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This entry addresses the South African legal system, covering both the apartheid era as well as the emergence of the postapartheid constitutional democracy. It examines how the apartheid legal and political system was of international concern because of the way it institutionalized racial discrimination and denied the majority of its citizens the most basic human rights. This entry then explores how the global movement to abolish the system of apartheid was highly influential in the transition to a postapartheid constitutional state premised on international human rights principles.

The political and legal system of apartheid, instituted in South Africa by the minority white Nationalist Party to perpetuate white supremacy, has since its inception in 1948 been a serious issue with international human rights ramifications. This rigid, racially hierarchical system, influenced by theological notions (especially the teachings of the Dutch Reformed Church), envisioned the destiny of white and nonwhite South Africans as separate, in which each group would maintain its culture and identity in distinct spheres.

Apartheid was also influenced by Nazi ideology, and many ministers in the first apartheid government were ardent supporters of Adolf Hitler during World War II. Indeed, some were students in Germany during the rise of Nazism and adopted notions of racial superiority and inferiority for subsequent application in South Africa. A notable irony is that the system of apartheid was instituted at the very moment that the United Nations Charter was adopted and while negotiations were underway for the drafting of the Universal Declaration of Human Rights (UDHR).

Developed and structured as the absolute contrast to the principles underlying the UDHR, apartheid, literally translated as "separateness," was deemed a crime against humanity by the United Nations in 1976. The system of apartheid violated the most basic tenets of international human rights law and policy, embodying a harsh combination of state-sponsored authoritarianism, militarism, race and gender discrimination, and economic exploitation.

It was a system in which the minority white population, about 12 percent of the overall population of South Africa, solely determined the distribution of (and benefited exclusively from) the country's wealth and resources.

The processes and institutions of apartheid were structured and reinforced by a legal edifice and infrastructure that impacted every social, political, and economic aspect of daily life: and at the core, they violated the fundamental human rights of the black population.

Racially Discriminatory Laws

Several racially discriminatory laws that essentially cemented the patterns of economic, political, and social inequity between white and black South Africans (and that would be the hallmark of apartheid) had been enacted prior to the formal implementation of apartheid in 1948. British colonialism and the imperatives of empire paved the way, through laws and policies, for the subsequent dispossession and disenfranchisement of the African population. These laws, including the Land Act of 1913 and the Native Trust and Land Act of 1926, designated 13 percent of South Africa's land mass available for African occupation and ownership, thereby stripping the majority African population of rights to occupation and ownership of most of South African land. These laws served to satisfy the needs of the various business sectors (mining in particular) for African labor. By depriving the African population of land and ensuring that a series of taxes were imposed on those who maintained some meager parcels of land, it was guaranteed that a steady supply of labor was available to the mines and to the factories of South Africa's urban centers.

When the Nationalist Party came to office in 1948, they inherited a system of racial segregation that Dutch and British colonialism had instituted since the late 1600s, when the Dutch East India Company established the first white settlement in South Africa. After the Nationalist Party victory and the formal establishment of the political system of apartheid, race became the overarching issue in South Africa. The separation of the races was the preeminent
organizing feature of South African political, economic, and social life, and a series of laws was passed to ensure that the “utopia” of racial separation, racial hierarchy, and racial purity would be instituted and maintained. These laws included:

