different circumstances that it was of no assistance. In addition, he did not think it appropriate to decide how the maxim would be satisfied. All that had to be afforded the applicants in question was a fair opportunity of attempting to show "innocence" (283).

It is worth noting that the attitude of the AD to the maxim has been rather ambivalent since the decision in **South African Defence and Aid.** In **Publications Board v Central News Agency Ltd**[25] (1970), Rumpff JA referred approvingly to the claim in the third edition of Steyn's work on statutory interpretation that Centlivres had in **Ng wevela** put the test "too high" in requiring "necessary implication" for the exclusion of the maxim.[26] Rumpff JA said that "necessary implication conveyed "a degree of inferential compulsion" that was "unwarranted". This is how he formulated the test:

> One begins with a presumption that the kind of statute referred to impliedly enacts that the **audi alteram** rule is to be observed, and, because there is a presumption of an implied enactment, the implication will stand unless the **clear intention** of Parliament negatives and excludes the implication (489).

This dictum may seem to promote the status of the maxim to somewhere in between **Sachs** and **Ngwevela.** But it is important to see that a slight promotion or demotion does not make much difference to the interpretation of security statutes. What matters with respect to them is whether the plain fact approach or the common law approach is adopted. For what the first takes as an implicit contrapointer, the second takes as an implicit propointer.

The difference which the further demotion can make is

to the interpretation of statutes which have nothing to do with security in particular or with apartheid in general. A statute may have nothing to do with these matters, but because there is also nothing in the statute which expresssly indicates that the maxim is to be implied, judges might hold that it is not.

5.4 A Matter of Practice

Forsyth notes that Botha, in 1966 and 1973, found that the right to be heard was excluded in cases on the interpretation of apartheid laws.[27] However, in cases in 1974 and 1976 in which principles of reasonableness or fairness were in issue but the dispute was between two individuals, or between an individual and a "non-state institution", Botha gave or expressed his concurrence in decisions which held that such principles were applicable.[28]

Forsyth suggests as a key to these and other decisions that there is a

> relatively strong, but unavowed, judicial policy of not allowing **audi alteram partem** to hinder the central government in the implementation and development of its policy. Only when essential government interests are not in issue is the **audi alteram partem** rule held applicable.[29]

It seems, then, that the cumulative effect of this decision together with other plain fact decisions is that by 1970, if not much earlier, the AD had established the plain fact approach as the one which judges were legally required to employ in interpreting apartheid laws. The dissents recorded in this chapter were merely a forlorn

rearguard action on the part of some AD judges.

This observation is strongly supported by the most senior judges of the time in two extra-curial speeches. The first is an angry speech by Chief Justice Steyn in 1967.[30] Although there is no explicit mention of the piece in his speech, it is clear that the 1966 Mathews and Albino critique of the judiciary is the target. Steyn said that he did not object to academic criticism of judgments, and it was not his intention to smother such criticism. But the imputation in the criticism of the AD because of its interpretation of section 17 was that the judges were guilty of something

> in the nature of a dereliction of duty, due to an inadequate concern for basic rights and liberties, in not giving it a meaning which would more effectively protect such rights and liberties.[31]

He wanted, he said, to remind critics of the "factual circumstances" in which the provision was enacted. Judges did not have to look to the statements of those involved in the political struggle to determine these circumstances: they had "been established in the course of many trials". Whatever the answers to the political issues involved, this was the

> provision which Parliament in fact adopted as a means directed towards coping with this situation. It is in this context and against this background that our Courts had to interpret this provision. The task of our Courts--I would emphasize, their only task--was to ascertain the intention of Parliament as expressed in this enactment. As is so often the case, it **was not** an easy task.[32]

The judges, Steyn said, had been blamed for not entering into the political arena, and for not taking a strong

stand on a particular side, after the law had been "duly passed",

> for not judging also of the law while, as the oath of a judge requires, we were judging, as we thought, in accordance with the law.[33]

But it would, he said,

> be an evil day for the administration of justice if our Courts should deviate from the well recognized tradition of giving politics as wide a berth as their work permits. It is one thing, and a very proper one, for a judge to point out defects in a statute or to draw attention to results, in all probability not anticipated or appreciated, which work hardship or injustice, i.e. to matters which Parliament might presumably want to rectify. It is a very different thing, and in my view a very improper one, for a judge to rush into a political storm or into the wake of it, in a strongly contested matter in which Parliament has, by way of firm deliberate policy, knowing what it was about and in the valid exercise of its legislative powers, laid down what is to be done. In such a matter, it is not our function to write an indignant codicil to the will of Parliament. If, in the eyes of some, there is any blame in avoiding such a course, I have no doubt that our judges, one and all of them, will not thereby be pressed into unwise participation, before or after the event, in a political conflict.[34]

Steyn's claim is that while judges, in interpreting statutes, may be confronted by very difficult legal questions, the answers are to be found by looking to purely factual considerations. Moreover, he suggests that the judges do not have discretion in deciding these questions--their task is to determine what the law was which Parliament had passed. In his view, the meaning of a statute is captured at the moment it is enacted and that meaning is what it in fact was intended to mean by legislators. To interpret it otherwise, to look for interpretations which would serve some political ideal, would be politically irresponsible. In sum, he expresses the ideal of fidelity to law captured in

the apolitical doctrine of judicial responsibility and which requires that law is seen, as Fuller put it, as a "one-way projection of authority".

In 1972, Ogilvie Thompson, who had succeeded Steyn as Chief Justice the year before, offered the same though more restrained rebuttal to those who had criticized the judges for adopting "constructions unfavourable to the individual".[35] His speech is noteworthy, first, for its stress on the hall-mark of the plain fact approach--the blinkered focus on the terms of the statute. Secondly, he clearly draws a distinction between the process of judicial reasoning on questions about what legislative intention is, in which moral considerations do not play a part, and reasoning on other matters, after these questions of law have been decided, in which moral considerations might play a part.

He said that the validity of the criticism of the judges

> vitally depends upon what is the true intention of the legislature as reflected in the relevant statutory provisions forming the subject of the criticized decision.[36]

He went on to distinguish between two "entirely separate aspects of the judicial process":

> In one aspect a judge must make what may perhaps conveniently be designated a value judgment. Instances which will readily be understood are, in the criminal law, the determination of the existence or otherwise of extenuating circumstances in murder cases; or, in the civil law, the determination of an appropriate sum to award as damages for defamation. .... When, however, the problem with which some judge is seised turns upon the construction of some statutory provision, it is essential for him to determine the intention of the legislature as expressed in the particular statute under consideration, a matter often--surprising to the layman though that may be--of considerable doubt and

difficulty.[37]

He said that in a system like this, and unlike the system in the United States, the judge had to interpret the law not as he

> perhaps would like it to be, or as he might consider it ought to be, but as set out in the relevant statutory provisions so interpreted.[38]

Criticism of the judges had not always accorded

> full recognition to the circumstance that, once a judge has determined what he conceives to be the intention of the legislature, he must perforce give effect to the intention so determined.[39]

By 1970 then, if not before, it seemed that the AD under the guidance of Steyn had changed the structure of the legal situation. The judges of that court had incorporated what we can call an 'official policy' into the South African legal tradition. The policy was made up of two principles. First: if a statute enables the setting up of complex machinery for implementing policies segregating the races and confers wide powers on executive officials to implement the policies, judges should be alert for the presence of a legislative intention that officials are not required to observe common law principles of reasonableness, fairness and equality in using the powers. Secondly: if a statute confers wide powers on executive officials to take action in securing the safety of the State, judges should be alert for the presence of a legislative intention that officials are not required to observe common law principles of reasonableness and fairness in using the powers. In addition, the AD had made a practice of finding that the intentions of important legislators constitute the legislative intention.

This change in the legal situation left liberal lawyers with the problem of what to advise like-minded judges. We saw (S4.5) that in 1966 Mathews and Albino had argued that judges who adopted what I have called the plain fact approach were drifting away from the legal tradition. Mathews and Albino took that tradition to be the common law one in which principles favouring individual liberty were embedded. But by 1970 it seemed that a practice had been established of judges relying on the official policy in deciding hard cases on the interpretation of apartheid laws. And this practice continued in the 1970s and 1980s.[40]

In 1971 John Dugard, one of the best known South African liberal lawyers, put forward an argument which he thought might persuade judges to give decisions resisting the official policy.[41] He suggested that judges, when interpreting statutes, frequently have to fill gaps which arise about matters upon which the Legislature cannot be said as a matter of fact to have an intention. In his view, a judicial claim that there is an intention to be discovered in such statutory interpretation is a "fiction". That is, he thought that there is no law on the matter in such cases and so judges have to fill the gap in the law in accordance with their own opinion about what the law should be. Dugard noted that judges will invoke "rules of interpretation" **en route** to a finding of what the law should be. But, adopting the language of the 'Realist' approach to jurisprudence, he argued that the rules are not used to "guide" a judge to a particular interpretation; rather they "justify" an inter-

pretation already arrived at by "judicial intuition".[42]

Dugard also claimed that the ultimate determinant of judicial decision-making is the particular judge's social and political views. His ambition was to make judges aware of the "inarticulate assumptions" predisposing them to give decisions in accordance with the official policy: executive-mindedness, an adherence to the values of the racial order, and so on. He thought that if judges were aware of such dispositions, they would be prompted to realize that they were not under a legal duty to decide in accordance with the official policy. Instead, they would see that they had a discretionary power. Dugard hoped that judges could be persuaded to exercise this power in favour of the common law principles which, in his view, promoted the "prime value of our legal tradition--the worth of the individual".[43]

In a nutshell, Dugard's advice to judges is, 'You have a discretionary power, so exercise it in the morally best way'. Much of the reasoning behind this advice is positivist in nature and the advice itself is, as we saw in **S**1.7, the same as that which Raz says positivism would offer to judges in a wicked legal system. But Dugard distanced himself from positivism.

On his list of the pernicious inarticulate assumptions operating in judicial practice was Austin's positivist "creed". As Dugard saw it, the creed is composed of, first, the view that law is the commands of the legislature, itself the "uncommanded commander", and, secondly, the insistence on the distinction between law and morality. His point is

very much the same as the one we saw Radbruch make about judges and lawyers in Nazi Germany (S1.3). For Dugard thought that positivism had played a role in creating the legal situation that existed in South Africa in 1970. The creed, he said, had been a part of the education of South African lawyers and it encouraged judges to reason mechanically and to be subservient to authority:

> to regard it as their duty to analyse and interpret the will of Parliament 'but not to reason why'.[44]

More recently, Dugard has qualified his position in response to critics who argue that he has misconstrued contemporary positivism. They point out that contemporary positivists reject the command theory of law and hold the view that judges have a discretionary power in the decision of hard cases.[45] Dugard now argues that his critique is directed at the command theory of law.[46] And he has acknowledged that his 'Realist' view is a version of contemporary positivism.[47]

In addition, we should note that Dugard and other liberal South African lawyers have been reluctant to adopt a morally charged view of law for the very reason which Fuller thought holds the positivists back: the fear that a bad positive morality would be infused into the law (S1.4).[48] Instead, they follow the view put forward by Schreiner in the same lectures in which he claimed that **salus reipublicae suprema lex** is not a "rule of interpretation" (S4.5):

> The charge that the Rule of Law has been infringed is a political charge, not a charge that a law has been contravened.[49]

So the response by liberal lawyers to the legal situ-

ation in South Africa is by and large a positivist one. But in S5.5 I shall argue that the advice to judges that they have a discretionary power is misconceived in the South African situation. In S5.6 I shall argue, with Dugard, that positivist ideas associated with the command theory of law played a role in establishing the official policy in South Africa. But I shall also argue that, given the role that the ideas played, it would not have helped at any time to advise the South African judges who were influenced by these ideas that they had a discretionary power.

5.5 **The Squeezing Out of Discretion**

Recall that Hart and Raz take on board Bentham's and Austin's insistence on the distinction between what law is (a matter of fact) and what it ought to be (a matter of moral judgment). Where they differ from their predecessors is that they locate ultimate legal authority, not in the legislature, but in the rule of recognition manifested in judicial practice. In their view, what constrains judges is the facts of practice. Judges are under a legal duty to decide cases by using tests which judges in the past have made a practice of using. If the tests determine as a matter of fact what the law is, judges are under a legal duty to apply that law in deciding a matter. The positivists also hold that because practice is often indeterminate and because there is often no fact of law on a matter, in most if not nearly all hard cases, judges will not be under a

legal duty to decide the case in any particular way. Rather the judges have to exercise a discretionary law-making power and decide what the law should be by choosing from among a range of solutions equally justified in law.

Hence a positivist would advise judges in a wicked legal system to decide hard cases in the following way. First, adopt the view that your legal duty is to apply the law that practice in fact requires you to apply. Secondly, keep in mind that because the case is a hard one you are likely to have discretion as to how it should be decided. Thirdly, exercise your discretion by adopting the morally superior or best solution of those available. In short, the positivist advice to the judges in a wicked legal system is, 'Exercise your discretionary power in the morally best way'. But I suggest that, in the context of the case study so far, there is a significant obstacle in the move from step (1)--accept that the facts of (judicial) practice determine judicial obligation--to step (2)--keep in mind that you have a discretion.

Recall that positivists hold that social facts can qualify as legal facts while 'facts' about the requirements of critical morality cannot. Raz, for example, says the following.

> A law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example).[50]

Thus facts about legislators' intentions on a matter can, for a positivist, qualify as legal facts.

For instance, in a jurisdiction where there is a strict doctrine of precedent, the judges of the highest court can establish as a matter of practice the following interpretive approach for deciding a particular class of cases. Judges are required to apply principles which tell them to search for the views and intentions of a particular group of people and to answer the legal questions raised by this class of cases as this group in fact wanted them answered. As it happens, these intentions do exist as a matter of fact and they do resolve the legal questions. It seems to follow from the assumption that judicial obligation is determined by the facts of practice that, at the point in time when such an interpretive approach can be said to be established as a matter of fact, judges are under a legal duty to decide the class of cases by using that approach.

We have seen that this situation was precisely the legal situation in South Africa. By 1970 such an interpretive approach had been established as a matter of fact. Thus given the political make-up of a legal system such as the South African one, it seems that a moral claim made by positivists on behalf of their view of law is false. Judges in South Africa would not have the room for **legal** manouevre which we saw Raz claims is given them by the notion of discretion. For even if we assume that at some earlier point in time, t_1, the judges had discretion, at some later point in time, t_2, discretion is likely to get squeezed out.

Discretion gets squeezed out at t_2, when an interpretive practice has come to be established as a matter of

fact. Hart and Raz might then say that the crucial time for judicial resistance is the earlier point in time--t_1--when judges have discretion. At t_1, that is, the judges could have ruled that officials should comply with common law principles. They would then have kept room for legal manoeuvre open. But I shall now argue both that positivist ideas tended to encourage the plain fact approach and that the way in which they encouraged the approach makes it difficult to see how plain fact judges could have accepted that they had discretion at any point in time.

5.6 **Positivism and the Plain Fact Approach**

I suggest that Dugard is correct to claim that the command theory of law played a part in the cases studied so far. Recall from S1.1 that Bentham and Austin think that the law on a matter is the law which has in fact been laid down by a sovereign authority. In their view, the common law is a source of factually determinable rules. These rules have the status of law only when the Legislature has failed to repeal them. Their legal status is by virtue of a 'quasi-command'.

I have argued in the case study that all of these ideas play a part in the plain fact approach. Plain fact judges adopted as a working assumption the view that the law on a matter should be determined by factual tests. They thought that law provided them (as Hart would put it (S1.2)) with reasons for action that are both peremptory and content-independent. In the political climate in which the judges

were operating, certain plain facts about legislators' intentions were starkly evident. They were the plain facts identified by the historical design test and the contra-pointer test.

These tests involved a blinkered focus on the terms of the statute. Plain fact judges faced with a question of statutory interpretation regarded statutes as the prime bearers of legal meaning. They gave little weight to common law principles at the initial stage of inquiry into what was intended. For them, the principles were rules of law for which past decisions stood. But the principles were relevant to the determination of the legal meaning of a statute only if the Legislature failed to indicate, explicitly or implicitly, that the principles were not relevant. In effect, the plain fact judges adopted Bentham's and Austin's notion of a quasi-command. The principles of common law were relevant to statutory interpretation only if there was no command to the contrary.

Of course, something more is needed to make such facts about intention legally compelling. The plain fact judges thought that the facts were legally compelling because their apolitical doctrine of judicial responsibility marked the facts as such. As we saw, plain fact judges held that when interpreting statutes, they should, in deference to the supreme law-giver, attribute to the statute the meaning which the statute was in fact intended to have. They also held that if there is uncertainty about what was intended, they had to resolve this uncertainty in accordance with the

same doctrine of judicial responsibility. They had to look not to what they thought the law should be, but to politically appropriate sources of fact which legitimated an attribution of actual intention to Parliament. And since it so happened that it was a matter of fact how those responsible for enacting the statute would have wanted it interpreted, the doctrine of judicial responsibility compelled them--a matter of legal duty--to decide the case in accordance with that want.

At this point we must recall from **S1.1** that Bentham puts forward a doctrine of judicial responsibility which is very much like the apolitical one. He argues that it is politically inappropriate for judges to have power over laws passed by an assembly in which the popular will has at least some influence. He holds, that is, a nascent democratic theory according to which judges, if they are not to be part of a power-stealing system, should bow to the will of the majority of elected legislators. And we have seen that this majoritarian democratic theory echoes in the criticisms made by Nationalist parliamentarians of common law judges (**SS2.5** and 3.2) and in the work of lawyers who think that the majority judgments in **Liversidge** are correct in their particular context (**S4.4**).

We saw in **S1.1** that Bentham eventually came round to the view that judges should be stripped of law-making power so that their decisions had legal force only as between the parties. But given that his recommendation has not been taken up, and given both the ideas associated with the command

theory of law and his doctrine of judicial responsibility, Dugard is right that the positivist ideas associated with the command theory of law encourage the plain fact approach.

However, Dugard fails to capture the way the ideas exert their influence. He supposes that judges use the ideas to rationalize a retreat into formalism and mechanism. But the plain fact judges were not mechanistic. They took great trouble to show why their decisions were justified. And they often acknowledged, as we have just seen Steyn and Ogilvie Thompson do, that interpretation can be difficult. As Hart points out (S1.2), when critics charge judges with formalim or mechanism, what they really mean is that the judges are deciding their cases in accordance with the wrong values.

Moreover, we have seen that contemporary positivists such as Hart and Raz will be quick to point out that plain fact judges are not positivists. Hart and Raz reject the command theory of law and, following Austin, they do NOT put forward any doctrine of judicial responsibility. In their view, the tests employed by the plain fact judges do not determine what law is. The tests come into play when there is in fact no intention that can be attributed to Parliament on a matter and are at most one way in which a judge may exercise his discretionary law-making power. In short, contemporary positivists would point out that the judges who entrenched the plain fact approach in South Africa were political conservatives and not positivists.

It might seem to follow that there is nothing in contemporary positivism requiring judges to take account of the class of social facts constituted by the intentions of wicked legislators. But there are significant traces in contemporary positivism of those ideas of their predecessors which I have argued encourage the plain fact approach.

