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CENTER NEWS

Truth and Justice in South Africa

by Cathleen Caron*

On January 25, 1999, the Washington College of Law's (WCL) Center for Human Rights and Humanitarian Law and International Legal Studies Department hosted a panel entitled "Truth and Justice in South Africa." The discussion, moderated by WCL Professor Nancy Polikoff, explored the role of the judiciary during the era of apartheid in South Africa, focusing on the years between 1954 and 1994. It also assessed the impact of South Africa's Truth and Reconciliation Commission (TRC), which the South African legislature created to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past . . ." To discuss these issues, three panelists—Phumelele Madala, a Johannesburg attorney who is currently studying in the LL.M. program at Georgetown University; Paul Van Zyl, former executive secretary to South Africa's Truth and Reconciliation Commission, who is currently a Hauser Global Scholar at the New York University School of Law; and Omphemetse Sibanda, professor of law at the University of Natal, Pietermaritzburg, South Africa, who also is currently studying in the Georgetown University LL.M. program—addressed different periods in recent South African history.

To help explain how discrimination was perpetuated in South Africa, Madala began with an examination of the role of the South African justice system, especially prosecutors and judges, during apartheid. Madala identified the South African Attorney General as actively supporting the pro-apartheid regime. Empowered by emergency regulations, the Attorney General was entitled to unlimited discretionary powers to detain and prosecute black South Africans. According to Madala, however, the Attorney General failed to prosecute police accused of brutality or investigate thousands of cases of murder and torture committed against black South Africans. This lack of prosecutorial zeal to punish state actors responsible for crimes against black South Africans resulted in a *de facto* legitimization of state terror.

For a judiciary to function properly, Madala believes it must enjoy the complete trust and confidence of the community in which it operates. He asserted, however, that the South African judiciary's pro-apartheid position during the era of apartheid severely damaged its credibility as a legal institution. Madala stated that, instead of confronting the "evil, immoral, and draconian laws" passed by the South African legislature, the judiciary upheld these discriminatory laws, thereby legitimizing the coercive power of the state.

In addition to the role of trial and appellate courts, Madala also asserted that, in general, magistrates—lower court judges—working during the apartheid era were "foot soldiers for the judiciary," assisting the police and prosecutors in investigating and prosecuting black political activists. In addition to the pro-apartheid beliefs that many magistrates held, they lacked independence, as the executive branch had the discretion to remove magistrates at will. This may have prevented even those magistrates with anti-apartheid beliefs from working against the apartheid system within their official positions. According to Madala, this combination of factors resulted in magistrates convicting thousands of inno-

cent black South Africans. Unfortunately, many of the same judges remain in place today, perpetuating public distrust of the judicial system.

Madala concluded by emphasizing that, for confidence to be restored in the South African judicial system, judges must be held accountable for their actions. No judges requested amnesty through the TRC, and therefore it is theoretically possible to charge judges for grievous past judicial errors. This legal claim, however, would be quite difficult to prosecute because it would call into question judicial discretion, an important power that allows for a broad range of judicial decisionmaking in rendering decisions. Regardless of the complexities of a legal challenge, Madala advocated for an investigation into the most controversial cases of the apartheid era.

Van Zyl discussed the formation, objectives, and impact of the TRC. The TRC is based on the final clause of the South African Interim Constitution of 1993 and was passed in Parliament as the Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (Act). The Act establishes that the TRC is headed by between 11 and 17 commissioners, appointed by the president of South Africa, and is organized into three committees: Human Rights Violations, Amnesty, and Reparation and Rehabilitation of Victims. The TRC's goal is to restore moral equilibrium to South Africa by revealing the truth about what actually transpired during the apartheid era and by providing a forum in which victims can tell their stories. Specifically, Section 3(1)(c) of the Act states that the TRC strives to "restore the human and civil dignity of . . . victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims." In addition, the TRC conducted "sectoral hearings" to determine the role played by the judicial branch, media, education system, and prisons in facilitating human rights abuses.

Van Zyl explained that the TRC's procedures did not arise from an idealistic vision of reconciliation, but rather as a means by which to escape a political dilemma. According to Van Zyl, during the TRC's final days of negotiation, South African President Nelson Mandela, then head of the African National Congress (ANC), the leading opposition group, learned that right-wing groups planned to sabotage the first democratic elections since the end of apartheid. Leaders of the South African armed forces offered to safeguard the elections, but only if they were guaranteed amnesty from prosecution when the new government investigated crimes committed during the apartheid era. The ANC chose election stability over chaos and established the TRC process, which included a grant of amnesty for those who testified before it. However, unlike the blanket amnesty arrangements that several Latin American countries granted to human rights violators after regaining democracy in the 1980s and 1990s, which did not place any requirements on amnesty recipients, the new South African government designed an alternative model. An individual found guilty of apartheid violations by the TRC may receive amnesty from prosecution, but only after a full confession of his involvement with apartheid.