- The Population Registration Act of 1950, which was the lynchpin of apartheid, separated the South African population into different racial categories. This statute allowed for the segregation of South Africa’s population and an attendant hierarchy of racial benefits and privileges. The classification was based on appearance, general acceptance, and racial descent. The classifications included White, Indian, Colored (further subdivided into several categories), and African (separated into several different ethnic groups). In disputed cases of racial identity, a race classification board made the final decision.
- The Prohibition of Mixed Marriages Act of 1949 forbade marriages between white and nonwhite South Africans.
- The Immorality Act of 1950 outlawed sexual intercourse between whites and nonwhites.
- The Group Areas Act of 1950 designated the residential areas for the various racial groups as articulated in the Population Registration Act.
- The Separate Representation of Voters Act of 1951 (and the 1956 Amendment) resulted in the removal of black South Africans from the common voters roll.
- The Promotion of Self-Government Act of 1959 provided for division of the 13 percent of South Africa’s land mass, designated for the African population, into self-governing Bantustans (or “homelands”), many of them not of contiguous land mass but scattered throughout the country.
- The Reservation of Separate Amenities Act of 1953 designated public amenities such as parks, beaches, trains, and buses for the various racial groups. The act did not mandate that such separate facilities be equal; and in actuality, the facilities for whites were always superior to those allocated to nonwhites.
- The Bantu Education Act of 1953 established an educational system that prepared Africans for an inferior status in South Africa’s labor hierarchy.
- The Extension of University Education Act of 1959 reserved institutions of higher education for the separate racial groups. The most prestigious and well-endowed institutions were those set aside for whites. Lesser endowed—and some outright poorly resourced—institutions were set aside on the basis of ethnic identity for members of the various black groups.

SECURITY LAWS

In addition to the outwardly discriminatory laws outlined above, a series of laws was passed to stifle political opposition. These laws included the:

- Internal Security Act of 1982 (this law repealed the earlier Internal Security Act of 1950)
- Suppression of Communism Act of 1950
- Terrorism Act of 1967
- Riotous Assemblies and Suppression of Communism Act No. 15 of 1954
- Unlawful Organizations Act of 1960

All of these laws in some way provided for the arrest and detention, with or without lawful warrant, of individuals considered to be political opponents of the apartheid government. South Africa’s most famous prisoner and later president, Nelson Mandela, along with many colleagues in the African National Congress (ANC), was convicted of treason in 1961 and sentenced to life imprisonment. In 1960 Robert Sobukwe, leader of the Pan Africanist Congress (PAC), was sentenced to three years’ imprisonment after an antiapartheid protest in Sharpeville, an African township south of Johannesburg. At this protest the police fired on the crowd, killing 68 and wounding 186. After Sobukwe had served his three-year prison term, he was not released but instead confined to the maximum-security prison at Robben Island. A special law was passed by parliament to enable the authorities to imprison Sobukwe indefinitely and without a trial.

The security laws outlined above also mandated the outlawing of political opposition, including the banning of such organizations as the ANC (in 2008 the government in power), the PAC, and other smaller and more localized political organizations. In addition, these laws regulated the validity and the organization (for example, venue, number of attendees, subject matter) of meetings considered “political” and in opposition to apartheid. Permission could be granted or withheld without reason and normally through executive discretion, at the behest of the police or a local official.

These laws also included the banning and banishment of individuals deemed subversive: again, in most circumstances, this was done by executive fiat. The doctrine of parliamentary supremacy meant that these laws could not be challenged in the courts and therefore not subjected to even the most cursory form of judicial oversight or review.
LABOR LAWS

The reservation of jobs for the absolute benefit of whites (and to the almost total exclusion of blacks) ensured that several categories of employment were set aside solely on the basis of race. Under the Industrial Conciliation Act of 1956, and defying even the most flexible notion of merit, these jobs guaranteed continuous and secure employment for whites while promising widespread unemployment and deep economic insecurity for blacks. Blacks were not allowed to form trade unions, and strike action was outlawed. Alongside these racially discriminatory labor laws, a series of migrant labor laws was promulgated for the sole purpose of regulating the flow of African labor to the urban centers of South Africa. The consequence of these laws and their underlying policies enmeshed black South Africans in a cycle of poverty and deprivation that will take generations to overcome.

A particularly pernicious set of laws, some promulgated by the British colonial authorities before the apartheid government came into office, came to be known as the "pass laws." These laws underpinned a rigidly regulated system of African migrant labor. The key pieces of legislation were the Natives (Abolition of Passes and Coordination of Documents) Act of 1952 and the Blacks (Urban Areas) Consolidation Act of 1952. Section 10 of the latter act was especially onerous, since it put restrictions on Africans in "white" urban areas. A compulsory labor bureau system regulated the movement of Africans to South Africa's urban centers, and a system of administration boards administered the pass laws.