While Hart and Raz have dropped the notion that the law that exists is contained in the commands of an uncommanded commander, they still ask judges to regard law as the actual communications across time of legal authorities.[51] It is for this reason that contemporary positivists hold that facts about peoples' actual views and intentions on moral matters can qualify as legal facts while the conclusions of correct exercises of moral judgment cannot. Law is for them a one-way projection of authority.

We should also recall that Raz holds that it is of the essence of law, its "specific virtue" as he puts it (S1.4), that it provides a framework of rules whose content is ascertainable as a matter of fact. He thinks that such law provides a certain and stable basis on which people can organize their lives. He also points out that the content of such rules might be morally repugnant. The virtue is such only in the sense that the virtue of knives is sharpness. That is, the virtue is purely instrumental. In addition, Raz has emphasized that this virtue is a corollary of the correct view of the nature of law. Law has this virtue because this is what law happens to be.

Suppose that judges think both that law is the factual

communications of legal authorities and that, as such, law has the virtue Raz supposes. We may then ask what the difference is between such judges and plain fact judges. For plain fact judges adopt Raz's view of law as a working assumption and serve the virtue which he describes by deciding hard cases by looking to publicly ascertainable facts. They try to maximize the public ascertainability of law in what they regard as the only politically responsible manner. These judges would require some persuading as to why they should not resort to the facts about legislators' intentions rather than, say, facts about the intentions of the extraparliamentary opposition in South Africa.

But all the positivists offer as a means of persuasion is the idea of discretionary power. In my view, there are three reasons why this advice would fail to persuade judges disposed to take the plain fact approach. First, it would be politically unfeasible. Positivists would tell the judges that plain facts about legislators' intentions are not legally compelling considerations. But the judges were working in a jurisdiction where plain facts about legislators' intention were thick on the ground because legislators, who were in firm control of the legislative assembly, wanted the statutes which they caused to be enacted to be implemented free of common law constraints. If the judges were to think that they had a discretionary power when facts were thick on the ground in this way, they would also have to think that plain facts about legislators' intentions were excluded as a class as candidates for legally compelling considerations.

The effect of this would be to give judges a complete discretion. If no plain facts about legislators' intentions count, then why should judges take as legally compelling even the plain fact of intention that their interpretation of the statute should be reasonably consistent with the text of the statute? The judges would regard such an invitation as one to engage in a wholesale arrogation of law-making power. As Bentham would put it, the judges would be accomplice in a power-stealing system which they would not dare to acknowledge (S1.1).

Secondly, it seems strange in the context in which the plain fact and common law judges were operating for **positivists** to advise the judges that they have a discretionary power. It would be strange for Austin because he, perhaps even more than Bentham, insists that what law is is determined by resort to facts about what a central and legally unlimited sovereign has commanded.[52] And it is strange for contemporary positivists given that they ask judges to regard law as the actual communications across time of legal authorities. Moreover, to be effective in a situation such as the South African one, the exclusion of plain facts would have to extend to the facts of what seemed in South Africa to be established judicial practice. For we saw that it seemed that the AD had incorporated the offical policy into practice. To suggest that judges exclude these facts, would seem to do more than advise even more power-stealing. It would also be at odds with the main theme of contemporary positivism. For Hart and Raz hold that the locus of legal

authority is official practice and, more particularly, that the locus of judicial obligation is judicial practice.

Thirdly, it would be especially strange to ask the judges who entrenched the official policy to exclude plain facts about legislators' intentions just because these judges do hold a doctrine of judicial responsibility that marks those very facts as legally compelling considerations. Recall that the plain fact approach is what I called a complete theory of law. It puts forward a view of what law is, a doctrine of judicial responsibility that underpins the view, and a way of resolving hard cases that accords with both the view and the doctrine.

The values which inform the plain fact approach are not, as Dugard seems to suggest, of the same kind as the repugnant values of racism or subservience to the executive. Plain fact judges do not enforce apartheid ideology but the official policy which permits officials to enforce that ideology unchecked. And they enforce that policy, not because they approve of it, but because, on their view, they must defer to a legislative intention which requires them to enforce it. The values which inform the plain fact approach are the ones upheld by the apolitical doctrine of judicial responsibility. They are bound up with a conception of deference to the will of the majority as it is captured by elected legislators. Judges serve these values when they do not make law themselves, but merely enforce the law enacted by elected legislators in accordance with the legislators' actual intentions. Hence, as the plain fact judges

see it, the values underpinning their approach are not external to the process of legal reasoning. The values inform legal reasoning from the start and come into play to resolve doubt and uncertainty when these are argued to arise.

Moreover, the doctrine, although apolitical is a political one. Those who hold it suggest that it serves democratic values to have judges deciding hard cases on the interpretation of statutes by enforcing the law that legislators intended the judges to enforce.[53] Of course, it will seem odd to claim that one is serving these values in a nation where the elected legislators represent a minority of citizens intent on keeping the majority in a rightless and servile role. But what is important is that the plain fact judges did not think that they had a choice between particular legal solutions. The significant choice facing them was one between different views of legal order and the role of judges in that order. And the plain fact view of legal order makes sense of the claim that what law is a matter of fact. It both puts that claim to work in solving legal questions and it supplies a justification in political morality for the solutions. It would certainly not be enough to tell plain fact judges that they had discretion just because there is no law on the matter, and that just because this is what law in its nature is.

In other words, the plain fact judges hold a doctrine of judicial responsibility which, in the cases I have discussed, point them to what they take to be the law on the matter. To be convinced otherwise, they would have to be

convinced that the law itself offers them a reason to exclude the plain facts and/or that their doctrine of judicial responsibility is misconceived. If the positivists are going to prevent judges who adopt the view that law is determined by social facts from looking to these particular facts about legislators' intentions, they owe such judges a doctrine of judicial responsibility which will supply them with another view of what counts as legally compelling considerations.

Notice that the common law judges did have what they regarded as a legal reason to attempt to screen out morally repugnant and practice-damaging plain facts. It is not that the common law judges disregarded repugnant plain facts about legislators' intentions because they did not like them. Rather they screened out the facts when, as they saw it, the correct view of law required them to do this. Had they ignored the plain facts merely for the reason that the facts were unpleasant, they too, as they saw it, would have been arrogating a law-making discretionary power.

But contemporary positivists are particularly hostile, as Bentham and Austin were, to the kind of doctrine of judicial responsibility which sets any store by a morally charged view of the common law. They maintain the Benthamite and Austinian theme that the common law is merely the set of content-independent rules for which past decisions as a matter of contingent practice stand. As a result, they conclude that there is no special virtue in principles of common law.

I suggest that the contemporary positivists have not

distanced themselves far enough from the command theory to escape the charge that their view of law encourages the plain fact approach. And they compound this by failing to offer a doctrine of judicial responsibility which could give judges an acceptable **legal** reason to exclude the plain facts. If a legal system like the South African one is in any way a testing ground for theories of law, the reasons for adopting the positivist theory of law cannot be moral or practical ones.

However, we must ask whether the proponents of the Common Law tradition are much better off than the positivists. Could they offer advice to judges in the South African legal situation other than Dworkin's--the judicial lie or resignation (S1.7)? In 1984, a South African lawyer sympathetic to Dworkin's account of adjudication claimed that this was the best that could be done. In a lecture which occasioned a heated debate, Raymond Wacks called on "moral" judges to resign. His reason was that judges were under a legal duty to apply a morally repugnant 'soundest' theory of law.[54] And recall that positivists think that Dworkin's account of adjudication fails because they suppose that he is committed to thinking that a judge would be under both a legal and a moral duty to apply such a soundest theory of law (S1.7). But I shall argue in the remaining part of the case study that neither the common law judges nor Dworkin can be so easily dismissed.

ENDNOTES TO CHAPTER 5

1. 1965 (1) SA 446 (N).

2. 1964 (4) SA 429 (E).

3. **R v Carson** 1926 AD 419; **R v Moiloa** 1956 (4) SA 824 (A).

4. 1965 (4) SA 606 (A).

5. Section 43.

6. Connolly (1983) 90-91.

7. Wade (1980) 20.

8. Wade (1980) 20.

9. Jacob (1970) 27. For a discussion of the inherent jurisdiction of the South African Supreme Court, which relies heavily on Jacob's article, see Taitz (1985).

10. He delivered his judgment in Afrikaans and what follows is my translation.

11. Allen (1978) 456.

12. For a discussion of the topic of the difference between the interests of the state and of government, see MacCormick (1986).

13. Third edition, 66. I have quoted only some of the extract reproduced in the judgment.

14. 1967 (1) SA 263 (A).

15. Baxter (1984) 573, and see the references cited in note 236 on that page.

16. 1934 AD 11.

17. 1954 (1) SA 123 (A).

18. Wade says of this decision that it helped to preserve the "true common law tradition" by ignoring the trend in the English courts of imposing the antecedent rights test; (1986) 458-61 and note 75 at 461.

19. Section 6(c) of Act 15 of 1954.

20. It is worth noting that the AD followed **Ngwevela** in **Saliwa v Minister of Native Affairs** 1956 (2) SA 310 (A) 1956. The court applied the same reasoning to section 5(1) of the Native Administration Act 38 of 1927 which

permitted the Governor-General to banish a "native" or "tribe" from one area to another whenever he deemed this "expedient or in the general public interest". As a result, this section was amended in order to rule out this reasoning (by sections 2 and 3 of Act 42 of 1956).

21. Steyn CJ delivered a short concurring judgment in which he distinguished certain English cases on the basis that there was no express provision in the legislation with which they dealt to the effect that the person affected had no claim to be heard by the deciding authority.

22. Dugard (1978) 341-43; Mathews (1971) 56; Baxter (1984) 572-73; Forsyth (1985) 117-18.

23. Baxter (1984) 573.

24. (1964) AC 40.

25. 1970 (3) SA 479 (A).

26. Steyn (1963) 237.

27. Forsyth (1985) chapter two. The cases are **Pretoria City Council v Modimola** 1966 (3) SA 250 (A) which arose out of an expropriation in terms of the Group Areas Act; and **Administrateur van Suidwes-Afrika v Pieters** 1973 (1) SA 850 (A) on the Native Administration Proclamation 11 of 1922 which required a person other than a "European" to obtain a permit before entering South West Africa (Namibia).

28. **Turner v Jockey Club of South Africa** 1974 (3) SA 633 (A); **Oberholzer v Padraad van Outjo** 1974 (4) SA 870 (A); **Theron en andere v Ring van Wellington van die NG Sendingskerk in Suid-Afrika** 1976 (2) SA (1) (A).

29. Forsyth (1985) 112-13 and 128.

30. Steyn (1967).

31. Steyn (1967) 105.

32. Steyn (1967) 106, emphasis in the original.

33. Steyn (1967) 106-07.

34. Steyn (1967) 107.

35. Ogilvie Thompson (1972).

36. Ogilvie Thompson (1972) 33.

37. Ogilvie Thompson (1972) 33.

38. Ogilvie Thompson (1972) 33.

39. Ogilvie Thompson (1972) 34.

40. See Appendix A.

41. Dugard (1971).

42. Dugard (1971) 183.

43. Dugard (1971) 195-200.

44. Dugard (1971) 183-87, at 187.

45. Gauntlett (1972); Forsyth (1981) and (1985).

46. Dugard (1981) 373-74.

47. Dugard (1986). I give a detailed account and critique of this debate in Dyzenhaus (1986). Andrew Altman has recently put forward a view of adjudication which is strikingly similar to Dugard's latest formulation of his position; Altman (1988).

48. Dugard, for example, has suggested that judges who think that they are required to reason in accordance with the spirit of the law will adopt the view that the spirit is that of the **Volk** or Afrikaner people; Dugard (1978) 396.

49. Schreiner (1967) 100.

50. Raz (1983) 48-49.

51. It is worth noting that Raz explains even customary law in this way; Raz (1985a) 306.

52. Postema suggests that this is the case and finds significant the fact that Hart, Raz and Austin seem to adopt Hobbes's notion of authority in practical reasoning rather than Bentham's; see Postema (1986) especially 325 ff and see Hart (1982) chapter X.

53. Notice it would not help to challenge the judges by suggesting that they adopt the approach not for the noble reason, as Steyn put it in S3.4, that it was required by "a sense of justice", but because it was the approach that best rationalized their taking a hand in implementing apartheid. For even if they adopted the approach for that expedient reason, their first line of defence when challenged would be to point to the values served by the apolitical doctrine of judicial responsibility.

54. Wacks (1984). For the debate see Dugard (1984); the pieces collected in **Lawyers for Human Rights Bulletin** (1984); and Dyzenhaus (1983).

Chapter 6

The Common Law Revival

6.1 The Judicial Assumption

The Terrorism Act 83 of 1967 went further than any previous security statute in that it allowed for indefinite detention. Senior government members had said of the Bill that it was needed to combat 'terrorist incursions' on South Africa's borders. They expressed the view that the courts were not competent to adjudicate on security matters and that such adjudication was embarrassing to judges. They therefore envisaged the Act as taking detention without trial entirely out of the reach of the courts.[1]

Die Beeld, a powerful Afrikaans newspaper, greeted the Bill by saying that "the police will now have a free hand to act without legal restraint".[2] The Deputy Minister of Police argued in Parliament that if one accepted the premise that South Africa should be safeguarded against dangerous attacks, then it was necessary that these "abnormally wide powers" be given to the police.[3] The opposition United Party somewhat reluctantly accepted this argument and the only real opposition to the Act in Parliament came from Helen Suzman, the sole parliamentary representative of the Progressive Party. She predicted that, whatever the government members' stated intentions at the time the Bill was debated, the government would not resist the temptation to use the powers it gave them against the extraparliamentary opposi-

tion.[4]

Section 6(1) of the Act provided that if an officer, of or above the rank of lieutenant-colonel, had "reason to believe" that someone was a "terrorist", "terrorism" being defined very widely, or was witholding from the police information about such terrorists or offences under the Act, he might cause the person in question to be arrested without warrant and to be detained for interrogation. The section also provided that detention was to last until the Commissioner of Police was satisfied that the detainee had replied satisfactorily to all questions or that no useful purpose was served by further detention. Section 6(4) provided that the Minister of Justice could order the release of the detainee at any time. Section 6(5) provided that:

> No court of law shall pronounce on the validity of any action taken under this section, or order the release of any detainee.

The Act seemed to have been drafted with an eye to Trollip's judgment on the 90-day law in **Schermbrucker** (S5.2). Trollip, as we saw, although he had joined Botha in rejecting an application to bring a detainee to court in order to investigate allegations of ill-treatment, had left open two avenues. He had suggested, first, that there might be a remedy at common law whereby the court could summon the detainee to give evidence about his treatment in detention. But the Terrorism Act could be interpreted as pointing even more strongly away from the common law context than the 90-day law. While the opening clause of the 90-day law was "Notwithstanding anything to the contrary in any law con-

tained", sections 4 and 5 of the Terrorism Act, though not section 6, added to this clause "or the common law contained"--as clear a contrapointer as there might be.

Secondly, Trollip had suggested that evidence might be taken on commission by a magistrate since the 90-day law required a weekly visit to the detainee by a magistrate. But section 6(7) seemed to make the magistrate's visit conditional upon official discretion. It provided that, if "circumstances so permit", a detainee would be visited in private by a magistrate at least once a fortnight. Even more significant in this regard was that section 6(6) placed an embargo on information about the detainee.

> No person, other than the Minister or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee, or shall be entitled to any official information relating to or obtained from any detainee.

In **Cooper and Others v Minister of Police**[5] (1974), Trengove J, sitting alone in the Transvaal Provincial Division, had interpreted section 6(6) as a legislative reaction to the possibility of the court ordering that evidence be taken on commission. After strongly endorsing the interpretive approach adopted in **Rossouw**, he held that the omission of the embargo in the 90 day law had left a "gap" which section 6(6) had filled. He concluded that, even if the court had the power to request a magistrate to take statements from detainees, the magistrate would not be entitled to disclose the information so obtained to the court (211-12).

In 1976, Didcott J, sitting alone in the Durban Local

Division, decided **Nxasana v Minister of Justice and Another,**[6] a case on the interpretation of section 6 under which the applicant's husband had been detained. She claimed that she had reason to believe that Nxasana had been assaulted or otherwise ill-treated by the police since his arrest and she asked the court for an order directing that he should make an affidavit as to his condition.

Didcott J said that the purpose of her application was to obtain procedural and not substantive relief. She had come to court to obtain evidence about her husband's condition and treatment so that

> if his need for the Court's protection emerges, she may seek it in due course on his behalf; and she has come to Court to arrange for the collection of such evidence from him because neither she nor any attorney may communicate with him, **and thereby get it in the ordinary way**, for as long as he remains in detention (748).

He noted that the applicant had not asked that her husband be produced in court. The decision in **Schermbrucker,** he said, would constitute an "insuperable difficulty" to such an application. Section 6 used language very similar to that used in section 17(1) of the 90-day law. It followed that he was bound by the decision that an order that a detainee be produced in court would constitute an "interruption" in detention which conflicted with the purpose of the statute (748-50).

But he held that he could appoint the Chief Magistrate of Durban as a commissioner and ask him to put to the detainee a series of specific questions or "interrogatories", whose nature could be settled with counsel (750). He said that he had this power unless the legislation deprived him

of it or stood in the way of its exercise and he reasoned that this was not the case.[7]

He began his reasoning with a clear indication that he was going to use a propointer test--one that takes statutory indications that the judicial role and rights recognized at common law are endangered as a sign of the urgent need for the judge to draw on the resources of the common law to do justice. Citing **Rossouw** and **Schermbrucker**, he commented that the Act was "draconian in its general effect".

> The object behind it is apparently to establish a setting conducive to, and a powerful inducement for, the supply of information about "terrorist" activities by persons believed to have it ... In providing for the detention for indefinite periods of those who have not been convicted of crimes, for their isolation from legal advice and from their families, and for their interrogation at the risk of self-incrimination, the Legislature has pursued its object by the enactment of measures which are undoubtedly foreign to the ordinary principles of our law ... Whether the end justifies the drastic means that have been sanctioned because they are necessary in troubled times for the security of the State, as they are apparently thought by Parliament to be, is a controversial question; and, while a court of law may not allow itself to be embroiled in the public debate which has surrounded the legislation, it can hardly pretend to be unaware of it (747).

His description of section 6 is a deliberate echo both of Ogilvie Thompson's description of the 90-day law in **Rossouw** (S4.5) and of LC Steyn's point that judges are not to get involved in political debate about the justification for statutes (S5.4). But the echo is subtly different. He manifestly conveys his disapproval of the conditions of detention prescribed by the Legislature. And, while he says that he will avoid involvement in the political debate, he suggests that he must make decisions pertinent to it.