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governments. The bill prohibits unilateral sanctions, either those that are ongoing or those that may take effect in the future, on exports of food, other agricultural products, medicines, medical supplies, and other equipment. The president may waive this prohibition for a period of not more than one year if necessary for U.S. national security.

Mass Immigration Reduction Act, H.R. 41

Major Sponsor: Rep. Bob Stump (R-AZ)
Status: Referred to the House Committee on the Judiciary on January 6, 1999, and referred to the House Subcommittee on Immigration and Claims on February 25, 1999.

Substance: The bill calls for significant reductions on levels of legal immigration, including complete moratoriums on certain categories of family and employment-based immigration for a five year period, until "the first fiscal year after" 2004. In that fiscal year, the bill requires the president to certify that fewer than 10,000 illegal immigrants enter the country each year. The president must also certify that any increases in immigration over the levels permitted

during the five year period do not adversely affect a number of factors, including environmental quality, public school capacity, or employment conditions of U.S. workers.

No Frills Prison Act, H.R. 370

Major Sponsor: Rep. Robert Franks (R-NJ)

Status: Referred to the House Committee on the Judiciary on January 19, 1999, and referred to the House Subcommittee on Crime on February 25, 1999.

Substance: The bill seeks to amend the Violent Crime Control and Law Enforcement Act of 1994 by preventing prisoners from enjoying prison conditions and opportunities that are "more luxurious" than what the "average prisoner" would experience outside of prison. The bill imposes a number of restrictions and requirements on inmates, such as limiting prisoners' recreation and leisure activities. The bill further restricts the rights of prisoners serving time for violent crimes through requirements such as mandatory physical labor, a total prohibition on television viewing, and limitations on the amount of personal property such inmates may possess.

United States Federal Government Preservation Act of 1999, H.R. 62

Major Sponsors: Rep. Bob Barr (R-GA)

Status: Referred to the House Committee on International Relations on January 6, 1999.

Substance: The bill prohibits the use of funds to administer or enforce the provisions of Executive Order 13107, which states that the policy of the U.S. government shall be to fully "respect and implement its obligations under international human rights treaties to which it is a party." The bill objects to U.S. compliance with these treaties because the U.S. Senate has not ratified a number of them. As such, the bill finds that the Executive Order "circumvented" the Constitution. ☹

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Ultimately, the value of the TRC's work is that it has established an irrefutable historical record of knowledge and acknowledgment: knowledge that apartheid crimes indeed occurred, and acknowledgment that they should never happen again. During the WCL discussion, however, Van Zyl highlighted that there is no magical connection between truth and reconciliation. Although providing the truth about South Africa's history has allowed some to forgive, for others it has led only to bitterness and anger.

Sibanda described how the TRC has affected the new political and social order in South Africa. He contended that the TRC was a catalyst for South Africa's new bifurcated judicial system, which consists of a Constitutional Court and ordinary courts. The Constitutional Court's role is to rule on constitutional issues, such as the president's proper execution of his constitutional duties or the constitutionality of legislative acts. Although the ordinary courts have concurrent jurisdiction on most of these issues, an appeal concerning a constitutional issue from the High Court, the highest ordinary court, goes to the Constitutional Court.

Furthermore, Sibanda contended that, under the new political and social order, South Africa is now more open to political discourse and international involvement, which is a positive sign for South Africa's future. He commended the government's Gender Commission for working to undo past prejudices against women. He also noted that nongovernmental groups are playing a particularly important role in

helping the country overcome intolerance. He specifically noted Street Law, Inc., an international organization dedicated to teaching human rights, and the Freedom of Expression Institute, a South African nongovernmental organization that advocates for all facets of freedom of speech. Although isolated instances of violence still occur, Sibanda is confident that, with continued support, South Africa will overcome the intolerance of the past.

The speakers concluded by emphasizing that the apartheid era left an indelible mark on South Africa and that it will take generations to restore faith in the state institutions that perpetuated and promoted apartheid. As Madala noted, the South African judiciary was one of the chief institutions involved in maintaining and applying discriminatory laws and policies that harmed thousands of people. All the panelists agreed that, although many important positive changes have occurred in South Africa, many challenges still lie ahead. To undo the effects of more than 30 years of this judicially condoned oppression, a new culture of tolerance must develop. The development of a judiciary system that will truly serve as an independent check on the other branches of government is a critical factor in this process. Once there is faith that the judiciary will not validate acts of oppression, South Africans will finally have peaceful means through which they may advocate for change. ☹

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