An appendix to the arsenal of pass laws was the Bantu Authorities Act of 1951, which provided for the establishment of African Bantustans and regional local authorities for the African population, with the aim of creating limited self-governing territories for the different African ethnic communities. The policy underpinning the statute was the idea that black South Africans would not exercise political rights in South Africa but would instead do so in designated Bantustans. Indeed, a few homelands were unilaterally declared independent states by the apartheid government; no country other than South Africa recognized their legitimacy.

All Africans over the age of sixteen had to carry a reference book—known as a "pass"—at all times, and failure to do so was a crime. The pass contained a photograph, fingerprints, and other information that served to identify the holder. Without passes, Africans could not work, obtain housing, register births, or obtain rights to reside in the urban centers. The rigid enforcement of the pass law system unduly relegated several generations of Africans to criminal status. Africans who sought to pursue activities taken for granted in most societies—such as traveling to obtain work, establishing a family life, or seeking a place to live—were rendered criminals through the operation of the pass law system. Millions of people were regularly charged and convicted in the pass courts established throughout the country—without access to legal representation.

This lack of rights to residence and citizenship in South Africa was the cornerstone of the apartheid government's policy of separate development. It was coupled with putative constitutional independence and self-determination for the various "homelands." The culmination of this policy would result in large numbers of mostly male African migrant workers living in the cities on a de facto permanent basis while their labor was required; but these workers did so without an enforceable legal right. They would effectively live there not by right, but on sufferance, because the bureaucrats who administered the pass law system exercised extensive discretion in making, interpreting, and enforcing the regulations. These laws listed above, individually and in combination, resulted in a comprehensive pattern of human rights violations.

In addition to those human rights breached by the abovementioned laws, the list of human rights violations perpetrated by apartheid is exhaustive. In combination they include violations of the right to human dignity; the right to life, liberty, and security; the right to equality; the right not to be held in slavery and servitude; the right to a fair trial; the right to freedom of movement; the right to asylum and a nationality; the right to own property; the right to freedom of association; and the right to marriage and a family, and a vast range of socioeconomic and cultural rights.

APARTHEID AND REGIONAL INSTABILITY

The human rights violations perpetrated by the apartheid government were not confined to those individuals within its borders but were also committed against the citizens of neighboring states. Namibia is a case in point. After World War II, Germany relinquished its control over Namibia, formerly known as South West Africa, and the country became a protectorate of South Africa. The apartheid government administered Namibia as part of South Africa despite continued United Nations efforts calling upon the
South African government to relinquish control over the territory. Eventually after a protracted war of liberation against the South African military, the South West People’s Organizations (SWAPO) won the elections in 1990, and Namibia became an independent state.

Citizens of South Africa’s other neighboring countries, the so-called frontline states, were also at the receiving end of apartheid violence and militarism. South Africa waged a full-scale war against Angola and supported a widespread counterinsurgency in Mozambique. The South African security establishment also made regular raids into neighboring states and imposed economic blockades on Zimbabwe, Zambia, Malawi, Botswana, and Lesotho in retaliation for those countries’ support of the African National Congress and the Pan-Africanist Congress.

The consequences of these armed attacks and economic sanctions had a disastrous impact on the citizens of those countries and led to widespread suffering. It is estimated that millions of Angolans and Mozambicans died during the nearly three-decade war and counterinsurgency, and that millions more were injured. This conflict also led to the displacement of millions of citizens and the creation of a huge refugee population. The overall destabilization of South Africa’s neighboring countries left many of their economies in shambles, a legacy that many are still attempting to overcome today.