He also cited **Rossouw** and **Schermbrucker** as authority

for the proposition that the Act did not sanction violence or ill-treatment of detainees and that, although the courts were prohibited from ordering the release of a detainee, or deciding the validity of any action taken under section 6, their jurisdiction over police officers with custody over detainees was "otherwise intact and not impaired". He said that because the maltreatment of detainees was "self-evidently" not action taken under this section, the courts had the power and "consequently the plain duty" to protect detainees against harm by appropriate relief whenever such protection was needed and sought (748-49).[8]

Hence his reaction to the fact that difficulties have been placed in the way of doing his duty is not to conclude that he cannot do it. Rather he seeks to find some other means to do justice in the reservoir of jurisdiction he assumes he has at common law. As I shall now show, he shares the common law regulative assumption which I argued underpins the dissents in **Schermbrucker.** In his view, a court must try to find ways of ensuring that the purpose for which it has jurisdiction in this type of case--facilitating the enforcment of the law which protects individuals against assault--can be fulfilled.

As Didcott J saw it, there were three such difficulties. First, the relief applied for did not fit neatly into, nor was it specifically authorized by, any of the relevant Rules of Court.[9] But he said that he did not have to decide the question whether there was a "gap" in the Rules. They were the court's "tools", "fashioned for its own use". The

court had inherent jurisdiction over its own procedure and this was sufficient justification for it to direct that such evidence should be taken in a proper case (750-51). Here he quoted with approval the "robust approach" adopted in an 1927 Cape Provincial decision on such matters:[10]

> The Rules of procedure of this Court are devised **for the purpose of administering justice and not of hampering it,** and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice (751-52).

Secondly, Didcott J had to deal with the government's contention, based on Botha's reasoning in **Schermbrucker,** that section 6(6) created an effective barrier to the order he thought appropriate. The contention was that the detainee was effectively beyond the court's jurisdiction because any 'interruption' of detention was inconsistent with the purpose of the kind of section before the court. But Didcott J pointed out that Steyn had concurred in both majority judgments in **Schermbrucker,** which, he said, "he would not have done had there been any conflict between the two". Thus he infers that the majority of the court agreed with Trollip that such sections do not bar a court from ordering that evidence be taken on commission.

In any case, Didcott J did not think there was a conflict. He said that while Botha had not "in so many words" postulated the existence of alternative remedies, his decision has not excluded such remedies because it had turned on the practical effects of the personal presence of the detainee in court. The idea that the detainee should testify was not considered in itself "obnoxious" to the section

(752).

In his view, the prohibition on access was designed to prevent even a temporary removal from detention and escape from isolation. This put the detainee beyond the court's reach, but only in the "strictly limited sense" that its ordinary power to insist upon the detainee's attendance could not effectively be exercised. If evidence were taken on commission by a magistrate, there would be no more interruption than was already contemplated by the statute in section 6(7) which provided for the fortnightly visit. The only difference would be that questions about the detainee's complaints would be amplified and on oath (752-53).

This left him with the third difficulty--the embargo on information in section 6(6) and Trengove's interpretation in **Cooper** that the section was a gap-filling measure. Didcott J reasoned that there was nothing in the provision which compelled Trengove's interpretation.

> Far from having expressed itself with the clarity and lack of ambiguity needed to convince one that it truly intended a drastic measure, the Legislature used terminology of remarkable vagueness and obscurity when it referred to "official information" (755).

It might well be, he said, that "official information" is information which is in or has passed through official hands. But it did not follow that all information was official because it had undergone that experience. The legislation could not be interpreted to have the absurd result that a magistrate was prevented from conveying information from the detainee to his wife to the effect that he had not paid his rent. 'Official information' pertained to reasons for

detention and details about 'terroristic' activities; and he doubted that the same could be said of evidence gained from a detainee about his health (755-57).

What drives his reasoning on this score is clearly the conviction he shares with the dissentients in **Schermbrucker**--the Legislature must intend that the law protecting detainees from assault be enforceable. Didcott J said that it was "most improbable" that the Legislature had seen a gap that required filling. If there was a gap, the Legislature would hardly have neglected to eliminate it from the 90-day law in which it had been discovered, and this had not been done. He reasoned further that if the Legislature had been distressed by the thought of testimony by detainees it would have resolved to stop the testimony, and this would have been done simply and directly. Finally, he found it difficult to see what mischief the Legislature could have seen in testimony by a detainee. It was "obviously essential" for such evidence to be available to the court for the "just decision" of the case and he could take for granted that the Legislature recognized the desirability of this (753-54).

He had to accept that the detainee's evidence could not be collected in such a manner as to interfere with the object of the section--effective interrogation. But this did not

> warrant the assumption that the Legislature meant to go to the extreme lengths of silencing him and denying the Court information which it required from him **in order to administer justice,** even when the circumstances of his detention could not have been affected one iota by the arrangements for his testimony, and

> when there was thus no prospect of conflict between the purposes of the legislation and the Court's exercise of its jurisdiction. Nothing less than the **Legislature's use of clear and unambiguous language, positively demonstrating such an extra-ordinary intention on its part, is needed to drive one to the conclusion that it existed.** Otherwise the contrary assumption, **as the more natural one**, must be preferred (753-54).

So Didcott J succeeds in his judgment in keeping together what Botha's judgment in **Schermbrucker** had cleaved--the fact that the judge has jurisdiction and the purposes for which he has jurisdiction, in this case getting the information necessary in order to enforce the law. Indeed, he expressly invoked Rumpff's dissent in that case in support of his own reasoning. He cited the passage from **Wigmore** which we saw Rumpff had thought so important in his dissent (S5.2). He then said the following.

> That Rumpff JA was in the minority does not rob **Wigmore**'s eloquence, or its endorsement by him, of its impact in a case like this. The majority did not disagree with or disregard what **Wigmore** had written. It differed from Rumpff JA, only to the extent of its opposite conclusion about the effect of the legislation (755).

In sum, the decision in **Schermbrucker** is a datum which Didcott J has to take into account since it is a decision of the AD which binds him. But he interprets the decision as Rumpff had in **Schermbrucker** interpreted **Rossouw.** He acknowledges that he is bound by the decision but he interprets it within a common law context. Thus he confines the decision, as he did the Terrorism Act itself, to its enactment force, and holds that its gravitational force, its moral and legal attraction, lies in Rumpff's dissent.

Moreover, he articulated fully his views as to the place of the regulative assumption. He said that

under a constitution like ours, Parliament is sovereign, and the courts can no more assume a power which it has decreed that they shall lack, or set its enactments at naught, than can anyone else. This, although a truism, is worth stressing, because it is not always understood as clearly as it should be. Our Courts are constitutionally powerless to legislate or to veto legislation. They can only interpret it, and then implement it in accordance with their interpretation of it. When there is a real doubt about the meaning of a statute, their tradition is to construe it so that it provides for the least amount of interference with the liberty of the individual that it compatible with the language used. The tradition has been observed for so long, and has permeated so many fields of our law, that it is unnecessary to cite authority for its acceptance. It is familiar to all lawyers. Its justification is the **judicial assumption**, deeply rooted in our legal heritage, that Parliament contemplated no greater infringement of personal freedom than is clearly and unmistakably apparent from the language in which it has expressed itself. Effect is then given to what is taken to have been Parliament's intention to limit the area of constraint to the minimum. **This, one emphasises, is done as as a normal part of the process of interpretation, and not because the Courts have or claim the authority to supervise statute law.** It follows, however, that effect must likewise be given to stringent enactments which are positively shown by Parliament's choice of plain words to have been meant, however offensive to conventional legal standards they may be. That too is axiomatic (747-48).

Notice the apparent tension in this statement between what I called in chapter one judicial creativity and constraint. On the one hand, Didcott J acknowledges that what he implements is a formative or creative interpretation of the statute. On the other, he asserts that the court does not exercise a law-making power--it does not legislate or "supervise" statute law.

A positivist would explain such a tension by saying that Didcott J is either exercising a discretion he had, or arrogating one he did not have. This description of the logic of his reasoning might seem to be supported by one of his concluding remarks. He said that, "at the very least", sec-

tion 6(6) lent itself as aptly to his construction as to Trengove's in **Cooper**. But his was preferable for it resulted in "less hardship to detainees and less interference with the Court's affairs" (757). I have argued in **S**5.5 that, even if we suppose with the positivists that South African judges had discretion at a certain point, it had been squeezed out by 1970. But a positivist might reply that, even if my arguments in this regard are correct, **Nxasana** could well be an exception. For, as I argued in **S**5.2, there was a conflict between the majority judgments in **Schermbrucker**. That Didcott J denies that there is such a conflict would then merely go to show that he is unwilling to admit that he is exercising a discretion that did not accord with the dominant trend of practice. But, whichever is the case, his remarks about the majority judgments in **Schermbrucker** will seem to a positivist to be what Hart describes, in a discussion of the inherent power of the courts, as a "pious fiction" used to conceal a "surprising piece of judicial law-making".[11]

This positivist description is, however, inconsistent with Didcott J's remark that his interpretation is the "more natural one". If one solution is more natural than another, it is not the case that a mere exercise of discretion between equally good legal answers is called for. Even more telling than this observation is that, as I have argued, what makes the solution more natural is that it accords with the regulative common law assumption; in Didcott J's words, the "judicial assumption deeply rooted in our

legal heritage" which is the "normal" starting point for interpretation.

As I have argued, the regulative assumption imposes a substantive coherence requirement in that the judge is required to preserve what Wade calls the integrity of the law (S5.2). The judge has jurisdiction for certain purposes, including the purpose of interpreting the law so that he can enforce fundamentally important legal principles. Since legal principles that require a judge to protect detainees from assault and torture are fundamental in this way, it is the judge's legal duty to try to find a means to enforce them. In sum, given that the assumption is that judges have jurisdiction in order to enforce the law that already exists, the solution is more natural because it coheres best with the law as it already exists.

That his solution is the more natural one is then not merely the result of the fact that the common law standards have become "conventional"--that "the tradition has been observed for so long, and has permeated so many fields of our law". It also meets the moral claims of the law embodied in the common law principles by virtue of which judges claim a jurisdiction to enforce other common law principles which protect people from assault and torture.

It follows that what creates the "real doubt" in this case is not any ambiguity 'inherent' in the statute. Doubt arises because the statute and judicial interpretations of it and similar statutes are difficult to square with the assumption the judge makes and which he assumes that the

Legislature acts on--that the judicial duty is to enforce the law.

As a common law judge, Didcott J is not bound to interpret in accordance with with a factual or historical report of legislators' intentions. Rather he must adopt the view that morally repugnant and practice-damaging interpretations are screened out until "plain words" compel him to conclude differently. He has to interpret the data available to him and in interpreting the data, try to show that they cohere with the scheme of principles of critical morality that both explains and justifies the law.

Consequently, the plain facts about legislators' intention are screened out altogether in so far as they suggest implicitly that judges do not have jurisdiction over action taken by security forces. In so far as the plain facts are explicit, for example, the embargo on information, the plain fact interpretation is outweighed in the common law context.

Notice that Didcott J did not comment on the fact that the Terrorism Act, though not section 6 specifically, was to be applied "Notwithstanding anything to the contrary in any law or in the **common law** contained". But I suggest that, for common law judges, the addition of the phrase "in the common law contained" is of no force. The parliamentary draftsman, if he thought that these words would exclude common law principles, was making the same mistake as do positivists and plain fact judges[12] when they suppose that principles of common law have to be seen as content-independent rules.

In my view, Didcott J's attitude to the common law and the judicial decisions which are its source is aptly captured by Fuller when he says that precedent offers to judges

> not simply a place of anchorage but also a shared point of embarkment towards new law. One may often accord respect to a precedent not by embracing it with a frozen logic but by drawing from its thought the elements of a new pattern of decision. The precedents become, under this view, like a common language; they preserve those systemic elements of the law without which communication between generations of lawyers, and among lawyers of the same generation, would be impossible. At the same time, while they might direct the course of change, they impose no unbreachable obstacle to it. These observations suggest that into the interpretation of precedents there may enter something like an artistic element. In his creative role the judge is, indeed, not unlike the poet who respects the inheritance of his native language in the very act of exploiting its resources for novel uses.[13]

That is, Didcott J does not view **Schermbrucker**, or any of the other decisions that seemed relevant, as a source of discrete rules. What concerns him is the comparative merits of the reasoned justifications offered by the judges in the course of deciding the cases and which of these could be said to support what he takes to be the correct conception of judicial role.[14] He is concerned, that is, to weave a pattern out of the past which will allow judges to take the law forward in as constructive a way as possible.

This description acknowledges that the judge is doing something creative. His answer to the legal question raised by the case is both novel and imaginative. A positivist might object at this point that just in acknowledging that Didcott J has to make a creative moral judgment to decide the case, one acknowledges that he is exercising a discretionary power between equally justified legal solutions.[15]

But I have started to show here how common law judges, can, because they adopt a particular view of law, fight back against an official policy which the AD had seemed, as a matter of practice, to require judges to apply in a certain class of cases. Didcott J's decision, as he sees it, both draws on and is justified by the legal resources available to him. The decision is one which, as a judge, he must as a matter of legal duty make in order to uphold the moral ideals embedded in the law. If he has to use a 'pious fiction' to achieve this, the fiction is not pious in the following **Oxford English Dictionary** sense.

> Of fraud and the like: Practised for the sake of religion or for a good object, or 'under the appearance of religion'.

For the fiction, as we saw Fuller put it (S3.1), is different from a fraud or lie in that it is not intended to conceal. If anything, the judge's careful articulation of what is at stake in the case is an attempt to draw attention to his sense that the judicial role in the legal order is under attack. The fiction is 'pious' only in the other sense which the dictionary gives:

> Faithful to the duties naturally owed ....

I suggest, therefore, that the burden is on those who might want to equate creativity, on the one hand, with discretionary power and absence of duty, on the other, to provide an argument to support that equation.

6.2 **Exorcising Liversidge**

In **S4.5** we saw that Ogilvie Thompson in **Rossouw** had declared that the plain fact approach of the majority in **Liversidge** is the appropriate one for South African judges to use when interpreting security statutes. In addition, in **S4.2** we saw that the upshot of this approach is that a provision in a statute conferring the power on an official to detain if he has 'reasonable cause to believe that the person is ...' is to be construed subjectively. That is, the plain fact of intention is taken to be that the court should not inquire into the reasonableness of the official's belief. It would seem to follow that if South African judges are to follow the approach which had been adopted by the AD in **Rossouw**, they should, when interpreting this kind of provision come to the same conclusion about its construction as the majority in **Liversidge.** The "ghost of **Liversidge**", as a Law Lord referred to the majority decision in 1980,[16] seemed to have a material presence in South African law.

In **Sigaba v Minister of Defence and Police and Another**[17] (1980) Rose Innes J, sitting alone, in the Supreme Court of the formally-independent Transkei homeland, had to decide the validity of an application for the release of a man who had been detained by the Transkei security police. In answer to an application to require the police to release him, the police had claimed that he had been arrested and detained in terms of section 47 of the Transkei Public Security Act 30 of 1977. This section was modelled in every

important respect on section 6 of the Terrorism Act. The application sought would, **inter alia**, require the police to produce Sigaba and would require them to show why he had not been released from custody and why the respondent should not pay the cost of proceedings.[18]

Rose Innes J pointed out both that in **Liversidge** the majority had held that the words 'reasonable cause to believe' conferred a "sole and absolute discretion" upon the Secretary of State and that if that decision were the law in the Transkei, judgment would have to be for the police. He also said that he had to follow the "approach" set out in **Rossouw.** But he reasoned that this approach did not require him to follow the majority in **Liversidge** (542-43).

Rose Innes J said that Ogilvie Thompson had referred to what "at first blush might appear to be competing canons of interpretation". The first canon was that a statute depriving the subject of his rights should in a case of ambiguity be restrictively interpreted in favour of liberty, so as to give the words the meaning which least interferes with the liberty of the individual. He referred to Innes's assertion in **Dadoo** that such presumptions are to be used in interpreting "the intent of the law as a whole" (S3.4).

The "apparently competing canon", Rose Innes J said, was that the interests of the individual must sometimes in times of extreme emergency, such as war or the declaration of martial law, yield to the public safety. Here he referred to the dictum in **Krohn** on which Ogilvie Thompson had relied (S4.5). But, Rose Innes J remarked, the dictum in **Krohn** re-

fers to circumstances when the State is compelled to disregard individual liberty. The courts are not to disregard individual liberty, unless Parliament enacts that they must. In his view,

> the criteria for ascertaining the intention of a statute do not differ according to the relative tranquillity or disruption of the community, but remain the same. The same rules of interpretation apply, but in grave emergency the purpose of the Legislature to subordinate private freedoms to what it considers the public need may compel it to enact restraints on the liberty of the citizen and if that is the intention clearly expressed there is no room for the presumption of liberty in giving effect to the measure (542).

So he subscribes to the general principle that judges must interpret statutes in accordance with the clearly expressed intention of the Legislature. It is a corollary of this principle that if the Legislature clearly states that the interests of the individual must yield to the public safety, the principle of liberty cannot operate as it normally would. But he also adopts the view which I have argued is integral to the common law approach.

That view is that the maxim that the interests of the individual must sometimes, in times of extreme emergency, yield to the public safety is not a legal principle. It is a mere "apparently competing canon", one which gets screened out by the regulative assumption that the judicial duty is to administer justice in accordance with the law in times of both tranquillity and disruption. In short, whether or not there is an emergency, a court should interpret statutes in accordance with the presumption of liberty unless Parliament expressly declares that common law presumptions are suspended.

This of course leaves the problem that Ogilvie Thompson and other AD judges had seemed to establish, or to attempt to establish, the "apparently competing canon" as part of South African law. But recall that in **Rossouw**, Ogilvie Thompson had said that the court

> should accord preference neither to the 'strict construction' in favour of the individual indicated in **Dadoo**'s case ... nor to the 'strained construction' in favour of the Executive referred to by Lord Atkin in **Liversidge** (S4.5).

Rose Innes J cited this dictum as authority for the view that the approach in **Liversidge** was not to be followed. The AD, he claimed, had held in "unequivocal terms" that the approach adopted in **Liversidge** is not the one to be adopted in interpreting such provisions (542-43). This bald claim may seem to be a flagrant example of judicial disingenuousness. However, it can be justified in a way which both allows a more charitable description of Rose Innes J's reasoning and is part and parcel of the common law approach.

Ogilvie Thompson's dictum can be read at several different levels. At the most abstract level, he is making the claim that judges have to interpret each statute in the appropriate context; and, as I pointed out in S4.4 such a claim is trivially true. At a less abstract level, he is claiming that the appropriate context is the one employed by the plain fact approach. Finally, at the most concrete, there is his decision that the statute, interpreted in this context, requires that the detainee not be entitled to reading and writing material. The majority judgments in **Liversidge** can be read in exactly the same way, the only differ-

ence being that the decision at the most concrete level is that 'reasonable cause to believe' confers an 'absolute discretion'.

Now I have argued that, on the common law approach, judges are bound by the enactment force of the decisions of their superior courts--what is decided on the facts. But they are not bound by the reasoned justifications for the decisions when these lack gravitational force--when the justifications are fundamentally wrong because they are mistaken as to appropriate interpretive context. I have also pointed out that the decision as to enactment force is itself morally charged: a judge will want to confine a decision to its enactment force only if he thinks that it lacks gravitational force. And the reason for thinking that the reasoned justification lacks gravitational force involves an exercise of moral judgment.