THE DEMISE OF APARTHEID

From the beginning, the system of apartheid was a cause of concern for the global community, and strategies to abolish it were employed across the globe. These strategies included nonviolent tactics in the form of educational, sports, cultural, and economic boycotts, marches, sit-ins, and protests. The egregious human rights violations suffered by the majority of South Africans at the hands of the apartheid government led to a systematic campaign by the United Nations to outlaw the minority white government; and in 1976, with the passage of the Convention on the Suppression and Punishment of the Crime against Humanity, apartheid was declared a “crime against humanity.” The United Nations Special Committee Against Apartheid played a major role in spearheading the demise of apartheid, and in the process created new norms of international law regarding the eradication of racism and apartheid. Indeed, from the Indian government’s 1946 official complaint to the General Assembly about the treatment of Indians in South Africa, to the official end of apartheid in 1994, the UN promulgated more than two hundred documents on the eradication of apartheid.

The first General Assembly resolution was passed in 1952 and was followed annually by reports citing the continued violation of international law by the apartheid government. In particular, the actions of the apartheid government against its citizens were regarded as a breach of international peace and security. Commencing in 1961, and followed successively thereafter, the General Assembly passed a resolution calling on all governments of the world to take action against the apartheid government. In particular, a boycott of the South African government was called for, including the severing of diplomatic relations, the closing of ports to South African vessels, a boycott on the import and export of South African goods, and the refusal of landing rights for South African aircraft. In 1974 the General Assembly ruled that the delegation of South Africa should be refused participation in the work of the General Assembly, and in 1985 this same body called for a sports-related boycott of South Africa.

By far the most dramatic resolution on South Africa was adopted in 1975 by the General Assembly that articulated the illegitimacy of the South African apartheid government; and the resolution also recognized the liberation movements as legitimate and authentic representatives of South Africa’s population.

Up until this point, largely as a consequence of Cold War politics, the West, including the United States and Western Europe, had been reluctant to isolate the apartheid government. Believing the South African government to be a bulwark against Communism on the African continent, the West regarded its interests as coinciding with the professed anti-Communist policies of the apartheid government. Because of support from the Communist regimes of Eastern Europe, China, and Cuba, the West viewed these exiled liberation movements as Communist-orientated. However, by the mid-1970s, the absolute suppression, subordination, and brutality of the minority white government could no longer be overlooked, and the West’s support for the apartheid government began to dissipate.

Governments across the globe also took a series of steps to isolate the apartheid government and imposed legislation that led to economic, political, and cultural sanctions. One of the most prominent and successful was the Comprehensive Anti-Apartheid Act passed in 1986 by the U.S. Congress, which resulted in the prohibition of new American investment; and even though not required by the act, there
was a slow withdrawal of American businesses from South Africa. At its founding meeting in 1963, the Organization of African Unity (now the African Union) called for the total political and economic isolation of South Africa. The International Olympic Committee withdrew its recognition of South Africa in 1961; this resulted in total isolation of South Africa in all international sporting events.

Coinciding with the actions taken by governments to isolate the apartheid government, a number of international nongovernmental organizations had either been established to focus entirely on apartheid or devoted large amounts of their resources to fighting apartheid. In the first group were organizations such as the International Defense and Aid Fund and TransAfrica Forum; the second included groups such as Amnesty International and the Lawyers’ Committee for Civil Rights Under Law.

While the international community, through the UN, was attacking the credibility of the apartheid government, the liberation movement in exile and the opposition groups inside South Africa, including trade unions, churches, and other civic associations, were embarking on concerted campaigns to unseat the government. After the banning of the major opposition movements in South Africa and the imprisonment of Nelson Mandela and other political leaders, a turning point in South African protest politics occurred in 1976, when the police fired on hundreds of thousands of students who had gathered peacefully to protest the compulsory teaching of Afrikaans (the language of the ruling class). Known as the Soweto uprising (for its location, a sprawling African township south of Johannesburg), this protest spread to all corners of South Africa, and set in motion a pattern of protest and civil disobedience that did not abate until the release of Nelson Mandela in 1990. The Soweto uprisings were followed by widespread labor organizing on the part of black workers in South Africa and the flexing of trade union muscles in an unprecedented show of defiance.