On the common law approach, the decision in **Rossouw** at the most concrete level, its enactment force, is about the right in detention to reading and writing materials and this right was not in issue in **Sigaba.** On the other hand, the decision in **Liversidge** at the most concrete level is directly relevant to **Sigaba.** But decisions of the House of Lords are at most persuasive authority for South African courts. Moreover, Rose Innes J pointed out that the "strained construction" in **Liversidge** had been clearly rejected in the United Kingdom.[19] He quoted with approval Lord Denning's comment in **Secretary of State for Education and Science v Tameside Metropolitan Brough Council**[20] (1976) on the

majority statements in **Liversidge** about "reasonable cause".

> Those statements do not apply today. Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another ... and the decision to which he comes must be one which is reasonable in this sense: that it is, or can be, supported with good reasons or at any rate is a decision which a reasonable person might reasonably reach (543).

Finally, Ogilvie Thompson's middle level view of appropriate interpretive context is, on the common law approach which Rose Innes J adopts, fundamentally wrong. It lacks gravitational force and so cannot bind a judge at any level. Rose Innes J, however, prefers to interpret the dictum as if the only claim it makes is the trivially true one that judges should interpret in the appropriate context. In this way, he makes the judgment into a datum which fits better into his view of the fundamental structure of the legal order. And, in doing so, he makes the legal situation better than Ogilvie Thompson had left it. It is better because officials are required to meet some standard of reasonableness in making a decision to detain someone and because the courts are kept off the slippery slope which leads to an abdication of their jurisdiction to enforce important legal principles.

Rose Innes J still had to contend with following argument put forward by the government. On the authority of **Schermbrucker**, the case was not a proper one for judicial intervention, because the court could not issue any order the effect of which would be to interfere in any manner with

the powers prescribed by a section such as section 47, or issue any order likely to defeat the purposes of the section.

His reply was that **Schermbrucker** was not in point because lawfulness was not in dispute in that case, while it was in the case before him. He relied here on **Nxasana** and on Botha's claim in **Schermbrucker** that it is only the court's jurisdiction to order the release of a person detained under a security section which is ousted and that the section did not go further. He said that it was

> never intended by the Legislature that anyone should be subjected to arrest and detention for the purpose of interrogation as provided for under section 47 unless there was reason to believe that he had committed an offence under the Act, or intended to do so, or was in possession of information relating to the commission or intended commission of such offence. That being so, it could not have been intended that where a person is arrested and detained without reason to believe in the state of affairs mentioned in the section and thus in conflict with the section this Court should not remedy the harm done (553).

He also pointed out that where there was an ouster clause in a statute, but the officials acted manifestly beyond the authority conferred on them by the statute, the court had not only the power but also the duty to intervene. Here he cited two 1923 AD decisions[21] "and the long line of cases applying this principle".

So much is uncontroversial in South African law. Courts will not accept that their jurisdiction is ousted to inquire into whether official action is **ultra vires.** The reason is that the judges regard it as their duty to enforce the law. That is, they must ensure that official action is, to use Fuller's phrase, congruent with declared rule. As a result,

even plain fact judges will seek at least to maintain the formal coherence or integrity of their legal system and will attempt to screen out the plain fact interpetation that they were not intended to have jurisdiction.[22] But a question remains about other plain facts, most notably the plain fact that the official was intended to have an 'absolute discretion'.

Rose Innes had discussed the doctrine of **ultra vires** in a work on judicial review of administrative action, written in 1963 before he became a judge.[23] He said there that the doctrine is an important part of the rule of law. In support, he quoted this dictum from a 1911 AD judgment, itself one of the "long line of cases":[24]

> every person resident within the jurisdiction of this Court is entitled to bring an official before the Court to justify his act of interfering with the applicant's liberty. To deny to the Court that right would be equivalent to the establishment of bureaucratic tyranny.

But he also recognized the following problem. Assume that the situation which must exist before an official is legally entitled to act can be broken down into several 'jurisdictional facts'. The Legislature may seem to delegate the decision as to whether one of the facts holds to the official and not to the court. As Rose Innes put it, if the fact

> is indefinite, depends upon official discretion, is a matter of opinion or degree, is not susceptible of objective proof or disproof, and is complex, it may be held to be a jurisdictional fact for the Minister and not for the court to decide.[25]

In such a case,

> even though it may appear to everyone that the decision

> was erroneous, such decisions could not be impugned in a court of law save on the want of good faith or a failure to consider the matter.[26]

His view in the book is the product of the rather uneasy combination in the "long line of cases" of grand affirmations of the court's role with rather timorous claims by the judges about the occasions when the court may play the role.[27] However, in his judgment in **Sigaba**, Rose Innes J, while noting that the Legislature, in enacting section 47, had expressly introduced a novel and drastic measure which ran counter to some of the "most radical principles of our common law", said that there were obvious limits on the section. The person exercising the power of arrest and detention had to be of the requisite rank, a commissioned officer of the police. He had to have "reason to believe" that the person to be arrested and detained had committed an offence, or intended doing so, or had information relating to the commission or intention to commit an offence, and the offence suspected had to be an offence under the Act. The section, he said, was so worded that the coexistence of these circumstances was a "condition precedent" to the valid and lawful exercise of the powers of arrest and detention conferred by the section. The official could arrest only "if" he had reason to believe, and the word "if" "imparted the conditional nature of the authorisation to exercise the powers conferred" (540-41).

He also pointed out that ample South African authority showed that it had never been suggested that the mere say-so or **ipse dixit** of an officer exercising the power of arrest

suffices to show that he did have reasonable cause to believe that an offence had been committed. In addition, in claims for damages at common law for wrongful arrest, the courts had always adjudicated upon the requirement for such a claim that the defendant acted without reasonable cause (543-44).

In his view, it followed that the commissioned officer had to have an "honest belief" that the person to be detained had committed an offence under the Act and, in addition,

> there must be reason for that belief, that is to say, he must have information such as would lead a reasonable man to believe that the suspect had committed an offence under the Act (544).

He said that it was manifest from these decisions that the onus was on the official who effected the arrest to show that the arrest was lawful and that the offence of which Sigaba was suspected was an offence under the Act.

He pointed out that in the case before him there was only the say-so of the security police to justify the arrest and detention, while the other evidence he had supported the conclusion that Sigaba was arrested and detained upon suspicion of fraud and not for any offence under the Act (547-48). There was no obligation on the security police to produce any evidence. But the failure to produce evidence meant in a case like this that it had not been established that the circumstances existed which the Legislature clearly required to exist before the powers conferred by the section may be exercised (549). Indeed, he said that he did not want to suggest that things were evenly balanced. He thought that

even on a preponderance of probabilities (the test the applicant would have to meet were the onus on her) the arrest and detention were unlawful.

In sum, Rose Innes J, like Didcott in **Nxasana** and the dissentients in **Schermbrucker**, keeps together what Botha's judgment in **Schermbrucker** cleaves--the jurisdiction which the courts have and the purposes for which they have that jurisdiction. It is not enough for him that the courts affirm their constitutional role by grand statements about their role in the legal order. They must also use that role for the purposes for which they have it--the protection of fundamental principles of reasonableness and fairness. The urgent demand for justice in practice leads him to the conclusion required by the regulative assumption and not clearly perceived at the time he wrote his work on judicial review.

So much is made clear in his 1984 decision, again sitting alone, this time in the Cape Provincial Division--**United Democratic Front (Western Cape Region) v Theron NO.**[28] There Rose Innes J had to interpret section 46 of the Internal Security Act 74 of 1982.

This statute had been enacted as a result of a commission into the security laws headed by a judge of appeal, Mr Justice PJ Rabie. The commission had been appointed after disquiet had been expressed in the legal profession about the lack of safeguards for detainees and others affected by offical action in terms of the security laws. Critics of the commission's report, known as the 'Rabie Report', pointed

out that while it did recommend that certain safeguards be introduced for people affected by security action, most of the changes it recommended, and which were subsequently enacted in the Internal Security Act, were hardly more than cosmetic. The critics were particularly perturbed by the approval in the report of Lord Parker's dictum in a case of the same vintage as **Halliday** , which, we should note, was also approved by Lord MacMillan in **Liversidge.**[29] In **The Zamora** (1916), Lord Parker had said:

> Those who are responsible for the national security must be the sole judges of what the national security requires.[30]

While the report and the Bill were criticized by Progressive Party members of Parliament, government spokesmen welcomed the endorsement of the dictum and made it clear that they approved the substantial exclusion of the courts from the supervision of security action.[31]

Section 46 of the Act provided that whenever a magistrate has "reason to apprehend" that the public peace would be "seriously endangered" by a gathering in his district he may prohibit the gathering for a period not exceeding 48 hours. A magistrate had issued an order prohibiting a branch of the United Democratic Front from holding a public meeting. Rose Innes J held that the magistrate's order was invalid because there was on the facts no reasonable cause to believe that the meeting would endanger public order and the magistrate had failed to advance reasons for his belief.

He pointed out that the United Democratic Front was a lawful organization formed to make known to the general pub-

lic its opposition to the government's proposed constitutional changes and that previous meetings had been conducted without incident and in a lawful manner (318-20). He also pointed out that the power conferred by the section was considerable. It encroached upon freedoms of assembly and discussion; and these freedoms were not just "philosophical suppositions", they were "rights recognized, protected and enforceable by law in this Court" (320). He thought there were clear indications that this considerable encroachment was born in mind by Parliament when it enacted the section. The Act in which the provision occurred dealt with serious offences such as subversion. The decision to prohibit the meeting had to be publicized, its duration was limited to 48 hours, and public safety had to be "seriously endangered". It was not, therefore, envisaged that the power to prohibit could be exercised merely because a meeting would be "somewhat boisterous" with "overenthusiastic" participation (320-22).

In sum, he does not conclude, as a plain fact judge would, that since some safeguards had been provided, others might not have been intended, nor that because of the grave import of the Act and the need for swift preventive action the say-so of the magistrate decided the issue. Instead, he uses a propointer test and reasons, that in view of the grave import, evidenced by the safeguards, Parliament must have intended to protect the right of lawful gathering so far as the right is consistent with the maintenance of public peace and of law and order. Notice that these standards

of reasonableness are far removed from those of the Nationalist government, which banned the United Democratic Front in 1988 (S2.4). The standards are, in Wigmore's words, much more those of the "community as a whole" (S5.2).

In three decisions subsequent to **Sigaba**, judges in interpreting similar statutory provisions declined to follow Rose Innes's decision because, in their view, the legislative intention was clearly to put the decision as to detention into the absolute discretion of the official.[32] We might, therefore, want to ask once more whether a judge was not, perhaps laudably, arrogating a power to make law. But I shall argue in S6.4 that the cases discussed in S6.3 below indicate quite clearly why the answer is 'No'.

6.3 **Bail, Security and Rights**

In **S v Ramgobin**[33] (1985) a full bench of the Natal Supreme Court had to interpret section 30(1) of the Internal Security Act. This provision stated:

> Whenever any person has been arrested on a charge of having committed any offence referred to in Schedule 3, the Attorney-General may, if he considers it necessary in the interest of the security of the State or the maintenance of law and order, issue an order that such person shall not be released on bail or on warning ....

Section 30(2)(a) reads:

> Notwithstanding the provisions of any law, but subject to the provisions of subsec(3), no persons shall be released on bail, or on warning, contrary to the provisions of an order under subsec(1).

(Subsection (3) merely gives the Attorney-General the right or power to withdraw any order made by him "at any time be-

fore its expiration".)

The accused had been arrested on warrants describing the offence for which they were arrested as "treason, alternatively contravening the Internal Security Act". A magistrate had refused bail to the accused when they appeared before him on the basis of an order from the Attorney-General, who stated that the accused had been arrested "on a charge of having committed an offence" and that he considered it necessary in the "interest of the security of the State or the maintenance of law and order" that each accused should not be released on bail or warning. The accused appealed against that decision.

Friedman J, began with this statement of his view on bail:

> Traditionally in our system of jurisprudence applications for bail are determined by courts of law. By balancing the need to preserve the liberty of the individual who is presumed to be innocent until proven guilty, on the one hand, and the interests of the due administration of justice, on the other hand, the courts will decide whether or not a person who is in custody awaiting trial, should or should not be released pending that trial. Where an application for bail is opposed by the prosecuting authority ..., the court will consider the grounds upon which such opposition is based and give its decision accordingly--to refuse bail, or to grant bail unconditionally or, if circumstances warrant it, subject to whatever conditions it may consider just to cater for the legitimate fears of the prosecuting authority. **It is right and proper that the courts should exercise this power.** It is only through the courts exercising their powers, fearlessly and impartially, that a proper balance can be achieved between the interest of the individual's liberty and the interest of the State in bringing alleged wrongdoers to justice. And the courts in this country do so exercise their powers entirely free from any direct or indirect pressure or influence from the State, the Legislature, or the Executive branch of Government. So basic is all this, that the courts will, **in so far as they are legally able to do so,** resist any attempts to lessen or minimise their powers and role in this regard

(588).

He found that the sections he had to consider made serious inroads into the traditional role of the courts. He said that the reason why the Legislature should have found it necessary to place in the hands of the Attorney-General a power which ought properly to repose in the courts was not clear. Notice that in one sense the reason is perfectly clear. The government's intention in causing the statute to be enacted is, as matter of plain fact, a desire to remove the court's traditional power. But Friedman J regards this plain fact about legislators' intention as one that he should attempt to screen out altogether. He said that the courts had in the past not granted bail when it appeared to them that to do so might constitute a threat to security or to law and order. It was for him a "complete anathema" that the Attorney-General should be a judge in his own cause. The Attorney-General was not an independent officer and, unlike the courts, he did not exercise his power free of executive control (588-89).

But, the judge said, although he did not "like" the provisions, his likes were irrelevant because Parliament was supreme. It could by simple majority pass whatever law it desires and the Courts could not gainsay its power to do so. What was relevant, however, was that,

> because of the inroads which s30 makes into the liberty of the individual and because of the limitations it imposes upon the courts, its provisions will be strictly interpreted in such a way as to limit its impact on those interferences **as much as its language may reasonably permit** (589-90).

The judge found that the charge mentioned in the sec-

tion had to exist before the Attorney-General could validly exercise his power. Whether the charge existed was an "objective jurisdictional fact"--one whose determination fell within the court's jurisdiction. Further, the appeal against the order had to succeed since in the case before him there was no evidence that, on his definition, there had been a decision of the type to satisfy the requirements of "arrested on a charge". For it had not been proved that there had been, prior to or at the time of arrest, a decision by the appropriate authority to "charge" the person with the offence for which he had been arrested. To the extent that the Attorney-General sought to invoke the section which ousted the court's jurisdiction, he had to establish the existence of this objective jurisdictional fact to the satisfaction of the court. And he could not discharge this **onus** merely by handing into the court the order made by him. He had to show that there had been a decision at the time of the arrests to charge the accused with treason.

Friedman J noted that the failure to prove the existence of the jurisdictional fact did not show that the accused had to be released on bail. The matter would become one for the decision of the court and the Attorney-General could oppose it in the usual manner. He added that even if the objective fact were in existence, the order could be the subject of a review proceeding in the Supreme Court, if the decision to charge was made in relation to allegations which were not reasonably capable of constituting the offence with which the appellants were charged (591-94).

Friedman J went on to consider another issue because it might arise when the question of bail was raised again in the court **a quo**. The issue arose out of the heads of argument, filed on behalf of the Attorney-General, where it was stated that:

> The true question and the one the Attorney-General asked himself was whether it was in the interest of the security of the State or the maintenance of law and order not to have the accused released from custody. No other question was relevant (595).

In Friedman J's opinion, the issue was whether the Attorney-General had exceeded his jurisdiction by asking himself the wrong question. The judge held that the true question is whether it is in the interest of the security of the State or the maintenance of law and order that the Attorney-General rather than the court should order that the appellants not be released on bail or warning. One had, he thought, to distinguish between two different situations. In one, the Attorney-General would argue in the ordinary manner in court that the accused should not be released on bail because this would, say, endanger the security of the State. Here the court would make the final decision. In the other situation, the "very special" one for which the section provided, the Attorney-General had to ask whether the security of the State or the maintenance of law and order would be threatened by the debate of the matter in court and whether, therefore, he was obliged to go to the "extreme length" of himself issuing an order which would take the matter out of the court's hands.

Friedman J concluded that, in principle, an order in

terms of section 30 could be reviewed and set aside because the question had not been properly confronted by the Attorney-General. Moreover, the Attorney-General was obliged to consider the question with reference to each person individually and separately, for the possibility of differentiation had to be borne in mind (595-96).

Friedman J's assumption is that it is constitutionally required that the courts decide all bail matters. However, a legislative provision like section 30 does affect the courts' traditional power in respect of bail matters, since it is clear that, in certain circumstances, the Attorney-General and not the courts will make the decision about bail. But, on the assumption, these circumstances would have at the least to be exceptional. They would have to be such that to entrust a court with its traditional role on a particular bail matter would jeopardize the security of the State or the maintenance of law and order, even when the bail matter could be argued **in camera**. (Friedman J (at 589) adverted to the possibility of **in camera** proceedings). And any judge would find it difficult to accept that he and counsel, as officers of the court, could not be trusted to hear argument on this matter.

Hence, in the normal course of events, a court must want to inquire into the question whether the Attorney-General has properly considered the true question, since a normal course of events could not form the basis for a proper decision that he, and not the court, should make the decision about bail. The argument about who should decide

the question of bail would be different from the argument about whether the accused should have bail. It would be limited to issues to do with security, law and order, and the trustworthiness of the court. The argument about whether the accused should have bail, on the other hand, would deal with the issues of security and law and order in regard to the traditional questions in bail matters: whether the accused are likely to abscond, interfere with potential witnesses and so on.

As Friedman J sees it then, the courts still enjoy considerable jurisdiction over bail matters even when bail has been refused in terms of section 30. Though notice that the courts would not enjoy the same jurisdiction over bail matters that they would without the section. For there will in principle be occasions when a court would grant bail were it not for the section, but defers to the Attorney-General's reasons for him making the decision about bail rather than the court; and he decides to refuse bail.

There is an important difference between the reasoning in this judgment and that in **Sigaba.** A judge considering the lawfulness of a detention does not consider it to be his constitutional role to decide whether the person should be detained. Common law judges do not deny that the security police should take decisions about arrest and detention. The jurisdiction they assert over detention is over the lawfulness of security police action by virtue of the statutes that confer the power to arrest and detain suspects. However, common law judges do think that they should make de-

cisions about bail. As a result, the structure of reasonableness imposed on detentions will give a great deal more scope to the official than is allowed in the bail situation, where there is only scope in principle. Thus the common law judges are not committed to thinking that it is their constitutional duty to be a final court of appeal for all who are justifiably aggrieved by executive action. As the judges see it, their constitutional duty is to enforce the law and it is a fundamental legal principle that the courts should make decisions about bail. Their decision as to whether official action is legal will depend on their view of what legal principles are at stake and not on whether they think that the action was merely unwarranted.

This attitude of common law judges to the issue of bail is underscored in **Buthelezi and Others v Attorney-General, Natal,**[34] a 1986 full bench decision on section 30 in the Durban Local Division. It was argued that an order in terms of section 30 was invalid because the Attorney General had failed to comply with the requirements of **audi alteram partem.**

Kumleben J, giving the judgment of the court, pointed out that the section constituted a serious inroad on the traditional role of the courts, on the rights of the individual and on the liberty of the subject. He said that when these are the consequences of an enactment, the right to be heard is taken to have been impliedly incorporated. He cited in support **Ngwevela** and **Publications Control Board** but not **South African Defence and Aid** (SS5.3 and 5.4) (379). He said

that in considering the question of the right to be heard, it was

> proper, indeed necessary, to consider s30 in its **contextual** setting. The purpose of the Act was not only to consolidate earlier statutes dealing with security matters. It had as its main purpose the introduction of more safeguards for those affected by such legislation, as recommended in the Report of Commission of Enquiry into Security Legislation, 1982 (381).

He pointed out that in some sections of the Act there was express provision for this right.

> Thus it was that the Legislature was conscious of this rule, and gave explicit expression to it in certain sections (381).

He noted that it could be argued that because the the rule was expressly incorporated here, it was excluded elsewhere. But, he said,

> the counter-argument appeared at least as valid, if not more so, viz that in those sections where no explicit provisions are inserted giving expression to the rule, there is no compelling reason for concluding that it has been excluded. One may cogently argue that the absence of express provisions in a section affirms that those implied have not been replaced (381).

The striking feature of this judgment is the judge's reliance on the work of a preparatory commission, in seeming contravention of the general rule against consulting preparatory materials. But, as Etienne Mureinik has recently pointed out, the argument Kumleben J employs is not one designed to show what the specific legislative intent was in enacting the Internal Security Act. It is designed to show that the legislative intentions which play a constitutive role in constructing the interpretive context--the "contextual setting"--are first and foremost made up of those intentions which express the constitutional responsibilities

of the Legislature.[35] I shall now argue that an appreciation of this point shows why a positivist explanation of this kind of case as the arrogation of a law-making power is unhelpful.

6.4 Disingenuousness and Democracy

As we have seen, the common law judges see themselves as occupying a constitutional role which is their duty to try to safeguard against incursions. This claim, of course, attracts the charge of judicial disingenuousness. If the courts are resisting a process in which not only legislators but the judges of the AD are complicit, can it be denied that they are using pious though perhaps laudable fictions to disguise their arrogation of a law-making power?

It may seem, that is, that the only tactic available to common law judges in dealing with morally uninhibited legislators is to misread what was plainly intended and to cover up that misreading with the rhetoric of the common law approach. It would follow that whether or not the rhetoric of the approach should be adopted will depend entirely on an assessment of the utility of judges using the approach to conceal what they are doing as against making plain what they are doing. It would also seem that there must come a point when this misreading becomes so flagrant as to be impractical. Most importantly, it would follow that Dworkin's view of law as morally charged is wrong.

Such problems are evident in the work of HWR Wade. Wade

is preoccupied with the problem of explaining how judges can stand in the way of a Parliament under the control of the executive.[36] He thus provides perhaps the most sustained attempt since Dicey to show why judges, in upholding the rule of law, occupy a role as democratic bulwark between citizen and executive. Wade suggests that the common law principles on which inherent jurisdiction are founded are so important in this regard that judges are under a legal duty to avoid ouster clauses. His reason is the familiar one--

> if a ministry or tribunal can be made a law unto itself, it is made a potential dictator; and for this there can be no place in a constitution founded on the rule of law.[37]

But Wade, as we saw in S5.2, also assumes that in fulfilling this duty the courts are disregarding what Parliament in fact intended. They are, as he puts it, "disobeying" Parliament. Indeed, he seems to suggest that the judges, in doing so, arrogate a discretionary power. For he says that the judges are engaging in interpretation which is "artificial", "stretched", and so on.[38] His argument would then seem to chime with the claim put forward by Schreiner in his **Hamlyn Lectures** that the charge that the rule of law has been infringed is a political and not a legal one (S5.4). That is, judges in enforcing the rule of law--on this conception of the rule of law--are adjudicating in accordance with a political ideal which has a firm foothold in the common law. But the judicial decision to adjudicate in accordance with that ideal involves an arrogation of discretionary power which in effect resists the legislative intention as it exists in fact.

However, Wade also wants to maintain that judges are working within the limits of the law. He claims that ouster clauses are so fundamentally objectionable that Parliament cannot "really intend" them.[39] It follows that judges in avoiding the clauses are merely enforcing the law that there is. Moreover, Wade says that the rules of law on which judicial intervention is based are

> objective and non-political, expressing indeed a particular judicial attitude but one that can be applied impartially to any kind of legislation irrespective of its political content. Without these rules all kinds of abuses would be possible and the rule of law would be replaced by the rule of arbitrary power. Their existence is therefore essential to the rule of law, and they themselves are principles of law, not politics.[40]

Wade seems to be caught in the same "irreducible contradiction" as Dicey and the Common Law theorists (S1.1). On the one hand, he claims that the courts are the effective guardians of liberty. On the other, he acknowledges that Parliament, which is by and large under the control of government, has supreme power.

Moreover, it is difficult to see how Wade can stop short at the admission that there is as a matter of fact a legislative intention in place that the courts not have jurisdiction to inquire into legality. For, given that admission, a judge, in addition to having to disobey that intention, would also have to disobey the intention, evident as a matter of plain fact, to put the matter in the subjective opinion of the official. In addition, for a judge in South Africa there is the fact that the AD advocates the plain fact approach which regards such plain facts, save for ouster clauses, not only as legitimate considerations for

the basis of judicial decisions, but as legally compelling considerations.

I suggest that the common law judges, responding to the demands of practice, give us part of the solution to the irreducible contradiction. The basis for this part solution was conveniently set out by judge Milne, at that time Judge President of Natal, in a speech to the **South African Lawyers for Human Rights** in 1984.[41] His concern was to portray what he called the "judicial function" as it was seen by those who have to

> carry out in practice what the many theorists on the matter propose.[42]

He pointed out that those who drew up the Universal Declaration of Human Rights drew their "definitions and principles" from legal systems where the rights had been established "often after years of painful struggle". He also noted that South Africa had inherited a political system from the British which contained all the

> checks and balances of a fully democratic system, with the vital difference that it took political account of the existence only of one group of people in the country.[43]

But this did not mean, he said, that the checks and balances were invalid. Judges could not take over the law-making process, but they were only indirectly bound by the will of the majority.

> They are appointed, not elected, and within limits answerable to no-one for their decisions, except to a higher Court, where one exists.[44]

Their task was to interpret the law and, in interpreting it, they had what he called a "shaping power". They interpreted

the laws bound by "what is called the intention of the legislature". He said that it was

> obvious that judges must bring certain presumptions to bear ... in interpreting the legislature's intention. They look at precedent and what can only be called the general inherited spirit of our laws. It is here that I find the Universal Declaration particularly interesting reading. A great many of the fundamental presumptions that guide our interpretation of what the legislature 'intended' are contained in the Declaration. I do **not**, of course, say that the legislature has embodied these principles in our laws. But I do wish to illustrate ... how they are in fact often found in the interpretation of laws in our courts--although in some of the cases I am going to quote, the lower courts stretched their interpretation of what the legislature intended beyond what the Appellate Division allowed to be valid.[45]

When Milne says that he is not bound by the will of the majority, he clearly means the will of the majority of whites as represented by the political party with the majority of members of Parliament. Judges are, he thinks, not under a legal duty to interpret the law in accordance with the way in which the majority of legislators want or would want it interpreted. For judges are not exclusively answerable to this will, but to a system of democratic government in which they occupy an important role as a check and balance on that will.

That judges have this role means that they are not answerable to anyone, to any particular person. They are bound by something which has come to be called the intention of Parliament. And, if possible, that intention should not be interpreted to be a one-way projection of authority--a mere communication of a group of legislators. Rather the judge should try to show that the legislative intention is one which can be attributed to an institution in the process of

common law interpretation, when that institution is seen constructively--as part of a democratic system of government. If judges are to see themselves as part of a democratic system, they must try to interpret statutes--the concrete expressions of Parliament's intention--as if the intention were to respect the various fundamental rights which are associated with democratic government. Law should, as far as possible, be seen, as Fuller puts it, as the "product of an interplay of purposive orientations between citizens and government" (S1.4).

Hence Milne is pointing out that a judge's test for legality and constitutionality is not something apart from his theory of Parliament. The test includes his theory of Parliament. If that theory includes the assumption, say, that the courts, and only the courts, should decide bail matters, then the courts will express surprise at a legislative fact such as a statute containing a provision purporting to oust the court's jurisdiction over bail. And they will still try to account for that fact in terms of their theory.[46]

The only way for the court to account for such a statute is to try make its provisions as far as possible subject to the scrutiny of the court. Put another way: if it is constitutionally required that courts decide bail matters, and if a statute sets out certain circumstances which seem to put the judicial role at risk, then it should be for the court to decide whether the defined circumstances exist. For, given the ideals of fairness, reasonableness and

equality which together constitute the common law ideal of justice in the law, the theory a judge should have of Parliament will make him, to say the least, reluctant to assign to Parliament an intention like the one to oust the jurisdiction of the courts in bail matters. The judge must attempt to square the language of the statute, from the start, with the intention to retain the jurisdiction of the courts.

The contradiction in which Wade is caught is the result of the conflation of legislators' intention with the intention of the Legislature. It is compounded by a positivist influence which led Dicey to try to construct a theory of legal limitations on legislative power by conjoining Blackstone and Austin.[47] For Wade supposes both that plain facts which are fundamentally practice-damaging pass a threshold test for fit and that there is something wrong with advocating a morally charged view of law.

The charge of judicial disingenuousness had, I suggest, a worthy origin. As we saw in S1.1, Bentham wants a theory of law that will exclude the possibility of a reactionary and entrenched elite standing in the way of legal reform. He does not want judges interfering with the statutes passed by an assembly in which the popular will has some influence. Later in his life, Bentham became one of the leading proponents of democratic government. As Hart points out, Bentham argued that only democratic assemblies could stand in the way of the "gangs of potential criminals" that he took governments to be.[48] But Bentham never saw that his attack on

the view of law offered by the Common Law theorists, mounted at a time when he was doubtful about the virtues of democracy, damaged a conception of the rule of law which could be enlisted in the cause of resisting such gangs.

My claim is not that the Common Law theorists were nascent democrats, only that their view of law and of legal order is bound up with an allegiance to the fundamental importance of certain legal ideals that were integrated into a democratic political programme which went beyond majoritarianism. The common law judges' conception of the law that there is incorporates these ideals but not as rules. The ideals are constitutive of the interpretive context in which judges must, as matter of legal duty, attempt to interpret particular laws. In the kinds of cases I have explored, the law on a matter is the law that can be made to approximate best to these ideals. Such common law ideals are not, as TRS Allan puts it,

> properly viewed as a curb on parliamentary intention, but as an integral part of the process of ascertaining that intention.[49]

In short, the judicial obligation is to try to interpret the intention of Parliament as if it is always to respect the ideals because Parliament should be seen as a body that in its nature respects them.

Thus the common law judges are not acting in bad faith when they engage in this constructive interpretation. A charge that they are misses the question which they ask themselves: 'How can I make this particular statute into the best possible law, given its text and the other legally

relevant data'. The legal obligation they seek to acquit is one which meets the common law ideals. And to say that they are acting in bad faith is to say that these ideals carry no weight.

In my view, this picture of law does much to defeat a charge that common law judges are involved in power-stealing. Indeed, the charge seems absurd once one appreciates that the judges seek to carry out their duty in accordance with an ideal of fidelity to law which requires them to be faithful both to the text of the statutes and to common law principles. Jowell and Lester suggest that the "search for principle" involved in serving this ideal will, because it is "based upon accepted standards of justice, fairness and other dimensions of morality" steer the courts "away from policy or personal preference".[50]

Of course, it can become very difficult or even impossible to make the text of the statute cohere with these ideals. And, like plain fact judges, common law judges regard it as their legal duty to make sense of the statute. Uinhibited legislators will find statutory forms that make their wicked intentions plain and there must be a limit to the extent to which common law judges can fight back using what they take to be legal resources. Indeed, I have suggested throughout that there is this limit by couching the descriptions of common law reasoning in the language of endeavour and attempt. Wicked legislators can prevent a judge from attributing a constructive intention to Parliament and thus explode his democratic theory about the place

of that body in the legal order. But I shall argue that, while the cases discussed in the next and final chapter show that a judge's democratic theory would be exploded in this way, an appreciation of the implications of the explosion both supports Dworkin's theory of adjudication and supplies the rest of the solution to the irreducible contradiction.

ENDNOTES TO CHAPTER 6

1. 1967 House of Assembly Debates, cols 7023-29.

2. Quoted by Helen Suzman, 1967 House of Assembly Debates, col 7042.

3. 1967 House of Assembly Debates, 7096-97.

4. 1967 House of Assembly Debates, cols 7040-47 and 7103-06.

5. Reported three years later, 1977 (2) SA 209 (T). Cf **S v Moumbaris**--1973 (3) SA 109 (T).

6. 1976 (3) SA 745 (D). In 1985, a full bench of the Natal Supreme Court resolved the conflict between this decision and **Cooper** in favour of **Nxasana--Mkhize v Minister of Law and Order and Another** 1985 (4) SA 147 (N). Cf Didcott J's judgment in 1983 in **In re Duma** 1983 (4) SA 469 (N), a full bench decision on the interpretation of the Bantu (Urban Areas) Consolidation Act 25 of 1945.

7. However, he found that the facts in this case did not warrant the order. His reasons for this finding are presented at 757-61. Briefly, he found that the applicant's evidence consisted of certain damage to her husband's clothing which had been returned to her for mending and unsubstantiated rumours that he had been severely beaten. Against this was the evidence of police officers, four magistrates who had visited her husband, and the Chief District Surgeon of Durban. Judges might today be more ready to doubt the worth of such evidence in the light of the disturbing revelations in the past ten years about the subservience of District Surgeons and magistrates to the will of the security police. See Foster (1987) and for an account of a magistrate's visit to a detainee in 90-day detention, see Dingake (1987).

8. Citing Botha at 618 and Trollip at 623 in **Schermbrucker.**

9. Some of the rules dealt only with the taking of evidence on commission for use in actions and did not mention applications (rules 38(3) and (5)) while the other relevant rule, rule 6(5)(g), stated only that:

> Where an application cannot properly be decided on affidavit, the Court may .... make such order as to it seems meet with a view to ensuring a just and expeditious decision.

10. **Ncoweni v Bezuidenhout** 1927 CPD 130 at 130.

11. Hart (1961) 150.

12. In **Nkondo v Minister of Law and Order** 1985 (2) SA 720 (W), Nestadt J held that the phrase "in the common law contained" in section 28(1) of the Internal Security Act excluded the right to a fair hearing; that is, as he put it, because the "common law would embrace the **audi alteram partem** rule" (725).

13. Fuller (1968) 96.

14. See Perry (1987) 250, arguing for what he takes to be the Dworkinian view that the common law is

> never more than a weighted but nonetheless provisional approximation to those requirements of morality the determination and application of which constitute the ultimate obligation of the common law judge.

15. I take Raz to be making just this point AGAINST Dworkin in Raz (1986) 1115-18.

16. **Inland Revenue Commissioner v and Another v Rossminster Ltd and Others** (1980) AC 952 at 1025.

17. 1980 (3) SA 535 (TkSC).

18. Sigaba had in fact been released from custody on the day that notice of application was lodged. The case thus concerned the question of on whom the burden of costs should lie, a question which depended on the issue whether Sigaba's wife was entitled to the order sought.

19. He referred at this point to **Nakkuda Ali v Jayaratne** (1951) AC 66 and **Ridge v Baldwin** (1964) AC 40.

20. (1977) AC 1014 at 1025.

21. **Union Government v Fakir** 1923 AD 466; **Narainsamy v Principal Immigration Officer** 1923 AD 673.

22. For example, none of the judges who gave the plain fact decisions discussed in S7.2 accepted an argument that their jurisdiction was altogether ousted. I suggest that plain fact judges take the presence of ouster clauses as a contrapointer which indicates that the legislative intention is probably that their substantive jurisdiction is ousted. That is, ouster clauses increase a judicial alertness on the part of plain fact judges for other contrapointers.

23. Rose Innes (1963) 89 ff.

24. Extracted from the more extensive quotation at 91 of Rose Innes (1963), from **Chotabhai v Union Government and Registrar of Asiatics** 1911 AD 13 at 30.

25. Rose Innes (1963) 113-14.

26. Rose-Innes (1963) 112-13.

27. See for example Innes CJ in **Union Government v Fakir** 1923 AD 466, at 469-70.

28. 1984 (1) SA 315 (C). His decision was upset on appeal but only on the ground that the magistrate had not in fact been afforded a proper opportunity to place his case before the court: see **Theron NO v United Democratic Front and Others** 1984 (2) SA 532 (C).

29. At 253.

30. (1916) 2 AC 77 at 107, approved in the Rabie Report RP 90/1981 at paras 11,3.1.23-11.3.1.26; cf 11.4.2.9 and 8.7.3.4-8.7.3.7. For a discussion of the report and the Act, see Dugard (1982).

31. The Minister of Law and Order, Louise le Grange, expressed his satisfaction that

> a judicial commission had established the principle beyond all doubt that the people responsible for national security "must be the sole judges of what the national security requires", as was stated in the English decision in **The Zamora** case (1982 House of Assembly Debates, col 1058).

32. **Mnyani and Others v Minister of Justice and Another** 1980 (4) SA 528 (TkSC), **Mbane v Minister of Police and Others** 1982 (1) SA 223 (TkSC), **Matroos v Coetzee NO** 1985 (3) SA 474 (SECAD).

33. 1985 (3) SA 587 (N). Booysen and Galgut JJ concurred in Friedman J's reasoning on the interpretation of "on a charge", but reserved their opinion as to his argument about the question which the Attorney-General had to ask himself.

34. 1986 (1) 361 (D).

35. Mureinik (1988) 209-09. Mureinik's argument in this essay is that the common law approach relies on the same conceptual tools that play a central role in Dworkin's theory of adjudication.

36. See, especially, Wade (1986).

37. Wade (1969) 200, commenting on **Anisminic Ltd v Foreign Compensation Commission** (1969) 2 AC 147 (HL).

38. For example, Wade (1986) at 40-43. See Galligan (1982) for a discussion of these locutions in Wade.

39. Wade (1986) 64-65.

40. Wade (1986) 23.

41. Milne (1984). For relevant discussions in the South African context, see Mureinik (1985) and (1987) and Dyzenhaus (1986).

42. Milne (1984) 47.

43. Milne (1984) 46-47.

44. Milne (1984) 48.

45. Milne (1984) 48, emphasis in original. Of the cases discussed in this thesis, Milne cited the decision of the court **a quo** in **Lockhat** (**S**3.5) and **Nxasana** (**S**6.1).