In addition, a public-interest legal movement began to emerge inside the country. Started first as a series of legal-aid clinics at universities to provide free legal advice to people from disadvantaged communities, the movement began to develop into a powerful force in challenging the apartheid state. The most significant of these public-interest law firms outside the universities was the Legal Resources Center: in addition to providing free legal advice to poor people, the center also engaged in litigation on behalf of people in need. The organization’s aims were also to develop comprehensive and innovative legal strategies to undermine and remove the labyrinth of laws, policies, and bureaucratic discretion that subjected South Africa’s majority black population to daily degradation. Other important public-interest law organizations included the Legal Assistance Center set up by the Black Lawyers’ Association, Lawyers for Human Rights, the National Democratic Lawyers Association, and the Center for Applied Legal Studies (CALS) at the University of the Witwatersrand. CALS focused much of its activity on research and litigation involving the newly emerging trade union movement.

The 1980s were particularly violent. The apartheid government in 1983 attempted unilaterally to impose a new constitutional dispensation that provided limited and unequal rights to Indians and certain persons of color in a tricameral parliament, but it would exclude Africans entirely from this constitutional framework. Opposition groups across South Africa and supporters abroad rallied to discredit and destroy this new political dispensation. Responding to the call of the ANC to make the country ungovernable, opposition groups from across the country—including religious organizations, trade unions, student and professional organizations—rallied to voice their resistance in an organized, persistent, and vocal manner.

In response to the widespread and very successful opposition, in 1985 the apartheid government declared a state of emergency that did not end until 1989. By the early 1990s South Africa had essentially become ungovernable, with violence becoming a daily feature of life. The most pronounced violence occurred in the province of KwaZulu-Natal, where the fighting between those who supported the ANC and those who supported the Inkatha Freedom Party (a political party that operated with the full support of the apartheid government) claimed the lives of approximately ten thousand people over a decade.

In the meantime, major campaigns calling for the abolition of apartheid as well as the release of Nelson Mandela and other political prisoners were gaining momentum in North America, Europe, Australia, parts of Asia, and elsewhere. These campaigns created a synergy between global antiapartheid activists and the political opposition inside South Africa, generating the conditions for major political figures to be released beginning in the 1980s and the eventual release of Nelson Mandela from prison in 1990. This synergy also created the conditions for the return of exiles to South Africa and the establishment of a multiparty negotiating forum to navigate the transition from apartheid to a constitutional democracy.
THE STRUGGLE AGAINST APARTHEID AND THE GLOBAL HUMAN RIGHTS PROJECT

The legacy of apartheid for the modern global human rights project has been profound. Following the ravages of Fascism and Nazism, the philosophy of apartheid eventually came to unite the global community against it. In the eyes of the international community, apartheid represented all the values that were antithetical to those that underpinned the human rights project. Apartheid became the focal point for the pursuit of human rights, especially the right to be free from all racial oppression.

The establishment of a constitutional democracy in South Africa in 1994 was seen as a triumph for global human rights advocates, who have embraced the post-apartheid South Africa as the quintessential postcolonial human rights state. The establishment of a postapartheid constitutional model of government has also provided succor to those individuals and communities who labor under repressive forms of government. Indeed, the word “apartheid” is regularly conscripted by such individuals and groups in their various struggles for human rights.

The impact and legacy of apartheid for the global human rights project can be summarized by four main points. First, there were the possibilities generated by a comprehensive and relentless global campaign in the struggle against apartheid. Opposition to the system of apartheid galvanized the international community and arguably elevated the norm of nondiscrimination with regard to race as customary international law. The moral unacceptability of apartheid meant that the eradication of racism, like the eradication of Fascism, would become a central focus of global human rights law and policy for five decades. The fatal blow to apartheid was struck by a combination of South Africans resisting apartheid at home, the liberation movements in exile, and the international community advocating at the UN, in foreign capitals, and elsewhere.