46. It is worth noting that Milne JP was responsible for a decision pursuant to the one discussed in this section--**S v Ramgobin and Others** 1985 (4) SA 130 (N)--in which he strongly expressed his approval of Friedman's discussion of the court's constitutional role in bail matters. (The accused had been served with various indictments to appear in the Supreme Court and they elected, as was their right, to proceed there in their application for bail).

47. Dicey (1987).

48. Hart (1983) 185.

49. Allen (1985) 139.

50. Jowell (1987) 381.

Chapter 7

The Integrity of a Legal System

7.1 The Common Law Approach and the State of Emergency

In S2.5 we saw that since June of 1985 South Africans have lived more or less continuously under a state of emergency. The cases discussed in this section all concern the interpretation of the Public Safety Act and regulations promulgated by virtue of it. Section 2(1) reads,

> If in the opinion of the Governor-General it at any time appears that--
> (a) any action or threatened action by any persons or body of persons in the Union or any area within the Union is of such a nature and of such an extent that the safety of the public, or the maintenance of public order is seriously threatened thereby; or
> (b) circumstances have arisen in the Union or any area within the Union which seriously threaten the safety of the public, or the maintenance of public order; and
> (c) the ordinary law of the land is inadequate to enable the Government to ensure the safety of the public, or to maintain public order, he may ... declare that a state of emergency exists ....

(Since South Africa became a Republic, 'Governor-General' is taken to be 'State President'.)

Section 3(1)(a) of the Act reads,

> The Governor-General may ... make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or the maintenance of public order and for making adequate provision for terminating such emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency.

The Act had been invoked only once before, in 1961 after the killings at Sharpeville. At that time, the courts had relentlessly turned down legal challenges to the validity of official action by virtue of the regulations promul-

gated then. Their attitude was that section 3, because of the nature of the situation with which it was designed to deal, and because of its wording, gave the executive what an English judge had, in a decision of the same vintage as **Liversidge**, called a "complete discretion".[1]

Nkwinti v Commissioner of Police and Others[2] (1985), a full bench decision of the Eastern Cape Provincial division, concerned the application by Mrs Nkwinti for the release of her husband who had been detained under regulation 3 which read,

> (1) A member of a Force may, without warrant of arrest, arrest or cause to be arrested, any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or that person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, or cause to be detained, any such person in custody in a prison.
> (2) No person shall be detained in terms of subreg (1) for a period exceeding 14 days from the date of his detention, unless that period is extended by the Minister in terms of subreg (3).
> (3) The Minister may, by written notice signed by him and addressed to the head of a prison, order that any person arrested and detained in terms of subreg (1) be detained in that prison during the further period mentioned in the notice.

The applicant applied to have the order set aside on several grounds.[3] However, Kannemeyer J, who delivered the judgment of the court, rejected the applicant's argument in respect of these grounds, and the decision turned on an issue which had arisen during the course of the application. The minister had, without giving Nkwinti an opportunity to be heard, issued a detention order which provided for his further detention in terms of regulation 3(3). It was argued that this order, for which no justification had been offer-

ed, was invalid because there had been no compliance with the right to be heard. The government's argument was that the Public Safety Act and the regulations implicitly conferred the power to ignore the right.

Recall once more that there was some confusion about the status of this right (**SS**5.3 and 5.4). However, Kannemeyer J was adamant that the right to be heard exists unless it is excluded by the enabling statute, either by an express provision or by necessary implication. He quoted in support the dictum in **Sachs**, and Centlivres's interpretation of that dictum and statement of the status of the right in **Ngwevela** (437). He did not quote or even cite the dicta in **South African Defence and Aid** or **Publications Board** which suggests that he thought that these dicta were of no force.

We saw in **S**5.3 that the AD in **Sachs** had been persuaded by an argument from the principle of 'preventive justice'. That is, the court had accepted the argument that, because in security matters there is a need to act swiftly, rights which slow down or impede security action should not easily be presumed to be in place. But Kannemeyer J did not think that this argument applied to the situation of someone who had been arrested and was being held in detention. He said that while considerations of urgency would apply at the time of arrest, these did not apply once the person had been detained (437- 38). As he saw it, the sole question was whether there were any indications to be found in the Act that it was the intention of the Legislature to exclude the operation of the right, or in the regulations made by the State

President, on the assumption that he had such powers (438).

In making this last remark, the judge is drawing attention to a distinction between two different issues. One is that raised by the case--'Do the provisions of the enactments exclude the right to a fair hearing?' The other is whether the provisions of the Public Safety Act show that Parliament intended to confer on the State President the power to exclude the right.

Suppose that a statute expressly permits the State President to exclude the right to a fair hearing by making a detention regulation excluding it. However, he makes the same detention regulation as the one in question in this case. The existence of the permission to exclude does not conclude the issue of whether the statute confers on officials acting under the regulation the power to ignore the right. Indeed, on the common law approach, the fact that the statute expressly gives a power to the State President to exclude the right would be an explicit propointer. It would be an indication that the legislative intention is not to give officials the power to exclude the right because a condition precedent to such exclusion is that the State President makes a regulation expressly excluding the right.

Kannemeyer J made it clear from the outset that the common law approach was the one he was disposed to adopt. He dealt at the outset with an objection by the respondent that the court did not have jurisdiction to hear an application to set aside the order because that jurisdiction was ousted by regulation 11(2):

> No interdict or other process shall issue for the staying or setting aside of any order, rule or notice issued under these regulations or any condition determined thereunder ...

Such an ouster clause, he said, had to be viewed with disquiet and only applied when its application was justified in law. He quoted in support, **inter alia**, the passage from Lord Atkin's "great dissenting speech" in **Liversidge** where the doctrine of separation of powers is strongly affirmed. He also quoted this passage from **Ganyile v Minister of Justice and Others,**[4] a 1962 Eastern Cape Provincial Division decision on **habeas corpus:**

> In Plato's **Republic** where one has the **res politica** the judiciary often has to state that action taken by the executive is justified on the principle **salus reipublicae suprema lex est.** On the other hand the Supreme Court is the protector of the rights of the individual citizen, and will protect him against unlawful action by the executive in all its branches in the same way as in England the Supreme Court will protect the British even from the Crown (425-27).

He reasoned that there was no indication in the enabling Act or in the regulations that the right to a fair hearing had been excluded. As he saw it, a critical examination of the "far-reaching" regulations relating to detention negatived any such inference. Here he noted that the fact that "any member of a force" could effect an arrest and initial detention meant that any member of the Police, the Railway Police, the Defence Force and the Prison Service had this power. As he put it,

> the arrest may be effected and the initial detention ordered by a raw recruit of any of the four services mentioned above (438).

He noted that after this stage the minister had to sign the order for a further period of detention, but the regulations

did not require him to hold any views concerning the desirability of this step. In addition, the further period could be indefinite as long as the state of emergency was reproclaimed every twelve months.

He could not, he said,

> accept that it was the Legislature's intention or that of the State President when making the regulations that the detainee against whom no charge is brought and who has been given no opportunity, when detained, to advance reasons to establish, or to attempt to establish that his detention is unnecessary, should be deprived of his right to advance such reasons before his further detention is ordered. One's **sense of justice** is offended by any such suggestion and only express words or a clear inference would lead one to accept that this was the intention of those responsible for the legislation and the regulations (438-39).

At work here is the same regulative assumption which underpins the common law judgments discussed so far. Kannemeyer J assumes that his role--to administer justice according to law--is not in the slightest affected by the declaration of a state of emergency. His attitude is 'the more serious the expressed inroads on liberty in a statute, the more ready the court should be to fulfil this role'. It follows that he also assumes that Parliament intends that the emergency regulations are to be interpreted in a common law context. This assumption is required by what he described, in perhaps an ironic echo of LC Steyn's comment on **Dadoo** (S3.4), as his 'sense of justice'. As I shall now show, his view is that the need for the assumption becomes more urgent precisely because a state of emergency threatens it.

He went on to say that the position under the regulations was even more striking when it was appreciated that a person could be detained for his own safety. He could not

infer an intention that a person could be detained for an indefinite period under these harsh conditions without being allowed to demonstrate that his safety does not require his detention. In addition, he found it illuminating to compare detention under the regulations with detention in terms of the Internal Security Act of 1982, which he said provided numerous safeguards.[5] Since Nkwinti had not been afforded such an opportunity to be heard, the order was **ultra vires** and of no force and effect. He was therefore entitled to his release (439).

The judge said he was not "unmindful" that a state of emergency existed in the area in which his court was sitting. But, in his view, the "possible consequences of the order" could not be a consideration once he was satisfied that Nkwinti's detention was illegal. Here he found apt the words of a Cape judge during a rebellion in 1879,[6] which he said were as valid today as when they had been expressed.

> But then it is said that the country is in such an unsettled state and the applicants are reputed to be of such a dangerous character that the Court ought not to exercise a power which, under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it and not to preserve the peace of the country .... The civil Courts of the country have but **one duty to perform and that is to administer the laws** of the country without fear, favour or prejudice, independently of the consequences which ensue (439).

On this view, a judge is required to administer justice without regard to the possible consequences of the order required at law. If, say, as a result of his order, every detainee held under emergency regulations is held illegally

and must be set free, he cannot shirk giving that order. For his conviction should be that he is adjudicating according to the rights which individuals have at law prior to his decision.

This is underscored by Kannnemeyer J's reasoning on a further point. More than likely in anticipation of a decision against the government in **Nkwinti**, regulation 3(3) had been replaced by a new subregulation 3(3).

> The Minister may, without notice to any person and without hearing any person, by written notice signed by him and addressed to the head of a prison, order that any person arrested and detained in terms of subreg (1) be further detained in the prison for the period mentioned in the notice, or for as long as these regulations remain in force.

It was provided in the same proclamation, that the new regulation would have retrospective effect.

Kannemeyer J accepted the applicant's submission that the new regulation, despite the express provision as to retrospectivity, could not affect rights which a party had acquired at the time when legal proceedings were instituted (440-41). He quoted with approval the following extract from the headnote to a (1968) AD decision:[7]

> It is clear that our law accepts the rule that, where a statutory provision is amended, retrospectively or otherwise, while a matter is pending, the rights of the parties to an action in the absence of contrary intention must be decided in accordance with the statutory provisions in force at the time of the institution of the action (440).

He could find no express or necessary implication to the effect that this rule was not to apply and so he ordered that Nkwinti be released from detention (440-41). **A fortiori**, then, in his view, his decision reflects the legal right

which Nkwinti had prior to the decision to have the law enforced in his favour. If the decision created the rights, Kannemeyer J would not have been able to find that Nkwinti's application fell out of the retrospective reach of the substituted subregulation.

This decision is only one example of the readiness shown by common law judges during the states of emergency to interpret the emergency regulations and the Public Safety Act in the common law context. In **Metal and Allied Workers Union and Another v State President of the Republic of South Africa and Others**[8] (1986) Didcott J, delivering the judgment for a full bench of the Durban Local Division, struck down several emergency regulations as void for vagueness. One of these made it an offence to make a "subversive" statement and defined 'subversive' to include statements calculated to or likely to incite any one to resist any official or the Government in "connection with the administration of justice". Didcott J declared this regulation invalid because it could lead to absurd results. He pointed out that it seemed to be a consequence of the regulation that if he said to someone, "Don't obey a subpoena to attend this civil trial", he would have made a subversive statement (370-72).

In the same decision, he held that a regulation made by the State President which deprived detainees of access to their legal advisers was invalid. He reasoned that the question he had to consider was whether the State President was ever empowered to require a detainee to get permission for visits for any purpose whatsoever. He pointed out that a

detainee might need to see his lawyer about some urgent matter which had nothing to do with the state of emergency. For example, his landlord was seeking his ejectment. Didcott J also noted that the prison regulations which governed such visits would ensure that the visit could not be used as a subterfuge for a purpose other than the client consulting his lawyer (374).

He then said:

> Is the State President really empowered, under this enabling section, to say that you may not see your lawyer over something that has nothing to do with the purpose of your detention or with anything else within the State President's power, and at a time which has nothing to do with either? The answer, of course, might no doubt be that permission in such a case could be obtained. Perhaps it would often be obtained. But that is not an answer. The question is whether such a visit should be subject to anybody's permission at all. And the answer, in my view, is that it is not, because the State President had no power whatsoever to go beyond the scope, wide as it is, of the enabling section (375).

He emphasized that he was not talking about "ordinary visitors", but about a right which, "in the eyes of the law", was fundamentally important. This had been recognized by the AD in the "plainest possible language", referring to a dictum in a 1983 AD case, in which it was argued on behalf of Nelson Mandela that prisoners had a common law right of access to legal advice--**Mandela v Minister of Prisons.**[9] The court had accepted that the right of access to a legal adviser was a "basic or fundamental common law right" which could only be abolished by the "clearest language" in the enabling statute.

In Didcott J's view, there was nothing in the enabling section which either expressly or by necessary implication

attenuated "a whole host of visits by lawyers". He said that there might well be circumstances amounting to the necessary consequences of incarceration which perforce controlled, regulated and limited visits. But such circumstances did not justify a total prohibition on access subject only to the choice of an official (375).

In **Radebe v Minister of Law and Order**[10] (1987), Goldstone J, sitting alone in the Witwatersrand Local Division, had to consider the validity of the arrest and detention of the applicant's boyfriend who had been arrested and detained under the substituted regulation 3. Regulation 16(4) stated that if "in any proceedings" against any person referred to in regulation 3(1) or the State, the question arose whether an act done by such a person was done in good faith, it would be presumed that the act was done in good faith until the contrary was proved.

Goldstone J reasoned that because so little was required to establish that the arrest and detention were lawful, there was all the more reason why a failure to provide a justification for the arrest and detention would be fatal to the legality of an order when the applicant had made out a **prima facie** case that the arrest and detention were not in good faith (at 593 and 596). In his view, the applicant had discharged the **onus** placed on her by regulation 16(4) of showing that the policeman who had arrested and detained her boyfriend could not have held the **bona fide** opinion required by the regulations in order to justify the arrest. Consequently, he set aside the detention order.

En route to this finding, he dismissed the government's suggestion that he did not have the power to inquire into the validity of the detention order. He also rejected the submission that it was undesirable for the courts to consider and adjudicate upon any alleged unlawful application of the emergency regulations bceause this would create an "undesirable precedent". First, he pointed out that other such applications had already been upheld by his court. Secondly, he said that he thought it was "most desirable" that if members of "a force" acted beyond their already vast powers, or if they did not use them in a legitimate and **bona fide** manner, that they should be "brought to account" by the courts. For it was

> wholesome and desirable that they should be made aware of the nature and limit of their powers and that they should know that if they abuse them, or use them unlawfully, there are the ordinary courts of the land before which they will be summoned to explain and answer for their actions (593).

In **Bill v State President and Others**[11] (1986), Leveson J, sitting alone in the Witwatersrand Local Division, considered the validity of an arrest and detention under the substituted regulation 3(3). The applicant accepted both that the regulation was **intra vires** and that the detainee had no right to a fair hearing when the minister determined the extension of his detention. But she pointed out that the regulation made no reference to the rights of the detainee after the extension. Thus she argued that the detainee had the right to a fair hearing by making written representations after the detention order had been extended.

Leveson J accepted this argument. He also held that the

detainee was entitled to know so much information as would enable him to know why he is detained. This was on the general principle that a person who is the subject of an administrative enquiry is entitled to have enough information concerning the charges against him to be able to meet them. Finally, relying on **Metal and Allied Workers Union**, he held that the detainee was allowed to consult his lawyer for the purpose of making representations to the minister.

Perhaps the most daring of all of the state of emergency decisions so far is **Tsenoli v State President**[12] (1986). Friedman J, giving judgment for a full bench of the Natal court, struck down the power of detention without trial conferred by regulation 3(1). He held that the correct interpretation of section 3 of the Public Safety Act required the State President to make only those regulations which would terminate the emergency. It followed that the detention regulation was invalid because it also enabled detentions for the sole purposes of maintaining law and order, or the safety of the public or that person himself alone.

He reasoned that it was not

> the mere threat to the safety of the public or the maintenance of law and order which gives rise to the state of emergency, but also, the circumstance that the ordinary law is inadequate to deal with the problems which have arisen. The object of the declaration of the state of emergency, therefore, is not simply to bring about the elimination of threats to public safety and law and order, but also to bring about a situation where the ordinary law once again will be adequate to cope with such threats. In other words, it might be said that an important purpose of the declaration of a state of emergency is to bring an end to such an emergency.

The essence of this reasoning, as Etienne Mureinik has

described it, is that the court

> should do all it can to ensure that the powers actually assumed by the authorities match their claim to be about the business of suppressing an immediate but transient threat.[13]

That reasoning, as I have argued, depends on the judges adopting the regulative common law assumption that the power conferred on the State President is subject to the "ordinary law of the land". And this law includes the principles of common law. Regulations which offend against the ordinary law are thus invalid unless it can be shown that the offence is expressly or by necessary implication permitted by the Public Safety Act.

7.2 The Plain Fact Approach and the State of Emergency

But other judges adopted the same attitude as the courts during the 1960s state of emergency. They adopted a plain fact approach, reasoning that the fact that emergency legislation has been invoked is itself a contrapointer. They could cite in support of this view, as an express contrapointer, the fact that the Public Safety Act is invoked when the "ordinary law of the land" is, in the opinion of the executive authorities, inadequate to deal with the situation. But it is worth noting that none of the judges who gave plain fact decisions put them on the basis that the ouster clause in regulation 11(2) is effective to oust the court's jurisdiction to inquire into the legality of executive action.

Rabie CJ, delivering the unanimous decision of the

court, upheld an appeal against the decision in **Tsenoli** (1986).[14] He held that the approach advocated by Ogilvie Thomson in **Rossouw** is the correct one to be adopted in interpreting security statutes. He said that it was only if the language of the statute was uncertain or ambiguous that it should be interpreted in a way that interferes least with the rights of the individual. He held further that there was no ambiguity and that Friedman's interpretation was "forced and strained" (1175-78).

In **Fanie and Others v Minister of Law and Order and Others,**[15] a 1985 full bench decision of the Eastern Cape Division, the court held that the State President had the power to issue the substituted subregulation (3)3 excluding the right to a fair hearing. This decision was followed in **Omar and Others v Minister of Law and Order and Others**[16] (1985), a full bench decision of the Cape Provincial Division, in which Friedman J delivered a strong common law dissent. Vivier J, delivering the majority judgment of the court, also held that the regulation restricting a detainee's access to legal advisers was valid.

Fanie, Omar and **Bill** went to the AD in a triple appeal in 1987 and Rabie ACJ, giving the majority judgment of the court, upheld the argument advanced on behalf of the executive official in each case.[17] The style and substance of Rabie ACJ's reasoning are the same on each point. He thought that Parliament had shown its clear intention that the Public Safety Act was not to be interpreted subject to common law principles because its provisions were to apply when the

> ordinary law of the land is inadequate to enable the Government to ensure the safety of the public or to maintain public order.

The way in which he emphasized, reiterated and interpreted this provision shows that he took over wholesale the reasoned justification for Vivier's decision in **Omar** which was argued to be correct by counsel for the various executive officials. The argument can be summarized as follows.

First, the State President can declare a state of emergency and make regulations to deal with it when, in his opinion, certain conditions prevail, one of them being that the ordinary law of the land is inadequate to maintain public order and safety. Because the ordinary law of the land is inadequate to maintain public order and safety, the State President may make regulations which abrogate any principles which are part of the ordinary law of the land as long as he does this for the purpose of restoring public order and safety. Principles such as the right to be heard and the right of access to legal advice are fundamental common law rights, but they are part of the ordinary law of the land and the State President can abrogate them.

Secondly, in making regulations, the State President is empowered to make those which seem to him to be "necessary and **expedient**", which puts the question of what means and methods should be used to achieve the purposes in the State President's subjective opinion. The State President must act **bona fide** and must put his mind to the issue and act only for the purposes set out in the Act. But as long as he honestly believes that a regulation is necessary and expedient,

and as long as the purpose is related to one of the purposes of the Act, the court cannot intervene.

Thus Rabie ACJ rejected an argument that an affidavit submitted by the State President disclosed that he had not properly apply his mind to the matter of the right to be heard or that he had acted with gross unreasonableness. The affidavit stated that the State President had said that he had deprived all detainees of the right to be heard because he thought that in some circumstances such a deprivation would be justified. Rabie ACJ said that it was not unreasonable to exclude the rule in all cases, even though there would be "individual cases" where the exclusion would not be necessary. He suggested that what this exclusion does is give to the relevant official a discretion to authorize an exclusion whenever the official considered "that it should be done".

He also rejected the argument that it was unreasonable for the State President to exclude the right to a fair hearing in all cases for the reason, put forward in the same affidavit, that to reveal information to some detainees might result in revealing the source of the information to them. Rabie ACJ said that it was true that a hearing in terms of the rule would not necessarily result in disclosing the source of information. But he held that this was no justification for saying that the State President went beyond the powers given to him by the Act when he decided to make a regulation which was "designed to avoid all danger of the disclosure of potentially harmful information" (893-94).

Rabie ACJ also held that the regulation subjecting the "fundamental right" of a detainee to a legal adviser to the consent of the authorities was not **ultra vires.** The argument for this contention was that the right of free and unconditional access to a legal adviser cannot reasonably be said to impinge on the purposes of section 3(1)(a). Rabie ACJ held that it could not be said that the regulation was not related to the purposes mentioned in the section (894-95).

Finally, he rejected the contention that the same affidavit of the State President showed that he had failed to apply his mind to the matter of access and that he had acted with gross unreasonableness. The State President had said that he had to prevent detainees from having access to the outside world because of the existence there of people who wanted to prolong the conditions which had caused the emergency. Rabie ACJ said that the affidavit showed that the State President had given "earnest consideration to the question of access to detainees". He did accept that it might be the case that detainees could urgently require access to legal advisers on matters unrelated to their detention or the emergency. But he said that it was not "to be supposed that" the authorities would in such a case refuse access. However, he did not indicate why he had this faith in authorities or why he thought that they, and not the court, should decide such a matter. In addition, he stated that access in this kind of situation could not be refused, although he did not suggest how a detainee could deal with such a refusal (895-97).

It followed, in his view, that the appeal against Vivier's judgment in **Omar** had to fail and also that the decision in **Metal and Allied Workers Union** on the regulation governing access to legal advisers was wrong. Since the same arguments had been relied on for the appeal against the decision in **Fanie**, that appeal failed for the same reasons (897-98).

Rabie ACJ then turned to the appeal against the decision in **Bill**. He said that Leveson had reasoned as follows. The detainee was entitled to make written representations to the minister to be released from detention and so the detainee was also entitled to writing materials and such information from the minister as would make the right to make the representations real and not illusory. But, Rabie ACJ said, it did not follow from the fact that the detainee had the right to make representations that he had the right to be given reasons which would allow him to contest the grounds of his detention. Thus while he conceded that a detainee was entitled to make such representations, he concluded that the regulation empowered the minister to order the further detention without the detainee having the right to be heard. The detention order, in his view, was effective on being made. It was final and it determined the further period of detention and so there was no obligation on the minister to inform the detainee of the grounds on which the order was made, and then, after considering such representations, to reconsider the order previously made by him.

Rabie ACJ accepted that his view meant that the regulation did away completely with the right to be heard and so it was a "very harsh provision". But this was what the regulation entailed and, in view of the wide powers conferred on the State President, it was not **ultra vires** (899-901).

It is important to see that Leveson is not guilty of the **non sequitur** with which Rabie ACJ charged him. His premise is that detainees have the right to be heard and the fact that they also have, or have not been denied, the right to make written representations, helps to support that premise. The premise is a part of the regulative common law assumption that judges must attempt to interpret statutes as if they were enacted in the same pursuit of justice in which the judges see themselves to be engaged. In short, Leveson's conclusion is warranted, given the regulative assumption which Rabie ACJ does not make.

This point is underscored by Hoexter JA in his lone dissent in the triple appeal.[18] He said that he preferred to adopt a different approach to the issue in **Bill** from that of Rabie ACJ.

> When one deals with an enactment which empowers a functionary to make an order prejudicially affecting the rights of another the principle which ordinarily governs the situation is enshrined in the maxim '**audi alteram partem**'. That is the broad and inveterate rule. It at once follows, so it seems to me, that in the instant case the question to be asked is not whether, in the light of the abrogation in reg 3(3) of the detainee's right to be heard **before** the ministerial order is made, one is nevertheless able to perceive an intention in the regulations that the detainee has a right to be heard while he remains in detention **after** the ministerial order. The correct aproach, with respect, is surely **directly the opposite one.** The real question to be asked is whether the contrary intention is manifest. One must examine the regulations

> in order to see whether they indicate, expressly or by necessary implication, that after the ministerial order has been made the detainee is deprived of his right to be heard (906).[19]

Hoexter JA also rejected Rabie ACJ's reliance on the 'finality' of the minister's order. The order, he said, was final only if it was legally impermissible for the minister to revoke or vary the order. The power conferred on the minister was "awesome" but not "arbitrary or autocratic". Further detention could be ordered only if the minister were of the opinion that the detention was necessary for the purposes stated in regulation 3(1). Consequently, Hoexter JA held that the minister was "in law obliged" to inform the detainee of the grounds for his detention and that he was "in law obliged" to give due consideration to the written representations of the detainee (906-07).

Rabie's decision in the triple appeal was the subject of stern criticism in several articles in the **South African Journal on Human Rights.**[20] One calls the decision a "judicial declaration of martial law"[21] and it is important to see what is involved in this charge.

A declaration of a martial law presupposes the existence of a situation in which official lawlessness is legitimate. It is an admission that the government can no longer govern through the medium of law. As Blackstone puts it, martial law is declared when there is required

> those **extraordinary** recources to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression.[22]

In contrast, a declaration of a state of emergency is a

declaration that government through the medium of law requires temporary support from officials acting lawfully under extraordinary regulations. By refraining from going the whole distance of proclaiming martial law, the State leaves in the hands of the judiciary the decisions as to what is lawful.

The common law judgments discussed in the last section took the State at its word. The judges did their best to show that the emergency made little difference to the judicial duty to enforce the law. But Rabie's decision in the triple appeal, together with other plain fact decisions, take the declaration of the state of emergency the whole distance. In effect, his decision makes the executive the arbiter of what is lawful.

As things now stand, the AD has given up jurisdiction over the area of civil liberties in substance but retained it in form. The courts retain their jurisdiction but in large part it is a jurisdiction to pronounce legal what the executive says is legal. This concludes a process which had its beginnings in the plain fact judgments discussed in chapters three, four and five. Each time the courts decided that they had no jurisdiction to do something which was regarded as part of their inherent jurisdiction, they hastened the collapse of their own institutional integrity. Their role now seems largely one of rubber-stamping whatever action the executive sees fit to take in suppressing opposition to the Nationalist government.

It is unfortunate that it was the courts that facilita-

ted this process. The AD has put itself and other South African courts in a position where the courts will take jurisdiction only to decline it and this gives the Nationalist government the facility to operate under the cloak of the rule of law. Positivists such as Hart and Raz might point out that there is no special merit in judges ensuring that official action is congruent with declared rule. Everything depends, they will claim, on the contingent content of the declared rules. But recall from S2.5 that the South African government likes to claim that it does comply with the rule of law. It claims that the fact that an independent judiciary ensures that official action is lawful lends something morally worth while to government in South Africa. A recent example is in State President Botha's opening speech to Parliament in 1986.

> We believe in the sovereignty of the law as a basis for the protection of the fundamental rights of individuals as well as groups. We believe in the sanctity and indivisibility of law and the just application thereof. There can be no peace, freedom and democracy without law. Any future system must conform with the requirements of a civilized legal order, and must ensure access to the courts and equality before the law. We believe that human dignity, life, liberty, and property of all must be protected, regardless of colour, race, creed or religion.[23]

Indeed, the Nationalist government has tried to get a great deal of moral mileage out of the claim that government in South Africa is according to the rule of law. This mileage can be gained only because both governments and governed, in contrast to the positivists, do regard the exercise of power through the medium of law as bringing about something morally worthwhile.

In addition, it is important to note that it is no accident that the process happened as it did. We have seen that a change in the interpretive approach of the AD followed LC Steyn's appointment as Chief Justice, presiding over a court whose other members were appointed by the Nationalist government. And Rabie was appointed Chief Justice after he had compiled the Rabie Report (S6.2). Moreover, in an interview with a journalist in 1987, Rabie professed to be unperturbed by the government encroachment on common law rights. He is reported as saying that as far as the court was concerned "there was no conflict. Once Parliament says this is the law, it is the law". On his view, a Bill of Rights should be viewed with scepticism--in the United States such a bill had produced a "bit of a shambles". To him the United States represents "freedom run mad".[24]

Liberal South African lawyers do not doubt that, whenever possible, judges who adopt what I have called the plain fact approach have been appointed to the bench and to the senior positions in the judicial hierarchy because they will not be obstacles in the path of executive action.[25] Perhaps the most blatant example of this is that Rabie, at the end of his term as Chief Justice, was asked to stay on as Acting Chief Justice. This is unprecedented in South Africa and it was rumoured that of his two natural successors--the most senior judges of appeal--one was thought to be 'too weak' and the other 'too liberal'.[26]

There is also evidence that the power to allocate judges to different matters, which is held by the Judge

Presidents of the different divisions and by the Chief Justice in the AD, has been used to keep common law judges away from the adjudication of security matters and political trials.[27] In short, the executive seems to have ensured that it had what we saw a South African judge warned against in 1916: "a complacent court" which would interpret statutes "in the widest possible sense so as effectually to suppress the liberty of the subject" (S4.5).

The result is that the group of people whom I have labelled liberal lawyers are now in a state of some despair. John Dugard, for example, rejected Raymond Wacks's call on liberal judges to resign (S5.6).[28] Now, in the wake of the triple appeal, Dugard says that he no longer rejects the call for resignation as the only "decent option for the 'moral judge'".[29]

But even if Wacks's call for judicial resignations is warranted, his argument for that call is not vindicated. As we saw, he argues that Dworkin's account of adjudication is correct and that South African judges should resign because they are under a legal duty to apply a repugnant soundest theory.

We have also seen that there are only two ways in which it might seem that common law judges would be under such a legal duty. First, given the doctrine of precedent, judges might be bound to apply the principles of the official policy because these have been incorporated into the reasoned justifications for decisions given by past courts. Secondly, legislators might stipulate in the text of a stat-

ute that the statute is to be interpreted in the light of such principles.

But I have argued that the legal duty of common law judges is to try to interpret statutes in the light of the principles constitutive of the common law context. I have argued further that common law judges are never bound by the reasoned justifications of courts superior to them when these justifications are fundamentally wrong, but only by the decisions themselves. Of course, decisions on fundamental issues, those which affect the inherent jurisdiction of the court to interpret in the common law context, are binding on common law judges. But the decisions bind, not by forcing common law judges to interpret and enforce the law in accordance with the principles of the official policy. Rather these decisions remove the power from common law judges to apply and enforce the (common) law. Similarly, statutes which expressly incorporate the principles of the official policy do not require judges to apply those principles. Rather such statutes strip the judges of their power to apply and enforce the common law.

The upshot is that if judges should resign in South Africa, it is not because they are now required to interpret apartheid laws in accordance with the official policy. It is because they are no longer in a position where they can enforce and interpret a substantial part of the law. South African judges are enjoined by their oath to do justice according to law, but in fact can no longer adjudicate on what is lawful in large and fundamental areas. To stay in

office while not being able to enforce this part of the law might well mean lending the cloak of legitimacy, of the rule of law, to executive tyranny. I shall argue in **S**7.3 that the jurisprudential implications of this point can show how the decision of hard cases in the standard example of a wicked legal system not only fails to be a counterexample to Dworkin's account of adjudication, but supports that account in a novel way.

7.3 **Constructivism and Wicked Legal Systems**

Recall from **S**1.7 that Hart and Raz think that wicked legal systems provide an effective counterexample to Dworkin's account of adjudication. Dworkin's central claim is that there is a soundest theory of the law of a legal system which both explains and justifies the explicit law and which a judge is under a legal duty to apply in the decision of hard cases. He also claims that there is some moral weight to the legal duty to apply the soundest theory of law in the decision of hard cases.

But the positivists point out that in a wicked legal system explanation and justification should part company. For the soundest theory which explains the explicit law will be a morally repugnant one. Thus the positivists find mysterious Dworkin's claim that a judge is under some kind of moral as well as legal duty to apply the soundest theory of law.

We saw in **S**1.7 that Dworkin offers two responses to the

positivists. First, he suggests that morally repugnant principles might in fact never figure in a soundest theory because they will be 'screened out'. Secondly, he takes the positivists to suppose that it must be the soundest theory that transmits moral weight to the judge's legal duty. That is, the positivists must suppose that the source of the moral weight which attaches to the duty to apply the soundest theory of law can only be the principles that figure in the soundest theory itself. Dworkin says that positivists are mistaken to suppose this.

In his view, the moral weight comes from a different source. It comes from a "general political situation" which amounts to the fact that

> the central power of the community has been administered through an articulate constitutional structure the citizens have been encouraged to obey and treat as a source of rights and duties, and that the citizens have in fact done so (S1.7).

We also saw in S1.7 that the positivists remain unconvinced. They continue to treat the idea that repugnant moral principles will not figure in a soundest theory of law as the expression of an unsupported and romantic ideal. And they can point out that the claim that the source of moral weight lies in a "general political situation" is a claim about why judges might have a **prima facie** moral obligation to enforce the law of even a wicked legal system. Even if that claim is warranted, it does not start to show why one should take seriously Dworkin's claim that there is a soundest theory which both explains and justifies the law. The positivists thus suggest that Dworkin is stuck with the

truism that in good legal systems, those in which principles of critical morality have contingently been incorporated, legal duties are also moral duties.

But we have seen in the case study that Dworkin is right to suggest that morally repugnant principles in fact tend to get screened out. On Dworkin's account, judges should adopt the common law approach which attempts to make all legal data cohere with the principles of critical morality which constitute the common law interpretive context.

There are, of course, limits to screening power. Legislators can, for example, enact statutes explicitly stating that the purpose of the statute is to achieve morally repugnant ends. In S1.4 we saw that this possibility was thought by Fuller's critics to show that there is no merit in his argument that even tyrants who wanted to govern through the law would be limited by an inner morality of law. The critics argued that the only constraints on tyrants were whatever inhibitions prevented them from making their repugnant intentions plain. Dworkin, for instance, suggested that the only substance in Fuller's claim was that we could gain no help from our sense of fairness in making discriminations under a law whose fundamental purpose is obnoxious to our sense of morality.

But the preceding analysis of cases shows that a common law judge can gain help from his 'sense of fairness'. If a common law judge understands the purpose of an obnoxious statute without help from his sense of fairness, he understands it as it was intended to be understood by those im-

mediately responsible for its enactment. But as a common law judge sees it, this is not necessarily the statute's **legal** purpose. He is not always legally bound to interpret the statute in the light of such repugnant plain facts about legislators' intentions. If the language in which the statute is expressed can be squared with the common law interpretive context, such facts will be screened out one way or another by that context.

So the common judge does indeed rely on a sense of fairness, for he resorts to principles of critical morality embedded in the law. When the judge draws on that sense of fairness in interpreting a statute, his interpretation of the law, because it draws on that sense, might make the statute into something which is better morally speaking than the legislators actually intended it to be.

Of course, very explicit statutes will preclude this. The statute might expressly state that officials are permitted to act unfairly, unreasonably and unjustly in implementing the statutes. Alternatively, a statute might, for instance, confer a power on an official not only to detain anyone he suspects of being engaged in subversion, but also to determine, unconstrained by considerations of reasonableness and good faith, what counts as subversion.

However, if wicked legislators make their intentions plain in this way, they condemn themselves as immoral. This leaves them in a dilemma. They do not want to state explicitly state that the purpose of a statute is wicked. But if they are not explicit about what they want, they leave open

some space for the common law approach. They permit judges to assume that the legislative assembly is engaged in the same quest for justice in the law.

But the cost of the first option is more than a bad press. The legislators also stand to lose the legitimacy which government in accordance with the rule of law attracts. Government in accordance with the rule of law requires the judicial imprimatur that official action is according to law. When the legislature has explicitly committed itself to injustice, judges have to conclude that they cannot enforce that part of the law in which principles of fairness, reasonableness and justice are embedded.

Thus this first method of precluding the common law approach does not work by requiring judges to decide cases in decide hard cases in accordance with morally repugnant principles. Rather it removes from them the power to decide the cases in accordance with principles of critical morality embedded in the law. The statutes, by giving officials absolute, arbitrary power, remove the power to enforce and interpret the law from the judges. The courts are removed to a large extent from the legal order and the claim that government is according to law becomes empty.[30]

The effect is the same as if judges adopted a plain fact interpretation of ouster clauses. Such clauses are the second method which legislators might use to attempt to preclude judges from finding the space to interpret in the common law context. On a plain fact interpretation of ouster clauses, judges can assume jurisdiction to hear an applicat-

ion about the lawfulness of official action. But they cannot determine whether the action is lawful because the principles and standards which are an integral part of such a determination are excluded by statute. Again, government cannot be said to be according to the rule of law.

Notice that my claim is only that the courts are removed to a large extent. They could still in principle continue to function, deciding cases in contract, tort, run-of-the-mill-criminal law, and run-of-the mill-administrative law.[31] But, in the full view of the world, they would have lost their jurisdiction over the very area which had to be conquered in order for them to have an unchallenged jurisdiction over the whole. The clock would be turned back to the day when the law was what the king said it was.

The final method relies on judges using tests such as the historical design test and contrapointer test. This method allows wicked legislators to have their cake and eat it. They enact statutes giving clues to judges, predisposed to be receptive to such clues, as to what their intention is. The judges will assume jurisdiction to interpret the statute, but find that they lack jurisdiction in the substantive sense to interpret it. But that is **their** decision. The judges decide that the law is what officials say it is without Parliament explicitly telling them that they should do so.

When this happens, more than the contingent content of a tradition is changed. The tradition itself has changed. In large part it is no longer a tradition of legality, of

judges seeing that official action is in accordance with the law. It has become a practice of judges saying that what executive officials do is legal. The rule of law in fact goes by the board.