The elimination of apartheid, at least formally, also created the possibilities for political and legal transformation that embraced human rights as central to government policy. In other words, the embrace of human rights in the South African Constitution vindicated fifty years of global human rights activism. A democratic South Africa, incorporating the most comprehensive range of human rights policies in its founding documents, the Constitution and Bill of Rights, became the poster child for the global human rights project. The preamble to the South African Constitution sets out unequivocally the values of human rights that underpin the democratic project. Not only was it the widespread incorporation of rights but also the peaceful transfer from authoritarianism to democracy (guided by a rights agenda) that gave the global human rights movement a tangible illustration of the possibilities human rights promised for political transformation.

Then there is the manner in which South Africa embraced human rights, not just as the operational vision for a future democratic state but also as a framework within which to deal with past violations of human rights. The choice of a model like the Truth and Reconciliation Commission (TRC) enabled South Africans to explore the processes and symbols of racial reconciliation and reparations in a manner that accommodated the aspirations of the society and that utilized indigenous notions of humanity (termed ubuntu) in its operations and procedures. The proceedings of the TRC provided the first occasion for a postcolonial government in Africa to consider the consequences of racism in the context of national transformation and to institute procedures that would deter its recurrence. Utilizing the language of human rights, particularly through the operation of its three committees, the Human Rights Violations Committee (the public face of the TRC), the Amnesty Committee, and the Reparations committee, the TRC could be harnessed as a very effective educational tool, both within South Africa and abroad. This educational process provided both an inspiration and a tangible example to the global human rights community about the possibilities of confronting gross human rights violations through the utilization of conciliatory processes that may endure in a previously divided society.

By insisting on a model that leads to national reconciliation as well as providing reparations for victims, the TRC embraced restorative justice as a guiding principle in its procedures. This conciliatory approach provided for a workable framework for other countries in transition from authoritarianism to democracy. In essence, the TRC set the tone for future governments on how to deal with past human rights violations that may create the possibilities for national reconciliation and a renewed commitment to the democratic project.

Within South Africa and elsewhere, it is fervently debated whether the TRC achieved the twin goals outlined in its title ("Truth" and "Reconciliation") as well as those goals outlined in the empowering statute, the Promotion of National Unity and Reconciliation Act. South Africans seem divided on the subject. But there appears to be a general consensus in the country that the TRC was an essential mechanism (indeed a precondition) for moving
the country from apartheid to democracy; and it is clear that the transition could not have occurred in the relatively peaceful manner that it did without the existence of the TRC.

Another important development was the human rights jurisprudence of South Africa's Constitutional Court, and the constitutional mandate to consider international law in its deliberations, that served as a link between the rights embodied in South Africa's Constitution and those outlined in the major international human rights documents. The Constitutional Court, through its deliberations, provided a real forum within which the rights incorporated in the Bill of Rights and various international human rights instruments can be considered and adjudicated upon in concrete factual settings. Until the establishment of South Africa's Constitutional Court, there were very few legal venues at the national level in which the corpus of international human rights law could be considered as part of a national enterprise in human rights transformation.

APARTHEID AND THE DEVELOPMENT OF INTERNATIONAL LAW

With respect to the development of international law, the campaign against apartheid provided an important impetus for the emerging international norms regarding the capacity of the international community, in particular the UN, to intervene when governments commit gross human rights violations against their citizens. The UN's efforts, and in particular the passage of many resolutions condemning apartheid, led to a weakening of the prohibition on interference in the affairs of states: a prohibition found in Article 2 of the UN Charter that specifically enshrines the sovereign equality of all states. More significantly, the UN, along with many governments across the globe, began to recognize popular movements—in particular, the African National Congress and the Pan-Africanist Congress—over the apartheid government in power in South Africa; this policy demonstrated a move away from the state-centric model in international law.

This development paved the way for future liberation movements in other parts of the colonized world to pursue their causes with the express purpose of gaining international recognition. These activities led the international community to engage in a comprehensive debate about democracy, representation, and good governance. Moreover, these debates strengthened the principle of self-determination by recognizing not only the putative elected government but also popular liberation movements. It is arguable that this deviation from the state-centric model created the strategic space for an even further erosion of state centrality in international law with the passage of, for example, the optional protocols to the International Covenant on Civil and Political Rights.

By defining apartheid as a crime against humanity in the Convention on the Suppression of the Crime of Apartheid, the UN enlarged the parameters for outlawing further crimes such as those outlined in the statutes adopted to establish the International Criminal Tribunal for Yugoslavia, Rwanda, and Sierra Leone, and in the passage of the Rome Statute of the International Criminal Court. In addition, once the armed struggle began in South Africa, international humanitarian law was overhauled to confer prisoner-of-war status on combatants who were members of national liberation movements.

The impact of South Africa on international human rights law is further illustrated by the intense debates at the UN and elsewhere regarding the efficacy, utility, and legitimacy of imposing military, economic, and cultural sanctions when a state violates customary international law. By imposing a military embargo on the South African apartheid government, the Security Council, for the first time in history, invoked Chapter VII of the UN Charter.

South Africa's persistent objections to the developing prohibition against apartheid could not relieve it of its duty under international law to abide by the new norm. South Africa is a commonly cited example for the international law principle that the "persistent objector" rule does not apply where the customary international law involves a *jus cogens* norm. The persistent objector rule provides that where a country has consistently objected to the development of a new international norm, it is not bound by such norm, unless it involves a peremptory rule that no country may derogate from, for example, genocide, torture, or slavery.

THE CONSTITUTIONAL TRANSFORMATION IN SOUTH AFRICA AND THE HUMAN RIGHTS PARADIGM

The expansive incorporation of human rights in the South African Bill of Rights represents a vindication of the global human rights struggle. The South African Constitution embraces international law and specifically references international human rights law in several ways. First, the comprehensive Bill of Rights is drawn not just from the Freedom Charter of the African National Congress (drawn up in 1955 as a human rights document in response to
HUMAN RIGHTS AND SOUTH AFRICA'S CONSTITUTIONAL COURT

The Constitutional Court of South Africa has adopted a bold vision of human rights in its jurisprudence. Since its
Inception in 1995, the Constitutional Court has heard several cases that directly implement the human rights agenda envisioned in the Constitution. In this endeavor the Constitutional Court has incorporated international human rights law in its interpretation of the Bill of Rights and, by doing so, has spawned an international human rights jurisprudence that continues to be cited in many jurisdictions. Indeed, the international human rights legal literature constantly references the transformative human rights jurisprudence of the South African Constitutional Court.

The Court has adjudicated upon a vast array of human rights issues. The first case the Court heard in 1995 was concerned with the constitutionality of the death penalty. The Court, invoking the right to life and right to dignity found in the Bill of Rights, struck down the death penalty as unconstitutional. The Court has also examined the question of equality, which is the paramount principle in the Bill of Rights. Exploring a range of real-life situations, the Court has formulated a substantive vision of equality that includes the following: the rights of HIV-positive persons not to be discriminated against in their place of employment; the rights of permanent residents not to be treated unfairly compared to citizens in the workplace; the rights of homosexuals to engage in consensual sexual conduct; and the rights of African girls and women not to be discriminated against under indigenous customary law. As a result, the Court has moved from a mere formal approach to one that recognizes the peculiar realities of South Africa and has attempted to contextualize South African equality.

The Court has made its mark with respect to curbing violence against women, utilizing both the imperatives in the Bill of Rights and those found in international instruments such as the International Convention on the Elimination of All Forms of Discrimination against Women. The Court has adopted a determined approach, outlining very clearly in its pronouncements the need to eradicate this ubiquitous problem in South Africa, and it has applied this approach in both the criminal (public) as well as the civil (private) law arena. An example of the first is the Court adopting a purposive approach when reinforcing the legislature's prerogative to choose appropriate strategies, through legislation, to stem domestic violence. The second is the Court's determination to hold state actors accountable when they negligently or intentionally fail to protect female victims from violence perpetrated by third parties.