Plain fact judges allow the third method to work. The government both seems to govern through the medium of law and achieves its wicked ends. But law has become a mere facade; only the formal integrity of the legal system is preserved. Thus plain fact judges make of a wicked legal system the worst that it could be. They end up protecting an emaciated idea of the State--the **Polizeistaat** or **Staats-recht**--rather than the idea which liberals and others have come to value of a Constitutional State or **Rechtsstaat.**[32] Only judges who adopt the common law approach are able to resist an attempt to make them complicit in government oppression through the medium of law. They use the jurisdiction they have for the purposes for which they have it and thus seek to maintain the Constitutional State.

We can now see why Dworkin should not deny that it is principles that figure in the soundest theory of law which, even in a wicked legal system, transmit moral weight to the judge's legal duty to apply the soundest theory of law. For, as long as the system is in a substance a legal system, sound moral principles will figure in the soundest theory of the law of that system. Judges, in adjudicating in accordance with the soundest theory of the law, will try to see to it that legislatures live up to their constitutional responsibilities. The courts will require that official action, by

virtue of statutory powers, operates within common law constraints of reasonableness, fairness, and justice.

My claim is one firmly based in Fuller's work on an inner morality of law with a Dworkinian twist. There are moral constraints internal to the very idea of law because the powerful, in order to govern through the medium of law, have to accept that they do not have the power to determine what law is. That power is reserved for judges. And given the sorts of standards that have been developed by judges in order to provide a context for these determinations, there is a constraining inner morality of law.

The constraints are not the sort that would limit a judge who adopted the point of view of Oliver Wendell Holmes's "bad man", who thinks that law is "nothing more pretentious" than the "prophecies of what the courts will do in fact".[33] They exist for those judges who regard is as their legal duty to perpetuate and develop a particular legal tradition: one which requires of judges that they take their primary legal duty to be the pursuit of justice in accordance with the law.

So at least in the area of law which forms the subject matter of my case study, sound judicial decisions are those that are decided in the context of the sound moral principles embedded in the common law. These principles express certain ideals of constitutionality in the sense that judges, in upholding them, will be a bulwark between citizens and government. But they are also constitutional in the sense that they are fundamentally constitutive of a

legal tradition in which judges play a crucial role in seeing to it that official action is justified in law. If the principles are eradicated by government, it is no longer governing through the medium of law but by arbitrary power. There is no longer a soundest theory of law because the substance of legality has been removed. In Radbruch's words (S1.3),

> where justice is not even aimed at, where equity, this nucleus of justice, is knowingly refused entry into the creation of a positive law, then the law is not simply unjust, it is outright devoid of all legality. For one cannot define law, not even the positive law otherwise than by saying that it is a rule or statute which by its meaning is intended to serve the cause of justice.[34]

7.4 Conclusion

There never was in South Africa the 'general political situation' of the kind that exists in the democracies of the West. To recall but one absent feature, the majority of citizens have never had the vote. Moreover, those who have joined a political struggle to achieve full rights of political participation for all South Africans have been subject to constraints and measures regarded as unjustifiable and abhorrent in Western democracies.

But those in that struggle have often sought the protection of the law. The names that figure in the cases are, as I have from time to time indicated, the names of individuals and organizations who have been in the frontline of this struggle. The African National Congress, though committed since its proscription to the violent overthrow of

the South African government, is deeply concerned about current debates about the rule of law in South Africa and the role which judges will play in the future.[35] Thus while the general political situation of liberal democracy has hardly existed in South Africa in the arena of parliamentary politics, the law has held a bare promise of such a situation for those engaged in extraparliamentary politics. This promise is no more than the bare basis of reciprocity between ruler and ruled which Fuller thought that law reflected.

I have not claimed that a judiciary composed only of common law judges would have made South Africa into a better place. Judges are not revolutionaries. They are committed to upholding the **status quo.** And I showed in chapter two that the **status quo** in South Africa is such that the ideals of liberalism, broadly construed, have either been heavily compromised or have found next to no political purchase.

However, a judiciary composed of common law judges would have attempted to make the government live up to its claims that South Africa is a democracy, observes the rule of law, and so on. The resources it would have used are those that are provided by the bare data we associate with the Western legal tradition. Such a judiciary might have succeeded to some extent and for some time in providing space for legal, extraparliamentary opposition.[36] The probable result would have been that the different governments which have participated in the systematic oppression of the majority of South Africans during this century would have decided to make do without the rule of law.[37] But this

would have made it clear to the world and to South Africans what the nature of South African society is.

Of course, that there are legal resources such as the ones on which the common law judges drew is contingent on legal systems having developed in a particular way. They must, that is, have developed in a way that provides judges disposed to do so with the resources to develop a jurisprudence in which individuals have rights against the government and thereby, as Hart once put it, "change the practices of government for human good".[38]

Harold J Berman, in the conclusion to his recent history of the Western legal tradition, argues that positivists fail to see that such resources have played a constitutive role in that tradition. He takes the central idea of legal positivism to be that law is an "instrument of domination, a means of effectuating the will of the law-maker" but finds that this idea only captures part of the historical story. He argues that an understanding of law also has to account for the way it has evolved in part by providing mechanisms to protect the powerless from the arbitrary power of the powerful.[39] My suggestion is that the common law approach is the best way of carrying forward the ideal which these mechanisms are designed to protect.

I have not, in this thesis, dealt with meta-issues such as whether an account of adjudication and law such as Dworkin offers can deal with an objection from moral scepticism or with the question whether the options which face judges in hard cases might sometimes be incommensurable. Given

that judges in practice have to decide what best justifies a decision they cannot shirk making, we cannot afford a luxury denied them and build an account of adjudication which incapacitates decision.[40]

We should, I maintain, adopt the view of law that gives us the best results in practice. Given that judges are at the centre of legal practice, we should adopt the view of law that judges should adopt if they are to make best sense of practice. I have thus limited my evaluation of the positivist theory of law to an assessment of the consequences for morality and practice if judges adopt positivist ideas in a particular wicked legal system. And I have argued for the view taken by the Common Law tradition on the grounds of such consequences. For what more could be asked of the correct view of law than that it lead to morally good results and that it makes sense of and perpetuates legal practice?

ENDNOTES TO CHAPTER 7

1. **R v Comptroller-General of Patents: Ex Parte Beyer Products LTD** (1941) 2 AER 677 (CA) at 681 approved in **R v Maphumulo and Others** 1960 (3) SA 793 (N), **Stanton v Minister of Justice** 1960 (2) SA 767 (T), **Ex parte Hathorn: In re OC, Durban Prison Command and Another** 767 (D).

2. 1986 (2) SA 421 (E).

3. They are set out at 424. They include: that the state of emergency had not been constitutionally proclaimed; that the regulations were invalid because of a question of timing; that the arresting officer had not formed the 'opinion' required to justify the order of arrest.

4. 1962 (1) SA 647 (E) at 653.

5. Some of the safeguards were as follows. Detention orders in terms of section 28 had to effected under a notice signed by the minister while a police officer of at least the rank of lieutenant colonel had to effect a section 29 order. In addition, the person detained in terms of section 28 was entitled to a written statement from the minister setting out the "reasons" and the "information" which had led to the detention and which could be disclosed, in the opinion of the minister, to the detainee. Provision was also made for a board to review the position of section 28 detainees.

6. **In re Willem Kok and Nathaniel Balie** 1879 Buchanan Supreme Court Reports 45 at 66. The rebellion was mounted by 'Griquas', a group of Coloureds, mostly as a protest over the rejection of their land claims in a diamondiferous area.

7. **Bell v Voorsitter van die Rasklassifikasieraad en Andere** 1968 (2) SA 678 (A) at 678-89.

8. 1986 (4) SA 358 (D).

9. 1983 (1) SA 938 (A) at 957.

10. 1987 (1) SA 586 (W).

11. 1987 (1) SA 265 (W).

12. I rely on the text as reproduced in the appeal, discussed in **S**7.2.

13. Mureinik (1988) 210.

14. **State President and Others v Tsenoli** 1986 (4) SA 1150 (A).

15. An unreported judgment delivered a month after **Nkwinti.**

16. (1986) (3) SA 306 (C).

17. **Omar and Others v Minister of Law and Order and Others, Fanie and Others v Minister of Law and Order and Others, State President v Bill** 1987 (3) SA 859 (A). I shall discuss Rabie's change in status from Chief Justice to Acting Chief Justice at the end of this section.

18. Hoexter JA also dissented from Rabie's holding on the question of access to legal advisers, although he joined him in rejecting the argument that the State President lacked the power to make the detention regulation which excluded the right to a fair hearing.

19."Before" and "after" are Hoexter JA's emphasis, the rest mine.

20. Vol 3 of (1987).

21. Baxter (1987).

22. Blackstone (1977), Volume I, 243, emphasis in original.

23. 1986 House of Assembly Debates cols 13-14.

24. Interview published in **The Sunday Star** (3rd May 1987) quoted in Davis (1987) at 231.

25. See the 'leaked memorandum' of judge Didcott on this topic; Didcott (1980).

26. Respectively, Jansen and Corbett JJA. For a frank discussion and assessment of these rumours, see Cameron (1987a).

27. For a discussion of this trend, see Dugard's comments on the composition of the court in the triple appeal; Dugard (1987). See also his comments on the practice in the Transvaal Provincial Division; Dugard (1982). A recent report by the **International Commission of Jurists** on the rule of law in South Africa notes that the only division in which such allocations did not take place is the Natal Provincial Division, under the judge presidentship of Milne; Bindman (1988). But the report also notes Milne's recent promotion to the AD (111 and 148). The worry is that in the AD Milne can effectively be kept away from cases on the interpretation of the apartheid laws, while his removal from the Natal Provincial Division will result in such cases being allocated to plain fact judges.

28. Dugard (1984).

29. Dugard (1987) 300.

30. I suggest that this is why it is the topic of arbitrary power, and not that of morally repugnant statutes, which dominates debates about the rule of law.

31. I doubt that the courts could function in practice in this way. For a discussion of the way that the process of attrition on civil liberties has affected run-of-the-mill tort, see Burchell (1988). For a discussion of how perceptions of race affect run-of-the-mill administration of justice, see Dlamini (1988). For discussions of how Nazi illegality infected the whole of German law, see Campbell (1946), Marsh (1946), Pappe (1960), and Stern (1979).

32. For a discussion of the contrast between these ideas, see Dietze (1973). See also MacCormick (1986).

33. Holmes (1897) 460-61.

34. MacCormick ((1985) 28-29) has pointed out that it is

> no accident that we have legislation under the name 'Administration of Justice Acts,' but never under the name 'Administration of Injustice Act' even in the cases where it seems that injustice is actually what is being done under the law. It would be pragmatically self-defeating if not strictly logically self-contradictory for a legislator to issue a law bearing the latter title. It follows that the implementation of the law in practice cannot but contain a large admixture of implementation and enforcement of what is the public morality of the state--what officials rightly or wrongly take to be and treat as morally right, even if they do so mistakenly or with wicked perversity. It is sometimes thought that Nazis and their like can do evil in the name of the law. So it is. But it strikes me as yet more shocking that the evil they do is done in the name of moral duty and racial purity and such like supposed moral values.

I suggest that that while MacCormick is right about the self-defeating nature of such legislation, the official action of the kind he goes on to describe will have much the same result.

It is worth noting that Oakley (1986), who argues for a sharp distinction between Dworkin's views about adjudication and his views about the legality of systems of government, asserts that Dworkin's theory of legality requires

> substantial acceptance of the justice of the state by its citizens, not just by its officials. If a political system meets this test of public acceptance, the rights conferred by its laws are **prima facie** moral rights because they exist in virtue of the sense of justice which inspires the public acceptance necessary for law to exist (92).

I suggest that a minimal condition for such public acceptance is that the ideals which the common law judges thought so fundamental are in place and that if these are eradicated the structure of a legal system is damaged. That is, the contingent presence of these ideals is necessary both for public acceptance and as an existence condition for legal systems.

35. See the report in Van Der Westhuizen (1988).

36. It is worth noting that, in line with his tradition, Raz not only claims that positivism gives good advice to judges, but that it gives good advice to citizens by inculcating the right moral attitudes to law in them. See the essays collected in section IV of Raz (1983). **Inter alia**, Raz thinks that the positivist morally neutral view of the authority of law serves the moral ideal of political toleration. My suggestion is that common law judges best serve this ideal by protecting legal principles which embody it.

Raz also claims that these moral benefits accrue by adopting the view of law as it in its nature is. MacCormick, in contrast, argues that we should adopt this view of law mainly because the chances are that such moral benefits will accrue. See MacCormick (1982) chapter two and, especially, MacCormick (1985).

37. This possibility is more interesting jurisprudentially then it might at first seem. Suppose that the AD was composed entirely of common law judges. The upshot would be that the government would be forced to enact statutes that made its intentions plainer. Eventually it would be clear that the judges were mere rubber-stamps for official illegality. At that stage, one option open to the judges would be to declare that they were no longer in a position to enforce the law and then resign **en masse**. But another, more interesting possibility is that the judges could declare invalid the statutes that made them into rubber-stamps. Their argument would simply be that it was not Parliament which passed the statute but Parliament acting as the mask of the executive. They would, to borrow a metaphor from company law, pierce the parliamentary veil. This second possibility is not, I suggest, bizarre.

First, whether judges resign **en masse** or declare statutes invalid on substantive moral grounds their reasons are, as they see it, based in the same ideal of legality which informs the common law approach. Secondly, the basis for piercing the veil in this way was laid by Schreiner in his lone dissent in the last of the trio of cases on the rights of Coloured voters--**Collins v Minister of the Interior** 1957 (1) SA 552 (A). And it appears that the supreme court of New Zealand has 'bootstrapped' itself into the position where it can declare statutes invalid where previously there was a strict doctrine of legislative supremacy; Joseph (1987).

Finally, the jurisprudential justification is quite simple. Common law judges enforce the letter of statutes because of a requirement of fairness that elected legislators should take the kinds of political decisions that are embodied in statutes. But the value of fairness if not purely formal. It is a substantive value which depends on legislative decisions being capable of being interpreted so that they can be shown to serve the value of justice. If legislative decisions diverge radically from these values, then they lack legal as well as moral authority. The judges can strike them down as illegal and leave it up to the legislators to try to find a legal means of implementing their policy objectives.

38. Hart (1983) 197.

39. Berman (1983), especially 356. If Berman is right, this would show that positivists might not do that well at the task to which John Finnis limits them--providing a "descriptive theory ...to historians to enable a discriminating history of legal systems to be written"--Finnis (1980) 21.

See also Dworkin (1984) 255, talking about Hart's account of the development of the rule of recognition:

> If Hart had identified a different set of defects in the primitive system--if he had pointed to the fact that a regime of primary social rules would provide no forum for testing whether these rules reflected any coherent set of principles about the rights and obligations the state should enforce--he would, I think, have been led to a rather different account of developed legal systems.

We can note in this regard that while liberal lawyers have called on South African judges to be true to the ideals of the Roman-Dutch legal tradition, the common law judges drew on administrative law principles developed by English judges. My point here is not that one set of principles is superior to another, a topic which sometimes arouses controversy among South African lawyers. (See, for example, Cameron (1982) and Van Blerk (1982)). My point is that it did not matter much which tradition the judges drew on. Both were part of a wider tradition in which lawyers had attempted to find in theory and in practice a rationale for a basis of reciprocity between ruler and ruled in which judges play a central role.

40. For different versions of the argument from incommensurability, see Mackie (1977) and Finnis (1987). See Dworkin (1965) 688 ("Lawyers have been forced to ask questions such as these ...") and his point in Dworkin (1984) (in reply to Mackie) at 272:

> I concede that my thesis, that ties will be rare, presupposes a conception of morality other than some conception according to which different moral theories

are incommensurate.

Appendix A

In hard cases in the 1970s and 1980s on the interpretation of the apartheid laws in which the decision against the government required a court to adopt the common law approach, the AD gave judgment for the government. An example is **Goldberg and Others v Minister of Prisons** 1979 (1) SA 14 (A). The case did not strictly speaking deal with an apartheid law, for it concerned the interpretation of the Prisons Act 8 of 1959 and regulations made thereunder. The AD held that (political) prisoners did not have a right of access to news of current affairs. Wessels ACJ, in giving the majority judgment, relied heavily on **Rossouw**, and showed an extraordinary alertness for contrapointers. Corbett JA dissented in a classic common law judgment in which he explicitly invoked what he called the "common law background".

In **S v Meer en n Ander** 1981 (4) SA 604 (A), the AD overruled the decision in the court **a quo** (1981 (4) SA 739 (N)) where it was held in a common law judgment that a social gathering of two people restricted under the Suppression of Communism Act was not a "gathering" within the meaning of the Act.

In **S v Adams, S v Werner** 1981 (1) SA 187 (A) Rumpff CJ declined to reconsider the court's decision in **Lockhat** on the Group Areas Act (**S**3.5) and also would not allow a common law defence of necessity to a charge of contravening the Act. Forsyth comments that the decision goes even further than **Lockhat**, since the AD seemed to hold that all aspects

of unreasonableness were impliedly authorized by the Act; Forsyth (1985) 100. For discussions of other plain fact decisions by the AD on the interpretation of apartheid statutes, see Dugard (1978) and Forsyth (1985).

When the AD was not confronted by an apartheid law, it sometimes showed itself ready to give full force to common law principles. See, for example, **Wood and Others v Ondangwa Tribal Authority and Another** 1975 (2) SA 294 (A). This is not to say that the AD always decided hard cases on the interpretation of the apartheid laws in accordance with what the government wanted. Indeed, in 1980 and 1983 the court decided two cases in a way which meant a significant improvement for hundreds of thousands of African people living in the dormitory townships near white urban areas. The cases dealt with the interpretation of the notorious section 10 of the Black (Urban Areas) Consolidation Act 25 of 1945 which governed the residence rights of urban Aricans. In particular, they concerned the validity of certain administrative procedures devised to prevent Africans from fulfilling the requirements of the section. In both, the AD held that that the particular procedures were **ultra vires: Komani NO v Bantu Affairs Administration Board, Peninsula Area** 1980 (4) SA 448 (A); **Oos-Randse Administrasieraad en 'n ander v Rikhoto** 1983 (3) SA 595 (A). Thus liberal lawyers and the English language press welcomed the decisions and expressed the hope that they indicated a shift in approach on the part of South Africa's highest court. However, those who examined the reasoning closely noticed that

the AD had carefully refrained from talk of fundamental rights and had in fact decided the cases on as narrow a basis as possible. (See Davis (1981), Dixon (1981) and Forsyth (1985) 85-90.)

In other decisions on apartheid laws which went against the government, the decision was made to turn entirely on an explicit propointer--that is, on a provision in the statute in question which was easily capable of being interpreted as a specific legislative indication that the official action in issue was invalid. See, for example, **More v Minister of Co-operation and Development** 1986 (1) SA 102 (A), **Nkondo v Minister of Law and Order** 1986 (2) SA 756 (A) and **Minister of Law and Order v Hurley** 1986 (3) SA 568 (A).

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