The Court has struck an impressive balance between the competing rights of privacy and state regulation, not to mention religious rights and equality, appreciating the context not only of the lived realities and steadfastly held beliefs of individuals and groups but also the need to create a society predicated on equality and dignity. In the same vein, the Court has tried to strike a healthy accord between the rights of criminals in a violent society, such as South Africa, and the rights of individuals to personal security.

By far the most impressive accomplishment of the Court have been its incremental adoption of a socio-rights jurisprudence that strives to grapple with the dismal economic conditions within which a large number of South Africans still find themselves. Mindful of the doctrine of separation of powers and reticent to usurp the prerogative of parliament, in addition to its concerns about institutional capacity, the Court has nonetheless attempted to ensure that the government is attentive to the needs of the poor. For example, in a landmark judgment in 2000, the Court outlined in great detail the obligation of the government to provide housing for those most in need of shelter. The Court has also mandated that the government, in compliance with the right to health as delineated in the Bill of Rights, provide antiretroviral drugs to HIV-positive pregnant women at public hospitals throughout South Africa.

The Court has therefore appreciated its pivotal role in the human rights transformation endeavor underway in the country. But the effectiveness of the Court in this human rights venture is dependent upon the willingness of government officials and members of civil society to give effect to, and enforce, its judgments. For the most part, the Court's judgments have been hailed by both the government and the society at large. But with respect to the enforcement of its socioeconomic rights judgments, the government has been somewhat lacking in giving effect to the Court's mandates. It is unclear whether this is a result of incompetence, hostility, or indifference: but the success of the human rights enterprise in South Africa is dependent upon a productive collaboration among the legislature, bureaucracy, and the Court. This is especially crucial in the area of socioeconomic rights, where failure to give effect to the Court's judgments may discredit the entire constitutional endeavor.

**ASSESSMENT**

South Africa's metamorphosis from a global pariah to a global "model citizen" has provided one of the key narratives for the modern global human rights story. The Constitution, the TRC, and the other structures for the human rights
transformation process in South Africa have been heralded internationally, partly because of the exciting possibilities they have generated. As the last major human rights document drawn up at the end of the twentieth century—and with enormous international investment, both financially and emotionally—the South African Constitution provided a poignant bookend to the modern global human rights venture that commenced with the establishment of the UN and the enactment of the Universal Declaration of Human Rights.

But despite this impressive constitutional framework, the last fourteen years of constitutional democracy have demonstrated that the implementation and enforcement of human rights legislation require more than a formal legal framework. The commitment of government is essential. Three areas of human rights violations have been of particular concern: first, the government has been slow in tackling the ravages of the HIV/AIDS epidemic, which is a violation of the right to health, as well as the right to life. Second, the government also appears reluctant to fully combat the levels of crime, and particularly crimes against women, that continue to devastate countless South Africans’ lives. This is clearly a violation of several rights, including the right to safety and security, the right to dignity, and the right to life. Third, many South Africans, overwhelmingly black South Africans, still find themselves mired in poverty: a clear challenge to the promise of socioeconomic rights embodied in the Constitution.

The South African human rights project, while providing inspiration to other communities struggling for democracy and human rights, may thus offer a cautionary tale. It is true that the human rights project has faltered in many societies similar to that of South Africa, even in the wake of democratic transformation, where extremes of poverty and deprivation hinder the achievement of rights, particularly socioeconomic rights. In the final analysis, the challenge for South Africa is whether a human rights culture will take root in a society emerging from the ravages of colonialism and apartheid. The formal human rights architecture is in place, and the concrete has slowly been added. But the actual construction will be long and difficult.

[See also African Union: Commission and Court on Human Rights; AIDS/HIV; Angola; Steve Biko; Botswana and Lesotho; Democracy and Right to Participation; Jus Cogens; National Human Rights Institutions; Torture: International Law; Desmond Tutu; and Women: Women’s Rights.]

BIBLIOGRAPHY


